With a Backlog of Cases, a Troubling Trend in Housing Court Emerges

A Practical Guidance® Article by Andrew Darcy, Mobilization for Justice

Andrew Darcy
Mobilization for Justice

This article discusses the inappropriate use of NY CPLR 409 in recent New York City Housing Court proceedings. Faced with a massive backlog of cases caused by pandemic-related moratoria, combined with an influx of new ones, judges in New York City's Housing Court are seeking ways to move cases expeditiously. While that effort is understandable, a troubling trend is emerging: In some circumstances, judges have issued orders of eviction (1) without giving prior notice to the parties that such an order was even being contemplated, (2) without requiring landlords to prove their case with admissible evidence, and (3) without giving tenants and occupants an opportunity to raise or present defenses a hearing. This practice, while ostensibly permitted by Rule 409 of New York's Civil Practice Laws and Rules, is not only unfair to tenants and occupants, but is also, arguably, an unconstitutional deprivation of their due process rights. It should end.

For more on residential landlord-tenant matters in New York, see Tenant Representation in a Residential Nonpayment Proceeding (NY), Commencing a Virtual Housing Part Proceeding in New York City Checklist, and In-Person and Virtual Hearing Comparison Chart (New York City Housing Court).

Legal Background: Housing Court vs. Article 78 Proceedings

Eviction cases commenced in New York City's Housing Court are a form of "special proceeding." NY CLS RPAPL § 701. Special proceedings are creatures of statute that are distinguished from common law civil actions. 200 Cent. Park S. Assocs. v. Copersino, 118 Misc. 2d 587, 588 (Civ. Ct. N.Y. Cty. 1983). Because of this status, Article 4 of the NY CPLR, which governs special proceedings, applies. NY CPLR 409(b), which relates to "Hearings" provides, in pertinent part:

> The court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised. The court may make any orders permitted on a motion for summary judgment." Appellate courts have interpreted this provision to mean that "a special proceeding is subject to the same standards and rules of decision as apply on a motion for summary judgment[.]

Karr v. Black, 55 A.D.3d 82, 86 (App. Div. 1st Dep't 2008).

But Housing Court cases are very different from one of the most common other forms of special proceedings—Article 78 proceedings. Indeed, Article 78 proceedings are used, among other ways, to challenge administrative decisions made by governmental actors. As such, they are, in some ways, similar to an appeal with a full record of established

facts. See, e.g., Featherstone v. Franco, 95 N.Y.2d 550, 554 (2000) (discussing the scope of judicial review on an Article 78). Moreover, the Article 78 procedure specifically contemplates parties providing proof with their pleadings. For example, NY CPLR 7804(b) contemplates the petition being "accompanied by affidavits or other written proof" and requires a verified answer with all material facts. Moreover, in such proceedings, trials appear to be the exception, not the norm. In fact, the NY CPLR contemplates a trial only if the respondent demonstrates an entitlement to one. NY CPLR 7804(e).

This is a far cry from Housing Court practice. Indeed, while a petition must be verified, it need not—and almost never does— contain any proof. Rather, the petition need only "[s]tate the facts upon which the proceeding is based." NY CLS RPAPL § 741(4). Verifications may be done by attorneys pursuant to NY CLS RPAPL § 741, but such verified petitions are lacking in evidentiary value. Zuckerman v. City of New York, 49 N.Y.2d 557, 563, 404 N.E.2d 718, 720 (1980) (holding that an "affirmation by counsel is without evidentiary value"). Moreover, a "landlord is not required to plead his evidence in the petition." Feuerbach v. Yanes, 76 Misc. 2d 979, 981 (Civ. Ct. N.Y. Cty. 1973).

Answers in summary eviction proceedings need not be verified. 689 E 187th St LLC v. Mathu, 76 Misc. 3d 1212(A) (Civ. Ct. Bronx Cty. 2022). Indeed, in nonpayment cases, answers are often just populated by a court employee on a prescribed form by checking off pre-set defenses. Finally, unlike in other special proceedings, the right to a trial is the norm, not the exception. In fact, while not regularly used because of waivers commonly found in residential leases, the right to a trial by jury is specifically reserved by the Civil Court Act. N.Y. Civ. Ct. Act. § 110(n).

Inappropriate Use of NY CPLR 409 in Recent Housing Court Cases

As explained, while NY CPLR 409 is technically applicable, it is generally not an appropriate fit for eviction proceedings. In recent months, however, it has been used by Housing Court judges for purposes of issuing a judgment of possession against tenants and occupants without providing them with proper notice or an opportunity to present defenses. In one case, a pro se tenant used the court-provided form to submit an answer to a nonpayment petition. The tenant—or, more likely the court employee assisting the tenant—checked off two boxes: one for a "general denial" and another noting that there were conditions in the apartment, which could potentially implicate the implied warranty of habitability. On no notice to either party—indeed without so much as a motion pending—the Housing Court judge held that both defenses were inadequately pled and granted judgment in favor of the landlord, thereby placing the tenant at imminent risk of eviction.

The court reasoned that the pro se answer was not sufficiently specific and that the tenant was required to "offer proof" to support her conditions-based defense. And even though the tenant submitted a general denial, the court determined that it had no effect and did not require a trial. This is contrary to the Court of Appeals' holding that a "a general denial puts in issue . . . matters which [the pleading party] is bound to prove." Munson v. New York Seed Imp. Co-op., Inc., 64 N.Y.2d 985, 987 (1985). The court thus granted judgment in the landlord's favor without requiring admissible proof as to each element of its case—for example, that it owns the building, that it has filed a multiple dwelling registration, that it has an enforceable lease with the tenant, and that it has proof of the arrears.

In another instance, a court was considering a landlord's request to add unnamed occupants to an existing petition and to include them in a judgment that had been issued years earlier against other occupants. The court allowed the petitioner to join the new occupants to the proceeding but denied the request to include them in the existing judgment. Yet, without any notice to either party, citing NY CPLR 409(b), it issued a new judgment against the occupants, giving the petitioner the legal right to evict them. Again, without requiring admissible proof or a hearing, the court concluded that the occupants were "squatters" as a matter of law and thus had no right to continued occupancy. In fact, the court refused to even allow the occupants to even file an answer—much less present facts to dispute their status, other defenses, or otherwise show they had a legal right to possession. Perhaps even most troublesome, the court never even required the landlord to properly serve the occupants with the notice of petition and petition in a manner required by law. That ruling, relying on NY CPLR 409(b), allowed the petitioner to sidestep obtaining personal jurisdiction over the occupants, who are now at imminent risk of eviction.

These are only two examples, but they are serious ones. They raise questions about the propriety of NY CPLR 409 being used against tenants to deprive them of their day in court. "The lack of notice and opportunity to be heard implicates the fundamental issue of fairness that is the cornerstone of due process." Rosenblatt v. St. George Health & Racquetball Assocs., LLC, 119 A.D.3d 45, 54 (App.

Div. 2d Dep't 2014); see also Aurora Loan Servs., LLC v. Moreno, 166 A.D.3d 933 (App. Div. 1st Dep't 2018) (noting the prejudice that results from sua sponte orders without permitting an opportunity to refute the determination); Crosby v. Crossett, 33 Misc. 3d 324, 328 (Sup. Ct. Steuben Cty. 2011) ("By entering a judgment and warrant of eviction . . . without affording petitioner the right to be heard, respondent has deprived petitioner of due process of law.").

And there is some concern that these two are not outliers. A search of publicly reported decisions shows that NY CPLR 409 has been cited 10 times by Housing Court judges, all of them since 2021. This timing correlates the resumption of eviction cases in New York, yet again suggesting that NY CPLR 409 could be being used as a tool of judicial economy—yet one that could be at the expense of vulnerable tenants.

To be clear, this is not a criticism of any particular judge or a suggestion of anti-tenant bias. Indeed, most, if not all, of the publicly available decisions implicating NY CPLR 409 involve rulings *against* landlords and in favor of tenants. But, put simply, NY CPLR 409 should not be used to summarily deprive tenants and occupants of notice and an opportunity to be heard. Indeed, judges should avoid doing anything that could limit the due process rights of someone at risk of losing their fundamental right to shelter. To the extent the courts in the decisions discussed above have been properly interpreting and using NY CPLR 409—and the author thinks they have not—the legislature should clarify that no judgment can be issued against a tenant or occupant unless there has been a trial, or until a proper motion has been filed on notice. Due process and fairness require nothing less.

Andrew Darcy, Supervising Attorney, Mobilization for Justice

Andrew Darcy is a Supervising Attorney in MFJ's Housing Project. Prior to becoming a Supervising Attorney, he was a Staff Attorney in MFJ's Housing Project. He has successfully defended hundreds of tenants who have been at risk of eviction and has also filed affirmative cases based on issues ranging from landlord violations of the warranty of habitability to violations of the Fair Housing Act. Prior to joining MFJ, Andrew was an associate at Cleary Gottlieb Steen & Hamilton, where he maintained an active *pro bono* docket, comprising immigration, criminal, and civil rights cases. Andrew was also a law clerk to a United States District Court Judge in the District of New Jersey, the Honorable Katharine S. Hayden. Andrew left MFJ briefly to work with a small team at the New York City Housing Authority that was focused on developing and implementing transformative strategies to improve conditions for New York City's public-housing residents. Andrew is a 2010 graduate of Seton Hall University School of Law.