Commercial Eviction (NY)

A Practical Guidance® Practice Note by Jarred Kassenoff, Newman Ferrara LLP

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This practice note provides an overview of the various grounds and procedures for terminating commercial leases and explains how to commence and prosecute a summary eviction against commercial tenants in New York. This note is intended to provide guidance to counsel for both landlords and tenants so they can better appreciate the multifaceted issues and statutory framework involved in the eviction process and assist with avoiding common pitfalls.

This note does not address residential evictions or the termination of residential tenancies, which are significantly more complex and involve greater statutory protections, particularly when complex rent-regulatory issues intersect with those occupancy rights.

For guidance on residential evictions in New York, see Residential Tenant Representation Resource Kit (NY).

For guidance on drafting and negotiation commercial leases in New York, see Commercial Real Estate Leasing (NY) and Office Leasing Resource Kit (NY).

Overview

There are three main instances when a landlord may evict a commercial tenant in New York: (1) when the tenant's lease has expired (by either its terms or pursuant to an early termination right that may exist in the lease), and the tenant holds over after the expiration of the term; (2) when the tenant fails to pay rent or "additional rent" due under the lease; and/or (3) when the tenant has defaulted in a substantial obligation of the tenancy, and the lease contains a "conditional limitation" provision permitting the landlord to terminate the lease on such grounds.

Typically, lease expiration is the simplest, quickest, and most straightforward basis to evict, as there is no predicate notice that is required to be served by the landlord prior to the commencement of eviction proceedings, and there is little the landlord must demonstrate to prevail in the ensuing eviction case, except for the fact that the lease has expired and that the tenant remains in possession of the premises without the landlord's permission. Accordingly, while this may be one of the most common bases to evict a commercial tenant, it requires little discussion and is not separately addressed below.

Conversely, when seeking to evict based upon either nonpayment of rent or a breach of a substantial obligation of the tenancy, it is important for the practitioner to carefully review the parties' lease, as both the permitted grounds and precise procedure for the termination are governed solely by that agreement. If the lease does not provide an express termination right, or the procedures for terminating the lease are not strictly followed, a landlord will likely be unable to evict.

Once the proper predicate notices have been served pursuant to the lease (i.e., a rent demand, cure notice, and/or termination notice), the landlord typically has the option of pursuing the eviction by commencing either (1) a summary nonpayment proceeding (where the default is based on nonpayment of rent or additional rent), (2) a summary holdover proceeding (where the default was based on a breach of a substantial obligation of the tenancy, and

the tenant is holding over after the termination of the lease), or (3) an ejectment action in the supreme court in the county where the premises are located. In certain situations, the tenant may be able to avoid the eviction proceeding by obtaining a "Yellowstone" injunction, which tolls the time tenant has to cure the alleged default, and enjoins the commencement of eviction proceedings until there is an adjudication as to whether the alleged default actually exists.

While some commercial leases may also provide that a landlord can use self-help to recover possession of the premises after the termination or expiration of the lease (such as by changing the locks, or discontinuing essential services), as the courts in New York generally disfavor this approach, and it could subject the landlord to a wrongful eviction claim and possible treble damages, it is generally not recommended that landlords avail themselves of self-help, absent carefully vetting these issues with counsel.

Defaults Based on the Nonpayment of Rent

One of the most common grounds to terminate a commercial lease is the tenant's failure to pay all rent or additional rent. If the tenant fails to pay rent on or before the due date, or defaults on other monetary obligations reserved by the lease (such as the utilities, real estate taxes, common area and maintenance, operating expenses, etc.), and the lease has a provision giving the landlord the right to treat such other monetary obligations as "additional rent," the landlord may pursue a number of options in seeking to recover those unpaid sums.

The Rent Demand

Prior to the commencement of a summary nonpayment proceeding, a landlord is statutorily required under Real Property Actions and Proceedings Law (RPAPL), to serve upon the tenant a written demand for the rent, providing the tenant with at least 14 days' notice requiring, in the alternative, the payment of the rent, or the surrender of possession of the premises. N.Y. Real Prop. Acts. Law § 711(2). Notably, while the statute provides that the landlord must give the tenant "at least fourteen days" notice to pay the rent and cure its rent default, the statute only sets forth the minimum payment-demand period, which time frame can be expanded by the parties' agreement. Accordingly, prior to serving this demand, it is important to review the lease to determine whether the landlord needs to provide the tenant with a payment period greater than the statutory minimum.

As this demand is a necessary predicate to maintaining a summary nonpayment proceeding, and defects in the demand could subject the proceeding to dismissal (or, minimally, delay the proceeding as a result of motion practice or a traverse hearing), it is important that landlords and practitioners ensure that the demand is accurate, includes all the necessary language, and is served in accordance with the RPAPL and the lease.

Contents of the Rent Demand

In order to pass judicial scrutiny, the rent demand should (1) be made and signed by the landlord (or an authorized agent known by the tenant), (2) be directed and addressed to the tenant at the premises (in addition to any other known addresses, including such addresses as the lease may require), (3) require the tenant to either pay the rent or surrender possession of the premises, (4) provide a good-faith approximation of the rent owed, and (5) provide the proper time period to pay. J.D. Realty Associates v. Jorrin, 632 NYS2d 441 (Civ. Ct. 1995). For a sample rent demand, see Rent Demand (Commercial Eviction) (NY).

Service of the Rent Demand and Notice of Petition and Petition

Under RPAPL § 711(2), service of the rent demand must be made in accordance with RPAPL § 735, which governs service of the pleadings—the notice of petition and petition—in summary proceedings. Specifically, pursuant to RPAPL § 735, the rent demand (and notice of petition and petition) can be served upon the tenant by any one of three methods: (1) personal delivery; (2) substituted service to a person of suitable age and discretion who is employed at the premises sought to be recovered; or (3) if upon after "reasonable application" service cannot be effected by personal or substituted service, by conspicuous-place service (i.e., by affixing the rent demand to a conspicuous part of the premises). N.Y. Real Prop. Acts. Law § 735.

Additionally, when service is made upon a corporation, joint stock, or other incorporated association by either substituted service or conspicuous-place service, the statute provides that, within one day of the delivery, the demand (and notice of petition and petition) must be mailed to the tenant, by both registered or certified mail and by regular first class mail, at the property sought to be recovered. In addition, if the principal office or principal place of business is not located on the property sought to be recovered, and if the landlord has written information of the principal office or principal place of business within the state, the notice must be sent (by both registered or certified mail and by regular first class mail) to the last place as to which landlord has such information, or if the landlord does not have this

information but has written information of any office or place of business within the state, to any such place as to which the landlord has such information. See N.Y. Real Prop. Acts. Law § 735(1)(b).

As improper service is a common defense asserted by tenants and has been used to both delay and dismiss summary proceedings, ensuring that the rent demand (as well as the notice of petition and petition) are properly served in accordance with the law, and that the affidavit of service filed with the court accurately and fully describes all service attempts, is of critical importance.

Personal Delivery

"Personal" or hand-delivery of the rent demand and notice of petition and petition upon the tenant is generally the preferred method of service, as (1) it is typically the most difficult for the tenant to challenge (particularly if there is photographic or video evidence of the delivery, which is highly recommended); (2) does not require any mailings; and (3) with regard to service of the notice of petition and petition, satisfies the requirements to obtain a money judgment in the event the tenant fails to appear. (Specifically, although there is some disagreement among the courts, because the service requirements under the RPAPL (governing summary proceedings) for both "substituted service" and "conspicuous-place service" are less stringent than those governed by N.Y. C.P.L.R. 308 (governing plenary actions), when a tenant in a summary proceeding is not served personally with the pleadings and subsequently defaults, the civil court may not have jurisdiction to award a monetary judgment for any unpaid rents. (but cf. Dolan v. Linnen, 195 Misc.3d 298 (Civ. Ct. Richmond Co. 2003)))

Although personal service is typically made at the property sought to be recovered, it can be effectuated wherever the tenant is located. And, if the tenant is a corporation or partnership, it may be made upon an officer, director, managing or general agent, cashier, assistant cashier, partner, or any other agent authorized to receive service on the tenant's behalf. 537 Greenwich LLC v. Chista Inc., 862 NYS2d 807 (Civ. Ct. 2008). Contrary to service under N.Y. C.P.L.R. 311(a)(1), and N.Y. Bus. Corp. Law § 306 (which authorizes services of the pleadings upon the secretary of state), under the RPAPL, service of a notice of petition and petition upon the secretary of state does not constitute valid service.

Substituted Service

If the rent demand (or notice of petition and petition) cannot be personally delivered to the tenant, service can be made by leaving the rent demand (or notice of petition and petition) with a person of "suitable age and discretion who is employed at the property sought to be recovered . . . and in addition, within one day after such delivering to such suitable person . . . by mailing to the [tenant] both by registered or certified mail and by regular first class mail . . . ." N.Y. Real Prop. Acts. Law § 735(1).

Generally, when determining if a person is authorized to accept service on a tenant's behalf, the question will be whether the person served was more likely than not to deliver process to the named party. Persons who have either apparent authority to accept service, have a stake in the tenant's continued occupancy, or are employees of the tenant, have been typically found by the courts to be authorized parties to accept service on the tenant's behalf. 50 Court St. Assocs. v. Mendelson & Mendelson, 572 N.Y.S.2d 997 (Civ. Ct. 1991).

Conspicuous-Place Service

RPAPL § 735 authorizes the landlord to affix the rent demand (or notice of petition and petition) to a conspicuous part of the premises (i.e., "conspicuous-place" or "nail and mail" service) if, upon "reasonable application," service cannot be made by either personal delivery or substituted service.

While the "reasonable application" standard is less than the "due diligence" standard required for service of process under N.Y. C.P.L.R. 308(4), the courts have held that the service attempt must have some expectation of success, and must be made at a time when the process server could reasonably expect someone to be at the premises. 50 Court St. Assocs. v. Mendelson & Mendelson, 572 N.Y.S.2d 997 (Civ. Ct. 1991). Generally, when the process server is not aware when the tenant is expected to be at the premises, at least two attempts at service should be made: one during normal working hours and the second before or after the usual Monday through Friday work schedule. Kokot v. Green, 836 NYS2d 493 (Civ. Ct. 2007). Additionally, service attempts on Sundays, and other known days of religious observance, are void, and in certain situations, may constitute a misdemeanor. See N.Y. Gen. Bus. Law § 11; N.Y. Gen Bus. Law § 13.

Limitations of the Summary Nonpayment Proceeding on Obtaining Possession

Because the primary function of the summary eviction proceeding is to provide the landlord with a forum to obtain legal possession of real property in an expedited

fashion, if in response to the demand, the tenant surrenders possession of the premises before a summary nonpayment proceeding is commenced, the court will likely be divested of jurisdiction and the landlord will be unable to commence that proceeding (since possession is no longer at issue). Darob Holding Co. v. House of Pile Fabrics, Inc., 310 NYS2d 418 (Civ. Ct. 1970). In that scenario, the landlord's only recourse against the tenant would be to commence a plenary action to obtain a monetary judgment for the unpaid arrears. Conversely, if the nonpayment proceeding is commenced before the tenant surrenders possession, the court is not divested of jurisdiction, and the proceeding can be commenced and pursued. Tricarichi v. Moran, 959 NYS2d 372 (App. Term 2012).

Additionally, if at any time prior to the issuance of a warrant of eviction, the tenant either (1) deposits with the clerk of the court (or where the office of clerk is not provided for, with the court) the arrears owed (with interest and costs) or (2) delivers to the clerk or court an undertaking, in such sum as the court approves, which ensures that the arrears will be paid to the landlord within 10 days (and such payment is made within said 10 days), the tenant may stay the issuance thereof and avoid eviction. N.Y. Real Prop. Acts. Law § 751(1).

Because the tenant can avoid eviction in a summary nonpayment proceeding by payment of the arrears at any time prior to issuance of the warrant, serving a rent demand followed by commencement of a summary nonpayment proceeding may not be the ideal procedure to obtain possession, if that is in fact the landlord's ultimate goal. In such an instance, the landlord should review the lease to determine if there is a "conditional limitation" that permits the lease's termination based on failure to pay rent.

Default and Termination Notice Based on Nonpayment of Rent

Rather than serving a rent demand (the predicate notice required for the commencement of a summary nonpayment proceeding), when the lease permits, the landlord may be able to terminate the lease and commence a holdover predicated upon the failure to pay rent. (While a contractual provision that permits the landlord to terminate the lease based on nonpayment of rent is permissible in the commercial context, such provision violates public policy in the case of a residential tenancy. Semans Family Limited Partnership v. Kennedy, 475 NYS 489 (Civ. Ct. 1998).)

In that regard, most commercial leases contain an "event of default" provision, which permits the landlord to terminate the lease upon the occurrence of certain delineated events and after proper notice and cure period is provided (commonly known as a "conditional limitation"). When the lease delineates nonpayment of rent as such an event of default, the landlord has the option of serving the tenant with a default or cure notice, which affords the tenant a certain contractually agreed-upon time frame to cure its default and pay the arrears. In the absence of a timely cure, the tenancy can then be terminated by the service of a separate termination notice.

By way of illustration, a conditional limitation for nonpayment of rent may provide, as follows:

> If Tenant defaults in the payment of any rent or additional rent, and such default continues for five (5) days after service of notice upon Tenant, then Landlord may, at its option, terminate this Lease upon giving three (3) days' notice to Tenant.

Rather than a rent demand, which must provide the tenant with a minimum of 14 days' notice, and must be served pursuant to RPAPL § 735, the time frame and service requirements for the default and termination notice are governed exclusively by the parties' lease. Benben v. DiMartini, 791 NYS2d 868 (App. Term 2004). Accordingly, the landlord and/or its counsel should carefully review the lease's default and notice provisions to ensure compliance. As with the service of a rent demand, the failure to strictly comply with the governing lease requirements, may subject the case to dismissal.

Once the lease has been properly terminated, and the tenant fails to vacate and surrender possession, the tenant becomes a holdover tenant who can be evicted by way of a summary holdover proceeding. The main distinction between the summary nonpayment proceeding and holdover proceeding is that, in the latter instance, the tenancy has been extinguished prior to the case's commencement. Accordingly, while the tenant in a nonpayment proceeding may be able to avoid eviction if it deposits the rent prior to the issuance of the warrant (as set forth in RPAPL § 751), the tenant in a holdover proceeding does not have that luxury. Once the tenancy has been extinguished, it typically cannot be revived by curing the default subsequent to the termination. For this reason, it is of critical importance that a tenant served with default or cure notice either (1) timely cure the alleged default prior to the expiration of the notice; or (2) obtain a toll of the cure period provided in the notice (by way of

either a Yellowstone injunction or by agreement with the landlord), to provide the tenant with additional time to cure or contest the default.

Defaults Based on a Breach of a Substantial Obligation of the Tenancy

In addition to termination following a rent default, most commercial leases also permit the landlord to prematurely terminate the tenancy for nonmonetary defaults by service of a cure and termination notice. While common examples include violation of the lease's use provision, subletting and/or assignment provision, alteration or repair provision, insurance provision, compliance with law provision, or security deposit provision, the violation of almost any lease provision can provide the basis for termination. The question will be whether there has been a breach of a "substantial obligation of the tenancy" or whether the breach is of a technical or de minimis nature. Courts generally abhor lease forfeitures when the lease obligations have been substantially performed by the tenant or there is no actual harm or substantial injury to the landlord and absent language in the lease to the contrary, the court may excuse the default. Park West Village v. Lewis, 62 NY2d 431 (1984); Haberman v. Gotbaum, 182 Misc.2d 267 (Civ. Ct. 1999).

By way of example, when a tenant breaches a lease provision prohibiting alterations, the court may examine whether the alterations were structural or nonstructural in nature. If the changes are easily removable (i.e., nonstructural) and necessary to carry on tenant's business, the purported breach may not be sufficient to justify the lease's termination. N. & S. Decor Fixture Co., Inc. v. V.J. Enterprises, Inc., 394 NYS2d 278 (App. Div. 1977).

Yellowstone Injunctions

When a commercial tenant is served with a default or cure notice threatening termination, the tenant is left with few options. Typically, the tenant can either (1) cure the default prior to the expiration of the cure period or (2) contest the validity or existence of the default in the context of a summary holdover proceeding or ejectment action.

Because a commercial lease generally cannot be revived subsequent to termination, the problem with litigating the default in a holdover proceeding or by way of a post-termination ejectment action is that, if the tenant is unsuccessful, it will not be able to preserve the tenancy by curing the default thereafter. (Contrast this to a summary proceeding involving residential tenancies, where RPAPL § 753(4) provides the residential tenant with a post-judgment opportunity to cure, and the tenant can preserve the tenancy by correcting the breach of the lease up to 30 days after judgment.)

Accordingly, when a tenant disputes the default and/or needs additional time to cure beyond the time frame provided in the default notice, it must obtain an injunction from the supreme court, tolling the cure period, prior to the default notice's expiration. This will give the tenant an opportunity to litigate the issues and potentially cure any default that the court finds to exist, without risking forfeiture of its tenancy.

While traditionally, the tenant could obtain a preliminary injunction in order to toll the cure period, because of the court's general abhorrence of lease forfeitures, a far more lenient standard to obtain injunctive relief has developed in this situation. Post v. 120 East End Avenue Corp., 62 NY2d 19 (1984). Rather than needing to demonstrate a likelihood of success on the merits, irreparable harm, and a balancing of the equities (the prerequisites to obtain a preliminary injunction), in order to obtain a "Yellowstone" injunction, a tenant need only demonstrate that (1) it has a valid commercial lease; (2) it was served with a default or cure notice, threatening termination of its lease; (3) it requested the injunctive relief prior to the lease's termination; and (4) it is prepared and maintains the ability to cure the default by any means short of vacating the premises. Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates, 95 NY2d 508 (1999).

Although the first three criteria of a Yellowstone injunction are pro forma (a tenant merely needs to proffer its lease and the default notice), the third element (that the tenant is prepared and maintains the ability to cure), is typically where the injunction will stand or fall. If the tenant is unable to demonstrate the ability or wherewithal to cure the alleged default, the court will likely deny the application.

Notably, the curability of certain defaults has been a controversial issue in Yellowstone jurisprudence. Certain defaults (such as the failure to maintain insurance or an illegal assignment) have often been held to be "incurable" by nature. See, e.g., Zona, Inc. v. Soho Centrale LLC, 704 NYS2d 38 (App. Div. 2000) (illegal assignment held incurable); but cf. Artcorp Inc. v. Citirich Realty Corp., 2 NYS3d 109 (App. Div. 2015) (illegal assignment held possibly curable with consent of landlord); Bliss World LLC v. 10 West 57th Street Realty LLC, 170 AD3d 401, 95 NYS3d 183 (1st Dep't 2019) (illegal assignment incurable); Prince Fashions, Inc. v. 60G 542 Broadway Owner, LLC, 53

NYS3d 24 (App. Div. 2019) (failure to maintain insurance incurable because any prospective insurance obtained by tenant will not protect the landlord from possible claims predating that policy); Lex Retail, LLC v. 71st Street-Lexington Corporation, 2020 N.Y. Slip Op. 31457(U) (Sup. Ct. N.Y. 2020) (insurance default may be curable). Thus, landlords seeking to terminate a tenant's lease will often attempt to exploit these specific defaults whenever possible.

In addition to ensuring that the tenant meets the four-pronged standard for a *Yellowstone*, the courts will often also condition the grant of any injunction on the posting of a bond and/or the payment of past and future rent that may be due under the lease. 37th Street Enterprises v. 500-512 Seventh Avenue Associates, 697 NYS2d 601 (App. Div. 1999). For this reason, although it is theoretically possible to obtain a Yellowstone injunction when the tenant is served with a default notice based on the failure to pay rent (New Deal Realty LLC v. 684 Owners Corp., 164 NYS3d 432 (App. Div. 2022)), the victory may ultimately prove pyrrhic, as the tenant may need to tender the disputed rent in order to obtain the injunction.

Notwithstanding the potential hurdles, a Yellowstone injunction remains an invaluable tool. Because such relief can often be protracted and costly, and the tenant ultimately maintains the ability to cure the asserted default even after any judgment, the injunction could provide the tenant with considerable leverage. Settlements of these cases are, thus, commonplace.

For additional information on Yellowstone injunctions and the relevant procedure to obtain such relief, see Provisional Remedies: Obtaining a Yellowstone Injunction (NY).

Summary Eviction Proceedings

Recognizing that traditional plenary or ejectment actions can be a costly and lengthy process for landlords, that often "amounted to the denial of justice," the summary proceeding (now embedded in RPAPL article 7) evolved in the early 19th century to provide landlords with a simple, expeditious, and inexpensive means of recovering unpaid rent and regaining possession of premises. Zenila Realty Corp. v. Masterandrea, 472 NYS2d 980 (Civ. Ct. 1984) citing Reich v. Cochran, 201 NY 450 (1911); Emray Realty Corp. v. Jackson, 174 NYS2d 618 (App. Term 1958). Unlike plenary and ejectment actions in supreme court, the summary proceeding is free of many of the procedural devices and hurdles that often burden regular civil actions. For example, absent leave of court, discovery is not permitted in a summary proceeding, and counterclaims that are not inextricably intertwined with the landlord's claims are often subject to dismissal. The time frames in summary proceedings are also typically much more abbreviated, and (at least in theory) absent a request for adjournment or motion practice, the proceeding may be trial ready as early as the first return date.

For the landlord to avail itself of this streamlined process, it must meet one of the grounds set forth in RPAPL § 711. That section provides, in pertinent part, as follows:

> A special proceeding may be maintained under this article upon the following grounds:
>
> 1. The tenant continues in possession of any portion of the premises after the expiration of his term, without the permission of the landlord or, in a case where a new lessee is entitled to possession, without the permission of the new lessee . . .
> 2. The tenant has defaulted in the payment of rent, pursuant to the agreement under which the premises are held, and a written demand of the rent has been made with at least fourteen days' notice requiring, in the alternative, the payment of the rent, or the possession of the premises, has been served upon him as prescribed in section seven hundred thirty-five of this article . . . .

N.Y. Real Prop. Acts. Law § 711.

Succinctly stated, once the requisite predicate notice has been served, and the time frames contained therein lapse, if the tenant has failed to surrender possession, the landlord may commence either a summary "holdover" proceeding under RPAPL § 711 (1) (when the lease has expired or been terminated), or a summary "nonpayment" proceeding under RPAPL § 711 (2) (when the tenant has defaulted in the payment of rent). (RPAPL § 711 contains additional grounds for maintaining a proceeding, not covered herein, such as when the premises are occupied as a bawdy house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business.)

Venue and Jurisdiction

The summary proceeding can be maintained in the county court, the court of a police justice of the village, a justice court, a court of civil jurisdiction in a city, or a district court, and should be brought within the county where the premises sought to be recovered are situated. N.Y. Real Prop. Acts. Law § 701.

Under RPAPL § 721, the proceeding may only be brought by:

- The landlord or lessor
- The reversioner or remainderman next entitled to possession of the property upon the termination of the estate of a life tenant, where a tenant of such life tenant holds over
- The purchaser upon the execution or foreclosure sale, or the purchaser on a tax sale to whom a deed has been executed and delivered or any subsequent grantee, distributee, or devisee claiming title through such purchaser
- The person forcibly put out or kept out
- The person with whom, as owner, the agreement was made, or the owner of the property occupied under an agreement to cultivate the property upon shares or for a share of the crops
- The person lawfully entitled to the possession of property intruded into or squatted upon
- The person entitled to possession of the property occupied by a licensee who may be dispossessed
- The person, corporation, or law enforcement agency authorized by this article to proceed to remove persons using or occupying premises for illegal purposes
- The receiver of a landlord, purchaser, or other person so entitled to apply, when authorized by the court
- The lessee of the premises, entitled to possession
- Not-for-profit corporations, and tenant associations authorized in writing by the commission of the department of the City of New York charged with enforcement of the housing maintenance code of such city to manage residential real property owned by such city

Unlike in civil or small claims court, there is no limit on the amount of rent that can be recovered in the proceeding, albeit the court's subject matter jurisdiction is circumscribed to the grant or denial of a possessory judgment (including the issuance of a warrant of eviction) and/or a monetary judgment for the unpaid rent, additional rent, and attorneys' fees (solely when permitted by the lease). Claims for declaratory or injunctive relief, or for money damages unrelated to the rent, cannot be sought in a summary proceeding. Blumenauer v. Richelson, 219 NYS 612 (App. Div. 1927); Petrakakis v. Crown Hotels, Inc., 158 NYS2d 15 (App. Div. 1956). Albeit, the court does have the power to consider all equitable defenses. Cobert Construction Corp. v. Bassett, 442 NYS2d 678 (App. Term 1981).

Commencement of the Proceeding

Pursuant to RPAPL § 731, the summary proceeding is commenced by notice of petition and petition. The contents of the notice of petition (as well as when the proceeding is returnable and the tenant's answer is due) differs depending on whether the proceeding is a holdover or based on nonpayment of rent.

In the case of holdover proceedings, RPAPL § 731 provides that "the notice of petition shall specify the time and place of the hearing on the petition and state that if respondent shall fail at such time to interpose and establish any defense that he may have, he may be precluded from asserting such defense or the claim on which it is based in any other proceeding or action." N.Y. Real Prop. Acts. Law § 731(2). For a sample notice of petition for a holdover proceeding that can be used in New York City, see Notice of Petition (Holdover). (Forms for use outside of New York City may vary.)

In the case of a nonpayment proceeding, RPAPL § 732, provides, in pertinent part, as follows:

1. The notice of petition shall be returnable before the clerk, and shall be made returnable within ten days after service.
2. If the respondent answers, the clerk shall fix a date for trial or hearing not less than three nor more than eight days after joinder of issue, and shall immediately notify by mail the parties or their attorneys of such date. If the determination be for the petitioner, the issuance of a warrant shall not be stayed for more than five days from such determination, except as provided in section seven hundred fifty-three of this article.
3. If the respondent fails to answer within ten days from the date of service, as shown by the affidavit or certificate of service of the notice of petition and petition, the judge shall render judgment in favor of the petitioner and may stay issuance of the warrant for a period of not to exceed ten days from the date of service, except as provided in section seven hundred fifty-three of this article.

While RPAPL § 753 (referenced in RPAPL § 732(2)) permits a stay of eviction for up to a year due to certain hardships, it is only applicable in proceedings seeking to recover the possession of premises occupied for dwelling purposes. It is not applicable in the commercial context.

For a sample notice of petition for a nonpayment proceeding that can be used in New York City, see Notice of Petition (Non-Payment). (Forms for use outside of New York City may vary.)

In essence, the main difference between the two is that in a holdover proceeding, the notice of petition specifies the date and place it is returnable, while in a nonpayment proceeding, the court will fix the date and place between three and eight days after the answer is filed.

Service of the Notice of Petition and Petition

Service of the notice of petition and petition must be made in accordance with RPAPL § 735. See "Service of the Rent Demand and Notice of Petition and Petition" above. Furthermore, the notice of petition and petition, together with proof of service, must be filed with the court or clerk thereof within three days after either (1) personal delivery to the tenant, or (2) mailing to the tenant (when service is made by either substituted service or conspicuous-place service). When service is made by personal delivery, service is deemed complete upon such delivery. Whereas, when service is made by substituted or conspicuous-place service, service is deemed complete upon completion of all mailings and filing of proof of service with the court. N.Y. Real Prop. Acts. Law § 735(2).

RPAPL § 733 further provides that the notice of petition and petition in a holdover proceeding shall be served "at least ten and not more than seventeen days before the time at which the petition is noticed to be heard."

Contents of the Petition

In a summary proceeding, the petition—which is akin to the "complaint" in a plenary action—sets forth the facts upon which the proceeding is based and the relief sought by the landlord. Under N.Y. Real Prop. Acts. Law § 741, every petition must set forth the following elements:

- The petitioner's interest in the premises from which removal is sought (i.e., whether the petitioner is the landlord, sublandlord, licensor, etc.)
- The respondent's interest in the premises and its relationship to petitioner (i.e., that respondent is the tenant of the premises who entered into possession pursuant to a written lease with the landlord)
- An accurate and complete description of the premises sought to be recovered
- The facts upon which the proceeding is based (i.e., for a nonpayment proceeding, the fact that rent in a certain amount has been demanded from the tenant pursuant to a written 14-day rent demand, and that tenant has not paid the amounts demanded) –and–
- The relief sought (i.e., that landlord requests a final judgment, awarding possession of the premises, and the issuance of a warrant of eviction; a money judgment for the outstanding rent, plus any additional rent that comes due; and assuming the lease permits, attorneys' fees, costs, and disbursements)

In addition to the foregoing, the petition should also allege, when applicable, compliance with Multiple Dwelling Law (i.e., whether the premises are located in a multiple dwelling and whether there is a currently effective registration statement on file with the office of code enforcement), and the regulatory status of the premises (i.e., whether the premises are subject to the City Rent and Rehabilitation Law or Rent Stabilization Law of 1969, as amended). 22 NYCRR 208.42(g); Villas of Forest Hills Company v. Lumberger, 513 NYS2 116 (App. Div. 1987).

Although the modern trend in summary proceedings is for the court to excuse "technical" or de minimis errors (see, e.g., 3170 Atlantic Ave Corp v. Jereis, 969 NYS2d 806 (Civ. Ct. 2013)), because certain defects could give rise to motion practice, resulting in either delay or dismissal of the proceeding, both landlords and their counsel should carefully review the pleadings to ensure compliance with the relevant statutes and court rules, prior to filing.

By way of example, because errors relating to the description of the premises could prevent a marshal or other office of the court from accurately identifying and locating the proper premises and evicting the proper party, such defects have often been found to be unamendable, and have resulted in a proceeding's dismissal. New York City Economic Development Corporation v. Salmar Master Tenant, LLC, 1147 NYS3d 468 (Civ. Ct. 2019).

Answer and Defenses

RPAPL § 732 and RPAPL § 743 govern when and how the tenant must answer the petition in nonpayment and holdover proceedings, respectively.

Under RPAPL § 732(3) (applicable in nonpayment proceedings), the tenant has up to 10 days from the date of service to answer the petition (by filing with the clerk), absent which a default judgment may be rendered in the landlord's favor.

Under RPAPL § 743 (applicable in holdover proceedings), the tenant may answer the petition on the date that the petition is first scheduled to be heard.

Furthermore, in both nonpayment and holdover proceedings, the answer may contain any legal or equitable defense or counterclaim. Albeit, where there is a provision in the lease barring the interposition of counterclaims in a summary proceeding, the counterclaim may be stricken by the court unless it is "inextricably intertwined" with

landlord's claim. 1376 Third Avenue, LLC v. MBHB, LLC, 3 Misc.3d 127(A), 787 NYS2d 682 (App. Term 2004).

Some common defenses in commercial proceedings include:

- General denial, where all of the allegations contained in the pleadings are disputed and/or the alleged default (either nonpayment of rent or breach of the lease) has been remedied or never existed
- The court lacks personal jurisdiction, based upon improper service of the notice of petition and petition and/or defects contained therein (see, e.g., YB Associates, LLC v. Mount Vernon Social Adult Day Care Center, LLC, 95 NYS3d 127 (City Ct. 2018) (improper service of the petition warrants dismissal of the proceeding))
- Failure to comply with a condition precedent, based upon the landlord's failure to serve the proper predicate notice(s) and/or material defects in the predicate notice(s) (see, e.g., St. James Court L.L.C. v. Booker, 673 NYS2d 821 (Civ. Ct. 1998) ("proof of a demand for rent is a jurisdictional requisite to maintain a summary proceeding Solack Estates Inc. v. Goodman, 425 N.Y.S.2d 906, aff'd, 432 N.Y.S.2d 3 (App. Div. 1980) and failing to comply calls for dismissal of the action"))
- The claims are barred by documentary evidence (where the lease or other documents contradict the allegations in the petition or the landlord's entitlement to relief)
- Waiver (where the landlord's conduct subsequent to the default, may indicate that the default was waived, such as where the landlord accepts and retains rent after the lease is terminated) (see Esplanade Gardens, Inc. v. Simms, 41 NYS3d 718 (Civ. Ct. 2016) (acceptance of rent after the service of a termination notice and prior to the commencement of a holdover proceeding may require dismissal of the petition))
- Party not in possession (where the tenant has vacated and surrendered prior to the commencement of the proceeding) (Darob Holding Co. v. House of Pile Fabrics, Inc., 310 NYS2d 418 (Civ. Ct. 1970), above) –and–
- Improper petitioner (where the petitioner is not a party authorized to maintain a summary proceeding pursuant to RPAPL § 721)

Specific defenses for nonpayment proceedings may also include:

- Payment (where the arrears sought have been paid)
- Accord and satisfaction (where the tenant pays and the landlord accepts less than the full amount of rent due and owing in full satisfaction of the tenant's payment obligations under the lease) (see, e.g., Guadagni v. Chong, 784 NYS2d 920 (App. Term 2003) ("The cashing of a check which clearly expresses that it is in full payment or full settlement of a disputed amount is generally considered to be an acceptance by the creditor, constituting an accord and satisfaction."))
- The amount sought is not the correct amount
- Actual or partial actual eviction (where the tenant is physically ousted or barred from the premises, or a portion thereof) (Camatron Sewing Mach., Inc. v. F.M. Ring Associates, Inc., 582 NYS2d 396 (App. Div. 1992)) –and–
- Constructive eviction (where the landlord's wrongful acts materially deprive the tenant of the beneficial use or enjoyment of the premises, or a portion thereof, and the tenant has abandoned all or a portion of the premises) (Barash v. Pennsylvania Terminal Real Estate Corp., 26 NY2d 77 (1970))

Defaults and Inquests

If the tenant fails to timely answer the petition as provided in RPAPL § 732 or RPAPL § 743, the landlord may make an application to the court for a judgment on default.

Typically, in the context of a nonpayment proceeding, where the primary relief sought is for a sum certain, and there are no triable issues of fact, the court will issue the judgment (granting the landlord a monetary judgment for the arrears sought, awarding the landlord possession of the premises, and directing the issuance of a warrant of eviction to remove the tenant), solely upon the pleadings and without the need for an inquest or hearing. N.Y. C.P.L.R. 409(b). One caveat: where service of the notice of petition and petition was not made by personal delivery, the court may not have the authority to award a monetary judgment. As noted above, although there is some disagreement among the courts, because the service requirements under the RPAPL (governing summary proceedings) for both "substituted service" and "conspicuous-place service" are less stringent than those governed by N.Y. C.P.L.R. 308 (governing plenary actions), when a tenant in a summary proceeding is not served personally with the pleadings and subsequently defaults, the civil court may not have jurisdiction to award a monetary judgment for any unpaid rents.

But, in the context of a holdover proceeding, where the primary relief sought is for possession of the premises, and triable issues may exist, the matter will typically be set down for an inquest before a judge, where the landlord will be required to establish its prima facie entitlement to the relief sought by way of testimony and/or documentary evidence. N.Y. C.P.L.R. 3215.

Adjournments and Rent Deposits

Assuming the tenant appears and issue is joined, under RPAPL § 745, either party has the right to request an adjournment of the trial. Upon such party's request, the court is required to adjourn the trial at least once, for a period of "not less than fourteen days, except by consent of all parties." Subsequent requests for adjournment by either party are in the court's sole discretion.

N.Y. Real Prop. Acts. Law § 745(1). While adjournment requests are commonplace, practitioners should be cautioned that excessive postponement requests by the landlord could subject the proceeding to dismissal. N.Y. Real Prop. Acts. Law § 745(e).

To protect landlords who may be prejudiced by delays of the summary proceeding, when the tenant requests a second adjournment (not including an adjournment on the initial return date by a pro se tenant in order to secure counsel), or upon the 60th day after the parties' first appearance in court (not including any days that the proceeding has been adjourned at the landlord's request), the court has the authority to direct the tenant to deposit with the court or pay to the landlord ongoing rent or "use and occupancy." N.Y. Real Prop. Acts. Law § 745(2).

The court may not order such payment when the tenant has properly interposed one or more of the following defenses in its answer:

- The petitioner is not a proper party to the proceeding pursuant to RPAPL § 721
- (1) Actual eviction; (2) actual partial eviction; or (3) constructive eviction, and respondent has quit the premises
- A defense pursuant to Section 143(b) of the social services law (This defense is typically only available in summary proceedings involving residential premises.)
- A defense based upon the existence of hazardous or immediately hazardous violations of the housing maintenance code in the subject apartment or common areas (This defense is typically only available in summary proceedings involving residential premises.)
- A colorable defense of rent overcharge (This defense is typically only available in summary proceedings involving residential premises.)
- A defense that the unit is in violation of the building's certificate of occupancy or is otherwise illegal under the multiple dwelling law or the New York City housing maintenance code –or–
- The court lacks personal jurisdiction over the respondent

See N.Y. Real Prop. Acts. Law § 745(2).

Furthermore, although prior to the passage of the Housing Stability Tenant Protection Act of 2019 (HSTPA), the failure to pay court-directed use and occupancy could provide a basis for the court to either dismiss the tenant's defenses or award judgment to the landlord (see Najjar v. Cooper, 950 NYS2d 724 (App. Term 2012)), the court no longer has that authority. Specifically, RPAPL § 745(2)(f) (enacted with the passage of the HSTPA) provides that "[u]nder no circumstances shall a respondent's failure or inability to pay use and occupancy as ordered by the court constitute a basis to dismiss any of the respondent's defenses or counterclaims, with or without prejudice to their assertion in another forum."

Now, under RPAPL § 745(2)(d), if the tenant fails to pay any court-ordered rent or use and occupancy, the court's authority is limited to setting the matter down for an immediate trial.

Traverse Hearings, Trial, and Judgment

Assuming the tenant appears in the proceeding, after all adjournment requests and pretrial motion practice have been exhausted, the case may proceed to either a traverse hearing or trial.

Traverse Hearing

When the tenant raises a defense of improper service of the rent demand or notice of petition and petition, the court may set the matter down for a traverse hearing (either before or in conjunction with the trial), to determine whether service of the pleadings was proper, and the court has the requisite jurisdiction to entertain the case.

To trigger such a hearing, the defense must sufficiently rebut the allegations in the process server's affidavit of service with specific and detailed factual allegations. Kew Gardens Portfolio Holdings, LLC v. Bucheli, 151 NYS3d 861 (Civ. Ct. 2021). A conclusory denial of service will not suffice. Amush Enterprises, LLC v. Wallace, 17 NYS3d 381 (App. Term 2015).

Typically, at the hearing, the landlord will demonstrate proper service via the testimony of the process server who served the rent demand or pleadings, as well as the submission of any records into evidence, detailing the time, manner, and place of the service attempts. If the landlord is successful at the hearing, the traverse will be overruled and the matter will proceed to trial.

Trial

At trial, the landlord will be required to establish its prima facie case by proving each of the petition's allegations which have been disputed by the tenant. Specifically, the landlord will, minimally, need to demonstrate the following:

- That the landlord is the owner or landlord of the premises sought to be recovered and entitled to maintain the proceeding under RPAPL § 721 (typically established by submission of the deed and/or lease into evidence)
- That the tenant is an occupant in possession of the premises (typically established by testimony and/or the submission of the lease into evidence)
- Whether the premises are located in a multiple dwelling, and if so, that there is a current effective multiple dwelling registration statement on file with the Office of Code Enforcement (typically established by testimony and/or submission of a certified copy of the multiple dwelling registration statement into evidence)
- That the tenant is in default of its obligations and/or failed to pay rent due and owing under the lease (typically established by documentary evidence and/or testimony)
- That the requisite predicate notices (i.e., either the rent demand or default and termination notices) were properly served upon the tenant (typically established by submission of the predicate notices and affidavits of service into evidence, or the court taking judicial notice of the file containing those documents) –and–
- That the tenant failed to timely cure the defaults or pay the rent set forth in the predicate notice and remains in possession of the premises (typically established by testimony and/or documentary evidence)

Upon the conclusion of trial, the court will either direct entry of judgment dismissing the proceeding (if the tenant prevails on its defenses and/or the landlord fails to establish its prima facie case), or issue a possessory judgment (together with the issuance of a warrant of eviction to evict the tenant) and/or monetary judgment in the landlord's favor, as may be warranted by the evidence. N.Y. Real Prop. Acts. Law § 749.

Obtaining the Warrant and Recovering Possession of the Premises

Once the possessory judgment issues in the landlord's favor, the landlord may provide the judgment to a marshal, sheriff, or constable, located in the city or town in which the premises are located, who will apply for the issuance of the warrant of eviction, authorizing them to remove the tenant from occupancy and restore the landlord to possession. N.Y. Real Prop. Acts. Law § 749. Depending on the warrant clerk's backlog, and any defects in the application, it may take anywhere from several weeks to several months for the court to issue the warrant.

Although the courts have generally held that the acceptance of rent subsequent to the issuance of the warrant does not vitiate the warrant or revive the tenancy, absent the showing of intent (see, e.g., New York City Housing Authority v. Torres, 403 NYS2d 527 (App. Div.1978)), to avoid any issues, it is recommended that landlord refuse any such payments, unless it is clear that they are being accepted without prejudice to the judgment and warrant.

Once the warrant issues, the marshal must serve the tenant with a written notice of eviction. The notice must be served upon the tenant in the same manner as a notice of petition and petition, and must provide the tenant with at least 14 days' notice of the scheduled eviction date, which may only occur on a business day between sunrise and sunset. N.Y. Real Prop. Acts. Law § 749(2).

On the eviction date, the marshal will typically arrive at the premises, ensure that the tenant is removed from legal possession, and provide the landlord with an inventory of any remaining personal property. Generally, the marshal will not remove the property unless arranged for, in advance, with the landlord. Where applicable, the landlord should make sure a locksmith is present at the eviction and that the locks are changed, to ensure that the evicted tenant does not regain entry.

If personal property has been left behind by the tenant, the landlord should provide the tenant with written notice and a reasonable time and opportunity to remove the property, before discarding to avoid potential liability predicated upon a bailment or other cognizable legal theory. Christian v. Hashmet Management Corp., 592 NYS2d 306 (App. Div. 1993).

Stays and Appeals

Following the court's issuance of a final judgment, tenants can pursue a number of possible avenues to avoid forfeiture of their businesses.

First, under RPAPL § 749(3), the court has the inherent authority to stay or vacate the warrant, prior to the execution thereof, or restore the tenant to possession subsequent to execution, for "good cause shown." N.Y. Real Prop. Acts. Law § 749(3). Although "good cause," is not defined in the statute, the courts have held that such

grounds may exist where the landlord has committed fraud, the tenant has demonstrated a meritorious defense, there was a misunderstanding with a settlement stipulation, or where the tenant has substantially complied with the terms of a settlement stipulation with respect to the timeliness of payments. Abuelafiya v. Orena, 155 NYS3d 715 (Dist. Ct. 2021); Brooks Shopping Center, LLC v. Pizza Mania, Inc., 967 NYS2d 865 (App. Term 2012).

Further, under RPAPL § 751(1), when the tenant holds over after a default in the payment of rent, it can typically avoid forfeiture by tendering the rent found to be due, in addition to any taxes, interest payments, and the costs of the proceeding, with the court or court clerk. N.Y. Real Prop. Acts. Law § 751(1).

Lastly, a tenant may be able to obtain an automatic stay of the judgment upon filing a notice of appeal and posting an undertaking. In that regard, N.Y. C.P.L.R. 5519(a)(6) provides, as follows:

> (a) Stay without court order. Service upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where:
>
> * * *
>
> (6) The appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party will not commit or suffer to be committed any waste and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the value of the use and occupancy of such property, or the part of it as to which the judgment or order is affirmed, from the taking of the appeal until the delivery of possession of the property . . . .

Self-Help Evictions

While commercial self-help evictions (i.e., removing a tenant from possession without a court order) are not prohibited, per se, they are generally disfavored by the courts in New York, carry substantial risk, and can only be legally executed under specific circumstances. See Sol De Ibiza, LLC v. Panjo Realty, Inc., 29 Misc.3d 72 (App. Term 2010).

In particular, a commercial landlord may use self-help when the subject lease specifically reserves the landlord's right to reenter and regain the premises upon tenant's breach, reentry can be effected peaceably, and tenant is, in fact, in default. See id.; see also Bozewicz v. Nash Metalware Co., Inc., 284 AD2d 288 (App. Div. 2001); 110-45 Queens Blvd. Garage, Inc. v. Park Briar Owners, Inc., 696 N.Y.S.2d 490 (App. Div. 1999); Sol De Ibiza, LLC v. Panjo Realty, Inc., 911 N.Y.S.2d 567 (App. Term 1st 2010). However, it should be noted that self-help should only be used when there is no dispute that the tenant is in breach, and the "peaceable" element requires that the landlord not resort to any tactics that could be construed as "forceful" or otherwise unlawful. "Forceful" conduct includes anything that would inspire fear or lead a tenant to apprehend danger of personal injury if they try to resist. See Drinkhouse v. Parka Corp., 3 N.Y.3d 82 (1957).

It should also be noted that barring physical access to premises is not necessary for a tenant to establish an unlawful eviction. Other conduct, such as removing its personal property from premises (Sun Ann Supply v. Trenz, Inc., 577 N.Y.S.2d 393 (App. Div. 1991)), severing utilities, (By the Stem, LLC v. Optimum Props., Inc., 862 N.Y.S.2d 756 (Civ. Ct. 2008)), and/or threatening to call the police if a tenant tries to reenter premises (O'Hara v. Bishop, 682 N.Y.S.2d 291 (App. Div. 1998)), have all been found to constitute unlawful evictions. A tenant who is forcibly removed without legal process may seek to be restored to possession. If a court finds that there is any ambiguity regarding the alleged breach, it is likely to restore the tenant to possession so that the purported default can be litigated in a summary proceeding.

Further, a tenant that establishes an unlawful eviction may be entitled to recover treble damages from the landlord. See N.Y. Real Prop. Acts. Law § 853. Tenants can be awarded damages for (1) loss of property (H&P Research, Inc. v. Liza Realty Corp., 943 F. Supp. 328 (SDNY 1996)), (2) negligent infliction of emotional distress (Bianchi v. Hood, 513 N.Y.S.2d 541 (App. Div. 1987)), and (3) loss of the leasehold (Randall-Smith v. 43rd St. Estates Corp., 17 N.Y.2d 99 (1966)).

Because of this potential exposure, it is strongly recommended that any landlord who is considering a self-help eviction proceed with extreme caution, and consult with counsel before engaging in any such extrajudicial conduct.

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For the last decade, Jarred has concentrated his practice in the areas of complex commercial real estate disputes, insolvency issues and zoning and tax matters. He has represented Fortune 500 corporations, real estate management companies, property owners, landlords and tenants in all aspects of their use, management and operation of commercial real estate. He has published prominent articles in the *Landlord-Tenant Practice Reporter*, the *New York State Bar Association Journal*, and the *New York Law Journal*.

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