Supplementary Materials for Quick Tips: Assisting Survivors With Housing Issues

1. Sample letter challenging denial of housing based on survivor's criminal history
2. Sample letter requesting a transfer to another public housing unit
3. Sample letter regarding break-up of a Section 8 voucher household due to domestic violence
4. Eviction answer, *Metro N. Owners LLC v. Thorpe*
5. Order, *Metro N. Owners LLC v. Thorpe*
6. Sample letter requesting termination of a lease

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September 26, 2008

Ms. W
Equal Housing Opportunity Manager
[]

Via fax and mail

Dear Ms. W:

Thank you for working with us as we attempt to amicably resolve Ms. F's housing dilemma. We hope you will agree that federal law, combined with Ms. F's unique circumstances and other factors, warrant reconsideration of her application for housing.

To summarize, we believe that Ms. F's housing application should be reconsidered for the following reasons: (1) federal regulations make it unreasonable to permanently bar individuals such as Ms. F from assisted housing; (2) California laws on domestic violence and self-defense have changed since 1985, so it is likely that Ms. F would not be convicted of the same charges today; (3) the Violence Against Women Act (VAWA) demonstrates Congress' intent to prevent housing discrimination against domestic violence victims; and (4) you did not provide specific reasons in writing for denial of Ms. F's application.

1. FEDERAL LAW DOES NOT PERMIT AN APPLICANT TO BE DENIED HOUSING IF A REASONABLE TIME HAS PASSED SINCE THE CRIMINAL ACTIVITY OCCURRED

In our view, the Criteria for Residency applied to Ms. F's application appear to be overly restrictive and in violation of the governing federal regulations. Rural Housing Service (RHS) regulations provide that owners of RDA properties are not required to bar applicants due to their criminal history. The regulations at 7 C.F.R. § 3560.154 provide that borrowers "may" deny admission for criminal activity in accordance with HUD regulations 24 C.F.R. §§ 5.854, 5.855, 5.856, and 5.857. Section 5.855 governs when admission may be prohibited due to Ms. F's type of criminal history.

Admission to federally assisted housing may be denied under 24 C.F.R. § 5.855(a) "under your standards if you determine that any household member is currently engaging in, or has engaged in during a reasonable time before the admission decision ... violent criminal activity ... [or] criminal activity that would threaten the health, safety, or right to peaceful enjoyment of the premises by other residents ... or criminal activity that would threaten the health or safety of the PHA or owner or any employee, contractor, subcontractor or agent of the PHA or owner who is involved in the housing operations." Under 24 C.F.R. § 5.855(b), the owner "may establish a period before the admission decision during which an applicant must not have engaged in the activities specified in paragraph (a) of this section (reasonable time)." Also, § 5.855(c) provides:

"If you previously denied admission to an applicant because of a determination concerning a member of the household under paragraph (a) of this section, you may reconsider the applicant if you have sufficient evidence that the members of the household are not currently engaged in and have not engaged in, such criminal activity during a reasonable period, determined by you, before the admission decision."

A "reasonable time" is not defined in the regulations, but the regulations make it clear that "never" and "indefinitely" are not reasonable time periods when considering a tenant with a criminal history like Ms. F's. Guidelines have been established in a number of federal housing programs, but we have found none that provide for indefinite bars. Most applicable appears to be HUD has suggested that a five-year period might be reasonable for "serious offenses" for Public Housing Authorities. (*See* Screening and Eviction for Drug Abuse and Other Criminal Activity; Final Rule, 66 Fed. Reg. 28, 776 28,779 (May 24, 2001)). Owners may differentiate different time periods for different categories of offenses, but nowhere in the regulations have we found a time period greater than 5 years suggested as "reasonable" for any type of offense. Implicit in the statutory and regulatory term 'reasonable period' of time is the concept that at some point **most applicants with an aging criminal record should be eligible for the housing** and should not be barred by screening criteria. This acknowledgment, that over time most applicants should be given the opportunity to demonstrate eligibility through **good behavior**, **rehabilitation**, or **changed circumstances**, is consistent with litigation challenging policies that rejected all applicants with any record of any past criminal activity"

Ms. F meets and exceeds all criteria for eligibility mentioned above:

(a) Aging criminal record

Ms. F's offense was committed in 1985. She has not had any criminal activity within the past 23 years. Her prison records reflect no criminal activity. Additionally, her prison records reflect that she was a model prisoner with no behavioral issues. Social science research demonstrates that, after about 7 years, there is little or no difference in propensity to re-offend between individuals with a criminal record and those without a criminal record.

(b) Good behavior

Ms. F's prison record and her conduct after release have been exemplary. Ms. F does not merely stay out of trouble; she is actively involved in positive endeavors. Her activities include helping other battered women and educating the public about the effects of domestic violence.

c) Rehabilitation

Ms. F has undergone years of counseling and treatment for the psychological condition known as battered women's syndrome. While in prison, she took optional classes to learn more about many subjects, including spousal abuse and battered women's syndrome. As a result of her increased knowledge and counseling, she is not likely to involve herself in an abusive relationship again.

(d) Changed circumstances

Ms. F's circumstances have changed drastically. She no longer lives in an abusive environment. This should alleviate any concerns you may have about the health and safety of other residents. Moreover, due to extensive counseling and education, it is implausible that Ms. F will get involved in another abusive relationship. Her focus today is on her children, her grandchildren, her volunteer work, her arts and crafts, and her health.

2. CALIFORNIA LAWS REGARDING DOMESTIC VIOLENCE AND SELF-DEFENSE HAVE CHANGED SINCE 1985, AND THE OUTCOME OF MS. F'S CASE WOULD HAVE BEEN DIFFERENT UNDER TODAY'S LAWS

In reassessing Ms. F's application, you may wish to consider how California's law on domestic violence and self-defense has changed since her 1985 conviction. The outcome of her case would have been different had she been allowed to tell the court about the physical, psychological, and emotional impact she suffered due to years of abuse. At the time of Ms. F's trial, California courts did not consider evidence of battering and its effects on victims.

In 1992, the California legislature recognized the reality of the Battered Women's Syndrome and enacted a law stating that evidence of the effects of physical, emotional, or mental abuse upon the beliefs or behavior of victims is admissible to prove that the victim's criminal behavior was a result of that abuse. *See* Evidence Code § 1107. To assist victims like Ms. F who never had the opportunity to present evidence of battering during their trials, the legislature enacted a law permitting these victims to submit petitions for reduced sentences. As you are aware, Ms. F successfully submitted such a petition with the help of community advocates.

The legislature enacted these laws because there is no reason to penalize domestic violence victims who had good defenses for their actions but were unable to raise these defenses at their trials. The laws recognize that many of these women would not have been convicted of their crimes had they been allowed to tell the court about the abuse they suffered at the hands of their partners. In Ms. F's case, the State of California found that the outcome of her case would have been different had she been allowed to fully tell her story. Your denial of Ms. F's application appears inconsistent with the state's action because it continues to penalize her for a crime for which she should not have been convicted. The State of California has recognized that Ms. F is not a threat to others and is entitled to a new start, and we would ask that you do the same by reconsidering your denial of her application.

3. THE VIOLENCE AGAINST WOMEN ACT OF 2005 (VAWA) PROTECTS DOMESTIC VIOLENCE VICTIMS

Under the Violence Against Women Act of 2005 (VAWA), Congress prohibited public housing authorities and Section 8 owners from denying admission to applicants on the basis of their status as victims of domestic violence. *See* 42 U.S.C. § 1437f(o)(6)(B). Congress also recognized that many applicants have been denied housing because they are victims of domestic violence, and that domestic violence is a leading cause of homelessness. *See* 42 U.S.C. §

14043e. As stated in VAWA, Congress and the Secretary of Housing and Urban Development have recognized in recent years that families experiencing domestic violence have unique needs that should be addressed by those administering the federal housing programs. *See* § 14043e.

To receive funds under VAWA, grantees must assist victims of domestic violence "with otherwise disqualifying rental, credit or criminal histories to be eligible to obtain housing ... if such victims would otherwise qualify for housing ... and can provide documented evidence that demonstrates the causal connection between such violence or abuse and the victims' negative histories ..." *See* 42 U.S.C. § 14043e-4(f)(1). While we recognize that VAWA does not currently apply to the rural housing programs, Congress' overall intent was to increase subsidized housing opportunities for domestic violence survivors and to prevent them from becoming homeless. Your reconsideration of Ms. F's application and acknowledgment that her conviction was a direct result of her status of as a domestic violence victim would demonstrate that the corporation seeks to comply with the spirit of the law and is taking affirmative steps to address victims' housing needs.

4. SPECIFIC REASONS WERE NOT GIVEN FOR DENIAL OF MS. F'S APPLICATION

We would also ask that you reconsider Ms. F's application in light of Rural Housing Service (RHS) regulations requiring owners to give specific reasons for denial of housing. *See* 7 C.F.R. § 3560.154(h). In making admissions decisions, you have discretion to examine the age of a criminal conviction and whether there are mitigating circumstances. Because of the presence of mitigating circumstances as well as the age of Ms. F's conviction, a generalized rejection due to criminal history is not specific enough. Rather, you should explicitly describe in writing whether you examined the mitigating circumstances presented in Ms. F's case, such as the age of her conviction, the fact that she does not pose a threat to tenants or staff, and that others have attested to her good character.

If in fact you considered all of this information, you should specifically explain why you rejected her application despite the mitigating factors. You should clearly explain the information you considered in making your decision, including whether you examined Ms. F's supporting documents, and justify the reasons for your determination in light of the mitigating circumstances presented in Ms. F's case.

For the reasons above, we respectfully disagree with your decision to deny Ms. F's application for federally-assisted housing, and request reconsideration of the denial. If there is any other information that we can provide which may assist in obtaining a favorable result for our client, please let us know. Please feel free contact me at []. I will contact you in a couple of days after you have had an opportunity to review this material so that we can discuss how to proceed with Ms. F's application.

Thank you very much for your attention and time.
Best regards,

Sample Letter Requesting an Emergency Transfer in Public Housing

The facts of this sample letter are taken from Robinson v. Cincinnati Metro. Hous. Auth., 2008 WL 1924255, No. 08cv238 (S.D. Ohio 2008)

[Housing authority staff member]
Housing Authority of [jurisdiction]

[Date]

Re: YR's Request for an Emergency Transfer

Dear [Name]:

I represent YR, a public housing tenant who lives at [address]. I am writing to request that the housing authority reconsider its decision to deny Ms. R an emergency transfer to another public housing unit. As Ms. R explained in her transfer request, her ex-boyfriend, CD, attacked her at her public housing unit and tried to stab her. Ms. R's safety will remain in jeopardy if she is not transferred to another unit. To avoid liability under state and federal laws, as well as future injury to Ms. R, the housing authority should assist her in moving to a safe public housing unit as soon as possible.

While Ms. R continues to pay rent and utilities at her current public housing unit, she has been unable to live there since January 14, 2008, after being severely beaten by Mr. D. Mr. D threatened to kill Ms. R if she returned to the unit. Since that time, she has feared for her safety and the safety of her family, and has been staying at various undisclosed locations.

In March 2007, Ms. R began dating Mr. D. A few months later, Mr. D and his mother moved just a half block from her unit. From June through December of 2007, Mr. D physically abused Ms. R on numerous occasions. On December 25, 2007, Ms. R told Mr. D that their relationship was over. He beat her and tried to stab her. She returned to the unit, but since she feared for her safety, she left that night and stayed at an undisclosed location for three weeks.

Ms. R returned to the unit on January 14, 2008. A few minutes after she arrived, Mr. D came to the unit. When she refused to unlock the door, he broke in and assaulted her. He threatened to kill her if she ever returned to the unit. She was able to call 911, and Mr. D fled. She filed a police report and was taken to the hospital to receive treatment for the injuries Mr. D caused. I have attached the police report and a letter from Ms. R's physician. On January 25, 2008, Ms. R was granted a restraining order against Mr. D, a copy of which is attached to this letter.

On January 16, 2008, Ms. R completed a transfer request form and returned it to her property manager, CS. A copy of the transfer request is attached to this letter. Ms. S subsequently informed Ms. R that her request for a transfer was denied. Ms. S told her that her situation did not qualify for a transfer under the housing authority's policy.

Housing authority's denial of Ms. R's request directly contradicts its own policies regarding transfers. As you are aware, housing authority's Admissions and Continued Occupancy Policy allows tenants to transfer in several circumstances, including, but not limited to, when the unit "poses an immediate threat to resident life, health, or safety" and for "residents who are victims of federal hate crimes or extreme harassment."As Ms. R's police report, physician's letter, and restraining order indicate, remaining in her unit would pose an immediate threat to her life, health, and safety. Further, Mr. D's acts of violence

against her constitute extreme harassment, and Ms. R will be subject to continued harassment if she remains in her existing unit. Accordingly, Ms. R clearly qualifies for a transfer under housing authority's policy and should be permitted to relocate to a safe unit as soon as possible.

Housing authority's denial of Ms. R's request also contradicts the guidance HUD has set forth in its Public Housing Occupancy Guidebook (June 2003). Because domestic violence victims may risk future harm if they remain in their current public housing units, HUD has suggested that PHAs institute transfer policies for these victims. HUD Guidebook, 19.4. Such policies should provide a preference for victims of domestic violence who need to move to other neighborhoods or jurisdictions and provide victims with vouchers for this purpose. *Id.* Further, PHAs should accept a broad range of evidence as proof of domestic violence, such as the victim's statement, a restraining order, medical records, police reports, or statements from domestic violence service providers. *Id.* at 19.2.

Housing authority's denial of Ms. R's request is also inconsistent with the intent and purpose of the Violence Against Women Act (VAWA). VAWA's purpose is to protect the safety of victims of domestic violence who reside in public housing. *See* 42 U.S.C. § 14043e-1. VAWA provides that incidents of domestic violence are not good cause for terminating the assistance of the victim of such violence. *See* 42 U.S.C. § 1437d(l)(5). By refusing to grant Ms. R an emergency transfer, housing authority has essentially terminated her public housing assistance because she can no longer safely reside in her existing public housing unit. As a result of the acts of violence committed against, Ms. R cannot reside in her public housing unit and has been forced to live in various undisclosed locations. In order to comply with the intent and spirit of VAWA, housing authority must grant Ms. R a transfer as soon as possible.

Finally, housing authorities with policies that discriminate against domestic violence victims may be subject to liability under federal and state law. Since domestic violence overwhelmingly affects women more than men, it is sex discrimination under state and federal law to treat domestic violence victims differently than other tenants with respect to the terms, conditions, and privileges of the tenancy. *See HUD v. CBM Group, Inc.*, HUDALJ 10-99-0538-8, Charge of Discrimination (2001); *Bouley v. Young-Sabourin*, 394 F. Supp.2d 675 (D. Vt. 2005); *Winsor v. Regency Property Mgmt.*, No. 94 CV 2349 (Wis. Cir. Ct. Oct. 2, 1995). By refusing to grant Ms. R occupancy rights granted to other tenants, specifically, a transfer to a safe location, based on the criminal behavior of her abuser, housing authority has discriminated against Ms. R on the basis of sex. Additionally, if a housing authority is aware that a public housing resident risks being harmed by a third party but does not take reasonable steps to prevent the harm, such as granting the resident a transfer, the housing authority may be subject to state tort liability if the resident is injured.

For the reasons discussed above, housing authority should immediately grant Ms. R's request for a transfer. I will call you this week to discuss how we can resolve this matter in a way that minimizes housing authority's administrative burden while protecting Ms. R's safety to the maximum extent possible.

Sincerely,

Sample Letter Regarding Break-Up of Section 8 Voucher Household Due to Domestic Violence

October 3, 2008

Ms. D.H.
State of New Jersey
Department of Community Affairs

RE: Request for Remedies: Section 8 Voucher Program & HPP
Ms. M.M.

Dear Ms. H:

This is an urgent situation. Imminent eviction of a family is in process. Our office represents Ms. M. M. who resides with her three (3) children at …, N.J. She had been living there with her husband, Mr. A. M., who is an unemployed Social Security recipient of SSD. She was living with her husband, Mr. A.M., and these children at the above address for about five years under the HUD Section 8 voucher program with DCA. Mr. M. was then, and is now, a recipient of SSD from the Social Security Administration. During the period of his residence with the family—he left sometime in April 2008--DCA considered Mr. M. "head of household", although, during the five years that the couple lived in the apartment they both would go to the DCA each year and execute the income recertification forms.

Ms. M. came to our office in the last few days with a summons and complaint for non-payment of the contract rent on the above apartment of $967 a month from June 2008 (partial rent) through October 2008: totals about $4,420. The trial date is October 9, 2008.

Mr. M. for many months had been verbally abusing our client and in April 2008, he decided to contact DCA and request that it issue a "Request for Tenancy Form" for him to leave the present apartment and move-in by himself into a new apartment at …., N.J. When he was in the act of requesting that DCA cooperate with him, Ms. M. contacted Mrs. X at the DCA office in Elizabeth, N.J. and asked DCA to give her to continue her Section 8 status notwithstanding Mr. M's notice to DCA that he wanted to take the Section 8 status with him to a new address. Ms. M. states that Ms. X told her that DCA could do nothing about her husband's request because he was the head of household under DCA's records and he was disabled.

The problem is that DCA gave the Section 8 voucher to the husband when he vacated in May 2008 and now our client is facing a summary dispossess action for the contract rent on the apartment. It appears that the HAP contract was terminated for the May and/or June 2008 rent because DCA started to pay a new landlord a HAP payment for Mr. M. starting in May or June 2008 at [second address], N.J.

On May 20, 2008, our client obtained a TRO DV order against the husband. The order states that the husband is prohibited from returning t the scene of the violence (the apartment) and he was barred from "the residence of the plaintiff." The order further stated that the defendant was "granted exclusive possession of ...the residence."

On May 29, 2008, our client obtained a final DV restraining order that states that the defendant was barred from the residence of the plaintiff and that the plaintiff was "granted exclusive possession of the residence" and the apartment's address is expressly stated. Ms. M. brought this final DV order to DCA's Elizabeth, N.J. office but the intake receptionist refused to take it and said Ms. M. could leave the police report, which she did.

Our client only receives $560 a month from the husband for herself and the three children which is from the husband's Social Security Disability. She faces imminent homelessness without the receipt of Section 8 status in the future and without immediate help to pay back rent from DCA's Homelessness Prevention Program.

Our office has reviewed client's rights under the federal Violence Against Womens' Act (VAWA), 42 U.S.C. 1437f(o)(D)ii through vi., the attached HUD regulation, 24 CFR §982.315(a) and (b), and DCA's attached "Housing Choice Voucher Program Administrative Plan" (July 2008). See definition in the latter of "applicant break-up" (p. 1-2), "Family Break-up" (p. 1-4 to 1-5) and "Violence Against Women Act", pp. 7-13 through 7-15.

HUD regulation 24 CFR §982.315(b), sets forth certain criteria that PHAs, such as DCA, need to follow in the establishment of their Section 8 Administrative Plans. These include assessing factors when a family break-up occurs, such as: whether the assistance should remain with the family members remaining in the original assisted unit, the interest of minor children, and whether family members are or have faced actual or threatened physical violence against a spouse; as well as "other factors specified" in the PHA Section 8 Administrative Plan. DCA's Administrative Plan, under the definition of "Family Break-up" (p. 1-4 to 1-5) and "Violence Against Women Act", pp. 7-13 through 7-15, has embodied the HUD regulatory standards but it has not followed them in this case.

It would appear that DCA has not properly exercised its discretion under the HUD regulation and DCA's Administrative Plan in that when DCA interviewed Ms. M. in April 2008, it did not place sufficient weight on her needs and those of her children in deciding to award the Section 8 voucher to her husband at the time of the family break-up. Therefore, Ms. M. requests the following remedies:

- Ms. M. requests and immediate administrative hearing on this. Part of the hearing should establish whether Mr. M. committed fraud, 24 CFR §982.551-553, in the representations he made to DCA in his request for a Request for Tenancy Form. (For this, it is requested that I have access to the DCA file for discovery.) See DCA's Administrative Plan, at p. 7-12, which states that DCA must determine whether Mr. M. was "eligible" for the issuance of a new Voucher. It is submitted that his eligibility had to be based on the factors found in the HUD regulation and the DCA Administrative Plan found under the definition of "family break-up" at pp. 1-4 and 1-5. Ms. M. is without a realistic remedy against Mr. M. under the State Domestic Violence Act, N.J.S.A. 2C:25-29(b)(2), to require him to pay for alternative housing at a contract rent because of Mr. M.'s income is Social Security Disability. Rather, Ms. M. depends on the need to obtain Section 8 eligibility from DCA.

- In addition, it is requested that DCA consider invoking that part of its Section 8 Administrative Plan—see definition of "Applicant break-up", pp. 1-2 and 1-3—which permits DCA to open its waiting list for former members of an applicant family that breaks-up. That provision gives the regional supervisor on a case-by-case basis the ability to give consideration "to former members of an applicant family who retain custody of the children…and to actual or threatened physical violence against the former members by a spouse… ."

- In addition, because DCA did not properly assess the situation adequately when it issued the Section 8 voucher to Mr. M., rather than deciding that Ms. M. would retain the Section 8 status in her present apartment, it is appropriate that DCA utilize its Homeless Prevention Program in issuing back rent so that Ms. M. can avoid the entry of a Judgment for Possession at the eviction trial date which is scheduled for October 9, 2008.

It is hoped that this matter can be resolved informally. If not, kindly consider this a request for an administrative hearing under DCA's Section 8 Administrative Plan.

Very truly yours,

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART E
----------X

Metro North Owners LLC,

Petitioner-Landlord

- against-

Sonya Thorpe,

Respondent-Tenant
----------X

L&T 79149/08

Answer

SIR OR MADAM:

PLEASE TAKE NOTICE that respondent hereby appears in this proceeding; that the undersigned has been retained as attorney for respondent; and that we demand that you serve all papers upon us at the address stated below.

PLEASE TAKE FURTHER NOTICE that the respondent hereby interposes the following answer to the petition herein:

1. Respondent denies the allegations in paragraph 2, 4,5, 8 and 9 of the petition.

2. Respondent lacks information sufficient to form a belief about the allegations in paragraph 1, 3,6 7, of the petition.

3. Respondent hereby denies the first allegation in the notice of termination. Respondent did not stab anyone on the date in question, was not charged with a crime on the date in question and was in fact a victim of a crime on that date.

4. Respondent hereby denies the fourth allegation in the notice of termination.

AS AND FOR A FIRST OBJECTION IN POINT OF LAW

5. Ms. Thorpe is a recipient of a section 8 voucher administered by the Department of Housing Preservation and Development (hereafter HPD). HPD pays a portion of Ms. Thorpe' monthly rent and these payments are sent directly to petitioner.

6. Ms. Thorpe is a recipient of public assistance. Each month public assistance pays a shelter allowance directly to petitioner as Ms. Thorpe's portion of the rent.

7. Upon information and belief petitioner has received and accepted rent payments from both HPD and Public Assistance for Ms. Thorpe after petitioner allegedly terminated Ms. Thorpe's tenancy.

8. As a result of this acceptance of rent petitioner has reinstated the tenancy and vitiated the notice of termination.

AND AS FOR A SECOND OBJECTION IN POINT OF LAW

9. Respondent hereby repeats and realleges paragraph 4 above.

10. The grounds contained in the notice of termination are not an acceptable grounds for termination of a section 8 tenancy according to CFR 982.310.

AND AS FOR A FIRST AFFIRMATIVE DEFENSE:

11. Ms. Thorpe is the recipient of a section 8 voucher administered by the Department of Housing Preservation and Development.

12. On November 21, 2006 the police were called to Ms. Thorpe's apartment when she was physically assaulted by John Capers when he did strike her with a closed fist. A police report was filed.

13. On January 10, 2007 Ms. Thorpe again called the police when she was attacked in her apartment building by John Capers. A police report was filed.

14. On February 28, 2007 Ms. Thorpe again called the police when she was assaulted by John Capers and a police report was filed.

15. On March 15, 2007 Ms. Thorpe obtained an order of protection against John Capers due to his repeated physical assaults. The order indicates Mr. Capers is to have no contact with Ms. Thorpe and no contact through third parties. The order of protection was issued through March 20, 2007.

16. Ms Thorpe did provide a copy of this order of protection along with a picture of Mr. Capers to building security and management so that they could prevent him from entering the building. They have failed in this regard.

17. On March 20, 2007 Ms. Thorpe obtained an order of protection against John Capers. This order indicates there is to be no personal contact and no third party contact. The order is valid until March 19, 2012 and was served on Mr. Capers while he was incarcerated.

18. Ms. Thorpe did provide a copy of the March 20, 2007 order of protection to her building security and management along with a picture of Mr. Capers so that they could assist in preventing Mr. Capers from entering the building. They have failed in this regard.

19. On April 1, 2008 Ms. Thorpe was again physically assaulted by Mr. Capers. The police were called and both Ms. Thorpe and Mr. Capers were arrested. All Charges against Ms. Thorpe were dropped and the District Attorney declined to prosecute Ms. Thorpe in any capacity.

20. On April 2, 2008 Ms. Thorpe again obtained a temporary order of protection against Mr. Capers because Mr. Capers was released on bail.

21. Ms. Thorpe provided copes of the April 2, 2008 order of protection to building management and security along with a picture of Mr. Capers.

22. Pursuant to the Violence Against Women Act 205 42 U.S.C. 1437 f. C 9 (B) and (C), it is unlawful for a private landlord to terminate the tenancy of a section 8 tenant based solely on incidents of domestic violence. As this proceeding is based solely on incidents of domestic violence it must be dismissed in it's entirety.

AND AS FOR A SECOND AFFIRMATIVE DEFENSE

23. Respondent hereby reaffirms and realleges the facts in paragraphs (10) through (21) above.

24. The Fair Housing Act makes it unlawful "refuse to sell or rent after the making of a bonafide offer or to otherwise refuse to negotiate for the sale or rental of or otherwise make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status or national origin". 42 USC 3604(a).

25. Terminating the tenancy of a domestic violence victim because of incidents of domestic violence is sex discrimination under the Fair Housing Act. Bouley v. Young 394 F Supp 2d 675 (D. Vt. 2005).

26. This holdover proceeding is based entirely on incidents of domestic violence.

27. Petitioner's attempt to terminate respondent's tenancy based on incidents of domestic violence is sex discrimination and unlawful pursuant to the Fair Housing Act.

AND AS FOR A THRID AFFIRMATIVE DEFENSE

28. Respondent hereby reaffirms and realleges paragraphs (10) through (21) above.

29. The New York City Human Rights Law makes it unlawful to "deny to or withhold from any person or group of persons such a housing accommodation or an interest therein because of the actual or perceived.... gender".

30. Petitioner's attempt to terminate respondent's tenancy based on incidents of domestic violence is gender discrimination and unlawful pursuant to the New York City Human Rights Law.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

31. The first, second and third allegations in the notice of termination do not state a cause of action for nuisance as a matter of law and consequently the proceeding should be dismissed.

WHEREFORE, respondent respectfully requests that petitioner take nothing by this proceeding, and that the court issue an order: a) dismissing the petition with prejudice b) granting such other and further relief including but not limited to attorney's fees as this court shall deem just and proper.

Dated: New York, New York
September 11, 2008

Respectfully submitted,

Gretchen Gonzalez

Steven Banks, Esq.,Attorney in Charge
Gretchen Gonzalez,Esq. of Counsel
Harlem Community Law Offices

870 N.Y.S.2d 768

METRO NORTH OWNERS, LLC, Petitioner,
v.
SONYA THORPE, Respondent.
79149/08
Civil Court of the City of New York, New York County.
Decided December 25, 2008.

Gutman, Mintz, Baker & Sonnenfeldt, P.C., New York City (Gary Friedman and Neil Sonnenfeldt), for petitioner.

The Legal Aid Society, Harlem Community Law Offices, New York City (Gretchen Gonzalez of counsel), for respondent.

GERALD LEBOVITS, J.

In this holdover proceeding, petitioner alleges that respondent, Sonya Thorpe, a Section 8 tenant, violated her lease by creating a nuisance. According to petitioner's notice of termination, respondent engaged in illegal and violent behavior during domestic disputes. Petitioner alleges that respondent stabbed John Capers on April 1, 2008, in one of numerous disturbances she allegedly created in and around the building.

Respondent denies these allegations and instead claims that Capers engaged in domestic violence against her. Invoking two subsections of the federal Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), signed into law on January 5, 2006, to remedy abuses in which landlords tried to evict domestic-violence victims (*see* Lenora M. Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence,* 11 Am U J Gender Soc Pol'y & L 377 [2003] [documenting abusive practices and citing strict-liability regulations that allowed domestic-violence victims to be evicted]; Tara M. Vrettos, Note, *Victimizing the Victim: Evicting Domestic Violence Victims from Public Housing Based on the Zero-Tolerance Policy*, 9 Cardozo Women's LJ 97, 102 [2002] [same]; Veronica L. Zoltowski, Note, *Zero Tolerance Policies: Fighting Drugs or Punishing Domestic Violence Victims?*, 37 New Eng L Rev 1231, 1266-1267 [2003] [same]), respondent argues in this motion for summary judgment under CPLR 3212 that VAWA 2005 forbids petitioner to terminate her federal-government-assisted Section 8 tenancy.

Respondent's motion is granted.

Both petitioner and respondent agree that a violent incident occurred at 420 East 102n Street, the subject premises, and that the New York Police Department and Emergency Medical Services responded to it. Both petitioner and respondent also agree that Capers told a security guard that he was stabbed. Respondent admits that Capers told the police that she stabbed him but denies that she stabbed anyone on the date in question and further claims that she was a victim of domestic violence, not the aggressor, as petitioner claims.

Respondent asserts that as a victim of domestic violence, she deserves VAWA's protection. According to VAWA 2005, 42 USC § 1437 f (c) (9) (B) and (C) (i), an incident of domestic violence or criminal activity relating to domestic violence will not be construed to violate a public-housing or government-assisted lease and shall not be good cause to terminate a public-housing or government-assisted tenancy (such as a Section 8 tenancy) if the tenant is the victim or threatened victim of that domestic violence. (*See* American Civil Liberties Union,*New Federal Law Forbids Domestic Violence Discrimination in Public Housing*, Jan. 25, 2006, at http://www.aclu.org/womensrights/violence/23929res20060125.html [accessed Dec. 25, 2008] [explaining contours of VAWA 2005 as they affect eviction proceedings].) VAWA's goal is to prevent a landlord from penalizing a tenant for being a victim of domestic violence. (*See generally* Kristen M. Ross, Note, *Eviction, Discrimination, and Domestic Violence: Unfair Housing Practices Against Domestic Violence Survivors*, 18 Hastings Women's LJ 249, 262-264 (2007); Elizabeth M. Whitehorn, Comment, *Unlawful Evictions of Female Victims of Domestic Violence: Extending Title VII's Sex Stereotyping Theories to the Fair Housing Act*, 101 Nw U L Rev 1419, 1423 (2007). Respondent argues that because petitioner's allegations of nuisance are based solely on acts of domestic violence committed against her, VAWA 2005 prevents her tenancy from being terminated.

VAWA 2005, 42 USC § 1437 f (c) (9) (B), provides that

"An incident or incidents of actual or threatened domestic violence . . . will not be construed as a serious or repeated violation of the lease by the victim or threatened victim of that violence and shall not be good cause for terminating the assistance, tenancy, or occupancy rights of the victim of such violence."

VAWA 2005, 42 USC § 1437f (c) (9) (C) (i), also provides that

"Criminal activity directly relating to domestic violence . . . engaged in by a . . . guest . . . shall not be cause for termination of assistance, tenancy, or occupancy rights if the tenant . . . is the victim or threatened victim of that domestic violence . . . ."

The movant on a motion for summary judgment bears the burden of presenting evidentiary proof in admissible form to establish a prima facie showing an entitlement to a judgment as a matter of law. (*E.g. GTF Mktg, Inc. v Colonial Aluminum Sales, Inc.*,66 NY2d 965, 967 [1987] ["A [party] moving for summary judgment has the initial burden of coming forward with admissible evidence, such as affidavits by persons having knowledge of the facts, reciting the material facts and showing that the cause of action has no merit "].) Summary judgment should be granted in the movant's favor only when a defense or cause of action is sufficiently established to warrant the court to direct judgment. (CPLR 3212 [b].)

To defeat a motion for summary judgment, the opposing party must "show facts sufficient to require a trial of an issue of fact." (*Zuckerman v City of NY*,49 NY2d 557, 562; CPLR 3212 [b].) The rule allows flexibility for the party opposing the motion. The opposing party may present evidentiary proof that falls short of the strict requirement to tender evidence in admissible form. An opposing party that does not produce evidentiary proof in admissible form sufficient to require a trial on material questions of fact must offer an acceptable excuse for its

failure to meet the requirements of tender in admissible form; mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient. (*Zuckerman,* 49 NY2d at 562; *Johnson v Phillips,* 261 AD2d 269, 270 [1st Dept 1999]; *see also Shaw v Looking Glass Assocs., LP,* 8 AD3d 100, 103 [1st Dept 2004] ["Conclusory assertions tailored to meet statutory requirements . . . are insufficient to rebut defendants' prima facie showing."].)

As the movant for summary judgment, respondent asks this court to consider the entire history between her and Capers as proof that she is a domestic-violence victim. She submits evidence of complaint reports she filed with the New York Police Department in November 2006, January 2007, and February 2007, along with an order of protection she obtained against Capers in March 2007 from the New York City Criminal Court. Respondent also submits evidence that the New York District Attorney's Office declined to prosecute her for allegedly stabbing Capers in April 2008. Respondent submits her evidence to raise an inference that Capers was the aggressor in April 2008 and that, as the past would show, she, as in November 2006, January 2007, and February 2007, was once again the victim of domestic violence, and hence protected by VAWA, 42 USC § 1437f.

Respondent and Capers's history may not be used to show respondent's propensity to stab Capers. The acts of domestic violence committed against respondent resulting in police reports and the Criminal Court protection order against Capers are relevant, however, to offer in proving necessary background information in establishing a pattern of domestic violence in which respondent is a victim. (*See People v Demchenko,* 259 AD2d 304, 120 [1st Dept 1999] ["Defendant's prior acts of domestic violence against the complainant, resulting in the order of protection violated by defendant in this case, were properly admitted . . . to provide necessary background information."].)

Respondent's affidavit, specifically her recollection of the April 2008 stabbing, identifies herself as the victim. Respondent states that an intoxicated and disheveled Capers arrived at her apartment and, despite her telling him to leave, forced his way into her apartment and assaulted her. During the assault, Capers threw respondent into a bathroom cabinet, causing glass to shatter on both of them, and that Capers injured himself on the glass. Respondent's affidavit about the incident is admissible because she is a person with knowledge of the relevant facts. Respondent's affidavit, police incident reports, and a judge-decreed protection order from Criminal Court against Capers depict respondent as the victim of domestic violence and shifts the burden of proof to petitioner to allege otherwise. Petitioner must show that its causes of action have merit and that triable issues of fact warrant a trial.

Petitioner submits an affidavit by Miriam Velette, petitioner's property manager, and a security guard's incident report dated April 2, 2008, in opposition to respondent's motion for summary judgment. Velette alleges that she is involved in the daily management and oversight of petitioner's properties and that even after Criminal Court granted the order of protection in March 2007, respondent gave Capers ongoing access to the building several times. Velette further alleges that respondent used obscenities when building security denied Capers access onto the subject premises and that "there have been several instances where the respondent has engaged in loud fighting, yelling, and screaming with Mr. John Capers who is apparently the respondent's ex-husband/boyfriend." Velette also claims that respondent stabbed Capers on April

1, 2008, causing him serious harm, and that this violent conduct shows her to be threat to the safety of the other tenants in the building.

Velette fails to give the court a time frame for any of the alleged prior disputes between respondent and Capers. Moreover, besides indicating that she does not have first-hand knowledge of the couple's relationship by using words like "apparently" and besides basing her reasoning on hearsay, her statement is ambiguous. A party's acts of domestic violence can be admissible to establish a party's status, even if established solely by testimony, if relevant "to establish motive and intent and to provide appropriate background." (*People v Meseck*, 52 AD3d 948, 950 [3d Dept 2008].) Nowhere in Velette's affidavit or in petitioner's opposing papers as a whole is any evidence that the prior disputes were the fault of or initiated by respondent. Rather, the only evidence that respondent poses a threat to the tenants of the building or that her conduct is an ongoing nuisance is Velette's single, generalized, and neutral statement that these alleged "several instances" are a "threat to the tenants" of the building. Petitioner fails to offer any documentation to establish a triable issue of fact for any of the allegations, such as hospital records, injury-aided reports, police reports, affidavits from the security guard, Capers, or other tenants or employees, or affidavits from anyone describing the tumultuous relationship between respondent and Capers.

Velette's statement that respondent stabbed Capers is unsubstantiated and conclusory. Velette is a person not familiar with the relevant facts. She was absent during the stabbing and she does not say how she concluded that respondent stabbed Capers. She did not witness any of the alleged prior disputes and provides no reliable basis to explain how she obtained her information. Her affidavit is a conclusory statement based solely on hearsay that does not fall under any of the hearsay exceptions. Her unsubstantiated and conclusory affidavit is merely an attempt to find 42 USC § 1437 f inapplicable to this case.

Petitioner's security guard, Specialist R. Ward, identifies respondent and Capers in his incident report as a person involved in the stabbing. In his report, Ward claims that an anonymous tenant told him a man had fallen on the grounds and that when Ward spoke to Capers, Capers told him that "he had been stabbed." Ward's report, not even an affidavit, is also hearsay because Ward is not knowledgeable of the relevant facts. He arrived after Capers had already been injured. He did not see what happened. Respondent is not identified as the assailant by the anonymous tenant who reported the incident, by Capers, or by Ward himself. The only mention of respondent in the incident report concerns the March 2007 protection order respondent obtained from Criminal Court and the alleged ongoing disputes between the respondent and Capers.

Petitioner submits proof in inadmissible form and fails to demonstrate an acceptable excuse for its failure to meet the requirements of tender in admissible form. Petitioner does not suggest that it engaged in a good-faith attempt to obtain additional evidence or establish a reasonable nexus to prove that respondent stabbed Capers. All that petitioner offers into evidence to defeat respondent's motion is a property manager's affidavit containing conclusory statements and an unsworn incident report based on hearsay filled out by a security guard responding in the aftermath. Petitioner alleges that respondent lacks credibility but itself presents no evidence to discredit her or her affidavit and ultimately bases all its allegations that respondent is a nuisance

and a threat to the tenants of the subject premises on inadmissible hearsay and prior, ambiguous, unspecific, undated acts.

Even if petitioner's evidence were not based on hearsay and conclusory statements, the court would find that the supposed stabbing incident is a domestic dispute and that respondent is a victim or a threatened victim of domestic violence. Although petitioner alleges that respondent allowed Capers access to the subject premises shortly after obtaining a protection order, her behavior, even if true, does not determine that respondent was not a victim of domestic abuse. The battered-woman syndrome, a well-established concept in law and science, explains the concept of anticipatory self-defense and seemingly inconsistent victim behavior. (*E.g. People v Torres*, 128 Misc 2d 129, 135 [Sup Ct, Bronx County 1985].) The battered-woman syndrome explains the behavioral pattern of abused women and how the abuse affects their conduct. (*People v Hryckewicz*, 221 AD2d 990, 991 [4th Dept 1995].) The syndrome is "`a series of common characteristics found in women who are abused both physically and emotionally by the dominant male figures in their lives over a prolonged length of time.'" (*People v Ellis*, 170 Misc 2d 945, 950 [Sup Ct, NY County 1996], quoting Christine Emerson, *United States v. Willis: No Room for the Battered Woman Syndrome in the Fifth Circuit?*, 48 Baylor L Rev 317, 320 [1996].) One "characteristic is that [i]f charges are filed, the battered woman may change her mind about prosecuting the batterer and withdraw her complaint, refuse to testify as a witness, or recant.'" (*Id.*, quoting Joan M. Schroeder, *Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer*, 76 Iowa L. Rev. 553, 560 [1991].)

Respondent might have changed her mind after she obtained the March 2007 protection order and allowed Capers access to the subject premises. Unrepresentative and inconsistent victim behavior toward an alleged aggressor fits into the cycle of domestic violence. Domestic violence is cyclical in nature. The battered woman's inconsistent behavior allows the victim to anticipate oncoming violence and entices her to remain with her abuser after the violence ends. (*Id.*, quoting Joann D'Emilio, *Battered Woman's Syndrome and Premenstrual Syndrome: A Comparison of Their Possible Use as Defenses to Criminal Liability*, 59 St John's L Rev 558, 563-564 [1985].) Respondent's seemingly inconsistent behavior toward Capers, even if true, characterizes a battered woman.

Respondent's motion for summary judgment is granted. Because the only admissible evidentiary proof submitted is respondent's affidavit, the court rests its decision on the factual scenario she presents. Petitioner failed properly to raise a triable issue of fact about whether respondent was a victim or aggressor. Accordingly, the court finds that respondent was a victim of domestic violence. As such, VAWA 2005 forbids petitioner to terminate respondent's Section 8 tenancy. Respondent is either a victim of incidents of domestic violence under 42 USC § 1437 f (c) (9) (B) or a victim of criminal activity relating to domestic violence under 42 USC § 1437 f (c) (9) (C) (i).

The petition is dismissed.

This opinion is the court's decision and order.

Sample Letter to Break the Lease:
Cases Where Client Does Not Have a Restraining Order or Police Report

[Date]

[Name]
[Address]

Re: <Client's Name>, Lease Termination

Dear [Name],

I would greatly appreciate your assistance with a matter involving one of our clients, [client's name]. I am a [name of title] at [organization]. [Describe your organization's services].

Ms. [client] currently resides at [address]. Unfortunately, it is no longer safe for Ms. [client] to live at this address because [Describe past incidents of violence that have occurred at the rental unit. Explain that it is likely that such incidents are likely to recur. If possible, describe and attach documentation of the abuse.] Ms. [client's] safety will be seriously jeopardized if she is forced to continue renting the unit.

To protect Ms. [client's] safety, it is essential for her to relocate to a safe, confidential location. I recognize that Ms. [client] has several months left on her lease agreement. To prevent future harm to Ms. [client], the best solution for all parties involved is to agree on a date for Ms. [client] to vacate her apartment, and to terminate the lease agreement on this date. Ms. [client] proposes to vacate the unit and terminate her lease agreement on [date]. [ONLY IF CLIENT AGREES:] If it would be helpful, Ms. [client or a friend or family member] is willing to assist you in finding a tenant to re-rent the unit.

As you likely know, California landlords must take reasonable precautions to protect tenants from foreseeable criminal assaults. *See Kwaitkowski v. Super. Trading Co.*, 176 Cal. Rptr. 494, 496-97 (Cal. Ct. App. 1981). In general, if a landlord is able to do something to reduce the risk of future criminal activity, and does not act to reasonably reduce the risk, he or she can be held responsible for the criminal acts of others. *See id.* As a result, you may be held liable for future attacks on Ms. [client] if you do not take the reasonable step of negotiating with her to end her obligations under the lease. We also request that you take reasonable steps to improve the safety at Ms. [client's] unit as follows: [list any safety improvements needed at the rental unit, such as replacement of burned-out light bulbs, replacement or repair of window and door locks, or trimming of overgrown shrubbery].

Please note that California law prohibits you from withholding Ms. [client's] security deposit if she terminates the lease early. California law provides that landlords can only withhold deposit money to cover rent that they have already lost because the tenant moved out early. *See* Cal. Civ. Code § 1950.5; *250 L.L.C. v. Photopoint Corp.*, 131 Cal. App. 4th 703 (2005). Deposit money cannot be withheld to cover future rent losses that a landlord may incur because the tenant moved out early. *See id.* Further, any remaining portion of the tenant's deposit must be

returned no later than 21 calendar days after the tenant has vacated the premises. Cal. Civ. Code § 1950.5. Accordingly, Ms. [client's] deposit can only be credited against any rent owing within 21 days following the termination of her lease, at which time she will become entitled to the balance. Finally, Ms. [client's] obligation to pay any rent under the lease ends once the unit is re-rented to another tenant. Cal. Civ. Code § 1951.2. Once Ms. [client] vacates the apartment, I trust that you will follow these statutory mandates in calculating the portion of the security deposit that must be returned to her. She has requested that the security deposit be mailed to [insert safe address, such as your workplace or the address of the client's friend or family member].

I would like to discuss Ms. [client's] proposed move-out date with you as soon as possible. To protect the safety and privacy of Ms. [client], I request that you keep confidential all matters pertaining to her status as a victim of domestic violence, including her efforts to relocate. I appreciate your time and consideration in addressing this matter, and look forward to speaking with you soon.

Sincerely,

[Name]
[Title]