OCTOBER 2017 COURT ATTORNEY SEMINAR

VICTOR S. FALECK

APPELLATE TERM, SECOND DEPARTMENT

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Koppelman v Barrett (49 Misc 3d 20 [App Term, 9th & 10th Jud Dists 2015]) (where holdover tenants paid no rent after the lease expiration and thereafter entered into a

contract to purchase, they became vendees in possession; a holdover tenancy is not created by continued occupancy after the termination of a lease where there is no payment of rent; a holdover proceeding does not lie against vendees in possession); **Tello v Dylag** (47 Misc 3d 141[A], 2015 NY Slip Op 50617[U] [App Term, 9th & 10th Jud Dists]) (an agreement that each party would contribute money and/or labor towards a property and would share in the profits from the sale was a joint venture, not a lease, even though the agreement gave one of the parties the exclusive right to occupy the premises; moreover, even if the agreement established a landlord-tenant relationship, the nonpayment petition, which alleged that the tenant was in possession pursuant to a written lease but failed to allege that the agreement had expired prior to the commencement of the proceeding, and to allege facts showing that the tenancy had continued after the expiration of the agreement, did not adequately state the facts and should have been dismissed); **Kosc Dev., Inc. v Scott** (28 Misc 3d 138[A], 2010 NY Slip Op 51474[U] [App Term, 2d, 11th & 13th Jud Dists]) (a tenant in common cannot maintain a holdover proceeding against another tenant in common); **Henry v Green** (126 Misc 2d 360 [Mt. Vernon City Ct 1984]) (where one tenant in common agrees to pay rent to the other, a landlord-tenant relationship is not created and a nonpayment proceeding will not lie); cf. **Bernadotte v Woolford** (52 Misc 3d 890 [Dist Ct, Nassau County 2016, S. Fairgrieve, J.]) (dismisses a summary proceeding by a husband against the wife's tenant where the husband and wife owned the property as tenants by the entirety, as a tenant by the entirety may convey her interest to another, who becomes a tenant in common; a tenant in common may maintain a summary proceeding to be put into nonexclusive possession with the tenant of the other tenant in common; either of two co-owners may maintain a summary proceeding [see **Martin v Shields**, 285 App Div 106 (3d Dept 1954)]; since the husband was already in possession, the proceeding would not lie); citing, inter alia, **Infante v Sperber** (271 App Div 896 [2d Dept 1946] [holding, in a plenary action, that a wife, who was a tenant by the entirety, had a right to be put into joint possession with the husband's tenant).

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").

Stuhr Gardens Assoc., LLC v Doe (2016 NY Slip Op 30813[U] [Peekskill City Ct, R. Johnson, J.]) (when the tenant of record vacated, the tenant's licensee obtained exclusive possession and thus was a tenant at will entitled to a 30-day notice); but see **Kerrains v People** (60 NY2d 221 [1875]) (a "considerable delay" can render a licensee a tenant at sufferance); cited in **167 N. Ninth St. Corp. v Helfand** (33 Misc 3d 518 [Civ Ct, Kings County 2011, G. Marton, J.]) (a long delay in removing a superintendent cloaked him with tenancy status).

ROBO, L.L.C. v Alford (17358/16, NYLJ 1202782776607 [Civ Ct, Bronx County, Mar. 7, 2017, B. Spears, J.]) (as a nonpayment proceeding can only be maintained where there is a landlord-tenant relationship between the parties, a proceeding could not be

maintained against an occupant with succession rights; the occupant was not a "distributee" under RPAPL 711 [2], as he was not entitled to inherit the deceased tenant's property since they had not formally been married or domestic partners); **475 Ocean Ave. Partners LLC v Enwereuzonh** (54274/16, NYLJ 1202765662028 [Civ Ct, Kings County, H. Baum, J., July 26, 2016]) (dismissing a nonpayment proceeding where the arrears sought accrued while no lease was in effect, even though the landlord had twice stipulated in a prior proceeding to give the respondent a lease, citing Underhill, Gassenbauer and Kimball); see **Sow v Thanvi** (50 Misc 3d 134[A], 2016 NY Slip Op 50045[U] [App Term, 2d, 11th & 13th Jud Dists]) (when the prime lease expired, any alleged subleases necessarily terminated; thus, as there was no rental agreement in effect during the period for which rental arrears were sought by the alleged sublessor, the nonpayment proceeding would not lie); **Underhill Ave. Realty, LLC v Ramos** (49 Misc 3d 155[A], 2015 NY Slip Op 51804[U] [App Term, 2d, 11th & 13th Jud Dists]) (notwithstanding the landlord's claim that the tenant's recertifications for her Section 8 subsidy evidenced her agreement to pay rent, a nonpayment proceeding, which must be predicated on an agreement to pay rent, could not be maintained where the landlord's predecessor had refused to issue a renewal lease to the tenant); **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, 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); see **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 a lease but the tenants never signed the lease, as the 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 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, 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, to make the undertenant the tenant 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 did not become a tenant until a lease was signed notwithstanding a stipulation, in a previous nonpayment against the deceased tenant, recognizing the successor as the new tenant and the successor's signing a renewal lease sent to his deceased mother).

Highbridge Apts. Equities LLC v Oliver (2017 WL 4124458 [Civ Ct, Bronx County 2017, K. Lach, J.]) (dismisses a petition demanding rent at the rate of $3,027.33 per month where the landlord had offered a renewal lease containing that legal rent and a preferential rent of $1,500, and the tenant had continued to pay rent at the rate of $1,275 per month, as, under Samson, the landlord had no right to deem the unexecuted lease renewed; as the tenant remained a month-to-month tenant at the previously agreed-to rent, the rent demand was defective); **97-101 Realty LLC v Sanchez** (51 Misc 3d 1202[A], 2016 NY Slip Op 50350[U] [Civ Ct, Kings County, J. Kuzniewski, J.]) (under Samson, a five-day notice which demanded a deemed renewed increase for four months was not a good-faith demand, requiring dismissal); **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 must be based on an agreement, 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 lease expiration, as, under Samson, 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 would not lie against a 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, 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 in which the landlord claimed his nonprimary-residence 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]); **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, the plaintiff's failure to offer renewal leases did not constitute a waiver of rent but required "that plaintiff prove the rent through quantum meruit or some subsequent agreement of the parties").

25 W. 24th St. Realty Corp. v Gianqinto (55 Misc 3d 28 [App Term, 1st Dept 2017]) (occupants who were referred by DSS to petitioner's SRO pursuant to a memorandum of understanding providing that the petitioner would set aside 30 rooms for eligible persons referred by HRA and would bill HRA $60 per night per occupied room were not licensees but "permanent tenants" since they had resided in their units for more than six months; however, Branic is not binding precedent); **Dexter 395, Inc. v Hanlon** (54 Misc 3d 1222[A], 2017 NY Slip Op 50269[U] [Civ Ct, NY County, P. Wendt, J.]) (in a nonprimary-residence holdover against a stabilized SRO tenant, the tenant's brother, who had resided in the premises since 2010, was a permanent tenant with a superior right to possession to that of the landlord, which had only a right of reversion, and could not be removed without a notice setting forth grounds to terminate his tenancy; upon remititur from the Court of Appeals, the Appellate Division in Branic dismissed as moot but reaffirmed its holding that the only requirement to become a permanent tenant is six months of continuous residence); citing **Matter of Branic Intl. Realty Corp. v Pitt** (124 AD3d 421 [1st Dept 2015]) (reverses and vacates Appellate Term's order and dismisses proceeding as moot); but see **Hearst Corp. v Clyne** (50 NY2d 707, 718 [1980]) (when the Court of Appeals reverses and directs that an action be dismissed as moot, it does so "to prevent a judgment which is unreviewable for mootness from spawning any legal consequences or precedent"); see **Mondrow v Days Inn Worldwide, Inc.** (53 Misc 3d 85 [App Term, 1st Dept 2016]) (an occupant who paid with reward points and requested a six-month lease was a "permanent tenant"); **Ahmed v Chelsea Highline Hotel** (49 Misc 3d 139[A], 2015 NY Slip Op 51577[U] [App Term, 1st Dept]) (restores to possession a forcibly removed "permanent tenant" of a hotel who had rented a room for one night and requested a six-month lease after checking in, as he had a possessory interest and could not be ousted without legal process); **Ouattara v Audthan LLC** (49 Misc 3d 1206[A], 2015 NY Slip Op 51496[U] [Civ Ct, NY County, S. Kraus, J.]) (an SRO constructed before 1969 and containing six or more units is subject to rent stabilization; the occupant, who checked in for one night and then requested a lease, was a permanent tenant and would be restored to possession); cf. **Branic Intl. Realty Corp. v Pitt** (24 NY3d 1005 [2014]) (proceeding should have been dismissed as moot, as the occupant had vacated), 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 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 pay rent 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).

Scarborough Manor Owners Corp. v Robson (__ Misc 3d ___, 2017 NY Slip Op 27279 [App Term, 9th & 10th Jud Dists 2017) (when a payment of rent is made following the termination of a lease, two issues arise: (1) whether the acceptance of the rent indicated an intent by the landlord to waive the violation at issue, and (2) whether the acceptance gave rise to a month-to-month tenancy; in a holdover based on the breach of a proprietary lease, the District Court properly denied the tenant's motion to dismiss the petition based on the tenant's claim that the landlord had accepted a month's rent after the termination of the lease; under Georgetown, the acceptance of the rent did not indicate an intent by the landlord to waive the violation, as a waiver is an intentional relinquishment of a known right and cannot be created by negligence, oversight or inadvertence; here, the board had instructed the managing agent to terminate the tenancy and not to accept any rent payments from the tenant, the tenant had deposited the unsolicited check into a bank lock box, and neither the landlord nor the agent knew of the deposit; under Georgetown, the mere failure to return an unsolicited check cannot, in the Second Department, be deemed to vitiate the notice of termination; for similar reasons, the payment did not give rise to an implied month-to-month tenancy; while the ordinary inference to be drawn from a payment and acceptance of rent is that there is an implied agreement to create a tenancy [citing Real Property Law § 232-c], 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" [quoting Stern]; here, the testimony showed there was no knowing acceptance of rent); see **Knowles v North Clinton Assoc.** (54 Misc 3d 127[A], 2016 NY Slip Op 51790[U] [App Term, 9th & 10th Jud Dists]) (where the landlord accepted a month's rent following the purported termination of the lease, it vitiated its notice of termination and was not entitled to recover pursuant to a cancellation clause in the lease); **Ochs v Gordon** (55 Misc 3d 1205[A], 2017 NY Slip Op 50413[U] [Dist Ct, Nassau County, S. Fairgrieve, J.]) (where a Section 8 lease provided for renewal for successive terms of one year, the landlord's acceptance of Section 8 payments for a period after the expiration of the lease waived the landlord's right to terminate the lease and created a yearly renewal); **Esplanade Gardens, Inc. v Simms** (51 Misc 3d 1228[A], 2016 NY Slip Op 50851[U] [Civ Ct, NY County, M. Weisberg, J.]) (the holding in Georgetown Unsold Shares that a landlord's acceptance of unsolicited rent checks after the expiration of the lease does not amount to a waiver

of the landlord's right to assert a nonprimary-residence claim rejects the contrary holding of Cassidy, but, as can be seen from 92 Bergenbrooklyn, is limited to nonprimary–residence cases); contra **Warren Murray Prop. Owner, LLC v Hexner** (50 Misc 3d 1229[A], 2016 NY Slip Op 50306[U] [Civ Ct, NY County, P. Goetz, J.]) (a landlord's acceptance of rent for a period subsequent to the termination date set forth in a termination notice did not vitiate the termination notice where there was a no-waiver clause in the lease); **385 Bayview LLC v Warren** (51 Misc 3d 289 [Dist Ct, Nassau County 2016, S. Fairgrieve, J.]) (the landlord's receipt of direct-deposit July DSS rent and HAP payments following the June 30 termination of the month-to-month tenancy, which payments were not returned, prior to the service of the holdover petition did not evidence an intentional waiver of a right to evict); citing **Matter of Georgetown Unsold Shares, LLC v Ledet** (130 AD3d 99 [2d Dept 2015], lv granted 2015 NY Slip Op 92399[U] [2d Dept, Dec. 3, 2015], appeal dismissed 2016 NY Slip Op 67292 [Feb. 26, 2016]) (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 the proceeding where, after the expiration of the 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); 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 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 dismissal 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).

Real Property Law § 232-c ("Where a tenant whose term is longer than one month holds over after the expiration of such term . . . if the landlord shall accept rent for any period subsequent to the expiration of such term, then, unless an agreement either express or implied is made providing otherwise, the tenancy created by the acceptance of such rent shall be a tenancy from month to month . . ."); see **RLR Realty Corp. v Duane Reade, Inc.** (145 AD3d 444 [1st Dept 2016]) (when the commercial tenant tendered, and the landlord accepted, rent at the last rate under the expiring lease, a month-to-month tenancy was created under Real Property Law § 232-c); **International Bus. Machs. Corp. v Stevens & Co.** (300 AD2d 222 [1st Dept 2002]) (a sublessor's agent's receipt and retention of a check for the rent for the month following the expiration of the sublease constituted an acceptance of rent, especially since the sublessor made no attempt to refund the payment; the sublessor's claim that the acceptance was inadvertent was not factually supported); **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).

Cadman Towers, Inc. v Kaplan (54 Misc 3d 140[A], 2017 NY Slip Op 50159[U] [App Term, 2d, 11th & 13th Jud Dists]) (a housing company's acceptance of rent from an occupant who lacks succession rights in the window period prior to the commencement of the proceeding does not create a tenancy); **322 W. 47th St. HDFC v Loo** (50 Misc 3d 143[A], 2016 NY Slip Op 50227[U] [App Term, 1st Dept]) (an HDFC's delay in commencing a holdover proceeding based on a tenant's failure to purchase was not fatal, citing Schorr and 546 W. 156th St. HDFC v Smalls [43 AD3d 7 (1st Dept 2007)] [stipulation to treat HDFC apartment as rent stabilized did not confer RSC protection in contravention of statutory exemption for co-ops; an HDFC is governed by the PHFL, which provides that the HDFC is to be operated exclusively for the benefit of the shareowners, and rentals are regulated by HPD]), affd (__ AD3d ___, 2017 NY Slip Op 06403 [1st Dept 2017]); 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); **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 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 lacked succession rights remained valid notwithstanding an eight-year delay between its issuance and the landlord's commencement of a 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 was a continuing wrong).

Hood v Koziej (140 AD3d 563 [1st Dept 2016]) (where the landlords accepted payment from the tenant and provided him with keys, they ratified the lease even though they never delivered a copy of the signed lease to the tenant); citing **One Ten W. Fortieth Assoc. v Isabel Ardee, Inc.** (124 AD3d 500 [1st Dept 2015]) ("delivery" established where the tenant took possession and made authorized renovations and the landlord cashed the tenant's security deposit check); cf. **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 and return it to the tenant); 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).

Predicate Notices

Culhane v Patterson (54 Misc 3d 10 [App Term, 2d, 11th & 13th Jud Dists 2016]) (an owner's use nonrenewal notice was not rendered stale by the stipulated discontinuance without prejudice of a prior holdover proceeding, where the new proceeding was commenced within two days after the discontinuance; the Nicolaides rationale that a tenant is entitled to peace of mind that an eviction is no longer pending is inapplicable where the first proceeding was discontinued without prejudice by stipulation rather than dismissed; a finding that a predicate notice has been rendered stale is justified where a landlord fails to act with reasonable diligence and the tenant is prejudiced thereby; here, the tenants could have no reasonable basis to believe that the landlord would not pursue the owner's use claim; moreover, the holding in Georgetown Unsold Shares that a landlord's acceptance of unsolicited rent checks does not vitiate a nonrenewal notice as it does not unmistakably manifest an intent to relinquish the landlord's right to pursue a holdover claim, raises a substantial issue as to the continuing validity of Nicolaides; in any event, since the tenants had successfully argued in the first proceeding that the proceeding was a nullity, they were judicially estopped from asserting the existence of the first proceeding as a bar to the second proceeding; concurrence, that, based on the cases cited in Nicolaides, it is applicable to discontinuances as well as dismissals; an unintended acceptance of unsolicited rent payments is not akin to an affirmative act of stipulating to a discontinuance, even though they both present a lack of intent to vitiate a Golub notice; it is for the Appellate Divisions to determine if they wish to depart from Nicolaides and Kaycee); see **Matter of Nicolaides v State of New York Div. of Hous. & Community Renewal** (231 AD2d 723 [2d Dept 1996]) (a nonrenewal notice does not survive the dismissal of a holdover proceeding); and **Kaycee W. 113th St. Corp. v Diakoff** (160 AD2d 573 [1st Dept 1990]) (where a prior Civil Court proceeding was dismissed, a new 30-day notice terminating a rent-controlled tenancy had to be served); **145 E. 16th St. LLC v Spencer** (36 Misc 3d 128[A], 2012 NY Slip Op 51199[U] [App Term, 1st Dept]) (under Arol Dev., a nonrenewal notice used as a predicate for an earlier nonprimary-residence proceeding could serve as a predicate for a subsequent proceeding where the earlier proceeding had not been terminated at the time of the commencement of the subsequent proceeding); **890 Park LLC v Rosenfeld** (34 Misc 3d 130[A], 2011 NY Slip Op 52338[U] [App Term, 1st Dept]) (a nonrenewal notice used as a basis for a prior nonprimary-residence proceeding was not an insufficient predicate for a second nonprimary-residence proceeding where the earlier proceeding had not been terminated at the time the second proceeding was commenced and there was no discernible prejudice to the tenant); citing **Arol Dev. Corp. v Goodie Brand Packing Corp.** (84 Misc 2d 493 [App Term, 1st Dept 1975], affd on op below 52 AD2d 538 [1st Dept 1976]); **808 W. End Ave. LLC v Pomeranz** (NYLJ, Jan. 10, 2007 [Civ Ct, NY County, M. Finkelstein, J.]) (where a second proceeding was commenced the day after the dismissal of the first proceeding and there was no prejudice, a new nonrenewal

notice was not required); but cf. **AREP 19 Fifty-Fifth LLC v McLaughlin** (28 Misc 135[A], 2010 NY Slip Op 51406[U] [App Term, 1st Dept], affg NYLJ, June 24, 2009 [Civ Ct, NY County, T. Elsner, J.]) (where a nonprimary-residence nonrenewal notice formed the predicate for a 2007 proceeding brought by the landlord's predecessor and that proceeding had been marked off the calendar at about the time that the landlord purchased the building, remained marked off for 17 months and was never restored to the calendar, the successor landlord could not re-use that notice as a predicate for a 2009 proceeding).

Jamison v Jamison (55 Misc 3d 139[A], 2017 NY Slip Op 50557[U] [App Term, 9th & 10th Jud Dists]) (in an RPAPL 711 [1] holdover proceeding based on a predicate notice terminating a tenancy at will, the City Court erred in holding that the petitioner was entitled to possession under RPAPL 713 [6], which allows for the eviction of a tenant of a life tenant after the termination of the life estate, as, inter alia, a valid predicate notice is a condition precedent to a holdover proceeding and the predicate notice was not amendable); **Bayview Loan Servicing, LLC v Lyn-Jay, Inc.** (54 Misc 3d 140[A], 2017 NY Slip Op 50160[U] [App Term, 2d, 11th & 13th Jud Dists]) (a 10-day notice stating that it was being served pursuant to RPAPL 713 [5], which allows the maintenance of a proceeding where the property has been sold in foreclosure, was not a proper predicate where the deed annexed to the petition was a bargain and sale deed, as the notice could not be amended and the petitioner was bound by the notice served); cf. **New York Shun On Realty Dev. Inc. v Mathieu** (64826/15, NYLJ 1202735692399 [Civ Ct, NY County Aug. 17, 2015, J. Stoller, J.]) (a 10-day notice to quit which did not state a ground for the notice was insufficient as it did not permit the occupant to prepare a defense); **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); cf. also **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).

136-76 39th Ave., LLC v Ai Ping Wu (55 Misc 3d 128[A], 2017 NY Slip Op 50363[U] [App Term, 2d & 11th & 13th Jud Dists]) (the allegedly defective service of a rent demand does not affect the court's subject matter jurisdiction, which is conferred by statute); **Wasserman v Kwiecinski** (54 Misc 3d 136[A], 2017 NY Slip Op 50112[U] [App Term, 9th & 10th Jud Dists]) (an allegation that a notice to cure was not properly served may constitute a defense to a holdover proceeding but it is not a jurisdictional defense and should not result in the granting of a traverse hearing); citing **433 W. Assoc. v Murdock** (276 AD2d 360 [1st Dept 2000]); see **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 petition's irregularities with respect to the allegations of its service implicated subject matter jurisdiction); **Cutting v Burns** (57 App Div 185 [2d Dept 1901]) (where a defendant appeared generally and joined issue and made no motion based on an alleged jurisdictional defect of failure to serve a predicate notice, the defect was waived; even if proof of such service was part of the plaintiff's case, the defendant could not first avail himself of the point on appeal); **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); cf. **80th Inc. v Witter** (48 Misc 3d 142[A], 2015 NY Slip Op 51258[U] [App Term, 1st Dept]) (it was error for the Civil Court, following a trial, to sua sponte dismiss based on an unraised ground of landlord's failure to serve a termination notice on the appearing undertenant and upon DHCR).

31-67 Astoria Corp. v Landaira (54 Misc 3d 131[A], 2017 NY Slip Op 50034[U] [App Term, 2d, 11th &13th Jud Dists]) (a notice of termination which failed to allege that the objectionable conduct described in the notice to cure had continued after the service of the notice to cure was defective, as a violation removed during the cure period will not support the termination of a lease); **1025-45 Assoc. Inc. v Tate** (L&T 54801/17, NYLJ 120279440370 [Civ Ct, Kings County, July 19, 2017, B. Scheckowitz, J.]) (a notice of termination which stated that the tenant had failed in every respect to cure the alterations violation failed to set forth how the landlord know that the tenant had failed to cure, such as a statement that the landlord had inspected the apartment or that the tenant had denied access); **CDC E. 105th St. Realty LP v Mitchel** (L&T 57435/16, NYLJ 12027855119363 [Civ Ct, NY County Apr. 26, 2017, J. Stanley, J.]) (a notice of termination which failed to allege the basis for the landlord's knowledge that the tenant had failed to cure the unsanitary conditions in his apartment lacked a statement of supporting facts to establish that the condition existed after the cure deadline); **Third Hous. Co., Inc. v Velez** (80678/16, NYLJ 1202787007020 [Civ Ct, Queens County Apr. 6, 2017, J. Rodriguez, J.]) (where a notice to cure alleged that the tenant was harboring three dogs, a termination notice flatly asserting that the tenant had failed to cure without providing any factual allegation that the tenant was seen with the dogs or that anyone reported hearing the dogs lacked the required specificity); citing **76 W. 86th St. Corp. v Junas** (55 Misc 3d 596 [Civ Ct, NY County 2017, M. Weisberg, J.]) (a notice of termination for illegal sublet, dated two days after the cure date, which fails to allege specific facts to support the landlord's claim that the tenant failed to comply with the notice to cure does not satisfy the RSC requirement that a termination notice must state the facts necessary to establish the ground for eviction); **Second Hous. Co., Inc. v Davis** (60698/16, NYLJ 1202772251405 [Civ Ct, Queens County, M. Pinckney, J., Oct. 31, 2016]) (under the Mitchell Lama regulations, a notice to cure is required for nuisance conduct which is ordinarily not considered curable; a notice to terminate which alleged no specific misconduct after the cure date was defective); cf. **Volunteers of Am. v Johnson** (97280/15, NYLJ 1202784918482 [Civ Ct, Kings County Apr. 3, 2017, J. Kuzniewski, J.]) (summary judgment granted to the tenant in a clutter case where the

landlord failed to show specific information in support of its allegation in the notice of termination that the condition had not been cured and the landlord did not expand on the notice in opposition to the tenant's motion).

Nachajski v Siwiec (55 Misc 3d 133[A], 2017 NY Slip Op 50438[U] [App Term, 2d, 11th & 13th Jud Dists]) (in a nonprimary-residence case in which the tenant had generally denied the allegations of the petition, the landlords failed to establish their prima facie case where they failed to introduce the nonrenewal notice and the expiring lease at trial, as the service of a nonrenewal notice in the 90-150 day period prior to the expiration of a lease is an element of the landlord's case); citing **Mautner-Glick Corp. v Glazer** (148 AD3d 515 [1st Dept 2017]) (a defense that a Golub notice was not properly served asserts that the landlord failed to comply with a condition precedent to suit, and not a lack of personal jurisdiction, and is not waived by a tenant's failure to raise it in a preanswer motion to dismiss; where the tenant raised the objection in her answer, the burden remained on the landlord to prove this element of its case); see also **1691 Fulton Ave. Assoc. v Watson** (55 Misc 3d 1221[A], 2017 NY Slip Op 50697[U] [Civ Ct, Bronx County, D. Lutwak, J.]) (service of a notice to cure and notice of termination is a condition precedent and an element of a landlord's case based on a breach of a substantial obligation of the tenancy, and a mere denial in the answer of the petition's allegation is sufficient without the assertion of an affirmative defense); citing **Second & E. 82 Realty v 82nd St. Gily Corp.** (192 Misc 2d 55 [Civ Ct, NY County, L. Billings, J.]); citing **433 W. Assoc. v Murdock** (276 AD2d 360 [1st Dept 2000]) (a holdover petition to recover possession of a Section 8 apartment must plead that the predicate notice and petition were served on NYCHA, and the tenant's Section 8 status, as these are "essential elements" of the landlord's prima facie case).

Manda v Badinsky (53809/16, NYLJ 1202789583670 [Civ Ct, Queens County May 31, 2017, L. Lai, J.]) (a notice advising the tenants that their lease would not be renewed upon its expiration was insufficient because it did not unequivocally terminate the tenancy); citing **Malta v Brown** (12 Misc 3d 1164[A], 2006 NY Slip Op 51028[U] [Civ Ct, NY County, G. Lebovits, J.]) (combined notice of nonrenewal and termination allowed); contra **Trojan v Wisniewska** (8 Misc 3d 382 [Civ Ct, Kings County 2005, G. Heymann, J.]) (no 30-day notice is required as a predicate to an owner's use proceeding, as the RSC only requires such a notice for a nonprimary-residence proceeding).

Port Royal Owners Corp. v Navy Beach Rest. Group, LLC (56 Misc 3d 56 [App Term, 9th & 10th Jud Dists 2017]) (a notice of termination sent by an attorney for the landlord, who was not identified in the lease, was not defective, as, unlike in Siegel, the lease did not have multiple lease provisions specifying "the landlord or its agent"; the holding in Spinner was not limited to nonpayment proceedings but addresses notice requirements in the context of eviction proceedings generally); **PS Food Corp. v Granville Payne Retail, LLC** (45 Misc 3d 1216[A], 2014 NY Slip Op 51601[U] [Sup Ct, Kings County, C. Demarest, J.]) (a default notice signed by an attorney not named in the lease is not defective), affd 140 AD3d 1046 [2d Dept 2016]); citing **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 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 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. **DLJ Mtge. Capital, Inc. v Grant** (51 Misc 3d 908 [Dist Ct, Nassau County 2016, S. Fairgrieve, J.]) (dismissing an RPAPL 713 [5] proceeding where the 10-day notice was executed by a third party; the limited power of attorney attached to the notice to quit did not authorize the third party to commence a summary proceeding and was limited to mortgage servicing and foreclosure matters); **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).

Matter of 322 W. 47th St. HDFC v Loo (__ AD3d ___, 2017 NY Slip Op 06403 [1st Dept 2017]) (while declining to reach the HDFC tenant's unpreserved claim that she was not served with a pretermination notice required where the catch-all "good cause" ground is the basis for the eviction, the court states that the claim would be unavailing, as the purpose of the notice is to provide the tenant advance notice of the conduct forming the grounds for the termination, and here the tenant admitted that she had been fully aware that her nonpurchase of the shares upon the building's conversion to a lower income cooperative pursuant to an eviction plan could subject her to eviction; in addition, the failure to raise the claim constituted a waiver, as it does not implicate

subject matter jurisdiction), affg (50 Misc 3d 143[A], 2016 NY Slip Op 50227[U] [App Term, 1st Dept]) (a tenant's failure to purchase her unit when the building was converted to an HDFC constituted good cause to evict under Grimmet); **206 W. 121st St. HDFC v Jones** (53 Misc 3d 149[A], 2016 NY Slip Op 51668[U] [App Term, 1st Dept]) (the HDFC was not required to serve a termination notice upon the expiration of a lease since the tenancy is unregulated; due process was satisfied by the petition's allegations of numerous acts of specified objectionable conduct); **Duke Ellington Trio HDFC v Gorritz** (2016 NY Slip Op 30627[U] [Civ Ct, NY County, S. Kraus, J.]) (while good cause needs to be articulated when an HDFC seeks to evict a tenant, there is no requirement in the cases that the predicate 30-day notice allege such cause, it is sufficient that the petition allege such cause; a petition which failed to allege such cause was capable of being amended where the HDFC had previously notified the tenant in writing of the reason for the holdover, to wit, the tenant's failure to make timely rent payments); contra **157 W. 123rd St. Tenants Assn. v Hickson** (142 Misc 2d 984 [App Term, 1st Dept 1989]) (in a holdover brought by a tenants association which operated the building under the Tenant Interim Lease [TIL] program, a notice of termination which specified no reason for the termination other than the expiration of the term was ineffective on due process grounds, as the City is entwined with the TIL program); see also **City of New York v Torres** (164 Misc 2d 1037 [App Term, 1st Dept 1995]) (a notice of termination which stated as grounds for the eviction the placement of a vacate order but failed to identify the conditions which gave rise to its placement failed to particularize the facts upon which the proceeding was based, as an article 78 proceeding is not the exclusive remedy to challenge a vacate order; dissent, that the notice stated the ultimate facts, since HPD's determination could only be challenged in an article 78 proceeding); **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.) (the landlord was required to allege a reason for the termination even though 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 against an HDFC tenant 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 Am.–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 it 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).

Barrett Japaning Inc. v Bialobroda (54 Misc 3d 145[A], 2017 NY Slip Op 50258[U] [App Term, 1st Dept]) (measured against the test of reasonableness under the attendant circumstances applicable to evaluating predicate notices, illegal sublet predicate notices which identified the proprietary lease provisions which were violated were sufficient, and any irregularity in the notices concerning the termination date did not mislead the tenant or hinder the preparation of her defense, citing **Oxford Towers Co. v Leites** [41 AD3d 144 (1st Dept 2007)] and the holdover proceedings were not based on "objectionable conduct"); see also **Amin Mgt LLC v Martinez** (55 Misc 3d 144[A], 2017 NY Slip Op 50664[U] [App Term, 1st Dept]) (a notice alleging that the tenant had illegally sublet or assigned to three named individuals in violation of RPL § 226-b and RSC §§ 2524.3 [h] and 2525.6 was reasonable in view of the attendant circumstances).

PS Food Corp. v Granville Payne Retail, LLC (140 AD3d 1046 [2d Dept 2016]) (a notice of default that the tenant had violated a provision of the lease requiring it to maintain a fire sprinkler system by failing to install a fire alarm sufficiently informed the tenant of the claimed default under the lease and of the forfeiture and termination of the lease if the claimed default was not cured within a set time period [because the Administrative Code requires that a fire alarm system be part of a sprinkler system]); citing **NY Kids Club 125 5th Ave., LLC v Three Kings, LLC** (133 AD3d 580 [2d Dept 2015]) (a notice to cure is sufficient when it advises the tenant of the purported

violations, the conduct required for compliance, the time allowed for compliance, and the consequences of failing to cure); **1346 Park Place HDFC v Wright** (52 Misc 3d 18 [App Term, 2d, 11th & 13th Jud Dists 2016]) (a notice to cure was sufficient where it adequately apprised the tenants of the conditions to be cured and referenced the specific lease section addressing the conditions; the notice set forth sufficient facts to establish the grounds for eviction, informed the tenants as to how they had violated the lease and adequately advised them so that they could prepare a defense); **Courtney House, LLC v Goetz** (51 Misc 3d 146[A], 2016 NY Slip Op 50751[U] [App Term, 1st Dept]) (a nuisance termination notice which alleged that the apartment was in an extremely cluttered and unhygienic condition with empty food cans and refuse covering the flat surfaces and the floors, piled several feet high; that the tenant had continually harbored wild animals, including squirrels and rats; and that a moth infestation had spread from the tenant's apartment was sufficiently specific); **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 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 authorized termination if the landlord elected to demolish or remarket the building or the tenant's space, a 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 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 building only "once a month for less than a week each time" sufficiently set forth case-specific allegations); **Lasala v Liguouri** 97378/2015, NYLJ 1202764732638 [Civ Ct, Kings County, M. Finkelstein, J., July 26, 2016]) (an owner's use nonrenewal notice which described the owner's current living situation and the advantages of the subject unit but failed to state that the owner was seeking three other units in the building lacked the required specificity); **Goldman v Mendez** (087066/2012 [Civ Ct, Kings County Oct. 8, 2013, M. Sikowitz, J.]) (a 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 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).

751 Union St., LLC v Charles (56 Misc 3d 141[A], 2017 NY Slip Op 51104[U] [App Term, 2d, 11th & 13th Jud Dists]) (where an RSC 10-day notice of termination based on nuisance stated 10 factually specific allegations of misconduct, the fact that one of the allegations — that the tenant had engaged in misconduct against another tenant — could not be maintained because the lease required that a notice to cure be served for improper conduct against another tenant, did not invalidate the entire termination notice, as the remaining nine factually specific allegations of misconduct against the landlord and its employees were severable, citing Lambert); cf. **69 E.M. LLC v Mejia** (49 Misc 3d 152[A], 2015 NY Slip Op 51765[U] [App Term, 1st Dept]) (a nuisance termination notice containing one specific factual allegation of damage to the apartment walls and floor due to the removal of molding but which also broadly alleged unspecified anti-social behavior and damage to unidentified fixtures was not reasonable under the circumstances; the entire notice was rendered defective by the impermissibly vague allegations); citing **542 Holding Corp. v Prince Fashions, Inc.** (46 AD3d 309 [1st Dept 2007]) (a substantive defect in the notice to cure renders the entire notice deficient); citing **200 W. 58th St. LLC v Little Egypt Corp.** (7 Misc 3d 1017[A], 2005 NY Slip Op 50640[U] [Civ Ct, NY County, L. Billings, J.]) (a notice to cure which sufficiently alleges a lease default but insufficiently alleges a separate lease default is defective); cf. also **Singh v Ramirez** (20 Misc 3d 142[A], 2008 NY Slip Op 51680[U] [App Term, 2d & 11th Jud Dists]) (where a notice to cure alleged that the tenant was subletting in violation of the lease's subletting clause to persons unknown who were using the premises nonresidentially in violation of the use clause, the landlord could not withdraw the subletting allegation and proceed only on a claim of nonresidential use); **309 E. 60th St. LLC v Atallah** (NYLJ, June 24, 2009 [Civ Ct, NY County, A. Engoron, J.]) (a notice to cure which amalgamated various facts and, separately, various lease provisions was defective); see generally **One E. 8th St. Corp. v Third Brevoort Corp.** (38 AD2d 524 [1st Dept 1971]) (a landlord is "bound by the notice served and cannot substitute another violation"); **Spinale v 10 W. 66th St.** (210 AD2d 85 [1st Dept 1994]) (a tenant "could not be evicted for other alleged violations that were not set forth in the notice of default"); but cf. **Lambert Houses Redevelopment Co. v Adam & Peck Org.** (169 Misc 2d 667 [App Term, 1st Dept 1996]) (where a predicate notice alleged factually specific defaults in rent, nuisance and breaches of substantial obligations of the lease, the insufficiency of the nonpayment ground [since the lease did not create a conditional limitation for nonpayment] did not invalidate the notice, as the allegation of the rent default was severable from the remaining allegations); **310 E. 4th St. Hous. Dev. Fund Corp. v Blackmon** (NYLJ, Jan. 30, 1996 [App Term, 1st Dept]) (same); **CRS Realty Assoc. Inc. v 235 Tenth Ave. Car Wash Inc.** (43 Misc 3d 1226[A], 2014 NY Slip Op 50790[U] [Civ Ct, NY County, L. Kotler, J.]) (where each basis set forth in the notice to cure was clear and separate and clearly apprised the tenants of the lease provisions involved and the action necessary to effect a cure, the fact that there was a triable issue as to one of the violations did not preclude an award to the landlord of summary

judgment where there were no triable issues as to the other violations); **Brodcom W. Dev. Co. v Lumpkin** (NYLJ, Jan. 8, 2009 [Civ Ct, NY County, S. Kraus, J.]) (where a notice to cure alleged that the subsidized tenant had defaulted in providing required forms and in having her undertenant present at the time of an apartment inspection, but the proof did not establish a requirement that the undertenant be present at the inspection, the landlord's failure to establish this prong of the notice did not require dismissal, as the defect was not prejudicial and the landlord established that the tenant was not residing in the apartment and her recertification was false).

Carlo v Koch-Matthews (53 Misc 3d 466 [Cohoes City Ct 2016, T. Marcelle, J.]) (the provision in Real Property Law § 232-b that a monthly tenancy or tenancy from month-to-month may be terminated by the landlord or the tenant "upon his notifying the other at least one month before the expiration of the term of his election to terminate" is permissive, not mandatory; the statute circumscribes the landlord's ability to require notice longer than a month; at common law, "a monthly tenancy" has a fixed term and ends even in the absence of notice; a month-to-month tenancy has an indefinite term and continues until terminated by notice; a monthly tenancy is an implied contract, normally following the expiration of a lease, based on an offer and acceptance of a month's rent; a month-to-month tenancy is founded in property, not contract, rights; it arises where the parties have agreed upon the amount of rent, but failed to agree upon an ending date for the lease; thus, each month, both the landlord and the tenant have the right to continue the tenancy; New York common law adopted a requirement of reasonable notice proportionate to the nature of the tenancy; thus, the tenants in the Carlo case were month to month and were required by common law to give one month's notice); but cf. **Sills v Dellavalle** (9 AD3d 561 [3d Dept 2004]) (a month's notice is mandatory under Real Property Law § 232-b); accord **Fajardo v Eisner** (11 Misc 3d 139[A], 2006 NY Slip Op 50585[U] [App Term, 9th & 10th Jud Dists]); see also **Gerolemou v Soliz** (184 Misc 2d 579 [App Term, 2d & 11th Jud Dists 2000]) (the common law requires a landlord to serve a month-to-month tenant with a month's notice before bringing an ejectment action).

Lova v Greg (51 Misc 3d 1210[A], 2016 NY Slip Op 50542[U] [Mt. Vernon City Ct 2016, A. Seiden, J.]) (a monthly tenancy outside the City of New York may be terminated upon a timely, definite and unequivocal month's notice, which can be oral or written, served or mailed, so long as the notice is given in a manner calculated to give actual notice); **O'Neill v O'Neill** (50 Misc 3d 1226[A], 2016 NY Slip Op 50271[U] [Civ Ct, Queens County, J. Rodriguez, J.]) (a notice terminating a month-to-month tenancy [in the City of New York] must state unequivocally that the landlord is electing to terminate the tenancy, that the tenant is required to surrender possession on the date the term expires and that if the tenant does not quit, summary eviction proceedings will be commenced against him); citing **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. **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); **Small v Fang** (50 Misc 3d 1201[A], 2015 NY Slip Op 51840[U] [Civ Ct, NY County, J. Stoller, J.]) (a 30-day notice which stated that it was without prejudice to the landlord's position in an existing holdover proceeding was not ambiguous, as there was no reading of the notice that would allow the tenant to believe that the landlord would agree to a continued tenancy; a five-month delay between the termination date in the notice and the commencement of the holdover proceeding did not render the notice stale where the landlord was prosecuting the earlier proceeding during that period, so that no actionable repose was conferred on the tenant).

Mansfield Owners, Inc. v Phillip (50 Misc 3d 139[A], 2016 NY Slip Op 50148[U] [App Term, 2d, 11th & 13th Jud Dists]) (in an illegal-sublet holdover proceeding, the parties' extensive settlement negotiations, including the co-op's acceptance of a sublet application and accompanying cashier's checks, served to extend the proprietary lease's cure period through the commencement of the proceeding); citing **Zuckerman v 33072 Owners Corp.** (97 AD2d 736 [1st Dept 1983]) (extensive settlement negotiations effectively set a new cure period to cure a default under a proprietary lease, thus extending the time to apply for a Yellowstone injunction); see also **Dara Realty Assoc., LLC v Musheyev** (52 Misc 3d 134[A], 2016 NY Slip Op 51023[U] [App Term, 2d, 11th & 13th Jud Dists]) (where the parties were negotiating a settlement at the time that the last payment was due under a stipulation settling a nonpayment proceeding, the parties extended the deadline for the last payment, citing Zuckerman and Mansfield; in any event, the final judgment was defective because it included electricity charges, which cannot be considered rent in the context of a rent-stabilized tenancy); **601 W. 135 St. HDFC v Tsiropoulos** (49 Misc 3d 1210[A], 2015 NY Slip Op 51550[U] [Civ Ct, NY County, S. Kraus, J.]) (in a proceeding based on a provision of an HDFC proprietary lease allowing the HDFC to terminate the lease where the lease passed by operation of law to someone other than the shareholder unless the transferee was an executor or administrator of the shareholder to whom the shares were transferred within 60 days after the death of the shareholder, which period could be extended by the HDFC, court finds that the 60-day period was extended by the Board's active consideration and failure to make a decision on the administrator's application for a transfer, prior to the commencement of the proceeding).

102 W. Hudson, LLC v Cordero (54 Misc 3d 838 [Dist Ct, Nassau County 2017, S. Fairgrieve, J.]) (where the housing authority had sent a letter to the landlord stating that the landlord could not recover any more than the tenant's share of the rent, the court vacates a stipulation in which the pro se tenant agreed to pay both the tenant share and the Section 8 share of the rent, and, based on the prejudice that the tenant may have

suffered as a result of the discrepancy between the rent demanded and the amount owed, dismisses the petition, citing Inland; court "has difficulty reconciling the holdings in Rippy and 1466 Holding, Inc. from that in Inland," and follows Inland to discourage landlords from making improper rent demands); see **Inland Diversified Real Estate Serv., LLC v Keiko NY, Inc.** (51 Misc 3d 139[A], 2016 NY Slip Op 50613[U] [App Term, 9th & 10th Jud Dists]) (where the landlord was not entitled to recover utility charges as additional rent absent proof that the landlord had paid the charges, a stipulation of settlement in which the tenant agreed to pay the sums demanded and to surrender possession would be vacated and, in light of the magnitude of the discrepancy between the amounts demanded and the amounts properly recoverable in the nonpayment proceeding, the petition would be dismissed, as the tenant may have been prejudiced in its ability to respond to the demand, formulate defenses and avoid litigation or eviction); cf. **Rippy v Kyer** (23 Misc 3d 130[A], 2009 NY Slip Op 50652[U] [App Term, 9th & 10th Jud Dists) (notwithstanding that the pro se landlord's demand improperly sought alleged arrears in the full contract rent of $1,300, rather than only the tenant's share of $449, the proceeding would not be dismissed, as there was nothing to indicate that the pro se demand for the contract rent was made other than in good faith, and a substantive dispute over the amount of arrears does not implicate the legal sufficiency of the rent demand); **1466 Holding Co. v Sanchez** (40 Misc 3d 138[A], 2013 NY Slip Op 51404[U] [App Term, 1st Dept]) (since the Section 8 subsidy was a term and condition of the tenancy, a renewal lease purporting to obligate the tenant for the Section 8 portion of the rent would not be given effect; thus, a stipulation in which the pro se tenant agreed to pay the Section 8 share was properly vacated; however, the petition should not have been dismissed since the landlord's facially meritorious claim to the unsubsidized portion of the rent remained unresolved).

Gottesman Family Props., LLC v Medi-Syst. Renal Care Mgt. Servs., LLC (55 Misc 3d 147[A], 2017 NY Slip Op 50690[U] [App Term, 2d, 11th & 13th Jud Dists]) (where a rent notice was served on February 23, 2015, a nonpayment proceeding commenced on February 26, 2015 was premature, as General Construction Law § 20 requires a calculation of the "number of calendar days exclusive of the calendar day from which the reckoning is made"); **T.D. Bank, N.A. v Yeshiva Chofetz Chaim, Inc.** (48 Misc 3d 127[A], 2015 NY Slip Op 50912[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 proper, 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); see **2 Dolan, Rasch's Landlord-and Tenant, § 32:10** (a petition verified on the last day of a three-day notice is defective); 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

2293 Sedgwick Ave. Realty Corp. v Burgess (71223/16, NYLJ 1202793829804 [Civ Ct, Bronx County July 13, 2017, K. Thermos, J.]) (in a squatter proceeding, the court lacked jurisdiction over the respondent, as the attempts at service were made while the petitioner knew that the respondent was not in occupancy because the petitioner had locked the respondent out and gotten an order of protection against him [citing DeStefano]; moreover, the attempts at service and the posting, at the apartment door rather that at the respondent's room, rendered the service defective; in addition, the fact that the respondent did not have a mailbox under his exclusive control and the petitioner handled and distributed the mail made the mailing delivery suspect); see **Doji Bak, LLC v Alta Plastics** (51 Misc 3d 148[A], 2016 NY Slip Op 50792[U] [App Term, 9th & 10th Jud Dists]) (notwithstanding a lease provision for the mailing of notices to the premises, two attempts at service upon the vacant commercial premises did not constitute a reasonable application, where the landlord had knowledge of the tenant's principal place of business and did not serve the tenant there; conspicuous-place service is permitted only where the landlord has failed, after a "reasonable application", to make personal or substituted service, and requires at least a reasonable expectation of success); **91 Fifth Ave. Corp. v Brookhill Prop. Holdings LLC** (51 Misc 3d 811 [Civ Ct, NY County 2016, P. Goetz, J.]) (service of a three-day notice was defective, where the landlord had knowledge of where the tenant's business was temporarily located at a different premises and the tenant had not yet moved into the subject premises, as an attempt that was predestined to fail was not a reasonable application); see **Zot, LLC v Crown Assoc.** (22 Misc 3d 133[A], 2009 NY Slip Op 50215[U] [App Term, 2d, 11th & 13th Jud Dists]) (where the landlord knew that the restaurant was closed because of a ceiling collapse, there was no "reasonable application" prior to the conspicuous-place service); **30-40 Assoc. Corp. v DeStefano** (2003 NY Slip Op 50625[U] [App Term, 1st Dept]) (where the tenant had been removed by the police at the landlord's instance, there was no "reasonable application" to effect personal or substituted service before the conspicuous-place service).

Redstone Garage Corp. v New Breed Automotive, Inc. (54 Misc 3d 126[A], 2016 NY Slip Op 51776[U] [App Term, 2d, 11th & 13th Jud Dists]) (in a commercial holdover proceeding, a default final judgment was vacated and the petition dismissed as against an undertenant sued as "XYZ Corp.", as the landlord was required to show due

diligence in seeking to ascertain the undertenant's name; the landlord was aware of the undertenant's occupancy and had received an insurance certificate for the undertenant, and the outside of the building had a sign with the undertenant's name on it); **Williams v Doe** (L&T 73826/15, NYLJ 1202746951713 [Civ Ct, Kings County, Dec. 28, 2015, J. Kuzniewski, J.]) (dismisses a petition where an absentee landlord resorted to "John Doe" service, as an owner cannot absolve himself of the requirement that he make a genuine effort to learn the true names of the occupants, and such efforts must be demonstrated by affidavit); see **RR Reo II, LLC v Omeje** (33 Misc 3d 128[A], 2011 NY Slip Op 51848[U] [App Term, 2d, 11th & 13th Jud Dists) (in order to employ the "John Doe" procedure of CPLR 1024, a petitioner must show that he made timely efforts to identify the correct party; where a petitioner failed to exercise due diligence to ascertain the identity of the occupant, the occupant's motion to vacate the default final judgment and warrant and to dismiss the petition should have been granted); **Deutsche Bank Natl. Trust Co. v Turner** (32 Misc 3d 1202[A], 2011 NY Slip Op 51153[U] [Civ Ct, Bronx County, S. Weissman, J.]) (proceeding by purchaser in foreclosure dismissed where the petitioner made no diligent effort to determine the name of the occupant; the petitioner could have knocked on the door, inquired of the prior owner, or checked the names on the mailbox); see **Bumpus v New York City Tr. Auth.** (66 AD3d 26 [2d Dept 2009]) (a party may not rely on the procedure of CPLR 1024 unless he has exercised due diligence to identify the defendant by name, and must, to obtain jurisdiction, describe the "Jane Doe" "in such form as will fairly apprise the party that she is the intended defendant"); **Chavez v Nevell Mgmt. Co.** (69 Misc 2d 718, 720 [Civ Ct, NY County, L. Sandler, J., 1972]) (the "unusual authority" sanctioned by CPLR 1024 should not be availed of in the absence of a genuine effort to learn the party's true name); see also **Triborough Bridge & Tunnel Auth. v Wimpfheimer** (165 Misc 2d 584 [App Term, 1st Dept]) (dismissal warranted as against the subtenants where the landlord knew their names prior to the commencement of the proceeding but designated them as "John Doe" and "Jane Doe"); cf. also **Taveras v City of New York** (108 AD3d 614 [2d Dept 2013]) (while a person named as a "John Doe" must be properly served, an informal appearance by that person by actively participating in the litigation will waive the service objection); **Teachers Coll. v Wolterding** (77 Misc 2d 81 [App Term, 1st Dept 1974]) (if the party named as a John Doe in the caption has been served and is before the court, the caption is amendable).

974 Anderson LLC v Davis (53 Misc 3d 1220[A], 2016 NY Slip Op 51765[U] [Civ Ct, Bronx County, D. Lutwak, J.]) (under CPLR 1024, providing that if a person is ignorant, in whole or part, of the name of a person who may properly be made a party, he may designate so much of the name as is known, it is sufficient if the summons describes the person in such a manner that he would have known that he was the intended defendant; a notice of petition which named Manuel Lora Davis was adequate to describe a squatter who said his name was Sully Manuel Lora); citing **Lenox Rd. Utica Ave. Realty v Spencer** (184 Misc 2d 628 [App Term, 2d & 11th Jud Dists 2000]) (a caption identifying the respondent as "John" Spencer rather than Andy Spencer was sufficient, as the tenant could not have been confused as to who was meant).

New York City Hous. Auth. v Dancil (55 Misc 3d 136[A], 2017 NY Slip Op 50499[U] [App Term, 2d, 11th & 13th Jud Dists]) (a defense that the court lacked personal jurisdiction was waived by the occupant's appearing in the proceeding, requesting pretrial adjournments and participating in the trial without raising the defense); **1168 Rockaway Ave. Corp. v Singh** (54 Misc 3d 1213[A], 2017 NY Slip Op 50125[U] [Civ Ct, Kings County, R. Montelione, J.]) (a claim that the court lacked jurisdiction over a party named as a "John Doe" was waived where there was a stipulation requiring the respondent to pay use and occupancy and the respondent's answer was stricken for failing to make the payment, since the respondent failed to request an immediate hearing pursuant to RPAPL 745 [2] at the time the court considered the use and occupancy request); cf. **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).

Bay Ridge Chicken Grill, Inc. v Cirrus Data Intl., LLC (49 Misc 3d 133[A], 2015 NY Slip Op 51452[U] [App Term, 2d, 11th & 13th Jud Dists]) (in an RPAPL 713 [10] proceeding, the "person in possession" must be made a party; where a new tenant was in possession and was not joined, jurisdiction over the property was not obtained); cf. **Saccheri v Cathedral Props. Corp.** (43 Misc 3d 20 [App Term, 9th & 10th Jud Dists 2014]) (notwithstanding the language in **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 when the proceeding is commenced, an objection that the respondent was not in possession when 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" as to be raiseable by post-judgment motion).

51 Middle Rd. LLC v Myers (__ Misc 3d ___, 2017 NY Slip Op 27293 [Greenport Just Ct 2017, R. Gagen, J.]) (to obtain a money judgment against a defaulting tenant, the "due diligence" requirement must be strictly observed, including a showing that the process server made genuine inquiries about the tenant's whereabouts and place of employment); citing **Greene Major Holdings, LLC v Trailside at Hunter, LLC** (148 AD3d 1317 [3d Dept 2017]); see **Cornhill, LLC v Sposato** (56 Misc 3d 364 [Rochester City Ct 2017, E. Yacknin, J.]) (due diligence is required before a default money judgment can be entered, citing Avgush), on remand from (55 Misc 3d 685 [Monroe

County Ct 2017, C. Ciaccio, J.]) (the ruling in **Matter of McDonald [Hutter]** [225 App Div 403 (4th Dept 1929)] that, in a summary proceeding, a money judgment can be awarded on default only if process was personally served was based on Civil Practice Act § 230, which allowed, in a plenary action, an award of a default money judgment upon other than personal service only if substituted service was made pursuant to an order of the court; since CPA § 230 no longer exists and CPLR 308 now allows the entry of a default judgment upon substituted service, RPAPL 735 should now be read to allow the entry of a default money judgment under any of the types of service set forth therein, as they satisfy the demands of due process); cf. **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 a ground 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, it was error for the court to take judicial notice of the affidavit of service and to find that it established proper service [see CPLR 4531]; in any event, the 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").

Clark Stores, Inc. v Young Girl 15, LLC (52 Misc 3d 131[A], 2016 NY Slip Op 50965[U] [App Term, 2d, 11th & 13th Jud Dists]) (Civil Court erred in granting attorney's fees, upon the landlord's default in opposing a motion to dismiss based on a defective notice, and in providing that the dismissal was with prejudice, since a court lacks jurisdiction to grant relief on default beyond that which is requested in the motion papers); cf. CPLR 3215 (b) (a default "judgment shall not exceed in amount or differ in type from that demanded in the complaint").

Parties and Standing

3648 White Plains LLC v Mensah (900509/17, NYLJ 12027944047222 [Civ Ct, Bronx County July 12, 2017, S. Kraus, J.]) (after a judgment of foreclosure, the mortgagor retains standing to maintain a summary proceeding until the actual sale, when the mortgagor's rights in the property become barred); citing, inter alia, **Dulberg v Ebenhart** (68 AD2d 323 [1st Dept 1979]).

1521 Sheridan LLC v Vasquez (56 Misc 3d 1061 [Civ Ct, Bronx County 2017, D. Lutwak, J.]) (where a landlord transferred title after obtaining a nonpayment consent final judgment, the tenant's motion to vacate the judgment would not be granted but the warrant of eviction would be permanently stayed).

Attia v Imoukhuede (55 Misc 3d 135[A], 2017 NY Slip Op 50490[U] [App Term, 9th & 10th Jud Dists]) (where the tenants had recognized the petitioner as their landlord, by entering into a lease with him, they were estopped from denying the existence of the

landlord-tenant relationship, and the fact that the petitioner was not the owner of the premises [his wife was] did not deprive him of standing to maintain the nonpayment proceeding, as, pursuant to RPAPL 721, a "landlord or lessor" may maintain a summary proceeding); **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; **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); **Unlimited Assets, Inc. v Chowdhry** (7001/16, NYLJ 1202784918992 [Civ Ct, Bronx County Apr. 10, 2017, K. Thermos, J.]) (in a holdover proceeding in which the tenant moved to vacate a stipulation based on a challenge to the petitioner's deed, a petition which alleged a landlord-tenant relationship between the parties was sufficient; it was not necessary for the landlord to allege or prove its right to possession); **19 Steven Lane Corp. v Kovar** (34 Misc 3d 1243[A], 2012 NY Slip Op 50517[U] [Dist Ct, Nassau County, S. Fairgrieve, J.]) (while a nonexistent entity cannot take title and any rights it transfers are void, a tenant who entered into a lease with a corporation, which was not incorporated at the time it took title but was fully incorporated at the time the lease was executed, was estopped from denying the title of the corporation).

Charles v Walker (48 Misc 3d 1208[A], 2015 NY Slip Op 51007[U] [Civ Ct, NY County, S. Kraus, J.]) (alleged transferees of a deceased tenant's interest in an HDFC apartment, who were never approved by the board or assigned the proprietary lease by the board, could not maintain a holdover proceeding against their month-to-month tenants, as only the HDFC could confer a possessory interest sufficient to allow a petitioner to obtain standing to commence a proceeding); citing **Williams v Williams** (46 Misc 3d 1201[A], 2014 NY Slip Op 51771[U] [Civ Ct, NY County, J. Stoller, J.]) (evidence that the petitioner had paid rent to the HDFC and that her name was on a ledger of stock certificates was insufficient to establish the petitioner's standing to maintain a holdover proceeding against a tenant of a room in the apartment, as only the HDFC can confer a possessory interest sufficient for the petitioner to obtain standing and an ownership of shares in a residential cooperative corporation cannot be granted except by conveyance in writing or operation of law, and the evidence did not show that the HDFC had conferred such an interest on the petitioner); citing **Newell Funding LLC v Tatum** (24 Misc 3d 597 [Civ Ct, NY County 2009, C. Gonzales, J.) (a lender that foreclosed on a co-op apartment shares lacked standing to maintain a holdover proceeding against the proprietary lessees, as only the cooperative can confer the right of possession); citing **City Enters. v Posemsky** (184 Misc 2d 287 [App Term, 2d & 11th Jud Dists 2000]) (an assignment of a proprietary lease as security for a mortgage creates only a mortgage).

Lewis v Jordan (L&T 78153/16, NYLJ 1202783907315 [Civ Ct, Queens County Mar. 23, 2017, C. Nembhard, J.]) (as a title defense may properly be raised in a summary proceeding, the court finds that the petitioner did not establish by a preponderance of the evidence that she was the owner because the leases to the tenant were signed after a deed to a third party had been recorded); citing **Redhead v Henry** (160 Misc 2d 546 [Civ Ct, Kings County 1994, D. Johnson, J.]) (for a petitioner to establish that he is a "landlord or lessor" within the meaning of RPAPL 721 [1], it is not enough to show that he granted a lease; the petitioner must also show that he had a right to transfer an interest; otherwise, anyone coming upon an abandoned building could enter into leases; as the petitioner failed to prove he had a right to lease the premises, the court sua sponte dismisses the proceeding for failure to prove a prima facie case); followed in **Vargas v Sotelo** (55 Misc 1206[A], 2017 NY Slip 50417[U] [Civ Ct, Bronx County, D. Lutwak, J.]).

Robles v Margaritis (52 Misc 3d 523 [Dist Ct, Nassau County 2016, S. Fairgrieve, J.]) (dismisses a nonpayment proceeding brought by an owner where the lease was between the owner's agent as landlord and the tenant, as a nonpayment proceeding must be predicated on a landlord-tenant relationship, which in turn is based on privity of estate and of contract); citing **New Amsterdam Cas. Co. v National Union Fire Ins. Co.** (266 NY 254 [1935]) (a landlord-tenant relationship entails privity of estate and of contract); and **3414 KNOS LLC v Bryant** (NYLJ, Jan. 12, 2011, p 25, col 1 [Civ Ct, Bronx County, E. Rashford, J.]) (an owner who was not the lessor had no privity with the tenant and could not maintain a summary proceeding, and the defect was jurisdictional and not amendable as the petitioner had no right to institute the proceeding); see also **Sanchez v Pickney** (55 Misc 3d 1214[A], 2017 NY Slip Op 50577[U] [Civ Ct, Kings County, J. Kuzniewski, J.]) (grants motion to dismiss where the petitioner, Sanchez, was not the lessor, as the rental agreement was with Brooklyn Luxury Homes, of which Sanchez was CEO/ founder); but see **Simmons v Berkshire Equity, LLC** (149 AD3d 1119 [2d Dept 2017]) (an undisclosed principal may sue on a contract made in the name of its agent unless there is a showing of fraud); **Hillside Metro Assoc., LLC v JPMorgan Chase Bank, Natl. Assn.** (747 F3d 44, 49 [2d Cir 2014]) (a third-party beneficiary of a contract has a "contractual relationship").

Randazzo v Galietti (55 Misc 3d 131[A], 2017 NY Slip Op 50423[U] [App Term, 2d, 11th & 13th Jud Dists]) (where only the landlord and the tenant had signed the most recent renewal lease, the tenant's husband was not a necessary party to the no-pet holdover and the failure to name him afforded no basis to dismiss the proceeding; declining to follow Stanford Realty Assoc.); **JLNT Realty, LLC v Liautaud** (49 Misc 3d 139[A], 2015 NY Slip Op 51567[U] [App Term, 2d, 11th & 13th Jud Dists]) (the tenant's family member was properly evicted under a nonpayment warrant issued against the tenant and should not have been restored to possession based on a claim that due process required that he be named in the proceeding in order for the warrant to be effective against him); **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 AD2d 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); but cf. **153-157 Lenox Holding, LLC v Konare** (50 Misc 3d 1227[A], 2016 NY Slip Op 50278[U] [Civ Ct, NY County, S. Kraus, J.] (where a rent-stabilized tenant stipulated to convert a nonpayment proceeding to a holdover proceeding in return for a waiver of $8,185.73 in arrears and a payment of $10,000, the tenant's wife was a necessary party and her motion to interpose an answer would be granted to the extent of ruling that she was not subject to eviction in the converted holdover proceeding and that the landlord would need to institute a separate proceeding against her); citing **Stanford Realty Assoc. v Rollins** (161 Misc 2d 754 [Civ Ct, NY County 1994, M. Friedman, J.]) (a wife not named in the lease may acquire independent possessory or tenancy rights to an apartment subject to regulation and may therefore become a necessary party); **2655 Realty, LLC v Berger** (50 Misc 3d 1218[A], 2016 NY Slip Op 50154[U] [Civ Ct, NY County, M. Weisberg, J.]) (stays a warrant, issued pursuant to a default nonpayment judgment against the tenant, as against an occupant who was not named or served); citing **170 W. 85th St. Tenants Assn. v Cruz** (173 AD2d 338 [1st Dept 1991]) (due process requires that for a warrant to be effective against a subtenant, licensee or occupant, he be made a party to the proceeding).

418 W. 130 St., LLC v Baez (78169/15, NYLJ 1202799913933 [Civ Ct, Kings County Sept. 25, 2017, M. Weisberg, J.]) (a landlord cannot proceed directly against his employee's tenant who resided in one room in the employee's apartment).

539 W 156, L.L.C. v Hernandez (55 Misc 3d 144[A], 2017 NY Slip Op 50663[U] [App Term, 1st Dept]) (an undertenant, whether licensee, subtenant or occupant, need not be served with prescribed notices); **Friedman v Yosef** (50 Misc 3d 138[A], 2016 NY Slip Op 50144[U] (App Term, 2d, 11th & 13th Jud Dists]) (a spouse who did not sign the most recent renewal lease was not a tenant and not entitled to receive a nonrenewal notice; any due process right that the spouse had to be joined in the proceeding was met); **149th Partners LP v Watts** (49 Misc 3d 139[A], 2015 NY Slip Op 51576[U] [App Term, 1st Dept]) (an occupant who is not a party to the lease need not be served with the prescribed notices); citing **1700 First Ave., LLC v Parsons-Novak** (46 Misc 3d 30 [App Term, 1st Dept 2014]) (this rule applies even where the occupant is the spouse of the tenant of record); citing **Katz Park Ave. Corp. v Olden** (158 Misc 2d 541 [Civ Ct, NY County 1993, M. Stallman, J.]) (since the RSC defines a tenant as a party to a lease agreement, only the tenant or tenants listed on the expiring lease must be served with a nonrenewal notice, even if the tenant's spouse had signed earlier leases).

Elias Props. Mgt., Inc. v One Half Fashion Corp. (__ Misc 3d ___[A], 2017 NY Slip Op 51307[U] [App Term, 2d, 11th & 13th Jud Dists]) (where an agent signed a lease on behalf of the named owner, the owner, not the agent, was the landlord, and the agent

could not maintain the summary proceeding); **Board of Mgrs. of the J Condominium v Tornabene** (55 Misc 3d 128[A], 2017 NY Slip Op 50362[U] [App Term, 2d, 11th & 13th Jud Dists]) (notwithstanding that the condominium bylaws authorized the condo to commence a summary proceeding on behalf of a condo owner who leased his unit in violation of the bylaws, as summary proceedings are statutory, it is RPAPL 721 which governs who is authorized to maintain a summary proceeding, not the parties' agreement, and RPAPL 721 does not permit an agent to maintain a summary proceeding); citing **Suderov v Ogle** (149 Misc 2d 906 [App Term, 2d & 11th Jud Dists 1991]) (in 1977, the legislature deleted the provision in RPAPL 721 which authorized legal representatives, attorneys, agents and assignees of a landlord to maintain summary proceedings) and **Key Bank of N.Y. v Becker** (88 NY2d 899 [1996]); cf. **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).

Fallarino v Fallarino (56 Misc 3d 67 [App Term, 9th & 10th Jud Dists 2017]) (where the petitioner's mother retained a life estate, the petitioner, a remainderman, had no right to possession and no standing to maintain a proceeding to remove his nephew; the fact that the petitioner had his mother's power of attorney did not give him standing, as an attorney-in-fact lacks standing under RPAPL 721); **Kurek v Luszcyk** (51 Misc 3d 19 [App Term, 2d, 11th & 13th Jud Dists 2015]) (a remainderman had no standing to bring a nonpayment proceeding against a life tenant, notwithstanding a document that purported to clarify the life estate clause in the deed, as the deed was without ambiguity and could not be varied); citing **Novakovic v Novakovic** (25 Misc 3d 94 [App Term, 2d, 11th &13th Jud Dists 2009]) (a remainderman lacked standing to bring a licensee proceeding against a life tenant's licensee, as the remainderman had no right to possession during the tenant's life).

Lee Chen v Ray (49 Misc 3d 137[A], 2015 NY Slip Op 51533[U] [App Term, 1st Dept]) (a licensee waived a claim that the petitioner lacked standing by failing to raise the defense in the answer or by way of preanswer motion); citing **Wells Fargo Bank Minn. N.A. v Mastropaolo** (42 AD3d 239 [2d Dept 2007]) (standing requires an inquiry into whether the litigant has an interest in the claim at issue; a defense of lack of standing does not implicate subject matter jurisdiction but affects at most the court's power to render a judgment on the merits); see **Chase Home Finance, LLC v Howland** (149 AD3d 1405 [3d Dept 2017]) (a standing defense was waived, as standing is not jurisdictional); but see **Desiano v Fitzgerald** (53 Misc 3d 935 [Peekskill City Ct 2016, R. Johnson, J.]) (the issue of standing goes to the jurisdictional basis of a court's authority to adjudicate a dispute); citing **Matter of Eaton Assoc. v Egan** (142 AD2d 330 [3d Dept 1988]); citing **Allen v Wright** (468 US 737, 751 [1984]).

DeMartino v Golden (150 AD3d 1200 [2d Dept 2017]) (corporations and limited liability companies must be represented by an attorney and cannot proceed pro se); **Ernest & Maryanna Jeremias Family Partnership, L.P. 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**.

15 Crown St. Realty, LLC v Walker (2017 NY Slip Op 85379[U] [App Term, 2d, 11th & 13th Jud Dists]) (where a pro se motion was made by the tenant's daughter, a nonparty who did not reside in the apartment, on behalf of the tenant, to be restored to possession, the motion and the order granting the motion were nullities, as a nonattorney may not appear on behalf of a party, since that constitutes the unauthorized practice of law); **Oakwood Terrace Hous. Corp. v Monk** (50 Misc 3d 141[A], 2016 NY Slip Op 50198[U] [App Term, 9th & 10th Jud Dists]) (a pro se's notice of appeal was not valid as to her husband; however, where the parties are united in interest, the dismissal of the petition as against one requires the dismissal as against both); **Pinpoint Tech. 3, LLC v Mogilevsky** (46 Misc 3d 145[A], 2015 NY Slip Op 50204[U] [App Term, 2d, 11th & 13th Jud Dists]) (a defendant's motion to vacate a default judgment should have been denied based on his failure to appear at a traverse hearing; it was error to allow his wife, who had a power of attorney, to appear for the defendant); **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); cf. **Rochdale Vil., Inc. v Goode** (16 Misc 3d 49 [App Term, 2d & 11th Jud Dists 2007]) (an undertenant with a colorable claim to succession rights had standing to defend a nonpayment proceeding based on a defective rent demand, and the dismissal of the petition as against her required the dismissal against the defaulting tenant in order to effectuate the relief against her); cf. also **611 Banner Owners Corp. v Seacove I LLC** (71818/13, NYLJ 120264082709 [Civ Ct, Kings County Jan. 9, 2014, J. Schneider, J.]) (dismisses an excessive-noise holdover by a co-op against a holder of unsold shares and the rent-stabilized subtenant where the petition did not allege the subtenant's stabilized status or state a claim for removal under the RSC [even though only the subtenant moved to dismiss]).

Forest and Gardens Apt. Co. v Goldberg (60747/15, NYLJ 1202788437964 [Civ Ct, Queens County May 4, 2017, J. Lansden, J.]) (since a GAL lacked the authority to forfeit his ward's property rights (citing 1234), a stipulation in which the GAL did so would be vacated); citing **BML Realty Group v Samuels** (a stipulation by a GAL, who had not met with the tenant or visited the apartment, was entered into inadvisably, where the appointment of an article 81 guardian had been imminent and there was no concrete plan to relocate the tenant; it is the court's responsibility to oversee settlements involving those unable to defend themselves); and **1234 Broadway LLC v Feng Chai Lun** (25 Misc 3d 476 [Civ Ct, NY County 2009, G. Lebovits, J.]).

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 2003]) (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).

Westbury Sr. Living, Inc. v Clements (57 Misc 3d 311 [Dist Ct, Nassau County 2017, S. Fairgrieve, J.]) (in a special proceeding pursuant to Social Services Law § 461-h to terminate the residency of an occupant of an adult home and to discharge the occupant, the court declines to allow a guarantor to be joined as a party, as SSL § 461-h contemplates a proceeding only against the resident and provides for service only upon the resident); citing **State Realty, LLC v Ger** (55 Misc 3d 133[A], 2017 NY Slip Op 50439[U] [App Term, 2d, 11th & 13th Jud Dists]) (in a nonpayment proceeding, court vacates a money judgment entered against a guarantor on default, as the court lacks subject matter jurisdiction to adjudicate a debt owed by the guarantor, which is not "rent" within the meaning of RPAPL 741 [5]); **MTC Commons, LLC v Millbrook Training Ctr. & Spa, Ltd.** (50 Misc 3d 135[A], 2016 NY Slip Op 50048[U] [App Term, 9th & 10th Jud Dists]) (in a summary proceeding, the court lacks subject matter

jurisdiction to adjudicate a debt owed to the landlord by a guarantor of the rent, as there is no landlord-tenant relationship between these parties, and the money owed is not "rent" within the meaning of RPAPL 741 [5]); **Triangle Props. # 14, LLC v Beauty Salon Depot/Beauty U.S.A.** (29 Misc 3d 132[A], 2010 NY Slip Op 51901[U] [App Term, 9th & 10th Jud Dists]) (a guarantor is not a proper party to a summary proceeding).

CDC E. 105th St. Realty LP v Mitchel (L&T 57435/16, NYLJ 12027855119363 [Civ Ct, NY County Apr. 26, 2017, J. Stanley, J.]) (an occupant who had a colorable claim to succession rights because he had lived with the tenant, his mother, for six years while his mother was in and out of the hospital had standing to move to dismiss a breach-of-lease holdover petition for failure to state a cause of action); citing **Rochdale Vil. v Goode** (16 Misc 3d 49 [App Term, 2d & 11th Jud Dists 2007]); cf. **Cadman Towers, Inc. v Barry** (49 Misc 3d 133[A], 2015 NY Slip Op 51453[U] [App Term, 2d, 11th & 13th Jud Dists]) (an occupant lacked standing to assert a claim that the tenant was wrongfully denied an opportunity to cure his nonprimary residence, which, in any event, is not curable); **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]).

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Gavriyelov v Appeldorn (L&T 91878/16, NYLJ 1202787005498 [Civ Ct, Kings County, May 10, 2017, M. Sikowitz, J.]) (dismissing a holdover addressed to 16 individuals, where the proof showed that the building was a rent-stabilized SRO containing 10 class B units, where the tenants were not served individually at their respective rooms but as one entity pursuant to an alleged expired one-year lease); see **Bayview Loan Servicing, LLC v Lyn-Jay, Inc.** (54 Misc 3d 140[A], 2017 NY Slip Op 50160[U] [App Term, 2d, 11th & 13th Jud Dists]) (where a building consisted of a store and residential premises, the commercial landlord-tenant part could not entertain the proceeding; the landlord was required to commence separate proceedings to recover the commercial and residential premises); **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, in a proceeding by a purchaser in foreclosure, 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).

5670 58 St. Holding Corp. v ASAP Towing Servs., Inc. (__ Misc 3d ___, 2017 NY Slip Op 51302[U] [App Term, 2d, 11th & 13th Jud Dists]) (neither a misdescription of the premises nor a claim that there was no landlord-tenant relationship implicates

subject matter jurisdiction within the meaning of CPLR 5015[a] [4]); cf. **M&Z Assoc. 1, LLC v Union Nature, LLC** (53 Misc 3d 145[A], 2016 NY Slip Op 51597[U] [App Term, 9th & 10th Jud Dists]) (a petition in a commercial nonpayment proceeding which mis-stated that the premises, "an office", was rented for dwelling purposes, was not jurisdictionally defective and was capable of correction by amendment where the tenant made no showing of prejudice; however, until amended, the petition could not support the entry of a default final judgment); citing **Martine Assoc., LLC v Minck** (5 Misc 3d 61 [App Term, 9th & 10th Jud Dists 2004]) (a nonpayment petition which stated that rent had been demanded personally and/or a three-day notice had been served could not support the entry of a default final judgment, as a default final judgment may not be granted on facially insufficient papers and a rent demand is one of the facts upon which a nonpayment proceeding is based).

Birch Leasing L.P. v Lee (56879/17, NYLJ 1202799913991 [Civ Ct, Queens County Sept. 25, 2017, J. Rodriguez, J.]) (where the tenant had paid the rents listed in the rent demand by earmarked checks, the demand was defective, requiring dismissal); **EOM 106-15 217th Corp. v Severine** (76840/16, NYLJ 1202782776491 [Civ Ct, Queens County Mar. 6, 2017, C. Nembhard, J.]) (the landlord's failure to credit earmarked checks to the period for which they were intended rendered the rent demand defective); see **270 E. 95 Props., LLC v Kent** (49 Misc 3d 33 [App Term, 2d, 11th & 13th Jud Dists 2015]) (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); **Park E. Co. v Cerrato** (76 Misc 2d 1066 [Civ Ct, NY County 1974, S. Egeth, J.]) (the landlord's unilateral allocation of money released by the tenants' committee among only 21 of 38 tenants in contravention of the tenants' instructions, constituted a defalcation of the funds and was a nullity); cf. **2675 Ocean Ave., Inc. v Roth** (33 NYS 2d 418 [App Term 2d Dept 1942]) (in the absence of an agreement to the contrary, the landlord could apply the monies received from the tenant either to arrears or to current rent); **1290 Ocean Realty LLC v Massena** (46 Misc 3d 1223[A], 2015 NY Slip Op 50256[U] [Civ Ct, Kings County, A. Lehrer, J.]) (a debtor may direct how payments to a creditor are to be applied, but where he fails to do so, the creditor may apply the payments as he sees fit; there is a presumption that the payment will be applied to the portion of the debt coming due first); citing **Snide v Larrow** (62 NY2d 633, 634 [1984]); cf. also **Greenbrier Garden Apts. v Eustache** (50 Misc 3d 142[A], 2016 NY Slip Op 50210 [App Term, 9th & 10th Jud Dists]) (a landlord's request for attorney's fees in a nonpayment proceeding was denied where the tenant's default was the result in part of the landlord's failure to credit the tenant's earmarked checks to the months for which they were earmarked, which the landlord was required to do, and in part of the

landlord's failure to supply the tenant with the information necessary for the tenant to understand that a particular check had not been received); see also **Newkirk 2215 LLC v Franklyn** (059026/16 [Civ Ct, Kings County, M. Sikowitz, J., May 19, 2016], NYLJ 1202759979430) (the landlord was not within its rights in applying the tenant's payments and a one-shot deal of $7,806 to 38-month old arrears, and the petition would be dismissed based on the tenant's defense of stale rent).

Island Assisted Living v Narbone (56 Misc 3d 1218[A], 2017 NY Slip Op 51058 [Dist Ct, Nassau County, S. Fairgrieve, J.]) (in a Social Services Law § 461-h proceeding to terminate an admission agreement based on an alleged failure to make timely payments, the petition did not sufficiently state the facts upon which the proceeding was based, as it provided no details as to the amounts owed or when the alleged failure had occurred; thus, it failed to provide the respondent with sufficient details to prepare a defense); see **Oakwood Terrace Hous. Corp. v Monk** (50 Misc 3d 141[A], 2016 NY Slip Op 50198[U] [App Term, 9th & 10th Jud Dists]) (dismissing a nonpayment petition which failed to identify which portion of the sum sought was for items other than for base rent, as it failed to adequately set forth the facts upon which the proceeding was based).

Hudson Piers Assoc. L.P. v Cortes (2017 WL 2802794 [Civ Ct, NY County, June 16, 2017, J. Stanley, J.) (in a proceeding based on an illegal trade or business and on a breach of a lease provision prohibiting the use of the apartment for unlawful purposes, the alternative pleading of breach of a lease could not be maintained, as an occupant cannot contemporaneously have a void lease pursuant to Real Property Law § 231 and be in violation of a lease that was voided, as the theories in the notice of termination were "intrinsically different" and not raised in the alternative); citing **Tik Sun Cheung v Xaiu Man Li** (148 Misc 2d 55 [Civi Ct, NY County 1989, D. Dowling, J.]) (notice to quit alleging squatter and licensee in the alternative was defective because summary proceedings are not civil actions and provide fewer procedural rights); but cf. **Kern v Guller** (40 AD3d 1231 [3d Dept 2007]) (inconsistent causes of action of holdover and nonpayment may be pleaded in the alternative); see also **City of New York v Bullock** (164 Misc 2d 1052 [App Term, 2d & 11th Jud Dists 1995), affg 159 Misc 2d 716 [Civ Ct, Kings County 1993 [D. Johnson, J.]) (to sufficiently state the facts, a notice to quit alleging squatter/licensee in the alternative must state why the petitioner does not know the occupant's states).

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 **172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc.** (24 NY3d 528 [2014]) (Civil Court lacks jurisdiction to address a claim for accelerated rent in a holdover proceeding); **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).

Parker v Howard Ave. Realty, LLC (56 Misc 3d 15 [App Term, 2d, 11th & 13th Jud Dists 2017]) (as the only relief available in an unlawful entry and detainer proceeding by a tenant who had relocated to a different apartment so that the landlord could make repairs was an award of possession, the court could make only such findings as were necessary to determine the issue of possession; in addition, the Civil Court cannot grant declaratory relief [CPLR 3001]; thus, the court lacked jurisdiction to declare that the landlord was not entitled to a first rent or to an individual apartment improvement increase); **Mondrow v Days Inn Worldwide, Inc.** (53 Misc 3d 85 [App Term, 1st Dept 2016]) (the ancillary relief sought by a petitioner in a lockout proceeding—i.e., a mechanical door lock, the removal of surveillance cameras, and a harassment determination—was beyond the limited scope of a lockout proceeding); citing **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]); cf. **Vera v Stamen Cropsey LLC** (54 Misc 3d 1216[A], 2017 NY Slip Op 50183[U] [Civ Ct, Kings County, C. Gonzales, J.]) (under CCA 110, a housing judge has authority to sign an order to show cause to commence a lockout proceeding; in determining the lockout proceeding, the housing court had jurisdiction to determine the validity of a surrender agreement, relied upon by the landlord, which the tenant claimed was fraudulently induced).

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).

Greenburgh Hous. Auth. v Hall (55 Misc 3d 146[A], 2017 NY Slip Op 50680[U] [App Term, 9th & 10th Jud Dists]) (in a drug holdover, an award of attorney's fees against a Section 8 tenant was improper as such fees cannot be considered rent as against a Section 8 tenant); **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).

Green v Weslowski (53 Misc 3d 144[A], 2016 NY Slip Op 51568[U] [App Term, 9th & 10th Jud Dists]) (landlords who did not properly move the lease into evidence failed to establish that they were entitled to legal and late fees as additional rent; in any event, the court lacked jurisdiction to entertain a claim for these charges, as the lease did not make them additional rent); **Oakwood Terrace Hous. Corp. v Monk** (50 Misc 3d 141[A], 2016 NY Slip Op 50198[U] [App Term, 9th & 10th Jud Dists]) (a landlord that failed to submit a copy of the lease failed to demonstrate that late fees and legal fees were collectible in the summary proceeding as "additional rent"); citing **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); **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); **Expressway Vil., Inc. v Denman** (26 Misc 3d 954, 960 [Niagara County Ct 2009, M. Murphy, J.]) ("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. **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"); cf. also **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); distinguishing **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).

Inland Diversified Real Estate Serv., LLC v Keiko NY, Inc. (51 Misc 3d 139[A], 2016 NY Slip Op 50613[U] [App Term 9th & 10th Jud Dists]) (under the terms of the commercial lease requiring the tenant to "indemnify" the landlord for any costs or expenses arising out of the use and occupancy of the premises, the landlord, which submitted no bills to show that it had paid the electricity and gas charges it sought, did not establish that these charges were additional rent; thus, the court lacked subject matter jurisdiction over these items and a stipulation requiring the tenant to pay them would be vacated; moreover, in light of the magnitude of the discrepancy between the amount of rent which could properly be sought in the proceeding, and the amounts actually claimed, the petition would be dismissed, as the tenant may have been prejudiced in its ability to respond to the demand and avoid litigation).

Aldrich Mgt. Co., LLC v Hanson (56 Misc 3d 1 [App Term, 9th & 10th Jud Dists 2017]) (in a nonpayment proceeding in which the landlord had been awarded $12,625.09, a motion by the tenant's attorney to direct the release of $25,000 in his escrow account, based in part on a separate Supreme Court judgment, was equitable and injunctive in nature, and beyond the District Court's jurisdiction); **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); **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 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 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); but see **CLAC Am. II, Inc. v Sky Worldwide LLC** (51 Misc 3d 1230[A], 2015 NY Slip Op 51998[U] [Civ Ct, NY County, J. D'Auguste, J.]) (enjoins, pursuant to CCA 110, a net lessee of a building from advertising and short-term renting of apartments; commercial landlord-tenant part had jurisdiction because the net lessee was not using any part of the building for its personal residence and five violations had been issued for the running of an illegal hotel, citing Penraat); 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); **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).

1234 Broadway LLC v Feng Chai Lin (25 Misc 3d 476 [Civ Ct, NY County 2009, G. Lebovits, J.]) (under Mental Health Law § 81.04, the Civil Court lacks jurisdiction to appoint an article 81 guardian); but cf. **Lisco Holdings LLC v JEM** (54 Misc 3d 1222[A], 2017 NY Slip Op 50272[U] [Civ Ct, NY County, A. Masley, J.]) (after granting a DSS motion to appoint an article 81 guardian and a GAL, the court vacates a judgment entered upon the incapacitated tenant's default in complying with a court order).

Answer

2094-2096 Boston Post Rd., LLC v Mackies Am. Grill, Inc. (51 Misc 3d 150[A], 2016 NY Slip Op 50844[U] [App Term, 9th & 10th Jud Dists]) (counterclaims which are inextricably intertwined with defenses to the summary proceeding are cognizable in the summary proceeding notwithstanding a lease clause barring the interposition of counterclaims); see **Sutton Fifty-Six Co. v Garrison** (93 AD2d 720, 722 [1st Dept 1983]) ("where the issues raised in the counterclaim bear directly upon the landlord's right to possession, they are said to be intertwined in the summary proceeding issues and should be disposed of in one proceeding"); citing **Great Park Corp. v Goldberger** (41 Misc 2d 988 [Civ Ct, NY County 1964, G. Starke, J.]) (since the primary purpose of summary proceedings is the speedy disposition of the right of the landlord to possession, counterclaims which have nothing to do with the right of possession should be severed and not considered).

Fountains Clove Rd. Apts., Inc. v Gunther (54 Misc 3d 49 [App Term, 2d, 11th & 13th Jud Dists 2017]) (in a nonpayment by a co-op against a deceased tenant's surviving issue, the Housing Part lacked jurisdiction to entertain the respondent's counterclaims for damages for a prior allegedly wrongful eviction and conversion, as these were not related to the landlord's nonpayment claim; thus, the counterclaims should not have been dismissed, but severed to be continued as an action); see **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. **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).

Nonpayment Proceedings

Rutland Rd. Assoc., L.P. v Grier (55 Misc 3d 128[A], 2017 NY Slip Op 50370[U] [App Term, 2d, 11th & 13th Jud Dists]) (in a nonpayment proceeding, a landlord's prima facie case must include a showing of an agreement to pay rent; where the petition alleged a written agreement to pay rent at a monthly rate of $1,269 but the only lease introduced by the landlord at trial had expired in 2001 and there was no evidence establishing an agreed-upon rent of $1,269, the landlord failed to establish its prima facie case); **Promesa HDFC v Frost** (56 Misc 3d 1201[A], 2017 NY Slip Op 50808[U] [Civ Ct, Bronx County, D. Lutwak, J.]) (as a proper rent demand is an element of the landlord's prima facie case in a nonpayment proceeding, a petition would be dismissed where the demand sought arrears for 30 months although, for 28 of those months, there was no rental agreement; the defect was not waived by the tenant's failure to specifically raise the claim in her answer); see **Community Hous. Innovations, Inc. v Franklin** (14 Misc 3d 131[A], 2007 NY Slip Op 50050[U] [App Term, 9th & 10th Jud Dists]) (as an element of its prima facie case in a nonpayment proceeding, a landlord must establish either that a personal demand for rent was made or that a three-day notice was served).

Stardom HDFC v Marlowe (50 Misc 3d 1207[A], 2016 NY Slip Op 50010[U] [Civ Ct, NY County, S. Kraus, J.]) (the landlord's obtaining a nonpayment judgment for rent arrears through December 2015 vitiated a notice terminating the tenancy as of September 30, 2015); citing **Shahid v Carillo** (18 Misc 3d 136[A], 2008 NY Slip Op 50278[U] [App Term, 2d & 11th Jud Dists]) (because a nonpayment proceeding must be predicated on an unexpired agreement to pay rent, the landlord's prosecution to judgment of a nonpayment proceeding conclusively established that the tenancy continued to exist or was reinstated after the service of a termination notice, vitiating the notice); cf. **200 Eleventh Assoc. v Lamontagne** (14 Misc 3d 139[A], 2007 NY Slip Op 50323[U] [App Term, 1st Dept]) (the landlord's commencement of a nonpayment proceeding for December 2002 rent negated the landlord's allegation that the tenant held over without permission during December 2002); citing **Ansonia Assoc. v Pearlstein** (122 Misc 2d 566 [Civ Ct, NY County 1984, D. Saxe, J.]) (the commencement of a nonpayment proceeding and the allegations in the nonpayment petition are inconsistent with an alleged prior termination of the tenancy); citing **McCormack** [reported as **McCoack] v Geidel** (NYLJ, Nov 22, 1978 [App Term, 2d & 11th Jud Dists]); cf. also **72nd St. Assoc., LLC v Persson** (47 Misc 3d 126[A], 2015 NY Slip Op 50345[U] [App Term, 1st Dept]) (the landlord's commencement, and immediate discontinuance, of a nonpayment proceeding did not vitiate a holdover proceeding or mislead the tenant to her prejudice); citing **Rockaway One Co. v Califf** (194 Misc 2d 191 [App Term, 2d & 11th Jud Dists 2002]) (the landlord's commencement of nonpayment proceeding during a holdover probationary period did not evince an intent to revive the tenancy or vitiate the notice of termination; as the landlord did not obtain a nonpayment judgment, the doctrine of judicial estoppel was inapplicable).

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]).

Cey Realty Assoc., LLC v Pettway (49 Misc 3d 152[A], 2015 NY Slip Op 51766[U] [App Term, 1st Dept]) (where rent arrears were discharged in bankruptcy, the landlord was entitled to summary judgment of possession based on nonpayment of rent; as the tenant subsequently tendered and the landlord accepted the full amount of the discharged arrears, the warrant would be permanently stayed, as the tenant could elect to disregard the discharge and pay the arrears); citing **Dulac v Dabrowski** (4 AD3d 308 [1st Dept 2004]) (a bankruptcy discharge shields debtors from actions to collect the debt, but not from other remedies; as the underlying debt is not extinguished, a discharge does not prevent a landlord from evicting based on nonpayment, as the only remedy barred is against the debtor personally to collect the money due).

83rd St. Apt. Co., LLC v Shaustyuk (50 Misc 3d 110 [App Term, 2d, 11th & 13th Jud Dists 2015]) (while the RPTL provides that a SCRIE exemption is to be deducted from the legal regulated rent, where the landlord had, from the inception of the tenancy, deducted the abatement from the tenant's preferential rent, the practice of deducting the SCRIE exemption from the preferential rent became a term and condition of the rent-stabilized lease which had to be continued in subsequent leases, even though a preferential rent itself is not a term and condition that must be continued; in any event, the parties' course of conduct established that it was their agreement to apply the SCRIE exemption to the preferential rent); citing **Rosario v Diagonal Realty, LLC** (8 NY3d 755 [2007]) (a landlord's acceptance of Section 8 subsidy payments is a term and condition of the lease which must be continued in renewal leases); cf. **OLR ECW, L.P. v Soto** (42158/15, NYLJ 1202750743743 [Civ Ct, Bronx County Jan. 29, 2016, T.

Elsner, J.]) (a holdover proceeding could not be maintained against a rent-stabilized tenant who refused to certify her income pursuant to the Low Income Housing Tax Credit Program [LIHTC] where the tenant did not seek low-income rent benefits; the landlord failed to demonstrate that the change was necessary to comply with a requirement of law or regulation applicable to the building; the regulatory agreement did not require over-income tenants to certify; whether the tenant qualified for the reduced rent, it was her right to choose not to participate); **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 tenant of combined apartments paid a single rent, 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).

N.Y. City Hous. Auth. v Traore (11248/16, NYLJ 1202784918656 [Civ Ct, Kings County Apr. 17, 2017, J. Schneider, J.]) (dismisses a nonpayment proceeding without prejudice where NYCHA sought rent calculated based on an assumption that the tenant was not an "eligible immigrant," where the tenant provided verification that she was an eligible immigrant and NYCHA had failed to use the DHS database to confirm her status); **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 where 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); cf. also **156 E. 37th St. LLC v Negron** (43 Misc 3d 1221[A], 2014 NY Slip Op 50739[U] [Civ Ct, NY County, S. Kraus, J.]) (where there was an executed lease renewal from 2010 to 2012 at a monthly rent of $671.60, the fact that the landlord continued to bill the tenant at a monthly rent of $611.60 and that the tenant continued to pay that amount from January 2010

through November 2011 did not establish the existence of a preferential rent, as there was no meeting of the minds to accept the lower amount).

Hermida v Blochwitz (55 Misc 3d 149[A], 2017 NY Slip Op 50722[U] [App Term, 9th & 10th Jud Dists]) (since a month-to-month tenancy which follows the expiration of a lease ordinarily continues on the same terms as the expired lease absent acts and conduct which negate the existence of the original contract, the landlord's acceptance of a partial rent payment for the month after the expiration of the lease did not indicate an intent to alter the monthly rent, where the landlord served a three-day notice within that month); cf. **Bahamonde v Grabel** (34 Misc 3d 58 [App Term, 9th & 10th Jud Dists 2011]) (where the tenants delayed in executing a lease extension and the landlord elected to accept $13,000 per month rent tendered by the tenants and did so for six months, the acts and conduct of the parties negated the existence of the original contract, which had a monthly rental rate of $16,500, and the landlord would not be heard to claim that there was no implied agreement for a rent of $13,000 per month); citing **Transit Drive-In Theater, Inc. v Outdoor Theater Caterers, Inc.** (53 AD2d 1009 [4th Dept 1976]) (the general implication that a tenant holds over upon the same terms and conditions as under a previous tenancy does not obtain where the acts and conduct of the parties negate the existence of the original agreement).

Flushing QP Portfolio, II LLC v Williams (L&T 75602/15 [Civ Ct, Queens County Aug. 11, 2017, J. Kullas, J.]) (temporarily stays the execution of a nonpayment warrant until the petitioner, which refused to provide a W-9 so that the long-term tenant could obtain rental assistance pursuant to the Special Exit and Prevention Supplement Program, provided the W-9, and vacates the warrant should the petitioner fail to do so); citing **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).

Holdover Proceedings

Fourth Hous. Co., Inc. v Bowers (53 Misc 3d 43 [App Term, 2d, 11th & 13th Jud Dists 2016]) (a holdover proceeding based upon a landlord's termination of the lease may only be maintained where there is a conditional limitation in the lease providing for its early termination; where a termination pursuant to a lease is by forfeiture for breach of a

condition and not by the lapse of time fixed in a notice, the landlord's remedy is an ejectment; since the landlord's chronic-nonpayment rule provided for the giving of a 30-day notice but did not provide that the term of the lease would expire upon the lapse of time fixed in that notice, the termination was not based on a conditional limitation; as it is the obligation of the court, in a summary proceeding, to "make a summary determination upon the pleadings papers and admissions to the extent that no triable issues of fact are raised" [CPLR 409 (b)], the Civil Court should have dismissed the petition, as the proceeding was defective for lack of a conditional limitation; dissent, that the majority should not reach an issue not raised by any party); citing **Dass-Gonzalez v Peterson** (258 AD2d 298 [1st Dept 1999]) (the absence of a lease provision permitting termination based on objectionable conduct deprived the court of "jurisdiction" to entertain a holdover proceeding); see **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").

620 Dahill, LLC v Berger (51 Misc 3d 4 [App Term, 2d, 11th & 13th Jud Dists 2016]) (a holdover proceeding could be maintained predicated on an arbitration finding that the term of the tenancy would end on a specified date without the service of a predicate notice, as no notice is required to terminate a tenancy of fixed duration); see also **206 W. 121st St. HDFC v Jones** (53 Misc 3d 149[A], 2016 NY Slip Op 51668[U] [App Term, 1st Dept]) (service of a notice of termination was not required upon the expiration of the lease, as the tenancy was unregulated).

92 Bergenbrooklyn, LLC v Cisarano (50 Misc 3d 21 [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], added in 1946, 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]); **Lewis v Roberson** (57001/16, NYLJ 1202764732414 [Civ Ct, Queens County, J. Lansden, J., July 28, 2016]) (a holdover based on a claim that the tenant physically assaulted the landlord while he was in the tenant's apartment supervising repairs was not timely commenced under RSC § 2524.3 [a] where the tenant has violated the lease by "inflicting serious and substantial injury upon the owner within the three-month period immediately prior to the commencement of the proceeding," neither under the First Department's commencement-by-filing rule nor the Second Department's commencement-by-service rule); see also **2328 Newkirk Ave. Corp. v Dames** (68051/15, NYLJ 1202738915209 [Civ Ct, Kings County, M. Finkelstein, J.]) (a no-pet case must be "commenced" within three months; commencement, under RPAPL 731, is service of a petition and notice of petition, not of a predicate notice).

Illegal Trade or Business

Greenburgh Hous. Auth. v Hall (55 Misc 3d 146[A], 2017 NY Slip 50680[U] [App Term, 9th & 10th Jud Dists]) (proof showing that a no-knock search warrant at the tenant's apartment resulted in the seizure of quantities of cocaine, heroin and marijuana was sufficient to establish a violation of the criminal activity provision of the lease; it is of no consequence that the charges were ultimately dismissed; the landlord was not "bound to exercise its discretion and consider mitigating factors"); quoting from **Matter of Syracuse Hous. Auth. v Boule** (265 AD2d 832, 833 [1999]); **Jamie's Place I, LLC**

v Reyes (25 Misc 3d 1234[A], 2009 NY Slip Op 52409[U] [Civ Ct, NY County, T. Kennedy, J.]) (while the HUD Handbook lists factors for landlords to consider in determining whether to evict a tenant for drug-related activity, it is not mandatory that the landlord consider such factors); but cf. **West Farms Estates Co., LP v Aquino** (16965/14, NYLJ 1202759552429 [Civ Ct, Bronx County, T. Elsner, J., May 23, 2016]) (in a holdover by a project-based Section 8 owner to remove the tenant on the ground that her son, now deported, had been convicted for a statutory rape which had occurred in the building, court holds that a Section 8 landlord is a government actor and that the Supreme Court's determination in **Department of Hous. and Urban Dev. v Rucker** [535 US 125 (2002)] (the Anti-Drug Abuse Act requires lease terms that give the PHA discretion to terminate the lease regardless of whether the tenant knew or should have known of the drug-related activity)] that a PHA must exercise discretion in deciding whether to evict a tenant who violated the lease, which determination was expanded to project-based Section 8 owners who are supervised by local PHAs, required that the landlord afford due process to the tenant, including considering factors enumerated in HUD Handbook 4350.3, including the seriousness of the offense, the extent of the tenant's participation, and the effect on household members; where the landlord had failed to establish procedures to protect the tenants' rights, and the court had no discretion to consider the relevant factors, the termination deprived the tenant of due process).

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); **New York City Hous. Auth. v Fashaw** (53 Misc 3d 1209[A], 2016 NY Slip Op 51548[U] [Civ Ct, NY County, A. Katz, J.]) (testimony that a confidential informant had made two drug buys at the premises, and the recovery, following the execution of a search warrant, of six bags of cocaine, a rock of cocaine, a scale and a razor blade from a hallway closet, which led to the arrest and conviction of the tenant's brother, did not show that the premises was used habitually for an illegal trade or business so as to justify the forfeiture of a valuable tenancy; in any event, the proof fell short of establishing that the tenant could not have been unreasonably unaware of the activity); citing **855-79 LLC v Salas** (40 AD3d 553 [1st Dept 2007]) (in an illegal-use holdover, the landlord has the burden of proving that the tenant knew or should have known of the illegal activity); see also **WHGA Renaissance Apts., L.P. v Jackson** (53 Misc 3d 11 [App Term, 1st Dept 2016]) (a new trial was required where the trial court struck expert testimony that the tenant lacked the mental capacity to comprehend that her adult son was using the premises for drug activity); **New York City Hous. Auth. v Lipscomb-Arroyo** (19 Misc 3d 1140[A], 2008 NY Slip Op 51085[U] [Civ Ct, Kings County, R. Velasquez, J.]) (NYCHA is required to prove that the tenant knew and acquiesced in the illegal activity; declining to apply strict

liability standard since the statute voids the lease); distinguishing **New York City Hous. Auth., Gowanus Houses v Taylor** (6 Misc 3d 135[A], 2005 NY Slip Op 50209[U] [App Term, 2d & 11th Jud Dists]) (a federally subsidized tenant agrees to be responsible for drug-related activity in the apartment, and thus is charged in an RPAPL 711 [5] proceeding with knowledge of the activity in the apartment); see also **New York City Hous. Auth. v Grillasca** (18 Misc 3d 524 [Civ Ct, NY County, J. Schneider, J., 2007]) (declining to apply strict liability standard to the statutory cause of action under RPAPL 711 [5]); citing e.g. **New York City Hous. Auth. v Eaddy** (7 Misc 3d 131[A], 2005 NY Slip Op 50617[U] [App Term 1st Dept]) (applying "knew or should have known" standard); but cf. **Matter of Satterwhite v Hernandez** (16 AD3d 131 [1st Dept 2005]) (the propriety of NYCHA's determination terminating a tenancy did not depend on whether the tenant knew that drugs were being stored in and sold from his apartment).

Illegal Use and Illegal Occupancy Holdovers

121 Irving MGM LLC v Perez (56 Misc 3d 694 [Civ Ct, Kings County 2017, J. Stanley, J.]) (the tenant's use of the apartment for the preparation of food for sale outside the premises did not support an illegal use claim [RSC § 2524.3 (c)], where no violation had been placed; the tenant's preparation of 12 to 15 meals a day, six days a week, was not a breach of a substantial obligation, as it did not materially affect the character of the building, damage the property, or disturb the other tenants; nor did it establish a nuisance, where the proof showed that the tenant had engaged in such conduct for 16 years, with the former landlord's permission and without complaint from other tenants) **Fernandez v Cronealdi** (L&T 74986/16, NYLJ 1202777492102 [Civ Ct, Kings County, D. Chinea, J., Jan. 4, 2017]) (to maintain a holdover proceeding under RSC § 2524.3 [c] [occupancy illegal and owner subject to civil or criminal penalties], a violation must have been placed); see **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 as premature where there was no showing that a violation had been placed or that the landlord was actually subject to civil or criminal penalties).

Holdovers: Nonprimary Residence

710 Madison Ave. LLC v Hicks (56 Misc 3d 131[A], 2017 NY Slip Op 50873 [App Term, 1st Dept]) (finding the 40-year tenant's absence from the apartment excusable based on the tenant's provision of care to his ailing parents in Georgia and his remaining in Georgia to wind up their estates after they died); citing **Second 82nd Corp. v Veiders** (146 AD3d 696 [1st Dept 2017] [the trial court's finding that the tenant's absence for more than 183 days per year was excusable was supported by a fair interpretation of the evidence, including the credible testimony of the tenant and his sister that the tenant did not remove his personal belongings from the premises, never sublet the apartment and paid New York City self-employment taxes), affg (51 Misc 3d 142[A], 2016 NY Slip Op 50652[U] [App Term, 1st Dept]) (in a nonprimary-residence

proceeding, the tenant's absence from the apartment for more than 183 days per days per year during the relevant period was "temporary and excusable' where the tenant had been providing end-of-life care for his mother in Clarence, NY and remained there to wind up the estates of his mother and aunt, as the tenant consistently had returned to the apartment, kept all his belongings there and continued to receive mail there; the RSC does not penalize a tenant who temporarily relocates to deal with compelling family obligations; dissent, that the majority created a "business pursuits" exception; that the tenant had claimed the Clarence residence as his domicile on his mother's and aunt's Surrogate Court's matters, and on his driver's license, registration, insurance banking and credit cards; and that the tenant had remained in Clarence to manage a family-owned 20-apartment complex, relying exclusively on the rental income for support); cf. **First Ave. Equities LLC v Doron** (44 Misc 3d 70 [App Term, 1st Dept 2014]) (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").

47 HK Realty, LLC v O'Leary (55 Misc 3d 129[A], 2017 NY Slip Op 50384[U] [App Term, 1st Dept]) (a nonprimary-residence proceeding was not subject to summary disposition, notwithstanding that the tenant designated her New Jersey residence on her tax returns, as, under RSC § 2520.6 [u], an address designated on tax returns is only one of many factors to be considered; Unwin not dispositive, as it did not involve a tenant's declaration of residence at a different address on a tax return and did not cite to or overrule prior precedent on this issue); see **Matter of Ansonia Assoc. L.P. v Unwin** (130 AD3d 453 [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 the 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** (49 Misc 3d 16 [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]) (summary resolution of primary-residence issues is ordinarily not favored; 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); cf. also **1568-1572 Third Ave. LLC v Beachley** (50 Misc 3d 140[A], 2016 NY Slip Op 50170[U] [App Term, 1st Dept]) (where a tenant was in Hawaii for 14 months during the two-year Golub period and filed a bankruptcy petition there in which she represented that she had been domiciled or had a residence there for 180 days immediately preceding the date of the petition, had moved to Hawaii within two years immediately preceding the commencement of the case, had vacated her New York apartment in March 2005 and had lived in Hawaii since then, and where she did not list her stabilized lease in the bankruptcy petition and admitted at a deposition that she moved to Hawaii in late 2006, she did not have the required physical nexus, notwithstanding that her furniture and possessions remained in the apartment and that she voted there in the 2004 and 2008 presidential elections).

Matter of 135 W. 13, LLC v Stollerman (151 AD3d 598 [1st Dept 2017]) (although the landlord made a prima facie showing that one of the two apartments the tenants leased was not their primary residence by presenting surveillance videos and Con Ed records, the tenants demonstrated that the two apartments were treated as a combined primary residence and that they had temporarily discontinued use of one of the apartments because of an upstairs neighbor and a scaffold issue [citing **Glenbriar Co. v Lipsman** (5 NY3d 388 [2005]) [husband and wife could have separate primary residences and the fact that the husband claimed Florida as his primary residence and received a homestead exemption did not require a finding, as a matter of law, that the New York apartment was not their primary residence]), revg 52 Misc 3d 8 [App Term, 1st Dept 2016]) (second apartment used by the tenants for storage was not their primary residence as it was not actually used for dwelling purposes; the trial court's reasoning that, pursuant to an understanding with the landlord, the tenants were entitled to use

the apartment as they saw fit was against public policy, as agreements to waive the primary-residence requirement are void); citing **Briar Hills Apts. Co. v Teperman** (165 AD2d 514 [1st Dept 1991]) (in view of minimal electrical consumption in second apartment, the apartment was not an integral part of the residence); cf. **26 Bond St. Mgt. LLC v Baumann** (2015 NY Slip Op 31238[U] [Civ Ct, NY County, J. Stoller, J.]) (a loft tenant who slept virtually every night in her boyfriend's apartment, because her son lived in the loft, nevertheless kept her primary residence in the loft, where she spent a substantial amount of time, as even spouses may have separate primary residences).

Project Renewal Inc. v Jones (64770/16, NYLJ 1202787005440 [Civ Ct, Bronx County May 10, 2017, K. Lach, J.]) (dismissing a holdover petition alleging that the building is subject to rent stabilization but the apartment was not because it was not occupied by the petitioner, a prime tenant, as a primary residence, where the petitioner's own proof submitted in opposition to the respondent's motion to dismiss, showed that petitioner, a provider of scatter-site housing to homeless individuals, was the corporate rent-stabilized tenant whose execution of a rent-stabilized lease with the owner allowed individuals for whose benefit the lease was created to occupy the premises as a dwelling; the respondent's name on a lease rider indicated that a particular individual was contemplated to occupy the apartment to allow the petitioner an entitlement to renewal leases; since the petition misdescribed the regulatory status of the premises and there was no motion to amend, the petition would be dismissed under MSG Pomp, which requires strict compliance with the statutes governing summary proceedings); citing **Matter of Cale Dev. Co. v Conciliation & Appeals Bd.** (94 AD2d 229 [1st Dept 1983]) (where a corporate tenant leases an apartment, the primary-residence test is applied to the actual occupant of the apartment; where a lease rider designated the corporation's president as the intended occupant, the president's son's primary residence in the apartment was irrelevant).

Holdovers: Chronic Nonpayment

31-67 Astoria Corp. v Cabezas (55 Misc 3d 132[A], 2017 NY Slip Op 50432[U] [App Term, 2d, 11th & 13th Jud Dists]) (denying the tenant's motion for summary judgment dismissing a chronic-nonpayment holdover proceeding where the proof showed that the landlord had successfully maintained three nonpayment proceedings in a three-year period and that the tenant had failed to pay in full and on time in any month from June 2004 through June 2015); cited in **Flatbush Builders, Inc. v Dubresil** (__ Misc 3d ___ 2017 NY Slip Op 27250 [Civ Ct, Kings County, M. Weisberg, J.]) (while the commencement of nonpayment proceedings that result in judgments may be evidence that the tenant violated a substantial obligation and perhaps even an element of the cause of action, they are not the only relevant evidence [also citing **Sharp v Norwood** (89 NY2d 1068 [1997]) (evidence that a landlord was forced to commence nonpayment proceedings and to serve rent demands might be enough to support an eviction based on breach of a substantial obligation but not based on nuisance)]; the six-year statute of limitations applicable to breaches of leases does not function as a rule of evidence to

prevent consideration of cases commenced more than six years prior to the commencement of the chronic-nonpayment proceeding, but only bars actions that had accrued but not continued more than six years before the commencement); quoting from **Chelsea Realty Div. Corp. v Couceiro** (Civ Ct, NY County, Oct 1, 2015, Wendt, J., index no. 84549/14); cf. **Terrilee 97th St. LLC v Alaharzi** (53 Misc 3d 151[A], 2016 NY Slip Op 51694[U] [App Term, 1st Dept]) (where the evidence showed that, while the landlord had commenced nine nonpayment proceedings over 16-year period, only two had been commenced since 2009, the tenant had received abatements in at least five of the proceedings, and two had been settled by stipulations requiring the landlord to make repairs, the landlord failed to establish a pattern of unjustified rent defaults sufficient to constitute a breach of a substantial obligation).

Git Leb, LLC v Golphin (51 Misc 3d 144[A], 2016 NY Slip Op 50713 [App Term, 2d, 11th & 13th Jud Dists]) (a petition alleging that landlord had to commence four nonpayment proceedings and to issue two rent demands in two years stated a cause of action for chronic nonpayment; the tenant's claim that, in two of the proceedings, she had withheld rent based on landlord's failure to make repairs was not conclusively established, even though the stipulation stated that the landlord was to make specified repairs, as her answers did not raise that defense and one stipulation stated that tenant was seeking a "one-shot deal"); cf. **2647 Sedgwick, LLC v Melo** (3066/15, NYLJ 1202742869217 [Civ Ct, Bronx County Nov. 5, 2015, K. Thermos, J.]) (four prior proceedings in four years insufficient to establish chronic nonpayment, where three of the proceedings were not pursued or were discontinued); **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).

RPAPL 713 and Other Non-Landlord-Tenant Proceedings

Chatham Sq. Owners Corp. v Roth (54 Misc 3d 1219[A], 2017 NY Slip Op 50236[U] [Dist Ct, Nassau County, S. Fairgrieve, J.]) (following the petitioner's purchase at a nonjudicial foreclosure of co-op shares and the lease, a licensee proceeding would not lie, on constraint of Perez); see **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).

BH 2628, LLC v Zully's Bubbles Laundromat, Inc. (__ Misc 3d ___, 2017 NY Slip Op 27319 [App Term, 2d, 11th & 13th Jud Dists 2017] (where an occupant was in possession pursuant to a lease signed after a notice of pendency of a foreclosure action had been filed, the occupant was bound by the foreclosure judgment even

though it was not named in the foreclosure action [see CPLR 6501], and the lease was voidable by the purchaser in foreclosure; as the purchaser showed that it had voided the lease, that it had exhibited the referee's deed to the occupant's principal and that it had served a 10-day notice to quit, it was entitled to possession pursuant to RPAPL 713 [5]; since the lease was voided, not terminated, no landlord-tenant relationship had existed between the parties).

Bank of Am., N.A. v Lilly (55 Misc 3d 1008 [Dist Ct, Nassau County 2017, S. Fairgrieve, J.]) (constrained to follow Moskowitz, court holds that substituted service upon an occupant by service upon a co-occupant did not constitute exhibition of the deed, although the court believed that there was no valid reason to set a higher standard for service of the referee's deed than for service of the notice of petition and petition); **Deutsche Bank Natl. Trust Co. v Dirende** (49 Misc 3d 1159 [Pound Ridge Just Ct 2015, I. Clair, J.) (the "exhibition" requirement of RPAPL 713 [5] means in-hand delivery; the Lorenz case's claim that the PTFA overruled Moskowitz is wrong, as the PTFA predates Moskowitz; as the meaning of "exhibit" is clear, there is no room for interpretation of the term based on the difficulty of accomplishing such exhibition; while the defect does not implicate subject matter jurisdiction, it may render the former owner's stipulation to vacate inadvisable); disagreeing with **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).

Taj v Bashir (__ Misc 3d ___[A], 2017 NY Slip Op 51278[U] [Dist Ct, Nassau County, S. Fairgrieve, J.]) (stays a licensee proceeding by a petitioner against his co-owner/ brother's wife, as the property might constitute marital property); citing **Yu-Dan Wong v Kenneth Ming Wei Wong** (128 AD3d 536 [1st Dept 2015]) (staying a holdover by the petitioner against his brother's wife, where it had yet to be determined whether the apartment was marital property); **Rinis v Toliou** (56 Misc 3d 1211[A], 2017 NY Slip Op 50964[U] [Civ Ct, Kings County, G. Marton, J.) (in a holdover proceeding by petitioners whose father had owned the building but had conveyed it to petitioners, retaining a life estate, against their father's wife, who resided in the second-floor apartment and was getting divorced, the court lacked jurisdiction to determine if the apartment was a marital home, as the respondent's marital rights had not been annulled by any court decree or agreement [citing Rosenstiel], notwithstanding that the proceeding was brought not by the father but by his children; Heckman was not applicable since there might be support issues).

Heckman v Heckman (55 Misc 3d 86 [App Term, 9th & 10th Jud Dists 2017]) (in a licensee proceeding by a trustee, the daughter of the former owner, against the daughter-in-law of the former owner, held that there is no basis for a "familial exception" to RPAPL 713 [7]; the Rosenstiel determination that a summary proceeding could not be brought against a spouse involved a situation where the respondent's possession was as a result of the special rights incidental to a marriage and the presence of a support obligation; where no support obligation is present, a licensee proceeding may be maintained, citing Halaby, Tausik, and Young); see **Young v Carruth** (89 AD2d 466, 469 [1st Dept 1982]) (an administrator of a decedent's estate could maintain a licensee proceeding against the decedent's cohabiter, in the absence of proof of a constructive trust; the lease was only in the decedent's name and only he had the obligation to pay rent; "we see no reason not to permit the modern and generally more satisfactory summary proceeding to be maintained by the decedent's estate against the decedent's cohabiter, under RPAPL 713 [7] permitting such a proceeding to be brought against a licensee whose license has been revoked"); **Pugliese v Pugliese** (51 Misc 140[A], 2016 NY Slip Op 50614[U] [App Term, 2d, 11th & 13th Jud Dists]) (in a holdover proceeding by a petitioner against her mother, allegedly a tenant at will, court states that while a holdover "proceeding is maintainable notwithstanding the existence of a familial relationship", the proof failed to establish a tenancy at will; citing Tausik and Halaby); see also **Odekhiran v Pearce** (54 Misc 3d 126[A], 2016 NY Slip Op 51779[U] [App Term, 2d, 11th & 13th Jud Dists]) (an occupant who was the former domestic partner of the plaintiff and the mother of their adult son was subject to eviction in an ejectment action as a licensee); **DiStasio v Macaluso** (47 Misc 3d 144[A], 2015 NY Slip Op 50694[U] [App Term, 9th & 10th Jud Dists]) (a licensee proceeding by a

petitioner against her nephew's spouse should not have been stayed pending the determination of the matrimonial action, notwithstanding the District Court's reasoning that a family member should not be permitted to evict a family member from a marital residence and that it would be unjust to allow the proceeding to go forward without provision for maintenance or an alternative residence); **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).

Jit v Johnson (73861/16, NYLJ 1202779508651 [Civ Ct, Queens County Jan. 30, 2017, J. Rodriguez, J.]) (dismisses a licensee proceeding by a tenant against her sister because a summary proceeding cannot be maintained against a family member; a poor family relationship does not divest a person of her status as a family member); **O'Neill**

v O'Neill (74120/15, NYLJ 1202752200143 [Civ Ct, Queens County, Feb. 24, 2016, J. Rodriguez, J.]) (in a holdover proceeding commenced by the petitioner's son via a power of attorney against his brother, held that Civil Court lacks jurisdiction over a family home and that the petition failed to allege a landlord-tenant relationship); **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); cf. **Jones v Jones** (43 Misc 3d 141[A], 2014 NY Slip Op 50842[U] [App Term, 1st Dept]) (allegations that the occupant entered into possession as the child of the former tenant "call into doubt" the viability of the possessory claim of the petitioner, the occupant's brother, based on the occupant's alleged status as a licensee, citing Rosenstiel).

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").

Clarke v Copenhagen Leasing, L.P. (48 Misc 3d 27 [App Term, 2d, 11th & 13th Jud Dists 2015]) (in a lockout proceeding by a tenant who claimed that the landlord had

failed to provide her with keycards to newly installed locks, held that, contrary, to the Civil Court's determination, while the unlawful eviction provisions of the Administrative Code subject a violator to criminal and civil penalties, they do not provide an avenue for restoration, and the landlord acted within its rights in refusing to provide the new keycards to the tenant, as she had refused to comply with a DHCR order requiring each tenant receiving a keycard to sit for a photo; thus, the landlord did not enter the property by force or unlawful means, within the meaning of RPAPL 713 [10]); cf. **Goncalves v Soho Vil. Realty, Inc.** (47 Misc 3d 76, 77 [App Term, 1st Dept 2015]) (lockout proceeding by son of deceased rent-controlled tenant should not have been summarily dismissed where there were questions of fact as to whether the petitioner was in actual or constructive possession, citing Banks; the petitioner's right to maintain the proceeding did not depend on the number of "consecutive" days he had resided in the apartment; while "possession for thirty consecutive days or longer" is relevant in determining "whether a landlord-tenant relationship exists in connection with certain limited classes of occupants [see RPAPL 711], it plays no part at all in determining whether a particular forcible entry proceeding is properly maintainable").

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. **Soto v Pitkin Junius Holding LLC** (16097/16, NYLJ 1202763458504 [Civ Ct, Kings County, C. Gonzales, J., July 12, 2016]) (restores to possession an occupant of a supportive living facility licensed by the New York State Office of Alcohol and Substance Abuse to provide chemical dependence services where HRA paid rent and the occupant had resided in the shared room for more than 30 days, as the building was used as a "rooming house" pursuant to MDL § 4 [13]); see **MDL § 4 (13)** ("A 'rooming house' is a multiple dwelling . . . having less than thirty sleeping rooms and in which persons either individually or as families are housed for hire or otherwise with or without meals. An inn with less than thirty sleeping rooms is a rooming house"); **NRI Group LLC v Crawford** (50 Misc 3d 1217[A], 2016 NY Slip Op 50129[U] [Sup Ct, NY County, N. Bannon, J.]) (in an ejectment action against occupants of a three-quarter house that housed four to six residents in each unit, where the residents were required to attend daily outpatient substance abuse programs and abide by house rules including restrictions on when they may leave the premises, the activities permitted in the units, barring their entry into their units between 10:00 a.m. and 2:00 p.m., and requiring them to change apartments every 28 days for the six months they are permitted to stay—the occupants showed a likelihood of success on the merits, as they were "tenants," not licensees, under RPAPL 711, which defines a tenant as "an occupant of one or more rooms in a rooming house . . . who

has been in possession for thirty consecutive days or longer"). **Andrews v Acacia Network** (11437/16, NYLJ 1202751018145 [Civ Ct, Kings County, M. Ressos, J., Feb. 23, 2016]) (restores an occupant to a shared room in a facility licensed by the NYS Office of Alcoholism and Substance Abuse Services, which provided support services to individuals with substance abuse problems, where the occupant had resided in the premises for more than 30 days and DSS had paid "his rent," but had been observed smoking in his room in violation of the program rules, citing the provision in RPAPL 711 that an occupant of one or more rooms in a rooming house who has been in "possession" for 30 days is a tenant and shall not be removed from "possession" except in a special proceeding, and the unlawful eviction provision of Administrative Code § 26-521); **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 Housing 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).

Sasmor v Powell (11 Civ 4645, 2015 WL 5458020 [ED NY, Sept. 17, 2015]) (RPAPL 711, stating that a "tenant . . . who has been in possession for thirty consecutive days or longer . . . shall not be removed from possession except in a special proceeding," does not confer cognizable property rights or possessory interests protected by the Constitution, and only entitles tenants who have lawfully held the premises for more than 30 days to procedural protections).

Defenses: Succession Rights

90 Elizabeth Apt. LLC v Eng (56 Misc 3d 128[A], 2017 NY Slip Op 50833[U] [App Term, 1st Dept]) (the fact that the rent-controlled tenant moved to a nursing home in 2010 and formally surrendered her tenancy rights in 2015 did not establish that her children were not entitled to succession rights where the children had primarily resided in the apartment with the tenant as family for decades and there was no showing of a subterfuge to protect their mother's possession); cf. **3750 Broadway Realty Group LLC v Garcia** (2015 NY Slip Op 31239[U] [Civ Ct, NY County, S. Kraus, J.]) (where the rent-controlled tenant purchased a co-op and began living there in October 2008 and did not notify the landlord that she had moved but commenced two HP proceedings in 2012 and continued to pay rent through 2013 by personal check and to correspond with the landlord as though she were the tenant of record, there were sufficient acts to show

that the tenant did not permanently vacate until 2013 and there was no co-occupancy in the two years prior to the permanent vacatur); citing **Ludlow 65 Realty, LLC v Chin** (42 Misc 3d 126[A], 2013 NY Slip Op 52129[U] [App Term, 1st Dept]) (the landlord was entitled to summary judgment where the rent-controlled tenant had taken up primary residence elsewhere in 1979 but tendered rent for several years thereafter, hired an attorney to defend a nonpayment proceeding, continued to maintain some personal belongings in the apartment and to come and go, and filed a DHCR form in 2011 indicating that he was the tenant, as there was no showing that the occupant resided with the tenant in the year prior to the tenant's permanent vacatur in 2011); see also **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 tenant to assert succession rights following the death of the tenant; "A family member who qualifies merely succeeds to the decedent tenant's rights if that is his or her choice"); 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); **Riverton Assoc. v Knibb** (11 Misc 3d 14 [App Term, 1st Dept 2005]) (where a granddaughter co-occupied with her grandmother from 1991 to 1998, her forging her grandmother's signature on two leases following her death did not forfeit her succession rights as it caused no prejudice to the landlord's prosecution of its eviction case); **360-363 Assoc. v Hyers** (L&T 72743/13 [Civ Ct, NY County Sept. 14, 2015, M. Milin, J.]) (where a domestic partner permanently vacated in August 2009 after the 20-year relationship had broken up, the fact that he signed a renewal lease in March 2011 did not compel a finding that he was still in possession of the apartment); **161 Holding Ltd. v Goris** (63692/16 NYLJ 1202793241493 [Civ Ct, NY County June 30, 2017, M. Weisberg, J.]) (denying the landlord's motion for summary judgment against an occupant who claimed succession rights despite the landlord's claim that the date of the tenant's permanent vacatur was either the date of a notarized surrender or the date of the expiration of her last lease, in either of which cases there was no two-year co-occupancy immediately prior to the vacatur; there is no bright line rule for establishing the date of the permanent vacatur; Third Lenox's use of the date of the expiration of the last lease was based on the totality of the facts presented; the proper test is whether the landlord has been prejudiced in its ability to contest the succession claim [citing Knibb and Eng]); **ELK 300 E. 83 LLC v Dowd** (2015 NY Slip Op 32443[U] [Civ Ct, NY County, M. Weisberg, J.]) (notwithstanding that the rent-controlled tenant had moved to a nursing home in July 2008, that rent and utilities continued to be paid in her name by her attorney in fact, and that the landlord was never notified that the tenant had moved, her grandson, who had lived in the apartment for 25 years, was entitled to succession rights, as delay or concealment alone does not establish that the landlord was prejudiced and the landlord showed no prejudice).

Cadman Towers, Inc. v Kaplan (54 Misc 3d 140[A], 2017 NY Slip Op 50159[U] [App Term, 2d, 11th & 13th Jud Dists]) (HPD had exclusive jurisdiction to determine succession rights in City-aided Mitchell-Lama housing and its issuance of a certificate of eviction cannot be collaterally attacked in a summary proceeding); **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); cf. also **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).

Willoughby Court Apts. LP v Gomez (59673/16, NYLJ 1202794949802 [Civ Ct, Kings County July 26, 2017, G. Marton, J.]) (notwithstanding the holding in **Evans v Franco** (93 NY2d 823 [1999]) that an occupant not listed on the annual income certification could not be a remaining family member entitled to succeed to a federal Section 8 subsidy, an occupant who established his long co-residence in the project-based Section 8 apartment with his father, the tenant, would be accorded succession rights, in view of the need to maintain family cohesion and of the occupant's long residence in the apartment, citing Murphy); **Alliance Hous. Assoc. v Garcia** (53 Misc 3d 1215[A], 2016 NY Slip Op 51672[U] [Civ Ct, Bronx County, D. Lutwak, J.]) (**Evans v Franco** is limited to succession rights to a Section 8 voucher and does not control with respect to succession rights to a project-based Section 8 apartment, so that the fact that a remaining nontraditional family member was not listed on the lease did not bar his claim

to succession rights; the HUD Handbook has no binding force and is in conflict with controlling state law); citing **Los Tres Unidos Assoc., LP v Colon** (45 Misc 3d 129[A], 2014 NY Slip Op 51566[U] [App Term, 1st Dept]) (an occupant who resided with his mother for more than a decade was entitled to succeed to a project-based Section 8 subsidy even though he was not listed on the income affidavits); citing **Matter of Manhattan Plaza Assoc., L.P. v Department of Hous. Preserv. & Dev. of City of N.Y.** (8 AD3d 111 [1st Dept 2004]) (an HPD regulation which permitted a family member not listed on annual certifications to rebut the presumption that he did not live in the project-based Section 8 apartment did not violate federal regulations; Evans "does not stand for the proposition that a state agency may never hold a hearing to permit an occupant to rebut the presumption . . .", and the HPD regulation encourages family cohesion and furthers the purpose of the Section 8 law, which recognizes the entire family as the tenant).

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).

Defenses: Multiple Dwelling Law

DDEH 103 E. 102 LLC v Jasabe (__ Misc 3d ___ [A], 2017 NY Slip Op 51322[U] [App Term, 1st Dept]) (the tenant's post-eviction motion to vacate a nonpayment stipulation and final judgment should not have been granted based on an unpleaded rent-forfeiture defense, as the defense did not implicate subject-matter jurisdiction and was waived); citing **Matter of Meaders v Jones** (15 AD3d 490 [2d Dept 2005]) (the portion of a holdover stipulation awarding the landlord possession would not be vacated based on the landlord's noncompliance with the MDL registration requirements, as this objection did not implicate subject matter jurisdiction and was waived), affg (2003 NY Slip Op 51123[U] [App Term, 2d & 11th Jud Dists]) (the monetary proscriptions against the recovery of rent and use and occupancy for lack of a certificate of occupancy could not be waived in a holdover stipulation and, thus, they would be stricken; however, as noncompliance with the MDL does not bar a holdover proceeding, the possessory award in the stipulation would not be vacated); see **BFN Realty Assoc. v Cora** (8 Misc 3d 139[A], 2005 NY Slip Op 51338[U] [App Term, 2d & 11th Jud Dists]) (since the registration and certificate of occupancy requirements of the MDL further the public interest in the safety of buildings and their tenants, a stipulation's waiver of these benefits would not be given effect); **Yuko Nii v Quinn** (195 Misc 2d 821 [App Term, 2d & 11th Jud Dists 2003]).

Momart Discount Store Ltd. v Rossi (2016 NY Slip Op 32165 [Civ Ct, NY County, J. Stoller, J.]) (Loft Law landlords have a cause of action for nonprimary residence, since the Loft Law is in pari materia with the Rent Stabilization Law; by that logic, a predicate notice should be required; given the pendency of a Loft Board proceeding, the holdover proceeding would be stayed; while, intuitively, a stay should be conditioned on the payment of use and occupancy, MDL § 302 precluded the landlord from collecting it because the landlord was not in compliance with the Loft Law's legalization schedules, notwithstanding the landlord's claim that the tenant had prevented the landlord from legalizing the premises, as Chazon rejects judicially carved-out exceptions to MDL § 302); **Lispenard Studio Corp. v Loeb** (2016 NY Slip Op 30945[U] [Civ Ct, NY County, J. Stoller, J.]) (notwithstanding that the failure to obtain a certificate of occupancy may have been due to the tenant's delays in fulfilling their responsibilities under the co-op shares purchase contract, the lack of a certificate required the dismissal of the nonpayment proceeding, as cases such as **Zane v Kellner** [240 AD2d 208 (1st Dept 1997)], holding that the MDL § 302 does not apply if the tenant was complicit in the illegality, and **Chatsworth 72nd St. Corp. v Rigai** [71 Misc 2d 647 (Civ Ct, NY County 1972, B. Shainswit, J.), affd 74 Misc 2d 298 (App Term, 1st Dept 1973), affd 43 AD2d 685 (1st Dept 1973), affd on op of Civ Ct, 35 NY2d 984 (1975)], holding that the statute does not apply if the tenants prevented the legalization, which rely on an abandonment of a literal interpretation of MDL § 302 in favor of allowing equity to control, have been implicitly overruled by **Chazon**, which rejected judicially carved-out exceptions to MDL § 302 in favor of a literal interpretation of the statute); see **Chazon, LLC v Maugenest** (19 NY3d 410 [2012]) (under Multiple Dwelling § 302 [1] [b], which provides that "no

rent shall be recovered . . . and no action or special proceeding shall be maintained therefor, or for possession of said premises for nonpayment of such rent," a landlord who does not comply with the Loft Law may not maintain an ejectment action based on nonpayment of rent, even though the tenant had not paid rent for nine years, and the parties are left in a stalemate until compliance is achieved); overruling **99 Commercial St. v Llewellyn** (240 AD2d 481 [2d Dept 1997]) and **Le Sannom Bldg. Corp. v Lassen** (173 AD2d 249, 250 [1st Dept 1991]) (allowing ejectment proceedings).

49 Bleecker, Inc. v Gatien (51 Misc 3d 152[A], 2016 NY Slip Op 50880[U] [App Term, 1st Dept]) (in a nonpayment proceeding, the tenants failed to establish, as a matter of law, that the petitioner, a net lessee of one floor of a six-story building was an owner of a multiple dwelling or "lessee of a whole dwelling" so as to be required to plead and prove multiple dwelling registration, as the tenants failed to show that the floor which the petitioner leased was a multiple dwelling; dissent, that the petitioner is an "owner," which is defined to include a lessee, the building was a multiple dwelling); **Small v Fang** (50 Misc 3d 1201[A], 2015 NY Slip Op 51840[U] [Civ Ct, NY County, J. Stoller, J.]) (an owner of a single condo unit is not required to allege compliance with MDL § 325, as the statute is designed to foster compliance with the filing requirements); citing, inter alia, **Eng v Roth** (NYLJ, Feb. 8, 1982, at 6, col 1 [App Term, 1st Dept]); cf. **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 could not maintain a nonpayment proceeding); **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 could not maintain a nonpayment proceeding).

Barrett Japaning Inc. v Bialobroda (54 Misc 3d 145[A], 2017 NY Slip Op 50258[U] [App Term, 1st Dept]) (neither the absence of a certificate of occupancy nor the fact that the apartment had qualified for Loft Law coverage barred the recovery of possession in a holdover proceeding based on illegal sublet, citing Lee v Gasoi); cf. **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. also **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]); **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).

Thomas v Brown (50 Misc 3d 130[A], 2015 NY Slip Op 51907[U] [App Term, 1st Dept]) (the rent forfeiture provisions of the MDL were inapplicable where a one-family house contained an illegal basement apartment); citing **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 **Chery v Santiago** (72927/14, Civ Ct, Queens County Jan. 7, 2015, Nembhard, J.) (dismissing a nonpayment proceeding upon a determination that the use of an attic as part of a two-story apartment in a two-family house renders the apartment illegal, notwithstanding that there is no statute prohibiting the collection of rent in an illegal two-family dwelling, as HPD had issued a violation deeming the entire apartment illegal and as the apartment was illegal at the inception of the tenancy); **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).

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); see **Silver v Moe's Pizza** (121 AD2d 376 [2d Dept 1986]) ("In the case of a commercial lease where the landlord has made no covenant to obtain a certificate of occupancy and the tenant's right to possession is wholly undisturbed, the mere absence of a certificate of occupancy does not relieve the tenant of its fundamental obligation to pay rent"); see also **Casilia v Webster** (140 AD3d 530 [1st Dept 2016]) (the tenant's inability to use the premises as a catering hall due to the certificate of occupancy did not relieve her of the obligation to pay rent for the period in which she occupied the premises); 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).

Defenses: Statute of Limitations and Laches

Parker v Howard Ave. Realty, LLC (56 Misc 3d 15 [App Term, 2d, 11th & 13th Jud Dists 2017]) (there is no one-year statute of limitations for an unlawful entry and detainer proceeding, which does not seek to recover damages for an intentional tort; in any event, a cause of action for wrongful eviction does not accrue until the tenant has been unequivocally removed with the implicit denial of any right to return); citing **Cudar v O'Shea** (37 Misc 3d 35 [App Term, 2d, 11th & 13th Jud Dists 2012]); cf. **Kent v 534 E. 11th St.** (80 AD3d 106 [1st Dept 2010]) (a cause of action for constructive eviction is subject to a one-year statute of limitations).

Bray Realty, LLC v Pilaj (54 Misc 3d 7 [App Term, 2d, 11th & 13th Jud Dists 2016] (CPLR 205 [a] did not toll the operation of Administrative Code § 27.2009.1 to give the landlord six months following the dismissal of a proceeding, as § 27.2009.1 does not impose a statute of limitations but rather a waiver of the landlord's right to enforce the no-pet clause, as a result of which the cause of action ceases to exist; this is a substantive qualification on the cause of action, not a statute of limitations).

Magal Props., LLC v Gritsyk (49 Misc 3d 144[A], 2015 NY Slip Op 51651[U] [App Term, 1st Dept]) (where the alterations underlying the landlord's holdover claim were completed more than 16 years before the commencement of the proceeding, the proceeding was barred by the statute of limitations); citing, inter alia, **Westminister Props. v Kass** (163 Misc 2d 773 [App Term, 1st Dept 1995]) (alterations claim was based in breach of contract and governed by six-year statute of limitations); **Kalaja Realty, LLC v Morel** (56 Misc 3d 1210[A], 2017 NY Slip Op 50931[U] [Civ Ct, Bronx County, K. Thermos, J.]) (an obligation to pay rent under a lease in a timely manner is a primary obligation of a tenancy and a failure to do so without justification constitutes a violation of a substantial obligation of the tenancy; there must be a pattern of unjustified defaults, to wit, three nonpayment cases or two nonpayments and at least one other rent default that are temporally clustered, at which time the six-year statute of limitations begins to run; once the cause of action has accrued, the landlord has six years to commence a proceeding; while a proceeding separated by six years is not temporally clustered, four nonpayment proceedings commenced two years apart, all of which resulted in judgments for the landlord, are temporally clustered, coupled with allegations of other defaults; the cause of action accrued after the third nonpayment proceeding); citing Cabezas, Chama and **Greene v Stone** (160 AD2d 367 [1st Dept 1990]) (where a petition asserting that, in a four-year period, the tenant had failed to pay rent on 4 occasions, compelling the landlord to serve him with legal process 21 times and to

commence three nonpayment proceedings and one holdover proceeding, two of which were never placed on the calendar and two settled by stipulation, the Civil Court erred in dismissing for failure to establish a prima facie case, given the tenant's persistent and long-standing failure to pay rent on time; "the number of nonpayment actions commenced is relevant only in the context of the entire circumstance surrounding the alleged withholding of rent"); cf. **Maimonides Med. Ctr. v Quinones** (L&T 83155/2015, NYLJ 1202746845461 [Civ Ct, Kings County, Dec. 29, 2015, J. Kuzniewski, J.]) (a breach based on chronic nonpayment must be documented by the absence of bona fide habitability claims or any dispute as to the amount of rent owed; two of four nonpayment proceedings relied upon by the landlord were barred by the six-year statute of limitations for contracts); **1975 Realty Assoc., LLC v Castellanos** (45 Misc 3d 1218[A], 2014 NY Slip Op 51623[U] [Civ Ct, Bronx County, J. Vargas, J.]) (dismisses consideration of two time-barred nonpayment proceedings]); **Mins Ct. Hous. Co., Inc. v Wright** (42 Misc 3d 1214[A], 2014 NY Slip Op 50034[U] [Civ Ct, Bronx County, J. Vargas, J.]).

Hudson Piers Assoc. L.P. v Cortes (2017 WL 2802794 [Civ Ct, NY County, June 16, 2017, J. Stanley, J.) (in a proceeding based on an illegal trade or business [RPAPL 711 (5)], the one-year statute of limitations of CPLR 215 [4] for actions "to enforce a penalty or forfeiture created by statute and given wholly or partly to any person who will prosecute it" applies and runs from when the offense is committed, not from when the criminal action terminates); citing **New York City Hous. Auth. v Pretto** (8 Misc 3d 708 [Civ Ct., Bronx County 2005, P. Alpert, J.]) (since an illegal-use proceeding is predicated on a violation of statute, not on a breach of the lease, the statute of limitations is not six years but CPLR 215 [4], as the proceeding involves a forfeiture); see **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 firearms 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).

Grand Concourse E. HDFC v Lambert-Nunez (60064/15, NYLJ 1202753507489 [Civ Ct, Bronx County Mar. 15, 2016, I. Hoyos, J.]) (notwithstanding the HDFC's claim that there was an issue of fact as to whether the delay was purposeful, since it, as a nonprofit entity, had no motive to delay and the HDFC was under the mistaken belief that its former attorney was handling the matter, the court severs the stale arrears, as the tenant established that the landlord knew of the arrears since 2010 and failed to commence an action or give notice to the tenant, and the tenant was prejudiced as she was unable to pay the arrears without public assistance); citing **Abart Holdings LLC v Hall** (4 Misc 3d 136[A], 2014 NY Slip Op 50823[U] [App Term, 1st Dept]) (finding no abuse of discretion in Civil Court's severance of stale arrears, where the landlord took no action for four years after discontinuing a nonpayment proceeding and collected rents for subsequent period).

Other Defenses

68-74 Thompson Realty, LLC v Heard (54 Misc 3d 144[A], 2017 NY Slip Op 50238[U] [App Term, 1st Dept]) (illusory-tenant defense not made out where the proof showed that the tenant and the undertenant had participated in a scheme to hide the sublet from the landlord, by representing that the undertenant was the tenant's roommate, paying rent from a joint account, and not notifying the landlord that the tenant had vacated).

1890 Adam Clayton Powell LLC v Penant (52 Misc 3d 76 [App Term, 1st Dept 2016]) (the landlord's acceptance of rent with knowledge of the tenant's multiple roommates in violation of the lease's occupancy clause was not a waiver, since the lease contained a no-waiver clause and provided that an acceptance of rent with knowledge of a breach would not prevent future action by the landlord, and because there was no conduct by the landlord constituting performance unequivocally referable to the modification).

Sun v Capies (73891/15, NYLJ 1202756466562 [Civ Ct, Kings County, J. Rodriguez, J. Apr. 15, 2016]) (vacates stipulations and restores to possession where the tenants had a right to remain in occupancy for 90 days from the date of mailing of an RPAPL 1305 notice, and did not receive such notice).

195-24, LLC v Titus (52 Misc 3d 134[A], 2016 NY Slip Op 51027 [App Term, 2d, 11th 13th Jud Dists]) (while a landlord's failure to provide heat is a breach of the warranty of habitability, the tenant must offer details regarding the inside and outside temperatures to prove the dates, duration and intensity of the deficiencies relative to the outdoor temperatures); cf. **386 Ft. Wash. Realty LLC v Brenes** (46 Misc 3d 150[A], 2015 NY Slip Op 50286[U] [App Term, 1st Dept]) (a tenant who offered no proof that he had given the landlord notice that repairs were needed was not entitled to an abatement); citing **Moskowitz v Jorden** (27 AD3d 305 [1st Dept 2006]); **72A Realty Assoc., L.P. v Mercado** (46 Misc 3d 59 [App Term, 1st Dept 2014]) (the absence of the requisite notice to the landlord of the alleged apartment defects is fatal to a habitability defense); see also **Reinhard v Connaught Tower Corp.** (150 AD3d 431 [1st Dept 2017]) (the finding of liability against the defendant landlord was not supported by the record where the evidence failed to show that the odor of cigarettes rendered the plaintiff's co-op apartment uninhabitable, as the evidence failed to show that the odor was present on a consistent basis and that it was sufficiently pervasive as to materially affect the health and safety of the occupants; plaintiff's witnesses testified only that they smelled smoke in the apartment on a handful of occasions over the years).

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 also **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 & 13th Jud Dists 2015]) (where a holdover 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).

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); cited in Fieldbridge.

Fieldbridge Assoc., LLC v Holmes (54 Misc 3d 136[A], 2017 NY Slip Op 50115[U] [App Term, 2d, 11th & 13th Jud Dists]) (the tenant's entry into a stipulation of settlement waived her claims of improper service and errors in the notice of petition and rent demand); citing **Ng v Chalsani** (51 Misc 3d 134[A], 2016 NY Slip Op 50544[U] [App Term, 2d, 11th & 13th Jud Dists]) (id.; a person is presumed to be competent and the burden of proving incompetence rests with the party asserting the incapacity; conclusory assertions of stress and depression are insufficient to establish that the person's mind was so affected as to render him incompetent to comprehend the nature of the transaction); **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 commercial 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 defects 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).

2345 Crotona Gold, LLC v Dross (50 Misc 3d 143[A], 2016 NY Slip Op 50226[U] [App Term, 1st Dept] (stipulations not vacated where the tenant was aware, prior to the execution of the three stipulations, that the landlord claimed an IAI of $317 but failed to submit any proof, or make any argument, that the landlord was not entitled to the increase); cf. **2701 Grand Assoc., LLC v Morel** (50 Misc 3d 139[A], 2016 NY Slip Op 50163[U] [App Term, 1st Dept] (vacating a stipulation where the unrepresented tenant advanced a potentially meritorious overcharge claim based on a one-year increase of 88% and sought vacatur immediately upon learning of the increase from a City agency).

270 Glenmore Ave., LLC v Blondet (55 Misc 3d 133[A], 2017 NY Slip Op 50437[U] [App Term, 2d, 11th & 13th Jud Dists]) (in a holdover based on a claim that the building was not rent stabilized because it contained five residential units, a stipulation in which the tenant agreed to vacate was vacated where the tenant showed that someone had been living in a commercial space and that she had observed a bathroom with a shower, and a kitchen with a regular stove in that space); **Bridgeview II, LLC v Mars** (51 Misc 3d 29 [App Term, 2d, 11th & 13th Jud Dists 2016]) (vacating a stipulation in which a represented tenant agreed to pay rents which did not comply with the federal statutes governing the prepayment of Section 236 mortgages, which statutes limit the amount that all the tenants, not only the income eligible tenants, can be charged following prepayment to 30% of income, based on mistake); **8 Beach St. Realty Inc. v Blagg** (48 Misc 3d 143[A], 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 had 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); see **Tabak Assoc., LLC v Vargas** (48 Misc 3d 143[A], 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 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 a 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).

4298 Park LLC v Bracero (46 Misc 3d 1209[A], 2015 NY Slip 50023[U] [Civ Ct, Bronx County, A. Lehrer, J.]) (the landlord's per diem attorney had apparent authority to enter into a stipulation, severing the older arrears, as the attorney had appeared in Resolution Part, which was created for the express purpose of settling cases, and it is presumed that an attorney appearing therein has authority to settle; as the landlord failed to object to the settlement and the tenant relied on the settlement and obtained public assistance for the unsevered arrears of $7,600, which the landlord accepted, the landlord ratified the stipulation); see **7 E. 75 LLC v Bekuraidze** (45 Misc 3d 127[A], 2014 NY Slip Op 51481[U] [App Term, 1st Dept]) (affirms the denial of a motion to vacate a stipulation, rejecting the tenant's claim that her attorney lacked the authority to settle the case, as

the attorney was at least clothed with apparent authority, as the tenant had been actively represented by counsel, who negotiated the stipulation in open court, and the tenant had spoken with counsel by phone and discussed the stipulation's terms; the tenant's claim of fraud or mutual mistake was not persuasive where the tenant had unsuccessfully raised the claim that the landlord had improperly deregulated the apartment in a prior DHCR proceeding).

Pretrial Proceedings & Trial

Hillside Place, LLC v Shahid (55 Misc 3d 101 [App Term, 2d, 11th & 13th Jud Dists 2017]) (there is no authority for the Civil Court to dismiss as abandoned a petition and counterclaim stricken from the calendar under 22 NYCRR 208.14 [c]), which makes no provision for dismissing an action based on neglect to prosecute); **Gaetane Physical Therapy, P.C. v Kemper Auto & House Ins. Co.** (50 Misc 3d 144[A], 2016 NY Slip Op 50255[U] [App Term, 2d, 11th & 13th Jud Dists]) (under Chavez, CPLR 3404 is inapplicable in the Civil Court; thus, a party who moves to restore a marked-off case within one year must, under 22 NYCRR 208.14 [c], submit an "affidavit by a person having first-hand knowledge, satisfactorily explaining the reasons for the action having been stricken and showing that it is presently ready for trial); **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).

Front St. Restaurant Corp. v Ciolli (55 Misc 3d 104 [App Term, 2d, 11th & 13th Jud Dists 2017]) (where a stipulation required the tenant to pay use and occupancy at the rate of $900 per day but did not provide a remedy in the event of a default, it was error for the Civil Court to award the landlord a final judgment based on an alleged default under the stipulation; RPAPL 745 [2] did not apply because there were no two

adjournments at the tenant's request or 30 days chargeable to the tenant; moreover, as the default was not in making the initial required payment, the court could only order an immediate trial, not the entry of judgment [RPAPL 745 (2) (c) (ii)]); see **Bush v Beauty Bay, Inc.** (52 Misc 3d 27 [App Term, 2d, 11th & 13th Jud Dists 2016]) (where a lease contained an arbitration clause, the Civil Court's power was limited to staying the proceeding and directing the parties to proceed to arbitration; it could not direct the tenant to tender rent arrears and enter a final judgment based on the tenant's failure to tender the arrears); **Myrtle Venture Five, LLC v Eye Care Opt. of NY, Inc.** (48 Misc 3d 4 [App Term, 2d, 11th & 13th Jud Dists 2015]) (RPAPL 745 [2] applies only where there have been two adjournment requests by the tenant or 30 days chargeable to the tenant have elapsed; where all the adjournments except one were on consent, the statute did not apply; as the stipulation did not provide for the striking of the pleading in the event of the tenant's default and the court does not have inherent authority to grant that relief, it was error for the court to strike the tenant's pleading; concurrence, that there should be a clear directive in a stipulation articulating the penalty for a breach); cited in **1747 Assoc., LLC v Raimova** (56 Misc 3d 1216[A], 2017 NY Slip Op 51040[U] [Civ Ct, Kings County, M. Weisberg, J.]) (in a summary proceeding, the authority of the court to direct a payment or deposit of use and occupancy is governed by RPAPL 745; where all the adjournments were on consent and 30 days chargeable to the tenant had not elapsed, the conditions of the statute were not met and use and occupancy could not be awarded notwithstanding the landlord's claim that the equities required an award); see also **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. **MH Residential 1 LLC v Peterson** (40 Misc 3d 133[A], 2013 NY Slip Op 51192[U] [App Term, 1st Dept]) (Civil Court properly awarded the landlord a final judgment upon the tenant's failure to pay interim use and occupancy as agreed to in a stipulation and as directed in a court order); citing **Rose Assoc. v Johnson** (247 AD2d 222 [1st Dept 1998]) (the tenant's failure to pay interim use and occupancy was a violation of a condition to her right to remain in the apartment, permitting the landlord to obtain a money judgment and an eviction); **Alliance Hous. Assoc. v Garcia** (53 Misc 3d 1215[A], 2016 NY Slip Op 51672[U] [Civ Ct, Bronx County D. Lutwak, J.]) (the court has "broad discretion" to award use and occupancy pendente lite upon such terms as are reasonable); **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 surcharges is entitled to use and occupancy pendente lite even in the absence of an adjournment request by the tenant).

386 Ft. Wash. Realty LLC v Brenes (46 Misc 3d 150[A], 2015 NY Slip Op 50286[U] [App Term, 1st Dept]) (the tenant's attorney's motion to withdraw was properly granted given the tenant's nonpayment of legal fees, the breakdown in the attorney-client relationship, and the adjournment of trial for the tenant to obtain new counsel); citing **Musachio v Musachio** (80 AD3d 738 [2d Dept 2011]).

1346 Park Place HDFC v Wright (52 Misc 3d 18 [App Term, 2d, 11th & 13th Jud Dists 2016]) (in a holdover based on unauthorized renovations, the trial court improvidently exercised its discretion in denying an adjournment where the tenant's attorney was unavailable on the continued trial date, as the evidence to be presented in the tenants' defense was material, the adjournment was not for the purpose of delay, and the need for an adjournment did not result from a failure to exercise due diligence, as the tenant's attorney had notified opposing counsel that he would be unavailable); cf. **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); **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).

Rutland Rd. Assoc., LP v Grier (55 Misc 3d 128[A], 2017 NY Slip Op 50370[U] [App Term, 2d, 11th & 13th Jud Dists]) (where a nonpayment petition alleged that the tenant was in possession pursuant to a written lease providing for a monthly rent of $1,269 but the tenant denied the existence of a lease, the only lease offered by the landlord at trial had expired in 2001, and there was no testimony establishing an agreed-upon rent, the landlord failed to make out a prima facie case [citing 2268 Church Ave. and Longbardi], as the landlord failed to make the required showing of the existence of an agreement to pay rent [citing Jaroslow et al.]); **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

Esposito v Larig (52 Misc 67 [App Term, 2d, 11th & 13th Jud Dists 2016]) (use and occupancy cannot be awarded in a summary proceeding where the petition is dismissed).

1472 Props., LLC v Solanki (52 Misc 3d 139[A], 2016 NY Slip Op 51127[U] [App Term, 2d, 11th & 13th Jud Dists]) (the tenant could not, after the warrant had been

executed, move in the Housing Part to enforce the payment term of a stipulation; even assuming that the Housing Part could enforce such a term prior to the termination of the action [citing **952 Assoc., LLC v Palmer**], here the summary proceeding had terminated (citing **Sweet v Sanella**) and the Housing Part lacked jurisdiction to enter a money judgment pursuant to the stipulation, notwithstanding the stipulation's attempt to reserve the tenant's right to do so); **1250, LLC v Augustin** (52 Misc 3d 135[A], 2016 NY Slip Op 51035 [App Term, 2d, 11th & 13th Jud Dists]) (where the occupants defaulted in making payments due under a stipulation settling a licensee proceeding and were evicted, the landlord could not move in the summary proceeding for the entry of a judgment for the unpaid use and occupancy, notwithstanding a purported reservation, in the stipulation, of the right to do so; the Civil Court [T. Fitzpatrick, J.] correctly reasoned that once the warrant was executed pursuant to the possessory final judgment, the landlord could not thereafter seek, in effect, to vacate that final judgment and substitute therefor a new judgment awarding it possession and arrears; once the summary proceeding terminated, it could not be restored by the landlord for the entry of a new judgment); **WM Realty, LLC v Weingarten** (52 Misc 3d 131[A], 2016 NY Slip Op 50968[U] [App Term, 2d, 11th & 13th Jud Dists]) (where the parties stipulated to the entry of a holdover final judgment of possession and the issuance of a warrant in return for a waiver of arrears, the proceeding terminated in accordance with the terms of the stipulation and the landlord could not move to restore it for the entry of a money judgment for the waived arrears when the tenant did not timely vacate, particularly as the stipulation made no provision for the entry of such a judgment).

Riverton Sq. LLC v McLeod (55 Misc 3d 143[A], 2017 NY Slip Op 50625[U] [App Term, 1st Dept]) (entry of a default judgment properly denied where the landlord submitted a document from the Department of Defense Manpower Data Center indicating that the tenant was not on active duty but no affidavit on personal knowledge as to what information had been provided to the DMDC).

136-76 39th Ave., LLC v Ai Ping Wu (55 Misc 3d 128[A], 2017 NY Slip Op 50363[U] [App Term, 2d, 11th & 13th Jud Dists]) (a default nonpayment final judgment would be vacated where it was entered upon an attorney's hearsay affirmation and not supported by a petition or affidavit sworn to on personal knowledge, even though the tenant showed no excusable default); **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

757 Miller Owners, LLC v Smith (L&T 69079/16, NYLJ 1202780573592 [Civ Ct, Kings County Feb. 17, 2017, J. Kuzniewski, J.]) (the execution of a rent-stabilized renewal lease after the termination of the tenancy vitiated the nuisance termination notice, under Second Department case law, where there was no conditional clause preserving the landlord's rights under the pending litigation); citing **Carroll St. Props. v Puente** (33 HCR 627A, NYLJ, July 13, 2005, p 30, col 6 [App Term, 2d & 11th Jud Dists]) (grants the tenant's motion to dismiss a landlord's appeal as moot because the execution of a renewal lease which did not preserve the landlord's rights in the litigation vitiated the termination notice); see **Delman v Ozcat** (2016 NY Slip Op 75426[U] [App Term, 2d, 11th & 13th Jud Dists]) (summarily reverses an order denying the tenant's motion to stay the execution of the warrant where the tenant showed that a new lease had been executed after the issuance of the warrant, vitiating the warrant), citing **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); **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 1982, W. Friedmann, J.]) (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); see also **Terrace 100, L.P. v Blaylock** (53 Misc 3d 1156 [Dist Ct, Nassau County 2016, S. Fairgrieve, J.]) (where, following the commencement of a holdover proceeding, the landlord sought recertification of the tenant's lease and the agency adjusted the tenant's rent, suggesting that the tenancy had been renewed, the recertification commenced a new tenancy and the tenant could not be evicted based on the termination of the previous lease, even though the landlord claimed that recertification was required by federal regulation, citing Stepping Stones); but see e.g. **FM United LLC v Dule-Wollin** (46 Misc 3d 126[A], 2014 NY Slip Op 51767[U] [App Term, 1st Dept]) (the landlord's postpetition execution of a renewal lease, as required by the RSC, did 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); **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).

New York City Hous. Auth. Glenwood Houses v Walker (56 Misc 3d 130[A], 2017 NY Slip Op 50862[U] [App Term, 2d, 11th & 13th Jud Dists]) (a tenant who did not show the present ability to pay the rent showed no basis to be restored; a marshal's failure to properly execute a warrant does not affect the validity of the final judgment or provide a basis to be restored); **Capital 2000, LLC v Tatum** (52 Misc 3d 139[A], 2016 NY Slip Op 51129[U] [App Term, 2d, 11th & 13th Jud Dists]) (the failure to properly serve a 72-hour notice and to afford 72 hours' notice affords no basis for restoring an occupant who had agreed to vacate); **789 St. Marks Realty Corp. v Waldron** (46 Misc 3d 138[A], 2015 NY Slip 50073[U] [App Term, 2d, 11th & 13th Jud Dists]) (where a court order conditionally stayed the execution of the warrant and provided that, upon a default, the warrant could execute after re-service of a marshal's notice, the failure to re-serve the marshal's notice did not provide a basis for restoring the defaulting tenants, where the

tenants did not show that they had the arrears available and restoration would be futile, as the tenants could immediately be re-evicted); see **Soukouna v 365 Canal Corp.** (48 AD3d 359 [1st Dept 2008]) (where the lockout petitioner had been selling counterfeit goods in his flea market booth, he would not be restored to possession, as restoration would be futile since he could be immediately re-evicted pursuant to RPAPL 711 [5]); **Two-Two-One Assoc. v Medina** (2015 NY Slip Op 32236[U] [Civ Ct, NY County, M. Weisberg, J.]) (where the landlord had discontinued the licensee proceeding as against a John Doe, so that his eviction may have violated due process, the John Doe, who lacked succession rights would not be restored, based on the futility doctrine); see also **100 Queens Blvd. Assoc., LLC v G&C Coffee Shop** (15 Misc 3d 141[A], 2007 NY Slip Op 51073[U] [App Term, 2d & 11th Jud Dists]) (where a tenant is in default, a marshal's failure to properly serve a 72-hour notice as required by RPAPL 749 [2] affords no basis to restore the tenant); **Graham v Moore** (10 Misc 3d 133[A], 2005 NY Slip Op 52087[U] [App Term, 2d & 11th Jud Dists]) (same); cf. **Elide Props., LLC v Analisa Salon, Ltd.** (NYLJ, July 1, 2005 [App Term, 9th & 10th Jud Dists]) (where the tenant was evicted on the day the nonpayment final judgment was entered, in violation of RPAPL 749 [2], and offered to satisfy the judgment at the time of the eviction, the tenant showed a likelihood of success and would be restored to possession pending appeal).

Madden v Juillet (46 Misc 3d 146[A], 2015 NY Slip Op 50214 [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]).

117 W. 142, L.L.C. v Villanueva (51 Misc 3d 149[A], 2016 NY Slip Op 50811[U] [App Term, 1st Dept]) (Civil Court providently exercised its discretion in permanently staying the warrant where the indigent tenant made prompt and diligent efforts to obtain the arrears and there were bureaucratic delays in obtaining government and charitable grants, and by the landlord, who initially entered judgment in an excessive amount); **Birchwood Ct. Owners, Inc. v Toner** (51 Misc 3d 133[A], 2016 NY Slip Op 50467[U] [App Term, 9th & 10th Jud Dists]) (good cause shown to vacate warrant where the long-term co-op tenant faced a potential loss of equity if evicted and demonstrated the availability of the arrears prior to the execution of the warrant and an excuse for not timely paying them).

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

Greenstone 26 LLC v Woods (53 Misc 3d 1218[A], 2016 NY Slip Op 51724[U] [Civ Ct, Bronx County, D. Lutwak, J.]) (in a holdover based on a claim that the Section 8 tenant had failed to recertify, the court vacates a default final judgment and restores the tenant to possession where the tenant established a meritorious defense that she had recertified and that the NYCHA subsidy had been improperly terminated, as no T-1 notice [advising of an incomplete recertification] had been sent, only a T-3 notice of termination; the court noted that Justice Saxe's criterion for undoing an eviction—that there was an error in the allegations supporting the eviction—was met); see **Matter of Lafayette Boynton Hous. Corp. v Pickett** (135 AD3d 518 [1st Dept 2016]) (rejects the landlord's contention that the Civil Court, under RPAPL 749 [3], lacked the authority to restore the tenant to possession; the Civil Court "providently exercised its discretion" to restore where the long-term disabled tenant made substantial payments toward the arrears and engaged in good-faith efforts to secure assistance, and the delays were, to a certain extent, attributable to the landlord and others; Saxe, J., concurring, questions "the underpinnings and validity of recent case law on the subject"; because the pre-eviction standard for vacating a warrant is, under RPAPL 749 [3], "good cause shown," a "more exacting standard should be employed where a tenant seeks to be restored to possession after eviction," since the tenant's rights to reside in the premises have been eliminated; yet First Department cases have imported the "good cause" standard or an "abuse of discretion" standard of review; to undo an eviction, a tenant should be required to show that "incorrect assumptions or findings were made in issuing the warrant"), affg (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); see e.g. **2203 Belmont Realty Corp. v Gant** (51 Misc 3d 140[A], 2016 NY Slip Op 50625[U] [App Term, 1st Dept]) (applies "good cause" standard in allowing post-eviction relief based on the tenants' payment of arrears and eviction costs 14 days after the eviction); **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]); 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).

Wira Assoc. v Easy (48 Misc 3d 137[A], 2015 NY Slip Op 51203[U] [App Term, 2d, 11th & 13th Jud Dists]) (restoration is appropriate when a default under a stipulation is de minimis, as enforcement of a stipulation remains subject to the supervision of the courts); **Austin Clayton Holdings, LLC v Taylor** (48 Misc 3d 132[A], 2015 NY Slip Op 51059[U] [App Term, 2d, 11th & 13th Jud Dists]) (where defaults under a stipulation were not de minimis, inadvertent and promptly cured, no basis was shown to restore the tenant); **Remeeder Houses, LP v Perry** (46 Misc 3d 139[A], 2015 NY Slip Op 50081[U] [App Term, 2d, 11th & 13th Jud Dists]) (no basis to be restored where defaults under a stipulation were neither de minimis nor promptly cured); **2242 Clarendon Realty, LLC v Etienne** (45 Misc 3d 132[A], 2014 NY Slip Op 51665[U] [App Term, 2d, 11th & 13th Jud Dists]) (restores the tenant to possession where the tenant's default under the stipulation was minimal, inadvertent and promptly cured, as the tenant had obtained a DSS commitment to pay all the arrears plus legal and marshal fees); **467 42nd St., Inc. v Decker** (186 Misc 2d 439 [App Term, 2d & 11th Jud Dists 2000]) (while CPLR 5015 [d] authorizes restitution only where the court sets aside the judgment or order pursuant to which the property was lost, the court also has inherent power to ensure that its process is not executed in an unlawful manner; where the warrant was executed after it had been vitiated by an acceptance postjudgment rent, it was proper to restore the tenant); **Davern Realty Corp. v Vaughn** (161 Misc 2d 550 [App Term, 2d & 11th Jud Dists 1994]) (the authority granted by RPAPL 749 [3] to vacate a warrant for good cause shown does not survive the execution of a warrant; restoration may be granted where grounds are shown under CPLR 5015 or the default under the stipulation was de minimis and promptly cured).

Matter of 175 W. 107th LLC v State of N.Y. Div. of Hous. & Community Renewal (135 AD3d 556 [1st Dept 2016]) (affirming a DHCR order finding that an apartment remained subject to rent control and that the landlord was not entitled to a rent increase for renovations where the renovations were made while the tenant had been unlawfully evicted, as the Appellate Term had reversed the final judgment ending the tenancy; when a judgment is reversed, the rights of the parties are left unaffected by the reversed adjudication); distinguishing **Sorkin v Salazar** (6 Misc 3d 129[A], 2000 NY Slip Op 50005[U] [App Term, 1st Dept]) (where a tenant had been lawfully evicted but was restored in the exercise of discretion upon payment of the arrears, as the failure to pay rent was engendered by delays in obtaining DSS assistance, the restoration was without prejudice to the landlord's claim for rent increases related to new appliances and flooring, and attorney's fees).

111-35 75th Ave. Owners Corp. v Hendrix (50 Misc 3d 17 [App Term, 2d, 11th & 13th Jud Dists 2015]) (to cure an illegal sublet within the 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); cf. **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 **Parkchester Preserv. Co., LP v Lambert** (51 Misc 3d 149[A], 2016 NY Slip Op 50804[U] [App Term, 1st Dept]) (where the tenants breached a holdover stipulation by failing to remove a washing machine by the stipulated date, the court exercises its "discretion" to afford the long-term tenants a final 10-day opportunity to remove the machine); **Harrison Hills 55 LLC v Mulligan** (51 Misc 3d 142[A], 2016 NY Slip Op 50684[U] [App Term, 1st Dept]) (in the exercise of "discretion," court permanently stays the execution of the warrant where the tenant, who failed to remove her dog within the stipulated period or within a year-later extension, ultimately removed the dog, where the delay was due in part to her son's health issues); **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).

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 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, on condition that the tenant tender post-petition use and occupancy),

revd (135 AD3d 525 [1st Dept 2016]) (in a holdover based on a failure to renew a lease, the Appellate Term improvidently exercised its discretion in allowing the tenant to remain in occupancy after she had been given numerous opportunities, at trial and in a post-judgment 10-day cure period, to sign the renewal lease and failed to do so); 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).

129th St. Cluster Assoc. v Levy (54 Misc 3d 128[A], 2016 NY Slip Op 51804[U] [App Term, 1st Dept]) (where the evidence showed that the tenant had engaged in a course of objectionable conduct, including regularly accosting other tenants and their children, screaming profanities at them, banging on the floors and ceiling at all hours, etc., it was error for the court to afford the tenant a two-year probationary stay; even if the incidents were "sporadic," given the severity of the circumstances of intolerance and aggression and the constant risk to the other tenants and their children, an opportunity to cure should not have been granted); **Volunteers of Am.–Greater NY, Inc. v Carr** (49 Misc 3d 140[A], 2015 NY Slip Op 51589[U] [App Term, 1st Dept 2015]) (where a tenant's conduct was manifestly objectionable—breaking into the landlord's locked storage room, removing client files and threatening the landlord's employees—it was error for the Civil Court to stay the execution of the warrant for a one-year probationary 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).

New York City Hous. Auth. (S. Jamaica Houses) v Jackson (56 Misc 3d 5 [App Term, 2d, 11th & 13th Jud Dists 2017]) (in a licensee proceeding by NYCHA to remove occupants who lacked succession rights, the Civil Court lacked the authority to permanently stay the issuance of the warrant so as to, in effect, award the occupants succession rights, since the Appellate Division's determination in an article 78 proceeding that the occupants lacked succession rights could not be collaterally attacked); **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 [App Term, 1st Dept 2000]; **New York City Hous. Auth. v Williams**, 179 Misc 2d 822 [App Term, 2d & 11th Jud Dists 1999]).

Section 8, NYCHA & Co-ops etc.

FAC Rennissance HDFC v Vega (55 Misc 3d 120[A], 2017 NY Slip Op 50480[U] [Civ Ct, Kings County, J. Stanley, J.]) (the requirement of 24 CFR § 982.310 [e] [2] [ii] that a petitioner serve a copy of an eviction notice on the PHA applies to all Section 8 tenants, and the failure to do so is a basis for dismissal); citing **433 W. Assoc. v Murdock** (276 AD2d 360 [1st Dept 2000]) (both the federal consent decree and the regulation require service of the termination notice and petition on NYCHA; such service is an essential element of the landlord's prima facie case, but noncompliance, while a defense to the holdover petition, does not implicate subject matter jurisdiction and was waived by the stipulation and by the tenant's failure to appeal); **Taylor v Shelton** (7697/16, NYLJ 1202783907203 [Civ Ct, Kings County Mar. 22, 2017, M. Ressos, J.]) (as a private landlord who participates in the Section 8 program must follow the Williams consent decree and the CFR, the absence of an affidavit of service attesting to service of the termination notice and notice of petition and petition on NYCHA required dismissal); **Sam Burt Houses, Inc. v Smith** (56156/15, NYLJ 1202731567320 [Civ Ct, Kings County, June 17, 2015, M. Ressos, J.]) (dismisses a nonpayment petition which failed to describe the Section 8 subsidy where the landlord also failed to serve HPD with the rent demand and notice of petition and petition, rejecting the landlord's claim that the Section 8 subsidy was not yet in effect when it commenced the proceeding, as the landlord had entered into the HAP contract effective prior to the commencement of the proceeding); citing **Jennie Realty Co. v Sandberg** (125 Misc 2d 28 [App Term, 1st Dept 1984]) (the requirements of the federal regulations that a landlord give a Section 8 tenant a 10-day notice and obtain NYCHA's authorization apply to nonpayment proceedings as well as holdover proceedings).

Baltic Co. v Karuby (52350/15 [Civ Ct, Richmond County, K. Slade, J., May 25, 2016] NYLJ 1202759979096) (grants summary judgment dismissing a holdover against a Section 8 tenant who cursed, yelled and charged at the landlord's employee, after having made phone calls three months earlier to the management office in which she used foul language, as the allegations did not establish a breach of a material obligation or repeated minor violations; if the conduct was criminal, the landlord failed to establish

that it threatened the health or safety of the other tenants or their peaceful enjoyment of the property); citing **Matter of Sumet I Assoc., LP v Irizarry** (103 AD3d 653 [2d Dept 2013]) (where the landlord demonstrated that the tenant had engaged in criminal activity by marking with graffiti the wall in the stairwell leading to the roof, but did not show that any resident's peaceful enjoyment of the premises was threatened, the petition was properly dismissed), affg (33 Misc 3d 51 [App Term, 2d, 11th & 13th Jud Dists 2011]) (in a holdover based on a claim that the Section 8 tenant had engaged in criminal activity by spray-painting a wall in the stairway leading to the roof, the majority holds that while a single criminal act may constitute material noncompliance with the lease, that criminal act must be drug related; otherwise, the landlord must show that the criminal conduct threatened the health or safety of the other tenants, or their peaceful enjoyment; the spray painting was an isolated act that did not rise to that level; dissent, spray painting has been declared by the Legislature to be a physical blight which prompts a downward spiral of economic conditions, and thus threatens the peaceful enjoyment of the premises by the other tenants); cf. **Lambert Houses Redevelopment Co. v Huff** (35 Misc 3d 1215[A], 2012 NY Slip Op 50709[U] [Civ Ct, Bronx County, A. Lehrer, J.]) (to prevail in a holdover proceeding against a Section 8 tenant on the ground that the tenant breached an obligation of the lease, the landlord must show that the obligation was a significant one; a Section 8 tenant's maintenance of a second residence constitutes a significant violation of the lease; while it is unclear whether a failure to recertify is a ground for eviction, the landlord's notices failed to comply with HUD requirements; where the tenant primarily resided in the Section 8 apartment, he would be given a post-judgment opportunity to cure his breach by surrendering the second apartment).

Henry Phipps Plaza S. Assoc. v Quijano (137 AD3d 602 [1st Dept 2016], revg for reasons set forth in dissenting op (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); **Valley Dream Hous. Co., Inc. v Albano** (52 Misc 3d 327 [Dist Ct, Nassau County 2016, S. Fairgrieve, J.]) (dismissing a holdover predicated on a notice terminating a Section 8 lease, on the ground that the notice failed to comply with the HUD Handbook, model lease and CFR by failing to inform the tenant of his right to assert a defense to any eviction proceeding); citing **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).

Estate of Del Terzo v 33 Fifth Ave. Owners Corp. (136 AD3d 486 [1st Dept 2016]) (the co-op corporation unreasonably withheld its consent to a transfer of a proprietary lease to the deceased shareholder's adult children; a provision in the proprietary lease to the effect that the co-op's consent would not be unreasonably withheld to an assignment to a financially responsible family member imposed a heightened standard of reasonableness beyond the business-judgment rule and required the co-op to consent to a transfer to the two children where, although the one who would be living in the apartment may not have been financially responsible, the other was and offered to guarantee the obligations; dissent, that the lease only required consent to a single financially responsible member, and the co-op was being asked to allow a transfer to an occupant that lacked the requisite financial responsibility and to allow part ownership by a nonresident family member).

211 Middle Neck Owners Corp. v Paris (56 Misc 3d 855 [Dist Ct, Nassau County 2017, S. Fairgrieve, J.]) (under Second Department law, the co-op lease provision restricting occupancy is ambiguous and must be construed against the drafter); citing **Wilson v Valley Park Estates Owners Corp.** (301 AD2d 589 [2d Dept 2003]) (proprietary lease provision ambiguous as to whether use of the unit was a sublet unless the shareholder was in residence); but see **50 Sutton Place S. Owners, Inc. v**

Fried (2016 NY Slip Op 31326[U] [Sup Ct, NY County, D. James, J.]) (a co-op lease provision that the apartment may not be used "other than as a private dwelling for the Lessee and Lessee's wife, their children . . . and domestic employees" permits occupancy by the listed persons only if the lessee maintains a concurrent occupancy [citing Haydon]; otherwise, the tenant's domestic employee could reside there without the tenant; a complaint which alleged that the tenants do not "primarily reside" in the apartment with their relative did not state a cause of action, as the lease did not require "contemporaneous occupancy", i.e. that the tenants be home whenever their relative was home); **230-79 Equity, Inc. v Frank** (50 Misc 3d 144[A], 2016 NY Slip Op 50245[U] [App Term, 1st Dept]) (the landlord was entitled to summary judgment based on language in the proprietary lease that the apartment may not be used for any purpose "other than as a private dwelling for the Lessee and Lessee's spouse, their children, grandchildren, brothers and sisters and domestic employees," which is "correctly construed . . . as permitting occupancy by the listed persons other than the lessee only if the lessee maintains a concurrent occupancy"); quoting from **445/86 Owners Corp. v Haydon** (300 AD2d 87 [1st Dept 2002]).

Rent Regulation Coverage Issues

151 Daniel Low, LLC v Li (__ Misc 3d ___, 2017 NY Slip Op 27299 [App Term, 2d, 11th & 13th Jud Dists 2017]) (where DHCR determined that the tenant, who had resided in the apartment since 1994, was rent stabilized, the tenant retained that status despite his refusal to sign a vacancy lease proffered by the landlord in 2014, and could not be evicted without a proper predicate RSC notice); citing **6 Greene St. Assoc. v Robbins** (256 AD2d 169 [1st Dept 1998]) (refusal to sign a vacancy lease is a ground for eviction pursuant to RSC § 2524.3 [f]), which is curable pursuant to RPAPL 753 [4], citing **Fairbanks Gardens Co. v Gandhi**).

Oren Apts, LLC v Torres (L&T 67038/16, NYLJ 1202785511994 [Civ Ct, Queens County Apr. 24, 2017, C. Nembhard, J.]) (where the last rent was $1,594.83 before the apartment was registered as exempt due to a high rent vacancy, Altman did not require a finding that the apartment remained regulated, as under the more recent case of **18 St. Marks Place Trident, LLC**, vacancy and improvement increases may be the basis for a finding of deregulation); see **Matter of 18 St. Marks Place Trident, LLC v State of New York Div. of Hous. & Community Renewal, Off. of Rent Admin.** (149 AD3d 574 [1st Dept 2017]) (an apartment was deregulated based on a prevacancy rent of $1,264.48, plus $202.31 for a vacancy increase, plus $568.34 for improvements); cited in **Smith v Acquisition Am. Vill, LLC** (2017 NY Slip Op 31386[U] [Sup Ct, NY County, A. Bluth, J.]) (an IAI increase can deregulate an apartment even if the rent was less than $2,000 at the time of the vacancy); **233 E. 5th LLC v Smith** (54 Misc 3d 79 [App Term, 1st Dept 2016]) (where the last tenant's rent was $1,836.20, the 20% vacancy increase allowance brought the legal rent above the $2,000 luxury decontrol threshold, as RSL § 26-504.2 provides for deregulation if an apartment "is or becomes vacant . . . with a legal regulated rent of two thousand dollars or more per month," noting that a

provision added by the City Council that allowed consideration only of the rent level at the time of the vacancy was "repealed;" Altman should not be interpreted "so broadly as to effectuate a sea change in nearly two decades of settled statutory and decisional law"; **Aimco 322 E. 61st St., LLC v Brosius** (50 Misc 3d 10 [App Term, 1st Dept 2015]) (the tenant's defense of rent stabilization coverage was not subject to summary dismissal where there were triable issues as to whether the apartment became exempt in 2001 because of a high-rent vacancy; post-vacancy improvements count toward the $2,000 threshold; distinguishing Altman, which relied only the first statutory basis, i.e., where the legal regulated rent was $2,000 at the time the tenant vacated); **Altman v 285 W. Fourth, LLC** (127 AD3d 654 [1st Dept 2015]) (under RSL § 26-504.2, exempting housing accommodations which became vacant between April 1, 1997 and the effective date of the rent act of 2011 [June 24, 2011] where, at the time the tenant vacated, the legal rent was $2,000 or more, and housing accommodations which are or become vacant during that period with a legal regulated rent of $2,000 or more, a vacancy increase of 20% which brought the legal rent above $2,000 following the departure of the tenant of record did not deregulate the apartment since the rent at the time of the tenant's vacatur did not exceed $2,000), revg (2014 NY Slip Op 32702 [Sup Ct, NY County D. Mills, J.]) (under the RRRA of 1997, units that were vacant on or after June 19, 1997 may be deregulated if the rent after vacancy reaches the $2,000 threshold through the application of vacancy increases or individual apartment increases; thus, where the prior tenant's rent plus a 20% vacancy increase brought the rent above $2,000, the subtenant's vacancy lease was exempt); followed in **Cates-Reither v 160 E. 48th St. II Owner LLC** (2017 NY Slip Op 30809[U] [Sup Ct, NY County, G. Lebovits, J.]) (constrained to follow Altman, court holds that where the last tenant's monthly rent had been $1,740.33, the landlord could not rely on the 2% vacancy increase to deregulate the apartment).

Matter of Cipolla v New York State Div. of Hous. and Community Renewal (153 AD3d 920 [2d Dept 2017]) (pursuant to RSC former 2526.1 [a] [3] [iii], when an apartment is vacant on the base date, the legal rent is the first rent agreed to by the owner and the first rent-stabilized tenant taking occupancy after the vacancy; notwithstanding that the first lease after the vacancy listed a legal rent of $2,000, since the actual rent charged was $1,700 which was a lawful stabilized rent, there was no overcharge); **Esposito v Larig** (52 Misc 3d 67 [App Term, 2d, 11th & 13th Jud Dists 2016]) (under RSC former § 2526.1 (a) (3) (iii), high-rent vacancy deregulation was available only where the first tenant after a vacancy was a "rent stabilized tenant"; where the post-vacancy tenants were not offered a stabilized lease, the apartment was not deregulated); **M&E Christopher LLC v Godfrey** (50 Misc 3d 143[A], 2016 NY Slip Op 50229[U] [App Term, 1st Dept], affg 47 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; 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); cf. **Matter of Ogunrimde v New York State Div. of Hous. & Community Renewal** (2010 NY Slip Op 33350[U] [Sup Ct, NY County, J. Gische, J.]) (DHCR treats an apartment tenanted on a transient basis as vacant because transient occupation temporarily exempts the apartment; where the apartment was "vacant" on the base date, the legal regulated rent is based on the rent paid by a permanent tenant at the commencement of his occupancy), affd (110 AD3d 441 [1st Dept 2013]) (DHCR's determination that the base rent was the rent the permanent tenant agreed to pay at the commencement of his occupancy was rational since there was an absence of reviewable records).

TJA Realty, LLC v Hermosa (56 Misc 3d 130[A], 2017 NY Slip Op 50858[U] [App Term, 2d, 11th & 13th Jud Dists]) (in a holdover based on a claim that contiguous structures did not constitute a horizontal multiple dwelling, where the tenant's answer challenged the petition's allegation that the building was not stabilized, the landlord's engineer testified only as to the current state of the buildings and the tenant's proof showed numerous indicia of common facilities, ownership and operation until at least 1980, the landlord did not meet its burden of demonstrating that the building is not subject to rent stabilization as it did not demonstrate that the buildings did not constitute a horizontal multiple dwelling on January 1, 1974 or that the determination as to the buildings' status should be made as of a later date).

124 Meserole, LLC v Recko (55 Misc 3d 146[A], 2017 NY Slip Op 50686[U] [App Term, 2d, 11th & 13th Jud Dists]) (a store proprietor's residential use of two rooms behind the store rendered that space a "housing accommodation", defined as "that part of any building or structure, occupied or intended to be occupied by one or more

individuals as a residence, home, dwelling unit or apartment" [RSC § 2520.6 (a)]; a unit need not be legal to constitute a "housing accommodation"; where the tenants put into issue the rent-regulatory status of their apartment, the burden is on the landlord to prove its allegation that the apartment is not regulated); **R.G.P. Mgt. and Realty Corp. v Jones** (71656/16, NYLJ 1202793829750 [Civ Ct, Kings County July 7, 2017, M. Sikowitz, J.]) (where the proof showed that the building once contained 10 units in violation of the certificate of occupancy for four units, the building was rent stabilized even if the current landlord did not subdivide the units (citing Recko), and the status continued even if the number of units was reduced to less than six [citing Rashid]); **Castell v Nembard-Smith** (L&T 68834/16, NYLJ 120278843022 [Civ Ct, Kings County June 7, 2017, M. Sikowitz, J.]) (vacates, upon renewal, a consent final judgment, where the tenant, while pro se, had inadvertently waived his rights under rent stabilization; the one-time existence of two illegal apartments in the basement brought the four-family building under rent stabilization [citing Joe Lebnan] and the removal of the units did not exempt the remaining units [citing Rashid]); **567 W. 184th LLC v Martinez** (L&T 60719/16, NYLJ 1202783907033 [Civ Ct, NY County Apr. 4, 2017, J. Stanley, J.]) (the use of a storage area as a sixth dwelling unit brought the building under rent stabilization [citing Robrish] and the removal of the sixth unit did not exempt the building); **Famous Devs. LLC v Daniel** (59613/16, NYLJ 1202783415031 [Civ Ct, Kings County Mar. 24, 2017, B. Scheckowitz, J.]) (the fact that a sixth apartment was illegal and removed after the placement of a violation did not prevent rent stabilization from attaching, citing Joe Lebnan and Rashid); **REDF Equitable LLC v Doe** (L&T 83226/15, NYLJ 1202763458008 [Civ Ct, Kings County, M. Finkelstein, J., July 13, 2016]) (vacates post-eviction stipulation providing for short-term restoration in "no-defense" holdover, where the occupant showed the existence of eight units in the building, and the stipulation was entered into on an emergency basis, citing Robrish); **Bermudez v Fuselli** (L&T No. 88360/15, NYLJ 1202764006027 [Civ Ct, Kings County, July 8, 2016, H. Cohen J.]) (rejects the petitioner's claim that the occupants were roommates, finding that their walled-off areas constituted separate units, entitling them to rent stabilization coverage); **Fernandez v Cronealdi** (L&T 85314/15, NYLJ 1202751732899 [Civ Ct, Kings County, Feb. 10, 2016, J. Kuzniewski, J.]) (illegal individually rented rooms were housing accommodations, which rendered the premises a nine-unit building subject to rent stabilization); citing **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); **Jones v Gumbs** (84034/15, NYLJ 1202746252450 [Civ Ct, Kings County, B. Scheckowitz, J., Dec. 23, 2015]) (a four-family containing seven units was stabilized); **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); see also **Rosenberg v Gettes** (187 Misc 2d 790 [App Term, 1st Dept 2000]) (a cellar apartment counts for determining whether a building has six housing accommodations notwithstanding that it does not appear on the certificate of occupancy or is otherwise "illegal"); cf. **DMARC 2007-CD5 212th St. LLC v Rijo** (50 Misc 3d 135[A], 2016 NY Slip Op 50053[U] [App Term, 1st Dept]) (where a stabilized lease had not expired, the landlord could not maintain a holdover proceeding alleging that the month-to-month tenancy of an unregulated apartment had been terminated, notwithstanding that the basement apartment was illegal; the landlord was required to pursue a remedy based on illegal occupancy [RSC § 2524.3 (c)]; the court need not reach the issue of whether the apartment was incapable of legalization or whether legalization would be unduly burdensome); citing **Hudson Cliff Bldg. Co. v Chandler** (279 AD2d 423 [1st Dept 2001]) (affirms the dismissal of a complaint seeking a declaration that an apartment was not legal and could not be made legal, as the landlord was required to proceed under RSC § 2524.3 [c]); cf. also **Berenholtz v Padel** (2015 NY Slip Op 31413 [Civ Ct, Queens County, G. Badillo, J.]) (a two-family building that was part of a 159-unit-garden-apartment development retained its stabilized status after it was sold and no longer shared common facilities with the other buildings, because the reduction of the number of units in a rent-stabilized building does not remove the building from rent stabilization).

2363 ACP Pineapple, LLC v Iris House, Inc. (55 Misc 3d 7 [1st Dept 2017]) (RSC § 2520.11 [f], which exempts from rent stabilization housing accommodations owned, operated or leased pursuant to government funding by a hospital, college, etc. or any institution operated for charitable or education purposes on a nonprofit basis was intended to exempt institutions whose needs were furthered by having access to unregulated housing in order to house staff or students, so long as their affiliation remained in effect; it applies to proceedings brought by the institutions, not to proceedings brought against the institutions); but see Adam Leitman Bailey and Dov A. Treiman, "Rent Stabilization Law: Sheltering the Homeless in New Rent Stabilized Units" (NYLJ, Oct. 11, 2017, p. 5, col. 2) (since Rent Stabilization applies to "housing accommodations" and is in rem, not in personam, it should not matter who brings the proceeding).

885 Park Ave. Brooklyn, LLC v Goddard (55 Misc 3d 74 [App Term, 2d, 11th & 13th Jud Dits 2017]) (a building converted from an empty warehouse to residential use was exempt based upon a substantial rehabilitation; RSC § 2520.11 [3] [8] allows but does not require a landlord to apply for a prior advisory opinion that a building will qualify for the exemption); see **Bartis v Harbor Tech, LLC** (147 AD3d 51 [2d Dept 2016]), affg 2014 NY Slip Op 31612[U] [Sup Ct, Kings County, D. Silber, J.]) (where a commercial building built before 1974 was converted to residential use after 1974 at an expense of $3.5 million, a substantial rehabilitation occurred irrespective of whether the requirements of Operational Bulletin 95-2 had 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 residential); 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).

310 E. 4th St. HDFC v Brandstein (50 Misc 3d 135[A], 2016 NY Slip Op 51005[U] [App Term, 1st Dept]) (an HDFC operated for charitable purposes is exempt from rent stabilization, citing Smalls); cf. **375 NY HDFC v Jones** (52 Misc 3d 129[A], 2016 NY Slip Op 50936 [App Term, 1st Dept]) (where the documents submitted to the Attorney General in support of a "no-action" letter, upon the conversion to an HDFC, expressly represented that the conversion plan would be treated as a noneviction plan and that nonpurchasing tenants would retain their stabilized status, the tenant, a 30-year resident who declined to purchase, remained stabilized), affg (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 rent stabilized; the building was not exempt as a building 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 (46 Misc 3d 40 [App Term, 1st Dept 2014]), affg (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 **Saad v Elmuza** (12 Misc 3d 57 [App Term, 2d & 11th Jud Dists 2006]).

350-352 S. 4th St., HDFC v Torres (56 Misc 3d 90 [App Term, 2d, 11th & 13th Jud Dists 2017]) (in a proceeding based on a claim that the occupant entered into possession as an incident of his employment as superintendent, where the occupant

acknowledged that he had entered into possession of a different apartment in connection with the employment but claimed that when he had moved into the subject apartment his job title had changed to janitor and he had commenced paying rent, the burden remained on the landlord to establish that the occupant had entered into the subject apartment as an incident of employment; it was not the occupant's burden to establish that he had entered into possession as a tenant; nor was it dispositive that the occupant had entered into possession of the previous apartment as an incident of employment; the landlord failed to introduce a witness with personal knowledge or documentary evidence to show the occupant's employment terms; dissent, that it was clear from the record that, upon the occupant's relocation, his rights derived solely from his status as superintendent); cf. **Kozinn 238 LLC v Harvey** (63681/16, NYLJ 1202794949348 [Civ Ct, NY County July 10, 2017, J. Stoller, J.]) (in a summary proceeding to remove a super, the court finds, after trial, that the petitioner failed to meet its burden of showing that the occupants surrendered their status as tenants when they moved into the former super's apartment and began working as super; although they never paid rent, the petitioner registered the premises as temporarily exempt rather than permanently exempt, the job as super was offered to the occupants in a casual breezy manner, the petitioner combined the former super's unit with a nonemployee unit at the occupant's request, and the petitioner failed to maintain records that would evince a meeting of the minds).

1290 Ocean Realty, LLC v Valdes (53732/15, NYLJ 1202766275758 [Civ Ct, Kings County, J. Stanley, J., Aug. 10, 2016]) (an occupant who worked for the former owner and was given an apartment as partial compensation, with the rent being deducted from his salary, was a rent-stabilized tenant, as he was in possession pursuant to an oral rental agreement); see **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 **GVS Props., LLC v Cepeda** (47 Misc 3d 145[A], 2015 NY Slip Op 50717[U] [App Term, 1st Dept]) (where a superintendent accepted an apartment solely as an incident of his employment without payment of rent, his occupancy rights terminated upon the termination of his employment, citing Genc); **Mohr v Gomez** (173 Misc 2d 553 [App Term, 1st Dept 1997]); but 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).

Use and Occupancy

Carlyle, LLC v Beekman Garage LLC (133 AD3d 510 [1st Dept 2015]) (in the landlord-tenant context, an occupant is liable to the owner for use and occupancy irrespective of the existence of a lease in the name of another entity, as the obligation is predicated on a theory of quantum meruit and is imposed by law for the purpose of bringing about justice without reference to the intention of the parties); citing **Gateway I Group, Inc. v Park Ave. Physicians, P.C.** (62 AD3d 141 [2d Dept 2009]) (while recovery in quantum meruit is precluded where there is a valid and enforceable agreement governing the subject matter, where there was no agreement between the landlord and the nontenant occupants, the landlord was not precluded from recovering in quantum meruit); cf. **1820 First Ave. Inc. v Mendoza** (92291/13, NYLJ 1202738915275, Sept. 22, 2015 [Civ Ct, NY County J. Stoller, J.]) (since, due to the personal nature of a license, the license expires upon the death of the licensor, a landlord "need not await the expiration of the prior tenant's lease in order to memorialize the purported termination of [the] license by a notice to quit", rejecting the

occupant's claim that the landlord could not predicate a licensee proceeding on a purported termination of his license during the pendency of the prior tenant's lease); but cf. **Holy Props. v Cole Prods.** (87 NY2d 130 [1995]) (a lease is a present transfer of an estate in real property).