

LANDLORD-TENANT LAW

The Rise of Ejectment Actions During the Pandemic



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For a time this spring and early summer, the COVID-19 pandemic brought New York's court system to a complete standstill. Perhaps hardest hit were the housing and commercial landlord-tenant parts of the New York City Civil Court (collectively, the "L&T Court"). While the New York State Supreme Court has regained some measure of functionality and new cases may be filed and move forward, the L&T Court remains mired in almost total paralysis. Although new summary proceedings may now be commenced, they are being adjourned until further notice. Cases filed before the pandemic many months ago, or longer, largely remain at a standstill; the latest guidance is that trials scheduled before the pandemic will begin to move forward in the coming weeks, but only where both sides are represented by counsel.

Proceedings in the L&T Court are conducted pursuant to Article 7 of the Real Property Actions and Proceedings Law (RPAPL). Given the situation as just described, it should be remembered that Article 7 of the RPAPL was enacted "to provide for *expeditious and fair procedures* for the determination

of disputes involving the possession of real property" (*159 MP Corp. v. Redbridge Bedford, LLC*, 33 NY3d 353, 364 [2019], *rearg denied*, 33 NY3d 1136 (2019) (emphasis supplied, citations omitted)). The current logjam in already-pending proceedings and the inability to move forward with new proceedings is the antithesis of "expeditious and fair" for L&T Court litigants.

This state of affairs has prompted renewed interest in the ejectment action, a common-law remedy for real property owners that predates the modern landlord-tenant summary proceeding. In recent times, owners

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have typically commenced ejectment actions (also known as "actions to recover real property" and governed by common law and Article 6 of the RPAPL) in situations where the L&T Court does not have jurisdiction—such as, for example, where a lease is terminated pursuant to a "condition subsequent" (see *e.g. Matter of Calvi v. Knutson*, 195 AD2d 828, 831 [3d Dept

1993]; *451 Rescue LLC v. Rodriguez*, 15 Misc 3d 1140[A], 2007 NY Slip Op 51062[U] [Civ Ct, New York County 2007]). Nevertheless, an owner's ability to utilize ejectment actions more widely in landlord-tenant disputes has never been abridged. As the Appellate Division has stated:

Although resort to a summary proceeding to regain possession of real property has become the rule rather than the exception...the common-law action for ejectment still survives in New York and is more properly referred to as an action to recover possession of real property (RPAPL art. 6). The common-law principles governing the ejectment action are unchanged, unless explicitly modified by statute.

(*Alleyne v. Townsley*, 110 AD2d 674, 675 [2d Dept 1985]).

A landlord may maintain an action to eject a tenant that is continuing in possession after the expiration of its term (see 90 N.Y. Jur. 2d Real Property—Possessory Actions § 377, *citing Schuyler v. Smith*, 51 NY 309, 1873 WL 10167 [1873]). A plaintiff asserting an ejectment claim must establish that (1) it is the owner of an estate in tangible real property, (2) it has a present or immediate right to possession thereof, and (3) the defendant is in present possession of the estate (see *RPAI Pelham Manor, LLC v. Two Twenty Four Enter-*

prises, LLC, 144 AD3d 1125, 1126 [2d Dept 2016]). If the plaintiff is successful, the court will issue a judgment or order awarding possession of the property, which may be enforced by an execution—which will, in turn, particularly describe the property and direct the county sheriff to deliver possession thereof to the plaintiff (see CPLR 5102).

It should be noted that the ejectment action is not a complete substitute for all L&T Court proceedings. For instance, because a successful claim requires the tenancy to have expired, the ejectment action cannot do the work of an L&T Court nonpayment proceeding, in which an owner seeks unpaid rent from an ongoing tenant backed up by a judgment of possession and warrant of eviction if the tenant fails to pay. However, in the commercial context, an ejectment action relating to nonpayment of rent *can* be brought if the owner elects to exercise a conditional limitation. In other words, if the owner serves a notice upon the tenant advising that the lease will be terminated unless rent arrears are paid and the tenant does not obtain a *Yellowstone* injunction prior to the expiration of the cure period, the owner may maintain an ejectment action upon the lease's termination. Moreover, if an ejectment action is commenced on other grounds, the owner may recover accrued rent arrears as well as use and occupancy for the period after the complaint is filed (see *Earl v. Nalley*, 273 AD 451, 455 [3d Dept 1948]).

It should be noted that recent legislative and executive activity concerning evictions does not appear applicable to ejectment actions.

Executive Order 202.28 (“EO 202.28”), signed by Governor Andrew Cuomo on May 7, 2020, states, in relevant part: There shall be no initiation of a *proceeding* or enforcement of either an *eviction* of any residential or commercial tenant, *for nonpayment of rent* . . . rented by someone that is eli-

gible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020 (emphasis supplied). (<https://www.governor.ny.gov/news/no-20228-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>).

Executive Order 202.48 (“EO 202.48”), signed on July 6, 2020 (<https://www.governor.ny.gov/news/no-20248-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>), limited the applicability of EO 202.28 to, *inter alia*, commercial tenants in light of the enactment of the Tenant Safe Harbor Act (“TSHA”) on June 30, 2020, which provides additional COVID-19-related protections to residential tenants (L 2020, ch 127).

Notably, the eviction moratorium reflected in EOs 202.28 and 202.48 applies only to a *proceeding*. RPAPL 701 specifies that a landlord-tenant proceeding is a “special proceeding” under Article 4 of the CPLR. New York has long distinguished between an “action” and a “proceeding,” such as a landlord-tenant proceeding (see, e.g., CPLR 103[a], [b] [clarifying that “[t]here is only one form of civil action” and distinguishing that form of action from a “special proceeding”]). Indeed, the TSHA, explicitly referenced in EO 202.48 as obviating the need to continue the eviction moratorium for residential tenants, only provides COVID-19-related defenses to residential tenants “in a summary proceeding under article 7 of the real property actions and proceedings law” (L 2020, ch 127, § 2, para 2[a]). By omission, such defenses do not apply in ejectment actions brought pursuant to Article 6 of the RPAPL.

Additionally, the eviction moratorium expressly applies to a “proceeding . . . for nonpayment of rent,” a seeming reference to L&T Court nonpayment

proceedings. An ejectment action based on the expiration of a commercial tenancy arising from a conditional limitation caused by the nonpayment of rent, as described above, does not fall within this prohibition. And, while EO 202.28 refers to a “proceeding” for an “eviction,” caselaw distinguishes between “a statutory summary eviction proceeding” and an “action seek[ing] the common-law remedy of ejectment” (*Alleyne v. Townsley*, 110 AD2d at 675 [holding, *inter alia*, that “[n]o statute abrogates the common-law rule that notice is unnecessary to maintain an ejectment action against a tenant who wrongfully holds over after expiration of a fixed and definite term”]).

As the courts continue the reopening process, there will be both a large backlog of landlord-tenant cases and a pent-up demand to commence new cases, the combination of which will be difficult and time-consuming for the L&T Court to manage. Under these circumstances, practitioners seeking to advance their clients’ rights would be well-advised to consider the ejectment action—which remains a viable avenue for relief in many situations commonly encountered in the L&T Court.