

### LANDLORD TENANT LAW

# Conditional Limitation v. Condition Subsequent



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In our last column, we discussed the ability of owners to commence ejectment actions in Supreme Court as an alternative to holdover proceedings in the New York City Civil Court's landlord-tenant part (or the analogous part in other local courts)—an option being chosen by many owners in light of the COVID-19 pandemic grinding landlord-tenant cases to a virtual halt. The pandemic is affecting the choice between ejectment actions and holdover proceedings in another significant way.

As rent defaults skyrocket in 2020, practitioners reviewing the default provisions in their clients' commercial leases must ask themselves a crucial question: does the provision set out a conditional limitation or a condition subsequent? The answer to this arcane question—which can trip up even experienced attorneys—will determine the forum in which an owner can recover possession. The common assumption among many practitioners is that all landlord-

tenant cases can be brought in the Civil Court. However, while this is true in connection with a lease termination based upon a conditional limitation, landlord-tenant courts—in which proceedings are governed by the Real Property Actions and Proceedings Law (RPAPL)—lack subject matter jurisdiction if the termination results from a condition subsequent.

The distinction between a conditional limitation and a condition subsequent was perhaps best explained by the court in *Lamlon Dev. Corp. v. Owens*:

... [T]he courts have consistently recognized a distinction in the termination of a leasehold pursuant to a condition (or condition subsequent) and a conditional limitation. If a leasehold can be terminated because the tenant's breach of a condition of the lease gives the landlord the option to declare the lease at an end, thereby exercising his right of forfeiture, a condition exists pursuant to which the landlord must enforce the forfeiture by reentry in an action for ejectment. If, however, the landlord

has the option to terminate the lease by serving a notice fixing a time after the lapse of which the lease will automatically expire, a conditional limitation of the leasehold exists, pursuant to which a summary holdover proceeding will lie.

(141 Misc 2d 287, 289-90 [Dist Ct, Nassau County 1988] [citations omitted]).

Here is an example of a default provision containing a conditional limitation:

If Tenant defaults in the performance of any of its obligations hereunder, and such default continues for ten (10) days after notice to Tenant with respect to the failure to pay any monies, or thirty (30) days after notice to Tenant with respect to the failure to perform or comply with any non-monetary obligations of Tenant hereunder, then Landlord may at its option terminate this Lease upon giving three (3) days' notice by certified mail of termination to Tenant, in which event neither Tenant nor any person claiming through or under the Tenant shall be entitled to possession or to remain in possession

of the Demised Premises but shall forthwith quit and surrender the Demised Premises.

Note the hallmark of a conditional limitation: the lapse of the tenancy after an event (a default under the lease) and time period (10 or 30 days, depending on the nature of the default) specified in the lease.

On the other hand, here is an example of a default provision from a commonly-used form lease containing a condition subsequent:

If the Tenant shall make default in the payment of the rent reserved hereunder, or any item of “additional rent” herein mentioned, or any part of either or in making any other payment herein provided for... the Landlord may immediately, or at any time thereafter, re-enter the demised premises and remove all persons and all or any property therefrom...

Thus, in the case of a condition subsequent, the tenancy terminates after a default only upon the owner taking affirmative action to do so—not upon the lapse of a period of time.

The significance of this distinction arises from RPAPL §711, which defines the grounds on which a landlord-tenant summary proceeding may be based. Insofar as the summary proceeding is a creature of statute, “it is well established that there must be strict compliance with the statutory requirements to give the court jurisdiction” (*MSG Pomp Corp. v. Doe*, 185 AD2d 798, 799-800 [1st Dept 1992]).

RPAPL §711(1) provides, *inter alia*, that a landlord may commence a summary proceeding where “[t]he tenant continues in possession of any portion of the premises *after the expiration of [its] term*, without

the permission of the landlord...” (emphasis supplied). Expiration of the tenant’s term “has been construed to mean expiration by lapse of time, *i.e.*, by natural conclusion of the lease term or by operation of a conditional limitation contained in the lease document which works an automatic termination of the tenancy upon the happening of a specified

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event” (*Matter of Calvi v. Knutson*, 195 AD2d 828, 830 [3d Dept 1993]).

Thus, an owner is entitled to commence a summary holdover proceeding where, *inter alia*, the period set forth in a default notice expires without the tenant having effected a cure by the deadline set forth in the notice (*see e.g. Miller v. Levi*, 44 NY 489, 493 [1871]; *Matter of Calvi v. Knutson*, 195 AD2d at 830; *Perrotta v. W. Regional Off-Track Betting Corp.*, 98 AD2d 1, 2 [4th Dept 1983]).

On the other hand, a lease termination “resulting from the landlord’s option to exercise his or her reserved right of reentry upon the tenant’s breach of a lease covenant [*i.e.* the exercise of a condition subsequent], because it is not an expiration by lapse of time, consistently has been recognized not to be an expiration

within the meaning of RPAPL 711(1)” (*Matter of Calvi v. Knutson*, 195 AD2d at 830). In such circumstance, the owner seeking to obtain possession is not entitled to maintain a summary proceeding and must instead commence an action to recover real property (*i.e.* an ejectment action) in Supreme Court pursuant to RPAPL Article 6 (*see e.g. Miller v. Levi*, 44 NY at 493; *Perrotta v. W. Regional Off-Track Betting Corp.*, 98 AD2d at 5; *LLDP Realty Co., LLC v. AGHR Enterprises LLC*, 44 Misc 3d 716, 718-19 [Civ Ct, Kings County 2014]; *451 Rescue LLC v. Rodriguez*, 15 Misc 3d 1140[A], 2007 NY Slip Op 51062[U] [Civ Ct, New York County 2007]).

A motion to dismiss based on a court’s lack of subject matter jurisdiction may be brought at any time and cannot be waived (*see Manhattan Telecom. Corp. v. H & A Locksmith, Inc.*, 21 NY3d 200, 203 [2013]). As a result, if a summary proceeding is improperly based on a lease termination resulting from a condition subsequent, an eagle-eyed tenant’s attorney can secure dismissal many months or even years after the owner commenced the proceeding and expended significant attorney fees in connection with its prosecution. Accordingly, as commercial rent defaults significantly increase due to the COVID-19 pandemic and related causes, practitioners must review the default provisions in their clients’ leases with extreme care to determine the proper forum for the litigation of the resulting disputes.