OCTOBER 2019 COURT ATTORNEY SEMINAR

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APPELLATE TERM, SECOND DEPARTMENT

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The Tenancy

JCF Assoc., LLC v Sign Up USA, Inc. (59 Misc 3d 135[A], 2018 NY Slip Op 50501[U] [App Term, 2d, 11th &13th Jud Dists]) (an agreement to allow a party access to an advertising billboard located on a lot in return for a monthly fee was a license, not a lease, even though the agreement referred to the parties as "lessor" and "lessee" and the fee as "rent", as the manifest intention was not the transfer of absolute control and possession but a revocable privilege to do one or more acts upon the land; thus, a holdover proceeding, which requires proof of a landlord-tenant relationship, would not lie); **Estate of Williams v Global Sq., Inc.** (58 Misc 3d 159[A], 2018 NY Slip Op 50254[U] [App Term, 2d, 11th & 13th Jud Dists]) (an occupant in occupancy pursuant to a lease from one of the deed owners of the premises was a tenant, not a licensee, even if, as the petitioner claimed, the lease was invalid, as the occupant had been granted exclusive possession); see **Union Sq. Park Community Coalition, Inc. v New York City Dept. of Parks & Recreation** (22 NY3d 648 [2014]) (an agreement between the Parks Department and a private entity allowing the entity to operate a seasonal restaurant in a pavilion in Union Square Park for 15 years was a license; a lease grants an exclusive right to use and occupy the land, while a license is a revocable privilege to do certain acts upon the land; a broad termination clause allowing the grantor to cancel the agreement whenever it decided to in good faith indicated a license; moreover, the entity's use was only seasonal and not exclusive, it was required to make outdoor seating available to the general public and to open the pavilion for community events, and the Parks Department retained control over the daily operations of the restaurant, including the hours of operation, the staffing, work schedules and menu prices); **C Broadway LLC v Alegre** (2019 NY Slip Op 68380[U] [App Term, 2d, 11th & 13th Jud Dists]) (the spouse of the former owner, who had been in exclusive occupancy of the house since 2004, when her husband abandoned the family, was not subject to removal in a licensee summary proceeding); **Fizzinoglia v Capozzoli** (58 Misc 3d 149[A], 2018 NY Slip Op 50081[U] [App Term, 9th & 10th Jud Dists]) (former owners who remained in exclusive possession after they had asked their cousin to purchase the property and agreed that they would pay the mortgage, taxes, insurance and other expenses were tenants and could not be evicted in a licensee proceeding); citing **Carbonella v Carbonella** (52 Misc 3d 141[A], 2016 NY Slip 51176[U] [App Term, 2d, 11th & 13th Jud Dists]) (in a licensee proceeding by a petitioner to remove her son's wife from premises the couple had occupied from the time of their marriage in 2004 and that the occupant had exclusively occupied from 2007, when she had locked out her husband, the occupant, who was in exclusive possession, was a tenant, not a licensee, irrespective of whether rent had been paid); **Hok Kwan Chu v Lee** (39 Misc 3d 147[A], 2013 NY Slip Op 50859[U] [App Term, 2d, 11th & 13th Jud Dists]) (family members of the owner who entered into exclusive possession in 1983 were, at least, tenants at will or at sufferance, not licensees, where the petitioner failed to establish that they were not in exclusive possession); **Rodriguez v Greco** (31 Misc 3d 136[A], 2011 NY Slip Op 50696[U] [App Term, 9th & 10th Jud Dists]) (a spouse given exclusive occupancy was a tenant, not a licensee); see generally **Kerrains v People** (60 NY 221 [1875]) (a

considerable delay before acting to remove a licensee suffices to warrant an inference of consent to a tenancy at will or sufferance).

Laffey v TCG Group LLC (__ Misc 3d ___, 2019 NY Slip Op 29228 [Nassau Dist Ct 2019, S. Fairgrieve, J.]) (a one-third owner of an LLC had no exclusive right to occupy the LLC property he had been occupying as an employee of the LLC; since the LLC waited over a year [when no stay was in effect] after terminating his employment before locking him out, the employee became a tenant at will, was entitled to a 30-day notice, and would be restored to possession).

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").

71 W. 68th St., LLC v Roach (57 Misc 3d 144[A], 2017 NY Slip Op 51433[U] [App Term, 1st Dept]) (a nonpayment petition seeking arrears which accrued prior to the date the successor to the deceased tenant became a party to a lease was properly dismissed, as a nonpayment can only be maintained to collect rent owed pursuant to an agreement between the parties, notwithstanding that the deceased tenant's expired lease provided that it was binding on the tenant's successors); **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); **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 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").

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, 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).

Inwood Ventura II LLC v Jackson (63 Misc 3d 1223[A], 2019 NY Slip Op 50660[U] [Civ Ct, Bronx County, S. Kraus, J.]) (awards rent due prior to the expiration of the lease but declines to make an award for the period after the expiration, as a nonpayment proceeding must be predicated on an agreement to pay rent).

Furnished Dwellings LLC v Households Headed by Women, Inc. (62 Misc 3d 864 [Civ Ct, Kings County 2018, G. Marton, J.]) (as there was no agreement to pay rent after the expiration of the lease, and the lease could not, under Samson Mgt., be deemed renewed, the landlord could not recover rent for that period in a nonpayment proceeding, even though use and occupancy might be due for the post-lease period); **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); 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 **NYSANDY12 CBP7 LLC v Negron** (__ Misc 3d ___[A], 2019 NY Slip Op 51452[U] [Civ Ct, Bronx County, D. Lutwak, J.]) (notwithstanding that the tenant's last renewal lease expired on July 31, 2017 and the landlord failed to offer a renewal lease thereafter, the landlord could maintain a nonpayment proceeding, as a landlord-tenant relationship continued to exist on a month-to-month basis [citing McBain] [here, the tenant continued to pay rent after the expiration of the lease]); **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").

Dexter 345, Inc. v Hanlon (59 Misc 3d 148[A], 2018 NY Slip Op 51292[U] [App Term, 1st Dept]) (the SRO tenant's brother who had lived openly in the unit since 2010 qualified as a permanent tenant, as he had continuously resided in the building for more than six months; however, the trial court should not have left unresolved the landlord's nonprimary-residence claim against the tenant), modg (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); **Aimco 240 W. 73rd St., LLC v Koren** (59 Misc 3d 127[A], 2018 NY Slip Op 50384[U] [App Term, 1st Dept]); **PR 307 W. 93, LLC v Peralta** (59 Misc 3d 141[A], 2018 NY Slip Op 50633[U] [App Term, 1st Dept]) (where the evidence established that the occupant had resided in the SRO unit for six years and that she had been placed into possession by the building superintendent, she qualified as a permanent tenant even in the absence of a landlord-tenant relationship, as the only requirement is continuous residency as a principal residence for at least six months); **212 E. 12 Realty, LLC v McNally** (59 Misc 3d 127[A], 2018 NY Slip Op 50383[U] [App Term, 1st Dept]); **Einhorn v McCloud** (57 Misc 3d 139[A], 2017 NY Slip Op 51323[U] [App Term, 1st Dept]) (the failure of the occupant's attorney to raise the permanent-tenant claim in the answer did not preclude the appellate court from reviewing the issue since it involves only a legal argument appearing on the face of the record); **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); **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).

PB 165 William St. Holdings LLC v Sero-Boim (62 Misc 3d 144[A], 2019 NY Slip Op 50132[U] [App Term, 1st Dept]) (where, over a seven-year period, the landlord accepted rent from the undertenants, and the undertenants claimed that they had made improvements with the landlord's consent, for which they had received a rent credit, and had corresponded directly with the landlord about rent and repair issues, there was at least a triable issue as to whether the landlord had waived its right to object to the undertenants' continued occupancy); citing **Park Holding Co. v Power** (161 AD2d 143 [1st Dept 1990]) (an issue of fact was presented as to whether the landlord's acceptance of rent from the tenant's roommate over a four-year period without any effort to terminate the tenancy waived the landlord's right to object to the roommate's continued occupancy after the tenant's surrender); see also **80 Delancey, LLC v Gee Hong Lee** (25 Misc 3d 131[A], 2009 NY Slip Op 52141[U] [App Term, 1st Dept]); **Johnny v Tolbert** (8 Misc 3d 130[A], 2005 NY Slip Op 51043[U] [App Term, 2d & 11th Jud Dists]) (the landlord affirmatively recognized the occupant as a tenant).

145 E. 16th St. LLC v Nanda (61 Misc 3d 128[A], 2018 NY Slip Op 51364[U] [App Term, 1st Dept]) (the tenant's motion to dismiss based on a waiver defense predicated on the landlord's billing, acceptance and retention of two rent payments after the termination of the tenancy should not have been granted before trial, as a waiver is not lightly presumed and the landlord claimed the acceptance was inadvertent, citing Georgetown); **Greater Centennial Homes Hous. Dev. Corp. v Nicholas** (63 Misc 3d 1212[A], 2019 NY Slip Op 50507[U] [Mount Vernon City Ct, A. Seiden, J.]) (while an acceptance of rent, standing alone, will not waive a termination notice (citing Ledet and Robson), the landlord vitiated its termination notice by accepting rent after the termination date and conducting the tenant's HUD recertification after communicating to the tenant that his recertifying would go a long way toward resolving the issues raised in the termination notice); **Jankus v Palmer** (63 Misc 3d 1204[A], 2019 NY Slip Op 50374[U] [Dist Ct, Nassau County, S. Fairgrieve, J.]) (the landlord's recertification and acceptance of Section 8 payments after the service of a notice to terminate the tenancy renewed the lease for another year, given the renewal provision in the lease, citing Ochs); **Rensselaer Hous. Auth. v Beverly** (59 Misc 3d 534 (Rensselaer City Ct 2018,

T. Marcelle, J.]) (the landlord's acceptance of December rent after the December 15th termination of the lease but before the commencement of the holdover proceeding gave the tenant the right to possess the apartment through the end of December and vitiated the notice of termination but did not waive the breach, as the person who accepted the rent was not authorized to waive contractual rights); distinguishing **Scarborough Manor Owners Corp. v Robson** (57 Misc 3d 24 [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 a 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; the mere failure to return the 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); 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 **Omansky v 160 Chambers St. Owners, Inc.** (155 AD3d 460 [1st Dept 2017] [the co-op's acceptance of rent after the expiration of the lease did not constitute a waiver of the co-op's right to object to the commercial tenant's failure to exercise the renewal option but merely created a month-to-month tenancy); **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).

Matter of Jian Min Lei v New York City Dept. of Hous. Preserv. & Dev. (158 AD3d 514 [1st Dept 2018]) (the occupant's inclusion on his father's income affidavits was not conclusive and HPD could look at other factors, such as the fact that the occupant listed a different address on his tax return; under Schorr, the housing company's acceptance of the occupant's rent checks for several years and its execution of a transfer agreement did not vest the occupant with tenancy rights); **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 (153 AD3d 1143 [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).

1242 Superior Apts., LLC v Rodriguez (61 Misc 3d 1221[A], 2018 NY Slip Op 51663[U] [Civ Ct, Bronx County, K. Bacdayan, J.]) (finding that where the tenants executed and returned a renewal lease offered pursuant to a stipulation, the lease was binding even if the landlord had sent it mistakenly, citing East 56th Plaza); see **SJS Thompson, LLC v Singer** (60 Misc 3d 132[A], 2018 NY Slip Op 51013[U] [App Term, 1st Dept]) (where the landlord's renewal offer was timely accepted by the tenant, the lease was enforceable notwithstanding the landlord's prior service of a nonrenewal notice and even if the landlord did not intend the proposed lease to constitute a binding offer, because the statute requires that the offer be binding, citing East 56th Plaza); **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).

31-36 32nd St. Astoria LLC v Nickell (64 Misc 3d 137[A], 2019 NY Slip Op 51164[U] [App Term, 2d, 11th & 13th Jud Dists]) (where a tenant relied on an attorney's fees provision in a 2012 $1,200-per-month lease but disavowed its enforceability, claiming that his rent was only $400 per-month, as he was the super, the parties' agreement was not reflected by the 2012 lease but by the parties' course of conduct, and the attorney's fees' claim failed); 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).

Johnson v Marcano (59 Misc 3d 134[A], 2018 NY Slip Op 50496[U] [App Term, 2d, 11th & 13th Jud Dists]) (while, generally, a surrender of keys evidences an intent to offer a surrender, the failure to surrender the keys is not conclusive that the premises has not been surrendered; where the tenant had informed the landlord of his intent to vacate and attempted to return the keys but the landlord was not at home, the tenant's removal constituted a surrender).

Predicate Notices

Fitzpatrick Hous. Dev. Fund Corp. v Gonzalez (61 Misc 3d 739 [Civ Ct, Bronx County 2018, S. Weissman, J.]) (as predicate notices are not amendable, the court dismisses a petition where the rent demand and the petition were in the name of a former owner who had not owned the premises for five years; where a proceeding is brought by an improper party, the defect is not curable); citing **William Manor Assoc. v Gregory** (NYLJ, May 4, 1988, p 13, col 2 [App Term, 9th & 10th Jud Dists]); see **Bray Realty, LLC v Pilaj** (59 Misc 3d 130[A], 2018 NY Slip Op 50426[U] [App Term, 2d, 11th & 13th Jud Dists]) (predicate notices were defective where the notices referenced an original lease dated November 19, 2012 and the landlord proceeded on the basis of a September 15, 1997 lease, as the landlord was bound by the notices served, which were not subject to amendment); cf. **East Vil. RE Holdings LLC v McGowan** (57 Misc 3d 155[A], 2017 NY Slip Op 51623[U] [App Term, 1st Dept]) (a notice to cure was reasonable in view of the attendant circumstances where it alleged that the tenant was living at a different specified address and had unlawfully sublet to a named individual in

violation of Real Property Law § 226-b and RSC §§ 2524.3 [a] and [h]); **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).

Hecsomar Realty Corp. v Camerena (62 Misc 3d 143[A], 2019 NY Slip Op 50115[U] [App Term, 1st Dept]) (a licensee proceeding could not be maintained where the proof showed that the occupant did not reside in the premises until several months after the tenant had died, and the landlord made no claim based on the occupant's status as a squatter); citing **Goffe v Goffe** (14 Misc 3d 130[A], 2007 NY Slip Op 50048[U] [App Term, 9th & 10th Jud Dists]) (a squatter proceeding could not be maintained where the occupant entered with permission) and **Singh v Ramierez** (20 Misc 3d 142[A], 2008 NY Slip Op 51680[U] [App Term, 2d & 11th Jud Dists]) (a landlord is bound by the notice served, which cannot be amended); see **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 [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** (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).

156 Nassau Ave. HDFC v Tchernitsky (62 Misc 3d 140[A], 2019 NY Slip Op 50059[U] [App Term, 2d, 11th & 13th Jud Dists]) (while the improper service of a termination notice may be a defense to a holdover proceeding, it does not implicate subject matter jurisdiction); **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 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); see **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); **West Haverstraw Preserv., LP v Diaz** (58 Misc 3d 150[A], 2018 NY Slip Op 50085[U] [App Term, 9th & 10th Jud Dists]) (a tenant who appears generally and fails to raise a challenge to the sufficiency of service of a predicate notice in the answer or in a pretrial motion to dismiss waives the objection); **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).

B & K 236 LLC v DiPremzio (62 Misc 3d 1204[A], 2018 NY Slip Op 51952[U] [Civ Ct, Bronx County, B. Black, J.]) (a combined notice to cure and notice to terminate is defective, as a notice to terminate cannot predate the expiration of the cure period); citing **396 Broadway Realty v Kyung Sik Kim** (18 Misc 3d 1119[A], 2008 NY Slip Op 50139[U] [Civ Ct, NY County, M. Mendez, J.]).

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); **2704 University Ave. Realty Corp. v Thompson** (63 Misc 3d 1222[A], 2019 NY Slip Op 50652[U] [Civ Ct, Bronx County, S. Ibrahim, J.]) (since, in an illegal-sublet proceeding, a landlord must prove that a notice to cure was served and that the tenant failed to cure [citing **Hudson Assoc. v Benoit**, 226 AD2d 196 (1st Dept 1996)], a landlord's bald statement in the notice to terminate that the

tenant had "failed to comply" did not provide the tenant with sufficient facts); **LS Realty (II) Ltd. Partnership v Truick** (85567/18 [Civ Ct, Kings County, M. Finkelstein J., Apr. 9, 2019]) (a nuisance notice of termination that did not set forth any specific dates and times of nuisance conduct occurring after the service of the notice to cure was defective); **Webster Bldg. A LLC v Mitchner** (72597/17 [Civ Ct, Bronx County July 5, 2018, H. Baum, J.]) (a notice of termination must state additional affirmative acts occurring after the service of the notice to cure); **BEC Continuum Owners v Taylor** (71844/17 [Civ Ct, Kings County May 2, 2018, M. Finkelstein, J.]) (a notice of termination which failed to allege facts to support the claim that the tenant had failed to cure was defective); **1025-45 Assoc. Inc. v Tate** (L&T 54801/17 [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 knew 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 [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 [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 [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 [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); but cf. **1123 Realty LLC v Treanor** (62 Misc 3d 326 [Civ Ct, Kings County 2018, Z. Wang, J.]) (a termination notice which did not cite any specific incidents occurring after the notice to cure was not unreasonable with respect to allegations that the tenant had failed to remove a dog and had continued to maintain a clutter condition, as these allegations were sufficient to allow the tenant to prepare a defense, but was unreasonable as to an allegation that the tenant had continued to fail to provide access, as it gave no dates and times of when access had been sought; a case-specific approach based on enumerated factors—such as the adequacy of notice

to allow the tenant to prepare a defense and the likelihood that the landlord could have ascertained that a cure was not effectuated—should be followed rather than a bright-line rule); **Village Mgt. Inc. v Silva** (61 Misc 3d 1204[A], 2018 NY Slip Op 51352[U] [Civ Ct, NY County H. Capell, J.]) (a termination notice which merely incorporates the notice to cure is sufficient); citing **East Vil. RE Holdings, LLC v McGowan** (57 Misc 3d 155[A], 2017 NY Slip Op 51623 [App Term, 1st Dept]) (a notice to cure was sufficient where it alleged that the tenant was living at a different address and named the individual to whom the tenant sublet); **Amin Mgt LLC v Martinez** (55 Misc 3d 144[A], 2017 NY Slip Op 50664[U] [App Term, 1st Dept]) (same); **539 W. 156, LLC v Hernandez** (55 Misc 3d 144[A], 2017 NY Slip Op 50663[U] [App Term, 1st Dept]) (same).

159 W. 23rd LLC v Spa Ciel De NY Corp. (63 Misc 3d 1219[A], 2019 NY Slip Op 50592[U] [Civ Ct, NY County, J. Kim J.]) (notwithstanding that the lease provided for service of a default notice prior to the service of a notice of termination, no default notice needed to be served because the breach—a failure to maintain insurance—was incurable, citing Sofizade and Adam's Tower Ltd. Partnership); distinguishing **Grenadier Parking Corp. v Landmark Assoc.** (283 AD2d 379 [1st Dept 2001]) (a proceeding could not be maintained where the landlord failed to serve a notice to cure and notice of termination as required by the lease).

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, 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); **W 54-7 LLC v Schick** (14 Misc 3d 49 [App Term, 1st Dept 2006]) (the tenant's failure to raise the issue of short service of the notice to cure in a pretrial motion or specifically in the answer did not relieve the landlord of its burden to prove compliance with the statutory notice requirements); distinguishing **Priel v Priel** (NYLJ, Mar. 5, 1993, p 25, col 3 [App Term, 1st Dept]) (where the tenant did not raise the issue of the defective predicate notice until after the case was fully tried and a possessory judgment was issued, the issue was waived); 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, and a mere denial in the answer of the petition's allegation is sufficient); 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 petition to recover 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 a prima facie case).

Bank of N.Y. Mellon v Salahuddin (60 Misc 3d 999 [Poughkeepsie City Ct 2018, F. Mora, J.]) (under QPII-143-45 and Port Royal Owners Corp., a notice to quit signed by an attorney in fact for the bank, accompanied by a power of attorney, was not invalid, as the Siegel holding that noone but the person authorized by the lease can sign notices was inapplicable where there was no lease; under Plotch, exhibition of the referee's deed by conspicuous-place service was sufficient); see **Port Royal Owners Corp. v Navy Beach Rest. Group, LLC** (57 Misc 3d 13 [App Term, 9th & 10th Jud Dists 2017]) (a notice of termination sent by an attorney who was not identified in the lease was not defective, as, unlike in Siegel, the lease did not have multiple provisions specifying "the landlord or its agent"; 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 signed by an agent of the landlord was not defective notwithstanding a lease provision requiring the "landlord" to give a written five-day notice of default for failure to pay rent on time; the 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); see also **Deutsche Bank Natl. Trust Co. v Cordova** (62 Misc 3d 1219[A], 2019 NY Slip Op 50178[U] [Nassau Dist Ct, S. Fairgrieve, J.]) (where a 10-day notice to quit issued by the petitioner's corporate agent was served together with the agent's limited power of attorney, the notice was not invalid under Siegel).

Matter of 322 W. 47th St. HDFC v Loo (153 AD3d 1143 [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]) (the tenant's failure to purchase her unit when the building was converted to an HDFC constituted good cause to evict under Grimmet); followed in **Cool NYC Apts. LLC v Witter** (61 Misc 3d 133[A], 2018 NY Slip Op 51485[U] [App Term, 1st Dept]) (a defense of noncompliance with the rent control notice requirements was waived by the undertenant's failure to raise it in her answer or during the trial); and **Jacoby v Cabrera** (60 Misc 3d 136[A], 2018 NY Slip Op 51079[U] [App Term, 9th & 10th Jud Dists]) (same); see **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); **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).

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); 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).

McDonnell v Mitchell (59 Misc 3d 133[A], 2018 NY Slip Op 50484[U] [App Term, 9th & 10th Jud Dists]) (reduces a nonpayment award of $10,695 to $1,213 as a Section 8 tenant is not, absent a new agreement, liable for the Section 8 portion of the rent; however, dismissal was not warranted based on a defective rent demand, as there was no indication that the pro se demand was made other than in good faith and a substantive dispute over the amount of the arrears does not implicate the sufficiency of the rent demand); citing **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); see **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); cf. **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); **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 it 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 and the Section 8 shares 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).

Pantigo Professional Ctr., LLC v Stankevich (60 Misc 3d 133[A], 2018 NY Slip Op 51039[U] [App Term, 9th & 10th Jud Dists]) (a proper rent demand is a statutory prerequisite to a nonpayment proceeding and an element of the landlord's prima facie case; where a demand sought a sum for common charges and utilities but failed to

specify which utilities were being sought, it was error for the court to conform the pleadings to the proof at trial that the amounts sought were for water charges and snow plowing, as the demand did not provide adequate information); **125 Court St., LLC v Sher** (58 Misc 3d 150[A], 2018 NY Slip Op 50092[U] [App Term, 2d, 11th & 13th Jud Dists]) (a proper rent demand is an element of the landlord's case in a nonpayment proceeding, and must set forth the approximate good faith amount of rent owed; where the rent was frozen at $3,540 per month and the demand sought $3,700 for four months and $4,475.65 for 13 months, the rent demand was defective); **146-42 Lakewood Ave., LLC v Bailey** (57 Misc 3d 1215[A], 2017 NY Slip Op 51475[U] [Civ Ct, Queens County, C. Nembhard, J.]) (a rent notice that demanded the entire contract rent of $1,956 for March and the tenant's share for four other months was defective where the tenant received a Living in Communities [LINC] subsidy, as the landlord was required to sign a Landlord Statement of Understanding in which it acknowledged that the tenant was responsible only for the tenant's share; the fact that the petition only demanded the tenant's share for March does not change the result).

EOM 106-15 217th Corp. v Severine (62 Misc 3d 141[A], 2019 NY Slip Op 50068[U] [App Term, 2d, 11th & 13th Jud Dists]) (where the landlord had received earmarked checks for May and June 2016 but did not apply them to those months, a rent notice demanding rent for May through September 2016 was defective and the tenant was prejudiced thereby), affg (76840/16 [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); **3463 Third Ave. Realty LLC v Vasquez** (59 Misc 3d 1224[A], 2018 NY Slip Op 50674[U] [Civ Ct, Bronx County, K. Bacdayan, J.]) (a rent demand was defective where the demand alleged arrears in monthly rent for July through November 2017 and failed to set forth that the landlord had received semi-monthly DSS checks during those months, even though the landlord's rent ledger had properly credited the DSS checks to the months in which they had been received; a direction as to how payment is to be applied may be evidenced by circumstances; DSS would likely not process a one-shot deal where the rent demand seeks rent it has already paid, citing Greenbrier and Earle); **Birch Leasing L.P. v Lee** (56879/17 [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); 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]) (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).

Holland v Donahue (63 Misc 3d 333 [Suffolk Dist Ct 2019, C. Hackeling, J.]) (an unanswered text and voicemail do not constitute a sufficient rent demand, as there is no proof that the tenant received the text or voicemail, and a personal demand must be such as to allow the tenant to make inquiry about the default).

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).

576 E. 187th St. Bronx, LLC v Hizam Deli Grocery Corp. (59 Misc 3d 1215[A], 2018 NY Slip Op 50554[U] [Civ Ct, Bronx County, S. Kraus, J.]) (an amended rent demand is not required as a predicate to amend a nonpayment petition at trial, analyzing First Department cases); see **36 Main Realty Corp. v Wang Law Office, PLLC** (49 Misc 3d 51 [App Term, 2d, 11th & 13th Jud Dists 2015]) (in a commercial nonpayment proceeding to recover January 2013 rent, the Civil Court properly allowed the landlord to amend the petition at trial to include the May 2013 rent; while a rent demand is a condition precedent to the commencement of a nonpayment proceeding under RPAPL 711 [2], the power to fix the rent due flows from RPAPL 741 [5] and RPAPL 747 [4]; indeed, the legislature has required the payment of post-commencement rent without a new demand [RPAPL 745 (2)], and it is the established practice to allow the amendment absent prejudice); **Bldg Mgt. Co., Inc. v Benmen** (36 Misc 3d 1225[A], 2012 NY Slip Op 51476[U] [Civ Ct, NY County, S. Kraus, J.]).

Jurisdiction and Service

Furnished Dwellings LLC v Households Headed by Women, Inc. (62 Misc 3d 864 [Civ Ct, Kings County 2018, G. Marton, J.]) (the assertion of an "unrelated" claim for reciprocal attorney's fees waived the personal jurisdiction defense, as it would not have been barred by collateral estoppel if not asserted); see **Caracaus v Conifer Cent. Sq. Assoc.** (158 AD3d 63 [4th Dept 2017]) (a tenant is not barred by the splitting doctrine from asserting a claim for attorney's fees in a separate action; O'Connell improperly made the claim a complusory counterclaim); disagreeing with **O'Connell v 1205 First Ave. Assoc., LLC** (28 AD3d 233 [1st Dept 2006]) (under the splitting doctrine, a tenant must seek attorney's fees in the action in which they were incurred); see also **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]) (implying O'Connell is wrong because New York does not have a mandatory-counterclaim rule); **USI Sys. AG v Gliklad** (2018 WL 3625074 [Sup Ct, NY County, G. Lebovits, J.]) (the assertion of an unrelated counterclaim which would not be barred by collateral estoppel if left unasserted, waives personal jurisdiction); citing **Halberstam v Kramer** (39 Misc 3d 126[A], 2013 NY Slip Op 50408[U] [App Term, 2d, 11th &13th Jud Dists]) (the tenant's challenge to the service of the petition and notice of petition was waived by the tenant's interposition of an unrelated counterclaim for damages for emotional distress, and the tenant's subsequent withdrawal of this counterclaim did not revive the objection to service);

Friedman v Eisner (23 Misc 3d 136[A], 2009 NY Slip Op 50817[U] [App Term, 2d, 11th & 13th Jud Dists]) (the assertion of an unrelated counterclaim for slander and libel waived the objection to personal service); citing **Textile Tech. Exch. v Davis** (81 NY2d 56 [1993]) (an unrelated counterclaim is one which would not be barred under principles of collateral estoppel); **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. **Kuper v Bravo** (61 Misc 3d 274 [Civ Ct, Queens County 2018, J. Lansden, J.]) (in an owner's use holdover where the petition also sought use and occupancy, the tenant's counterclaims for an injunction to force repairs and to correct Housing Code violations, damages for breach of the warranty of habitability and for wrongful eviction were "related" within the meaning of Textile Tech. because they were related to the tenant's defenses and might be precluded if not raised).

255 Huguenot St. Corp. v Rwechungura (61 Misc 3d 131[A], 2018 NY Slip Op 51446[U] [App Term, 9th & 10th Jud Dists]) (where the landlord knew that the tenant was in Africa and had been emailing her there, the landlord's resort to conspicuous-place service at the premises without emailing a copy to the tenant was not a reasonable application); **Joseph v Lyu** (58 Misc 3d 159[A], 2018 NY Slip Op 50250[U] [App Term, 2d, 11th & 13th Jud Dists]) (where the landlord was aware that the tenant had never opened its business at the premises, the landlord's two attempts at service at the premises did not constitute a reasonable application); citing **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); **2293 Sedgwick Ave. Realty Corp. v Burgess** (71223/16 [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); **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).

Genuine Realty Corp. v Mitchell (61 Misc 3d 132[A], 2018 NY Slip Op 51457[U] [App Term, 1st Dept]) (the tenant's argument that the landlord was required to serve her in Missouri, where she was caring for her ailing mother, lacked merit, since the tenant had failed to provide the landlord with written information that she resided elsewhere); **305 MK Secure Holdings, LLC v Jiang Chen** (59 Misc 3d 144[A], 2018 NY Slip Op 50719[U] [App Term, 1st Dept]) (where an allegedly out-of-the-country tenant never provided the landlord with written information of an alternate address, the landlord's two attempts at service constituted a reasonable application); cf. **NYCHA Pub. Hous. Preserv. I LLC v Anderson** (57 Misc 3d 156[A], 2017 NY Slip Op 51645[U] [App Term, 1st Dept]) (in a commercial nonpayment proceeding, evidence that the landlord had written information of the tenant's "residence address" [RPAPL 735 (1) (a)] was sufficient to rebut the presumption of proper mailing where the substituted-service mailing was to the tenant at the premises); **Horatio Arms, Inc. v Celbert** (41 Misc 3d 11 [App Term, 1st Dept 2013]) (where the landlord had written information that the co-op tenant actually resided in Paris, the landlord's failure to mail a copy of the papers there deprived the court of personal jurisdiction); **F & V Realty Corp. v 1014 Flatbush Ave., Inc.** (38 Misc 3d 139[A], 2013 NY Slip Op 50193[U] [App Term, 2d, 11th & 13th Jud Dists]) (where the landlord had written information as to the tenant's corporate address and failed to mail the papers there, service was defective); citing **Tradito v 815 Yonkers Ave. Series TDS Leasing, LLC** (30 Misc 3d 3 [App Term, 9th & 10th Jud Dists 2010]) (conspicuous-place service, where the respondents had not yet opened for business at the premises, was defective where the landlord had written information regarding the respondent's business address, since RPAPL 735 [1] requires that the papers be mailed to that address if the landlord has written notice of it).

GNPZ 17E17 LLC v Sims (51730/18 [Civ Ct, Kings County May 2, 2019, M. Sikowitz, J.]) (in an illegal-sublet holdover, the landlord's naming of the tenant's daughter as a "Jane Doe" required the dismissal of the petition where the landlord knew her identity and had stipulated to make her a party in a prior proceeding); see **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 [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).

Mia Terra Realty Corp. v Sloan (57 Misc 3d 141[A], 2017 NY Slip Op 51360[U] [App Term, 1st Dept]) (an undertenant sued as a "John Doe" who sustained no prejudice as the result of the designation was fairly apprised that he was the intended party and waived the objection by defending the proceeding on the merits; in any event, as the undertenant had no birth certificate or Social Security card and paid no taxes, the landlord was unaware of his identity); **2264 G LLC v Issac Deli Grocery Corp.** (57 Misc 3d 1209[A]], 2017 NY Slip Op 51344[U] [Civ Ct, Bronx County, A. Montano, J.]) (where a tenant objects to jurisdiction in the answer, the tenant's participation in the defense of the proceeding does not waive the objection but puts off resolution of the objection until trial; where the landlord knew the undertenant's name, its use of a "John Doe" pursuant to CPLR 1024 required dismissal as to the undertenant]); cf. **CPLR 320 (b)** (an appearance equals personal service) see also **Aurora Loan Servs., LLC v Colleluori** (170 AD3d 1097 [2d Dept 2019]) (waiver by appearance); **Deutsche Bank Natl. Trust Co. v Vu** (167 AD3d 844 [2d Dept 2018]) (waiver by filing of notice of appearance); **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. also **DFS of Springfield, Inc. v DiMartino** (40 Misc 3d 70 [App Term, 2d, 11th & 13th Jud Dists 2013]) (upon a tenant's second adjournment request, 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).

Efaplomatidis v Aires Mexicanos Rest. Corp. (58 Misc 3d 153[A], 2018 NY Slip Op 50155[U] [App Term, 2d, 11th & 13th Jud Dists]) (a claim that the court lacked subject matter jurisdiction because the named tenant had abandoned the premises prior to the commencement of the proceeding lacked merit, as a court's power to entertain a particular kind of proceeding is conferred by constitution or statute [citing Saccheri]; with regard to in personam and in rem jurisdiction, the undertenants waived these claims by stipulating to waive all defenses); citing **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. **Lepore v 65 Whipple LLC** (61 Misc 3d 1202[A], 2018 NY Slip Op 51319[U] [Civ Ct, Kings County, G. Marton, J.]) (a lockout proceeding would not lie against a new owner because it was not the party that had

wrongfully deprived the tenant of possession); cf. also **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]) (assumes, for purposes of the appeal, that a dispute as to whether a lease provision was a conditional limitation was sufficiently "jurisdictional" as to be raisable by post-judgment motion).

Merrbill Holdings, LLC v Toscano (59 Misc 3d 129[A], 2018 NY Slip Op 50410[U] [App Term, 9th & 10th Jud Dists]) (in light of one of the tenants' undisputed averment that she had vacated the premises with the landlord's permission one month before the commencement of the nonpayment proceeding and that she had given the landlord written notice of her new address and place of employment, so much of the proceeding as was against that tenant did not lie, because a summary proceeding cannot be maintained against a tenant who is neither in possession nor claiming possession at the time the proceeding is commenced; in any event, the landlord's three attempts to serve the tenant at the premises did not constitute due diligence, since the landlord made no attempt to serve her at her new residence or place of employment; thus, the entry of a default money judgment against her was improper); see also **O'Connell v Singletary** (31 Misc 3d 126[A], 2011 NY Slip Op 50439[U] (where one tenant had surrendered his interest); see **Borg v Feeley** (56 Misc 3d 128[A], 2017 NY Slip Op 50834[U] [App Term, 1st Dept]) (in order to obtain a monetary recovery against a tenant who does not appear in a summary proceeding, the landlord must establish that process was served personally or after due diligence before resorting to conspicuous–place service; two attempts at service were insufficient where the affidavit of service did not describe any efforts to ascertain the tenant's whereabouts, work schedule or business address); **51 Middle Rd. LLC v Myers** (57 Misc 3d 750 [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").

Emigrant Mtg. Co., Inc. v Westervelt (105 AD3d 896 [2d Dept 2013]) (when a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015 [a] [4], the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur under CPLR 5015 [a] [1]); **Fountain Terrace Owners, Inc. v Balic** (59 Misc 3d 136[A], 2018 NY Slip Op 50519[U] [App Term, 2d, 11th & 13th Jud Dists]) (a tenant asserting a lack of personal jurisdiction need not establish an excusable default and a meritorious defense; where the affidavit of service alleged conspicuous-place service at apartment 4 and the occupant lived in "L4", a traverse would be ordered); cf. **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. also CPLR 3215 (b) (a default "judgment shall not exceed in amount or differ in type from that demanded in the complaint").

Parties and Standing

Minicozzi v Heffernan (59 Misc 3d 133[A], 2018 NY Slip Op 50483[U] [App Term, 9th & 10th Jud Dists]) (where a mortgagee has not taken possession or obtained the appointment of a receiver, the rents generated by the mortgaged property belong to the owner until he is divested of ownership by virtue of a foreclosure, and the owner may maintain a nonpayment proceeding to recover these rents); **3648 White Plains LLC v Mensah** (900509/17 [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).

Smith v Jenkins (59 Misc 3d 1226[A], 2018 NY Slip Op 50712[U] [Mt. Vernon City Ct, A. Seiden, J.]) (as a lessor has standing to maintain a summary proceedings, the tenant was estopped from showing that the lessor's sister was the owner); citing **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 [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 [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 [Civ Ct, Queens County Mar. 23, 2017, C. Nembhard, J.]) (as a title defense may 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.]) (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.]).

Pandey v Pierce (158 AD3d 460 [1st Dept 2018]) (where a lease was executed only by the husband, who had previously transferred his interest to his wife, now the sole owner, and there was no proof that the tenants were aware of the wife, as the husband had held himself out as the owner and had collected rents in his own name, there were triable issues as to whether the husband could enforce the lease as agent for his wife, and the wife could not enforce the lease, as she was not a signatory to it); **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").

2701 Grand Assoc. LLC v Encarnacion (64 Misc 3d 1229[A], 2019 NY Slip Op 51343[U] [Civ Ct, Bronx County, D. Lutwak, J.]) (declining to allow the landlord to amend the caption to substitute two named occupants, who had moved in after the commencement of the proceeding, for "John Doe", because the landlord had not demonstrated that it had conducted the required diligent inquiry into their identities, but permitted the landlord to join them, as they were "proper parties", so that the warrant would be effective against them); cf. **Parkash 2125 LLC v Galan** (61 Misc 3d 502 [Civ Ct, Bronx County 2018, M. Weisberg, J.]) (an undertenant who had paid rent to the tenant's son was, under Cruz, deprived of due process by being evicted without having been joined in the nonpayment proceeding, but would not be restored based on the futility doctrine, as he lacked succession rights).

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).

304 PAS Owner LLC v Life Extension Realty LLC (60 Misc 3d 132[A], 2018 NY Slip Op 51020[U] [App Term, 1st Dept]) (there is no requirement that an undertenant be served with a 30-day notice of termination); **RSP UAP-3 Prop. LLC v Schulz** (2017 NY Slip Op 32859[U] [Civ Ct, NY County, J. Stoller, J.]) (in a nonprimary-residence proceeding, the occupants claiming succession rights were not entitled to be served with the Golub notice [citing Watts]); see **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); **see 170 W. 85th St. Tenants Assn. v Cruz** (173 AD2d 338 [1st Dept 1991]); **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. (57 Misc 3d 138[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).

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 an 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**.

Carroll St. Props. v Velez (59 Misc 3d 134[A], 2018 NY Slip Op 50493[U] (App Term, 2d, 11th & 13th Jud Dists]) (a holdover proceeding purportedly commenced by a non-attorney managing agent on behalf of the landlord should have been dismissed, as a non-attorney may not appear for a person other than himself); **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).

Estate of Williams v Global Sq., Inc. (58 Misc 3d 159[A], 2018 NY Slip Op 50254[U] (App Term, 2d, 11th & 13th Jud Dists]) (although the petition, brought in the name of an estate—which is not a legal entity—was defective, the defect was not jurisdictional; since the petition was verified by a co-executor of the estate, the court deemed the co-executor to be the petitioner); **Visutton Assoc. v Fastman** (44 Misc 3d 56 [App Term, 2d, 11th & 13th Jud Dists 2014]) (where the rent-stabilized tenancy was terminated based on a claim that the deceased tenant's estate had permitted a distributee to occupy the apartment without permission, the landlord's naming only the distributee as respondent required dismissal, as a lease is not terminated by the death of the tenant and, absent a surrender, the landlord could not proceed directly against the distributee but was required to sue the estate by suing an executor or administrator thereof); see also **Salanitro Family Trust v Gorina** (49 Misc 3d 153[A], 2015 NY Slip OP 51785[U] [App Term, 2d, 11th & 13th Jud Dists]) (where the trustee did not sign the trust agreement or appear in the proceeding, a proceeding by the trust would be dismissed); **Ronald Henry Land Trust v Sasmor** (44 Misc 3d 51 [App Term, 2d, 11th & 13th Jud Dists 2014]) (a summary proceeding brought by an express trust would be dismissed for lack of capacity to sue; EPTL 7-2.1 [a] vests title to an express trust in the trustees, and the trustees did everything in their power to avoid disclosing their identities and

appearing in the proceeding); see generally **Gleason v Town of Clifton Park Planning Bd.** (90 AD3d 1205 [3d Dept 2011]) (trustee is the titled owner).

PB 2180 Pitkin Ave., LLC v Tress (__ Misc 3d ___, 2019 NY Slip Op 29264 [App Term, 2d, 11th & 13th Jud Dists 2019]) (the respondent's claim that the Civil Court lacked subject matter jurisdiction over so much of the nonpayment proceeding as was brought against him because he was merely a guarantor and not a tenant was not waived by the respondent's failure to raise it in the Civil Court, as a defect in subject matter jurisdiction is not waiveable and may be raised at any time; since, in a summary proceeding, the court lacks subject matter jurisdiction to adjudicate a claim against a guarantor of the rent, the court should have, on its own motion, dismissed so much of the proceeding as was against the respondent); **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]).

Confe Realty Corp. v Jimenez-Nunez (64 Misc 3d 1224[A], 2019 NY Slip Op 51284[U] (Civ Ct, NY County, D. Ramseur, J.]) (an occupant who established a colorable claim to succession rights would be given a new trial at which she could assert a succession defense on her behalf and on behalf of her child in a nonpayment proceeding, so that she could obtain a lease in her own name and financial assistance to satisfy the arrears); **Boston Props. LLC v Taveras** (60 Misc 3d 398 [Civ Ct, Bronx County 2018, K. Bacdayan, J.]) (a nontraditional domestic partner, mother of the tenant's child, who could not get DSS assistance because she was not the tenant of record, was a proper party to a nonpayment proceeding against the defaulting tenant, and could assert a succession rights claim therein); **CDC E. 105th St. Realty LP v Mitchel** (L&T 57435/16 [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]) (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. **Cambridge Hgts. HDFC v McCormick** (61 Misc 3d 154[A], 2018 NY Slip Op 51813[U] [App Term, 2d, 11th & 13th Jud Dists]) (an undertenant lacked standing to assert that the tenant had a reasonable excuse for defaulting, citing Chelsea 139); 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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Valley E. Props., LLC v Child Care Council of Nassau, Inc. (59 Misc 3d 131[A], 2018 NY Slip Op 50442[U] [App Term, 9th & 10th Jud Dists]) (in a holdover proceeding to recover an office, a fourth-floor storage space, and a basement storage space, demised pursuant to different agreements, the storage spaces were not the proper subjects of the proceeding, which was based on the expiration of the office lease, as separate properties held under different agreements cannot be joined in a single proceeding); **SP Prop. 232 Ct. LLC v Ideal Props. Group, LLC** (2018 NY Slip Op 73417[U] [App Term, 2d, 11th & 13th Jud Dists]) (separate summary proceedings for different spaces cannot be consolidated for all purposes, as a separate summary proceeding must be maintained for each space, citing Magee and Yglesia); **Gavriyelov v Appeldorn** (L&T 91878/16 [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).

Fountain Terrace Owners, Inc. v Balic (59 Misc 3d 136[A], 2018 NY Slip Op 50519[U] [App Term, 2d, 11th & 13th Jud Dists]) (a petition's misdescription of the premises does not deprive the court of subject matter jurisdiction); **5670 58 St. Holding Corp. v ASAP Towing Servs., Inc.** (57 Misc 3d 137[A], 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]); **601 W. Realty, LLC v Mao Chu Zheng** (54 Misc 3d 145[A], 2017 NY Slip Op 50257[U] [App Term, 1st Dept]) (a petition's misstatement of the building's address, 3847 Broadway instead of 3845 Broadway, was not a jurisdictional defect and the petition was amendable, as the obvious typographical error could not have misled or confused the tenant); see also **307 W. 82nd St. Hous. Corp. v Zacharias** (59 Misc 3d 148[A], 2018 NY Slip Op 50785[U] [App Term, 1st Dept); 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).

Jaikarran & Sons, Inc. v Beecham (61 Misc 3d 130[A], 2018 NY Slip Op 51410[U] [App Term, 1st Dept]) (where the number of defects was "extreme and extraordinary," the petition was not amendable, as there must be strict compliance with the statutory requirements that the petition state the respondent's interest and the facts upon which the proceeding is based); cf. **Brookwood Coram, I, LLC v Oliva** (47 Misc 3d 140[A], 2015 NY Slip Op 50607[U] [App Term, 9th & 10th Jud Dists]) (dismissing, after trial, a petition which failed to allege that the tenant received a Section 8 subsidy or explain why his initial lease was not for one year, as the petition failed to state the facts; a petition which contains fundamental misstatements and omissions is subject to dismissal).

Pri Villa Ave. L.P. v Santiago (62 Misc 3d 1206[A], 2019 NY Slip Op 50012[U] [Civ Ct, Bronx County, D. Lutwak, J.]) (the erroneous pleading of an inapplicable law or regulation—the Shelter Plus Care program—differs from the failure to plead an applicable law or regulation and is harmless error, as the inclusion of surplus information does not affect the outcome of the proceeding; similarly, the inclusion of the erroneous information in the predicate notice does not render the notice defective as the surplusage does not affect the respondent's rights or render the notice unreasonable, citing Oxford Towers; the omission to plead that the premises was subject to the LIHTC program did not prejudice the tenant in a nuisance proceeding, as

the "good cause' requirement of that program was superfluous since the apartment was rent stabilized and the respondent pointed to no aspect of the LIHTC regulatory agreement which affected his substantive rights); **OLR ECW, L.P. v Myers** (59 Misc 3d 650 [Civ Ct, Bronx County 2018, D. Lutwak, J.]) (in a licensee proceeding against occupants who remained in a stabilized apartment following the tenant's surrender, the petitioner's failure to allege that, in addition to rent stabilization, the apartment was subject to a regulatory agreement with the City pursuant to the federal "Home Investments Partnerships Program", which limits the maximum rents which could be charged, was not a basis for dismissal, as, unlike in Almonte, the occupants failed to explain how they were prejudiced by the omission or to point to any aspect of the agreement which affected their substantive rights; the petitioner's cross motion to amend would be granted); distinguishing **PCMH Crotona, LP v Taylor** (57 Misc 3d 1212[A], 2017 NY Slip Op 51401[U] [Civ Ct, Bronx County, K. Thermos, J.]) (a petition was defective where it failed to state that the premises was supportive housing and that the occupant had been referred to petitioner because of mental health issues; the defect was prejudicial because the court was not put on notice of the occupant's mental disability and his need for a GAL and the occupant might have defenses arising from the contract); **Diego Beekman Mut. Hous. Assn. Hous. Dev. Fund Corp. v Nieves** (23867/15 [Civ Ct, Bronx County, Mar. 10, 2016, K. Thermos, J.]) (although the landlord's petition pleaded rent stabilization, its failure to plead the particular HUD/HPD low-income subsidy program justified vacatur of a stipulation, as this program was an essential component of the landlord's prima facie case and bestowed the tenants with substantial rights); citing **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 the building as an SRO facility for homeless adults, and the contract designated the amount of rent each tenant would pay and how the petitioner should spend the rents, and required the petitioner to use the City-approved lease and to be responsible for evicting tenants that violated the regulations, the petitioner was required to allege the existence of the contract in the petition because without that allegation, the court and the tenant would be unaware that the City owned the building and operated it as an SRO facility, and since the contract provided the tenant with certain defenses, the court could not properly adjudicate them without the contract); citing **Kabir v Limbert** (47 Misc 3d 147[A], 2015 NY Slip Op 50758[U] [App Term, 2d, 11th & 13th Jud Dists]) (a petition in an RPAPL 713 [5] proceeding alleging that the tenant had entered into possession pursuant to an oral rental agreement with the former owner, in which the tenant claimed that she had a rent-stabilized lease, would be dismissed where the landlord acknowledged knowing about the lease but claimed that it was invalid, as the petition contained fundamental omissions and misstatements and did not adequately put the court and the tenant on notice that the petitioner was claiming that the lease was invalid because it had been executed after a notice of pendency and judgment of foreclosure had been entered); **Brookwood Coram I, LLC v Oliva** (47 Misc 3d 140[A], 2015 NY Slip Op 50607[U] [App Term, 9th & 10th Jud Dists]) (as a petition must set forth the interest of the tenant and the facts upon which the proceeding is based,

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

Lilley v Molina (63 Misc 3d 155[A], 2019 NY Slip Op 50815[U] [App Term, 2d, 11th & 13th Jud Dists]) (where a predicate notice and petition prepared by an attorney, not on personal knowledge, alleged that the occupant was a licensee, sublessee or assignee of a previous tenant, and the petitioner submitted an affidavit asserting that the occupant was a squatter who entered without permission, the petition and predicate notice failed to properly state the facts, citing Bullock); **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 a 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 status).

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).

Sokolow v Neuman-Werth (62 Misc 3d 1 [App Term, 2d, 11th & 13th Jud Dists 2018]) (under a lease provision allowing the landlord to recover attorney's fees where the tenant's default leads to the rerenting of the apartment, the court does not have subject matter jurisdiction to award attorney's fees where there was no default by the tenant leading to the cancellation of the lease and a re-renting); **Jacoby v Cabrera** (60 Misc 3d 136[A], 2018 NY Slip Op 51079[U] [App Term, 9th & 10th Jud Dists]) (where the lease provided that the tenants would pay late fees, utilities and legal fees but did not deem these additional rent, the Justice Court lacked subject matter jurisdiction over these claims, and the tenant's postjudgment motion to set aside the final judgment would be granted, pursuant to CPLR 5015 [a] [4], as to these items); **LA Gem, LLC v Fuentes** (60 Misc 134[A], 2018 NY Slip Op 51051[U] [App Term, 9th & 10th Jud Dists]) (where the landlord failed to submit a copy of the lease into evidence, it did not show that it was entitled to recover legal fees, late fees and disbursements as additional rent); **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).

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).

Chery v Raie (61 Misc 3d 153[A], 2018 NY Slip Op 51808[U] [App Term, 9th & 10th Jud Dists]) (the courts of limited jurisdiction, such as the District Court and the Civil Court, cannot grant the equitable relief of piercing the corporate veil so as to impose liability on a corporation's principal for the corporation's malfeasance); citing **19 W. 45th St. Realty Co. v Doram Elec. Corp.** (233 AD2d 184 [1st Dept 1996]).

LA Gem, LLC v Fuentes (60 Misc 134[A], 2018 NY Slip Op 51051[U] [App Term, 9th & 10th Jud Dists]) (the City Court lacked the authority to direct the landlord to remove certain charges from the tenant's rent bill going forward, as this was injunctive in nature); **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).

Answer

655 Country Rd., Inc. v Caltagirone (59 Misc 3d 139[A], 2018 NY Slip Op 50571[U] [App Term, 9th & 10th Jud Dists]) (pursuant to RPAPL 743, a tenant may answer orally

in a summary proceeding, and may orally assert a counterclaim; where a landlord can make no tenable claim that the tenant's request to amend the answer to include a claim for reciprocal attorney's fees would be surprising or prejudicial, the tenant has not waived the claim; where the landlord asserted a claim for attorney's fees, it could not claim prejudice; however, the court should have held a hearing to determine the reasonableness of the fees sought).

Ndiaye v 2123 FOB MPPH LP (63 Misc 3d 153[A], 2019 NY Slip Op 50770 [App Term, 1st Dept]) (a tenant's claim for property damage cannot be litigated in a nonpayment proceeding); but see **Westchester Plaza Holdings, LLC v Afriyie** (60 Misc 3d 1202[A], 2018 NY Slip Op 50900[U] [Mt. Vernon City Ct, A. Seiden, J.]) (in a nonpayment proceeding, the tenant's counterclaim for property damage caused by a burst pipe in the tenant's apartment would not be stricken, notwithstanding a no-counterclaim clause, because the counterclaim was "inextricably intertwined" with the landlord's claim); see **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 also **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); 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

459 Webster Ave., LLC v Green (64 Misc 3d 146[A], 2019 NY Slip Op 51349[U] [App Term, 9th & 10th Jud Dists]) (in a nonpayment proceeding to recover alleged arrears in rent at $4,000 per month where the occupants claimed they were vendees in possession, the petitioner failed to meet its burden of showing the existence of an agreement to pay rent; the occupants' "counterclaim" that they were constructive owners could not be considered, as title cannot be determined as an affirmative claim in a summary proceeding and it was unnecessary to make a finding with respect to constructive ownership in order to determine the petitioner's claim); **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); **554-558 W. 181 St. LLC v Cochrane** (61 Misc 3d 1203[A], 2018 NY Slip Op 51341[U] [Civ Ct, NY County, J. Stoller, J.]) (where, after executing a lease for a higher rent, the parties executed a lower-rent lease to satisfy the requirements of the SEPS program, the purpose of which is to house residents of homeless shelters, the higher lease would not be enforced as it would undermine the SEPS program's purpose, and, even if legal, did not satisfy the landlord's burden to prove the existence of a contract to pay the higher rent demanded in the petition); **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. **31-36 32nd St. Astoria, LLC v Nickell** (64 Misc 3d 137[A], 2019 NY Slip Op 51164[U] [App Term, 2d, 11th & 13th Jud Dists]) (where the tenant sought to rely on a 2012 lease with a $1,200 rental to recover attorney's fees but had disavowed that lease before DHCR, saying he had signed it only as an accommodation to the landlord, and, at the time he had signed that lease, had been paying only $400, the record showed a course of conduct that was not consistent with the lease, and the lease's attorney's fees clause would not be enforced); **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).

Kohl's Dept. Store, Inc. v 5 Star Holding NY, LLC (64 Misc 3d 148[A], 2019 NY Slip Op 51402[U] [App Term, 9th & 10th Jud Dists]) (where a nonpayment petition alleged that a written rent notice had been served and that proof of the service was annexed, but proof of the service was not annexed and the petition did not specify the manner of service, and the answer denied the allegation that a rent notice had been served, the petition was dismissed, as a landlord must allege and prove compliance with the predicate notice requirement; the petition must state the manner of service on the affidavit of service must be attached to the petition; while a landlord can cure the defect at trial, the landlord failed to introduce proof of service at trial, citing Merrbill).

EOM 106-15 217th Corp. v Severine (62 Misc 3d 141[A], 2019 NY Slip Op 50068[U] [App Term, 2d, 11th & 13th Jud Dists]) (a proper rent demand is a statutory prerequisite to a nonpayment proceeding and an element of the landlord's 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).

Mercy Haven, Inc. v Backer (2019 NY Slip Op 61523[U] [App Term, 9th & 10th Jud Dists]) (summarily reverses, in effect, an order denying the tenant's motion to vacate a nonpayment warrant based on the landlord's failure to comply with its obligation to provide DSS with a corrected rent breakdown form); **116 Lenox Realty, LLC v Smith** (61 Misc 3d 137[A], 2018 NY Slip Op 51562[U] [App Term, 2d, 11th & 13th Jud Dists]) (where the landlord had stipulated to do so grants the tenant's motion to stay the execution of a nonpayment warrant until 14 days after the landlord provided the tenant with a completed W-9 form with taxpayer and building ownership information that

matched the information on file with the IRS so that SEPS funds could be released to pay the tenant's arrears); **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

1646 Union, LLC v Simpson (62 Misc 3d 141[A], 2019 NY Slip Op 50089[U] [App Term, 2d, 11th & 13th Jud Dists]) (since a summary proceeding is a statutory proceeding, relief can be granted to the petitioner only where all the elements of the cause of action have been established, a requirement that is sometimes referred to as "jurisdictional"; in addition, the court is required to make a summary determination on the papers to the extent that there is no triable issue; as a review of the papers showed that the required RSC termination notice was not given, and as proof of compliance with that requirement is a necessary element of a holdover proceeding, the landlord's holdover based on a claim that the tenant failed to execute a renewal lease, which the tenant claimed contained an incorrect rent, should have been dismissed and the issue of whether the rent was excessive under RSC § 2521.1 [j] because the building had previously been subject to agreements between the prior landlord, and HUD and HDC not reached); followed in **Rochdale Vil. Inc. v Sterling** (63 Misc 3d 1208[A], 2019 NY Slip Op 50438[U] [Civ Ct, Queens County, C. Guthrie, J.]) (a rent demand which failed to itemize the periods for which additional rent of $4,014 and $2,086.46 was sought, was defective and the tenant was prejudiced in his ability to respond to the demand and formulate defenses; since a proper rent demand is a "jurisdictional" requirement, the court would not reach the tenant's claim that collection of the arrears was barred by the statute of limitations).

JCF Assoc., LLC v Sign Up USA, Inc. (59 Misc 3d 135[A], 2018 NY Slip Op 50501[U] [App Term, 2d, 11th &13th Jud Dists]) (as a holdover proceeding based on a landlord's

termination of a lease may only be maintained where there is a conditional limitation in the lease providing for its early termination, an agreement which contained no provision for its termination upon the failure to cure a breach could not support a holdover proceeding); **1900 Albermarle, LLC v Solon** (57 Misc 3d 158[A], 2017 NY Slip Op 51665[U] [App Term, 2d, 11th & 13th Jud Dists]) (a holdover proceeding based on a claim that the tenant had failed to comply with the obligation to assure that his section 8 subsidy continued to be paid did not lie where there was no conditional limitation in the lease); **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).

Bedford Oak, LLC v Hernandez (63 Misc 3d 1201[A], 2019 NY Slip Op 50315[U] [Civ Ct, Bronx County, S. Weissman, J.]) (dismisses an owner-occupancy holdover where the last lease had expired in 1994, as a Golub notice must be served within the window period prior to the expiration of an existing lease); citing **Ansonia Assoc. v Rosenberg** (163 AD2d 101 [1st Dept 1990]) (nonprimary residence holdover cannot be maintained unless a Golub notice was served during the window period prior to the expiration of an existing lease); **Nussbaum Resources I LLC v Gilmartin** (4 Misc 3d 80 [App Term, 1st Dept 2004]); see also **533 W. 144th LLC v Severino** (62 Misc 3d 136[A], 2018 NY Slip Op 51945[U] [App Term, 1st Dept]) (where a lease renewal lacked essential terms, such as its duration and the rent to be paid, it was unenforceable, as the missing terms could not be fixed by the intent of the parties and surrounding circumstances; since there was no lease, a nonprimary-residence proceeding would not lie).

Holdovers: Failure to Sign Renewal Lease

Cunningham Assoc., L.P. v Peterson (62 Misc 3d 6 [App Term, 2d, 11th & 13th Jud Dists 2018]) (no predicate notice other than a 15-day termination notice is required to commence a proceeding based on failure to sign a renewal lease).

120 Beach 26th St. LLC v Cannon (__ Misc 3d ___, 2019 NY Slip Op 51238[U] Civ Ct, Queens County, M. Ressos, J.]) (dismissing a holdover based on the failure to execute a renewal lease where the required lease rider was not attached to the renewal lease, as the renewal lease was not in the prescribed form and not on the same terms and conditions as the prior lease); citing **Haberman v Neumann** (2003 NY Slip Op 50031[U] [App Term, 1st Dept]) (same).

Illegal Sublet and Profiteering

230 E. 48th St. LLC v Campisi (59 Misc 3d 148[A], 2018 NY Slip Op 50798[U] [App Term, 1st Dept]) (proof at trial that the tenant listed her apartment on Airbnb at nightly rental rates stating at $200, that she entered into more than 12 separate rentals totalling 79 nights in 10 months, with up to five guests per rental, collecting as much as $366 per night, established an incurable commercialization of the apartment; also, the

tenant's de facto hotel operation showed complete disregard for the safety of the other tenants and the landlord, warranting termination; the tenant was not entitled to a notice to cure or an opportunity to cure); see **Aurora Assoc., LLC v Hennen** (157 AD3d 608 [1st Dept 2018]) (Supreme Court erred in dismissing the plaintiff's ejectment claim based on profiteering where the defendants had illegally sublet rooms in their loft through Airbnb to numerous individuals over a period of two years, resulting in profits well in excess of the legal regulated rent; when regulated tenants rent space on a short-time basis to transient individuals at rates higher than allowed by the regulations, the conduct is in the nature of subletting rather than taking in roommates, and constitutes commercialization, which is an incurable violation; no notice to cure is required; Loft Law tenants are subject to eviction for profiteering); citing, inter alia, **Goldstein v Lipetz** (150 AD3d 562 [1st Dept 2017]) (a tenant who sublet to 93 customers through Airbnb for 338 days over a period of 18 months, at nightly rates of $95 for an individual and $120 for two, while her daily rent came to $57.80 a day, which, plus a permissible 10% increase, would equal $63.58 a day, commercialized the apartment; the guests she hosted were not roommates but were, as a matter of law, subtenants; the fact that the subletting occurred in only an 18-month period of a 40-year tenancy was, contrary to the dissent's view, irrelevant); cf. **494 W. End Ave. LLC v Reynolds** (2018 NY Slip 31708[U] (Civ Ct, NY County, J. Stoller, J.]) (there were triable issues as to whether a tenant who rented the apartment to 18 people, 13 of whom were for less than 30 days, over a 303-day period was entitled to an opportunity to cure where the rent she collected was only 76% of her rent, the occupants who were there for more than 30 days were not "transient," and transiency is required for a profiteering cause of action, citing Aurora); but cf. **Clent Realty Co., L.P. v Levine** (61 Misc 3d 260 [Dist Ct, Nassau County 2018, S. Fairgrieve, J.]) (where the tenant's daily stabilized rent came to $30.90, the tenant's renting the apartment on Airbnb for $345 for December 30, 2016 through January 3, 2017 constituted a willful commercialization of the apartment, and no notice to cure was required because the conduct was incurable).

12 E. 86th St. LLC v Brenner (63 Misc 3d 143[A], 2014 NY Slip Op 50622[U] [App Term, 1st Dept]) (as there were issues as to whether the nature and frequency of the rent-stabilized tenant's rental of space on a short-term basis constituted profiteering, which is incurable, summary judgment to landlord was not appropriate), affg (58834/16 [Civ Ct, NY County June 17, 2018, D. Chinea, J.] (in a profiteering proceeding against a 74-year-old, 40-year tenant based on allegations of operating a de facto hotel between September 2014 and June 2015, where the tenant claimed she stopped immediately upon receiving the notice of termination and was willing to refund any overcharges, court holds there is a triable issue as to whether the profiteering was systemic and substantial and whether the tenant could cure the behavior; Goldstein v Lipetz should not be interpreted as prohibiting a factual analysis of what is "substantial and systemic", and whether the short-term rental activity can be cured); **498 W. End Ave. LLC v Reynolds** (62 Misc 3d 136[A], 2018 NY Slip Op 51943[U] [App Term, 1st Dept) (same); see **13775 Realty, LLC v Foglino** (51 Misc 3d 126[A], 2016 NY Slip Op 50335[U] [App Term, 1st Dept]) (summary judgment on illegal-sublet-profiteering cause of action

properly denied where there were unresolved issues as to how many times the tenant had sublet through Airbnb or otherwise, and the amount of any overcharges); **Horseshoe Realty, LLC v Meah** (47 Misc 3d 127[A], 2015 NY Slip Op 50370[U] [App Term, 1st Dept]) (a meritorious defense to a profiteering holdover was shown where the tenant claimed that the alleged subtenant was actually a roommate who vacated after one month, citing Seaborn); **335-7 LLC v Steele** (43 Misc 3d 144[A], 2014 NY Slip Op 50891[U] [App Term, 1st Dept]) (a profiteering claim should not be decided on summary judgment where there are mixed questions of law and fact as to whether the series of short-term occupants were roommates or subtenants, and whether the "overcharges were so substantial and pervasive as to constitute incurable rent profiteering"); cf. **Graham Court Owners Corp. v Taylor** (49 Misc 3d 7 [App Term, 1st Dept 2015]) (where it was alleged that the tenant sublet for more than two out of four years, service of a notice to cure was required under RSC § 2524.3 [a], notwithstanding that RSC § 2524.3 [h] does not expressly say so); **Tribeca Equity Partners, L.P. v Jacobson** (45 Misc 3d 132[A], 2014 NY Slip Op 51652[U] [App Term, 1st Dept]) (the landlord's failure to serve a notice to cure as required by the lease and RSC § 2524.3 [a] warranted dismissal of the illegal-sublet proceeding); citing **Hudson Assoc. v Benoit** (226 AD2d 196 [1st Dept 1996]) (in a summary proceeding based on illegal sublet, RSC § 2524.3 [a] requires the landlord to prove, as part of its prima facie case, that a notice to cure was served and that the tenant failed to cure); and distinguishing **Matter of Waterside Redevelopment Co. v Department of Hous. Preserv. & Dev. of City of N.Y.** (270 AD2d 87 [1st Dept 2000]) (a tenant's conduct in subletting and not reporting the income on her annual income affidavits constituted acts of fraud and illegality which, under 28 RCNY 3-18 [b], were not curable); cf. **Gruber v Anastas** (100 AD3d 829 [2d Dept 2012] (a landlord's failure to give a cure notice to a tenant who illegally sublet did not preclude an award of possession to the landlord where the violation was not subject to cure because the tenant had collected a substantial surcharge); **Gold St. Props. v Freeman** (90185/2013 [Civ Ct, NY County, J. Stoller, J.]) (a tenant could cure a breach of renting out her apartment on Airbnb where the apartment was not rent stabilized, as the cases barring a cure deal with profiteering on a rent-stabilized apartment).

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

for eviction; citing, inter alia, **West 148 LLC v Yonke** [11 Misc 3d 40 (App Term, 1st Dept 2006)], affd for the reasons stated below 50 Misc 3d 130[A], 2015 NY Slip Op 51915[U] [App Term, 1st Dept]) (no notice to cure required since the tenant charged the subtenants far in excess of the legal rent).

Illegal Trade or Business

JCF Assoc., LLC v Sign Up USA, Inc. (59 Misc 3d 135[A], 2018 NY Slip Op 50501[U] [App Term, 2d, 11th &13th Jud Dists]) (the "illegality" alleged in the petition—a failure to obtain permits for a sign — did not constitute the use of the premises for an "illegal business" within the meaning of RPAPL 711 [5]).

Greenburgh Hous. Auth. v Hall (55 Misc 3d 146[A], 2017 NY Slip 50680[U] [App Term, 9th & 10th Jud Dists]) (proof that a no-knock search warrant at the 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 [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).

West Haverstraw Preserv., LP v Diaz (58 Misc 3d 150[A], 2018 NY Slip Op 50085[U] [App Term, 9th & 10th Jud Dists]) (it is not necessary that a federally subsidized landlord maintaining a proceeding based on a single incident of drug-related criminal activity prove that the incident threatened the health, safety or peaceful enjoyment of the other tenants); cf. **Town of Oyster Bay Hous. Auth. v Garcia** (59 Misc 3d 329

(Nassau Dist Ct 2018, S. Fairgrieve, J.]) (while mere possession of a controlled substance is a sufficient basis to terminate a federally subsidized lease [citing **Matter of Bradford v New York City Hous. Auth.**, 34 AD3d 46 (2d Dept 2006)], a tenant's plea of guilty to attempted possession of a controlled substance is not a sufficient basis, and a hearing would be ordered to determine if the tenant possessed drugs); cf. also **One Eighteen Hous. Fund, Inc. v Smith** (56 Misc 3d 383 [Civ Ct, NY County 2017, M. Weisberg, J.]) (under the federally required clause permitting eviction for drug-related criminal activity "on or near the premises" a petition alleging a tenant's plea of guilty to criminal sale of a controlled substance, a class "B" felony, four blocks north of the building, which was between 1,088 and 1,584 feet from the premises, depending on whether a straight-line or pedestrian measurement is used, stated a cause of action, as "near" is broader than "immediate vicinity").

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), affd (63 Misc 3d 157[A], 2019 NY Slip Op 50835[U] [App Term, 2d, 11th & 13th Jud Dists]); **Fernandez v Cronealdi** (L&T 74986/16 [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: Owner's Use

Rayupudi v Littshwager (61 Misc 3d 127[A], 2018 NY Slip Op 51348[U] [App Term, 1st Dept]) (a determination as to the landlord's good faith in an owner's use proceeding should be made at trial, as it rests in large part on credibility considerations).

Fried v Lopez (64 Misc 3d 1025 [Civ Ct, Kings County 2019, D. Harris, J.]) (where a pre-HSTPA Golub notice stated that the landlord sought to recover all the apartments in the building to convert it into a single-family home, under the amendment to RSL § 26-511 [c] [9] [b], limiting landlords to the recovery of only one unit, which was effective immediately and applies to any tenant in possession at or after the time it takes effect, the petition would be dismissed, as the purpose set forth in the Golub notice was precluded); cf. **Sung Yoon Kim v Hettinger** (58 Misc 3d 159[A], 2018 NY Slip Op 50257[U] [App Term, 1st Dept]) (an owner-use nonrenewal notice which stated that the landlord intended to recover all nine apartments in the five-story building and convert the building into a single-family dwelling for herself, her husband, and their two children, and set forth the contemplated use of the space on a floor-by-floor basis, was adequate to advise the tenant and to permit the tenant to frame a defense; any evidentiary

matters, such as the status of the landlord's recovery of the other apartments, were to be explored during the discovery phase).

Holdovers: Nonprimary Residence

Columbus Manor, LLC v Turnbull (63 Misc 3d 143[A], 2019 NY Slip Op 50625[U] [App Term, 1st Dept]) (the trial court's fact-based determination that the tenant's absence from her apartment was excusable was supported by the record where the evidence showed that the tenant had lived in the apartment for most of her life but had been required to relocate to Texas for a definite period or lose her signing bonus; the tenant continued to list the apartment on her tax returns and driver's license, among others, continued to pay City resident taxes and to vote in the City, and returned to the City after her commitment had been met, citing Veiders); **Boulder Apts., LLC v Raymond** (59 Misc 3d 141[A], 2018 NY Slip Op 50653[U] [App Term, 9th & 10th Jud Dists]) (the landlord failed to establish its entitlement to summary judgment in a nonprimary-residence proceeding where the tenant alleged in her answer that she had resided outside the apartment only to care for her ailing mother, as ETPR § 2500.2 [r] [3] creates an exception to the 183-day requirement for "temporary periods of relocation" for "reasonable grounds", which the courts have construed to include to provide care to others; the landlord's evidence failed to eliminate all triable issues as to whether the tenant's absence fell under this exception, even though the tenant's absence for more than 183 days lasted from 2006 to 2015 and the tenant's apartment was less than a half-hour drive from her mother's, as tenant explained that her mother's aides worked only 11 hours a day and she would provide meals, turn her mother every two hours when the aides were absent, assist her mother with getting in and out of bed and administer her medication); **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).

Matter of 92 Cooper Assoc., LLC v Roughton-Hester (165 AD3d 416 [1st Dept 2018] (while the place of residence on a tax return is but one factor to be considered in determining primary residency, the trial court's determination that the tenant did not maintain the required physical nexus was also supported by other evidence such as testimony that the tenant had spent only 139 and 161 days in the apartment in the two-year period), revg (57 Misc 3d 156[A], 2017 NY Slip 51631[U] [App Term, 1st Dept]) (ordering a new trial where the trial court had found dispositive that the tenant had listed a Pennsylvania address on her tax returns); **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 is 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 Sassoonian**, 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).

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 [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 the 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: Nuisance

711 Seagirt Ave. Holdings, LLC v Harris (62 Misc 3d 1227[A], 2019 NY Slip Op 50304[U] [Civ Ct, Queens County, J. Kullas, J.]) (a termination notice alleging only one incident, in which the tenant was arrested in the building and charged with assault and harassment, was insufficient to allege a nuisance).

Holdovers: Chronic Nonpayment

3175 GC LLC v Basey-Goodison (68357/17 [Civ Ct, Bronx County, H. Baum, J., July 20, 2018]) (a notice of termination and petition which merely stated the index numbers of six nonpayments brought over six years without any other facts providing details of the nonpayment did not state a chronic nonpayment cause of action, as without supporting facts a greater concentration of nonpayment proceedings was required); cf. **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** (57 Misc 3d 456 [Civ Ct, Kings County 2017, 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 the 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 [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** (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** (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

Federal Natl. Mtge. Assn. v Tenenbaum (63 Misc 3d 313 [Dist Ct, Nassau County 2019, S. Fairgrieve, J.]) (in a holdover proceeding against the tenant by a petitioner that had obtained a stock certificate and cooperative lease in its name from the co-op corporation after a UCC article 9 nonjudicial sale, there were triable issues as to whether the petitioner, which had not assigned the lease to an individual, could

maintain the proceeding in view of the lease's prohibition of corporate ownership of the shares and proprietary lease); **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); citing **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); cf. **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).

Castle Peak 2012-1 REO, LLC v New York Found. For Senior Citizens, Guardian Servs. Inc. (63 Misc 3d 157[A], 2019 NY Slip Op 50834[U] [App Term, 2d, 11th & 13th Jud Dists]) (a purchaser in lieu of foreclosure cannot maintain an RPAPL 713 [5] proceeding).

Martin v Martin (53 Misc 3d 1014 [Red Hook Just Ct 2016, J. Triebwasser, J.]) (where the occupant had been married to the life tenant, a proceeding pursuant to RPAPL 713

[6] would not lie, as there was no evidence that the occupant was a tenant and the occupant cohabited with his wife by virtue of the bonds of matrimony).

BH 2628, LLC v Zully's Bubbles Laundromat, Inc. (57 Misc 3d 63 [App Term, 2d, 11th & 13th Jud Dists 2017]) (an occupant in possession pursuant to a lease signed after a notice of pendency of a foreclosure action had been filed 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).

US Bank Trust, N.A. v Hayes (62 Misc 3d 980 [Mt. Vernon City Ct 2019]) (service of the deed upon a person of suitable age and discretion was sufficient); citing **Plotch v Dellis** (60 Misc 3d 1 [App Term, 2d, 11th & 13th Jud Dists 2018]) (upon reconsideration, the court holds that where a copy of the deed was served by substituted service, the exhibition requirement was satisfied, as a certified copy of the deed is left at the premises for the respondent to retain and examine; service of a photocopy of the attorney-subscribed certificate was sufficient under CPLR 2105); followed in **Kushnir v Hartman** (61 Misc 3d 131[A], 2018 NY Slip Op 51445[U] [App Term, 9th & 10th Jud Dists]) (substituted service); **Citibank, N.A. v Colucci** (60 Misc 3d 135[A], 2018 NY Slip Op 51064[U] [App Term, 2d, 11th & 13th Jud Dists]) (conspicuous-place service of deed sufficient); **Federal Home Loan Mtg. Corp. v McGibney** (63 Misc 138[A], 2018 NY Slip Op 51989[U] [App Term, 9th & 10th Jud Dists]) (same); abrogating **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); declining to follow **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); **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).

Abdul-Karim v Mitchel (62 Misc 3d 1211[A], 2019 NY Slip Op 50111[U] [Greenburgh Just Ct, B. Orden, J.]) (where a separation agreement provided that the wife would have sole ownership of the marital home, the wife could maintain a licensee proceeding against her husband after the parties' divorce, citing Halaby); cf. **Taj v Bashir** (57 Misc 3d 1204[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]) (declining to vacate a stay of a holdover by the petitioner against his brother's wife, where it had yet to be determined whether the apartment was marital property, as there was evidence that the petitioner's brother had acquired the property during the marriage); **Rinis v Toliou** (56 Misc 3d 1211[A], 2017 NY Slip Op 50964[U] [Civ Ct, Kings County, G. Marton, J.) (in a holdover by petitioners whose father had conveyed the building to them, retaining a life estate, against their father's wife, who resided in the second-floor apartment and was getting divorced, the court dismisses after trial, as it 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).

Rotondo v Rotondo (2018 WL 2702143 [Sup Ct, Onondaga County, D. Greenwood, J.]) (a 30-year-old man with no impediment was not entitled to a family exception); citing

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).

Aloni v Oliver (64 Misc 3d 1223[A], 2019 NY Slip Op 51235[U] [Civ Ct, NY County, T. James, J.]) (denies a motion for summary judgment and a cross motion to dismiss a licensee proceeding where there was a triable issue as to whether the occupant was a licensee, since he allegedly had a nontraditional marriage with the petitioner, citing Braschi and Rosenstiel); **Morris v Morris** (63 Misc 3d 453 [Civ Ct, Bronx County 2018, S. Weissman, J.]) (an owner could not maintain a licensee proceeding against her brother, adoptive or natural, a 60-year occupant, because of the family relationship); **Jit v Johnson** (73861/16 [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 [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** (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).

Chow v 86 Bay, LLC (59 Misc 3d 1229[A], 2018 NY Slip Op 50793[U] [Civ Ct, Kings County, G. Marton, J.]) (in a lockout proceeding, a showing that the petitioner resided in the premises for 30 days does not establish an entitlement to judgment; RPAPL 711 refers to an occupant who has been in "possession" for 30 days and does not apply to a licensee of the tenant [citing **Brown v 165 Conover Assoc.**, 5 Misc 3d 128(A), 2004 NY Slip Op 51244(U) (App Term, 2d & 11th Jud Dists) (the tenant's sister, who did not claim tenancy rights, was a mere licensee upon the tenant's death and could not maintain a lockout proceeding)]; Administrative Code § 26-217 does not convert a license into a possessory interest]); see **Chappuis v CUCS–The Kelly** (60 Misc 3d 137[A], 2018 NY Slip Op 51091[U] [App Term, 1st Dept]) (Civil Court erred in restoring an illegally evicted occupant of a federally funded transitional housing program without a hearing as to whether the occupant had been in actual or constructive possession, notwithstanding that The Kelly had failed to comply with the due process requirements of the federally funded transitional housing program); citing **Andrews v Acacia Network** (59 Misc 3d 10 [App Term, 2d, 11th & 13th Jud Dists 2018]) (an occupant of a supportive living facility did not have "possession" and could not maintain a lockout proceeding, as the occupant had not been granted exclusive dominion and control over a specifically identified portion of the premises and there were no locks on the dormitory-style rooms; the unlawful-eviction provisions of Administrative Code § 26-521 do not operate to change a license into a possessory interest; similarly, RPAPL 711, which states that a tenant shall include an occupant of a room in a rooming house who has been in "possession" for 30 consecutive days, does not operate to convert a license into a possessory interest; in any event, the occupant was not in "possession" of a room and the supportive living facility was not a "rooming house"), revg (11437/16 [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); abrogating **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).

Soto v Pitkin Junius Holding, LLC (58 Misc 3d 153[A], 2018 NY Slip Op 50156[U] [App Term, 2d, 11th & 13th Jud Dists]), revg (16097/16 [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").

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); see also **Pelt v City of New York** (11 Civ 5633, 2013 WL 4647500 [ED NY 2013, K. Matsumoto, J.]) (Pelt was a long-term co-occupant in a NYCHA apartment who was evicted by police after the tenant

surrendered); **Paulino v Wright** (210 AD2d 171 [1st Dept 1994]) (squatters had no property interest and could be evicted without a court proceeding); citing **P&A Bros. v City of New York** (184 AD2d 267 [1st Dept]) (nontenants such as licensees and squatters can be evicted without legal process).

Services for the Underserved v Alvarado (59 Misc 3d 1205[A], 2018 NY Slip Op 50378[U] [Civ Ct, Kings County, G. Marton, J.]) (dismissing a nonpayment petition by a prime tenant against an alleged subtenant where the petitioner failed to establish a landlord-tenant relationship; the parties' agreement was called a "Residency Agreement" and stated that the petitioner provided residential and community-based services to assist individuals to obtain their highest level of independent functioning; that the occupant had a right to an individualized written service plan and psychiatric rehabilitative services; that the occupant agreed to participate fully in the rehabilitative services; and that the monthly residency fee covered personal living space, limited furnishings, utilities, limited transportation and recreation, meals and support services; thus, the agreement, which did not specify a rental unit, was for a package of services, and the payments due were not rent); citing **Federation of Orgs., Inc. v Bauer** (6 Misc 3d 10 [App Term, 2d & 11th Jud Dists 2004]) (where an admission agreement did not grant the occupant exclusive dominion over a specific space and indicated that the occupant's residence was part of a package of services, the occupant was a licensee).

Hui Zhen Wei v 295 E. Broadway Assoc.,LLC (57 Misc 3d 136[A], 2017 NY Slip Op 51277[U] [App Term, 1st Dept]) (where the tenant had formally agreed to surrender the apartment in exchange for compensation, the tenant's wife, who had previously advised the landlord that she was asserting possessory rights but was in China at the time of the lockout, could maintain a lockout proceeding, as she was at least in "constructive possession" of the apartment at the time of the lockout, citing Banks and Dixon); **Goris v Salce** (41 Misc 3d 128[A], 2013 NY Slip Op 51678[U] [App Term, 1st Dept]) (the son of the deceased rent-controlled tenant was in "constructive possession", could not be ousted without legal process and could maintain a lockout proceeding); **Classic N.Y. Realty 2009, LLC v Aimco 240 W. 73rd St., LLC** (35 Misc 3d 139[A], 2012 NY Slip Op 50859[U] [App Term, 1st Dept]) (the petitioner, which rented 89 units in the building for use as transient accommodations, was entitled to be restored to possession of a concierge desk and luggage room in the lobby, as petitioner was in constructive, if not actual, possession of those spaces and had a colorable tenancy interest in them); **Rostant v 790 RSD Acquisition LLC** (21 Misc 3d 138[A], 2008 NY Slip Op 52308[U] [App Term, 1st Dept]) (restoring the deceased rent-controlled tenant's stepdaughter where she was in constructive possession at the time of the lock-out and the landlord's principal was aware of her possessory claim); **Truglio v VNO 11 E. 68th St. LLC** (35 Misc 3d 1227[A], 2012 NY Slip Op 50908[U] [Civ Ct, NY County, S. Kraus, J.]) (a rent-stabilized tenant who rented a maid's room on a different floor and who claimed to have used the premises as a guest room was in actual possession and could maintain an RPAPL 713 [10] proceeding, without the need to establish that the maid's room was a housing accommodation; the court would also enjoin the landlord to rebuild the unit,

which the landlord had demolished, as such relief is within the authority of the Housing Part); **Banks v 508 Columbus Props.** (8 Misc 3d 135[A], 2005 NY Slip Op 51189[U] [App Term, 1st Dept]) (restores the husband of the stabilized tenant, who died shortly before the lockout, because the existence of a landlord-tenant relationship is not a prerequisite to an RPAPL 713 [10] proceeding); **Dixon v Fanny Grunberg & Assoc., LLC** (4 Misc 3d 139[A], 2004 NY Slip Op 50943[U] [App Term, 1st Dept]) ("a landlord-tenant relationship is not a sine qua non to the maintenance of a forcible entry and detainer summary proceeding"); cf. **Brown v 165 Conover Assoc.** (5 Misc 3d 128[A], 2004 NY Slip Op 51244[U] [App Term, 2d & 11th Jud Dists]) (restoration would not be granted to the sister of the deceased tenant of record, who did not claim tenancy rights and was a mere licensee); **Viglietta v LaVoie** (33 Misc 3d 36 [App Term, 9th & 10th Jud Dists 2011]) (a petitioner who claimed equitable ownership but was not the record owner was not in "actual" or "constructive" possession and could not maintain an RPAPL 713 [10] proceeding).

Defenses: Succession Rights

Tres Realty LLC v Ta-Wei Yu (63 Misc 3d 28 [App Term, 1st Dept 2019]) (denies the landlord's motion for summary judgment against a student who was a citizen of Taiwan admitted to the U.S. on a still valid F-1 student visa seeking succession rights as a nontraditional family member; while an F-1 visa requires that the holder have a "principal, actual dwelling place in fact, without regard to intent" in a foreign country, the identical language applicable to the B-2 tourist visa in Jagger, there are significant differences between the two, as a B-2 tourist visa is designed to permit short-term entry "temporarily for business or temporarily for pleasure", while an F-1 visa has a duration defined as the time the student is pursuing a full course of study. Thus, an international student may make a long-term commitment to live, study and work here, get married and start a family. In addition, students do not possess ties to property; moreover, even Jagger recognized that there may be circumstances where a foreign national on a tourist visa might meet the primary-residence requirement); distinguishing **Katz Park Ave. Corp. v Jagger** (11 NY3d 314 [2008]) (since a holder of a B-2 visa must have a principal actual dwelling place outside the U.S., the holder cannot, absent unusual circumstances, have a primary residence in New York).

Matter of Aponte v Olatoye (30 NY3d 693 [2018]) (NYCHA's denial of succession rights to the tenant's son who had lived with her for several years to care for her was not arbitrary or capricious, as the occupant could not be granted RFM status as he could not have received written permanent permission to reside with his mother; the two requests for the son to be granted permanent permission had been denied and could not have been granted, because that would have resulted in overcrowding; it was not arbitrary not to allow the son to bypass a 250,000 person waiting line as a reward for caring for his mother, as NYCHA's policy prioritized children in need and persons facing homelessness), revg (138 AD3d 440 [1st Dept 2016]) (annuls NYCHA's determination that the disabled tenant's son was not entitled to RFM status where the tenant, who had

suffered from advanced dementia and was incapable of living alone, had twice requested to add her son as an occupant and NYCHA had denied the applications, first because it would create an overcrowding condition in the one-bedroom apartment, and later because the manager did not believe that the tenant had signed the application; the determination to deny RFM status was arbitrary even though the occupant had never received written permission, citing McFarlane [NYCHA's awareness of an occupancy for a substantive period of time is an "important component" in determining RFM status]); followed in **Matter of Cintron v Olatoye** (167 AD3d 1003 [2d Dept 2018]) (NYCHA's determination denying succession rights had a rational basis where NYCHA never granted written permission for the RFM to reside in the apartment and the RFM was not listed on the income affidavits) and **Blas v Olatoye** (161 AD3d 562 [1st Dept 2018]); but see **Matter of Porter v New York City Hous. Auth.** (169 AD3d 455 [1st Dept 2019]) (a NYCHA RFM can qualify for succession rights by showing that she lived with the tenant for a year or more either with NYCHA's written permission or under circumstances that relieve her of the written permission requirement; where the NYCHA hearing officer failed to consider the RFM's argument that she had resided with her mother for the required period with the project manager's permission, remand for a hearing on that issue was required, as there was testimonial and documentary evidence to support the RFM's contention, including a 2011 permanent permission request her mother had given the project manager, but the project manager had told her she could stay but could not go on the lease [citing **Matter of McFarlane v New York City Hous. Auth.**, 9 AD3d 289, 291 (1st Dept 2004) (a showing that NYCHA knew of, and took no preventive action against, an RFM's occupancy, could be an acceptable alternative to the notice and consent requirements); the federal regulations do not require written consent, only the Management Manual, and the lease allows occupancy by an individual who has been "authorized by the Landlord;" dissent, that NYCHA's determination was supported by substantial evidence, as the hearing officer found the RFM's claim that her mother had been given oral consent to be incredible, as her mother was suffering from dementia at the time of the meeting; under Schorr, NYCHA cannot be estopped from discharging its duties; the remand insulates the majority from Court of Appeals' review; McFarlane is contrary to Schorr).

New York City Hous. Auth. – Fulton Houses v Alicea (63 Misc 3d 502 [Civ Ct, NY County 2019, J. Stoller, J.]) (where an RFM had lived with the tenant but had not been included on income affidavits; where the tenant had applied for approval to add the RFM to her household but had been refused based on overcrowding; and where NYCHA denied the RFM's grievance at the development level and the RFM failed to appear for the scheduled grievance at the borough level, the Housing Part could entertain the RFM's succession defense, since the RFM had not had a hearing; Aponte is limited to its facts and does not necessarily nullify the McFarlane cases; NYCHA did not make a prima facie showing that the occupant was a licensee, where the occupant did not have a GAL at the grievance, but needed one, citing the Blatch settlement requiring NYCHA to provide GALs for mentally incompetent RFMS); citing **Matter of Henderson v Popolizio** (76 NY2d 792 [1990]) (a person who makes a reasonable

showing of co-residency with a family member for a substantial period of time with NYCHA's knowledge is entitled to a hearing).

Masaryk Towers Corp. v Xiao Feng (63 Misc 3d 133[A], 2019 NY Slip Op 50392[U] [App Term, 1st Dept]) (summary judgment properly awarded against RFMs whose succession applications had been denied by HPD, as HPD is vested with exclusive jurisdiction to determine succession-rights claims in City-aided Mitchell-Lama housing; the RFMs' remedy was an article 78 proceeding; the petitioner's acceptance of the RFMs' rent checks for many years did not create a tenancy, as estoppel cannot be invoked against HPD); citing **Matter of Jian Min Lei v New York City Dept of Hous. Preserv. & Dev.** (158 AD3d 514 [1st Dept 2018]) (the RFM's inclusion on his father's income affidavits did not require a finding of succession rights where the RFM had provided another address on her tax return; the housing company's acceptance of rent for several years did not create an estoppel, citing Schorr); see also **Matter of Bien-Amie v Been** (171 AD3d 495 [1st Dept 2019]) (an RFM who was the tenant of record on a rent-stabilized apartment, which by law required that he reside there, was not entitled to succeed to an HPD-governed apartment, notwithstanding documentation supporting his residing there; in addition, the RFM failed to pay City income taxes in one of the two years); **Matter of Broussard v New York City Dept. of Hous. Preserv. & Dev.** (170 AD3d 563 [1st Dept 2019]) (being listed on income affidavits and tax returns was insufficient where the RFM failed to provide credible documentation, such as bank and voter registration statements or bills addressed to the apartment).

Shore Towers, Inc. v Abt (63 Misc 3d 43 [App Term, 2d, 11th & 13th Jud Dists 2019]) (an occupant who had moved out in 2009 to live across the street, when she had enrolled in school, and moved back in in May 2015, after her father, the tenant of record, died, was not entitled to succession rights, since she did not co-occupy the apartment in the two-year period prior to his death; although she was a full-time student, she did not fall within RSC § 2523.5 [b] [2], which provides that the co-occupancy period shall not be deemed to be interrupted when a family member is a full-time student, since the purpose of that provision is to allow temporary relocation to live in student housing or attend a non-local school; the purpose of the succession provision to allow continuity in possession would not be furthered by granting occupant succession rights); citing **528 W. 123rd St. LLC v Baptiste** (59 Misc 3d 20 [App Term, 1st Dept 2018]) (a son who co-resided with the tenant for 15 months until his November 2013 incarceration was not entitled to succeed upon his father's May 2015 death; the absence was not a protected temporary absence under the safe harbor protection of RSC § 2523.5 [b] [2], which protects family members who relocate for enumerated reasons—i.e. military service, full-time student, relocation for employment—where the son was absent for 18 months prior to the tenant's death and was incarcerated until at least 2021); cf. **Cronson v BLDG Mgt. Co., Inc.** (2018 NY Slip Op 30238[U] [Sup Ct, NY County, R. Kalish, J.]) (on a motion by plaintiff for summary judgment in an action for a declaration that the plaintiff was entitled to succession rights to a rent-stabilized apartment, the court holds that, while the RSC does not define a "full-time student"

other state regulations define the term as a student enrolled for at least 12 semester hours per semester, and that the term should be applied semester by semester; the plaintiff, who was a student at the California Institute of the Arts, did not show that he was a full-time student, where his tuition for 2016 was about half of what it had been in 2015).

Zevrone Realty Corp. v Irving (63 Misc 3d 141[A], 2019 NY Slip Op 50587[U] [App Term, 1st Dept]) (the trial court could credit the RFM's testimony that she had resided in the apartment with her mother and brother, the deceased successive stabilized tenants, her entire adult life, notwithstanding that the RFM's nondriver identification card issued in May 2014, listed a different Bronx address, as the court could credit the RFM's explanation for the discrepancy); **Tri-Bel, L.P. v Everett** (62 Misc 3d 1223[A], 2019 NY Slip Op 50239[U] [Civ Ct, Bronx County, D. Lutwak, J.]) (while the tenant's failure to include the RFM on annual income certifications, in a rent-stabilized apartment that was also subject to two regulatory agreements with HPD under its neighborhood redevelopment program, was not outcome determinative, the RFM's proof fell short of substantiating a relationship characterized by emotional and financial commitment, with the tenant, her uncle); citing **170 Spring St. LLC v Doe** (61 Misc 3d 1222[A], 2018 NY Slip Op 51705[U] [Civ Ct, NY County, J. Stoller, J.]) (the tenant's improprieties in reporting household composition to the New York City Department of Finance for SCRIE purposes did not undermine the RFM's otherwise meritorious succession claim).

EB Bedford, LLC v Lee (64 Misc 3d 39 [App Term, 2d, 11th & 13th Jud Dists 2019]) (notwithstanding that the tenant, who moved to a nursing and rehabilitation center in 2007 and remained there until her death in 2013, continued to sign three two-year renewal leases and to pay rent, the relevant two-year co-occupancy period was, under Jourdain, the two years prior to 2007; Third Lenox Terrace was, in any event, inapplicable, as the testimony showed that the tenant had intended to return to the apartment if her health improved and the landlord admitted there was no fraud or deceptive conduct); **JIMS Realty LLC v Barrett** (62 Misc 3d 957 [Civ Ct, Kings County 2019, J. Wang, J.]) (denies a landlord's motion for summary judgment against a 73-year-old RFM who had executed six renewal leases after her mother's death in 2004 where the RFM claimed she had signed the lease as her mother's proxy and that she had lived in the premises for 40 years, since, under Jourdain, a major factor is whether the RFM can show long-term residency and an entitlement to succeed at the time the tenant actually vacated, and the totality of the circumstances must be examined; in addition, the landlord made only a conclusory claim of prejudice and it could not be said, as a matter of law, that the RFM intended to deceive the landlord); **2258 Assoc. LLC v Mompremier** (61 Misc 3d 1220[A], 2018 NY Slip Op 51624[U] [Civ Ct, Kings County, G. Marton, J.]) (although the tenant moved out in 2007 but continued to sign renewal leases and filed a DHCR harassment claim in 2015, the tenant's son was entitled to succession rights under Jourdain, since he would have been entitled to those rights if he had asserted his claim when his mother had moved out); see **Matter of Jourdain v New York State Div. of Hous. & Community Renewal** (159 AD3d 41 [2d

Dept 2018]) (DHCR erred in holding that the tenant's mother was not entitled to succession rights where the tenant's mother had lived in the apartment since the beginning of the tenancy in December 2003, notwithstanding that the tenant had moved out in 2008 but continued to pay the rent and, in September 2009, executed a renewal lease for January 2010 through December 2011; the succession provisions serve the important remedial purpose of preventing dislocation of long-term residents due to the head of household's vacatur (quoting from Murphy) and should be liberally construed to carry out the reform intended; RSC 2523.5 [b] [1] should not be read as it was read in Third Lenox Terrace Assoc., but was intended to mean that the "permanent vacating" occurs when the tenant permanently ceases residing in the housing accommodation, and the mere execution of a renewal lease and the continuation of rent payments should not extend the relevant time period; it was not DHCR's intent to deny succession rights to a family member who had resided in the apartment after the tenant had permanently vacated; even if fraud considerations are relevant, they were inapplicable to this case, as there was only one renewal lease and the landlord was not prejudiced by the delay); but see **Well Done Realty, LLC v Epps** (58 Misc 3d 160[A], 2018 NY Slip Op 50259[U] [App Term, 1st Dept]) (where the tenants began residing elsewhere in 2003 but continued to execute renewal leases and pay rent by checks in their names through 2015, they could not be found to have permanently vacated prior to the expiration of the last lease in 2015, citing Third Lenox Terrrace); **206 W. 104th St. LLC v Zapata** (45 Misc 3d 135[A], 2014 NY Slip Op 51747[U] [App Term, 1st Dept]) (the landlord was entitled to summary judgment where the record showed that the tenants had relocated to Puerto Rico in the early 1990s and the occupant continued to sign renewal leases, the last of which expired in August 2006, as the occupant's father could not be found to have permanently vacated until August 2006); **525 W. End Corp. v Ringelheim** (43 Misc 3d 14 [App Term, 1st Dept 2014]) (a niece lacked succession rights, as the 1997 amendment of RSC 2520.6 [o]—deleting a niece as a qualifying family member—was applicable; the niece's claim that her succession rights accrued in 1992 when the tenant had relocated failed where the tenant had continued to sign renewal leases running through August 2012; the tenant could not be found to have permanently vacated before his death in October 2010); **Jols Realty Corp. v Nunez** (43 Misc 3d 129[A], 2014 NY Slip Op 50529[U] [App Term, 2d, 11th & 13th Jud Dists]) (an occupant claiming succession rights must establish that he resided with the tenant for two years prior to the tenant's permanent vacatur; where the tenant moved out in 2005 but continued to execute renewal leases through March 2011, the tenant could not be deemed to have permanently vacated before March 2011; as the tenant did not live in the apartment between 2009 and 2011, the occupant could not establish succession rights); **PS 157 Lofts LLC v Austin** (42 Misc 3d 132[A], 2013 NY Slip Op 52241[U] [App Term, 1st Dept]) (where the tenant began residing elsewhere in 2002 but continued signing lease renewals through November 2008, she could not be found to have permanently vacated prior to November 30, 2008; thus, the occupants could not have succession rights, as they did not reside with the tenant in the apartment during the two-year period immediately before the tenant's permanent vacatur); see **Third Lenox Terrace Assoc. v Edwards** (91 AD3d 532 [1st Dept 2012]) (where the

tenant vacated the apartment in 1998 but continued to execute renewal leases through 2005 and continued to pay rent in her name, the tenant's sister, who resided in the apartment since 1995, was required to show co-occupancy with the tenant for the 2003-2005 period, and could not, since the tenant had admittedly been residing elsewhere); **610 L.L.C. v Lewis** (36 Misc 3d 151[A], 2012 NY Slip Op 51678[U] [App Term, 1st Dept]) (where the tenant took up primary residence elsewhere by 1994 but could not be found to have permanently vacated until 2009, since he appeared in defense of a 2009 nonpayment proceeding and continued to execute a series of renewal leases, the last expiring in 2009, the occupant's proof did not establish co-residency for the two years prior to the tenant's permanent vacatur); **360 W. 55th St., L.P. v DeGeorge** (36 Misc 3d 126[A], 2012 NY Slip Op 51159[U] [App Term, 1st Dept]) (summary judgment properly granted to the landlord where the evidence showed that the tenant took up primary residence in Pennsylvania in January 2007 but did not permanently vacate the apartment prior to the expiration of her most recent renewal lease on May 31, 2009); **Manhattan Mansions, L.P. v Garvey** (34 Misc 3d 130[A], 2011 NY Slip Op 52339[U] [App Term, 1st Dept]) (where the tenants had permanently relocated to Florida years earlier but had not surrendered their interest and had continued to make rent payments in their own name until 2009, the tenants' daughter could not show that she had "resided with" the tenants during the two-year period immediately preceding their permanent vacatur); **Clinton Realty Assoc., LLC v De Los Angeles** (29 Misc 3d 142[A], 2010 NY Slip Op 52178[U] [App Term, 1st Dept]) (a landlord was entitled to summary judgment where the occupant's claim to succeed to his wife's tenancy based on her vacating the apartment in 2001 was conclusively belied by his wife's execution of a renewal lease in 2003 and payment of rent through September 2004); 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).

BPP ST Owner LLC v Nichols (63 Misc 3d 18 [App Term, 1st Dept 2019]) (where the disabled RFM had resided in the apartment with his mother for 33 years, including the requisite period before his mother's permanent departure, and was listed as an occupant on all renewal leases, he was entitled to succession rights notwithstanding that his mother had continued to sign renewal leases and pay the rent after she had moved out in 2003; in Third Lenox, the court found that the tenant had affirmatively misrepresented the fact that she no longer lived in the apartment and had unduly prejudiced the landlord in its eviction claim; here, there was no misrepresentation and no prejudice and it was clear that the RFM would have been entitled to succeed if he had sought to right after his mother moved out, citing Curry and Riverton); **Park Tower S. Co., LLC v Mandal** (63 Misc 3d 134[A], 2019 NY Slip Op 50471[U] [App Term, 1st Dept]) (despite "serious and troubling issues regarding the forgery of the tenant's signature on renewal leases after her death," the landlord was not entitled to summary judgment dismissing the RFM's succession counterclaim as there were credibility

issues raised by the occupant's denial that he knew of and acquiesced in the forgery, citing South Pierre Assoc. and Riverton Assoc.); cited in **5712 Realty LLC v Taylor** (63 Misc 3d 922 [Civ Ct, Kings County 2019, F. Ortiz, J.]) (based on Jourdain, notwithstanding the tenant's signing of two two-year renewal leases after she vacated, the RFM was entitled to a trial on the issue of whether she co-resided with her mother in the two years before her mother permanently vacated).

Mexico Leasing, LLC v Jones (46 Misc 3d 127[A], 2014 NY Slip Op 51456[U] [App Term, 2d, 11th & 13th Jud Dists 2014], lv denied 2015 NY Slip Op 71089[U] [2d Dept]) (RSC § 2523.5 [b] [1], when read in light of the goal of the succession provisions to prevent the dislocation of long-term residents due to the vacatur of the head of the household, as set out in Murphy, neither mandates nor even allows a finding of nonentitlement to succession rights solely on the ground that the tenant did not maintain her primary residence in the stabilized apartment during the two-year period prior to her permanent vacatur; where the tenant, who moved to Pennsylvania in 1999 to be closer to her place of employment, leaving her young-adult children and a grandchild in the apartment, continued to return to the apartment several times a month, to view herself as living in the apartment, and to pay the rent and sign renewal leases, the fact that the apartment was not her primary residence in the two years before she stopped signing renewal leases would not bar succession rights).

Matter of Underhill-Washington Equities, LLC v Division of Hous. & Community Renewal (157 AD3d 705 [2d Dept 2018]) (notwithstanding that the occupant and the tenant, his sister, had maintained, in nonprimary-residence holdovers commenced in 2009 and 2011, that they had co-resided in the rent-controlled apartment since 1971, and that the tenant had paid the rent through 2009, the DHCR could credit the tenant's affidavit that she had permanently vacated in December 2005 when she had moved to Florida to care for her daughter, so that the two-year co-occupancy requirement was met; judicial estoppel did not apply because the holdovers were not prosecuted to completion; in determining succession rights, the focus is on preventing displacement and the occupant had resided in the apartment for more than 30 years); **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); **90 Elizabeth Apt. LLC v Eng** (58 Misc 3d 300 [Civ Ct, NY County 2017, J. Stoller, J.]) (the tenant's daughter had succession rights notwithstanding the landlord's claim that the tenant did not maintain her primary residence in the apartment after she moved to a nursing home, as the apartment was rent-controlled, not stabilized, and a rent-controlled occupant has no affirmative obligation to notify the landlord of his status as a successor, and as there was no deceptive conduct; in addition, a tenant's move into a nursing home is not determinative of primary residence); 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 [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 prejudice and the landlord showed none).

CDC E, 105th St. Realty LP v Cachola (61 Misc 3d 133[A], 2018 NY Slip Op 51478[U] [App Term, 1st Dept]) (an RFM who had resided with her mother for at least three years in the stabilized apartment prior to her mother's death was entitled to summary judgment on her succession claim notwithstanding that the tenant, who had suffered from Alzheimer's Disease, did not include the RFM's name and SSI disability income on annual household and income declarations); see also **Wildwood Co., LP v DeBruin** (59 Misc 3d 127[A], 2018 NY Slip Op 50375[U] [App Term, 1st Dept]).

Matter of 530 Second Ave. Co., LLC v Zenker (160 AD3d 160 [1st Dept 2018]) (the evidence established the behaviors associated with a traditional marriage where the occupant had been romantically involved with the tenant for 9½ years beginning in 1979, moved out in 1988, and moved back in in 2003 after the tenant offered her shelter, and where she took care of the domestic chores while the tenant took care of household expenses, they accompanied each other to doctors' appointments, and intermingled some funds; the lack of sexual intimacy after she moved back in in 2003 did not make them roommates, where they shared decades of dedication and self-sacrifice), revg (54 Misc 3d 144[A], 2017 NY Slip Op 50232 [App Term, 1st Dept]) (there was no evidence of financial and emotional commitment after the occupant moved back in; Ling Cohan, J. dissenting, the lack of a sexual relationship is not a factor that the Civil Court should have considered).

Matter of Maldonado v Crotona Place W. Hous. Dev. (168 AD3d 524 [1st Dept 2019]) (the omission from an annual recertification, and the RFM's mother's request to remove the RFM from the household composition, created a presumption that the RFM had moved out of the household, citing Matter of Manhattan Plaza Assoc., L.P.); **Boston Tremont Hous. Dev. Fund Corp. v Dunbar** (62 Misc 3d 844 [Civ Ct, Bronx County 2018, S. Ibrahim, J.]) (the failure to add an RFM to annual certifications and/or leases did not constitute "irrebuttable evidence"; the RFM could present evidence to rebut the presumption of nonresidence; nontraditional family members can succeed to a Section 8 tenancy; the period of coresidency is not two years but "a bona fide co-occupancy of suitable duration"); quoting **NSA Flatbush Assoc. v Mackie** (166 Misc 2d 446 [Civ Ct, NY County 1995, M. Finkelstein, J.]; see also **Amsterdam Ave. Hous. v Estate of Wells** (10 Misc 3d 142[A], 2006 NY Slip Op 50084[U] [App Term, 1st Dept]) (the absence of an RFM's name on a lease or recertification is not fatal to a Section 8 succession claim); but cf. **Matter of Evans v Franco** (93 NY2d 823 [1999]) (an RFM who was never certified as a family member or listed on the tenant's 13 annual statements was not entitled to a hearing to confirm his status to succeed to the Section 8 subsidy).

Willoughby Court Apts. LP v Gomez (57 Misc 3d 1211[A], 2017 NY Slip Op 51377[U] Kings County, 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: Roommate Law

OH 161st St. LLC v Brooks (63 Misc 3d 478 [Civ Ct, Bronx County 2019, K. Bacdayan, J.]) (in a holdover against a tenant in state-funded supportive housing for people with disabilities, based on a claim that the tenant violated the visitor's policy by allowing a visitor to frequently spend nights with him, the court denies the tenant's motion to dismiss for failure to state a cause of action, as the Roommate Law [Real Property Law § 235-f] was inapplicable to tenant's visitor, who was a guest, not a roommate, as she was not a long-term occupant; the landlord's visitor's policy was not facially invalid under the First Amendment right of association as not every imaginable application would be unenforceable).

Defenses: Multiple Dwelling Law

West 47th Holding, LLC v Eliyahu (64 Misc 3d 133[A], 2019 NY Slip Op 51066[U] [App Term, 1st Dept]) (summary judgment properly awarded to the tenant on an MDL § 302 defense in a nonpayment proceeding, where the landlord's predecessor had subdivided two apartments into four units, increasing the number of units from 10 to 12, notwithstanding that the building was constructed prior to the requirement to obtain a certificate of occupancy, as the subdivision constituted substantial alterations, and notwithstanding that the tenant's apartment was not one of the newly constructed apartments); citing **GVS Props., LLC v Vargas** (172 AD3d 466 [1st Dept 2019]) (in 19 nonpayment proceedings, the collection of rent was barred where there were multiple violations of the CO and fire safety concerns, as the certificate of occupancy was not valid because it did not fulfill the requirements of MDL § 301), affg (59 Misc 3d 128[A], 2018 NY Slip Op 50396[U] [App Term, 1st Dept]) (where a building had been substantially altered to contain 60 apartments rather than the 53 permitted in the certificate of occupancy and the Department of Buildings had refused to issue a certificate of occupancy for the building as currently configured because of serious fire safety concerns and the lack of a second means of egress for certain apartments which could cause overcrowding in the corridor in case of an emergency, the landlord was barred from collecting rent for the entire building).

Matter of 49 Bleecker, Inc. v Gathien (157 AD3d 619 [1st Dept 2018]) (a net lessee of one story of a de facto multiple dwelling was an "owner" within the meaning of Multiple Dwelling Law § 302 [1] [b], barring owners of a "dwelling" occupied without a certificate of occupancy from recovering rent), revg **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, and 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** (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).

Bornstein v Goldberger (59 Misc 3d 135[A], 2018 NY Slip Op 50513[U] [App Term, 2d, 11th & 13th Jud Dists]) (the absence of a multiple dwelling registration does not bar the recovery of possession in a holdover summary proceeding, citing Czerwinski); **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]); see generally **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); **Arnav Indus., Inc. v Pitari** (82 AD3d 557 [1st Dept 2011]) (MDL § 302 did not bar a landlord from recovering rent where no permanent certificate of occupancy had been issued because the Department of Buildings would not issue one as long as there was work being done in the building and the temporary certificates of occupancy for the tenant's 14th-floor apartment and the 14th floor demonstrated no violations for construction on the 14th floor; the absence of the required certificate did not adversely affect the habitability of the structure or render the tenant's residential occupancy illegal; a claim for rent arrears is governed by a six-year statute of limitations that runs on each payment from the date it becomes due).

BSP 1898 Belmont I, LLC v Dean (59 Misc 3d 1220[A], 2018 NY Slip Op 50637[U] [Civ Ct, Bronx County, D. Lutwak, J.]) (where the landlord remedies a defective multiple dwelling registration, the prior noncompliance does not bar the nonpayment proceeding); citing **Mago, LLC v Singh** (57 AD3d 629 [2d Dept 2008]) (where MDL registration defects are cured, recovery of retroactive rent is allowed).

Atif v DiSapio (63 Misc 3d 134[A], 2019 NY Slip Op 50472[U] [App Term, 9th & 10th Jud Dists]) (a failure to obtain a Town's rental permit does not bar the recovery of rent absent a bar in the statute); **Messerschmidt v Romney** (61 Misc 3d 153[A], 2018 NY Slip Op 51807[U] [App Term, 9th &10th Jud Dists]) (there is no bar to the recovery of rent where a one-family home is used as a two-family); **Hayes v Ramsey** (60 Misc 3d 137[A], 2018 NY Slip Op 51114[U] [App Term, 9th & 10th Jud Dists]) (the fact that an apartment is rented without a permit does not preclude the recovery of rent absent a statutory bar to the recovery, citing Madden and Sinclair; even where there is a statutory proscription, rents voluntarily paid are not recoverable by the tenant); **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 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); cf. **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).

Defenses: Statute of Limitations and Laches

East Midtown Plaza Hous. Co. v Gamble (60 Misc 3d 9 [App Term, 1st Dept 2018]) (the one-year statute of limitations of CPLR 215 [4] does not apply to a proceeding based on an illegal trade or business; CPLR 215 [4] applies to penalties or forfeitures imposed in a punitive way for infractions of a public law and does not include a liability created for the purpose of redressing a private injury even if the wrongful act is a public wrong; the tenant's eviction under RPAPL 711 [5] is intended to protect the health, welfare and safety of the community and of the tenants who reside in the building, not to punish; Pretto should not be followed); abrogating **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 also **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).

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 a lockout 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).

Dee Cee Assoc., LLC v 44 Beehan Corp. (148 AD3d 636 [1st Dept 2017]) (the six-year statute of limitations on the recovery of rent arrears runs from the date on which the payments became due).

Defenses: Illusory Tenancy

Matter of 333 E. 49th Partnership, LP v New York State Div. of Hous. & Community Renewal (165 AD3d 93 [1st Dept 2018]) (an owner who leased multiple apartments to a business entity was liable for treble damages for the overcharges that entity collected, as the owner derived substantial benefits from the scheme by decontrolling some of the apartments and was aware of the prime tenant's activities; collusion need not be found for the owner to be responsible for an illusory tenancy; however, the owner's lease to the prime tenant contained a proper rent, and lookback beyond the four-year period was not appropriate); **388 Broadway Owners, LLC v Salaway** (60 Misc 3d 132[A], 2018 NY Slip Op 51010[U] [App Term, 1st Dept]) (an undertenant failed to prove an illusory tenancy where the evidence showed that he had never represented himself as anything other than a roommate, neither he or the tenant had ever notified the landlord that the tenant had vacated, rent had been continuously paid with a check bearing the tenant's name, and there was no evidence that the landlord had actual or constructive knowledge of the arrangement between the tenant and the undertenant or that the landlord had derived any benefit from the tenant's conduct; in addition, as the tenant had refunded the overcharges, the undertenant did not acquire tenancy rights); **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); **1 Bk St. Corp. v Sykorova** (61 Misc 485 [Civ Ct, NY County 2018, H. Capell, J.]) (an illusory tenancy exists when a prime tenant rents an apartment for the sole purpose of reletting it, and profits from the arrangement or otherwise subverts the RSL; the tenant must establish at least constructive knowledge on the part of the landlord of the arrangement [citing Primrose Mgt.]; where the landlord actively sought to terminate the tenancy as soon as it learned of the arrangement, an illusory tenancy would not be found); cf. **622 E. 169 LLC v McClain** (59 Misc 3d 1208[A], 2018 NY Slip Op 50449[U] [Civ Ct, Bronx County, D. Bryan, J.]) (grants a post-eviction motion to be restored in a licensee

proceeding where the occupant was a subtenant of a scattered-site housing provider and showed an arguably meritorious illusory tenancy defense [citing Avon Furniture]).

Defenses: Warranty of Habitability

Musey v 425 E. 86 Apts. Corp. (154 AD3d 401 [1st Dept 2017]) (a terrace that is safe and suitable for a tenant's own exclusive, outdoor use is an amenity, not an essential function that a co-op must provide, and is not covered by the warranty of habitability); but see **Goldhirsch v St. George Tower** (142 AD3d 1044 [2d Dept 2016]) (since the implied warranty of habitability includes a covenant that the premises are fit for the uses reasonably intended by the parties, where a terrace was unfit for use the warranty of habitability was breached); **Israel Realty LLC v Shkolnikov** (59 Misc 3d 148[A], 2018 NY Slip Op 50812[U] [App Term, 1st Dept]) (a sublessor of a co-op apartment breached the warranty of habitability when the co-op closed off the subtenant's terrace/patio; the warranty of habitability applies to conditions beyond the landlord's control).

Grinberg v Eissenberg (58 Misc 3d 84 [App Term, 2d, 11th & 13th Jud Dists 2017]) (MDL § 78, which imposes a nondelegable duty on an owner to maintain premises in a reasonably safe condition, does not entitle a tenant to make repairs and sue for the value of the work; the proprietary tenant waived his rights under MDL § 78 by agreeing in the lease that it was his responsibility to keep the interior walls, floors and ceilings in good repair; however, the implied warranty of habitability cannot be similarly waived, and the tenant was entitled to be reimbursed for repairs of conditions which were detrimental to his health and safety notwithstanding the provision in the proprietary lease purporting to transfer the responsibility for the repairs to the tenant).

13 E. 9th St. LLC v Seelig (63 Misc 3d 1218[A], 2019 NY Slip Op 50582[U] [Civ Ct, NY County, J. Stoller, J.]) (the contract rent comprises the basis for a rent abatement, notwithstanding that the tenant received a Section 8 subsidy and a SCRIE exemption; the remedy of repair and deduct is available only after the landlord willfully refuses to repair); citing **Matter of Committed Community Assoc. v Croswell** (250 AD2d 845 [2d Dept 1998]), affg (171 Misc 2d 340 [App Term, 2d & 11th Jud Dists 1997]) (where rent is partly paid by the tenant and partly by Section 8, the diminution in value is based on the full contract rent; however, the tenant may not recover in excess of his share of the rent since recovery is dependent upon the obligation to pay rent by the party asserting the right to recover).

Atif v DiSapio (63 Misc 3d 134[A], 2019 NY Slip Op 50472[U] [App Term, 9th & 10th Jud Dists]) (a counterclaim for breach of the warranty of habitability may be maintained for rent previously paid and the tenant's recovery is not limited to the rent demanded in the petition; the fact that five of seven windows did not open constituted a deprivation of light, air and ventilation and a breach of the warranty; expert testimony was not needed to determine the amount of damages); **Dunbar Owner LLC v Jones** (54 Misc 3d 134[A], 2017 NY Slip Op 50088[U] [App Term, 1st Dept]) (a claim for breach of the

warranty of habitability was not limited to the period after the landlord purchased the building where the closing documents indicated that the landlord took subject to existing tenancies); citing **Stasyszyn v Sutton E. Assoc.** (161 AD2d 269 [1st Dept 1990]) (where a stipulation with a former owner provided that the tenant agreed to vacate during renovations and that the stipulation would be binding on the owner's successors, the covenant ran with the land), and **Real Property Law § 223** (rights where property or lease is transferred).

Cambridge Hgts. HDFC v McCormick (61 Misc 3d 154[A], 2018 NY Slip Op 51813[U] (App Term, 2d, 11th & 13th Jud Dists]) (a warranty-of-habitability defense can only be raised by one who is a party to the rental agreement); citing **Wright v Catcendix Corp.** (248 AD2d 186 [1st Dept 1998]) (subtenants had no cause of action against the overlandlord for constructive eviction, breach of lease, breach of covenant of quiet enjoyment or breach of the warranty of habitability as there was no contractual or landlord-tenant relationship); cf. **Israel Realty LLC v Shkolnikov** (59 Misc 3d 148[A], 2018 NY Slip Op 50812[U] [App Term, 1st Dept]) (a subtenant may assert a warranty-of-habitability claim against a sublessor); **230-79 Equity, Inc. v Frank** (50 Misc 3d 144[A], 2016 NY Slip Op 50245[U] [App Term, 1st Dept]) (the tenant, who did not reside in the co-op apartment, could not assert a claim for breach of the warranty of habitability); citing **Genson v Sixty Sutton Corp.**, 74 AD3d 560 [1st Dept 2010]); **Hope Horizon Realty v Johnson** (56 Misc 3d 1217[A], 2017 NY Slip Op 51052[U] [Mt. Vernon City Ct, A. Armstrong, J.]) (while a breach of the warranty of habitability is not a defense to a holdover, it may be raised in the proceeding to the extent that the petition also seeks arrears); **1691 Fulton Ave. Assoc., LP v Watson** (55 Misc 3d 1221[A], 2017 NY Slip Op 50697[U] [Civ Ct, Bronx County, D. Lutwak, J.]) (same); cf. **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).

Retaliatory Eviction

689 Flushing Realty Corp. v Schiller (59 Misc 3d 135[A], 2018 NY Slip Op 50502[U] [App Term, 2d, 11th & 13th Jud Dists]) (the presumption of retaliation when a holdover proceeding is commenced within six months after a tenant's taking action to enforce his warranty of habitability rights is inapplicable where the conditions were created by the tenant, citing Real Property Law § 223-b [6]); cf. **Brown v Felton** (58 Misc 3d 161[A], 2018 NY Slip Op 50301[U] [App Term, 1st Dept]) (the trial evidence supported a finding of nonretaliatory motive where the tenant's unregulated lease had expired by its terms and the landlord had terminated the ensuing month-to-month tenancy because the tenant had failed to pay her portion of the rent for over a year).

Stipulations

Matter of 35 Jackson House Apts. Corp. v Yaworski (163 AD3d 805 [2d Dept 2018]) (where a shareholder who had stipulated to provide the landlord with the names and license information of workers doing renovations in the apartment within 30 days failed to do so within that period and within two subsequent extensions, the default was not de minimis), affg 50 Misc 3d 128[A], 2015 NY Slip Op 51887[U] [App Term, 2d, 11th & 13th Jud Dists]).

ML 1188 Grand Concourse LLC v Sha (64 Misc 2d 1224[A], 2019 NY Slip Op 51237[U] [Civ Ct, Bronx County, D. Lutwak, J.]) (where, after a nonpayment petition had been dismissed and the matter adjourned for a trial on the tenant's counterclaims, the parties stipulated that the tenant would pay an agreed-upon amount by a certain date and that, upon a default, the matter could be restored "for appropriate relief", the court, based on the decisions from both Appellate Terms, would not award the landlord a final judgment, as the stipulation did not provide for the entry of judgment upon a default and the law requires strict construction of instruments that could work a forfeiture); **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)]); **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); see also **PK Mgt., LLC v Baumann** (61 Misc 3d 129[A], 2018 NY Slip Op 51391[U] [App Term, 2d, 11th & 13th Jud Dists]) (as strict compliance with termination provisions that can result in a forfeiture is required, the landlord's failure to submit an affidavit of noncompliance, as required by the stipulation before entering a final judgment, required the vacatur of the final judgment).

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** and in **Parkash v Grindley** (55 Misc 3d 140[A], 2017 NY Slip Op 50563[U] [App Term, 2d, 11th & 13th Jud Dists]).

448 LLC v Butcher's Choice Meat Mkt. (62 Misc 3d 149[A], 2019 NY Slip Op 50244[U] [App Term, 1st Dept]) (the tenant's entry into two settlement stipulations waived its claim of purported defects in the predicate notice); **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]) (same; 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 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); but 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).

Ave. D. Props. v Baker (97201/17 [Civ Ct, Kings County July 13, 2018, M. Sikowitz, J.]) (where there was a DHCR order setting the rent at $278, a stipulation settling a prior proceeding setting the rent at $1,000 a month was void, citing, inter alia, Blagg and Mars); see **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** (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); 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]).

Diego Beekman Mut. Hous. Assoc. Hous. Dev. Fund Corp. v McClain (63 Misc 3d 1218[A], 2019 NY Slip Op 50580[U] [Civ Ct, Bronx County, S. Ibrahim, J.]) (vacates a stipulation to vacate entered into by a pro se tenant in a nuisance holdover based on "Collyer" conditions where the tenant did not know that she could seek an opportunity to cure [citing **Lincoln Terrace v Snow**, NYLJ, Nov. 23, 1983 at 5, col. 3 (App Term, 1st Dept) (RPAPL 735 [4] should be broadly applied to include certain nuisance conditions)] and where the tenant might qualify for a reasonable accommodation); see **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).

Pretrial Proceedings & Trial

Amity Ct., Inc. v Wertheim (62 Misc 3d 139[A], 2019 NY Slip Op 50048[U] [App Term, 2d, 11th & 13th Jud Dists]) (since a motion to dismiss for improper service pertained in part to the court's jurisdiction, the court was required to pass on that motion before making any other ruling, including with regard to the landlord's motion for leave to discontinue the proceeding).

CO-BB Devonshire Venture, LLC v Smith (60 Misc 3d 139[A], 2018 NY Slip Op 51197[U] [App Term, 9th & 10th Jud Dists]) (it was error for the District Court to deny the tenant's motion to modify a stipulation of settlement based on the tenant's failure to make a court-ordered deposit, as the right to be heard on the merits of the motion cannot properly be conditioned on the making of a deposit); **Carlos v Primus** (58 Misc 3d 159[A], 2018 NY Slip Op 50247[U] [App Term, 9th & 10th Jud Dists]) (it was error for the court to award a nonpayment final judgment to the landlord based on the tenant's failure to make a court-ordered deposit); **Parkview Equities, LLC v Coughlin** (42 Misc 3d 138[A], 2014 NY Slip Op 50164[U] [App Term, 9th & 10th Jud Dists]) (it is error to deny a motion to vacate a default judgment based on the tenant's failure to make a court-ordered deposit); **Merenda v Fried** (42 Misc 3d 136[A], 2014 NY Slip Op 50117[U] [App Term, 9th & 10th Jud Dists]) (it is error to deny a tenant a trial and award the landlord a final judgment based on the tenant's failure to make a court-ordered deposit); but cf. **RPAPL 745 (2)**.

Hillside Park 168, LLC v Hossain (61 Misc 3d 132[A], 2018 NY Slip Op 51451[U] [App Term, 2d, 11th & 13th Jud Dists]) (there is a strong rule against staying a summary proceeding pending the determination of an action in another court, as a landlord is entitled by statute to an expeditious determination of its claim that it is wrongfully being denied possession; thus, a holdover based on the tenant's failure to execute a renewal lease should not have been stayed based on the pendency of a Supreme Court action by the tenant and others alleging, inter alia, rent overcharge and deceptive business practices, as the tenant's claims were fully cognizable in the Civil Court); followed in **Hillside Park 168, LLC v Zaman** (64 Misc 3d 143[A], 2019 NY Slip Op 51279[U] [App Term, 2d, 11th & 13th Jud Dists]) (over a dissent by Justice Siegal that complete relief could not be granted in the summary proceeding).

CJK Real Estate LLC v McGrath (63 Misc 3d 141[A], 2019 NY Slip Op 50594[U] [App Term, 1st Dept]) (since the suspension of the tenant's attorney resulted in an automatic stay until 30 days after notice to appoint another attorney was served upon the tenant [CPLR 321 (c)], which did not occur, a default judgment entered against the tenant while the stay was in effect should have been vacated unconditionally, even though a new attorney had filed a notice of appearance in the morning of the day the default was taken).

Findlay House, Inc. v Hongliu (49386/17 [Civ Ct, Bronx County, Aug. 31, 2018, K. Bacdayan, J.]) (since, under CPLR 406, a motion made before the petition is to be heard shall be noticed at that time, the time for service is shortened and any prejudice to the opposing party can be cured by an adjournment); citing **PCMH Crotona, L.P. v Taylor** (57 Misc 3d 1212[A], 2017 NY Slip Op 51401[U] [Civ Ct, Bronx County, K. Thermos, J.]); **Goldman v McCord** (120 Misc 2d 754 [Civ Ct, NY County 1983, L. Friedman, J.]).

Findlay House, Inc. v Hongliu (49386/17 [Civ Ct, Bronx County, Aug. 31, 2018, K. Bacdayan, J.]) (stays a licensee proceeding against the deceased tenant's wife pending a determination by DHCR, which has exclusive jurisdiction of the occupant's succession rights claim, as DHCR's determination would determine the outcome of the summary proceeding; an award of use and occupancy pursuant to RPAPL 745 [2] would be antithetical to the stay, as the tenant's defense would be stricken upon her failure to make the initial deposit or she would be required to go to an immediate trial if she failed to make a subsequent payment; however, use and occupancy would be set pursuant to the court's "broad discretion", pending DHCR's decision); citing **Eli Haddad Corp. v Cal Redmond Studio** (102 AD2d 730 [1st Dept 1984]; **Silver Towers Owners Corp. v Da Costa** (55 Misc 3d 1224[A], 2017 NY Slip Op 50784[U] [Civ Ct, Queens County, J. Rodriguez, J.]) (in a no-pet holdover, the court denies the tenant's application for a stay pending the tenant's Department of Human Rights proceeding, as the relief sought by the tenant could be had in the court, which had the necessary expertise to determine if the tenant had proven the necessity of the dog); **Pavel v Fischer** (21 Misc 3d 143[A], 2008 NY Slip Op 52452[U] [App Term, 2d & 11th Jud Dists]) (court providently exercised its discretion in refusing to stay a summary proceeding against an occupant who had filed a succession rights claim with DHCR); cf. also **Plaza Residences LP v Lake** (NYLJ, Jan. 4, 2010, p 18, col 3 [Civ Ct, Kings County, M. Finkelstein, J.]) (staying a nuisance holdover proceeding that was based on allegations that the tenant was arrested on old warrants and a sawed-off shotgun found in the apartment, pending determination of the criminal court action, since it was not alleged that the tenant was using the apartment in furtherance of an ongoing criminal enterprise and since a stay would further the tenant's Fifth Amendment rights); **5201 Snyder Ave. Assoc. LP v Clarke** (32 Misc 3d 1203[A], 2011 NY Slip Op 51169[U] [Civ Ct, Kings County, M. Finkelstein, J.]) (stays a superintendent holdover proceeding pending the determination of a previously filed federal unfair labor practices action, where the federal action included a claim of improper termination of employment and sought relief including rehiring); see **Society of the New York Hosp. v San Filippo** (92 AD2d 496 [1st Dept 1983]) (staying summary proceeding pending determination by Division of Human Rights of age discrimination complaint); **Boca Broadway Realty Co. v Naim** (NYLJ, June 8, 1995 [App Term, 1st Dept]) (stays summary proceeding against superintendent pending determination of gender discrimination complaint by Commission on Human Rights); **660 Riverside Dr. Aldo Assoc. v Marte** (178 Misc 2d 784 [Civ Ct, NY County, Ling-Cohan, J. 1998]) (after examining merits of superintendent's claim, court stays superintendent proceeding pending determination by NLRB of unfair labor practice

proceeding); cf. **3720 Homes, Inc. v Hyman** (30 Misc 3d 79 [App Term, 1st Dept 2010]) (in a holdover based on the tenants "harboring" a dog, a stay was not warranted pending the determination of the tenants' housing discrimination complaint filed with the State Division of Human Rights given the indefinite delay of the "summary" remedy and the existence of numerous issues unrelated to the claim of discrimination).

BAE 193 Realty LLC v Rosales (63 Misc 3d 948 [Civ Ct, Bronx County 2019, K. Bacdayan, J.]) (in a nonpayment proceeding, following several stipulated–to adjournments, where the landlord had adjourned the case six times, the court denies the landlord's request for the lump-sum use and occupancy which had accrued in the nine months since the proceeding had been commenced, as the tenant would be unable to pay it, was prejudiced by the landlord's delay and had an arguably meritorious overcharge claim; while RPAPL 745 [2] has been held to be constitutional in certain situations, the court must apply RPAPL 745 [2] in a manner which does not deny tenants their due process rights; thus, the court would order payment of use and occupancy only from the time the landlord made its motion); cf. **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)]); followed in **Bronx Park Phase II Preserv. LLC v V.C.**, 56 Misc 3d 1218[A], 2017 NY Slip Op 51063[U] [Civ Ct, Bronx County, D. Lutwak, J.]); 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).

Judgment

Esposito v Larig (52 Misc 3d 67 [App Term, 2d, 11th & 13th Jud Dists 2016]) (use and occupancy cannot be awarded in a summary proceeding where the petition is dismissed); see **Jacob Marion, LLC v Doe** (58 Misc 3d 155[A], 2018 NY Slip Op 50191[U] [App Term, 2d, 11th & 13th Jud Dists]) (same).

Goldburd v Langer (62 Misc 3d 140[A], 2019 NY Slip Op 50060[U] [App Term, 2d, 11th & 13th Jud Dists]) (since the holdover proceeding terminated following the entry of a final judgment and the tenant's removal from the premises [citing **Whitmarsh v Farnell**, 298 NY 336 (1949) and **Sweet v Sanella**, 46 AD2d 688 (2d Dept 1974)], the Civil Court lacked jurisdiction to entertain the landlord's motion to recover the use and occupancy which had been waived in the stipulation of settlement on condition the tenant timely vacated); **Jung Ho Lee v Green World Cleaners 1, LLC** (61 Misc 3d 155[A], 2018 NY Slip Op 51826[U] [App Term, 2d, 11th & 13th Jud Dists]) (since the nonpayment proceeding terminated following the entry of a final judgment and the tenants' removal from the premises, the Civil Court lacked jurisdiction to entertain the landlord's motion to, in effect, amend the final judgment to include a monetary award for unpaid water bills and damages for the tenants' failure to leave the premises in broom-clean condition, notwithstanding that the stipulation of settlement had purported to reserve the landlord's right to make that motion); **Edgemont Assoc., LLC v Goldman** (58 Misc 3d 160[A], 2018 NY Slip Op 50271[U] [App Term, 9th & 10th Jud Dists]) (where the parties stipulated to the entry of a final judgment and that the tenants would receive a $50,000 buyout if they timely surrendered, the Justice Court lacked jurisdiction to entertain the tenants' motion for the entry of a money judgment pursuant to the stipulation, as the proceeding had terminated after the entry of judgment and the tenant's removal from the premises, and as the amount sought exceeded the court's jurisdiction); **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); but see **Lexington Ave. Assoc. v Kandell** (283 AD2d 379 [1st Dept 2001]) (since the Civil Court is the preferred forum for landlord-tenant disputes, enforcement of a nonpayment stipulation requiring the tenant to vacate while repairs were ongoing and to re-occupy under certain conditions should be in the Civil Court where the stipulation provided for the Civil Court's continuing jurisdiction); **728 Fulton St. LLC v Perch** (63 Misc 3d 602 [Civ Ct, Kings County 2019, Z. Wang, J.]) (where the parties stipulated that the tenants would vacate by September 20, 2018 in return for $27,500 in certified funds, court holds that, under **Mountain View Coach Lines, Inc. v Storms** [102 AD2d 633 (2d Dept 1984]), it was bound to apply the rule of 952 Assoc., LLC v Palmer, to the effect that the Housing Part has subject matter jurisdiction to compel compliance with a so-ordered stipulation; however, as the Appellate Division, Second Department, has held that the Civil Court cannot grant the equitable relief of specific performance, the court would grant only a money judgment, as the court retained jurisdiction to enforce the stipulation, which arose from a Housing Court proceeding and the parties contemplated its enforcement in Housing Court); citing **952 Assoc., LLC v Palmer** (52 AD3d 236 [1st Dept 2008]) (in a Supreme Court action by a landlord for the disgorgement of funds paid to the tenant, for breach of a confidentiality provision of a settlement reached in the Civil Court in which the landlord agreed to pay the tenant $550,000 in exchange for the tenant's agreement to vacate, the Supreme Court properly stayed the action pending the resolution of the Civil Court proceeding, as the Housing Part had jurisdiction to compel compliance with the settlement and thus could hear related matters, such as the landlord's cross motion to disgorge disputed funds); citing **CPLR 5221 (a) (3)** (if a judgment was entered in the Civil Court, an article 52

special proceeding to enforce the judgment shall be commenced there); **One York Prop. LLC v Vista Media Group, Inc.** (12 Misc 3d 1155[A], 2006 NY Slip Op 50899[U] [Civ Ct, NY County, A. Singh, J.) (where a stipulation settling a holdover proceeding provided that the court would retain jurisdiction to enforce the stipulation, the court retained jurisdiction even after the final judgment was entered and possession surrendered; thus, the court awarded the tenant judgment in the sum of $294,250).

Grand Concourse Estates LLC v Ture (63 Misc 3d 139[A], 2019 NY Slip Op 50564[U] [App Term, 1st Dept]) (although legal fees were not demanded in the petition, they could be requested by way of a motion after the merits determination had been made, and the landlord did not waive its entitlement to attorney's fees); citing **AD 1619 Co. v VB Mgt., Inc.** (259 AD2d 382 [1st Dept 1999]) and **Monacelli v Farrington** (240 AD2d 296 [1st Dept 1997]); followed in **Dara Realty Assoc. v Schachter** (2003 NY Slip Op 51150[U] [App Term, 2d & 11th Jud Dists]); see also **Rotunno v Gruhill Const. Corp.** (29 AD3d 772 [2d Dept 2006]) (due to the expeditious nature of summary proceedings, which are creatures of statute, "a landlord's right to an award of an attorney's fee, when raised, is typically postponed until after a determination on the merits"); **815 Park Ave. Owners, Inc. v Metzger** (250 AD2d 471 [1st Dept 1998]) ("it is common practice to sever a derivative claim for attorneys' fees upon granting judgment on the main claim").

Avalonbay Communities, Inc. v Johnson (2019 NY Slip Op 67325[U] [App Term, 9th & 10th Jud Dists]) (summarily reversing an order denying the tenant's motion to vacate a nonpayment default final judgment, and dismissing the petition, where the court committed clear legal error in entering judgment on a facially defective petition which alleged that rent was demanded "personally in writing" but did not state the manner of service of the rent notice or attach the notice and an affidavit of its service); **Merrbill Holdings, LLC v Toscano** (59 Misc 129[A], 2018 NY Slip Op 50410 [App Term, 9th & 10th Jud Dists]) (as a default judgment cannot be entered on facially insufficient papers, the entry of a nonpayment judgment where the rent demand had been served only by mail and not in accordance with RPAPL 735 was improper); **Parkview Apts. Corp. v Pryce** (58 Misc 3d 155[A], 2018 NY Slip Op 50187[U] [App Term, 9th & 10th Jud Dists]) (where a holdover petition failed to allege that a notice of termination had been served, the petition was facially defective; as a default final judgment may not be granted on facially defective papers, the tenant's motion to vacate the judgment would be granted and, upon a review of the pleadings [CPLR 409 (b)], the petition would be dismissed); 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); cf. **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); **New York City Hous. Auth., Edenwald Houses v Ramirez** (60 Misc 3d 1231[A], 2018 NY Slip Op 51281[U] [Civ Ct, Bronx County, E. Sanchez, J.]) (in a holdover against a NYCHA tenant based on a disposition of termination for failure to furnish income verification information, where the testimony at an inquest showed that the tenant was a recipient of SSI benefits and had not appeared at the administrative hearing, the court declines to issue a default final judgment, as the tenant was not represented by a guardian at the administrative hearing and may have required one pursuant to the Blatch consent decree [Blatch v Hernandez, 97 Civ 3918 (SD NY), filed Oct. 10, 2008]).

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).

Warrant

175 E. 52nd St., LLC v Lamothe (2018 NY Slip Op 91349[U] [App Term, 2d, 11th & 13th Jud Dists]) (in a nonpayment proceeding, the court summarily reverses an order denying the tenant's motion to permanently stay the execution of a warrant, as the subsequent execution of renewal leases vitiated the warrant); **Zandieh v Polkosnik** (2018 NY Slip Op 66141[U] [App Term, 2d, 11th & 13th Jud Dists]) (dismisses as moot a landlord's appeal from a final judgment after trial dismissing an owner's use proceeding where the parties executed a renewal lease during the pendency of the appeal); **Related Broadway Dev., LLC v Malo** (58 Misc 3d 154[A], 2018 NY Slip Op 50175[U] [App Term, 1st Dept]) (where, in a holdover proceeding based on the subsidized tenant's subletting the apartment on Airbnb, after a consent final judgment had been entered and the execution of the warrant stayed, the parties executed a renewal lease, the final judgment and warrant should have been vacated,

notwithstanding the landlord's agent's claim that it serviced over 1,000 units and the renewal was mistakenly mailed; the issuance of the warrant annulled the landlord-tenant relationship and the landlord was under no legal compulsion to offer a renewal lease, and the landlord did not reserve its rights under the final judgment; thus, the tenant's right of possession flowed from the binding renewal lease, and the landlord's unilateral mistake in failing to note the stipulation and judgment in its records provided no basis to invalidate the lease; citing, inter alia, Stepping Stones Assoc. and Kew Gardens Assoc., and, in effect, declining to follow Coleman v Dabrowski (163 Misc 2d 763 [App Term, 1st Dept 1994]); **757 Miller Owners, LLC v Smith** (L&T 69079/16 [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 Ozcan** (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. **ML 1188 Grand Concourse, LLC v Khan** (60 Misc 3d 1215[A], 2018 NY Slip Op 51139[U] [Civ Ct, Bronx County, K. Bacdayan, J.]) (the execution of a rent-stabilized renewal lease during the litigation of a holdover proceeding but prior to the issuance of a warrant does

not vitiate a notice of termination because the landlord is required by law to execute the lease); citing **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).

Foundation of Love, USA, Inc. v Pena (63 Misc 3d 165[A], 2019 NY Slip Op 50945[U] [App Term, 2d, 11th & 13th Jud Dists]) (a tenant who was evicted after failing to pay the judgment amount would not be restored based on his claim that he was not served with a warrant or eviction notice, as these defects did not affect the validity of the judgment or afford a basis for restoration; in any event, restoration upon motion is discretionary, and the court did not abuse its discretion where the tenant provided no justification for his failure to pay the judgment); see **72-06 Austin Realty Corp. v Cano Ventures Corp.** (60 Misc 3d 128[A], 2018 NY Slip Op 50944[U] [App Term, 2d, 11th & 13th Jud Dists]) (even if the tenant had been evicted in violation of an automatic bankruptcy stay, the tenant would not be restored as the tenant, whose lease had expired, could be immediately re-evicted and restoration would be futile); **Bornstein v Goldberger** (59 Misc 3d 135[A], 2018 NY Slip Op 50513[U] [App Term, 2d, 11th & 13th Jud Dists]) (where a stipulation settling a holdover proceeding permitted the tenants to remain in possession until August 31, 2016 conditioned upon their payment of use and occupancy, the fact that the tenants may have been wrongfully evicted on July 11, 2016 even though they had paid the use and occupancy provided no basis for restoration after August 31, 2016, as the tenants could be immediately re-evicted); **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).

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

Matter of Prospect Union Assoc. v DeJesus (167 AD3d 540 [1st Dept 2018]) (the determination whether a permanent stay should be granted in a holdover based on clutter, bedbugs and a failure to prepare the apartment for extermination should not have been made without a hearing to determine whether an article 81 guardian's help in managing the tenants' affairs would allow them to stay in the apartment without harming others; no specific diagnosis is necessary for a "handicapped" person to be protected under the FHA, and the appointment of an article 81 guardian sufficiently established that the tenants were handicapped); **Strata Realty Corp. v Pena** (166 AD3d 401 [1st Dept 2018]) (grants a 90-day stay of execution of the warrant, directs the tenant and her family to vacate within seven days and the landlord to provide alternative accommodations during the construction work in the apartment, and enjoins the tenant and her family from entering the premises during the construction and from filing complaints about the construction without first notifying the landlord in a nuisance proceeding based on the tenant's continuing and repeated complaints to HPD and her refusal to permit the landlord to correct violations; although the tenant had had many opportunities to cure, in light of her advanced age, disability and long-time occupancy, equity required that she be afforded another opportunity to cure), modg (57 Misc 3d 156[A], 2017 NY Slip Op 51646[U] [App Term, 1st Dept]) (the tenant's repeated filing of complaints and refusal to allow the landlord to correct the conditions, which threatened the health and safety of the other tenants, constituted a nuisance; the landlord was not required to serve a notice to cure, even if the lease required one for objectionable conduct, because the cumulative pattern of the tenant's conduct over a period of years was not curable within the five-day period provided in the lease, and the service of a notice to cure would have been a futile act).

642-654 Whippersnapper LLC v Mahoney (63 Misc 3d 46 [App Term, 1st Dept 2019]) (while no basis was shown for vacating the stipulations entered into by the GAL, who obtained extensions of time to cure the "Collyer" condition, in light of the subsequent appointment of an article 81 guardian who performed heavy duty cleaning and extermination services and arranged for home-care services to maintain the apartment in a sanitary condition, an order denying the tenant's motion to vacate the final judgment and warrant would be modified to provide for a temporary stay of the warrant and a remand for a hearing to determine whether the tenant was entitled to a permanent stay as an accommodation; the DeJesus and Pena opinions are "a clear departure from the approach previously taken in nuisance cases", which previously had held that this type of conduct was incurable); **529 W. 29th LLC v Reyes** (63 Misc 3d 65 [App Term, 1st Dept 2019]) (Civil Court properly conditionally stayed the warrant for six months as a "reasonable accommodation" to a tenant who had caused two fires in three months, as the tenant suffered from schizophrenia and was handicapped within the meaning of the FHA, where the tenant's conditions had improved as the result of an intensive treatment program and social service assistance; **Matter of Hobbs v New York City Hous. Auth.** [128 AD2d 3d 582 (1st Dept 2015) (NYCHA not required to accommodate a tenant who had two fires and kept two unregistered pit bulls)] did not require a contrary result, as each case is specific to its facts and as DeJesus and Pena represent a clear departure from the previous approach).

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).

Elmback Owners, LLC v Newbold (59 Misc 3d 136[A], 2018 NY Slip Op 50518[U] [App Term, 2d, 11th & 13th Jud Dists]) (affirms an order restoring the tenants to possession where the default under the stipulation settling the nonpayment proceeding was de minimis, the tenant had diligently pursued funds to pay the arrears, and no funds were owing, as the courts may relieve a party from the consequences of strict enforcement of a stipulation where enforcement would be unjust or inequitable); **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).

Thamer Props. Corp. v Nava (58 Misc 3d 149[A], 2018 NY Slip Op 50079[U] [App Term, 1st Dept]) (where the tenant tendered the full amount due on January 31, 2017, several days after the deadline set in a January 10, 2017 order but two weeks prior to her eviction, restoration was proper but the eviction was not unlawful); cf. **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).

133 Realty 2010 LLC v Fitzpatrick (59 Misc 3d 137[A], 2018 NY Slip Op 50558[U] [App Term, 1st Dept]) (where there was a minor delay in effecting a cure by signing a renewal lease, the court appropriately exercised its direction in permanently staying the warrant); **Mansfield Owners, Inc. v Robinson** (45 Misc 3d 133[A], 2014 NY Slip Op 51667[U] [App Term, 2d, 11th & 13th Jud Dists]) (where, in an illegal-sublet proceeding, the court stayed issuance of the warrant through October 31, 2012 for the tenant to cure, the tenant's showing that she had served a 30-day notice on the subtenant in July 2012 terminating the subtenancy as of August 31, 2012; that she had commenced a holdover returnable September 19, 2012; and that she had obtained a consent final judgment on October 12, 2012 with execution of the warrant stayed until November 12, 2012 established a timely cure even though the subtenant delayed the eviction until December 11, 2012, as the delay would be deemed de minimis); citing **Caniglia v Elnokrashy** (2003 NY Slip Op 50824[U] [App Term, 2d & 11th Jud Dists]) (a slight delay in curing may be treated as de minimis); **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. **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).

Iris Holdings 961 42nd LLC v Piedrahita (63 Misc 3d 157[A], 2019 NY Slip Op 50833[U] [App Term, 2d, 11th & 13th Jud Dists]) (in a holdover predicated on a claim that the tenant had harbored two pitbulls in the apartment, the tenant was entitled to a permanent stay where she removed the pitbulls during the postjudgment cure period; the presence of an Irish Terrier, which had been in the apartment all along, could not provide a ground to deny the tenant's motion to permanently stay the warrant, as issuance of a holdover warrant must be stayed when the tenant cures the breach upon which the proceeding was predicated); citing **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).

311 Lincoln Place Inv., LLC v Woldmarian (56 Misc 3d 139[A], 2017 NY Slip Op 51085[U] [App Term, 2d, 11th 13th Jud Dists]) (to warrant the granting of a postjudgment cure period, the violation must be curable within 10 days; where the tenant had endangered the other tenants' health and safety over several years by repeatedly refusing to grant access to make repairs, a postjudgment cure period was not warranted); **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]).

Attorney's Fees

245 Owner LLC v Mills (58 Misc 3d 1224[A], 2018 NY Slip Op 50262[U] [Sup Ct, NY County, R. Reed, J.]) (a provision that the rent received upon a reletting shall be used to pay the landlord's expenses, including reasonable attorney's fees, does not permit the landlord to recover attorney's fees based on the successful prosecution of a holdover proceeding where there was no reletting); see **Sokolow v Neuman-Werth** (62 Misc 3d 1 [App Term, 2d, & 13th Jud Dists 2018]).

JK Two LLC v Garber (171 AD3d 496 [1st Dept 2019]) (the trial court based its attorney's fees award on the appropriate factors, including the time and labor required, the difficulty of the issues, and the skill and effectiveness of counsel, and reduced the amount to eliminate work that was duplicative or unnecessarily performed by an attorney rather than a secretary or paralegal; although the attorney's fees exceeded the amount recovered, the court could take into account that the defendant had engaged in conduct that resulted in delay or unnecessary litigation); **Rangoon Inc. v Yi Gui Lin** (60 Misc 3d 1220[A], 2018 NY Slip Op 51180[U] [Civ Ct, NY County, J. Stoller, J.]) (the hourly rate of an attorney's fee must be shown to be reasonable; a court may determine the reasonableness of the rate without expert testimony; while expertise was needed for the complex litigation, a rate of $650 per hour was greater than that charged by similarly situated attorneys, but $550 per hour would be reasonable; the court may reduce the amount sought with regard to unsuccessful claims); citing **RSB Bedford Assoc. LLC v Ricky's Williamsburg, Inc.** (112 AD3d 526 [1st Dept 2013]) (amount of attorney's fees should be reduced to reflect that the prevailing party did not prevail on all its claims); **Fleetwood Commons, Inc. v Fredericks** (59 Misc 3d 1057 [Mt. Vernon City Ct 2018, A. Seiden, J.]) (attorney's fees incurred in relation to the tenancy over a five-year period, although related to the issues which led to the holdover proceeding, for which the co-op had served four notices to cure, were not incurred in the commencement of the holdover, as the co-op took no action on those cure notices until calling a special meeting with the Board; the co-op was also not entitled to the attorney's fees incurred in preparing three termination notices after the meeting, all of which were vitiated by the

co-op's carelessness in accepting rent payments); cf. **40-50 Brighton First Rd. Apts. Corp. v Henderson** (51 Misc 3d 1 [App Term, 2d, 11th & 13th Jud Dists 2015]) (where a lease limited the landlord's right to recover attorney's fees to instituting an action or proceeding, or defending a proceeding or counterclaim brought by the tenant, the landlord was not entitled to attorney's fees incurred in defending an action by an undertenant to secure his interest in the proprietary lease, as attorney's fees provisions are strictly construed); **338 W. 46th St. Realty, LLC v Morton** (50 Misc 3d 126[A], 2015 NY Slip Op 51845[U] [App Term, 1st Dept]) (the tenants were entitled to the additional attorney's fees they had incurred in defending against the landlord's unsuccessful challenge on a prior appeal to their award of attorney's fees as the prevailing parties, but were not entitled to the fees expended in defending against the landlord's successful challenge to a distinct legal fee award relating to a DHCR proceeding); **Megan Holding LLC v Conason** (48 Misc 3d 128[A], 2015 NY Slip Op 50952[U] [App Term, 1st Dept]) (while the tenants were entitled to attorney's fees for prevailing on their prior appeal, they were not entitled to fees incurred in their unsuccessful motion practice, including five motions to dismiss the appeal for failure to timely perfect); see **Santorini Equities, Inc. v Picarra** (30 Misc 3d 136[A], 2011 NY Slip Op 50174[U] [App Term, 1st Dept]) (where the tenant secured a dismissal of a nonprimary-residence proceeding based on a defective Golub notice, the "ultimate outcome" was reached in favor of the tenant, but the tenant was entitled only to the fees he had incurred in litigating the Golub notice issue); **Kura, LLC v Praschnik-Buchman** (27 Misc 3d 127[A], 2010 NY Slip Op 50580[U] [App Term, 2d, 11th & 13th Jud Dists]) (where the tenant obtained a 1% abatement, the landlord was the prevailing party; the landlord should not be awarded fees in connection with the tenant's order to show cause to compel the landlord to accept a timely tender of the judgment amount, on which the tenant prevailed); citing **Binaku Realty Co. v Penepede** (2 Misc 3d 140[A], 2004 NY Slip Op 50292[U] [App Term, 1st Dept]) (although tenant prevailed in the litigation, he was not entitled to recover attorney's fees for an unsuccessful pre-answer dismissal motion); **Dara Realty Assoc. v Schachter** (2003 NY Slip OP 51150[U] [App Term, 2d & 11th Jud Dists]) (a prevailing party is entitled to attorney's fees only to the extent it prevailed); cf. also **338 W. 46th St. Realty LLC v Leonardi** (32 Misc 3d 31[A], 2011 NY Slip Op 51333 [App Term, 1st Dept]) (a fee arrangement, while indicative of what is reasonable, is not determinative).

Tomfol Owners Corp. v Parker (59 Misc 3d 140[A], 2018 NY Slip Op 50608[U] [App Term, 1st Dept]) (although the petition was dismissed due to a defective rent demand, the tenant was not entitled to attorney's fees in light of her admitted default in rent, citing Stepping Stones and RAM I); see **Matter of 251 CPW Hous. LLC v Pastreich** (124 AD3d 401 [1st Dept 2015]) (a tenant who prevailed, i.e, obtained a result that was substantially favorable to him, in a holdover proceeding, was entitled to attorney's fees regardless of whether the proceeding was formally dismissed, as a tenant is entitled to recover fees when the ultimate outcome is in his favor; the fact that the landlord relied on the 2003 amendments to the RSL to discontinue a tenant's preferential rent was not a basis to deny the successful tenant attorney's fees; the standard is not whether the

landlord's claim was of "colorable merit," as such a standard would gut the protections afforded by Real Property Law § 234; while courts have discretion to deny attorney's fees sought pursuant to Real Property Law § 234, such discretion should be exercised sparingly; attorney's fees should be denied only where a fee award would be manifestly unfair or where the successful party engaged in bad faith); **333 E. 49th Partners, L.P. v Flamm** (107 AD3d 584 [1st Dept 2013]) (where the tenant signed false affidavits of primary residency and entered into a subtenancy without consent, equitable considerations and fairness militated against an award of fees to the prevailing tenant); **Kralik v 239 E. 79th St. Owners Corp.** (93 AD3d 569 [1st Dept 2012]) (prevailing tenants denied fees where the cooperative's position was justified by the state of the law when the action was commenced, as courts have discretion to deny attorney's fees based on considerations of equity and fairness); citing **Solow Mgt. Corp. v Lowe** (1 AD3d 135 [1st Dept 2003]) and **Jacreg Realty Corp. v Barnes** (284 AD2d 280 [1st Dept 2001]) (attorney's fees will not be awarded where it is "manifestly" unfair to do so); see **Matter of Stepping Stones Assoc. v Seymour** (48 AD3d 581 [2d Dept 2008]) (a tenant who succeeded in getting a nonpayment petition dismissed based on the landlord's execution of a renewal lease was not entitled to attorney's fees where he had admittedly defaulted in rent); **Abrams v 4-6-8, LLC** (38 Misc 3d 127[A], 2012 NY Slip Op 52345[U] [App Term, 1st Dept]) (in an HP proceeding, where the evidence showed that the noise violation had been corrected prior to trial, the successful landlord was not entitled to attorney's fees because the tenant had to resort to legal proceedings to compel the landlord to cure the violation; the tenant was not entitled to fees because she prolonged the proceeding after the violation had been cured); **Skyline Terrace Corp., Inc. v Butler** (32 Misc 3d 138[A], 2011 NY Slip Op 51546[U] [App Term, 2d, 11th & 13th Jud Dists]) (where a holdover proceeding predicated on violations of lease provisions requiring the tenant to install noise-reducing carpeting, to avoid excess noise, and to permit inspections, was discontinued because the landlord's witness had died, the tenant was not entitled to attorney's fees, as an inspection had revealed that the carpeting installed by the tenant did not cure the violation, and the outcome was "mixed"); **Carlton Estates, Inc. v Cruz** (31 Misc 3d 144[A], 2011 NY Slip Op 50878[U] [App Term, 2d, 11th & 13th Jud Dists]) (where, in a holdover proceeding based on the tenants' failure to cease using the basement portion of the apartment as a living room, after the parties stipulated that the tenants had cured the breach, the petition was dismissed based on the landlord's commencement of a nonpayment proceeding, the tenants were not entitled to attorney's fees); **East Midtown Plaza Hous. Co. v Cannings** (14 Misc 3d 127[A], 2006 NY Slip Op 52481[U] [App Term, 1st Dept]) (in view of the landlord's delay in complying with the MDL registration requirements, it would be "manifestly unfair" to award the landlord attorney's fees, notwithstanding that it prevailed); citing **Wells v West 10th St. Assoc.** (205 AD2d 431 [1st Dept 1994]) (it would be manifestly unfair to award fees against an unsuccessful landlord where the law at the time the proceeding was commenced supported the landlord's claim).

HP Proceedings

Department of Hous. Preserv. & Dev. v France (63 Misc 3d 792 [Civ Ct, Bronx County 2019, D. Bryan, J.]) (since HPD's notice of violation failed to advise the owner that, if requested, HPD would confer with the owner or the owner's representative, as required by HMC § 27-2115 (b), HPD's petition for an order to correct was dismissed).

Matter of Tejada (HP201/2018 [Civ Ct, Kings County, J. Kuzniewski, J., June 29, 2018]) (one tenant can constitute the one third of the occupants needed to maintain an article 7A proceeding if he is the only occupant of the building; occupants who were employees of the landlord did not qualify as tenants, as the proceeding is intended to allow tenants to use the rent money to effectuate repairs and the employees, who depended on the landlord for their livelihoods, had a conflict of interest).

Matter of Brodie v Alam (62 Misc 3d 1214[A], 2018 NY Slip Op 51966[U] [Civ Ct, Kings County, J. Kuzniewski, J.]) (a 7A administrator would not be appointed for a building that had a certificate of occupancy as a two-family home, which had been converted to at least six separate units; article 7A was intended to provide tenant groups an expeditious method of obtaining repairs by having the rent monies used for that purpose; however, since this was an illegal multiple dwelling, the court could not direct the payment of rent, notwithstanding that the tenants asserted that they would pay rent).

Robinson v Taube (63 Misc 3d 1224[A], 2019 NY Slip Op 50666[U] [Civ Ct, NY County, J. Stoller, J.]) (in the Housing Maintenance Code context, an "owner" includes all those in control of a building, including net lessees, but does not include a neighboring tenant; an owner's failure to take action against a neighboring tenant who causes a nuisance does not amount to harassment unless there was collusion between the owner and the neighbor); **Ellouzi v Sherman** (63 Misc 3d 1216[A], 2019 NY Slip Op 50555[U] [Civ Ct, NY County, J. Stoller, J.]) (in an HP proceeding against a net lessee/registered managing agent, the owner's nonreceipt of notice did not deprive the owner of due process, even though a lien was placed on the property, as the owner either affirmatively registered the premises, giving only the managing agent's information, or failed to register; an owner who fails to register cannot establish a reasonable excuse for a default; if the landlord affirmatively directed that service be on the agent, it cannot argue that service on the agent deprived it of due process).

Section 8, NYCHA, LINC, Co-ops etc.

2600 Creston Ave. Owner LLC v Minena (63 Misc 3d 1222[A], 2019 NY Slip Op 50651[U] [Civ Ct, Bronx County, S. Ibrahim, J.]) (dismissing a licensee proceeding because a rent-stabilized lease remained in effect after the death of the tenant notwithstanding that the HAP contract provided that it terminated automatically upon

the tenant's death and the lease addendum provided the lease terminates if the HAP contract terminates, as federal law cannot preempt stabilization rights).

Soumas v Gregg (57 Misc 3d 135[A], 2017 NY Slip Op 51270[U] [App Term, 1st Dept]) (conditional restoration warranted in a nonpayment proceeding where the receiver had impermissibly demanded the full contract rent against a Section 8 tenant).

Alston v Starrett City, Inc. (161 AD3d 37 [1st Dept 2018]) (in an action by two prospective tenants who had been living in homeless shelters and a housing advocacy group to compel the landlord to accept vouchers issued pursuant to New York City's Living in Communities [LINC] Program, on the ground that the landlord's refusal to accept the vouchers constituted income discrimination under the New York City Human Rights Law [Administrative Code § 8-101, as amended in 2008 by Local Law 10 to ban discrimination based on a tenant's lawful source of income], the court holds that provisions in the LINC lease rider—requiring the landlord to agree that the lease shall automatically renew for a second year at the same rent as the first year and that rent increases for the following three years will be limited to the amounts approved by the Rent Guidelines Board for rent-stabilized apartments—violated the 1971 Urstadt Law by expanding the number of buildings subject to City control beyond those approved by DHCR; however, standing alone, neither Local Law 10 nor the LINC program's use of rent vouchers violates the Urstadt Law, as acceptance of Section 8 vouchers has no impact on expanding the buildings subject to control); **Elejalde v Douglas** (68007/18 [Civ Ct, Kings County, K. Barany, J., Aug. 27, 2018]) (in a holdover against a LINC tenant based on the termination of an alleged month-to-month tenancy, the landlord correctly claimed that the tenant's renewal lease was void under Alston, as Alston must apply to LINC leases already in existence to comply with the Urstadt Law; however, the petition's failure to state the facts deprived the court of personal jurisdiction [citing Clarke v Wallace Oil]).

385 Bayview, LLC v Warren (58 Misc 3d 89 [App Term, 9th & 10th Jud Dists 2017]) (a tenant who receives an enhanced Section 8 voucher has a right to remain, absent cause to evict, so long as the property is offered as rental housing).

Bronx Preserv., L.P. v Rodriguez (59 Misc 3d 1210[A], 2018 NY Slip Op 50457[U] [Civ Ct, Bronx County, D. Bryan, J.]) (the Section 8 tenant's son, who had co-resided with her from 2012 until her death in 2016 was not entitled to succeed to the project-based subsidy, because his application for a tenancy had been rejected due to a poor credit history, following which he had applied for and accepted occupancy as a "live-in aide", which rendered him ineligible for succession).

2013 Amsterdam Ave. Hous. Assn., L.P. v King (63 Misc 93 [App Term, 1st Dept 2019]) (in a holdover against a Section 8 tenant who had caused flooding into the units below and refused to allow access, the termination notice was defective because it did not advise the paraplegic double amputee that he could request a reasonable

accommodation, and that the landlord was required to participate in a pretermination meeting).

Greater Centennal Homes Hous. Dev. Fund, Inc. v Rembert-Wigfall (55 Misc 3d 142[A], 2017 NY Slip Op 50602[U] [App Term, 9th & 10th Jud Dists]) (where the tenant's HUD-prescribed lease provided that any increases in rent must comply with the HUD Handbook, and the owner failed to comply by failing to give the tenant 30 days' advance notice of the increase, the landlord could not recover the increased rent).

Clinton-178 Towers, LLC v Chapple (58 Misc 3d 198 [Civ Ct, Bronx County 2017, D. Lutwak, J.]) (where the PHA is DHCR, not NYCHA, there is no prescribed method for serving the PHA with the owner eviction notice that must be given to the PHA; moreover, there is no requirement that proof of notice to the PHA be filed in the same manner as proof of service of the petition and notice of petition); cf. **FAC Renn 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 [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 [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 as well as holdover proceedings).

Eugene Smilovic Hous. Dev. Fund Corp. v Lee (61 Misc 3d 1216[A], 2018 NY Slip Op 51534[U] [Civ Ct, Bronx County, K. Bacdayan, J.]) (the 60-year-old spouse of an elderly tenant of a Section 202 project could not succeed to his tenancy after his death; whereas the Housing Act of 1959 previously defined "elderly families" to include surviving family members, in 1990 it was amended to make clear that at least one family member must at all times be at least 62); citing **Findlay Teller Hous. Dev. Fund Corp. v Chevere** (29 Misc 3d 1203[A], 2010 NY Slip Op 51674[U] [Civ Ct, Bronx

County, S. Kraus, J.]); **607 Concord Senior Hous. v Morales** (16 Misc 3d 1121[A], 2007 NY Slip Op 51531[U] [Civ Ct, Bronx County, J. Madhavan, J.]); distinguishing **Matter of Windmill Hous. Dev. Fund Co., Inc. v Winchell** (16 AD3d 429 [2d Dept 2005]) (where the elderly tenant moved into the Section 202 project in 1987 and her son in 1994, the applicable statute predated the 1990 amendments).

OLR ECW, L.P. v De Abreu (59 Misc 3d 1204[A], 2018 NY Slip Op 50365[U] [Civ Ct, Bronx County, D. Lutwak, J.]) (where a stabilized tenant failed to complete a Low Income Housing Tax Credit Program recertification, she violated a substantial obligation of her tenancy, notwithstanding her claim that, because she received a FEPS subsidy, she was not seeking a reduced rent pursuant to the LIHTC program; the landlord had agreed to rent 100% of the apartments, except for over-income in-place tenants, to low-income tenants and the tenant had signed an LIHTC lease requiring her to recertify annually); cf. **OLR ECW, L.P. v Soto** (42158/15 [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).

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).

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

Kuzmich v 50 Murray St. Acquisition LLC (___ NY3d___, 2019 NY Slip Op 05057 [2019]) (apartments receiving tax benefits in connection with their conversion from office space are not subject to luxury deregulation, as RPAPL 421-g provides that notwithstanding the RSL or ETPA provisions, the units will be fully subject to control); revg (157 AD3d 556 [2018]) (unlike buildings receiving RPTL 421-a benefits, buildings that receive 421-g benefits upon being converted to at least 75% residential use are subject to the luxury-decontrol provisions, and it is not necessary that a dwelling first be registered as a rent-stabilized apartment), revg (2017 NY Slip Op 31416[U], NY County, C. Edmead, J.]); see also **West v B.C.R.E.-90 W. St., LLC** (161 AD3d 566 [1st Dept 2018]) (same; the fact that the building also received HDC financing did not bar luxury decontrol, as the HDC agreement required only that the building be subject to rent stabilization to the extent it applied), revg (57 Misc 3d 428 [Sup Ct, NY County 2017, R. Reed, J.]) (RPTL 421-g, which requires that apartments in buildings converted from obsolete commercial buildings to residential use be rent stabilized in exchange for tax benefits, does not contain an exception for high-rent deregulation).

Matter of Trainer v State of New York, Div. of Hous. & Community Renewal (162 AD3d 461 [1st Dept 2018]) (the erroneous execution of a rent-stabilized renewal lease does not estop a landlord from arguing that the apartment is not rent stabilized because rent stabilization coverage is a matter of statutory right and cannot be created by waiver or estoppel); cf. **435 Cent. Park W. Tenant Assn. v Park Front Apts., LLC** (164 AD3d 411 [1st Dept 2018]) (so long as a building was subject to an HUD mortgage, the RSL was expressly preempted; when the owner paid the mortgage and entered into a "Use Agreement" with HUD, which referenced a Financial Assistance Contract the owner had entered into, in which the owner agreed to continue the low and moderate income affordability restrictions, the RSL remained preempted because it was impossible to comply with both the state and federal requirements; however, after the Financial Assistance Contract expired, HUD thereafter lacked the authority to preempt the RSL).

Matter of Bleecker St. Invs., LLC v Zabari (148 AD3d 577 [1st Dept 2017]) (a qualifying apartment's regulated status is deemed a continuous circumstance until facts or events demonstrate a change of status).

Dixon v 105 W. 75th St., LLC (148 AD3d 623 [1st Dept 2017]) (the landlord substantially altered the character of an existing apartment by connecting it to a new penthouse, thus satisfying the criteria for a first-rent or high-rent vacancy deregulation; a first rent is permitted when the perimeter walls of the apartment have been substantially moved and the previous apartment essentially ceases to exist, rendering its rent history meaningless); **Esposito v Larig** (52 Misc 3d 67 [App Term, 2d, 11th & 13th Jud Dists 2016]) (where the landlord did not come forward with proof showing the extent of the work done and the movement of perimeter walls, she was not entitled to a first rent); cf. **Rubin v Decker Assoc. LLC** (52 Misc 3d 1208[A], 2016 NY Slip Op

51070[U] [Sup Ct, NY County, G. Lebovits, J.]) (the landlord could charge a first rent where the perimeter walls were substantially moved).

151 Daniel Low, LLC v Li (57 Misc 3d 41 [App Term, 2d, 11th & 13th Jud Dists 2017]) (where DHCR had 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**).

Matter of Rania Mesiskli, LLC v New York State Div. of Hous. & Community Renewal (166 AD3d 625 [2d Dept 2018]) (where the tenant's vacancy lease given to her by a temporary receiver appointed in a foreclosure action specified a monthly rent of $1,000 and did not specify that this was a preferential rent or set forth a higher legal regulated rent, the $1,000 constituted the legal regulated rent, notwithstanding the landlord's claim that the receiver had made a mistake and that $1,000 was a preferential rent); **Hee Ja Yang v Macadji** (61 Misc 3d 1211[A], 2018 NY Slip 51465[U] [Civ Ct, Bronx County, K. Bacdayan, J.]) (where the original lease sets forth only one monthly rent and does not preserve a higher legal regulated rent, the preferential rent cannot be revoked).

EMA Realty, LLC v Levya (64 Misc 3d 11 [App Term, 2d, 11th & 13th Jud Dists 2019]) (where a landlord that had been receiving J-51 benefits had improperly, under Roberts, deregulated an apartment and failed to file amended registrations until 2016, the rent remained frozen at the last registered rent, in 2007, of $1,671.79; the holding in Park that rents should not be frozen if the failure to register was deregulated applies only where the landlord promptly registered after **Gerstein v 56 7th Ave., LLC** [88 AD3d 189 (1st Dept 2011)]); citing **Nolte v Bridgestone Assoc. LLC** (167 AD3d 498 [1st Dept 2018]) (a landlord who failed to register in March 2012 when the applicability of Roberts was clear engaged in a fraudulent scheme to deregulate apartments); **Redlisky v Boyko** (63 Misc 3d 1217[A], 2019 NY Slip Op 50556[U] [Civ Ct, Queens County, L. Lai, J.]) (a rent demand for $950 per month for five months was defective where the rent remained frozen at $434.35 due to the landlord's failure to register since 1993); citing **Samson Mgt. v Cordero** (62 Misc 3d 129[A], 2018 NY Slip Op 51879[U] [App Term, 9th & 10th Jud Dists]) (vacates a stipulation as inadvisedly entered into where the rent in the stipulation was illegal, based on the landlord's failure to register between 2007 and 2011); **125 Ct. St., LLC v Sher** (58 Misc 3d 150[A], 2018 NY Slip Op 50092[U] [App Term, 2d, 11th & 13th Jud Dists]) (in a building constructed pursuant to Real Property Tax Law § 421-a, the sum paid by the first tenant in the initial lease becomes the legal regulated rent; where the landlord registered an incorrect initial legal regulated rent and improper rents for the next eight years and offered no explanation for filing improper registrations, the rent was frozen at the initial legal regulated rent of

$3,540 and landlord's rent demand for $3,700 for four months and $4,475.65 for another 18 months was defective; a proper rent demand is an element of the landlord's prima facie case); see RSL 26-517 [e]; RSC § 2528.4 [a]; cf. **Bldg Mgt. Co. Inc. v Orelli** (59 Misc 3d 148[A], 2018 NY Slip Op 50811[U] [App Term, 1st Dept]) (a landlord's failure to file rent registrations will not freeze the rent where the landlord did so based on a pre-Roberts justifiable belief that the apartment was no longer subject to regulation); citing **Matter of Park v New York State Div. of Hous. & Community Renewal** (150 AD3d 105 [1st Dept 2017]).

1650 Realty Assoc., LLC v Ovadiah (__ Misc 3d ___, 2019 NY Slip Op 29266 [App Term, 2d, 11th & 13th Jud Dists 2019]) (a vacancy increase of 20% and a six percent longevity increase which, after the prior tenant had vacated in 2014, brought the legal regulated rent over the $2,500 threshold then applicable could be used to support the deregulation of the apartment, as the language of RSL § 26-504.2 [a] — "which is or becomes vacant on or after" the effective date of the 2011 rent act was similar to the language construed in Altman in RSL § 26-504.2 [a] with regard to an apartment which became vacant between 1997 and 2011); see **Altman v 285 W. Fourth, LLC** (31 NY3d 178 [2018]) (a 20% vacancy increase must be included in calculating the legal regulated rent in determining whether an apartment has reached the $2,000 deregulation threshold; while the City Council's 1997 enactment of Local Law 13 provided that a vacant housing accommodation becomes deregulated only where the legal regulated rent was two thousand dollars or more at the time the tenant vacated, the 1997 RRRA added a second clause – "or any accommodation which is or becomes vacant . . . with a legal regulated rent of two thousand dollars or more per month" specifically to counter the City Council's provision), revg (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 **Ruggerino v Prince Holdings 2012, LLC** (170 AD3d 568 [1st Dept 2019]) (post-vacancy IAI improvements can be included when calculating the legal rent to determine if the deregulation threshold was met).

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); see **Thompson Assets LLC v Raffelo** (61 Misc 3d 130[A], 2018 NY Slip Op 51411[U] [App Term 1st Dept]) (same; consideration of events beyond the four year period was proper since it was not for the purpose of calculating an overcharge but to determine whether the apartment was regulated); **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]).

Matter of Brookford, LLC v New York State Div. of Hous. & Community Renewal (31 NY3d 679 [2018]) (the income reported on a joint tax return filed on behalf of a tenant and her non-occupant spouse may be apportioned to determine the tenant's individual income for the purpose of determining whether the "total annual income" $175,000 deregulation threshold has been met, as "total annual income" means the sum of the incomes of "all persons who occupy" the apartment").

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); cf. **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).

IA2 Serv. LLP v Quinipanta (64 Misc 3d 1220[A], 2019 NY Slip Op 51218[U] [Civ Ct, Kings County, K. Slade, J.]) (knowledge of the commercial tenant's use of the basement as a sixth residential unit would be imputed to the landlord, where the use was open and included a barking dog, a crying baby, and construction work); **Gogarnow v Silvia** (60 Misc 3d 337 [Civ Ct, Queens County 2018, J. Lansden, J.]) (an unoccupied sixth unit under construction to be configured as an apartment was "intended to be occupied" within the meaning of "housing accommodation"); **Rivas v Conty** (57 Misc 3d 986 [Civ Ct, NY County 2017, J. Lansden, J.]) (where the landlord knew, as the result of receiving a violation therefor, that the third floor of his building had been converted to SROs and failed to take action for many years, the building became rent stabilized even if the landlord did not create the units).

Beverly Holding NY, LLC v Blackwood (63 Misc 3d 160[A], 2019 NY Slip Op 50877[A] [App Term, 2d, 11th & 13th Jud Dists]) (where the tenant showed that a basement storage space had been used as a sixth residential dwelling by at least two different tenants and contained a kitchen, bathroom and bed, and that the landlord had previously brought a residential holdover against one of the former tenants, the building was rent stabilized); cf. **Bravo v Marte** (64 Misc 3d 1223[A], 2019 NY Slip Op 51236[U] [Civ Ct, Kings County, K. Slade, J.]) (where the noncommercial use of the store was secondary and subordinate to its primary use as a store, all the leases were commercial, there were no meaningful bathroom facilities, no bed, and no division of the space, and there was no proof that the landlord acquiesced in the noncommercial usage, there was insufficient proof that the store had been used as a dwelling); **Motyka v Babiak** (63 Misc 3d 1224[A], 2019 NY Slip Op 50668[U] [Civ Ct, Kings County, G. Marton, J.]) (under **Gracecor Realty Co. v Hargrove** [90 NY2d 350 (1997) (a unit furnished with a bed and locker but no kitchen, bathroom or window is a housing accommodation)] to determine if a space is a housing accommodation, the court must evaluate whether the occupancy is characterized by indicia of permanency and whether the parties intended the space to be occupied as a residence; the occasional use of a first-floor space for family gatherings did not bear the indicia of permanency and and did not transform the space into a residence); **Edison 1205 LLC v Brickhouse** (58 Misc 3d 1229[A], 2018 NY Slip Op 50308[U] [Civ Ct, Queens County, K. Thermos, J.]) (where a new owner purchased a two-family house in which the former owner had rented 10 separate rooms as dwelling units, the succeeding owner inherited the status of the tenancies created by the former owner [citing Ocasio] and the rooms were subject to rent stabilization [citing Joe Lebnan, LLC and Recko, and rejecting Arrow Linen Supply]; the landlord's remedy was to bring an illegal-occupancy proceeding after serving proper RSC notices); see **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 [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 [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 [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 [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 [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 [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 [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 [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]).

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 educational 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 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).

Costanzo v Joseph Rosen Found., Inc. (61 Misc 3d 73 [Sup Ct, NY County 2018, L. Kotler, J.]) (where a prior landlord had purchased all the loft tenant's rights to the premises and fixtures, the sale did not end the unit's eligibility for rent stabilization because the zoning expressly allowed residential use and the apartment could be legalized); citing **Acevedo v Piano Bldg., LLC** (70 AD3d 124 [1st Dept 2009]) (an apartment covered by the Loft Law may revert to rent stabilization after the landlord purchases the prior occupant's rights where it is used residentially; the intent of the Loft

Law was not to supplement rent regulation; Wolinsky only stands for the proposition that illegal loft units are not entitled to rent stabilization protection when the units are incapable of being legalized); contra **Caldwell v American Package Co., Inc.** (57 AD3d 15 [2d Dept 2008]) (an illegally converted loft cannot be subject to the ETPA even if the landlord knew and acquiesced in the residential use and the building is capable of being legalized, unless, as in **Matter of 315 Berry St. Corp. v Hanson Fine Arts** [39 AD3d 656 (2d Dept 2007)] the owner sought ETPA protection).

867-871 Knickerbooker, LLC v Poli (__ Misc 3d ___, 2014 NY Slip Op 29265 [App Term, 2d, 11th & 13th Jud Dis 2019]) (in view of the landlord's conclusory testimony and lack of records, the evidence was insufficient to satisfy the requirement of RSC § 2520.11 [e] for a substantial rehabilitation that the building be in substandard or seriously deteriorated condition); cf. **Heller v Cooper** (62 Misc 3d 136[A], 2018 NY Slip Op 51944[U] [App Term, 1st Dept]) (the validity of Operational Bulletin 95-2 has been repeatedly upheld by the Appellate Division; there were triable issues as to whether the landlord had good cause for not meeting the 75% requirement on the basis that a particular component had been recently installed); citing **WFCC Realty Corp. v Huang Hui Zhen** (61 Misc 3d 130[A], 2018 NY Slip Op 50620[U] [App Term, 1st Dept]) (a landlord claiming a substantial rehabilitation must show that at least 75 percent of the building-wide and apartment systems had been totally replaced in accordance with DHCR Operational Bulletin 95-2; where the rehabilitation was done before the implementation of the bulletin, its documentation requirements are relaxed but the landlord must still produce adequate documentation that a substantial rehabilitation occurred).

885 Park Ave. Brooklyn, LLC v Goddard (55 Misc 3d 74 [App Term, 2d, 11th & 13th Jud Dists 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)]).

River Tower Owner, LLC v 140 W. 57th St. Owner Corp. (172 AD3d 537 [1st Dept 2019]) (where an apartment was subject to rent stabilization, a lease to a corporation for 40 years which did not name an occupant was void as, under rent stabilization, a lease must be for one or two years; the lease removed the apartment from rent stabilization for 40 years, and a lease to a corporation must, under Manocherian, name an occupant to avoid perpetual leases; as the lease was void, the landlord's request for attorney's fees had to be denied); **Fox v 12 E. 88th LLC** (160 AD3d 401 [1st Dept 2018]) (under Manocherian, when a tenant, who did not know that he was entitled to rent stabilization protection because his agreement to deregulate the apartment when it was combined with another apartment was invalid [as the landlord was receiving J-51 benefits], signed a lease in a corporate name which did not designate an individual who would be residing in the apartment, the apartment became deregulated; Gesmer, J., dissenting, that the unknowing waiver of rent stabilization rights should not be given effect); cf. **Nappi v Community Access, Inc.** (169 AD3d 535 [1st Dept 2019]) (a subtenant of a not-for-profit corporation which rented apartments from private landlords to house government-subsidized occupants had no stabilization rights, as the prime lease did not specify that she or any particular group was intended to live in the apartment); citing **Manocherian v Lenox Hill Hosp.** (229 AD2d 197 [1st Dept 1997]); **Capital 155 E. 55th, LLC v Garden House Sch. of N.Y.** (60 Misc 3d 41 [App Term, 1st Dept 2018]) (where an apartment was leased to a corporation for the use of a designated occupant and that individual had vacated, the corporation was not entitled to a renewal lease, even though the apartment was occupied by a subsequent school director, as, under Manocherian, a corporation is entitled to a renewal lease only where it specifies an individual and no perpetual tenancy is possible); **156 Prince St., LLC v Rothstein** (57 Misc 3d 156[A], 2017 NY Slip Op 51643[U] [App Term, 1st Dept]) (where the parties to the lease were fully aware from the inception of the lease that the named tenant was renting the apartment for his son, the son, who primarily resided in the

apartment from the outset, was the nominal tenant, the "actual contemplated resident" and "true occupant", and was thus entitled to rent-stabilization protection).

McDonald v JBAM TRG Spring, LLC (58 Misc 3d 1213[A], 2018 NY Slip Op 50075[U] [Sup Ct, NY County, C. St. George, J.]) (a tenant's rent-stabilized status does not transfer to a new apartment where the move was at the tenant's request); distinguishing **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]); see **Matter of Capone v Weaver** (6 NY2d 307 [1959]) (notwithstanding the clear language of the rent-control statute exempting an apartment occupied by an owner for one year prior to the date of renting, the statute would not be applied where the tenant transferred into the apartment from a controlled apartment for the landlord's benefit; literal meanings of words are not to be adhered to, to defeat the general purpose and manifest policy to be promoted).

Majestic Realty Corp. v Orgel (60 Misc 3d 57 [App Term, 1st Dept 2018]) (where the occupant had leased one of two combined apartments prior to their combination and the landlord accepted rent for many years, the landlord failed to establish as a matter of law that the occupant exchanged his status as a tenant of one of the apartments when he was permitted to combine the apartments and he signed agreements providing that he would occupy both apartments as a licensee incident to his employment, as the license agreement made no reference to his status as a tenant of the first apartment or of the rights under rent stabilization he was purportedly relinquishing); **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 [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 [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).

Rent Overcharge

Dugan v London Terrace Gardens, L.P. (__ AD3d ___, 2019 NY Slip Op 06578 [1st Dept 2019]) (applying Roberts retroactively does not offend due process; under the HSTPA, which applies to the tenants' pending claims, an overcharge claim may be filed at any time but penalties are limited to six years; the HSTPA resolves the split in the First Department between Taylor, permitting examination of the entire rental history to ensure that landlords do not benefit from illegal rents, and Raden and Regina, which limited review to four years absent fraud; under RSL § 26-516 [a], the legal regulated rent is the "rent indicated in the most recent reliable registration statement filed and served upon the tenant six or more years prior to the most recent registration statement" plus lawful increases; because there is a new methodology for calculating overcharges, the matter would be remanded to the motion court to give the parties an opportunity to present additional evidence with respect to the calculation of rents and overcharges; RSL § 26-516 [h] sets out the documents which may considered and provides for no limit on the examination of rental history in determining the legality of a charged or registered rent; retroactive application of the new CPLR 213-a does not violate due process).

Gold Rivka 2 LLC v Rodriguez (64 Misc 3d 1228[A], 2019 NY Slip Op 51341[U] [Civ Ct, Bronx County, K. Bacdayan, J.]) (under the HSTPA, the determination of whether the rent charged or registered is reliable is made in light of all the evidence, including whether there was an unexplained increase in the registered or lease rents, or a fraudulent scheme to destabilize the unit [RSL § 26-516 (h)]; the legal regulated rent is the rent indicated in the most recent reliable annual registration statement filed and served upon the tenant six or more years prior to the most recent registration statement [RSL § 26-516 (a)]; under the Thornton default formula, the base date rent was the lowest rent charged for a stabilized apartment with the same number or rooms in the same building immediately prior to the lease that created the illusory tenancy, later expanded to other fraud situations; in 2014, DHCR codified a slightly different version of the default formula [RSL § 2522.6 (b) (3)]; under the HSTPA, use of the default formula is no longer necessary or desirable in determining the amount of an overcharge, and is merely an alternate method, as courts must now look back as far as necessary to find the most recent reliable rent registration; where no proper registrations were filed

thereafter, the rent remained frozen and none of the increases were lawful; under **Matter of 215 W. 88th St. Holding LLC** [143 AD3d 652 (1st Dept 2016)], there is no discretion to add in guideline increases where the owner files improper registrations).

315 Jefferson LLC v Antonio (__ Misc 3d ___, 2019 NY Slip Op 29255 [Civ Ct, Kings County, K. Barany, J.]) (denies a renewal motion where the tenant's rent-overcharge claim had been dismissed prior to the effective date of the HSTPA, as the claim was no longer "pending" when the HSTPA took effect).

Butterworth v 281 St. Nicholas Partners, LLC (160 AD3d 434 [1st Dept 2018]) (sufficient indicia of fraud where the prior landlord increased the rent from $949.34 to $1,600 and ceased filing registration statements for 2007 through 2012, and where the tenants' original lease contained a deregulation rider which left blank spaces which would have indicated that the last legal regulated rent exceeded $2,000); followed in **East 17th LLC v McCusker** (63 Misc 3d 134[A], 2019 NY Slip 50469[U] [App Term, 1st Dept]) (Judge Stoller properly looked back more than four years, since sufficient indicia of fraud existed where the prior landlord had increased the rent from $604.46 to $1,627 in 2006, had ceased filing annual registration statements for 2000 through 2005 and had improperly sought to deregulate the apartment more than a year after the Court of Appeals had held that buildings receiving J-51 benefits are not eligible for vacancy decontrol).

SF 878 E. 176th LLC v Grullon (___ Misc 3d ___, 2019 NY Slip 29201 [Civ Ct, Bronx County 2019, C. Garland, J.]) (while previously there was an issue as to whether the tenant had shown sufficient indicia of fraud, based on the HSTPA, the court vacates nonpayment stipulations, where a review of the DHCR information showed that the increases over the years did not correspond to the permitted percentage increases).

Ollie Assoc. LLC v Santos (64 Misc 3d 1208[A], 2019 NY Slip Op 51085[U] [Civ Ct, Bronx County, S. Ibrahim, J.]) (since, under DHCR Operational Bulletin 2016-1, an IAI increase must be reflected in the next occurring annual registration, where a claimed IAI increase was not so reflected there were questions as to the reliability of the registration and whether the increase was "unexplained").

Reich v Belnord Partners, LLC (168 AD3d 482 [1st Dept 2019]) (the tenant's rent-overcharge claim based on the landlord's failure to charge stabilized rents while receiving J-51 tax benefits was properly dismissed, where the tenant had received a rent-stabilized lease and the landlord had registered the apartment more than four years before the complaint was filed; there was no basis for considering the rental history beyond the four-year period, as there was no fraud [citing Regina], and no other special circumstances [citing Taylor]); **Raden v W 7879, LLC** (164 AD3d 440 [1st Dept 2018] [Sweeny, Andrias, Kahn and Moulton, JJ., concurring; Richter, J., dissenting]) (where the landlord had not engaged in fraud in deregulating an apartment and had refunded the overcharges pursuant to Roberts, the free-market base date rent four

years before the landlord refunded the overcharges was a proper method of establishing the stabilized rent and further look-back was not appropriate); **Matter of Regina Metropolitan Co., LLC v New York State Div. of Hous. & Community Renewal** (164 AD3d 420 [1st Dept 2018] [Friedman, Kahn and Moulton, JJ.; Gische and Kapnick, JJ., dissenting]) (where the landlord's deregulation of an apartment was improper under Roberts because the landlord was receiving J-51 benefits, DHCR violated the statute of limitations and the RSL by looking beyond the four-year period to find the last legal regulated rent, as the only limited exception to the four-year look back period is for fraud; however, DHCR is not limited to calculating the base date rent according to the market rent that obtained in the parties' lease and may implement other methods of base-date rent calculation, citing **Matter of 160 E. 84th St. Assoc.**; dissent, that the bar to examining rental history should apply only where there is a proper rental history on file with DHCR and here there was none since 2003; **Matter of 160 E. 84th Assoc.** rejected the idea that the illegal market rent on the base date could serve as the base date rent; the majority's formulation permits the landlord to continue to charge fair-market rents in violation of Roberts and leaves the tenants with a right without a remedy); **Matter of 160 E. 84th St. Assoc. LLC v New York State Div. of Hous. & Community Renewal** (160 AD3d 474 [1st Dept 2018]) (where an apartment was, under Roberts, improperly treated as deregulated for many years, DHCR providently exercised its broad equity discretion by using a sampling method to determine the legal regulated rent based on the average stabilized rents for studio apartments in 2006; the market rent in effect on the lease date was the result of improper deregulation; because there was no evidence of fraud, the punitive default formula was inappropriate); **Taylor v 72 A Realty Assoc., L.P.** (151 AD3d 95 [1st Dept 2017]) (a tenant in occupancy at the time an apartment is improperly deregulated by a landlord receiving J-51 benefits retains his regulated status for the duration of the tenancy); citing **72A Realty Assoc. v Lucas** (101 AD3d 401 [1st Dept 2012]) (same; where an apartment was improperly deregulated and the record did not clearly establish the validity of an IAI increase that brought the rent above $2,000, the free-market lease rent charged on the base rate should not be adopted).

Petros Realty Owners, LLC v Vetrano (59 Misc 3d 148[A], 2018 NY Slip Op 50783[U] [App Term, 2d, 11th & 13th Jud Dists]) (as the courts and DHCR have concurrent jurisdiction to hear overcharge complaints, a determination by DHCR bars relitigation of the issue and the determination cannot be challenged in a summary proceeding); **Bernstein v 96 Diamond St. Realty Inc.** (2018 NY Slip Op 31280[U] [Sup Ct, Kings County, D. Silber, J.]) (the Supreme Court has concurrent jurisdiction with DHCR to determine the legal rent and to adjudicate rent overcharge claims; where a premises is constructed pursuant to Real Property Tax Law § 421-a, the initial legal regulated rent is the initial rent charged but no higher than the amount approved by HPD; affidavits and leases were sufficient to establish overcharges without cancelled checks).

Graham Ct. Owners Corp. v Thomas (62 Misc 3d 1088 [Civ Ct, NY County 2019, J. Stoller, J.]) (a rent overcharge is not willful where the owner did not have reason to

know that the amount it was charging exceeded the lawful rent; a lack of clarity about an issue until a DHCR ruling cannot be the basis for a willfulness finding; where a rent reduction order appeared to apply to a different structure, the landlord's collection of excessive rents was not willful until after DHCR ruled that the rent reduction order applied to the structure in question; thereafter, the overcharge was willful, notwithstanding DHCR's issuance of intervening MBR orders, as the landlord's misapprehension of the law is insufficient to rebut the presumption of willfulness [citing **PWV Acquisition, LLC v Paradise** (59 Misc 3d 130[A], 2018 NY Slip Op 50430[U] [App Term, 1st Dept]) (the landlord's conclusory claim that it relied on its attorney's advice did not rebut the presumption of willfulness)]; unlike the RSL, which provides for prejudgment interest, the Rent Control Law [Administrative Code § 26-413 (d)] does not so provide).

Rent, Use and Ocupancy, Security Deposits

500 Cathedral Parkway LLC v Gutierrez (61 Misc 3d 148[A], 2018 NY Slip Op 51723[U] [App Term, 1st Dept]) (where the landlord's motion for summary judgment was properly denied because triable issues existed as to whether the parties had engaged in an improper scheme to deregulate the apartment [citing Jazilek], the court's granting of only prospective use and occupancy was appropriate, as the award is only pendente lite and the remedy for any over or underpayment is a speedy trial); **245 Owner LLC v Mills** (58 Misc 3d 1224[A], 2018 NY Slip Op 50262[U] [Sup Ct, NY County, R. Reed, J.]) (where the Civil Court stayed a lease-expiration holdover pending the determination in an FMRA of the tenant's claim that the apartment was rent stabilized, on condition that the tenant pay use and occupancy of $2,600 per month, the rent under the expired lease, without prejudice to the landlord's claim for fair market use and occupancy, collateral estoppel did not bar the landlord's subsequent action for use and occupancy at the rate of $6,600 for the period from the lease expiration until the vacate date, because, among other things, the proper amount of use and occupancy was not actually litigated and the award of $2,600 was made only in the context of the stay).

Matter of First Am. Tit. Ins. Co. v Cohen (163 AD3d 814 [2d Dept 2018]) (where an order required a tenant to pay rent due under a lease, the tenant did not disobey the order by failing to pay use and occupancy; the obligation to pay use and occupancy does not arise from a contract but is predicated on a theory of quantum meruit); citing **Eighteen Assoc. v Nanjim Leasing Corp.** (257 AD2d 559 [2d Dept 1999]).

Berger v UEI 642 Tenth, LLC (62 Misc 3d 148[A], 2019 NY Slip Op 50228[U] [App Term, 1st Dept]) (where no rent was paid after the lease's expiration, the landlord was entitled to use and occupancy only for the five days that the tenant remained in possession after the expiration); citing **C&N Camera & Elecs. v Farmore Realty** (128 AD2d 310 [1st Dept 1991]); see **Vanchev v Mulligan** (52 Misc 3d 138[A], 2016 NY Slip Op 51121[U] [App Term, 2d, 11th & 13th Jud Dists]; **Rustagi v Sanchez** (44 Misc 3d

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

Hayes v Ramsey (60 Misc 3d 137[A], 2018 NY Slip Op 51114[U] [App Term, 9th & 10th Jud Dists]) (while a security deposit is the property of the tenant and must be returned at the conclusion of the tenancy, it is error for the court to return a security deposit before the tenancy has ended).

Zielinski v Kiwak (60 Misc 3d 138[A], 2018 NY Slip Op 51127[U] [App Term, 2d, 11th & 13th Jud Dists]) (where a landlord purports to unilaterally raise a month-to-month tenant's rent, the landlord's acceptance of the previous amount of rent precludes its recovery of the amount of the increase).

Mayflower Props., LLC v Pacheco (64 Misc 3d 1216[A], 2019 NY Slip Op 51180[U] [Civ Ct, Bronx County, B. Black, J.]) (under former Real Property Law § 235-e [a] and RSC § 2525.2 [b] [2], the landlord had a duty to provide a tenant who paid cash or otherwise than by personal check with a rent receipt containing the date, the amount, the premises, the period for which paid and the signature and title of the person receiving the rent; RSC § 2525.2 [b] [3] also requires that the receipt state the name and address of the managing agent; where a landlord failed to show that it provided receipts, the credibility issue was decided against the landlord); see generally **Robinson v Robles** (28 Misc 3d 868 [Rochester City Ct 2010, T. Morse, J.]).

Victor Faleck, Landlord's Duty to Mitigate: Cases Highlight Need for Legislative Action, NYLJ, June 30, 2009, at 4, col 4 [noting that 42 states and the District of Columbia have imposed a duty to mitigate upon landlords]).