

# Appellate Division Rules that Defective Code Enforcement in Rental Properties Requires Legislative Fix

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## For Immediate Release

**April 5, 2024, New York State** - On March 28, 2024, the Appellate Division, Third Judicial Department, in a 3-2 split decision, affirmed an Albany County Supreme Court decision dismissing a case challenging the Secretary of State's alleged failure to implement guidelines governing the code enforcement process in rental properties. The case is titled "Keionzie Clements v. New York Secretary of State," and the decision can be found at <https://decisions.courts.state.ny.us/ad3/Decisions/2024/CV-22-2099.pdf>.

The petitioners, represented by Legal Assistance of Western New York, Inc., argued that the lack of any statewide required minimum enforcement framework for responding to tenant complaints violates the Secretary of State's duty under the Executive Law to promulgate minimum regulatory standards governing the enforcement of the code. Both the majority and the dissent confirmed the apparent failure of the code enforcement system to protect tenants, disagreeing on whether a legislative fix was required to address gaps in the code enforcement process.

New York State's Uniform Fire Prevention and Building Codes are designed to ensure that structures are safe, and that housing provides basics such as adequate heating and running water, smoke alarms, and protection from the elements. Tenants are entitled to housing which complies with these important protections, but the enforcement mechanism is inconsistent across the state. The Petitioner in Clements argued that the lack of adequate enforcement is due to a lack of required enforcement standards from the Secretary of State, who has statutory oversight authority over the code enforcement process.

The submissions in the case included an amicus brief submitted by legal aid programs covering most of the geographic area of New York State. The amici included Legal Services of the Hudson Valley, Legal Aid Society of Northeastern New York, Legal Services of Central New York, and the Center for Elder Law and Justice. Their brief, together with extensive submissions from LawNY, documented widespread persistent defects in the enforcement of the code on behalf of tenants, causing unsafe building conditions and contributing to homelessness by the ejection of tenants in place of ensuring repairs. Often the evictions by code enforcement officials violate well-established safeguards which prohibit evictions without due process of law.

David Kagle, the Managing Attorney for LawNY's housing program, states "The code enforcement process is broken. Tenants are afraid to ask for help because it is well-known that they are likely to be put out on the street. Many legal aid agencies actively discourage their clients from engaging with code enforcement, because these officials often make their problems worse."

Marcie Kobak, Litigation Director for Legal Services of the Hudson Valley, confirmed the ongoing problems, noting: "Inadequate code enforcement is a statewide problem. This decision acknowledges that a primary goal of housing code enforcement is to protect tenants. The experience of LSHV's clients and amici's members is that code enforcement does not protect them from unsafe conditions, with a disparate impact on tenants of color."

Nic Rangel, Executive Director of Legal Aid Society of Northeastern New York states: "At LASNNY, we are very concerned with the lack of decent safe and affordable housing available in upstate New York, particularly for lower income households. Many lower income tenants rely on code enforcement standards to protect them and their families from unsafe living conditions because moving to a safer home is unaffordable or unavailable. Unfortunately, code enforcement officials in some localities are used as a tool to effectuate illegitimate or illegal evictions and harass tenants. For much of the state, building code standards are meaningless without adequately funded code enforcement agents and appropriate oversight at the state level. The burden of inadequate code enforcement should not fall on tenants - these families need the state to step up."

Kevin M. Quinn, Director of Impact Litigation for Center for Elder Law & Justice states: "New York State tenants have a right to live in safe and habitable housing. Tenants should be able to turn to their local code enforcement department when these rights are violated. Instead of landlords being held accountable, tenants are often forced to leave the property, further contributing to the homeless crisis in New York State."

While acknowledging this problem, the majority found that a legislative fix was required, stating:

"the specific examples presented in Clements' and amici's briefs paint a compelling picture of the legislation's failure to meet one of its primary goals: the protection of tenants from unscrupulous landlords who avoid their obligation to properly maintain their properties in conformance with the Uniform Code. Indeed, we share the sentiment of our dissenting colleagues relative to Clements' specific experience, which in our view reflects

that even the use of an order to remedy may ultimately fail to compel a landlord to perform necessary repairs...

and

...The fact that enforcement of the Uniform Code may on occasion result in the replacement of one prominent concern – inadequate and unsafe housing – with another – rendering tenants of these buildings homeless – suggests that the legislation may be falling short of its intended goals. Nevertheless, the ineffectiveness of the statutory scheme ultimately demands a legislative fix rather than the relief sought in this proceeding, as it is the content of the regulations promulgated in accordance with the mandates of the statute that is seemingly insufficient to meaningfully protect the public from unsafe housing conditions brought on by derelict landlords. As such, we are constrained to find that the extraordinary relief of mandamus cannot be used to rectify the policy shortcomings that Clements has identified in this proceeding.” (internal citations omitted).

Two dissenting judges on the five-judge panel argued that the Secretary of State’s “complete deference” to local governments “does not comport with [Secretary of State]’s statutory obligation to actually specify a minimum enforcement standard.” The dissenting judges therefore urged that there were grounds for a court order requiring the Secretary of State to implement meaningful statewide standards governing code enforcement practices.

LawNY is heartened to see the Appellate Division recognize the serious gaps in the code enforcement system and affirm the experiences of our clients that the current code enforcement system does not protect them. However, advocates strongly disagree with the majority’s position that the only solution is a legislative fix, and are reviewing options for further appeal. Kagle adds, “LawNY continues to advocate and litigate for lawful and effective code enforcement. Addressing defective practices, including unlawful evictions by code officials on a town-by-town basis can remedy individual abuses or maybe even improve practices in a single town, village, or city. However, as a practical matter, it is not possible to ensure that the code is consistently and lawfully enforced statewide without meaningful and effective oversight and guidance from the state agency charged with that duty.”

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