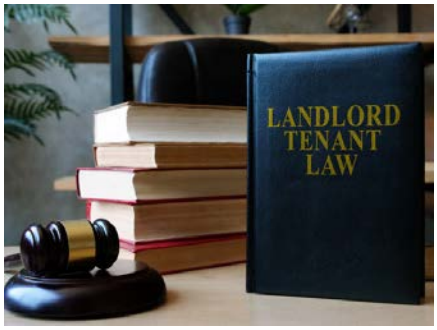
SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY 11788
(631) 234-5588



2023 LANDLORD-TENANT UPDATE

FACULTY:

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

Warren M. Berger, Esq.

Deputy John Hornick, Suffolk County Sheriff's Department

Marissa Luchs Kindler, Esq., Nassau Suffolk Law Services

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

Program Coordinator:
Patrick McCormick, Esq.

March 28, 2023
Suffolk County Bar Association, New York

Like us on:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Patrick McCormick, Esq. - Campolo, Middleton & McCormick, LLP

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

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

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

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

LANDLORD-TENANT LAW UPDATE (2023)

Suffolk County Bar Association
Hauppauge, New York

March 28, 2023

***Presenters*:**

HON. STEPHEN L. UKEILEY

Suffolk County Acting County Court and District Court Judge,
Coordinating Judge, Landlord/Tenant Matters for Suffolk County

WARREN BERGER, ESQ.
Co-Chair, Landlord - Tenant Law Committee
Suffolk County Bar Association

MARISSA LUCHS KINDLER, ESQ.
Senior Staff Attorney
Nassau Suffolk Law Services Committee, Inc.

PATRICK MCCORMICK, ESQ.
First Vice President, Suffolk County Bar Association, Program Coordinator
Senior Partner, Campolo, Middleton & McCormick, LLP

TABLE OF CONTENTS

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

1. Purpose: Award "Possession"

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

The Housing Part's jurisdiction ceases upon the execution of the warrant of eviction (***Dixon v. County of Albany***, 192 A.D.3d 1428 (3d Dep't 2021); ***Steinmetz v. Oyala***, 142 N.Y.S.3d 273 (App. Term 2d, 11th & 13th Jud. Dists. 2021)). Although the Housing Part is the preferred forum for Landlord and Tenant disputes, the Supreme Court has concurrent original jurisdiction (*see* ***Cabrera v. Humphrey***, 192 A.D.3d 227 (3d Dep't 2021); ***Extell Belnord LLC v. Uppman***, 113 A.D.3d 1 (1st Dep't 2013)). Permitting multiple forums to adjudicate housing disputes is practical because the Housing Courts' authority and jurisdiction is limited. For example, the Housing Court lacks authority to issue declaratory and/or injunctive relief (*see* ***Faith In Action Deliverance Ministries v. 3231 Assoc., LLC****,* 168 A.D.3d 502 (1st Dep't 2019); *see also* ***Robinson v. 47 Thames Realty, LLC***, 158 A.D.3d 781 (2d Dep't 2018)). The Court/Housing Parts further lack jurisdiction to determine "ownership" or "title." Accordingly, these matters, plus possession, may be raised in the Supreme Court.

The Tenant in a summary proceeding may assert any affirmative defense, whether in law or equity, including that the Landlord is no longer the owner of the premises or has a superior possessory interest in the premises (RPAPL § 743; *see*, *e.g.*, ***Yau v. Yau***, 2021 N.Y. Misc. LEXIS 5406 (App. Term, 2d, 11th & 13th Jud. Dists. Oct. 22, 2021); ***Fizzinoglia v. Capozzoli***, 94 N.Y.S.3d 538 (App. Term, 9th & 10th Jud. Dists. 2018); ***Fountains-Clove Rd. Apts., Inc. v. Gunther***, 47 N.Y.S.3d 212 (App. Term, 2d, 11th & 13th Jud. Dists. 2017)). The Tenant may further assert that it is the "owner" (if not previously acknowledged and accepted), but only as an affirmative defense (not as an affirmative claim) (*see* ***Fizzinoglia****,* 94 N.Y.S.3d at 212; ***Jacob Marion, LLC v. Bey***, 36 N.Y.S.3d 47 (App. Term, 2d, 11th & 13th Jud. Dists. 2016)).

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

Supreme Court provided the new action is commenced within sixty (60) days of entry of the Court's decision (*see* RPAPL § 749(2); ***Haque v. Rob***, 83 A.D.3d 895 (2d Dep't 2011)).

2. Types of Summary Proceedings

Generally, there are two (2) types of summary proceedings: (1) non-payment proceedings and (2) holdover proceedings. The requisite elements of each are different, and the Landlord, commonly referred to as the Petitioner in a summary proceeding, has the burden of commencing the proper type of proceeding. Otherwise, the proceeding will be dismissed. Regardless of the type of proceeding, the Respondent must be in possession of the premises at the time the summary proceeding is commenced (*see* ***MHA Realty 1 LLC v. Rostoker***, 142 N.Y.S.3d 888 (App. Term 2d, 11th & 13th Jud. Dists. 2021); ***92 Bergenbrooklyn, LLC v. Cisarano***, 21 N.Y.S.3d 810 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (noting "[t]he rule is that, in a summary proceeding, the respondent must be in possession of the premises at the time the proceeding is commenced in order for the proceeding to lie")).

A. Non-payment Proceeding

The purpose of a non-payment proceeding, similar to a holdover proceeding, is to recover possession of real property (***MHA Realty 1 LLC*** , 142 N.Y.S.3d at 888; ***West 152nd Assoc.. L.P. v. Gassama***, 119 N.Y.S.3d 801 (App. Term, 1st Dep't 2019)). A non-payment proceeding presupposes that the parties have a valid Landlord and Tenant relationship when the summary proceeding is commenced, and the Landlord claims the Tenant failed to pay all or a portion of the rent (***MHA Realty 1 LLC*** , 142 N.Y.S.3d at 888).

The Landlord and Tenant relationship is not terminated by the Landlord's rent demand or the commencement of the summary proceeding. In fact, where the Landlord prevails following a hearing on the merits, the Landlord and Tenant relationship continues until the Sheriff executes the warrant of eviction or the Tenant vacates the premises (RPAPL § 749(3); ***Dixon v. County of Albany***, 192 A.D.3d 1428 (3d Dep't 2021); ***636 Apt. Assoc., JV v. Mayo***, 130 N.Y.S.3d 649 (Mt. Vernon City Ct. 2020) (holding that the "[n]ew RPAPL § 749(3), enacted under the [HSTPA] ... no longer terminates the landlord tenant relationship upon issuance of a warrant of eviction," but instead affords greater protections until the execution of the warrant)). The money judgment may only include, *inter alia*, rent arrears and any use and occupancy for the time the Tenant was in possession following the termination or expiration of the rental agreement (*see* ***Madden v. Juillet***, 13 N.Y.S.3d 850 (App. Term, 9th & 10th Jud. Dists. Feb. 23, 2015); ***Priegue v. Paulus***, 988 N.Y.S.2d 525 (App. Term, 9th & 10th Jud. Dists. 2014)). Of note, the money judgment may only be awarded "[c]oncomitant with an award of possession" (***FBD Realty, LLC v. Rego Park N.H., Ltd.***, 2021 N.Y. Misc. LEXIS 5118 (App. Term, 2d, 11th & 13th Jud. Dists. Oct. 8, 2021); ***Fieldbridge Assoc., LLC v. Sanders***, 139 N.Y.S.3d 474 (App. Term 2d, 11th & 13th Jud. Dists. 2021)). In other words, a money judgment may not be awarded in a summary proceeding if the Landlord is not simultaneously awarded a judgment of possession (***id***.).

B. Holdover Proceeding

A holdover proceeding presupposes the parties do not have a valid Landlord and Tenant relationship when the summary proceeding was commenced. In other words, if the parties at some point had a valid Landlord and Tenant relationship, that relationship expired or was terminated (and a new agreement was not reached) before the action was commenced (***Barton v. Truesdell***, 183 A.D.3d 979 (3d Dep't 2020); ***Xheng v. Fu Jian Hong Guan Am. Unity Assoc., Inc.***, 168 A.D.3d 511 (1st Dep't 2019)). Accordingly, the Petition must allege that at the commencement of the proceeding, the parties' rental agreement, if one existed, expired and the Tenant continues to hold over without permission (***Gayle v. Flynn***, 143 N.Y.S.3d 497 (App. Term 2d, 11th & 13th Jud. Dists. 2021)). A holdover proceeding may further be appropriate in certain circumstances where a Landlord and Tenant relationship never existed (e.g., a squatter and proceeding to evict the former owner of a foreclosed property).

RPAPL §§ 711 and 713 list several types of situations that permit a holdover summary proceeding. These include, but are not limited to, (1) where the lease expired on its own terms and a new agreement was not reached (***Jamaica Ave., LLC v. H. Carpets Inc.***, 153 N.Y.S.3d 834 (N.Y. Civ. Ct. Queens Cnty. 2021)); (2) a terminated rental agreement due to a breach of a substantial obligation specified within the lease (***2186 Realty NY LLC v. Martinez***, 2022 NYLJ LEXIS 434 (N.Y. Civ. Ct. N.Y. Cnty. April 25, 2022)); (3) termination of a month-to-month tenancy (***Double Down Realty Corp. v. Avalone***, 2021 N.Y.L.J. LEXIS 305 (N.Y. Civ. Ct. N.Y. Cnty. April 14, 2021)); (4) revocation of a license agreement (***Aloni v. Oliver***, 138 N.Y.S.3d 788 (App. Term, 1st Dep't 2021)); (5) where the Tenant of record vacates the premises and his or her guests remain (***Marine Terrace Assocs. v. Kesoglides***, 884 N.Y.S.2d 552 (App. Term, 2d, 11th & 13th 2009)); (6) unlawful activity conducted at the premises (***West Haverstraw Preserv., LP v. Diaz***, 94 N.Y.S.3d 541 (App. Term, 9th & 10th Jud. Dists. 2018)); (7) termination of a tenancy-at-will (***Jamison v. Jamison***, 58 N.Y.S.3d 874 (App. Term, 9th & 10th Jud. Dists. 2017)); (8) to remove a squatter (***Hecsomar Realty Corp. v. Camerena***, 113 N.Y.S.3d 463 (App. Term,2d, 11th & 13th Jud. Dists. 2019)); and (9) seeking possession of post-foreclosed properties (***Federal Home Loan Mtge. Assn. v. Perez***, 968 N.Y.S.2d 317 (App. Term, 9th & 10th Jud. Dists. 2013)). Unlike non-payment proceedings, a Respondent in a holdover proceeding may not avoid the eviction by paying the amount awarded *prior* to the issuance of the judgment or execution of the warrant because the proceeding was generally commenced for reasons other than the non-payment of rent.

3. The Relief Sought – Judgments and Warrant of Eviction

In a summary proceeding, a prevailing Petitioner will typically receive three (3) separate Orders of the Court - a judgment of possession, money judgment, and warrant of eviction. The ultimate relief in a summary proceeding is a judgment of possession and warrant of eviction directing legal possession of the property back to the Petitioner (***Grand Concourse Estates LLC v. Ture***, 2018 N.Y.L.J. LEXIS 3759 (N.Y. Civ. Ct. Bronx Cnty. Nov. 18, 2018)). The judgment and warrant further authorize an eviction should the Respondents refuse to voluntarily surrender possession by a date certain.

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

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

A. Money Judgments

A prevailing Landlord may be awarded a money judgment without regard to amount because the Court's maximum dollar jurisdictional limit does not apply to summary proceedings (Uniform City Ct. Act § 204; Uniform Dist. Ct. Act § 204; Uniform Just. Ct. Act § 204; ***Edgemont Assoc., LLC v. Goldman***, 97 N.Y.S.3d 55 (App. Term, 9th & 10th Jud. Dists. 2018); ***MTC Commons, LLC v. Millbrook Training Ctr. & Spa, Ltd.***, 31 N.Y.S.3d 922 (App. Term, 9th & 10th Jud. Dists. 2016)). While rent and use and occupancy may be included within the money judgment, at the time these materials were prepared, it is not entirely clear whether items beyond "rent" or "use and occupancy" (i.e. additional or added rent) may similarly be awarded in a summary proceeding. This issue will ultimately be decided by the Appellate Courts.

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

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

In ***Beco v. Ritter***, the Appellate Division, Third Department held that the Landlord's two-tiered rent payment schedule based upon the timing of the Tenant's payments constituted an impermissible late fee in contravention of Real Property Law ("RPL") § 238-a, which limits the late

fee for the non-payment of rent for residential property to 5% of the rent or $50, whichever is less (190 A.D.3d 1150 (3d Dep't 2021)). Citing RPAPL 702, the Court noted that the fee was a "[p]enalty that may not be sought in a summary proceeding" (***id***.). Although it appears that the late fee was denied because it was a penalty prohibited by RPAPL § 702, it is possible that the Court based its decision on the excessive amount of the late fee which was in contravention of RPL § 238-a, or both. Regardless, clarification in subsequent rulings will be helpful.

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

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

However, the failure to seek monetary relief for an item that may be awarded in a summary proceeding precludes an award for that same item within a subsequent plenary action because that "[w]ould constitute an improper splitting of a cause of action" (*see* ***See Why Gerard, LLC v. Gramro Entm't Corp.***, 94 A.D.3d 1205 (3d Dep't 2012)). In addition, the doctrine of *res judicata* precludes the re-litigation of a claim that was fully adjudicated in a prior proceeding (***Maki v. Bassett Healthcare***, 141 A.D.3d 979 (3d Dep't 2016)).

1. Rent and Use and Occupancy

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

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

The term "rent" generally refers to the agreed dollar amount to occupy property pursuant to a rental agreement. The term "use and occupancy" refers to the fair and reasonable value to occupy the property in the absence of a rental agreement (***Nisim v. Ramirez***, 152 N.Y.S.3d 208 (App. Term, 2d, 11th & 13th Jud. Dists. 2021); ***London Paint & Wallpaper Co., Inc. v. Kesselman***, 138 A.D.3d 632 (1st Dep't 2016)). Even though the value of "rent" and "use and occupancy" may be identical, the terms are not interchangeable (***2114 Realty LLC v. Estate of Sanabria***, 2021 N.Y.L.J. LEXIS 874, at *21 (N.Y. Civ. Ct. Kings Cnty. Sept. 1, 2021) (noting that "[r]ent derives from a contract or an agreement, while use and occupancy derives, literally from use and occupancy of a place and from a sense of equity, fairness and ultimately from a desire to `balance equities'")). Unless waived by agreement, the Landlord typically pursues rent that becomes due following the summary proceeding in a subsequent plenary action. The claim is not be barred by res judicata, collateral estoppel, or the doctrine of against claim splitting (*see* ***de la Rosa v. Landucci***, 138 N.Y.S.3d 787 (App. Term 1st Dep't 2021); ***Messam v. Neisca***, 129 N.Y.S.3d 612 (App. Term, 2d, 11th & 13th Jud. Dists. 2020)). Likewise, use and occupancy may be sought in a subsequent plenary action following the Tenant's surrender of the premises. Unlike rent, which is a negotiated dollar amount, use and occupancy is computed by multiplying the daily pro-rated value of the last month's rent when the agreement was in effect by the number of days the Tenant remained in possession without a rental agreement (***Madden v. Juliet***, 13 N.Y.S.3d 850 (App. Term, 9th & 10th Jud. Dists. 2015) (in small claims action, use and occupancy awarded for the sixteen (16) days the Tenant remained in possession following lease termination, or 16/30 of the monthly rent); ***Rustagi v. Sanchez***, 999 N.Y.S.2d 798 (App. Term, 2d, 11th & 13th Jud. Dists. 2014); ***Sap V/Atlas 845 WEA Assocs. NF LLC v. Jannelli***, 918 N.Y.S.2d 691 (App. Term, 1st Dep't 2010) (occupants permitted to remain in possession provided pro-rated use and occupancy tendered "identical to the rent they had been paying")).

Expert testimony, such as from a licensed realtor or appraiser, is typically not required to demonstrate the reasonable value of use and occupancy for a residential property. Rather, the Court will typically rely upon the dollar amount equal to the last month's rent set forth within the expired or terminated lease (***Nisim***, 152 N.Y.S.3d at 208; ***Vanchev v. Mulligan***, 41 N.Y.S.3d 722 (App. Term, 2d, 11th & 13th Jud. Dists. 2016)). In a commercial case, the testimony of a licensed appraiser or realtor is typically required (*see generally* ***Rubenstein v. Mayor***, 161 A.D.3d 1202 (2d Dep't 2018); *cf.* ***98-48 Queens Blvd. LLC v. Parkside Mem. Chapels***, 2020 N.Y.L.J. LEXIS 1381 (N.Y. Civ. Ct. Queens Cnty. Sept. 9, 2020) (attempting to avoid delay, the Court "set interim use and occupancy at the last rent rate" and the parties could revisit the rate via expert testimony or other available evidence at the upcoming hearing on the merits)).

The distinction between "rent" and "use and occupancy" is further significant in defining the parties' relationship. In a non-payment proceeding, the Landlord seeks unpaid rent. In a holdover proceeding, the Landlord generally does not make a claim for rent (other than prior rent arrears) because the tenancy was terminated or expired at the time the proceeding was commenced, or a Landlord and Tenant relationship never existed (*see* ***MHA Realty 1 LLC***, 142 N.Y.S.3d at 888 (non-payment proceeding); ***Gayle***, 143 N.Y.S.3d at 497 (holdover proceeding)). As a result, absent a valid rental agreement, the appropriate claim is for use and occupancy for the precise number of days the occupant remained in possession without a rental agreement.

2. Rule Against Apportionment

The rule against apportionment applies to rent, but not use and occupancy (***Warner v. Lyon***, 115 N.Y.S.3d 806 (App. Term, 2d, 11th & 13th Jud. Dists. 2019)). This means that the Tenant is liable for an entire month's rent when the lease is terminated prior to the end of the month (***Seabury v. Galloway***, 130 N.Y.S.3d 188 (App. Term, 9th & 10th Jud. Dists. 2020)). On the other hand, use and occupancy is "apportioned" by awarding the pro-rated amount for the precise number of days the Tenant remains in possession without a rental agreement (***Rossi v. Scott***, 52 N.Y.S.3d 248 (App. Term, 9th & 10th Jud. Dists. 2017) (use and occupancy must be apportioned, that is, absent a tenancy, the occupant is liable only for the actual days in possession); ***Priegue v. Paulus***, 988 N.Y.S.2d 525 (App. Term, 9th & 10th Jud. Dists. 2014) (same)).

For example, if the monthly rent was $1,500 and the Tenant remains in possession for ten (10) days following the termination of the lease, then the Landlord would be entitled to use and occupancy in the amount of $500 ($1,500/30 x 10 days). It is worth repeating that unless waived, the Landlord may commence a subsequent plenary action to recover use and occupancy "[a]ccrued after entry of a final judgment in a summary proceeding" (***Rustagi***, 999 N.Y.S.2d at 798).

3. Added or Additional Rent

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

a. Attorney's Fees

An award of attorney's fees, whether in the summary proceeding or a subsequent plenary action, must be reasonable and just (*see* ***East Aurora Coop. Mkt., Inc. v. Red Brick Plaza LLC***, 197 A.D.3d 874 (4th Dep't 2021); ***W6 Facility X, LLC v. West 6 Care Ctr., Inc.***, 169 A.D.3d 968 (2d Dep't 2019)). RPL § 234, as amended by the HSTPA, explicitly provides that "[a] landlord may not recover attorneys' fees upon a default judgment."

To be considered the prevailing party in a summary proceeding, the Landlord must be awarded the central relief sought, i.e., possession of the property. Although the Court may consider other factors, such as abatement of rent and mixed outcomes, in a non-payment proceeding, the Appellate Term for the Ninth and Tenth Judicial Districts has succinctly stated that where the Landlord does not "[o]btain a judgment of possession for the rental arrears, it was not the prevailing party" (***Sherwood Suffolk Co. v. Panorama Catering, Ltd.***, 128 N.Y.S.3d 780 (App. Term, 9th & 10th Jud. Dists. 2020) (emphasis added); ***Blinds to Go (U.S.), Inc. v. Times Plaza Dev., L.P.***, 191 A.D.3d 939 (2d Dep't 2021) (denying attorney's fees where "[i]n this highly litigated and

contentious action, notwithstanding numerous motions, trials, hearings, and appeals spanning more than 17 years, neither party has obtained the central relief each seeks so as to constitute a prevailing party")).

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

In determining the reasonableness of a request for attorney's fees, the Court may consider "counsel's testimony and records as to the nature, extent and necessity of the legal services rendered on landlord's behalf in the [summary] proceeding" (***600 Realty Heights, LLC v. Paula-Molina***, 26 N.Y.S.3d 216 (App. Term, 1st Dep't 2015); ***125-127 Allen St. Assocs. v. Lin***, 26 N.Y.S.3d 214 (App. Term, 1st Dep't 2015); ***APF 286 Mad LLC v. RIS Real Props., Inc.***, 13 N.Y.S.3d 849 (App. Term, 1st Dep't 2015)). A prevailing Landlord may only be awarded attorney's fees incurred in the summary proceeding, and not fees related to a separate action (***Hawthorne Gardens Owners Corp. v. Jacobs***, 17 N.Y.S.3d 382 (App. Term, 9th & 10th Jud. Dists. 2015)). The fees have been awarded where incurred, even when the Petitioner had not yet paid counsel (***East Aurora Coop. Mkt., Inc.***, 197 A.D.3d at 874).

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

A lease provision authorizing attorney's fees merely for maintaining a summary proceeding, regardless of the outcome, is an unenforceable penalty (*see* ***Krodel v. Amalagated Dwellings Inc.***, 166 A.D.3d 412 (1st Dep't 2018) (lease provision requiring Tenant to pay attorney's fees for commencing action against Landlord is "unconscionable and unenforceable"); ***Weidman v. Tomaselli***, 365 N.Y.S.2d 681, 691 (Rockland Cnty. Ct.), *aff'd*, 386 N.Y.S.2d 276 (App. Term, 9th & 10th Jud. Dists. 1975)). Only a prevailing party is entitled to recover attorney's fees pursuant to a rental agreement, and a stay on the execution of the warrant of eviction does not alter the Petitioner's status as the prevailing party (***600 Realty Heights, LLC***, 26 N.Y.S.3d at 216).

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

may a Landlord recover fees incurred litigating an unrelated action (***40-50 Brighton First Rd. Apts. Corp. v. Henderson***, 27 N.Y.S.3d 310 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)).

b. Late Fees

For residential properties, RPL § 238-a(2) provides that where the rent is more than five (5) days late, the Landlord may recover a late rent fee equal to five percent (5%) of the monthly rent or $50, whichever is less. A late fee for a higher dollar amount is impermissible (*see* ***Beco***, 190 A.D.3d at 1150 (holding that a routine substantial "discount" for timely rent payment constitutes an unenforceable late fee penalty pursuant to RPAPL § 702)). The statute does not state in which forum(s) – a summary proceeding or plenary action – the late fee may be recovered. Late fees are not recoverable against a Tenant in a rent-stabilized apartment (***Bandil Farms Inc. v. New York State Div. of Hous. & Cmty. Renewal***, 190 A.D.3d 403 (1st Dep't 2021)).

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

Late fees are more commonly awarded in summary proceedings involving commercial premises as it is presumed the parties were represented by counsel during negotiations (*see, e.g.*, ***VRA Family L.P. v. Salon Mgt. USA, LLC***, 183 A.D.3d 614 (2d Dep't 2020); ***23 E. 39th St. Mgmt. Corp. v. 23 E. 39th St. Developer***, 134 A.D.3d 629 (1st Dep't 2015) (2% late fee); ***Brixmor SPE 6 LLC v. H & N Holding Group, LLC***, 2022 N.Y. Misc. LEXIS 381 (N.Y. Cnty. Sup. Ct. Jan. 6, 2022); ***Empire LLC v. Sharapov***, 2020 N.Y. Misc. LEXIS 358 (N.Y. Cnty. Sup. Ct. Jan. 31, 2020) (awarding late fees and referring matter to a Special Referee for computation); ***39-50 24th St. Realty v. Ol' Bridge Café***, 2020 N.Y.L.J. LEXIS 1961 (N.Y. Civ. Ct. Queens Cnty. Feb. 17, 2021) (10% late fee); ***Goidel & Siegel, LLP v. 122 E. 42nd St., LLC***, 2012 N.Y. Misc. LEXIS 5949 (N.Y. Cnty. Sup. Ct. Dec. 27, 2012) (4% late fee), *rev'd on other grounds*, 143 A.D.3d 567 (1st Dep't 2016)). However, usurious, unjust and disproportionate late fees are unenforceable in any proceeding (*see, e.g.*, ***TY Bldrs. II, Inc. v. 55 Day Spa, Inc.***, 167 A.D.3d 679 (2d Dep't 2018); ***Regatta Prop. LLC v. 21 S. End Hudson Inc.***, 113 N.Y.S.3d 486 (N.Y. Civ. Ct. 2019) (claim for ten percent (10%) late fee, or 120% per year, dismissed)).

c. Reciprocal Attorney's Fees (Residential Property)

RPL § 234 applies where a residential lease provides for the award of a prevailing Landlord's attorney's fees, but does not include similar relief for a prevailing Tenant. In such a case, the lease is deemed to contain a reciprocal provision in favor of the Tenant's attorney's fees (and expenses) if the Tenant prevails in the summary proceeding or the Landlord fails to perform its obligations under the lease (RPL § 234; ***W54-7 LLC v. Perrin***, 183 A.D.3d 448 (1st Dep't 2020); ***Inwood***

Ventura, LLC v. Ferraira, 7 N.Y.S.3d 242 (App. Term, 1st Dep't 2014)).

The purpose of RPL § 234 is to dissuade unscrupulous Landlords from engaging in improper conduct while offering an incentive to expeditiously resolve Landlord and Tenant disputes (***Marsh v. 300 W. 106th St. Corp.***, 95 A.D.3d 560 (1st Dep't 2012)). The Tenant may be entitled to interest on the RPL § 234 fees (***251 CPW Hous. LLC v. Pastreich***, 124 A.D.3d 401 (1st Dep't 2015); ***Queens Fresh Meadows, LLC v. Newberry***, 2 N.Y.S.3d 310 (App. Term, 2d, 11th & 13th Jud. Dists. 2014)). A lease provision waiving the Tenant's rights to attorney's fees is void as against public policy (RPL § 234).

A residential Tenant may seek attorney's fees either as a counterclaim in the summary proceeding or in a separate plenary action. Regardless, the fees may only be awarded where the Tenant prevails "in a [Landlord-Tenant] controversy that has reached an `ultimate outcome'" (***J.P. & Assocs. Props. Corp. v. Krautter***, 128 A.D.3d 963 (2d Dep't 2015); ***125 Ct. St., LLC v. Sher***, 94 N.Y.S.3d 539 (App. Term, 2d, 11th & 13th Jud. Dists. 2018) (denying Tenant's attorney's fees notwithstanding dismissal of the proceeding due to a defective rent demand because the award "should await the ultimate outcome of the nonpayment dispute")). Dismissal of the Landlord's summary proceeding "without prejudice" may result in denial of the Tenant's claim for attorney's fees due to the absence of a final adjudication (***Horatio Arms, Inc. v. Celbert***, 972 N.Y.S.2d 813 (App. Term, 1st Dep't 2013) (Tenant's claim for attorney's fees premature where summary proceeding was dismissed due to improper service); *see also* ***339-347 E. 12th St. LLC v. Ling***, 921 N.Y.S.2d 781 (App. Term, 1st Dep't 2011) (eleven percent (11%) rent reduction awarded but Tenant did not prevail since claims for punitive and treble damages were denied); ***157 E. 57th St. LLC v. Birrenbach***, 801 N.Y.S.2d 779 (App. Term, 1st Dep't 2005)).

Where the Landlord seeks a voluntary discontinuance of a summary proceeding, the award of the Tenant's RPL § 234 attorney's fees is left to the discretion of the Court (***Anello v. Fiedler***, 159 N.Y.S.3d 315 (App. Term, 2d, 11th & 13th Jud. Dists. 2021)). In ***Anello***, following fifteen (15) months of litigation, including motion practice, an appeal that was abandoned, discovery exchanges initiated at the Tenant's behest, and the Landlord immediately sought to discontinue the summary proceeding after a new affirmative defense arose that warranted dismissal, the Appellate Term held that it would be unjust to further penalize the Landlord with attorney's fees where the Tenant was the cause of "substantial delay and expense (***id***.). Similarly, in ***526 W. 158th St., HDFC v. Ramon***, the Appellate Term affirmed the Housing Part's denial of RPL § 234 fees where the Landlord sought to "withdraw the claim [within a timely manner] after discovery raised questions about the nature of the tenant's occupancy" (137 N.Y.S.3d 617 (App. Term, 1st Dep't 2021)).

A prevailing Tenant must establish the reasonableness of the fees sought (***655 Country Rd., Inc. v. Caltagirone***, 101 N.Y.S.3d 701 (App. Term, 9th & 10th Jud. Dists. 2018)). For example, fees incurred for unsuccessful motion practice have been deducted from the award (***Megan Holding LLC v. Conason***, 18 N.Y.S.3d 579 (App. Term, 1st Dep't 2015)). The Court may further deny a prevailing Tenant's counterclaim for attorney's fees where the award is "[m]anifestly unfair or where the successful party engaged in bad faith" (***251 CPW Hous. LLC***, 124 A.D.3d at 401; ***Parkview***

Apts. Corp. v. Pryce, 95 N.Y.S.3d 125 (App. Term, 9th & 10th Jud. Dists. 2018) (although the holdover proceeding was dismissed after the default judgment was vacated, the Appellate Term denied the counterclaim for attorney's fees due to "overwhelming proof" that the Tenants breached the lease)).

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

B. Accelerated Rent and Survival Clauses

The Housing Part has subject matter jurisdiction over rent arrears and use and occupancy, but not future rent or use and occupancy. Thus, a Landlord in a summary proceeding may not be awarded rent not yet due even where the lease includes an acceleration clause (***LC Apts. LLC v. Trovato***, 151 N.Y.S.3d 343 (Monroe Cnty. Sup. Ct. 2021)).

The Court considers an award of "accelerated" rent (i.e., a lease provision that states all remaining months' rent and obligations immediately become due upon breach or termination) to be damages which are not recoverable in a summary proceeding. Unless waived, the Landlord may commence a plenary action in an appropriate court to enforce the acceleration rent provision (*see* ***University Sq. San Antonio, Tx. LLC v. Mega Furniture Dezavala, LLC***, 2021 N.Y. App. Div. LEXIS 5333 (4th Dep't Oct. 1, 2021); ***172 Van Duzer Realty Corp. v. Globe Alumni Stud. Assist. Assoc., Inc.***, 102 A.D.3d 543 (1st Dep't 2013); ***30 Broadway, LLC v. Grand Centr. Dental, LLP***, 96 A.D.3d 934, 947 N.Y.S.2d 545 (2d Dep't 2012)). If an acceleration clause is omitted from the lease, then the Landlord may still recover these items in a plenary action (at a much slower pace) provided the lease contains a survival clause. However, the Landlord's claim for unpaid rent would be stagnated due to the fact the Landlord would only be permitted to assert a claim after each particular month's rent became due (***Pikoulas v. Hardina***, 36 N.Y.S.3d 340 (App. Term, 9th & 10th Jud. Dists. 2016); ***299 Broadway, LLC v. James A. O'Malley, P.C.***, 2021 N.Y. Misc. LEXIS 5959 (N.Y. Cnty. Sup. Ct. Nov. 18, 2021)).

The omission of a "survival" clause is significant to the post-lease termination rights of the parties. Generally, the termination of the lease results in the cessation of all future rights and obligations under the agreement. An exception exists where the lease states post-termination, the Tenant continues to remain liable for "damages" and financial obligations under the rental agreement (i.e., a survival clause). Otherwise, claims that had not yet accrued at the time of the lease termination, including accelerated rent, are forfeited and incapable of being recovered in a

subsequent plenary action (***Kings Park 8809, LLC v. Stanton-Spain***, 48 N.Y.S.3d 266 (App. Term, 2d, 11th & 13th Jud. Dists. 2016); ***Patchogue Assocs. v. Sears, Roebuck and Co.***, 951 N.Y.S.2d 314 (App. Term, 9th & 10th Jud. Dists. 2012)).

C. Damages are NOT Recoverable

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

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

D. Interest, Costs and Disbursements

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

A prevailing Landlord may further be entitled to recover statutory costs and disbursements (*see, e.g.*, N.Y. City Civ. Ct. Act §§ 1906-a, 1908; Uniform City Ct. Act §§ 1906-a, 1908; Uniform Dist. Ct. Act §§ 1906-a, 1908; Uniform Just. Ct. Act §§ 1903(d),(m), 1908; *but see* CPLR § 1102(d); ***Boyle v. Bishop***, N.Y.L.J., Apr. 25, 1978, at 11, col. 1 (App. Term, 9th & 10th Jud. Dists. 1978) (holding that a "poor person" pursuant to CPLR § 1102(d) is not liable for costs)). Statutory costs include, but are not limited to, a fee for each "necessary" Respondent served and, if the award is based upon a default, an additional fee may be awarded to secure an affidavit from the process server stating the Tenant is not presently in the military. The amount awarded for the affidavit is $5.00 except in the Justice Courts where the amount is $1.50 (*see* N.Y. City Civ. Ct. Act § 1906-a; Uniform City Ct. Act § 1906-a; Uniform Dist. Ct. Act § 1906-a; Uniform Just. Ct. Act § 1903(d),(m)). The affidavit stating the Tenant is not in the military is required only where the Tenant does not appear in Court (***Unitrin Advantage Ins. Co. v. 21st Century Pharmacy***, 158 A.D.3d 450

(1st Dep't 2018) (denying default judgment where non-military affidavit of service not provided); ***Avgush v. De La Cruz***, 924 N.Y.S.2d 307 (App. Term, 9th & 10th Jud. Dists. 2011)).

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

4. Proper and Necessary Parties

A contractual relationship must exist between the parties where a claim for a lease violation is asserted (*see* ***Herson v. Marzullo***, 148 N.Y.S.3d 605 (App. Term, 2d, 11th& 13th Jud. Dists. 2021) (dismissing Tenant's action where the Landlord named on the rental agreement was the father of the defendant)). The Landlord must name each and every Tenant in a summary proceeding (***Bay Ridge Chicken Grill, Inc. v. Cirrus Data Int'l, LLC***, 26 N.Y.S.3d 723 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)). In other words, the Landlord may not pick and choose which Tenants to include even where some of the Tenants paid their share of the rent. This is because a Tenant is both a "proper" and a "necessary" party to the summary proceeding. The adult children of a Tenant, however, need not be named unless they have an independent possessory right to the subject premises (***Friedman v. Yosef***, 31 N.Y.S.3d 921 (App. Term, 2d, 11th & 13th Jud. Dists. 2016)), and minor children neither be named nor appear on the warrant of eviction (***Daley v. Billinghurst***, 799 N.Y.S.2d 159 (App. Term, 2d & 11th Jud. Dists. 2004)). The general rule is that a spouse, family member, and the Tenant's guests may be evicted where they are not named in the summary proceeding (*see* ***JLNT Realty, LLC v. Liautaud***, 26 N.Y.S.3d 213 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)).

A Subtenant may be named (but is not required) because a Subtenant is a "proper" party but not a "necessary" party in a summary proceeding (*see* ***117-119 Leasing Corp. v. Reliable Wool Stock, LLC***, 139 A.D.3d 420 (1st Dep't 2016); ***Kew Gardens Portfolio Holdings, LLC v. Bucheli***, 151 N.Y.S.3d 861 (N.Y. Civ. Ct. Queens Cnty. 2021)). The Landlord may not commence a summary proceeding directly against a Subtenant without also naming the Tenant(s) because the Landlord is not in privity with the Subtenant (*see generally* ***7001 E. 71st St., LLC v. Millennium Health Servs.***, 138 A.D.3d 573 (1st Dep't 2016); ***Triborough Bridge & Tunnel Auth. v. Wimpfheimer***, 633 N.Y.S.2d 695, 696-97 (App. Term, 1st Dep't 1995)). It is typically in the Landlord's interest to name Subtenants because when the Landlord and Tenant relationship is terminated, as a matter of law, the subtenancy is also terminated. However, if a Subtenant is omitted from the summary proceeding, then the Subtenant will not appear on the warrant of eviction. Thus, if the Subtenant does not vacate after the Tenant leaves the premises, the Subtenant may become a Tenant at Sufferance which would require a thirty (30) day predicate notice pursuant to RPL § 228 before commencement of a separate holdover proceeding against the Subtenant.

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 the Tenant may commence a summary proceeding in the Housing Part to evict a Subtenant (*see generally* ***Sow v. Thanvi***, 31 N.Y.S.3d 924 (App. Term, 2d, 11th & 13th Jud. Dists. 2016) (commercial non-payment proceeding dismissed absent agreement between Tenant and Subtenant for the payment of rent); ***Subway Rests., Inc. v. Mannetti***, 2003 N.Y. Misc. LEXIS 1115 (App. Term, 9th & 10th Jud. Dists. July 11, 2003)).

The Sheriff may refuse to evict the occupants, including the named Tenant, until clarification is obtained from the Court if persons other than those named on the warrant of eviction are present in the premises. If the Landlord names a "John Doe" or "Jane Doe", then the Landlord must move to amend the caption to reflect the "Doe's" proper name once learned (CPLR § 1024; ***66 Fort Washington Assocs, LLC v. Acevedo***, 131 N.Y.S.3d 778 (App. Term, 1st Dep't 2020); ***Netherland Props. LLC v. Karalesis***, 115 N.Y.S.3d 835 (N.Y. Civ. Ct. 2019)).

The Court may not issue a judgment of possession or render a monetary award against a Guarantor unless the Guarantor has an independent possessory right to the subject premises (*see* ***PB 2180 Pitkin Ave., LLC v. Tress***, 107 N.Y.S.3d 616 (App. Term, 2d, 11th & 13th Jud. Dists. 2019); ***State Realty, LLC v. Ger***, 55 N.Y.S.3d 694 (App. Term, 2d, 11th & 13th Jud. Dists. 2017); ***MTC Commons, LLC v. Millbrook Training Ctr. & Spa, Ltd.***, 31 N.Y.S.3d 922 (App. Term, 9th & 10th Jud. Dists. 2016)). In other words, a Guarantor is not a proper party to a summary proceeding unless the Guarantor has a possessory right to the premises. The Landlord may, however, seek damages in a subsequent plenary action to enforce the guaranty of the rental agreement provided the agreement included a survival clause (a lease provision that provides the financial obligations continue even where the rental agreement has been terminated) (*see* ***Seabring, LLC v. Elegance Rest. Furniture Corp.***, 188 A.D.3d 744 (2d Dep't 2020); ***Green 333 Corp. v. RNL Life Science, Inc.***, 186 A.D.3d 1334 (2d Dept 2020); ***H.L. Realty, LLC v. Edwards***, 131 A.D.3d 573 (2d Dep't 2015)).

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

5. Predicate Notice

The Landlord must typically provide the Tenant with notice of the breach, default or termination of the tenancy, often referred to as predicate notice, prior to commencing a summary proceeding (s*ee generally* ***U.S. Bank Trust, N.A. v. Augustine***, 159 N.Y.S.3d 661 (N.Y. Civ. Ct. Queens Cnty. 2022)). The duration of the notice period is dependent upon the type of recognizable Landlord and Tenant relationship.

A mistake in the identification of the relationship, which occurs prior to the commencement of the summary proceeding, may result in an improper predicate notice which, in turn, may result in a dismissal. The Landlord is bound by the "[predicate] notice served", and further is unable to amend same (*see* ***DLB of NY, LLC v. Billan***, 139 N.Y.S.3d 744 (App. Term, 1st Dep't 2021); ***Hollis Partners, LLC v. Artis***, 2021 N.Y. Misc. LEXIS 4937 (App. Term, 2d, 11th & 13th Jud. Dists. Sept. 17, 2021); ***Chen v. Salvador***, 145 N.Y.S.3d 780 (N.Y. Civ. Ct. Queens Cnty. 2021)). This principle further applies to the Notice of Petition and Petition to the extent that if the Landlord fails to amend a meaningful pleading defect and/or inaccurate description within the Petition, the Landlord will be held to that description in making a *prima facie* case (***DLB of NY, LLC***, 139 N.Y.S.3d at 744 (vacating judgment where the property upon which an eviction was granted was a second property not included within the predicate notice and/or Petition)).

A lease provision specifying the manner and upon whom the notice must be served is generally enforceable (***146 Flushing Ave. v. 66s Fusion***, 147 N.Y.S.3d 868 (App. Term, 2d, 11th & 13th Jud. Dists. 2021); ***Omansky v. 160 Chambers St. Owners, Inc.***, 155 A.D.3d 460 (1st Dep't 2017)). Establishing timely service of a proper predicate notice is a "[c]ondition precedent to [the] maintenance of a summary eviction proceeding, and the burden remains with the landlord to prove that element of its case" (***541 Ct. St. v. Zheng***, 147 N.Y.S.3d 868 (App. Term, 2d, 11th & 13th Jud. Dists. 2021); ***Mautner-Glick Corp. v. Glazer***, 148 A.D.3d 515 (1st Dep't 2017); ***W54-7 LLC v. Schick***, 829 N.Y.S.2d 399 (App. Term, 1st Dep't 2006)).

Although service of a proper predicate notice is an element of the Landlord's case, it is not a jurisdictional issue – neither personal nor subject matter jurisdiction (*see* ***Marmon Realty Group, LLC v. Khalil***, 148 N.Y.S.3d 822 (App. Term 2d, 11th & 13th Jud. Dists. 2021); ***Nguyen v. Perparim***, 116 N.Y.S.3d 467 (App. Term, 1st Dep't 2019); *see also* ***541 Ct. St.***, 147 N.Y.S.3d at 868 (holding that "subject matter jurisdiction is conferred by statute and is not impacted by defects in a predicate notice itself or in the service thereof")). Generally, claims regarding defects in the predicate notice may not be waived unless the error is a *de minimis* improper description of the premises (e.g., stating the property is at 32 Wilson Road when the formal address is 32 Wilson Street) (*see* ***Kit Ming Corp. v. Tsang***, 2001 N.Y. Misc. LEXIS 564 (App. Term, 1st Dep't June 1, 2001)); or where the amount in the rent demand was the "approximate good faith amount of rent owed" (*see* ***Moniaci v. Kelly***, 152 N.Y.S.3d 216 (App. Term, 9th & 10th Jud. Dists. 2021); or the parties voluntarily enter into a Stipulation of Settlement resolving the summary proceeding (***448 LLC v. Butcher's Choice Meat Mkt.***, 113 N.Y.S.3d 792 (App. Term, 2d, 11th & 13th Jud. Dists 2019); ***Fieldbridge Assoc., LLC v. Holmes***, 52 N.Y.S.3d 246 (App. Term, 2d, 11th & 13th Jud. Dists. 2017)). However, if there is a

hearing on the merits, then the Landlord must demonstrate by a preponderance of the evidence that a suitable predicate notice was timely served in an appropriate manner (***Gristmill Realty, LLC v. Roa***, 133 N.Y.S.3d 383 (App. Term, 9th & 10th Jud. Dists. 2020)). Below are some of the common predicate notices associated with summary proceedings.

A. Non-payment Proceedings

The Landlord must make a written "demand" for the payment of unpaid rent prior to the commencement of a non-payment proceeding (***Greenport Preserv., L.P. v. Heyward***, 160 N.Y.S.3d 734 (App. Term, 2d, 11th & 13th Jud. Dists. 2021); ***Oakwood Terr. Hous. Corp. v. Monk***, 36 N.Y.S.3d 48 (App. Term, 9th & 10th Jud. Dists. 2016)). Effective June 14, 2019, the HSTPA eliminated oral rent demands as a predicate notice for non-payment proceedings, and the law now requires a fourteen (14) day written rent demand prior to the commencement of either a residential and/or commercial non-payment proceeding (*see* RPAPL §§ 711(2), 735; HSTPA, L. 2019, c. 36, Part M, § 12). The HSTPA more than quadrupled the prior rent demand period, which had been three (3) days.

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

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

A written rent demand must be served in the same manner as the Notice of Petition and Petition (*see* RPAPL §§ 711(2), 735). This means that the rent demand may not simply be mailed to the Tenant, whether by regular, overnight delivery or certified mail (***Merrbill Holdings, LLC v. Toscano***, 100 N.Y.S.3d 610 (App. Term, 9th & 10th Jud. Dists. 2018)). Rather, the demand must be personally delivered, left with a person of suitable age and discretion or left in a conspicuous place following reasonable efforts to ascertain personal delivery. Follow-up mailings by both certified and regular mail are required where the latter two (2) methods are utilized.

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

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

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

B. Holdover Proceedings

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

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

Under common law, a Tenant who remains in possession following expiration of the lease without entering into a new agreement or paying additional moneys is considered to be a holdover, and, as a result, the parties continue to be bound by the terms of the expired lease (RPL § 232-c; ***Zheng v. Fu Jian Hong Guan Am. Unity Assn., Inc.***, 168 A.D.3d 511 (1st Dep't 2019); ***Zielinski v. Kiwak***, 110 N.Y.S.3d 210 (App. Term, 2d, 11th & 13th Jud. Dists. 2018)). A month-to-month tenancy need not be in writing and may result by operation of law, such as when a rental agreement of longer than one (1) month expires and the Tenant remains in possession and continues to pay without entering into a new rental agreement (RPL § 232-c; ***Zielinski***, 110 N.Y.S.3d at 210). The Statute of Frauds does not apply to an oral month-to-month tenancy (even where the month-to-month tenancy has been renewed for more than twelve (12) consecutive months) because the tenancy is capable of being performed within one (1) year; i.e., the tenancy automatically renews upon the payment of rent each month (*see* ***28 Mott St. Co., Inc. v. Summit Import Corp.***, 34 A.D.2d 144 (1st Dep't 1970); *cf.* N.Y. General Obligations Law § 5-703(2)).

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

set forth within the statutes. In New York City, the termination notice must be formally served in the same manner as the Notice of Petition and Petition (*see* RPL § 232-a).

a. Within New York City

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

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

b. Outside New York City

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

2. Landlord's Refusal to Re-New Lease (including Month-to-Month Tenancy) OR Rent Increase (at least 5%) (Residential) [RPL § 226-c] (30 Days, 60 Days or 90 Days)

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

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

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

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

For commercial properties, it appears that absent a lease provision to the contrary, a predicate notice is not required to terminate a rental agreement that expires on a date certain (e.g., a lease that expires by its own terms on December 31, 20__) (RPL § 232-b; ***620 Dahill, LLC v. Berger***, 27 N.Y.S.3d 315 (App. Term, 2d, 11th & 13th Jud. Dists. 2016); ***Arverne Ltd. Profit House Corp. v. Taft's Dental, P.C.***, 99 N.Y.S.3d 851 (N.Y. Civ. Ct. Queens Cnty. 2019) (noting that "[a] holdover relationship after a [commercial] lease expires by its own terms does not require statutory notice prior to a holdover proceeding") (emphasis added); ***BGB Realty, LLC v. Annunziata***, 820 N.Y.S.2d 841 (App. Term, 9th & 10th Jud. Dists. 2006)). As a result, where a commercial Tenant holds over without paying for the additional time, the Landlord need not provide a predicate notice prior to commencing a holdover proceeding (RPL § 232-c).

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

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

A Landlord and Tenant relationship does not exist where the occupant is either a "licensee" or a "squatter" (***Federal Nat'l Mtg. Assoc. v. Simmons***, 12 N.Y.S.3d 487 (App. Term, 1st Dep't 2015)). Section 713 of the RPAPL authorizes commencement of a holdover proceeding to evict licensees and squatters following formal service of a ten (10) day Notice to Quit in the manner set forth within RPAPL § 735.

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

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

On the other hand, a "tenant-at-will" (similar to a licensee) takes lawful possession of the premises with the permission of the Landlord but for an undetermined duration. The critical distinction between a tenant-at-will and a licensee is whether the occupation of the premises is "exclusive." This distinction is the difference between the Landlord having to serve a thirty (30) day notice (tenant-at-will) or a ten (10) day notice (licensee) prior to commencing suit (*see* ***Russian Orthodox Convent Novo-Diveevo, Inc. v. Sukharevskaya***, 166 A.D.3d 1036 (2d Dep't 2018)). Where the occupant has complete and unfettered access to all or a portion of the property (e.g., the bedroom and full and complete access to the kitchen, laundry room and bathroom at all times without restriction), the occupant is likely to be considered a tenant-at-will notwithstanding the absence of an agreement to pay rent. Where the occupant is restricted from areas of the property and/or shares in possession with another individual(s), the occupant is more likely a licensee (*see* ***Zhu v. Li***, 138 N.Y.S.3d 792 (App. Term 2d, 11th & 13th Jud. Dists 2021); ***645 Brooklyn Realty, LLC v. Beecher-Sakil***, 138 N.Y.S.3d 789 (App. Term, 2d, 11th & 13th Jud. Dists. 2021) (denying summary judgment where there was "[a]n issue of fact with respect to occupant's affirmative defense asserting that she was not a licensee, but rather a tenant")).

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

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

Until mid-2009, when the owner lost title in a foreclosure action, the occupants were entitled to the same predicate notice as squatters; i.e., a ten (10) day Notice to Quit (RPAPL § 713(5)). The Federal Title VII Protecting Tenants at Foreclosure Act ("PTFA"), which originally took effect on

May 20, 2009, substantially expanded the notice provisions for "bona fide Tenants" of foreclosed residential premises and properties involving federally-related mortgage loans.[2]

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

A bona fide Tenant does not include the mortgagor (former owner) or the child, spouse, or parent of the mortgagor under the contract. In addition, the tenancy must have been the result of an "arm's length transaction," and the rent may not be substantially less than fair market value unless the rent was reduced or subsidized by a Federal, State or local subsidy. An occupant who is not a bona fide Tenant is entitled to ten (10) days notice. In addition, the purchaser of the dwelling at foreclosure "cannot look to a lease agreement in an effort to hold occupants liable for [the] payment of rent" (***U.S. Bank Trust, NA v. Alston***, 162 N.Y.S.3d 909 (Pleasant Valley Just. Ct. 2022)).

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

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

RPAPL § 713(5) provides that a certified copy of the deed must be "exhibited" (i.e., presented for inspection) to the occupants prior to the commencement of a summary proceeding (***769 E. LLC v. Ofori***, 121 N.Y.S.3d 760 (N.Y. Civ. Ct. Bronx Cnty. 2020) (dismissing holdover

---

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

proceeding where neither the referee's deed nor a certified copy of the deed was exhibited to the occupant)). Attaching a certified copy of the referee's deed to the Notice to Quit, which is subsequently served upon a person of suitable age and discretion at the premises (*see* ***Plotch v. Dellis***, 75 N.Y.S.3d 779 (App. Term, 2d, 11th & 13th Jud. Dists. 2018); ***U.S. Bank Trust, N.A. v. Hayes***, 94 N.Y.S.3d 809 (Mt. Vernon City Ct. 2019)) or by conspicuous place service (i.e. "nail and mail") (***Federal Home Loan Mtg. Corp. v. McGibney***, 114 N.Y.S.3d 554 (App. Term, 9th & 10th Jud. Dists. 2018); ***Citibank, N.A. v. Colucci***, 110 N.Y.S.3d 202 (App. Term, 2d, 11th & 13th Jud. Dists. 2018)), satisfies the exhibition requirement. In ***Plotch v. Dellis***, the Appellate Term for the Second, Eleventh and Thirteenth Judicial Districts adopted substituted service as a viable form of service and, in doing so, held that its prior ruling in ***Home Loan Servs., Inc. v. Moskowitz***, 920 N.Y.S.2d 569 (App. Term, 2d, 11th & 13th Jud. Dists. 2011), which held that personal delivery was the only acceptable form of service of the deed, was no longer the law (***Plotch***, 75 N.Y.S.3d at 779).

6. Victims of Domestic Violence (10 Days)

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

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

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

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

7. Military Families

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

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

6. Service of Notice of Petition and Petition

Service of the Notice of Petition and Petition is not an element of the Petitioner's case, but rather the mechanism to establish personal jurisdiction over the Respondent. A personal jurisdiction defense may be waived. For example, where the Respondent appears but does not timely challenge service, the defense is waived (i.e., the Respondent has consented to the proceeding) (*see* ***Citi Land Servs., LLC v. McDowell***, 926 N.Y.S.2d 343 (App. Term, 2d, 11th & 13th Jud. Dists. 2011); *see also* ***744 E. 215 LLC v. Simmonds***, 119 N.Y.S.3d 828 (N.Y. Civ. Ct. Bronx Cnty. 2019) (asserting unrelated counterclaim constitutes waiver of personal jurisdiction defense)). It has further been held that the Tenant waived a personal jurisdiction defense when the Tenant moved post-judgment to vacate the judgment and warrant due to newly discovered evidence regarding service (***S & H Clinton Assoc., LLC v. Cherry***, 148 N.Y.S.3d 823 (App. Term 9th & 10th Jud. Dists. 2021) (the newly discovered evidence regarding service was untimely and the Tenant further failed to establish the newly discovered evidence could not have been discovered earlier)).

Where the Respondent does not appear or if the Respondent appears and timely objects to service, the Court must consider whether personal jurisdiction has been established (*see* ***Gristmill Realty, LLC v. Roa***, 133 N.Y.S.3d 383 (App. Term, 9th & 10th Jud. Dists. 2020)). Initially, this is performed through a review of the affidavit of service, but a "sworn, nonconclusory and factually specific denial of service" will require the testimony of the process server at a traverse hearing (***Fountain Terr. Owners, Inc. v. Balic***, 101 N.Y.S.3d 699 (App. Term, 2d, 11th & 13th Jud. Dists. 2018); *see generally* ***Federal Natl. Mortgage Assn. v. Greenfield***, 203 A.D.3d 1139 (2d Dep't 2022); ***Serlin Bldg. Ltd. Partnership v. Little***, 120 N.Y.S.3d 727 (N.Y. Civ. Ct. Kings Cnty. 2020)). If at the hearing service is deemed inadequate, then the Court is devoid of personal jurisdiction and the proceeding will routinely be dismissed "without prejudice." However, a "bare and unsubstantiated denial of service in [an] affidavit lack[ing] the factual specificity required to rebut the prima facie evidence of proper service" will result in a denial of the motion without the need for

a hearing (***Marmon Realty Group, LLC v. Khalil***, 148 N.Y.S.3d 822 (App. Term 2d, 11th & 13th Jud. Dists. 2021)).

There are three (3) acceptable ways to serve the Notice of Petition and Petition: (1) personal delivery upon the Respondent; (2) substituted service; or (3) conspicuous place service, commonly referred to as "nail and mail" (RPAPL § 735). Any individual over the age of eighteen (18) and not a party to the proceeding may serve the papers (CPLR § 2103(a)). Since a party to the proceeding may not serve the Notice of Petition and Petition, the Petitioner will typically retain a licensed process server. However, outside New York City, generally a process server need not be licensed and an attorney may legally serve process anywhere within the State. In New York City, excluding attorneys, where the process server serves five (5) or more processes during a one-year period, the process server must be licensed (*see* NYC Admin. Code, Ch. 2, subch. 23, § 20-403 *et seq*.).

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

In determining whether service was completed in a timely manner, the Court does not include the "day of reckoning" (i.e., the date service is completed), but the day the proceeding is to be heard is counted (*see* General Construction Law § 20; ***JPMorgan Chase Bank v. Lowell***, 309 A.D.2d 541 (1st Dep't 2003); ***25-31 Ontario St. v. Anthony***, 115 N.Y.S.3d 645 (Cohoes City Ct. 2019)). If the final day is a "Saturday, Sunday or public holiday," then the time to complete service is extended to the next business day. Service of "legal process" may not be made on Sunday or other religious observance day (General Business Law § 11; *see e.g.*, ***JPMorgan Chase Bank, N.A., v. Lilker***, 153 A.D.3d 1243 (2d Dep't 2017) (in foreclosure proceeding, holding that service on the Sabbath upon a person known to observe the Sabbath "constitutes malice" and is a misdemeanor pursuant to General Business Law § 13, which is imputed upon the process server)).

A. Personal Delivery

Personal delivery is the preferred method of service. This is achieved by handing the Notice of Petition and Petition to the Respondent. Unless agreed otherwise, the papers need not be personally delivered at the premises (*see* ***City of New York v. DeNoble***, 801 N.Y.S.2d 777 (App. Term, 1st Dep't 2005) (noting that RPAPL § 735 "does not require that such in-hand delivery of the Notice of Petition and Petition be effectuated at the subject property")). Service in this manner is considered "complete" when the papers are handed, or personally delivered, to the Respondent, which must be done not less than ten (10) but no more than seventeen (17) days prior to the return date. Although service is considered "complete" when the papers are handed to the Respondent, the term "complete" is not entirely accurate because the process server must further file proof of service

with the Clerk of the Court in the form of a sworn affidavit within three (3) days of the date of service (RPAPL § 735(2)(a)).

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

B. Substituted Service

Unlike the personal delivery method, substituted service is considered "complete" when the affidavit of service is filed with the Clerk of the Court (RPAPL § 735(2)(b)). Substituted service is the result of an unsuccessful attempt at personal service. For example, if the Respondent is not home when service is attempted, the process server may leave the papers with an individual who answers the door provided that person is of an appropriate age and has the appropriate judgment (***Rosenberg v. Chervil***, 134 N.Y.S.3d 614 (App. Term, 9th & 10th Jud. Dists. 2020)). Although a precise description of a "person of suitable age and discretion" is not clearly defined, leaving the Notice of Petition and Petition with a spouse, adult child or other mature adult at the residence, or with the office manager at a place of business, will generally suffice (***Siedlecki***, 931 N.Y.S.2d at 203).

The process server is required to leave the same number of copies of the Notice of Petition and Petition with a person of suitable age and discretion as there are named Respondents. For example, if there are three (3) named Tenants, then the process server must leave three (3) complete sets of the Notice of Petition and Petition with the person of suitable age and discretion. The process server in this scenario must also mail a complete set of the Notice of Petition and Petition in two (2) forms to each Respondent at the subject premises the following business day; one (1) copy via certified mail and one (1) by regular mail (RPAPL § 735(1)). Thus, the Notice and Notice of Petition would have to be mailed in two (2) forms to each of the three (3) Tenants for a total of six (6) mailings – three (3) via certified mail and three (3) via regular mail. For commercial properties, a copy of the papers must be mailed to the Tenant's known corporate address, whether on or off the subject premises, by regular and certified or registered mail the following business day (***id***. at § 735(1)(b); ***Saba Realty Partners, LLC v. International Gold Star, Inc.***, 130 N.Y.S.3d 878 (App. Term, 2d, 11th & 13th Jud. Dists. 2020) (dismissing commercial non-payment proceeding where Landlord failed to mail the Notice of Petition and Petition to the Tenant's premises and its principal place of business within the State by registered or certified mail, and regular first class mail, following service upon a person of suitable age and discretion)).

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

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

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

A process server must utilize "reasonable" efforts to serve each Respondent at a time and place when the occupant is expected to be present (RPAPL § 735). In other words, if the process server believes that the Tenant will not be present when service is attempted, the attempt is not considered reasonable (*see* ***George Washington Bridge Bus Station Develop. Venture LLC v. Inho Beauty Inc.***, 120 N.Y.S.3d 581 (N.Y. Civ. Ct. N.Y. Cnty. 2019) (service defective where Petitioner, knowing that the "Tenant's business [was] not yet open to the public," failed to serve the papers at the commercial Tenant's known alternative location)). Attempts at service exclusively during normal working hours are inadequate.

Where a money judgment is sought in the event of default, due diligence pursuant to CPLR § 308(4) must be satisfied, which has been interpreted as requiring at least one (1) additional attempt at service (a total of three (3) attempts over two (2) days) before resorting to "nail and mail" service (***Avgush v. Berrahu***, 847 N.Y.S.2d 343 (App. Term, 2d, 11th & 13th Jud. Dists. 2007); ***Suero v. Rivera***, 162 N.Y.S.3d 684 (N.Y. Civ. Ct. Queens Cnty. 2022)). The Appellate Term for the Ninth and Tenth Judicial Districts has held at least one (1) of the attempts at service must be at the Respondent's "[p]lace of employment or new residence" if known (***Merrbill Holdings, LLC v. Toscano***, 100 N.Y.S.3d 610 (App. Term, 9th & 10th Jud. Dists. 2018); ***1653 Realty, LLC v. Hernandez***, 117 N.Y.S.3d 790 (App. Term, 2d, 11th & 13th Jud. Dists. 2019) (plenary action for unpaid rent)). Inquiries must be made to identify the Respondent's whereabouts to satisfy due diligence (***Jamaica Seven LLC v. Douglas***, 2021 N.Y. Misc. LEXIS 5025 (N.Y. Civ. Ct. Queens Cnty. Sept. 30, 2021); ***Harborview Props. I, LLC v. Valentin***, 94 N.Y.S.3d 538 (Greenburgh Just. Ct. 2018)).

The use of "nail and mail" service at a commercial property is defective where the Landlord and/or Landlord's representatives are aware the Tenant is not present and/or previously vacated the

premises (***255 Huguenot St. Corp. v. Rwechungura***, 110 N.Y.S.3d 862 (App. Term, 9th & 10th Jud. Dists. 2018)). Similarly, conspicuous place service at commercial premises is defective where the Tenant was denied access due to the Landlord's changing of the locks (*see* **214 *Knickerbocker v. Molly's Milk Truck Sweet & Savory***, 144 N.Y.S.3d 796 (App. Term 2d, 11th & 13th Jud. Dists. 2021)).

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

7. Answer

The Respondent in a summary proceeding may submit an Answer at or before the hearing, either orally or in writing, by denying all or a portion of the allegations and asserting affirmative defenses (*see* RPAPL § 743; HSTPA, L. 2019, c. 36, Part M, § 16*;* ***655 Country Rd., Inc. v. Caltagirone***, 101 N.Y.S.3d 701 (App. Term, 9th & 10th Jud. Dists. 2018)). However, effective July 14, 2019, pursuant to RPAPL § 743, a Respondent is not required to file an Answer. Previously, the Petitioner had opportunity to demand an Answer on notice where the Notice of Petition and Petition were served between eight (8) and twelve (12) days prior to the return date. This is no longer the case, and a denial of the substantive allegations is presumed by the Respondent's timely appearance in Court.

Where an Answer is made in Court, "the substance thereof shall be recorded by the clerk" and "maintained in the case record" (RPAPL § 743). A written Answer, unlike the Petition, need not be verified (*see* ***Stein v. Jeff's Express, Inc.***, 955 N.Y.S.2d 713 (App. Term, 2d, 11th & 13th Jud. Dists. 2012); ***Neck Rd. One Realty v. Magna Physical Therapy PC***, 2019 N.Y.L.J. LEXIS 1655 (N.Y. Civ. Ct. May 15, 2019)). Notwithstanding the Housing Part's limited authority to grant equitable relief, the Respondent may assert any affirmative defense, whether based in law or equity (RPAPL § 743; ***Yacoob v. Persaud***, 950 N.Y.S.2d 611 (App. Term, 2d, 11th & 13th Jud. Dists. 2012); ***Seward Pk. Hous. Corp. v. Flowers on Essex, LLC***, 15 N.Y.S.3d 714 (N.Y. Civ. Ct. N.Y. Cnty. 2014)). For example, the Tenant may move for a dismissal based upon a pleading defect where the Petition contains conflicting lease termination dates, thereby failing to provide "[a]dequate notice of the transactions intended to be proved" (***June-July Trust v. Fletcher***, 141 N.Y.S.3d 832 (App. Term, 9th & 10th Jud. Dists. 2021)). The failure to assert a timely defense (other than subject matter jurisdiction) may constitute a waiver, and the defense may not be asserted for the first time on appeal (***Ellerby v. Helman***, 148 N.Y.S.3d 329 (App. Term, 2d, 11th & 13th Jud. Dists. 2021)). A proposed Amended Answer to assert a succession defense was denied where the defense was "palpably insufficient or clearly devoid of merit" (***William 165 LLC v. Sero-Boim***, 139 N.Y.S.3d 471 (App. Term, 1st Dep't 2021)).

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

8. Counterclaims

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

Counterclaims are not limited to the period for which unpaid rent is sought. The Court's maximum dollar jurisdictional limit in civil actions, which in New York City equals $50,000 and in many of the other local Courts equals $15,000, excluding costs and interest, does not apply to either the Petitioner's claim for rent arrears (N.Y. City Civ. Ct. Act § 204; Uniform City Ct. Act § 204; Uniform Dist. Ct. Act § 204; Uniform Just. Ct. Act § 204) or the Respondent's counterclaims, with the exception of counterclaims asserted in the Justice Courts which are limited to $3,000 (N.Y. City Civ. Ct. Act § 208; Uniform City Ct. Act § 208; Uniform Dist. Ct. Act § 208; Uniform Just. Ct. Act § 208). The portion of a counterclaim asserted in the Justice Court in excess of $3,000 is deemed waived (***2094-2096 Boston Post Rd., LLC v. Mackies Am. Grill, Inc.***, 41 N.Y.S.3d 452 (App. Term, 9th & 10th Jud. Dists. 2016)).

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

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

Lease provisions barring counterclaims are generally enforced (***Joseph v. Lyu***, 97 N.Y.S.3d 55 (App. Term, 2d, 11th & 13th Jud. Dists. 2018)). There is an exception where the counterclaims

are "inextricably intertwined" with the Petitioner's claims for unpaid rent and/or use and occupancy, in which case, the counterclaims may be permitted notwithstanding the lease provision to the contrary (***1035 Third Ave. LLC v. Pure Green NYC 62nd St. Corp.***, 2021 N.Y. App. Div. LEXIS 6502 (1st Dep't Nov. 18, 2021); ***2094-2096 Boston Post Rd., LLC***, 41 N.Y.S.3d at 452).

9. Adjournments

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

10. Default Judgments

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

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

Unless previously amended, the money judgement is limited to the amount sought in the Petition (***Mustafa v. Plein***, 950 N.Y.S.2d 492 (App. Term, 2d, 11th & 13th Jud. Dists. 2012); ***Port Chester Hous. Auth. v. Turner***, 734 N.Y.S.2d 805 (App. Term, 9th & 10th Jud. Dists. 2001)). The process server must further make genuine inquiry into the Tenant's place of employment (*see* ***Bel Air Leasing LP v. Johnson***, 2021 N.Y. Misc. LEXIS 5453 (N.Y. Civ. Ct. Kings Cnty. Nov. 8, 2021)

and attempt service at the "[p]lace of employment or new residence" if known (***Merrbill Holdings, LLC***, 100 N.Y.S.3d at 610)).

The Petitioner must file with the Court a non-military affidavit attesting that the process server made a reasonable inquiry regarding the Tenant's military status (***Riverton Sq. LLC v. McLeod***, 57 N.Y.S.3d 677 (App. Term, 1st Dep't 2017)). Since there is no fixed time to file a non-military affidavit, the failure to file the affidavit by the return date is not a jurisdictional defect. Instead, the Court may adjourn the case to allow for the filing of the affidavit, at which time, should the Tenant again fail to appear, a default judgment may be entered.

Where the Tenant moves to vacate a default judgment, it must be shown that the Tenant both had a reasonable excuse for failing to appear and the possibility of a meritorious defense (CPLR § 5015(a)(1); ***Lotz v. Westbourne Apts., Inc.***, 159 A.D.3d 810 (2d Dep't 2018); ***Mid-Hudson Props., Inc. v. Klein***, 167 A.D.3d 862 (2d Dep't 2018) (miscommunication regarding court appearance was reasonable excuse) ***Murphy v. Coalition of Landlords***, 147 N.Y.S.3d 869 (App. Term, 9th & 10th Jud. Dists. 2021); ***1449 Fulton v. Britton***, 144 N.Y.S.3d 797 (App. Term 2d, 11th & 13th Jud. Dists. 2021); ***ADM Mgmt. Corp. v. Mathews***, 116 N.Y.S.3d 484 (App. Term 1st Dep't 2019)).

11. Stipulations of Settlement

A Stipulation of Settlement is a binding agreement that will generally be enforced in the event of substantial non-compliance (***Shalimar Leasing v. Medina***, 2021 N.Y. Misc. LEXIS 5127 (App. Term, 2d, 11th & 13th Jud. Dists. Oct. 8, 2021); ***2345 Crotona Gold, LLC v. Dross***, 31 N.Y.S.3d 924 (App. Term, 1st Dep't 2016)). Where the Tenant consents to the entry of a judgment of possession and a warrant of eviction, often in consideration for additional time to remain in possession of the premises and/or a reduction in rent arrears, a motion to vacate the judgment to assert affirmative defenses will typically be denied (***HSBC Bank USA, N.A. v. Posy***, 55 N.Y.S.3d 692 (App. Term, 9th & 10th Jud. Dists. 2017); ***Michalak v. Fechtel***, 911 N.Y.S.2d 693 (App. Term, 9th & 10th Jud. Dists. 2010)). In addition, as a general matter, there is no appeal from a final judgment entered as result stipulation (***Kitty Holding Corp. v. Corriette***, 138 N.Y.S.3d 790 (App. Term 9th & 10th Jud. Dists. 2021)).

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

Due to the high volume of cases in the Housing Parts, *inter alia*, the Court generally encourages negotiated resolutions, and stipulations are generally upheld absent fraud, collusion, mistake, and/or accident (*see* ***Molinelli v. Goulbourne-Fontan***, 138 N.Y.S.3d 790 (App. Term 2d, 11th & 13th Jud. Dists. 2021)). The inclination to uphold settlements, including an agreement to

discontinue the proceeding, is predicated upon the theory that "[p]arties to a civil dispute are free to chart their own litigation course . . . and [it] is essential to the management of court calendars and the integrity of the litigation process" (***191 St. Assocs. LLC v. Cruz***, 29 N.Y.S.3d 848 (App. Term, 1st Dep't 2016)).

The Appellate Term reasoned that "[l]iteral enforcement of the terms of [a] stipulation of settlement is not unjust . . ., where the agreement was negotiated by sophisticated parties, all of whom were represented by counsel, and the default was neither inadvertent nor trivial" (***580 Park Ave., Inc. v. Mirto***, 116 N.Y.S.3d 843 (App. Term, 1st Dep't 2019); *see* ***90th St. Corp. v. 203 W. 90th St. Retail, LLC***, 187 A.D.3d 497 (1st Dep't 2020) (absent an unjust or inequitable result, stipulation enforced where the parties "were sophisticated business persons represented by counsel")). Stipulated terms have been upheld where a commercial Tenant failed to replace the awning in front of the commercial premises (***Serencha Realty Corp. v. A.M. Two In One, Inc.***, 31 N.Y.S.3d 924 (App. Term, 1st Dep't 2016)); a Landlord was denied "access" to make repairs (***Wira Assocs. v. Easy***, 26 N.Y.S.3d 216 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)); the stipulated liquidated damages provision awarding use and occupancy was double the monthly rent where the commercial Tenant failed to vacate (***723 Edible, Inc. v. 721 Borrower, LLC***, 150 N.Y.S.3d 896 (Sup. Ct. N.Y. Cnty. 2021)); the Tenant's repeated non-compliance with stipulated payment terms (***Mehr Props., LLC v. Fonrose***, 29 N.Y.S.3d 847 (App. Term, 2d, 11th & 13th Jud. Dists. 2015); the Tenant's compliance with negotiated payment terms (***Alsamet***, 148 N.Y.S.3d at 330); the movant's failure to establish "legal cause" to vacate the stipulation (***Alvarez v. Strujan***, 110 N.Y.S.3d 865 (App. Term, 1st Dep't 2018)); an unsubstantiated undue duress claim more than one (1) year after the stipulation was signed (***Maxwell Dev., L.P. v. France***, 111 N.Y.S.3d 517 (N.Y. Civ. Ct. 2018)); requiring the installation of a new roof by a commercial Tenant (without removing the pre-existing roof) (***Islip Theaters, LLC v. Landmark Plaza Props. Corp.***, 183 A.D.3d 872 (2d Dep't 2020) ("[c]ontrary to the landlord's contention, the stipulation did not require that the preexisting roof be removed as a precondition to the installation of the new roof")); and where a *pro se* Tenant "understood the terms of the stipulation and received ample consideration for his agreement to vacate" (***Skeete v. Bah***, 29 N.Y.S.3d 849 (App. Term, 1st Dep't 2015)).

On the other hand, a settlement will <u>not</u> be enforced, even when there is substantial compliance, where it "[w]ould be unjust or inequitable, or would permit the other party to gain an unconscionable advantage" (***368 Chauncey Ave. Trust v. Whitaker***, 911 N.Y.S.2d 696 (App. Term, 2d, 11th & 13th Jud. Dists. 2010)); the agreement "[w]as entered into inadvisably or . . . it would be inequitable to hold the parties" to its terms (***2701 Grand Assoc. LLC v. Morel***, 31 N.Y.S.3d 924 (App. Term, 1st Dep't 2016)); or where there is "[e]vidence of fraud, overreaching, unconscion[able conduct] or illegality" (***Chelsea 19 Assocs. v. James***, 67 A.D.3d 601, at 602, 889 N.Y.S.2d 564, 566 (1st Dep't 2009)). Settlements have been vacated, or otherwise not enforced, where the attorney lacked actual and/or apparent authority to enter into the settlement (***Bank of New York v. Betancourt***, 950 N.Y.S.2d 721 (App. Term, 9th & 10th Jud. Dists. 2012)); the Landlord refused to submit the requisite W-9 Form for payment of the rent arrears (***Dino Realty Corp. v. Khan***, 3 N.Y.S.3d 259 (App. Term, 2d, 11th & 13th Jud. Dists. 2014)); the *pro se* Tenant was evicted the day <u>before</u> entering into a stipulation in which he waived "several meritorious defenses" (***Chauncey***

Equities, LLC v. Murphy, 112 N.Y.S.3d 861 (App. Term, 2d, 11th & 13th Jud. Dists. 2019)); the stipulation with a *pro se* Tenant included a money judgment "substantially in excess" of the amount demanded within the Petition (***Rochdale Vil. v. Baker***, 2021 N.Y. Misc. LEXIS 4474 (N.Y. Civ. Ct. Queens Cnty. May 4, 2021)); the Department of Social Services approved the payment of arrears (***Gerard Ct. Assocs., LLC v. Hamer***, 31 N.Y.S.3d 921 (App. Term, 1st Dep't 2016)); the Landlord failed to file an annual rent registration that barred a rent increase (***Samson Mgmt. v. Cordero***, 112 N.Y.S.3d 422 (App. Term, 9th & 10th Jud. Dists. 2018)); and where the money judgment negotiated by the Landlord's attorney and *pro se* Tenant included impermissible items (***Nu Horizons Manor v. Adderly***, 951 N.Y.S.2d 87 (Suffolk Cnty. Dist. Ct. 2012)).

The Court is not "[b]ound by language in the stipulation stating that any default shall be deemed material" (***Boston Rd. Brooklyn, L.P. v. Steptoe***, 92 N.Y.S.3d 702 (App. Term, 2d, 11th & 13th Jud. Dists. 2017); ***135 Amersfort Assoc., LLC v. Jones***, 20 N.Y.S.3d 292 (App. Term, 2d, 11th & 13th Jud. Dists. 2015)) or that "time is of the essence" (***Alsamet***, 148 N.Y.S.3d at 330). Similarly, the Court is not bound by language that a default is "*de minimis*" (***GHR Co., LLC v. Sannon***, 95 N.Y.S.3d 125 (App. Term, 2d, 11th & 13th Jud. Dists. 2018)).

Any ambiguity within a Stipulation of Settlement may be construed against the drafter (***125-127 Allen St. Assocs. v. Lin***, 122 N.Y.S.3d 488 (App. Term, 1st Dep't 2020)). The Court may not unilaterally modify the terms of the parties' agreement to make the stipulation enforceable. A stipulation that omits explicit language awarding possession in the event of a breach will not result in such an award, even where substantial non-compliance is demonstrated. In ***Wallkill Affordable Senior Hous., L.P. v. Powell***, the Appellate Term for the Ninth and Tenth Judicial Districts vacated the judgment of possession where the parties' stipulation merely stated in the event of a breach of the stipulation, the case "[s]hall be restored to the Court's calendar", and did not include the issuance of a judgment of possession and/or warrant of eviction (127 N.Y.S.3d 693 (App. Term, 9th & 10th Jud. Dists. 2020)).

Amendments to the Petition should be memorialized in the stipulation or, at minimum, placed on the record. For example, if additional months' rent since accrued are negotiated in a stipulation, but not included within the Petition, the Landlord must amend the Petition to include these additional months. Otherwise, the judgment may not be enforced in the event of a dispute over compliance (*see* ***Nathanson v. Mitchell***, 836 N.Y.S.2d 487 (Nassau Cnty. Dist. Ct. 2007); *see* ***201 W. 136 St. Realty MNGMNT LLC v. Roman***, 957 N.Y.S.2d 267 (N.Y. Civ. Ct. N.Y. Cnty. 2012)).

A. RPAPL § 746 – Pro Se Settlements

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

Effective March 22, 2022, RPAPL § 746 was amended, and the statute now lists the topics of inquiry that must be included within the Court's on the record colloquy prior to accepting a Stipulation of Settlement involving an unrepresented litigant. Previously, the inquiry was left to the discretion of the Court.

The colloquy with the *pro se* litigant must include all of the following inquiries: (1) confirmation of the parties' identities and whether all necessary parties have been named in the proceeding; (2) the authority of the signatory, if the named party is not present (presumably this pertains to a litigant that is represented by counsel but is not present); (3) the *pro se* litigant's right to a hearing, and that the right will be waived if the parties settle the claims; (4) whether the adversary's counsel (or client) misrepresented any of the facts, engaged in coercive conduct, or placed undue pressure upon the unrepresented litigant; (5) an inquiry into the *pro se* litigant's acquiescence and/or objections to the allegations in the Petition; (6) confirmation that the *pro se* litigant was fully apprised of the available "claims or defenses," and the consequences (waiver) if the stipulation is accepted; (7) a full and accurate description of the stipulated terms; (8) in a non-payment proceeding, whether the *pro se* litigant intends to apply for public assistance or other financial assistance to satisfy the rent arrears; and (9) an inquiry into the *pro se* litigant's understanding of the implications of a judgment, and the legal requirement that a satisfaction of judgment must be provided when the arrears are paid in full (RPAPL § 746(2)).

In the interests of justice, the Court may omit from the inquiry a "topic" that is rendered irrelevant due to prior Court appearances, the history of the case, or for other satisfactory reasons (***id***. at § 746(4)). A reason for the omission must be stated on the record. Although the statute permits the judge's Court Attorney to conduct the conference, a Court Attorney is not a "[s]ubstitute for an allocution by the Court and, where [a conference with a Court Attorney] is used, the results shall be reported to the court, which shall note on the record that such conference occurred" (***id***. at § 746(3)).

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

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

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

Where the Tenants are spouses and only one (1) spouse appears in Court, the appearing spouse may not sign on behalf of or bind the non-appearing spouse to a settlement agreement (*see* N.Y. General Obligations Law § 3-305; ***Pinpoint Techs. 3, LLC v. Mogilevsky***, 15 N.Y.S.3d 714 (App. Term, 2d, 11th & 13th Jud. Dists. 2015) (breach of contract)). Provided proper service is alleged, the Court will typically enter a default judgment against the non-appearing spouse similar to the terms agreed to by the appearing spouse. The reader should be mindful that Tenants to a rental agreement are united in interest, and, as a result, the liability of one (1) may be conferred equally – positively or negatively – upon all. Accordingly, where only some of the Tenants appear in Court, the resulting judgments, including the monetary relief, may be identical (s*ee* ***Rossi v. Scott***, 52 N.Y.S.3d 248 (App. Term, 9th & 10th Jud. Dists. 2017)). Parenthetically, a parent may not appear on behalf of an adult child who is also a party in the proceeding (***2701 Grand Assoc. LLC***, 31 N.Y.S.3d at 924)).

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

C. Landlord's Acceptance of Future Rent

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

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

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

2. Acknowledging Rent Arrears Without a Judgment

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

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

12. Security Deposit

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

If the Landlord co-mingles the security deposit with other funds, the Landlord forfeits the right to avail herself of the funds for any purpose and the Tenant is entitled to its immediate return (*see* ***id.*** at § 7-103(1); ***DeVries v. Jim Duffy LLC***, 138 N.Y.S.3d 787 (App. Term 1st Dep't 2021)). However, a Landlord may re-gain the ability to retain the security deposit where the co-mingling is cured prior to the expiration/termination of the rental agreement and/or the Tenant's demand for its return (*see* ***Harlem Capital Ctr., LLC v. Rosen & Gordon, LLC***, 145 A.D.3d 579 (1st Dep't 2016); ***1710 Realty, LLC v. Portabella 308 Utica, LLC***, 189 A.D.3d 944 (2d Dep't 2020) (commingling moot where Tenant entitled to return of security deposit after terminating tenancy due to Landlord's failure to provide the premises "vacant, broom-clean, and free of the prior tenant's property")).

The law establishes guidelines for the inspection of the premises by the Landlord and Tenant both (1) prior to the Tenant taking possession and (2) following notice of a party's intention to terminate the tenancy. Where the Tenant requests an inspection after the lease is signed, but prior to taking possession, the parties must jointly perform an inspection and prepare a "written document"

memorializing "any existing defects" (General Obligations Law § 7-108(1-a)[c]). An item included within the "document" may not be a basis for the future withholding of the Tenant's security deposit.

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

In any action or proceeding, the Landlord has the burden of proving the "reasonableness" of the withholdings (***id.*** at § 7-108(1-a)(f)). A violation of this section may result in damages, and, a wilful violation may result in punitive damages equal to two (2) times the deposit (***id***. at § 7-108(1-a)(g)).

CHART:

PREDICATE NOTICE

Relationship		**Days**	**Section**
1. **Unpaid Rent**	(1)	14 days (rent demand) (residential and commercial)	RPAPL § 711(2)
	(2)	5 days (reminder) (residential only)	RPL § 235-e
2. **Month-to-Month (Outside NYC)**			
Landlord terminates:			
Residential		at least 30 days, 60 days or 90 days	RPL § 226-c
Commercial		at least 1 month	RPL § 232-b
Tenant terminates:			
Residential and Commercial		at least 1 month	RPL § 232-b
3. **Month-to-Month (NYC)**			
Landlord terminates:			
Residential		at least 30 days, 60 days or 90 days	RPL §§ 232-a, 226-c
Commercial		at least 30 days	RPL § 232-a
Tenant terminates:			
Residential and Commercial		at least 30 days	RPL § 232-a
4. **L Refuses to Re-New** (Residential)		at least 30 days, 60 days or 90 days	RPL § 226-c
5. **Rent Increase (at Least 5%)** (Residential)		at least 30 days, 60 days or 90 days	RPL § 226-c

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

CHART:

PRACTITIONER'S CHECKLIST

(Things to Consider)

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

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

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

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

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

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

D. Was the one-time automatic (without cause) adjournment of not less than fourteen (14) days, unless the parties agreed to a shorter adjournment, previously granted?

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

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

F.* Is there a COVID-19 applicable defense or stay?
(Emergency Rental Assistance Program application or appeal still pending)?

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

H. 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. (* In the City of Albany only, it must further be alleged that there has been compliance with Local rental laws/ordinances pertaining to the registration of rental properties – RPAPL § 741(6)).

H1. If the subject premises is Section 8 or pursuant to another government funded residency program, is this fact alleged in the Petition?

H2. If a predicate notice was required prior to the commencement of the summary proceeding, is the type of notice and date served alleged within the Petition? Is a copy of the notice attached to the Petition? (If the predicate notice is not attached, Petitioner may provide a copy in opposition to a motion to dismiss.)

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

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

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

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

K1. What are the affirmative defenses asserted and are they applicable? (e.g., Warranty of Habitability only applies to residential non-payment proceedings).

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

M. Are all of the parties present?

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

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

P. 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.)

Q. 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?

R. Have the parties discussed an amicable resolution?