Tenant Representation in a Residential Nonpayment Proceeding (NY)

A Practical Guidance® Practice Note by Donna Chiu, Mobilization for Justice

Donna Chiu
Mobilization for Justice

This practice note explains how to represent a residential tenant in a nonpayment proceeding in New York City from the perspective of an attorney working for Mobilization for Justice (MFJ), a direct legal services organization that provides free legal assistance to low-income New Yorkers. The note addresses the initial steps in a New York residential nonpayment proceeding, common tenant defenses in a nonpayment proceeding, and important COVID-19 considerations.

For additional guidance on residential tenant rights generally, see Coronavirus (COVID-19) Resource Kit: Residential Tenants' Rights.

For additional guidance on representing residential tenants in New York City, see De Facto Rent Stabilization in New York City, Regina Metro One Year On: Residential Tenants in New York City Can Still Conduct Robust Discovery in Rent Overcharge Cases, and In-Person and Virtual Hearing Comparison Chart (New York City Housing Court).

Background and Initial Client Intake

Many organizations like MFJ have in-person clinics and telephone intake numbers where tenants can call for assistance. Since New York was put on PAUSE by the governor on March 22, 2020, most, if not all, of these organizations have suspended all in-person clinics or walk-ins. New Yorkers can access free legal advice via the MFJ Housing Project telephone line. When a tenant calls the housing intake line, an MFJ staff member conducts an intake over the telephone. The attorney or paralegal gathers some general information about the tenant, opens a case file unique to the tenant, and then assists the tenant with their legal problem.

On November 13, 2020, the New York State Office of Court Administration (OCA) revised its pandemic procedures by moving all in-person hearings and trials to virtual proceedings. On December 28, 2020, New York State Governor Cuomo signed into law the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (CEEFPA). In short:

- Pending residential eviction proceedings are stayed for 60 days
- Residential eviction proceedings filed within 30 days of December 28, 2020, are stayed for 60 days
- OCA is required to publish "Hardship Declarations" forms for use by tenant-respondents to report financial hardship during or due to COVID-19 pandemic (These forms are available at the New York City Civil Court website here.)
- Where tenant-respondents submit this Hardship Declaration, residential eviction proceedings are stayed until at least May 1, 2021
- The New York City Civil Court website also includes email addresses for each of the five boroughs where the tenant-respondents may submit these Hardship Declarations

Though communications with tenants who need legal assistance are now done almost completely remotely, the legal issues remain largely the same. So much of the analysis and strategy that go into defending the tenant are also the same. However, as noted above, legislative measures and executive orders have been implemented to prevent tenants from being evicted, at least in the short term. These are discussed in further detail below in COVID-19-Related Defenses and Protections.

Elements of a Nonpayment Proceeding

A nonpayment proceeding is just what it sounds like: the tenant is sued by the landlord for nonpayment of rent. In a nonpayment proceeding, the party commencing the case (i.e., the landlord) is called the petitioner and seeks a money and possessory judgment for the unpaid rent. N.Y. Real Prop. Law § 220 et seq. The tenant defending the lawsuit is referred to as the respondent. In a nonpayment case, the landlord cannot sue for other charges like the security deposit or damage done to property or unpaid air conditioner charges, unless there is an agreement that these additional charges can be treated as rent. See Allyn v. Markowitz, 83 Misc. 2d 250 (Cnty. Ct. 1975); Net Realty Holding Trust v. Kluge, 1989 N.Y. Misc. LEXIS 920 (Dist. Ct. Feb. 15, 1989); 1809-15 7th Ave. HDFC v. Bouey, 47 Misc. 3d 396 (Civ. Ct. 2015); Garfunkel & Tauster Corp. v. Gulinazzo, 24 Misc. 3d 1205(A) (Civ. Ct. 2009); River View Assocs. v. Sheraton Corp. of Am., 33 A.D.2d 187 (App. Div. 1969).

For the landlord to sue a tenant in a nonpayment proceeding, a few key elements must be met:

- There must be an agreement between the landlord and the tenant for the payment of rent during that period.
- The tenant must have defaulted in the payment of rent.
- The landlord must seek possession at the commencement of the proceeding.
- The landlord must have served the tenant with a rent demand prior to the commencement of the nonpayment proceeding.

NY CLS RPAPL § 711.

Rent Demand

NY CLS RPAPL § 711 requires the landlord to make a demand for rent prior to the commencement of a nonpayment proceeding. In 2019, the Housing Stability Tenant Protection Act (HSTPA) amended NY CLS RPAPL § 711 to require that this demand be in writing and give the tenant 14 days' notice to pay the alleged rent owed or give up possession. NY CLS RPAPL § 711(2). In other words, the landlord cannot commence a court proceeding or verify the petition before the 14 days have expired. Otherwise, the landlord has failed to comply with a jurisdictional prerequisite and the petition must be dismissed. See Bristed v. Harrell, Misc. 93 (App. Term 1897). The tenant can raise these challenges to the rent demand in their answer, an amended answer, or a pre-answer motion.

In the rent demand, the demanding party must request that the tenant pay the amount demanded or give up possession. The demand can be signed by the landlord or their attorney unless the lease specifies otherwise. The demand must provide unambiguous notice of who is making the demand and the extent to which that person had authority to represent the petitioner. See Anastasia Realty Co. v. Lai, 173 Misc. 2d 1012, 1015 (Civ. Ct. 1997).

Generally, the content of the demand is determined by the lease terms. See Margis Realty Co. v. Belaguer, 1992 NYLJ LEXIS 8831. It must be a good-faith assertion of the rent due at the time of the demand. The demand must be for a specific sum representing rent for specific months. It must inform the tenant the period for which rent is allegedly due as well as the amount claimed. See Schwartz v. Weiss-Newell, 87 Misc. 2d 558 (Civ. Ct. 1976); Dendy v. McAlpine, 27 Misc. 3d 138(A) (App. Term 2010). This will allow the tenant an opportunity to avoid litigation and possible eviction by remedying the default. See Zenila Realty Corp. v. Masterandrea, 123 Misc. 2d 1 (Civ. Ct. 1984); Stiles v. Donovan, 100 Misc. 2d 1048 (Civ. Ct. 1979).

Additionally, if the tenant designated or earmarked a rent payment for a specific month, the payment must be applied to that month's rent. See Shimon Realty, Inc. v. Stosko, 6/24/02 N.Y.L.J. 22, col. 6 (Civ. Ct. Kings Cty.). A landlord is not allowed to apply a tenant's earmarked checks as it sees fit. See 134-38 Maple St. Realty Corp. v. Medina, 3 Misc. 3d 134(A) (2004) ("landlord was required to apply the checks that it accepted to the months for which they were earmarked"); L&T East 22 Realty Co. v. Earle, 192 Misc. 2d 75, 76 (App. Term 2002) ("[w]hether or not the DSS payment was explicitly earmarked for December 2000 rent, it was at all times clear to landlord that the payment, which was in the amount of the December 2000 rent, was intended to be applied to that rent and not to the arrears"); Kew Realty Co. v. Charles, 6/3/98 NYLJ 5, col. 1 (App. Term 2d Dep't) ("landlord was not entitled to apply tenant's earmarked checks as it saw fit but was required to apply them toward which the payments were directed").

Circumstances can evidence how to apply a payment just as well as words. See L&T East 22 Realty Co. v. Earle, 192 Misc. 2d 75, 76 (App. Term 2002).

Fair Debt Collections Practices Act (FDCPA)

Since the FDCPA governs debt collection practices by debt collectors, an attorney who attempts to collect money on behalf of a landlord falls within the scope of the act. 15 U.S.C. § 1692 et seq. Thus, the written rent demand must notify the consumer/tenant that they have 30 days to dispute the debt in writing or else the debt will be assumed valid. See Romea v. Heiberger & Assocs., 988 F. Supp. 712 (S.D.N.Y. 1997). However, this defense is not a basis to dismiss the nonpayment proceeding.

Courts have found that a rent demand is **not** a good-faith assertion of the rent due when:

- Discrepancies between the rent demand and petitioner's monthly rent statement and proof offered by the respondent indicate that the petition does not include a good-faith sum of rent alleged to be due (See Sixth Avenue Terrace Assoc. v. Langley, 2014 NYLJ LEXIS 7519; Severin v. Rouse, 134 Misc. 2d 940 (1987); Solack Estates, Inc. v. Goodman, 102 Misc. 2d 504 (1979).)
- A rent demand failed to state the proper amount of a tenant's monthly share of Section 8 rent (See Parkview Gardens LP v. Lamont, 2008 NYLJ LEXIS 1531.)
- A rent demand sought arrears that had been resolved in prior litigation (Since this defect cannot be cured by amendment, the petition was dismissed. See 104-110 Grove St. HDFC v. Fulton, 2017 NYLJ LEXIS 1255.)

However, the examples above are different from the situation where a rent demand includes itemization of attorney's fees and other charges (late charges). They are also different from impermissible charges masked as rent or seeking rent in excess of stabilized or legal maximum rent. In these scenarios, the rent demand gives notice of the landlord's additional claim for contractual damages provided for in the parties' lease. See Brusco v. Miller, 167 Misc. 2d 54 (App. Term 1995).

There is conflicting authority on whether a rent demand must include the date by which the rent must be paid to avoid commencement of the nonpayment proceeding. One line of cases holds that the rent demand may not be ambiguous as to when the tenant must pay to avoid litigation. If there is no way the tenant would know when the 14 days in a 14-day notice would expire, the rent demand is inadequate and the petition will be dismissed. For example, in 95 River Co. v. Burnett, the tenant received a three-day notice that required him to pay the alleged rent due "on or before the expiration of THREE days from the day of service of this Notice." 160 Misc. 2d 294, 295 (Civ. 1993). The notice was affixed to the entrance door of the tenant's subject premises, along with it being mailed regular and certified mail. The tenant argued the notice was defective because there was no way he could know for sure when the three-day period began since he does not know what day the posting occurred. The court in this case agreed with the tenant. See 95 River Co. v. Burnett, 160 Misc. 2d 294 (Civ. 1993); see also, Parkchester Apts. Co. v. Walker, 1995 N.Y. Misc. LEXIS 738; 2966 Briggs Co. v. Soto, 2019 NYLJ LEXIS 4678.

A rent demand can go stale. Thus, a rent demand is effective as a predicate to the nonpayment proceeding only for a period that bears a reasonable relationship to the period of the default. See Zenila Realty Corp. v. Masterandrea, 123 Misc. 2d 1 (Civ. Ct. 1984). A rent demand for a proceeding dismissed on other grounds may be used to support a second nonpayment proceeding brought within a proper period of time. See 36-59 Main Street Assocs. v. Mainnor Co., 1992 NYLJ LEXIS 8789.

Service of the Rent Demand

To properly serve the rent demand, first look to the lease terms. See B&A Realty Co. v. Castro, 5/9/95 NYLJ 25, col.1. Otherwise, service is governed by NY CLS RPAPL § 735 for the service of the notice of petition and petition. NY CLS RPAPL § 711. Note that the requirement for the filing of an affidavit of service for a notice of petition and petition does not apply here.

Nonpayment Petition

After the landlord has served the tenant with the rent demand and 14 days have passed without the tenant paying the rent, the landlord can commence the nonpayment proceeding by filing a petition and notice of petition at the housing court in the county where the property is located.

As of March 2021, New York State Administrative Order of the Chief Administrative Judge of the Courts #AO/267/20 (effective November 4, 2020) governs the filing of court papers during the ongoing COVID-19 health emergency and until prohibited by gubernatorial executive order. The process is as follows:

- Generally speaking, in-person filing by represented parties is not permitted in the courts. Represented parties are to use the New York State Court Electronic Filing System (NYSCEF).

- Unrepresented parties may answer using the following methods:
  - Provide an oral answer over the telephone by calling the New York City Housing Court Help Centers at the following numbers:
    - **Bronx:** 718-466-3022
    - **Brooklyn/Kings and Red Hook:** 347-404-9043, 9044
    - **Manhattan/New York and Harlem:** 646-366-5554, 5555
    - **Queens:** 718-262-7185, 7186
    - **Staten Island/Richmond:** 718-675-8441
  - E-file an answer on NYSCEF if the case is available on NYSCEF. You can check here to see if the case is in the NYSCEF system.
  - Bring a copy of the written answer to the housing court to file, but there may be delays getting into the courthouse.

Often, defects on the face of the court papers provide defenses in the nonpayment proceeding. Thus, knowing what the nonpayment petition must contain allows the practitioner to identify defenses that can be raised to dismiss the proceeding. In practice, these defenses translate into leverage to settle the case.

When the courts first reopened, courts allowed landlords to serve notices of petition and petitions without court dates, but these cases were subject to dismissal for failure to include specific information such as the time, the location, and an unequivocal date for the hearing as required by N.Y. C.P.L.R. 403(a) and NY CLS RPAPL § 731(2).

- See 769 East LLC v. Ofori, 2020 NYLJ LEXIS 355, where in a motion to dismiss the petition, where the respondent raised Brusco v. Braun in support of her claim that the petition was defective, the petitioner argued in court—without submitting written opposition—that it was only following instructions from the court. Judge Hahn dismissed the holdover proceeding.
- However, in Matter of Mitcham v. Breier, 2021 NY Slip Op 21036, the tenant commenced an Article 78 proceeding against the Bronx Housing Court Supervising Judge seeking a mandamus to enjoin the Honorable Breier from making any future declarations instructing litigants to file motions in contravention of N.Y. C.P.L.R. 2214. The court denied the Article 78 proceeding, holding the court had discretion under Governor Cuomo's Executive Order 202.8 and 202.67 to determine the manner in which a motion would be scheduled to be heard. "The manner in which motions should be brought before the Court during the continuing Covid-19 emergency was thus subject to the 'the exercise of discretion, not the performance of a mandatory, non-discretionary act; a writ of mandamus to compel is therefore not available." Matter of New York City Yacht Club v. New York City Dept. of Bldgs., 172 A.D.3d 606, 606 (1st Dept. 2019).

Despite this, as Housing Court resumes more operations, attorneys for landlords will continue to insist that the Office of Civil Justice (OCJ) allow petitioners to commence proceedings and motions with a date certain instead of with a date that is "TBA."

Contents of Nonpayment Petition

The nonpayment petition must clearly state:

- The amount of rent due and how the petitioner arrived at that amount (See Goldman Bros. v. Forester, 62 Misc. 2d 812 (Civ. Ct. 1970).)
- The rent regulatory status of the apartment and the owner's compliance with the rent registration requirements (However, courts have found this category of information can be amended to avoid dismissal. See Giannini v. Stuart, 6 A.D. 2d 418 (App. Div. 1958); 251 East 119th Street Tenants Assoc. v. Torres, 125 Misc. 2d 279 (Civ. Ct. 1984).)
- The building's multiple dwelling registration (If the building is not registered, the tenant does not have an obligation to pay rent. 22 NYCRR § 208.42(g).)
- Whether the premises are subject to federal regulations and which regulations (See Rac Gardens Co. v. Rodriguez, 1989 N.Y. Misc. LEXIS 934.)

Where the tenant tenders the full amount of rent due before the court enters a judgment in the proceeding, the court may not grant judgment in favor of the petitioner. This judicial holding was codified when HSTPA added new subsection (4) to NY CLS RPAPL § 731 to require the landlord to accept the full amount of rent due at any time prior to the hearing on the petition.

Common Tenant Defenses

It is important for the tenant to answer in the nonpayment proceeding. If the tenant does not answer, the court will enter a default judgment for the landlord. The answers can include counterclaims as well as defenses.

In New York City, the time to answer is governed by NY CLS RPAPL § 732. Usually, the petition will not state a specific date to answer and will only contain a notification

for the respondent to go to court and file an answer within 10 days of service of the petition. 22 NYCRR §§ 208.7(d), 210.7(d), 212.7(d), 214.1(d) provide that the respondent can seek one ex parte order extending the time to answer up to 10 days beyond the original time to answer.

On November 3, 2020, the New York State governor issued EO 202.72 that provides:

- The time to answer in a nonpayment proceedings pending on Nov 3, 2020, will be 60 days (through Jan. 2, 2021) (Thus, cases on PAUSE due to COVID-19 received this extension.)
- But since Housing Court has slowly reopened, in nonpayment proceedings commenced after November 3, 2020, the tenant will have the standard 10 days from service of the petition to file an answer at court

After learning the facts from the tenant and reviewing the tenant's documents, the attorney should identify the tenant's defenses. There are nine primary defenses available to a tenant in a nonpayment proceeding. Additional protections for tenants were recently enacted as COVID-19 relief.

Payment of Rent

That the rent has been paid may seem the most straightforward of the tenant defenses, but there are several permeations of this defense, depending on the circumstances.

Application of Rent

If the tenant paid the rent, but the landlord applied the current rents (not earmarked) to earliest arrears, this can make it seem on the rent ledger that the tenant consistently owes rent. When confronted with this situation, the burden is unfairly placed on the tenant to find proof that old arrears were paid. There is a six-year statute of limitations so the landlord cannot seek rent that goes back more than six years.

Rent Stabilization

For units that are subject to rent stabilization, a landlord is required to provide the tenant with a written receipt for rent paid. 9 NYCRR § 2525.2(b)(1). The details of this requirement are as follows:

- The receipt should indicate the date, the amount paid, the premises, the period for which the rent is paid, and the signature and title of the person receiving the rent, unless rent has been paid with a personal check. N.Y. Real Prop. Law § 235-e. One request for receipts is enough to require the landlord to provide the tenant with receipts for the entire tenancy.
- If a landlord fails to comply with this requirement, the court should resolve any dispute as to rent paid in favor of the tenant. See Palmieri v. Hernandez, 127 Misc. 2d 369 (City Ct. 1984).
- The HSTPA amended the Real Property Law so that this requirement now applies to subtenants and other non-tenant-but-rent-paying occupants as well as to the tenant(s). N.Y. Real Prop. Law § 235-e requires that:
  - The landlord must keep record of all cash payments received for three years
  - If rent is personally transmitted, receipt must be immediately provided
  - If rent is indirectly transmitted, the landlord has 15 days to provide a receipt
  - If rent is five days late, the landlord must send by certified mail a written rent default notice

The landlord's failure to comply with N.Y. Real Prop. Law § 235-e is an affirmative defense in a nonpayment proceeding.

Tender and Refusal

A landlord may not maintain an eviction proceeding if they refuse a tender of rent by a third-party payee (such as the New York City Department of Social Services (DSS) or Human Resources Administration (HRA)) as well as when the landlord refuses a tender of rent by the tenant. See Clarke-Walton v. Ramos, 2016 NYLJ LEXIS 5000.

The Landlord Frustrated the Tenant's Efforts to Pay

Courts have repeatedly found tenants are not responsible for alleged rent defaults, on stipulated judgments, when their landlords frustrate their efforts to pay. This is in line with well-settled contract principles, including the implied covenants of good faith and fair dealing. See Dino Realty Corp. v. Khan, 46 Misc. 3d 71, 72–73 (App. Term 2014) (vacating a nonpayment warrant after a landlord refused to provide a form to a charity, which would have enabled the tenant's payment); Monastery Manor v. Donati, 2010 N.Y. Misc. LEXIS 3540 (vacating a nonpayment warrant where the landlord refused to provide forms and information to DSS, which would have enabled the tenant's payment); HPS Holdings Co., LLC v. AL & Assoc., 2005 N.Y. Misc. LEXIS 2867 (holding that "default under the stipulation was not chargeable to tenants since landlord's agent frustrated their attempts to make timely payment"); 2720 LLC v. White, 2012 N.Y. Misc. LEXIS 2681 (vacating judgment and warrant and dismissing nonpayment proceeding because the landlord waived its right to the rent by failing to provide a form for charitable agencies).

The Landlord Is Seeking the Wrong Rental Amount

In rent-regulated housing or other programs—like NYCHA—where rent is increased as a matter of law, a rent increase must be agreed to by the tenant (by signing the renewal lease with the higher rent). If the tenant continues to pay the old amount, the landlord cannot evict them for nonpayment of the rent increase. The landlord's remedy is to terminate the tenancy (for failure to renew the lease) and commence a holdover proceeding.

The Landlord Has Overcharged the Tenant

Rent overcharge can be raised as a defense or a counterclaim and the amount sought can be used as a setoff of rent. HSTPA amended this defense in what is called "Part F," but the New York State Court of Appeals stuck it down in Matter of Regina Metro Co. LLC v. DHCR et. al., 2020 NY Slip Op 02127, 2020 NY LEXIS. There is no consensus on the reach of *Regina Metro*, so practitioners are advised to read the decision and its progeny carefully in assessing this defense. Generally speaking, *Regina Metro* held:

- The pre-HSTPA law and four-year lookback rule and standard method of calculating Legal Regulated Rent (LLR) govern certain proceedings absent fraud
- The four-year lookback applies to the tenant's overcharge claim accrued prior to HSTPA
- For fraudulent de-regulatory schemes, *Regina Metro* retained the exception from years of pre-HSTPA litigation so that review of records beyond the four-year statute of limitations is appropriate (See Upper Manhattan J LLC. v. Janice Iverson, Index No. LT 80175/17 (Civ. Ct. N.Y. Cty. Oct. 14, 2020).)

For more on *Regina Metro* see New York City Tenants Can Still Uncover Landlord Fraud in Residential Landlord-Tenant Litigation and Regina Metro One Year On: Residential Tenants in New York City Can Still Conduct Robust Discovery in Rent Overcharge Cases.

Laches

A landlord cannot obtain a possessory judgment for nonpayment of rent if the rent arrears were allowed to accrue for too long. The essential elements of this defense are as follows:

- The landlord must have a valid claim which, but for the laches defense, would be viable.
- The landlord must have delayed in asserting the claim without good cause. But it is not a delay if for some reason the landlord was not able to sue or attempted unsuccessfully to assert the claim. For example:
    - There was no delay in a current proceeding brought four months after prior proceeding, which lasted 17 months was dismissed because of an improper rent demand. See Salgro Realty v. Russell, 4/6/92 NYLJ 31, col. 2.
    - There was no delay where there was continuous vexatious litigation between the landlord and tenant. See Thunderbird Realty v. Ahn, 11/19/81 NYLJ 11, col. 1 (App. Term 1st Dep't).
    - The landlord did not delay where there were extensive settlement negotiations between the parties in an attempt to arrange a reasonable payout schedule. See Clinton Hous. Dev. Co. v. Quon, M-1353, 1994 N.Y. App. Div. LEXIS 3891 (App. Div. Apr. 12, 1994).
- The tenant must be prejudiced if the proceeding is not barred. Courts have found prejudice where:
    - The landlord sues the tenant for period so long ago that the tenant has lost rent receipts or proof of payment (See Grand Concourse E. Hdfc v. Glenylamberth-Nunez, 2016 NYLJ LEXIS 4998.)
    - The tenant relies on limited Supplemental Security Income as the only source of income (See 383 Realty Corp. v. Young NYLJ 1/29/2014 NYLJ 1202640083022.)
    - The landlord waited 23 months to bring a nonpayment proceeding against a 73-year-old, indigent tenant who had been in her apartment for 30 years, and each month she indicated on the rent payments that they were to be applied to current rent and not arrears (See A & E Tiebout Realty v. Johnson, 23 Misc.d 1112(A) (Civ. Ct. 2009).)

A landlord can defeat laches by showing a reasonable excuse for the delay. See Rodriguez v. Torres, 2003 N.Y. Misc. LEXIS 2078 (Civ. Ct. Jan. 22, 2003). If the tenant is successful, the landlord can only secure a nonpossessory judgment for the stale rent but can still obtain a possessory judgment for the non-stale rent. Even so, there are also strategic reasons to assert laches as a defense. There are times when the non-stale rent coupled with the stale rent will make the tenant ineligible for rent arrears assistance from charities or the HRA or DSS because the alleged rent arrears is too large an amount. Thus, with laches, the court can sever the stale rent, which will make the non-stale rent within the limits of what a charity or HRA/DSS will cover.

The Landlord's Failure to Register the Building as a Multiple Dwelling (NYC)

This defense applies only to buildings that have three or more units in a city with more than 1,000,000 people

(in other words, New York City). N.Y. Mult. Dwell. Law § 325(2). A landlord cannot bring a nonpayment proceeding if it failed to properly register the building as a multiple dwelling with the New York City Housing Preservation and Development (HPD). In this situation, the tenant has a right to withhold rent. If the tenant voluntarily pays the rent, it cannot be recovered. NYC Administrative Code 27-2097. The registration requirements are as follows:

- A new registration must be filed every three years.
- The requirement applies to all multiple dwellings and one and two-family houses if the owner lives outside NYC.
- Use this website to look up publicly available information about the address.

Once a landlord complies with the registration requirements, they can seek recovery of rents for the period of noncompliance. See 128 East 83d St Co. v. Kagan, 10/6/87 NYLJ 14, col. 1 (App. Term 1st Dep't); 9 Montague Terrace Assoc. v. Feuerer, 191 Misc. 2d 18 (App. Term 2001).

In addition, note that in the Second Department (at least), failure to allege and comply with multiple dwelling registration requirements in a holdover (NY CLS RPAPL § 711) is not grounds for a dismissal. See Czerwinski v. Hayes, 8 Misc. 3d 89 (App. Term 2005).

Illegal units are subject to registration requirements, as follows:

- A two-family home with a basement illegally converted to a residential unit for which there is no certificate of occupancy, such building is a de facto multiple dwelling.
- The landlord is required to register the building as a multiple dwelling.
- Without a registration, the landlord cannot bring a nonpayment proceeding against the tenant in the illegal unit (third unit) or the tenant in the legal unit. This applies even if the conversion of the illegal unit to a legal unit is not possible because of economic infeasibility. See Marrocco v. Lugero, 10/6/99 NYLJ 31, col. 2; Harris v. Corbin, 79 Misc. 2d 971 (App. Term 1974).
- Even if the illegal third unit is vacant, as long as the intended use is residential, the landlord is required to register the building as a multiple dwelling. See Ropla Realty Corp. v. Ulmer, 110 Misc. 2d 619 (Civ. Ct. 1981).

See also Harris v. Corbin, 79 Misc. 2d 971 (App. Term 1974) . For further guidance, see De Facto Rent Stabilization in New York City.

Failure to Obtain a Certificate of Occupancy (NYC)

The Multiple Dwelling Law provides that if any multiple dwelling is occupied in whole or in part for residential purposes in violation of the obligation to have a certificate of occupancy pursuant to N.Y. Mult. Dwell. Law § 301, the landlord cannot collect rent or bring a nonpayment proceeding. N.Y. Mult. Dwell. Law § 302(1); see also Singh v. Cappacetti, 10/11/88 NYLJ 23, col. 1 (Civ. Ct. Bx Cty.); Guarino v. Timares, 196 Misc. 414 (App. Term 1949); Baum Residence Corp. v. Van Rosson, 206 Misc. 314 (App. Term 1954); Schwarzkopf v. Buccafusca, 98 N.Y.S.2d 42 (App. Term 1950); Pierette Chery v. Santiago, et. al., NYLJ 1/21/2015, NYLJ 1202715494495 (Civ. Ct. Queens Cty.).

However, the landlord can maintain a holdover proceeding to recover possession of the premises occupied in violation of the certificate of occupancy. See Nii v. Quinn, 195 Misc. 2d 821 (App. Term 2003). Where the landlord alters a building in a manner that requires a certificate of occupancy for the first time or a new certificate, the landlord cannot collect rent. See Lee v. Gasoi, 113 Misc. 2d 760 (Civ. Ct. 1982) (residential units were created); Mathurin v. Jackson, 12/12/90 NYLJ 23, col. 2.

Exceptions that permit the landlord to collect rent include:

- If the tenant does not live in the basement apartment that violates the certificate of occupancy (See Ziegler v. Schiffren, 1994 NYLJ LEXIS 9353.)
- Where the tenant created the violation of the certificate of occupancy (See Zafra v. Sawchuk, 1995 N.Y. Misc. LEXIS 768.)
- Where the violation did not affect the structural integrity of the building or make the tenant's occupancy illegal (See Goldman v. Bishins, 1/8/92 NYLJ 21, col. 2; Milbeck Apts. v. McLeon, 10/9/90 NYLJ 28, col. 1.)

Warranty of Habitability

The warranty of habitability is the implied covenant in every residential lease that the premises and all common areas are fit for human habitation and free from conditions that are dangerous; hazardous; or detrimental to life, health, or safety. N.Y. Real Prop. Law § 235-b.

As a Defense or an Affirmative Claim

The warranty of habitability can be a defense to a nonpayment proceeding or an affirmative claim. The tenant must raise it as a counterclaim to avoid having its damages limited to the months for which the petitioner has sued. See Park West Management Corp. v. Mitchell, 47 N.Y. 2d 316 (1979). The tenant can recover emotional distress or

punitive damages only where the warranty of habitability rises to the level of high moral culpability or indifference to civil obligations. See KEV Realty Co, Inc. v. Kelly, 5/13/96 NYLJ 26, col. 4.

There are three parts to this implied covenant:

1. The premises should be free from conditions dangerous to life, health, or safety.

   (a) It is a bright-line rule that the warranty of habitability has been breached when there is a violation of the Multiple Dwelling Law. N.Y. Mult. Dwell. Law § 78; N.Y. Mult. Resid. Law §§ 40, 70, and 174. See also Park West Management Corp. v. Mitchell, 47 N.Y. 2d 316 (1979).

   (b) There are limits to the landlord's liability for dangerous conditions., such as:

   (i) N.Y. Real Prop. Law § 235-b does not impose a duty on a landlord to remove a Registered Sex Offender who has become a legal occupant (See Knudsen v. Lax, 17 Misc. 3d 350 (Cnty. Ct. 2007).)

   (ii) Nor where a tenant claims a neighbor has COVID-19

2. The landlord has a duty to maintain residential property in a habitable and usable fashion. N.Y. Real Prop. Law § 235-b.
3. The landlord must also maintain the property "in accord with the uses reasonably intended by the parties." N.Y. Real Prop. Law § 235-b(1). The New York Court of Appeals in Solow v. Wellner, 86 N.Y.2d 582 (1995), discussed this stating the "[l]egislature's concern that tenants be provided with premises suitable for residential habitation, in other words, living quarters having 'those essential functions which a residence is expected to provide'" (citing Park W. Mgt. Corp. v Mitchell, 47 N.Y.2d 316 (1979)), and not the heightened amenities based on the parties' specific contractual arrangements. Such was the case here where the trial court held (and was later overruled) that the tenants in a uniquely designed building on Manhattan's "fashionable" Upper East Side who paid comparatively high rents were reasonable to expect that their landlord's responsibilities went beyond providing minimal amenities.

Remedy

At the outset, it important to remember that the tenant can only obtain damages if the landlord had actual or constructive notice of the existence of the condition in need of repair. See Sanchez v. Badami, 7/8/91 NYLJ 24, col. 6. The tenant is entitled to damages calculated in the form of a rent abatement and injunctive relief ordering the breach to be remedied. The proper measure of damages for breach of the warranty of habitability is the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach. See Park West Management Corp. v. Mitchell, 47 N.Y. 2d 316 (1979).

Damages are measured as a percentage of the rent. The total amount of the abatement should be set off against the petitioner's claim for rent. If the abatement exceeds the amount of rent due, that excess should be awarded as a money judgment to the tenant. See McGuinness v. Jakubiak, 106 Misc. 2d 317 (Sup. Ct. 1980). There is a six-year statute of limitations. N.Y. C.P.L.R. 213.

Constructive Eviction

A tenant can be relieved of the obligation to pay rent if the tenant abandons the premises without unreasonable delay after the premises have been so damaged or destroyed, or conditions have deteriorated so badly, that the premises have been rendered unfit for occupancy. See Barash v. Pennsylvania Terminal Real Estate Corp., 26 N.Y.2d 77 (App. Term 1954).

Partial Actual Eviction

A tenant's obligation to pay rent for the entire premises is suspended if the tenant is physically removed from some portion of the premises. See Sanders v. Goldinger, 12/30/98 NYLJ 24, col. 3.

Rent Impairing Violations

It is a defense if the tenant can pay the rent, but is withholding it because of rent impairing violations in the apartment or in a common area. HPD promulgated a list of rent impairing violations under N.Y. Mult. Dwell. Law § 302-a. See 28 RCNY 25-191. This defense does not apply if the tenant caused the violations. N.Y. Mult. Dwell. Law § 302-a.

COVID-19-Related Defenses and Protections

The Tenant Safe Harbor Act (TSHA) (L 2020, CH 127), enacted by the New York State legislature, provides an affirmative defense that tenants can raise against a possessory judgment in a nonpayment proceeding if they experienced financial hardship from March 7, 2020, through the end of the state of emergency in New York. However, it does not waive or forgive missed rent payments and

landlords may still seek a monetary judgment. See NYS MGMT LLC v. Maurice Lee, Index No. LT 28284/19 (Civ. Ct. Bx. Cty. July 14, 2020). The TSHA does not prohibit eviction for other reasons. The more recently enacted CEEFPA goes beyond the TSHA and places a moratorium on residential evictions until May 1, 2021, for all tenants who have endured COVID-19-related hardship. To prevent eviction, a tenant must submit a COVID-19 hardship declaration. Landlords can still evict tenants who create safety or health hazards for other tenants. The CEEFPA also stays all pending residential eviction actions and any actions filed within 30 days of December 30, 2020, for 60 days.

On September 4, 2020, the Department of Health and Human Services and the Centers for Disease Control issued an agency order halting certain residential evictions through December 31, 2020 (CDC Order). The order includes a certification for tenants to complete and give to their landlord to certify COVID-19-related hardship. Note that this order supersedes any state order that does not offer greater protections.

As discussed above, on December 28, 2020, New York State Governor Cuomo signed into law the CEEFPA, which stayed residential eviction proceedings for 60 days, among other measures. COVID-19 restrictions are evolving rapidly in New York. Best practice is to look to the appropriate court and government websites to ensure you are aware of the latest orders and restrictions.

Donna Chiu, Managing Attorney, Mobilization for Justice

Donna Chiu is a Managing Attorney for Housing Administration in MFJ's growing housing unit. Aside from helping to manage administrative tasks, she supervises attorneys practicing landlord-tenant law in New York. Ms. Chiu returned to MFJ where she started her legal career as a housing attorney. Prior to returning to MFJ, she was the Director of Housing and Community Services at Asian Americans for Equality (AAFE), a non-profit, community-based organization. At AAFE, Ms. Chiu led a team comprised of attorney, organizer, and housing advocate to provide legal representation, organize, and empower non-English speaking immigrants in Queens and Chinatown to stand up to their predatory equity landlords and fight back against tenant harassment. Ms. Chiu is an immigrant from Hong Kong, China and a native Chinese-Cantonese speaker. She takes great pride in leveraging her lived experiences growing up in Chinatown as an immigrant to provide linguistically and culturally appropriate services to some of New York's most underserved tenants.

In 2015, Ms. Chiu received the Community Partner Award from Manhattan Legal Services and the Community Ally Award from the Committee Against Anti-Asian Violence. In 2016, Ms. Chiu was the recipient of the Association of the Bar of the City of New York's Legal Services Award.