SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY 11788
(631) 234-5588

LANDLORD TENANT UPDATE

FACULTY:

Hon. Stephen L. Ukeiley, Suffolk County District Court Judge, Acting County Court Judge (Mental Hygiene Law Art. 81 Guardianship Proceedings), Coordinating Judge for Landlord Tenant Matters, Chair, Access to Justice Subcommittee on Eviction Proceedings

Warren M. Berger, Esq.

Captain Christopher Guercio, Commanding Officer of the Enforcement/Civil Bureau, Suffolk County Sheriff's Department

Deputy John Hornick, Suffolk County Sheriff's Office Enforcement Bureau

Marissa Luchs Kindler, Esq., Nassau Suffolk Law Services

Patrick McCormick, Esq., SCBA Second Vice President
Campolo Middleton & McCormick, LLP

Coordinator:
Patrick McCormick, Esq.

Thank you to our Sponsor: SPANO ABSTRACT

March 8, 2022
Suffolk County Bar Association, New York

Like us on:

"The opinions, beliefs and viewpoints expressed herein are those of the authors and do not necessarily reflect the official policy, position or opinion of the Suffolk County Bar Association, Suffolk Academy of Law, their i Board of Directors or any of their members"

There's a whole new way to obtain your CLE certificate! It's fast, easy and best of all you can see the history of courses that you've attended!

Within 10 days of the course you attended, your CLE Certificate will be ready to view or print. Follow the instructions below:

1. Go to SCBA.org
2. Member Log In (upper right corner)
3. If you **do not** know your username or password, click the area below and enter your email that is on file with SCBA. Follow the prompts to reset your username and password.
4. After you log in, hover over your name and you will see "Quick Links". Below that you will see:
   a. My SCBA
   b. My CLE History
   c. Update My Information
   d. Update My Committees
5. Click on **My CLE History**, you will see the courses you have attended. Off to the right side you will see the Icon for certificates. You are now able to download the certificate, print it or save it. You may go to your history and review the courses you have taken in any given year!
6. **CLE certificates will no longer be mailed or emailed**. Certificates will be available within 10 days after the course.

The HONORABLE STEPHEN L. UKEILEY is presently in his third term as a duly elected Suffolk County District Court Judge. He is also an Acting County Court Judge where he presides in the Guardianship Part of the Suffolk County Supreme Court and is the Coordinating Judge of the District's Landlord - Tenant Matters. Judge Ukeiley also oversees Suffolk County's Landlord - Tenant Alternate Dispute Resolution (ADR) Program, a pilot program he assisted in creating, and is the Chair of the Access to Justice Subcommittee on Eviction Proceedings.

Judge Ukeiley has presided over 80,000 civil and criminal cases to completion, including 16,000 Landlord and Tenant summary proceedings. He has also presided in Suffolk County's Human Trafficking Intervention Court. Prior to taking the Bench, he was the Principal Law Clerk to the Honorable E. Thomas Boyle, former United States Magistrate Judge for the Eastern District of New York, and has also served as the Principal Law Secretary to the Honorable Richard I. Horowitz, Court of Claims Judge and Acting Supreme Court Justice.

Judge Ukeiley is an adjunct professor at the Touro University Jacob D. Fuchsberg Law Center where he teaches Landlord and Tenant Law. In 2018, he was named the institution's "Adjunct Professor of the Year." He has also taught law classes on Human Trafficking and is a former adjunct professor at both the New York Institute of Technology and Long Island University (C.W. Post Campus).

Judge Ukeiley is a frequent lecturer and is routinely requested to present on the law to members of the Judiciary at both the New York State Judicial Institute and the New York State Magistrate Association conferences. He is an active member of his hometown Suffolk County Bar Association, where he co-chairs the Landlord and Tenant Law Committee, and previously served as an officer of the Suffolk Academy of Law. In 2017, Judge Ukeiley was named to the New York State Judicial Institute's City/District/Housing Courts Curriculum Advisory Committee. He has also served on the Board of Directors of the Suffolk County Women's Bar Association and is the recipient of numerous Recognition Awards for exemplary service and commitment to continuing legal education.

Judge Ukeiley is the author of all four (4) editions of *The Bench Guide to Landlord & Tenant Disputes in New York*©. He has also written numerous scholarly articles and a Children's Book, *The Silly School*©. In 2014 and 2020, the *Bench Guide* was distributed to over 1,200 Town and Village Justice Courts in New York. Judge Ukeiley also previously authored a regular law column in *The Suffolk Lawyer*, the Suffolk County Bar Association's publication.

Judge Ukeileyearned his Juris Doctor from Hofstra Law School, where he was the Editor-in-Chief of the Hofstra Labor Law Journal, and his Bachelor of Arts from Rutgers University. In his spare time, he is a certified soccer referee of both National Collegiate Athletic Association (NCAA) and youth soccer matches and has completed eighteen (18) marathons.

PATRICK MCCORMICK

Campolo, Middleton & McCormick, LLP

Patrick McCormick heads the firm's **Litigation & Appeals** practice, which is known for taking on the most difficult cases. He litigates all types of complex commercial and real estate matters and counsels clients on issues including contract disputes, disputes over employment agreements and restrictive and non-compete covenants, corporate and partnership dissolutions, trade secrets, insurance claims, real estate title claims, mortgage foreclosure, and lease disputes. His successes include the representation of a victim of a $70 million fraud in a federal RICO action and of a prominent East End property developer in claims against partners related to ownership and interest in a large-scale development project.

Patrick also handles civil and criminal appeals. Additionally, Patrick maintains a busy landlord-tenant practice, representing both landlords and tenants in commercial and residential matters.

Patrick's diverse legal career includes serving four years as an Assistant District Attorney in the Bronx, where he prosecuted felony matters and appeals and conducted preliminary felony and homicide investigations at crime scenes. He is past Dean of the Academy of Law and the current Treasurer of the SCBA.

Patrick attended Fordham University, B.A. and received his J.D. from St. John's University School of Law

Deputy Sheriff Captain Christopher Guercio is the Commanding Officer of the Sheriff's Office Enforcement Bureau which provides the services of civil enforcement and patrol of Gabreski Airport. In addition, Captain Guercio is the Commanding Officer of the Grants Bureau, the Quartermaster Bureau, and numerous community and department programs.

Captain Guercio is a 26 year member of the Suffolk County Sheriff's Office. He joined the Sheriff's Office in June of 1994. Captain Guercio began his career assigned to First District Court and transferred to the Civil Enforcement Bureau in June of 2000. In 2004 he was promoted to Sergeant, supervising both First District Court and the Civil Enforcement Bureau. In June of 2014 he was promoted to Lieutenant and assigned to the Enforcement Bureau where he was appointed Commanding Officer. Captain Guercio received his latest promotion in September of 2018, remaining Commanding Officer of the Enforcement Bureau along with the responsibilities of the additional commands.

Captain Guercio received his Bachelor's Degree in Accounting from Dowling College.

Marissa Luchs Kindler, Esq. has been an attorney with Nassau/Suffolk Law Services Committee, Inc. since 2006. Since 2013 she has been the supervisor of their Suffolk County Housing Unit, which represents indigent and low income tenants in summary proceedings in Suffolk County District and Justice Courts, at administrative hearings with respect to termination of Section 8 vouchers, and appellate work attendant thereto.

Ms. Luchs Kindler began her career as an associate at Finkelstein, Borah, Schwartz, Altschuler & Goldstein, P.C., a large New York City landlord/tenant firm, where she represented both landlords and tenants in residential and commercial proceedings, and then went on to work as in-house counsel to one of their clients, Solil Management Corp.

Ms. Luchs Kindler also served as Assistant Counsel to the New York City Loft Board, an agency of the Mayor's Office of the City of New York during both the Dinkins and Giuliani administrations.

Ms. Luchs Kindler is a graduate of Brooklyn Law School and the State University of New York at Albany.

Warren M. Berger, Esq. is a graduate of Hofstra Law Schqol and has been in private practice in Suffolk County for over 40 years specializing in landlord-tenant matters in the Long Island courts.

Mr. Berger is currently a Co-Chairman of the Landlord/Tenant Committee of the Suffolk County Bar Association.

LANDLORD-TENANT LAW UPDATE (2022)

Suffolk County Bar Association
Hauppauge, NY

March 8, 2022

***Presenters*:**

HON. STEPHEN L. UKEILEY

Suffolk County District Court Judge, Acting County Court Judge,
Coordinating Judge for Landlord/Tenant Matters, and
Chair Access to Justice Subcommittee on Eviction Proceedings

WARREN M. BERGER, ESQ.

CAPTAIN CHRISTOPHER GUERCIO

Commanding Officer of the Enforcement/Civil Bureau,
Suffolk County Sheriff's Department

MARISSA LUCHS KINDLER, ESQ.

Nassau Suffolk Law Services

PATRICK MCCORMICK, ESQ.

SCBA Second Vice President,
Campolo, Middleton & McCormick, LLP

TABLE OF CONTENTS

I. PRESENTERS' BIOGRAPHIES

The HONORABLE STEPHEN L. UKEILEY was first elected to the Suffolk County District Court Bench in 2008. He has handled thousands of civil and criminal cases, including more than 16,000 Landlord and Tenant summary proceedings. He has also been appointed Acting County Court Judge and concurrently presides in the Guardianship Part of the Suffolk County Supreme Court. Judge Ukeiley is the Coordinating Judge of Suffolk County's Landlord/Tenant Alternate Dispute Resolution (ADR) Program and chairs the Access to Justice's Subcommittee on Eviction Proceedings. Judge Ukeiley previously presided in Suffolk County's Human Trafficking Intervention Court. Prior to taking the Bench, he was the Principal Law Clerk to the Honorable E. Thomas Boyle, former United States Magistrate Judge for the Eastern District of New York.

Judge Ukeiley is also an adjunct professor at the Touro College Jacob D. Fuchsberg Law Center where he teaches Landlord and Tenant Law. In 2018, he was named the institution's "Adjunct Professor of the Year." He has also taught law classes on Human Trafficking, and, prior to that, was an adjunct professor at both the New York Institute of Technology and Long Island University (C.W. Post Campus).

Judge Ukeiley is a frequent lecturer at Bar Association events and has had the honor of presenting to members of the Judiciary at the New York State Judicial Institute and New York State Magistrate Association conferences. He is an active member of his hometown Suffolk County Bar Association, where he co-chairs the Landlord and Tenant Law Committee and previously served as an officer of the Suffolk Academy of Law. In 2017, Judge Ukeiley was named to the New York State Judicial Institute's City/District/Housing Courts Curriculum Advisory Committee. He has also served on the Board of Directors of the Suffolk County Women's Bar Association and is the recipient of numerous Recognition Awards for exemplary service and commitment to continuing legal education.

Judge Ukeiley is the author of all four (4) editions of *The Bench Guide to Landlord & Tenant Disputes in New York*© (2011- 2019) and has published numerous scholarly articles. In 2014 and 2020, the *Bench Guide* was distributed to every Town and Village Justice Court throughout New York. Judge Ukeiley also previously authored a regular law column in *The Suffolk Lawyer*, the Suffolk County Bar Association's publication, and has written a children's book, *The Silly School*©.

Judge Ukeiley earned his Juris Doctor from Hofstra Law School, where he was the Editor-in-Chief of the Hofstra Labor Law Journal, and his Bachelor of Arts from Rutgers University. In his spare time, he is a certified soccer referee of both NCAA and youth soccer matches, and has completed eighteen (18) marathons.

II. INTRODUCTION

In normal times, in excess of 330,000 new Landlord and Tenant summary proceedings are filed each year throughout the State. The Court's day-to-day handling of eviction proceedings has recently been transformed by both legislation that has presented sweeping changes to Landlord and Tenant matters and global events, including the COVID-19 Pandemic ("COVID-19" or "Pandemic").

On June 14, 2019, the ***Statewide Housing Stability and Tenant Protection Act of 2019 ("HSTPA")*** was signed into law (A.8281/S.6458 Ch. 36 of the Laws of 2019; a subsequent chapter amendment was passed on June 20, 2019 and signed by the Governor on June 25, 2019). Part M within the HSTPA, titled The Statewide Housing Security and Tenant Protection Act ("Housing Security Act"), applies to both unregulated and regulated properties where not otherwise designated. In addition to reforming condominium and co-op conversions and expanding protections for mobile home and manufactured home park Tenants, the Housing Security Act, *inter alia*, defines the term "rent," imposes restrictions on money judgments, modifies rent demands and service requirements, expands the Court's stay authority, creates criminal and civil liability for unlawful evictions, places restrictions on a Landlord's ability to refuse to rent to prospective Tenants, establishes mitigation responsibilities in residential cases, and enhances restrictions on security deposits.

In the midst of adjusting to the changes implemented by the HSTPA, in early 2020 the world was devastated by the Pandemic. The Pandemic continues to impact all walks of life. Millions have been adversely impacted, including those seeking the resolution of their disputes within our Courts. Related to this presentation on evictions, the result has been a housing crisis approaching two (2) years in duration. In response to the crisis, both the federal and state governments, in addition to the Courts, have enacted a series of measures intended to avoid mass homelessness. At the time of writing, although the status of eviction proceedings remains in flux, the statutory stays on evictions are due to expire on January 15, 2022. Additional changes may yet again be implemented, and, as such, the reader should remain current.

Part III of these materials provides a detailed overview of the general legal principles applicable to eviction proceedings. The descriptions include each and every stage of a summary proceeding, including predicate notices prior to the commencement of the action through post-eviction applications. Part IV identifies the government's response to the Pandemic regarding eviction proceedings, including recent legislation, Executive and Administrative Orders, and the Court's response.

The materials are supplemented by Charts designed to present in a condensed manner the information contained in Parts III and IV. Specifically, Chart #1 summarizes the requisite predicate notices required for a variety of eviction proceedings. Chart #2 provides a roadmap of Landlord - Tenant Court procedures and protocols during COVID-19. Chart #3 is a "Before" and "After" examination of the changes to Landlord and Tenant law implemented by the HSTPA. Finally, Chart #4 is a Judge's Checklist for quick reference while on the Bench.

III. OVERVIEW OF SUMMARY PROCEEDINGS (NOT COVID-19 SPECIFIC)

1. Purpose: Award "Possession"

A summary proceeding is a special proceeding governed by Real Property Actions and Proceedings Law ("RPAPL") for the purpose of recovering lawful "possession" of real property, whether residential or commercial. Typically, a Landlord seeks to regain possession as quickly as possible while the Tenant either wants to remain in possession and/or have additional time to relocate. With that in mind, typical of any litigation, summary proceedings generally lend themselves to amicable resolutions.

The Housing Part's jurisdiction ceases upon the execution of the warrant of eviction (***Steinmetz v. Oyala***, 142 N.Y.S.3d 273 (App. Term 2d, 11th & 13th Jud. Dists. 2021)). Although the Housing Part is the preferred forum for Landlord and Tenant disputes, the Supreme Court has concurrent original jurisdiction (*see* ***Cabrera v. Humphrey***, 192 A.D.3d 227 (3d Dep't 2021)). Permitting multiple forums to adjudicate housing disputes is practical because the Housing Courts' authority and jurisdiction is limited. For example, the Housing Court lacks authority to issue declaratory and/or injunctive relief (*see* ***Faith In Action Deliverance Ministries v. 3231 Assoc., LLC***, 168 A.D.3d 502 (1st Dep't 2019)). The Court/Housing Parts further lack jurisdiction to determine "ownership" or "title." Accordingly, these matters, plus possession, may be raised in the Supreme Court.

The Tenant in a summary proceeding may assert any affirmative defense, whether in law or equity, including that the Landlord is no longer the owner of the premises or has a superior possessory interest in the premises (*see, e.g.*, ***Yau v. Yau***, 2021 N.Y. Misc. LEXIS 5406 (App. Term, 2d, 11th & 13th Jud. Dists. Oct. 22, 2021); ***Fountains-Clove Rd. Apts., Inc. v. Gunther***, 47 N.Y.S.3d 212 (App. Term, 2d, 11th & 13th Jud. Dists. 2017)). The Tenant may further assert that it is the "owner" (if not previously acknowledged and accepted), but only as an affirmative defense (not as an affirmative claim) (*see* ***Jacob Marion, LLC v. Bey***, 36 N.Y.S.3d 47 (App. Term, 2d, 11th & 13th Jud. Dists. 2016)).

Ordinarily, the parties will litigate the issue of "title" following completion of the summary proceeding. However, where the Tenant, commonly referred to as the Respondent, unsuccessfully asserts that he/she/it is the lawful owner of the premises, for example, by adverse possession, then the Respondent may be collaterally estopped from re-asserting the claim as an affirmative cause of action in a subsequent declaratory judgment action (*see* ***Nissequogue Boat Club v. State of New York***, 14 A.D.3d 542, at 544 (2d Dep't 2005)). Where the Respondent asserts the defense and prevails in the summary proceeding, then the issue may be litigated in a subsequent action in the Supreme Court provided the new action is commenced within sixty (60) days of entry of the Court's decision (*see* ***Haque v. Rob***, 83 A.D.3d 895 (2d Dep't 2011)).

2. Types of Summary Proceedings

Generally, there are two (2) types of summary proceedings: (1) non-payment proceedings and (2) holdover proceedings. The requisite elements of each are different, and the Landlord, commonly referred to as the Petitioner in a summary proceeding, has the burden of commencing the proper type of proceeding. Otherwise, the proceeding will be dismissed. Regardless of the type of proceeding, the Respondent must be in possession of the premises at the time the summary proceeding is commenced (*see* ***MHA Realty 1 LLC v. Rostoker***, 142 N.Y.S.3d 888 (App. Term 2d, 11th & 13th Jud. Dists. 2021)).

A. *Non-payment Proceeding*

The purpose of a non-payment proceeding, similar to a holdover proceeding, is to recover possession of real property (***MHA Realty 1 LLC*** , 142 N.Y.S.3d at 888). A non-payment proceeding presupposes that the parties have a valid Landlord and Tenant relationship when the summary proceeding is commenced, and the Landlord claims the Tenant failed to pay all or a portion of the rent (***id***.).

The Landlord and Tenant relationship is not terminated by the Landlord's rent demand or the commencement of the summary proceeding. In fact, where the Landlord prevails following a hearing on the merits, the Landlord and Tenant relationship continues until the Sheriff executes the warrant of eviction or the Tenant vacates the premises (RPAPL § 749(3); ***Dixon v. County of Albany***, 192 A.D.3d 1428 (3d Dep't 2021)). The money judgment may only include, *inter alia*, rent arrears and any use and occupancy for the time the Tenant was in possession following the termination or expiration of the rental agreement (*see* ***Madden v. Juillet***, 13 N.Y.S.3d 850 (App. Term, 9th & 10th Jud. Dists. Feb. 23, 2015); ***Priegue v. Paulus***, 988 N.Y.S.2d 525 (App. Term, 9th & 10th Jud. Dists. 2014)). Of note, the money judgment may only be awarded "[c]oncomitant with an award of possession" (***FBD Realty, LLC v. Rego Park N.H., Ltd.***, 2021 N.Y. Misc. LEXIS 5118 (App. Term, 2d, 11th & 13th Jud. Dists. Oct. 8, 2021); ***Fieldbridge Assoc., LLC v. Sanders***, 139 N.Y.S.3d 474 (App. Term 2d, 11th & 13th Jud. Dists. 2021))). In other words, a money judgment may not be awarded in a summary proceeding if the Landlord is not entitled to a judgment of possession (***id***.).

B. *Holdover Proceeding*

A holdover proceeding presupposes the parties do not have a valid Landlord and Tenant relationship when the summary proceeding was commenced. In other words, if the parties at some point had a valid Landlord and Tenant relationship, that relationship expired or was terminated (and a new agreement was not reached) before the action was commenced. Accordingly, the Petition must allege that at the commencement of the proceeding, the parties' rental agreement, if one existed, expired and the Tenant continues to hold over without permission (***Gayle v. Flynn***, 143 N.Y.S.3d 497 (App. Term 2d, 11th & 13th Jud. Dists. 2021)). A holdover proceeding may further be appropriate in certain circumstances where a Landlord and Tenant relationship never existed (e.g., a squatter and proceeding to evict the former owner of a foreclosed

property).

RPAPL §§ 711 and 713 list several types of situations that permit a holdover summary proceeding. These include, but are not limited to, (1) where the lease expired on its own terms and a new agreement was not reached; (2) a terminated rental agreement due to a breach of a substantial obligation specified within the lease; (3) termination of a month-to-month tenancy; (4) revocation of a license agreement; (5) where the Tenant of record vacates the premises and his or her guests remain; (6) unlawful activity conducted at the premises; (7) termination of a tenancy-at-will; (8) to remove a squatter; and (9) seeking possession of post-foreclosed properties. Unlike non-payment proceedings, a Respondent in a holdover proceeding may not avoid the eviction by paying the amount awarded *prior* to the issuance of the judgment or execution of the warrant because the proceeding was generally commenced for reasons other than the non-payment of rent.

3. The Relief Sought – Judgments and Warrant of Eviction

In a summary proceeding, a prevailing Petitioner will typically receive three (3) separate Orders of the Court - a judgment of possession, money judgment, and warrant of eviction. The ultimate relief in a summary proceeding is a judgment of possession and warrant of eviction directing legal possession of the property back to the Petitioner. The judgment and warrant further authorize an eviction should the Respondents refuse to voluntarily surrender possession by a date certain.

Pursuant to RPAPL § 749(3), in a non-payment proceeding the warrant of eviction must be vacated and, therefore, the tenancy will continue, where the rent arrears are paid in full prior to the execution of the warrant. The exception to this rule is where the late rent payment was withheld in "bad faith." In other words, the law considers the Petitioner to have been made whole where, absent "bad faith" by the Respondent, the rent arrears are paid prior to the eviction. The HSTPA further codified longstanding case law that held in a non-payment proceeding, the payment of rent arrears prior to the hearing, without regard to reason, must be accepted by the Landlord and the summary proceeding dismissed as moot (*see* RPAPL § 731(4)).

In a holdover proceeding, on the other hand, due to the fact the Landlord and Tenant relationship was terminated or expired prior to the commencement of the summary proceeding, the judgment of possession and warrant of eviction formalize the Petitioner's entitlement to legal possession. The payment of rent arrears does not reinstate the tenancy or right to possession.

A. *Money Judgments*

A prevailing Landlord may be awarded a money judgment without regard to amount because the Court's maximum dollar jurisdictional limit does not apply to summary proceedings (Uniform City Ct. Act § 204; Uniform Dist. Ct. Act § 204; Uniform Just. Ct. Act § 204). While rent and use and occupancy may be included within the money judgment, at the time these materials were prepared, it is not entirely clear whether items beyond "rent" or "use and occupancy" (i.e. additional or added rent) may similarly be awarded in a summary proceeding.

This issue will ultimately be decided by the Appellate Courts.

The uncertainty arose with the enactment of RPAPL § 702, effective June 14, 2019, as part of the HSTPA. RPAPL § 702 now defines the term "rent" as "[i]n a proceeding relating to a residential dwelling or housing accommodation, the term `rent' shall mean the monthly or weekly amount charged in consideration for use and occupation of a dwelling pursuant to a written or oral rental agreement" (RPAPL§ 702; HSTPA, L. 2019, ch. 36, Part M, § 11). Significantly, the section further provides that "[*n*]*o fees, charges, or penalties other than rent*" may be sought in a summary proceeding, and any lease provision to the contrary is void (*id*.).

Thus the issue has been raised (and conflicting decisions have resulted) whether items defined as "added" or "additional" rent within a rental agreement may continue to be included within the money judgment. Prior to the HSTPA, "added rent" was typically awarded to a prevailing Landlord provided the additional rent items were reasonable and had been incurred. RPAPL § 702 has put this into question.

In ***Beco v. Ritter***, the Appellate Division, Third Department held that the Landlord's two-tiered rent payment schedule based upon the timing of the Tenant's payments constituted an impermissible late fee in contravention of Real Property Law ("RPL") § 238-a, which limits the late fee for the non-payment of rent for residential property to 5% of the rent or $50, whichever is less (190 A.D.3d 1150 (3d Dep't 2021)). Citing RPAPL 702, the Court noted that the fee was a "[p]enalty that may not be sought in a summary proceeding" (***id***.). Although it would appear that the Appellate Division barred the late fee because it was a penalty prohibited by RPAPL § 702, it is possible that the Court based its decision on the excessive amount of the late fee which was in contravention of RPL § 238-a, or both. Regardless, clarification in subsequent rulings will be helpful.

Although not unequivocally resolving the question whether "added rent" items, such as attorney's fees, utilities and statutorily permissible late fees, are permissible in a summary proceeding, the ***Beco*** decision appears to be one of the earlier Appellate decisions regarding the breadth and scope of RPAPL § 702. The decision was cited by a Justice Court (Ossining Justice Court) as authority for the elimination of all traditional "added rent" items (e.g., utilities and attorney's fees) in summary proceedings pursuant to RPAPL § 702 (***Magnano v. Stewart***, 145 N.Y.S.3d 329 (Ossining Just. Ct. 2021); *see also* ***56-11 94th St. Co. L.L.C. v. Jara***, 116 N.Y.S.3d 866 (Queens Cnty. Civ. Ct. 2019) (same); ***Regency Vill. Mgmt. v. Rodriguez***, 121 N.Y.S.3d 510 (App. Term, 9th & 10th Jud. Dists. 2020) (in dicta, implicitly stating same)).

If not available in a summary proceeding, the Landlord may seek these items, unless otherwise waived, in a subsequent plenary action for the recovery of damages (***Magnano***, 145 N.Y.S.3d at 329). Damages are beyond the jurisdictional authority of the Housing Part. Notably, rent and use and occupancy are not considered "damages" in a summary proceeding.

However, the failure to seek monetary relief for an item that may be awarded in a summary proceeding precludes an award for that same item within a subsequent plenary action because that "[w]ould constitute an improper splitting of a cause of action" (*see* ***See Why Gerard, LLC v. Gramro Entm't Corp.***, 94 A.D.3d 1205 (3d Dep't 2012)). In addition, the doctrine of *res judicata*

precludes the re-litigation of a claim that was fully adjudicated in a prior proceeding (***Maki v. Bassett Healthcare***, 141 A.D.3d 979 (3d Dep't 2016)).

1. Rent and Use and Occupancy

RPAPL § 711(2) authorizes a Landlord's right to commence a non-payment proceeding, and RPAPL §§ 702, 741(5) and 747(4) allow for the recovery of rent in summary proceedings. In computing rent arrears, the Tenant's debt obligations accrue when the rent is due (***Bri Jen Realty Corp. v. Altman***, 146 A.D.3d 744 (2d Dep't 2017); ***Eujoy Realty Corp. v. Van Wagner Comms., LLC***, 22 N.Y.3d 413 (2013)). Under common law, rent is not considered to have been earned "until the end of the rental period" (***Eujoy Realty Corp.***, 22 N.Y.3d at 413). However, as a practical matter, the parties typically negotiate an earlier "earned" date, routinely the 1st day of each month.

Where the lease is terminated early, unless otherwise agreed, the Tenant may not recover rent paid "in advance." Parenthetically, an advance for a non-rent stabilized residential property may not exceed one (1) month's rent (*see* General Obligations Law § 7-108(1-a)). Similarly, the obligation to pay previously accrued rent is not impacted by the early termination of the tenancy.

The term "rent" generally refers to the agreed dollar amount to occupy property pursuant to a rental agreement. The term "use and occupancy" refers to the fair and reasonable value to occupy the property in the absence of a rental agreement (***London Paint & Wallpaper Co., Inc. v. Kesselman***, 138 A.D.3d 632 (1st Dep't 2016)). Even though the value of "rent" and "use and occupancy" may be identical, the terms are not interchangeable. Unless waived by agreement, the Landlord typically pursues rent that becomes due following the summary proceeding in a subsequent plenary action. The claim is not be barred by res judicata, collateral estoppel, or the doctrine of against claim splitting (*see* ***de la Rosa v. Landucci***, 138 N.Y.S.3d 787 (App. Term 1st Dep't 2021)). Likewise, use and occupancy may be sought in a subsequent plenary action following the Tenant's surrender of the premises. Unlike rent, which is a negotiated dollar amount, use and occupancy is computed by multiplying the daily pro-rated value of the last month's rent when the agreement was in effect by the number of days the Tenant remained in possession without a rental agreement (***Rustagi v. Sanchez***, 999 N.Y.S.2d 798 (App. Term, 2d, 11th & 13th Jud. Dists. 2014)).

Expert testimony, such as from a licensed realtor or appraiser, is typically not required to demonstrate the reasonable value of use and occupancy for a residential property. Rather, the Court will typically rely upon the dollar amount equal to the last month's rent set forth within the expired or terminated lease (***Nisim v. Ramirez***, 152 N.Y.S.3d 208 (App. Term, 2d, 11th & 13th Jud. Dists. 2021); ***Vanchev v. Mulligan***, 41 N.Y.S.3d 722 (App. Term, 2d, 11th & 13th Jud. Dists. 2016)). In a commercial case, the testimony of a licensed appraiser or realtor is typically required (*see generally* ***Rubenstein v. Mayor***, 161 A.D.3d 1202 (2d Dep't 2018)).

The distinction between "rent" and "use and occupancy" is further significant in defining the parties' relationship. In a non-payment proceeding, the Landlord seeks unpaid rent. In a holdover proceeding, the Landlord generally does not make a claim for rent (other than prior rent arrears) because the tenancy was terminated or expired at the time the proceeding was commenced,

or a Landlord and Tenant relationship never existed (*see* ***MHA Realty 1 LLC*** , 142 N.Y.S.3d at 888 (non-payment proceeding); ***Gayle***, 143 N.Y.S.3d at 497 (holdover proceeding)). As a result, absent a valid rental agreement, the appropriate claim is for use and occupancy for the precise number of days the occupant remained in possession without a rental agreement.

2. Rule Against Apportionment

The rule against apportionment applies to rent, but not use and occupancy (***Warner v. Lyon***, 115 N.Y.S.3d 806 (App. Term, 2d, 11th & 13th Jud. Dists. 2019)). This means that the Tenant is liable for an entire month's rent when the lease is terminated prior to the end of the month. On the other hand, use and occupancy is "apportioned" by awarding the pro-rated amount for the precise number of days the Tenant remains in possession without a rental agreement.

For example, if the monthly rent was $1,200 and the Tenant remains in possession for ten (10) days following the termination of the lease, then the Landlord would be entitled to use and occupancy in the amount of $400 ($1,200/30 x 10 days). It is worth repeating that unless waived, the Landlord may commence a subsequent plenary action to recover use and occupancy "[a]ccrued after entry of a final judgment in a summary proceeding" (***Rustagi***, 999 N.Y.S.2d at 798).

3. Added or Additional Rent

With regard to "added" or "additional" rent items, as stated above, prior to the HSTPA, the money judgment typically included any reasonable item identified within the rental agreement as "added" or "additional" rent. Common "additional rent" items included, but were not limited to, attorney's fees, utilities, and late fees. Due to the HSTPA, whether "additional rent" continues to be available in a summary proceeding will have to be determined by the Appellate Courts.[1]

a. Attorney's Fees

An award of attorney's fees, whether in the summary proceeding or a subsequent plenary action, must be reasonable and just (*see* ***East Aurora Coop. Mkt., Inc. v. Red Brick Plaza LLC***, 197 A.D.3d 874 (4th Dep't 2021); ***W6 Facility X, LLC v. West 6 Care Ctr., Inc.***, 169 A.D.3d 968

[1] Initially, a determination must be made whether items such as attorney's fees and utilities, when identified in the rental agreement as "added" or "additional" rent, are considered "rent" pursuant to RPAPL § 702. If "added rent" items are not available in a summary proceeding, then Landlords will have to commence a separate plenary action each time an item besides unpaid rent (or use and occupancy) is sought. Another determination to be made if "added" rent items are no longer permitted in residential cases is whether the same holds true for commercial cases. RPAPL § 702 is titled "Rent in a Residential Dwelling." However, the section states that other than "rent" (or use and occupancy), no additional "fees, charges or penalties" may be sought in a summary proceeding pursuant to RPAPL Article 7." Article 7 of the RPAPL includes both residential and commercial premises (*see* ***Beco***, 190 A.D.3d at 1150).

(2d Dep't 2019)). RPL § 234, as amended by the HSTPA, explicitly provides that "[a] landlord may not recover attorneys' fees upon a default judgment."[2]

Attorney's fees are not recoverable following a non-payment proceeding where the Tenant pays all of the rent arrears prior to the hearing (***Sherwood Suffolk Co. v. Panorama Catering, Ltd.***, 128 N.Y.S.3d 780 (App. Term, 9th & 10th Jud. Dists. 2020); ***40-50 Brighton First Rd. Apts. Corp. v. Shneyerson***, 130 N.Y.S.3d 194 (App. Term, 2d, 11th & 13th Jud. Dists. 2020) (same with regard to pre-judgment interest and attorney's fees, although the fee was not part of the appeal)). Since the arrears were paid in-full prior to the hearing, the Landlord was not the prevailing party on the ultimate relief; i.e., a possessory judgment.

In determining the reasonableness of a request for attorney's fees, the Court may consider "counsel's testimony and records as to the nature, extent and necessity of the legal services rendered on landlord's behalf in the [summary] proceeding" (***600 Realty Heights, LLC v. Paula-Molina***, 26 N.Y.S.3d 216 (App. Term, 1st Dep't 2015)). A prevailing Landlord may only be awarded attorney's fees incurred in the summary proceeding, and not fees related to a separate action (***Hawthorne Gardens Owners Corp. v. Jacobs***, 17 N.Y.S.3d 382 (App. Term, 9th & 10th Jud. Dists. 2015)). The fees have been awarded where incurred, even when the Petitioner had not yet paid counsel (***East Aurora Coop. Mkt., Inc.***, 197 A.D.3d at 874).

The Court has limited discretion to deny a prevailing Landlord's request for attorney's fees based upon "equitable considerations and fairness" (*see* ***Greenbrier Garden Apts. v. Eustache***, 31 N.Y.S.3d 921 (App. Term, 9th & 10th Jud. Dists. 2016)). Outright denial of attorney's fees is appropriate where "[b]ad faith is established on the part of the successful party or where unfairness is manifest" (***id***.; *cf*. ***Win Feng LLC v. Lawrence***, 110 N.Y.S.3d 774 (App. Term, 1st Dep't 2018) (permitting award of attorney's fees absent "unfairness or bad faith by landlord")).

A lease provision authorizing attorney's fees merely for maintaining a summary proceeding, regardless of the outcome, is an unenforceable penalty (*see* ***Weidman v. Tomaselli***, 365 N.Y.S.2d 681, 691 (Rockland Cnty. Ct.), *aff'd*, 386 N.Y.S.2d 276 (App. Term, 9th & 10th Jud. Dists. 1975)). Only a prevailing party is entitled to recover attorney's fees pursuant to a rental agreement, and a stay on the execution of the warrant of eviction does not alter the Petitioner's status as the prevailing party (***600 Realty Heights, LLC***, 26 N.Y.S.3d at 216).

The Court is not bound by the attorney's fee amount set forth within the rental agreement or a fee agreement between counsel and a client (*see* ***Queens Fresh Meadows, LLC v. Newberry***, 2 N.Y.S.3d 310 (App. Term, 2d, 11th & 13th Jud. Dists. 2014); ***338 W. 46th St. Realty, LLC v. Leonardi***, 930 N.Y.S.2d 177 (App. Term, 1st Dep't 2011)). Moreover, a prevailing Landlord may not recover attorney's fees directly against a Subtenant unless contractually agreed otherwise. Nor may a Landlord recover fees incurred litigating an unrelated action (***40-50 Brighton First Rd.***

[2] If attorney's fees, when identified as "added rent" in a rental agreement, are not permitted in a summary proceeding pursuant to RPAPL § 702, then this provision is relegated to the defense of plenary actions commenced by the Landlord.

Apts. Corp. v. Henderson, 27 N.Y.S.3d 310 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)).

b. Late Fees

For residential properties, RPL § 238-a(2) provides that where the rent is more than five (5) days late, the Landlord may recover a late rent fee equal to five percent (5%) of the monthly rent or $50, whichever is less. A late fee for a higher dollar amount is impermissible (*see* ***Beco***, 190 A.D.3d at 1150 (holding that a routine substantial "discount" for timely rent payment constitutes an unenforceable late fee penalty pursuant to RPAPL § 702)). The statute does not state in which forum(s) – a summary proceeding or plenary action – the late fee may be recovered.

To recover a late rent fee, the Landlord must provide the Tenant written notice, by certified mail, that the rent was not received within five (5) days of the due date (RPL § 235-e(d); HSTPA, L. 2019, c. 36, Part M, § 9). This notice is in addition to a fourteen (14) day rent demand. The failure to provide the five-day (5 day) late notice "may be used as an affirmative defense" in a non-payment proceeding (*id*.). A lease provision waiving or limiting the late fee notice is void (*id*. at § 238-a(3) (HSTPA, L. 2019, c. 36, Part M, § 10)).

Late fees are more commonly awarded in summary proceedings involving commercial premises as it is presumed the parties were represented by counsel during negotiations (*see, e.g.*, ***23 E. 39th St. Mgmt. Corp. v. 23 E. 39th St. Developer***, 134 A.D.3d 629 (1st Dep't 2015) (2% late fee); ***Goidel & Siegel, LLP v. 122 E. 42nd St., LLC***, 2012 N.Y. Misc. LEXIS 5949 (N.Y. Cnty. Sup. Ct. Dec. 27, 2012) (4% late fee), *rev'd on other grounds*, 143 A.D.3d 567 (1st Dep't 2016)). However, usurious, unjust and disproportionate late fees are unenforceable in any proceeding (*see, e.g.*, ***TY Bldrs. II, Inc. v. 55 Day Spa, Inc.***, 167 A.D.3d 679 (2d Dep't 2018); ***Regatta Prop. LLC v. 21 S. End Hudson Inc.***, 113 N.Y.S.3d 486 (N.Y. Civ. Ct. 2019) (claim for ten percent (10%) late fee, or 120% per year, dismissed)).

c. Reciprocal Attorney's Fees (Residential Property)

RPL § 234 applies where a residential lease provides for the award of a prevailing Landlord's attorney's fees, but does not include similar relief for a prevailing Tenant. In such a case, the lease is deemed to contain a reciprocal provision in favor of the Tenant's attorney's fees (and expenses) if the Tenant prevails in the summary proceeding or the Landlord fails to perform its obligations under the lease (RPL § 234; ***Inwood Ventura, LLC v. Ferraira***, 7 N.Y.S.3d 242 (App. Term, 1st Dep't 2014)).

The purpose of RPL § 234 is to dissuade unscrupulous Landlords from engaging in improper conduct while offering an incentive to expeditiously resolve Landlord and Tenant disputes. The Tenant may be entitled to interest on the RPL § 234 fees (***251 CPW Hous. LLC v. Pastreich***, 124 A.D.3d 401 (1st Dep't 2015); ***Queens Fresh Meadows, LLC v. Newberry***, 2 N.Y.S.3d 310 (App. Term, 2d, 11th & 13th Jud. Dists. 2014)). A lease provision waiving the Tenant's rights to attorney's fees is void as against public policy (RPL § 234).

A residential Tenant may seek attorney's fees either as a counterclaim in the summary

proceeding or in a separate plenary action. Regardless, the fees may only be awarded where the Tenant prevails "in a [Landlord-Tenant] controversy that has reached an `ultimate outcome'" (***J.P. & Assocs. Props. Corp. v. Krautter***, 128 A.D.3d 963 (2d Dep't 2015); ***125 Ct. St., LLC v. Sher***, 94 N.Y.S.3d 539 (App. Term, 2d, 11th & 13th Jud. Dists. 2018) (denying Tenant's attorney's fees notwithstanding dismissal of the proceeding due to a defective rent demand because the award "should await the ultimate outcome of the nonpayment dispute")). Dismissal of the Landlord's summary proceeding "without prejudice" may result in denial of the Tenant's claim for attorney's fees due to the absence of a final adjudication (***Horatio Arms, Inc. v. Celbert***, 972 N.Y.S.2d 813 (App. Term, 1st Dep't 2013) (Tenant's claim for attorney's fees premature where summary proceeding was dismissed due to improper service)).

Where the Landlord seeks a voluntary discontinuance of a summary proceeding, the award of the Tenant's RPL § 234 attorney's fees is left to the discretion of the Court. In ***526 W. 158th St., HDFC v. Ramon***, the Appellate Term affirmed the Housing Part's denial of RPL § 234 fees where the Landlord sought to "withdraw the claim [within a timely manner] after discovery raised questions about the nature of the tenant's occupancy" (137 N.Y.S.3d 617 (App. Term, 1st Dep't 2021)).

A prevailing Tenant must establish the reasonableness of the fees sought (***655 Country Rd., Inc. v. Caltagirone***, 101 N.Y.S.3d 701 (App. Term, 9th & 10th Jud. Dists. 2018)). For example, fees incurred for unsuccessful motion practice have been deducted from the award (***Megan Holding LLC v. Conason***, 18 N.Y.S.3d 579 (App. Term, 1st Dep't 2015)). The Court may further deny a prevailing Tenant's counterclaim for attorney's fees where the award is "[m]anifestly unfair or where the successful party engaged in bad faith" (***251 CPW Hous. LLC***, 124 A.D.3d at 401; ***Parkview Apts. Corp. v. Pryce***, 95 N.Y.S.3d 125 (App. Term, 9th & 10th Jud. Dists. 2018) (although the holdover proceeding was dismissed after the default judgment was vacated, the Appellate Term denied the counterclaim for attorney's fees due to "overwhelming proof" that the Tenants breached the lease)).

In ***Maplewood Mgmt., Inc. v. Best***, a prevailing Tenant who was represented by a governmentally funded agency, and, thus, had no obligation to pay for the legal services provided, was awarded RPL § 234 attorney's fees. The Appellate Division, Second Department reasoned that "[i]t would significantly thwart the accomplishment of the Legislature's intent . . . if the courts were to hold that the statute requires those landlords who have brought meritless eviction proceedings to pay for their tenant's attorneys' fees only when the tenant himself is of sufficient financial ability to afford his own attorney" (143 A.D.2d 978 (2d Dep't 1988); *see also* ***East Aurora Coop. Mkt., Inc.***, 197 A.D.3d at 874) (Landlord's attorney's fees awarded for private counsel notwithstanding it was undisputed that Petitioner had not yet paid counsel)).

B. *Accelerated Rent and Survival Clauses*

The Housing Part has subject matter jurisdiction over rent arrears and use and occupancy, but not future rent or use and occupancy. Thus, a Landlord in a summary proceeding may <u>not</u> be awarded rent not yet due even where the lease includes an acceleration clause.

The Court considers an award of "accelerated" rent (i.e., a lease provision that states all remaining months' rent and obligations immediately become due upon breach or termination) to be damages which are not recoverable in a summary proceeding. Unless waived, the Landlord may commence a plenary action in an appropriate court to enforce the acceleration rent provision (*see* ***University Sq. San Antonio, Tx. LLC v. Mega Furniture Dezavala, LLC***, 2021 N.Y. App. Div. LEXIS 5333 (4th Dep't Oct. 1, 2021); ***172 Van Duzer Realty Corp. v. Globe Alumni Stud. Assist. Assoc., Inc.***, 102 A.D.3d 543 (1st Dep't 2013)). If an acceleration clause is omitted from the lease, then the Landlord may still recover these items in a plenary action (at a much slower pace) provided the lease contains a survival clause. However, the Landlord's claim for unpaid rent would be stagnated due to the fact the Landlord would only be permitted to assert a claim after each particular month's rent became due (***Pikoulas v. Hardina***, 36 N.Y.S.3d 340 (App. Term, 9th & 10th Jud. Dists. 2016)).

The omission of a "survival" clause is significant to the post-lease termination rights of the parties. Generally, the termination of the lease results in the cessation of all future rights and obligations under the agreement. An exception exists where the lease states post-termination, the Tenant continues to remain liable for "damages" and financial obligations under the rental agreement (i.e., a survival clause). Otherwise, claims that had not yet accrued at the time of the lease termination, including accelerated rent, are forfeited and incapable of being recovered in a subsequent plenary action (***Kings Park 8809, LLC v. Stanton-Spain***, 48 N.Y.S.3d 266 (App. Term, 2d, 11th & 13th Jud. Dists. 2016); ***Patchogue Assocs. v. Sears, Roebuck and Co.***, 951 N.Y.S.2d 314 (App. Term, 9th & 10th Jud. Dists. 2012)).

C. *Damages are NOT Recoverable*

The Housing Part may not award a money judgment for "property damages" caused by the Tenant. Similarly, the Landlord may not be awarded an unpaid security deposit or other unspecified items because they are beyond the jurisdiction of the Housing Part.

Regardless, it is prudent for the Landlord to refrain from seeking property damages until the occupant vacates the premises because the extent of the damages may not be accurately assessed until possession reverts back. Accordingly, the Landlord will typically reserve the right to commence a plenary action (civil lawsuit) in the civil part of the Court following the summary proceeding provided the amount sought is within the maximum dollar jurisdictional limit of the Court (i.e., $50,000 exclusive of costs and interest in the New York City Civil Courts (effective January 1, 2022); $15,000 exclusive of costs and interest in the District Courts; or $3,000 exclusive of costs and interest in the Justice Courts) (*see* ***Messerschmidt v. Romney***, 112 N.Y.S.3d 410 (App. Term, 9th & 10th Jud. Dists. 2018)). Otherwise, the Landlord may commence an action for damages in either the County Court (up to $25,000) or Supreme Court (*see* ***University Sq. San Antonio, Tx. LLC***, 2021 N.Y. App. Div. LEXIS at 5333; ***Chelsea 18 Partners, LP v. Mak***, 90 A.D.3d 38, 933 N.Y.S.2d 204 (1st Dep't 2011)).

D. *Interest, Costs and Disbursements*

A summary proceeding based upon a breach of a lease agreement "sounds in contract" and,

as a result, a prevailing Landlord may be entitled to prejudgment interest in the Housing Court (CPLR § 5001(a)). However, where the Landlord fails to deposit the Tenant's tendered rent check, the right to prejudgment interest is waived (***B.N. Realty Assocs. v. Lichtenstein***, 96 A.D.3d 434 (1st Dep't 2012)).

A prevailing Landlord may further be entitled to recover statutory costs and disbursements (*see, e.g.*, N.Y. City Civ. Ct. Act §§ 1906-a, 1908; Uniform City Ct. Act §§ 1906-a, 1908; Uniform Dist. Ct. Act §§ 1906-a, 1908; Uniform Just. Ct. Act §§ 1903(d),(m), 1908; *but see* CPLR § 1102(d); ***Boyle v. Bishop***, N.Y.L.J., Apr. 25, 1978, at 11, col. 1 (App. Term, 9th & 10th Jud. Dists. 1978) (holding that a "poor person" pursuant to CPLR § 1102(d) is not liable for costs)). Statutory costs include, but are not limited to, a fee for each "necessary" Respondent served and, if the award is based upon a default, an additional fee may be awarded to secure an affidavit from the process server stating the Tenant is not presently in the military. The amount awarded for the affidavit is $5.00 except in the Justice Courts where the amount is $1.50 (*see* N.Y. City Civ. Ct. Act § 1906-a; Uniform City Ct. Act § 1906-a; Uniform Dist. Ct. Act § 1906-a; Uniform Just. Ct. Act § 1903(d),(m)). The affidavit stating the Tenant is not in the military is required only where the Tenant does not appear in Court.

A prevailing Landlord appearing *pro se* is entitled to recover the $45 filing fee for commencing the proceeding (*see* Letter to Hon. Matthew T. Crosson, Formal Op. No. 90-F6, 1990 N.Y. Op. Atty. Gen. 25 (August 8, 1990)). The filing fee may not be awarded where the Landlord was represented by counsel.

- remainder of page intentionally left blank -

4. Proper and Necessary Parties

A contractual relationship must exist between the parties where a claim for a lease violation is asserted (*see* ***Herson v. Marzullo***, 148 N.Y.S.3d 605 (App. Term, 2d, 11th& 13th Jud. Dists. 2021) (dismissing Tenant's action where the Landlord named on the rental agreement was the father of the defendant)). The Landlord must name each and every Tenant in a summary proceeding. In other words, the Landlord may not pick and choose which Tenants to include even where some of the Tenants paid their share of the rent. This is because a Tenant is both a "proper" and a "necessary" party to the summary proceeding. The adult children of a Tenant, however, need not be named unless they have an independent possessory right to the subject premises (***Friedman v. Yosef***, 31 N.Y.S.3d 921 (App. Term, 2d, 11th & 13th Jud. Dists. 2016)), and minor children neither be named nor appear on the warrant of eviction (***Daley v. Billinghurst***, 799 N.Y.S.2d 159 (App. Term, 2d & 11th Jud. Dists. 2004)). The general rule is that a spouse, family member, and the Tenant's guests may be evicted where they are not named in the summary proceeding (*see* ***JLNT Realty, LLC v. Liautaud***, 26 N.Y.S.3d 213 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)).

A Subtenant may be named (but is not required) because a Subtenant is a "proper" party but not a "necessary" party in a summary proceeding (*see* ***117-119 Leasing Corp. v. Reliable Wool Stock, LLC***, 139 A.D.3d 420 (1st Dep't 2016)). The Landlord may not commence a summary proceeding directly against a Subtenant without also naming the Tenant(s) because the Landlord is not in privity with the Subtenant (*see generally* ***7001 E. 71st St., LLC v. Millennium Health Servs.***, 138 A.D.3d 573 (1st Dep't 2016)). It is typically in the Landlord's interest to name Subtenants because when the Landlord and Tenant relationship is terminated, as a matter of law, the subtenancy is also terminated. However, if a Subtenant is omitted from the summary proceeding, then the Subtenant will not appear on the warrant of eviction. Thus, if the Subtenant does not vacate after the Tenant leaves the premises, the Subtenant may become a Tenant at Sufferance which would require a thirty (30) day predicate notice pursuant to RPL § 228 before commencement of a separate holdover proceeding against the Subtenant.

The Sheriff may refuse to evict the occupants, including the named Tenant, until clarification is obtained from the Court if persons other than those named on the warrant of eviction are present in the premises. If the Landlord names a "John Doe" or "Jane Doe", then the Landlord must move to amend the caption to reflect the "Doe's" proper name once learned (CPLR § 1024; ***Netherland Props. LLC v. Karalesis***, 115 N.Y.S.3d 835 (N.Y. Civ. Ct. 2019)).

The Court may not issue a judgment of possession or render a monetary award against a Guarantor unless the Guarantor has an independent possessory right to the subject premises (*see* ***State Realty, LLC v. Ger***, 55 N.Y.S.3d 694 (App. Term, 2d, 11th & 13th Jud. Dists. 2017); ***MTC Commons, LLC v. Millbrook Training Ctr. & Spa, Ltd.***, 31 N.Y.S.3d 922 (App. Term, 9th & 10th Jud. Dists. 2016)). In other words, a Guarantor is not a proper party to a summary proceeding unless the Guarantor has a possessory right to the premises. The Landlord may, however, seek damages in a subsequent plenary action to enforce the guaranty of the rental agreement provided the agreement included a survival clause (a lease provision that provides the financial obligations continue even where the rental agreement has been terminated) (*see* ***Seabring, LLC v. Elegance***

Rest. Furniture Corp., 188 A.D.3d 744 (2d Dep't 2020); ***H.L. Realty, LLC v. Edwards***, 131 A.D.3d 573 (2d Dep't 2015)).

It is worth noting that although the Landlord/Petitioner is typically the "owner" of the rental premises, ownership is not a required element. Rather, the Petitioner must merely demonstrate by a fair preponderance of the evidence that it has a "superior possessory interest" in the premises over the Respondent. It is for this reason that a Tenant may commence a summary proceeding against a Subtenant.

Parenthetically, individuals may represent themselves in Court. However, corporations and limited liability companies must appear by counsel (CPLR § 321(a); ***Hamilton Livery Leasing, LLC v. State of New* York**, 151 A.D.3d 1358 (3d Dep't 2017); ***Inland Diversified Real Estate Serv., LLC v. Keiko New York, Inc.***, 36 N.Y.S.3d 407 (App. Term, 9th & 10th Jud. Dists. 2016)). The Appellate Term for the Second, Eleventh and Thirteenth Judicial Districts has held that partnerships and limited liability partnerships must also appear by counsel in summary proceedings (***Carroll St. Props. v. Velez***, 101 N.Y.S.3d 699 (App. Term, 2d, 11th & 13th Jud. Dists. 2018); ***Ernest & Maryanna Jeremias Family Partnership, L.P. v. Sadykov***, 11 N.Y.S.3d 792 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)).

5. Predicate Notice

The Landlord must typically provide the Tenant with notice of the breach, default or termination of the tenancy, often referred to as predicate notice, prior to commencing a summary proceeding. The duration of the notice period is dependent upon the type of recognizable Landlord and Tenant relationship.

A mistake in the identification of the relationship, which occurs prior to the commencement of the summary proceeding, may result in an improper predicate notice which, in turn, may result in a dismissal. The Landlord is bound by the "[predicate] notice served", and further is unable to amend same (*see* ***DLB of NY, LLC v. Billan***, 139 N.Y.S.3d 744 (App. Term, 1st Dep't 2021); ***Hollis Partners, LLC v. Artis***, 2021 N.Y. Misc. LEXIS 4937 (App. Term, 2d, 11th & 13th Jud. Dists. Sept. 17, 2021)). This principle further applies to the Notice of Petition and Petition to the extent that if the Landlord fails to amend a meaningful pleading defect and/or inaccurate description within the Petition, the Landlord will be held to that description in making a *prima facie* case (***DLB of NY, LLC***, 139 N.Y.S.3d at 744 (vacating judgment where the property upon which an eviction was granted was a second property not included within the predicate notice and/or Petition)).

A lease provision specifying the manner and upon whom the notice must be served is generally enforceable (***146 Flushing Ave. v. 66s Fusion***, 147 N.Y.S.3d 868 (App. Term, 2d, 11th & 13th Jud. Dists. 2021); ***Omansky v. 160 Chambers St. Owners, Inc.***, 155 A.D.3d 460 (1st Dep't 2017)). Establishing timely service of a proper predicate notice is a "[c]ondition precedent to [the] maintenance of a summary eviction proceeding, and the burden remains with the landlord to prove that element of its case" (***541 Ct. St. v. Zheng***, 147 N.Y.S.3d 868 (App. Term, 2d, 11th &

13th Jud. Dists. 2021); ***Mautner-Glick Corp. v. Glazer***, 148 A.D.3d 515 (1st Dep't 2017)).

Although service of a proper predicate notice is an element of the Landlord's case, it is not a jurisdictional issue – neither personal nor subject matter jurisdiction (*see* ***Marmon Realty Group, LLC v. Khalil***, 148 N.Y.S.3d 822 (App. Term 2d, 11th & 13th Jud. Dists. 2021)). Generally, claims regarding defects in the predicate notice may not be waived unless the error is a *de minimis* improper description of the premises (e.g., stating the property is at 32 Wilson Road when the formal address is 32 Wilson Street) (*see* ***Kit Ming Corp. v. Tsang***, 2001 N.Y. Misc. LEXIS 564 (App. Term, 1st Dep't June 1, 2001)); or where the amount in the rent demand was the "approximate good faith amount of rent owed" (*see* ***Moniaci v. Kelly***, 152 N.Y.S.3d 216 (App. Term, 9th & 10th Jud. Dists. 2021); or the parties voluntarily enter into a Stipulation of Settlement resolving the summary proceeding (***448 LLC v. Butcher's Choice Meat Mkt.***, 113 N.Y.S.3d 792 (App. Term, 2d, 11th & 13th Jud. Dists 2019); ***Fieldbridge Assoc., LLC v. Holmes***, 52 N.Y.S.3d 246 (App. Term, 2d, 11th & 13th Jud. Dists. 2017)). However, if there is a hearing on the merits, then the Landlord must demonstrate by a preponderance of the evidence that a suitable predicate notice was timely served in an appropriate manner (***Gristmill Realty, LLC v. Roa***, 133 N.Y.S.3d 383 (App. Term, 9th & 10th Jud. Dists. 2020)). Below are some of the common predicate notices associated with summary proceedings.

A. *Non-payment Proceedings*

The Landlord must make a written "demand" for the payment of unpaid rent prior to the commencement of a non-payment proceeding (***Oakwood Terr. Hous. Corp. v. Monk***, 36 N.Y.S.3d 48 (App. Term, 9th & 10th Jud. Dists. 2016)). Effective June 14, 2019, the HSTPA eliminated oral rent demands as a predicate notice for non-payment proceedings, and the law now requires a fourteen (14) day written rent demand prior to the commencement of either a residential and/or commercial non-payment proceeding (*see* RPAPL §§ 711(2), 735; HSTPA, L. 2019, c. 36, Part M, § 12). The HSTPA more than quadrupled the prior rent demand period, which had been three (3) days.

For residential properties, RPL § 235-e requires the service of a second written notice where the rent is not received within five (5) days of the due date. This notice, unlike the fourteen (14) day rent demand, need not be formally served but rather must be sent via certified mail. The failure to provide the five (5) day notice may constitute an affirmative defense in a non-payment proceeding (RPL § 235-e). The statutes do not specify the order in which the notices must be served.

The fourteen (14) day rent demand must state that Tenant is to pay the unpaid rent, or, alternatively, return possession (RPAPL § 711(2)). The demand must further specify the period for which rent is owed and a good faith approximate sum of the arrears (***Moniaci***, 152 N.Y.S.3d at 216; ***125 Ct. St., LLC v. Sher***, 94 N.Y.S.3d 539 (App. Term, 2d, 11th & 13th Jud. Dists. 2018)).

A written rent demand must be served in the same manner as the Notice of Petition and Petition (*see* RPAPL §§ 711(2), 735). This means that the rent demand may not simply be mailed to the Tenant, whether by regular, overnight delivery or certified mail (***Merrbill Holdings, LLC v.***

Toscano, 100 N.Y.S.3d 610 (App. Term, 9th & 10th Jud. Dists. 2018)). Rather, the demand must be personally delivered, left with a person of suitable age and discretion or left in a conspicuous place following reasonable efforts to ascertain personal delivery. Follow-up mailings by both certified and regular mail are required where the latter two (2) methods are utilized.

Service must be performed by a non-party over the age of eighteen (18) (*see* CPLR § 2103(a)). If the demand is made prior to the rent being late, then the demand is defective. For example, if the rent is due on the 1st of the month, then a rent demand may not be made until at least the 2nd. This is because unless the lease specifies otherwise, the rent is not considered late until 12:00 a.m. on the 2nd.

The rent demand period is fourteen (14) days. In other words, the Landlord must wait fourteen (14) days following service of the demand before commencing suit. The date of service is not included within the calculation (*see* General Construction Law § 20). Accordingly, the earliest a non-payment proceeding may be commenced is the 15th day following service of the rent demand.

An exception to the fourteen (14) day notice involves manufactured home parks and mobile homes. Where a manufactured home park owner seeks to evict a Tenant for the non-payment of rent, the owner must provide the Tenant, who may be the owner of the mobile home, a thirty (30) day written notice, and the notice must be formally served in the manner set forth in RPAPL §735 (RPL § 233(b)(2)).

B. *Holdover Proceedings*

Where the parties do not have a valid Landlord and Tenant relationship at the time the summary proceeding is commenced, the Petitioner may commence a holdover proceeding to recover possession. Notwithstanding the absence of a valid Landlord and Tenant relationship, the proceeding must be based upon an identifiable relationship within the RPL or RPAPL (***JCF Assoc., LLC v. Sign Up USA, Inc.***, 101 N.Y.S.3d 700 (App. Term, 2d, 11th & 13th Jud. Dists. 2018)).

1. Month-To-Month Tenancy (30 Days or One Month, 60 Days or 90 Days)

Under common law, a Tenant who remains in possession following expiration of the lease without entering into a new agreement or paying additional moneys is considered to be a holdover, and, as a result, the parties continue to be bound by the terms of the expired lease (***Zheng v. Fu Jian Hong Guan Am. Unity Assn., Inc.***, 168 A.D.3d 511 (1st Dep't 2019)). A month-to-month tenancy need not be in writing and may result by operation of law, such as when a rental agreement of longer than one (1) month expires and the Tenant remains in possession and continues to pay without entering into a new rental agreement (RPL § 232-c; ***Zielinski v. Kiwak***, 110 N.Y.S.3d 210 (App. Term, 2d, 11th & 13th Jud. Dists. 2018)). The Statute of Frauds does not apply to an oral month-to-month tenancy (even where the month-to-month tenancy has been renewed for more than twelve (12) consecutive months) because the tenancy is capable of being performed within

one (1) year; i.e., the tenancy automatically renews upon the payment of rent each month (*see* ***28 Mott St. Co., Inc. v. Summit Import Corp.***, 34 A.D.2d 144 (1st Dep't 1970); *cf.* N.Y. General Obligations Law § 5-703(2)).

The Tenant's failure to provide a proper notice prior to vacating the premises may result in the Tenant remaining liable for one (1) additional month of rent (***Hickey v. Trahan***, 31 N.Y.S.3d 921 (App. Term, 9th & 10th Jud. Dists. 2016)). The Landlord's failure to provide an appropriate notice may result in the tenancy continuing until the appropriate written notice is provided and the termination date set forth therein expires (RPL § 226-c(1)). A notice terminating a month-to-month tenancy must be in writing, but the manner of service for properties outside of New York City is not set forth within the statutes. In New York City, the termination notice must be formally served in the same manner as the Notice of Petition and Petition (*see* RPL § 232-a).

a. Within New York City

Where the tenancy is month-to-month for a residential property, the Landlord must provide the Tenant at least thirty (30) days written notice prior to commencing a summary proceeding (*see* RPL § 232-a (within New York City)). Significantly, RPL § 232-a refers to RPL § 226-c (described below) to determine in each case whether the required notice period is thirty (30) days, sixty (60) days, or ninety (90) days (*id*.). For month-to-month commercial properties within New York City, the notice period is at least thirty (30) days with no need to consider sixty (60) or ninety (90) unless the parties' rental agreement provides otherwise.

The term "at least" is used as a reminder that the termination notice must terminate the tenancy on the final day of the rental term (*see generally* ***Anthi New Neocronon v. Coalition of Landlords, Homeowners & Merchs., Inc.***, 2021 N.Y. Misc. LEXIS 5773 (App. Term, 9th & 10th Jud. Dists. Nov. 4, 2021)). For example, if a month-to-month tenancy begins on the 1st day of the month, and on the 6th day the Landlord wishes to terminate the tenancy, then the earliest termination date would be the final day of the following month (a date more than thirty (30) days from the service of the notice).

b. Outside New York City

For month-to-month residential properties outside New York City, as of October 2019, the Landlord (similar to New York City residential properties) must follow the notice period requirements – either thirty (30), sixty (60) or ninety (90) days – of RPL § 226-c (*see* below). In 2019, the legislature deleted the term "Landlord" from RPL § 232-b which had previously required the Landlord seeking to terminate a residential month-to-month tenancy to provide at least one month notice. This is no longer the only option dependent upon the particular length of time the Tenant has been in possession. Finally, where the Tenant seeks to terminate a residential month-to-month tenancy outside New York City or either party seeks to terminate a commercial month-to-month tenancy outside New York City, at least one month notice is required (without need to consider a longer notice period unless agreed to within a rental agreement) (RPL § 232-b).

2. Landlord's Refusal to Re-New Lease (including Month-to-Month

Tenancy) OR Rent Increase (at least 5%) (Residential) [RPL § 226-c] (30 Days, 60 Days or 90 Days)

Prior to October 12, 2019, the Landlord could permit the lease to expire and commence a holdover proceeding without any advanced notice where either (1) the Landlord refused to re-new the Tenant's expiring lease or (2) if seeking to re-new the lease, provided the rent is increased not less than five percent (5%). This is no longer the case as a timely notice must now be provided to the Tenant in both scenarios.

The duration of the notice period is based upon the "cumulative amount of time the Tenant has occupied the residence or the length of the tenancy in each lease, whichever is longer" (RPL § 226-c(2)(a)). The failure to provide notice results in the tenancy continuing until such time as an appropriate notice is sent and the notice expiration period expires (*id*. at § 226-c(1)).

Where both the rental agreement and the total amount of time the Tenant has been in possession of the residential premises has been less than one (1) year, the Landlord must provide at least thirty (30) days notice. Where the Tenant occupied the premises for more than one (1) year but fewer than two (2) years, or the rental agreement was for at least one (1) year but fewer than two (2) years, the Landlord must provide at least sixty (60) days written notice. Finally, where the Tenant occupied the premises for more than two (2) years or the parties' rental agreement was for at least two (2) years, the Landlord must provide at least ninety (90) days notice (*id*. at §§ 226-c(2)(b),(c),(d)). The statute does not specify the manner in which service must be completed. The reader should be mindful that for month-to-month tenancies, the termination date listed in the notice must coincide with the last day of the rental term (***Anthi New Neocronon***, 2021 N.Y. Misc. LEXIS at 5773).

3. Lease Expired By Its Own Terms (Commercial Property) (No Notice)

For commercial properties, it appears that absent a lease provision to the contrary, a predicate notice is not required to terminate a rental agreement that expires on a date certain (e.g., a lease that expires by its own terms on December 31, 20__) (RPL § 232-b; ***620 Dahill, LLC v. Berger***, 27 N.Y.S.3d 315 (App. Term, 2d, 11th & 13th Jud. Dists. 2016)). As a result, where a commercial Tenant holds over without paying for the additional time, the Landlord need not provide a predicate notice prior to commencing a holdover proceeding (RPL § 232-c).

It is well-established that the Landlord may not hold the Tenant to a new rental term or re-new the expired lease without consent. In other words, although the Landlord may be entitled to a money judgment for use and occupancy, the Landlord may not unilaterally elect to re-new the expired lease based on the holdover.

4. Licensees and Squatters (10 Days) vs. Tenants-At-Will (30 Days)

A Landlord and Tenant relationship does not exist where the occupant is either a "licensee" or a "squatter" (***Federal Nat'l Mtg. Assoc. v. Simmons***, 12 N.Y.S.3d 487 (App. Term, 1st Dep't

2015)). Section 713 of the RPAPL authorizes commencement of a holdover proceeding to evict licensees and squatters following formal service of a ten (10) day Notice to Quit in the manner set forth within RPAPL § 735.

A "licensee" is defined as an individual "entitled to possession of the property at the time of the license," and the license either expired, was revoked or the occupant is no longer entitled to possession (RPAPL § 713). Case law has since clarified that a licensee is a person who lawfully gained entry to the subject premises with the express or implicit permission of the owner, or pursuant to a "[p]ersonal, revocable, non[-]assignable privilege from the owner, without possessing any interest in the property, and who becomes a trespasser thereon upon revocation of the permission of the privilege" (***Rosenstiel v. Rosenstiel***, 20 A.D.2d 71 (1st Dep't 1963)).

A "squatter" is an individual who initially obtained possession without permission or consent, and remains in possession without permission, or, if at some point after unlawful entry permission to occupy was granted, it has since been revoked (*see* ***Hecsomar Realty Corp. v. Camerena***, 113 N.Y.S.3d 463 (App. Term, 1st Dep't 2019)). Similar to licensees, squatters are entitled to a ten (10) day predicate notice.

On the other hand, a "tenant-at-will" (similar to a licensee) takes lawful possession of the premises with the permission of the Landlord but for an undetermined duration. The critical distinction between a tenant-at-will and a licensee is whether the occupation of the premises is "exclusive." This distinction is the difference between the Landlord having to serve a thirty (30) day notice (tenant-at-will) or a ten (10) day notice (licensee) prior to commencing suit (*see* ***Russian Orthodox Convent Novo-Diveevo, Inc. v. Sukharevskaya***, 166 A.D.3d 1036 (2d Dep't 2018)). Where the occupant has complete and unfettered access to all or a portion of the property (e.g., the bedroom and full and complete access to the kitchen, laundry room and bathroom at all times without restriction), the occupant is likely to be considered a tenant-at-will notwithstanding the absence of an agreement to pay rent. Where the occupant is restricted from areas of the property and/or shares in possession with another individual(s), the occupant is more likely a licensee (*see* ***Zhu v. Li***, 138 N.Y.S.3d 792 (App. Term 2d, 11th & 13th Jud. Dists 2021)).

The written notice provided to a tenant-at-will must be at least thirty (30) days notice, not necessarily one (1) month, prior to the commencement of a summary proceeding (RPL § 228). The thirty (30) days need not end on any particular date, and the termination notice must be formally served.

5. Post-Foreclosure (10 Days, 90 Days or Longer)

Until mid-2009, when the owner lost title in a foreclosure action, the occupants were entitled to the same predicate notice as squatters; i.e., a ten (10) day Notice to Quit (RPAPL § 713(5)). The Federal Title VII Protecting Tenants at Foreclosure Act ("PTFA"), which originally took effect on May 20, 2009, substantially expanded the notice provisions for "bona fide Tenants" of foreclosed residential premises and properties involving federally-related mortgage

loans.[3]

A "bona fide Tenant" is defined as an individual rightfully in possession of the premises having entered into an agreement with the then owner, or other person with a superior interest in the property, prior to the Notice of Foreclosure. The new owner is required to provide a bona fide Tenant with at least ninety (90) days written notice prior to the commencement of a holdover proceeding. A bona fide Tenant with a written lease is entitled to remain in possession of the foreclosed property for either the ninety (90) day notice period or the remainder of the lease, whichever is greater, except where the new owner intends to occupy the property as a primary residence, in which case, a ninety (90) day notice will suffice (*see* Protecting Tenants at Foreclosure Act of 2009, at § 702(a)(2)).

A bona fide Tenant does not include the mortgagor (former owner) or the child, spouse, or parent of the mortgagor under the contract. In addition, the tenancy must have been the result of an "arm's length transaction," and the rent may not be substantially less than fair market value unless the rent was reduced or subsidized by a Federal, State or local subsidy. An occupant who is not a bona fide Tenant is entitled to ten (10) days notice.

Under the HSTPA, if an occupant is removed from the premises following either a property or tax foreclosure, then the Court records of the summary proceeding relating to the lessee must be sealed and "deemed confidential" (RPAPL § 757 (HSTPA, L. 2019, c. 36, Part M, § 23)). It appears that the eviction (i.e., removal), and not the summary proceeding, triggers the sealing of the records in a post-foreclosure eviction summary proceeding.

Where the foreclosed premises contains multiple families living independently in separate units, the owner must commence a separate summary proceeding for each independent living area (***First Cent. Savings Bank v. Yglesia***, 2012 N.Y. Misc. LEXIS 4911 (App. Term, 9th & 10th Jud. Dists. Oct. 11, 2012)). New York enacted a statute comparable to the PTFA regarding judgments of foreclosure issued after January 13, 2010 (RPAPL § 1305).

RPAPL § 713(5) provides that a certified copy of the deed must be "exhibited" (i.e., presented for inspection) to the occupants prior to the commencement of a summary proceeding. Attaching a certified copy of the referee's deed to the Notice to Quit, which is subsequently served upon a person of suitable age and discretion at the premises (*see* ***Plotch v. Dellis***, 75 N.Y.S.3d 779 (App. Term, 2d, 11th & 13th Jud. Dists. 2018)) or by conspicuous place service (i.e. "nail and mail") (***Federal Home Loan Mtg. Corp. v. McGibney***, 114 N.Y.S.3d 554 (App. Term, 9th & 10th Jud. Dists. 2018)), satisfies the exhibition requirement. In ***Plotch v. Dellis***, the Appellate Term for the Second, Eleventh and Thirteenth Judicial Districts adopted substituted service as a viable form of

[3] Protecting Tenants at Foreclosure Act of 2009, Pub. Law No. 111-22, §§ 701-04, 123 Stat. 1660 (2009). The statute expired on December 31, 2014. However, in June 2018, section 304 of the Economic Growth, Regulatory Relief, and Consumer Protection Act restored the PTFA (*see* Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. Law No. 115-174, 132 Stat. 1296 (2018)).

service and, in doing so, held that its prior ruling in ***Home Loan Servs., Inc. v. Moskowitz***, 920 N.Y.S.2d 569 (App. Term, 2d, 11th & 13th Jud. Dists. 2011), which held that personal delivery was the only acceptable form of service of the deed, was no longer the law (***Plotch***, 75 N.Y.S.3d at 779).

6. Victims of Domestic Violence (10 Days)

At any time while an order of protection in favor of the victim of domestic violence is in effect, the Tenant may terminate the tenancy after giving the Landlord and all co-Tenants ten (10) days written notice (RPL § 227-c(2)(a)). The Criminal Court must entertain the application, even where the underlying domestic violence dispute has been resolved, provided the order of protection remains in effect.

The Tenant must demonstrate that notwithstanding the order of protection, (1) a substantial risk of physical and/or emotional harm to the Tenant and/or his or her children will continue to persist if they remain in the premises and (2) the Tenant's request for early lease termination was refused by the Landlord (*id*. at § 227-c(2)(b)). If the application is granted, the Court must terminate the tenancy between thirty (30) and 150 days <u>following</u> the due date of the next rent payment (*id*. at § 227-c(2)(d)).

The Court must further condition termination of the rental agreement on the Tenant's payment of all rent due through the termination date (*id*. at § 227-c(2)[c]). A lease provision waiving the rights afforded under RPL § 227-c is void as against public policy (*id*. at § 227-c(4)).

In a detailed opinion, the Court in ***Riverton v. Culliton*** addressed a situation where the co-Tenant qualified for the protections afforded to victims of domestic violence pursuant to RPL § 227-c because of the abusive acts of her co-Tenant husband (2018 N.Y.L.J. LEXIS 3833 (Cohoes City Ct. Nov. 20, 2018)). The Landlord sought to hold the victim liable for unpaid rent under the theory of joint and several liability. Although the defense was not asserted, the Court declined to award monetary relief against the wife holding that a "victim of domestic violence should not be forced to pay the rent of her abuser" (***id***.).

7. Military Families

Upon written notice, a lease entered into by or on behalf of a member of the military service following execution of the rental agreement may be terminated by the Tenant with written notice at any time (New York States Soldiers' and Sailors' Civil Relief Act [Military Law] § 310). This provision applies equally to leases executed on behalf of the spouse of a person who entered into the military after signing the lease.

The notice of termination may be mailed to the Landlord via regular United States Mail as there are no formal service or certified mailing requirements (*id*. at § 310(2)). The termination date is typically thirty (30) days after the next rent payment is due following the delivery or mailing of the termination notice. If the rental agreement does not include a monthly rent payment, then the termination date is the final day of the month following the month the termination notice was mailed or delivered.

6. Service of Notice of Petition and Petition

Service of the Notice of Petition and Petition is not an element of the Petitioner's case, but rather the mechanism to establish personal jurisdiction over the Respondent. A personal jurisdiction defense may be waived. For example, where the Respondent appears but does not timely challenge service, the defense is waived (i.e., the Respondent has consented to the proceeding) (*see* ***Citi Land Servs., LLC v. McDowell***, 926 N.Y.S.2d 343 (App. Term, 2d, 11th & 13th Jud. Dists. 2011)). It has further been held that the Tenant waived a personal jurisdiction defense when the Tenant moved post-judgment to vacate the judgment and warrant due to newly discovered evidence regarding service (***S & H Clinton Assoc., LLC v. Cherry***, 148 N.Y.S.3d 823 (App. Term 9th & 10th Jud. Dists. 2021) (the newly discovered evidence regarding service was untimely and the Tenant further failed to establish the newly discovered evidence could not have been discovered earlier)).

Where the Respondent does not appear or if the Respondent appears and timely objects to service, the Court must consider whether personal jurisdiction has been established (*see* ***Gristmill Realty, LLC v. Roa***, 133 N.Y.S.3d 383 (App. Term, 9th & 10th Jud. Dists. 2020)). Initially, this is performed through a review of the affidavit of service, but a "sworn, nonconclusory and factually specific denial of service" will require the testimony of the process server at a traverse hearing (***Fountain Terr. Owners, Inc. v. Balic***, 101 N.Y.S.3d 699 (App. Term, 2d, 11th & 13th Jud. Dists. 2018)). If at the hearing service is deemed inadequate, then the Court is devoid of personal jurisdiction and the proceeding will routinely be dismissed "without prejudice." However, a "bare and unsubstantiated denial of service in [an] affidavit lack[ing] the factual specificity required to rebut the prima facie evidence of proper service" will result in a denial of the motion without the need for a hearing (***Marmon Realty Group, LLC v. Khalil***, 148 N.Y.S.3d 822 (App. Term 2d, 11th & 13th Jud. Dists. 2021)).

There are three (3) acceptable ways to serve the Notice of Petition and Petition: (1) personal delivery upon the Respondent; (2) substituted service; or (3) conspicuous place service, commonly

referred to as "nail and mail" (RPAPL § 735). Any individual over the age of eighteen (18) and not a party to the proceeding may serve the papers (CPLR § 2103(a)). Since a party to the proceeding may not serve the Notice of Petition and Petition, the Petitioner will typically retain a licensed process server. However, outside New York City, generally a process server need not be licensed and an attorney may legally serve process anywhere within the State. In New York City, excluding attorneys, where the process server serves five (5) or more processes during a one-year period, the process server must be licensed (*see* NYC Admin. Code, Ch. 2, subch. 23, § 20-403 *et seq*.).

Effective June 14, 2019, the HSTPA extended the service period for the overwhelming majority of summary proceedings. Excluding non-payment proceedings in New York City, service of the Notice of Petition and Petition must be completed no fewer than ten (10) days but not more than seventeen (17) days prior to the original return date (first Court appearance) (RPAPL § 733(1); HSTPA, L. 2019, c. 36, Part M, § 15)). This rule replaced what was formally known as the "5 and 12 Rule." Regardless of the type of service, service must be completed during the appropriate limited period.

In determining whether service was completed in a timely manner, the Court does not include the "day of reckoning" (i.e., the date service is completed), but the day the proceeding is to be heard is counted (*see* General Construction Law § 20). If the final day is a "Saturday, Sunday or public holiday," then the time to complete service is extended to the next business day. Service of "legal process" may not be made on Sunday or other religious observance day (General Business Law § 11).

A. *Personal Delivery*

Personal delivery is the preferred method of service. This is achieved by handing the Notice of Petition and Petition to the Respondent. Unless agreed otherwise, the papers need not be personally delivered at the premises. Service in this manner is considered "complete" when the papers are handed, or personally delivered, to the Respondent, which must be done not less than ten (10) but no more than seventeen (17) days prior to the return date. Although service is considered "complete" when the papers are handed to the Respondent, the term "complete" is not entirely accurate because the process server must further file proof of service with the Clerk of the Court in the form of a sworn affidavit within three (3) days of the date of service (RPAPL § 735(2)(a)).

Notwithstanding RPAPL § 735(2), which requires the affidavit of service to be filed within three (3) days of personal delivery, it has been held that the failure to comply with this provision constitutes a mere ministerial error that warrants denial of a motion to dismiss (***Siedlecki v. Doscher***, 931 N.Y.S.2d 203 (App. Term, 2d, 11th & 13th Jud. Dists. 2011)). The Petitioner may move to cure the filing date of the affidavit of service *nunc pro tunc* (***Martin, Jr. v. Sandoval***, 9 N.Y.S.3d 594 (Peekskill City Ct. 2015); *but see* ***2198 Cruger Assocs. v. Xhurreta***, 2019 N.Y.L.J. LEXIS 4387 (N.Y. Civ. Ct. Bronx Cnty. Dec. 9, 2019) (*citing* ***Riverside Syndicate Inc. v. Saltzman***, 49 A.D.3d 402 (1st Dep't 2008) (holding that in the First Department, strict compliance with statutory requirements maintained for filing affidavits of service))).

B. *Substituted Service*

Unlike the personal delivery method, substituted service is considered "complete" when the affidavit of service is filed with the Clerk of the Court (RPAPL § 735(2)(b)). Substituted service is the result of an unsuccessful attempt at personal service. For example, if the Respondent is not home when service is attempted, the process server may leave the papers with an individual who answers the door provided that person is of an appropriate age and has the appropriate judgment. Although a precise description of a "person of suitable age and discretion" is not clearly defined, leaving the Notice of Petition and Petition with a spouse, adult child or other mature adult at the residence, or with the office manager at a place of business, will generally suffice (***Siedlecki***, 931 N.Y.S.2d at 203).

The process server is required to leave the same number of copies of the Notice of Petition and Petition with a person of suitable age and discretion as there are named Respondents. For example, if there are three (3) named Tenants, then the process server must leave three (3) complete sets of the Notice of Petition and Petition with the person of suitable age and discretion. The process server in this scenario must also mail a complete set of the Notice of Petition and Petition in two (2) forms to each Respondent at the subject premises the following business day; one (1) copy via certified mail and one (1) by regular mail (RPAPL § 735(1)). Thus, the Notice and Notice of Petition would have to be mailed in two (2) forms to each of the three (3) Tenants for a total of six (6) mailings – three (3) via certified mail and three (3) via regular mail. For commercial properties, a copy of the papers must be mailed to the Tenant's known corporate address, whether on or off the subject premises, by regular and certified or registered mail the following business day (*id*. at § 735(1)(b)).

In order to complete service, the process server must file with the Court a sworn affidavit of service within three (3) days of the mailing (*id*. at § 735(2)). Again, all of this must be completed no more than seventeen (17) but no fewer than ten (10) days prior to the initial Court date.

C. *Conspicuous Place Service ("Nail and Mail")*

The third method of service is conspicuous place service, which is commonly referred to as "nail and mail." If on the initial attempt at service no one answers the door, the process server must make at least one (1) additional attempt at service during a different time of day. If on the second visit there is still no answer and the Petitioner is willing to forego a money judgment if the Tenant fails to appear in Court, then the process server may fasten the papers (one (1) copy per Respondent) to the door or slide them beneath the entrance of the residence (***156 Nassau Ave. HDFC v. Tchernitsky***, 112 N.Y.S.3d 859 (App. Term, 2d, 11th & 13th Jud. Dists. 2019); ***Latchman v. Hardnett***, 143 N.Y.S.3d 863 (N.Y. Civ. Ct. Queens Cnty. 2021); ***Cornhill LLC v. Sposato***, 54 N.Y.S.3d 548 (Rochester City Ct. 2017)). The process server may not "wedge" the papers between the door knob and door frame without the use of tape or other fastening device (***Bruckner by the Bridge, LLC v. Gonzales***, 18 N.Y.S.3d 577 (N.Y. Civ. Ct. 2015)).

A process server must utilize "reasonable" efforts to serve each Respondent at a time and place when the occupant is expected to be present (RPAPL § 735). In other words, if the process server believes that the Tenant will not be present when service is attempted, the attempt is not considered reasonable. Attempts at service exclusively during normal working hours are inadequate.

Where a money judgment is sought in the event of default, due diligence pursuant to CPLR § 308(4) must be satisfied, which has been interpreted as requiring at least one (1) additional attempt at service (a total of three (3) attempts over two (2) days) before resorting to "nail and mail" service (***Avgush v. Berrahu***, 847 N.Y.S.2d 343 (App. Term, 2d, 11th & 13th Jud. Dists. 2007)). The Appellate Term for the Ninth and Tenth Judicial Districts has held at least one (1) of the attempts at service must be at the Respondent's "[p]lace of employment or new residence" if known (***Merrbill Holdings, LLC v. Toscano***, 100 N.Y.S.3d 610 (App. Term, 9th & 10th Jud. Dists. 2018)). Inquiries must be made to identify the Respondent's whereabouts to satisfy due diligence (***Jamaica Seven LLC v. Douglas***, 2021 N.Y. Misc. LEXIS 5025 (N.Y. Civ. Ct. Queens Cnty. Sept. 30, 2021); ***Harborview Props. I, LLC v. Valentin***, 94 N.Y.S.3d 538 (Greenburgh Just. Ct. 2018)).

The use of "nail and mail" service at a commercial property is defective where the Landlord and/or Landlord's representatives are aware the Tenant is not present and/or previously vacated the premises (***255 Huguenot St. Corp. v. Rwechungura***, 110 N.Y.S.3d 862 (App. Term, 9th & 10th Jud. Dists. 2018)). Similarly, conspicuous place service at commercial premises is defective where the Tenant was denied access due to the Landlord's changing of the locks (*see* **214 *Knickerbocker v. Molly's Milk Truck Sweet & Savory***, 144 N.Y.S.3d 796 (App. Term 2d, 11th & 13th Jud. Dists. 2021)).

Similar to substituted service, two (2) copies of the Notice of Petition and Petition must be mailed the following business day to each Respondent at the premises; one (1) via certified mail and one (1) by regular mail. The process server must further file a sworn affidavit of service within three (3) days of the mailing (RPAPL § 735(2)(b)), and all of this must be completed between ten (10) and seventeen (17) days prior to the initial Court date.

7. Answer

The Respondent in a summary proceeding may submit an Answer at or before the hearing, either orally or in writing, by denying all or a portion of the allegations and asserting affirmative defenses (*see* RPAPL § 743; HSTPA, L. 2019, c. 36, Part M, § 16*;* ***655 Country Rd., Inc. v. Caltagirone***, 101 N.Y.S.3d 701 (App. Term, 9th & 10th Jud. Dists. 2018)). However, effective July 14, 2019, pursuant to RPAPL § 743, a Respondent is not required to file an Answer. Previously, the Petitioner had opportunity to demand an Answer on notice where the Notice of Petition and Petition were served between eight (8) and twelve (12) days prior to the return date.[4]

[4] Prior to the 2019 Law changes, it was well-established that a *pro se* Tenant's request for an adjournment on the initial Court date for the purpose of seeking counsel extended the time to answer (*see* ***In-Towne Shopping Ctrs. Co. v. DeMottie***, 851 N.Y.S.2d 70 (App. Term, 9th & 10th

This is no longer the case, and a denial of the substantive allegations is presumed by the Respondent's timely appearance in Court.

Where an Answer is made in Court, "the substance thereof shall be recorded by the clerk" and "maintained in the case record" (RPAPL § 743). A written Answer, unlike the Petition, need not be verified (*see* ***Stein v. Jeff's Express, Inc.***, 955 N.Y.S.2d 713 (App. Term, 2d, 11th & 13th Jud. Dists. 2012); ***Neck Rd. One Realty v. Magna Physical Therapy PC***, 2019 N.Y.L.J. LEXIS 1655 (N.Y. Civ. Ct. May 15, 2019)). Notwithstanding the Housing Part's limited authority to grant equitable relief, the Respondent may assert any affirmative defense, whether based in law or equity (RPAPL § 743; ***Yacoob v. Persaud***, 950 N.Y.S.2d 611 (App. Term, 2d, 11th & 13th Jud. Dists. 2012)). For example, the Tenant may move for a dismissal based upon a pleading defect where the Petition contains conflicting lease termination dates, thereby failing to provide "[a]dequate notice of the transactions intended to be proved" (***June-July Trust v. Fletcher***, 141 N.Y.S.3d 832 (App. Term, 9th & 10th Jud. Dists. 2021)). The failure to assert a timely defense (other than subject matter jurisdiction) may constitute a waiver, and the defense may not be asserted for the first time on appeal (***Ellerby v. Helman***, 148 N.Y.S.3d 329 (App. Term, 2d, 11th & 13th Jud. Dists. 2021)). A proposed Amended Answer to assert a succession defense was denied where the defense was "palpably insufficient or clearly devoid of merit" (***William 165 LLC v. Sero-Boim***, 139 N.Y.S.3d 471 (App. Term, 1st Dep't 2021)).

A personal jurisdiction defense may similarly be waived if not asserted in the Answer or at the initial Court appearance (***Iodice v. Academics R Us, Inc.***, 26 N.Y.S.3d 724 (App. Term, 1st Dep't 2015)). In ***Iodice***, the Appellate Term held that the defense could not be included within an Amended Answer where the claim was not asserted in the original Answer (***id***.).

8. Counterclaims

RPAPL § 743 authorizes counterclaims in summary proceedings. On the return date, the Respondent may assert counterclaims either orally or in writing (RPAPL § 743). Unlike the Petitioner, a Respondent may be awarded damages on its counterclaims in the summary proceeding. However, equitable counterclaims and counterclaims for money damages "arising out of torts unrelated to possession of the premises or [the] collection of rent" are prohibited (***Wheeler v. Linden Plaza Preserv. LP***, 172 A.D.3d 608 (1st Dep't 2019); *see* ***Ndiaye v. 2123 FDB MPPH LP***, 115 N.Y.S.3d 584 (App. Term, 1st Dep't 2019)).

Counterclaims are not limited to the time period for which unpaid rent is sought. The Court's maximum dollar jurisdictional limit in civil actions, which in New York City equals $50,000 and in many of the other local Courts equals $15,000, excluding costs and interest, does not apply to either the Petitioner's claim for rent arrears (N.Y. City Civ. Ct. Act § 204; Uniform City Ct. Act § 204; Uniform Dist. Ct. Act § 204; Uniform Just. Ct. Act § 204) or the Respondent's

---

Jud. Dists. 2007)). Parenthetically, pursuant to CPLR §§ 3012(d), 2004 and 2005, an extension to file a late pleading in a proceeding may be obtained where a reasonable excuse is shown or in the interest of justice, including law office failure.

counterclaims, with the exception of counterclaims asserted in the Justice Courts which are limited to $3,000 (N.Y. City Civ. Ct. Act § 208; Uniform City Ct. Act § 208; Uniform Dist. Ct. Act § 208; Uniform Just. Ct. Act § 208). The portion of a counterclaim asserted in the Justice Court in excess of $3,000 is deemed waived (***2094-2096 Boston Post Rd., LLC v. Mackies Am. Grill, Inc.***, 41 N.Y.S.3d 452 (App. Term, 9th & 10th Jud. Dists. 2016)). In ***2094-2096 Boston Post Rd., LLC***, the Appellate Term directed the Housing Part to permit the Tenant to withdraw the portion of the counterclaim exceeding $3,000, without prejudice, prior to ruling on the underlying motion.

The assertion of an unrelated counterclaim may constitute a waiver of a personal jurisdiction defense (***Halberstam v. Kramer***, 969 N.Y.S.2d 803 (App. Term, 2d, 11th & 13th Jud. Dists. 2013)). Where personal jurisdiction is waived, whether intentional or otherwise, the defense may not be revived by the Tenant's subsequent withdrawal of the counterclaims (***id***.). The Appellate Term, First Department held that the waiver does not apply where the Tenant asserts an affirmative defense challenging service of the predicate notice because challenges to the predicate notice do not "implicate" personal jurisdiction (***Nguyen v. Perparim***, 116 N.Y.S.3d 467 (App. Term, 1st Dep't 2019)).

Where the Tenant asserts a counterclaim, but fails to appear at the hearing in the Housing Part, the claim may be barred in a subsequent plenary action by res judicata and collateral estoppel (*see* ***32nd Jabez Corp. v. Meekang, Inc.***, 194 A.D.3d 414 (1st Dep't 2021)). In ***32nd Jabez Corp.***, the Appellate Division, First Department reasoned that the Tenant's plenary claims of interference with use and enjoyment of the premises and constructive eviction bore "`[d]irectly upon the Landlord's right to possession' and ability to collect rent" which were both decided in the Housing Part (*id*.).

Lease provisions barring counterclaims are generally enforceable (***Joseph v. Lyu***, 97 N.Y.S.3d 55 (App. Term, 2d, 11th & 13th Jud. Dists. 2018)). There is an exception where the counterclaims are "inextricably intertwined" with the Petitioner's claims for unpaid rent and/or use and occupancy, in which case, the counterclaims may be permitted notwithstanding the lease provision to the contrary (***1035 Third Ave. LLC v. Pure Green NYC 62nd St. Corp.***, 2021 N.Y. App. Div. LEXIS 6502 (1st Dep't Nov. 18, 2021); ***2094-2096 Boston Post Rd., LLC***, 41 N.Y.S.3d at 452).

- remainder of page intentionally left blank -

9. Adjournments

Each party in a summary proceeding is entitled to one (1) adjournment on the first Court date; i.e., at the time issue is joined. RPAPL § 745(1) provides that the adjournment must be granted for not less than fourteen (14) days, unless the parties consent to a shorter adjournment. The granting or denial of "[a] party's second or subsequent request for adjournment" is left to the discretion of the Court (RPAPL § 745(1); HSTPA, L. 2019, c. 36, Part M, § 17). In deciding whether to grant a discretionary adjournment, the Court may consider factors such as whether the request was "made for the purpose" of delaying the proceedings or the failure to exercise due diligence (*see* ***Tuscan Realty Corp. v. O'Neill***, 731 N.Y.S.2d 830 (App. Term, 2d & 11th Jud. Dists. 2001)).

10. Default Judgments

The Respondent's failure to appear on the hearing date may result in a default judgment (judgment of possession and warrant of eviction) provided service was proper. A money judgment may also be awarded where service was executed with due diligence. Effective June 14, 2019, a Landlord may not be awarded attorney's fees where the Tenant defaults (i.e., fails to appear) in a summary proceeding involving residential property (RPL § 234 (HSTPA, L. 2019, c. 36, Part M, § 8)). If attorney's fees (when listed in the lease as "added rent") are no longer available in a summary proceeding, as discussed *supra*, then RPL § 234 may be asserted as a defense for attorney's fees in a subsequent plenary action.

The content of the process server's affidavit of service is *prima facie* proof that service was performed in the manner and at the date and time alleged (***Iodice***, 26 N.Y.S.3d at 724). Attempts at service must ordinarily comply with the "reasonable application" standard pursuant to RPAPL § 735. As stated above, the Petitioner may further be entitled to a money judgment if the process server satisfies the "due diligence" requirements pursuant to CPLR § 308(4), which have generally been interpreted as three (3) attempts at service over two (2) days at different times of the day, and not on Sunday or public holiday (*see* CPLR § 308; ***Filancia v. Clarke***, 113 N.Y.S.3d 480 (Mt. Vernon City Ct. 2019)). The previous standard required "personal delivery" to obtain a money judgment on default (i.e., at least three (3) attempts at service over two (2) days at reasonable times).

Unless previously amended, the money judgement is limited to the amount sought in the Petition (***Mustafa v. Plein***, 950 N.Y.S.2d 492 (App. Term, 2d, 11th & 13th Jud. Dists. 2012); ***Port Chester Hous. Auth. v. Turner***, 734 N.Y.S.2d 805 (App. Term, 9th & 10th Jud. Dists. 2001)). The process must also make genuine inquiry into the Tenant's place of employment (*see* ***Bel Air Leasing LP v. Johnson***, 2021 N.Y. Misc. LEXIS 5453 (N.Y. Civ. Ct. Kings Cnty. Nov. 8, 2021) and attempt service at the "[p]lace of employment or new residence" if known (***Merrbill Holdings, LLC***, 100 N.Y.S.3d at 610).

The Petitioner must file with the Court a non-military affidavit attesting that the process server made a reasonable inquiry regarding the Tenant's military status (***Riverton Sq. LLC v.***

McLeod, 57 N.Y.S.3d 677 (App. Term, 1st Dep't 2017)). Since there is no fixed time to file a non-military affidavit, the failure to file the affidavit by the return date is not a jurisdictional defect. Instead, the Court may adjourn the case to allow for the filing of the affidavit, at which time, should the Tenant again fail to appear, a default judgment may be entered.

Where the Tenant moves to vacate a default judgment, it must be shown that the Tenant both had a reasonable excuse for failing to appear and the possibility of a meritorious defense (CPLR § 5015(a)(1); ***Murphy v. Coalition of Landlords***, 147 N.Y.S.3d 869 (App. Term, 9th & 10th Jud. Dists. 2021); ***1449 Fulton v. Britton***, 144 N.Y.S.3d 797 (App. Term 2d, 11th & 13th Jud. Dists. 2021); ***ADM Mgmt. Corp. v. Mathews***, 116 N.Y.S.3d 484 (App. Term 1st Dep't 2019)).

11. Stipulations of Settlement

A Stipulation of Settlement is a binding agreement that will generally be enforced in the event of substantial non-compliance (***Shalimar Leasing v. Medina***, 2021 N.Y. Misc. LEXIS 5127 (App. Term, 2d, 11th & 13th Jud. Dists. Oct. 8, 2021); ***2345 Crotona Gold, LLC v. Dross***, 31 N.Y.S.3d 924 (App. Term, 1st Dep't 2016)). Where the Tenant consents to the entry of a judgment of possession and a warrant of eviction, often in consideration for additional time to remain in possession of the premises and/or a reduction in rent arrears, a motion to vacate the judgment to assert affirmative defenses will typically be denied (***Michalak v. Fechtel***, 911 N.Y.S.2d 693 (App. Term, 9th & 10th Jud. Dists. 2010)). In addition, as a general matter, there is no appeal from a final judgment entered as result stipulation (***Kitty Holding Corp. v. Corriette***, 138 N.Y.S.3d 790 (App. Term 9th & 10th Jud. Dists. 2021)).

However, a post-eviction application to be restored to possession due to substantial compliance with the parties' negotiated stipulated terms may be granted. For instance, a commercial Tenant was restored to possession after having been evicted for failing to pay the full amount of arrears set forth in a "time is of the essence" stipulation where the Tenant demonstrated "substantial compliance" with that agreement (*see* ***164-03 v. Alsamet***, 148 N.Y.S.3d 330 (App. Term 2d, 11th & 13th Jud. Dists. 2021)).

Due to the high volume of cases in the Housing Parts, *inter alia*, the Court generally encourages negotiated resolutions, and stipulations are generally upheld absent fraud, collusion, mistake, and/or accident (*see* ***Molinelli v. Goulbourne-Fontan***, 138 N.Y.S.3d 790 (App. Term 2d, 11th & 13th Jud. Dists. 2021)). The inclination to uphold settlements, including an agreement to discontinue the proceeding, is predicated upon the theory that "[p]arties to a civil dispute are free to chart their own litigation course . . . and [it] is essential to the management of court calendars and the integrity of the litigation process" (***191 St. Assocs. LLC v. Cruz***, 29 N.Y.S.3d 848 (App. Term, 1st Dep't 2016)).

The Appellate Term reasoned that "[l]iteral enforcement of the terms of [a] stipulation of settlement is not unjust . . ., where the agreement was negotiated by sophisticated parties, all of whom were represented by counsel, and the default was neither inadvertent nor trivial" (***580 Park Ave., Inc. v. Mirto***, 116 N.Y.S.3d 843 (App. Term, 1st Dep't 2019)). Stipulated terms have been

upheld where a commercial Tenant failed to replace the awning in front of the commercial premises (***Serencha Realty Corp. v. A.M. Two In One, Inc.***, 31 N.Y.S.3d 924 (App. Term, 1st Dep't 2016)); a Landlord was denied "access" to make repairs (***Wira Assocs. v. Easy***, 26 N.Y.S.3d 216 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)); the stipulated liquidated damages provision awarding use and occupancy was double the monthly rent where the commercial Tenant failed to vacate (***723 Edible, Inc. v. 721 Borrower, LLC***, 150 N.Y.S.3d 896 (Sup. Ct. N.Y. Cnty. 2021)); Tenant's repeated non-compliance with stipulated payment terms (***Mehr Props., LLC v. Fonrose***, 29 N.Y.S.3d 847 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)); the movant's failure to establish "legal cause" to vacate the stipulation (***Alvarez v. Strujan***, 110 N.Y.S.3d 865 (App. Term, 1st Dep't 2018)); an unsubstantiated undue duress claim more than one (1) year after the stipulation was signed (***Maxwell Dev., L.P. v. France***, 111 N.Y.S.3d 517 (N.Y. Civ. Ct. 2018)); and where a *pro se* Tenant "understood the terms of the stipulation and received ample consideration for his agreement to vacate" (***Skeete v. Bah***, 29 N.Y.S.3d 849 (App. Term, 1st Dep't 2015)).

On the other hand, a settlement will not be enforced, even when there is substantial compliance, where it "[w]ould be unjust or inequitable, or would permit the other party to gain an unconscionable advantage" (***368 Chauncey Ave. Trust v. Whitaker***, 911 N.Y.S.2d 696 (App. Term, 2d, 11th & 13th Jud. Dists. 2010)); the agreement "[w]as entered into inadvisably or . . . it would be inequitable to hold the parties" to its terms (***2701 Grand Assoc. LLC v. Morel***, 31 N.Y.S.3d 924 (App. Term, 1st Dep't 2016)); or where there is "[e]vidence of fraud, overreaching, unconscion[able conduct] or illegality" (***Chelsea 19 Assocs. v. James***, 67 A.D.3d 601, at 602, 889 N.Y.S.2d 564, 566 (1st Dep't 2009)). Settlements have been vacated, or otherwise not enforced, where the attorney lacked actual and/or apparent authority to enter into the settlement (***Bank of New York v. Betancourt***, 950 N.Y.S.2d 721 (App. Term, 9th & 10th Jud. Dists. 2012)); the Landlord refused to submit the requisite W-9 Form for payment of the rent arrears (***Dino Realty Corp. v. Khan***, 3 N.Y.S.3d 259 (App. Term, 2d, 11th & 13th Jud. Dists. 2014)); the *pro se* Tenant was evicted the day before entering into a stipulation in which he waived "several meritorious defenses" (***Chauncey Equities, LLC v. Murphy***, 112 N.Y.S.3d 861 (App. Term, 2d, 11th & 13th Jud. Dists. 2019)); the Department of Social Services approved the payment of arrears (***Gerard Ct. Assocs., LLC v. Hamer***, 31 N.Y.S.3d 921 (App. Term, 1st Dep't 2016)); the Landlord failed to file an annual rent registration that barred a rent increase (***Samson Mgmt. v. Cordero***, 112 N.Y.S.3d 422 (App. Term, 9th & 10th Jud. Dists. 2018)); and where the money judgment negotiated by the Landlord's attorney and *pro se* Tenant included impermissible items (***Nu Horizons Manor v. Adderly***, 951 N.Y.S.2d 87 (Suffolk Cnty. Dist. Ct. 2012)).

The Court is not "[b]ound by language in the stipulation stating that any default shall be deemed material" (***135 Amersfort Assoc., LLC v. Jones***, 20 N.Y.S.3d 292 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)) or that "time is of the essence" (***Alsamet***, 148 N.Y.S.3d at 330). Similarly, the Court is not bound by language that a default is "*de minimis*" (***GHR Co., LLC v. Sannon***, 95 N.Y.S.3d 125 (App. Term, 2d, 11th & 13th Jud. Dists. 2018)).

The Court may not unilaterally modify the terms of the parties' agreement to make the stipulation enforceable. A stipulation that omits explicit language awarding possession in the event of a breach will not result in such an award, even where substantial non-compliance is demonstrated. In ***Wallkill Affordable Senior Hous., L.P. v. Powell***, the Appellate Term for the

Ninth and Tenth Judicial Districts vacated the judgment of possession where the parties' stipulation merely stated in the event of a breach of the stipulation, the case "[s]hall be restored to the Court's calendar", and did not include the issuance of a judgment of possession and/or warrant of eviction (127 N.Y.S.3d 693 (App. Term, 9th & 10th Jud. Dists. 2020)).

Amendments to the Petition should be memorialized in the stipulation or, at minimum, placed on the record. For example, if additional months' rent since accrued are negotiated in a stipulation, but not included within the Petition, the Landlord must amend the Petition to include these additional months. Otherwise, the judgment may not be enforced in the event of a dispute over compliance (*see* ***Nathanson v. Mitchell***, 836 N.Y.S.2d 487 (Nassau Cnty. Dist. Ct. 2007)).

A. *RPAPL § 746 – Pro Se Settlements*

RPAPL § 746 requires the Court to "fully describe the terms of a stipulation" (other than an adjournment or stay of the proceeding) to a *pro se* litigant. Where a *pro se* litigant reaches a settlement, the individual may not simply send written correspondence or submit the Stipulation of Settlement to the Clerk of the Court. Instead, the parties must appear, and the Court will affirmatively explain that which was agreed.

If a *pro se* litigant reaches an out-of-court agreement but does not appear before the Court, then it may be proper to adjourn the case. A default judgment will typically not be granted against a non-appearing Tenant without first adjourning the proceeding in light of the proposed stipulation. If the Tenant fails to appear on the adjourned date, then an application for a default judgment may be entertained and the relief granted will typically mirror the terms of the parties' agreement to the extent the Court has the authority to grant such relief. The parties should be mindful that the money judgment is limited to the amount sought in the Petition, unless previously amended, notwithstanding an agreement to include another month's rent in the proposed stipulation.

The provisions of RPAPL § 746 are not applicable where both parties are represented by counsel. However, it is customary to confirm on the record that the attorneys explained the terms and obligations of the stipulation to their clients.

It should be noted that RPAPL § 746 will be amended effective March 22, 2022.

The amendments add three sections to the statute.

New section (2) requires the Court, before approving a stipulation covered by section (1), to conduct an allocution, on the record, and make eleven specific findings. Those required findings are spelled out in section (2).

New section (3) provides: "The Court may use a Court attorney to conference a case to determine the unrepresented party's claims or defenses and his or her understanding of all available options in light of those claims or defenses, or any of the other elements of the allocution required by this section. However, such conference may not substitute for an allocution by the Court and, where it is used, the results shall be reported to the Court, which shall note on the record that such

conference occurred."

New section (4) permits the Court, in its discretion, to omit from the allocution, as unnecessary, one or more of the finding referenced in section (2)(c) but the reasons for such omission must be set forth on the record.

B. *A Spouse May NOT Bind Another Spouse to a Settlement*

Where the Tenants are spouses and only one (1) spouse appears in Court, the appearing spouse may not sign on behalf of or bind the non-appearing spouse to a settlement agreement (*see* N.Y. General Obligations Law § 3-305). Provided proper service is alleged, the Court will typically enter a default judgment against the non-appearing spouse similar to the terms agreed to by the appearing spouse. The reader should be mindful that Tenants to a rental agreement are united in interest, and, as a result, the liability of one (1) may be conferred equally – positively or negatively – upon all. Accordingly, where only some of the Tenants appear in Court, the resulting judgments, including the monetary relief, may be identical (s*ee* ***Rossi v. Scott***, 52 N.Y.S.3d 248 (App. Term, 9th & 10th Jud. Dists. 2017)).

To avoid a potential windfall, the Court may require confirmation from the Landlord that if the appearing spouse complies with the Stipulation of Settlement, the Petitioner will not seek to enforce the judgment and warrant against the non-appearing spouse. The same applies where the Respondents are unmarried.

C. *Landlord's Acceptance of Future Rent*

1. Consent to a Judgment and Warrant With Time to Pay

In a non-payment proceeding, provided the rent was not withheld in "bad faith," the Court must vacate the judgment and warrant if all of the arrears are paid or deposited with the Court prior to the execution of the warrant of eviction (RPAPL § 749(3); HSTPA, L. 2019, ch. 36, § 19, Part M). For residential properties, the Petitioner will typically seek to include within the stipulation a provision that the money received for a period following the issuance of the judgment is deemed "use and occupancy" (as opposed to rent) and/or that "future payments are not intended to revive the tenancy." Otherwise, the acceptance of subsequent payments could nullify the judgment of possession and warrant of eviction. The money judgment in favor of the Landlord would, however, remain unaffected.

For commercial properties, the Landlord's acceptance of rent for a future month following issuance of the judgment is permitted provided the parties did not intend to continue the tenancy. In other words, a commercial Landlord may accept the payment of rent following issuance of the judgment and warrant without vitiating the warrant provided there is no intent to revive the tenancy (***First Citizens Nat'l Bank v. Koronowski***, 46 A.D.3d 1474 (4th Dep't 2007)).

2. Acknowledging Rent Arrears Without a Judgment

Alternatively, the parties may agree that the Tenant will be given time to pay an agreed amount of rent arrears prior to the issuance of a judgment. The consideration is typically the immediate issuance of a final judgment of possession and a warrant of eviction, without stay, plus a money judgment for the remaining unpaid rent arrears, if the Tenant fails to make a scheduled payment. To obtain the judgment, the Landlord may submit *ex parte* (without notice) an affidavit of non-compliance.

A finding of non-compliance in this hypothetical may only be based upon a breach of a provision within the stipulation; i.e., the Tenant's failure to pay rent arrears. Non-compliance may not be based on the failure to pay a future month's rent (***Fairgate Assocs., Inc. v. Adams***, 2002 N.Y. Misc. LEXIS 914 (App. Term, 1st Dep't July 29, 2002)). Accordingly, many Landlords include within the stipulation that "all payments going forward shall first be applied to the current month's rent with any additional monies thereafter applied towards arrears." This means that the Tenant must be current on both the rent and the rent arrears to be in compliance. Absent such a provision, the monies would first be applied towards the arrears which would require the commencement of a new summary if the Tenant failed to pay a subsequent month's rent.

12. Stays: Execution of the Warrant (RPAPL § 749), Issuance of the Warrant (RPAPL 753), and the Summary Proceeding (RPAPL 756)

RPAPL § 749(3) permits the Court, for good cause shown, at any time prior to execution, to stay execution or vacate the warrant of eviction, or, following execution, to restore the tenant to possession. Likewise, the Court has discretion to deny a motion to stay execution where a stay is unwarranted (*see, e.g.*, ***Kitty Holding Corp.***, 138 N.Y.S.3d at 790).

Pursuant to the HSTPA, the Sheriff must provide the Respondent with a 14-Day notice, following the expiration of all stays, prior to executing the warrant of eviction (RPAPL § 749). However, the Sheriff need not file an affidavit of service with the Court (***Dixon v. County of Albany***, 192 A.D.3d 1428 (3d Dep't 2021)). In fact, it has been held that the Sheriff's failure to serve the requisite 14-Day Notice prior to the eviction (was previously 72-Hours Notice) does not negate or adversely impact the judgment or warrant (***Molinelli v. Goulbourne-Fontan***, 138 N.Y.S.3d 790 (App. Term, 2d, 11th & 13th Jud. Dits. 2021) (noting that the Tenant was required to vacate the premises having agreed to do so via a stipulation of settlement entered into during the summary proceeding)).

Where restoration to possession is sought following execution of the warrant of eviction, the new Tenant in possession must be noticed and joined in the application (*see* ***DLB of NY, LLC v. Billan***, 139 N.Y.S.3d 744 (App. Term, 1st Dep't 2021)). An application by the Tenant (or Landlord) to vacate the judgment and warrant (or other relief awarded) on the grounds of ineffective assistance of counsel will typically be denied absent "extraordinary circumstances" (***Zhu v. Li***, 138 N.Y.S.3d 792 (App. Term 2d, 11th & 13th Jud. Dists. 2021)).

The reader should be mindful that a former Tenant seeking to be restored to the premises may make the application in the Landlord's underlying summary proceeding where the eviction was pursuant to a lawful Order of the Court. However, if, for example, the Landlord exercised self-help notwithstanding an Order of the Court authorizing the Sheriff to evict the occupants, then the dispossessed Tenant seeking restoration would have to commence a new proceeding presumably pursuant to RPAPL § 713(10) for the relief of restoration (*see*, *e.g.*, **214 *Knickerbocker v. Molly's Milk Truck Sweet & Savory***, 144 N.Y.S.3d 796 (App. Term 2d, 11th & 13th Jud. Dists. 2021)).

RPAPL § 749(3) further provides that where the full amount of rent arrears are paid or deposited with the Court prior to the execution of the warrant, the warrant must be vacated except where the Landlord demonstrates that the Tenant withheld the rent in bad faith. This applies to both residential and commercial properties.

RPAPL§ 753 governs stays on "issuance" of the warrant of eviction and the execution to collect costs regarding residential premises for up to one (1) year (was previously six (6) months). To grant the relief, the occupant must demonstrate: (1) the premises are used for residential purposes (other than hotels or rooming houses); (2) the application is made in good faith; and (3) "due and reasonable efforts" were taken but unsuccessful in finding a similarly suitable alternative premises in the neighborhood (outside a city with greater than one (1) million residents, the term "neighborhood" is defined as "school district") or (4) denial would result in "extreme hardship" to the applicant or the applicant's family (RPAPL § 753(1)).

The Court must consider the following in determining whether denial of the stay would result in "extreme hardship": (1) serious ill-health or exacerbation of an ongoing condition; (2) the child's enrollment in school; (3) any "extenuating life circumstance" impacting ability to relocate or quality of life; and (4) any substantial hardship to the Landlord if the stay is granted (*id*.).

If granted, for the stay to remain in effect, the occupant must deposit with the Court the full amount of use and occupancy for possession (RPAPL § 753(2)). The amount of use and occupancy, which is computed by the Court, shall be the rent for the last month the occupant was in lawful possession of the premises, plus the additional amount, if any, to reach the fair market value. The amount may further include unpaid rent prior to the stay (*id*.).

Where the Petitioner's claim was predicated upon an "objectionable" Tenant's holding over, the stay provision pursuant to RPAPL § 753 is not applicable provided the "competent evidence" demonstrates the occupant is in fact objectionable (RPAPL § 753(3)). If the summary proceeding was predicated upon a breach of the rental agreement by the Tenant, then the Court must stay issuance of the warrant of eviction for thirty (30) days to afford the Tenant an opportunity to cure the breach (RPAPL § 753(4)). A lease provision waiving the occupant's rights under RPAPL § 753 is deemed void as against public policy (RPAPL § 753(5)).

Pursuant to RPAPL § 756, a summary proceeding involving residential property is stayed where the utilities are turned off due to the Landlord's failure to make payment (where Landlord

was obligated to pay). The stay remains in effect until such time as the utilities are paid in full by Landlord, and the utilities have been restored to "working order" (RPAPL § 756).

13. Security Deposit

The General Obligations Law was amended, effective July 14, 2019, resulting in significant changes to the use and handling of security deposits. For example, the security deposit for residential property may not exceed one (1) month's rent (*see* General Obligations Law § 7-108(1-a)(a)). The section further specifies the purposes for which the Landlord may utilize (retain) the security deposit: (1) "reasonable and itemized" costs due to the non-payment of rent; (2) damages caused by the Tenant beyond "ordinary wear and tear"; (3) non-payment of utility charges; and (4) moving and storing Tenant's belongings (*id*. at § 7-108(1-a)(b)).

If the Landlord co-mingles the security deposit with other funds, the Landlord forfeits the right to avail him- or herself of the funds for any purpose and the Tenant is entitled to its immediate return (*see id*. at § 7-103(1); ***DeVries v. Jim Duffy LLC***, 138 N.Y.S.3d 787 (App. Term 1st Dep't 2021)). However, a Landlord may re-gain the ability to retain the security deposit where the co-mingling is cured prior to the expiration or termination of the rental agreement and/or the Tenant's demand for the return of the deposit (*see* ***Harlem Capital Ctr., LLC v. Rosen & Gordon, LLC***, 145 A.D.3d 579, 44 N.Y.S.3d 36 (1st Dep't 2016)).

The law further creates guidelines for the joint inspection of the premises by the Landlord and Tenant both (1) prior to the Tenant taking possession and (2) following notice of either party's intention to terminate the tenancy. Where the Tenant requests an inspection after signing the rental agreement, but prior to taking possession, the parties must jointly perform an inspection and prepare a "written document" memorializing "any existing defects" (General Obligations Law § 7-108(1-a)[c]). An item included within the "document" may not be a basis for the future withholding of the Tenant's security deposit.

After taking possession, if either party indicates an intention to terminate the rental agreement, then the Landlord must provide written notice to the Tenant of the right to have another joint inspection. If the Tenant requests an inspection with more than two (2) weeks remaining on the agreement, then the inspection must occur between one (1) and two (2) weeks prior to lease termination (*id*. at § 7-108(1-a)(d)). Following the inspection, but prior to the Tenant's vacating of the premises, the Landlord must submit an itemized written statement "specifying repairs or cleaning" which may form a basis for a withholding of a portion of the security deposit. Within fourteen (14) days after the Tenant vacates the premises, the Landlord must provide the Tenant an "itemized statement" listing the basis for the actual withholding of the security deposit, and return, if any, remaining portions (*id*. at § 7-108(1-a)(e)). The Landlord's failure to timely provide the itemized statement results in the forfeiture of rights to retain any portion of the security deposit (*id*.).

In any action or proceeding, the Landlord has the burden of proving the "reasonableness" of the withholdings (*id*. at § 7-108(1-a)(f)). A violation of this section may result in damages,

and, a wilful violation may result in punitive damages equal to two (2) times the deposit (*id*. at § 7-108(1-a)(g)).

- remainder of page intentionally left blank -

14. Manufactured Home Parks

Manufactured homes and mobile homes are both recognized as "manufactured homes" under RPL § 233 and adhere to a majority of the eviction proceeding laws applicable to rental properties, with several exceptions (*see generally* ***Lyke v. Anderson***, 147 A.D.2d 18, 23 (2d Dep't 1989) (summary proceeding available to evict occupants of manufactured home park). When situated within a privately owned contiguous parcel of property designed for three (3) or more manufactured homes for year-round living ("manufactured home park"), the provisions set forth within RPL § 233 *et seq*. are applicable to both a manufactured home park owner ("manufactured home park owner" or "Landlord") and the manufactured home owners or manufactured home Tenants ("manufactured home owner" or "Tenant").

The occupant of a manufactured home may be the owner of the manufactured home (but is not required to be) (*see* RPL § 233(a)(1)). The Landlord and Tenant may enter a "rent to own contract" where the parties anticipate the Tenant becoming the owner of the manufactured home upon the fulfilment of a condition(s) or the passage of a specific period of time (*id*. at § 233(a)(6)).

A "manufactured home" is defined as "[a] structure, transportable in one (1) or more sections, which in the traveling mode, is eight (8) body feet or more in width or forty (40) body feet or more in length, or, when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems contained therein" (*id*. at § 233(a)(4)).

A "mobile home," on the other hand, is "[a] moveable or portable unit, manufactured prior to January 1, 1966, designed and constructed to be towed on its own chassis, comprised of frame and wheels, connected to utilities, and designed and constructed without a permanent foundation for year-round living. A unit may contain parts that may be folded, collapsed or telescoped when being towed and expanded later to provide additional cubic capacity as well as two (2) or more separately towable components designed to be joined into one (1) integral unit capable of being again separated into the components for repeated towing" (*id*. at § 233(a)(5)). A mobile home may only be used for residential purposes (*id*.; *see* ***Lazy Acres Park, LLC v. Ferretti***, 118 A.D.3d 1406 (4th Dep't 2014) (inapplicable to commercial properties)).

The permissible grounds for evicting a Tenant from a manufactured home are the failure to pay rent; use of the premises, or any portion thereof, for an illegal trade or business; occupancy that violates a Federal, State or local law or ordinance; or the continued violation of a lease provision or the Landlord's rules for the manufactured home park for more than ten (10) days following notification of the specific breach (RPL § 233(b)(2)-(5)). A thirty (30) day predicate notice is required prior to the commencement of a summary proceeding for either the non-payment of rent or following the expiration of the Landlord's ten day notice to cure the breach of a lease provision and/or park rule (*id*.).

An eviction from a manufactured home may only take place between the hours of sunrise and sunset (*id*. at § 233(d)). The eviction proceeding is governed by the procedures set forth

within Article 7 of the RPAPL with the following modifications to RPAPL 749. After the expiration of all applicable stays, the warrant of eviction may not be executed until the Sheriff/Marshal causes to be formally served upon the manufactured home owner written notice of not less than ninety (90) days (*id*. at § 233(d)(1) (for properties other than manufactured homes, the Sheriff's notice must be not less than fourteen (14) days)). However, if the conditions at the premises "[p]ose an imminent threat to the health, safety or welfare of the other manufactured home tenants," then the Court may shorten the notice period to not less than thirty (30) days (*id*. at § 233(d)(2)). Finally, where the occupant is renting the manufactured home from the manufactured home park owner (i.e., the Tenant does not home the manufactured home), then the notice period is only seventy-two (72) hours (*id*. at § 233(d)(4)).

The HSTPA posed several changes to RPL § 233. For instance, where there is a proposed change in the usage (purpose) of the land upon which the manufactured home park is located, an eviction proceeding based upon the proposed land use change may be commenced no sooner than two (2) years after the manufactured home owners are served with notice of the change (*id*. at § 233(b)(6) (previously was six (6) months); *see* ***STP Assoc., LLC v. Hess***, 994 N.Y.S.2d 230 (App. Term, 9th & 10th Jud. Dists. 2014); ***Amityville Mobile Home Civ. Ass'n Corp. v. Frontier Park Corp.***, 2014 N.Y. Misc. LEXIS 1636 (Suffolk Cnty. Sup. Ct. March 25, 2014)). Parenthetically, if the purchaser of the manufactured home park fails to provide a certification notifying the occupants of the intent to change land usage prior to the sale of the land, then an eviction may not occur for at least five (5) years following the closing (RPL § 233(b)(6)(ii)).

Where a potential buyer offers to purchase the manufactured home park, the manufactured home park owner, prior to acceptance of the offer or the making of a counteroffer, must receive a written certification from the proposed purchaser attesting whether the proposed purchaser, within sixty (60) months of closing, intends to change the use of the land upon which the manufactured home park is situated (*id*. at § 233-a(2)). An acceptance and/or counteroffer by the manufactured home park owner (or any action to market the sale) must include a notice to the proposed purchaser that the manufactured home owners have the right to match the offer and/or counteroffer (*id*.; *see* ***Willow Woods Manufactured Homeowners' Ass'n Inc. v. R & R Mobile Home Park, Inc.***, 81 A.D.3d 930 (2d Dep't 2011)). The manufactured home owners further have the right to form a homeowners' association regarding the purchase (if one does not already exist) comprised of not less than fifty-one percent (51%) of the manufactured home owners (RPL § 233-a(3)).

Formal service of the notice of change of land use is required in accordance with § RPAPL 735, and the notice must simultaneously be served upon all other impacted occupants (*id*. at § 233(b)). Each manufactured home owner is entitled to a stipend from the manufactured home park owner not to exceed $15,000, the precise amount to be determined by the Court (*id*. at § 233(b)(6)(iii)). In determining the stipend amount, the Court must consider the following: (1) the cost to relocate the manufactured home; (2) the number of manufactured homes within the park receiving a stipend; (3) the purchase price for the park; (4) the value of the real property; (5) the value of the development rights of the property; and (6) any other relevant factor (*id*. at § 233(b)(6)(iii)(b)). A warrant of eviction may not be executed until the stipend has been paid (*id*.). In the event the manufactured home owner is not evicted and the summary proceeding is

terminated, the stipend must be returned to the manufactured home park owner (*id*. at § 233(b)(6)(iii)[C]).

In addition, all initial and renewal lease offers must be in writing and include a statement of the Tenant's rights as approved by the Commissioner of Housing and Community Renewal (*id*. at § 233(e)(1)). Although not a result of the 2019 amendments, it is well-established that the manufactured home park owner must offer a renewal lease of at least twelve (12) months to all manufactured home owners, regardless of their standing (*see* ***A.K.A.B. & E. Mobile Home Rentals, Inc. v. Marshall***, 452 N.Y.S.2d 144 (Poughkeepsie Just. Ct. 1982)). The renewal offer to a manufactured home owner without a lease must be provided on October 1st or, in all other situations, it must be provided ninety (90) days prior to the expiration of the existing lease (RPL § 233(e)(2)). The manufactured home owner is afforded thirty (30) days to accept and return the lease renewal, or, the renewal is otherwise deemed to have been declined. The failure on the part of the manufactured home park owner to provide a timely lease renewal results in the manufactured home owner having all of the protections of the existence of a valid rental agreement, and further may only be evicted for cause (*id*. at § 233(e)(4)).

RPL § 233(g)(2) mandates a written disclosure from the manufactured home park owner of all fees, charges and assessments prior to entering into a rental agreement. No fees, charges or assessments may be increased unless at least ninety (90) days written notice of the "date of implementation" is provided (*id*. at § 233(g)(3)). Rent utilities and facility charges may not be increased unless a rental agreement has been offered to the manufactured home owner (*id*.).

If the manufactured home park has six (6) or more manufactured home lots, then the security deposit must be deposited within an interest bearing account (*id*. at § 233(g)(4)[c]). Generally, a manufactured home park owner may not deny a manufactured home owner from selling the manufactured home provided twenty (20) days notice of the intent to sell is provided (*id*. at § 233[i]). The manufactured park home owner may, however, reasonably reserve the right to deny the sale for the remainder of the tenancy, but the "[p]ermission may not be unreasonably withheld" (*id*.; *see* ***Higgins v. Orsland***, 183 A.D.2d 175 (3d Dep't 1992)). The manufactured home park owner may not receive a commission or fee from the sale of the manufactured home unless the park owner acted as an agent for the manufactured home owner and such relationship is memorialized within the written contract of sale" (RPL § 233[i]).

Other than in emergency situations, a manufactured home park owner may not enter the manufactured home owner's manufactured home without consent (*id*. at § 233(j)). The responsibilities, protocols and obligations pursuant to the implied warranty of habitability, retaliatory evictions and one-sided reciprocal attorney's fees lease provisions apply to manufactured homes (*id*. at § 233(m),(n),(o); *see* ***Higgins v. Peranzo***, 179 A.D.2d 871 (3d Dep't 1992) (retaliatory eviction claim); ***Clarkson Mobile Home Park, Inc. v. Ecklund***, 532 N.Y.S.2d 615 (Monroe Cnty. Ct. 1987) (warranty of habitability)).

A manufactured home park owner must provide a written receipt where the payment of rent or any other fees or charges associated with the manufactured home park are paid by a means other than personal check (RPL § 233(q)). The receipt must be signed by the recipient and include the date, the amount, and the premises and the period for which payment was made (*id*.).

Late fees may not exceed three percent (3%) (had been five percent (5%)), and the late fee may neither be compounded nor considered additional rent (RPL § 233[r]). A late fee provision must be included within the written rental agreement to be enforced, however, no late fee may be collected where payment is tendered within ten (10) days of the due date (*id*.).

Rent increases are governed RPL § 233-b which generally limits the increase (all costs including rent, fees, assessments and utilities) to three percent (3%) (*id*. at § 233(e)(5); ***Clarkson Mobile Home Park, Inc.***, 532 N.Y.S.2d at 615 (rent increase invalid where lease was not offered to mobile home Tenants)). However, where the manufactured home park owner demonstrates an increase in operating expenses, property taxes or capital improvement costs, the rent increase, subject to challenge, may be as much as six percent (6%) (RPL § 233-b(2),(6)). A rent increase exceeding six percent (6%) requires Court approval of a Temporary Hardship Application (*id*. at § 233-b(6)).

15. Additional Changes Implemented by the HSTPA

A. *Real Property Law*

1. Refusal To Rent

The HSTPA makes it unlawful to refuse to rent residential property to a prospective Tenant on the grounds that the prospective Tenant is presently, or was previously, involved in a summary proceeding (RPL § 227-f; HSTPA, L. 2019, c. 36, Part M, § 5). There is a "rebuttable presumption" of a violation of RPL 227-f where the Landlord either "request[s] information from a tenant screening bureau" or inspects Court records regarding a potential Tenant, and thereafter refused to offer a lease (*see* RPL at § 227-f(1)).

The Attorney General has standing to prosecute an action in Supreme Court on behalf of a prospective Tenant unlawfully denied an opportunity to rent in violation of RPL § 227-f. The available remedies includes injunctive and declaratory relief in addition to civil penalties between $500 - $1,000 for each violation (*id*. at § 227-f(2)). To avoid a potential conflict, the HSTPA amended Judiciary Law § 212 to prohibit the Unified Court System from selling data regarding residential tenancies to its third-party vendors.

2. Rent Increases and Declination to Renew

As referenced above, effective October 12, 2019, the HSTPA implemented RPL § 226-c for residential premises which requires notification where the Landlord either (1) declines to offer a renewal lease or (2) seeks to re-new the lease but impose a rent increase of at least five percent (5%). The failure to provide written notice results in the tenancy continuing until after both an appropriate notice is sent and the notice expiration period expires (RPL § 226-c(1)). This provision may not be waived in a rental agreement (*id*.).

The duration of the notice period is case specific. Where the Tenant occupied the premises for less than one (1) year and the rental agreement is for a term of less than one (1) year (for example, a month-to-month tenancy), then at least thirty (30) days notice is required. Where the Tenant occupied the premises for more than one (1) year but fewer than two (2) years or the rental agreement is for a term not less than one (1) year but fewer than two (2) years, then at least sixty (60) days written notice is required. Finally, if the tenant occupied the premises for more than two (2) years or the rental agreement is for at least two (2) years, then at least ninety (90) days written notice is required (RPL §§ 226-c(2)(A)(B)[C]).

3. Limit on Fees Charged for Credit and Background Checks

The HSTPA placed financial restrictions on the amount of fees a Landlord may charge for a background and/or credit check. The cumulative maximum charge to the Tenant is the actual cost of the background and credit checks or $20, whichever is less (RPL § 238-a(1)(b); HSTPA, L. 2019, c. 36, Part M, § 10). The Landlord is permitted to demand payment prior to the tenancy but only after copies of the background and/or credit check, and receipt of payment from the credit agency, have been provided to the prospective Tenant (*id*. at §§ 238-a(1)(a),(b)). The fee is automatically waived where the prospective Tenant provides a background and/or credit report prepared within the previous thirty (30) days. A lease provision that waives or limits the above provisions is void as against public policy.

4. Rent Receipts

For residential properties, the Landlord must provide the Tenant a receipt where the rent is paid by any means other than personal check (RPL § 235-e). If the rent is paid by personal check, then the Tenant must request a receipt, but once requested, the request is deemed continuous for the duration of the tenancy (RPL § 235-e(b)). The Landlord must maintain a "record" of all receipts for cash payments for three (3) years (*id*.).

Where the rent is paid directly to the Landlord or Landlord's agent, the receipt must be given "immediately" to the Tenant (RPL § 235-e[c]). If the rent is paid indirectly to the Landlord, then the Landlord has fifteen (15) days from receipt to provide a receipt (*id*.). The receipt must state the date, the amount paid, identify the premises and the period for which rent was paid, and include the signature and title of the person receiving the rent (RPL § 235-e(a)). The law does not provide a penalty for noncompliance.

5. Retaliatory Eviction

The HSTPA expanded protections for retaliatory evictions from residential premises (excluding owner-occupied dwellings with fewer than four (4) units) by expressly qualifying the Implied of Warranty of Habitability as protected Tenant activity and prohibiting substantial alterations to the tenancy in retaliation for protected conduct (RPL § 223-b(1),(2)). The statute further creates a rebuttable presumption that the Landlord acted unlawfully where the Tenant is served with a notice to terminate/quit, an action for possession is commenced, and/or the Landlord engages in any effort to substantially alter the tenancy within one (1) year (previously was six (6) months) of the protected activity (RPL § 223-b(5)).

Violations of this section may result in liability for civil damages, plus attorney's fees (RPL § 223-b(3)). For the defense to apply, the conditions must not have been caused by the Tenant, the Tenant's household or the Tenant's guests.

6. Mitigation

Under the HSTPA, where a Tenant vacates a dwelling (residential premises) in violation of the rental agreement, the Landlord must in good faith "take reasonable and customary actions" to re-rent the premises at the lower of either the fair market rate or the previously agreed rate between the parties (RPL § 227-e). The new rental agreement terminates the prior lease and mitigates the damages of the prior Tenant. The statute carves out exceptions for the following: (1) a contract for the sale of the premises; (2) a lease-with-obligation-to purchase agreement; and (3) installment land sale contracts (*id*.; RPL § 461(4)(a)[c](d)).

The burden to demonstrate mitigation is on the party seeking damages. A lease provision waiving the duty to mitigate is "void as contrary to public policy" (RPL § 227-e).

B. *RPAPL*

1. Payment of Rent Prior to Hearing (Non-payment Proceeding)

RPAPL § 731 was amended to provide at subdiv. 4 that the payment of rent in a non-payment proceeding prior to the hearing renders the proceeding moot. In other words, the full payment of rent arrears prior to an adjudication on the merits renders the Landlord whole, and, as a result, the tenancy continues. In addition, the warrant of eviction is stayed and the judgment is vacated where the rent is paid prior to the execution of the warrant provided the non-payment of rent was not due to bad faith. This applies to both residential and commercial properties.

2. Proceeding Against the Estate

The HSTPA permits a Landlord to maintain a summary proceeding against the Estate of the Tenant where the Tenant passes away during the tenancy and rent is owed. Any other occupant lawfully in possession may be named in the non-payment proceeding, but the warrant may not be used to remove them (RPAPL § 711 (2)). The changes eliminated a three (3) month

waiting period prior to commencing a summary proceeding where an administrator had not be named. Parenthetically, if the Tenant is the lone Respondent in the proceeding and was deceased at the time the summary proceeding was commenced, then the action is a nullity, incapable of amendment against the Estate or any subsequent occupants, even upon consent (*see* ***356-358 SJP, LLC v. Stewart***, 130 N.Y.S.3d 595 (App. Term, 2d, 11th & 13th Jud. Dists. 2020)).

3. Return Date and Service

RPAPL § 732 provides that where required by the rules of the local Appellate Division, the Notice of Petition and Petition in a non-payment proceeding are returnable within ten (10) days of service (was previously five (5) days). If the Tenant fails to appear, a judgment must be entered in favor of the Landlord and, absent a circumstance permitting a longer stay pursuant to RPAPL § 753, the Court may stay issuance of the warrant of eviction up to ten (10) days from the date of service (RPAPL § 732(3)). If the Landlord prevails and the Tenant appears, then the Court may stay issuance of the warrant of eviction up to five (5) days from the date of the determination (RPAPL § 732(2)).

4. Unlawful Evictions

Only the Sheriff, pursuant to a lawful order of the Court, may return possession of residential property to the Landlord. An unlawful eviction (e.g., the use of self-help and changing of the locks without the tenant's permission or providing access) is codified as a crime in New York, a Class A Misdemeanor (maximum jail sentence of one (1) year). An offender may further be liable for civil penalties of $1,000 - $10,000 for each violation (RPAPL § 768).

5. Warrant of Eviction

The warrant of eviction must state the earliest date the eviction may occur (RPAPL § 749(1)). In addition, the 72-Hour Rule has been eliminated. Now, the Sheriff/Marshal must formally serve a Fourteen (14) Day Notice prior to performing the eviction after the expiration of all stays. The warrant must be executed on a business day (Monday - Friday) between sunrise and sunset (RPAPL § 749(2)(a)).

Of note, the Sheriff's failure to file an affidavit of service following service of the 14-Day Notice does not negate or adversely impact enforcement of the judgment or warrant (***Dixon***, 192 A.D.3d at 1428). Moreover, the Appellate Term for the Second, Eleventh and Thirteenth Judicial Districts has held that the failure to serve the Tenant with a 14-Day Notice (then 72 Hours) altogether similarly is of no consequence and does not negate the enforcement of the judgment and/or warrant (***Molinelli***, 138 N.Y.S.3d at 790) (noting that the Tenant agreed to vacate the premises via a stipulation of settlement entered into during the summary proceeding)).

IV. RESPONSE TO THE PANDEMIC

As of December 1, 2021, of the approximate 48 million COVID-19 cases reported within the United States, there have been in excess of 777,000 deaths. New York comprises approximately 2.7 million of the total COVID-19 cases for the Nation (or 5.62%) and approximately 57,000 deaths (7.34%) (*see* N.Y. Times Coronavirus Outbreak Online Tracker, dated Dec. 1, 2021).

In response to the COVID-19 Pandemic, which the State has recognized from both a legal and a policy perspective as commencing on March 7, 2020 and continuing though January 15, 2022, the Federal and State governments have enacted several laws and issued a series of Orders to assist those impacted. The Courts have similarly undertaken measures through Administrative Orders ("AO") to implement the new legislation and to provide a framework for the Courts to remain operational during the Pandemic.

The actions of all three (3) branches of the Federal and New York State governments are generally described below to provide both a recap and a blueprint for the government's ongoing handling of the Pandemic and the Court's day-to-day handling of eviction proceedings. These materials are not intended to provide a complete recitation of the government's response, but instead are provided in a summary fashion as applicable to Landlord and Tenant matters to assist in the adjudication of eviction proceedings.

The reader may wish to review Chart #2, "Roadmap for Handling Cases During the Pandemic," for a more succinct review of the protocols and procedures implemented due to COVID-19 and the impact on the day-to-day handling of eviction proceedings. For more information about the State's emergency rental assistance programs, Landlords and Tenant may call 844-NY1RENT (844-691-7368) or visit online at www.otda.ny.gov/ERAP.http://www.suffolkcountyny.gov

1. Current New York COVID-19 Pandemic Laws

A. ***Tenant Safe Harbor Act*** (creates an affirmative defense)

On June 30, 2020, the Tenant Safe Harbor Act ("TSHA") was enacted. The TSHA, which applies to residential properties only, prohibits the issuance of a judgment of possession and/or warrant of eviction against a Tenant due to the non-payment of rent where the Tenant demonstrates that he/she "***suffered a financial hardship***" during the COVID-19 Period (*i.e.*, March 7, 2020 - January 15, 2022) (as amended within Part D of the Emergency Rental Assistance Program on Sept. 2, 2021) ("ERAP Amendments", which are further described herein)).

Where the defense is successfully asserted, the Court may only award a prevailing Landlord a money judgment for rent arrears. Section 2 explicitly provides that the defense is exclusively available for rent *accruing or having become due during the COVID-19 Period*. The

Court must consider the following factors in determining whether the Tenant suffered a financial hardship: (1) the Tenant's or lawful occupant's income prior to the COVID-19 Period; (2) the Tenant's or lawful occupant's income during the COVID-19 Period; (3) the Tenant's or lawful occupants liquid assets; (4) the Tenant's and lawful occupants eligibility and receipt of government financial assistance including cash assistance, supplemental nutrition assistance, disability assistance, home energy assistance, unemployment insurance and emergency rental assistance; and (5) any additional relevant factor (Part D, § 2 of the ERAP Amendments). Of note, the TSHA will remain in effect (absent subsequent legislation) beyond the expiration of the eviction moratorium.

B. *Emergency Rental Assistance Program of 2021*

On April 16, 2021, the COVID-19 Emergency Rental Assistance Program of 2021 ("ERAP") was enacted for the purpose of distributing billions of Federal dollars of rental assistance designated for New York, in addition to $100 million in State funding. Although procedures for recovering such funding is generally beyond the purview of the Court, ERAP is of practical import to the Court's day-to-day handling of eviction proceedings. Moreover, the Court is required to provide Tenants with notice of available ERAP programs and information on the application process through the State's portal.

ERAP funds may only be applied to residential properties. Both Landlords and Tenants may apply for the funding, and the legislation anticipates mutual cooperation. The Landlord's failure to participate in the ERAP application process may constitute an affirmative defense in an eviction proceeding. The submission of an ERAP application, whether by the Landlord or the Tenant, stays the proceeding (or filing of the action if not previously commenced) until there is a finding of "ineligibility."

Payment under ERAP may be made on behalf of the Tenant for rent arrears and/or utilities accruing on or after March 13, 2020, for up to twelve (12) months, with the potential of an additional three (3) months in prospective payments where the Tenant is a member of a "rent burdened household" (i.e., 30% or more of household gross monthly income goes to rent) (§ 9). When ERAP funding is accepted (there is no option for the Landlord to decline), the Landlord consents to the following: (1) arrears are deemed paid in full, and a non-payment proceeding may not be commenced for that period; (2) late fees are waived; (3) the Tenant's rent may not be raised for, at minimum, one (1) year following the initial ERAP payment; (4) the Tenant may not be evicted due to an expired lease or a holdover for at least twelve (12) months following such payment (unless the rental unit is within a building containing four (4) or fewer units, in which case, the Landlord may refuse to extend the lease if the Landlord or an immediate family member intends to immediately occupy the unit as a primary residence); and (5) provide the Tenant notice of these protections (§ 9(2)(d)).

C. *Amendments to ERAP Extending the Moratorium*

On September 2, 2021, Governor Kathy Hochul signed into law several amendments to ERAP ("ERAP Amendments"). The ERAP Amendments, *inter alia*, (1) extended the eviction

moratorium for most properties (residential and commercial) through ***January 15, 2022*** (had been August 31, 2021) and, in the process, (2) reinstated modified versions of (a) The COVID-19 Emergency Eviction and Foreclosure Prevention Act (2020) ("COVID-19 Act"), part of which (Part A) was held unconstitutional by the United States Supreme Court, and (b) The Protect Our Small Businesses Act (2021), which had expired on August 31, 2021. The ERAP Amendments further reinstated the rebuttable presumption of "financial hardship" on the part of the Tenant by the submission of a COVID-19 Financial Hardship Declaration Form.

The ERAP Amendments are to sunset on January 15, 2022 (unless further extended), except for the rebuttable presumption of financial hardship (Part A, §§ 1(4), 12). Parenthetically, on November 17, 2021, Governor Hochul announced that the State's ERAP Program would cease taking new applications in most regions because the $2.4 billion emergency rental assistance funds allocated to the State had been exhausted. Through November 12, 2021, approximately 165,000 of the more than 280,000 ERAP applications submitted through the State's portals had been processed. The Governor has since requested an additional $996 million in Federal funding to continue the ERAP program (*Governor Hochul Announces New York State Requests Additional Federal Funding For Emergency Rental Assistance* (Nov. 12, 2021), www.governor.ny.gov).

.

The submission of a COVID-19 Financial Hardship Declaration Form automatically results in a stay of pending residential and commercial eviction proceedings (and the commencement of new proceedings) through January 15, 2022. The ERAP Amendments further extended the moratorium protections to those applying for ERAP assistance via a municipality that elected to opt out of the State's ERAP program (e.g., Rochester, Yonkers, and the Towns of Hempstead, Islip and Oyster Bay on Long Island).

Notably, the ERAP Amendments addressed the Due Process concerns raised in ***Chrysafis v. Marks***, 141 S.Ct. 2482 (2021), which held that the portion of the COVID-19 Act granting an automatic stay of the eviction proceeding based solely upon the submission of a COVID-19 Hardship Declaration Form, without affording the Landlord an opportunity to challenge the Tenant's declaration, was unconstitutional. The ERAP Amendments further provide for the sharing of ERAP application information with the Office of Court Administration for the purpose of identifying the status of cases (Part A, § 3) and directs the Court to continue to provide Tenants with information on applying for ERAP funds (Part A, § 11).

1. Commercial Properties

Part B of the ERAP Amendments extended the eviction protections (and exceptions) to commercial Tenants. An eligible commercial Tenant is defined as (1) a resident of the State of New York; (2) independently owned and operated; (3) not dominant in its field; and (4) employs not more than 100 persons (Part B, subpart A, § 1(3)).

For the stay to be invoked, the commercial Tenant must submit a Hardship Declaration Form attesting that due to the COVID-19 Pandemic, the commercial Tenant has (1) suffered a significant loss of revenue; (2) a significant increase in necessary expenses related to purchasing and providing protective equipment to employees or installing same within the leased premises;

or (3) would suffer a hardship due to moving expenses and/or difficulties in relocating. The commercial Tenant must further represent that any public financial assistance received did not "fully make up for the business's loss of revenue or increased expenses" (Part B, subpart A, § 1).

Submission of the Hardship Declaration Form creates a rebuttable presumption that the commercial Tenant is experiencing a financial hardship (*id*., Part B, subpart A, § 9). The ERAP Amendments permit for a challenge to the presumption provided the Landlord, on notice to the commercial Tenant, makes a good faith assertion that the commercial Tenant is not experiencing a financial hardship (Part B, subpart A, § 10). Where the objection is properly asserted and a good faith basis for the challenge exists, the Court must conduct a hearing on the application. If, after the hearing, the Court finds that a financial hardship was not experienced, then the case resumes (*id*.). Otherwise, the stays remains in place through January 15, 2022 (unless extended by subsequent legislation).

In addition, Part B of the ERAP Amendments continues to require the Landlord to include a Hardship Declaration Form with all notices, and the Landlord must further make an attestation of compliance when the proceeding is commenced. The Landlord's non-compliance with this obligation will result in the Clerk of the Court rejecting the Petition (Part B, subpart A, §§ 3-4).

The ERAP Amendments further prohibit the use of self-help for commercial premises, even where permitted in a lease agreement, through January 15, 2022 (Part B, subpart A, § 2). In those proceedings where the judgment and warrant were issued prior to September 1, 2021, but not yet executed upon, execution is automatically stayed so that the Court may conduct a conference and/or hearing (if necessary) to determine whether the stay should continue (Part B, subpart A, § 6).

For commercial cases, the warrant of eviction must include the following language to be enforceable: (1) the Tenant has not submitted the hardship declaration and the Tenant was properly served with a copy of the hardship declaration, and list the dates of service of same by the Petitioner and/or the Court; OR (2) the Tenant intentionally caused significant damage to the premises; OR (3) the Tenant is ineligible for a stay because the Court has found the Tenant's hardship declaration claim invalid or the Tenant is persistently and unreasonably engaging in behavior that (a) substantially infringes upon the use and enjoyment of other Tenants or occupants or (b) causes a substantial safety hazard to others, with a description of the conduct (Part B, subpart A, §§ 6(2),(5), 7). If "objectionable conduct" was not previously alleged in the Petition, the Landlord is not permitted to amend the Petition to assert this claim. Rather, a new proceeding would have to be commenced (Part B, subpart A, § 7).

In cases where the judgment and warrant were awarded prior to September 1, 2021 based upon objectionable conduct, the Court must conduct a hearing to determine whether the objectionable conduct is "continuing" (*id*.). If the Court sustains the Landlord's claim of continuing objectionable conduct, then the stay is lifted and the case may proceed (*id*.).

2. Residential Properties

Part C of the ERAP Amendments essentially mirrors the provisions for commercial properties set forth within Part B, with a few exceptions. In doing such, Part C reinstated the COVID-19 Act for residential properties with modifications in response to ***Chrysafis v. Marks***. The amendments are similarly effective through January 15, 2022, and are applicable to all residential properties (non payment and holdover proceedings), with the exception of seasonal rentals where the Tenant has another residence to return (Part C, subpart A, § 1).

Residential eviction proceedings are stayed through January 15, 2022 (and new proceedings may not be commenced) where the Tenant submits a COVID-19 Hardship Declaration Form stating that he/she is either ***(a) "[e]xperiencing financial hardship, and unable to pay [his/her] rent in full or obtain alternative suitable permanent housing ..."*** due to any of the following during the COVID-19 Period: (1) significant loss of household income; (2) increase in necessary out-of-pocket expenses related to performing essential work or health impacts; (3) attending to a family member (child, elderly, disabled and/or sick) negatively impacted a household member's ability to earn income or increased out-of-pocket expenses; (4) moving expenses and difficulty in securing a new residence render it a hardship to relocate; or (5) other factors that significantly reduced income or significantly increased expenses OR ***(b) moving would "pose a significant health risk due to a household member's increased risk for severe illness or death due to age (over 65) or disability or pre-existing condition*** (Part C, subpart A, § 1(4) (emphasis added)).

The Tenant's Financial Hardship claim, and the resulting rebuttable presumption, may be challenged (Part C, subpart A, § 9). To rebut the presumption, the Landlord may move by written notice asserting a good faith basis to challenge the claim of financial hardship. A hearing is required on a properly submitted motion. Following the hearing, if the Court finds that a financial hardship was not experienced, then the case resumes. Otherwise, the case continues to be stayed.

Similar to commercial properties, the Landlord must continue to provide the COVID-19 Hardship Declaration form with required notices and further attest at the time of commencement of the proceeding that this obligation has been fulfilled, otherwise the Clerk of the Court may not accept the Petition (Part C, subpart A, §§ 3-4). Prior to January 15, 2022, the Court may not issue a default judgment or permit the execution of an existing judgment and warrant based upon a default until after a hearing is held at the Landlord's request and further upon submission of proof that the Petitioner provided the Tenant of written notice of the request (Part C, subpart A, § 5). Moreover, default judgments issued prior to September 1, 2021 are automatically vacated (regardless of any Court proceedings that occurred subsequent thereto), and upon written request of the Tenant, the case shall be restored to the Court's Calendar (*id*.).

However, where a judgment and warrant were issued prior to September 1, 2021, but not yet executed upon, the matter is stayed until the Court conducts a status conferences. Further similar to commercial properties, the submission of a COVID-19 Hardship Declaration form at any time prior to the eviction institutes a stay on the proceeding until January 15, 2022, subject to the Landlord's challenge on proper notice (Part C, subpart A, § 6).

The warrant of eviction for residential properties must include the following language: (1) the Tenant has not submitted the hardship declaration and the Tenant was properly served with a copy of the hardship declaration, and list the dates of service of same by the Petitioner and/or Court; OR (2) that the Tenant is not entitled to a stay because the Court found the Tenant's Hardship Declaration to be invalid or the Tenant intentionally caused significant damage to the premises or the Tenant is persistently and unreasonably engaging in behavior that (a) substantially infringes on the use and enjoyment of other tenants or occupants or (b) causes a substantial safety hazard to others, with a description of the conduct (Part C, subpart A, § 6).

The procedural requirements also mirror that of commercial properties. Specifically, an existing proceeding that does not include an allegation of objectionable conduct by the Tenant may not be amended to assert same. Rather, a new proceeding is required. Moreover, if a judgment and warrant were awarded prior to September 1, 2021 based upon objectionable conduct, the Court must conduct a hearing to determine whether the Tenant is continuing in such objectionable conduct (*id*.). If the Court sustains the Landlord's claim of continuing objectionable conduct, then the case may proceed (*id*.).

2. Administrative Orders of the Chief Administrative Judge

In addition to the aforementioned, former Governor Cuomo issued several Executive Orders (EO) and Chief Administrative Judge Lawrence K. Marks issued a series of Administrative Orders (AO) addressing evictions and Court Operations. On or about June 25, 2021, during a downward trend in COVID-19 positive diagnoses, the former Governor rescinded virtually all EOs pertaining to evictions (and foreclosures) due to the existing legislation (*see* EO 210, dated June 24, 2021, rescinding EOs 202 - 202.11). Judge Marks subsequently issued additional AOs providing instruction on the Court's handling of eviction proceedings going forward.

A. *AO 245/21 - Resumption of Residential Eviction Proceedings (Aug. 13, 2021)*

AO 245/21 authorized the ***immediate*** resumption of residential eviction proceedings in accordance with "current or future federal and state emergency relief provisions governing time limits for commencement and prosecution of [eviction] matters ....". Thus, residential eviction proceedings may proceed unless stayed by ERAP or the Amended CDC Order (expressly referenced within the AO). Of note, the CDC Orders are no longer to be considered as they were found to be unlawful by the United States Supreme Court.

Judge Marks further directed, with regard to residential eviction proceedings commenced *before March 17, 2020*, that the prior mandatory Court "conference" requirements continue to apply and the Court must ***initiate*** a status or settlement conference before resuming a pending case, including those cases where a warrant of eviction was previously issued but not executed. During the conference, the Court must review the procedural history of the case for compliance with notice requirements, assess the impact of the Pandemic upon the parties, consider available relief, defenses and stays, and refer all unrepresented parties to counsel and/or agencies for assistance

and alternate dispute resolution ("ADR") where appropriate. These steps are to be taken with the intent of resolving the eviction proceeding.

Following the conference, if the case is not resolved, the Court may proceed with the case as it deems suitable and appropriate. AO 245/21 further allows residential eviction proceedings to be conducted remotely or in-person.

B. *AO 244/21 - ERAP Notification (Aug. 13, 2021)*

To monitor potentially thousands of residential eviction proceedings stayed due to pending ERAP applications, AO 244/21 directs Landlords in receipt of ERAP funds or with knowledge that an ERAP application is pending to submit a "Notice of Pending or Completed Rental Assistance" form. As indicated previously, this is done in conjunction with the provisions of the ERAP Amendments directing the Office of Court Administration to have access to ERAP applications for the purpose of determining the status of the claim and whether a stay continues to apply.

C. *AO 261/21 - ERAP Amendments (Sept. 8, 2021)*

AO 261/21 lists the changes implemented by the ERAP Amendments and restates that submission of the Hardship Declaration Form extends the stay through January 15, 2022 (unless the Court directs otherwise following a successful challenge), and that this provision is applicable to both residential and commercial tenancies. In addition, the Landlord and the Court must provide the Tenant with notice of the Landlord's challenge to the hardship. The Court's notice must include a hearing date, location and time. If a Hardship Declaration was previously submitted, then the Landlord must move by written motion, on notice to the Tenant, and assert a good faith basis for the challenge to the Tenant's hardship claim. Where the Court sustains the validity of the hardship claim following a hearing, the case continues to remain stayed through January 15, 2022. If the Tenant did not submit an application for ERAP funds, the Court must further direct the Tenant to do so and provide the Tenant with information for completing such. On the other hand, if the hardship claim is deemed improper, then the case may proceed.

With regard to residential properties, the AO further provides that a default judgment may not be issued without a hearing. Where a default judgment was either awarded before December 28, 2020 or between August 13, 2021 and September 2, 2021, the default must be vacated and the case restored to the Calendar upon the Tenant's written or oral request. There is no similar requirement regarding commercial properties.

The AO further sets forth the applicable time periods for holding hearings in cases where a judgment and/or warrant of eviction were issued but not executed. Where the warrant was issued prior to September 2, 2021, the warrant has no effect unless it states that the Landlord served a Hardship Declaration Form on the Tenant (with dates) and a completed Hardship Declaration Form was not returned or the Tenant is not entitled to a stay because the Court determined the hardship claim was invalid or the Tenant caused significant property damage, is persistently and unreasonably engaging in nuisance behavior or causes a safety hazard to others (with a description

of the behavior).

In a case based upon the Tenant *causing significant damage to the premises*, the Court must conduct a hearing to determine whether the Tenant is continuing to intentionally cause the damage. On the other hand, if a warrant regarding a residential property was issued before December 28, 2020 or between August 13, 2021 and September 2, 2021 on the grounds the Tenant persistently engaged in *unreasonable behavior that substantially infringed upon the quiet use and enjoyment or posed a safety hazard to others*, then the Court must similarly conduct a hearing to determine whether the Tenant is continuing with this behavior.[5] The same is true for commercial Tenants where the warrant was issued prior to March 9, 2021. Finally, the AO continues to prohibit commercial Landlords from using self-help to regain possession through January 15, 2022.

- remainder of page intentionally left blank -

[5] Where an ERAP application results in the stay of enforcement of a judgment issued prior to September 2, 2021, the stay will be vacated where following a hearing it is demonstrated that the residential Tenant intentionally caused destruction of the premises or persistently engages in nuisance/objectionable behavior. The purpose of the hearing is to determine whether the behavior is continuing. If the behavior is continuing, then the case may proceed. Otherwise, the stay continues.

CHART #1:

PREDICATE NOTICE

Relationship		**Days**	**Section**
1. **Unpaid Rent** (Res. and Commerc.)	(1)	14 days (rent demand)	RPAPL § 711(2)
	(2)	5 days (reminder)	RPL § 235-e
2. **Month-to-Month (Outside NYC)**			
Landlord terminates:			
Residential		at least 30 days, 60 days or 90 days	RPL § 226-c
Commercial		at least 1 month	RPL § 232-b
Tenant terminates:			
Residential and Commercial		at least 1 month	RPL § 232-b
3. **Month-to-Month (NYC)**			
Landlord terminates:			
Residential		at least 30 days, 60 days or 90 days	RPL §§ 232-a, 226-c
Commercial		at least 30 days	RPL § 232-a
Tenant terminates:			
Residential and Commercial		at least 30 days	RPL § 232-a
4. **L Refuses to Re-New** (Residential)		at least 30 days, 60 days or 90 days	RPL § 226-c
5. **Rent Increase (at Least 5%)** (Residential)		at least 30 days, 60 days or 90 days	RPL § 226-c
6. **Lease Expires** (Commercial)		No notice	

(cont.)

Relationship		Days	Section
7.	**Licensee**	10 days	RPL § 713(7)
8.	**Guest of Tenant** (Tenant vacates)	10 days	RPL § 713(7)
9.	**Squatter**	10 days	RPL § 713(3)
10.	**Tenant-at-Will**	30 days	RPL § 228
11.	**Post-Foreclosure**	10 days, 90 days or Longer	RPL § 713(5); RPAPL §1305
12.	**Victim of Domestic Violence**	10 days	RPL 227-c
13.	**Military Families** (Service Member and Spouse)	No notice * provided entered military after lease executed	Mil. Law § 310
14.	**Tenant of a Life Tenant**	10 days * after life estate terminated	RPL §713(6)
15.	**Tenancy-by-Sufferance**	30 days	RPL § 228
16.	**Illegal Activity/Bawdy House** (Landlord fails to evict)	5 days to the Landlord by Tenant or Law Enforcement	RPAPL § 715

CHART #2:

ROADMAP FOR HANDLING CASES DURING THE PANDEMIC

COVID-19 CASE PROTOCOLS AND PROCEDURE

1. Eviction proceedings resume subject to applicable stays.

2. The COVID-19 Period is: **March 7, 2020 - January 15, 2022**

3. **ERAP APPLICATION**
(*Residential Cases ONLY*).

If an ERAP APPLICATION is **PENDING**, the case is **STAYED** until January 15, 2022.

EXCEPTIONS:

1. Finding of **Ineligibility for ERAP** (proceeding resumes)

2. Where a warrant was issued prior to September 2, 2021 based upon **the Tenant intentionally causing damage to the property or persistently engaging in objectionable or nuisance behavior**, and following a HEARING [on notice], the Court finds that the Tenant continues to engage in such behavior (execution of warrant may take place); and/or

3. Landlord **RECEIVES THE RENT** for the applicable period (case dismissed)

- remainder of page intentionally left blank -

4. **COVID-19 HARDSHIP DECLARATION FORM**
(*Residential and Commercial Cases*).

A. Submission of a COVID-19 Hardship Declaration Form:

1. creates a **REBUTTABLE PRESUMPTION** of financial hardship; and
2. **STAYS** pending proceedings (and prohibits commencement of new proceeding) through January 15, 2022

B. **CHALLENGING** the rebuttable presumption:
1. in writing
2. on notice to the Tenant (Court must provide notice as well); and
3. where a good faith belief is asserted why the stay is not applicable.

C. The Court MUST conduct a **HEARING**.

D. STANDARD TO VACATE STAY:

1. Tenant ***did NOT sustain a Financial Hardship***;

OR

2. If asserting Objectionable/Nuisance Exception, the Tenant:

a. ***INTENTIONALLY caused significant damage to the premises***; OR

b. ***PERSISTENTLY AND UNREASONABLY is engaging in behavior that (a) substantially infringes on the use and enjoyment of other tenants or occupants or (b) causes a substantial safety hazard to others***.

If presumption rebutted, then the stay is lifted and the case may proceed. If the Landlord is unsuccessful at the Hearing, then the case remains STAYED through January 15, 2022.

E. Landlord may not amend the Petition to assert Nuisance/Objectionable conduct. Instead must commence a new proceeding.

5. **<u>WARRANT ISSUED BUT NOT EXECUTED PRIOR TO 9/2/21</u>**:
(*Residential and Commercial Cases*)

A. Execution **STAYED** until the Court holds a **STATUS CONFERENCE**.

EXCEPTIONS:
(a **Hearing** is required (not a conference))

1. RESIDENTIAL AND COMMERCIAL CASES

Warrant based upon Tenant *causing significant damage to premises*.

<u>Hearing</u>: to determine whether the Tenant is ***continuing to intentionally cause the damage***.

2. RESIDENTIAL CASES ONLY:

Warrant (a) issued before December 28, 2020 OR between August 13, 2021 and September 2, 2021 and (b) issued on the grounds the *Tenant persistently engaged in unreasonable behavior that substantially infringed the quiet use and enjoyment or posed a safety hazard to others*.

<u>Hearing</u>: to determine whether the Tenant is ***continuing with this unreasonable behavior***.

3. COMMERCIAL CASES ONLY:

Warrant (a) issued before March 9, 2021 and (b) issued on the grounds the commercial *Tenant persistently engaged in unreasonable behavior that substantially infringed the quiet use and enjoyment or posed a safety hazard to others*.

<u>Hearing</u>: to determine whether the Tenant is ***continuing with this unreasonable behavior***.

6. **TENANT SAFE HARBOR ACT**
(*Residential Cases Only*)

* consider if case is stayed/pending ERAP application or Hardship Declaration

A. *If* the case was commenced or a warrant was issued **PRIOR to March 17, 2020**:

1. The Court must first **INITIATE a CONFERENCE** (AO 245/21; Aug. 17, 2021);
2. If *CASE NOT RESOLVED AT CONFERENCE*, then Court may **PROCEED AS IT DEEMS APPROPRIATE** (remote or in-person) (AO 245/21)

B. *If* the case was commenced **AFTER March 17, 2020**:

1. The Court may first **INITIATE a CONFERENCE** (not required pursuant to AO 245/21);
2. If ERAP funds received (non-payment), then the case is **DISMISSED**
3. If *CASE NOT RESOLVED AT CONFERENCE*, the Court may **PROCEED AS IT DEEMS APPROPRIATE** (remote or in-person) (AO 245/21).

C. If a **HEARING**: **Tenant Safe Harbor Act** defenses-

1. The COVID-19 Period is 3/7/20 - 1/15/22.
2. Tenant demonstrates suffered a **FINANCIAL HARDSHIP** during the COVID-19 Period, then NEITHER a judgment of possession nor warrant of eviction may be issued due to the non-payment of rent through January 15, 2022 (non-payment proceedings).

   Factors to consider for FINANCIAL HARDSHIP:

   a. Tenant's income prior to the COVID-19 Period;
   b. Tenant's income during the COVID-19 Period;
   c. Tenant's liquid assets;
   d. Tenant's eligibility for and receipt of cash assistance, supplemental nutrition assistance program, supplemental security income, ERAP, NYS Disability Program, Home Energy Assistance Program, and/or unemployment insurance/benefits (Federal or State); OR
   e. Any other relevant factor (*Tenant Safe Harbor Act*, § 2(2), ERAP Amendments).

3. Court may award a money judgment for the full amount owed.

7. **DEFAULT JUDGMENTS**:

A. Residential Properties

* Issued between March 7, 2020 - September 1, 2021:

Automatically VACATED regardless of any subsequent Court proceedings. Case must be restored to the Calendar if requested by the Tenant
(ERAP Amendments, Part C, sect. 6).

* Until January 15, 2022:

no new Default Judgments may be issued unless Court holds a **HEARING** upon proof Landlord provided WRITTEN NOTICE to the Tenant of Landlord's intent to obtain default judgment.

B. Commercial Properties

* All judgments issued but not executed (including default judgments) are stayed until after the Court holds a **STATUS CONFERENCE**
(it does not appear that the above requirements for vacating previously issued default judgments apply to commercial cases).

- remainder of page intentionally left blank -

8. **Additional Items**:

A. Residential Cases

* OCA mailed notices to Landlords and Tenants regarding ERAP.

* The **Court SHOULD** notify Tenants with existing cases of the ERAP program and how to apply for ERAP funds (ERAP, § 11).

* Landlord's failure to reasonably cooperate with the ERAP process (whether by act or omission or unavailability following statutory notice provisions) constitutes an **affirmative defense** to the Landlord's claim for the non-payment of rent
(ERAP, § 9(2)[b][c]).

B. Residential and Commercial Cases

* Landlord must serve a Hardship Declaration Form with all required notices.

* Landlord must affirm in writing when filing a new eviction proceeding that the Hardship Declaration Form was provided (and when). Otherwise, the Clerk may not accept the filing.

C. RPAPL § 749 (3)

* In all non-payment proceedings, the payment of the full amount owed prior to the execution of the warrant vitiates the warrant, unless the Landlord demonstrates the rent was withheld in "bad faith".

* The Court for "good cause" shown may vacate or stay execution of the warrant at any time, or, if already executed upon, restore the Tenant to possession.

CHART #3:

CHANGES FROM HSTPA:
"Before" and "After" 2019

QUICK REFERENCE CHART

Topic	Pre-HSTPA	Current Status
Rent (defined - Residential)	-	amount charged in consideration for occupying a dwelling pursuant to a written or oral agreement *RPAPL § 702*
Rent Money Judgment	Rent, U & O and Additional Rent	Rent and U & O only *unclear if Additional Rent permitted, and, if not, is it permitted in commercial case? *RPAPL § 702* "No other fees, charges or penalties may be sought"
Rent Money Judgment Residential Attorney's Fees on Default	Yes (Added Rent)	No *RPAPL § 234*
Rent Demand Residential/Commercial	3 Day Written ***OR*** Oral Rent Demand	14 Day Written Rent Demand *RPAPL § 711(2)*
Rent Demand Late Rent Notice (in addition to 14 Day Rent Demand)	-	5 Days After Due Date (certified mail) *RPL 235-e*

(cont.)

Topic	**Pre-HSTPA**	**Current Status**
Late Fees Residential must be 5 days late and send late rent notice	5% unconscionable	permit 5% or $50 (the lesser) *RPL § 238-a* * unclear if may recover in summary proceeding
Rent Increase Residential 5% or more	No Notice	Written Notice *RPL § 226-c*
Rent Paid Prior to Hrg./ non-payment proceeding	case law (case is terminated)	statute (case is terminated) *RPAPL § 731*
Rent Receipt Residential	Yes (no specifics)	Yes (must keep for 3 years) Automatic (no need to request) [pay other than check] Immediately [pay directly to Landlord] 15 days [pay indirectly to Landlord] *RPL § 235-e*
Mitigation Residential	No	Yes *RPL § 227-e*

Topic	Pre-HSTPA	Current Status
Refuse to Renew Residential	None	Lease Less than 1 year OR occupy lease < 1 year (30 days)
	None	Lease >= 1 year and < 2 years OR occupy between 1 and 2 years (60 days)
	None	Lease >= 2 years OR Occupy >= 2 years (90 days) *RPL § 226-c*
Refusal to Offer Lease Residential Tenant Screening Bureau/ Court Records	Legal	Unlawful *RPL § 227-f*
Background Check/ **Credit Report Fee** Residential	None	Max. $20 or Actual Cost (whichever is less) *RPL § 238-a*
Service Notice of Petition/Petition	"5 and 12 Rule"	"10 and 17 Rule" *RPAPL § 733*
Answer	Usually not required (8 and 12 Rule)	Never required *RPAPL § 734*

| Topic | Pre-HSTPA | Current Status |

Adjournments	Discretionary but usu. 1 granted not more than 10 days (2 weeks in practice)	Entitled on first Court date for not less than 14 days (discretionary thereafter) *RPAPL § 745*
Warrant Sheriff's Notice prior to execution	72 Hours Notice	14 Day Notice *RPAPL § 749*
Warrant document itself	-	Must state earliest date eviction occur *RPAPL § 749*
Warrant non-payment/pay prior to execution of warrant	Eviction may occur	Warrant vacated *unless* withheld in "bad faith" *RPAPL § 749*
Unlawful Eviction Residential perform or assist in	-	Class A Misdemeanor $1,000 - $10,000 fine *RPAPL § 768*
Retaliatory Eviction Residential * except owner occupied with 3 or fewer units	-	Warranty of Habitability protected activity *RPL § 223*

Topic	Pre-HSTPA	Current Status
Retaliatory Eviction Residential * except owner occupied with 3 or fewer units	-	Duty to Repair is protected activity *RPL § 223*
Retaliatory Eviction Residential Rebuttable Presumption of Retaliation * except owner occupied with 3 or fewer units	6 months	1 year *RPL § 223*
Sealing Post-Foreclosure Removal	-	Court records pertaining to lessee "sealed" and "confidential" *RPAPL § 757*
Stay of Proceeding Utilities Turned Off/ Landlord Failed to Pay	-	Mandatory stay until restored *RPAPL § 756*
Stay Issuance Warrant (Residential) Based Upon Breach of Lease	Discretionary	30 days for Tenant to correct *RPAPL § 753(4)*
Stay (Residential) Issuance or Collect Costs	Up to 6 months	Up to 1 year* *RPAPL § 753(1)* * unless Tenant "Objectionable"

| Topic | Pre-HSTPA | Current Status |

Tenant Passes Away Proceeding Against Estate Executor **NOT** named	Wait Three (3) Months	No Need to Wait *RPAPL § 711(2)*
Security Deposit/ Advances Residential	-	may <u>not</u> exceed 1 month rent *GOL § 7-108(1-a)(a)*
	-	use for: (1) reas. costs from non-pay; (2) damage beyond ord. wear and tear; (3) non-pay of utilities; and (4) moving/storage T's belongings *GOL § 7-108(1-a)(b)*
	-	Inspections and Written Corr. *GOL § 7-108(1-a)(c)(d)*
Manufactured Home Proposed Land Usage Change How much notice before evict?	6 months	2 years *RPL § 233*
Manufactured Home Proposed Land Usage Change Stipend	-	up to $15,000 *RPL § 233(b)(6)(iii)*
Manufactured Home Late fee	5% (maximum)	3% (maximum) *RPL § 233[r]*

CHART #4:

PRACTITIONER'S CHECKLIST

PRACTITIONER'S CHECKLIST (Things to Consider)

Counsel may wish to consider the following. The list is not exhaustive. Initially, review the pertinent lease provisions set forth in the rental agreement. In addition, the reader may consider all of the below:

A. Is the subject premises located within the geographical jurisdiction of the Court?

B. What type of proceeding was commenced: non-payment or holdover?
Or is it a special proceeding to be restored to the subject premises or other type of permitted action?

B1. What is the identifiable Landlord and Tenant relationship?
Examples:

Landlord-Tenant
Lease expired
Lease terminated
Month-to-Month Tenancy
Licensee
Tenant-at-Will
Squatter
Post-foreclosure
Manufactured/Mobile Home
Tenancy by Sufferance

C. How many times has the case appeared on the Calendar? Has there been a "final marking" against either party?

D. Was the one-time mandatory adjournment previously granted?

E. If required, was the appropriate predicate notice(s) served in a timely fashion and in the appropriate manner? A lease provision imposing more stringent service requirements than those statutorily required will generally be enforced.

E1. If the subject premises is Section 8 or pursuant to another government funded residency program, was the governing agency simultaneously served the predicate notice?

F.* Is there a COVID-19 applicable defense or stay?

(Hardship Declaration or Emergency Rental Assistance Program application pending)?

G.* Is a conference required prior to proceeding due to COVID-19 regulations? Were all COVID-19 notices provided?

H. Was the Tenant/Occupant in possession of the subject premises at the time the summary proceeding was commenced? (Parenthetically, a Landlord has no duty to mitigate damages in a summary proceeding).

I. Does the Petition include (1) a description of the premises; (2) the Petitioner's interest in the premises; (3) the Respondent's interest in the premises; (4) the relationship between the parties; (5) the facts upon which the proceeding is based; and (6) the relief sought.

I1. If the subject premises is Section 8 or pursuant to another government funded residency program, is this fact alleged in the Petition?

I2. If a predicate notice was required prior to the commencement of the summary proceeding, is the type of notice and date served alleged within the Petition? Is a copy of the notice attached to the Petition? (If the predicate notice is not attached, Petitioner may provide a copy in opposition to a motion to dismiss.)

J. Is the Petition verified? Counsel may verify the Petition even if located within the same county as the Petitioner.

K. Is it alleged that the Notice of Petition and Petition were properly served and service was completed no fewer than ten (10) but not more than seventeen (17) days <u>before</u> the return date (RPAPL § 733(1))? Review the affidavit of service.

Counsel may further wish to inquire about the following from the parties?

L. Was an Answer provided and/or stated on the record?

L1. What are the affirmative defenses asserted and are they applicable? (e.g., Warranty of Habitability only applies to residential non-payment proceedings).

M. Is the Tenant/Occupant disputing service? If yes, does the Petitioner have the process server available to testify at either a traverse hearing or a hearing on the merits (trial)?

N. Are all of the parties present?

O. Were counterclaims asserted, and, if so, is there a lease provision barring counterclaims? (Such a provision is generally enforceable unless the counterclaims are "inextricably intertwined" with the Landlord's underlying claims.)

P.* In a residential non-payment proceeding seeking rent arrears from between *March 7, 2020 and January 15, 2022* ("the COVID-19 Period"), was the Tenant's ability to pay rent impacted by COVID-19? If yes, then the Tenant Safe Harbor Act must be considered. Where the Tenant demonstrates that he/she suffered a financial hardship during this period, only a money judgment may be awarded for the non-payment of rent (no judgment of possession or warrant of eviction).

Q. Is there a timely demand for a jury trial and the appropriate jury trial fee paid? If yes, is there a lease provision barring a jury trial? (Such a provision is generally enforceable.)

R. Does Petitioner seek to amend the Petition, whether to add additional dollar amounts for rent or use and occupancy accrued following commencement of the summary proceeding, to insert the proper name of a "John/Jane Doe" and/or to correct the property address/description, etc?

S. Have the parties discussed an amicable resolution?

SCBA Lawyers Helping Lawyers Committee

The SCBA Lawyers Helping Lawyers Committee provides free and confidential assistance to those in the legal community who are concerned about their alcohol or drug use and/or mental health or wellbeing or that of a colleague or family member.

Assistance is available to the legal community including attorneys, members of the judiciary, law students, and family members dealing with alcohol or substance abuse disorder, other addictive disorders, anxiety, depression, vicarious trauma, age related cognitive decline and other mental health concerns that affect one's well-being and professional conduct.

Please call the
Lawyers Helping Lawyers Helpline at (631) 697-2499
to speak with an attorney who will provide support and recommend resources. All calls are private and confidentiality is protected under Judiciary Law Section 499. (Lawyer Assistance Committee)