

Lease Violations, Notices and Rent Rejection – What To Do

COUNSELS' CORNER

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WHITE PLAINS – A Landlord has a tenant who is in violation of the lease. The tenant has continued paying rent. The Landlord has finally decided to take legal action and decides to do it properly. What are the steps to be taken and what are the risks?

First, in an Emergency Tenant Protection Act (ETPA) residential premises, the Landlord generally has to give a Notice to Cure and Notice of Termination. These can be combined in the same document which can, for the lack of better phrasing, be called “30-day notice of termination including 10-day notice to cure.”

However, risk one – do not terminate effective as of the middle of a month and all terminations should be the last day of a calendar month. Then, the Landlord should not collect any rent after the last day of the month in which the tenancy and lease was terminated and wait until you commence legal action or you will have been deemed to have waived the termination and if you go to court, will lose the case.

Further Examples

If you have commercial premises or a non-ETPA residential premises, you have to look to the terms of the lease to see what is required. It differs.

For example, in most co-

operatives, if there is an illegal sublet, there is a 10-day notice to cure. Other cooperative violations generally require a 30-day notice to cure. Thereafter, there is generally a 5-day notice of termination.

Commercial premises may require a variety of time limits. However, in any case, once the notice of termination is served, the tenancy and lease are considered terminated as of the effective date and if rent is collected before a court action is started, as stated, the termination will be considered waived.

But, suppose you have a lockbox and the bills go out automatically and the lockbox accepts the rent automatically – what then is to be done? First, try to stop the bill from going out for rent after the effective date of the termination.

In Landlord and Tenant Practice in New York (Finkelstein / Ferrara, Ch. 15, Holdover Proceedings, ©Westlaw 2014 Thomson Reuters), the authors said: “Petitioner’s acceptance of two rent checks after the tenancy’s termination did not vitiate the predicate notices where the landlord returned the payments uncashed “without unreasonable delay...following discovery of its clerical error.”; Liant Record Co. v. Newman, N.Y.L.J., 6/7/93, p. 29, col. 1 (App. Term, 1st Dep’t) (“[L]andlord’s accep-

ptance of certain rent payments through a lockbox following the death of respondent’s brother did not constitute a waiver of landlord’s right to prosecute this eviction proceeding.”); 83rd St. Assocs. v. Gourmet Wine and Spirits, Ltd., N.Y.L.J., 6/7/93, p. 28, col. 5 (App.Term, 1st Dep’t) (“[P]etitioner’s inadvertent acceptance through a lockbox of a single ‘rent’ payment ... did not constitute a waiver Notably, the landlord immediately tendered a refund check ... upon discovering this error which tenant rejected.”); Metropolitan Life Insurance Company v. Succad, N.Y.L.J., 8/2/85, p. 6, col. 1 (App. Term, 1st Dep’t) (“[I]n large residential complexes ... where rent is remitted to a bank through use of a lock-box, the receipt of rent checks signed by unauthorized occupants does not realistically put the landlord on notice of or constitute a waiver of the unauthorized occupancy.”).

Therefore, in at least this situation, the Court looks at the realities so long as the Landlord acts expeditiously and returns the checks as soon as it realizes they came in through the lock box. The important thing is to expeditiously return the rent as soon as received. What can happen if the rent is not immediately rejected? The Court, in all probability will dismiss the proceeding and the Landlord will have to start all

over again with the loss in time and legal fees and costs.

Suffering For The Landlord?

But does the Landlord have to suffer through a “holdover” proceeding (court action to evict the tenant for the breach of its lease) until it gets its rent? The answer is no, it does not have to wait.

An occupant of the apartment, store, unit is obligated to pay “use and occupancy” for the premises predicated on the theory that it just isn’t just for the tenant to have the use of the premises and not pay the landlord for the reasonable use and occupancy.

As to what is reasonable use and occupancy, one measure is the rent prior to the termination. If the lease is up, there may be other methodologies of computing the sums due (New York City has special rules as to the payment of use and occupancy if the matter is successively adjourned – those rules do not exist in Westchester).

Responsibilities

At a minimum, once the holdover proceeding is brought, the Tenant is obligated to pay and the Landlord is entitled to collect use and occupancy, both presumably without prejudice. Are there risks to accepting the rent? Probably not once

the court action starts, but to be safe, it is wise to ask the court to require the tenant to pay use and occupancy during the pendency of the proceeding and to allow the Landlord to accept same, both without prejudice.

As the Court said in the case of Marbru Associates v. White, 114 AD3d 554, “Plaintiffs are entitled to an order requiring defendants to pay use and occupancy pending the determination of this action (see Levinson v. 390 W. End Assoc., L.L.C., 22 A.D.3d 397, 403, 802 N.Y.S.2d 659 [1st Dept.2005]; MMB Assoc. v. Dayan, 169 A.D.2d 422, 564 N.Y.S.2d 146 [1st Dept.1991]).

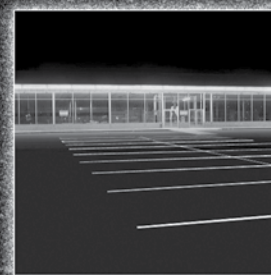
The amount sought, \$1,595.53 per month, is the amount of monthly rent under the last lease effective between the parties, and, as such, is fair (see Eli Haddad Corp. v. Redmond Studio, 102 A.D.2d 730, 731, 476 N.Y.S.2d 864 [1st Dept.1984]). Plaintiffs are also entitled to an award of use and occupancy arrears as indicated (see Shoshany v. Goldstein, 20 Misc.3d 687, 689, 860 N.Y.S.2d 908 [Civ.Ct., N.Y. County 2008]).”

Thus, be careful and wait until you actually start the legal action until you accept the rent (called use and occupancy after a termination) and make sure to ask the Court for permission to do so. If you do collect it too soon – return it promptly and then ask for it once the proceeding is started.

Editor’s Note: The authors are attorneys with Finger and Finger, A Professional Corporation. Finger and Finger is chief counsel to The Builders Institute (BI)/The Building and Realty Institute (BRI) of Westchester and The Mid-Hudson Region. The firm is based in White Plains.

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