OCTOBER 2015 COURT ATTORNEY SEMINAR

VICTOR S. FALECK

APPELLATE TERM, SECOND DEPARTMENT

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The Tenancy

Union Sq. Park Community Coalition, Inc. v New York City Dept. of Parks & Recreation (22 NY3d 648 [2014]) (an agreement between the Parks Department and a private entity allowing the entity to operate a seasonal restaurant in a pavilion in Union Square Park for 15 years was a license; a lease grants an exclusive right to use and occupy the land, while a license is a revocable privilege to do certain acts upon the land; a broad termination clause allowing the grantor to cancel the agreement whenever it decided to in good faith indicated a license; moreover, the entity's use was only seasonal and not exclusive, it was required to make outdoor seating available to the general public and to open the pavilion for community events, and the Parks Department retained control over the daily operations of the restaurant, including the hours of operation, the staffing, work schedules and menu prices); **Women's Interart Ctr., Inc. v New York City Economic Dev. Corp.** (97 AD3d 17 [1st Dept 2012]) (to determine whether an agreement is a management agreement or a lease, the court must examine the interest transferred; the fact that an agreement is referred to as a "net lease" is not determinative; the critical question is whether exclusive control and possession of the property has passed, even if the tenant's use is restricted by limitations or reservations; an agreement that imposed upon the tenant the responsibility for all expenses arising from the property, including repairs, utilities, insurance, and of leasing the premises to commercial and residential tenants, in which the tenant agreed to indemnify the City for damages or injury occurring on the property, and which granted the tenant the authority to maintain legal actions against month-to-month tenants for the collection of rents and evictions, was a lease, notwithstanding the reservation of the right to inspect the common areas at reasonable times and to audit the books); see **Miller v City of New York** (15 NY2d 34, 38 [1964]) (an agreement between the Parks Commissioner and a corporation giving it the right to construct on a 30-acre site in a public park a golf-driving range with accessory buildings was a lease even though denominated a license: "A document calling itself a 'license' is still a lease if it grants not merely a revocable right to be exercised over the grantor's land without possessing any interest therein but the exclusive right to use and occupy that land"); **Reynolds v Van Beuren** (155 NY 120 [1898]) (a "lease" of a roof to be used for advertising was merely a license to go on the roof and place ads on a sign); **Hok Kwan Chu v Lee** (39 Misc 3d 147[A], 2013 NY Slip Op 50859[U] [App Term, 2d, 11th & 13th Jud Dists]) (family members of the owner who entered into exclusive possession in 1983 were, at least, tenants at will or at sufferance, not licensees); **Rodriguez v Greco** (31 Misc 3d 136[A], 2011 NY Slip Op 50696[U] [App Term, 9th & 10th Jud Dists]) (a spouse given exclusive occupancy was a tenant, not a licensee); see generally **Park v Automotive Realty Corp.** (1998 WL 40199 [SD NY]) (the key fact in determining whether an agreement is a lease or license is whether the occupant has exclusive possession and the power to exclude the lessor from a specific area).

RSC § 2520.6 (d) (a "tenant" is "any person . . . named on a lease as lessee . . . or who is . . . a party . . . to a rental agreement and obligated to pay rent for the use and occupancy of a housing accommodation").

Fortress CD LLC v Canales (62177/14, Civ Ct, Bronx County, S. Weissman, J., Apr. 24, 2015) (vacating a stipulation in which the successor agreed to pay arrears which had accrued prior to the tenant's death and, thereafter, prior to the time the successor was offered a lease); citing **East Harlem Pilot Block Bldg. IV HDFC Inc. v Diaz** (46 Misc 3d 150[A], 2015 NY Slip Op 50289[U] [App Term, 1st Dept]) (a nonpayment petition seeking arrears accruing prior to when the tenant, as successor to her mother's Section 8 project-based tenancy, became a party to the lease, was properly dismissed, as a nonpayment proceeding can only be maintained pursuant to an "agreement" between the parties; a contrary result was not warranted by lease language purporting to give the agreement retroactive effect, as a successor is not a tenant until he signs a lease); citing **Putnam Realty Assoc., LLC v Piggot** (44 Misc 3d 141[A], 2014 NY Slip Op 51306[U] [App Term, 2d, 11th & 13th Jud Dists]) (since a nonpayment proceeding lies only where there is a landlord-tenant relationship and must be predicated on an agreement to pay rent, a proceeding does not lie against a successor who had not yet signed a lease when the arrears accrued); **Strand Hill Assoc. v Gassenbauer** (41 Misc 3d 53 [App Term, 2d, 11th & 13th Jud Dists 2013]) (where the landlord did not give the successor a renewal lease until June 13, 2011, effective retroactively to May 1, 2011, the landlord could not maintain a nonpayment proceeding for February and March 2011 arrears; as the RSC defines a tenant as a person named on a lease or party to a rental agreement and obligated to pay rent, the successor is not a tenant until he signs a lease); **615 Nostrand Ave. Corp. v Roach** (15 Misc 3d 1 [App Term, 2d & 11th Jud Dists 2006]) (where a landlord refused, for two years after the tenant's death, to offer the successor a lease, there was no landlord-tenant relationship until the landlord offered the lease, and a nonpayment proceeding would not lie to collect the use and occupancy accruing during the two-year period); **Tivoli BI LLC v Clarke** (NYLJ 1202587553751 [Civ Ct, Kings County 2013, M. Sikowitz, J.]) (a nonpayment proceeding did not lie against a successor to a Section 8 apartment who was not given a lease because he refused to certify his income, as there was no landlord-tenant relationship between the parties); see also **245 Realty Assoc. v Sussis** (243 AD2d 29, 33 [1st Dept 1998]) (a person entitled to succession rights who has not yet signed a lease is not a tenant under the RSC); see generally **Stern v Equitable Trust Co. of N.Y.** (238 NY 267, 269 [1924]) ("the relation of landlord and tenant is always created by contract, express or implied, and will not be implied where the acts and conduct of the parties negative its existence"); but cf. **428 E. 66th St. LLC v Meirowitz** (12 Misc 3d 141[A], 2006 NY Slip Op 51364[U] [App Term, 1st Dept]) (the absence of a formal lease agreement did not bar the maintenance of a nonpayment proceeding where the parties' impasse over the lease terms was fueled by the tenant's meritless claim of entitlement to use of the backyard).

329 Union Bldg. Corp. v LoGiudice (47 Misc 3d 1 [App Term, 2d, 11th & 13th Jud Dists 2015]) (a nonpayment proceeding could not be maintained where the parties had stipulated in a prior proceeding that the landlord would offer the tenants a lease but the tenants never signed the lease, as a nonpayment proceeding must be predicated on an agreement; the fact that the parties stipulated that, upon a default, the landlord could serve a rent demand and commence a nonpayment proceeding was irrelevant, as summary proceedings can be created only by the legislature, not by the parties); **Kimball Ave. Assoc., LLC v Walsh** (43 Misc 3d 135[A], 2014 NY Slip Op 50660[U] [App Term, 9th & 10th Jud Dists]) (in a nonpayment proceeding against a tenant of record, where an undertenant intervened, a final judgment could not be entered solely against the undertenant, since a nonpayment proceeding will lie only where there is a conventional landlord-tenant relationship and there has been a default pursuant to the agreement under which the premises are held, notwithstanding that the landlord had agreed, in a prior nonpayment proceeding, to make the undertenant the tenant of record and to give him a lease); **314 E. 19th St. Realty Corp. v Scott** (NYLJ 1202569850083 [Civ Ct, Kings County 2012, M. Milin, J.]) (a successor in interest did not become a tenant until a lease was signed with him notwithstanding a stipulation, in a previous nonpayment proceeding against the deceased tenant, recognizing the successor as the new tenant and notwithstanding that the successor had signed a renewal lease sent to his deceased mother).

Jasper Hous., LLC v Regula (L&T 68565/14, Civ Ct, Kings County, July 6, 2015, M. Finkelstein, J.) (where there is a payment and acceptance of rent after the expiration of the last stabilized lease, a nonpayment proceeding may be maintained, citing Trec); **Marin v 21-23 Bond St. Assoc., LLC** (47 Misc 3d 1206[A], 2015 NY Slip Op 50461[U] [Mt. Vernon City Ct, A. Seiden, J.]) (where an ETPA tenant did not sign a renewal lease and held over paying rent, under Real Property Law 232-c the tenancy created was month to month, as the landlord failed to show the existence of an implied agreement for a new lease); **Table Run Estates v Perez** (61179/13 [Civ Ct, Bronx County Mar. 18, 2014, M. Pinckney, J.]) (since a nonpayment proceeding must be based on an agreement to pay rent, a petition would be dismissed where it sought rent of $810.49 pursuant to an alleged written agreement for 2010 through 2013 but the tenant had not signed any renewal leases following the expiration of her 1988 initial one-year lease at $515 per month, as, under Samson, the landlord's deemed renewals were invalid; RSC § 2523.5 [c] [2] has been amended and now only permits a landlord to assert, as a defense to an overcharge proceeding, that the deemed renewals were proper); **West 161, LLC v Reynolds** (43 Misc 3d 1209[A], 2014 NY Slip Op 50550[U] [Civ Ct, NY County, S. Kraus, J.]) (in a nonpayment proceeding, the landlord failed to meet its prima facie burden of showing an agreement to pay rent for any month after the expiration of the lease, as, under Samson Mgt., the lease could not be deemed renewed); see **265 Realty, LLC v Trec** (39 Misc 3d 150[A], 2013 NY Slip Op 50974[U] [App Term, 2d, 11th & 13th Jud Dists]) (a nonpayment proceeding would not lie against a rent-stabilized tenant who did not sign a renewal lease and did not pay rent after the expiration of her

last lease, as there was no rental agreement in effect; under Samson Mgt., the landlord was not permitted to deem the lease renewed, and no month-to-month tenancy had been created); **Weiss v Straw** (36 Misc 3d 139[A], 2012 NY Slip Op 51452[U] [App Term, 2d, 11th & 13th Jud Dists]) (in a holdover proceeding in which the landlord claimed his nonrenewal notice was timely sent prior to the expiration of a lease that he had deemed renewed for one year, under the Appellate Division's ruling in Samson Mgt., the landlord was not within his rights in deeming the lease renewed; thus, as no lease was in effect, a nonrenewal notice could not be served); citing **Samson Mgt., LLC v Hubert** (92 AD3d 932 [2d Dept 2012]) (where, after the landlord timely offered the tenant a rent-stabilized renewal lease, which the tenant did not execute, the tenant remained in possession after the expiration of the lease, the landlord was not entitled to the rent accruing after the tenant vacated pursuant to a deemed lease renewal; under Real Property Law § 232-c, a tenant becomes a month-to-month tenant upon the landlord's acceptance of rent for the period after the expiration of a lease; RSC 2523.5 [c], which provides for deemed lease renewals, is invalid to the extent that it impairs a right granted to tenants by Real Property Law § 232-c), affg (28 Misc 3d 29 [App Term, 2d, 11th & 13th Jud Dists 2010]); **Fishbein v MacKay** (36 Misc 3d 1228[A], 2012 NY Slip Op 51529[U] [Civ Ct, NY County, S. Kraus, J.]) (where the initial lease provided for a continuing preferential rent, the landlord's deemed renewals, which did not reflect the preferential rent, were not proper offers; moreover, no implied agreement could be found; thus, the rent continued at the rate in the initial lease); **Middleton v Ralph Ave. Assoc. Phase II, LLC** (29 Misc 3d 836 [Civ Ct, Kings County, M. Chan, J., 2010]) (where a tenant, after communicating his intent not to renew the lease, held over paying the increased rent, there was no implied agreement for a new lease and the tenant was not liable for the rent for the period after he moved out pursuant to a deemed lease agreement); contra **FAV 45 LLC v McBain** (42 Misc 3d 1231[A], 2014 NY Slip Op 50292[U] [Civ Ct, NY County, J. Stoller, J.]) (a nonpayment proceeding lies against a rent-stabilized tenant who does not sign a renewal lease, because a landlord-tenant relationship continues on a month-to-month basis on the same terms as in the expired lease even if the tenant does not pay rent, citing **B.N. Realty** and **Sacchetti**); cf. also **Matter of Lacher v New York State Div. of Hous. & Community Renewal** (25 AD3d 415, 417 [1st Dept 2006]) ("Since no lease was in effect . . . because the landlord had not offered the tenant a renewal, the lease is deemed to have been renewed . . . under section 2523.5 [c] [2]"); followed in **Sacchetti v Rogers** (12 Misc 3d 131[A], 2006 NY Slip Op 51114[U] [App Term, 1st Dept]) (deeming leases to have been renewed); cited in **B.N. Realty Assoc. v Lichtenstein** (96 AD3d 434 [1st Dept 2012]) (in an action for rent and/or use and occupancy, held that, while the plaintiff had failed to offer renewal leases, this did not constitute a waiver of rent but simply required "that plaintiff prove the rent through quantum meruit or some subsequent agreement of the parties").

Branic Intl. Realty Corp. v Pitt (24 NY3d 1005 [2014]) (a proceeding should have been dismissed as moot, as the occupant had vacated the premises), revg (106 AD3d 178 [1st Dept 2013]) (an occupant of an SRO hotel who continuously resided therein for

more than six months was a "permanent tenant" even absent a landlord-tenant relationship; the only requirement to become a permanent tenant is six months of continuous residence); **Crossbay Equities LLC v Balzano** (47 Misc 3d 1203[A], 2015 NY Slip Op 50374[U] [Civ Ct, NY County, J. Stoller, J.]) (where HRA entered into a memorandum of understanding with an SRO owner to provide temporary housing for HRA clients, providing that the owner would set aside 102 rooms for them and bill $52 per night based on electronic swipes and/or sign-ins; that the clients would contribute $359 per month; and that the owner could evict with HRA approval, the occupant, who was the sole remaining occupant after the agreement had expired and who had never paid rent, was a "permanent tenant," as he had resided in the building as a principal residence for at least six months [9 NYCRR 2520.6 (j)]; while the Appellate Division's decision in Branic has no precedential effect, its reasoning is supported by the plain language of the regulation; the fact that the occupant did not rent the premises is not determinative; HRA was not a tenant, as exclusive control of the premises was never given to it, where the owner received the clients and could commence eviction proceedings).

Matter of Georgetown Unsold Shares, LLC v Ledet (130 AD3d 99 [2d Dept 2015]) (the landlord's acceptance of unsolicited rent checks from a stabilized tenant after the expiration of the lease did not vitiate the landlord's nonprimary-residence nonrenewal notice, where the landlord's agent mistakenly deposited the two checks, as a waiver is the intentional relinquishment of a known right and cannot be created by negligence or oversight), revg (35 Misc 3d 137[A], 2012 NY Slip Op 50818[U] [App Term, 2d, 11th & 13th Jud Dists 2012]) (dismissing a nonprimary-residence proceeding where, after the expiration of the stabilized lease following the service of a nonrenewal notice, the landlord accepted a month's rent prior to commencing the proceeding; it was unnecessary to determine whether the acceptance entitled the tenant to a renewal lease or merely created a month-to-month tenancy, as, in either case, dismissal was required; concurrence, that the acceptance entitled the tenant to a renewal lease; upon the expiration of a stabilized lease, the tenancy must either be terminated or renewed; the acceptance of rent nullified the termination date of the nonrenewal notice, rendering the notice ineffectual); cf. **1414 Holdings, LLC v BMS-PSO, LLC** (116 AD3d 641 [1st Dept 2014]) (a commercial landlord's acceptance of a single rent check after service of a cancellation notice did not establish that the owner intended to relinquish its right to cancel the lease); but see **205 E. 78th St. Assoc. v Cassidy** (192 AD2d 479 [1993], revg on dissent of McCooe, J., NYLJ, Sept 27, 1991, at 21, col 4 [App Term, 1st Dept]) (at the expiration of a stabilized lease following the service of a nonprimary-residence nonrenewal notice, a landlord must either commence an eviction proceeding or offer the tenant a renewal lease; the acceptance of a month's rent after the expiration of the lease nullifies the termination date of the nonrenewal notice, rendering the notice ineffectual); **Martine Assoc., LLC v Donahoe** (11 Misc 3d 129[A], 2006 NY Slip Op 50294[U] [App Term, 9th & 10th Jud Dists]) (the landlord's acceptance of rent for several months following the expiration of the regulated lease vested the tenant with

new tenancy rights; it was unnecessary to determine whether the tenant was a month-to-month tenant or entitled to a renewal lease, since the landlord had not served a 30-day notice); see also **Matter of Wellington Estates v New York City Conciliation & Appeals Bd.** (108 AD2d 685 [1st Dept 1985]) (where a rent stabilized lease had been terminated for failure to cure a breach, the tenant was a month-to-month tenant subject to removal in a holdover proceeding); cf. **184 W. 10th Corp. v Westcott** (8 Misc 3d 132[A], 2005 NY Slip Op 51150[U] [App Term, 1st Dept]) (holdover proceeding properly dismissed where the landlord accepted rent checks for three months after the termination of the tenancy, thus vitiating the nonrenewal notice); **Shuhab HDFC v Allen** (37 Misc 3d 1223[A], 2012 NY Slip Op 52144[U] [Civ Ct, NY County, J. Stoller, J.]) (where a tenant fails to execute a renewal lease and remains in possession, he is not divested of his rent-stabilized status, and he cannot be evicted on the ground that he is a month-to-month tenant; he may, however, be evicted for failure to sign a renewal lease); citing **3657 Realty Co., LLC v Jones** (52 AD3d 272 [1st Dept 2008]) (a notice to cure and notice to terminate which allege alternative grounds for eviction of illegal sublet and nonprimary evidence were not defective and sufficiently apprised the tenant of the grounds for the proceeding); cf. also **49 Terrace Corp. v Richardson** (36 Misc 3d 143[A], 2012 NY Slip Op 51530[U] [App Term, 1st Dept]) (the landlord's post-termination, pre-petition acceptance of a single rent payment did not conclusively establish that the landlord waived the right to evict, but merely raised a triable issue as to the landlord's intent in accepting and negotiating the money order); **Beacon 109 223-225 LLC v Mon Sheng Wu** (32 Misc 3d 140[A], 2011 NY Slip Op 51570[U] [App Term, 1st Dept]) (the landlord's acceptance of a single, unsolicited rent check during the window period between the termination of the tenancy on nonprimary-residence grounds and the commencement of the holdover proceeding did not entitle the tenant to the dismissal of the petition as it did not establish that the landlord intended to relinquish a known right); citing **Baginski v Lysiak** (154 Misc 2d 275 [App Term, 2d & 11th Jud Dists 1992]) (the mere acceptance of rent after the expiration of a lease cannot in itself be deemed an automatic renewal of the lease; the acceptance of rent does not vitiate the notice of nonrenewal as it is not inconsistent with a continued intention by the landlord not to renew the lease); **PCV/ST LLC v Finn** (2003 NY Slip Op 50897[U] [App Term, 1st Dept]) (the landlord's acceptance of rent for three months following the lease expiration and prior to the commencement of the nonprimary-residence holdover proceeding did not require a finding that the landlord had vitiated its nonrenewal notice, where the evidence showed that the landlord had continued to bill the tenant because of a computer malfunction).

Sugar Hill Prop. Veh. I, LLC v Ashley (39 Misc 3d 143[A], 2013 NY Slip Op 50773[U] [App Term, 1st Dept]) (the landlord's acceptance of rent from an occupant who was not the tenant of record, and the prior owner's knowledge of his occupancy as a roommate of the tenant, were not sufficient to defeat the landlord's motion for summary judgment, as they did not confer rent stabilization protection on the occupant; any month-to-month tenancy created was terminated by a 30-day notice); citing **Weiden v 926 Park Ave.**

Corp. (154 AD2d 308 [1st Dept 1989]) (where the landlord accepted rent from an occupant of a stabilized apartment who was found not to have succession rights, the occupant was a month-to-month tenant entitled to a 30-day notice); **Simry Realty Corp. v Ondrias** (38 Misc 3d 137[A], 2013 NY Slip Op 50150[U] [App Term, 1st Dept]) (the landlord's post-petition letter to the occupant in response to illegal renovations by the occupant did not constitute a formal acknowledgment of any tenancy rights or vitiate the notice to quit, as a landlord-tenant relationship only arises from a legitimate manifestation of an intention on the part of the parties to create such a relationship); cf. **FS 41-45 Tiemann Place LLC v Estrella** (38 Misc 3d 29 [App Term, 1st Dept 2012]) (where a renewal offer was transmitted by landlord's back office, there were mixed questions of fact and law as to whether the issuance was inadvertent, and the effect to be given the landlord's prompt letter withdrawing the offer, precluding summary judgment in favor of the tenant); **23 Manhattan Val. N., LLC v Bass** (28 Misc 3d 139[A], 2010 NY Slip Op 51508[U] [App Term, 1st Dept]) (a licensee was not entitled to summary judgment based on the landlord's acceptance of rent from her, as the circumstances did not warrant a finding as a matter of law that the landlord had waived its right to object to her occupancy, particularly as the licensee admitted executing three renewal leases addressed to the tenant); but cf. **Linden Lefferts, LLC v Cox** (31 Misc 3d 84 [App Term, 2d, 11th & 13th Jud Dists 2011]) (where the landlord and/or its predecessors accepted rent from an occupant, the occupant raised a triable issue as to whether there had been an affirmative recognition of his tenancy); citing **Johny v Tolbert** (8 Misc 3d 130[A], 2005 NY Slip Op 51043[U] [App Term, 2d & 11th Jud Dists]) (where the occupant's unrebutted testimony established that the prior owner had affirmatively recognized her as the tenant for 10 years but continued to use the former tenant of record's name for its administrative convenience, the occupant was entitled to tenancy rights); see also **80 Delancey, LLC v Gee Hong Lee** (25 Misc 3d 131[A], 2009 NY Slip Op 52141[U] [App Term, 1st Dept]) (a landlord's acceptance of rent for a long period of time may constitute a waiver of its right to object to an occupancy).

Matter of Gottlieb v New York State Div. of Hous. & Community Renewal (90 AD3d 527 [1st Dept 2011]) (notwithstanding that the housing company accepted maintenance from the occupant, the tenant's son, for 13 years after his father died, estoppel cannot be invoked to prevent DHCR from carrying out its statutory duty); **Lindsay Park Hous. Corp. v Hines** (27 Misc 3d 140[A], 2010 NY Slip Op 50988[U] [App Term, 2d, 11th & 13th Jud Dists]) (a certificate of eviction determining that the occupant did not have succession rights remained a valid predicate for a holdover proceeding notwithstanding an eight-year delay between its issuance and the landlord's commencement of the holdover proceeding and notwithstanding the landlord's acceptance of rent and annual income certifications from the occupant, since a Mitchell-Lama housing company cannot grant tenancy rights by estoppel, laches or waiver; the statute of limitations was inapplicable because the occupant's remaining in the apartment was a continuing wrong); see **Matter of Schorr v New York City Dept. of Hous. Preserv. & Dev.** (10 NY3d 776 [2008]) (a Mitchell-Lama housing company's acquiescence in an occupancy

did not create a tenancy by estoppel because estoppel cannot be invoked against HPD to keep it from executing its statutory duty to provide Mitchell-Lama housing only to individuals who meet the eligibility requirements).

Jamsol Realty, LLC v German (46 Misc 3d 11 [App Term, 2d, 11th & 13th Jud Dists 2014]) (dismisses a holdover based on failure to sign a renewal lease where the landlord accepted rents for the period after the expiration of the lease); cf. **MH Residential 1 v Waitman** (41 Misc 3d 128[A], 2013 NY Slip Op 51680[U] [App Term, 1st Dept]) (holdover tenants' payments of rent did not create a month-to-month tenancy, as they were properly treated as use and occupancy payments required under a stipulation); **104 Div. Ave., HDFC v Lebovits** (NYLJ, Mar. 30, 2001 [App Term, 2d & 11th Jud Dists]) (since a landlord-tenant relationship is always the product of an agreement, the landlord's acceptance of payments did not create a new tenancy where both parties knew or should have known that the payments were being accepted as use and occupancy while efforts to legalize the occupancy continued).

Perez Realties, LLC v Ottley (42 Misc 3d 148[A], 2014 NY Slip Op 50399[U] [App Term, 2d, 11th & 13th Jud Dists]) (a renewal lease was created where the landlord sent and the tenant signed a renewal offer and returned it, notwithstanding that the landlord did not sign the renewal lease and return it to the tenant; the landlord's claim that it had revoked the offer prior to its acceptance was not made on personal knowledge and would not be considered); citing **Matter of E. 56th Plaza v New York City Conciliation & Appeals Bd.** (56 NY 2d 544 [1982]) (the RSC requires a landlord to make a binding offer within the statutory period containing all the terms of the lease).

46 Warren LLC v Lynch (48 Misc 3d 135[A], 2015 NY Slip Op 51098[U] [App Term, 1st Dept]) (notwithstanding that the premises were intended to be used for a business purpose, where the landlord gave the tenant a residential lease providing that the landlord would provide heat and hot and cold water and that the tenant could enforce her rights under the warranty of habitability, the tenant's claim for an abatement should not have been dismissed, as there was no basis to disregard the written agreement).

Guy v Washington (44 Misc 3d 137[A], 2014 NY Slip Op 51247[U] [App Term, 2d, 11th & 13th Jud Dists]) (where a landlord requests or directs a tenant to vacate before the end of the lease and the tenant does so, the landlord is estopped from enforcing the lease; thus, a tenant who vacated at the landlord's request on April 30th was not liable for May rent); see **Ramirez v Sino** (36 Misc 3d 143[A], 2012 NY Slip Op 51510[U] [App Term, 9th & 10th Jud Dists]) (where a month-to-month tenant moved out after the landlord's agent demanded that the tenant do so because of an overcrowding condition, a month's notice of the tenant's intention to terminate the tenancy was not required); cf. **Sandra's Jewel Box v 401 Hotel** (273 AD2d 1, 2 [1st Dept 2000]) ("it is, at the very least, counterintuitive that a tenant who surrendered possession at the landlord's suggestion and with the landlord's consent would expect to remain liable for the rent").

Predicate Notices

Tzifil Realty Corp. v Temammee (46 Misc 3d 144[A], 2015 NY Slip Op 50196[U] [App Term, 2d, 11th & 13th Jud Dists]) (a failure to comply with the statutory requirements for service of a rent notice does not implicate jurisdiction); **716 Realty, LLC v Zadik** (38 Misc 3d 139[A], 2013 NY Slip Op 50194[U] [App Term, 2d, 11th & 13th Jud Dists]) (neither the failure to comply with statutory requirements for service of the rent notice nor the irregularities in the petition with respect to the allegations of its service implicated subject matter jurisdiction); **Forest Hills S. Owners, Inc. v Ishida** (33 Misc 3d 141[A], 2011 NY Slip Op 52202[U] [App Term 2d, 11th & 13th Jud Dists]) (a claim that service of a rent notice was defective was waived by the failure to assert it in the answer); **Citi Land Servs., LLC v McDowell** (30 Misc 3d 145[A], 2011 NY Slip Op 50387[U] [App Term, 2d, 11th & 13th Jud Dists]) (same).

STP Assoc., LLC v Hess (45 Misc 3d 1 [App Term, 9th & 10th Jud Dists 2014]) (Real Property Law § 233 [b] [6] [i] six-month notices of change of use from a trailer park were not termination notices, so that acceptance of rent after the expiration of the notices did not vitiate them).

Tzifil Realty Corp. v Samuels (43 Misc 3d 144[A], 2014 NY Slip 50886[U] [App Term, 2d, 11th & 13th Jud Dists]) (when a landlord serves a 10-day cure notice by mail upon a stabilized tenant, it must compute the cure date by adding an additional five days for mailing; it is irrelevant that the tenant actually received the notice more than 10 days before the cure date); see **Matter of ATM One v Landaverde** (2 NY3d 472 [2004]); **9 NYCRR § 2524.3 (a)** (as amended) (requiring the addition of five days when a notice to cure is served by mail).

Matter of QPII-143-45 Sanford Ave., LLC v Spinner (108 AD3d 558 [2d Dept 2013]) (a five-day rent notice signed by a previously unidentified agent of the landlord was not defective, as Siegel is limited to its factual peculiarities), affg (34 Misc 3d 14 [App Term, 2d, 11th & 13th Jud Dists 2011]) (a rent notice setting forth the arrears due, signed by an agent of the landlord, was not defective notwithstanding the applicability of a lease provision requiring the "landlord" to give a written five-day notice of default for failure to pay rent on time; the Court of Appeals' decision in **Siegel v Kentucky Fried Chicken of Long Is.** [67 NY2d 792 (1986), affg 108 AD2d 218 (1985)] was based on the factual peculiarities of the lease involved therein, which in four other places referred to "landlord or landlord's agent" but in its default provision referred only to "the landlord"; the Appellate Division also highlighted these factual peculiarities in holding that the lease should be strictly construed to require notice by the landlord or an attorney named in the lease; moreover, the Appellate Division's ruling applies to forfeiture notices, and the instant five-day notice was only a predicate to a nonpayment proceeding, not a forfeiture notice; in **Yui Woon Kwong v Sun Po Eng** [183 AD2d 558 (1st Dept 1992)],

the First Department rejected the notion that Siegel should be applied to statutory rent notices); cf. **Ashley Realty Corp. v Knight** (73 AD3d 500 [1st Dept 2010]) (a nonrenewal notice issued by the landlord's registered managing agent with whom the tenant had previous dealings was valid notwithstanding that the agent's signature was illegible and there was no printed information identifying the signer); **Tuckahoe Hous. Auth. v Logan** (33 Misc 3d 1222[A], 2011 NY Slip Op 52052[U] [Tuckahoe Just Ct]) (a notice terminating a month-to-month tenancy signed by an attorney was sufficient as there was no lease requiring that the landlord serve the notice and Real Property Law § 232-b requires only that notice be given); but cf. **HMH Rests. LP v Mio Posto of Hicksville LLC** (41 Misc 3d 1224[A], 2013 NY Slip Op 51825[U] [Dist Ct, Nassau County, S. Fairgrieve, J.]) (notices to cure rent defaults under a commercial sublease sent by a consultant for the sublandlord were invalid under Siegel); **HSBC Bank USA, N.A. v Jeffers** (30 Misc 3d 1209[A], 2011 NY Slip 50019[U] [Dist Ct, Nassau County, S. Fairgrieve, J.]) (a 10-day notice to quit is subject to the Siegel rule).

Hempstead Vil. Hous. Assoc. v Pitts (41 Misc 3d 714 [Dist Ct, Nassau County 2013, S. Fairgrieve, J.]) (under 24 CFR 247.4 [c], the amount of time necessary for a notice of material noncompliance with a lease is determined by the rental agreement or state law; where both are silent, a 22-day notice satisfies due process requirements).

St. Nicholas Ave. HDFC v Rasheed (46 Misc 3d 1211[A], 2015 NY Slip Op 50039[U] [Civ Ct, NY County, S. Kraus, J.]) (a notice stating that the HDFC was constrained to terminate the tenant's tenancy so that it could sell certain units to raise funds to comply with an order requiring the building to reduce energy consumption, especially units where there was a rent delinquency, failed to state good cause against a 17-year tenant, as the landlord failed to introduce financial proof of income necessity at trial); **823 E. 147th St. Hous. Dev. Fund Corp. v Hinnant** (L&T 051880/13, Civ Ct, Bronx County, Apr. 9, 2014, J. Vargas, J.) (court rejects the landlord's contention that the landlord was not required to allege a reason for the termination because the tenant did not take possession until after the HDFC conversion; procedural due process requires that, because the operation of the building is significantly "entwined" with a government agency, which fixes the rentals, provides income guidelines for certain units and restricts the use of profits, the tenant was entitled to notice of the ground for eviction); see **City of New York v Johnson** (32 Misc 3d 128[A], 2011 NY Slip Op 51255[U] [App Term, 1st Dept]) (evidence that the tenant used the apartment for illicit activities involving drugs and weapons established the requisite good cause for terminating the month-to-month tenancy); **207-211 W. 144th St. HDFC v Sprull** (29 Misc 3d 142[A], 2010 NY Slip Op 52196[U] [App Term, 1st Dept]) (holdover petition against an HDFC tenant was properly dismissed where the landlord did not articulate good cause for the eviction); **330 S. Third St., HDFC v Bitar** (28 Misc 3d 51 [App Term, 2d, 11th & 13th Jud Dists 2010]) (where there was significant entwinement between the City and the HDFC, which took title from the City, was organized pursuant to article XI of the PHFL as a housing project for persons of low income, and was subject to restrictions on the

use, transfer and sale of the building, as well as to a security and a regulatory agreement, the landlord was required to allege, in the predicate notice, a cause for the eviction, notwithstanding that the tenant was not in possession at the time the City had owned the building and that the City's approval was not required prior to the landlord's commencement of a holdover proceeding); see also **Matter of Volunteers of America – Greater N.Y., Inc. v Almonte** (65 AD3d 1155 [2d Dept 2009], affg 17 Misc 3d 57 [App Term, 2d & 11th Jud Dists 2007]) (where the City owned the building and contracted with the petitioner to operate the building as an SRO facility for homeless adults, and the contract designated the amount of rent each tenant would pay and how the petitioner should spend the rents, and required the petitioner to use the City-approved lease and to be responsible for evicting tenants that violated the regulations, the City was entwined with the premises so as to trigger due process guarantees, including that the tenant was entitled to notice of the alleged cause for the eviction); **512 E. 11th St. HDFC v Grimmet** (181 AD2d 488 [1st Dept 1992]) (where a building, previously owned by the City, was converted to a not-for-profit housing corporation for persons of low income, and its certificate of incorporation imposed restrictions on its use, sale and transfer and required the City's approval before a tenant could be evicted or the property sold, the government was entwined with the premises, and the tenant had a due process right to notice of the reasons for an eviction).

Matter of Arc on 4th St. Inc. v Quesada (112 AD3d 431 [1st Dept 2013]) (the fact that the notice terminating the tenant's month-to-month tenancy stated a reason for the termination, to wit, that the tenant had failed to execute a lease offered him by the landlord, did not require the landlord to prove that the tenant had refused to execute the lease, as Real Property Law § 232-a does not require a landlord to state the ground for termination); cf. **JP Morgan Chase Bank, N.A. v Hanspal** (37 Misc 3d 140[A], 2012 NY Slip Op 52264[U] [App Term, 9th & 10th Jud Dists]) (the inclusion of language in a 10-day notice notifying the occupant that he may be liable for damage to the premises and attorney's fees did not invalidate the notice, which satisfied the statutory purpose); **Mayflower Dev. Corp. v Deri** (36 Misc 3d 128[A], 2012 NY Slip Op 51205[U] [App Term, 1st Dept]) (a notice that the apartment would become deregulated upon the expiration of the J-51 tax abatement was not rendered invalid by a minor misstatement as to the date of the expiration or the inclusion of a statement of the landlord's good-faith belief that the apartment was exempt from rent stabilization).

Nowillo v Leon (48 Misc 3d 134[A], 2015 NY Slip Op 50182[U] [App Term, 2d, 11th & 13th Jud Dists]) (an owner-occupancy nonrenewal notice which identified the premises, the date by which the tenants were to vacate, and the identity of the person—the landlord—to occupy the premises, and which stated that the 78-year-old landlord had been sleeping on a couch in his daughter's living room in Manhattan and that the landlord performed all the maintenance on the Queens building in which the apartment was located and would no longer have to travel from Manhattan on a daily basis was sufficient, even though the notice failed to state that the landlord would use the

apartment as his "primary residence," as this was an element to be established at trial); cf. **2363 ACP Pineapple, LLC v Iris House, Inc.** (43 Misc 3d 136[A], 2014 NY Slip Op 50692[U] [App Term, 1st Dept]) (nonprimary-residence nonrenewal notices which were devoid of facts tending to support the ground for eviction and misrepresented the rent-regulatory status of the apartments were insufficient); **Hagels, LLC v TM701 Corp.** (39 Misc 3d 13 [App Term, 1st Dept 2013]) (where a lease provision authorized the landlord to terminate the lease if it elected to demolish or remarket the building or the tenant's space, a termination notice which did not specify whether the landlord elected to demolish or remarket the building or the tenant's space was not sufficiently clear and unequivocal); cf. also **Second 82nd Corp. v Veiders** (34 Misc 3d 130[A], 2011 NY Slip Op 52311[U] [App Term, 1st Dept]) (a nonprimary-residence nonrenewal notice which alleged a specified street address at which the tenant allegedly resided, a residential phone number at that address, and that the landlord's employees had observed tenant at the subject building only "once a month for less than a week each time" sufficiently set forth case-specific allegations).

Goldman v Mendez (087066/2012 [Civ Ct, Kings County Oct. 8, 2013, M. Sikowitz, J.]) (an owner's use nonrenewal notice which sought to recover a 556-square-foot apartment for the owner's brother's family of eleven, which made no mention of the landlord's plan to combine the subject unit with another unit that was the subject of a nonpayment proceeding and possible buyout, was unreasonable under the attendant circumstances, and the owner's intention to combine the units was speculative).

Homewood Gardens Estates, LLC v Gibbs (38 Misc 3d 146[A], 2013 NY Slip 50324[U] [App Term, 2d, 11th & 13th Jud Dists]) (as the service of a new termination notice terminated the tenant's obligation to pay "rent" pursuant to a probationary stipulation, the tenant could not be evicted for a default thereunder).

436-438 Assoc. v Alvardo (41 Misc 3d 1225[A], 2013 NY Slip Op 51830[U] [Civ Ct, NY County, P. Wendt, J.]) (in an RPAPL 711 [5] illegal-use proceeding against a rent-stabilized tenant, a 10-day termination notice alleging only that on a specified date the police arrested one or more individuals in the apartment was inadequate; the landlord could have ascertained sufficient facts by visiting the precinct; RSC § 2524.2 [b] requires that every notice to vacate state the ground for removal and the facts necessary to establish that ground); see **Clinton Manor Assoc. v Santiago** (9 Misc 3d 1106[A], 2005 NY Slip Op 51418[U] [Civ Ct, NY County, P. Wendt, J.]) (despite the general rule that no notice of termination is required to maintain an RPAPL 711 [5] proceeding, a termination notice is necessary where required by the governing Section 8 regulation); accord **New York City Hous. Auth. v Harvell** [189 Misc 2d 295 [App Term, 1st Dept 2001]) (since federal regulations now require a written termination notice of 30 days for drug-related criminal activity, an RPAPL 711 [5] proceeding cannot be maintained if such a notice was not given); see also **NYC Hous. & Dev. v Arias** (2 Misc 3d 343 [Civ Ct, NY County 2003, C. Bedford, J.]) (RSC-required seven-day notice must

be given before an RPAPL 711 [5] proceeding can be maintained); **2312-2316 Realty Corp. v Font** (140 Misc 2d 901 [Civ Ct, Bronx County 1988, P. Wendt, J.]) (the statutes should, if possible, be read in harmony); but cf. **New York County Dist. Attorney's Off. v Robinson** (27 Misc 3d 137[A], 2010 NY Slip Op 50869[U] [App Term, 1st Dept]) (the district attorney is not required to serve the notice of termination provided for in 24 CFR 966.4 [l] for housing authority tenants because the district attorney is seeking only to remove the tenant from occupancy, not to terminate her lease); **Murphy v Relaxation Plus Commodore** (83 Misc 2d 838 [App Term, 1st Dept 1975]) (Real Property Law § 231 [1] is not dependent on the covenants of the lease; it is unnecessary to terminate the lease prior to commencing the RPAPL 711 [5] proceeding; an acceptance of rent with knowledge of the illegal activities will not waive the illegal-use proceeding); cf. also **Jackson Terrace Assoc. v Howard** (NYLJ, Apr. 7, 1993 [App Term, 9th & 10th Jud Dists]) (service of a termination notice was not required in an RPAPL 711 [5] proceeding under the then applicable Section 8 regulations); **Jackson Terrace Assoc. v Patterson** (159 Misc 2d 637 [App Term, 9th & 10th Jud Dists 1994]) (same).

575 Warren St. HDFC v Barreto (41 Misc 3d 141[A], 2013 NY Slip Op 52019[U] [App Term, 2d, 11th & 13th Jud Dists]) (the method of service of lease notices to cure and to terminate is governed by the lease, not RPAPL 735).

Lincoln Mercury Holding Co., LLC v Magee (42 Misc 3d 136[A], 2014 NY Slip Op 50122[U] [App Term, 9th & 10th Jud Dists]) (where one of the LLC's managers served termination notices and the other manager revoked them, a holdover proceeding could not be maintained).

T.D. Bank, N.A. v Yeshiva Chofetz Chaim, Inc. (48 Misc 3d 127[A], 2015 NY Slip Op 50412[U] [App Term, 9th & 10th Jud Dists]) (the court-directed post-commencement re-service of a 10-day notice to quit, where the occupant challenged service of the initial notice, was not a proper predicate, as the petition must allege that the respondent remained in possession after the expiration of the 10 days fixed in the notice); citing **Lally v Fasano-Lally** (22 Misc 3d 29 [App Term, 9th & 10th Jud Dists 2008]) (a petition verified nine days after service of a 10-day notice is defective because the petition must allege that the respondent remained in occupancy after the expiration of the 10 days) but cf. **3170 Atl. Ave. Corp. v Jereis** (38 Misc 2d 1222[A], 2013 NY Slip Op 50235[U] [Civ Ct, Kings County, K. Levine, J.]) (a petition dated and verified two days before a five-day notice's expiration would not be dismissed, where it was not filed and served until after the notice's expiration, as a defective verification is waived if not raised with due diligence, i.e., within 24 hours; the allegation that tenants were in default was not false; and the rent demand was made before the proceeding was commenced); cf. also **Paris Lic Realty, LLC v Vertex, LLC** (41 Misc 3d 145[A], 2013 NY Slip Op 52074[U] [App Term, 2d, 11th & 13th Jud Dists]) (a claim that a 10-day rent notice was defective because it was not served 10 days before the due date did not implicate a jurisdictional

defect and was waived where the objection was not raised in the answer or in a pretrial motion and there was no requirement in the lease that a 10-day notice be served).

Jurisdiction and Service

32-05 Newtown Ave. Assoc. v Caguana (48 Misc 3d 141[A], 2015 NY Slip Op 51247[U] [App Term, 2d, 11th & 13th Jud Dists]) (dismissing a commercial holdover where the proof at trial established that the landlord knew that the tenant was illegally occupying the premises residentially, as all summary proceedings to recover residentially occupied premises must be brought in the Housing Part); **Ditmas Flats, LLC v Pantoja** (__ Misc 3d ___[A], 2015 NY Slip Op 51284[U] [Civ Ct, Kings County, R. Montelione, J.]) (a summary proceeding to recover parking spaces in a garage in a residential building should have been brought in the Housing Part, since the petitioner and prior owner had acquiesced in the residential use of the space, in which the occupant lived in his van); **Artykova v Avramenko** (37 Misc 3d 42 [App Term, 2d, 11th & 13th Jud Dists 2012]) (vacates a default final judgment in a commercial nonpayment proceeding and dismisses the petition, which alleged that the premises was used for commercial purposes, where the tenant showed that the premises was in a two-family house and was used as a residential daycare facility and the landlord had sold the daycare operation to the tenant; the landlord was charged with knowledge of the residential nature of the occupancy and misrepresented the nature of the occupancy in the petition); **Clark v Strauss** (33 Misc 3d 189 [Civ Ct, Kings County 2011, Devin Cohen, J.]) (dismissing a superintendent proceeding on the ground that the occupancy was residential and, under CCA 110 [a] [5], the proceeding should have been brought in the Housing Part); see **379 E. 10th St., LLC v Miller** (23 Misc 3d 137[A], 2009 NY Slip Op 50864[U] [App Term, 1st Dept]) (despite the commercial nature of a lease, if a business holdover petition incorrectly alleges that a residentially occupied premises was rented for commercial use, the petition must be dismissed); **Freeman St. Props., LLC v Coirolo** (17 Misc 3d 137[A], 2007 NY Slip Op 52299[U] [App Term, 2d & 11th Jud Dists]) (where a premises is used residentially with the landlord's knowledge, a summary proceeding must be brought in Housing Part, pursuant to 22 NYCRR 208.42 [a]); citing **U.B.O. Realty Corp. v Mollica** (257 AD2d 460 [1st Dept 1999]).
Martin v Sandoval (46 Misc 3d 1216[A], 2015 NY Slip Op 50099[U] [Peekskill City Ct, R. Johnson, J.]) (the filing of an affidavit of service five days after personal service was not a jurisdictional defect even though RPAPL 735 [2] [a] provides that such filing must be made within three days after personal delivery; the "vast majority of courts and commentators are of the view that filing a late affidavit of service in a summary proceeding can be excused or granted nunc pro tunc relief"); see **Siedlecki v Doscher** (33 Misc 3d 18 [App Term, 2d, 11th & 13th Jud Dists 2011]) (while RPAPL 733 [1] requires that a petition be served at least five days before it is to be heard, and RPAPL 735 [2] provides that service by mail is complete upon the filing of proof of service, as the Second Department does not follow the "strict compliance" approach, the filing of proof of service in a summary proceeding is not jurisdictional in nature; thus, since no

prejudice resulted from the landlord's filing only four days before the return date, the defect should have been disregarded); contra **Riverside Syndicate, Inc. v Saltzman** (49 AD3d 402 [1st Dept 2008]) (since a summary proceeding is governed entirely by statute, with which there must be strict compliance, a landlord's failure to "complete" service by filing proof of service at least five days prior to the date the petitions were noticed to be heard, required dismissal); **Berkeley Assoc. Co. v DiNolfi** (122 AD2d 703 [1st Dept 1986]) (dismissing a petition "for lack of subject matter and personal jurisdiction" where the petition was returnable one day after the affidavit of service was filed); see also **Zot, Inc. v Watson** (20 Misc 3d 1113[A], 2008 NY Slip Op 51341[U] [Civ Ct, Kings County, S. Kraus, J.]) (since **Riverside Syndicate** is predicated on the First Department's rule of strict construction, it should not be followed in the Second Department, which holds that de minimis errors are to be overlooked); **Djokic v Perez** (22 Misc 3d 930 [Civ Ct, Kings County, G. Heymann, J., 2008]) (where the landlord filed proof of service four days before the petition was noticed to be heard, the failure to "complete service" at least five days before the petition was noticed to be heard was a de minimis defect which did not prejudice the tenant and did not warrant dismissal); see generally **Helfand v Cohen** (110 AD2d 751, 752 [2d Dept 1985]) ("the purpose of requiring filing of proof of service . . . pertains solely to the time within which a defendant must answer, and does not relate to . . . jurisdiction"); **Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C308:3** ("The only procedural consequence of a belated filing of proof of service is postponement of defendant's time to appear").

George Doulaveris & Son, Inc. v P.J. 37 Food Corp. (39 Misc 3d 1 [App Term, 2d, 11th & 13th Jud Dists 2013]) (where substituted service is made upon a person of suitable age and discretion, jurisdiction attaches when there has been both a delivery and a mailing; a mailing to "CTOWN" was not a curable defect under CPLR 2001 where there was no evidence that the respondent and "CTOWN" were the same entity; actual receipt of the papers is not dispositive of the efficacy of service); cf. **Ruffin v Lion Corp.** (15 NY3d 578 [2010]) (as a service defect relating to the residence of a process server has no effect on the likelihood of the receipt of service, it is a technical defect which may be disregarded under CPLR 2001).

Saccheri v Cathedral Props. Corp. (43 Misc 3d 20 [App Term, 9th & 10th Jud Dists 2014]) (notwithstanding the language in cases such as **Radlog Realty Corp. v Geiger** [254 App Div 352 (1938)] and **Warrin v Haverty** [149 App Div 564, 567 (1912)] that it is a jurisdictional prerequisite to the maintenance of a summary proceeding that the party sought to be removed be in possession at the time the proceeding is commenced, an objection that the respondent was not in possession at the time the proceeding was commenced does not implicate subject matter jurisdiction, which is conferred by constitution or statute alone, and would not support a CPLR 5015 [a] [4] motion); see **Woodlaurel, Inc. v Wittman** (163 AD2d 383 [2d Dept 1990]) (where a petition was brought in the name of the landlord's agent, in violation of RPAPL 721, the defect did

not implicate subject matter jurisdiction); but cf. **Nordica Soho LLC v Emilia, Inc.** (44 Misc 3d 76 [App Term, 1st Dept 2014]) (assuming, for purposes of the appeal, that a dispute as to whether a lease provision was a conditional limitation was sufficiently "jurisdictional" so as to be raiseable by post-judgment motion).

1129 N. Blvd., LLC v Astria Group, Inc. (43 Misc 3d 137[A], 2014 NY Slip Op 50704[U] [App Term, 9th & 10th Jud Dists]) (the tenant's post-commencement vacatur did not divest the court of jurisdiction); **Mauer-Bach Realty, LLC v Gomez** (43 Misc 3d 141[A], 2014 NY Slip Op 50845[U] [App Term, 1st Dept]); **Tricarichi v Moran** (38 Misc 3d 31 [App Term, 9th & 10th Jud Dists 2012]) (a surrender after commencement does not divest the court of jurisdiction, although it terminates the tenancy).

Rosquist v Richmond Senior Servs., Inc. (41 Misc 3d 14 [App Term, 2d, 11th & 13th Jud Dists 2013]) (while Real Property Law § 235 makes it a violation for a landlord to fail to provide services required by a lease, such as telephone service, under CCA 110, the Housing Part has jurisdiction to enjoin the landlord to provide only those services which are otherwise included in state laws "for the establishment and maintenance of housing standards," and could not enjoin the landlord to provide a ceiling fan or screen door); **Elshiekh v 76th St. Owners Corp.** (36 Misc 3d 139[A], 2012 NY Slip Op 51453[U] [App Term, 2d, 11th & 13th Jud Dists]) (in an HP proceeding, the court lacks jurisdiction to award a rent abatement).

77 Commercial Holding, LLC v Central Plastic, Inc. (46 Misc 3d 80 [App Term, 2d, 11th & 13th Jud Dists 2014]) (where an issue of jurisdiction is raised as one among other grounds for dismissal, the jurisdiction issue must be determined first; at a traverse hearing, the burden is on the petitioner to establish proper service; where the process server failed to appear at the hearing, it was error for the court to take judicial notice of the affidavit of service and to find that the affidavit established proper service [see CPLR 4531]; in any event, the manner of service was insufficient to satisfy the CPLR's requirements for an award of a money judgment); citing **Avgush v Berrahu** (17 Misc 3d 85 [App Term, 9th & 10th Jud Dists 2007]) (the standard for an award of possession of a default following nail and mail service is "reasonable application"; for a monetary award, it is "due diligence";) see **342 E. 67 Realty LLC v Jacobs** (106 AD3d 610 [1st Dept 2013]) (where an issue of personal jurisdiction is raised, it is improper to decide a motion to vacate a default judgment without first resolving this threshold issue); cf. **LaCarubba v Outdoors Clothing Corp.** (42 Misc 3d 136[A], 2014 NY Slip Op 50119[U] [App Term, 9th & 10th Jud Dists]) (the tenant's attorney's submission, at the commencement of trial, of an affidavit from the tenant's principal stating that the store manager who had accepted service was not authorized to do so, was insufficient to properly raise the issue of service, as the tenant failed to submit a written pretrial motion rebutting the affidavit of service or to produce a witness at trial to do so).

Parties and Standing

Ernest & Maryanna Jeremias Family Partnership, LP. v Sadykov (48 Misc 3d 8 [App Term, 2d, 11th & 13th Jud Dists 2015]) (under CPLR 321 [a]), a limited partnership must be represented by counsel, as it is a fictional entity and a type of voluntary association; however, the limited partnership was estopped from obtaining dismissal on this basis where it sought to have the proceeding dismissed only after losing at trial); cf. **Boente v Peter C. Kurth Off. of Architecture & Planning, P.C.** (113 AD3d 803, 804 [2d Dept 2014]) (since, pursuant to CPLR 321 [a], a corporation must appear by an attorney, a corporation's pro se answer was a nullity, and a default judgment should have been entered against the corporation); **Matter of Tenants Comm. of 36 Gramercy Park v New York State Div. of Hous. & Community Renewal** (108 AD3d 413 [1st Dept 2013]) (dismisses appeal by a voluntary association not represented by an attorney); **Michael Reilly Design, Inc. v Houraney** (40 AD3d 592 [2d Dept 2007]) (dismisses a motion by an LLC not represented by an attorney); see **Hilton Apothecary v State of New York** (89 NY2d 1024 [1997]) (dismissing a motion for leave to appeal by a corporation not represented by an attorney); but cf. **CCA 110 (l)** (a corporation may be represented in Housing Part by an officer, director or principal stockholder); **§§ 1809** and **1809-A** of the uniform court acts and **UJCA 501**.

Ronald Henry Land Trust v Sasmor (44 Misc 3d 51 [App Term, 2d, 11th & 13th Jud Dists 2014]) (a summary proceeding brought by an express trust would be dismissed for lack of capacity to sue; EPTL 7-2.1 [a] vests title to an express trust in the trustees, and the trustees did everything in their power to avoid disclosing their identities and appearing in the proceeding).

Visutton Assoc. v Fastman (44 Misc 3d 56 [App Term, 2d, 11th & 13th Jud Dists 2014]) (where the rent-stabilized tenancy of the estate of the deceased tenant was terminated based on a claim that the estate had permitted a distributee to occupy the apartment without the landlord's permission, the landlord's naming only the distributee as respondent required dismissal, as a lease is not terminated by the death of the tenant and, absent a surrender, the landlord could not proceed directly against the distributee but was required to sue the estate by suing an executor or administrator thereof); **Greenpoint Ave. Realty, LLC v Estate of Galasso** (18 Misc 3d 135[A], 2008 NY Slip Op 50208[U] [App Term, 2d & 11th Jud Dists]) (an estate is not a legal entity, and any action on behalf of or against the estate must be by or against the executor or administrator of the estate in his representative capacity; where a personal representative had been appointed prior to the substitution of the estate as a party and participated in the proceeding in that capacity, the defect in the notice of appeal would be overlooked and the personal representative deemed the appellant); see **Grosso v Estate of Gershonson** (33 AD3d 587 [2d Dept 2006]); cf. **Bender v Uys** (24 Misc 3d 130[A], 2009 NY Slip Op 51350[U] [App Term, 1st Dept]) (where there was a previously appointed executrix, the commencement of a proceeding in the name of the estate was a mere irregularity correctable by amendment).

Adelphi Assoc., LLC v Toruno (48 Misc 3d 126[A], 2015 NY Slip Op 50903[U] [App Term, 2d, 11th & 13th Jud Dist]) (where the landlord did not allege that it had terminated the tenancy or that the tenant had surrendered his interest, a licensee petition by the landlord against the tenant's daughter would be dismissed); **Convent Realty LLC v Smalo** (81429/13, Civ Ct, NY County, C. Gonzalez, J., Feb. 27, 2015) (where the tenant, who had an unexpired lease, was in a nursing home, a letter from her son stating that his mother was in a nursing home did not support the conclusion that the tenant intended to surrender her right to possession; thus, the tenant was a necessary party and the landlord's failure to name her in a licensee proceeding required dismissal); see **Extell Belnord LLC v Uppman** (113 AD3d 1 [1st Dept 2013]) (the tenant's death did not obviate the need to join a representative of his estate, as the estate is a necessary party to a proceeding to terminate a lease based on a breach); **935 E. Parkway L.P. v Kaplan** (NYLJ 1202611239271 [Civ Ct, Kings County 2013, M. Finkelstein, J.]) (absent a surrender by the tenants, the landlord could not maintain a licensee proceeding directly against the tenants' family members, even though the landlord claimed the tenants had abandoned); citing **170 W. 85 St. Tenants Assn. v Cruz** (173 AD2d 338, 339 [1st Dept 1991]) ("absent a surrender of possession by the [departed month-to-month] tenant . . . the lessor must obtain a judgment of possession against the lessee pursuant to RPAPL 711 and may not proceed directly against the undertenant, whether licensee, subtenant or occupant, pursuant to RPAPL 713"); cf. **Mitchell v Thompson** (21 Misc 3d 131[A], 2008 NY Slip Op 52125[U] [App Term, 9th & 10th Jud Dists]) (if a tenant has not abandoned or surrendered his interest, a proceeding cannot be brought by the landlord directly against the undertenants; rather, the tenant's interest must first be terminated and the tenant made a party to the proceeding; if there is an issue as to whether the tenant has abandoned his interest, the tenant should be made a party); **Valley Dream Hous. Co. v Lupo** (11 Misc 3d 130[A], 2006 NY Slip Op 50303[U] [App Term, 9th & 10th Jud Dists]) (in the absence of a surrender, a Section 8 landlord could not bring a licensee proceeding directly against the daughter of the Section 8 tenant, who had removed to a nursing home); **Stahl Assoc. Co. v Goodstadt** (NYLJ, Jan. 13, 1984 [App Term, 1st Dept]) (the landlord could not maintain a licensee proceeding against the stepdaughter of the tenant, whose lease had not expired, without joining the tenant, even though the landlord claimed that the tenant had removed from the premises); **Triborough Bridge and Tunnel Auth. v Wimpfheimer** (163 Misc 2d 412 [Civ Ct, NY County 1994, M. Stallman, J.], mod on other grounds 165 Misc 2d 584 [App Term, 1st Dept 1995]) (in a holdover proceeding based on the termination of a month-to-month tenancy, the landlord could not proceed directly against the subtenant); cf. also **Starrett City, Inc. v Smith** (25 Misc 3d 42 [App Term, 2d, 11th and 13th Jud Dists 2009]) (a tenant who abandons, leaving someone else in the apartment, is not a necessary party to a proceeding to remove the occupant); **Marine Terrace Assoc. v Kesoglides** (24 Misc 3d 35 [App Term, 2d, 11th & 13th Jud Dists 2009]) (where the lease of the deceased Section 8 tenant had expired, the tenant's estate was not a necessary party).

Crossroads Assoc., LLC v Amenya (47 Misc 3d 1216[A], 2015 NY Slip Op 50637[U] [Peekskill City Ct, R. Johnson, J.]) (the tenant's children were not necessary parties to a holdover proceeding); citing **Loira v Anagnastopoulos** (204 AD3d 608 [2d Dept 1994]); see also **FS 45 Tieman Place, LLC v Gomez** (38 Misc 3d 135[A], 2013 NY Slip Op 50132[U] [App Term, 1st Dept]) (where the rent-stabilized tenant never surrendered possession, any occupancy rights that her daughter had were subordinate and the daughter was not a necessary party to the nonprimary-residence proceeding).

Halle Realty Co. v Abduljaami (42 Misc 3d 148[A], 2014 NY Slip Op 50390[U] [App Term, 1st Dept]) (proof of ownership is not required, as a "landlord or lessor" may maintain the proceeding; an award to the landlord of possession and attorney's fees would not be disturbed, as the tenant's post-petition payment of the arrears precluded the tenant from challenging the petitioner's right to maintain the proceeding and to recover attorney's fees); **Tacfield Assoc. v Davis** (43 Misc 3d 129[A], 2014 NY Slip Op 50531[U] [App Term, 2d, 11th & 13th Jud Dists]) (where the proof showed that the tenants had recognized the petitioner as their landlord, the petitioner could maintain a nonpayment proceeding, as, pursuant to RPAPL 721 [1], a "landlord or lessor" is entitled to maintain a summary proceeding); **Sedgwick Ave. Realty Assoc., L.L.C. v Torres** (38 Misc 3d 1212[A], 2013 NY Slip Op 50080[U] [Civ Ct, Bronx County, A. Lehrer, J.]) (an owner or lessor has standing to maintain a summary proceeding).

Dovie Realty, LLC v Gordon (2014 NY Slip Op 75882[U] [App Term, 2d, 11th & 13th Jud Dists]) (dismissing the appeal and vacating the holdover final judgment, as the death of the rent-stabilized tenant prior to the completion of the trial divested the court of jurisdiction to conduct any proceedings until a proper substitution had been made); see **CPLR 1015 (a)** ("If a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties"); **Republic Wash., LLC v Webb** (2013 NY Slip Op 83222[U] [App Term, 2d, 11th & 13th Jud Dists]) (the death of the tenant prior to the making of a motion divested the court of jurisdiction until a proper substitution was made).

Jamsol Realty, LLC v German (46 Misc 3d 11 [App Term, 2d, 11th & 13th Jud Dists 2014]) (upon being advised by the tenant's counsel that the tenant was an adult incapable of protecting her own rights, the court had a duty to determine if this were the case and, if so, to appoint a GAL; where a GAL is not appointed for a person who needs one, any proceedings adverse to that person are subject to vacatur); **896A LF, LLC v Vong** (2014 NY Slip Op 76052[U] [App Term, 2d, 11th & 13th Jud Dists]) (where the record established that the tenant was an adult incapable of protecting his own rights and no GAL had been appointed, the order appealed from by the tenant and the underlying default judgment would be vacated); **1150 Brighton Co. v Persits** (2014 NY Slip Op 76042[U] [App Term, 2d, 11th & 13th Jud Dists]) (where the undertenant-appellant, who claimed succession rights, was an adult incapable of defending his rights

and had not appeared by a GAL, the appeal would be dismissed and the final judgment vacated); see **Sarfaty v Sarfaty** (83 AD2d 748 [4th Dept 1981]) (where a plaintiff is on notice that the defendant is under a mental disability, it is his burden to bring that fact to the court's attention for the court to determine whether a GAL should be appointed; when a plaintiff fails to meet this burden, a default judgment will be vacated); see also **CPLR 1201, 1202 (c)** (order appointing a GAL not effective until the required consent and affidavit have been filed).

KBF Related Amsterdam Partners v Glasser (38 Misc 3d 136[A], 2013 NY Slip Op 50134[U] [App Term, 1st Dept]) (the petitioner was authorized, under CPLR 1018, to continue the nonpayment proceeding even after the transfer of its ownership).

Priegue v Paulus (43 Misc 3d 135[A], 2014 NY Slip Op 50662[U] [App Term, 9th & 10th Jud Dists]) (a notice of appeal by a pro se on behalf of himself and another was valid only as to the pro se, since a non-attorney is not authorized to appear on behalf of another); **2638 Tenants Corp. v Pabst** (39 Misc 3d 1207[A], 2013 NY Slip Op 50518[U] [Civ Ct, NY County, S. Kraus, J.]) (stipulations by an undertenant purportedly on behalf of himself and the tenant were valid only as against the undertenant, and the tenant's motion to vacate the stipulations as against him would be granted, as a power of attorney does not give a non-attorney authority to appear on behalf of the principal); **Parkchester Preserv. Co. v Feldeine** (31 Misc 3d 859 [Civ Ct, Bronx County 2011, S. Kraus, J.]) (where a person who resided in the apartment entered into a stipulation with purported authority from the tenant, the stipulation did not bind the tenant, as a lay person cannot appear on behalf of a party); citing, inter alia, **91 E. Main St. Realty Corp. v Angelic Creations by Lucia** (24 Misc 3d 25 [App Term, 9th & 10th Jud Dists 2009]) (a person with a power of attorney cannot appear on behalf of a party).

800 Ocean Ave., Inc. v Juarez (39 Misc 3d 147[A], 2013 NY Slip Op 50858[U] [App Term, 2d, 11th & 13th Jud Dists]) (where an occupant established that he was in possession and that the landlord was aware of his presence and did not make him a party to the nonpayment proceeding, the warrant would be stayed); **Linden Lefferts, LLC v Cox** (31 Misc 3d 84 [App Term, 2d, 11th & 13th Jud Dists 2011]) (an occupant claiming possession and a right to possession should have been permitted to intervene, as RPAPL 743 permits "any person in possession or claiming possession" to answer, and the occupant raised a triable issue as to whether there had been an affirmative recognition by landlord and its predecessors of his tenancy).

LaCarubba v Outdoors Clothing Corp. (42 Misc 3d 136[A], 2014 NY Slip Op 50119[U] [App Term, 9th & 10th Jud Dists]) (since a summary proceeding lies only against those in actual or constructive possession, an assignor of a lease who is not in possession is not a necessary [or proper] party in a summary proceeding); **C & D Car Wash, Inc. v Mroczkowski** (94 AD3d 935 [2d Dept 2012] (an assignor of the lease was not a necessary party to a summary proceeding); citing, inter alia, **Park Prop. Dev. v**

Santos (1 Misc 3d 16 [App Term, 2d & 11th Jud Dists]) (since NYCHA is not in possession, it is not a proper party respondent against whom a judgment for rent can be entered in a summary proceeding, even if the Williams consent decree requires that NYCHA be joined for the purposes of notice and of providing a defense for the tenant).

575 Warren St. HDFC v Barreto (41 Misc 3d 141[A], 2013 NY Slip Op 52019[U] [App Term, 2d, 11th & 13th Jud Dists) (an occupant lacked standing to challenge service of the predicate notices and petition on the tenant, since such a claim is personal in nature); see **Chelsea 139, LLC v Saunders** (32 Misc 3d 140[A], 2011 NY Slip Op 51572[U] [App Term, 1st Dept]).

46 Downing St. LLC v Thompson (44 Misc 3d 143[A], 2014 NY Slip Op 51401[U] [App Term, 1st Dept]) (the tenant's efforts to appear and his incarceration provided a reasonable excuse for his default), affg (41 Misc 3d 1018 [Civ Ct, NY County 2013, S. Kraus, J.]) (where the incarcerated tenant attempted to respond to the proceeding and to be produced, incarceration was an adequate excuse for his default; the tenant was denied due process by the court's failure to appoint a GAL for him).

Contents of Petition

Lincoln Mercury Holding Co., LLC v Magee (42 Misc 3d 136[A], 2014 NY Slip Op 50122[U] [App Term, 9th & 10th Jud Dists]) (separately possessed properties cannot be recovered in a single proceeding); **First Central Sav. Bank v Yglesia** (37 Misc 3d 130[A], 2012 NY Slip Op 51969[U] [App Term, 9th & 10th Jud Dists]) (where the proof showed that the subject house was the residence of three families living independently of each other, with each unit having its own entrance, kitchen and bathroom, the petitioner was required to maintain a separate proceeding to recover each unit).

270 E. 95 Props., LLC v Kent (__ Misc 3d __, 2015 NY Slip Op 25254 [App Term, 2d, 11th & 13th Jud Dists]) (where the stabilized tenant missed a rent payment in 2009, the landlord was not within its rights in applying the tenant's subsequent monthly payments, which were clearly intended to be rent payments, toward claimed legal and late fees, which are not rent; where the bulk of the arrears sought in the petition were for these non-rent items and were not identified as such, the petition would be dismissed); citing **L&T E. 22 Realty Co. v Earle** (192 Misc 2d 75 [App Term, 2d & 11th Jud Dists 2002]) (where it was clear that a DSS payment was intended for December rent, even if not so earmarked, the landlord could not apply the payment to other arrears).

Kabir v Limbert (47 Misc 3d 147[A], 2015 NY Slip Op 50758[U] [App Term, 2d, 11th & 13th Jud Dists]) (a petition in an RPAPL 713 [5] proceeding alleging that the tenant had entered into possession pursuant to an oral rental agreement with the former owner, in which the tenant claimed that she had a rent-stabilized lease, would be dismissed where the landlord acknowledged knowing about the lease but claimed that it was invalid, as the petition contained fundamental omissions and misstatements and did not

adequately put the court and the tenant on notice that the petitioner was claiming that the lease was invalid because it had been executed after a notice of pendency and judgment of foreclosure had been entered); **Brookwood Coram I, LLC v Oliva** (47 Misc 3d 140[A], 2015 NY Slip Op 50607[U] [App Term, 9th & 10th Jud Dists]) (as a petition must set forth the interest of the tenant and the facts upon which the proceeding is based, including the tenant's rent-regulatory status, a petition which did not allege that the tenant was a recipient of Section 8 benefits nor set forth the landlord's claim that this did not subject the tenancy to Section 8 regulations because the landlord never signed the HAP contract, would be dismissed as it contained fundamental omissions); **287 Realty Corp. v Livathinos** (38 Misc 3d 146[A], 2013 NY Slip Op 50308[U] [App Term, 2d, 11th & 13th Jud Dists]) (where there was a long history of dealings between the parties and one of the occupants was a party to a partnership agreement that made him a 50% owner of petitioner, a barebones petition alleging that occupants were licensees did not state the ultimate facts and was not reasonable under the attendant circumstances); **Park Props. Assoc., L.P. v Williams** (38 Misc 3d 35 [App Term, 9th & 10th Jud Dists 2012]) (granting the tenant's motion to vacate a stipulation settling a holdover proceeding where the petition failed to allege that the building receives a project-based Section 8 subsidy; where a tenancy is subject to a specific type of regulation, the petition must set forth the regulatory status because the status may determine the scope of the tenant's rights; while this type of defect may be overlooked where there is no prejudice, here the stipulation may have been the product of the tenant's attorney's lack of knowledge of the fact that the tenant stood to lose a Section 8 subsidy); **Cintron v Pandis** (34 Misc 3d 152[A], 2012 NY Slip Op 50309[U] [App Term, 9th & 10th Jud Dists]) (a petition must set forth the ultimate facts upon which the proceeding is based, including the tenant's regulatory status, as this may determine the scope of the tenant's rights; a petition which failed to allege that the premises was a mobile home regulated under Real Property Law § 233 and to explain how the tenant allegedly became a month-to-month tenant contained fundamental omissions requiring dismissal); cf. **631 Edgecombe LP v Fajardo** (39 Misc 3d 143[A], 2013 NY Slip Op 50779[U] [App Term, 1st Dept]) (a nonpayment petition which misstated the rent-stabilized status of the apartment should not have been dismissed, as the misstatement was not deliberate, having apparently resulted from uncertainty as to the retroactive application of Roberts, and did not rise to the level of a jurisdictional defect); **Paikoff v Harris** (185 Misc 2d 372 [App Term, 2d & 11th Jud Dists 1994]) (a misstatement in a holdover petition that the tenants were not "nonpurchasing tenants" entitled to protection under the Martin Act did not provide a basis for dismissal where the tenants were prepared to litigate their status and were not prejudiced by the misstatement); cf. also **Najjar v Cooper** (35 Misc 3d 129[A], 2012 NY Slip Op 50629[U] [App Term, 2d, 11th & 13th Jud Dists]) (denying a tenant's motion to dismiss a petition which gave the address of the premises but not the apartment number and granting the landlord's cross motion to amend the petition, as the defect was not jurisdictional).

Petition: Relief Sought

RPAPL 741 (5) ("The relief may include a judgment for rent due, and . . . for the fair value of use and occupancy . . ."); see **Seminole Hous. Corp. v M&M Garages** (47 AD2d 651 [2d Dept 1975], affg 78 Misc 2d 762 [App Term, 2d & 11th Jud Dists 1974]) (prior to the 1976 amendment, the language of RPAPL 741 [5] precluded a holding that use and occupancy was recoverable in a summary proceeding; to avoid "circuity of actions," the statute should be amended to permit such recovery where the petition so demands and the notice of petition gives notice to that effect).

36 Main Realty Corp. v Wang Law Office, PLLC (__ Misc 3d ___, 2015 NY Slip Op 25279 [App Term, 2d, 11th & 13th Jud Dists 2015]) (in a commercial nonpayment proceeding to recover January 2013 rent, the Civil Court properly allowed the landlord to amend the petition at trial to include the May 2013 rent; while a rent demand is a condition precedent to the commencement of a nonpayment proceeding under RPAPL 711 [2], the power to fix the rent due flows from RPAPL 741 [5] and RPAPL 747 [4]; indeed, the legislature has required the payment of post-commencement rent without a new demand [RPAPL 745 (2)], and it is the established practice to allow the amendment absent prejudice); **Bldg Mgt. Co., Inc. v Benmen** (36 Misc 3d 1225[A], 2012 NY Slip Op 51476[U] [Civ Ct, NY County, S. Kraus, J.]) (since RPAPL 741 [5] provides that a petition may include a demand for rent due, there is no basis to limit the award to the amount sought in the petition; the Appellate Term, First Department's decision in **1587 Broadway Rest. Corp. v Magic Pyramid** has been superseded by its decisions in **CF Monroe v Nemeth** [NYLJ, Oct. 25, 1994] and **GSL Enters., Inc. v Newlinger** [NYLJ, May 24, 1996], which allowed the amendment of petitions to include rent to the date of trial, without requiring a further demand); **JDM Washington St., LLC v 90 Washington Rest. Assoc., LLC** (36 Misc 3d 769 [Civ Ct, NY County 2012, P. Moulton, J.]) (the holding in **1587 Broadway Rest. Corp.** is contrary to the common practice in the Civil Court, and did not involve a motion to conform the pleadings to the proof; absent clear statutory or appellate authority, the court would not read into the RPAPL, which provides only for a single rent demand, a requirement for updated demands); but see **RCPI Landmark v Chase Lake Mgt. Servs., LLC** (32 Misc 3d 405 [Civ Ct, NY County, A. Bluth, J., 2011]) (where a demand was for rent through January, a petition which included February rent was fatally defective, as leave to amend had not been sought; leave to amend requires a showing of an additional demand); citing **1587 Broadway Rest. Corp. v Magic Pyramid** (NYLJ, Dec. 19, 1979 [App Term, 1st Dept]) (a motion to amend the petition to include rent that accrued after the service of the rent demand was properly denied, but the landlord would be granted leave to renew the motion upon a proper showing of a demand for the after-accruing rent); followed in **501 Seventh Ave. Assoc. v 501 Seventh Ave. Bake Corp.** (2002 NY Slip Op 50362[U] [Civ Ct, NY County, C. Kern, J.]) and **Walsam Fifth Ave. Dev. Co. v Lions Gate Capital Corp.** (163 Misc 2d 1071 [Civ Ct, NY County 1995, R. Braun, J.]).

Saccheri v Cathedral Props. Corp. (43 Misc 3d 20 [App Term, 9th & 10th Jud Dists 2014]) (the District Court's jurisdiction in summary proceedings, regarding the relief which can be granted to a petitioner, is limited to possession, rent, and use and occupancy; in a lock-out proceeding, the court lacks jurisdiction to award the petitioner attorney's fees); see **Eze v Spring Cr. Gardens** (85 AD3d 1102 [2d Dept 2011]) (in a summary proceeding, the Civil Court lacks jurisdiction over a cause of action for treble damages); **Rostant v Swersky** (79 AD3d 456 [1st Dept 2010]) (same); **Grant Forbell, L.P. v Macias** (21 Misc 3d 133[A], 2008 NY Slip Op 52175[U] [App Term, 2d & 11th Jud Dists]); (same); **Saccheri v Cathedral Props. Corp.** (16 Misc 3d 111 [App Term, 9th & 10th Jud Dists 2007]) (same); see also **Pied-A-Terre Networks Corp. v Porto Resources, LLC** (33 Misc 3d 126[A], 2011 NY Slip Op 51757[U] [App Term, 1st Dept]).

33 Fifth Ave. Owners Corp. v 33 Fifth Endo, LLC (47 Misc 3d 154[A], 2015 NY Slip Op 50850[U] [App Term, 1st Dept]) (dismissing a nonpayment proceeding seeking co-op sublet surcharges, as the surcharges were not rent); see **Matter of Bedford Gardens v Silberstein** (269 AD2d 445 [2d Dept 2000]) (since surcharges imposed were not rent, the Civil Court lacked jurisdiction to award them); cf. **Riverbay Corp. v Carrey** (29 Misc 3d 855 [Civ Ct, Bronx County 2010, S. Kraus, J.]) (where a Mitchell-Lama occupancy agreement provided that income-related surcharges would "be deemed to be additional carrying charges due", the income-related surcharges were rent, but surcharges imposed for noncompliance with income verification procedures were a penalty and not recoverable in a summary proceeding).

Riverview II Preserv., L.P. v Brice-Frazier (47 Misc 3d 134[A], 2015 NY Slip Op 50484[U] [App Term, 9th & 10th Jud Dists]) (since the tenant received a Section 8 subsidy, an agreement providing for the recovery of electricity charges as additional rent was unenforceable, as the tenant's rent could not exceed 30% of her monthly adjusted income; thus, the court lacked jurisdiction over the nonpayment proceeding); **Fairview Hous., LLC v Wilson** (38 Misc 3d 128[A], 2012 NY Slip Op 52385[U] [App Term, 9th & 10th Jud Dists]) (attorney's fees cannot be considered "additional rent" as against a Section 8 tenant even where the lease so provides).

Evans v Tracy (34 Misc 3d 152[A], 2012 NY Slip Op 50307[U] [App Term, 9th & 10th Jud Dists]) (while arrears could properly be awarded upon the tenant's admission that they were owed, it was error to award the landlord attorney's fees where the landlord failed to submit the lease into evidence to establish his entitlement to those fees); **Saunders St. Owners, Ltd. v Broudo** (32 Misc 3d 135[A], 2011 NY Slip Op 51459[U] [App Term, 2d, 11th & 13th Jud Dists]) (the landlord was not entitled to summary judgment in a nonpayment proceeding where neither the pleadings nor the stipulated facts established that the sublet fees sought were deemed additional rent); **Hines v Ambrose** (26 Misc 3d 144[A], 2010 NY Slip Op 50442[U] [App Term, 9th & 10th Jud Dists]) (since a security deposit is not "rent" and not within the jurisdiction of the court in a summary proceeding, a consent final judgment which included the amount of the

security deposit would be vacated); **Henry v Simon** (24 Misc 3d 132[A], 2009 NY Slip Op 51369[U] [App Term, 9th & 10th Jud Dists]) (where a lease provision does not deem attorney's fees additional rent, the fees are not recoverable in a summary proceeding); **Peekskill Hous. Auth. v Quaintance** (20 Misc 3d 57 [App Term, 9th & 10th Jud Dists 2008]) (to be entitled to an award of attorney's and other fees, a landlord must establish, by submitting a copy of the lease, that the lease deems the fees additional rent); **Expressway Vil., Inc. v Denman** (26 Misc 3d 954, 960 [Niagara County Ct 2009]) ("in order to secure a money judgment for attorney's fees and other incidental expenses beyond traditional rent owed, the petitioner must demonstrate that there was a contractual basis for recovery of such damages *as rent*. This is because RPAPL only authorizes recovery . . . of the physical property and 'rent' owed"); **Bldg. Mgt. Co. Inc. v Bonifacio** (25 Misc 3d 1233[A], 2009 NY Slip Op 52398[U] [Civ Ct, NY County, G. Lebovits, J.]) (since washing-machine and extermination fees cannot be considered rent in a rent-stabilized context, the court lacks jurisdiction over a claim for these fees in a summary proceeding); cf. **Fifth & 106th St. Assoc. v Harris** (37 Misc 3d 128[A], 2012 NY Slip Op 51911[U] [App Term, 1st Dept]) (awarding a tenant a money judgment for attorney's fees even though the lease did not expressly denominate the attorney's fees as "rent"; interest on the award of attorney's fees set at midpoint between the date the holdover proceeding was dismissed and the date of the judgment for attorney's fees); **167-169 Allen St. HDFC v Franklin** (28 Misc 3d 136[A], 2010 NY Slip Op 51426[U] [App Term, 1st Dept]) (an award of attorney's fees to an HDFC was properly in the form of a nonpossessory monetary award since "rent" as defined in the applicable federal statute, "the charges under the occupancy agreements," "cannot be read so broadly as to encompass a nonrent item of inchoate amount such as attorney's fees").

C.H.T. Place, LLC v Rios (36 Misc 3d 1 [App Term, 2d, 11th & 13th Jud Dists 2012]) (the landlord's inclusion in its holdover petition of a demand for arrears which included electricity submetering charges, which charges cannot be deemed "rent" in a rent-stabilized tenancy, did not render the petition jurisdictionally defective or provide a basis for vacating a stipulation settling the proceeding, where the stipulation did not award the landlord judgment for the electricity charges but merely provided that the tenants would cure their breach by paying the charges in installments); cf. **Related Tiffany v Faust** (191 Misc 2d 528 [App Term, 2d & 11th Jud Dists 2002]) (under the RSC, utility charges may not be considered "rent" and lease clauses deeming them additional rent are unenforceable); **Greater Allen Affordable Hous. v Martinez** (NYLJ 1202627012881 [Civ Ct, Queens County, Oct. 18, 2013, M. Pinckney, J.]) (a tenant who failed to pay submetered electric charges to the landlord was not in substantial violation of a lease provision requiring that the tenant pay electric charges to the utility company); cf. also **Tacfield Assoc., LLC v Dalton** (37 Misc 3d 843 [Civ Ct, Kings County 2012, G. Marton, J.]) (a DHCR order allowing the landlord to switch to submetering did not amend a lease provision requiring the tenant to pay for utilities; thus, the tenant's failure to pay the landlord was not a breach of a substantial obligation of the lease).

Satchell v Nickelson (39 Misc 3d 217 [Civ Ct, Kings County 2013, G. Marton, J.]) (where the tenant was removed by the landlord changing the locks, she could not be restored to possession upon a motion in the holdover proceeding, but was required to maintain her own proceeding, as the court's authority to restore a tenant in a landlord's proceeding is an incident of its power to vacate its own judgments; the tenant's motion to be restored could not be deemed a petition); citing **Ric-Mar Equity Ventures v Murell** (184 Misc 2d 298 [App Term, 2d & 11th Jud Dists 2000]).

133 Plus 24 Sanford Ave. Realty Corp. v Xiu Lan Ni (47 Misc 3d 55 [App Term, 2d, 11th & 13th Jud Dists 2015]) (as injunctive relief is generally not available in the Civil Court, the court lacked authority to direct the commercial tenant to procure a certificate of occupancy and to direct the landlord to allow the tenant access to the basement and to present monthly bills to the tenant; as the Civil Court generally lacks authority to issue declaratory judgments, the court's determinations as to amounts due and as to the continuation of the lease, which were not part of a final judgment, were also unauthorized); **Waxman v Pattabe, Inc.** (42 Misc 3d 142[A], 2014 NY Slip Op 50221[U] [App Term, 2d, 11th & 13th Jud Dists]) (Civil Court was without jurisdiction to issue an order, in a holdover proceeding, permanently enjoining the tenant from removing a coal oven from the premises, as, with certain limited exceptions, local courts may not grant injunctive relief); **Tobin v Bearro, Inc.** (31 Misc 3d 127[A], 2011 NY Slip Op 50446[U] [App Term, 2d, 11th & 13th Jud Dists]) (where a so-ordered stipulation included provisions requiring injunctive power to enforce, such as directing discontinuances of other actions and execution of releases, enforcement of the stipulation could not be had in the Civil Court); but cf. **952 Assoc., LLC v Palmer** (52 AD3d 236 [1st Dept 2008]) (where the tenant stipulated to the entry of a judgment of eviction and to vacate the premises in exchange for $550,000, the Housing Part had subject matter jurisdiction, pursuant to CPLR 5221, to compel compliance with this stipulation; once such jurisdiction is established, the Civil Court could, pursuant to CCA 212, hear related matters, such as the landlord's cross motion to disgorge disputed funds); cf. also **Alphonse Hotel Corp. v Roseboom** (29 Misc 3d 34 [App Term, 1st Dept 2010]) (although the Civil Court has narrow equitable powers, it has inherent authority to control the attorneys appearing before it, including authority to supervise the charging of fees for legal services and to require an attorney to turn over a client's file).

Answer

Forest Hills S. Apts., LLC v Lynch (42 Misc 3d 148[A], 2014 NY Slip Op 50398[U] [App Term, 2d, 11th & 13th Jud Dists]) (it was error for the court, upon granting the landlord's application to discontinue a holdover proceeding based on ceiling-fan noise, to relegate the tenant's counterclaim for attorney's and expert-witness fees to a plenary action; while New York does not have a mandatory counterclaim rule, the tenant's counterclaim was properly subject to adjudication in the summary proceeding, as the ultimate outcome of the fan-noise issue had been reached); cf. **Engel v Wolfson** (38

Misc 3d 17 [App Term, 2d, 11th & 13th Jud Dists 2012]) (as a tenant's counterclaim for the attorney's fees he had incurred in a prior proceeding by the previous owner was not related to the current landlord's summary proceeding, it was not within the jurisdiction granted to the Housing Part by CCA 110); **Halberstam v Kramer** (39 Misc 3d 126[A], 2013 NY Slip Op 50408[U] [App Term, 2d, 11th & 13th Jud Distsl]) (a counterclaim for damages for emotional distress is not within the jurisdiction of the Housing Part); **Town Mgt. Co. v Leibowitz** (38 Misc 3d 17 [App Term, 2d, 11th & 13th Jud Dists 2012]) (although RPAPL 743 permits a tenant to interpose any legal counterclaim, the Housing Part is not authorized under CCA 110 to hear tort counterclaims for damages and such counterclaims should be severed without passing on their merits); **374 E. Parkway Common Owners Corp. v Albernio** (32 Misc 3d 1240[A], 2011 NY Slip Op 51654[U] [Civ Ct, Kings County, A. Fiorella, J.]) (a tenant who interposed an unrelated counterclaim for intentional infliction of emotional distress waived any objection to personal jurisdiction; as the Housing Part is not the appropriate forum for a tort cause of action, the failure to interpose such a counterclaim would have no preclusive effect); cf. also **354 E. 66th St. Realty Corp. v Curry** (40 Misc 3d 20 [App Term, 1st Dept 2013]) (the splitting doctrine would not prevent a tenant from recovering the attorney's fees he incurred in a prior summary proceeding where the prior determination did not constitute the ultimate outcome of the succession issue).

1234 Broadway, LLC v Kai Huang (44 Misc 3d 1 [App Term, 1st Dept 2014]) (in a licensee proceeding to recover combined SRO units following the tenant's death, where the named respondents failed to comply with discovery orders and, after four years of litigation, stipulated to surrender their possessory claims, a motion by proposed intervenors, relatives of the respondents, for leave to interpose an answer asserting that they had lived in the units and were permanent tenants should have been denied in the absence of a reasonable excuse for the delay, in view of their awareness for four years of the proceeding; a proposed intervenor's claim that she believed the respondents' counsel would protect her interests was not a reasonable excuse).

Nonpayment Proceedings

Hernco, LLC v Hernandez (46 Misc 3d 137[A], 2015 NY Slip Op 50062[U] [App Term, 2d, 11th & 13th Jud Dists]) (a nonpayment proceeding may be brought against a month-to-month tenant based on a three-day, rather than a 30-day, notice); citing **Nadeau v Tuley** (160 AD2d 1130 [3d Dept 1990]) (where a month-to-month tenant defaults in rent, the tenancy may be terminated on a three-day rent notice); **Priegue v Paulus** (43 Misc 3d 135[A], 2014 NY Slip Op 50662[U] [App Term, 9th & 10th Jud Dists]) (a nonpayment proceeding may be brought against month-to-month tenants); **Tricarichi v Moran** (38 Misc 3d 31 [App Term, 9th & 10th Jud Dists 2012]) (a nonpayment proceeding is maintainable against a month-to-month tenant; Real Property Law § 232-c abolishes the rule that a landlord may elect to hold a holdover tenant for a new term only where the term of the tenancy is longer than one month, and the term of a month-to-month tenancy is one month; Real Property Law § 233-b continues to require that,

outside New York City, a tenant give one month's notice to terminate a month-to-month tenancy; a rent demand and the commencement of a nonpayment proceeding constitute an election by the landlord to treat the holdover tenant as a tenant for another month); disagreeing with **1400 Broadway Assoc. v Lee & Co. of NY** (161 Misc 2d 497 [Civ Ct, NY County 1994, M. Stallman, J.]); (a nonpayment proceeding cannot be maintained against a month-to-month tenant who fails to pay rent, as there is no longer a meeting of the minds); see also **Krantz & Philips, LLP v Sedaghati** (2003 NY Slip Op 50032[U] [App Term, 1st Dept]).

300 E. 85th Hous. Corp. v Dropkin (84231/2013, July 24, 2014 [Civ Ct, NY County, J. Stoller, J.]) (in a nonpayment proceeding, it is the landlord's burden to prove the amount of the monthly rent; where the proprietary lease did not state an amount but provided that the rent would be the tenant's proportionate share of the landlord's cash requirements, the landlord could not satisfy its burden by showing repeated payment of the same amount since there was no pattern of repeated payments); cf. **239 Troy Ave., LLC v Langdon** (38 Misc 3d 141[A], 2013 NY Slip Op 50221[U] [App Term, 2d, 11th & 13th Jud Dists]) (in a nonpayment proceeding seeking monthly rent of $800, the tenant's submission of his rent bills for the four years prior to the commencement of the proceeding showing that had been billed $100 per month and his sworn averment that landlord's predecessor had accepted his payments in that amount warranted summary judgment dismissing the petition); citing **BPIII-548 W. 164 St. LLC v Garcia** (95 AD3d 428 [1st Dept 2012]) (awarding summary judgment to a SCRIE tenant who claimed, as a preferential rent, that his share of the rent was to be capped at $358 for the life of the lease, where the uncontroverted evidence, including the course of conduct between the tenant and the prior landlord, who had continued to accept $358 per month from the tenant even after the tenant transferred apartments, established the existence of such an agreement); **Gordon v Baez** (NYLJ, Jan. 10, 2002 [App Term, 2d & 11th Jud Dists]) (proof of 12 rent checks in the amount of $200 paid to the landlord's predecessor supported a finding of an agreement to pay $200 per month).

Dino Realty Corp. v Khan (46 Misc 3d 71 [App Term, 2d, 11th & 13th Jud Dists 2014]) (where the tenant was unable to comply with a nonpayment stipulation because the landlord refused to provide a W-9 form required by Catholic Charities, good cause was shown to vacate the warrant, as the law abhors a forfeiture; it is the policy of the state to prevent unnecessary evictions; New York City prohibits discrimination based on any lawful source of income; and the landlord proffered no reason for its refusal); citing **Monastery Manor v Donati** (28 Misc 3d 133[A], 2010 NY Slip Op 51335[U] [App Term, 9th & 10th Jud Dists]) (where, in a nonpayment proceeding against a Section 8 tenant, the tenant had obtained a commitment from DSS to pay the unpaid rent but the landlord refused to provide a W-9 form and tax identification number, good cause was shown to vacate the warrant, as the federal regulations provide that landlords shall not interfere with the efforts of tenants to obtain rent subsidies).

PCMH 2950 Grand Concourse v Jones (62655/13 [Civ Ct, Bronx County, L. Stroth, J. July 3, 2014]) (in a nonpayment by a nonprofit specializing in housing people with mental illness against a rent-stabilized tenant who received a Section 8 voucher, where the tenant's grandson began living with the tenant pursuant to a Family Court order and the tenant received a DSS shelter allowance for the grandson, the landlord was not within its rights in refusing to cash the tenant's and DSS's checks on the ground that it suspected that the public assistance had been obtained fraudulently and the grandson was an unauthorized occupant, and the landlord could not maintain a nonpayment proceeding after refusing the tendered rent); **Windemere Owners, LLC v Mullu** (2013 NY Slip Op 31714[U] [Civ Ct, NY County, S. Kraus, J.]) (where the landlord refused the occupant's tenders, claiming the occupant was not a tenant, the landlord could not thereafter maintain a nonpayment proceeding for the refused rent); citing **16 Apt. Assoc., Inc. v Lewis** (24 Misc 3d 127[A], 2009 NY Slip Op 51265[U] [App Term, 9th & 10th Jud Dists]) (where the landlord wrongfully refused to accept DSS checks, it could not maintain a nonpayment proceeding for the refused rent); cf. **2720 LLC v White** (35 Misc 3d 1236[A], 2012 NY Slip Op 51023[U] [Civ Ct, Bronx County, S. Weissman, J.]) (where the landlord refused to supply a W-9 form so that the tenant could receive the rental arrears from charitable organizations, the landlord was permanently estopped from seeking the arrears); but cf. **Mengoni v Gleason** (29 Misc 3d 130[A], 2010 NY Slip Op 51819[U] [App Term, 1st Dept]) (a landlord who refused to accept the tenant's tender of rent fixed in a DHCR reduction order during the pendency of the landlord's challenge to the order was nevertheless entitled to a nonpossessory judgment as the landlord's refusal did not by itself establish an intent to manipulate the tenant so that the tenant would be unable to pay the arrears).

Mornaghi, LLC v Britton (48 Misc 3d 132[A], 2015 NY Slip Op 51063[U] [App Term, 9th & 10th Jud Dists]) (an oral demand is sufficient under RPAPL 711 [2]).

Charles C. Goldman, LLC v Kassab (43 Misc 3d 135[A], 2014 NY Slip Op 50669[U] [App Term, 1st Dept]) (grants summary judgment to the landlord in a nonpayment proceeding, based on the landlord's proof, including its rent ledger); citing **Crystal Run Newco, LLC v United Pet Supply, Inc.** (70 AD3d 1418 [4th Dept 2010]).

Holdover Proceedings

92 Bergenbrooklyn, LLC v Cisarano (__ Misc 3d ___, 2015 NY Slip Op 25282 [App Term, 2d, 11th & 13th Jud Dists 2015]) (dismissing a holdover based on the termination of a month-to-month tenancy where the landlord accepted a month's rent following its purchase of an index number and prior to service of the petition and notice of petition; the 2005 amendments to the CCA changing the practice in the Civil Court from a commencement-by-service to a commencement-by-filing system apply to summary proceedings, in view of the 1994 amendment of RPAPL 731 [1] to delete the words "service of" in the sentence stating that a summary proceeding "shall be commenced by

service of a petition and a notice of petition" so as to conform to the commencement-by-filing system then going into effect in Supreme Court; however, for the purpose of the provision of RPAPL 711 [1] which allows a landlord to accept rent after "commencing" a holdover proceeding, "commencement" must still be defined in terms of service, as the purpose of the change to a commencement-by-filing system—which was to raise money for the state—is unrelated to the provision governing the acceptance of rent, the purpose of which was to allow the tenant to pay and the landlord to accept rent without fear of prejudicing their positions, a purpose which requires that both parties have notice of the commencement when rent is accepted; similarly, "commencement" should be defined in terms of service for the rules that the respondent must be in possession at the time of commencement—as this involves the acquisition of jurisdiction—and that a surrender after commencement terminates the tenancy, as this is based on the notion that service of the petition gives the tenant an option to consider the lease canceled); contra **ABN Assoc., LLC v Citizens Advice Bur., Inc.** (27 Misc 3d 143[A], 2010 NY Slip Op 51075[U] [App Term, 1st Dept]).

Holdovers: Nuisance & Illegal Use

Dubor Assoc. v Richburg (__ Misc 3d ___, 2015 NY Slip Op 25277 [App Term, 2d, 11th & 13th Jud Dists 2015]) (where a tenant stipulated to permanently exclude her son, proof that the tenant's son had come to the tenant's door to discuss funeral arrangements for his father did not constitute a sufficient violation to warrant termination of the tenant's long-term tenancy); citing **Tri Cruger Realty, LLC v Masterson** (36 Misc 3d 145[A], 2012 NY Slip Op 51590[U] [App Term, 1st Dept]) (forfeiture of a half-century rent-controlled tenancy was not warranted because the brief unannounced visits of the excluded occupant to retrieve his possessions did not injure the landlord or put the other tenants at risk, and the settlement stipulation expressly authorized the court to determine whether a breach was material); **160 W. 118th St. Corp. v Gary** (32 Misc 3d 1 [App Term, 1st Dept 2011]) (where a stipulation settling a nuisance holdover proceeding based on a single violent altercation involving the 74-year-old tenant and her adult son provided that the tenant would permanently exclude her son and that it would be for the court to determine whether a breach merited eviction, the landlord's evidence that the tenant had technically violated the stipulation more than 4½ years later by allowing her son to visit was insufficient to justify the forfeiture of a 50-year rent-controlled tenancy, where the landlord offered no particularized proof as to the frequency or duration of the son's presence and did not show that the son interfered with the safety of the building's staff and tenants); cf. **Kismo Apts, LLC v Delgado** (505108/15 [Civ Ct, Richmond County, Aug. 31, 2015, K. Moser, J.]) (a termination notice alleging a single incident in which the tenant's dog bit another resident was insufficient, under Domen, to support a nuisance holdover proceeding).

WRG Acquisition XIII, LLC v Dalton (43 Misc 3d 127[A], 2014 NY Slip Op 50479[U] [App Term, 9th & 10th Jud Dists]) (a notice to cure's allegations regarding foul odors

continuously emanating from the apartment satisfied the requirement that the notice state the facts necessary to establish the wrongful act or omission).

Northtown Roosevelt, LLC v Bailey (41 Misc 3d 127[A], 2013 NY Slip 50162[U] [App Term, 1st Dept]) (the disruptive and antisocial behavior of tenant and his guests constituted a basis for eviction); cf. **Mautner-Glick Corp. v Tunne** (38 Misc 3d 126[A], 2012 NY Slip Op 52320[U] [App Term, 2d, 11th & 13th Jud Dists] (proof of the tenant's abusiveness toward the super's wife and the management company's staff established a nuisance; the RSC does not require a notice to cure where the ground for termination is nuisance).

SLL 407 CPW, LLC v Reilly (14/54672, Civ Ct, NY County, Mar. 24, 2015, B. Spears, J.) (in a proceeding based on RSC § 2524.3 [d], immoral or illegal purpose, predicated on the tenant's possession of loaded fire arms and ammunition, and the tenant's conviction of criminal possession of a weapon, the court dismisses the proceeding as time-barred under the one-year limitation period of CPLR 215 [4], governing actions to enforce a penalty or forfeiture created by statute).

Holdovers: Illegal Sublet and Profiteering

Tribeca Equity Partners, L.P. v Jacobson (45 Misc 3d 132[A], 2014 NY Slip Op 51652[U] [App Term, 1st Dept]) (the landlord's failure to serve a notice to cure as required by the lease and RSC § 2524.3 [a] warranted dismissal of the illegal-sublet proceeding); citing **Hudson Assoc. v Benoit** (226 AD2d 196 [1st Dept 1996]) (in a summary proceeding based on illegal sublet, RSC § 2524.3 [a] requires the landlord to prove, as part of its prima facie case, that a notice to cure was served and that the tenant failed to cure); and distinguishing **Matter of Waterside Redevelopment Co. v Department of Hous. Preserv. & Dev. of City of N.Y.** (270 AD2d 87 [1st Dept 2000]) (a tenant's conduct in subletting and not reporting the income on her annual income affidavits constituted acts of fraud and illegality which, under 28 RCNY 3-18 [b], were not curable) and **501 W. 41st St. Assoc. v Annunziata** (41 Misc 3d 138[A], 2013 NY Slip Op 51922[U] [App Term, 1st Dept]) (where a tenant resided in a building receiving a Low Income Housing Tax Credit, the tenant's failure to disclose tens of thousands of dollars in funds in joint accounts on his initial and annual certifications constituted "material noncompliance", and a notice to cure was not required, since the assets, had they been disclosed, would have rendered him ineligible for the tenancy); cf. **Gruber v Anastas** (100 AD3d 829 [2d Dept 2012] (a landlord's failure to give a cure notice to a tenant who illegally sublet did not preclude an award of possession to the landlord where the violation was not subject to cure because the tenant had collected a substantial surcharge); cf. also **Gold St. Props. v Freeman** (90185/2013 [Civ Ct, NY County, J. Stoller, J.]) (a tenant could cure a breach of renting out her apartment on Airbnb where the apartment was not rent stabilized, as the cases barring a cure deal with profiteering on a rent-stabilized apartment).

First Hudson Capital, LLC v Seaborn (54 AD3d 251 [1st Dept 2008]) (unlike RSC § 2526.6 [f], which permits an owner to terminate the tenancy of a tenant who charges a subtenant more than the legal regulated rent, RSC § 2525.7 [b] does not provide for termination when a roommate is overcharged; prior to the adoption of § 2525.7, the firm rule was that profiteering against a roommate was not a ground for eviction; the courts are not free to develop a common-law cause of action in an area as thoroughly legislated and regulated as rent stabilization; to the extent Yonke allows a cause of action for eviction, it should not be followed; Saxe, J., dissenting: while RSC § 2525.7 [b], enacted in 2000, contains no enforcement provision, it's the courts' job to interpret provisions and create a common-law jurisprudence, and prior First Department cases, such as BLF Realty, had indicated that there should be a cause of action for eviction); but cf. **42nd & 10th Assoc. LLC v Ikezi** (46 Misc 3d 1219[A], 2015 NY 50124[U] [Civ Ct, NY County, J. Stoller, J.]) (using a stabilized apartment for profiteering is a ground for eviction; citing, inter alia, **West 148 LLC v Yonke** (11 Misc 3d 40 [App Term, 1st Dept 2006]).

Horseshoe Realty, LLC v Meah (47 Misc 3d 127[A], 2015 NY Slip Op 50370[U] [App Term, 1st Dept]) (a meritorious defense to a profiteering holdover was shown where the tenant claimed that the alleged subtenant was actually a roommate who vacated after one month, citing Seaborn); **335-7 LLC v Steele** (43 Misc 3d 144[A], 2014 NY Slip Op 50891[U] [App Term, 1st Dept]) (a profiteering claim should not be decided on summary judgment where there are mixed questions of law and fact as to whether the series of short-term occupants were roommates or subtenants, and whether the "overcharges were so substantial and pervasive as to constitute incurable rent profiteering"); cf. **51 W. 86th St. Assoc. LLC v Fontana** (28 Misc 3d 140[A], 2010 NY Slip Op 51602[U] [App Term, 1st Dept]) (where the record established that the tenants had sublet, i.e., transferred a part of their estate for consideration by leasing the right to occupy the apartment and never co-occupying with the subtenant, summary judgment of eviction was proper pursuant to RSC §§ 2524.3 [h] and 2525.6); cf. also **Brookfield, LLC v Penraat** (47 Misc 3d 723 [Sup Ct, NY County 2014, C. Edmead, J.]) (where a rent-controlled tenant, over a period of two years, had 135 short-term rentals, providing hotel amenities, using Airbnb, court grants preliminary injunction, as the landlord had served a notice terminating the tenancy based a breach of a substantial obligation of the tenancy [9 NYCCR 2204.2 (a) (1)]; the short-term occupancies were in the nature of subletting, not taking in roommates, and constituted an incurable violation of the Rent Control Law; moreover, the dangers created by the tenant's noncompliance with Multiple Dwelling Law § 4.8 [a], which was intended to bar owners of class A multiple dwellings from renting out dwelling units for less than 30 days or on a transient basis, are the same whether the owner or the tenant rents out the unit).

St. Catherine of Sienna Roman Catholic Church, at St. Albans, Queens County v 118 Convent Assoc., LLC (44 Misc 3d 8 [App Term, 2d, 11th & 13th Jud Dists 2014])

(a holdover based on a termination of the lease may only be maintained where there is a conditional limitation in the lease; where a lease provided that if the tenant failed to obtain written consent to a sublease "the term herein shall immediately cease . . . at the option of the landlord," a condition was created, not a conditional limitation; a provision that if the tenant defaulted in the payment of rent, the landlord could terminate the lease on five days' notice created a conditional limitation; the tenants were in default of the rent payments after they failed to re-tender upon the landlord's demand, as the landlord had been within its rights in rejecting the tenant's tenders, since acceptance might have constituted a waiver of the tenant's illegal sublet or vitiated the notice of termination); **Hudson Hills Tenant Corp. v Stovel** (38 Misc 3d 25 [App Term, 9th & 10th Jud Dists 2012]) (in an illegal-sublet proceeding, it was the co-op's burden to establish that there was a lease; that there was a conditional limitation in the lease providing for termination on the ground alleged by the co-op; that the tenant had breached the lease; and that the co-op had followed the lease procedures for terminating the lease; an affirmation of counsel failed to satisfy these requirements); cf. also **Nordica Soho LLC v Emilia, Inc.** (44 Misc 3d 76 [App Term, 1st Dept 2014]) (a commercial lease clause allowing the landlord to terminate upon 90 days' notice constituted a conditional limitation); **Almarine Realty Corp. v Stern** (203 Misc 190 [App Term, 1st Dept 1952]) (a petition which fails to allege the existence of a contractual right to terminate the tenancy prior to the lease expiration date is "jurisdictionally defective").

Skyline Terrace Coop., Inc. v Ortiz-Robles (45 Misc 3d 129[A], 2014 NY Slip Op 51527[U] [App Term, 2d, 11th & 13th Jud Dists]) (in a holdover against the estate of the deceased proprietary lessee, where the tenant's daughter remained in occupancy, an illegal sublet would not be presumed; moreover, the death of the tenant did not render her daughter's occupancy unauthorized within the meaning of the lease clause permitting the use of the apartment only as a dwelling for the tenant and the tenant's immediate family); cf. **Joint Props. Owners v Deri** (113 AD2d 691 [1st Dept 1986]) (where the occupant, the tenant's executor, took possession in his individual capacity after the tenant's death, the occupancy constituted an unauthorized occupancy in substantial violation of the lease).

Fort 709 Assoc. LP v Ramirez (2013 NY Slip Op 33119[U] [Civ Ct, NY County, S. Kraus, J.]) (the presumption of a sublet in the absence of the tenant does not apply where the occupant is the tenant's child or other immediate family member); see **Morris Asset Mgmt., LLC v Hammel** (34 Misc 3d 148[A], 2012 NY Slip Op 50228[U] [App Term, 1st Dept]) (an illegal-sublet proceeding was properly dismissed on the tenant's motion for summary judgment where the "subtenant" was the tenant's sister, who had extensive ties to the stabilized apartment, with several years of co-occupancy with the tenant; a determination of the sister's unpleaded succession-rights claim should be made in the context of a nonprimary-residence holdover proceeding); **Klein Props., LLC v Estate of Hammonds** (33 Misc 3d 140[A], 2011 NY Slip Op 52134[U] [App Term, 9th & 10th Jud Dists]) (in an illegal-sublet proceeding against the estate of a

deceased tenant, the landlord failed to establish that the occupancy by the tenant's daughter constituted an illegal sublet); **155 W. 81st St. Assoc. v Paredes** (26 Misc 3d 145[A], 2010 NY Slip Op 50472[U] [App Term, 1st Dept]) (where there was no evidence that the tenant's brother paid or was obligated to pay rent, the occupancy arrangement between the tenant and his brother was not shown to constitute an illegal sublet); **Shore Lane Arms Owners Corp. v Mazza** (26 Misc 3d 122[A], 2010 NY Slip Op 50190[U] [Civ Ct, Kings County, G. Heymann, J.]) (the occupation of the tenant's daughter does not constitute an illegal sublet unless the landlord can prove that the tenant no longer utilizes the premises as his primary residence and is collecting rent from his daughter); see **PLWJ Realty, Inc. v Gonzalez** (285 AD2d 370 [1st Dept 2001]) (proof that the tenant had moved out and that the tenant's son was living in the apartment did not establish an illegal sublet but might furnish grounds for a nonprimary-residence proceeding); **Park Holding Co. v Rosen** (241 AD2d 304 [1st Dept 1997], revg NYLJ, Oct. 3, 1996 [App Term, 1st Dept] for the reasons stated in the dissenting opinion of Freedman, J.]) (no illegal sublet where the tenant's son had resided in the premises virtually his entire life); **B&B Manhattan, LLC v Sack** (23 Misc 3d 127[A], 2009 NY Slip Op 50543[U] [App Term, 1st Dept]) (finding that the arrangement between the long-absent rent-stabilized tenant and her son had "more of the indicia of a licensee or guest relationship, as opposed to a sublet"); **Hudson St. Equities Group, Inc. v Escoffier** (2003 NY Slip Op 51213[U] [App Term, 1st Dept]) (the tenant's foster brother's occupancy was as a licensee or guest, not a subtenant; dissent: an illegal sublet or assignment is presumed where a person other than the tenant is shown to be in possession); **Mitchell Gardens Co-operative Corp. v Graziosa** (NYLJ, June 3, 1999 [App Term, 2d & 11th Jud Dists]) (no sublet established where the landlord failed to show that the tenants' daughter, an approved occupant, paid rent to the tenants).

Holdovers: Nonprimary Residence

Matter of Ansonia Assoc. L.P. v Unwin (130 AD3d 415 [1st Dept 2015]) (a showing that the tenant had deducted the entire rent for the apartment on her federal income taxes as an expense of her S corporation, the instructions for which disallow the deduction for a dwelling occupied by the shareholder for personal use, made a prima facie showing entitling landlord to summary judgment; the tenant's position that the apartment is her primary residence is contrary to declarations made under the penalty of perjury), revg (47 Misc 3d 28 [App Term, 1st Dept 2014]) (summary disposition not appropriate where there were questions of fact regarding the tenant's presence at and use of the apartment, from which she operated a spa, notwithstanding that the tenant deducted her entire rent as a commercial expense on her tax returns; the proposition that a party cannot take a position contrary to a position taken in a tax return cannot be imported into primary-residence analysis, in which "no single factor shall be solely determinative"); **Goldman v Davis** (__ Misc 3d ___, 2015 NY Slip Op 25310[U] [App Term, 1st Dept 2015]) (despite the Civil Court's finding that the tenant and his wife had a nontraditional relationship, living separately and thereby happily, the apartment could

not be found to be the tenant's primary residence because he had deducted 100% of the rent as a business expense on his federal income tax returns, which allow a deduction only for the portion of the home used exclusively as a business; prior First Department cases holding that declarations on a tax return are not dispositive on primary-residence issue [e.g. **West 157th St. Assoc. v Sassonian**, 156 AD2d 137 (1989)] cannot be applied in light of Unwin); cf. **Extell Belnord LLC v Uppman** (113 AD3d 1 [1st Dept 2013]) (nonprimary residence could not be determined as a matter of law where the occupant's deposition revealed that for a period during the two years prior to his grandmother's removal, he had resided in another city three days per week to teach, and during another period for two days per week, and he had filed tax returns and had a bank account in the other city).

25 W 71 Units LLC v Zeballos (127 AD3d 489 [2015]) (where a nonregulated condo lease, entered into as part of a relocation agreement out of a stabilized apartment, required that the tenant reside in the apartment as her primary residence, a lease notice to cure was required before the landlord could bring a nonprimary-residence ejectment action); cf. **21 W. 58th St. Corp. v Foster** (44 AD3d 410, 411 [1st Dept 2007]) ("the failure to use one's [stabilized] apartment as one's primary residence as not capable of being cured"); cf. also **Matter of Arroyo v Donovan** (70 AD3d 517 [1st Dept 2010]) (Mitchell-Lama tenants are not entitled to an opportunity to cure their nonprimary residence).

409-411 Sixth St., LLC v Mogi (22 NY3d 875 [2013]) (agreeing with the Appellate Division dissent that the standard of review in a nonprimary-residence proceeding is whether the factfinder's conclusions could be reached under any fair interpretation of the evidence); see **190 Claremont Realty, LLC v Ruderman** (39 Misc 3d 144[A], 2013 NY Slip Op 50815[U] [App Term, 1st Dept]) ("a fair interpretation of the evidence" that tenant owned a luxury co-op elsewhere, maintained a regular presence there, and spent less than 183 days at the subject apartment, using a negligible amount of electricity there, supported the finding of nonprimary residence); cf. **370 Columbus Realty LLC v Liew** (38 Misc 3d 135[A], 2013 NY Slip Op 50131[U] [App Term, 1st Dept]) (in a nonprimary-residence holdover proceeding, the fully credited testimony of the tenant and her witnesses preponderated over the documentary evidence listing the address of the tenant's husband in a studio apartment at a different address).

Citadel Estates, LLC v Pathways to Hous., Inc. (44 Misc 3d 1222[A], 2014 NY Slip Op 51225[U] [Civ Ct, Kings County, S. Avery, J.]) (where an institution leased scatter-site housing for formerly homeless persons with mental health challenges, designating its clients as the intended occupants, the landlord did not show that the premises was exempt under Manocherian, because it did not show that the individual residing in the apartment was an authorized occupant using the apartment as his primary residence, even though the institution stipulated to remove from the apartment); **2976 Marion LLC v University Consultation Ctr.** (44 Misc 3d 1209[A], 2014 NY Slip

Op 51063[U] [Civ Ct, Bronx County, J. Vargas, J.]) (a corporate tenant is entitled to renewal where the lease specifies an individual as the occupant and no perpetual tenancy is possible [citing **Manocherian v Lenox Hill Hosp**., 229 AD2d 197 (1997)]; a nonprimary-residence holdover proceeding is the proper vehicle where the premises is not occupied by that individual; a not-for-profit behavioral health corporation which rented a stabilized apartment without identifying an individual was subject to removal).

40 E. 68th St. Co. v Habbas (42 Misc 3d 134[A], 2014 NY Slip Op 50071[U] [App Term, 1st Dept]) (the landlord was not required to prove that the tenant had a specific alternative primary residence, where the tenant spent a considerable time living abroad); citing **TOA Constr. Co., Inc. v Tsitsires** (54 AD3d 109 [1st Dept 2008]).

First Ave. Equities LLC v Doron (44 Misc 3d 70 [App Term, 1st Dept]) (evidence showing that the tenant, a dual American and Israeli citizen, lived in Israel for all but 54 days over a 3½-year period and had illegally sublet the apartment supported a finding of nonprimary residence, notwithstanding the tenant's claim that she relocated to Israel to provide specialized therapeutic services for her autistic son; the tenant failed to explain why she did not resume occupancy in 2000 when her son would have been eligible for public specialized services in New York City); **Manhattan Transfer, L.P. v Quon** (36 Misc 3d 136[A], 2012 NY Slip Op 51372[U] [App Term, 1st Dept]) (where the evidence demonstrated that the tenant had lived in an assisted living facility since 2005, received all her mail there, listed that address on all her financial documents, and had emptied the subject apartment of all her belongings, the tenant's relocation was not a temporary, excusable absence but an abandonment of the apartment as her primary residence); **Budhu v Castro** (34 Misc 3d 36 [App Term, 1st Dept 2011]) (dismissal at the close of the landlord's nonprimary-residence case was error where the proof showed that the tenant lived with his wife in a nearby building, that mail sent to him was returned as undeliverable, and that the landlord had seldom seen the tenant around the building for three years; "absolute synchronicity between the trial evidence and the allegations set out in a predicate notice is not required").

117 Ltd. Partnership v Wagenberg (38 Misc 3d 147[A], 2013 NY Slip Op 50356[U] [App Term, 1st Dept]) (in a nonprimary-residence proceeding, the landlord showed ample need for discovery related to an occupant, as the occupant possessed particular knowledge which could shed light on the tenant's use).

Holdovers: Chronic Nonpayment

Kerim Realty LLC v Hussein (NYLJ 1202655815017 [Civ Ct, Kings County 2014, B. Scheckowitz, J.]) (dismissing a chronic-nonpayment holdover proceeding where the tenant had asserted warranty of habitability defenses in two of four prior nonpayment proceedings, only two of the proceedings had resulted in judgments, and the tenant was a 20-year tenant); **Lincoln Place 1226 Prop., LLC v Goins** (NYLJ 1202624453496

[Civ Ct, Kings County 2013, E. Ofshtein, J.]) (in a chronic-nonpayment proceeding, the landlord must establish that it was required to commence frequent nonpayment proceedings in a relatively short period of time; the court must also consider whether the rent delinquency can be explained by public assistance errors, warranty of habitability claims or other defenses; where a period of seven years elapsed subsequent to the filing of three of the seven nonpayment proceedings, the three were not "part of a continuance;" the remaining four proceedings involved substantial repairs and DSS delays); see **Chama Holding Corp. v Taylor** (37 Misc 3d 70 [App Term, 1st Dept 2012]) (in a chronic-nonpayment holdover proceeding, the landlord was not entitled to summary judgment where two of the four nonpayment proceedings had arisen from legitimate disputes as to the propriety of the monthly rent and the existence of rent-impairing conditions, with each of these two proceedings yielding settlement stipulations awarding the landlord substantially less than sought, and with one of the stipulations requiring the landlord to make repairs); citing **Hudson St. Equities v Circhi** (9 Misc 3d 138[A], 2005 NY Slip Op 51764[U] [App Term, 1st Dept]) (where two of five nonpayment proceedings in a 4½-year period were settled by stipulations requiring the landlord to make repairs and a third was dismissed for the landlord's nonappearance, a chronic-nonpayment holdover proceeding will not lie).

Matter of Moore v Rhea (111 AD3d 445 [1st Dept 2013]) (penalty of termination for chronic nonpayment not shocking to the conscience).

Holdovers: Substantial Obligation

Windy Acres Farm, Inc. v Penepent (40 Misc 3d 63 [App Term, 9th & 10th Jud Dists 2013]) (in a holdover proceeding based on a provision in a residential lease which allows the landlord to terminate the lease for nonpayment, public policy requires that where the tenant establishes that there has been a breach of the warranty of habitability, the proceeding must be dismissed; Goldcrest is inapplicable in such circumstances); see **Goldcrest Realty Co. v 61 Bronx River Rd. Owners, Inc.** (83 AD3d 129 [2d Dept 2011]) (a conditional limitation in a proprietary lease providing for the forfeiture of the tenancy upon the nonpayment of rent is not void as against public policy); followed in **Stadt v Kurkin** (35 Misc 3d 128[A], 2012 NY Slip Op 50585[U] [App Term, 9th & 10th Jud Dists); but see **205 W. End Ave. Owners Corp. v Adler** (NYLJ, Nov. 2, 1990 [App Term, 1st Dept]) (a lease provision which allows a residential landlord to terminate a lease based on nonpayment [other than chronic nonpayment] violates public policy because it frustrates a tenant's right to assert the warranty of habitability, and the cure provisions for nonpayments and holdovers are different); see also **61 E. 72nd St. Corp. v Zimberg** (161 AD2d 542 [1st Dept 1990]); followed in **199 E. 7th St. LLC v ABC Realty Corp.** (2012 NY Slip Op 32914 [Sup Ct, NY County, J. Madden, J.]) (in a residential tenancy, a conditional limitation for a rent default is unenforceable as against public policy); cf. **1461 Amsterdam Ave. LLC v Carrasquillo** (2015 NY Slip Op 30831[U] [Civ Ct, NY County 2015, S. Kraus, J.]) (where a lease gave

the tenant a free month's rent in the sixth month of the lease but only if the tenant's account was current, the tenant was entitled to the free month even though she had withheld rent based on a good faith warranty of habitability claim, as an agreement to waive the benefit of Real Property Law § 235-b is void).

Gold Queens, LLC v Cohen (42 Misc 3d 15 [App Term, 2d, 11th & 13th Jud Dists 2013]) (where a prior no-pet proceeding commenced within the three-month period upon a short notice to cure was discontinued without prejudice, a second proceeding commenced outside the three-month period was untimely); distinguishing **Baumrind v Fidelman** (183 AD2d 635 [1st Dept 1992]) (no waiver of the right to enforce a no-pet clause even though the proceeding was commenced after the three-month period, where the parties had stipulated to discontinue a timely prior proceeding because of improper service and the landlord promptly re-served the tenant); **Noonan Plaza, LLC v Rubio** (37 Misc 3d 132[A], 2012 NY Slip 52008[U] [App Term, 1st Dept]) (notwithstanding the landlord's claim that it had delayed commencing proceedings in reliance upon the tenant's assurance that the dog would be removed, the no-pet provision was waived by the landlord's failure to commence the proceeding within three months); citing **Toledo Mut. Hous. Corp. v Schwartz** (33 Misc 3d 58 [App Term, 2d, 11th & 13th Jud Dists 2011]) (the landlord's failure to commence a proceeding within three months of learning that the tenants were harboring a pet constituted a waiver of the no-pet provision, notwithstanding the landlord's claim that it refrained from commencing proceedings in reliance on the tenants' assurance that the matter would be resolved); cf. **EQR - Hudson Crossing A, LLC v Kalouf** (33 Misc 3d 140[A], 2011 NY Slip Op 52172[U] [App Term, 1st Dept]) (waiver of the no-pet provision in connection with the tenant's first dog did not constitute a waiver as to a second dog).

Holdovers: Failure to Sign Renewal Lease or Option

Jamsol Realty, LLC v German (46 Misc 3d 11 [App Term, 2d, 11th & 13th Jud Dists 2014]) (a tenant's election not to renew a lease is not a ground for eviction separate from RSC § 2524.3 [8], refusal to renew an expiring lease; thus, the 10-day post-judgment cure period would apply); **Shuhab HDFC v Allen** (37 Misc 3d 1223[A], 2012 NY Slip Op 52144[U], *2 [Civ Ct, NY County, J. Stoller, J.]) ("the remedy the Rent Stabilization Code provides for an owner whose tenant does not renew a lease must be deemed to be the only remedy"); cf. **686 W. 204th St. LLC v Athanasios** (44 Misc 143[A], 2014 NY Slip Op 51402[U] [App Term, 1st Dept]) (where the tenants, at their instigation, executed a pro se surrender agreement, there was a "mixed question of law and fact" as to whether the proceeding was maintainable without an RSC § 2524.2 [a] termination notice); **68 Assoc., LLC v Jensen** (4 Misc 3d 127[A], 2004 NY Slip Op 50621[U] [App Term, 1st Dept]) (where a tenant responded to a renewal notice by electing not to renew the lease, the landlord could maintain the proceeding without serving an RSC § 2524.2 termination notice, as a notice "would have been surplusage since the proceeding is based upon the tenant's own election not to renew, which was

never rescinded"); see generally **Crow v 83rd St. Assoc.** (68 NY2d 796 [1986]) (a landlord's failure to serve a nonprimary-residence nonrenewal notice requires that the lease be renewed, notwithstanding the 1983 Omnibus Housing Act's amendment of the RSL to exclude from coverage dwelling units not occupied by a tenant as his primary residence); disapproving **G. Warhit Real Estate v Krauss** (131 Misc 2d 429 [App Term, 9th & 10th Jud Dists 1985]) (a nonrenewal notice is not required for nonprimary residence because housing accommodations not occupied as a primary residence are excluded from coverage) and **Continental Towers v Jahss** (NYLJ, Oct. 10, 1985 at 11, col 2 [App Term, 1st Dept]).

Waterfalls Italian Cuisine, Inc. v Tamarin (119 AD3d 773 [2d Dept 2014]) (equity will intervene to relieve a commercial tenant's failure to renew a lease where (1) the failure to timely exercise the option resulted from an honest mistake or inadvertence; (2) the nonrenewal would result in a substantial forfeiture; and (3) the landlord would not be prejudiced by the renewal); cf. **Marina Tower Assoc., L.P. v 325 Southend Corp.** (40 Misc 3d 12 [App Term, 1st Dept 2013]) (equity would not intervene to excuse a failure to exercise a renewal option where the default was not inadvertent but resulted from the tenant's inability to afford the rental amount specified in the option or to successfully re-negotiate the rental terms).

270-274 8th Ave., LLC v Bakal (34 Misc 3d 158[A], 2012 NY Slip Op 50429[U] [App Term, 9th & 10th Jud Dists]) (the subsidized tenant showed an arguably meritorious defense to a holdover proceeding where she showed that she had sought to sign a renewal lease, albeit late, as equity may relieve a tenant of an inadvertent failure timely to sign a renewal lease, particularly where there had been a history of the landlord's acceptance of late renewals and deemed renewals); citing **Matter of 210 Realty Assoc. v O'Connor** (302 AD2d 396 [2d Dept 2003]) (City Court possessed discretion to relieve the tenant's default in renewing the lease for her rent-regulated apartment).

M&M Plaza Assoc., LLC v Pusey (45 Misc 3d 129[A], 2014 NY Slip Op 51541[U] [App Term, 2d, 11th & 13th Jud Dists]) (where the landlord offered a renewal lease containing a guidelines increase, after failing to offer renewal leases for several years, the tenant's contention that she was a month-to-month tenant entitled to a new lease with no increase lacked merit); citing **Santorini Equities, Inc. v Picarra** (72 AD3d 73 [1st Dept 2010]) (a tenant's obligation to sign an untimely renewal offer is controlled by RSC § 2523.5 [c] [I]); cf. **494 Hudson, LLC v Hart** (38 Misc 3d 126[A], 2012 NY Slip Op 52344[U] [App Term, 1st Dept]) (a holdover based on the tenant's refusal to execute a renewal lease would be dismissed where the offer was not on the same terms as the expired lease); **Lexford Props., L.P. v Alter Realty Co., Inc.** (31 Misc 3d 142[A], 2011 NY Slip Op 50859[U] [App Term, 1st Dept]) (where the rent specified exceeds the legal regulated rent, the tenant is justified in refusing to sign the renewal lease).

Illegal Use and Illegal Occupancy Holdovers

JMW 75 LLC v Wielaard (47 Misc 3d 133[A], 2015 NY Slip Op 50473[U] [App Term, 1st Dept]) (an illegal occupancy holdover proceeding [RSC § 2524.3 (c)] based on a claim that there was a minor child residing in the SRO unit would be dismissed where there was no showing that a violation had been placed or that the landlord was actually subject to civil or criminal penalties).

Las Tres Unidos Assoc., LP v Mercado (44 Misc 3d 5 [App Term, 1st Dept 2014]) (proof consisting of a Criminal Court certificate of disposition showing that the tenant pled guilty to one count of unlawful possession of marihuana, a violation, and the tenant's testimony that he was stopped by a police officer as he exited the building and found to be in possession of one bag of marihuana, was insufficient to establish that the tenant had engaged in drug-related criminal activity in violation of the HUD lease, which requires possession accompanied by an unlawful intent).

RPAPL 713 and Other Non-Landlord-Tenant Proceedings

Federal National Mortgage Assn. v Simmons (48 Misc 3d 24 [App Term, 1st Dept 2015]) (the assignee of a successful bidder at a nonjudicial sale of co-op shares cannot maintain a licensee proceeding to remove the tenant who defaulted on the loan; if the lease had terminated, the tenant is a holdover tenant, not a licensee; nor could the proceeding be maintained on the ground that the property had been sold by virtue of an execution [RPAPL 713 (1)], as the notice to quit did not give notice of such a claim, and the co-op shares were not real property; a summary proceeding can be maintained only where authorized by statute); **Retained Realty Inc. v Zwicker** (46 Misc 3d 133[A], 2014 NY Slip Op 51852[U] [App Term, 1st Dept]); follows **Federal Home Loan Mtge. Assn. v Perez** (40 Misc 3d 1 [App Term, 9th & 10th Jud Dists 2013]) (where a secured party obtains ownership of co-op shares and a proprietary lease at a UCC article 9 nonjudicial sale, a licensee proceeding does not lie because the tenant has possession, not a license; RPAPL 713 [1] is inapplicable, because the "real property" was not sold by "virtue of an execution;" the shares and lease are not "real property" and an "execution" is a judicial writ); abrogating **Emigrant Mtge. Co., Inc. v Greenberg** (34 Misc 3d 1236[A], 2012 NY Slip Op 50387[U] [Dist Ct, Nassau County 2012, S. Fairgrieve, J.]) (allowing the maintenance of the proceeding under RPAPL 713 [1] and [7], as the cooperative shares and proprietary lease are akin to real property); see also **Newell Funding LLC v Tatum** (24 Misc 3d 597 [Civ Ct, Kings County 2009, C. Gonzales, J.]) (a purchaser of cooperative shares after a loan foreclosure lacked standing to maintain a summary proceeding where it did not acquire title or the right to possess); cf. also **City Enters. v Posemsky** (184 Misc 2d 287 [App Term, 2d & 11th Jud Dists 2000]) (tenants who turned over their shares as collateral and then defaulted on the loan were not licensees of the lender).

Rayevich, LLC v Gerstman (45 Misc 3d 134[A], 2014 NY Slip Op 51723[U] [App Term, 2d, 11th & 13th Jud Dists]) (a purchaser of co-op shares could not maintain an RPAPL 713 [8] proceeding, which allows for the maintenance of a summary proceeding where "the owner of real property . . . having voluntarily conveyed title to the [real property] to a purchaser for value, remains in possession without the permission of the petitioner," as the petitioner was not a purchaser for value of the real property).

AJM RE Holdings VIII v Cortese (40 Misc 3d 444 [Dist Ct, Nassau County 2013, S. Fairgrieve, J.]) (to maintain an RPAPL 713 [4] proceeding, a petitioner must show (1) that the real property has been sold for unpaid taxes; (2) that a tax deed was executed and delivered to the purchaser; (3) that the petitioner is the purchaser or a successor thereof; (4) that the petitioner has complied with all provisions of law precedent to the right of possession; and (5) that the time of redemption has expired).

Hudson City Sav. Bank v Lorenz (39 Misc 3d 538 [Dist Ct, Suffolk County 2013, C. Hackeling, J.]) (nail and mail service of a referee's deed at the premises was sufficient even though the occupant had moved out pursuant to a stay-away order, where the petitioner did not have notice of the stay-away order, as RPAPL 713 [5] does not expressly require personal exhibition, and the Legislature enacted the Protecting Tenants at Foreclosure Act to address concerns about unlawful evictions); contra **Home Loan Servs., Inc. v Moskowitz** (31 Misc 3d 37 [App Term, 2d, 11th & 13th Jud Dists 2011) ("exhibition" of a referee's deed is not effected by attaching a copy to a 10-day notice to quit served by conspicuous-place service), lv granted (2011 NY Slip Op 74615[U] [App Term, 2d, 11th & 13th Jud Dists]); followed in **Investec Bank PLC v Elite Intl. Fin., Ltd.** (42 Misc 3d 1207[A], 2014 NY Slip Op 50003[U] [Civ Ct, NY County, S. Kraus, J.]) (where the deed was annexed to the notice to quit served by conspicuous-place service, the petition would be dismissed; the fact that a lease is subordinate to a mortgage is not a disqualifying factor for protection under RPAPL 1305); **U.S. Bank N.A. v Eichenholtz** (37 Misc 3d 536 [Yorktown Just Ct 2012, S. Lagonia, J.]) (under Moskowitz, a referee's deed attached to a notice to quit served by substituted service on a person of suitable age and discretion was not "exhibited"); see also **Colony Mtge. Bankers v Mercado** (192 Misc 2d 704 [Sup Ct, Westchester County, J. Lefkowitz, J., 2002]) (denying a writ of assistance because a certified copy of a deed attached to a notice to quit served by substituted service was not "exhibited"); but see also **Deutsche Bank Natl. Trust Co. v Resnik** (24 Misc 3d 1238[A], 2009 NY Slip Op 51793[U] [Dist Ct, Nassau County, S. Fairgrieve, J.]) (a certified copy of the deed, annexed to the 10-day notice served by substituted service, satisfies the requirement of RPAPL 713 [5]); accord **GRP/AG REO 2004-1 v Friedman** (8 Misc 3d 317 [Ramapo Just Ct, A. Etelson, J., 2005]; cf. **Novastar Mtge., Inc. v LaForge** (12 Misc 3d 1179[A], 2006 NY Slip Op 51306[U] [Sup Ct, Greene County, D. Lalor, J.]) (there is no requirement of personal exhibition to obtain a writ of assistance; RPAPL 221 contains none and such a requirement would enable foreclosed occupants to frustrate the judgment by making themselves unavailable for personal service).

Fay Capital Corp. v Rans (50532/2014 [Civ Ct, Kings County July 14, 2014, M. Sikowitz, J.]) (RPAPL 713 [5] does not authorize the maintenance of a proceeding by a petitioner twice removed from the purchaser in foreclosure); contra **1644 Broadway LLC v Jimenez** (43 Misc 3d 1229[A], 2014 NY Slip Op 50859[U] [Civ Ct, Kings County, H. Thompson, J.]) (the presentation of a referee's deed and a subsequent deed satisfied RPAPL 713 (5)'s exhibition requirement); cf. **IFS Props. LLC v Willins** (41 Misc 3d 370 [Dist Ct, Nassau County 2013, S. Fairgrieve, J.]) (the exhibiting by a successor of a purchaser in foreclosure of the deed by which it acquired title is insufficient under RPAPL 713 [5]).

Kakwani v Kakwani (40 Misc 3d 627 [Dist Ct, Nassau County 2013, E. Bjorneby, J.]) (a licensee proceeding would not lie by a petitioner against her brother's wife to recover what had been the marital residence for four years; occupancy due to family relationship does not constitute a license within the meaning of RPAPL 713 [7]); **Lopez v Reyes** (NYLJ 1202580059542 [Civ Ct, Bronx County 2012, B. Spears, J.]) (a licensee proceeding could not be maintained by a petitioner who had been in a committed relationship with the respondent for 25 years, even though the parties were not married; under **Braschi v Stahl**, the court must focus on the nature of the relationship); **Phelps v Ray-Chaudhuri** (NYLJ, July 8, 2010, at 29, col 5 [Civ Ct, Kings County, L. Lau, J.]) (a licensee proceeding would not lie against a life partner where the parties had a child in common and commingled their finances; the occupant was a family member under Braschi); **Robinson v Holder** (24 Misc 3d 1232[A], 2009 NY Slip Op 51706[U] [Dist Ct, Suffolk County, S. Ukeiley, J.]) ("familial relationship" exception to licensee statute has been extended by Braschi to include domestic partners and paramours; the occupant, the mother of the co-petitioner's son, was not a mere licensee where the co-petitioner was in prison and there was no evidence he would not co-occupy the premises upon his release; in view of the co-petitioner's support obligation, the co-petitioner could not evict his minor son); **Griffith v Reid** (NYLJ, Dec. 11, 2008 [Civ Ct, Kings County, M. Milin, J.]) (a licensee proceeding to remove the tenant's infant son and the boy's mother from the family home would not lie); **Landry v Harris** (18 Misc 3d 1123[A], 2008 NY Slip Op 50174[U] [Civ Ct, NY County, G. Lebovits, J.]) (whether a paramour can be evicted as a licensee raises issues of fact regarding e.g., whether the parties moved in together and held themselves out as family members, and whether the paramour shared the household expenses and contributed to the purchase of the home; a minor son may not be evicted as a licensee but may be evicted with his custodial parent once custody and support issues are resolved); but see **Citi Land Servs., LLC v McDowell** (30 Misc 3d 145[A], 2011 NY Slip Op 50387[U] [App Term, 2d, 11th & 13th Jud Dists]) (a tenant could obtain a stay of a warrant upon a showing that the corporate landlord's principal was the father of her minor child and was not paying support which included an allowance for alternate housing for the child); **Sears v Okin** (16 Misc 3d 134[A], 2007 NY Slip Op 51510[U] [App Term, 9th & 10th Jud Dists]) (where a petitioner seeks to evict his former paramour and their minor children, execution of the warrant should be

stayed until the petitioner shows that there is a support order that includes an allowance for alternate housing for the children); **Piotrowski v Little** (30 Misc 3d 609 [Middletown City Ct 2010, S. Brockett J.]) (a former domestic partner was a licensee and could be removed in an RPAPL 713 [7] proceeding); **Drost v Hookey** (25 Misc 3d 210 [Dist Ct, Suffolk County, S. Hackeling, J., 2009]) (a cohabiting boyfriend may employ an RPAPL 713 [7] proceeding to remove his girlfriend of three years; since the girlfriend did not have exclusive dominion and control over a specific part of the premises, she was not a tenant at will; court rejects "familial relationship" exception); **Lally v Fasano** (23 Misc 3d 938 [Dist Ct, Nassau County, S. Fairgrieve, J., 2009]) (a petitioner could maintain a licensee proceeding to remove his daughter-in-law from his beach cottage even though a matrimonial action was pending, because the cottage was not marital property); **Isler v Isler** (NYLJ, Jan. 9, 2009 [Civ Ct, Kings County, M. Sikowitz, J.]) (dismissing a petition seeking to remove the petitioner's ex-wife and the parties' two children because, irrespective of whether Housing Court had jurisdiction to enforce a separation agreement, an eviction could not be had, under Sears, until there was a support order that clearly included an allowance for alternate housing); cf. also **Halaby v Halaby** (44 AD2d 495 [4th Dept 1974]) (where full provision had been made for satisfaction of the husband's pre-divorce support obligations to his wife, the husband could maintain a licensee proceeding to remove the wife from the former marital home owned by him); **Tausik v Tausik** (11 AD2d 144 [1st Dept 1960], affd 9 NY2d 664 [1961]) (where a husband and wife entered into a pre-divorce agreement permitting the wife to use an apartment owned by the husband as a temporary abode following a separation, the husband could maintain a licensee proceeding to remove the wife); **Rosenstiel v Rosenstiel** (20 AD2d 71 [1st Dept 1963]) (a licensee proceeding does not lie against a wife, who occupies the marital home not by virtue of the permission of her husband but as an incident of the marriage contract, and as long as the marriage relationship is unabridged by court decree or valid agreement between the parties, the husband has an obligation to support his wife).

RPAPL 713 (10) ("The person in possession has entered the property or remains in possession by force or unlawful means and he or his predecessor in interest was not in quiet possession for three years before the time of the forcible or unlawful entry or detainer and the petitioner was peaceably in actual possession at the time of the forcible or unlawful entry or in constructive possession at the time of the forcible or unlawful detainer").

David v #1 Mktg Serv., Inc. (113 AD3d 810 [2d Dept 2014]) (in an action by occupants against a three-quarter house, the operation of which involves recruiting people with disabilities and histories of substance abuse, as well as those living in shelters or re-entering the community after serving time in jail, held that the occupants were licensees, not tenants protected under the RSC, and that the occupants had established the existence of triable issues of fact as to whether they had signed the contracts under conditions that were procedurally unconscionable and as to whether the landlord had

engaged in harassment and unlawful evictions under Administrative Code § 27-2005 [d] and § 26-521); but cf. **Shearin v Back on Track Group, Inc.** (46 Misc 3d 910 [Civ Ct, Kings County 2014, G. Marton, J.]) (in a lockout proceeding by an occupant of a three-quarter house, where the record showed that the occupant signed forms indicating that he would be living in a "program house" and a "temporary shelter;" that the rules included a ban on visitors, a daily curfew, a prohibition of drug and alcohol use, a consent to random testing, and a requirement that the occupant leave the building every weekday from 10:00 a.m. to 2:00 p.m.; and that the occupant was charged the maximum shelter allowance of $215 per month, the court finds that the occupant was a tenant, not a licensee, even though the occupant could claim only a bunk bed and a closet space, since the occupant's compliance with the rules would lead to a continued residency for six to nine months and the residence was not terminable at will, which is greater than the 30 days provided for in RPAPL 711 and Administrative Code § 26-521 [a]; court distinguishes David as dicta, and **Coppa v LaSpina** [41 AD3d 756 (2d Dept 2007) (a woman in supportive housing subject to rules barring certain visitors, requiring her to allow staff to enter her living area, and to refrain from certain actions, was a licensee, not a tenant under RPAPL 711)]); **Ross v Baumblit** (46 Misc 3d 637 [Civ Ct, Kings County 2014, G. Marton, J.]) (in a lockout proceeding, the court restores a "tenant" who rented the bottom right bunk on the second floor; RPAPL 711 includes an occupant of a room in a rooming house or hotel who has been in possession for 30 days, Administrative Code § 26-521 [a] makes it unlawful to evict an occupant who has been in occupancy for 30 days, and Administrative Code § 26-522 (a) (l) references the tenancy Maintenance Code definition of "residential accommodation," which is a "dwelling unit" "in a multiple dwelling or private dwelling" "Thus, the "tenant's" bunk was a "residential accommodation"; **Cooper v Back on Track Group, Inc.** (45 Misc 3d 623 [Civ Ct, Kings County 2014, L. Lau, J.) (notwithstanding that the occupant of a three-quarter house, which ran a drug-treatment recovery program, signed an agreement waiving any rights under landlord-tenant laws, the court restored the occupant to possession, as the agreement was an unenforceable adhesion contract, as DSS had paid a shelter allowance for the occupant, and RPAPL 711 states that a person who lawfully occupies a [rooming house or hotel] for 30 days or more cannot be removed except in a special proceeding; the Administrative Code also makes it unlawful to evict such occupants); **McCormick v Resurrection Homes** (38 Misc 3d 847 [Civ Ct, Kings County 2012, B. Scheckowitz, J.]) (restores an occupant residing in a not-for-profit premises, where the landlord received funding from the VA to provide housing for homeless veterans on a temporary basis; the occupant's waiver of the statutory right to 30-day notice was unenforceable, as it violated RPAPL 711 and Administrative Code § 26-521, and constituted an adhesion contract); **Gregory v Crespo** (NYLJ, Mar. 20, 2012, Index No. 801290/12 [Civ Ct, Bronx County, J. Rodriguez, J.]) (restoring a parolee living in an apartment provided by a drug-treatment program; a landlord-tenant relationship existed because the occupant had been in occupancy for more than 30 days and DSS had paid rent directly to the drug-treatment program; the NYC Unlawful Eviction Law [Admin Code § 26-521 et seq.] prohibits evictions of occupants after 30

days of lawful occupancy); see also **Barclay v Natoli** (NYLJ, Dec. 30, 1998 [App Term, 2d & 11th Jud Dists]) (a licensee had no possessory interest and could not maintain an RPAPL 713 [10] proceeding; the unlawful eviction provisions of the Administrative Code subject a violator to criminal liability and civil penalties but do not change a licensee's status to a possessory interest); **World Evangelization Church v Devoe St. Baptist Church** (27 Misc 3d 141[A], 2010 NY Slip Op 50996[U] [App Term, 2d, 11th & 13th Jud Dists]) (an occupant that had a contractual right to use the premises on specified days at specified hours was a licensee and could not maintain an RPAPL 713 [10] proceeding); **Korelis v Fass** (26 Misc 3d 133[A], 2010 NY Slip Op 50122[U] [App Term, 1st Dept]) (a licensee with no independent right to possession cannot maintain a lockout proceeding); **Almonte v City of New York** (166 Misc 2d 376 [App Term, 2d & 11th Dists 1995]); cf. **People v Goli** (33 Misc 3d 61 [App Term, 1st Dept 2011]) (a tenant who ousted her roommate by changing the entrance lock and removing the roommate's possessions was guilty of an unlawful eviction).

Goris v Salce (41 Misc 3d 128[A], 2013 NY Slip Op 51678[U] [App Term, 1st Dept]) (the son of the deceased rent-controlled tenant was in "constructive possession", could not be ousted without legal process and could maintain a lockout proceeding); **Classic N.Y. Realty 2009, LLC v Aimco 240 W. 73rd St., LLC** (35 Misc 3d 139[A], 2012 NY Slip Op 50859[U] [App Term, 1st Dept]) (the petitioner, which rented 89 units in the building for use as transient accommodations, was entitled to be restored to possession of a concierge desk and luggage room in the lobby, as petitioner was in constructive, if not actual, possession of those spaces and had a colorable tenancy interest in them); **Rostant v 790 RSD Acquisition LLC** (21 Misc 3d 138[A], 2008 NY Slip Op 52308[U] [App Term, 1st Dept]) (restoring the deceased rent-controlled tenant's stepdaughter where she was in constructive possession at the time of the lock-out and the landlord's principal was aware of her possessory claim); **Truglio v VNO 11 E. 68th St. LLC** (35 Misc 3d 1227[A], 2012 NY Slip Op 50908[U] [Civ Ct, NY County, S. Kraus, J.]) (a rent-stabilized tenant who rented a maid's room on a different floor and who claimed to have used the premises as a guest room was in actual possession and could maintain an RPAPL 713 [10] proceeding, without the need to establish that the maid's room was a housing accommodation; the court would also enjoin the landlord to rebuild the unit, which the landlord had demolished, as such relief is within the authority of the Housing Part); **Banks v 508 Columbus Props.** (8 Misc 3d 135[A], 2005 NY Slip Op 51189[U] [App Term, 1st Dept]) (restores the husband of the stabilized tenant, who died shortly before the lockout, because the existence of a landlord-tenant relationship is not a prerequisite to an RPAPL 713 [10] proceeding); **Dixon v Fanny Grunberg & Assoc., LLC** (4 Misc 3d 139[A], 2004 NY Slip Op 50943[U] [App Term, 1st Dept]) ("a landlord-tenant relationship is not a sine qua non to the maintenance of a forcible entry and detainer summary proceeding"); cf. **Brown v 165 Conover Assoc.** (5 Misc 3d 128[A], 2004 NY Slip Op 51244[U] [App Term, 2d & 11th Jud Dists]) (restoration would not be granted to the sister of the deceased tenant of record, who did not claim tenancy rights and was a mere licensee); **Viglietta v LaVoie** (33 Misc 3d 36 [App Term, 9th & 10th

Jud Dists 2011]) (a petitioner who claimed equitable ownership but was not the record owner was not in "actual" or "constructive" possession and could not maintain an RPAPL 713 [10] proceeding).

Pianello v New York City Hous. Auth. (Taft Houses) (38 Misc 3d 133[A], 2013 NY Slip Op 50057[U] [App Term, 1st Dept]) (restoration denied where the tenant had abandoned the apartment, moved to another state, and paid no rent for several months, and a member of tenant's family had returned the key); cf. **Starrett City, Inc. v Smith** (25 Misc 3d 42 [App Term, 2d, 11th and 13th Jud Dists 2009]) (to constitute an abandonment there must be an intention to relinquish and some overt act or failure to act which gives rise to the implication that the party abandoning neither claims nor retains an interest in the property; an abandonment of a tenant's interest may be found, even where a tenant has left someone else in possession; the tenant of record's failure to pay rent for over a year and her absence from the premises and relocation to Florida gave rise to an inference that the tenant had abandoned the property); cf. also **Colemen v Onsite Prop. Mgt., Inc.** (L&T 805127/14 [Civ Ct, Bronx County, July 11, 2014, J. Rodriguez, J.]) (in a lock-out proceeding, the burden of establishing a surrender is upon the party asserting it; the tenant's failure to pay his utility bill resulting in the electricity's being turned off, did not establish a surrender).

Gomez v Mateo (NYLJ 1202627375709 [Civ Ct, Queens County, Oct. 30, 2013, A. Katz, J.]) (dismisses an RPAPL 713 [7] proceeding for lack of service of a 10-day notice, notwithstanding that there was a surrender agreement).

Defenses: Equitable and Title Defenses

RPAPL 743 ("The answer may contain any legal or equitable defense, or counterclaim"); see generally **Susquehanna S.S. Co. v A.O. Andersen & Co.** (239 NY 285 [1925]) (facts establishing a claim for reformation make out an equitable defense and may be set up as a bar to relief).

Naroznik v Prockett (47 Misc 3d 141[A], 2015 NY Slip Op 50613[U] [App Term, 2d, 11th & 13th Jud Dists]) (in a nonpayment proceeding, where the tenant claimed a rent overcharge because he was entitled to a renewal lease as a successor, instead of a vacancy lease, the Civil Court could properly make a finding as to the succession-rights issue for the purpose of determining the validity of the lease rent; the Civil Court can consider equitable defenses such as rescission and reformation); **DiStasio v DiStasio** (47 Misc 3d 144[A], 2015 NY Slip Op 50694[U] [App Term, 9th & 10th Jud Dists]) (where the occupant, who was the wife of the petitioner's nephew, claimed that her husband was the true owner of the house, which was their marital residence, the District Court abused its discretion in staying the licensee proceeding pending the determination of a matrimonial action, to which the petitioner was not a party; the issue of title could be fully litigated in this proceeding for the purpose of determining the right

to possession); **Chun Wah Lee v Insook Han** (39 Misc 3d 132[A], 2013 NY Slip Op 50480[U] [App Term, 2d, 11th & 13th Jud Dists]) (while title cannot be determined as an affirmative claim in a summary proceeding, the court is not divested of jurisdiction by the assertion of a title defense and must entertain the claim that the petitioner is not the owner of the property); **Yacoob v Persaud** (34 Misc 3d 150[A], 2012 NY Slip Op 50249[U] [App Term, 2d, 11th & 13th Jud Dists]) (the tenant should have been permitted to interpose her equitable defense regarding ownership of the cooperative apartment, notwithstanding that she had failed to post an undertaking set as a condition of a preliminary injunction in her Supreme Court constructive trust action); **Carbone v Hurdle** (38 Misc 3d 1203[A], 2012 NY Slip Op 52341[U] [Dist Ct, Nassau County, S. Fairgrieve, J.]) (summary proceeding court has jurisdiction to entertain the occupant's defense that the petitioner lacks title); see **Freire v Fajardo** (28 Misc 3d 137[A], 2010 NY Slip Op 51453[U] [App Term, 2d, 11th & 13th Jud Dists]) (Civil Court erred in precluding the occupant from asserting a claim that he was the equitable owner of the premises, as a defense of constructive ownership may be asserted in a summary proceeding); **Dandey Realty Corp. v Nick's Hideaway, Inc.** (24 Misc 3d 105 [App Term, 9th & 10th Jud Dists 2009]) (while the District Court does not have jurisdiction to grant the affirmative equitable relief of rescission, the facts alleged in support of the tenant's claim for rescission were properly asserted in the summary proceeding as an equitable defense); **Hammel v Rodrigues** (19 Misc 3d 37 [App Term, 9th & 10th Jud Dists 2008]) (facts establishing a claim for reformation of a lease may be asserted in a summary proceeding by way of an equitable defense); **Paladino v Sotille** (15 Misc 3d 60 [App Term, 9th & 10th Jud Dists 2007]) (although affirmative relief declaring that the tenant was entitled to a life estate could not be had in the summary proceeding, the court was required to entertain the claim that the tenant was entitled to a life estate as a defense to the landlords' claim that they had terminated his tenancy at will); **Decaudin v Velazquez** (15 Misc 3d 45 [App Term, 9th & 10th Jud Dists 2007]) (although title cannot be determined as an affirmative claim in a summary proceeding, the court must entertain an occupant's claim that the petitioner is not the owner); see also **Nissequogue Boat Club v State of New York** (14 AD3d 542 [2d Dept 2005]) (while the District Court could not adjudicate a tenant's claim of adverse possession as an affirmative claim in a summary proceeding, the claim was properly raised as a defense); **Chopra v Prusik** (9 Misc 3d 42 [App Term, 2d & 11th Jud Dists 2005]); but cf. **Gouverneur Gardens Hous. Corp. v Silverman** (26 Misc 3d 133[A], 2010 NY Slip Op 50121[U] [App Term, 1st Dept]) (the occupant's challenge to the landlord's ownership raised a question of title which was not the proper subject of a summary proceeding); **Thaler v Rush** (2002 NY Slip Op 40400[U] [Dist Ct, Nassau County, K. Gartner, J.) (a summary proceeding was not the proper forum to adjudicate the tenants' claim of equitable ownership, and a stay should be sought in the forum in which the title question would be litigated); citing **Rodgers v Crumb** (242 AD2d 874 [4th Dept 1997]) (in a summary proceeding, the court may consider a collateral defense concerning title but is not required to do so); and **Hoffman v Hoffman** (212 App Div 531 [4th Dept 1925]) (a

summary proceeding court has jurisdiction to pass on issue of disputed title for purpose of determining right to possession, but not over issue of equitable title).

Defenses: Succession Rights

Matter of Murphy v New York State Div. of Hous. & Community Renewal (21 NY3d 649 [2013]) (grants succession rights to an occupant whose mother did not file the requisite income affidavit for one of the two years prior to her vacatur, where there was overwhelming evidence of the occupant's primary residency and there was no indication that the failure to file had any relationship to the tenant's income or the co-occupancy; the succession regulations serve the remedial purpose of preventing the dislocation of long-term residents; in the succession context, the principal purpose of the income affidavit is to provide proof of the applicant's primary residence; "courts must scrutinize administrative rules for genuine reasonableness and rationality in the specific context presented by a case"; dissent, that the income affidavit requirement has been a prerequisite for Mitchell-Lama succession since 1991, provides an additional incentive for tenants to submit accurate income affidavits and assures that the tenant was income eligible for residency; in February 2003, HPD amended its regulations— which formerly had provided that the omission of a family member from the income affidavits gave rise to a rebuttable presumption that the apartment was not the family member's primary residence—to remove the presumption because of the administrative burdens and necessity for a bright-line rule, which also promotes fairness and efficiency; the requirement has a rational basis and is not unreasonable or arbitrary; the majority substitutes its judgment for that of the agency, which in 1990 rejected the proposition that an occupant be allowed to demonstrate residency through evidence other than an annual certification); see **Marine Terrace Assoc. v Kesoglides** (44 Misc 3d 141[A], 2014 NY Slip Op 51303[U] [App Term, 2d, 11th & 13th Jud Dists]) (succession rights vest when the tenant of record dies or permanently vacates; although the HUD Handbook requires that, to qualify for succession rights, a family member be a party to the lease, the landlord could not invoke that provision to bar succession rights where there was clear and convincing evidence that the occupant had co-resided with his mother for many years and the landlord had actively frustrated the tenant's and the occupant's attempts to add him to the lease; dissent, that there was ample evidence that the occupant did not reside with his mother and the occupant was not on the lease or any recertification).

Matter of Russo v New York City Hous. Auth. (128 AD3d 570 [1st Dept 2015]) (an RFM widow with a mental disability was denied due process by NYCHA where the GAL was not a "suitable representative"; the GAL did not understand the issues, testified, without personal knowledge, although the RFM was present, failed to offer evidentiary support on key factual issues, and admitted his ignorance as to when the RFM had moved into the apartment; since the RFM did not have a meaningful opportunity to be heard, it cannot be determined whether there are circumstances that might relieve the

RFM of the requirement of written consent to her occupancy, citing Echeverria and McFarlane), affg (44 Misc 3d 401 [Sup Ct, NY County 2014, A. Schlesinger, J.]) (annuls NYCHA's determination that the tenant's wife who, the court found, had resided with the tenant for 15 months prior to his death, was not an RFM because she did not have written permission to reside in the apartment; while the federal regulation requires that the tenant request approval to add a family member, the requirement that the tenant receive written permission at least one year before the tenant dies or vacates is found only in the management manual; under Murphy, an occupant's technical noncompliance with an agency's succession rules should not bar an otherwise meritorious RFM claim; the McFarlane dictum that NYCHA's implicit approval of an occupancy might establish RFM status has not been overruled by Schorr [citing Gutierrez]; under Murphy, the failure to file the income affidavit was not fatal; Murphy is not limited to Michell-Lama housing, as the regulatory schemes serve the same purposes); see **Gutierrez v Rhea** (105 AD3d 481 [1st Dept 2013]) (where, in 2004, the tenant wrote to NYCHA to request permission that her psychiatrically disabled son be permitted to move in to take care of her, completed NYCHA's request form to add a tenant to a lease, and provided NYCHA with her son's birth certificate, social security card and proof of prior address; where NYCHA failed to act upon the request within 90 days as required by its rules; where the tenant informed the management office that her son had moved in and listed his income on her 2003, 2004, 2005 and 2006 income affidavits and in the "family composition" portion of the affidavits; where the tenant was, in violation of NYCHA's rules, not given an opportunity to show that her son had been rehabilitated from a 10-year-old burglary conviction, when NYCHA learned of the conviction during a criminal background check in 2006 and failed to notify the tenant that her son was required to vacate within 15 days; and where there was substantial evidence that the tenant's son had been rehabilitated, the fact that the tenant's son never received written permission was not decisive; while estoppel is not available against NYCHA, under McFarlane, NYCHA's knowledge of an occupancy for a substantial period of time is "an important component of the determination of a subsequent RFM application"); cf. **Matter of Figueroa v Rhea** (120 AD3d 814 [2d Dept 2014]) (an occupant of a NYCHA apartment who never obtained written permission from the housing manager to occupy the apartment and who did not co-reside with her grandmother for one year lacked succession rights; NYCHA cannot be estopped from denying RFM status, even if it failed to explain the applicable policies or assist the tenant with the necessary forms, or if it implicitly acquiesced in the occupancy, citing Schorr); **Matter of Perez** (99 AD3d 624 [1st Dept 2012]) (NYCHA cannot be estopped from discharging its statutory duties when a claimant does not meet eligibility requirements, even if the managing agent acquiesced in the claimant's occupancy; the claimant's mental health and her status as a single parent with an asthmatic daughter are mitigating factors which are not required to be considered; nor did the claimant's payment of rent confer succession rights on her); **Matter of Kwan-Fong Fung v New York City Hous. Auth.** (99 AD3d 452 [1st Dept 2012]) (a governmental agency cannot be estopped from discharging its statutory duty when a claimant does not qualify for succession, even if the managing agent

acquiesced in the unauthorized occupancy), affg (33 Misc 3d 260 [Sup Ct, NY County 2011, A. Hunter, J.]) (Schorr "abrogates the McFarlane dicta", since a governmental agency is statutorily required to enforce its regulations regardless of any acquiescence by the management office); **Rosello v Rhea** (89 AD3d 466 [1st Dept 2011]) (even if the tenant, prior to his death, had asked NYCHA for assistance in adding the occupant to his household, NYCHA could not be estopped from denying the occupant RFM status); **Matter of Muhammad v New York City Hous. Auth.** (81 AD3d 526 [1st Dept 2011]) (an occupant's claim that NYCHA employees misinformed her about its policies does not render her an RFM because an agency cannot be estopped from invoking its regulations; occasional rent payments did not make her an authorized tenant); but see also **Matter of Echeverria v New York City Hous. Auth.** (85 AD3d 580 [1st Dept 2011]) (an occupant who did not enter the apartment lawfully would not be relieved of the written-notice requirement where she failed to demonstrate that NYCHA knew or implicitly approved of her residency); **Nunez v New York City Hous. Auth.** (27 Misc 3d 1235[A], 2010 NY Slip Op 51038[U] [Sup Ct, NY County, A. Schlesinger, J.]) (NYCHA's knowledge [while the record tenant is alive] of an RFM's occupancy is legally significant, even absent written permission); citing **Matter of Detres v New York City Hous. Auth.** (65 AD3d 442 [1st Dept 2009]) (remitting to NYCHA to hear evidence that the occupant had co-resided with her mother for more than the requisite year and that NYCHA "implicitly approved of the coresidency"); citing **Matter of McFarlane v New York City Hous. Auth.** (9 AD3d 289 [1st Dept 2004]) (if the Authority knew of an occupancy and took no action, the occupants could achieve RFM status).

Golden Mtn. Realty Inc. v Severino (47 Misc 3d 147[A], 2015 NY Slip Op 50623[U] [App Term, 1st Dept]) (it is unnecessary for a successor to a rent-controlled tenancy to assert succession rights following the death of the statutory tenant; "A family member who qualifies merely succeeds to the decedent tenant's rights if that is his or her choice").

G&L Holding Corp. v JR Gonzalez (43 Misc 3d 1206[A], 2014 NY Slip Op 50506[U] [Civ Ct, NY County, P. Wendt, J.]) (a remaining family member who was incarcerated from 2006 to 2013 did not forfeit his primary-residence status due to his temporary absence, and the landlord's failure to join him in the licensee proceeding required that the warrant be permanently stayed); distinguishing **Emay Props. Corp. v Norton** (136 Misc 2d 127 [App Term, 1st Dept 1987]) (the legislative objectives of the primary-residence requirement would not be served by allowing a tenant convicted of murder and sentenced to 15 years to life to retain his apartment; the tenant should not have greater rights than a voluntarily absent tenant) and **Chris-Mac Co. v Johnpoll** (134 Misc 2d 597 [App Term, 1st Dept 1987]) (in an illegal-sublet proceeding, where the tenant was incarcerated and unable to resume occupancy in the foreseeable future, the co-occupant was not a permitted additional occupant under Real Property Law § 235-f).

1504 Assoc., L.P. v Wescott (41 Misc 3d 6 [App Term, 1st Dept 2013]) (status as an undocumented alien does not preclude qualification for succession rights, as it is not among the criteria enumerated in the rent control regulations); distinguishing **Katz Park Ave. Corp. v Jagger** (11 NY3d 314 [2008]) (a foreign national with a B-2 tourist visa cannot meet the RSC "primary residence" requirement because the visa holder must have a "principal, actual dwelling place" in a foreign country); cf. **111 Realty Co. v Sulkowska** (21 Misc 3d 53 [App Term, 1st Dept 2008]) (a declaration of residence for a Florida homestead exemption is one factor in determining primary residence but not dispositive as a matter of law; distinguishing **Katz Park Ave. Corp.**, in which the tenant's immigration status as a "temporary visitor," not a self-initiated declaration of residence, was determinative of her claim of primary residence).

158 St. & Riverside Dr. Hous. Co., Inc. v Eccleston (38 Misc 3d 132[A], 2013 NY Slip Op 50010[U] [App Term, 1st Dept]) (HPD has exclusive jurisdiction to determine tenant eligibility in Mitchell-Lama housing, and a certificate of eviction cannot be collaterally attacked in a summary proceeding); **St. Marks Place Hous. Co., Inc. v Moultrie** (34 Misc 3d 140[A], 2012 NY Slip Op 50053[U] [App Term, 2d, 11th & 13th Jud Dists]) (because DHCR is vested with exclusive jurisdiction to determine remaining-family-member claims in State-assisted Mitchell-Lama housing, a succession-rights defense could not be entertained in a licensee summary proceeding); cf. **City of New York v Montefusco** (29 Misc 3d 126[A], 2010 NY Slip Op 51659[U] [App Term, 1st Dept]) (an occupant was precluded from relitigating his succession claim to a City-owned apartment by virtue of HPD's denial of his succession applications and the dismissal of his article 78 proceeding; the occupant also failed to demonstrate the absence of a full and fair opportunity to contest the agency determination, as the agency's combination of investigative, prosecutorial and quasi-judicial functions is not in itself a denial of due process); cf. also **Kent Vil. Hous. Co. Inc. v Wertzberger** (NYLJ 1202590772455 [Civ Ct, Kings County 2013, M. Finkelstein, J.]) (in a holdover proceeding based on a denial of succession rights and an HPD certificate of eviction, the HPD determination would not be given effect, as HPD did not have the authority to initiate proceedings regarding improperly obtained succession rights); citing **Matter of Waldman v New York City Dept. of Hous. Preserv. & Dev.** (36 AD3d 501 [1st Dept 2007]) (HPD is not authorized to commence proceedings, pursuant to the succession provision, where succession rights have been improperly obtained; its remedy is to commence lease termination proceedings); **Matter of Romero-Mitchell v New York City Dept. of Hous. Preserv. & Dev.** (2013 WL 1088795 [Sup Ct, NY County, A. Schlesinger, J.]) (where an occupant claiming succession rights to a Mitchell-Lama apartment was listed on the stock certificate as a joint tenant, it was HPD's burden to prove nonprimary residence, not the occupant's burden to prove a two-year co-residency).

Golden Mtn. Realty Inc. v Severino (40 Misc 3d 67 [App Term, 1st Dept 2013]) (Civil Court has concurrent jurisdiction over succession claims to rent-controlled apartments; it is unnecessary to first obtain a certificate of eviction from DHCR); **Regina Metro. Co.,**

LLC v Hartheimer (40 Misc 127[A], 2013 NY Slip Op 51044[U] [App Term, 1st Dept]) (same; triable issues precluded summary dismissal where the occupant failed to produce all relevant tax returns and had an acknowledged occupancy interest in another apartment); **1504 Assoc., L.P. v Wescott** (35 Misc 3d 1235[A], 2012 NY Slip Op 51002[U] [Civ Ct, NY County, L. Lau, J.]) (no certificate of eviction required prior to commencing a licensee proceeding against an RFM in a rent-controlled apartment). **Elk 300 83 LLC v Dowd** (40 Misc 3d 127[A], 2013 NY Slip Op 51042[U] [App Term, 1st Dept]) (ample need shown for additional disclosure in the form of deposition and document production of the occupant's cousin, who lived in the premises for a part of the relevant period, and for interrogatories of the occupant's sister, who was the tenant's health-care proxy and could shed light on the occupant's claim that he had provided medical care for the tenant); **656 W. Realty, LLC v Blanco** (32 Misc 3d 128[A], 2011 NY Slip Op 51254[U] [App Term, 1st Dept]) (the landlord showed ample need to depose the tenants and the occupant claiming succession rights as they had particular knowledge of the facts concerning the occupancy of the premises).

RSC § 2523.5 (b) (1) ("Unless otherwise prohibited by occupancy restrictions based upon income limitations pursuant to federal, state or local law, regulations or other requirements of governmental agencies, if an offer is made to the tenant . . . and such tenant has permanently vacated the housing accommodation, any member of such tenant's family, as defined in section 2520.6(o) of this Title, who has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years . . . immediately prior to the permanent vacating of the housing accommodation by the tenant, or from the inception of the tenancy or commencement of the relationship, if for less than such periods, shall be entitled to be named as a tenant on the renewal lease").

Mexico Leasing, LLC v Jones (46 Misc 3d 127[A], 2014 NY Slip Op 51456[U] [App Term, 2d, 11th & 13th Jud Dists 2014]) (RSC § 2523.5 [b] [1], when read in light of the goal of the succession provisions to prevent the dislocation of long-term residents due to the vacatur of the head of the household, as set out in Murphy, neither mandates nor even allows a finding of nonentitlement to succession rights solely on the ground that the tenant did not maintain her primary residence in the stabilized apartment during the two-year period prior to her permanent vacatur; where the tenant, who moved to Pennsylvania in 1999 to be closer to her place of employment, leaving her young-adult children and a grandchild in the apartment, continued to return to the apartment several times a month, to view herself as living in the apartment, and to pay the rent and sign renewal leases, the fact that the apartment was not her primary residence in the two years before she stopped signing renewal leases would not bar succession rights); cf. **Fourth Lenox Terrace Assoc. v Wilson** (15 Misc 3d 113 [App Term, 1st Dept 2007]) (the landlord would not be heard to invoke claimed indicia of the tenant's nonprimary-residence to defeat a meritorious succession claim, where the landlord failed to initiate a nonprimary-residence holdover during the tenancy).

525 W. End Corp. v Ringelheim (43 Misc 3d 14 [App Term, 1st Dept 2014]) (a niece lacked succession rights, as the 1997 amendment of RSC 2520.6 [o]—deleting a niece as a qualifying family member—was applicable; the niece's claim that her succession rights accrued in 1992 when the tenant had relocated failed where the tenant had continued to sign renewal leases running through August 2012; the tenant could not be found to have permanently vacated before his death in October 2010); **Jols Realty Corp. v Nunez** (43 Misc 3d 129[A], 2014 NY Slip Op 50529[U] [App Term, 2d, 11th & 13th Jud Dists]) (an occupant claiming succession rights must establish that he resided with the tenant for two years prior to the tenant's permanent vacatur; where the tenant moved out in 2005 but continued to execute renewal leases through March 2011, the tenant could not be deemed to have permanently vacated before March 2011; as the tenant did not live in the apartment between 2009 and 2011, the occupant could not establish succession rights); **PS 157 Lofts LLC v Austin** (42 Misc 3d 132[A], 2013 NY Slip Op 52241[U] [App Term, 1st Dept]) (where the tenant began residing elsewhere in 2002 but continued signing lease renewals through November 2008, she could not be found to have permanently vacated prior to November 30, 2008; thus, the occupants could not have succession rights, as they did not reside with the tenant in the apartment during the two-year period immediately before the tenant's permanent vacatur); see **Third Lenox Terrace Assoc. v Edwards** (91 AD3d 532 [1st Dept 2012]) (where the tenant vacated the apartment in 1998 but continued to execute renewal leases through 2005 and continued to pay rent in her name, the tenant's sister, who resided in the apartment since 1995, was required to show co-occupancy with the tenant for the 2003-2005 period, and could not, since the tenant had admittedly been residing elsewhere); **610 L.L.C. v Lewis** (36 Misc 3d 151[A], 2012 NY Slip Op 51678[U] [App Term, 1st Dept]) (where the tenant took up primary residence elsewhere by 1994 but could not be found to have permanently vacated until 2009, since he appeared in defense of a 2009 nonpayment proceeding and continued to execute a series of renewal leases, the last expiring in 2009, the occupant's proof did not establish co-residency for the two years prior to the tenant's permanent vacatur); **360 W. 55th St., L.P. v DeGeorge** (36 Misc 3d 126[A], 2012 NY Slip Op 51159[U] [App Term, 1st Dept]) (summary judgment properly granted to the landlord where the evidence showed that the tenant took up primary residence in Pennsylvania in January 2007 but did not permanently vacate the apartment prior to the expiration of her most recent renewal lease on May 31, 2009); **Manhattan Mansions, L.P. v Garvey** (34 Misc 3d 130[A], 2011 NY Slip Op 52339[U] [App Term, 1st Dept]) (where the tenants had permanently relocated to Florida years earlier but had not surrendered their interest and had continued to make rent payments in their own name until 2009, the tenants' daughter could not show that she had "resided with" the tenants during the two-year period immediately preceding their permanent vacatur); **Clinton Realty Assoc., LLC v De Los Angeles** (29 Misc 3d 142[A], 2010 NY Slip Op 52178[U] [App Term, 1st Dept]) (a landlord was entitled to summary judgment where the occupant's claim to succeed to his wife's tenancy based on her vacating the apartment in 2001 was conclusively belied by his wife's execution of

a renewal lease in 2003 and payment of rent through September 2004); **South Pierre Assoc. v Mankowitz** (17 Misc 3d 53 [App Term, 1st Dept 2007]) (succession rights' claim waived where the occupant concealed his occupancy for 13 years following the tenant's death; the rights do not automatically vest upon the tenant's death but remain inchoate until ratified by judicial determination); **Extell 609 W. 137th St. v Santana** (21 Misc 3d 1131[A], 2008 NY Slip Op 52289[U] [Civ Ct, NY County, G. Marton, J.], affd for reasons stated below 24 Misc 3d 141[A], 2009 NY Slip Op 51702[U] [App Term, 1st Dept]) (where the tenant maintained significant contacts with the apartment for several years and concealed the fact that she had moved out, the tenant's daughter was unable to establish that she had lived with the tenant for two years prior to the tenant's permanent vacatur); cf. **M & B Lincoln Realty Corp. v Thompson** (06987/2011 [Civ Ct, Kings County Jan. 14, 2013, E. Ofshtein, J.]) (the rule that a would-be successor must prove a one- or two-year co-residency with the tenant prior to the tenant's death or permanent vacatur is inapplicable to a family member who has resided in the apartment since the inception of the tenancy, particularly where the tenant continued to maintain a nexus with the apartment, and would come and go) cf. also **354 E. 66th St. Realty Corp. v Curry** (26 Misc 3d 130[A], 2010 NY Slip Op 50025[U] [App Term, 1st Dept]) (the landlord's claim of deceptive conduct was insufficient to establish a triable issue where the landlord had actual notice, within 15 months after the tenant of record had moved to a nursing home and during the pendency of her last lease renewal, that her son was asserting succession rights).

157 E. 89th St., LLC v McAuliffe (42 Misc 3d 143[A], 2014 NY Slip Op 50270[U] [App Term, 1st Dept]) (on its motion for summary judgment in a licensee proceeding, the petitioner had the initial burden of demonstrating the absence of triable issues regarding the occupant's succession defense, notwithstanding that the occupant would ultimately bear the "affirmative obligation" to establish succession rights).

WSC Riverside Dr. Owners LLC v Wiliams (42 Misc 3d 63 [App Term, 1st Dept 2013]) (an occupant failed to establish succession rights where he failed to show that he and the tenant had intermingled their finances or formalized legal obligations; there were no joint bank accounts or credit cards, the occupant knew nothing about the tenant's savings, and the tenant had paid all the rents and the bills); **Fort Washington Holdings, LLC v Abbott** (36 Misc 3d 11 [App Term, 1st Dept 2012]) (Civil Court erred in setting aside a jury verdict of no succession rights that was supported by legally sufficient evidence, including the occupant's testimony and that of his witnesses showing that he and his deceased aunt did not jointly own property or intermingle their finances; that the tenant had named her son, not occupant, as her beneficiary; and that the tenant's son handled the tenant's financial transactions); **509 Realty Co., LLC v Wright** (34 Misc 3d 131[A], 2011 NY Slip Op 52344[U] [App Term, 1st Dept]) (an occupant failed to establish she was a nontraditional family member where there was no showing that she and the tenant, allegedly her cousin, had intermingled their finances, formalized legal obligations or jointly owned property); cf. **Jackson Surrey 35th, LLC v**

Litvinova (31 Misc 3d 131[A], 2011 NY Slip Op 50594[U] [App Term, 2d, 11th & 13th Jud Dists]) (an occupant who lived with the tenant and intended to marry him was found to be a nontraditional family member, notwithstanding that the only evidence to support her claim came from her and her sister); **2025 Walton Assoc., LLC v Arroyo** (34 Misc 3d 1232[A], 2012 NY Slip Op 50337[U] [Civ Ct, Bronx County, J. Madhavan, J.]) (looking to indicia relevant to a parent/child relationship, court finds a nontraditional mother/son relationship where the occupant and the tenant spent time together, the occupant sought the tenant's guidance and cared for her during a long-term illness); citing **RHM Estates v Hampshire** (18 AD3d 326 [1st Dept 2005]) (finding a nontraditional mother-son relationship, despite the absence of an intermingling of finances); cf. also **Limani Realty, LLC v Zayfert** (40 Misc 3d 32 [App Term, 2d, 11th & 13th Jud Dists 2012]) (a cousin is not a protected family member; the date of the terminus of the two-year co-residency period is the effective date of the tenant of record's surrender; the occupant's proof was insufficient to establish that he was a "full time student," so that his primary residency would not deemed interrupted under RSC § 2523.5 [b] [2] [ii]).

Defenses: Multiple Dwelling Law

Light Re LLC v Frank (NYLJ 1202599205969 [Civil Ct, Kings County 2013, M. Finkelstein, J.]) (a sublessor of an apartment in a de facto multiple dwelling that lacks a C of O cannot maintain a nonpayment proceeding); see **A Real Good Plumber v Kelleher** (191 Misc 2d 94 [App Term, 2d & 11th Jud Dists 2002]) (since the MDL defines an owner to include a "lessee . . . in control of a dwelling", a sublessor of a de facto multiple dwelling cannot maintain a nonpayment proceeding).

Shawkat v Malak (38 Misc 3d 52 [App Term, 2d, 11th & 13th Jud Dists 2013]) (lack of a certificate of occupancy, where the landlord did not covenant to obtain one, does not relieve a commercial tenant who remains in possession of the obligation to pay rent); cf. **455 Second Ave. LLC v NY School of Dog Grooming, Inc.** (37 Misc 3d 933 [Civ Ct, NY County 2012, M. Chan, J.]) (a nonpayment proceeding can be maintained against a commercial tenant notwithstanding that the expired certificate of occupancy was for a multiple dwelling with a basement and that a portion of the building was still being occupied residentially, as appellate precedents allow nonpayment proceedings against commercial tenants where there is no certificate of occupancy and as MDL § 302 must be strictly construed and limited to residential tenants); disagreeing with **Elizabeth Broome Realty Corp. v China Printing Co., Inc.** (157 Misc 2d 572 [Civ Ct, NY County 1993, M. Stallman, J.]) (a commercial business in a mixed-used building could assert an MDL § 302 defense based on an expired commercial certificate of occupancy notwithstanding that the apartments had a valid residential certificate of occupancy); **Ying Lung Corp. v Medrano** (123 Misc 2d 1074 [Civ Ct, NY County 1984 [Lehner, J.]) (the strong penalty for failure to obtain a certificate of occupancy for a "structure" if a

portion thereof is occupied residentially implies that nonresidential tenants may be entitled to assert the MDL § 302 defense).

151 Daniel Low, LLC v Gassab (43 Misc 3d 134[A], 2014 NY Slip Op 50637[U] [App Term 2d, 11th & 13th Jud Dists]) (as a failure to plead and prove compliance with MDR requirements bars an award of possession or arrears in a nonpayment proceeding, the landlord's submission, at trial, of a registration statement for the wrong building required that the petition be dismissed without prejudice); cf. **Halberstam v Kramer** (39 Misc 3d 126[A], 2013 NY Slip Op 50408[U] [App Term, 2d, 11th & 13th Jud Dists]) (a landlord's failure to allege in a holdover petition that the building was an illegal multiple dwelling was not a basis to dismiss, where the landlord was only seeking possession); **O'Neil v Zolot** (2012 NY Slip Op 30074[U] [Sup Ct, Queens County, A. Weiss, J.]) (Housing Part has subject matter jurisdiction to grant a final judgment of possession even if the premises is an illegal multiple dwelling); citing **Czerwinski v Hayes** (8 Misc 3d 89 [App Term, 2d & 11th Jud Dists 2005]); cf. **Nairne v Perkins** (14 Misc 3d 1237[A], 2007 NY Slip Op 50336[U] [Civ Ct, Kings County, S. Kraus, J.]) (in a holdover proceeding, a landlord need not allege or prove compliance with MDR requirements).

Madden v Juillet (46 Misc 3d 146[A], 2015 NY Slip Op 50214[U] [App Term, 9th & 10th Jud Dists]) (the absence of a certificate of occupancy for an apartment not subject to the MDL does not bar the recovery of rent); **Sinclair v Ramnarace** (36 Misc 3d 150[A], 2012 NY Slip Op 51671[U] [App Term, 9th & 10th Jud Dists]) (there is no bar to the recovery of rent where a one-family is used as a two-family); **Pickering v Chappe** (29 Misc 3d 6 [App Term, 2d, 11th & 13th Jud Dists 2010]) (there is no bar to the recovery of rent when a one-family dwelling contains an illegal apartment; the MDL's rent-forfeiture sanction is applicable to buildings occupied or intended to be occupied as the residence of three or more families living independently of each other); contra **Fazio v Kelly** (2003 NY Slip Op 51671[U] [Civ Ct, Richmond County, P. Straniere, J.]) (since it is illegal, under the Health Code, to have a basement apartment, there is no tenancy and the contract cannot be enforced); see also **Acquino v Ballester** (37 Misc 3d 705 [Civ Ct, Richmond County 2012, P. Straniere, J.]) (although there is no statute barring the collection of rent in illegal one-family and two-family dwellings, rent is not collectible because the contract is illegal).

208 Himrod St., LLC v Irizarry (42 Misc 3d 145[A], 2014 NY Slip Op 50344[U] [App Term, 2d, 11th & 13th Jud Dists]) (the landlord's addition of three illegal apartments to a building built before 1929 constituted substantial alterations, requiring that the landlord have a certificate of occupancy; the lack of a certificate barred the landlord's collection of rent in the whole building, not just in the illegally altered apartments).

Other Defenses

MH Residential 1, LLC v Barrett (41 Misc 3d 24 [App Term, 1st Dept 2013]) (tenants whose leases had expired and who were at most tenants at sufferance were nevertheless entitled to invoke the retaliatory-eviction statute); cf. **339-347 E. 12th St. LLC v Ling** (35 Misc 3d 30 [App Term, 1st Dept 2012]) (a holdover proceeding based on the expiration of an unregulated lease was not susceptible to summary dismissal even if the tenant made a prima facie showing giving rise to the statutory presumption of retaliation; sufficient proof of a landlord's subjective, retaliatory state of mind can generally not be presented on papers alone); cf. also **Chelsea Ridge NY, LLC v Clarke** (42 Misc 3d 128[A], 2013 NY Slip Op 52154[U] [App Term, 9th & 10th Jud Dists]) (retaliatory eviction is not a defense to a nonpayment proceeding); cf. **CASSM Realty Corp. v Cohen** (38 Misc 3d 136[A], 2013 NY Slip Op 50144[U] [App Term, 1st Dept]) (retaliatory eviction is not a defense to a nonpayment proceeding).

AGBH Bel Air Rental, LLC v Best (39 Misc 3d 47 [App Term, 2d, 11th & 13th Jud Dists 2013]) (an occupant's defense that he had succession rights to a formerly rent-stabilized apartment because the eviction-plan declaration contained false statements as to the number of tenants alleged to have purchased their shares would not be heard, as there is no private cause of action for such violations of the Martin Act).

Paris Lic Realty, LLC v Vertex, LLC (41 Misc 3d 145[A], 2013 NY Slip Op 52074[U] [App Term, 2d, 11th & 13th Jud Dists]) (the tenant was not entitled to an abatement even if an elevator was deemed part of the leasehold, where the lease provided for no abatement because of landlord's making repairs; the tenant's inability to access parking spaces was not a partial actual eviction, where the lease did not identify specific spaces to which the tenant was entitled); see also **The Carlyle LLC v Beekman Garage LLC** (2014 NY Slip Op 31739[U] [Sup Ct, NY County, J. Kenney, J.]).

Stipulations

1234 Broadway LLC v Kim (48 Misc 3d 127[A], 2015 NY Slip Op 50924[U], *2 [App Term, 1st Dept]) (where a stipulation providing for the payment of use and occupancy "did not authorize the drastic remedy of striking the answer in the event of a payment default," it was error for the Civil Court to strike the answer upon a default); citing **49 Terrace Corp. v Richardson** (40 Misc 3d 135[A], 2013 NY Slip Op 51306[U] [App Term, 1st Dept]) (same); see **Gloria Homes Apts. LP v Wilson** (47 Misc 3d 142[A], 2015 NY Slip Op 50665[U] [App Term, 1st Dept]) (where a stipulation settling a nuisance holdover proceeding provided that, upon a default, the landlord could restore for an immediate hearing on the sole issue of violation of the stipulation, it was error for the court to award the landlord a final judgment following a hearing, as the stipulation did not provide for the entry of judgment and the parties' intent was not clear; the court should have made findings on this issue); citing **133 Plus 24 Sanford Ave. Realty Corp. v Xiu Lan Ni** (47 Misc 3d 55 [App Term, 2d, 11th & 13t Jud Dists 2015]) (where a stipulation did not provide for the entry of a final judgment upon a default, the landlord

was not entitled to a final judgment, as the law requires strict construction of written instruments that work a forfeiture).

135 Amersfort Assoc., LLC v Jones (48 Misc 3d 142[A], 2015 NY Slip Op 51250[U] [App Term, 2d, 11th & 13th Jud Dists]) (while the Civil Court acted well within its discretion in forgiving a lateness of four days on the 22nd payment due under a stipulation, the court could not prospectively change the payment due date under the stipulation from the 7th to the 11th of the month); citing **Harvey 1390 LLC v Bodenheim** (96 AD3d 664 [1st Dept 2012]) (although enforcement of stipulations is favored [citing Chelsea 19 Assoc.], a court always retains the power to vacate a warrant for good cause shown; where the tenant showed that he had approached charities and agencies to obtain assistance, tendered almost all the payment due, and would soon receive enough assistance to satisfy the arrears, the Civil Court properly exercised its discretion in finding good cause to stay the warrant for a short period to allow the long-term rent-stabilized tenant to pay the remaining arrears; in Chelsea 19 Assoc., the tenant had a history of defaults, failed to appear in opposition to the landlord's motion for the issuance of a warrant and failed to pay the amounts due under the stipulation and subsequent rents for more than six months; Chelsea 19 Assoc. does not require that a court never consider a tenant's difficulty in obtaining funds in determining whether good cause exists to vacate a warrant); followed in **Archstone Camargue I LLC v Korte** (40 Misc 3d 103 [App Term, 1st Dept 2013]) (good cause shown to vacate the warrant where the elderly 30-year rent-stabilized tenant tendered the full amount of the judgment and had exercised steady efforts to secure emergency rent relief; concurrence, that the relief was proper even though there was some doubt as to the tenant's ability to pay the rent in the future); **Homewood Gardens Estates, LLC v Deen** (40 Misc 3d 134[A], 2013 NY Slip Op 51269[U] [App Term, 2d, 11th & 13th Jud Dists]) (where a probationary stipulation in a chronic-nonpayment proceeding contemplated that the tenant might not be able to make a specified payment on time and there was proof that DSS error caused the delay in making that payment, tenant's delay would be excused); **123 E. 92nd Realty, LLC v Thomas** (38 Misc 3d 141[A], 2013 NY Slip Op 50224[U] [App Term, 2d, 11th & 13th Jud Dists]) (the Civil Court providently exercised its discretion to excuse a 32-year rent-stabilized tenant's default under a second stipulation settling a chronic-nonpayment holdover proceeding); **Tricham Hous. Assoc. v Akindayi** (38 Misc 3d 146[A], 2013 NY Slip Op 50321 [App Term, 1st Dept]) (excuses delay in complying with a stipulation where the tenant had engaged in good faith efforts to secure emergency rental assistance to cover the arrears); **117 W. 142, LLC v Villanueva** (36 Misc 3d 155[A], 2012 NY Slip Op 51734[U] [App Term, 1st Dept]) (relieves the tenant of brief payment defaults to avoid the forfeiture of a long-term rent-stabilized tenancy); cf. **First MWH & G Incorporation v Gilbert** (36 Misc 3d 135[A], 2012 NY Slip Op 51353[U] [App Term, 2d, 11th & 13th Jud Dists]) (granting a tenant's motion to further stay the execution of a warrant where execution had been stayed to June 30, 2011 for the tenant to make a payment and the tenant, on July 8, 2011, produced money orders for the full amount, as the tenant was in

substantial compliance with the order; in any event, the tenant's claim that she timely had the money but the landlord did not come to collect it raised an issue of credibility which should not have been determined without a hearing); but cf. **Chelsea 19 Assoc. v James** (67 AD3d 601 [1st Dept 2009]) (where a stipulation provided for the entry of a possessory and money judgment upon the tenant's failure to make certain payments by December 31, 2006, a default judgment was entered in April 2007, and the tenant did not tender all the monies due under the stipulation as well as all rent arrears until July 2007, Civil Court "lacked the discretion" not to enforce the stipulation, as the tenant's claimed difficulty in obtaining funds does not constitute fraud, overreaching**,** unconscionability or illegality); **Brigham Park Co-operative Apts., Sec. # 3, Inc. v Rock** (42 Misc 3d 141[A], 2014 NY Slip Op 50220[U] [App Term 2d, 11th & 13th Jud Dists]) (in a chronic-nonpayment holdover proceeding, held that, while enforcement of a stipulation remains subject to the supervision of the court, and the court is not bound by language in the stipulation stating that no breach will be deemed de minimis, the tenants were in substantial breach because their March payment was not made until August and their May personal check was not replaced until July).

Wira Assoc. v Easy (48 Misc 3d 137[A], 2015 NY Slip Op 51203[U] [App Term, 2d, 11th & 13th Jud Dists]) (the tenant would not be relieved of the obligation to make payments under the stipulation based on a claim that the landlord had failed to make repairs, where the tenant did not show that she had provided access in compliance with the stipulation and where the obligation to pay the arrears was not made dependent on the landlord's making the repairs).

201 W. 136 St. Realty Mgt. LLC v Roman (36 Misc 3d 1215[A], 2012 NY Slip Op 51329[U] [Civ Ct, NY County, S. Kraus, J.]) (a stipulation allowing a landlord to evict for rent that is not due when the stipulation is executed is void as a matter of public policy); see **Eastside NYC Corp. v Olmedo** (28 Misc 3d 140[A], 2010 NY Slip Op 51603[U] [App Term, 1st Dept]) (where a stipulation contained no provision converting the nonpayment proceeding to a holdover proceeding yet afforded the landlord the ability to evict the tenants for failure to make future payments, the stipulation "violated well-established public policy"); citing **Ruppert House Co. v Altmann** (127 Misc 2d 115 [Civ Ct, NY County, D. Saxe, J., 1985]) (a stipulation which entitles a landlord to evict for nonpayment of rents not yet due violates public policy because it impedes the tenant's ability to assert defenses such as a breach of the warranty of habitability); but cf. **368 Chauncey Ave. Trust v Whitaker** (28 Misc 3d 130[A], 2010 NY Slip Op 51254[U] [App Term, 2d, 11th & 13th Jud Dists]) (enforcing a stipulation containing a current-rent provision, despite the dissent's claim that this violated **Ruppert House Co.**).

Hernco, LLC v Hernandez (46 Misc 3d 137[A], 2015 NY Slip Op 50062[U] [App Term, 2d, 11th & 13th Jud Dists]) (where a petition alleged a written rental agreement, whereas the tenancy was based on a month-to-month oral agreement, the petitioner's failure to accurately plead the nature of the leasehold did not implicate subject matter

jurisdiction and was waived by the tenant's entry into a stipulation); **Geraci v Jankowitz** (36 Misc 3d 135[A], 2012 NY Slip Op 51354[U] [App Term, 2d, 11th & 13th Jud Dists]) (the tenant's claim that there were defects in the notice of termination did not afford a basis to invalidate a stipulation of settlement, as the claim was waived by virtue of the tenant's entry into the stipulation); citing **1781 Riverside LLC v Chinchu Song** (35 Misc 3d 137[A], 2012 NY Slip Op 50830 [App Term, 1st Dept]); see **Semen v Dor** (33 Misc 3d 138[A], 2011 NY Slip Op 52073[U] [App Term, 2d, 11th & 13th Jud Dists]) (where the tenant raised an overcharge claim in her answer to the nonpayment petition, her subsequent entry into a stipulation of settlement waived the claim); **PR 247 Wadsworth LLC v DeJesus** (32 Misc 3d 140[A], 2011 NY Slip Op 51600[U] [App Term, 1st Dept]) (objections to the service and sufficiency of a petition are waived by a tenant's failure to raise the claim in the trial court); cf. **Michalak v Fechtel** (27 Misc 3d 140[A], 2010 NY Slip Op 50946[U] [App Term, 9th & 10th Jud Dists]) (by consenting to the entry of judgment, the tenant waived any objection to the service of the predicate notice and petition); **2380-86 Grand Ave. Assoc., LLC v Ortega** (20 Misc 3d 135[A], 2008 NY Slip Op 51511[U] [App Term, 1st Dept]) (by virtue of the stipulation, any defect in the predicate notice and petition were waived); see also **Seeram v Kearse** (2 Misc 3d 135[A], 2004 NY Slip Op 50213[U] [App Term, 2d & 11th Jud Dists]) (the landlord's service of the statutory three-day notice instead of the five-day notice required by the lease did not provide a basis to vacate a stipulation since the defect was not jurisdictional and was waived, and the tenant did not show prejudice); cf. **BFN Realty Assoc. v Cora** (8 Misc 3d 139[A], 2005 NY Slip Op 51338[U] [App Term, 2d & 11th Jud Dists]) (since the MDL registration and certificate-of-occupancy requirements further the public interest in the safety of buildings and their tenants, a tenant's waiver of the benefit of these statutes will not be given effect).

8 Beach St. Realty Inc. v Blagg (__ Misc 3d ___, 2015 NY Slip Op 51313[U] [App Term, 1st Dept]) (a stipulation settling a prior holdover proceeding in which the stabilized tenant received a 10-year unregulated lease with a five-year renewal option would not be enforced, as an agreement which waives the benefit of a statutory protection is unenforceable as a matter of public policy); **1796 Nostrand Ave. LLC v Gabriel** (47 Misc 3d 141[A], 2015 NY Slip Op 50618[U] [App Term, 2d, 11th & 13th Jud Dists]) (where a holdover petition alleged that the apartment was not rent stabilized because the building had fewer than six units, a two-attorney stipulation in which the tenant had agreed to surrender the apartment in return for a waiver of arrears would be vacated based on the misstatement in the petition and the resulting prejudice to the tenant, as it has now been judicially determined, in a separate proceeding against a different tenant, that the building was subject to rent stabilization); **Kings Hwy. Realty Corp. v Riley** (35 Misc 3d 127[A], 2012 NY Slip Op 50572[U] [App Term, 2d, 11th & 13th Jud Dists]) (a stipulation in which the tenant agreed to the entry of a holdover final judgment if she violated the stipulation, would be vacated where the tenant had inadvertently waived a defense that the landlord had failed to serve a notice terminating the stabilized tenancy, in light of the provisions of the RSC requiring that no tenant be

removed unless the landlord gives a termination notice and that a waiver of the benefit of an RSC provision is void); **Remie Realty Corp. v Rodriguez** (46 Misc 3d 1210[A], 2015 NY Slip Op 50036[U] [Civ Ct, Bronx County, J. Vargas, J.]) (where the stabilized tenant of combined apartments paid a single rent for the combined apartments, the recent separate lease renewal forms reflecting separate rents for each apartment impermissibly changed the terms and conditions of the lease; thus, a stipulation in a nonpayment proceeding to recover rents for one of the apartments, in which the pro se tenant agreed to surrender that apartment in exchange for a waiver of purported rent arrears, would be set aside as inadvisable, as a tenant cannot waive her statutory rights); see **Tabak Assoc., LLC v Vargas** (__ Misc 3d ___, 2015 NY Slip Op 51314[U] [App Term, 1st Dept]) (a nonpayment stipulation would be set aside as inadvisably entered into where the pro se tenant demonstrated that she had a potentially meritorious rent-overcharge claim); **Loscalzo v Rodriguez** (43 Misc 3d 139[A], 2014 NY Slip Op 50799[U] [App Term, 9th & 10th Jud Dists]) (vacates a nonpayment stipulation as inadvertently entered into where the tenant showed that she was not the tenant of record for at least part of the period for which she had stipulated to pay the arrears and thus that the stipulated sum exceeded any amount due from her); **130 E. 18th L.L.C. v Mitchel** (NYLJ 1202602644244 [Civ Ct, Kings County 2013, M. Sikowitz, J.]) (vacating pro se stipulations containing an illegal rent, as the court and the tenant were unaware of the existence of rent reduction orders until after the tenant obtained counsel, and landlord was aware of the orders; the DHCR orders remained in effect even though they preceded the four-year period; there was no merit to the landlord's argument that, since it had corrected the underlying conditions, DHCR restoration orders were not required); **Hy Mgt. LLC v DeJesus** (NYLJ 1202575097128 [Civ Ct, Kings County 2012, M. Milin, J.]) (vacates a nonpayment stipulation where it was based on a rental amount that was unregistered and thus not collectible); **410 St. Nicholas LLC v Khalid** (NYLJ 1202569108703 [Civ Ct, NY County 2012, J. Stoller, J.]) (vacates a stipulation where the tenant made a colorable showing of rent overcharge and a potential Grimm fraud claim); see **Northtown Roosevelt LLC v Daniels** (35 Misc 3d 137[A], 2012 NY Slip Op 50835[U] [App Term, 1st Dept]) (in a holdover based on allegations that the tenants' son had engaged in criminal activity in the premises, court vacates a stipulation in which the unrepresented tenants agreed to surrender possession, where the tenants submitted documentary evidence tending to show the existence of possible defenses, including that the criminal charges had ultimately been dismissed); **Sontag v Garcia** (31 Misc 3d 1223[A], 2011 NY Slip Op 50811[U] [Civ Ct, Bronx County, J. Kullas, J.]) (vacating a stipulation converting a nonpayment to a holdover proceeding where the pro se tenant inadvertently waived a meritorious warranty-of-habitability and a possible laches defense and received inadequate consideration for the conversion); see also **Kosc Dev., Inc. v Scott** (28 Misc 3d 138[A], 2010 NY Slip Op 51474[U] [App Term, 2d, 11th & 13th Jud Dists]) (where it was shown that the occupants might be tenants in common with the petitioner, a hearing was required to determine if their agreement to surrender should be vacated on the ground that the occupants had inadvertently waived their right to assert a fundamental defect in

the petitioner's proceeding, as one tenant in common may not evict another); **PC 999 High St. Corp. v Blackburn** (27 Misc 3d 144[A], 2010 NY Slip Op 51104[U] [App Term, 9th & 10th Jud Dists]) (a stipulation which provides for the tenant to make payments in excess of the amount due will be vacated); **600 Hylan Assoc. v Polshak** (17 Misc 3d 134[A], 2007 NY Slip Op 52225[U] [App Term, 2d & 11th Jud Dists]) (vacating a stipulation where the tenant waived a substantial and meritorious laches defense); **Cretans Assn. 'Omonoia' Inc. v Perkis** (4 Misc 3d 136[A], 2004 NY Slip Op 50830[U] [App Term, 1st Dept]) (vacating a stipulation and permitting the tenant to assert fundamental defenses relating to the legal regulated rent and Multiple Dwelling Law § 302); see generally **Cabbad v Melendez** (81 AD2d 626 [2d Dept 1981]).

45-48 47th St. Corp. v Murphy (45 Misc 3d 23 [App Term, 2d, 11th & 13th Jud Dists 2014]) (vacating a stipulation settling a holdover proceeding based on the tenant's refusal to sign a renewal lease where the tenant had entered into the stipulation while appearing pro se; where she ultimately paid the waived arrears; where it did not appear from the record that a proper renewal lease had been offered; and where the tenant inadvertently waived her right to a post-judgment cure period; dissent, that vacating the stipulation usurps the Civil Court's authority over enforcement of stipulations; that the tenant was an intelligent educator who was fully capable of defending her rights; that the tenant's payment of the arrears is of no moment because she paid them only because she failed to vacate as agreed; and that the tenant was fully aware of her rights and had previously filed a complaint with DHCR, which she agreed, in the stipulation, to withdraw); **Table Run Estate, Inc. v Perez** (NYLJ, Feb. 23, 1994 [App Term, 1st Dept]) (in holdover proceeding based on failure to sign a renewal lease, the court vacates a stipulation in which the pro se tenant agreed to surrender in return for a forgiveness of arrears, where the tenant did not understand that she was, inter alia, giving up her right to cure); cf. **125 Court St., LLC v Nicholson** (44 Misc 3d 128[A], 2014 NY Slip Op 50973[U] [App Term, 2d, 11th & 13th Jud Dists]) (where, in a holdover proceeding based on the tenant's failure to sign a renewal lease, the tenant, an attorney represented by two different attorneys, executed two stipulations in which she agreed to vacate in return for a waiver of approximately $10,000 of the arrears, her allegation that she was unaware of her right to a post-judgment cure period was an insufficient basis to vacate the stipulations).

Trial

Parkview Equities, LLC v Coughlin (42 Misc 3d 138[A], 2014 NY Slip Op 50164[U] [App Term, 9th & 10th Jud Dists]) (it is error to deny a motion to vacate a default judgment based on the tenant's failure to make a court-ordered deposit); **Merenda v Fried** (42 Misc 3d 136[A], 2014 NY Slip Op 50117[U] [App Term, 9th & 10th Jud Dists]) (it is error to deny a tenant a trial and award the landlord a final judgment based on the tenant's failure to make a court-ordered deposit); but cf. **RPAPL 745 (2)**.

DFS of Springfield, Inc. v DiMartino (40 Misc 3d 70 [App Term, 2d, 11th & 13th Jud Dists 2013]) (upon a tenant's second request for an adjournment, the tenant must be prepared to establish his affirmative defense of lack of personal jurisdiction at an immediate hearing; where the tenant is not prepared to do so, the tenant cannot later assert a lack of personal jurisdiction to avoid an RPAPL 745 [2] judgment for failure to make the required deposit); cf. **49 Terrace Corp. v Richardson** (40 Misc 3d 135[A], 2013 NY Slip Op 51306[U] [App Term, 1st Dept]) (where a tenant has made at least one of the court-ordered use and occupancy payments, RPAPL 745 [2] [c] [ii] provides for an "immediate trial", not the striking of the answer); but cf. **1644 Broadway LLC v Jimenez** (43 Misc 3d 1229[A], 2014 NY Slip Op 50859[U] [Civ Ct, Kings County, H. Thompson, J.]) (a petitioner who has been required to pay fines and water and surcharges is entitled to use and occupancy pendente lite even in the absence of an adjournment request by the tenant).

Excellent Care Physical Therapy PC v MVAIC (43 Misc 3d 136[A], 2014 NY Slip Op 50679[U] [App Term, 1st Dept]) (where no testimony was taken and Civil Court issued judgment following untranscribed colloquy with counsel, the judgment would be reversed and a new trial ordered); **Milio Sons, Inc. v Begum** (37 Misc 3d 137[A], 2012 NY Slip Op 52183[U] [App Term, 9th & 10th Jud Dists]) (where no record was made to support the court's award of rent and legal fees, and no lease was introduced into evidence, the final judgment would be reversed and the matter remitted for trial); **Homewood Gardens Realty, LLC v Kirby** (36 Misc 3d 147[A], 2012 NY Slip Op 51633[U] [App Term, 2d, 11th & 13th Jud Dists]) (the Civil Court erred in finding, without a hearing, that the tenant had defaulted on four occasions under a stipulation settling a chronic-nonpayment holdover proceeding, as the tenant's opposition to the landlord's motion for the entry of judgment raised triable issues as to the number of defaults and whether they should be excused as de minimis); **Oakwood Terrace Hous. Corp. v Monk** (35 Misc 3d 149[A], 2012 NY Slip Op 51111[U] [App Term, 9th & 10th Jud Dists]) (it was error for the Justice Court to award the arrears sought without conducting a trial, notwithstanding the tenant's representation that she was unprepared for trial); **Mondrow v Dexter Props., LLC** (34 Misc 3d 131[A], 2011 NY Slip Op 52346[U] [App Term, 1st Dept]) (it was error for the Civil Court to dismiss a lockout proceeding without taking sworn testimony or receiving evidence in admissible form, as there were triable issues raised concerning the petitioner's occupancy status in the SRO unit and the legality of the landlord's actions); **Vicky Inc. v Haddad** (32 Misc 3d 141[A], 2011 NY Slip Op 51609[U] [App Term, 9th & 10th Jud Dists]) (where a triable issue of waiver was raised, it was error for the City Court to award landlord judgment without holding a trial); cf. **Evans v Tracy** (34 Misc 3d 152[A], 2012 NY Slip Op 50307[U] [App Term, 9th & 10th Jud Dists]) (it was proper for the City Court to award the landlord arrears of $620 without taking sworn testimony where the tenant admitted owing that amount).

Halpern v Tunne (38 Misc 3d 126[A], 2012 NY Slip Op 52321[U] [App Term, 2d, 11th & 13th Jud Dists]) (under Chavez, CPLR 3404, governing dismissals for abandonment,

does not apply to Civil Court cases); see **Chavez v 407 Seventh Ave. Corp.** (39 AD3d 454 [2007]) (CPLR 3404 is not applicable to Civil Court actions, and the Civil Court has no authority to dismiss an action as abandoned); **Marone v Bevelaqua** (36 Misc 3d 140[A], 2012 NY Slip Op 51484[U] [App Term, 2d, 11th & 13th Jud Dists]) (same; a party who moves to restore an action to the trial calendar more than one year after it had been marked off is required to demonstrate a reasonable excuse for the delay in moving to restore, a meritorious cause of action, a lack of intention to abandon the action and a lack of prejudice to the other party); cf. **Bldg Mgt. Co. v Meija** (32 Misc 3d 652 [Civil Ct, NY County 2011, S. Kraus, J.]) (22 NYCRR 208.14, which governs calendar defaults, restorations and dismissals, allows the court to dismiss if one party defaults, and provides for restoration of stricken actions upon so-ordered stipulation or a motion made within one year after the action is stricken, is inapplicable to summary proceedings that have been marked off the calendar for discovery; as CPLR 3404, which provides for the dismissal of abandoned cases, is inapplicable to Civil Court cases, and 208.14 makes no provision for dismissing for neglect to prosecute, the four-prong test is inapplicable; CPLR 3216 provides authority for the Civil Court to dismiss for failure to prosecute, notwithstanding the rule's reference to a note of issue). **Matter of Arc on 4th St. Inc. v Quesada** (112 AD3d 431 [1st Dept 2013]) (Civil Court did not improvidently exercise its discretion in denying the tenant's adjournment request after he voluntarily discharged his attorney on the day of trial); cf. **Dexter 345 Inc. v Belem** (37 Misc 3d 134[A], 2012 NY Slip Op 52106[U] [App Term, 1st Dept]) (a tenant's request for a continuance was properly denied where his need for an adjournment resulted from his own lack of due diligence); **Malcolm X Apts. Inc. v Allen** (36 Misc 3d 151[A], 2012 NY Slip Op 51682[U] [App Term, 1st Dept]) (an application for an adjournment was properly denied where the need therefor resulted from the tenant's lack of due diligence in preparing for the scheduled trial).

2268 Church Ave., LLC v Clarke (48 Misc 3d 127[A], 2015 NY Slip Op 50915[U] [App Term, 2d, 11th & 13th Jud Dists]) (where a holdover petition alleged the termination of a monthly tenancy, but the parties' proof at trial showed competing versions of a lease, and no motion was made to conform the pleadings to the proof, the petition would be dismissed for failure of proof); citing **Longobardi v Martin** (43 Misc 3d 128[A], 2014 NY Slip Op 50525[U] [App Term, 2d, 11th & 13th Jud Dist]) (in a holdover based on the termination of a monthly tenancy, a Supreme Court stipulation settling the issue of ownership and providing that the occupant would remove 60 days following the petitioner's deposit of funds into escrow did not establish a landlord-tenant relationship; in any event, a monthly tenancy was not demonstrated at trial).

Judgment

1081 Flatbush Ave., LLC v Jadoo (34 Misc 3d 136[A], 2011 NY Slip Op 52394[U] [App Term, 2d, 11th & 13th Jud Dists]) (where a nonpayment petition was verified by an attorney and the landlord failed to submit an affidavit on personal knowledge in support

of its application for a default final judgment awarding it the additional rent allegedly owed, it was error for the court to enter a default final judgment); **367 E. 201st St. LLC v Velez** (31 Misc 3d 281 [Sup Ct, Bronx County, K. Thompson, J., 2011]) (rejecting the landlord's application to prohibit the warrant clerk from refusing a warrant application based on the omission of an affidavit of merit; Civil Court Directive DRP-191-A, requiring that an application for a default judgment be accompanied by an affidavit on personal knowledge or petition verified on personal knowledge, does not add an "additional requirement", but rather gives "teeth" to RPAPL 732); see **Sella Props. v DeLeon** (25 Misc 3d 85 [App Term, 2d, 11th & 13th Jud Dists 2009]) (while a petition verified by an attorney is sufficient to satisfy RPAPL 741, a default judgment could not be entered unless the petition was supplemented by an affidavit sworn to on personal knowledge); see also **Matter of Brusco v Braun** (199 AD2d 27 [1st Dept 1993], affd 84 NY2d 674 [1994]) (a petition verified by an attorney is of no probative value for purposes of summary determination); cf. **104 Realty LLC v Brown** (41 Misc 3d 1228[A], 2013 NY Slip Op 51867[U] [Civ Ct, Kings County, S. Avery, J.]) (consolidates, for the purpose of applications for the entry of default final judgments, 12 nonpayment proceedings by the same attorney with the same managing agent who claims to have conducted each investigation of military status, and holds that the court must be provided with the details concerning the alleged oral demands, including the identity of the individual who made the demand, from whom rent was demanded, the means of communication of the demand, the circumstances surrounding the demand, and the content of the demand; moreover, as the managing agent claimed 18 conversations as to military status on the same day, further inquiry was required, as false statements on military status violate federal and state law; in addition, despite these alleged conversations, none of the respondents were personally served); **Intervale Ave. Assoc. v Donlad** (38 Misc 3d 1221[A], 2013 NY Slip Op 50210[U] [Civ Ct, Bronx County, S. Avery, J.]) (in 14 consolidated cases involving 11 different petitioners, all represented by the same attorney, where each affidavit in support of the application for a default judgment, asserting lack of payment, was sworn by the same individual, who claimed to be an employee of each of the petitioners, court, concerned with "robo-signing" and lack of actual first-hand knowledge, sets matter down for hearing to determine if signer had personal knowledge); cf. also **2132 Presidential Assets, LLC v Carrasquillo** (39 Misc 3d 756 [Civ Ct, Bronx County 2013, S. Avery, J.]) (denying apparently "robo-signed" applications for default judgments in 13 consolidated proceedings with leave to renew).

Warrant

FM United LLC v Dule-Wollin (46 Misc 3d 126[A], 2014 NY Slip Op 51767[U] [App Term, 1st Dept]) (in a holdover proceeding, the landlord's postpetition execution of a renewal lease, as required by the RSC, does not void the landlord's termination notice based on chronic rent delinquency, since the act was not one of free will but adhering to the requirements of law); citing **Chelsea 19 Assoc. v James** (67 AD3d 601 [1st Dept

2009]) (the landlord's renewal of the tenant's rent-stabilized lease during the pendency of the appeal did not vitiate the warrant because the landlord was legally obligated under the RSC to tender the lease); contra **Matter of Stepping Stones Assoc. v Seymour** (48 AD3d 581 [2d Dept 2008]) (where, subsequent to the issuance of a warrant in a nonpayment proceeding, the landlord tendered and the tenant accepted a renewal lease, a new tenancy arose, and the landlord could no longer seek possession of the premises on the basis of the tenant's default under the previous lease; contrary to the landlord's contention that it was compelled under the ETPA to offer the renewal lease, the issuance of the warrant terminated the landlord-tenant relationship and with it the landlord's obligation to offer a renewal lease); see also **43-19 39th Place, LLC v Morillo** (17 Misc 3d 138[A], 2007 NY Slip Op 52333[U] [App Term, 2d & 11th Jud Dists]) (the parties' execution of a renewal lease subsequent to the issuance of the warrant vitiated the warrant and reinstated the tenancy); **Morris v Local 804 Delivery & Warehouse Empls. Health & Welfare Fund** (116 Misc 2d 234 [Civ Ct, NY County, W. Friedmann, J., 1982]) (where there is no allegation that the tenant is in default under the current lease, a nonpayment proceeding cannot be maintained to recover rent due under the prior expired lease); but see e.g. **AA Spirer & Co. v Adams** (NYLJ, June 3, 1991 [App Term, 1st Dept]); cf. **J.H.B., L.P. v Martin** (19 Misc 3d 142[A], 2008 NY Slip Op 51041[U] [App Term, 1st Dept]) (the tenant's execution of a rent-stabilized renewal lease during the pendency of his appeal from the final judgment did not revive the tenancy, which had terminated based on illegal drug activity in the premises).

Priegue v Paulus (43 Misc 3d 135[A], 2014 NY Slip Op 50662[U] [App Term, 9th & 10th Jud Dists]) (the issuance of a warrant in a nonpayment proceeding cancels the rental agreement as of the date the proceeding was commenced, and all amounts due the landlord thereafter are for use and occupancy, not rent; the rule against apportionment does not apply to use and occupancy).

598 Marcy Ave. Assoc. LLC v Othman (41 Misc 3d 1239[A], 2013 NY Slip Op 52110[U] [Civ Ct, Kings County, G. Marton, J.]) (once a warrant is executed, the summary proceeding is terminated; if the tenant re-enters, the marshal cannot re-execute the warrant); see **Sweet v Sanella** (46 AD2d 688 [2d Dept 1974]).

Post-Judgment Cure: RPAPL 749 (3) and 753 (4)

111-35 75th Ave. Owners Corp. v Hendrix (___ Misc 3d ___, 2015 NY Slip Op 25280 [App Term, 2d, 11th & 13th Jud Dists 2015]) (to cure an illegal sublet within the 10-day postjudgment cure period, it is not enough to commence a proceeding to remove the occupants; the violation must be readily curable within 10 days, as the court does not have authority to extend the 10-day period; in any event, the tenant, who did not even commence a proceeding within the cure period as extended by the Civil Court, was not entitled to a stay of the warrant); **Mansfield Owners, Inc. v Robinson** (45 Misc 3d 133[A], 2014 NY Slip Op 51667[U] [App Term, 2d, 11th & 13th Jud Dists]) (where, in an

illegal-sublet proceeding, the court stayed issuance of the warrant through October 31, 2012 for the tenant to cure, the tenant's showing that she had served a 30-day notice on the subtenant in July 2012 terminating the subtenancy as of August 31, 2012; that she had commenced a holdover returnable September 19, 2012; and that she had obtained a consent final judgment on October 12, 2012 with execution of the warrant stayed until November 12, 2012 established a timely cure even though the subtenant delayed the eviction until December 11, 2012, as the delay would be deemed de minimis); citing **Caniglia v Elnokrashy** (2003 NY Slip Op 50824[U] [App Term, 2d & 11th Jud Dists]) (a slight delay in curing may be treated as de minimis); cf. **201 W. 54th St. Buyer LLC v Rodin** (47 Misc 3d 154[A], 2015 NY Slip Op 50863[U] [App Term, 1st Dept]) (the tenant's breach of the no-alterations clause by removing the bathroom sink, toilet, medicine cabinet and a wall was not a "lasting or permanent injury" and was susceptible to a postjudgment cure by replacement of the sink cabinet, toilet and wall within 10 days), affg (44 Misc 3d 1217[A], 2014 NY Slip Op 51167[U] [Civ Ct, NY County, S. Kraus, J.]); distinguishing **259 W. 12th, LLC v Grossberg** (89 AD3d 585 [1st Dept 2011]) (a lasting or permanent injury to the apartment by demolition of the existing bathroom was not capable of a meaningful postjudgment cure; RPAPL 753 [4] applies only to breaches that may be cured within the 10-day period); see **Belmont Owners Corp. v Murphy** (153 Misc 2d 444 [App Term, 2d & 11th Jud Dists 1992]) (Civil Court lacks authority to extend the 10-day stay); but see **Eight-19th Co. v Scarano** (NYLJ, Feb. 5, 1992, at 21, cols 2, 3 [App Term, 1st Dept]) (where it is not feasible to legalize extensive alterations within the 10-day postjudgment cure period, "all that should be required is that the tenant commence to cure within 10 days and to diligently and in good faith pursue such cure until the default is remedied"; cf. also **Vicky Inc. v Haddad** (32 Misc 3d 141[A], 2011 NY Slip Op 51609[U] [App Term, 9th & 10th Jud Dists]) (where substantial work cannot be completed in 10 days, a tenant can meet the predicate notice obligation to cure by commencing to cure within 10 days).

Nagle 112, LLC v Miqui (46 Misc 3d 149[A], 2015 NY Slip Op 50245[U] [App Term, 1st Dept]) (post-eviction relief properly granted to the tenant upon his payment in 10 days of the full rent arrears plus eviction costs and attorney's fees, in view of the tenant's long-term rent-controlled tenancy, his tender of a substantial portion of the arrears on the return date of the application to be restored, and the relatively small amount of the payment default); citing **102-116 Eighth Ave. Assoc., L.P. v Oyola** (299 AD2d 296 [1st Dept 2002] and **Parkchester Apts. Co. v Scott** (271 AD2d 273 [1st Dept 2000]); **Lafayette Boynton Hsg. Corp. v Pickett** (44 Misc 3d 140[A], 2014 NY Slip Op 51288[U] [App Term, 1st Dept]) (a 46-year, disabled and infirm tenant showed good cause to be conditionally restored to possession upon payment of $14,000 in arrears, eviction costs and attorney's fees, where the tenant tendered a substantial portion of the arrears and showed various agency commitments, notwithstanding the protracted nature of the proceedings, given the tenant's good faith, ultimately successful efforts to make the landlord whole by securing emergency assistance); cf. **100 W. 174 LLC v Daley** (37 Misc 3d 139[A], 2012 NY Slip Op 52232[U] [App Term, 1st Dept]) (where the

tenant was still unable to pay the arrears three months after his eviction, his motion to vacate the warrant and to be restored was properly denied).

Barmat Realty Co., LLC v Quow (39 Misc 3d 151[A], 2013 NY Slip Op 50977[U] [App Term, 2d, 11th & 13th Jud Dists]) (a tenant who timely cures the breach upon which a holdover proceeding is predicated is entitled to a permanent stay, and the court may not add conditions, such as the payment of arrears); but cf. **Marsid Realty Co. v Ching Leou Liu** (44 Misc 3d 135[A], 2014 NY Slip Op 51206[U] [App Term, 1st Dept]) (permanently stays issuance of the warrant where the long-term tenant ultimately signed the renewal lease before trial, but only on condition that the tenant tender post-petition use and occupancy); cf. also **72 A Realty Assoc., L.P. v Mercado** (36 Misc 3d 137[A], 2012 NY Slip Op 51380[U] [App Term, 1st Dept]) (where the tenant cured by signing the renewal lease, execution of the warrant would be permanently stayed, notwithstanding the landlord's attempt to inject a nonprimary-residence claim to deny a right to cure).

M.M.&I. Realty Co., L.L.C. v Gargano (46 Misc 3d 13 [App Term, 2d, 11th & 13th Jud Dists 2014]) (on an appeal by the tenant's spouse in a nuisance holdover proceeding to remove a rent-controlled tenant, the court permanently stays the issuance of the warrant on condition the tenant never return to the building, as RPAPL 753 [4], which is to be liberally construed, provides for a cure period "during which time the respondent may correct the breach" [emphasis added]); cf. **86 W. Corp. v Singh** (30 Misc 3d 127[A], 2010 NY Slip Op 52265[U] [App Term, 1st Dept]) (where the tenants breached a substantial obligation of the lease by failing to comply with dog-leashing requirements, the appropriate cure was not the removal of the dogs but to require the tenants to comply with the leashing requirements during the relevant period and to permanently stay execution of the warrant on condition the tenants continue to comply with the leashing requirements); citing **Ansonia Assoc. v Bozza** (180 Misc 2d 702 [App Term, 1st Dept 1999]) (the tenant's significant violation of the tenancy by extensive professional use of the apartment was subject to a post-judgment cure); citing **Post v 120 E. End Ave. Corp.** (62 NY2d 19 [1984]) (where a psychiatrist improperly used his apartment for professional purposes, the Court of Appeals remits for application of the 10-day cure period).

433 E. 78 Realty LLC v Tupas (48 Misc 3d 52 [App Term, 1st Dept 2015]) (where a clutter condition existed over a substantial period and was not abated even though the tenant had been given ample opportunity to do so, a post-judgment cure period should not have been granted; the fact that an odor condition was not present on a particular day was not determinative, given the persistence of the clutter condition); cf. **ST Owner LP v Yeremenko** (22 Misc 3d 136[A], 2009 NY Slip Op 50289[U] [App Term, 1st Dept]) (a nuisance created by the tenant's dropping bags of feces from the window posed a health risk and was not subject to cure); **205 E. 77th St. Tenants Corp. v Meadow** (41 Misc 3d 134[A], 2013 NY Slip Op 51857[U] [App Term, 1st Dept]) (RPAPL 753 [4] cure

provision inapplicable where the lease was terminated based on objectionable conduct); citing **Matter of Chi-Am Realty, LLC v Guddahl** (33 AD3d 911 [2d Dept 2006]) (a nuisance created by the tenants' permitting their toilet to overflow was not subject to cure since the proof established a pattern of objectionable conduct which showed no sign of abating).

Barrett Japaning, Inc. v Bialobroda (36 Misc 3d 144[A], 2012 NY Slip Op 51549[U] [App Term, 1st Dept]) (allowing a post-judgment cure period in a holdover based on the illegal sublet of a loft, as the loft was occupied for dwelling purposes); **B & B Manhattan, LLC v Sack** (23 Misc 3d 127[A], 2009 NY Slip Op 50543[U] [App Term, 1st Dept]) (permanent post-judgment stay was proper where the tenant cured the subletting violation prior to trial); **34 Realty LLC v Udoh** (23 Misc 3d 126[A], 2009 NY Slip Op 50520[U] [App Term 1st Dept]) (illegal sublet of stabilized apartment subject to post-judgment cure); **Cambridge Dev., LLC v Staysna** (22 Misc 3d 136[A], 2008 NY Slip Op 28514 [App Term, 1st Dept]) (a short-term sublet was subject to a post-judgment cure).

New York City Hous. Auth. (Rangel Houses) v Groves (38 Misc 3d 128[A], 2012 NY Slip Op 52364 [App Term, 1st Dept]) (Civil Court lacks authority to permanently stay an eviction where the tenancy was terminated following an agency hearing on the merits and the tenants exhausted all administrative remedies), revg (35 Misc 3d 1205[A], 2011 NY Slip Op 51789[U] [Civ Ct, NY County, S. Kraus, J.]) (permanently stays a warrant where NYCHA had terminated a tenancy based on chronic nonpayment of rent and the tenants showed they had become current with HRA's assistance); see **New York City Hous. Auth. v Hall** (40 Misc 3d 135[A], 2013 NY Slip Op 51272[U] [App Term, 2d, 11th & 13th Jud Dists]) (NYCHA's administrative determination to terminate a tenancy is subject to review only in an article 78 proceeding and cannot be collaterally attacked in a summary proceeding); **New York City Hous. Auth. v McClinton**, 184 Misc 2d 818 [2000]; **New York City Hous. Auth. v Williams**, 179 Misc 2d 822 [1999]).

Stay

Lanuto v Vargas (43 Misc 3d 134[A], 2014 NY Slip Op 50636[U] [App Term, 2d, 11th & 13th Jud Dists]) (where one of the occupants was a daughter of the former owner of the house and showed that she had commenced an action in Supreme Court to set aside the deathbed transfer of the house to the petitioner, the occupant's brother, Civil Court should have granted the occupant's request for a stay, as full redress could only be had in the Supreme Court); cf. **Murphy v 317-319 Second Realty LLC** (95 AD3d 443 [1st Dept 2012]) (while ordinarily Civil Court is the preferred forum for holdover proceedings, where complete relief cannot be granted in the Civil Court, consolidation is proper to resolve the common questions of law and fact; where the tenant counterclaimed for unjust enrichment and the counterclaim was stricken based on a provision of a lease the validity of which was in issue, it was appropriate to consolidate).

Attorney's Fees

Graham Ct. Owner's Corp. v Taylor (24 NY3d 742 [2015]) (Real Property Law § 234 applies to a lease that authorizes a landlord to cancel the lease upon the tenant's default, repossess the premises and then collect attorney's fees incurred in retaking possession; the language of § 234 "in any action or summary proceeding" does not require that the attorney's fees be available in the proceeding against the tenant for the breach, only that the landlord can recover attorney's fees incurred as a result of the breach; a construction that would deny the tenant attorney's fees would, contrary to the intent of the legislature, favor the landlord by allowing him to recoup attorney's fees where the tenant could not), affg (115 AD3d 50 [1st Dept 2014, Renwick, J.]) (a 3-2 majority holds that a clause permitting the landlord to deduct attorney's fees from the monies received upon reletting following a default under the lease triggers Real Property Law § 234; the purpose of the statute is to level the playing field between landlords and tenants; as a remedial statute, it should be accorded its broadest meaning; the clause allows the landlord to re-rent to recover attorney's fees and thus falls within the literal meaning of the statute; that the landlord can only recover the fees indirectly is of no moment, what is significant is that the landlord's right is triggered by the tenant's failure to perform a covenant of the lease; dissent, that Real Property Law § 234 is in derogation of the common law; that the clause does not provide for the tenant's payment of attorney's fees, merely for an offset of rents in the event of a reletting; that the rule of liberal construction does not apply where a remedial statute creates a liability not otherwise existing; and that the clause would not allow the landlord to recover attorney's fees in a summary proceeding); **Casamento v Juaregui** (88 AD3d 345 [2d Dept 2011]) (in a proceeding involving an unsuccessful claim that the tenant had made unauthorized repairs, a lease clause providing that "any rent received by landlord for the re-renting [following a cancellation of the lease] shall be used first to pay landlord's expenses [including] reasonable legal fees" triggered the tenant's reciprocal right to attorney's fees); cf. **Bunny Realty v Miller** (180 AD2d 460, 462 [1st Dept 1992]).

Matter of 251 CPW Hous. LLC v Pastreich (124 AD3d 401 [1st Dept 2015]) (a tenant who prevailed, i.e, obtained a result that was substantially favorable to him, in a holdover proceeding, was entitled to attorney's fees regardless of whether the proceeding was formally dismissed, as a tenant is entitled to recover fees when the ultimate outcome is in his favor; the fact that the landlord relied on the 2003 amendments to the RSL to discontinue a tenant's preferential rent was not a basis to deny the successful tenant attorney's fees; the standard is not whether the landlord's claim was of "colorable merit," as such a standard would gut the protections afforded by Real Property Law § 234; attorney's fees should be denied only where a fee award would be manifestly unfair or where the successful party engaged in bad faith); **333 E. 49th Partners, L.P. v Flamm** (107 AD3d 584 [1st Dept 2013]) (where the tenant signed false affidavits of primary residency and entered into a subtenancy without consent,

equitable considerations and fairness militated against an award of fees to the prevailing tenant); **Kralik v 239 E. 79th St. Owners Corp.** (93 AD3d 569 [1st Dept 2012]) (prevailing tenants denied fees where the cooperative's position was justified by the state of the law when the action was commenced, as courts have discretion to deny attorney's fees based on considerations of equity and fairness); citing **Solow Mgt. Corp. v Lowe** (1 AD3d 135 [1st Dept 2003]) and **Jacreg Realty Corp. v Barnes** (284 AD2d 280 [1st Dept 2001]) (attorney's fees will not be awarded where it is "manifestly" unfair to do so); see **Matter of Stepping Stones Assoc. v Seymour** (48 AD3d 581 [2d Dept 2008]) (a tenant who succeeded in getting a nonpayment petition dismissed based on the landlord's execution of a renewal lease was not entitled to attorney's fees where he had admittedly defaulted in rent); **Abrams v 4-6-8, LLC** (38 Misc 3d 127[A], 2012 NY Slip Op 52345[U] [App Term, 1st Dept]) (in an HP proceeding, where the evidence showed that the noise violation had been corrected prior to trial, the successful landlord was not entitled to attorney's fees because the tenant had to resort to legal proceedings to compel the landlord to cure the violation; the tenant was not entitled to fees because she prolonged the proceeding after the violation had been cured); **Skyline Terrace Corp., Inc. v Butler** (32 Misc 3d 138[A], 2011 NY Slip Op 51546[U] [App Term, 2d, 11th & 13th Jud Dists]) (where a holdover proceeding predicated on violations of lease provisions requiring the tenant to install noise-reducing carpeting, to avoid excess noise, and to permit inspections, was discontinued because the landlord's witness had died, the tenant was not entitled to attorney's fees, as an inspection had revealed that the carpeting installed by the tenant did not cure the violation, and the outcome was "mixed"); **Carlton Estates, Inc. v Cruz** (31 Misc 3d 144[A], 2011 NY Slip Op 50878[U] [App Term, 2d, 11th & 13th Jud Dists]) (where, in a holdover proceeding based on the tenants' failure to cease using the basement portion of the apartment as a living room, after the parties stipulated that the tenants had cured the breach, the petition was dismissed based on the landlord's commencement of a nonpayment proceeding, the tenants were not entitled to attorney's fees); **East Midtown Plaza Hous. Co. v Cannings** (14 Misc 3d 127[A], 2006 NY Slip Op 52481[U] [App Term, 1st Dept]) (in view of the landlord's delay in complying with the MDL registration requirements, it would be "manifestly unfair" to award the landlord attorney's fees, notwithstanding that it prevailed); citing **Wells v West 10th St. Assoc.** (205 AD2d 431 [1st Dept 1994]) (it would be manifestly unfair to award fees against an unsuccessful landlord where the law at the time the proceeding was commenced supported the landlord's claim).

174 LLC v Goldstein (45 Misc 3d 129[A], 2014 NY Slip Op 51563[U] [App Term, 1st Dept]) (the tenant's success on his Pet Law defense warranted an award of attorney's fees); citing **184 W. 10th St. Corp. v Marvits** (29 Misc 3d 134[A], 2010 NY Slip Op 51970[U] [App Term, 1st Dept]) (a tenant who prevails on a Pet Law defense is entitled to attorney's fees); contra **Gold Queens, LLC v Cohen** (42 Misc 3d 15 [App Term, 2d, 11th & 13th Jud Dists 2013]) (where the tenants admitted that they had breached the no-pet provision, they were not entitled to attorney's fees); **Toledo Mut. Hous. Corp. v Schwartz** (33 Misc 3d 58 [App Term, 2d, 11th & 13th Jud Dists 2011]) (Real Property

Law § 234, enacted in 1966, applies retroactively to a lease executed in 1962; as section 234 is to be read broadly, it applies to attorney's fees provisions in a cooperative's by-laws, not just to lease provisions; in view of the tenants' blatant disregard of the lease no-pet provision and of their unfulfilled assurance to landlord that they would resolve the problem, the tenants were not entitled to attorney's fees upon prevailing on their Pet-Law defense); **2299-13 Apt. Corp. v Portnov** (33 Misc 3d 128[A], 2011 NY Slip Op 51849[U] [App Term, 2d, 11th & 13th Jud Dists]) (in view of all the circumstances, including the tenants' misrepresentations to the landlord that the dog was not theirs, which misrepresentations caused the landlord to delay commencing legal proceedings, the tenants were not entitled to attorney's fees upon prevailing on their Pet-Law defense); see **Beach Haven Apts. No. 1 v Cheseborough** (2 Misc 3d 33 [App Term, 2d & 11th Jud Dists 2003]) (an award of attorney's fees to a tenant who violates his lease but, after settlement negotiations [which may have delayed the commencement of the proceeding], prevails on a Pet Law defense would impair the policy rationale of Real Property Law § 234).

433 Sutton Corp. v Broder (22 NY3d 1161 [2014]) (a co-op tenant was not the prevailing party in an action by the co-op for an injunction and damages based on the tenant's allowing odors to emanate from the apartment, notwithstanding that the Supreme Court had found that the co-op had improperly resorted to self help before commencing the action and that the action was ultimately dismissed on the ground that the situation had been resolved, since, as noted in the Appellate Division dissent, the co-op had received the relief requested of permission to enter the apartment and remove the source of the odor), revg (107 AD3d 623 [1st Dept 2013]) (the tenant's successful defense against the action warranted an award of attorney's fees in his favor); cf. **Great Neck Terrace Owners Corp. v McCabe** (101 AD2d 944 [2d Dept 2012]) (smell of cat urine emanating from the tenant's apartment and the tenant's failure to give the landlord access to remedy the situation established a breach of the proprietary lease and entitled the co-op to attorney's fees).

Fairview Hous., LLC v Dickens (39 Misc 3d 146[A], 2013 NY Slip Op 50848[U] [App Term, 9th & 10th Jud Dists]) (where after the commencement of the proceeding, the tenant paid all the arrears, the landlord was not entitled to attorney's fees, as it did not prevail with respect to the central relief sought of a possessory judgment; moreover, there was no proof that the lease allowed the recovery of attorney's fees as additional rent); see **Babylon Vil. Equities v Mitchell** (11 Misc 3d 84 [App Term, 9th & 10th Jud Dists 2006]) (where the landlord accepted the rent arrears during trial, it was not entitled to attorney's fees because there was no possessory judgment which included rent arrears); citing **Nestor v McDowell** (81 NY2d 410, 415-416 [1993]) (where, in an ejectment action based on the tenant's installation of a washing machine, the landlord did not obtain a judgment because the tenant cured the violation, the plaintiff was not entitled to attorney's fees); cf. **Stribula v Tisdale** (21 Misc 3d 137[A], 2008 NY Slip Op 52239[U] [App Term, 1st Dept) (an award of attorney's fees may be based on the

ultimate outcome of the dispute, even if the outcome is not on the merits; a landlord who did not obtain a judgment qualified as a prevailing party where the landlord obtained possession after the tenant chose to surrender the apartment and not to contest the merits); **60 W. 57th Inc. v Adams** (18 Misc 3d 134[A], 2008 NY Slip Op 50165[U] [App Term, 1st Dept]) (the landlord prevailed on its breach-of-lease claim so as to be entitled to recover attorney's fees where the tenant cured the lease violation during trial, even absent a formal merits determination); citing **Sykes v RFD Third Ave., I Assoc.** (39 AD3d 279 [1st Dept 2007]) (where the plaintiffs received the escrow funds they sought through stipulation rather than judicial determination, they sufficiently "prevailed" on their claim); see also **Soho Vil. Realty v Gaffney** (188 Misc 2d 261 [App Term, 1st Dept 2001]) (where the tenant surrendered the apartment during the holdover proceeding after 18 months of litigation, the landlord obtained the central relief sought of possession and was entitled to attorney's fees).

J.P. & Assoc. Props. Corp. v Krautter (38 Misc 3d 60 [App Term, 2d, 11th & 13th Jud Dists 2013]) (the dismissal of a nonpayment petition, where the tenant established the existence of a DHCR rent reduction order and tenant's DHCR overcharge complaint was pending, was not the ultimate outcome of the controversy); cf. **Engel v Wolfsohn** (38 Misc 3d 17 [App Term, 2d, 11th & 13th Jud Dists 2012]) (the landlord's discontinuance of the holdover proceeding with prejudice, upon his acknowledgment that he had no case and could not prevail, constituted the "ultimate outcome" of the controversy over whether the apartment was rent stabilized, even though the tenant's rent overcharge claims remained to be determined in another forum).

Megan Holding LLC v Conason (48 Misc 3d 128[A], 2015 NY Slip Op 50952[U] [App Term, 1st Dept]) (while the tenants were entitled to attorney's fees for prevailing on their prior appeal, they were not entitled to fees incurred in their unsuccessful motion practice, including five motions to dismiss the appeal for failure to timely perfect); **see Santorini Equities, Inc. v Picarra** (30 Misc 3d 136[A], 2011 NY Slip Op 50174[U] [App Term, 1st Dept]) (where the tenant secured a dismissal of a nonprimary-residence proceeding based on a defective Golub notice, the "ultimate outcome" was reached in favor of the tenant, but the tenant was entitled only to the fees he had incurred in litigating the Golub notice issue); **Kura, LLC v Praschnik-Buchman** (27 Misc 3d 127[A], 2010 NY Slip Op 50580[U] [App Term, 2d, 11th & 13th Jud Dists]) (where the tenant obtained a 1% abatement, the landlord was the prevailing party; the landlord should not be awarded fees in connection with the tenant's order to show cause to compel the landlord to accept a timely tender of the judgment amount, on which the tenant prevailed); citing **Binaku Realty Co. v Penepede** (2 Misc 3d 140[A], 2004 NY Slip Op 50292[U] [App Term, 1st Dept]) (although tenant prevailed in the litigation, he was not entitled to recover attorney's fees for an unsuccessful pre-answer dismissal motion); **Dara Realty Assoc. v Schachter** (2003 NY Slip OP 51150[U] [App Term, 2d & 11th Jud Dists]) (a prevailing party is entitled to attorney's fees only to the extent it prevailed); cf. also **338 W. 46th St. Realty LLC v Leonardi** (32 Misc 3d 31[A], 2011 NY

Slip Op 51333 [App Term, 1st Dept]) (a fee arrangement, while indicative of what is reasonable, is not determinative).

Rossman v Windermere Owners, LLC (111 AD3d 429 [1st Dept 2013]) (lease provisions entitling the landlord to attorney's fees in actions or proceedings for the recovery of rent or possession, or based on a breach of the lease, were inapplicable in an action by the tenant for a declaratory judgment that he was rent stabilized and for rent overcharge); **338 W. 46th St. Realty, LLC v Morton** (103 AD3d 518 [1st Dept 2013]) (RPL § 234 is inapplicable to a DHCR proceeding, even if it is related to a summary proceeding); **Matter of Blair v New York State Div. of Hous. & Community Renewal** (96 AD3d 687 [1st Dept 2012]) (because Real Property Law § 234 authorizes attorney's fees only "in any action or summary proceeding", it does not apply to either administrative proceedings or article 78 proceedings); **Raynier v 159 Eluji Assoc., LLC** (92 AD3d 617 [1st Dept 2012]) (Real Property Law § 234 does not provide for the recovery of attorney's fees for a tenant's successful DHCR application); **191 Chrystie LLC v Ledoux** (82 AD3d 681 [1st Dept 2011]) (in a declaratory judgment action to determine whether the tenant was protected under the Loft Law, the tenant was not entitled to attorney's fees pursuant to Real Property Law § 234 because the landlord did not base its claim on a violation of a lease term; moreover, as the lease was not included in the record, it was not established that the lease provided for an award of attorney's fees to the landlord triggering § 234); **Feinman v Fifty Seven Assoc.** (28 Misc 3d 131[A], 2010 NY Slip Op 51267[U] [App Term, 1st Dept]) (a provision authorizing the landlord's recovery of attorney's fees in the event of a default by the tenant under the lease did not authorize the landlord's recovery of fees for the tenant's commencement of an ultimately discontinued HP proceeding, where there was no violation of the lease).

1781 Riverside LLC v Castillo (36 Misc 3d 126[A], 2012 NY Slip Op 51157[U] [App Term, 1st Dept]) (attorney's fees may be awarded pursuant to Real Property Law § 234 only where the lease provides for the landlord's recovery of fees; the allegation of the petition, verified by the landlord's counsel on information and belief, did not constitute a formal judicial admission); citing **Sound Communications, Inc. v Rack & Roll, Inc.** (88 AD3d 523 [1st Dept 2011]) (allegations in a pleading made upon information and belief do not constitute formal or informal judicial admissions); see **Roxborough Apts. Corp. v Kalish** (29 Misc 3d 41 [App Term, 1st Dept 2010]) (while statements made in a pleading verified on personal knowledge are formal judicial admissions, those made on information and belief are not); **Quisequeya Hous. Co. LLP v De La Cruz** (23 Misc 3d 127[A], 2009 NY Slip Op 50545[U] [App Term, 1st Dept]) (a petition's terse prayer for attorney's fees did not constitute a judicial admission); cf. **Riverside Syndicate, Inc. v Richter** (26 Misc 3d 137[A], 2010 NY Slip Op 50183 [App Term, 1st Dept]) (where the landlord requested attorney's fees in the petition, and identified the initial lease and referenced the specific lease clause, the landlord made a formal judicial admission that a lease containing an attorney's fees clause existed, and the tenant was entitled to

attorney's fees notwithstanding the fact that neither side produced the lease); **Tabak v Steele** (24 Misc 3d 144[A], 2009 NY Slip Op 51811[U] [App Term, 1st Dept]) (a tenant who obtained a legal fee award in an earlier phase of the proceeding was estopped from denying the existence of a lease agreement containing a legal fee provision).

67-15 102nd St., LLC v Whitman-Gross (43 Misc 3d 135[A], 2014 NY Slip Op 50659[U] [App Term, 2d, 11th & 13th Jud Dists]) (as attorney's fees can only be recovered where an applicable agreement, statute or court rule provides for their recovery, the tenant was liable for attorney's fees in an illegal-sublet proceeding but the undertenant, who had not signed the lease, was not).

Section 8, NYCHA & Co-ops etc.

Matter of Banos v Rhea (25 NY3d 266 [2015]) (the four-month statute of limitations to challenge a NYCHA termination of a Section 8 subsidy commences to run upon receipt of the T-3 notice of default letter, even if the landlord fails to prove the mailing of the predicate warning letter and T-1 notice of termination, as the Williams consent judgment provides that the determination to terminate benefits becomes final and binding upon receipt of the notice of determination or the notice of default [the T-3 letter]; the consent judgment contains a rebuttable presumption that the T-3 letter is received on the fifth day after mailing).

Plaza Residences LP v Rawlerson (55093/14, Civ Ct, Kings County, B. Scheckowitz, J., June 10, 2015) (in a holdover based on a claim that the tenant caused the landlord to be penalized civilly by failing to recertify [9 NYCRR § 2524.3 (c)], causing the landlord to lose Section 8 subsidy payments, the court holds that the tenant's failure to recertify was not willful, as she had repeatedly tried to comply and had been reinstated retroactively); citing **DU 1st Realty Co. LP v Robinson** (35 Misc 3d 138[A], 2012 NY Slip Op 50840[U] [App Term, 1st Dept]) (where a failure to recertify was not purposeful and had been cured several months before the commencement of the holdover proceeding, the proceeding would not lie); see **2 Macon St. Assoc., L.P. v Sealy** (32 Misc 3d 52 [App Term, 2d, 11th & 13th Jud Dists 2011]) (a tenant's deliberate refusal to recertify so that the landlord could receive a low-income housing tax credit constituted a breach of a substantial obligation of the tenancy); citing **Pinnacle Bronx W. LLC v Jennings** (29 Misc 3d 61 [App Term, 1st Dept 2010]); see also **Heywood Towers Assoc. v Hussain** (31 Misc 3d 1235[A], 2011 NY Slip Op 51003[U] Civ Ct, NY County, A. Hahn, J.]) (the landlord's remedy when a Section 8 tenant fails to recertify is to commence a holdover based on breach of a substantial obligation); but cf. **2011 Newkirk LLC v Legree** (NYLJ, July 29, 2010, at 28, col 1 [Civ Ct, Kings County, M. Finkelstein, J.]) (a tenant's failure to reinstate her Section 8 voucher when an apartment, which had previously failed inspection, finally passed did not breach a substantial obligation of the lease).

Matter of Perez v Rhea (20 NY3d 399 [2013]) (where the tenant was convicted for failing to report income over seven years, gave no explanation for her conduct, and appeared to have sufficient income to find other housing, the termination of the NYCHA tenancy was an appropriate penalty for the tenant's concealment of over $27,000 of employment income), revg 87 AD3d 476 [1st Dept 2011]); **Matter of Grant v New York City Hous. Auth.** (116 AD3d 531 [1st Dept 2014]) (penalty of eviction from public housing was warranted where a significant amount of marijuana, a bottle of oxycodone pills and a loaded weapon were found in the apartment of the long-term tenant, who resided with her five children, two of whom were minors; the tenant acknowledged that one of her older sons was a habitual marijuana user and that she could not control his activities when she was not present; the penalty was not shocking to the sense of fairness, as the tenant endangered her neighbors); **Matter of Cruz v New York City Hous. Auth.** (106 AD3d 631 [1st Dept 2013]) (upholding NYCHA's determination to terminate the tenancy where the tenant violated an exclusion order, as the evidence showed that the tenant's son, who had been barred for drug-related activity, maintained a room in the apartment, visited regularly, and was arrested in the apartment while in possession of crack cocaine); **Matter of Rodriguez v New York City Dept. of Hous. Preserv. & Dev.** (94 AD3d 505 [1st Dept 2012]) (termination was justified where the Section 8 tenant violated the agency's policies requiring truthful reporting of income; the hearing officer had no duty to inquire as to the tenant's mental health where there was no indication that she was suffering from any mental incapacity); **Matter of Morman v New York City Dept. of Hous. Preserv. & Dev.** (81 AD3d 528 [1st Dept 2011]) (termination of enhanced Section 8 voucher warranted where the tenant violated the requirement of truthful and complete reporting of household composition); **Matter of Gerena v Donovan** (51 AD3d 502 [1st Dept 2008]) (termination of a Section 8 voucher was warranted where the tenant did not notify HPD that his wife was living with him); cf. **Matter of Smith v Tuckahoe Hous. Auth.** (111 AD3d 642 [2d Dept 2013]) (the penalty of termination was shocking to the judicial conscience where the tenant, who had multiple confrontations with landlord's employees, who felt intimidated by the tenant, did not use violence and was receiving therapy for his anger issues); **Matter of Oliver v Cestero** (39 Misc 3d 1214[A], 2013 NY Slip Op 50612[U] [Sup Ct, NY County, D. Ling-Cohan, J.]) (termination of the Section 8 subsidy based on underreporting of income was unduly harsh where the disabled tenant claimed that the failure was unintentional and due to confusion as to which months she had worked part time and which she had received unemployment, and her need to care for her daughter's mental disabilities, and where the tenant, unlike in Perez, was never charged criminally and was living in a homeless shelter).

Henry Phipps Plaza S. Assoc. Ltd. Partnership v Quijano (45 Misc 3d 12 [App Term, 1st Dept 2014]) (the tenants' intentional misrepresentation of their household income on their Section 8 recertifications justified termination of the tenancy; dissent, that the landlord failed to follow HUD procedures, as it failed to provide the tenant with the HUD-required notice of the possibility of eviction based on fraud and with an opportunity to

respond; after receiving a letter from HUD's OIG that OIG had information that the tenant had failed to report an unauthorized occupant, the landlord was required to begin an independent investigation but all the landlord did was send the tenant a letter advising her that HUD was requesting a termination of the subsidy; that she would be charged a market rent; and that she should set up an appointment to discuss the matter; the tenant had no notice that the landlord was terminating the tenancy based on fraud); but cf. **Starrett City, Inc. v Brownlee** (22 Misc 3d 38 [App Term, 2d & 11th Jud Dists 2008]) (where the HUD Handbook required a series of notices apprising the tenant of, inter alia, the staff person to contact about scheduling a recertification interview and specifying the amount of rent that the tenant would have to pay if he failed to timely recertify, notices stating that the tenant was to contact a "staff member" and that he would be charged a "market rent" were insufficient to terminate the subsidy, and a nonpayment proceeding seeking the market rent would be dismissed); **Westbeth Corp. HDFC Inc. v Ramscale Prods., Inc.** (37 Misc 3d 13 [App Term, 1st Dept 2012]) (dismissing holdovers against tenants of mixed-use subsidized premises where the landlord failed to give the required notice that the tenants' conduct would constitute a basis for termination under the "other good cause" language of CFR 247.3; the tenants were protected under that provision although they had failed to comply with annual income certification requirements); **Lambert Houses Redevelopment Co. v Jobi** (43 Misc 3d 1227[A], 2014 NY Slip Op 50819[U] [Civ Ct, Bronx County, J. Vargas, J.]) (court vacates stipulations and dismisses petition in a nonpayment proceeding by an owner of a project-based Section 8 building seeking market rents based on the termination of the subsidy; the court has jurisdiction to determine the propriety of the subsidy termination; the landlord's notices were inadequate, as there was no evidence that the landlord had sent the initial notice, and the reminder notices omitted required information regarding the staff person to contact); **Stevenson Commons Assoc. v Vargas** (36 Misc 3d 1211[A], 2012 NY Slip Op 51248[U] [Civ Ct, Bronx County, S. Avery, J.]) (dismissing a claim for market rents where the landlord failed to provide proper HUD mandated notices and thus failed to properly terminate the tenant's subsidy); **Prospect Hgts. Assoc. v Gonzalez** (34 Misc 3d 1203[A], 2011 NY Slip Op 52351[U] [Civ Ct, Kings County, L. Lau, J.]) (where the landlord failed to comply with HUD requirements, its demand for the full market rent was defective and the proceeding would be dismissed). **501 W. 41st Assoc., LLC v Annunziata** (41 Misc 3d 138[A], 2013 NY Slip Op 51922[U] [App Term, 1st Dept]) (a tenant who failed to disclose tens of thousands of dollars in joint account funds on his initial application for the low-income subsidized tenancy, as well as income from those assets on annual recertifications, was in material noncompliance with the lease, as the HUD Handbook, New York Banking Law and the law of New Jersey, where the funds were held, deemed the tenant to be the owner of half the funds; had the assets been disclosed, the tenant would have been ineligible for the housing; a notice to cure was not required because the failure to disclose assets that would have rendered the tenant ineligible is not curable), affg 36 Misc 3d 1203[A], 2012 NY Slip Op 51181[U] [Civ Ct, NY County, P. Wendt, J.]); cf. **560 W. 165th St. Assoc. L.P. v Figueroa** (39 Misc 3d 1005 [Civ Ct, NY County 2013, T. Elsner, J.]) (the

Section 8 contract did not require the landlord to evict the tenant for allowing her infant to reside with her; the tenant's continued occupancy with the infant child did not violate the lease, where there was no specific restriction against housing children in the premises; an agreement by the tenant, while unrepresented by counsel, to relinquish the unit after she gave birth to a child was void as against public policy and violated the tenant's rights under the fair housing statutes).

Irizarry v Ewer (44 Misc 3d 140[A], 2014 NY Slip Op 51283[U] [App Term, 1st Dept]) (a private side agreement impermissibly altered the terms of the HAP contract and was unenforceable as violative of the rent-limitation provisions of the federal regulations; thus, the tenant was entitled to the return of the excess rent paid); cf. **385, LLC v Marlow** (42 Misc 3d 131[A], 2013 NY Slip Op 52227[U] [App Term, 9th & 10th Jud Dists]) (a stipulation settling a nonpayment proceeding would fairly be interpreted as providing that the landlord would have judgment for the Section 8 portion of the rent only if the Section 8 subsidy were reinstated, since, absent a new agreement, a Section 8 tenant is not liable for the Section 8 portion of the rent); **1466 Holding Co. v Sanchez** (40 Misc 3d 138[A], 2013 NY Slip Op 51404[U] [App Term, 1st Dept]) (vacating a stipulation in which the unrepresented tenant, who formerly had received a Section 8 subsidy, agreed to pay the Section 8 share of the rent, as a former Section 8 tenant does not become liable for the Section 8 share absent a new agreement; a renewal lease obligating the tenant to pay the full amount was of no effect since the Section 8 subsidy was a term of the lease which could not be modified); **Sedgwick Ave. Realty Assoc., L.L.C. v Torres** (38 Misc 3d 1212[A], 2013 NY Slip Op 50080[U] [Civ Ct, Bronx County, A. Lehrer, J.]) (a nonpayment proceeding could not be maintained against a Section 8 tenant who had not signed a renewal lease after his subsidy was terminated; a rental agreement requires a meeting of the minds; although the tenant had paid the increased rent for one month, an agreement would not be implied because a rent-stabilized lease must be on the same terms as the expired lease)**;** see **MPlaza, LP v Corto** (35 Misc 3d 139[A], 2012 NY Slip Op 50860[U] [App Term, 1st Dept]) (dismisses so much of a nonpayment petition as sought to recover in excess of the tenant's share of the rent as, absent a new agreement, a Section 8 tenant does not become liable for the Section 8 share of the rent even after the subsidy is terminated); cf. **Pinnacle Bronx W. LLC v Jennings** (29 Misc 3d 61 [App Term, 1st Dept 2010]) (since the landlord's acceptance of the former tenant's Section 8 voucher constituted a term and condition of the stabilized lease which continued into the deemed lease renewal [citing **Rosario v Diagonal Realty LLC**, 8 NY3d 755 (2007)], a renewal lease purporting to obligate the tenant to pay the full lease rent would not be given effect, and the tenant was liable only for the tenant's share of the rent; the landlord's remedy was a holdover proceeding based on the tenant's failure to recertify); citing **835-37 Trinity Ave. HDFC v Royal** (26 Misc 3d 1240[A], 2010 NY Slip Op 50481[U] [Civ Ct, Bronx County, S. Kraus, J.]) (where the rent-stabilized Section 8 tenant failed to recertify, a new agreement signed by the tenant obligating her to pay the full rent would not be enforced, as a renewal must be on the same terms as the expired lease).

MMB Apts., LLC v Guerra (45 Misc 3d 132[A], 2014 NY Slip Op 51662[U] [App Term, 2d, 11th &13th Jud Dists]) (majority adheres to rule of Paikoff that a tenant who rents from a sponsor after the transfer of title to the cooperative is a non-purchasing tenant protected under the Martin Act; the failure to sign a renewal lease constitutes a breach of the non-purchasing tenant's obligations within the meaning of General Business Law § 352-eeee [2] [c] [ii] and is thus a ground for eviction; the 10-day cure period of RPAPL 753 [4] would apply to this breach; concurrence, that re-examination of Paikoff is warranted, citing **Park W. Vil. Assoc.**); see **Geiser v Maran** (189 Misc 3d 442 [App Term, 2d & 11th Jud Dists 2001]) (the process of conversion does not end upon the transfer of title to the corporation. Before and after the transfer, the sponsor may sell shares pursuant to the plan. After the closing, the sponsor remains a seller and is not included in the definition of "purchaser under the plan," and people who sublet from a sponsor do not fall within the coverage exception for those who sublet from purchasers under the plan); **Paikoff v Harris** (185 Misc 2d 372 [App Term, 2d & 11th Jud Dists 1999]) (a tenant who rents from the sponsor after the transfer of title to the co-op is a non-purchasing tenant protected from eviction by the Martin Act, as a "non-purchasing tenant" includes "a person to whom a dwelling unit is rented subsequent to the effective date"); contra **Park W. Vil. Assoc. v Chiyoko Nishoika** (187 Misc 2d 243 [App Term, 1st Dept 2000]) (in light of the purpose of § 352-eeee to protect tenancies extant during the conversion process, a post-conversion tenancy does not fall within the statute's reach); see also **Arkansas Leasing Co. v Gabriel** (3 Misc 3d 46 [App Term, 2d & 11th Jud Dists 2004]) (dissent would adopt reasoning of **Park W. Vil. Assoc.**).

Cohan v Board of Directors of 700 Shore Rd. Waters Edge, Inc. (108 AD3d 697 [2d Dept 2013]) (the co-op lacked authority under its governing documents to assess a $3,000 sublet fee; the sublet policy recited in the shareholder handbook was not an enforceable house rule; the assessment was not protected under the business-judgment rule; the tenant was entitled to attorney's fees where the lease required the tenant to pay the co-op's fees in collecting any sums due); cf. **40-50 Brighton First Rd. Apts. Corp. v Kosolapov** (39 Misc 3d 27 [App Term, 2d, 11th & 13th Jud Dists 2013]) (even if the tenants' claim that the co-op's assessment was not used for the purpose it was imposed—facade repairs—but rather to cure a budgetary shortfall were true, absent evidence of fraud, self dealing or unconscionability the board's decisions were insulated by the business-judgment rule).

Linda Tenants Corp. v Spanakos (43 Misc 3d 137[A], 2014 NY Slip Op 50705[U] [App Term, 2d, 11th & 13th Jud Dists]) (in a holdover proceeding by a co-op to recover possession of a parking space allegedly held pursuant to a month-to-month agreement, where it was undisputed that the space was provided as in incident of the proprietary lease, application of the business-judgment standard of review required the dismissal of the petition, as the co-op had articulated no basis for the termination and it could not be determined whether its actions were taken in good faith or were arbitrary); cf. **257**

Central Park W., Inc. v Abraham (40 Misc 3d 138[A], 2013 NY Slip Op 51405[U] [App Term, 1st Dept]) (the tenant failed to show that the co-op's termination of his parking license violated the business-judgment rule where the termination was based on the tenant's delinquency in paying monthly parking fees).

Walden Gardens, Inc. v Burns (71274/11 [Civ Ct, Bronx County, June 5, 2014, T. Elsner, J.]) (a covenant in a Mitchell-Lama proprietary lease requiring the premises to be used solely for residential use was unenforceable in view of the strong public policy of the Social Services Law to expand the availability of licensed day care facilities); **Riverdale Osborne Towers Hous. Assoc., LLC v Keaton** (41 Misc 3d 537 [Civ Ct, Kings County 2013, B. Scheckowitz, J.]) (as HUD regulations permit legal profitmaking activities that are incidental to the primary use of an apartment as a residence, the fact that the tenants generated most of their income by operating a day care facility did not constitute a breach of a stipulation in which the tenants represented that their day care was an incidental business which generated only incidental income, as the stipulation was ambiguous and would be interpreted against the drafter); citing **Quinones v Board of Mgrs. Regalwalk Condominium I** (242 AD2d 52 [1998]) (condo board prohibited, as a matter of public policy, from enforcing the residential restriction in the condo declaration to bar the use of a unit or group family day care home).

Rent Regulation Coverage Issues

Extell Belnord LLC v Uppman (113 AD3d 1 [1st Dept 2013]) (an agreement between the landlord and the tenants' association decontrolling apartments in return for 49-year leases and succession rights was void as against public policy, as the parties cannot compromise the enforcement of the RSL or the rent control regulations; although the agreement was approved by DHCR, its determination was not res judicata, as the issue of deregulation was not litigated).

126 W. 25th St. Realty Co. v Chea (40 Misc 3d 141[A], 2013 NY Slip Op 51485[U] [App Term, 1st Dept]) (a subtenant who claimed an illusory tenancy was not entitled to rent stabilization protection where, measuring his rights from the time he moved in, the lawful rent, together with the vacancy increase to which the landlord would have been entitled on a direct rental to the subtenant, would have exceeded $2,000); cf. **Chelsea Dynasty, LLC v Shomron** (NYLJ 1202583538780 [Civ Ct, NY County 2013, M. Schreiber, J.]) (to show a high-rent vacancy deregulation, the landlord had to establish a vacancy after 1997 and a rent at that time in excess of $2,000; to establish a legal regulated rent and to deregulate an apartment under the high-rent vacancy statute, the landlord must first subject the apartment to rent stabilization; as the apartment was never registered, nor vacant after 1997, the landlord could not establish the exemption); citing **Tribeca M. Corp. v Haller** (2003 NY Slip Op 51271[U] [Civ Ct, NY County, G. Lebovits, J.], affd 11 Misc 3d 133[A], 2006 NY Slip Op 50444[U] [App Term, 1st Dept]).

M&E Christopher LLC v Godfrey (347 Misc 3d 1230[A], 2015 NY Slip Op 50897[U] [Civ Ct, NY County, Wendt, J.]) (where a tenant takes possession following a period of exemption from rent stabilization, under RSC former § 2526.1 [a] [3] [iii], the landlord is entitled to a negotiated first rent only if that rent was a legal regulated rent; where the first lease after the exemption stated that the apartment was not rent stabilized and the rent was $2,050, the apartment remained regulated); citing **Goldman v Malagic** (45 Misc 3d 37 [App Term, 1st Dept 2014]) (an exempt apartment reverted back to stabilized status after the exemption ended; where the first lease after the exemption fixed the rent at $2,000, the apartment was not deregulated because RSC former § 2526.1 [a] [3] [iii] presumes that the first tenant after a vacancy is offered a stabilized lease); citing **Gordon v 305 Riverside Corp.** (93 AD3d 590 [1st Dept 2012]); see **Tanzillo v Windermere Owners, LLC** (2015 NY Slip Op 30818[U] [Sup Ct, NY County, E. Coin, J.]) (transient occupation of a housing accommodation is treated as a vacancy; where the long-term tenant departed in 2009, the next occupants were transients, followed by a vacancy, and the plaintiff became a permanent hotel tenant in 2013 pursuant to a lease that stated the apartment was not stabilized, the legal regulated rent was the most recent rent charged the prior permanent tenant plus lawful guidelines increases [citing **Kanti-Savita Realty Corp. v Santiago**, 18 Misc 3d 74 (App Term, 2d & 11th Jud Dists 2007)]; since a legal regulated rent was not charged, the apartment was not deregulated upon the vacancy; RSC § 2526.1 [a] [3] [iii], as amended Jan 8, 2014, provides that the legal regulated rent, if the apartment was vacant or exempt on the base date shall be the prior legal regulated rent plus an appropriate vacancy increase, plus, if vacant or exempt for more than one year, successive two-year guideline increases that could have been offered, whereas this provision formerly provided that the legal regulated rent would be the rent agreed to by the owner and the first stabilized tenant taking occupancy after the vacancy or exemption; where the tenant's first lease, pre-2014, stated that it was not a stabilized lease and the rent was $2,520, the landlord could not rely on the pre-2014 provision, which applies only where the first post-vacancy lease is a stabilized lease).

Robrish v Watson (48 Misc 3d 143[A], 2015 NY Slip Op 51299[U] [App Term, 2d, 11th & 13th Jud Dists]) (where a landlord used a two-family house as a rooming house, renting 10 rooms to 10 different individuals, the house became subject to rent stabilization regardless of whether any structural changes had been made to the premises; the fact that the illegal use had ended did not remove the rent-stabilized status); **Joe Lebnan, LLC v Oliva** (39 Misc 3d 31 [App Term, 2d, 11th & 13th Jud Dists 2013]) (a building which contained eight residential units was subject to rent stabilization notwithstanding the landlord's contention that illegal apartments cannot become rent stabilized unless the landlord knew of and acquiesced in the conversion, and sought to legalize the conversion; the Court of Appeals' decision in **Wolinsky v Kee Yip Realty** [2 NY3d 487 (2004)] exempted loft units from the ETPA because the court read "the ETPA and Loft Law together" and was not intended to undo prior precedent that other illegal units are subject to rent stabilization); overruling **Payne v Rivera** (28 Misc 3d 469 [Civ

Ct, Kings County 2012, G. Marton, J.]) (where a single-family dwelling was allegedly part of an illegal horizontal multiple dwelling containing six or more units, the tenants, under Wolinsky, bore the burden of showing that the premises could be legalized to establish the affirmative defense of ETPA coverage) and **Arrow Linen Supply Co., Inc. v Cardona** (15 Misc 3d 1143[A], 2007 NY Slip Op 51128[U] [Civ Ct, Kings County, S. Kraus, J.]) (the illegal conversion of a three-family to a 10-unit SRO did not subject the premises to rent stabilization because the ETPA is inapplicable to units that cannot be legalized; no public policy would be served by requiring the landlord to commence a holdover based on the violation).

Bartis v Harbor Tech, LLC (2014 NY Slip Op 31612[U] [Sup Ct, Kings County, D. Silber, J.]) (where a commercial building built before 1974 is converted to residential use after 1974, a substantial rehabilitation has occurred irrespective of whether the requirements of Operational Bulletin 95-2 have been satisfied, as OB 95-2 applies only where 75% of the building-wide and apartment systems have been completely "replaced," indicating that it applies only where the building was already rent stabilized); cf. **22 CPS Owner LLC v Carter** (84 AD3d 456 [1st Dept 2011]) (the conversion of a purely commercial space into an almost purely residential space, creating 23 residential units when none had existed, is a substantial rehabilitation); **Brownstone Partners, L.P. v Slupinski** (44 Misc 3d 134[A], 2014 NY Slip Op 51199[U] [App Term, 1st Dept]) (substantial rehabilitation found where the prior owner spent $319,000 to rehabilitate the combined dwelling, so as to convert the class "B" SRO to a class "A" multiple dwelling and to qualify for a J-51 tax abatement; where the tenant took occupancy pursuant to an unregulated lease many years after the expiration of the J-51 abatement, the tenancy was not subject to rent stabilization).

Gaia by the Park LLC v Near (40 Misc 3d 86 [App Term, 1st Dept 2013]) (where the initial temporary C of O, issued November 28, 1973, certified that the building's 48 residential units conformed to approved plans, and the uses specified therein were virtually identical to those specified in the July 9, 1974 permanent C of O, the building was properly found to have been completed before January 1, 1974); citing **Matter of Ardor Mgt. Corp. v Division of Hous. & Community Renewal of State of N.Y.** (104 AD2d 984 [2d Dept 1984]).

375 N.Y. HDFC v Jones (47 Misc 3d 1206[A], 2015 NY Slip Op 50452[U] [Civ Ct, NY County, S. Kraus, J.]) (a tenant who lived in the building before its conversion to an HDFC retained her stabilized status where the offering plan provided that nonpurchasing tenants would remain as rent-stabilized residents; the building was not covered by the exemption for buildings operated exclusively for charitable purposes [RSC § 2520.11 (j)] because it received government funding [RSC § 2520.11 (f)]).

91 Real Estate Assoc. LLC v Eskin (2013 NY Slip Op 31181[U] [Civ Ct, NY County, S. Kraus, J.]) (a non-purchasing tenant in a non-eviction co-op did not lose her rent-

stabilized status upon her transfer, at the landlord's request, to a different unit); citing, inter alia, **Saad v Elmuza** (12 Misc 3d 57 [App Term, 2d & 11th Jud Dists 2006]).

Arkon Props., Inc. v Rivera, 48 Misc 3d 131[A], 2015 NY Slip Op 51051[U] [App Term, 2d, 11th & 13th Jud Dists]) (in a proceeding to remove a superintendent, the occupant negated the existence of an agreement to surrender his stabilized status, by showing that he had moved from a different stabilized apartment into the subject apartment, which was not a superintendent's apartment, because he needed a larger apartment and that he had continued to pay rent, albeit at a reduced rate); **530 Second St. Co., L.P. v Alirkan** (37 Misc 3d 52 [App Term, 2d, 11th & 13th Jud Dists 2012]) (since RSC § 2520.11 [m] exempts housing accommodations occupied by employees to whom the space is provided as part or all of their compensation without payment of rent, an apartment for which the employee paid an allegedly reduced rent was not exempt); cf. **OLR LBCE LP v Trottman** (42 Misc 3d 1227[A], 2014 NY Slip 50238[U] [Civ Ct, Bronx County, A. Lehrer, J.]) (a superintendent who had been a tenant in another apartment and later moved to the subject apartment would have retained his tenancy rights in the original apartment had he not moved, as the language in his employment agreement requiring him to vacate within 30 days after his employment was terminated was an impermissible waiver of his rent stabilization rights; the factors to be considered in determining whether a tenant who becomes a superintendent loses his tenancy rights when he moves to a new apartment include (1) whether the new apartment is a superintendent's apartment, (2) whether the move was necessary for the performance of his duties, (3) who requested the move, (4) and whether there is evidence that the superintendent exchanged his status of tenant for that of employee; where it was not shown that the new apartment was a superintendent's apartment or that the move was necessary for the superintendent to perform his duties, where it was the landlord who requested the move and there was no proof that the superintendent exchanged his status as tenant for that of employee, the superintendent retained his tenancy rights); citing **Genc Realty LLC v Nezaj** (52 AD3d 415 [1st Dept 2008]) (when the husband of the rent-stabilized tenant accepted employment as a superintendent and moved into the superintendent's apartment, he exchanged his status as tenant for that of employee and the landlord-tenant relationship ceased to exist), affg (13 Misc 3d 114 [App Term, 1st Dept 2006]) (absent a clear showing that the parties did not treat the occupancy as an incident of respondent's employment, there was no dual relationship of employer-employee and landlord-tenant where the respondent moved from an apartment in which he had been living with his wife, into another apartment, in which he resided rent free for 16 years as superintendent); see also **Mohr v Gomez** (173 Misc 2d 553 [App Term, 1st Dept 1997]); cf. **Clearview Apt. Assoc. v Ocasio** (17 Misc 3d 23 [App Term, 2d & 11th Jud Dists 2007]) (absent a clear showing of an intent to surrender her rent-stabilized status, a rent-stabilized tenant did not lose this status during the period that her co-tenant was employed as superintendent, notwithstanding that she may have received a rent concession); **Gottlieb v Adames** (NYLJ, Sept. 23, 1994 [App Term, 1st Dept])

(where the respondent moved into the premises as a tenant before becoming an employee, the landlord-tenant relationship survived the termination of employment).

Royal Terrace Assoc. LP v Singh (39 Misc 3d 135[A], 2013 NY Slip Op 50582 [App Term, 1st Dept]) (where the record showed some linkage between the tenant's rental of a garage space and his residential unit, but was unclear as to the extent of the connection, a determination of whether the space was an ancillary service could not be made and a new trial was required).

73 Tribeca LLC v Greenbaum (44 Misc 3d 16 [App Term, 1st Dept 2014]) (a "constructive purchase" of the fixtures belonging to the prior tenant was not established where the landlord did not show that the prior tenant abandoned the fixtures and the loft with unpaid rent exceeding the fair market value of the fixtures, as there was no proof of rent owed or of the value of the fixtures; the landlord's claim that it purchased the improvements from the subsequent tenant of record could not be considered as it was not set forth in the termination notice).

North-Driggs Holdings, LLC v Burstiner (44 Misc 3d 318 [Civ Ct, Kings County, S. Avery, J. 2014]) (a building that was exempt as new construction became subject to regulation on the date it began receiving the RPTL § 421-a tax benefits).

Rent Stabilization: Rent Overcharge

Conason v Megan Holding, LLC (25 NY3d 1 [2015]) (Thornton held that, where there was an illusory tenancy, the illusory tenant's lease was void in its inception; that a registration statement listing this illegal rent was also a nullity; that CPLR 213-a could not transform an illegal rent into a lawful assessment that would form the basis for all future rents; and that the DHCR default formula should be used to determine the base rent; Grimm held that, where an overcharge complaint alleges fraud, DHCR is obligated to ascertain whether the rent charged on the base date is lawful; in Conason, the tenants had alleged, in a prior Civil Court nonpayment proceeding, substantial evidence that the landlord had fraudulently registered someone who had never lived in the apartment for 2003-2005; while the Civil Court determination was not res judicata, because the tenants' overcharge counterclaim had been dismissed without prejudice, the Civil Court trial record was sufficient to satisfy the minimum quantum of evidence for the tenants to taint the reliability of the base date rent; dissent, that CPLR 213-a precludes an overcharge action commenced more than four years after the first alleged overcharge); **Matter of Grimm v State of New York Div. of Hous. & Community Renewal Off. of Rent Admin.** (15 NY3d 358 [2010]) (where an overcharge complaint alleges fraud, DHCR has an obligation to ascertain whether the rent charged on the base date is lawful by examining its own records; not every increase will establish a colorable claim of fraud; what "is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization";

dissent, that the majority has effectively repealed an unequivocal statute), affg (68 AD3d 29 [1st Dept 2009]) (where an owner, more than four years before the overcharge action was commenced, had improperly charged a prior tenant "a fictitious and illegal rent," the base rent was not the rent charged four years before the filing of the complaint and the leases were a nullity; a default formula should be used where no valid registration statement was on file as of the base date, because rental history before the base date cannot be used; DHCR has an affirmative obligation to determine whether fraud has been committed; the owner's retroactive filing of registration statements was not dispositive on the issue of the proper rent; dissent, that DHCR properly applied the statute of limitations, which prohibits examination of the rental history more than four years before the complaint is filed, and that the majority improperly relies on such rental history to establish that there is an overcharge); **Thornton v Baron** (5 NY3d 175 [2005]) (where a lease, entered into before the four-year period, purported to deregulate the apartment, the lease was void and the legal rent should be calculated by application of DHCR's default formula, which was the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date); cf. **Matter of Gomez v New York State Div. of Hous. & Community Renewal** (79 AD3d 878 [2d Dept 2010]) (where there were no substantial indicia of fraud, DHCR properly refused to examine the rental history prior to the four-year period); **Friscia v Towns** (2013 NY Slip Op 31832[U] [Sup Ct, NY County, A. Schlesinger, J.]) (the burden of going forward with proof when a tenant claims a fraudulent-deregulation scheme is on the tenant; DHCR's obligation to investigate the tenant's fraud claim was satisfied by its conducting a hearing at which both sides could present evidence; the landlord's proof to justify an IAI increase, while perhaps insufficient to defeat a timely overcharge complaint, was sufficient to allow the ALJ to determine whether the owner had engaged in a fraudulent scheme).

Borden v 400 E. 55th St. Assoc., L.P. (24 NY3d 382 [2014]) (where the landlords had decontrolled apartments while accepting J-51 tax benefits, the tenants could maintain a class action even though CPLR 901 [b] prohibits a claim for penalties to be brought as a class action; what is dispositive is that the action does not seek to recover the penalties, and here the tenants had waived their right to recover treble damages; treble damages are not mandatory, and recovery of the base amount is compensatory; the tenants' waiver of their right under the RSL was valid, as it was not coerced or collusive; dissent, that an action to recover a rent overcharge is an action to recover a "penalty" under Rent Stabilization Law § 26-516[U]).

Parker Yellowstone, L.P. v Chetrick (47 Misc 3d 144[A], 2015 NY Slip Op 50691[U] [App Term, 2d, 11th & 13th Jud Dists]) (where the tenant moved into the building while it was a master-metered electrical inclusion building, paying $100 per month for the hiring of five air conditioners, the landlord was required, after the building was converted to submetering, to remove that portion of the air conditioning charges that was attributable to the excess electricity consumption but not the portion thereof that was attributable to

the hiring and maintenance of the air conditioners; as neither the parties nor DHCR had provided a formula for determining the proportionate shares, the tenant's overcharge counterclaim would be dismissed without prejudice to the tenant seeking relief from DHCR, given its expertise in these areas, pursuant to the doctrine of primary jurisdiction); citing **Wilcox v Pinewood Apt. Assoc., Inc.** (100 AD3d 873 [2d Dept 2012]) (where the issues involved factual evaluation to be made based upon the interpretation of DHCR orders pertaining to the premises, the overcharge complaint should be re-submitted to DHCR, which is best suited to interpret its own orders) and **Olsen v Stellar W. 110, LLC** (96 AD3d 440 [1st Dept 2012]) (where the landlord's predecessor never notified the tenants, who moved in in 2001 after the rent-controlled tenant moved out, of their right to file an FMRA and charged $2,800, pursuant to the primary-jurisdiction doctrine, the matter should be determined by DHCR, which can investigate the tenants' fraud claims, determine the regulatory status of the apartment and, if warranted, apply the Thornton formula); cf. **Davidson v 730 Riverside Drive, LLC** (2015 NY Slip Op 30532[U] [Sup Ct, NY County, R. Kalish, J.]) (dismissing without prejudice to a claim before DHCR the plaintiff's rent-overcharge cause of action, as there was a triable issue within DHCR's expertise as to whether the landlord's decontrol of the apartment while receiving J-51 benefits was fraudulent or merely illegal); **Morton v 338 W. 46th St. Realty** (42 Misc 3d 135[A], 2014 NY Slip Op 50075[U] [App Term, 1st Dept]) (Civil Court has concurrent jurisdiction over a rent-overcharge claim and should not have remanded it to DHCR where DHCR had declined to assume jurisdiction and its determination had been upheld in an article 78 proceeding); see also **Katz 737 Corp. v Cohen** (104 AD3d 144 [1st Dept 2012]) (DHCR has exclusive jurisdiction to determine whether a tenant's household income exceeds the $175,000 threshold for deregulation; a landlord's plenary fraud action alleging that the tenants used an S-corporation to conceal income was an improper collateral attack on the DHCR determination; any concerns of fraud may be referred by DHCR to the Department of Taxation and Finance; Andrias, J., concurring, that since the landlord's fraud claim is entirely dependent for its existence on the luxury deregulation statute, allowing the claim would circumvent the legislative intent that DHCR hear these matters; Catterson, J., concurring, that the common-law fraud cause of action is independently viable but not properly pleaded); **Matter of 338 W. 46th St. Realty, LLC v State of N.Y. Div. of Hous. & Community Renewal** (101 AD3d 439 [1st Dept 2012]) (DHCR's determination that a rent-overcharge claim should be heard in the Civil Court was not irrational, notwithstanding the "primary jurisdiction" doctrine).

Matter of 10th St. Assoc., LLC v New York State Div. of Hous & Community Renewal (110 AD3d 605 [1st Dept 2013] (where the initial lease does not refer to a preferential rent, the landlord cannot rely on the 2003 amendments authorizing an owner to increase a preferential rent upon a renewal; where a tenant does not elect to recover an overcharge penalty by deducting it from rent due, the landlord is not authorized to pay the overcharge penalty via a rent credit).

Atsiki Realty LLC v Munoz (48 Misc 3d 33 [App Term, 1st Dept 2015]) (a rent reduction order, which imposes a continuing duty on the owner to charge the reduced rent until DHCR issues a restoration order, cannot be collaterally attacked).

Bradbury v 342 W. 30th St. Corp. (84 AD3d 681 [1st Dept 2011]) (where the landlord filed knowingly false rent registrations, it was barred from collecting rent in excess of the last properly registered rent); **M. Rubin & Co. LLC v Ortiz** (37 Misc 3d 1226[A], 2012 NY Slip Op 52168[U] [Civ Ct, Bronx County, A. Lehrer, J.]) (an owner who fails to serve a tenant with a proper lease renewal offer may not charge a rent increase, and payment of the increase constitutes an overcharge); **Passarelli Family Partnership, L.P. v Davis** (32 Misc 3d 1226[A], 2011 NY Slip Op 51434[U] [Civ Ct, Richmond County, M. Mundy, J.]) (the landlord's failure to file annual registration statements barred it from collecting rent in excess of the base date rent).

Rent & Use and Occupancy

Rustagi v Sanchez (44 Misc 3d 137[A], 2014 NY Slip Op 51245[U] [App Term, 2d, 11th & 13th Jud Dists]) (a landlord may bring a separate action to recover the use and occupancy which accrues after the entry of a final judgment in a summary proceeding; the parties' stipulation extending a stay of the warrant was not a waiver of the landlord's right to recover the use and occupancy; the rule against apportionment does not apply to use and occupancy); see **Towne Partners, LLC v RJZM, LLC** (79 AD3d 489 [1st Dept 2010]) (where the tenant held over for a portion of a month, it was liable for use and occupancy only for that portion of the month); **Rufai v Providence** (28 Misc 3d 134[A], 2010 NY Slip Op 51353[U] [App Term, 2d, 11th & 13th Jud Dists]) (same); **Vacca v Balbuena** (25 Misc 3d 132[A], 2009 NY Slip Op 52176[U] [App Term, 9th & 10th Jud Dists]) (the rule against apportionment, which applies to rents, does not apply to use and occupancy); cf. **Deban v Hoevener** (34 Misc 3d 141[A], 2012 NY Slip Op 50080[U] [App Term, 9th & 10th Jud Dists]) (where rent is payable on the first of the month, a month-to-month tenant who vacates during the month is generally liable for the entire month's rent); **Smith v Woodson** (31 Misc 3d 143[A], 2011 NY Slip Op 50870[U] [App Term, 2d, 11th & 13th Jud Dists]) (where rent is payable on the first of the month, a month-to-month tenant who vacates during the month is ordinarily liable for the entire month's rent even where the landlord accepts a mid-month surrender of the tenancy); cf. also **Garfield v Howard** (2002 NY Slip Op 40422[U] [App Term, 2d & 11th Jud Dists]) (where the tenant's removal was at the express request of the landlord, the landlord waived the claim to the unapportioned rent).

Park Haven, LLC v Robinson (45 Misc 3d 129[A], 2014 NY Slip Op 51540[U] [App Term, 2d, 11th & 13th Jud Dists]) (a rent "discount" scheme which provided for a rent of $1,449 if rent was paid on time and of $2,509 if not paid by the fifth of the month constituted an unconscionable late charge and penalty, in that the increase was grossly disproportionate to any damages that the landlord might sustain as a result of the delay

in payment); **Lal Little Italy Mgmt. Co., LLC v De Corcho** (51688/14 [Civ Ct, Bronx County Sept. 2, 2015, M. Pinckney, J.]) (where the registered rent was $1,930.39 and the preferential rent was $1,607.85, a discount rider providing for a reduced rent of $1,400 so long as rent was received by the fifth of the month could not be rescinded, even though the discount was only 13%, as opposed to 42% in Park Haven, and even though the tenant received a preferential rent, as the increase, on top of a $50 late fee, was not proportionate to any damages the landlord might sustain as a result of the late payment); **Jamaica Seven LLC v Jean** (L&T 85240/2013, NYLJ 1202663259524 [Civ Ct, Queens County, G. Badillo, J., June 27, 2014]) (a provision giving the tenant a discounted rent if he paid rent on time by automatic debit payment, which allowed the landlord, if payment was not timely, to impose the higher rent and late fee, to unilaterally void the benefit, refuse to renew the rent-stabilized lease and terminate the tenant's tenancy for violating a substantial obligation, was unenforceable); cf. **VP Vil. Park, LLC v Victor** (40 Misc 3d 1233[A], 2013 NY Slip Op 51418[U] [Pleasant Val. Just Ct, D. Sears, J.]) (a late charge of $50 per month plus $10 per day until all the rent and late charges were paid, was a penalty, unconscionable and void); see **Wilsdorf v Fairfield Northport Harbor, LLC** (34 Misc 3d 146[A], 2012 NY Slip Op 50163[U] [App Term, 9th & 10th Jud Dists]) (a late fee of 10% of the monthly rent is an unenforceable penalty, as it is disproportionate to any loss the landlord may incur.)

The Carlyle LLC v Beekman Garage LLC (2014 NY Slip Op 31739[U] [Sup Ct, NY County, J. Kenney, J.]) (a landlord can maintain an action for use and occupancy against a subtenant while seeking rent from the tenant).

Joseph v Burke (41 Misc 3d 1225[A], 2013 NY Slip Op 51835[U] [Dist Ct, Nassau County, S. Fairgrieve, J.]) (mortgage payments can be considered rent); citing **Matter of Lefton** (160 AD2d 702 [2d Dept 1990]); cf. also **Cazares v Aguilar** (34 Misc 3d 1228[A], 2012 NY Slip Op 50283[U] [Dist Ct, Nassau County, S. Fairgrieve, J.]) (an agreement between a purchaser and the house's occupants, the former owners, pursuant to which the occupants paid the mortgage, utilities and repairs, was not an agreement to pay rent and did not establish a landlord-tenant relationship).