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560 Wheeler Road, Hauppauge, NY 11788
(631) 234-5588

2018 LANDLORD TENANT UPDATE

FACULTY
Hon. Stephen Ukeiley
Victor Ambrose, Esq.
Warren Berger, Esq.
Jeffrey Fried, Esq.
Marissa Lucks Kindler, Esq.
Patrick McCormick, Esq.

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April 16, 2018
Suffolk County Bar Center, NY

ANNUAL LANDLORD & TENANT

LAW UPDATE

Suffolk County Bar Association
Hauppauge, New York

April 16, 2018

Panel:

Hon. Stephen Ukeiley,
Suffolk County Acting County Court and District Court Judge

Victor Ambrose, Esq.

Warren Berger, Esq.

Jeffrey Fried, Esq.,
New York State Associate Court Attorney - Trial Part

Marissa Luchs Kindler, Esq.,
Nassau/Suffolk Law Services Cmtee.

Patrick McCormick, Esq.,
***Campolo, Middleton & McCormick LLP* (Dean, Suffolk Acad. of Law)**

The Honorable Stephen L. Ukeiley is a Suffolk County Acting County Court and Suffolk County District Court Judge. Judge Ukeiley is presently in his second term on the District Court Bench. He has sat in every Part of the District Court, and has presided over in excess of 75,000 civil and criminal matters to completion, including more than 16,000 Landlord and Tenant summary proceedings. In addition to a misdemeanor criminal part, Judge Ukeiley presides over Guardianship cases. Judge Ukeiley is also the former presiding judge of Suffolk County's Human Trafficking Intervention Court.

Judge Ukeiley is an adjunct professor of law at the Touro College Jacob D. Fuchsberg Law Center where he teaches courses on Human Trafficking and Landlord and Tenant Law. He frequently lectures before judges and attorneys throughout the State, and has had the honor of lecturing on numerous occasions at the New York State Judicial Institute in White Plains. Judge Ukeiley is the author of *The Bench Guide to Landlord & Tenant Disputes in New York*© (all three editions) and authors a regular column in *The Suffolk Lawyer*. In 2014, the second edition of his book was distributed to every Town and Village Justice Court in New York. He has also written a children's book titled *The Silly School*©.

Judge Ukeiley is the former Principal Law Clerk to the Honorable E. Thomas Boyle, United States Magistrate Judge for the Eastern District of New York (retired). He also served on the Board of Directors of the Suffolk County Women's Bar Association, and has been honored with numerous Recognition Awards for exemplary service and commitment to continuing legal education programs.

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.

JEFFREY FRIED, ESQ.

Jeffrey Fried graduated Brooklyn Law School in 1983 and began his career with the Court system in 1984 serving as a law assistant to a Manhattan Civil Court Judge and then worked as a law assistant in both the Manhattan and Brooklyn Housing Courts. Subsequently, he became a Court Attorney for the Law Department of the Kings County Supreme Court and currently serves as an Associate Court Attorney in the Law Department of the Suffolk County District Court assigned to the 1st and 5th District Court in Ronkonkoma with Judge Vincent J. Martorana.

Marissa Lucks Kindler, Esq.
Nassau/Suffolk Law Services Committee

Marissa Kindler has been an attorney at Nassau/Suffolk Law Services Committee, Inc. since 2006, and is the supervisor of the Housing Unit in Suffolk County since 2013. Prior to that Ms. Kindler represented both landlord and tenants, in residential and commercial cases, in both New York and Kings Counties. She was assistant counsel to the New York City Loft Board, an agency of the Mayor's Office of the City of New York.

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. Representing clients in both federal and state court, he has argued numerous appeals, including three arguments at the New York State Court of Appeals – the state's highest court. His appellate work includes a successful appeal of a lower court order resulting in an award of legal fees and interest for our client, a major lending institution.

Additionally, Patrick maintains a busy landlord-tenant practice, representing both landlords and tenants in commercial and residential matters. His broad range of services in the landlord-tenant arena includes lease and contract drafting and review, eviction proceedings, rent collection, lease violations, security deposits,, habitability issues, and environmental matters. His clients include national commercial shopping centers, retailers, and publicly traded home builders.

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.

Education

Fordham University, B.A.

St. John's University School of Law, J.D.

Admissions

New York

United States District Court, Southern District of New York

United States District Court, Eastern District of New York

United States Court of Appeals, Second District

United States Supreme Court

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Past Adjunct Professor of Law, Hofstra University, Maurice A. Deane School of Law

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2015 - New York Super Lawyers - Metro Edition

2014 - New York Super Lawyers - Metro Edition

2013 - New York Super Lawyers - Metro Edition

2011 - Who's Who in Commercial Real Estate Law, Long Island Business News

TABLE OF CONTENTS

I. OVERVIEW OF SUMMARY PROCEEDINGS – BASIC FUNDAMENTALS

1. Purpose: Award "Possession"

A summary proceeding is a special proceeding governed by the Real Property Actions and Proceedings Law (RPAPL) for the purpose of recovering lawful "possession" of the subject premises. The Court should be mindful of the parties' often differing goals and priorities. Typically, a Landlord seeks to regain possession as soon 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 provided the parties demonstrate flexibility.

Although the Housing Part is the preferred forum for landlord and tenant disputes, the Court has no authority to issue declaratory and/or injunctive relief (*see London Paint & Wallpaper Co., Inc. v. Kesselman*, 138 A.D.3d 632 (1st Dep't 2016)). A summary proceeding may be utilized to determine lawful "possession", but the Court/Housing Part lacks capacity to determine issues of "ownership" or "title", which may be heard in the Supreme Court. The Tenant in a summary proceeding may, however, assert as an affirmative defense that the Landlord is no longer the owner of the premises or has a superior possessory interest in the premises. 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 may litigate the issue of "title" following completion of the summary proceeding. However, where the Respondent unsuccessfully asserts in the summary proceeding as an affirmative defense that he/she/it is the owner of the premises, for example, by adverse possession, the Respondent may be collaterally estopped from re-asserting the claim as an affirmative claim in a subsequent declaratory judgment action (*see Nissequogue Boat Club v. State of New York*, 14 A.D.3d 542, at 544 (App. Div., 2d Dep't 2005); *Jacob Marion, LLC, supra*)). 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 action is commenced within sixty (60) days of entry of the Court's decision.

2. Types of Summary Proceedings

Two (2) types of proceedings comprise the overwhelming majority of summary proceedings: (1) non-payment proceedings and (2) holdover proceedings. The requisite elements of each are different, and, as such, the Petitioner has the burden of commencing the proper type of proceeding. Otherwise, the proceeding will be dismissed. Regardless of the type of proceeding, the occupant must be in possession at the time the summary proceeding is commenced (*see Clark v. Singletary*,

31 N.Y.S.3d 920 (App. Term, 9th & 10th Jud. Dists. 2016); *92 Bergenbrooklyn, LLC v. Cisarano*, 21 N.Y.S.3d 810 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)).

A. Non-payment Proceeding

The purpose of a non-payment proceeding, similar to a holdover proceeding, is to recover possession (*36 Main Realty Corp. v. Wang Law Office, PLLC*, 19 N.Y.S.3d 654 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)). A non-payment proceeding presupposes the parties have a valid Landlord and Tenant relationship when the summary proceeding is commenced, and the Landlord alleges the Tenant failed to pay all or a portion of the rent (*Underhill Ave. Realty, LLC v. Ramos*, 29 N.Y.S.3d 850 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (action dismissed where the Section 8 tenancy expired prior to commencement of non-payment proceeding).

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 Court "issues" (signs) the judgment, at which point, the rental agreement is deemed to have been terminated as of the date the non-payment proceeding was commenced. Accordingly, the money judgment will include rent arrears, plus use and occupancy for the time the Tenant remains in possession following commencement of the proceeding (*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)). As in any non-payment proceeding, the Tenant may avoid the eviction by tendering the full amount awarded prior to the Court's issuance (signing) of the judgment of possession and warrant of eviction.

B. Holdover Proceeding

A holdover proceeding presupposes the parties do not have a valid Landlord and Tenant relationship when the summary proceeding is commenced. In other words, if the parties at some point had a valid Landlord and Tenant relationship, the relationship expired or was terminated (and a new agreement was not reached). A holdover proceeding may further be appropriate when a Landlord and Tenant relationship never existed.

There are several recognizable relationships set forth in RPAPL §§ 711 and 713 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) vacatur by the tenant of record who had a guest staying in the premises; (6) where illegal activity is conducted at the premises; (7) termination of a tenancy-at-will; (8) efforts to remove a squatter; and (9) seeking possession of post-foreclosed properties. Unlike a non-payment proceeding, the occupant may not avoid the eviction by paying the amount awarded *prior* to the issuance of the judgment because the proceeding was commenced for reasons other than the non-payment of rent.

3. Proper and Necessary Parties

The Landlord must name each and every Tenant in a summary proceeding. The Landlord may not pick and choose which Tenants to include, even where some of the Tenants have paid their share of the rent. This is the case because a Tenant is a "proper" and "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, and minor children neither be named nor appear on the warrant of eviction. 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 it is not required) because a Subtenant is a "proper" but not a "necessary" party to a summary proceeding. 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. It is typically in the Landlord's interest to name Subtenants because when the Landlord and Tenant relationship is properly 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. Therefore, if the Subtenant does not vacate after the Tenant leaves, the Subtenant may become a Tenant at Sufferance which requires a Thirty-Day predicate notice pursuant to Real Property Law (RPL) § 228 before a separate holdover proceeding may be commenced against the Subtenant.

Counsel should be mindful that the Sheriff may refuse to perform the eviction, including against 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.

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, although an individual may represent him- or herself, corporations and limited liability companies must appear by counsel (*Inland Diversified Real Estate Serv., LLC v. Keiko New York, Inc.*, 36 N.Y.S.3d 407 (App. Term, 9th & 10th Jud. Dists. 2016)). In 2015, the Appellate Term for the Second, Eleventh and Thirteenth Judicial Districts held that partnerships and limited liability partnerships must also appear by counsel in a summary proceeding (*Ernest & Maryanna Jeremias Family Partnership, L.P. v. Sadykov*, 11 N.Y.S.3d 792 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)).

4. Predicate Notice

Except where the lease agreement expires on its own terms, the Landlord is generally required to provide the occupants a predicate notice prior to commencing a summary proceeding (*see 620 Dahill, LLC v. Berger*, 27 N.Y.S.3d 315 (2d Dep't 2016) (no predicate notice required following expiration of a tenancy of a fixed duration where the tenant continues to occupy the premises without paying additional money and/or entering into a new rental agreement)).

The issue of predicate notice is important for several reasons. First, an occupant must be given sufficient notice of the allegations and an adequate opportunity to be heard. Second, the type and length of the predicate notice is dependent upon the identification of a recognizable Landlord and Tenant relationship. A mistake in the identification of the relationship, which occurs days, weeks or perhaps months prior to the commencement of the summary proceeding, may result in an improper predicate notice, which, in turn, upon motion, may result in a dismissal. From the Tenant's perspective, this information is required to assess the validity of the predicate notice and whether a motion to dismiss is in order.

The parties should consult their lease agreement for any restrictions or heightened obligations regarding predicate notices which are generally enforceable. (*see, e.g., 575 Warren St. HDFC v. Barreto*, 983 N.Y.S.3d 203 (App. Term, 2d, 11th & 13th Jud. Dists. 2013); *1626 Second Ave., LLC v. Notte Rest. Corp.*, 880 N.Y.S.2d 225 (N.Y. Cnty. Civ. Ct. 2008)).

5. Answer

Pursuant to RPAPL § 743, a Tenant is generally not required to interpose an Answer to the Petition. Rather, the Tenant may, within his/her discretion, assert an Answer on the return date either orally or in writing. However, except as set forth in RPAPL § 732 regarding non-payment proceedings in New York City, there is an exception (i.e., an Answer is required) when the Notice of Petition and Petition are served no fewer than eight (8) days before the return date and the Landlord demands an Answer at least three (3) days prior thereto (*see* N.Y. Uniform Rules for Trial Courts [22 N.Y.C.R.R.] § 212.42[c]; *cf. Development Strategies Co., LLC v. Ditmars Roofing and Sheetmetal Contractors, Inc.*, 924 N.Y.S.2d 308 (App. Term, 9th & 10th Jud. Dists. 2011) (Petition did not demand that the Respondent serve an Answer)).

The failure to assert a personal jurisdiction defense due to improper service is waived where the defense is not asserted in the original Answer or timely raised on the return date (*Chen v. Ray*, 26 N.Y.S.3d 212 (App. Term, 1st Dep't 2015)). Moreover, a respondent was precluded from asserting the defense for the first time in a timely Amended Answer (*see Iodice v. Academics R Us, Inc.*, 26 N.Y.S.3d 724 (App. Term, 1st Dep't 2015)). Of note, the affirmative defense that the predicate notice is defective is not waived when it is neither included in the Answer or a pre-answer motion to dismiss (*W54-7 LLC v. Schick*, 829 N.Y.S.2d 399 (App. Term, 1st Dep't 2006)).

6. Adjournments

A *pro se* Tenant's request for an adjournment for the purpose of retaining counsel extends the time to answer (*In-Towne Shopping Ctrs. Co. v. DeMotties*, 851 N.Y.S.2d 70 (App. Term, 9th & 10th Jud. Dists. 2007); *City of New York v. Caldelario*, 601 N.Y.S.2d 371 (App. Term, 2d & 11th Jud. Dists. 1993) (same), *rev'd in part on other grounds*, 223 A.D.2d 617 (App. Div., 2d Dep't 1996)).

Typically, each party in a summary proceeding is entitled to one (1) adjournment. Notwithstanding RPAPL § 745(1), which limits adjournments in summary proceedings outside New York City to ten (10) days, the Court has "inherent authority to grant a continuance" of longer duration (*see Paladino v. Sotille*, 835 N.Y.S.2d 799 (App. Term, 9th & 10th Jud. Dists. 2007)). Rules regarding adjournments in New York City are set forth at RPAPL § 745(2). In deciding whether to grant an 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)).

7. The Court's Award – Judgment of Possession, Money Judgment and Warrant of Eviction

In a summary proceeding, the Court may award a prevailing Landlord a judgment of possession, money judgment and a warrant of eviction.

A. Judgment of Possession and Warrant of Eviction

In a non-payment proceeding, the judgment of possession and warrant of eviction terminate the Landlord and Tenant relationship and authorize an eviction should the occupants named on the warrant refuse to voluntarily vacate. In a holdover proceeding, since the Landlord and Tenant relationship was terminated or expired prior to the commencement of the summary proceeding, the judgment and warrant formalize a prevailing petitioner's entitlement to legal "possession" and authorize the eviction.

B. Money Judgment

In a summary proceeding, a prevailing Landlord is entitled to recover, without regard to amount, unpaid rent arrears, use and occupancy and/or any reasonable item denominated within a written lease as "added rent" or "additional rent". There is no dollar limit on the amount awarded because the Court's maximum dollar jurisdiction is not applicable in summary proceedings (*see* Uniform District Court Act § 204; Uniform Justice Court Act § 204).

The Appellate Term for the Ninth and Tenth Judicial Districts has held that a general, catch-all lease provision which states that "all costs that tenant is obligated to incur pursuant to the lease are deemed 'additional rent'" encompasses the other provisions within the lease, even those specific

provisions that omit the necessary "added" or "additional" rent language (*Inland Diversified Real Estate Serv., supra* (petition dismissed because petitioner failed to demonstrate the items were owed, but otherwise the catch-all "additional rent" provision would have been enforced)). Although the Courts generally defer to the will of the parties unless there is fraud, duress, a mistake, coercion or unfair advantage, a lease provision containing impermissible items may not be enforced (*see, e.g., 270 E. 95 Props, LLC v. Kent*, 18 N.Y.S.3d 260 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (notwithstanding lease provision to the contrary, dismissing petition because late and legal fees may not be considered "rent" for a rent stabilized apartment)).

1. Rent/Use and Occupancy and "Additional Rent"

"Rent" is the dollar amount the parties agree the Tenant shall pay to occupy a residential or commercial premises for a specific duration. "Use and occupancy", on the other hand, is the fair and reasonable value to occupy the premises without a valid rental agreement (*London Paint & Wallpaper Co., Inc. v. Kesselman*, 138 A.D.3d 632 (1st Dep't 2016)). Rent and use and occupancy may be equivalent in value, but the terms are not interchangeable. Rent relates to the period the parties have/had a valid rental agreement. Use and occupancy pertains to the period where the parties do not have a valid agreement because the lease expired, was terminated or such a relationship never existed. If the parties previously had a lease agreement that expired or was terminated, the Landlord need not elicit expert testimony because use and occupancy "may properly be assessed at the rent reserved in an expired lease" (*see Siodlak v. Light*, 31 N.Y.S.3d 924 (App. Term, 9th & 10th Jud. Dists. 2016)).

Typical "additional rent" items include (1) attorney's fees and (2) utilities (electricity, oil, cable/telephone). The Petitioner must demonstrate that these items are listed in the rental agreement as "added rent", are reasonable and have been incurred. Otherwise, they may not be recovered in a summary proceeding, but instead may be sought in a subsequent plenary action for damages.

The petitioner must submit the lease agreement to verify that attorney's fees are delineated in the rental agreement as "additional" or "added" rent (*Oakwood Terrace Hous. Corp. v. Monk*, 36 N.Y.S.3d 48 (App. Term, 9th & 10th Jud. Dists. 2016)). In addition, attorney's fees may not be awarded in favor of the Landlord against the Subtenant because the Subtenant is not a party to the rental agreement, and, as a result, there is no privity that would create a statutory or contractual obligation to pay Landlord's attorney's fees (*see Oakdale Manor Owners, Inc. v. Raimondi*, 29 N.Y.S.3d 848 (App. Term, 9th & 10th Jud. Dists. 2015)).

Interestingly, it has been held that the Housing Part may deny a prevailing Landlord's request for attorney's fees where "fairness" requires such a result, or the Landlord acted in "bad faith" or "unfairness is manifest" (*Greenbrier Garden Apts. v. Eustace*, 31 N.Y.S.3d 921 (App. Term, 9th & 10th Jud. Dists. 2016) (Landlord refused to negotiate rent payments and failed to respond to the Tenant's inquiries)).

Where the parties' rental agreement for residential property includes a one-sided Landlord attorney's fee provision, the lease is automatically deemed to contain a similar provision in favor of the Tenant should the Tenant prevail in the summary proceeding (*see* RPL § 234). The same does not apply to commercial leaseholds.

RPL § 234 is intended to "level the playing field" between Landlords and Tenants by encouraging resolution without unnecessary expense. A Tenant's attorney's 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 2016)). However, notwithstanding the clear language of the statute, the Court may deny a prevailing Tenant's attorney's fees where (1) the award would be manifestly unfair or (2) the Tenant engaged in bad faith (*251 CPW Hous. LLC v. Pastreich*, 124 A.D.3d 401 (1st Dep't 2015) (where the Landlord asserted a colorable claim that was ultimately unsuccessful on the merits, the Tenant should be awarded attorney's fees under RPL § 234)).

Late fees have been the source of substantial discussion. Both 5% and 10% late fee provisions, even when delineated within the rental agreement as "additional rent", have been held to be excessive, unconscionable and unrecoverable where they do not reasonably reflect the actual harm the Landlord sustained due to the late payment of rent (*see Wilsdorf v. Fairfield Northport Harbor, LLC*, 950 N.Y.S.2d 494 (App. Term, 9th & 10th Jud. Dists. 2012) (10% late fee); *67-26 Dartmouth St. Corp. v. Silberman*, N.Y.L.J., Apr. 2, 1996, at 30, col. 1 (App. Term, 2d & 11th Jud. Dists. 1996) (5% late fee); *Bonham Strand, LLC v. Paredes*, 2017 N.Y. Misc. LEXIS 4281 (Greenburgh Just. Ct. Nov. 1, 2017) (5% late fee)).

An item not identified within a written rental agreement as either "added rent" or "additional rent" may not be recovered in a summary proceeding (*see, e.g., Green v. Weslowski*, 48 N.Y.S.3d 265 (App. Term, 9th & 10th Jud. Dists. 2016) (lease did not identify attorney's fees as "additional rent"); *Saunders Street Owners, Ltd. v. Broudo*, 936 N.Y.S.2d 61 (App. Term, 2d, 11th & 13th Jud. Dists. 2011) (sublet fees)). Property damages, future/accelerated rent and unpaid security deposits are not recoverable under any circumstance in a summary proceeding (*see, e.g., Kings Park 8809, LLC v. Stanton-Spain*, 26 N.Y.S.3d 725 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (damages are *not* recoverable)).

The Court may not issue a judgment or render a monetary award against a Guarantor unless the Guarantor has an independent possessory right to the subject premises (*MTC Commons, LLC v. Millbrook Training Ctr. & Spa, Ltd.*, 31 N.Y.S.3d 922 (App. Term, 9th & 10th Jud. Dists. 2016)). The Landlord may, however, seek these amounts in a subsequent plenary action provided the rental agreement includes a survival clause (a lease provision that provides the Tenant's obligations continue even where the rental agreement has been terminated) (*see H.L. Realty, LLC v. Edwards*, 131 A.D.3d 573 (2d Dep't 2015)).

2. Costs and Disbursements

The money judgment may include pre-judgment interest where there is a breach of a lease obligation because such claims "sound[] in contract" (*see* CPLR § 5001(a); *Solow v. Wellner*, 86 N.Y.2d 582 (1995) (nonpayment proceeding)). Statutory costs and disbursements that may be awarded include service of the pleadings on each "necessary" party, and, in the event the Respondent fails to appear, an additional $5.00 for an affidavit from the process server stating the Respondent is not presently in the military ($1.50 in the Justice Courts) (*see, e.g.*, Uniform District Court Act § 1906-a, 1908; Uniform Justice Court Act § 1903(d), (m)). Some Courts have adopted the approach that the filing fee is recoverable only where the prevailing Landlord appears *pro se* (but not if represented by counsel) (*see* Formal Op. No. 90-F6, 1990 N.Y. Op. Attny Gen. 25 (Aug. 8, 1990)).

3. Counterclaims

A Tenant is entitled to a money judgment on its successful counterclaims, without regard to amount, in a summary proceeding. However, in the Justice Courts, since counterclaims may not exceed $3,000, any dollar amount on a counterclaim above $3,000 is deemed waived (*see* Uniform Justice Court Act § 208; *2094-2096 Boston Post Road, LLC v. Mackies American Grill, Inc.*, 41 N.Y.S.3d 452 (App. Term, 9th & 10th Jud. Dists. 2016)).

A lease provision barring counterclaims will generally be enforced (i.e., requiring a plenary action in a court of competent jurisdiction) unless the counterclaims are "inextricably intertwined" with the Landlord's underlying claims, such as, for example, a counterclaim for the breach of the warranty of habitability or the diminution in parking at a commercial premises (*2094-2096 Boston Post Road, LLC, supra*; *William J. Garry, As Receiver v. Ryan & Henderson, P.C.*, 36 N.Y.S.3d 364 (Nassau Cnty. Dist. Ct. 2016)). A counterclaim must be timely asserted or it will be waived, thereby requiring a separate plenary action for such relief (*see LGS Realty Partners LLC v. Kyle*, 26 N.Y.S.3d 725 (App. Term, 1st Dep't Nov. 18, 2015)).

8. Stipulation of Settlement

A. General Matters

Stipulations of Settlement are favored and typically enforced. However, upon a sufficient showing of fraud, overreaching, unconscionable conduct, mistake or illegality, the Court may refrain from enforcing the Stipulation (*see Banana Kelly Union HDFC v. Chambers*, 41 N.Y.S.3d 448 (App. Term, 1st Dep't May 25, 2016); *Hallock v. State of New York*, 64 N.Y.2d 224 (1984)). The Court may further relieve a party from strict compliance with the Stipulation where there has been "substantial compliance" and enforcement "would be unjust or inequitable, or would permit the other party to gain an unconscionable advantage" (*see generally Chauncey Ave. Trust v. Whitaker*, 911 N.Y.S.2d 696 (App. Term, 2d, 11th & 13th Jud. Dists. 2010)).

The Court is not required to enforce a provision that states "any" breach of the Stipulation is deemed to be a "material" default (*see 135 Amersfort Assoc., LLC v. Jones*, 20 N.Y.S.3d 292 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)). Moreover, for good cause pursuant to RPAPL § 749(3), the Court may vacate a warrant of eviction, whether obtained by stipulation, default or a hearing on the merits, at any time prior to its execution (*see Harvey 1390 LLC v. Bodenheim*, 96 A.D.3d 664, 948 N.Y.S.2d 32 (App. Div., 1st Dep't 2012)).

1. Amending the Petition to Include a Larger Dollar Amount

Where the Petitioner seeks a money judgment that is greater than the amount sought in the Petition, petitioner should move to amend the Petition to include the higher dollar amount and provide a rationale for the amendment (e.g., an additional month's rent has since become due following commencement of the proceeding). The reason for doing so is that in the event there is a dispute regarding enforcement of the Stipulation of Settlement, the Court may only enforce the amount set forth in the Petition, as amended. Of course, the amount amended must actually be due and owing at the time of the amendment.

2. *Pro Se* Litigants (RPAPL § 746)

Where one (1) or more of the parties to the Stipulation appears *pro se*, the Court must "fully describe" the terms of the Stipulation to the *pro se* party. In other words, a *pro se* litigant wishing to settle a summary proceeding must appear in Court. Otherwise, the Court may adjourn the matter to another date. If the *pro se* party fails to appear again, then the Court may dismiss the proceeding or grant a default judgment depending on whether the Landlord or Tenant failed to appear.

RPAPL § 746 does not specify the manner in which the Court must "fully describe" the terms of the Stipulation. It does not appear that the provisions under this section may be waived.

3. Multiple Tenants (Only Some Appear in Court)

If the Tenants are spouses and only one (1) spouse appears, then the Stipulation of Settlement may only bind the appearing spouse (*see* General Obligations Law § 3-305). The Court will typically enter a default judgment against the non-appearing spouse along the same terms provided proper service is alleged. An amendment for an increased dollar amount may not be granted against a non-appearing party (*see Mustafa v. Plein*, 950 N.Y.S.2d 492 (App. Term, 2d, 11th & 13th Jud. Dists. 2012) (holdover proceeding); *Port Chester Hous. Auth. v. Turner*, 734 N.Y.S.2d 805 (App. Term, 9th & 10th Jud. Dists. 2001) (nonpayment proceeding)).

The same principles apply where the Tenants are not married. The Court may confirm on the Record and/or in the Stipulation that the petitioner will not seek to enforce the judgment or warrant against the non-appearing Tenant(s) provided the appearing Tenant(s) fully complies with the Stipulation.

B. Completing the Stipulation of Settlement Form

The Courts generally encourage the parties, whether represented by counsel or appearing *pro se*, to utilize the Court's pre-printed Stipulation of Settlement form. Although not applicable in every situation, the form is useful in a majority of the circumstances presented in summary proceedings.

Proper completion of the Stipulation is imperative to ensure the intentions of the parties are accurately enforced and to avoid unnecessary confusion and/or delay. A misstatement may result in a subsequent vacating of the judgment of possession and/or dismissal of the action.

As a practical matter, the proceeding is not "finished" merely because the Court has accepted a Stipulation of Settlement. Rather, the parties may continue to move the Court for appropriate relief until such time as there has been a lawful vacating of the premises or, in a non-payment proceeding, the rent arrears are paid in full (prior to the issuance of the judgment). Where the Tenant fails to vacate the premises by the date agreed in the Stipulation of Settlement, the Tenant may bring an *ex parte* Order to Show Cause for additional time to remain in possession and/or to vacate the judgment and warrant. Parenthetically, the Sheriff must provide a 72-Hour Notice prior to performing the eviction (*see* RPAPL § 749(2)).

Where it is agreed that the Landlord is to be awarded immediate "possession" of the premises, the parties typically need only concern themselves with the amount of the money judgment and how long of a stay, if any, there will be on the execution of the warrant of eviction. The money judgment may not include future rent or an unpaid security deposit. Any additional terms may also be addressed within the Stipulation. Again, the petitioner may need to amend the Petition to include additional monies that have become due following commencement of the summary proceeding. The petitioner may further seek to include a provision that would permit the collection of use and occupancy during the stay period.

For example, assume the parties to a residential lease agreed on January 5, 2018 that the Landlord is entitled to an immediate judgment of possession, a money judgment in the amount of $5,000, and a warrant of eviction, but the execution of the warrant will be stayed until March 1, 2018. Further assume the Landlord amended the Petition for the January 2018 rent. To avoid having to vacate the judgment and warrant if the Landlord accepts payment for the month of February 2018 (or any subsequent month), the Landlord may seek to insert either of the following provisions in the Stipulation of Settlement: "*Future moneys paid are not intended to revive the tenancy*" or "*All future moneys are considered use and occupancy*".

The reason for including this language is twofold. First, future moneys may not be awarded in a summary proceeding. Second, the Landlord's acceptance of a future month's rent following issuance of the judgment generally terminates the judgment of possession and warrant of eviction (without effecting the money judgment). However, the Landlord may typically accept "use and occupancy" at any time without vitiating the judgment or creating a new Landlord and Tenant

relationship because, as stated previously, "use and occupancy" presupposes the parties do not have a valid Landlord and Tenant relationship.

In *368 Chauncey Ave. Trust v. Whitaker*, the Appellate Term upheld a Stipulation provision which stated future post-judgment payments for the residential party were to be applied to the then current month's "rent" (*368 Chauncey Ave.*, 911 N.Y.S.2d 696 (App. Term, 2d, 11th & 13th Jud. Dists. 2010)). This case is fact specific, but the more suitable term would have been "use and occupancy" (as opposed to rent). If the premises is a commercial property, then the Landlord may accept future months' rents without vitiating the warrant/judgment provided there is no intent to revive the tenancy (*see Crystal Run Newco, LLC v. United Pet Supply, Inc.*, 70 A.D.3d 1418 (App. Div., 4th Dep't 2010); *First Citizens Nat'l Bank v. Koronowski*, 46 A.D.3d 1474, 848 N.Y.S.2d 494 (App. Div., 4th Dep't 2007)).

Another common resolution is for the Tenant to acknowledge rent is owed, and the Landlord permits the Tenant to remain in possession while paying the arrears. If the payments are made as agreed, then the tenancy continues. Otherwise, the Landlord is entitled to a judgment of possession, a money judgment for the unpaid arrears and a warrant of eviction.

In this scenario, the parties typically memorialize the payment plan for the arrears (dollar amounts and dates). The dollar amount may only include rent arrears and/or other items identified within the rental agreement as "additional" or "added" rent that are reasonable and due and owing at the time of the Stipulation (*see Walden Ctr. Assocs., L.P. v. Cardenas*, 930 N.Y.S.2d 177 (App. Term, 9th & 10th Jud. Dists. 2011)). The arrears may not reflect future rents.

Since a judgment of possession is not awarded while the parties seek to amicably resolve the dispute, the petitioner typically negotiates within the stipulation that in the event the Tenant fails to abide by the payment schedule, petitioner may submit an *ex parte* Affidavit of Noncompliance which would entitle the Landlord to the immediate issuance of a judgment of possession, a money judgment for the remaining rent arrears and a warrant of eviction. Absent a provision setting forth the remedy for noncompliance with the Stipulation, the Landlord would not be able to obtain a judgment or warrant in the summary proceeding (*see Gloria Homes Apts. LP v. Wilson*, 17 N.Y.S.3d 382 (App. Term, 1st Dep't 2015)).

To account for the situation where another month's rent becomes due prior to the full payment of arrears, the Landlord may consider including in the Stipulation of Settlement that "*Future payments shall first be applied towards the current month's rent*". This requires the Tenant to remain current with the rent each month to be in compliance. The omission of this provision would result in future payments first being applied towards the arrears.

Noncompliance may only be based upon the failure to pay rent arrears, and not the failure to pay a subsequent month's rent. Thus, the Tenant may seek to pay the arrears as soon as possible.

9. Maintaining Order and Courtroom Decorum

The Judge has a responsibility to not only be faithful to the law, but to maintain "order and decorum in the proceedings" (*see* 22 N.Y.C.R.R. § 100.3(B)(1),(2)). The Judge must also be "patient, dignified and courteous" and ensure that the attorneys, court staff and all others subject to the Judge's direction and control act in a similar manner (*see* 22 N.Y.C.R.R. § 100.3(B)(3)).

Although a high percentage cases are settled, in the event an agreement is not reached, the Court must conduct a hearing and take sworn testimony. The Court may not simply listen to the Tenant's defenses and, if it finds that the defenses have not been established or are otherwise without merit, award in favor of the petitioner without eliciting testimony from the petitioner. This is because the petitioner has the burden of establishing a prima facie case by a preponderance of the evidence (*1764 Majors Path Corp. v. Petrinolis*, 36 N.Y.S.3d 408 (App. Term, 9th & 10th Jud. Dists. 2016)). CPLR § 4213 requires that the Court sets forth the essential facts that it relied upon in reaching its decision (*see 129th St. Cluster Assocs. v. Levy*, 26 N.Y.S.3d 214 (App. Term, 1st Dep't 2015); *RBD Realty Consultants, Inc. v. Espinal*, 949 N.Y.S.2d 565 (App. Term, 1st Dep't 2012)). Although generally not a problem in a summary proceeding, the Court must render its decision within sixty (60) days of the matter being fully submitted (CPLR § 4213[c]).

The determination of the Housing Part is afforded "great deference" on appeal, and will remain unchanged unless the result was unobtainable under a "fair interpretation" of the evidence (*see Mautner-Glick Corp. v. Glazer*, 31 N.Y.S.3d 922 (App. Term, 1st Dep't 2016)). Each person with a "legal interest" in the proceeding has a right to be heard at the hearing (*see* 22 N.Y.C.R.R. § 100.3(B)(6)). The Court has within its discretion the right to implement its own rules and procedures to effectuate the above standards. Obviously, the de-escalation of an emotionally charged situation or individual is preferable. Using, condoning or tolerating intolerant speech or action may constitute a violation of the above rules.

A. *Pro se* Litigants

Pro se litigants proceed at their own peril (*Tanenbaum Assocs., L.L.P. v. Yudenfreund*, 831 N.Y.S.2d 363 (App. Term, 2d & 11th Jud. Dists. 2006)). While unrepresented litigants may be afforded some "latitude", they are held to the same standard of proof as those represented by counsel (*Callender v. Titus*, 791 N.Y.S.2d 868 (App. Term, 2d & 11th Jud. Dists. 2004) (denying Tenant's counterclaim due to the lack of evidence)). Moreover, the Judge is not responsible for advising *pro se* litigants regarding the burden of proof or the admissibility of evidence (*Limani Realty, LLC v. Zayfert*, 970 N.Y.S.2d 345 (App. Term, 2d, 11th & 13th Jud. Dists. 2012) (*pro se* occupant failed to submit evidence establishing the premises was his primary residence which may have triggered succession rights under the Rent Stabilization Code)).

B. Judge's Role During the Hearing

A trial judge may take "an active role in the examination of witnesses where proper or

necessary to facilitate or expedite the orderly progress of the trial" (*Accardi v. City of New York*, 121 A.D.2d 489 (2d Dep't 1986) (civil case)). The Judge may further ask witnesses to clarify vague or indirect responses (*Kaminester v. Foldes*, 51 A.D.3d 528 (1st Dep't 2008) (civil case concerning guardian)) and request clarification of a material fact for the purpose of expediting the trial (*Tonkin v. Lofthouse*, 34 A.D.3d 1309 (4th Dep't 2006) (breach of contract claim)).

The Judge may not make an inappropriate inquiry that deprives a party of a "fair and unprejudiced consideration of the evidence" (*see Schrager v. New York Univ.*, 227 A.D.2d 189 (1st Dep't 1996) (judgment affirmed in part, and reversed in part, where the Court repeatedly interrupted examinations, sustained objections not made and asked pointed questions favoring some of the defendants)). Nor may the Judge display hostility towards a party that denies a fair trial (*Hubrecht v. Terrassault*, 178 N.Y.S.2d 225 (App. Term, 1st Dep't 1958)) or summarily deny a claim or defense that raises a triable issue of fact without conducting a hearing/trial (*Development Strategies Co., LLC*, 924 N.Y.S.2d 308 (App. Term, 9th & 10th Jud. Dists. 2011); *Concord Mgmt. Ltd. v. Kaplan*, 2002 N.Y. Misc. LEXIS 1835 (App. Term, 9th & 10th Jud. Dists. 2002)).

C. Evidentiary Matters

There is no discovery in a summary proceeding without a Court Order pursuant to CPLR § 408 except where the parties mutually agree to participate. The Landlord may be granted discovery where a (1) cause of action has been demonstrated; (2) the proposed discovery is related to the central dispute; (3) the discovery sought is in the exclusive control of the Tenant; and (4) there is no resulting prejudice (*see Zada Assocs. v. Melucci*, 28 N.Y.S.3d 651 (App. Term, 1st Dep't 2015); *72A Realty Assocs. v. Lucas*, 26 N.Y.S.3d 216 (App. Term, 1st Dep't 2015) (Tenant permitted to conduct discovery)). Counsel should seek a Court Order before participating in voluntary discovery with a *pro se* litigant (*Missionary Sisters, Inc. v. Fauerbach*, 41 N.Y.S.3d 450 (App. Term, 1st Dep't 2016)).

The following section discusses common evidentiary issues in summary proceedings.

1. Documents/Records

A. Predicate Notice (Landlord)

If a predicate notice was required, the notice may be introduced at the hearing following a proper foundation from a person with firsthand knowledge of the service (i.e., process server). The Petitioner may further seek to introduce proof of delivery and/or receipt. If the occupant timely and credibly objects to service, then the Landlord must elicit testimony from the process server because the petitioner may not simply rely upon the affidavit of service (*Bham v. Wilson*, 809 N.Y.S.2d 776 (App. Term, 9th & 10th Jud. Dists. 2005); 2 Dolan, Rasch's Landlord and Tenant Including Summary Proceedings § 32:15 (4th ed. 2010)).

B. Lease Agreements

The Landlord will typically seek to introduce the lease as a contract between the parties by laying a proper foundation and authenticating the signature(s) of those sought to be charged under the terms of the lease (*see Tuscan Realty Corp. v. O'Neill*, 731 N.Y.S.2d 830 (App. Term, 2d & 11th Jud. Dists. 2001)).

C. Business Records

Commercial Landlords may also introduce the lease as a business record exception to the hearsay rule through the testimony of a property manager/agent (*Lowell Assocs. v. Barney Mac, LLC*, 824 N.Y.S.2d 755 (App. Term, 1st Dep't 2006)). The business record exception requires the testimony of a person with personal knowledge of the corporation's business records and record keeping procedures, including that the document was made in the regular course of business, it was the regular course of the business to make such a document at the time of the occurrence, and that the document was found in the business file (*see* CPLR § 4518; *APF 286 MAD, LLC v. Chittur & Assocs., P.C.*, 28 N.Y.S.3d 647 (App. Term, 1st Dep't 2016) (computer printouts admitted as business records)). For example, a computer lease may be introduced into evidence as a business record without calling the drafter to testify (*see, e.g., Intercontinental Leasing Assocs., Inc. v. Barington Capital Group*, 2003 N.Y. Slip Op. 51255U (App. Term, 1st Dep't 2003)).

D. Best Evidence Rule (original document)

This section applies to lost or destroyed leases (*B.N. Realty Assocs. v. Lichtenstein*, 96 A.D.3d 434 (App. Div., 1st Dep't 2012) (holding that although the denial of the introduction of the lease was proper because no reason was given for its non-production, the lease should have been allowed under other grounds)). Federal Rules of Evidence § 1004 provides that an original of the writing, recording or photograph sought to be introduced is not required where:

(1) all of the originals are lost or destroyed, and not by the proponent acting in bad faith;

(2) an original cannot be obtained by any available judicial process;

(3) the non-moving party (1) had control of the original; (2) was at that time put on notice that the original would be a subject of proof at the trial or hearing; and (3) failed to produce it at the trial or hearing; or

(4) the writing, recording, or photograph is not closely related to a controlling issue.

E. Photo Copies (CPLR § 4539)

A copy of the original lease may be introduced where a proper business foundation is provided (*see 174 LLC v. Roberts*, 809 N.Y.S.2d 482 (N.Y. Civ. Ct. Bronx Cty. 2005)). As stated previously, an exception to the Best Evidence Rule permits the introduction of a substitute or secondary source (e.g., testimony or other form of proof) where the moving party sufficiently explains (1) the unavailability of the original document; (2) demonstrates the original was neither lost nor destroyed in bad faith; and (3) establishes the reliability/accuracy of the secondary evidence (*B.N. Realty Assocs., supra*, 96 A.D.3d at 434) (notwithstanding the lack of an explanation for the non-production of the lease, the lost or destroyed lease was admissible based on secondary proof, namely the Tenant's counterclaim was founded upon specific provisions within the lease and the Tenant admitted owing rent pursuant to the lease); *Schozer v. William Penn Life Ins. Co.*, 84 N.Y.2d 639 (1994)).

F. Rent Roll and Other Proof of Rent Owed

Rent rolls establishing rent and "added rent" for apartment complexes may be introduced as business records with a proper foundation. However, an "unverified document prepared under unspecified circumstances" without an adequate foundation is not admissible, and, even if considered, a judgment (including small claims) may not be based exclusively on hearsay alone (*see Hudson House, LLC v. Pointdujour*, 799 N.Y.S.2d 161 (App. Term, 2d & 11th Jud. Dists. 2004) (small claims action for unpaid rent)). Parenthetically, even if not admissible, a witness could be shown a Rent Roll/Ledger, or any other document, for the purpose of Refreshing the Witness' Recollection.

G. Photographs (photos, cell phones, laptops etc.)

Photographs are admissible provided they "fairly and accurately" depict the condition of the subject matter on the date in question (*Read v. Ellenville Nat'l Bank*, 20 A.D.3d 408 (2d Dep't 2005); *Lott-Coakley v. Ann-Gur Realty Corp.*, 886 N.Y.S.2d 67 (Bronx Cty. Sup. Ct. 2009)). If the movant did not take the photograph, but identifies the contents, truthfulness and accuracy of the depiction at the time of the incident, then the Court may admit the photograph regardless of when and by whom the photograph was taken (*cf. Leven v. Tallis Dept. Store*, 178 A.D.2d 466 (2d Dep't 1991)).

H. Bills/Receipts

With respect to counterclaims, the Tenant may testify as to the amount paid for repairs and other damages. However, absent consent from the non-movant, the introduction of a paid invoice requires proper authentication from the preparer of the receipt or another person familiar with the vendor's business record keeping (*see generally Tofa Jewelry, Inc. v. Silver Stars, Inc.*, 885 N.Y.S.2d 713 (N.Y. Civ. Ct. 2009)). The "small claims standard" which permits the introduction of a paid receipt or two (2) itemized estimates without a foundation from the preparer is not applicable in

summary proceedings.

Parenthetically, the Tenant's assertion of a counterclaim unrelated to the claims set forth in the Petition may constitute a waiver of a personal jurisdiction defense (*see ROL Realty Co., LLC v. Gordon*, 920 N.Y.S.2d 244 (App. Term, 1st Dep't 2010) (withdrawing the counterclaim does not revive the jurisdictional objection)).

1. Audio Recordings (cell phones and tape recordings)

It is lawful to record a conservation where at least one (1) party to the conversation consents to the recording (*see* Penal Law § 250; *People v. Lasher*, 58 N.Y.2d 962 (1983)). The recording may be made by a participant without notice to the other participant(s). To be admitted into evidence, the movant must lay a proper foundation regarding the relevancy, authenticity and accuracy of the recording. This is typically accomplished through a participant or witness to the conversation and/or recording (e.g., recording is an accurate representation of the conversation and was not altered) (*see Samra v. Messeca*, 17 N.Y.S.3d 385 (App. Term, 1st Dep't 2015) (tape recordings of conversations between Landlord's agent and Tenant were admissible where the Tenant testified the recordings were a fair and accurate representation of the conversations)).

Hearsay may preclude the admission of all or portions of the recording. An admission by a party to the litigation, however, may be admissible as an exception to the hearsay rule (*see Iannielli v. Consolidated Edison Co.*, 75 A.D.2d 223 (2d Dep't 1980)). If the conversation is recorded or obtained illegally in violation of Penal Law § 250.05 (eavesdropping), then the recorded conversation is inadmissible (*see* CPLR § 4506(1)).

2. Testimony

Hearsay and exceptions to the hearsay rule for out-of-court statements are applicable (*cf. Haff v. FNJ Transmissions Inc.*, 798 N.Y.S.2d 344 (App. Term, 9th & 10th Jud. Dists. 2004)). Out-of-court testimony offered not for its truth, but rather as evidence of the witness' state of mind may be admissible (*see Benitez v. Whitehall Apts. Co., LLC*, 862 N.Y.S.2d 813 (N.Y. Cnty. Sup. Ct. 2008)). If an objection to hearsay is not timely raised, then the objection is waived and the Court, as with any particular evidence, may consider the testimony and give it the appropriate weight (*see generally Tracy v. Tracy*, 309 A.D.2d 1252 (4th Dep't 2003)).

Parenthetically, *pro se* litigants may request that the Court issue a subpoena duces tecum and subpoena duces tecum ad testificandum. An adjournment may be granted in the discretion of the Court for the purpose of calling a witness to rebut testimony.

II. RECENT CASES

1. AFFIRMATIVE DEFENSES

Fizzinoglia v. Capozzoli, 2018 N.Y. Misc. LEXIS 227 (App. Term, 9th & 10th Jud. Dists. Jan. 18, 2018) (Any Affirmative Defense)

In a summary proceeding, tenant may raise any defense, whether legal or equitable. The Housing Part must entertain the defense, but may not affirmatively rule on the issue of ownership. Here, the proceeding was dismissed because landlord alleged the occupants were licensees and thus gave a 10-Day predicate notice, when the occupants were in fact were tenants and entitled to 30-Days notice.

Board of Mgrs. of the Saratoga Condo. v. Shuminer, 148 A.D.3d 609 (1st Dep't 2017) (Constructive Eviction)

Commercial tenant's constructive eviction claim denied, notwithstanding tenant's vacating the premises due to the conditions of the premises, where the lease provided landlord was not liable for "inconvenience, annoyance or injury to business" due to the scaffolding. Accordingly, since there was no constructive eviction, the guarantor was liable for the money judgment.

ESRT 250 W. 57th St., L.L.C. v. 13D/West 57th LLC, 148 A.D.3d 621 (1st Dep't 2017) (Constructive Eviction and Fraud)

Tenant may not recover damages when commercial subtenant was constructively evicted where the subtenancy was prohibited by the lease. Landlord had no duty to inform or advise tenant that a neighboring tenant's marijuana smoking could impact the quiet use and enjoyment of the premises. The Court noted that no liability attaches to landlord provided landlord did not make an "actionable misstatement" regarding the neighboring tenant's marijuana smoking.

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Soundview Cinemas, Inc. v. AC I Soundview, Inc., 149 A.D.3d 1121 (2d Dep't 2017) (Duty to Repair Independent of Obligation to Pay Rent - Commercial Lease)

Reversing granting of preliminary injunction that enjoined landlord from terminating the lease. While recognizing the tenant may ultimately succeed on its claim for damages due to landlord's failure to provide essential services (i.e., HVAC system and repair roof leaks), commercial tenant that remains in possession must continue to pay rent where landlord fails to provide essential services. To withhold rent, the commercial tenant must establish that it was either actually or constructively evicted, at which time, it may elect to withhold rent or sue for damages.

Heckman v. Heckman, 2017 N.Y. Misc. LEXIS 1324 (App. Term, 9th & 10th Jud. Dists. April 13, 2017) (Familial Relationship)

Reversing dismissal of daughter's holdover proceeding against sister-in-law. The Court was critical of the increasing usage and expansion of the "familial defense".

Pugliese v. Pugliese, 37 N.Y.S.3d 208 (App. Term, 2d, 11th & 13th Jud. Dists. 2016) (Familial Relationship)

On appeal, petition dismissed where petitioner attempted to evict his mother in a holdover proceeding alleging that he and his mother had entered into a tenancy-at-will pursuant to an oral agreement. A summary proceeding may be maintained against a family member where possession is obtained via a recognizable landlord and tenant-type relationship. The lower court had ruled in favor of petitioner concluding a tenancy-at-will was created and that petitioner properly terminated the tenancy via service of a 30-day notice. The Appellate Term reversed and directed dismissal of the action because the hearing record demonstrated that respondent denied the claim (i.e., she was there by virtue of the familial relationship) and petitioner failed to introduce any evidence in support of an oral agreement.

Barrett Japaning, Inc. v. Bialobroda, 2017 N.Y. Misc. LEXIS 662 (App. Term, 1st Dep't Feb. 28, 2017) (Illegal Apartment)

Holding the lack of a certificate of occupancy for an illegal sublet does <u>not</u> preclude the landlord from recovering possession.

Matute v. New York City Hous. Auth., 153 A.D.3d 916 (2d Dep't 2017) (Lead-based Paint)

Denying owner's motion to dismiss the 2003 complaint on behalf of an infant who sustained injuries from being exposed to lead-based paint in the multiple dwelling. At the time of the alleged injuries, NYC Administrative Code Local Law No. 1 obligated owners to "remove or cover" lead-based paint where a minor age 6 or younger resided in the unit. Here, the owner knew that a minor of the appropriate age was residing in the premises, and, thus further pursuant to the then applicable Local Law, the owner was deemed to have had constructive notice of the condition.

John v. Cassidy, 151 A.D.3d 1598 (4th Dep't 2017) (Lead-based Paint)

Denying defendant building owner's motion for summary judgment to dismiss the complaint for damages from lead-based paint injuries sustained by an infant. To incur liability for a lead-based paint condition, landlord must have "actual or constructive notice of the hazardous condition and a reasonable opportunity to remedy it, but failed to do so". Issues of fact precluded dismissal of the action.

Rodrigues v. Lesser, 150 A.D.3d 1686 (4th Dep't 2017) (Lead-based Paint)

Tenant may demonstrate landlord's constructive knowledge of lead-based paint by showing (1) landlord retained right of entry and assumed a duty to make repairs; (2) knew the premises was constructed before lead-based paint was banned; (3) was aware that paint was peeling in the premises; (4) knew the hazzards of lead-based paint to young children; and (5) knew young children resided in the premises. Summary judgment denied because only the right of entry and duty to make repairs were adequately demonstrated. Issues of fact persisted regarding the remaining prongs.

Waterfalls Italian Cuisine, Inc. v. Tamarin, 149 A.D.3d 1141 (2d Dep't 2017) (Option to Renew)

Denying cross-motion for summary judgment where the lease expired due to tenant's failure to exercise its right to renew. Equity may relieve a commercial tenant's failure to timely exercise a lease renewal where (1) the tenant's failure to exercise the option was due to a honest and inadvertent mistake; (2) the non-renewal would result in a substantial forfeiture by tenant; and (3) there would be no resulting prejudice to the landlord. Here, issues of fact with respect to all three (3) prongs, including whether conversations with the former owner were sufficient to exercise the renewal provision, required denial of motion for summary judgment.

Zmoore, Ltd. v. Kingman Mgt. LLC, 2017 N.Y. App. Div. LEXIS 7593 (1st Dep't Oct. 26, 2017) (Partial Actual Eviction - Commercial)

Commercial landlord's taking of a four (4) foot, walled-in common area in the basement of the two-story restaurant does not arise to a partial actual eviction because the space taken was a "common area". The mere trivial interference with the use and enjoyment of the premises does not amount to a partial actual eviction. Here, the lease permitted landlord to make repairs and changes to the public areas of the premises.

L'Aquilla Realty, LLC v. Jalying Food Corp., 148 A.D.3d 1004 (2d Dep't 2017) (Post-Termination Liability - Mitigation of Damages)

Where the lease provides the landlord has no duty to mitigate damages after recovering possession, and further that the tenant is liable for rent going forward, the tenant remains liable for all obligations under the lease.

K.A.M.M. Group, LLC v. 161 Lafayette Realty, Inc., 153 A.D.3d 799 (2d Dep't 2017) (Rescission)

Tenant paid $65,792 deposit in connection with commercial lease. However, the lease contained a mistake as to the commencement date and the premises were leased to another tenant before taking possession. Tenant rescinded the lease and requested the return of its deposit which landlord refused. The Court held that rescission was appropriate because the mutual mistake was material and essentially undermined the purpose of the lease, and, as a result, tenant was entitled to recover the deposit.

317 Magnone LLC v. Gumina, 2017 N.Y. Misc. LEXIS 1660 (App. Term, 1st Dep't May 8, 2017) (Rent Control - Primary Residence)

Petitioner prevailed in holdover proceeding for rent controlled premises where tenant did not occupy the property as her primary residence. The Court noted the tenant had not been at the apartment for several years at a time, during which she maintained and owned property in Wisconsin, was issued a Wisconsin driver's license and utilized Wisconsin address for filing tax returns.

47 HK Realty, LLC v. O'Leary, 2017 N.Y. Misc. LEXIS 1063 (App. Term, 1st Dep't March 31, 2017) (Rent Stabilized Premises – Primary Residence)

Summary judgment properly denied because the address utilized on tenant's tax return was just one (1) of several factors to be considered in making a determination on primary residence. The court distinguished **Ansonia Assoc. L.P. v. Unwin**, 130 A.D.3d 453 (1st Dep't 2015) where the tenant's federal tax returns demonstrated that the address tenant claim as his primary residence was "logically incompatible". The Appellate Term here noted that the Rent Stabilization Code specifically provides that there is no "single factor" which is determinative, including "the place of residence on any tax return" (RSC § 2520.6[u][1]).

710 Madison Ave. LLC v. Hicks, 2017 N.Y. Misc. LEXIS 2522 (App. Term, 1st Dep't July 3, 2017) (Rent Stabilized Premises – Primary Residence)

Dismissing holdover proceeding where tenant's extended absence from the premises was due to his taking care of the affairs of his ailing parents in Georgia. While in Georgia, tenant listed the New York premises as his home on medical records, power of attorney and death certificate. Further, there was no evidence that tenant removed any of his items from the premises.

Feria v. Johnson, 2017 N.Y. Misc. LEXIS 55 (App. Term, 2d, 11th & 13th Jud. Dists. Jan. 5, 2017) (Rent Stabilized Premises - Non-renewal so Owner or Immediate Family Occupy as Primary Residence)

Affirming dismissal of holdover proceeding where landlord refused to renew tenant's lease because he claimed that his son was going to use the premises as his primary residence. However, the Court concluded that there were significant questions whether the son was intending to use the premises as a business office, and, as a result, dismissed landlord's proceeding to recover possession.

124 Meserole, LLC v. Recko, 2017 N.Y. Misc. LEXIS 2022 (App. Term, 2d, 11th & 13th Jud. Dists. May 19, 2017) (Rent Stabilized Premises - Number of Units in the Building)

Dismissed petition because the premises was subject to rent stabilization, and, therefore landlord's failure to terminate the tenancy on grounds listed in Rent Stabilization Code [9 N.Y.C.C.R.] section 2524.3 necessitates dismissal. Here, since the building at one time contained six (6) or more units, the building remains subject to rent-stabilization even where the number of units are later reduced to below six (6).

Correa v. Matsias, 153 A.D.3d 1312 (2d Dep't 2017) (Res Ipsa Loquitur)

Holding that liability based upon the doctrine of res ipsa loquitur was not applicable where sleeping tenant sustained injuries when a portion of the bedroom ceiling collapsed. Res ipsa loquitur, a rule of evidence, permits an inference of negligence where (1) the event is a type that does not occur in the absence of negligence; (2) the "instrumentality that caused the injury" was within the exclusive control of defendant; and (3) plaintiff's injuries were not the result of any voluntary action by plaintiff. Here, since tenant had resided at the premises for more than a year, landlord did not have exclusive control over the alleged defective/dangerous condition. However, tenant is permitted to proceed with her claim that defendant failed to maintain the premises in a "reasonably safe condition".

Kaplan v. Tai Props. LLC, 147 A.D.3d 420 (1st Dep't 2017) (Safety - Appliances)

Dismissing tenant's personal injury action after she sustained burns to her head attempting to light burner on gas stove where the stove's ignitor malfunctioned. It was undisputed that tenant bought and had installed the stove. The lease obligated landlord to maintain and repair appliances provided by landlord, not those provided by tenant. Since no duty to repair the appliance was "[i]mposed by statute, by regulation or by contract", the claim was dismissed.

Golub v. Louris, 153 A.D.3d 903 (2d Dep't 2017) (Safety - Armed Robbery/Injuries)

Dismissing tenants' personal injury action resulting from an armed robbery in the rental unit. For there to be liability, the criminal act must have been foreseeable, which means that the unlawful act was "reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location". Here, the intruders gained entrance by breaking into a basement apartment (through a window). The court concluded the acts were "not reasonably foreseeable", and further, the landlords were not required to install a secure rear entry door as tenants argued.

Ramos v. New York City Hous. Auth., 147 A.D.3d 992 (2d Dep't 2017) (Safety - Assault)

Landlord need only take minimal precautions to protect tenants from "foreseeable harm, including foreseeable criminal conduct by a third person". Thus, to prevail against landlord for injuries tenant sustained after being assaulted by a third party, the evidence must demonstrate that landlord's negligent failure to provide adequate security was the proximate cause of tenant's injuries. In premises security cases, tenant cannot prevail unless it is shown the attacker gained access to the

premises through a negligently maintained entrance. In other words, the assailant had to be an intruder as opposed to having gained access through another tenant etc. Summary judgment in favor of landlord denied.

Kraycer v. Fowler St., LLC, 147 A.D.3d 1038 (2d Dep't 2017) (Safety - Dog Bites)

Denying defendant landlord's motion for summary judgment dismissing personal injury action. The occupant sued landlord after being bitten inside tenant's apartment by tenant's dog. To prevail on claim for damages for injuries resulting from the dog bite, plaintiff must demonstrate that landlord (1) had notice the dog was harbored on the premises; (2) knew or should have known of that the dog had vicious propensities; and (3) had sufficient access to the leased premises to remove or confine the dog.

Daly v. 9 E. 36th LLC, 2017 N.Y. App. Div. LEXIS 6385 (1st Dep't Sept. 5, 2017) (Safety - Fire)

Denying summary judgment in tenant's personal injury action for damages resulting from a fire in the subject studio apartment. The court held there was an issue of fact whether landlord had "actual or constructive notice" of the alleged dangerous wiring condition and failed to remedy the defect. Tenant's expert testified the building's 1930s electrical system posed a dangerous condition. Although the expert did not opine that the electrical system failed to meet standard safety codes, the court did not dismiss the action because in a multiple dwelling, the landlord is obligated to "exercise reasonable care in maintaining the property, including the wiring". The Fire Inspector's Report stated the fire originated "in an area of electrical wiring" but noted that multiple extension cords had been plugged into a single outlet with a power strip cord.

Ballo v. AIMCO 2252-2258 ACP, LLC, 2017 N.Y. App. Div. LEXIS 8502 (1st Dep't Nov. 30, 2017) (Safety - Shooting)

Out-of-possession landlord not liable because it had no duty of care to a patron of the commercial tenant (bar) who was shot while standing on the public sidewalk. Although the commercial lease permitted landlord the right to re-enter to make repairs, there was no evidence that landlord either had in fact entered the premises or had any involvement with the manner in which the tenant operated its business. Of note, approximately seven (7) years prior to the incident, landlord, the bar and New York City had entered into a stipulation of settlement regarding an unrelated public nuisance at the premises. The Court gave no credence to the stipulation because it expired by its own terms prior to the shooting and further that document did not obligate landlord "to do anything" with respect to the bar's operations.

Cotto v. New York City Hous. Auth., 2017 N.Y. App. Div. LEXIS 8290 (2d Dep't Nov. 22, 2017) (Safety - Window)

Summary judgment affirmed in favor of out-of-possession landlord where it did not create/cause the defective condition and further had no actual or constructive notice of the defect. Here, the son of the tenant severed the tip of a finger opening a window in the living room (the window slammed shut on his finger). The only evidence of notice was that a different window in the living was repaired approximately a year earlier following an inspection by landlord. However, no complaints were made regarding any of the windows following the repair.

LaCarrubba v. Outdoor Clothing Corp., 2017 N.Y. Misc. LEXIS 3792 (App. Term, 9th & 10th Jud. Dists. Sept. 29, 2017) (Statute of Frauds)

Holding that an oral five-year rental agreement violates the statute of frauds, and the doctrine of partial performance (by the party seeking to enforce the proposed renewal lease) does not negate the requirements posed by that statute (Gen. Obligs. Law § 5-703(2)]. In addition, an "agreement to agree" does not obligate either party to a particular lease or renewal lease. To the contrary, the agreement is void for "uncertainty".

Dee Cee Assoc., LLC v. 44 Beehan Corp., 148 A.D.3d 636 (1st Dep't 2017) (Statute of Limitations)

Notwithstanding potential laches or stale rent defenses, the statute of limitations for unpaid rent is six (6) years from the date the rent became due.

Jacob Marion, LLC v. Bey, 36 N.Y.S.3d 47 (App. Term, 2d, 11th & 13th Jud. Dists. 2016) (Tenant claims she is the owner)

In granting motion to vacate default judgment, the Appellate Term held that the housing part was required to consider the tenant's assertion that she is the owner of the subject premises as a potential meritorious defense.

Clark v. Singletary, 31 N.Y.S.3d 920 (App. Term, 9th & 10th Jud. Dists. 2016) (Tenant Not in Possession When Action Commenced)

Reaffirming that a nonpayment proceeding may not be maintained where the tenant vacated the premises before the summary proceeding was commenced. This was a small claims action by the joint tenant seeking to recover the proportionate share of the rent arrears from the joint tenant, plaintiff's former spouse.

551 W. 172nd St. LLC v. Taveras, 2018 N.Y. Misc. LEXIS 254 (App. Term, 1st Dep't Jan. 29, 2018) (Unlawful Activity)

Affirming dismissal of holdover proceeding for unlawful activity pursuant to RPAPL § 711(5) where there was insufficient evidence that tenant knew or reasonably knew her adult son was engaged in illegal drug activity at the residence. There was no indicia that tenant sold or attempted to sell unlawful drugs from the residence. Moreover, the evidence suggested that tenant's son actively sought to conceal any unlawful activity from his mother. ***See also*** **People v. F.B., 2017 N.Y. App. Div. LEXIS 7271 (1st Dep't Oct. 17, 2017); Paul Robeson Houses Assoc., L.P. v. Harris, 2017 N.Y. Misc. LEXIS 1806 (App. Term, 1st Dep't May 16, 2017) [Predicate Notices].**

Potts v. Thomas, 2017 N.Y.L.J. 3398 (Nassau Cnty. Dist. Ct. Dec. 6, 2017) (Vendee in Possession)

Stipulation of settlement term in a summary proceeding that merely states landlord and tenant agree to enter into a contract of sale does not render the tenant a vendee in possession. In other words, the tenancy continues. The tenancy would, however, be terminated where the parties enter into a contract of sale for the premises.

Grinberg v. Eissenberg, 2018 N.Y.L.J. 318 (App. Term, 2d, 11th & 13th Jud. Dists. Feb. 7, 2018) (Warranty of Habitability)

Awarding judgment in favor of tenant in plenary action for breach of warranty of habitability. The breach stemmed from a ceiling leak from the apartment above which resulted in water damage and mold. Landlord attempted but failed to make the repair. Tenant fixed the leak three (3) years after first reported. A lease provision shifting the burden of making repairs that fall under the warranty of habitability is unenforceable.

46 Warren, LLC v. Lynch, 2017 N.Y. Misc. LEXIS 8389 (1st Dep't Nov. 28, 2017) (Warranty of Habitability)

Although warranty of habitability is only applicable to residential leases, here the parties' residential lease specifically provided that landlord would provide heat and hot water. The parties separately and outside the scope of the lease agreed tenant could also utilize the premises for commercial purposes (home office). Since the lease was not modified/reformed, landlord was responsible for providing heat and hot water based on the express lease terms (not warranty of habitability).

101 Cooper St. LLC v. Beckwith, 2017 N.Y. Misc. LEXIS 2001 (App. Term, 1st Dep't May 25, 2017) (Warranty of Habitability)

Holding that a counterclaim pursuant to the warranty of habitability may be permitted to seek the return of rent previously paid.

Mateo v. Anokwuru, 2017 N.Y. Misc. LEXIS 3853 (App. Term, 1st Dep't Oct. 11, 2017) (Warranty of Habitability)

Reversed full rent abatement due to "deplorable" conditions in the basement because tenant had received shelter, and, therefore, cannot recoup the full amount of rent paid. The proper method to compute the warranty of habitability abatement is to subtract the value of the premises during the breach from the fair market value if provided as warranted. A tenant may recover for a breach of the warranty of habitability where the apartment is illegal.

Dunbar Owner LLC v. Jones, 2017 N.Y. Misc. LEXIS 252 (App. Term, 1st Dep't Jan. 25, 2017) (Warranty of Habitability)

Warranty of habitability claim is <u>not</u> limited to the time the landlord owned the premises. Here, the purchase documents demonstrated that the property was purchased "subject to existing tenancies". Therefore, it was proper to award tenant on its counterclaim pursuant to the warranty of habitability for any breach that arose during the tenancy. The evidence specifically established that the bathroom was unusable, the kitchen sink and living room window were malfunctioning, there were recurrent leaks, and the premises had a rodent and vermin infestation.

LGS Realty Partners LLC v. Kyle, 26 N.Y.S.3d 725 (App. Term, 1st Dep't 2015) (Warranty of Habitability)

Holding tenant was not entitled to rent abatement under the warranty of habitability during the period tenant "did not cooperate with [landlord's] attempts to make repairs" which resulted in additional delays.

227J LLC v. Barker, 2017 N.Y. Misc. LEXIS 2000 (App. Term, 1st Dep't May 25, 2017) (Warranty of Habitability - Notice to Landlord)

Abatement for breach of warranty of habitability denied where tenant asserted "vague" and nonspecific statements concerning alleged notice provided to building employees regarding the defective conditions.

2. AGENT

Fallarino v. Fallarino, 2017 N.Y. Misc. LEXIS 2091 (App. Term, 9th & 10th Jud. Dists. May 23, 2017)

Dismissing holdover proceeding where petitioner's nephew entered into tenancy with petitioner's brother following the deeding of the premises to petitioner and his brothers as a life estate. The Court held that the petitioner (not an attorney) lacked standing to commence the summary proceeding because his power of attorney for his mother did not permit him to commence a proceeding in his own name. In addition, petitioner could not amend the petition to reflect his mother's name as that would constitute the unauthorized practice of law.

Elias Props. Mgmt., Inc. v. Bone Half Fashion Corp., 2017 N.Y. Misc. LEXIS 3765 (App. Term, 2d, 11th & 13th Jud. Dists. Sept. 29, 2017)

Affirming dismissal of commercial nonpayment proceeding where the action was commenced by petitioner's agent, another corporation, in violation of RPAPL § 721.

Board of Mgrs. of J Condominium v. Tornabene, 2017 N.Y. Misc. LEXIS 1028 (App. Term, 2d, 11th & 13th Jud. Dists. March 21, 2017)

Notwithstanding condominium bylaw authorizing managing board to commence a summary proceeding on behalf of unit owner, the bylaw provision is unenforceable because RPAPL § 721 does not give standing to a managing board (agent) to commence such a proceeding. As a result, the proceeding was dismissed and the $24,391.36 award for attorney's fees was vacated.

Inland Diversified Real Estate Serv., LLC v. Keiko New York, Inc., 36 N.Y.S.3d 407 (App. Term, 9th & 10th Jud. Dists. 2016)

Petitioner limited liability company was required to obtain counsel because RPAPL 721 does not authorize the agent of a limited liability company to maintain a summary proceeding.

Oakwood Terrace Hous. Corp. v. Monk, 36 N.Y.S.3d 48 (App. Term, 9th & 10th Jud. Dists. 2016) (co-tenant wife; united in interest)

Where a *pro se* non-attorney files an appeal on behalf of herself, she is not authorized to appear on behalf of her co-tenant husband (*see* CPLR 321). However, based upon the Appellate Term's finding that the judgment and warrant should be vacated and the petition dismissed due to the landlord's failure to prove or plead that a rent demand was made prior to commencement of the nonpayment proceeding, the proceeding was dismissed against both tenants because they are united in interest. (Note: the tenants' unified interest arose from the same rental agreement which imposes joint and several liability and, as such, their claims are identical in that they will either prevail or lose together).

Priegue v. Paulus, 988 N.Y.S.2d 525 (App. Term, 9th & 10th Jud. Dists. April 14, 2014) (co-tenant brother; united in interest)

Where the brother respondents appeared *pro se* in the underlying action and only one (1) appealed the Housing Part's decision, the appealing brother could not appear on behalf of the other (*see* CPLR 321). However, based upon the Appellate Term's finding that the respondent correctly asserted that the money judgment should be reduced, the court reduced the money judgments against both respondents because they are unified in interest.

Ernest & Maryanna Jeremias Family P'ship, L.P. v. Sadykov, 11 N.Y.S.3d 792 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (Limited Liability Partnerships and Partnerships)

Holding that limited liability partnerships and partnerships must appear by counsel. Although CPLR 321(a) does not explicitly refer to partnerships and limited liability partnerships, the Appellate Term reasoned that they are required to appear by counsel because they were "largely subsumed within the definition of voluntary associations", which in many jurisdictions require representation by counsel. In this nonpayment proceeding, petitioner was a limited partnership which had appeared by one of its partners who was not an attorney.

O'Kelly, as Administrator of the Estate of Magdy O'Kelly v. John Doe, 36 N.Y.S.3d 408 (App. Term, 2d, 11th & 13th Jud. Dists. 2016)

A "friend" of the "John Doe" lacks standing to file a motion to vacate the default judgment.

3. APPEALS

Matter of 141 Ave. A Assoc. v. Klein, 2018 N.Y. App. Div. LEXIS 1155 (1st Dep't Feb. 20, 2018) (party failed to participate in appeal to Appellate Term)

Tenant obtained a stay on the execution of the warrant of eviction and denial of landlord's cross-motion for rent arrears and attorney's fees in the housing part. Tenant, however, failed to participate in landlord's appeal of that order to the Appellate Term which ultimately reversed the housing part in all respects. The Appellate Division held that tenant had no standing to appeal the Appellate Term's decision because he was not an "aggrieved party" under CPLR 5511 due to his failure to "oppose the landlord's appeal to the Appellate Term or otherwise participate in the proceeding before that court".

136-76 39th Ave., LLC v. Wu, 2017 N.Y. Misc. LEXIS 1029 (App. Term, 2d, 11th & 13th Jud. Dists. March 29, 2017) (defective rent demand cannot be raised for first time on appeal)

Granting tenant's motion to vacate default judgment to the extent that the Housing Part should not have entered a default judgment based upon landlord's attorney's affirmation which was based upon hearsay statements. However, tenant failed to demonstrate a reasonable explanation for her non-appearance or the possibility of a meritorious defense. Tenant's claim that rent could be withheld

due to landlord's failure to make repairs/construction was belied by the lease and rider to the lease. In addition, the claim that a rent demand was not served cannot be raised on the first time on appeal, and, in any event, the predicate notice does not involve subject matter jurisdiction (it is a prerequisite that may be waived). Moreover, the petition alleges an oral rent demand was made, which was not disputed. Thus, the default was vacated but tenant's request to be restored to possession was denied.

29-33 Convent Ave. Hous. Dev. Fund Corp. v. Bost, 2017 N.Y. Misc. LEXIS 5040 (App. Term, 1st Dep't Dec. 22, 2017) (failure to file notice of appeal and/or address order appealed from)

Dismissed as abandoned tenant's appeal of issuance of a warrant of eviction because tenant failed to address any issue contained within the order appealed from in her appellate brief. Moreover, the appeal of the possessory judgment, which was issued following a hearing on the merits, was similarly rejected because tenant did not file a notice of appeal from the final judgment.

Goldman v. Flynn, 2017 N.Y. Misc. LEXIS 3854 (App. Term, 1st Dep't Oct. 11, 2017) (rent regulated - nuisance)

Denied request for appointment of guardian ad litem where the request was first made on appeal, and the record further did not reflect that the tenant, who was unsuccessful in the holdover proceeding, was incapable of understanding the nature of the summary proceeding or unable to adequately defend himself.

McKenzie v. Damazio, 2017 N.Y. Misc. LEXIS 4500 (App. Term, 1st Dep't Nov. 29, 2017) (incomplete transcript)

Dismissed appeal without prejudice to renew where trial transcript was incomplete due to "inaudible" gaps in the testimony. A deficient record requires dismissal of the appeal. Appellant bears the burden of providing a satisfactory record that complies with CPLR § 5526.

Parkchester Preservation Co., L.P. v. Adams, 28 N.Y.S.3d 649 (App. Term, 1st Dep't 2016)

Appeal of judgment in favor of petitioner following a hearing on the merits was rendered moot where tenant voluntarily vacated the premises while the appeal was pending. Apparently, the issue raised on appeal was whether petitioner was motivated by retaliation for a lawful or otherwise protected conduct by the tenant.

4. COUNTERCLAIMS

Joseph v. Lyu, 2018 N.Y.L.J. 599 (App. Term, 2d, 11th & 13th Jud. Dists. Feb. 16, 2018) (Rent Demand)

Dismissed tenant's counterclaims where lease contained a "no counterclaim" provision. Moreover, where the attempts to serve the rent demand – prior to resorting to "nail-and–mail" service – were done at the premises at times when landlord knew the tenant had not yet opened for business, service is defective. The attempts were deemed "not reasonable", and the landlord's action was dismissed.

246 W. 38 Holdings LLC v. Tufamerica, Inc., 2016 N.Y. Misc. LEXIS 4459 (App. Term, 1st Dep't 2016)

Enforcing lease provision barring counterclaims in a summary proceeding.

2094-2096 Boston Post Rd., LLC v. Mackies American Grill, Inc., 2016 N.Y. Misc. LEXIS 1975, 2016 N.Y. Slip Op 50844(U) (App. Term, 9th & 10th Jud. Dists. May 25, 2016)

Tenant's counterclaims may be heard in a summary proceeding where the rental agreement contains a "no counterclaim provision" provided the counterclaims are "inextricably intertwined" with the landlord's primary claim or the tenant's defenses. In the Justice Court, unlike other Housing Parts, the maximum dollar amount that may be awarded on a counterclaim is $3,000 (UJCA § 208), and, as a result, if pursued, any dollar amount in excess of the $3,000 is deemed waived. Accordingly, the Appellate Term directed the Justice Court to provide the tenant with an opportunity to withdraw its counterclaims without prejudice.

LGS Realty Partners LLC v. Kyle, 26 N.Y.S.3d 725 (App. Term, 1st Dep't Nov. 18, 2015)

Housing Part properly denied tenant's motion on the eve of the hearing to amend the answer to assert a counterclaim. Since no excuse was proffered for the delay in making the request, the tenant waived the counterclaim in the summary proceeding regardless of the adequacy of its merits.

5. DISCOVERY

86 W. Corp. v. Singh, 2017 N.Y. Misc. LEXIS 4451 (App. Term, 1st Dep't Nov. 27, 2017)

Granting landlord's motion to conduct discovery concerning respondent's succession claim. The applicable discoverable period was extended beyond the customary two-year look-back period for succession claims in rent stabilized premises. Here, the court permitted the discovery to encompass the period leading up to the death of the tenant of record, and the time prior to tenant's incarceration approximately five (5) years earlier.

1234 Broadway, LLC v. Wong, 2017 N.Y. Misc. LEXIS 544 (App. Term, 1st Dep't Feb. 17, 2017)

Holding that discovery was appropriate to determine the circumstances upon which one (1) of the occupants entered the single occupant room and his claim to succession rights (successor tenant to his brother). However, since the discovery demand was overly broad, leave was granted to submit a more narrowly tailed request.

Casanas v. Cariel Group, LLC, 149 A.D.3d 515 (1st Dep't 2017)

Affirming denial of tenant's motion to strike complaint due to landlord's continuous delay in disclosing documents, including various versions of the lease. Notwithstanding the delays, the Court reasoned that some of the hindrance was attributable to a fire at the premises. Absent a "clear showing" that the party's noncompliance was "willful and contumacious", the drastic remedy of striking the complaint is unwarranted.

Missionary Sisters, Inc. v. Fauerbach, 2016 N.Y. Misc. LEXIS 1942, 2016 N.Y. Slip Op 50829(U) (App. Term, 1st Dep't May 31, 2016)

Holding that counsel's informal gathering of discovery from a *pro se* 86-year old tenant without a Court Order pursuant to CPLR 408 was troubling. However, the sanction of disqualification and suppression was unwarranted where there was no indication that counsel obtained confidential and/or privileged information from the tenant and the majority of the documents would have routinely been disclosed in the summary proceeding had formal discovery been conducted. Accordingly, the Appellate Term modified the suppression order by holding it was "without prejudice" to a proper discovery motion.

Zada Assocs. v. Melucci, 28 N.Y.S.3d 651 (App. Term, 1st Dep't Oct. 30, 2015)

Reversing Housing Part's denial of landlord's motion for discovery (photographs related to the unauthorized alterations and renovations). Discovery was warranted because (1) landlord set forth facts to demonstrate a cause of action; (2) the renovations were the main issue at dispute; (3) the discovery sought was in the exclusive control of tenant; and (4) there was no prejudice because any delay resulting from discovery impacts landlord's own case.

Hyatt Ave. Assocs., LLC v. Rahman, 17 N.Y.S.3d 579 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (Notice to Admit)

Affirming Housing Part's denial of tenant's motion to deem admitted assertions set forth in tenant's Notice to Admit. The purpose of the Notice to Admit is to narrow the breadth of disputed issues at the hearing/trial by seeking an admission from the recipient that would remove the burden of proving certain facts. The request for an admission on the ultimate issue or a detail "going to the heart of the matter" is improper. Pursuant to CPLR § 408, the recipient's responses must be served no more than one (1) day prior to the hearing.

6. EARMARKED FUNDS

Greenbrier Garden Apts. v. Eustace, 31 N.Y.S.3d 921 (App. Term, 9th & 10th Jud. Dists. 2016)

Landlord must apply earmarked rent payments to the month or months specified on the check. The funds may not be applied to earlier arrears.

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7. EVIDENCE

76-82 St. Marks, LLC v. Gluck, 147 A.D.3d 1011 (2d Dep't 2017) (Best Evidence and Secondary Evidence Rules)

Trial court properly denied admission of copy of lease guaranty into evidence. An exception to the Best Evidence Rule permits items such as a copy (secondary evidence) to be admitted where moving party demonstrates that the original (Best Evidence) is not available and the unavailability of the original was not due to bad faith. The movant must further demonstrate that the copy is reliable and an accurate depiction of the original. Here, the evidence sufficiently demonstrated the lack of availability of the original but failed to demonstrate the copy's reliability and accuracy.

Ortiz v. Sohngen, 50 N.Y.S.3d 239 (App. Term, 2d, 11th & 13th Jud. Dists. April 7, 2017) (Business Record)

Certified records of a department of a municipal corporation are admissible (CPLR § 4518). Here the records were prima facie proof that the building contained more than approved six (6) residential units, and, therefore, the NYC premises was subject to rent stabilization.

APF 286 MAD, LLC v. Chittur & Assocs., P.C., 28 N.Y.S.3d 647 (App. Term, 1st Dep't Jan. 4, 2016) (Business Records)

Holding that computer printouts may be admitted as business records where landlord entered the payment information in the regular course of landlord's business (*see* CPLR § 4518).

Ulm I Holding Corp. v. Antell, 2017 N.Y. App. Div. LEXIS 8504 (1st Dep't Nov. 30, 2017) (Expert Witness - Forgery)

Affirming $439,881.85 summary judgment award against guarantor of commercial lease. Guarantor's claim that his signature was a forgery summarily rejected as his own expert's report was unsworn, and he failed to provide a sufficient explanation for failing to provide a sworn statement. The rule is that more than bald, conclusory assertions are required to create an issue of fact regarding "the authenticity of a signature". Although expert testimony is not required, where an expert purports an opinion in opposition to a moving party's prima facie case, to be considered by the court, the opinion "must be in admissible form and state with reasonable professional certainty that the signature at issue is not authentic".

Noah Trading Co., Inc. v. Bell, 2017 N.Y. Misc. LEXIS 251 (App. Term, 1st Dep't Jan. 25, 2017) (Parol Evidence - Merger Clause)

In this holdover proceeding, summary judgment granted in favor of landlord where the parties' lease expired by its own terms and no new agreement had been reached. The lease did not contain a renewal provision. Moreover, tenant could not introduce parol evidence regarding purported representations of the leasing agent because the lease contained a merger clause (integration) that the lease was the complete and final agreement.

Samra v. Messeca, 17 N.Y.S.3d 385 (App. Term, 1st Dep't 2015) (Recordings)

Tape recordings of conversations between an agent of landlord and the tenant were properly admitted into evidence where the recordings were a fair and accurate representation of the conversations and the recordings had not been altered.

8. HEARINGS

Jiao v. Worldwide Direct Membership LLC, 2017 N.Y. Misc. LEXIS 3666 (App. Term, 1st Dep't Sept. 27, 2017)

Reversing dismissal of consolidated plenary actions for unpaid rent where the action was dismissed prior to the completion of plaintiff's case after it was acknowledged that the premises lacked a valid certificate of occupancy. Notwithstanding plaintiff's assertion that a certificate was not required due to the age of the building, the Court noted that the former tenants did not raise this defense and that the trial court's conduct circumvented the concept of "fair play".

1970 Univ LLC v. Estate of Garcia, 58 N.Y.S.3d 897 (App. Term, 1st Dep't 2017)

Affirmed dismissal of licensee holdover proceeding after a nonjury trial because "due deference" should be afforded to the trial court in assessing the credibility of witnesses (expert and lay) and reliability of documents. Here, the trial court concluded that the respondent qualified as a "disabled person" under the succession laws of the Rent Stabilization Code of NYC based upon the testimony and the Report of Confidential Social Security Benefit Information, and, as such, she was entitled to succession rights to the premises where it was undisputed that she had resided in the premises with her now deceased grandmother (the tenant of record) during the relevant one-year look-back period.

Sunderland v. Kane, 2017 N.Y. Misc. LEXIS 1631 (App. Term, 2d, 11th & 13th Jud. Dists. April 28, 2017)

Affirming damages award in favor of tenant where landlord discarded four (4) articles of tenant's clothing. The Court deferred to the trier of fact's assessment of credibility (evaluation of the testimony and observance of the demeanor of the witnesses).

1764 Majors Path Corp. v. Petrinolis, 36 N.Y.S.3d 408 (App. Term, 9th & 10th Jud. Dists. 2016)

Housing Part erred by directing the tenant to state all affirmative defenses without first requiring the landlord to put forth its case at the hearing. Following the tenant's testimony, and without the elicitation of any sworn testimony from petitioner to establish its case, the Housing Part awarded the landlord possession on the grounds that the tenant failed to establish a defense. The judgment was vacated and the case was remitted to the Housing Part for a new hearing. The defaults of the two (2) non-appealing occupants (squatters) remained unaffected because no appeal lies from a default judgment (CPLR 5511). There could be an appeal of the denial of a motion to vacate a default.

129th St. Cluster Assocs. v. Levy, 26 N.Y.S.3d 214 (App. Term, 1st Dep't 2015)

Holding in abeyance the appeal of the possessory judgment because the Housing Part's "terse" decision was devoid of any evidentiary facts upon which it relied. CPLR § 4213 provides that the court's decision may be oral or in writing, but it must "state the facts it deems essential" and relied upon (CPLR § 4213(b)). The decision must be made within sixty (60) days after the matter is fully submitted (CPLR § 4213[c]).

9. INJUNCTIONS

A. PRELIMINARY INJUNCTIONS

Soundview Cinemas, Inc. v. AC I Soundview, Inc., 149 A.D.3d 1121 (2d Dep't 2017)

Reversing issuance of preliminary injunction enjoining landlord from terminating the lease because tenant failed to establish that it would suffer irreparable harm and/or the balance of the equities

supporting injunctive relief. The court concluded that since the damages claimed were monetary and capable of being computed, injunctive relief was not available. The standard for issuance of a preliminary injunction is (1) likelihood of success on the merits; (2) irreparable harm if an injunction is not issued; and (3) a balance of the equities favoring injunctive relief. In addition, the lower court erred by failing to preserve the status quo when it effectively re-wrote the lease by directing tenant pay only a portion of the rent due while it remained in possession. While recognizing that the tenant may ultimately succeed on its claim for damages due to the landlord's failure to provide essential services (i.e., HVAC system and repair roof leaks), a commercial tenant that remains in possession must continue to pay rent even where landlord fails to provide essential services. To withhold rent, the commercial tenant must establish that it was either actually or constructively evicted, at which time, it may elect to withhold rent or sue for damages.

B. *YELLOWSTONE* INJUNCTIONS

159 MP Corp. v. Redbridge Bedford, LLC, N.Y.L.J. LEXIS 339 (2d Dep't Feb. 9, 2018)

In a case of first impression, the Court enforced a lease provision waiving commencement of a declaratory judgment action – and further extending that restriction to the application for a *Yellowstone* injunction. The Appellate Division held that this is a case-by-case determination. The decision further discusses the requirements for obtaining a *Yellowstone* injunction.

Riesenburger Props., LLLP v. Pi Assoc., LLC, 2017 N.Y. App. Div. LEXIS 8304 (2d Dep't Nov. 22, 2017)

Affirming denial of *Yellowstone* injunction where commercial tenant failed to move for injunctive relief prior to the expiration of the cure period and service of the notice of lease termination. The Court held that it did not matter whether the lease was actually terminated when the injunction was sought. The standard to obtain a *Yellowstone* injunction requires tenant to demonstrate that (1) it has a commercial lease; (2) it received from landlord a notice of default, a notice to cure or a threat of lease termination; (3) it sought injunctive relief prior to (a) the termination of the lease and (b) expiration of the cure period; and (4) it has the ability to cure the alleged breach 'by any means short of vacating the premises".

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Juan v. 213 W. 28 LLC, 149 A.D.3d 539 (1st Dep't 2017)

Affirming denial of *Yellowstone* injunction, *inter alia*, where tenants were in violation of lease provision requiring insurance coverage for the entire lease term. Here, there were two (2) gaps in coverage. The Court reasoned that the breach was material and incapable of being cured because a new policy could not cover claims arising during the period where there was no coverage.

Superior Tech. Solutions, Inc. v. Rozenhoic, 147 A.D.3d 485 (1st Dep't 2017)

Dismissing malpractice claim against counsel for failing to exercise lease renewal provision and/or advising tenant to renew the lease. The evidence demonstrated that counsel was retained to represent tenant in connection with a separate action for a *Yellowstone* injunction, and, at the time the lease was due to be renewed, defendant was not "actively" representing tenant. The evidence further illustrated that tenant was aware that the renewal notice had to be in writing, and that on a prior occasion tenant renewed the identical lease.

10. JURISDICTION

Robinson v. 47 Thames Realty, LLC, 2018 N.Y. App. Div. LEXIS 1159 (2d Dep't Feb. 21, 2018)
Robinson v. 47 Thames Realty, LLC, 2018 N.Y. App. Div. LEXIS 1172 (2d Dep't Feb. 21, 2018)

Affirming Supreme Court's decision to remove older (1 month) summary proceeding to join and consolidate with the tenant's Supreme Court action which sought, among other things, injunctive relief. The cases involved similar or the same facts and transactions, and required a determination of common issues. Landlord would suffer no prejudice from removal, and consolidation avoids duplication, unnecessary costs and the possibility of contradicting decisions.

Efaplomatidis v. Aires Mexicanos Rest. Corp., 2018 N.Y. Misc. LEXIS 361 (App. Term, 2d, 11th & 13th Jud. Dists. Feb. 2, 2018)

Affirming denial of respondents' motion to vacate final judgment and to be restored to possession. Moving respondents had consented to be named respondents during the summary proceeding and waived all defenses and consented to jurisdiction of the court. The parties entered into a stipulation of settlement which respondents eventually breached. After respondents were evicted, they claimed the judgment should be vacated because the housing part lacked subject matter jurisdiction. The

basis for the claim was that respondents vacated the commercial premises prior to the commencement of the summary proceeding pursuant to an temporary restraining order issued by the Supreme Court. The Appellate Term rejected that argument holding that their stipulation to be substituted as parties and the waiver of defenses constituted a waiver of the claim. Moreover, the Court reasoned that the housing part had subject matter jurisdiction over the proceeding pursuant to RPAPL §§ 701 and 711.

Caracaus v. Conifer Cent. Sq. Assocs., 2017 N.Y. App. Div. LEXIS 9100 (4th Dep't Dec. 22, 2017)

Holding that County Court could not transfer tenant's plenary action for attorney's fees pursuant to RPL § 234 to Justice Court in accordance with Article VI, § 19(b) of the New York Constitution. The reason for the limitation on the County Court's authority to do so is that the dollar amount sought ($25,000) exceeded the monetary jurisdiction of the Justice Court.

Abner Props. Co. v. Frederick Goldman, Inc., 2017 N.Y. Misc. LEXIS 4450 (App. Term, 1st Dep't Nov. 27, 2017)

Affirming award of partial summary judgment in favor of landlord on the issue of possession in holdover proceeding concluding that there was no need for a predicate notice because the parties' renewal lease had expired. The court rejected the commercial tenant's claim that it was a month-to-month tenant which would have required a 30-Day Notice. The trial court set the matter down for a hearing to determine use and occupancy, rent and attorney's fees. The court further held that tenant's vacating the premises during the pendency of the appeal neither deprived the court of jurisdiction nor rendered the appeal moot, particularly since the relief sought by landlord included, but was not limited to, attorney's fees and use and occupancy, which were not decided on summary judgment.

London Paint & Wallpaper Co., Inc. v. Kesselman, 138 A.D.3d 632 (1st Dep't 2016)

Although the Housing Part is the preferred forum for landlord and tenant disputes, the court has no authority to issue declaratory and/or injunctive relief. Since the Supreme Court has concurrent jurisdiction, that court may (not always) be the appropriate forum for resolving a landlord and tenant dispute where declaratory relief is sought.

11. JURY WAIVER

Inwood Gardens, Inc. v. Udoh, 26 N.Y.S.3d 213 (App. Term, 1st Dep't 2015)

Lease provision waiving hearing by jury generally enforceable. The Appellate Term granted tenant's motion to vacate the default judgment, but affirmed the Housing Part's decision to deny discovery because the tenant's request was overbroad and sought irrelevant information.

12. LEASE INTERPRETATION

159 MP Corp. v. Redbridge Bedford, LLC, 2018 N.Y.L.J. LEXIS 339 (App. Div., 2d Dep't Feb. 9, 2018)

In a case of first impression, the Court enforced a lease provision waiving commencement of a declaratory judgment action – and further extending that restriction to the application for a *Yellowstone* injunction. The Appellate Division held that this is a case-by-case determination. The decision further discusses the requirements for obtaining a *Yellowstone* injunction.

Bri Jen Realty Corp. v. Altman, 146 A.D.3d 744 (2d Dep't 2017)

Where lease provides a "due date" for the payment of rent, that date is the date the tenant's debt accrues. Here, the Court enforced a lease provision that stated the annual rent was due at the beginning of each year of the lease. Thus, the guarantor was liable for a full year's rent even where the tenant surrendered the premises during the term.

82-90 Broadway Realty Corp. v. New York Supermarket, Inc., 2017 N.Y. App. Div. LEXIS 7288 (2d Dep't Oct. 18, 2017)

Personal guaranty must be in writing, but need not be notarized to be enforced. In addition, a typographical error in the guaranty that amounts to a scrivener's error which does not reflect a mistake about the agreement terms, but rather a mere error in memorializing the parties' agreement, does not invalidate the agreement.

After Midnight Co. LLC v. MIP 145 E. 57th St., LLC, 146 A.D.3d 446 (1st Dep't 2017)

Dismissing part of commercial tenant's claim for damages where the lease barred tenant from "bringing any claim against defendant landlord for inconvenience, annoyance, or injury to plaintiff's business". The Court held that the provision was enforceable.

Omansky v. 160 Chambers St. Owners, Inc., 2017 N.Y. App. Div. LEXIS 8031 (1st Dep't Nov. 14, 2017)

Strict enforcement of lease provision requiring tenant provide notice of renewal within sixty (60) days of completion of the 25-year lease. Here, tenant gave written notice of renewal fifteen (15) years prior to lease expiration. Moreover, landlord's failure to provide tenant fifteen (15) days notice of the option to renew, as required by the lease, similarly did not result in the automatic renewal. Finally, the acceptance of new rent payments post-termination did not waive the right to object to the failure to renew the lease. Rather, the payments created a month-to-month tenancy, but since the lease had expired, landlord could not then assign its interest in the lease to a third party more than one (1) year later.

Shaukat v. Wilcox, 2017 N.Y. Misc. LEXIS 2212 (App. Term, 2d, 11th & 13th Jud. Dists. June 2, 2017)

Enforcing commercial lease provision allowing either party to terminate lease due to "partial destruction" of premises that could not be repaired by landlord within sixty (60) days. Here, a fire destroyed the entire building before landlord purchased the premises. Since the repairs could not be performed within the specified time period, landlord's motion for summary judgment was granted.

Inland Diversified Real Estate Serv., LLC v. Keiko New York, Inc., 36 N.Y.S.3d 407 (App. Term, 9th & 10th Jud. Dists. 2016)

Appellate Term vacated stipulation of settlement and dismissed the nonpayment proceeding. The court reasoned that a catch-all lease provision stating "all costs that tenant is obligated to incur pursuant to the lease are deemed 'additional rent'" is enforceable where another provision in the lease states a particular item is the responsibility of the tenant but does not utilize the term "added" or "additional" rent. The court determined it was permissible to read the provisions together and in conjunction with one another. However, the case was dismissed because landlord failed to demonstrate it was entitled to an award for any of the items.

13. LEASE MODIFICATION

New Whitehall Apts. LLC v. S.A.V. Assoc. Inc., 2017 N.Y. Misc. LEXIS 2520 (App. Term, 1st Dep't July 3, 2017)

Where the lease modification for a restaurant failed to specify the monthly rent for five (5) of the ten (10) years of the purported extension, the Appellate Term held that the lower court correctly used parol evidence to determine the intent of the parties. The Court further determined that based upon the parties' meticulous drafting, attention to details in prior agreements and the tenant's financial troubles, amongst other factors, that the purported ten (10) year date on the modification was a typographical error. The Court thus concluded that the parties intended the modification agreement to apply to a five (5) year period.

Latin Events, LLC v. Doley, 120 A.D.3d 501 (2d Dep't 2014)

Reversing order of Supreme Court granting tenant's motion for summary judgment because questions of fact existed as to whether the parties orally modified their written rental agreement. Generally, a written agreement that prohibits oral modification may only be changed by a written agreement signed by the party against whom enforcement of the change is sought (*see* General Obligations Law 15-301[1]). However, an oral modification may be permitted in such a circumstance where there is clear "partial performance of the oral modification" and the part performance is "unequivocally referable to the modification".

14. MONEY JUDGMENTS

Parker v. Howard Ave. Realty, LLC, 53 N.Y.S.3d 879 (App. Term, 2d, 11th & 13th Jud. Dists. 2017)

In a summary proceeding, the available relief is a judgment of possession, warrant of eviction and a money judgment for rent, added rent and use and occupancy. Where the proceeding is commenced by a tenant claiming unlawful eviction under RPAPL§ 713(10), the relief is limited to a judgment of possession. Damages are not available. Moreover, the housing part cannot grant declaratory relief.

Hermida v. Blochwitz, 2017 N.Y. Misc. LEXIS 2068 (App. Term, 9th & 10th Jud. Dists. May 23, 2017)

A month-to-month tenant who vacates during the month is obligated to pay the full month's rent.

A. ACCELERATED RENT

Royal Equities Operating, LLC v. Rubin, 154 A.D.3d 516 (1st Dep't 2017)

Granting summary judgment in lieu of complaint to enforce accelerated rent provisions of commercial lease against guarantors. In awarding $1.7 million to landlord, the Court rejected guarantors' claim that the accelerated rent provision was unenforceable because the premises had been re-let. The Court noted that such a claim was "personal to the obligor tenant", and thus was not a viable defense to be asserted by the guarantors (they could raise consideration but that defense was not applicable because the tenant was still in possession). Further, the liability of the guarantors, who waived all rights and remedies accorded under law, could exceed that of the tenant.

Clearview Farms LLC v. Fannon, 145 A.D.3d 1556 (4th Dep't 2016)

Holding that an "accelerated rent" provision in a plenary action commenced in Supreme Court was an unenforceable penalty where landlord failed to prove its actual damages. Notwithstanding the well-established principle that a landlord has no duty to mitigate damages, the landlord still must establish the actual amount owed and further offset such amounts against any rent payments made by a subsequent tenant (credit to the former tenant). Here, the landlord was given two (2) opportunities – at the trial and then again in post-trial submissions – but failed to do so. As a result, landlord was denied money damages.

B. ADDITIONAL RENT

Martin Operating Corp. v. Andrew Bernstein, Inc., 2017 N.Y. Misc. LEXIS 2308 (App. Term, 1st Dep't June 16, 2017)

Enforcing commercial lease provision that required tenant to pay 20% of a real estate tax increase as "additional rent".

River Park Residences, LP v. Richman Plaza Garage Corp., 2017 N.Y. Misc. LEXIS 1519 (App. Term, 1st Dep't April 26, 2017)

Enforcing commercial lease provision that required tenant to pay the increase in parking charges collected by the tenant as "additional rent".

Inland Diversified Real Estate Serv., LLC v. Keiko New York, Inc., 36 N.Y.S.3d 407 (App. Term, 9th & 10th Jud. Dists. 2016)

On appeal, challenge by tenant to vacate stipulation of settlement and resulting judgment granted where petitioner failed to demonstrate that the "additional rent" items (electricity and gas charges) had been incurred and/or paid. Tenant was apparently represented by counsel when it agreed to pay such sums in the stipulation.

C. ATTORNEY'S FEES

Attia v. Imoukhuede, 57 N.Y.S.3d 674 (App. Term, 9th & 10th Jud. Dists. April 12, 2017)

Following breach of stipulation of settlement, denying attorney's fees, in part, because the lease was not introduced establishing that attorney's fees were negotiated as "additional rent". The court denied the claim without prejudice to renew upon the submission of the appropriate proof.

Greenbrier Garden Apts. v. Eustace, 31 N.Y.S.3d 921 (App. Term, 9th & 10th Jud. Dists. 2016)

Affirming Housing Part's denial of the prevailing petitioner's application for attorney's fees (which were denominated in the rental agreement as "additional rent"). Holding that the court may deny a prevailing landlord's request for attorney's fees "based on equitable considerations and fairness", and further where the landlord acted in "bad faith" or "unfairness is manifest". Here, the landlord and its agents apparently refused to negotiate certain rent payments and failed to respond to the tenant's inquiries.

D. ATTORNEY'S FEES (Tenant) (RPL § 234)

Parkview Apts. Corp. v. Pryce, 2018 N.Y. Misc. LEXIS 462 (App. Term, 9th & 10th Jud. Dists. Feb. 8, 2018)

Although the default judgment was vacated and holdover proceeding dismissed on appeal due to the petition failing to assert that a termination notice was served, the Appellate Term denied tenant's counterclaim for reciprocal attorney's fees due to "overwhelming proof" that the tenants had breached the lease.

125 Ct. St., LLC v. Sher, 2018 N.Y. Misc. LEXIS 226 (App. Term, 2d, 11th & 13th Jud. Dists. Jan. 19, 2018)

On appeal, non-payment proceeding which was decided following a hearing dismissed where the rent arrears alleged in the rent demand were not "approximate good faith rent amounts". Landlord overestimated the rent-regulated arrears by more than 20% over the course of seventeen (17) months. In addition, the Appellate Term held that Tenant's counterclaim for attorney's fees would properly be determined after the nonpayment of rent claims are ultimately decided.

130 St. Marks Place, LLC v. Hines, 2017 N.Y. Misc. LEXIS 547 (App. Term, 1st Dep't Feb. 17, 2017)

Awarding tenant attorney's fees after one (1) year had passed from the withdrawal of petitioner's holdover proceeding. The Court concluded that the tenant prevailed due to the petitioner's abandonment of the matter, and the petitioner may not "postpone indefinitely the 'ultimate outcome' of the lawsuit", which effectively denied respondent's attorney's fees.

Aurora Assoc., LLC v. Locatelli, 2017 N.Y. Misc. LEXIS 4630 (App. Term, 1st Dep't Dec. 6, 2017)

Remitting matter to Housing Part for determination on amount of attorney's fees to award tenant. Although tenant was unsuccessful on his rent overcharge counterclaim, he prevailed on petitioner's primary claim regarding the rent regulatory status of the premises (i.e., dismissal). Thus, in this "mixed" result decision, tenant was entitled to attorney's fees as the prevailing party.

281 St. Nicholas Partners LLC v. Blake, 2017 N.Y. Misc. LEXIS 942 (App. Term, 1st Dep't March 22, 2017)

Landlord appealed Housing Part's award of $261,887.48 in attorney's fees to tenant. The Appellate Term held that the lower court correctly determined following a hearing that tenants were the prevailing parties and entitled to recover attorney's fees. The Court further concurred with the use of the lodestar method to calculate the fees. Generally, the lodestar method is a two-pronged formula. First, the total hours reasonably spent on the matter are multiplied by a reasonable hourly rate. The product then may be adjusted (upward or downward) depending on the particular circumstances of the action. However, the matter was remanded to the lower court to conduct a hearing to determine the "reasonableness" of the hours charged; whether the time spent by counsel on legal research (300 hours), document composition (175 hours), and client meetings (50 hours) was reasonable in this illegal sublet holdover proceeding that was revolved without a hearing/trial.

E. AWARD VS. ISSUANCE OF JUDGMENT

Ocean Gate, L.P. v. Steele, 2017 N.Y. Misc. LEXIS 2477 (App. Term, 2d, 11th & 13th Jud. Dists. June 23, 2017)

Landlord is under no obligation to accept rent offered for a prior period after the judgment and warrant have been issued in a nonpayment proceeding. Here the offer to pay arrears from third parties was conditioned upon landlord reinstating tenant who was evicted following entry of a judgment issued when tenant defaulted in paying arrears as per the parties' stipulation.

F. DAMAGES

Ogba v. Obilor, 2017 N.Y. Misc. LEXIS 1511 (App. Term, 2d, 11th & 13th Jud. Dists. April 21, 2017)

Landlord impermissibly withheld a half of month's rent paid prior to tenants taking possession when the landlord failed to repair items previously agreed. These items included the boiler, providing hot water and fixing a sink that did not properly drain.

Bonham Strand, LLC v. Paredes, 2017 N.Y. Misc. LEXIS 4281 (Greenburgh Justice Ct. Nov. 1, 2017)

Damages may not be awarded in a summary proceeding.

Kings Park 8809, LLC v. Stanton-Spain, 26 N.Y.S.3d 725 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)

On appeal, holding that damages are not recoverable in a summary proceeding.

G. INTEREST

APF 286 MAD, LLC v. Chittur & Assocs., P.C., 28 N.Y.S.3d 647 (App. Term, 1st Dep't Jan. 4, 2016)

In commercial holdover proceeding, affirming Housing Part's decision to award the prevailing landlord interest for the period the tenant remained in possession.

H. LATE FEES

Cleo Realty Assoc., L.P. v. Papagiannakis, 151 A.D.3d 418 (1st Dep't 2017)

Late fee of 4% per month held unenforceable against guarantor in plenary action involving residential property.

Bonham Strand, LLC v. Paredes, 2017 N.Y. Misc. LEXIS 4281 (Greenburgh Justice Ct. Nov. 1, 2017)

In a residential lease, a 5% late fee for rent six (6) days late, plus an additional $15 per day late charge each day the rent is past due more than thirty (30) days, held unconscionable.

I. USE AND OCCUPANCY

Madden v. Juillet, 13 N.Y.S.3d 850 (App. Term, 9th & 10th Jud. Dists. Feb. 23, 2015)

In a nonpayment proceeding, the tenancy is terminated upon issuance of the judgment and warrant. The termination date, however, is deemed to be "the date the proceeding was commenced". Accordingly, the moneys owed in this subsequent small claims action for the tenants' continued occupancy of the premises during the pendency of the summary proceeding was considered use and occupancy, rather than rent. Since the rule against apportionment applies to rent, and not use and occupancy, the tenants were responsible for use and occupancy for the actual days they remained in possession.

London Paint & Wallpaper Co., Inc. v. Kesselman, 138 A.D.3d 632 (1st Dep't 2016)

'Use and occupancy' is computed by determining the fair market value for occupying the commercial premises.

Siodlak v. Light, 31 N.Y.S.3d 924 (App. Term, 9th & 10th Jud. Dists. 2016)

Where the tenant previously paid and landlord accepted monthly rent payments, landlord may seek use and occupancy for the period tenant remained in possession following the lease expiration. In such a circumstance, landlord need not prove the reasonable value for occupying the premises because use and occupancy "may properly be assessed at the rent reserved in an expired lease" and in this particular case, the regular rent payments absent a written rental agreement.

J. MILITARY AFFIDAVIT

Riverton Sq. LLC v. McLeod, 2017 N.Y. Misc. LEXIS 1724 (App. Term, 1st Dep't May 10, 2017)

Denying default judgment where landlord provided insufficient evidence that tenant was not serving in the military. Although landlord submitted a document from the Department of Defense Manpower Center suggesting that the tenant was not "on active duty", there were no sworn

statements from a person with personal knowledge regarding the interpretation of that document. Counsel's conclusory statement that petitioner contacted the Defense Manpower Center was insufficient.

K. RULE AGAINST APPORTIONMENT

Rossi v. Scott, 2017 N.Y. Misc. LEXIS 58 (App. Term, 9th & 10th Jud. Dists. Jan. 5, 2017)

Reducing money judgment to reflect that landlord was entitled to a prorated amount for any additional days tenant remained in possession absent a lease (which had commenced on the 22nd day of the month and thus expired on the 21st). In other words, since the lease was terminated on the 30th, landlord was awarded one (1) full month of rent for the previous month's unpaid rent (22nd to the 21st), plus use and occupancy equivalent to 9/30 of the monthly rent (prorated for nine (9) days between the 22nd and 30th). The rule is that use and occupancy is prorated for the days the occupant remains in possession absent a rental agreement. On the other hand, where there is a rental agreement, rent for the entire month becomes due and payable on the due date, and whether the tenant remains in possession for the entire month is irrelevant in computing the money judgment. In addition, the court noted that a tenant in default may not appeal from the final judgment. However, where the non-appealing is united in interest with the successful appealing tenant, the relief may be applied to the non-appealing tenant.

15. MOTION PRACTICE

Mautner-Glick Corp. v. Rodriguez, 2017 N.Y. Misc. LEXIS 4631 (App. Term, 1st Dep't Dec. 6, 2017)

Holding that trial court was required to conduct a hearing to determine whether there was substantial compliance with the parties' stipulation of settlement. Tenant agreed to refrain from acting as a nuisance towards other tenants (harass and threatening) during a specified period of time. Landlord sought to restore the matter to the calendar for a hearing based upon the sworn statement of an upstairs neighbor who alleged several incidents of harassing conduct in violation of the stipulation. The stipulation provided that landlord had the right to a hearing on the issue were it to make such a motion. The court emphasized that there should be strict compliance with the enforcement of the parties' agreement (i.e., holding a hearing) because "parties to a civil dispute are free to chart their own litigation course".

Regency Vil. Mgmt. v. Morris, 2017 N.Y. Misc. LEXIS 3037 (App. Term, 9th & 10th Jud. Dists. Aug. 10, 2017)

Denying landlord's motion for summary judgment where tenants of record defaulted (but the occupant appeared) because the motion was predicated upon an attorney's affirmation that lacked personal knowledge of the facts.

Sherman Realty, LLC v. Kevelier, 2017 N.Y. Misc. LEXIS 5047 (App. Term, 91st Dep't Dec. 22, 2017)

In nuisance holdover proceeding, denying landlord's motion for summary judgment due to triable issues of fact concerning the repairs made by tenant and the resulting injuries. Landlord's photographic evidence was insufficient to render judgment as a matter of law.

W & HM Realty Partners Co., LLC v. Houtenbos, 2017 N.Y. Misc. LEXIS 208 (App. Term, 1st Dep't Jan. 24, 2017)

Conditioned the petitioner's motion to discontinue the holdover proceeding upon landlord paying tenant's reasonable attorney's fees and costs. Landlord sought discontinuance after the proceeding had been pending for twenty (20) months, discovery was completed and tenant's motion for summary judgment was before the court.

151 Daniel Low, Inc. & Li, 2017 N.Y. Misc. LEXIS 4662 (App. Term, 2d, 11th & 13th Jud. Dists. Dec. 1, 2017)

Reversing judgment granting landlord attorney's fees due to tenant's and/or tenant's attorney's frivolous conduct. Section 130-1.1 of the Rules of the Chief Administrator (22 N.Y.C.R.R.) permits the court to sanction an attorney for frivolous conduct. The conduct that may be sanctionable includes (1) acting utterly without merit in law; (2) taking action primarily intended to delay or prolong the proceeding or resolution; or (3) the asserting material false statements. Here, the Appellate Term held that the post-judgment motion for a permanent stay of eviction and an opportunity to cure by signing the vacancy lease, while the appeal was pending, was not frivolous as tenant's argument was premised upon the theory that the failure to sign the lease was curable.

90 Elizabeth Apt. LLC v. Eng, 2017 N.Y. Misc. LEXIS 2425 (succession rights of Rent Controlled premises) (App. Term, 1st Dep't June 23, 2017)

Denied petitioner's motion for summary judgment because a determination whether the occupants (adult children) were entitled to possession after their father had passed away and their mother surrendered her tenancy in 2015 raised issues of material fact. It was undisputed that the children had lived in the premises with their parents as a family for decades. The court further concluded that the mother's entering into a nursing home five (5) years prior to formally surrendering her tenancy did not negatively impact the succession rights claims of the children.

Clark Stores, Inc. v. Young Girl 15, LLC, 38 N.Y.S.3d 830 (awarding relief not sought in motion) (App. Term, 2d, 11th & 13th Jud. Dists. 2016)

On appeal of an order granting commercial tenant and subtenant's unopposed motion to dismiss the summary proceeding due to a defect in service of the three-day rent demand, the Housing Part erred when it awarded, sua sponte, tenant's attorney's fees. There is no basis to grant relief the tenant did not seek in the motion papers. In addition, dismissal due to the defective rent demand is "without prejudice".

16. PLEADINGS

Parkview Apts. Corp. v. Pryce, 2018 N.Y. Misc. LEXIS 462 (App. Term, 9th & 10th Jud. Dists. Feb. 8, 2018)

Vacating default judgment and dismissing holdover proceeding where the petition failed to allege that a termination notice was served upon the tenants as a result of the alleged "objectionable conduct" (causing noxious odors).

Rutland Rd., Assoc., L.P v. Grier, 2017 N.Y. Misc. LEXIS 1025 (App. Term, 2d, 11th & 13th Jud. Dists. April 3, 2017)

Landlord failed to make a prima facie case where it alleged in the petition that the parties entered into a rental agreement for an agreed monthly rent of $1,269, but failed to introduce any proof of that allegation at the hearing.

5670 58 St. Holding Corp. v. ASAP Towing Servs., Inc., 2017 N.Y. Misc. LEXIS 3780 (App. Term, 2d, 11th & 13th Jud. Dists. Sept. 29, 2017)

A "misdescription" of the premises in the petition does not deprive the Housing Part of subject matter jurisdiction. The petition listed the premises to be recovered as "56-25 56th Terrace" when the correct address was "56-09 56th Terrace".

601 W. Realty, LLC v. Zheng, 2017 N.Y. Misc. LEXIS 663 (App. Term, 1st Dep't Feb. 28, 2017)

Typographical error in petition listing the premises at "3847 Broadway" as opposed to the correct address – "3845 Broadway" – was not a jurisdictional defect, and the petition could be amended. The error could not reasonably be concluded to have "materially misled or confused the tenant" or hindered the defense. Of note, the petition included a correct alternative address.

Potts v. Thomas, 2017 N.Y.L.J. 3398 (Nassau Cnty. Dist. Ct. Dec. 6, 2017) (Vendee in Possession)

Summary proceeding dismissed where landlord alleged in the petition that the occupant is a licensee, but the evidence demonstrates that she was a tenant with exclusive control and possession of the premises. A licensor - licensee relationship signifies the "absence of a landlord [and] tenant relationship" and the licensee does not receive "exclusive use and occupancy" of the premises. Further contrast with a tenant at will who is given exclusive use and possession of the designated premises but for an indefinite period of time. Of note, conforming the pleadings to the proof at the hearing, while an option for petitioner, still may not change the result because the predicate notice may not be amended, and, thus, that element of the case cannot be proved.

1346 Park Place HDFC v. Wright, 34 N.Y.S.3d 561 (App. Term, 2d, 11th & 13th Jud. Dists. 2016)

An attorney may verify the petition even where counsel resides within the same county as petitioner (RPAPL § 741). It is noteworthy, however, that even had the petition not been verified and/or the verification was improper (which was not the case), the defect is not considered a jurisdictional defect. The tenant may, however, pursuant to CPLR § 3022, deem the pleading a "nullity" provided tenant "immediately" raises an objection (within 24 hours). The notice of objection allows the petitioner to correct the defect and/or seek relief from the court if necessary.

17. POST-JUDGMENT MOTIONS TO ENFORCE/VACATE WARRANT/STIPULATION

Portillo v. Simpson, 2018 N.Y. Misc. LEXIS 435 (App. Term, 9th & 10th Jud. Dists. Feb. 8, 2018)

Reversing housing part's denial of tenant's post-judgment motion to vacate judgment following nonjury trial where good cause was shown. As a result of the court's stay on execution, tenant was given approximately one (1) month to pay the arrears awarded following the trial for the non-payment proceeding but failed to do so. However, tenant demonstrated that (1) the arrears were available prior to execution of the warrant of eviction and (2) the payment was not made on time because tenant was temporarily unable to work due to a physical injury.

Thamer Props. Corp. v. Nava, 2018 N.Y. Misc. LEXIS 191 (App. Term, 1st Dep't Jan. 24, 2018)

Affirming granting of post-eviction relief restoring tenant to rent stabilized premises where tenant paid the arrears in full more than two (2) weeks prior to the eviction. Although the payment was tendered after the date specified in the Court Order, the Appellate Term held that the payment in the nonpayment proceeding warranted restoring the tenant. The fact that landlord had re-rented the premises (now non-rent stabilized) and a new tenant was already in possession was not a basis to deny relief.

Soumas v. Gregg, 2017 N.Y. Misc. LEXIS 3655 (App. Term, 1st Dep't Sept. 27, 2017)

Affirming granting of post-eviction relief restoring tenant to the premises (RPAPL § 749(3)) where the tenant had since paid her share of the Section 8 arrears and attorney's fees, plus some of the arrears collected by the landlord that exceeded the tenant's portion of the Section 8 rent. A Section 8 tenant is not liable for "rent" for a period after the subsidy ends absent a new agreement.

Halpern v. Tunne, 2017 N.Y. Misc. LEXIS 3777 (App. Term, 1st Dep't Oct. 5, 2017)

Motion to vacate judgment approximately seven (7) years after it was entered, three and one-half (3 ½) years after the judgment was affirmed and three (3) years after the tenant was evicted is untimely.

52 Hamilton Place NYC Corp. v. Araman, 2017 N.Y. Misc. LEXIS 4469 (App. Term, 1st Dep't Nov. 27, 2017)

No appeal may be taken from court's declination to sign post-judgment order to show cause. Rather, an appeal may be taken of the order granting/denying the underlying motion. Here, the court concluded that tenant's second attempt at post-eviction relief to be restored to the premises was without merit. The court noted that the premises had since been re-rented to a non-party to the summary proceeding.

In re Lafayette Boynton Housing Corp., 135 A.D.3d 518 (1st Dep't 2016)

As a general matter, a court may vacate a warrant of eviction prior to execution for "good cause" pursuant to RPAPL § 749(3). Here, the Appellate Division, citing the Court of Appeals decision in Brusco v. Braun, 84 N.Y.2d 674 (1994), held that the disabled tenant *who was already evicted* may be restored to possession where he acted in good-faith, paid all of the arrears, including the costs of the summary proceeding, and some of the delays in payment were attributable to the landlord. *Cf.* **Thamer Props. Corp. v. Nava**, 2018 N.Y. Misc. LEXIS 191 (App. Term, 1st Dep't Jan. 24, 2018) (holding that restoral order affirmed under similar circumstances).

A. STIPULATIONS OF SETTLEMENT

GHR Co., LLC v. Sannon, 2018 N.Y. Misc. LEXIS 443 (App. Term, 2d, 11th & 13th Jud. Dists. Feb. 9, 2018)

Affirming further extension of stay on execution of warrant of eviction by the housing part because enforcement of a stipulation of settlement is left to the discretion of the trial court. Also holding that the court is not bound by language in the stipulation that "any default shall be deemed de minimis".

Parkash v. Grindley, 2017 N.Y. Misc. LEXIS 1514 (App. Term, 2d, 11th & 13th Jud. Dists. April 21, 2017)

Denying tenant's motion to vacate judgment entered three (3) years earlier due to noncompliance with payment schedule. Tenant claimed he suffered from a mental disability caused by a brain injury sustained prior to entering into the stipulation and further the landlord failed to make required repairs. The Court found that the medical records failed to establish that tenant had an "impairing condition" at the time he entered into the stipulation.

Lucky v. Ezenwa, 2017 N.Y. Misc. LEXIS 1390 (App. Term, 1st Dep't April 17, 2017)

Dismissing landlord's small claims action for rent arrears where the parties' stipulation of settlement in the prior summary proceeding provided that the arrears would be waived if the tenant timely vacated the property, which she did.

Bay Ridge Air Rights, Inc. v. Marlatt, 2017 N.Y. Misc. LEXIS 1155 (App. Term, 2d, 11th & 13th Jud. Dists. April 7, 2017)

Denying tenant's request to vacate the stipulation, which included $2,400 in attorney's fees, where tenant argued that he "had reconsidered his agreement".

720 W. Partners, LLC v. Alvarez, 2017 N.Y. Misc. LEXIS 249 (App. Term, 1st Dep't Jan. 25, 2017)

Affirming denial of tenant's motion to stay execution of warrant of eviction where the evidence at the hearing demonstrated that tenant violated the two-attorney stipulation settling the nuisance holdover proceeding. Specifically, the tenant impermissibly allowed her adult son, who was permanently excluded from staying overnight, to stay with her in the premises and further failed to escort him into and out of the building.

Chung v. Joita, 2017 N.Y. Misc. LEXIS 276 (App. Term, 2d, 11th & 13th Jud. Dists. Jan. 17, 2017)

Enforcing stipulation that rent and use and occupancy are waived where tenant vacates on or before the date agreed.

DDEH 103 E. 102 LLC v. Jasabe, 2017 N.Y. Misc. LEXIS 3776 (App. Term, 1st Dep't Oct. 5, 2017)

Reversing trial court's granting of tenant's post-judgment motion to vacate stipulation of settlement where tenant failed to pay the required $8,175.00 in rent arrears. The Court noted that the tenant was given multiple extensions to pay the arrears.

HSBC Bank USA v. Posy, 2017 N.Y. Misc. LEXIS 929 (App. Term, 9th & 10th Jud. Dists. March 13, 2017)

Denied tenant's motion to vacate consent judgment. The Court noted that the defense of lack of personal jurisdiction was waived when tenant consented to the entry of the judgment. Moreover, there was no indication of fraud.

Azully v. Maslavi, 2016 N.Y. Misc. LEXIS 4781 (App. Term, 1st Dep't Dec. 30, 2016)

Enforcing so-ordered stipulation of settlement negotiated in commercial holdover proceeding, including the money judgment. The Court found that even if respondent's counsel lacked "actual authority" to negotiate the settlement, he had "apparent authority" upon which the landlord relied.

Gerard Court Assocs., LLC v. Hamer, 31 N.Y.S.3d 921 (App. Term, 1st Dep't 2016)

The Appellate Term exercised its discretion in extending stay on execution of the warrant of eviction because the stipulation of settlement did not include a "time is of the essence" clause and tenant submitted proof that the Department of Social Services approved payment of the rent arrears.

1250, LLC v. Augustin, 2016 N.Y. Misc. LEXIS 2458, 2016 N.Y. Slip Op 51035(U) (App. Term, 2d, 11th & 13th Jud. Dists. June 23, 2016)

Where the warrant of eviction is executed pursuant to the parties' stipulation of settlement, the summary proceeding is terminated and the petitioner may not restore the case to the calendar for the purpose of obtaining a new judgment to include arrears that were conditionally waived. Here, the stipulation of settlement included a provision that petitioner could recoup the arrears in the event respondent defaults in either payment or surrender. However, that relief would have to be sought in a separate plenary action and not in a motion to restore the summary proceeding to the Housing Part's calendar.

Gloria Homes Apts. LP v. Wilson, 17 N.Y.S.3d 382 (App. Term, 1st Dep't 2015)

Where the stipulation of settlement fails to include a provision entitling landlord to a judgment of possession in the event tenant breaches the stipulation, the petitioner may not be awarded a judgment of possession due to a breach because that would require the court to presume and "read into" the

minds of others to ascertain the parties' intent under such a circumstance. Since the intent of the parties was undeterminable from the stipulation itself, the housing part most likely will need to conduct additional hearings, if necessary, to fashion an appropriate remedy.

B. DEFAULT JUDGMENTS

London Terrace Assoc. v. Rubin, 2017 N.Y. Misc. LEXIS 1036 (App. Term, 1st Dep't March 29, 2017)

Affirming trial court's vacating of default judgment in holdover proceeding where the failure to pay use and occupancy was not willful, the tenant had a potential meritorious defense to the non-primary residence claim, and the tenant had since obtained funds sufficient to pay the amount owed.

Shorefront Apts., LLC v. Manko, 2017 N.Y. Misc. LEXIS 1169 (App. Term, 2d, 11th & 13th Jud. Dists. April 7, 2017)

Affirming default judgment due to tenant's failure to offer a reasonable excuse for her non-appearance. The decision as to the reasonableness of the excuse offered by the non-appearing party is left to the discretion of the trial court. Here, a prior order of the court listed the hearing date, and further the tenant was in the courthouse on the date but refused to enter the courtroom.

136-76 39th Ave., LLC v. Wu, 2017 N.Y. Misc. LEXIS 1029 (App. Term, 2d, 11th & 13th Jud. Dists. March 29, 2017)

Granting tenant's motion to vacate default judgment because the housing part should not have entered a default judgment based upon landlord's attorney's affirmation which only contained hearsay statements. However, tenant failed to demonstrate a reasonable explanation for her non-appearance or the possibility of a meritorious defense. Tenant's claim that rent could be withheld due to landlord's failure to make repairs/construction was belied by the lease and rider to the lease. In addition, the claim that a rent demand was not served cannot be raised on the first time on appeal, and, in any event, the predicate notice does not involve subject matter jurisdiction (it is a prerequisite that may be waived). Moreover, the petition alleges an oral rent demand was made, which was not disputed. Thus, the default was vacated but tenant's request to be restored to possession was denied.

O'Kelly, as Administrator of the Estate of Magdy O'Kelly v. John Doe, 36 N.Y.S.3d 408 (App. Term, 2d, 11th & 13th Jud. Dists 2016)

Movant's conclusory statement that he was "never served with any documents" was inadequate to rebut the presumption of service set forth in the process server's affidavit of service, and, as a result, failed to raise an issue of fact that would warrant a traverse hearing.

Oakdale Manor Owners, Inc. v. Raimondi, 29 N.Y.S.3d 848 (App. Term, 9th & 10th Jud. Dists. 2015)

Credible excuse of law office failure (unspecified in the decision) provided a reasonable explanation for the default. Since there was a possibility of a meritorious defense, the default judgments against the tenant and subtenant were vacated.

18. PREDICATE NOTICE

751 Union St., LLC v. Charles, 2017 N.Y. Misc. LEXIS 3271 (App. Term, 2d, 11th & 13th Jud. Dists. Aug. 25, 2017) (General)

If lease imposes predicate notice requirements that are more stringent than those set forth by statute, the lease provision generally prevails. Also held that where one (1) of the alleged deficiencies in the notice to cure is inadequate, that does not equate to the entire notice being defective. Instead, the defective allegation is severable.

Fieldbridge Assoc., LLC v. Holmes, 52 N.Y.S.3d 246 (App. Term, 2d, 11th & 13th Jud. Dists. Jan. 20, 2017) (General)

Denying tenant's post-eviction motion to vacate judgment in nonpayment proceeding where tenant failed to pay rent arrears pursuant to the stipulation of settlement. The tenant's claim that the predicate notice was defective was waived when tenant entered into the settlement agreement. Tenant's motion was made nine (9) months following the eviction.

Mautner-Glick Corp. v. Glazer, 148 A.D.3d 515 (1st Dep't 2017) (General)

Dismissing holdover proceeding because tenant's failure to assert defective non-renewal predicate notice in the pre-answer motion does not constitute a waiver. Thus, tenant's assertion of the defense in the answer and cross-motion for summary judgment was timely, and, here, demonstrated that the predicate notice was defective. In other words, landlord failed to satisfy a condition precedent to commencing the proceeding. ***But see*** **Haverstraw v. Diaz, 2018 N.Y.L.J. 233 (App. Term, 9th & 10th Jud. Dists. Jan. 31, 2018) (below).**

Haverstraw v. Diaz, 2018 N.Y.L.J. 233 (App. Term, 9th & 10th Jud. Dists. Jan. 31, 2018) (General)

Affirming judgment of possession in favor of landlord in holdover proceeding because tenant's failure to raise the defense of a defective non-renewal predicate notice in either the pre-answer motion to dismiss and/or answer constitutes a waiver. Moreover, the Court held that a single unlawful drug-related incident may be sufficient unlawful activity to justify lease termination.

Jamison v. Jamison, 2017 N.Y. Misc. LEXIS 1515 (App. Term, 9th & 10th Jud. Dists. April 20, 2017) (Amendment)

Predicate notice may not be amended. Petitioner commenced holdover proceeding against his three (3) brothers. The petition alleges that the brothers' mother bequeathed the premises to petitioner. The predicate notice, however, was defective because it purported to terminate a tenancy-at-will, which was not demonstrated by the evidence.

Bayview Loan Servicing, LLC v. Lyn-Jay, Inc., 2017 N.Y. Misc. LEXIS 391 (App. Term, 9th & 10th Jud. Dists. Jan. 25, 2017) (Amendment)

Predicate notice may not be amended. Here, the predicate notice alleged that the occupancy was terminated pursuant to RPAPL § 713(5) (post-foreclosure), but there was no evidence that the premises was sold in foreclosure.

Port Royal Owners Corp. v. Navy Beach Rest. Group, 2017 N.Y. Misc. LEXIS 3531 (App. Term, 9th & 10th Jud. Dists. Sept. 20, 2017) (Who can give notice)

Holding that landlord's attorney was permitted to sign notice to cure and termination notice even though lease provided that only landlord or landlord's agent could terminate the lease (lease did not refer to counsel). The Court affirmed denial of commercial tenant's motion for summary judgment dismissing the holdover proceeding due to a defective predicate notice.

BH 2628, LLC v. Zully's Bubble Laundromat, Inc., 61 N.Y.S.3d 809 (App. Term, 2d, 11th & 13th Jud. Dists. Sept. 29, 2017) (Post-foreclosure)

Reversing dismissal of post-foreclosure holdover proceeding and directing trial court to enter a judgment of possession in favor of petitioner. The Appellate Term held that since respondent entered into the tenancy with the former owner after (several months) the notice of pendency of the foreclosure was filed, the occupant was bound by the foreclosure and there was no need to name the respondent in the foreclosure action. Moreover, the new owner served notice "voiding" the lease. Since the lease was voided, as opposed to terminated, under RPAPL §713(5), a 10-day predicate notice was all that was required.

People v. F.B., 2017 N.Y. App. Div. LEXIS 7271 (1st Dep't Oct. 17, 2017) (Illegal Activity)

District Attorney's Office may send notice to landlord that he must commence proceeding to evict tenant engaged in unlawful activity at the premises (RPAPL § 715(1)). The district attorney (and other law enforcement) must give the landlord five (5) days to commence the proceeding after receipt of the notice. In this case, the Court held that the District Attorney was not a law enforcement agency under CPL § 160.55(1)(d)(ii) which would have permitted the District Attorney to unseal the defendant-tenant's criminal records to be used in the summary proceeding. ***See* 551 W. 172nd St. LLC v. Taveras, 2018 N.Y. Misc. LEXIS 254 (App. Term, 1st Dep't Jan. 29, 2018) [Affirmative Defenses].**

Paul Robeson Houses Assoc., L.P. v. Harris, 2017 N.Y. Misc. LEXIS 1806 (App. Term, 1st Dep't May 16, 2017) (Illegal Activity)

Termination notice alleged that tenant engaged in drug related activity in the premises in violation of the lease. The notice included a letter from the District Attorney requesting the holdover proceeding pursuant to RPAPL §§ 711(5) and 715, copies of the statutes, search warrant, laboratory

reports reflecting the contraband recovered and the felony complaint charging one (1) of the tenants. The court held that the notice sufficiently provided both a factual and legal basis for the eviction. *See* **551 W. 172nd St. LLC v. Taveras, 2018 N.Y. Misc. LEXIS 254 (App. Term, 1st Dep't Jan. 29, 2018) [Affirmative Defenses].**

Noah Trading Co., Inc. v. Bell, 2017 N.Y. Misc. LEXIS 251 (App. Term, 1st Dep't Jan. 25, 2017) (Lease Expiration)

Summary judgment granted in favor of landlord in holdover proceeding where the lease expired by its own terms and no new agreement between the parties had been reached. The lease did not contain a renewal provision. No predicate notice required.

Amin Mgmt. LLC v. Martinez, 2017 N.Y. Misc. LEXIS 1988 (App. Term, 1st Dep't May 24, 2017) (Notice to Cure)

The notice to cure, which incorporated by reference the notice of termination, was sufficient predicate notice in illegal sublet/assignment holdover proceeding. The notice provided that tenant illegally sublet the premises or assigned the premises to three (3) individuals without landlord's written consent. The alternative assertion of violations was adequate because the notice clearly delineated the relief sought, i.e., removal of the illegal subtenants or assignees.

539 W. 156, L.L.C. v. Hernandez, 2017 N.Y. Misc. LEXIS 1985 (App. Term, 1st Dep't May 24, 2017) (Notice to Cure)

Notice to cure, which was incorporated by reference in the termination notice, was sufficient because it "fairly stated the nature [of the claims] and the facts necessary to establish the existence of grounds for eviction". An undertenant; i.e., subtenant, licensee or other occupant, does not have to be served with this notice.

Barrett Japaning, Inc. v. Bialobroda, 2017 N.Y. Misc. LEXIS 662 (App. Term, 1st Dep't Feb. 28, 2017) (Notice to Cure)

Notice to Cure and Termination Notice sufficiently identified the lease provisions allegedly violated. Provided the notice does not "materially mislead" or hinder the tenant's preparation of a defense, it may be valid.

Strata Realty Corp. v. Pena, 2017 N.Y. Misc. LEXIS 4628 (App. Term, 1st Dep't Dec. 4, 2017) (Notice to Cure - not required even where set forth in lease if the defect cannot be cured in the applicable cure period)

Affirmed issuance of judgment and warrant in nuisance holdover proceeding involving rent-stabilized premises. The parties' dispute had been ongoing for approximately ten (10) years and through multiple proceedings. Tenant made numerous formal complaints to government agencies regarding the unsatisfactory condition of the premises, but consistently denied landlord the opportunity to make the repairs based upon "distrust" of landlord. The repairs were extensive and impacted other tenants as these items included carbon monoxide and smoke detectors, lead paint, window guards and the removal of vermin. The court held that the tenant's actions constituted a nuisance and although the lease, which had been executed by tenant's husband, provided for the "service of a notice to cure where objectionable conduct is alleged", there was no requirement to provide tenant with such a notice here because "the continuous pattern of tenant's course of conduct that continued over a period of years is incapable of any meaningful cure". In addition, the court concluded that upholding this provision would be "a useless and futile act".

133 Plus 24 Sanford Ave. Realty Corp. v. Ni, 2017 N.Y. Misc. LEXIS 4658 (App. Term, 2d, 11th & 13th Jud. Dists. Dec. 1, 2017) (Notice to Terminate - Rent/Additional Rent)

Dismissing commercial holdover proceeding predicated upon the nonpayment of sewage usage and water consumption which were defined in the lease as "added rent". Where the termination of the lease is based upon the failure to pay rent, the predicate notice must assert the approximate amount claimed due. Here the landlord overstated the amount owed ($50,940) in the notice by nearly nine (9) times. Accordingly, the notice was defective. The proceeding was dismissed due to petitioner's failure to make a prima facie case due to the defective predicate notice.

Joseph v. Lyu, 2018 N.Y.L.J. 599 (App. Term, 2d, 11th & 13th Jud. Dists. Feb. 16, 2018) (Rent Demand)

Dismissing non-payment proceeding where attempted service of the rent demand prior to "nail-and–mail" was done at the premises when landlord knew the tenant had not yet opened for business. Thus, the attempts were deemed "not reasonable", and the action was dismissed. The court further held that tenant's counterclaims were properly dismissed because the lease contained a "no counterclaim" provision.

Gottesman Family Props., LLC v. Medi-System Renal Care Mgmt.-Servs., LLC, 2017 N.Y. Misc. LEXIS 2014 (App. Term, 2d, 11th & 13th Jud. Dists. May 19, 2017) (Rent Demand)

Landlord must wait three (3) full days following service of a written rent demand prior to commencing a nonpayment proceeding. Here, the judgment in favor of landlord, including a $354,436.17 money judgment, was reversed because landlord brought the summary proceeding on the 3rd day following service of the rent demand. In computing the three (3) days, according to General Construction Law § 20, the date of service is not to be counted. Thus, since the demand was served on the 23rd day of the month, landlord had to wait until the 27th to commence the nonpayment proceeding.

125 Ct. St., LLC v. Sher, 2018 N.Y. Misc. LEXIS 226 (App. Term, 2d, 11th & 13th Jud. Dists. Jan. 19, 2018) (Rent Demand)

Dismissing non-payment proceeding where the rent arrears alleged in the rent demand were not "approximate good faith rent amounts". Landlord overestimated the rent-regulated arrears by more than 20% over the course of seventeen (17) months. In addition, the Appellate Term held that Tenant's counterclaim for attorney's fees could not be determined until after the nonpayment of rent claims are decided.

Lee v. Kucker & Bruh, LLP, 958 F. Supp.2d 524 (S.D.N.Y. 2013) (Rent Demand)

Partial summary judgment on liability granted against landlord's attorney for making an unintentional, but material, misrepresentation (wrong dollar amount) within the written three-day rent demand (Federal Debt Collection Practices Act (FDCPA), 15 USC § 1692 et seq.). The rent demand counsel signed mistakenly claimed $1,125.23 was past due when the correct amount was approximately $724.50. When asked to verify the debt, petitioner's attorney forwarded a one-page document obtained from the landlord's managing/billing staff which stated $1,525.95 was due. Apparently, the billing error was due to the staff mistakenly adding a payment received to the outstanding balance as opposed to deducting the partial payment. The nonpayment of rent for a residential property is considered a consumer debt, and the FDCA imposes strict liability on debt collectors for making a "false representation of the character, amount, or legal status of any debt" (15 USC § 1692e(2)(A)). Any person whose principal purpose is to collect "any debts" is considered a debt collector (15 USC § 1692a(6)). The 'bona fide error defense' is available to debt collectors where (1) the misrepresentation regarding the debt was unintentional; (2) the misrepresentation resulted from a bona fide error; and (3) the debt collector maintained procedures "reasonably adapted" to avoid such errors. Here, defendant attorney failed to implement reasonable procedures to safeguard against the misrepresentation and, as a result, liability attached which include attorney's fees under the federal statute.

Goldstein v. Lipetz, 150 A.D.3d 652 (1st Dep't 2017) (Rent Regulated - Illegal Sublet/Profiteering)

Landlord properly terminated rent regulated tenancy by termination notice without an opportunity to cure where the tenant sublet the premises for a substantial length of time at a rate higher than landlord was legally permitted to obtain.

149th Partners LP v. Watts, 2015 N.Y. Misc. LEXIS 3877, 2015 N.Y. Slip Op 51576(U) (App. Term, 1st Dep't Oct. 30, 2015) (Rent Regulated – Non-party to lease)

Notice provisions required pursuant to the Rent Stabilization Code are applicable only to the tenant. Thus, the court held that a landlord need not serve a non-party occupant with the notices required under that statute prior to commencing a summary proceeding.

Nachajski v. Siwiec, 2017 N.Y. Misc. LEXIS 1162 (App. Term, 2d, 11th & 13th Jud. Dists. April 7, 2017) (Rent Stabilized – Non-primary residence)

Dismissing petition where landlord failed to introduce evidence that he properly served a predicate non-renewal notice for the rent stabilized premises due to tenant not living in the property as her primary residence. The time to serve the non-renewal notice is 90 to 150 days prior to the expiration of the lease. The predicate notice is a condition precedent to maintaining the proceeding, and the burden remains on landlord to prove that element (and every other element) of the case by a preponderance of the evidence. Moreover, it was held that renewal of the lease after serving a non-renewal notice renders the non-renewal notice unenforceable.

31-67 Astoria Corp. v. Landaira, 2017 N.Y. Misc. LEXIS 57 (App. Term, 2d, 11th & 13th Jud. Dists. Jan. 5, 2017) (Rent Stabilized – Termination Notice)

Dismissing proceeding because the termination notice failed to allege that the defects had not been cured during the cure period. The court held that the removal of a curable violation during the cure period does not support the termination of the lease.

19. PROCEDURE & PROTOCOL

Carlos v. Primus, 2018 N.Y. Misc. LEXIS 595 (App. Term, 9th & 10th Jud. Dists. Feb. 15, 2018)

Reversing housing part's award of possession and $20,350 money judgment in a non-payment proceeding because the lower court failed to conduct a hearing. A hearing was required even though the tenant failed to make the court ordered deposit of one-half of the arrears. Outside New York City, there is no authority for the court to grant a judgment on the grounds that the tenant failed to pay a court-ordered deposit of rent.

101 Cooper St. LLC v. Beckwith, 2017 N.Y. Misc. LEXIS 2001 (App. Term, 1st Dep't May 25, 2017)

A dismissal following the completion of a "proponent's [submission of] evidence" is considered to be a dismissal on the merits unless otherwise specified by the judge. Thus, where the court does not indicate whether its dismissal is with prejudice, the presumption is that the dismissal is with prejudice which prohibits the re-litigation of those particular issues.

Annis Realty, LLC v. Roman, 2017 N.Y. Misc. LEXIS 2371 (App. Term, 2d, 11th & 13th Jud. Dists. June 16, 2017)

Remitting case back to Housing Part to conduct a hearing on tenant's post-judgment motion to vacate an income execution. The trial court erred by failing to conduct an evidentiary hearing on the factual dispute as to the amount owed landlord. Here, the trial court considered unsworn arguments by the parties and reviewed "rent records", none of which were introduced into evidence. The Appellate Term concluded that it could not determine if the appropriate credits were given to tenant.

Wasserman v. Kwiecinski, 2017 N.Y. Misc. LEXIS 279 (App. Term, 9th & 10th Jud. Dists. Jan. 20, 2017)

Trial court erred by directing a traverse hearing where tenant did not raise the issue of service.

818 Woodward, LLC v. Gerges, 2017 N.Y. Misc. LEXIS 1042 (App. Term, 2d, 11th & 13th Jud. Dists. March 24, 2017)

Although landlord was awarded possession following a hearing on the merits, the Appellate Term reversed and remitted the matter to the lower court for another hearing before a different judge. The Appellate Term concluded that factual questions regarding the reconciliation of the two versions of the lease and the rider warranted additional inquiry.

New York City Hous. Auth v. Walker, 2017 N.Y. Misc. LEXIS 2475 (App. Term, 2d, 11th & 13th Jud. Dists. June 23, 2017)

Affirming denial of tenant's motion to be restored to possession following entry of default judgment. Although the court has the authority to restore a tenant to possession following execution of the warrant, since the tenant failed to pay the rent arrears and demonstrated no ability to pay, the trial court's denial of tenant's motion in the underlying non-payment proceeding was proper. The Court further determined that if the marshal had inappropriately executed the warrant as tenant claimed, then the tenant's recourse would be against the marshal. It does not otherwise permit the tenant to be restored to possession.

Front St. Rest. Corp. v. Ciolli, 2017 N.Y. Misc. LEXIS 1017 (App. Term, 2d, 11th & 13th Jud. Dists. April 3, 2017) (hearing to compute use and occupancy)

Housing Court erred in awarding use and occupancy without conducting an evidentiary hearing where the claim was based upon the failure to make payments pursuant to the parties' stipulation and settlement. Here, the stipulation failed to provide a remedy for the default.

1346 Park Place HDFC v. Wright, 34 N.Y.S.3d 561 (App. Term, 2d, 11th & 13th Jud. Dists. 2016) (adjournments)

Adjournments are left to the discretion of the Housing Part. However, where the adjournment request is made because (1) "the evidence to be presented is material"; (2) is not made for the purpose of delay; and (3) the requesting party has "acted with due diligence to protect its interest", denial of the adjournment request is an improper exercise of discretion. Here, during the pendency of the hearing, tenant's attorney, who was engaged in another trial, advised both the court and petitioner's counsel the previous day of his unavailability. The housing part denied the adjournment and further provided an ultimatum to tenant – she could either discharge her attorney and participate in the continued hearing or otherwise she would be precluded from being involved. Tenant opted

not to discharge her attorney and petitioner was ultimately awarded a possessory judgment. On appeal, the Appellate Term reversed the judgment and remanded the case to the housing part for a new hearing because tenant's request for an adjournment was not a dilatory tactic and notice was provided the previous day. This was the ruling notwithstanding the fact tenant's attorney did not submit a formal affidavit of actual engagement.

Chen v. Ray, 26 N.Y.S.3d 212 (App. Term, 1st Dep't 2015) (adjournments)

Affirming housing part's decision to deny respondent's request for an adjournment where tenant's delays had previously resulted in a mistrial.

Greenburgh Hous. Auth. v. Hall, 58 N.Y.S.3d 874 (App. Term, 9th & 10th Jud. Dists. 2017) (Illegal Activity - eviction upheld where criminal charges dismissed)

Affirming judgment of possession and warrant of eviction issued to landlord who terminated Section 8 tenancy and commenced holdover proceeding based upon tenant's possession of controlled substances. The controlled substances were discovered upon execution of a search warrant. The officer participating on the execution of the search warrant testified that he personally observed tenant in possession of the unlawful drugs. The court held that the fact that the drug charges were ultimately dismissed were a non-factor in the eviction proceeding because the officer personally observed the unlawful activity (drug possession).

80th Inc. v. Witter, 22 N.Y.S.3d 137 (App. Term, 1st Dep't 2015) (dismissal)

Reversing dismissal of holdover proceeding in which the housing part concluded, *sua sponte*, that the landlord failed to serve a proper termination notice on the occupant where illegal drug activity was alleged. The respondent did not raise the defense and petitioner was not afforded an opportunity to be heard. The Appellate Term, in a scathing opinion, concluded that the courts are "not in the business of blindsiding litigants, who expect us to decide their [cases] on rationales advanced by the parties, not arguments their adversaries never made". Accordingly, the matter was remitted to the housing part to conduct necessary proceedings.

191 Street Assocs. LLC v. Cruz, 29 N.Y.S.3d 848 (App. Term, 1st Dep't 2016) (default)

Notwithstanding tenant's filing of an answer, the failure to appear on the return date without a reasonable explanation constitutes a default.

Elnazer v. Quoquoi, 17 N.Y.S.3d 267 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (withdrawal)

Holding that the petitioner's "withdrawal" of the summary proceeding is the equivalent to a "discontinuance" without prejudice which permits the landlord to bring another action.

Bayview Loan Servicing, LLC v. Lyn-Jay, Inc., 2017 N.Y. Misc. LEXIS 391 (App. Term, 9th & 10th Jud. Dists. Jan. 25, 2017) (NYC - Housing and Commercial Parts)

Summary proceeding alleging the premises contained both a store and residential units was improperly commenced in the commercial part of the NYC Housing Court. The landlord was required to commence separate proceedings – one in the commercial part and another in the regular residential landlord-tenant part.

20. PROPER PARTIES

Chip Fifth Ave. LLC v. Quality King Distribs., Inc., 2018 N.Y. App. Div. LEXIS 602 (1st Dep't Feb. 1, 2018) (Guarantor in plenary action)

Affirming judgment in supreme court against guarantor of commercial lease ($308,743.89). The court held that a guarantor's obligation under the lease may exceed that of a named tenant where the lease and the guaranty are "separate undertakings, and the [guaranty] is enforceable without qualification or reservation".

Attia v. Imoukhuede, 2017 N.Y. Misc. LEXIS 1312 (App. Term, 9th & 10th Jud. Dists. April 12, 2017)

Petitioner in a summary proceeding need not necessarily be the owner of the premises. RPAPL § 721(1) maintains that a "landlord or lessor" may commence the proceeding. Where the tenant acknowledges and accepts that the lessor has the authority to enter into the rental agreement, as evidenced by the fact that a rental agreement was consummated, tenant may not later claim that the petitioner lacks standing due to its not being the lawful owner.

Randazzo v. Galietti, 2017 N.Y. Misc. LEXIS 1173 (App. Term, 2d, 11th & 13th Jud. Dists. April 7, 2017)

Husband of tenant is not a necessary party where he is not a signatory on the lease.

Fountains-Clove Rd. Apts., Inc. v. Gunther, 2017 N.Y. Misc. LEXIS 94 (App. Term, 2d, 11th & 13th Jud. Dists. Jan. 6, 2017)

Landlord properly commenced nonpayment proceeding against deceased tenant's surviving issue in accordance with RPAPL § 711(2). The court further held that the housing part lacked jurisdiction over respondent's counterclaims for conversion and wrongful conviction.

41 Clinton Ave. Realty Corp. v. Silver, 150 A.D.3d 1053 (2d Dep't 2017)

In a plenary action following the summary proceeding, summary judgment granted in favor of landlord seeking damages against guarantor due to the tenant's failure to pay rent. The court concluded that the guaranty was absolute and unconditional. The case was remitted back to the Supreme Court for the computation of damages.

State Realty, LLC v. Ger, 2017 N.Y. Misc. LEXIS 1157 (App. Term, 2d, 11th & 13th Jud. Dists April 7, 2017)

A guarantor without an independent possessory interest in the premises is not a proper party in a summary proceeding. The absence of a landlord - tenant relationship results in the monies owed being damages, as opposed to rent, which may not be awarded in a summary proceeding.

MTC Commons, LLC v. Millbrook Training Ctr. & Spa, Ltd., 31 N.Y.S.3d 922 (App. Term, 9th & 10th Jud. Dists. 2016)

Where the commercial nonpayment proceeding is dismissed against a guarantor named in the petition, the housing part continues to maintain jurisdiction over the remainder of the summary proceeding.

1234 Broadway LLC v. Ying, 31 N.Y.S.3d 922 (App. Term, 1st Dep't 2016)

Even though the summary proceeding was dismissed against the subtenant, the proceeding could continue against the tenant because a subtenant is a "proper" but not a "necessary party". The action was dismissed against the subtenant because he was improperly identified in the petition as a "John Doe" when his proper name and address were known to landlord.

Sow v. Thanvi, 31 N.Y.S.3d 924 (App. Term, 2d, 11th & 13th Jud. Dists. 2016)

Tenant may commence a summary proceeding against a subtenant. Here the proceeding was dismissed because the lease expired prior to the month for which unpaid rent was sought against the subtenant. A nonpayment proceeding is improper where the lease expired or was terminated prior to the commencement of the summary proceeding. With regard to a sublease, the sublease may not extend beyond the termination of the primary lease.

21. RENEWAL LEASE

Related Broadway Dev. LLC v. Malo, 2018 N.Y.L.J. LEXIS 541 (App. Term, 1st Dep't Feb. 28, 2018)

Landlord and tenant entered into a two-attorney stipulation of settlement terminating the tenancy with a stay period. During the stay period, landlord offered tenant a renewal lease which tenant signed and returned with a check and new security deposit (2-year renewal). Landlord accepted the funds and countersigned the renewal lease of which a fully executed version was delivered to tenant. The housing part vacated the judgment and dismissed the summary proceeding. On landlord's motion to renew, the housing part reinstated the judgment and warrant based upon new affidavits from personnel of landlord's managing agent stating that the renewal lease was offered by mistake due to a data entry error involving one (1) of the twenty (20) properties it manages. The Appellate Term reversed and vacated the judgment and dismissed the proceeding noting that the warrant of eviction terminated the tenancy. As such, the landlord was not obligated to offer a renewal lease, and further landlord failed to reserve its rights under the judgment in the renewal lease. Moreover, the renewal lease could not invalidated upon landlord's unilateral mistake due to its "own negligence in failing to note the prior stipulation and final judgment in its records".

22. RES JUDICATA and CLAIM-SPLITTING

Highlands Ctr., LLC v. Home Depot U.S.A., Inc., 149 A.D.3d 919 (2d Dep't 2017)

Successor landlord failed to demonstrate that prior proceedings addressed the landlord's contractual obligations and other related agreements between landlord and tenant. The only relevant proceeding was a federal proceeding which was voluntarily dismissed without prejudice. Thus, res judicata did not apply because the issues at hand were not decided in a "final conclusion".

Caracaus v. Conifer Cent. Sq. Assocs., 2017 N.Y. App. Div. LEXIS 9100 (4th Dep't Dec. 22, 2017)

Deviating from the 1st Department, the Appellate Division for the 4th Department held that a tenant could commence a plenary action against landlord for reciprocal attorney's fees pursuant to RPL § 234 after successfully defending two (2) prior summary proceedings. The Court reasoned that claim-splitting did not apply because New York does not maintain a compulsory counterclaim rule, and, as a result, a respondent that fails to assert a counterclaim where such counterclaim would be permitted is not barred from asserting the claim in a subsequent action. The Court further asserted that claim-splitting only applies where plaintiff commences a new action (or counterclaim) to expand his recovery from a previous action. The 1st Department holds differently based upon **O'Connell v. 1205-15 First Ave. Assoc., LLC, 28 A.D.3d 233 (1st Dep't 2006)**. In O'Connell, the 1st Department affirmed dismissal of tenant's plenary action for attorney's fees incurred from the landlord's prior summary proceeding which was dismissed. The Court reasoned that "the prohibition against the splitting of causes of action required [the tenant] to seek attorney's fees within the action in which they were incurred, not a subsequent action".

Hanna v. 19 W. 55th St. Prop. LLC, 2017 N.Y. Misc. LEXIS 4780 (App. Term, 1st Dep't Dec. 18, 2017)

Dismissing tenant's second small claims action for personal injuries and property damages allegedly resulting from building renovations performed by landlord. The court dismissed the more recent action concluding that it was "duplicative" and "an improper attempt by [tenant] to circumvent the jurisdictional limit of the small claims court".

23. SECTION 8

1900 Albemarie, LLC v. Solon, 2017 N.Y. Misc. LEXIS 4652 (App. Term, 2d, 11th & 13th Jud. Dists. Dec. 1, 2017) (Conditional Limitation)

Dismissing holdover proceeding claiming Section 8 tenant violated lease by failing to ensure the rental subsidy was paid. Tenant was in a rehabilitation center for three (3) years recovering from a stroke during which the subsidy was terminated for "vacating" the premises. Landlord's nonpayment proceeding for the tenant's portion of the rent was dismissed at that time, and after the rental subsidy payment was re-instated following necessary repairs by landlord, landlord commenced the instant holdover proceeding for the uncovered periods in excess of $70,000. The court summarily dismissed the proceeding because the lease did not contain a conditional limitation (i.e., a lease provision stating that if a certain act(s) occurs, then the lease is terminated) for the failure to ensure the rental subsidy was paid; and, as such, a holdover proceeding was improper.

In re Shortt v. Pritchett, 2017 N.Y. App. Div. LEXIS 7653 (2d Dep't Nov. 1, 2017)

Section 8 lease properly terminated where tenant was absent from the premises for more than 180 consecutive days notwithstanding the fact that tenant was unable to notify the agency. However, the decision to terminate the participant from the Housing Voucher program was "shocking to the judicial conscious" as the absence was due to tenant's involuntary hospitalization for a mental health illness. The Court noted that the failure to notify the agency of the absence could constitute grounds for termination but doing so under these circumstances was an improvident exercise of discretion (24 C.F.R. § 982.552[c][1][I]).

Greenburgh Hous. Auth. v. Hall, 58 N.Y.S.3d 874 (App. Term, 9th & 10th Jud. Dists. 2017)

Section 8 tenant is not liable for attorney's fees in a summary proceeding. However, the award of a judgment of possession and warrant of eviction in favor of landlord was affirmed based upon tenant's possession of controlled substances. The controlled substances were discovered upon execution of a search warrant. The officer participating in the execution of the search warrant testified that he personally observed tenant in possession of the unlawful drugs. The court held that the fact that the drug charges were ultimately dismissed were a non-factor in the eviction proceeding because the officer personally observed the unlawful activity (drug possession).

Greater Centennial Homes Hous. Dev. Fund, Inc. v. Jones, 2017 N.Y. Misc. LEXIS 1639 (App. Term, 9th & 10th Jud. Dists. April 27, 2017)

Dismissing nonpayment proceeding where landlord substantially failed to comply with Department of Housing and Urban Development's (HUD) re-certification requirements. The court reasoned that the noncompliance resulted in landlord forfeiting any right to a Section 8 rent increase. HUD handbook requires an annual re-certification of the Section 8 tenant's eligibility. The process requires the owner to (1) give the tenant a 30-day notice of a rent increase; (2) obtain signatures of all of the adults in the tenant's household; and (3) provide tenant initial notice of the following year's annual re-certification. Here, thirty (30) day notice of the rent increase was not provided.

443-445 Jefferson Ave, LLC v. Severin, 2017 N.Y. Misc. LEXIS 1510 (App. Term, 2d, 11th & 13th Jud. Dists. April 21, 2017)

Vacating judgment and restoring matter to housing part's calendar where landlord claimed several month's rent that exceeded the Section 8 tenant's share. The New York City Housing Authority advised landlord prior to commencement of the summary proceeding that the tenant's share of the monthly rent was $410 for the months in question, yet the stipulated amount reflected $800 per month. The fact that landlord agreed to allow tenant to remain an additional three (3) months was of no significance to the amount of rent landlord may collect from a Section 8 tenant. Of note, the tenant appeared *pro se* when the stipulation was reached and tenant consented to convert the nonpayment proceeding into a holdover proceeding.

Rutland Rd., Assoc., L.P v. Grier, 2017 N.Y. Misc. LEXIS 1025 (App. Term, 2d, 11th & 13th Jud. Dists. April 3, 2017)

Section 8 tenant is not liable for her portion of the Section 8 rent "after the termination of the subsidy".

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24. SECURITY DEPOSIT

Fifth Ave. Ctr., LLC v. Dryland Props., LLC, 149 A.D.3d 445 (1st Dep't 2017)

Where the lease provides that tenant's security deposit will be returned "after the date fixed as the end of the lease" (i.e., 2028) provided tenant is in compliance with the material terms, tenant need not wait for such future date should the tenancy be terminated earlier. Here, tenant terminated the tenancy on the ground of constructive eviction.

Harris v. Diorio, 2017 N.Y. Misc. LEXIS 2464 (App. Term, 9th & 10th Jud. Dists. June 22, 2017)

In small claims action, tenant is entitled to money judgment for the security deposit tendered ($800) when a formal lease was not ultimately executed and the "agreement to agree" did not include a provision that the landlord could retain the security deposit.

Wicklund v. Mukhtyar, 2017 N.Y. Misc. LEXIS 2270 (App. Term, 9th & 10th Jud. Dists. June 8, 2017)

Tenant entitled to money judgment in the full amount of the security deposit ($3,600) where landlord failed to demonstrate that tenant caused any damage to the premises beyond that "attributable to ordinary wear and tear".

Hermida v. Blochwitz, 2017 N.Y. Misc. LEXIS 2068 (App. Term, 9th & 10th Jud. Dists. May 23, 2017)

To retain tenant's security deposit, landlord must demonstrate that tenant caused damage beyond ordinary wear and tear and further the reasonable value of the necessary repairs for such damage. Here, landlord failed to substantiate the amount of the damages.

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County of Suffolk v. Hafferkamp, 2017 N.Y. Misc. LEXIS 2078 (App. Term, 9th & 10th Jud. Dists. May 23, 2017)

Holding that the county (landlord) was not entitled to retain tenant's security deposit because tenant's failure to comply with the agreement to provide the county with the DSS "cash landlord claim form" within ten (10) days of vacating the premises was not his fault. To the contrary, the evidence demonstrated that tenant had requested but DSS failed to provide the requisite form.

25. SERVICE

Shaukat v. Wilcox, 61 N.Y.S.3d 193 (App. Term, 2d, 11th & 13th Jud. Dists. June 2, 2017)

Reversing housing part decision denying landlord's motion for summary judgment which had further directed a traverse hearing be conducted as part of the trial. The process server's affidavit of service presumes proper service, and to rebut the allegations, tenant must assert "a sworn, nonconclusory and factually specific denial of service". Counsel's conclusory denials are insufficient to rebut the presumption. Judgment awarded in favor of landlord.

Borg v. Feeley, 2017 N.Y. Misc. LEXIS 2431 (App. Term, 1st Dep't June 23, 2017)

Two (2) attempts at service at the premises, one (1) of which was during normal business hours, before resorting to "nail and mail" service, was adequate to satisfy the reasonable application standard and a possessory judgment was properly granted. However, this service did not satisfy the more stringent due diligence standard necessary to obtain a money judgment upon tenant's default. As a result, the $91,254 money judgment was vacated. Of note, there was no indication in the affidavit of service that the process server attempted to obtain tenant's work schedule, address or whereabouts.

NYHCA Pub. Hous. Preserv. I LLC v. Anderson, 2017 N.Y. Misc. LEXIS 4605 (App. Term, 1st Dep't Dec. 4, 2017)

Case remanded for trial court to conduct a traverse hearing. Factual dispute as to whether the petition and notice of petition were mailed to the appropriate address following service on a person

of suitable age and discretion rebuts the presumption of proper service set forth in the process server's affidavit of service. Landlord mailed the papers to the leased commercial property although tenant asserts that landlord was previously in possession of a different mailing address.

Doji Bak, LLC v. Alta Plastics, 2016 N.Y. Misc. LEXIS 1851, 2016 N.Y. Slip Op 50792(U) (App. Term, 9th & 10th Jud. Dists. May 12, 2016)

In a commercial nonpayment proceeding, two (2) unsuccessful attempts at service at the vacant premises when landlord was aware of tenant's principal place of business was at a different location did not constitute a "reasonable application" of attempted personal or substituted service before resorting to conspicuous place service (nail and mail). The fact that the rental agreement explicitly provided notices were to be delivered at the subject premises was an inadequate basis for "attempting" service at the known vacant premises.

322 West 47th St. HDFC v. Loo, 31 N.Y.S.3d 924 (App. Term, 1st Dep't 2016)

Where the process server's progress was impeded by the building's exterior door, the outer bounds of the tenant's dwelling place was deemed to extend to that exterior door. The Appellate Term affirmed the Housing Part's determination at a traverse hearing that service of the termination notice in this fashion by nail and mail service was adequate.

26. SLIP AND FALL LIABILITY

He v. Troon Mgmt., Inc., 157 A.D.3d 586 (2d Dep't 2018)

Out-of-possession landlord not liable for injuries following slip and fall on snow-filled and icy sidewalk adjacent to premises. Landlord had no contractual obligation to maintain sidewalk and snow and ice do not constitute a structural or design defect.

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SAPP v. S.J.C. 308 Lenox Ave. Family Ltd. P'ship, 150 A.D.3d 525 (1st Dep't 2017)

Out-of-possession landlord not liable for injuries sustained by tenant's employee who fell on a wet staircase that was in the exclusive possession of tenant. The exceptions to the rule immunizing an out of possession landlord from slip and fall liability include a contractual agreement to maintain the premises or where the accident was caused by a structural or design defect which violated a statutory provision.

Martinez v. 3801 Equity Co., LLC, 155 A.D.3d 445 (1st Dep't 2017)

Out-of-possession landlord not liable for injuries sustained by tenant's employee who fell in a hole in the backyard area of the commercial restaurant/lounge while taking out the garbage. The parties' lease required the landlord to maintain the "public" portions of the premises, which this was not. Moreover, the hole was not a "structural defect", and the evidence demonstrated that the employer tenant was having work done in that area to expand the restaurant space.

Cepeda v. KRF Realty LLC, 148 A.D.3d 512 (1st Dep't 2017)

Absent a lease provision to the contrary, an out-of-possession landlord is not liable for removing snow or ice from the premises' sidewalk. Here, the lease required the tenant to remove snow/ice. Thus, the injured person may only proceed against the tenant.

Casson v. McConnell, 148 A.D.3d 863 (2d Dep't 2017)

Denying plaintiff's motion for summary judgment in personal injury action because there were issues of fact regarding the landlord's obligation to remove snow and ice from the premises and whether the tenant's falling was attributable to the snowstorm. An owner or landlord in possession is liable for slip-and-fall accidents due to snow and ice "only when it created the alleged dangerous condition or had actual constructive notice of it". Here there was a dispute whether the occupant interfered with the snow removal.

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27. STATUTE OF LIMITATIONS

Parker v. Howard Ave. Realty, LLC, 53 N.Y.S.3d 879 (App. Term, 2d, 11th & 13th Jud. Dists. 2017) (Unlawful Entry and Detainer to Be Restored to Possession; RPAPL 713(10) (no notice to quit required))

Statute of limitations on tenant's wrongful eviction claim is one (1) year, which runs from the time "it is reasonably certain that the tenant has been unequivocally removed with the implicit denial of any right to return". Here, the claim was timely as the special proceeding was commenced less than one (1) year after the landlord purchased the building.

28. STAYS

Caton Owners, LLC v. Lyttle, 2017 N.Y. Misc. LEXIS 3260 (App. Term, 2d, 11th & 13th Jud. Aug. 18, 2017)

Reversing denial of tenant's motion to extend stay on execution of warrant of eviction. The court exercised its discretion after noting that the long-term senior citizen tenant's failure to comply with the payment terms in the stipulation was due to medical illness/deaths in her family. The tenant had since paid all the rent due.

311 Lincoln Place, Inv., LLC v. Woldmarian, 2017 N.Y. Misc. LEXIS 3266 (App. Term, 2d, 11th & 13th Jud. Dists. Aug. 18, 2017)

For properties in NYC, RPAPL § 753(4) provides that a holdover proceeding based upon a breach of the lease requires the court to grant a 10-day stay to cure the breach in which case if cured, the stay becomes permanent. However, where there is "a pattern of continuity or recurrence of objectionable conduct" which "shows no sign of abating", then the stay is inappropriate. Here, the evidence demonstrated that tenant repeatedly over the period of years and in violation of a court order and multiple stipulations denied landlord access to make repairs which jeopardized the safety of other residents (and amounts to a nuisance). Consequently, the denial of the 10-day stay was held proper.

29. SUBSEQUENT LITIGATION FOR DAMAGES

237 Realty LLC v. Crawford, 2017 N.Y. Misc. LEXIS 4722 (App. Term, 1st Dep't Dec. 12, 2017)

Affirming landlord's small claims award for unpaid rent plus late fees. The court noted that the parties' so ordered stipulation of settlement from the earlier summary proceeding expressly preserved the unpaid rent claims in a plenary action.

Charles v. Boland, 2017 N.Y. Misc. LEXIS 4248 (App. Term, 2d, 11th & 13th Jud. Dists. Nov. 3, 2017)

Dismissing tenant's plenary action for personal property damage resulting from landlord-defendant's wrongful eviction. To prove damages for loss of personal property, tenant was required to elicit testimony regarding the items' value by the owner or other individual familiar with the items' "quality and condition" at the time of loss. Here, tenant merely introduced receipts as to the value of the items if newly purchased which was held insufficient.

Murphy v. Bronx Park Phase I Preserv., LLC, 2017 N.Y. Misc. LEXIS 4842 (App. Term, 1st Dep't Dec. 20, 2017)

Affirming dismissal of plaintiff-tenant's plenary action for property damage at the conclusion of tenant's case due to the absence "competent proof of damages". Specifically, tenant failed to demonstrate that bedbugs existed in the premises or that landlord either caused or failed to remediate water leaks and mold within the premises following adequate notice.

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30. SURVIVAL CLAUSE

Lane NY Realty Holding, LLC v. CLDC Inc., 39 N.Y.S.3d 743 (Nassau Cnty. Dist. Ct. 2016)

Enforcing lease survival clause imputing continuing obligation on tenant for rent obligations following termination of the lease.

H.L. Realty, LLC v. Edwards, 131 A.D.3d 573 (2d Dep't 2015)

Although the termination of the lease generally terminates the duties and obligations under the agreement, summary judgment was granted in favor of landlord against the guarantor because the lease contained a survival clause which stated the tenant remained liable for monetary obligations arising under the rental agreement. Accordingly, even though the landlord and tenant had entered into a stipulation of settlement in the summary proceeding terminating the lease, that agreement neither removed the guarantor's obligations nor the tenant's ongoing obligation to pay for damages following lease termination.

Kings Park 8809, LLC v. Stanton-Spain, 26 N.Y.S.3d 725 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)

Dismissing small claims action for post-judgment rent/use and occupancy following tenant's surrender of possession. Neither the parties' stipulation of settlement in the summary proceeding nor the rental agreement for the residential property included a provision continuing to impose responsibility for post-termination rents and/or damages (i.e., there was no survival clause). Accordingly, the tenant had no obligation for ongoing rents under the now-terminated lease.

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31. TYPES OF PROCEEDINGS

133 Plus 24 Sanford Ave. Realty Corp. v. Ni, 2017 N.Y. Misc. LEXIS 4658 (App. Term, 2d, 11th & 13th Jud. Dists. Dec. 1, 2017) (Holdover - Commercial Tenant Failed to Pay Additional Rent)

Dismissing commercial holdover proceeding based upon nonpayment of additional rent items in lease (i.e., sewage and water consumption). Where the lease provides for the termination of the lease based upon the failure to pay rent, the predicate notice must assert the approximate amount claimed. Here landlord overstated the amount owed ($50,940) in the notice by nearly 9 times ($5,437 - actual amount). Accordingly, the notice was defective and did not terminate the tenancy. The proceeding was then dismissed due to the defective predicate notice.

Goldman v. Flynn, 2017 N.Y. Misc. LEXIS 3854 (App. Term, 1st Dep't Oct. 11, 2017) (Rent Regulated - Nuisance)

Affirming trial court's award of possession to landlord in holdover proceeding where tenant's conduct rose to the level of a "nuisance" after he "repeatedly compromised the safety and interfered with other tenants' use and enjoyment of the building". The evidence demonstrated that tenant repeatedly verbally abused and threatened neighbors and physically assaulted a postal worker, some of which was corroborated by video surveillance.

150 West 21st LLC v. "John Doe", 31 N.Y.S.3d 922 (App. Term, 1st Dep't 2016) (Rent Regulated – Nuisance)

Holding that a handful of obnoxious complaints during the calendar year to a neighbor regarding "noise" in the rent regulated apartment does not constitute a "recurring or continuing pattern of objectionable conduct that threatens the comfort and safety of others in the building".

31-67 Astoria Corp. v. Cabezas, 2017 N.Y. Misc. LEXIS 1160 (App. Term, 2d, 11th & 13th Jud. Dists. April 7, 2017) (Rent Stabilized Premises – Chronic Nonpayment)

History of repeated nonpayment proceedings for late payment of rent supports a holdover proceeding on the grounds that the tenant violated a substantial obligation under the lease. The number of nonpayment proceedings is not determinative. Where the tenant establishes that the premises was in need of repairs, a chronic nonpayment proceeding cannot be sustained. Here, of the seven (7)

prior nonpayment proceedings over a three-year period, three (3) were either discontinued or not pursued, and in a fourth, the tenant raised a justified warranty of habitability claim. These four (4) proceedings should not have been counted against the tenant. However, the tenant's motion for summary judgment was properly denied because the landlord was successful in the other three (3) prior nonpayment proceedings and the tenant did not pay the rent on time for eleven years (between 2004 - 2015).

Zevrone Realty Corp. v. Gumaneh, 37 N.Y.S.3d 209 (App. Term, 1st Dep't 2016) (Rent Stabilized – Chronic Nonpayment)

In reversing the granting of tenant's motion to dismiss the holdover summary proceeding, the Appellate Term held that the repeated nonpayment of rent resulting in six (6) nonpayment proceedings in 4½ years constituted a cognizable possessory claim that withstands a motion to dismiss.

Well Done Realty, LLC v. Epps, 2018 N.Y. Misc. LEXIS 623 (App. Term, 1st Dep't Feb. 26, 2018) (Rent Regulated – Succession Rights))

Affirming summary judgment in favor of landlord and rejecting undertenant's succession rights claim where undertenant (mother of the tenant) failed to provide evidence showing that she lived with the named tenants during the two-year period immediately before the tenants vacated.

WRG Acquisition XIII, LLC v. Strasser, 2017 N.Y. Misc. LEXIS 1020 (App. Term, 9th & 10th Jud. Dists. March 24, 2017) (Rent Regulated (Nassau County) – Succession Rights))

Affirming housing part's award of possession in favor of landlord where occupant failed to demonstrate that he resided with his sister (tenant of record) in the premises as his "primary residence" for at least two (2) years prior to the tenant's permanent vacating of the property. Here, the occupant used a different address for his driver's license, automobile registration, insurance and other "official" documents.

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Martinez v. Ulloa, LLC, 22 N.Y.S.3d 787 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (Unlawful Entry – Self-Help)

Reversing the housing part's granting of petitioner-tenants' unlawful and entry detainer summary proceeding to be restored to possession because a commercial landlord, under limited circumstances such as those presented in this case, may utilize self-help to regain possession provided it is done peacefully. The parties' commercial lease allowed for self-help provided a five-day notice to cure and three-day notice of termination were served. Tenants' petition failed to allege that the tenants were in compliance with the lease, that the predicate notice had not been served or that the landlord's re-entry was not performed in a peaceful manner. Accordingly, the petition was dismissed. Respondent-landlord's undisputed counterclaim for a judgment of possession was also dismissed because during the pendency of the appeal, the tenants called the police and with the assistance of the police, the landlord was required to allow entry by the tenants. The majority held that if it agreed with the landlord that the tenants became squatters when they re-entered, albeit with the assistance of the police, then the counterclaim of landlord had to be dismissed because the tenants were not provided a ten-day notice following re-entry as required by RPAPL 713(3). The Appellate Term reasoned that the utilization of self-help comes with "uncertainty" and that the pleading requirements of the statute should not be abandoned in an effort to restore landlord to possession.

32. WAIVERS

Scarborough Manor Owners Corp. v. Robson, 2017 N.Y. Misc. LEXIS 3245 (App. Term, 9th & 10th Jud. Dists. Aug. 17, 2017) (Accept Payment After Lease Terminated But Before Commence Summary Proceeding)

Deviating from **92 Bergenbrooklyn LLC v. Cisarno**, 21 N.Y.S.3d 810 (App. Term, 2nd, 11th & 13th 2015), the Appellate Term for the Ninth and Tenth Judicial Districts held that the landlord's acceptance of rent following lease termination, but prior to commencement of a summary proceeding, failed to give rise to a month-to-month tenancy that would have vitiated the termination notice. Where such a payment is made, the court must decide (1) whether the payment was accepted and an indicator of a "waiver" by the landlord of tenant's breach of the lease and (2) if landlord did not intend to waive the violation, did the payment and acceptance create a month-to-month tenancy. Here, tenant deposited her check into a bank lock box unbeknownst to landlord or its agent. Moreover, the board directed the agent not to accept any additional payment. Therefore, there was no waiver, and, further, due to landlord not knowing a payment had been made, a month-to-month tenancy was not created because there was no express or implied contract/agreement between the parties. The mere failure to return the check in the Second Department, without more, does not vitiate the termination notice. The award of possession in favor of landlord was affirmed.

Tenth St. Holdings, LLC v. McKowen, 31 N.Y.S.3d 924 (Answer – Waiver) (App. Term, 1st Dep't 2016)

In this chronic rent delinquency holdover proceeding, Housing Part properly granted summary judgment in favor of landlord. Tenant's motion to renew and reargue were denied because tenant raised on this motion the defense of waiver for the first time. The court held that the failure to assert the defense either in the answer and/or in opposition to the original motion precluded tenant from doing so on a motion to renew.

River Park Residences, LP v. Richman Plaza Garage Corp., 2017 N.Y. Misc. LEXIS 1519 (App. Term, 1st Dep't April 26, 2017) (No Waiver Provision in Commercial Lease)

Enforcing a broad "no waiver" lease provision with respect to the submission of documents by tenant regarding parking charges collected on behalf of landlord. Landlord awarded possession due to tenant's failure to provide the required documentation necessary for landlord to compute the amount of additional rent due. The Appellate Term held the "no waiver" provision of the lease insulated landlord from the lone occasion where it accepted less than the required documentation from the tenant, and thus, did not constitute a "course of conduct".

36 Main Realty Corp. v. Wang Law Office, PLLC, 19 N.Y.S.3d 654 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (No Waiver Provision in Commercial Lease)

Holding that a clear and unambiguous "no waiver" provision in a commercial lease will generally be enforced. Here, the no waiver provision applied to the lease requirement that tenant make certain repairs and that the failure to make the repairs would not constitute a basis for a rent abatement. Tenant thus was not entitled to an abatement of rent due to the lack of repairs (which tenant was obligated to perform anyway).

III. SELECTED STATUTES

CIVIL PRACTICE LAW AND RULES § 321[c]

Where counsel passes away or is physically or mentally incapacitated, suspended, disabled or removed from the case prior to a final judgment, no further action may be taken against that counsel's client until after at least thirty (30) days notice to appoint another attorney is personally served (or in another manner directed by the court) upon the adversely effected party.

CIVIL PRACTICE LAW AND RULES § 4213

The court in rendering a decision, whether oral or in writing, must "state the facts it deems essential" and relied upon in reaching the holding (CPLR 4213(b)). The decision must be made within sixty (60) days after the matter is fully submitted (CPLR 4213[c]).

NYC ADMINISTRATIVE CODE Intro. 214-b (Right to Counsel in Housing Court)

Signed into law on August 11, 2017, and effective in New York City, this is the first law in the United States that requires the providing of free legal representation for tenants and occupants by July 31, 2022. In 2013, approximately just 1% of all tenants were represented by counsel in Housing Court.

NYC ADMINISTRATIVE CODE § 27-2009.1(b) (Multiple Dwellings - Pets)

In New York City, where the lease for an apartment in a multiple dwelling prohibits a pet but the tenant "openly and notoriously" harbors a pet (not otherwise prohibited by the multiple dwelling law or other applicable law) and the landlord fails to bring a summary proceeding to enforce the "no pet" provision for a period of at least three (3) months, then the lease provision is deemed waived and tenant may keep the pet. Typically, the basis of the holdover proceeding is that the violation of the "no pet" rule created a nuisance. The purpose of the legislation is to dissuade landlords/owners who

are aware of a pet violation from either holding the "threat" of litigation over the tenant's head or using it at an unspecified future date as a pretext for an otherwise unjustified eviction.

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW § 1305 (Post-foreclosure)

Notwithstanding the expiration of the federal Title VII Protecting Tenants at Foreclosure Act on December 31, 2014, RPAPL § 1305 continues to require that bona fide tenants of premises not subject to rent regulation at the time of the filing of the notice of foreclosure receive a predicate notice of ninety (90) days, or the remainder of the lease, whichever is greater, prior to commencement of a holdover proceeding. If the new owner intends to occupy the premises as a primary residence, then the notice period is ninety (90) days regardless of the duration of the remainder of the lease. Otherwise ten (10) days notice is required.

REAL PROPERTY LAW § 227-a (Senior Citizens)

In any residential lease where the tenant or tenant's spouse has or will reach the age of 62 during the tenancy, the tenant may terminate the lease early by providing a certified physician's note that the tenant (or spouse) is unable to live independently in the premises and requires assistance with daily activities. The applicant must further provide documentation that, as a result, the tenant (spouse) will be moving into the residence of a family for a period fo at least 6 months or a nursing or assisted living facility. Depending on where the tenant (spouse) will be going, a notarized statement from the family member confirming the relationship and acceptance of the family member or the agreement with the assisted living facility are to be provided. The termination date is no earlier than thirty (30) days after the date the next rental payment is due. Tenant must be current on rent through termination date.

REAL PROPERTY LAW § 235-bb (Rental Properties) * NEW LAW

Effective November 2017, prior to executing a rental agreement for residential property containing three (3) or fewer rental units, the landlord must provide tenant with conspicuous notice in boldface font that the premises has a valid and current certificate of occupancy. Providing a copy of the actual certificate of occupancy is deemed sufficient compliance. The purpose of the law is to reduce the number of unlawful conversions and nonconforming uses. A lease provision waiving the notice is void. The statute also applies to illegal basement apartments (nonconforming use). The statute does <u>not</u> set forth a specific penalty for noncompliance.

REAL PROPERTY LAW § 235-f (The Roommate Law)

235-f(3) provides that any residential lease entered into by a tenant automatically allows for the occupancy of the tenant and the tenant's immediate family, plus one (1) additional occupant and the dependent children of the occupant provided the tenant or tenant's spouse occupies the premises as his/her primary residence.

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IV. PRACTITIONER'S CHECKLIST (Things to Consider)

Practitioners should pay particular attention to the following before the case is called. The list is not exhaustive.

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. If required, was the appropriate predicate notice served in a timely fashion and in an appropriate manner? A lease provision imposing more stringent service requirements than those set forth by statute will generally be enforced.

D1. If the subject premises is Section 8 or regulated pursuant to another government funded residency program, was the governing agency simultaneously served the predicate notice?

E. Was the Tenant/Occupant in possession of the subject premises at the time the summary proceeding was commenced?

F. 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.

F1. If the subject premises is Section 8 or pursuant to another government funded residency program, is this fact alleged in the petition?

F2. If a predicate notice was required, 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.)

G. Is the Petition verified? Counsel may verify the petition even if located within the same county as the petitioner.

H. Is it alleged that the notice of petition and petition were properly served and service was completed no fewer than five (5) days but not more than twelve (12) days before the return date (RPAPL § 733(1))? Review the affidavit of service.

I. Was an answer required, and, if so, was an answer provided? (A request by a *pro se* litigant for an adjournment for the purpose of seeking counsel extends the time to answer.)

I1. What affirmative defenses have been asserted and are they applicable? (e.g., the warranty of habitability only applies to residential nonpayment proceedings).

J. 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?

K. 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 petitioner's underlying claims).

L. 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).

M. 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?

N. Have the parties discussed an amicable resolution?

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