# Eviction Proceedings in New York

Prepared by:
Jay B. Solomon
*Klein & Solomon, LLP*

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# Landlord and Tenant Law in New York

## I. Eviction Proceedings in New York

### A. SUMMARY PROCEEDINGS IN THE CIVIL COURT

**Background**

Historically, landlords were relegated to the protracted, common law action of ejectment to remove persons who were in possession of their property without their permission or authorization. Over time, legislatures enacted statutory schemes to provide a more simplified, speedy and inexpensive remedy to recover possession of real property. In New York, the first summary proceeding statute was enacted in 1820. However, summary proceedings under the initial statute in New York were strictly limited to express landlord-tenant relations, where a lease term had expired, or the tenant had defaulted in the payment of rent (beyond the value of the tenant's crops or chattels located on the property), or the tenant had abandoned the property. Any other alleged breaches of a lease were not covered by the statute, and the statute was not applicable to non-landlord-tenant relationships, such as licensees, squatters and occupants in possession of lands acquired through foreclosure, execution or sale.

In 1880, the summary proceeding was codified in New York in the Code of Civil Procedure, and then, in 1920, in Article 83 of the Civil Practice Act. When the Civil Practice Act was repealed in 1963, former Article 83, pertaining to summary proceedings to recover possession of real property, became Article 7 of the Real Property Action and

Proceedings Law ("RPAPL"). Today, the statutory scheme for summary proceedings to recover possession of real property is contained in RPAPL Article 7.

Summary proceedings are considered "special proceedings" under New York's Civil Practice Law and Rules ("CPLR") Article 4. As with all special proceedings, discovery is substantially limited (except with leave of court), but parties have the right to demand a Bill of Particulars to expand upon pleadings, and may serve a Notice to Admit and Notice to Produce in preparation for trial.

Summary proceedings, being completely statutory, have traditionally been strictly construed, meaning that defects in the pleadings usually resulted in a dismissal, albeit without prejudice. The modern trend, however, particularly over the past ten years, is to treat pleadings in summary proceedings much more liberally, permitting amendments coextensive with the rules applicable to plenary actions under the CPLR, provided a substantial right of a party is not prejudiced by the proposed amendment. Matters relating to the court's subject matter jurisdiction remain technical, and must be conducted in strict conformance with the statute. For example, predicate notices, such as rent demands, notices to cure, notices of default, notices to quit and termination notices may not be amended *nunc pro tunc* in order to correct defects. However, once jurisdiction is obtained by the court, the statute is construed and applied much more liberally. 2 Rasch, New York Landlord and Tenant, § 29:13, pp. 409-11 (4th 1998).

Nevertheless, summary proceedings are statutory remedies, and they remain a very technical field of landlord-tenant law, requiring a fair amount of specialization.

**Two Types of Landlord-Tenant Summary Proceedings:**

**Non-Payment Proceedings**

**Holdover Proceedings**

The fundamental difference between the two types of proceedings is the continuing existence of the landlord-tenant relationship. In a nonpayment proceeding, the parties' lease agreement continues in full force and effect until the entry of a final judgment of possession and the issuance of a warrant of eviction. In a non-payment proceeding, the issuance of a warrant of eviction for the removal of a tenant cancels the agreement under which the person removed held the premises, and annuls the relation of landlord and tenant. RPAPL § 749(3). In a holdover proceeding, the relationship of landlord and tenant either never existed (such as licensees, squatters and occupants in possession of lands acquired through foreclosure, execution or sale), or the relationship was terminated prior to the commencement of the summary proceeding, either through the expiration of the lease term, or the termination of the lease based upon a tenant's default or a conditional limitation. This difference is particularly important in the commercial context, because a commercial tenant can cure a nonpayment default, even after the entry of a final judgment (up until the time the warrant of eviction is issued, terminating the landlord-tenant relationship). In a holdover case, there is no right for a commercial tenant to cure a default, after the lease has been terminated by the landlord. (Hence, the necessity for the Yellowstone injunction.)

**Non-Payment Proceedings - RPAPL § 711(2)**

A very powerful remedy. It is not barred by a pre-existing action for the payment of rent, or a prior judgment for the rent due from the tenant, or a tenant's bankruptcy.

**Four Basic Requirements:**

1) Person (or entity) to be removed is a tenant.

2) Person (or entity) to be removed is in possession of real property.

3) Person (or entity) to be removed has defaulted in payment of rent.

4) There has been a prior demand for payment of rent.

Non-payment proceedings must be based upon a tenant's default in the payment of rent. Not all financial obligations of a tenant, even under a written lease agreement, constitute rent. The lease must define the particular monetary obligation as "rent" or "additional rent" in order to include the payment obligation in a non-payment petition.

**The Rent Demand**

A rent demand is a condition precedent to the commencement of a non-payment proceeding. A nonpayment proceeding may not be commenced against a tenant if there has been no prior demand for rent. The burden is on the landlord to prove that a proper demand for rent was made upon the tenant prior to the commencement of a non-payment proceeding.

**Oral vs. Written Rent Demand**

A non-payment proceeding may be predicated upon an oral demand for rent. The demand must be definite and unequivocal. J.D. Realty Associates v. Scoullar, 169 Misc.2d 292, 650 N.Y.S.2d 67 (AT, 1st Dep't 1996).

However, the practice of relying on an oral demand for rent is not recommended. It is undocumented and too easily open to challenge at trial.

**Contents of Written Rent Demand**

1) Proper name of tenant (check lease) and any amendments and/or assignments.
2) A detailed accounting of the open rent items claimed to be owed - broken down by the type of rent arrears and date upon which each installment was due.
3) The required number of days for the notice (at least 3 days under RPAPL § 711(2), and a date certain for the payment (not technically required, but good practice).
4) A demand for either the payment of the rent arrears or the surrender of possession of the premises by the tenant.

A rent demand must inform the tenant of the period for which the rent was due, and the approximate, good-faith amount of rent owed for such period. Brusco v. Miller, 167 Misc.2d 55, 639 N.Y.S.2d 246 (AT, 1st Dep't 1995). Importantly, a landlord should not lump retroactive rent charges just because they are billed together in a rent statement. See Singapore Leasing v. Outler, NYLJ, Apr. 20, 2018, p.21, col.2 (Civ.Ct. Queens 2018)

(Landlord's rent demand notice held to be defective for lumping together retroactive rent increases and other charges as a single charge for month billed to tenant.)

Note: The parties' lease may enlarge the number of days required for a rent demand notice; however, unless the lease agreement specifically references a rent demand notice, general service requirements in the lease do not control, because a rent demand is not a notice under the lease. It is a statutory notice. See Broadway 54th Improvement Corp. v. Hit Factory Broadway, Inc., (AT 1st Dep't 1998) N.Y.L.J., Jan. 20, 1998, p. 29, col. 4 (Parties' intention to vary the statutory notice requirements of RPAPL Art. 7 will not be presumed unless clearly expressed, citing, inter alia, Muss & Sons v. Rozany, 170 Misc.2d 890, 892, 655 N.Y.S.2d 238 (AT 2d Dep't 1996) and Four Star Holding Company v. Alex Furs, Inc., 153 Misc.2d 447, 448, 590 N.Y.S.2d 667 (AT 1st Dep't 1992)).

**Service of a Written Rent Demand - RPAPL § 735**

RPAPL § 711(2) requires that a written rent demand notice be served in the same manner as a petition under RPAPL § 735.

Process Service: Best practice - use a licensed process server, who will be available to testify at trial (or traverse hearing) if service is contested. CPLR 2103 provides that papers may be served by any person eighteen years of age or older, who is not a party to the proceeding. However, an unlicensed person may not serve papers in the City of

New York more than five times in any twelve month period. [NYC Admin.Code §§ 20-403 et. seq.]

Reasonable Application: Statutory term related to the required number of attempts at service a process server must make before resorting to “nail and mail” - Under RPAPL §735, reasonable application requires a minimum of two prior attempts, at different times of the day, before "nail and mail" service may be utilized. Service attempts must be made in a manner reasonably "calculated to adequately and fairly apprise the respondent of the impending lawsuit." City of New York v. Wall Street Racquet Club, 136 Misc.2d 405, 518 N.Y.S.2d 737, 736 (Civ.Ct.N.Y.Co. 1987), citing 417 East Realty Assoc. v. Ryan, 110 Misc.2d 607, 442 N.Y.S.2d 880 (Civ.Ct.N.Y.Co. 1984)). Therefore, attempting to serve a nightclub at 7:00 a.m. is not going to be deemed a reasonable application at service. For commercial premises, the attempts should be made during normal business hours, and if two attempts are required, they should be made a different times of the day (*i.e.* morning and evening). If service is attempted upon a residential tenant, at least one attempt must be made during non-business hours (*i.e*, between 6:00 am and 9:00 am and/or between 6:00 pm and 10:00 pm).

If the tenant does not substantially cure its rent default within the time provided in the rent demand notice, the landlord may commence a nonpayment proceeding by the filing and service of a Notice of Petition and Petition seeking a final judgment of possession against the tenant and a warrant of eviction to remove the tenant from possession of the leased premises.

**<u>Holdover Proceedings</u> - RPAPL §§ 711(1), 713, 715**

The holdover proceeding is based upon the expiration of a tenant's (or licensee's or other occupant's) term or right to occupy the premises, or the removal of persons not authorized or permitted to be in possession of the property.

Where there is a landlord-tenant relationship between the parties [RPAPL § 711(1)], a holdover proceeding may be maintained when:

1) Person (or entity) to be removed is a tenant.
2) Person (or entity) to be removed is in possession of real property.
3) Person (or entity) to be removed holds over after the expiration of his/her/its term.
4) Person (or entity) is holding over without the landlord's permission.

The grounds for a holdover proceeding, where there is not a landlord-tenant relationship between the parties, are governed by RPAPL § 713, and include the following:

1) The property was sold by virtue of an execution and the new owner wants to remove the tenant/occupant.
2) The property is being occupied for cultivation for a share of the crops and the term of the agreement has expired.
3) Against a squatter.
4) The property was sold for unpaid taxes, the right of redemption has expired, and the new owner wants to remove the tenant/occupant.

5) The property was sold in foreclosure and the deed has been displayed by the new owner to the tenant/occupant.

6) Against the tenant or occupant under a life estate after the life estate has expired.

7) Against a licensee, after the license has expired or been revoked, or the licensor is no longer entitled to possession of the property.

8) Against a former owner after title has been conveyed to a purchaser for value.

9) Against a contract vendee which is to be closed within 90 days, and the vendee defaults in closing.

10) Against a person who enters and remains in possession by force or unlawful means and neither he nor his predecessor was in quiet possession for three years before the time of the forcible or unlawful entry.

11) Against a person formerly employed by the petitioner and the use of the premises was an incident to employment and the time agreed upon for such possession has expired (or, where there is no fixed term, where the employment has terminated).

Holdover proceedings under RPAPL § 713 require the service of a ten-day Notice to Quit, served in the same manner as a Petition pursuant to RPAPL § 735, as a condition precedent to the commencement of the proceeding (except with respect to the last two enumerated grounds (nos. 10 and 11, supra., where a Notice to Quit is not required).

A landlord can also maintain a holdover proceeding under RPAPL § 715, where a tenant is using the premises for an illegal or criminal purpose -- i.e., drugs, guns, prostitution,

gambling, etc. Two or more convictions of a tenant for prostitution or gambling offenses within a period of one year in or at the premises is presumptive evidence of the unlawful use of the premises. RPAPL §715(2) and (3), respectively. Generally, no predicate notice is required before commencing a holdover summary proceeding under RPAPL §715, except where mandated by a governing regulatory scheme. *See* New York City Housing Authority v. Harvel, 189 Misc.2d 295, 731 N.Y.S.2d 919 (AT, 1st Dep't 2001) (Federal regulation governing tenancy required service of thirty day pre-eviction notice, where tenancy terminated based upon drug related criminal activity on or near the premises, under 24 CFR §966.4(l)(2)(ii)(B)). Notwithstanding the fact that the basis for the eviction is criminal conduct, the landlord's burden of proof is by a preponderance of the evidence, because the proceeding is civil and not criminal. West Haverstraw Preserv., LP v. Diaz, 58 Misc.3d 150(A) (AT 2d 2018).

**Predicate Notices**

No predicate notice is required to commence a holdover proceeding, when the tenant's term has expired in accordance with the lease, the tenant holds-over in the premises without the permission of the landlord, and the landlord has not collected rent from the tenant for any period after the expiration of the lease term.

Generally, where there is a landlord-tenant relationship between the parties, a landlord may terminate a lease upon a material default by the tenant (residential), or pursuant to a conditional limitation pertaining to an act or omission of the tenant (commercial).

Material defaults by tenants often involve a violation of a specific provision of the lease, and may include failure to maintain required insurance, illegal use, unauthorized subleases and/or assignments, unauthorized use of the premises, unauthorized alterations or improvements, excessive noise, odors or debris in the premises, or other violations imposed by governmental agencies.

Conditional limitations under a commercial lease may prohibit illegal subleases and/or assignments, impermissible uses, abandonment, rent and additional rent defaults, failure to maintain an adequate security deposit as required by the lease, unauthorized alterations or improvements, failure to procure or maintain required insurance, mechanic's liens, excessive noise or odors, tenant insolvency, failure to properly maintain the premises, and/or may be triggered if the tenant defaults in the performance of any material covenant required by the lease.

Customarily, the parties' lease will provide for a specified notice period to afford the tenant an opportunity to cure the alleged default, and will further provide for the manner of service of such notice. The notice may be designated as a Notice to Cure or a Notice of Default. In the event that the tenant fails to cure the alleged default within the time period set forth in the cure/default notice, the landlord is entitled to serve upon the tenant a notice terminating the lease and tenancy. Upon the expiration of the termination notice, the lease term expires as if the date in the notice were the date fixed by the parties in the

lease for the expiration of the lease term. At that point in time, the landlord may then commence a holdover summary proceeding to recover possession of the premises.

Some alleged lease defaults are not curable, such as (a) a tenant's failure to procure or maintain minimal insurance required by the lease: Kyung Sik Kim v. Idylwood, N.Y., LLC, 66 A.D.3d 528 (1st Dept. 2009), and JT Queens Carwash, Inc. v. 88-16 N. Blvd., LLC, 101 A.D.3d 1089 (2d Dept. 2012); and (b) conduct by a tenant that constitutes a nuisance. 326-330 E. 35th St. Assoc. v. Sofizade, 191 Misc.2d 329, 741 N.Y.S.2d 380 (AT 1st Dept. 2002) (In chronic nonpayment proceeding, the cumulative pattern of tenant's course of conduct is incapable of any meaningful cure.) However, the termination of a tenancy based upon nuisance must be predicated on a pattern of objectionable conduct and permanence – a single objectionable act will not suffice. Sydney Leasing LP v. Maquilon, NYLJ, Mar. 7, 2018, p.21, col.3 (Civ.Ct. Queens 2018), *citing* University Towers Associates v. Gibson, 18 Misc.3d 349, 846 N.Y.S.2d 872 (Civ.Ct. Kings 2007)

Notices to Cure, Default Notices and Termination Notices must be specific and detailed, including factual allegations and dates, and may not merely track statutory or lease language. 31-67 Astoria Corp. v. Landaira, 54 Misc. 3d 131(A), 52 N.Y.S.3d 248 (AT 2d 2017) (termination notice was defective because it failed to allege that the defaults specified in the notice to cure, which were curable, had not been cured during the cure period), *citing* Oxford Towers Co. v. Leites, 41 A.D.3d 144, 837 N.Y.S.2d 131 (1st Dept.

2007) (In evaluating the facial sufficiency of a predicate notice in a summary eviction proceeding, the appropriate test is one of reasonableness in view of the attendant circumstances); see also 76 West 86th Corp. v. Junas, 45 N.Y.S.3d 921 (Civ.Ct. NY Cty. 2017) (Landlord required to allege specific facts supporting claim that tenant failed to cure default in termination notice.); BEC Continuum Owners v. Taylor, NYLJ, May. 30, 2018 (Civ.Ct. Kings 2018).

Importantly, predicate notices cannot be amended during a pending summary proceeding in order to correct errors. Chinatown Apartments, Inc. v. Chu Cho Lam, 51 N.Y.2d 786 433 N.Y.S.2d 86 (1980) (since the right to terminate the tenancy pursuant to the terms of the lease was dependent upon service of an adequate notice, the subsequent amendment of the petition could not operate retroactively to cure a defect in the notice).

In a landmark decision from New York State's highest court (Matter of ATM One, LLC v. Landaverde, 2 N.Y.3d 472, 779 N.Y.S.2d 808, 812 N.E.2d 298 (2004)), the Court of Appeals held that, where a landlord serves a tenant with a notice to cure by regular or certified mail, pursuant to a notice provision in a residential lease governed by the Emergency Tenant Protection Regulations, the landlord must add five days to the minimum cure period in order to ensure that the tenant receives the benefit of the entire cure period before suffering a potential forfeiture of its leasehold. The holding in Landaverde has not been extended to the minimum 90 day period pertaining to rent stabilized, non-renewable (Golub) notices [Skyview Holdings LLC v. Cunningham, 13

Misc.3d 102, 827 N.Y.S.2d 399 (AT, 1st Dep't 2006)], or to notices terminating month-to-month tenancies under RPL § 232-a [170 East 77th 1 LLC v. Berenson, 12 Misc.3d 1017, 820 N.Y.S.2d 693 (Civ.Ct.N.Y.Co. 2006)], or to unregulated, commercial tenancies [Montgomery Trading Co. v. Cho, 11 Misc.3d 1058(a), 815 N.Y.S.2d 495 (Civ.Ct.N.Y.Co. 2006)] or to notices to quit where there is no landlord-tenant relationship under RPAPL §§ 713 and 715 [135 PPW Owners LLC v. Schwartz, 7 Misc.3d 1016(A), 801 N.Y.S.2d 238 (Civ.Ct.Kings Co. 2005) (Licensees and squatters are not entitled to enhanced protections afforded to tenants.)]. It remains prudent practice, nevertheless, to add an additional five days to short-term lease notices (*i.e.*, where the notice period is less than 30 days) served on tenants by mail in order to eliminate any Landaverde service issues from the case.

Additionally, the Real Property Law prescribes the required minimum notice period to terminate certain tenancies.

RPL § 228 requires a written notice of not less than thirty days to terminate a tenancy at will or a tenancy by sufferance, which must be delivered personally to the tenant or to a person of suitable age and discretion residing at the premises sought to be recovered, or, if the tenant or such person cannot be found, by affixing the notice to a conspicuous part of the premises where it can be found.

In New York City, under RPL § 232-a, a monthly tenancy or tenancy from month-to-month may only be terminated by a written notice of not less than thirty days

before the expiration of the term, served in the same manner as a notice of petition in a summary proceeding (i.e., RPAPL § 735). The expiration date in the notice must be consistent with the expiration of the monthly or month-to-month term - e.g., if the monthly tenancy is from the first to the last day of each month, the termination notice must terminate the tenancy as of the last day of the month.

**Acceptance of Rent May Vitiate Notice**

A landlord's acceptance of rent applicable to a period after the date set forth in the landlord's notice for the termination of the tenant's lease term, will vitiate the landlord's termination notice, unless the landlord can show that the acceptance was inadvertent and the payment is promptly returned to the tenant. Even a landlord's retention of a tenant's uncashed rent checks has been held sufficient to vitiate a landlord's notice. Roxborough Apartment Corporation v. Becker, 176 Misc.2d 503, 673 N.Y.S.2d 814 (Civ.Ct.N.Y.Co. 1998). However, even where a landlord accepts and deposits a post-termination payment from a tenant, if the check is dishonored, there is no implied waiver of the termination. Holy Spirit Assn. for the Unification of World Christianity v. World Harmony Found, Inc., 19 Misc.3d 117(A), 862 N.Y.S.2d 814 (Civ.Ct.N.Y.Co. 2008). Moreover, whether a post-termination acceptance of rent or the retention of one or more rent checks by the landlord vitiates a landlord's termination of a lease is a fact question based upon the doctrine of waiver, which requires the intentional relinquishment of a known right. Notably, in the Second Department, courts have carved out an exception in nonprimary residence holdover cases, and declined to follow the general rule that retention of checks,

alone, vitiated a landlord's termination based on non-primary residence. 113-115 North 5th Avenue Holding Corp. v. Rita Costa, 58 Misc.3d 576, 65 N.Y.S.3d 676 (Mt. Vernon City Ct. 2017), *citing* Matter of Georgetown Unsold Shares, LLC v Ledet, 130 A.D.3d 99, 12 N.Y.S.3d 160 (2d Dept. 2015) (Landlord's acceptance of unsolicited rent after the expiration of lease but before the commencement of holdover proceeding did not, standing alone, amount to a voluntary relinquishment of the landlord's right to contest the tenant's possession as violating primary residence.)

**The Notice of Petition and Petition**

Summary proceedings are commenced by the preparation and filing of a Notice of Petition or Order to Show Cause (very rare, except by tenants in wrongful lockout proceedings), and a verified Petition. The Notice of Petition and Petition are filed with the clerk along with the filing fee (currently $45.00). The Notice of Petition is returned by the clerk to the landlord, to be refiled with the proof of service. The proof of service must be filed within 72 hours from the completion of the service.

The Notice of Petition in a holdover proceeding must apprise the tenant of the time and place of the hearing. The date specified in the holdover Notice of Petition for the hearing must be not less than five days, nor more than twelve days, from the date of service. RPAPL § 733(1).

In New York City, the nonpayment Petition is made returnable before the clerk within five days after its service. The Notice of Petition must apprise the respondent-tenant that it is required to answer before the clerk within such five days, that the clerk will set the Petition down for a hearing not less than three nor more than eight days after the answer is filed, and that if the respondent fails to answer within such five days, a judgment shall be rendered in favor of the petitioner-landlord, and that the issuance of the warrant of eviction may be stayed for a period not to exceed ten days from the date of service of the Petition. RPAPL § 732.

In either type of proceeding, the Notice of Petition must also advise the tenant that if it fails to interpose and establish any defense or claim, it may be precluded from asserting the defense or claim in any other proceeding or action. RPAPL § 731(2). Additionally, in New York City, where a petitioner is permitted to make an application before the court for use and occupancy pending trial upon the second of two adjournments requested by the tenant, the Notice of Petition must provide notice to the tenant that such an application may be made pursuant to RPAPL § 745(2).

The requirements for the contents of the Petition are set forth in RPAPL § 741, and must include:

1) The petitioner-landlord's interest in the premises sought to be recovered.
2) The respondent-tenant's interest in the premises and his/ her/its relationship to the petitioner.

3) A description of the premises sought to be recovered, with sufficient detail to enable the marshal or sheriff to locate the premises in the event of an eviction.

4) The facts upon which the proceeding is based --

For a nonpayment proceeding, this would include the tenant's rent default, the landlord's prior demand for rent, the tenant's failure to cure its rent default, and that the tenant continues in possession of the premises without the permission of the landlord. The written rent demand notice should be annexed as an exhibit to the petition, with the proof of service included, thereby becoming a part of the petition.

For a holdover proceeding, the petition must allege the expiration of the tenant's lease term or the circumstances under which the landlord terminated the tenant's lease term, and that the tenant continues in possession without the permission of the landlord. Where the tenant's lease term was terminated based upon a material default or a tenant's breach of a condition in the lease, any notices served by the landlord (notice of default, notice to cure, termination notice, etc.), together with proof of service, should be included as exhibits to the petition and made a part thereof.

For either type of Petition, the landlord is also required to allege whether the premises are located within a multiple dwelling, and, if so, it must allege that there is a currently effective registration statement on file with the Office of Code Enforcement (HPD), in

which the owner has designated a managing agent, a person over 21 years of age, to be in control of and responsible for the maintenance of the building, and must include the multiple dwelling registration number, the registered agents name, the residence or building address of the managing agent, and a telephone number for the managing agent. This requirement applies in commercial proceedings as well as residential proceedings.

Additionally, in summary proceedings involving residential property, the Petition must allege the rent regulatory status of the premises sought to be recovered, and if rent controlled or rent stabilized, that the apartment is in compliance with either the rent control laws, the rent stabilization laws, or the Emergency Tenant Protection Act of 1974, or the reason why the premises is exempt from those laws and regulations. In commercial cases, this pleading requirement is easily dispensed with by alleging that the applicable laws and regulations do not apply because the premises was leased exclusively for business purposes.

5) A description of all the relief sought - final judgment of possession, issuance of a warrant of eviction, money judgment for rent arrears, request of rent or use and occupancy during the pendency of the proceeding, and attorneys' fees and expenses, if provided by the lease.

**Important - Confirm all Occupants in Possession of the Premises**

It is important to name all persons and/or entities in possession of the premises in the Notice of Petition and Petition, and to serve copies of the pleadings on all such parties.

Parties may not be summarily removed from possession of premises without due process of law. A landlord may be liable for substantial damages if it unlawfully removes a party from possession of premises without due process. See RPAPL § 853 - Action for forcible entry and detainer; treble damages.

Many practitioners routinely name a "John Doe", "Jane Doe" and/or "XYZ Corp." as additional parties in their summary proceedings, and cause additional copies of the Notice of Petition and Petition to be served on such fictitious parties, so that subsequently discovered occupants can easily be added and/or substituted in the pending proceeding.

It was common practice to update the Petition with any subsequently accruing rent – where additional rent became due after date of rent demand. That practice ended in response to RCPI Landmark v. Chasm Lake Management Svcs., 32 Misc. 3d 405, 926 N.Y.S.2d 267, 2011 N.Y. Slip Op. 21177 (Civ.Ct.N.Y.Co. 2011), a 2011 case in which Judge Arlene Bluth dismissed a petition that included rent that accrued after the issuance of the rent demand. The court held that pursuant to RPAPL 711(2), the Petition must allege that a demand was made for the rent arrears sought in the Petition, and relied upon an Appellate Term holding in 1587 Broadway Rest. Corp. v Magic Pyramid, NYLJ, Dec. 19, 1979, at 10, col 2, prohibited a landlord from seeking to amend a Petition to include subsequently accruing rent, absent the service of an amended rent demand notice on tenant for the additional rent arrears. Nevertheless, the landlord may move to amend the petition to conform to the evidence, either after trial or within a summary judgment

motion, where proof is offered of the rent arrears then due and owing. 576 E 187TH St. Bronx, LLC v Hizam Deli Grocery Corp., 59 Misc. 3d 1215(A), 2018 WL 1802279 (Civ.Ct. Bx. 2018) *citing* GSL Enterprises, Inc. v. Newlinger, 1996 N.Y. Misc. LEXIS 630, NYLJ May 24, 1996, p. 25, col 6 (AT 1st Dept. 1996). The Court, within its discretion, may include such post rent demand rent arrears in the final judgment awarded to the landlord.

## B. EJECTMENT ACTIONS IN THE SUPREME COURT.

Ejectment is a common law remedy, now known as an Action to Recover Real Property, codified in part under Article 6 of the Real Property Actions and Proceedings Law. Except as modified by statute, the common law principles of the ejectment action are unchanged. Alleyne v. Townsley, 110 A.D.2d 674, 487 N.Y.S.2d 600 (2d Dep't 1985).

The ejectment action was replaced by the Summary Proceeding because it became overburdened with procedural impediments, such as the common law demand (a rigid condition requiring that the precise amount of rent arrears be demanded in person, at the property, on the day in which the rent was due), and because it was "an expensive and dilatory proceeding, which in many instances amounted to a denial of justice." Reich v. Cochran, 201 N.Y. 450, 94 N.E. 1080 (1911).

The purpose of the ejectment action is to enforce a right of entry in real property, by a person having a right of possession, who is being excluded by the wrongful act of

another. It is a plenary action, which may be brought by either a landlord or a tenant. In addition to the issuance of a legal mandate entitling the plaintiff to possession of the property (the writ of assistance or order of possession), a plaintiff may seek money damages for the defendant's wrongful withholding of the property, including rents and profits or the value of the use and occupancy of the property for a term not to exceed six years. [RPAPL § 601] The use and occupancy damages may not include the value of any improvements to the property made by the defendant, and the defendant may be entitled to an offset for the value of permanent improvements made in good faith. Id.

Despite the time and expense involved in maintaining an ejectment action, it remains an important and necessary remedy. For instance, where a lease may be terminated by the landlord based upon a tenant's breach of a condition subsequent, the lease remains in full force and effect until the landlord exercises its right of re-entry. This can only be done through an ejectment action; a summary holdover proceeding may not be maintained where the lease remains in effect. For example, if a lease provides that the landlord shall have the right to terminate the lease if the tenant's sales fall below a certain stated level, the condition in the lease giving rise to the landlord's right to terminate the lease is a condition subsequent. The landlord may not utilize a summary holdover proceeding to enforce a condition subsequent.

Additionally, where a landlord cannot maintain a summary proceeding against a residential tenant, because it is not in compliance with the registration requirements of the

Multiple Dwelling Law [MDL § 325], or the tenancy violates the certificate of occupancy for the building, the landlord may be relegated to the more burdensome Action to Recover Possession of Real Property.

Actions between co-tenants and tenants in common are also governed by RPAPL Art. 6. [RPAPL § 621]

**Predicate Notices**

There is no requirement for the service of a predicate notice to commence an ejectment action, unless the tenant is in possession under an agreement for an indefinite term (i.e., year-to-year or month-to-month). Alleyne v. Townsley, 110 A.D.2d 674, 487 N.Y.S.2d 600 (2d Dep't 1985); Gerolemou v. Soliz, 184 Misc.2d 579, 710 N.Y.S.2d 513 (AT, 2d Dep't 2000). At common law, a six month notice was required to terminate a tenancy with an indefinite term. See Kosa v. Legg, 12 Misc.3d 369, 816 N.Y.S.2d 840 (Sup.Ct. Kings Co. 2006) citing Blackstone's Commentaries: with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and the Commonwealth of Virginia, Vol. 3, Chapter 9, St. George Tucker, 1803.

Today, the termination of tenancies at will or tenancies by sufferance, no matter what type of proceeding is contemplated, is governed by Real Property Law § 228. That provision requires the service of a written notice of not less than thirty days, served either by delivering the notice to the tenant or a person of suitable age and discretion residing at

the premises, or, if neither the tenant nor such person can be found, by affixing it upon a conspicuous part of the premises, where it may be conveniently read. [RPL § 228] Service of such a termination notice on a person employed at the premises has been held to be sufficient under the statute. Pepsi-Cola Metropolitan Bottling Co. v. Miller, 50 Misc.2d 40, 269 N.Y.S.2d 471 (1966).

There is a split of authority in the length of notice required to terminate a month-to-month tenancy prior to commencing an ejectment proceeding. In Riccardo v. Riccardo, 6 Misc.3d 223, 785 N.Y.S.2d 903 (Civ.Ct. Kings Co. 2004), the court held that thirty days was the appropriate length of notice under RPL 232-a, despite the fact that the statute referred specifically to summary proceedings. In Kosa v. Legg, 12 Misc.3d 369, 816 N.Y.S.2d 840 (Sup.Ct. Kings Co. 2006), the court expressly rejected the holding in Riccardo, and held that the appropriate length of notice under the common law is six months, despite the fact that the tenancy was one from month-to-month, on the grounds that statutory modifications of common law must be strictly construed. Id. at 382. Consequently, in the Second Judicial Department (covering Queens, Brooklyn and Staten Island), an ejectment action requires a six month notice to terminate a month-to-month tenancy; while, in the First Judicial Department (covering Manhattan and the Bronx), an ejectment action requires a thirty day notice to terminate a month-to-month tenancy.

**Ejectment Action Used to Evict Condominium Unit Owner**

In Heywood Condominium, by its Board of Managers, Respondent, v Steven Wozencraft, 148 A.D.3d 38, 48 N.Y.S.3d 304 (1st Dept. 2017), a condominium Board of Managers

commenced a lien foreclosure proceeding against a condo unit owner based upon the owner's failure to pay common charges assessed against the unit. The Board moved for the appointment of a Receiver to collect reasonable rent from the unit owner pursuant to RPL § 339-aa, which provides that a unit owner is required to pay a reasonable rental for the unit for any period prior to sale pursuant to judgment of foreclosure and sale, if so provided in the by-laws, and the plaintiff in such foreclosure is entitled to the appointment of a receiver to collect the same. Once appointed, and upon the unit owner's failure to pay reasonable rent, the Receiver filed a motion in the foreclosure proceeding for a writ of assistance to eject the unit owner. The court held that the Receiver was entitled to a writ of assistance to eject the unit owner since the order of appointment authorized the receiver to take certain actions, including ejectment of defendant from the property, and the unit owner defaulted in paying reasonable rent to the Receiver.

**C. YELLOWSTONE INJUNCTION ACTIONS IN THE SUPREME COURT.**

Traditionally, when a tenant was served by a landlord with a notice of default or notice to cure, alleging a breach or default under the lease, and was advised that the landlord may terminate the lease absent a timely cure, the tenant was placed in the precarious position of either curing the breach, or commencing a declaratory judgment action challenging the landlord's right to terminate the lease. If the tenant commenced a declaratory judgment action, and was unsuccessful, the cure period under the landlord's notice would have

expired. Once expired, a court cannot revive a terminated lease. 2 Rasch, New York Landlord and Tenant, § 23:53, p. 214 (4th 1998).

Now, tenants have a remedy. A tenant can preserve its right to cure an alleged breach, provided it commences an action in the Supreme Court for a declaratory judgment or for reformation of the lease, and moves in the action for a Yellowstone injunction. Yellowstone injunctions are now routinely granted in order to avoid a forfeiture of a tenant's substantial interest in its leasehold.

The Yellowstone injunction originated in First National Stores, Inc. v. Yellowstone Shopping Center, Inc., 21 N.Y.2d 630, 290 N.Y.S.2d 721, 237 N.E.2d 868 (1968), a controversy between a landlord and commercial tenant over who was required to pay the cost of a sprinkler system required by the New York City Fire Department. On the last day of the cure period under the landlord's notice, the tenant commenced a declaratory judgment action in the Supreme Court. The tenant, however, did not seek a temporary restraining order to prevent the notice period from lapsing, and the court held that it was powerless to revive the expired lease. As a result of the harsh consequences to the tenant in the Yellowstone case, commercial tenants developed the practice of obtaining a stay of the cure period under a landlord's notice before it expired, in order to preserve the lease term during the litigation, in the event that the tenant's challenge was not successful. The Yellowstone injunction, therefore, maintains the status quo during a commercial tenant's challenge to a landlord's default or cure notice, providing the tenant with an

opportunity to challenge the landlord's allegations that there was a default, without risking the forfeiture of the lease term.

In a nutshell, the purpose of a Yellowstone injunction is to enable a tenant confronted with a notice to cure, notice of default or threat of termination of its lease to obtain a stay tolling the running of the cure period so that after the determination of the merits, the tenant has an opportunity to cure the default and avoid a forfeiture of the leasehold. See 2 Rasch, New York Landlord and Tenant, § 23:53, p. 215 (4th 1998), citing, inter alia, Empire State Building Associates v. Trump Empire State Partners, 245 A.D.2d 225, 667 N.Y.S.2d 31 (1st Dep't 1997) (The Yellowstone injunction is a preliminary injunction designed to preserve the status quo until the rights of the parties can be fully adjudicated, by enjoining the landlord from taking any action to terminate the lease during the pendency of the action.)

Importantly, the Yellowstone injunction only stays the cure period under the landlord's notice; it does not relieve the tenant from the obligation to cure the default, if the court determines that the landlord's notice was bona fide. Waldbaum, Inc. v. Fifth Ave. of Long Island Realty Associates, 85 N.Y.2d 600, 627 N.Y.S.2d 298, 650 N.E.2d 1299 (1995).

A tenant seeking Yellowstone relief must demonstrate the following four factors:

1) It holds a commercial lease;

2) It has received from the landlord a notice of default, a notice to cure, or a threat of termination of its lease;

3) The application for a temporary restraining order was made prior to the expiration of the cure period; and

4) It has the desire and ability to cure the alleged default by any means short of vacating the premises.

Yellowstone injunctions have become commonplace in commercial landlord-tenant litigation, and are routinely granted by the courts. As long as a tenant can establish the four factors required for Yellowstone relief, it need not make the more onerous showing required for injunctive relief - (i) a probability of success on the merits of the case; (ii) the danger of irreparable injury in the absence of an injunction; and (iii) a balance of the equities in its favor. Lexington Ave. & 42nd Street Corp. v. 380 Lexchamp Operating, Inc., 205 A.D.2d 421, 613 N.Y.S.2d 402 (1st Dep't 1994).

Where the cure provision in the lease requires the tenant to make diligent efforts to cure during the period, but the tenant (despite making diligent efforts) is unable to cure in time, the cure period may be deemed extended, entitling the tenant to a Yellowstone injunction even though the application is filed after the cure period. See Village Ctr. for Care v. Sligo Realty and Serv., 95 A.D.3d 219, 222-23 (1st Dep't 2012); Becker Parlin Dental Supply Co. v. 450 Westside Partners, 284 A.D.2d 112, 112-13 (1st Dep't 2001).

A tenant must show that it is willing and able to cure the alleged default upon the determination that the tenant breached the lease. Confidence Beauty Salon v. 299 Third

SA, 148 A.D.3d 439 (1st Dept. 2017) (tenant denied Yellowstone injunction for failing to plead ability to cure alleged defaults); Rappa v. Palmieri, 203 A.D.2d 270 (2d Dept. 1994) (Yellowstone injunction denied where tenant commenced the action to rescind lease and failed to plead ability to cure default.

In General, Yellowstone injunctions are not available in the following types of cases:

1) Residential cases in the City of New York, because a residential tenant in New York City maintains the right to cure a breach of a lease condition under RPAPL § 753(4). RPAPL § 753(4) requires the court to grant a ten day stay of the issuance of the warrant of eviction, during which time the tenant may correct the breach, even after it lost the case at trial; and

2) Non-payment of rent cases, either residential or commercial, because the tenant is entitled to a stay of the judgment under RPAPL § 751(1), by (i) paying the full judgment amount to the landlord, or (ii) depositing the amount of rent due and the costs of the special proceeding with the clerk of the court, or (iii) posting an undertaking to the petitioner for such amount, at any time before a warrant of eviction is issued.

However, no rule is immune to exceptions, and there have been extraordinary cases reported in which courts have found exceptions to these two once inviolable rules.

**Extension of Yellowstone Injunctions to Residential Cases**

In Stolz v 111 Tenants Corp., 3 A.D.3d 421, 772 N.Y.S.2d 3 (1st Dept. 2004), a co-op tenant under a proprietary lease was alleged to be in default for constructing a greenhouse on a terrace to their apartment. The co-op issued a ten day notice to cure the alleged default. The proprietary tenant filed suit and moved for a Yellowstone injunction on the grounds that, if (i) the co-op issued a termination notice based upon the alleged default, and (ii) the tenant was not successful in opposing the alleged default in court, the tenant would not have sufficient time under RPAPL § 753(4) to cure the default by removing the greenhouse, as the stay granted by the statute is only for ten days. The tenant argued and the court recognized that removal of the greenhouse would require a demolition permit from the New York City Department of Buildings, which could take more than ten days to procure. Since Stoltz, at least two other appellate courts have recognized the availability of Yellowstone injunctions in residential cases in New York City: Abramowitz v 145 E. 16th St. LLC, 50 AD3d 594, 855 N.Y.S.2d 365 (1st Dept. 2008); and Caldwell v Am. Package Co., Inc., 57 AD3d 15, 20, 866 N.Y.S.2d 275, 278 (2d Dept. 2008).

Similarly, outside of New York City, where there is no protection of the 10-day grace period provided in RPAPL § 753, a Yellowstone injunction may be appropriate. *See, e.g.*, Hopp v Raimondi, 51 AD3d 726, 728, 858 N.Y.S.2d 300, 302 (2nd Dept. 2008) ("Since the subject apartment is located outside of New York City and the plaintiff is thus not entitled to the protection of RPAPL 753 (4), the defendant's service upon her of the

combined notice to cure and surrender possession necessitated the commencement of this declaratory judgment action and the application for *Yellowstone* relief in order to toll the running of the cure period.")

**Extension of Yellowstone Injunctions to Monetary Defaults**

In certain situations, a Yellowstone injunction may be appropriate in the case of a monetary default. Lexington Ave. & 42nd St. Corp. v 380 Lexchamp Operating, 205 AD2d 421, 613 N.Y.S.2d 402 [1st Dept 1994] (Holding that where a landlord issued a notice to cure as a predicate to a holdover proceeding for failure to pay rent, instead of commencing a non-payment proceeding, a Yellowstone injunction should have been issued). *See also* 3636 Greystone Owners, Inc. v Greystone Bldg., 4 AD3d 122, 123 (1st Dept 2004) ("Yellowstone relief granted even where nonpayment of rent is the only issue."); Front St. Rest. Corp. v 27 Old Fulton St. LLC, 2016 NY Slip Op 30817[U], *7 (Sup Ct, Kings County 2016) ("Where the landlord serves the tenant who has not paid rent with a notice of default or notice to cure, the tenant may obtain a Yellowstone injunction.").

**Landlord's Push-Back Against Yellowstone Relief**

In 159 MP Corp. v. Redbridge Bedford, 160 A.D.3d 176, 71 N.Y.S.3d 87 (2d Dept. 2018), the Appellate Division, Second Department, recently granted landlord's motion to dismiss tenant's Yellowstone injunction case on the grounds that tenant waived its right to seek a declaratory judgment with respect to any provision of the lease or with respect

to any notice sent pursuant to the provisions of the lease. Since a Yellowstone injunction is inextricably intertwined with a tenant's claim for a declaratory judgment that it has not breached the lease, the waiver of that remedy also waives the right to seek the injunction. Addressing the tenant's argument that the waiver was against public policy, the court stated: "To hold that the waiver of declaratory judgment remedies in contractual leases between sophisticated parties is unenforceable as a matter of public policy does violence to the notion that the parties are free to negotiate and fashion their contracts with terms to which they freely and voluntarily bind themselves." The court pointed out that many constitutional and statutory rights may be waived, including the right to a jury trial, the right against self-incrimination, the right to counsel and the right to appeal, that the right to a declaratory judgment, inclusive of Yellowstone relief, is not so vaulted as to be incapable of self-alienation. It will be interesting to see whether the Court of Appeals will weigh-in on the issue.

For a good discussion of the law pertaining to Yellowstone injunctions, see Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Associates, 93 N.Y.2d 508, 514, 693 N.Y.S.2d 91, 94, 715 N.E.2d 117 (1999); and 225 E. 36th St. Garage Corp. v. 221 East 36th Owners Corp., 211 A.D.2d 420, 421, 621 N.Y.S.2d 302, 303-04 (1st Dep't 1995).