

NON-PAYMENT OF RENT LANDLORD-TENANT PRACTICE TIPS

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1. An Overview of the Limited Jurisdiction of Landlord-Tenant Court

The landlord-tenant court is a creature of statute located within the Special Civil Part of the Superior Court and its powers are thus limited. N.J.S.A. 2A:18-53. The New Jersey Supreme Court recently summed up the limited power of the landlord-tenant court:

The New Jersey summary dispossession statute . . . affords landlords an expedited procedure to regain possession of leased premises, thereby avoiding the delays ordinarily associated with common-law ejectment actions. One of several statutory grounds permitting a summary dispossession action is nonpayment of rent. *Possession of the premises is the only available remedy for nonpayment of rent, because money damages may not be awarded in a summary dispossession action.* If the rent owed is paid on or before entry of judgment, the legal proceeding is terminated.

[Hodges v. Sasil Corp., 189 N.J. 210, 221 (2007).]

Indeed, the power of the landlord-tenant court is so limited that no decision in landlord-tenant court constitutes res judicata in any future proceeding, and the statements made in landlord-tenant court and evidence presented in landlord-tenant court cannot be used in future proceedings in any other court. Moyano v. Williams, 267 N.J. Super. 213, 216-17 (Law Div. 1993). Once the landlord has successfully evicted the tenant from the premises, the landlord may then pursue monetary damages for unpaid rent and/or other damages in either the Special Civil Part or the Law Division.

Pursuant to R. 6:4-3(a), neither the landlord nor the tenant may join any other claims, counterclaims, or third party complaints in the summary dispossession proceeding. A tenant is not prevented, however, from making a R. 6:4-1(g) motion to transfer the matter to the Law Division pursuant to N.J.S.A. 2A:18-60, which motion must be filed with the Clerk of the Special Civil Part no later than the last court day before the trial date. Motions to transfer, which are rarely granted, are dependent upon the complexity of the issues requiring pre-trial discovery (which is unavailable in a summary dispossession action) and the judicial economy in potentially disposing of all landlord-tenant issues together. Bloomfield Twp. v. Rosanna’s, 253 N.J. Super. 551 (App. Div. 1992). If there are other issues between the landlord and the tenant that do not affect the right to possession of the premises, the proper procedure is to first go through with the summary dispossession proceeding for an eviction, and then file a separate complaint on the other issues, keeping in mind that nothing in the landlord-tenant court constitutes res judicata.

2. Filing a Landlord-Tenant Complaint for Non-Payment of Rent

A landlord-tenant complaint for non-payment of rent must be filed in the form set forth in Appendix XI-X, which is a Verified Complaint. If not based on non-payment of rent, no

verification is required, however requisite notices to “cease and quit” must be attached to the complaint. Special care should be taken to file the correct notices in the correct order and time period when eviction is sought for reasons other than non-payment of rent. Because non-payment of rent is the most common ground for landlords seeking eviction, this article focuses on the eviction process as it relates to non-payment of rent only. The landlord, or a principal of the landlord, or an authorized officer must verify the complaint. The complaint must be filed in the name of the landlord, rather than an agent or management company. The tenancy summons must be in the form set forth in Appendix XI-B. Three (3) copies of the summons and complaint must be filed with the Clerk of the Special Civil Part.

After filing a copy of the summons and complaint, the Special Civil Part Officer effects service upon the tenant which must be by (a) regular mail and personal service, or; (b) if unable to effect personal service, then by affixing the summons and complaint to the door, or if not possible to do so, then upon another conspicuous part of the property. See R. 6:2-3(b). If the landlord has reason to believe that service cannot be effected at the address of the property, then the landlord must request service also be effected by certified and regular mail at the alternate address.

3. What to Expect in Landlord-Tenant Court

Landlord-tenant court usually occurs every other week. Each vicinage has different dates for court. Landlord-tenant court is usually initiated in a large conference room or courtroom. An informational video about landlord rights and tenant rights is shown in both English and Spanish (Appendix XI-S).

After the informational video, the court conducts the first call of the calendar. Cases in which all parties are present are marked as ready. Such cases are either voluntarily mediated between the parties, or a free court mediator is offered to assist in settlement.

Approximately 30-45 minutes after the first calendar call, the court conducts the second calendar call. Because the landlord has the burden of proof, all cases are dismissed in which (a) the landlord is not present; or (b) neither party is present. If the landlord is present but the tenant is not present, then default is entered. If default is entered, the landlord must fill out a Landlord’s Certification in the form prescribed Appendix XI-T and the attorney must fill out a Landlord’s Attorney’s Certification in the form prescribed by Appendix XI-U. These documents must be presented to the court and the landlord/attorney should not leave until they are approved by court staff.

If the case is ready, the parties are encouraged to attempt to reach a settlement. If settlement cannot be reached, then the case is scheduled for trial, which is normally the same day. For that reason, it is important to have a person at the courthouse or on call who is capable of testifying as to rent.

4. Types of Settlements

The vast majority of landlord-tenant cases are settled before trial. There are two types of settlements permissible in the landlord-tenant court: (a) consent to enter judgment with tenant to

stay in the premises (“consent to stay”) (Appendix XI-V); and (b) consent to enter judgment with tenant to vacate the premises (“consent to vacate”) (Appendix XI-U).

In a “consent to stay,” the landlord and tenant agree upon a payment plan. Judgment for possession is immediately entered. If the tenant is able to make the payments in the payment plan (in addition to paying normal monthly rent), then the judgment is vacated and the complaint dismissed. If the tenant fails to make any required payment, then the landlord can submit a certification attesting to the non-payment in accordance with R. 6:7-1(e), and the court will issue a warrant of removal. A “consent to stay” requires a Landlord’s Certification in the form prescribed by Appendix XI-T and a Landlord’s Attorney’s Certification in the form prescribed by Appendix XI-U, and must also be approved by Special Civil Part staff. This type of settlement is advantageous to the landlord because it provides for the possibility of receiving all back rent (rather than having to sue separately for money damages) while providing for quick eviction in the event of non-payment.

In a “consent to vacate,” the landlord and tenant agree that the tenant will vacate by a date certain, regardless of whether or not the tenant pays any further rent. A judgment of possession is immediately entered and the warrant of removal is issued and served but cannot be executed until the agreed upon date to vacate. A “consent to vacate” must be reviewed in open court by a Judge, who will question the tenant to make sure he or she understands that his or her right to remain in the unit is being irrevocably waived. A “consent to vacate” also requires a Landlord’s Certification in the form prescribed by Appendix XI-T and a Landlord’s Attorney’s Certification in the form prescribed by Appendix XI-U. This type of settlement may not be advantageous for a landlord because it can take just as long to be approved as it would take to go to trial, and the agreed upon date to vacate may not be any earlier than if the landlord had simply gone to trial and prevailed therein.

5. Necessary Proofs for Judgment at Trial (Nonpayment)

A bench trial is conducted for those cases that do not settle. The burden of proof is on the landlord to show (1) the existence of the lease; (2) the amount of rent due and owing under the lease; and (3) the tenant’s failure to pay such rent. The landlord or an agent familiar with these matters should be available for testimony. If the landlord meets its burden of proof, a judgment of possession is entered. If the landlord does not meet its burden of proof, the complaint is dismissed.

If the tenant alleges a Marini defense, i.e. that the warranty of habitability was breached, a trial is held to determine how much the rent should be abated, if at all. (Marini v. Ireland, 56 N.J. 130 (1970).) The burden of proving the violation of the warranty of habitability is on the tenant. If an adjournment is needed for the landlord to prepare a response to the Marini defense, a request should be made to have the entirety of the rent deposited in court to secure the landlord’s interest.

6. Judgments for Possession and Warrants for Removal

The entry of a judgment for possession terminates the tenancy and provides the landlord with the legal right to the possession of the premises. However, a tenant may only be removed from the premises by the Sheriff in accordance with a warrant for removal in the form prescribed by Appendix XI-G. A warrant of removal may not be issued until the fourth business day after the entry of the judgment for possession. The warrant of removal may not be executed until the third business day after service upon the defendant. The Sheriff will effect service and execution of the warrant. Typically, the landlord will be contacted with a time for the execution of the warrant and it is advisable that the landlord be present and have a locksmith on hand to change the locks as soon as the eviction is effected.

7. Fee-Shifting, Utility Shifting and Recent Statutory Developments

A landlord may include reasonable attorney's fees and utility fees in the required amount to be paid by the tenant in order to avoid eviction so long as such attorney's fees and utility fees are clearly identified in the lease as "additional rent." Failure to specifically identify these fees as "additional rent" in the lease is fatal to a claim for said fees in the summary dispossess proceeding, and the tenant will only need to deposit/pay the base rent in order to have the eviction complaint dismissed. It should be noted that generally courts have considered attorney's fees of between \$500 and \$750 reasonable for an eviction complaint. Inclusion of fees above \$750 may lead to greater scrutiny of the complaint by the court. Furthermore, the court can and will reduce greater fees to between \$500 and \$750 based on its inherent power to determine the reasonableness of fees.

A new law, N.J.S.A. 2A:18-61.66 and 67, was recently adopted in January 2014. This law provides that in any residential lease entered into after January 17, 2014 which provides that the landlord is entitled to attorney's fees for an action or summary proceeding arising out of the lease, an additional parallel implied covenant shall be read into the lease in favor of the tenant. This provides two avenues of recovery for a tenant. First, if a landlord sues to evict a tenant for breach of a lease, and the tenant is successful in defending the action for any reason other than payment of overdue rent before the entry of judgment of possession, then the landlord is liable for the tenant's reasonable attorney's fees and expenses. Second, if a landlord fails to perform any covenant or agreement in the lease and the tenant successfully sues for said failure, then he/she is entitled to attorney's fees and expenses. The tenant has the option of choosing whether the award is paid as money damages or as a credit against future rent. Additionally, the new law now requires that the following statement, either one point larger than the rest of the lease clause or 11-point font, whichever is greater, be placed within any residential lease clause providing for landlord recovery of attorney's fees:

“IF THE TENANT IS SUCCESSFUL IN ANY ACTION OR SUMMARY PROCEEDING ARISING OUT OF THE LEASE, THE TENANT SHALL RECOVER ATTORNEY’S FEES OR EXPENSES, OR BOTH FROM THE LANDLORD TO THE SAME EXTENT THE LANDLORD IS ENTITLED TO RECOVER ATTORNEY’S FEES OR EXPENSES, OR BOTH AS PROVIDED IN THIS LEASE.”

There is no penalty provision for the failure to include the above statement.

One interesting thing about this new law is that it appears to provide greater rights to the tenant than the landlord. As noted before, a landlord is not entitled to a money judgment for rent or attorney's fees in a summary dispossess proceeding. At most, the attorney's fees can be added to the rent due and owing to avoid eviction. A separate collection action can be filed for unpaid rent and attorney's fees in the Law Division after the eviction. N.J.S.A. 2A:18-61.66, however, provides the option for the tenant to receive a money judgment of fees and expenses *as part of the summary dispossess proceeding*. As far as the authors are aware, this is the only opportunity for a money judgment to be entered in a summary dispossess action, as typically a judgment of possession was the only relief previously allowed.