

### REAL ESTATE TRENDS

# Do Tenants Have To Pay if They Want To Stay?

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February 3, 2025

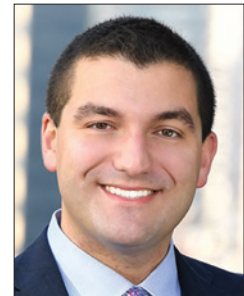
**T**he New York real estate industry has seen more legislative reform within the past five years than ever before. With all the recent protection provided to tenants, the question is now raised—can a landlord require a tenant to pay rent and/or use and occupancy during the pendency of a case?

The answer is simply, “Yes.” In fact, if a landlord obtains an order in Supreme Court compelling the tenant to pay use and occupancy, and the tenant fails to pay use and occupancy pursuant to that court order, the landlord’s legal remedy is for immediate possession of the subject premises. Bottom line—if the tenant wants to stay, the tenant must pay.

Use and occupancy is a legal remedy available to landlords at equity awarded by the court as monetary consideration for the tenant’s using and occupying of the premises to be paid to the landlord during the adjudication of dispute in court. Use and occupancy can be awarded



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irrespective of whether or not a tenant is holding over past the expiration of the lease.

The term use and occupancy is still appropriate to use even when there is a valid rent and an unexpired or terminated lease in effect which calls for a specific rent to be paid during a term. The courts of New York State have routinely and continually required a tenant to pay use and occupancy even when the amount of rent is in dispute pending a determination of the rights at issue in the case.

The question then becomes what constitutes “use and occupancy?” The Appellate Division, First Department examined this question when it was presented during the COVID-19 pandemic. The First Department ultimately held that a

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landlord is entitled to use and occupancy when a tenant is “using and occupying the premises.” See *The Gap Inc. v 44-45 Broadway Leasing Co., LLC*, 191 AD3d 549 (1<sup>st</sup> Dept 2021).

In *Gap*, Gap and Old Navy occupied flagship retail space in Times Square. Both tenants were mandated to close their doors to the public due to executive orders restraining retail stores from opening to the public during the COVID-19 pandemic.

Notwithstanding the fact that these tenants were not allowed to be open, the First Department found both tenants were still obligated to pay their landlord use and occupancy since they were in possession of the space with their property inside.

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Thus, a tenant using and occupying the premises has full possession and occupies the premises with its property therein, then the tenant is using and occupying the premises.

In *MMB Assoc. v Dayan*, 169 AD2d 422 (1st Dept. 1991), the First Department articulated similar rationale, holding, that an award of use and occupancy during the pendency of an action or proceeding accommodates the competing interest of the parties in affording necessary and fair protection to both. It is manifestly unfair that a tenant shall be permitted to remain in possession of the subject premises without paying for their use and/or occupancy.

Compelling a tenant to pay use and occupancy during the pendency of a litigation accommodates the competing interests of the parties by

affording fair and necessary protection to both and by preserving the status quo until a final judgment is entered. See *Abright v Shapiro*, 92 AD2d 452, 45354 [1st Dept 1983].

Even if situations where a tenant does not have a lease or if the lease has expired, the occupant of premises is liable to the owner of the property for use and occupancy irrespective of the existence of a contract See, *Carlyle, LLC v. Beekman Garage LLC*, 133 AD3d 510 [1st Dept 2015].

The Appellate Courts have routinely awarded landlords retroactive use and occupancy, and in doing so, have squarely held that a dispute concerning the amount of rent owed is no reason to allow a tenant to occupy a landlord’s real property gratis.

Most importantly, New York courts have recognized the necessity and urgency a landlord faces when a tenant remains in possession of the premises without paying; thus, a landlord is entitled to use and occupancy by virtue of an order to show cause with interim relief for use and occupancy to be paid pending the hearing and/or determination of the motion-in-chief.

In *35 W. Realty Co., LLC v. Booston LLC*, 2024 Slip Op 70750[U] [1<sup>st</sup> Dept 2024] the Appellate Division, First Department granted the landlord’s application pursuant to CPLR 5704(a) seeking, a temporary restraining order compelling defendant to remit use and occupancy pending the hearing and determination of its motion.

A landlord’s entitlement to use and occupancy is not limited to situations where commercial tenants fail to pay, but in residential matters as well. Recently, the court in *225 East 74<sup>th</sup> Apartments Corp. v. Skender Rugova* granted the plaintiff cooperative a TRO for use and occupancy against a superintendent whose occupancy at the subject super apartment was incidental to his employment but failed to vacate the apartment after his employment was terminated, awarding the

cooperative use and occupancy on a TRO at the fair market value as established in the moving papers. The motion-in-chief was subsequently granted by the court, and the superintendent was ordered to pay use and occupancy *pendente lite* at the fair market value.

Obtaining a court order directing a tenant to pay use and occupancy is just half the battle. What happens when a tenant fails to comply with a court order for use and occupancy? The legal remedy for the landlord is ejectment.

The Appellate Division, First Department has squarely held that a defendant's failure to comply with an order directing payment of use and occupancy entitles a plaintiff to a money judgment, an award of judgment of possession, or both. *Marbru Assoc. v. White*, 206 AD3d 562 (1st

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Dept. 2022) ("failure to comply with any of these directives will result in ejectment and an award of judgment of possession to plaintiffs"); *Rose Assocs. v. Johnson*, 247 AD2d 222, 223 (1st Dept 1998), where the Appellate Division, First Department, held:

*The tenant's failure to pay the interim use and occupancy was a violation of a condition to her right to remain in the apartment, 'permitting defendant [landlord] to apply for appropriate relief, e.g., a money judgment, or eviction, or both.' (internal citation omitted).*

The Appellate Division is abundantly clear that ejectment is proper when a tenant or occupant fails to comply with orders directing payment of use and occupancy, as it is a condition of the continued occupancy of a subject premises.

The reasoning behind such well-settled policy was enunciated in *61 West 62<sup>nd</sup> Owners Corp. v. Harkness Apartment Owners Corp.*, 202 AD2d 345, 346 (1st Dept. 1994), where the First Department stated, a party claiming a security interest in a lease must, as a condition for asserting its right in the litigation, comply with the court's directions to maintain the status quo or lose its interest in the property.

Under the foregoing authorities, if a tenant or occupant fails to pay use and occupancy and/or rent in violation of a Supreme Court order, the landlord can seek to recover possession of the premises thereof as a remedy for the contemptuous behavior of violating party.

In *Black Quarry Millwork, LLC v. Sandy Littman Realty Corp.*, Index No. 153243/2022 (NYSCEF Doc. No. 136), the court granted landlord's order to show cause seeking, *inter alia*, immediate possession of the subject premises based upon tenant's failure to comply with this court's order directing tenant to post a bond and remit payment for ongoing use and occupancy. This court's reasoning in *Black Quarry* is crystal clear, to wit: "[p]laintiff cannot simply ignore the court's order and it cannot occupy the premises without paying for its use."

The landlord's entitlement to possession of the subject premises if the tenant violates a Supreme Court order for use and occupancy is absolute and can be granted as part of an award of contempt of court from the tenant's failure to comply with the court order.

Accordingly, such relief can be granted even when the landlord does not have an underlying cause of action for ejectment in its complaint. The relief can be granted as part of a content application for failure to comply with the court order. If the relief is granted as part of contempt, the landlord may also avail itself of other statutory remedies such as a money judgment for the

unpaid amounts of use and occupancy as well as attorney fees, costs and disbursements pursuant to the New York State Judiciary Law §773.

While making a motion for use and occupancy in Supreme Court is a powerful tool for the landlord to ensure that the tenant is not unjustly enriched by virtue of remaining in possession of premises without compensating the landlord, this relief is not always available to the landlord.

For instance, a landlord cannot obtain an emergency TRO to pay use and occupancy in Civil Court in summary proceedings. Summary proceedings are statutory proceedings governed by the RPAPL in which certain landlord-tenant cases are commenced in Civil Court, which has historically been the predominant venue for landlord-tenant matters. This is due, in part, to the fact that summary proceedings are intended to be expedited proceedings to hear landlord-tenant matters.

RPAPL §745 does not entitle the landlord to immediate use and occupancy like a landlord would be able to obtain in Supreme Court, but rather the landlord cannot make a motion for use and occupancy pursuant to our RPAPL §745 until, at a minimum, after the 60th day after the first appearance of the parties in court, less any days that the proceeding has been adjourned upon the request of the petitioner/landlord, counting only days attributable to a germane request made solely at the request of the respondent/tenant and not counting an initial adjournment requested by the respondent to obtain counsel, whichever occurs sooner.

Additionally, the remedy for the landlord in the event that a tenant fails to pay use and occupancy

in a summary proceeding as ordered by the court per our RPAPL §745 is not a money judgment and/or possession of the subject apartment, rather the sole remedy is that the court, upon an application of the petitioner landlord, “may order an immediate trial of the issues raised in the respondent’s answer.

An “immediate trial” shall mean that no further adjournments of the proceeding upon respondent sole request shall be granted, the case shall be assigned by administrative judge to a trial ready part and such trial shall commence as soon as practical and continue until completed.” See RPAPL §745.

In such event, a trial is to then be scheduled and presided over until the issues are complete. Summary proceedings have historically and remain by the courts to be the preferred venue for landlord-tenant matters; however, some landlord-tenant disputes cannot be heard in summary proceedings, as the nature of the relief that the landlord and/or tenant may be seeking may not be available in summary proceedings, such as instances where a commercial tenant is seeking a *Yellowstone* injunction to toll the tenant’s time to cure its default after a landlord sends a notice of default. A *Yellowstone* injunction, can only be obtained and heard in Supreme Court, along with instances where a landlord and/or tenant may be seeking other damages or remedies which are outside the scope of the confines of the RPAPL.

Whatever type of case of a landlord and tenant may have in whichever court of competent jurisdiction the fact simply remains, if a tenant wants to stay in their space the tenant has to pay.