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NYS Commercial Landlord-Tenant Law & Procedure: A Primer—Part III

Gerald Lebovits

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Rebecca Rose Woodland Inducted As The Ninety Ninth President Of The Brooklyn Bar Association

By: Glenn Verchick, Esq.

On June 11, 2014, Rebecca Rose Woodland was inducted as the Ninety Ninth President of the Brooklyn Bar Association. The event was held in the Ceremonial Courtroom of the Brooklyn Borough Hall. This architectural masterpiece was a fitting setting for this event and was filled to capacity with friends, colleagues and distinguished members of the judiciary and legislature.

The evening was hosted by Brooklyn Bar Association Immediate Past President Andrew M. Fallek, who managed to pay tribute to the many dignitaries in attendance while moving the event along efficiently and with a fine sense of humor.

After the invocation by Rabbi Joseph Potasnik and the presentation of the Citation of the Borough President of Brooklyn by Andrew Gounardes, Counsel to the Brooklyn Borough President, the first speaker was Glenn Lau-Kee, President of the New York State Bar Association. President Lau-Kee acknowledged the many accomplishments of the Brooklyn Bar Association, which he noted was formed four years before the State Bar Association. In particular, he praised the work of the Volunteer Lawyers Project.

BBA Past President Steven D. Cohen introduced the many judges, elected officials and bar leaders who were in attendance for this wonderful event. Next, Hon. Marsha Steinhardt, the newly inducted President of the Brooklyn Woman's Bar Association, spoke and praised President Woodland as a good friend and a person always willing to help others. She vowed to work together with President Woodland to present joint continuing legal education programs in conjunction with her organization.

Administrative Justice of the Civil Term, Kings Supreme, Lawrence Knipel, spoke next followed by Hon. Frank R. Seddio. Both men spoke highly of President Woodland as a person and as a lawyer. In particular, Frank Seddio remarked that Rebecca was one of the nicest people he has ever known. He said she was, "smart, well spoken and determined — in a

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Rebecca Rose Woodland, President of the Brooklyn Bar Association, with Avery Eli Okin, Esq., CAE, Brooklyn Bar Association Executive Director and Andrew M. Fallek, right, Brooklyn Bar Association Immediate Past President. Photo courtesy of the Brooklyn Bar Association

Members of the Brooklyn Bar Association who traveled to Washington, D.C. to be admitted to practice before the Supreme Court of the United States of America.

Photo courtesy of the Brooklyn Bar Association

BROOKLYN BARRISTER

FICTION CONTEST WINNER

ARTHUR SUSNOW, ESQ.

for: *"The Client From Hell"*

(To be published in July)

HONORABLE MENTION

JACQUELINE MCMAHON SMITH, ESQ.

for: *Book Chapter submission*

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New York State Commercial Landlord-Tenant Law And Procedure: A Primer — PART III

By: Hon. Gerald Lebovits & Michael B. Terk, Esq.

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Parts I and II of this article, published in the February and March 2014 issues of the Brooklyn Barrister, covered general procedures and pleadings in summary proceedings, holdover proceedings, nonpayment proceedings, illegal lockout proceedings by tenants against landlords, and personal jurisdiction and service of process in summary proceedings. We continue with defenses against summary proceedings, trials and settlements in summary proceedings, defaults and evictions in summary proceedings, venues where summary proceedings are adjudicated, various plenary actions between landlords and tenants outside the context of summary proceedings, and the implications of bankruptcy on the landlord-tenant relationship.

F. Defenses against Summary Proceedings

The foregoing requirements for summary proceedings might seem like a guide for landlords' attorneys seeking to commence and prosecute summary proceedings. But these requirements are equally relevant and useful to tenants' attorneys defending against summary proceedings, as a landlord's failure to comply with any of these requirements will form a defense against the landlord's petition and be a potential ground for dismissal.

Some of the more common defenses against summary proceedings by commercial tenants include the following:

Traverse/service of process/lack of personal jurisdiction.

Omitting required elements of the petition. A petition is defective if it is missing or misstates required elements of the petition under RPAPL 741, such as an accurate description of each party's interest in the property and a complete and accurate description of the premises from which removal is sought. These omissions or misstatements, however, are typically amendable. Absent prejudice to the respondent, the petition can usually avoid dismissal by the petitioner's cross-moving to amend the petition to correct those defects.

Defective predicate notice. The proceeding must be dismissed if a notice to cure, termination notice, rent demand, or other predicate notice required by statute or lease is either (i) not properly and timely served or (ii) is substantively defective or insufficient in its contents. Unlike a petition, predicate notices are not amendable.[i] Defects or omissions may not be corrected by amendment or otherwise. A defective predicate notice is not only fatal to the proceeding, but the petitioner must start from scratch by issuing a new underlying predicate notice.

Predicate notice vitiated (in holdover proceedings). A petitioner will likely be deemed to have vitiated a termination notice and reinstated the tenancy by accepting rent for a period of time after the termination date, commencing a nonpayment proceeding, or issuing a subsequent termination notice or notice to cure.

Breach of the lease waived (in breach-of-lease holdover proceedings). When the proceeding is based on a breach of the lease or a violation of a substantial obligation of the tenancy, a petitioner will have waived its right to object to the breach by accepting rent for a period of time if it knows about the breach and took no step to terminate the tenancy.[ii] Even a lease's "no waiver" clause can sometimes itself be waived by this acceptance of rent.[iii]

Stale predicate notice. The predicate notice can be stale based on the passage of time, or if a termination notice was previously used as the predicate for an earlier dismissed or discontinued proceeding and the current proceeding was not commenced promptly while the earlier proceeding was still pending and absent discernable prejudice to the tenant.

Conditions precedent to exercising an early termination option not met (in early cancellation holdover proceedings). If the lease has an early cancellation option that allows early termination upon limited conditions such as a planned demolition of the building, the petitioner must prove the conditions precedent to exercising the early termination option. The petitioner must prove that it is planning to demolish the building and that it did not issue the notice in bad faith to free the space up for another tenant offering a higher rent.

Other substantive defenses in breach-of-lease disputes (in breach-of-lease holdover proceedings). When a landlord alleges a breach of a provision of the lease and the parties dispute whether a breach that forms the basis for termination has occurred, the specific, substantive provisions of a lease often come into play. When the lease is on a form provided or substantially prepared by the landlord, ambiguities in the lease terms will be construed against the landlord.[iv]

Incorrect calculation of rent or additional rent due under the lease; payment of rent owed, and rent not owed (in nonpayment proceedings).

Constructive eviction and actual eviction (in nonpayment proceedings). To prove constructive eviction sufficient to form a complete defense against the landlord's rent claim, the tenant must establish that (i) the landlord's intentional acts or omissions created conditions that rendered the premises unusable for its intended purposes and thereby deprived the tenant of the use and enjoyment of the premises and (ii) the tenant vacated and was out of possession of the premises for the time period for which rent is sought.[v] To claim constructive eviction, the tenant must actually be out of possession; the tenant cannot remain in full possession and simultaneously be constructively evicted. Although the old common-law rule was an "all or nothing" rule requiring the tenant to vacate and abandon the entire premises to claim constructive eviction, the law now recognizes the concept of a partial constructive eviction, in which a tenant can claim a partial constructive eviction from only a portion of the premises to obtain a rent abatement proportional to the portion of the premises that the tenant was unable to use and which was abandoned.[vi] An actual physical eviction that prevents the tenant's access to all or part of the subject premises likewise constitutes a defense against all or part of the rent.[vii] Lease provisions barring tenants from claiming rent abatements for interruption or loss of business contemplate situations in which the interruption or loss occurs while the tenant remains fully in possession. These provisions do not bar constructive or actual eviction defenses.[viii]

Similar to but separate from a constructive-eviction defense is a tenant's entitlement to a set-off in rent if a landlord fails to provide services a lease requires. A commercial tenant is entitled to utilities and building services like heat, water, electricity, and elevator service provided by the landlord to the extent that such services are provided for in the tenant's lease. A tenant may defend against a landlord's rent claims and obtain an abatement of rent if the landlord fails to provide the building services required under the lease.[ix] Unlike residential tenants, however, the RPL 235-b warranty of habitability does not protect commercial tenants.

If a landlord illegally rents commercial premises for residential purposes, an eviction proceeding in the commercial landlord-tenant part is improper. It must be brought in a residential Housing Part. If the petitioner leased the premises knowing that it would be used residentially or if the residential use was with the landlord's knowledge and acquiescence, the tenancy is deemed residential, even if the premises are leased under a commercial lease. A residential proceeding brought in the commercial landlord-tenant part is improper and must be dismissed.[x]

In a breach-of-lease holdover, the summary-proceeding court has the equitable power to excuse a breach, even where it has occurred, and dismiss the proceeding if the breach is not material but, rather, de minimis and inconsequential.[xi]

G. Trials in Summary Proceedings

A summary proceeding not dismissed, discontinued, or settled must be tried. A petitioner's prima facie case at trial includes:

Proving that the petitioner is the real property's owner, net lessee, sublessor, receiver, or otherwise authorized to maintain the proceeding. An owner should have an original or certified copy of the deed to introduce into evidence.

If the subject commercial premises are in a building that contains three or more residential units, proof of a valid MDR statement. If applicable, the petitioner should have a certified MDR statement from HPD.

Other than for month-to-month tenants, the lease between the parties. The petitioner should have the original lease or a satisfactory explanation for its absence from a credible witness if a photocopy is sought to be used.

Other than a no-grounds holdover based on the natural expiration of the full term of a written lease, the predicate notice(s) (rent demand in a nonpayment proceeding; notice of termination and, if applicable, notice to cure in a holdover proceeding), and proof of serving the predicate notice(s) as required by the lease, statute, or both. This might require the testimony of the process server or individual who served the predicate notice(s).

In a nonpayment proceeding, proof that the rent demanded is owed. This should include a rent ledger setting forth each month's rent that has come due and each payment that has been made since the last undisputed zero balance. A witness must authenticate the rent ledger and explain and confirm the accuracy of the figures in the ledger based upon personal knowledge.

In the case of a breach-of-lease holdover proceeding, testimonial and documentary evidence proving the respondent's the breach and, if applicable, the failure to cure the breach by the deadline in the notice to cure.

In the case of a holdover proceeding in which the petitioner has exercised an early termination option, such as pursuant to a demolition clause, testimonial and documentary proof of the existence of the condition(s) precedent to the petitioner's right to exercise the early termination option (such as, in the case of a demolition clause, proof of the existence demolition the landlord alleges).[xii]

At the end of the petitioner's prima facie case, the petitioner should ask the court to amend the pleadings to add rent or use and occupancy that has become due, to conform the pleadings to the proof, and to take judicial notice of all the pleadings and papers in the court file.

H. Settlements of Summary Proceedings

The overwhelming majority of landlord-tenant summary proceedings settle without a trial. There are endless permutations of potential settlements and settlement structures. Among the more common settlement structures are (i) in nonpayment proceedings, agreed upon "pay-outs" of rent arrears over a period of time, with judgments of possession and warrants of eviction issued with execution stayed pending payment under the "pay-out" schedule, and (ii) in holdover proceedings, the respondent's agreement to vacate within an agreed-upon period of time (sometimes coupled with a rent/use and occupancy concession, sometimes not), again with judgments of possession and warrants of eviction issued with execution stayed through and including the agreed-upon vacate date.

Respondents prefer to settle per stipulation, without a judgment, and even to ask the petitioner for written notice of any default. These things will force a petitioner to mail a notice and then move for a judgment if the respondent defaults, thus giving a respondent extra time to satisfy the stipulation and prevent an eviction. Settling without a judgment also prevents credit problems.

A respondent that fails to make timely payments after a trial or under a payout schedule or requires additional time beyond the agreed-upon vacate date may bring a post-judgment order to show cause for an extension of time. Similarly, when a respondent fails timely to vacate under a judgment of possession issued upon a stipulation of settlement or after a trial in a holdover proceeding, the respondent may move by order to show to extend the time to vacate. If granted, the court will typically grant the stay conditioned on the respondent's paying use and occupancy for the additional time the respondent remains in possession.

Whether to decline to sign or to sign and grant these orders to show cause is reserved to the court's discretion. Judges exercise their discretion less liberally after a trial than after a stipulation resolves the proceeding. Judges are also less liberal in granting extra time in commercial cases than in residential cases.

Petitioners whose priority is to remove the respondents from possession as quickly as possible will vigorously oppose these orders to show cause to extend a respondent's time to pay or vacate under a stipulation. But it is strategically preferable for a petitioner whose priority is to be paid to consent to extensions if the petitioner believes that the respondent is likely to make additional payments with an extension of time but will be judgment-proof once evicted.

I. Defaults in Summary Proceedings

In New York City, if the tenant fails to appear on an initial or adjourned return date in a holdover proceeding, the court will conduct an inquest. The inquest, which requires that a witness with actual knowledge offer testimony establishing the petitioner's prima facie case, is required before a default judgment may be entered and the inquest sustained. Outside New York City, courts often award default judgments in holdover proceedings without holding inquests.

If a tenant fails to answer or otherwise appear in a nonpayment proceeding and still owes the petitioner rent at the time of the default, the petitioner may apply for a judgment of possession and warrant of eviction on default. In addition, a respondent who files an answer but then fails to appear on any return date will be held in default, and a default judgment will be awarded to the landlord. Unlike in a holdover proceeding, an inquest is not held upon a respondent's default in a nonpayment proceeding. Courts may not require an inquest before issuing a default judgment. The issuance of a default judgment is a nondiscretionary, ministerial act if the respondent does not appear and the petitioner's papers are sufficient on their face.[xiii]

J. Carrying Out the Eviction

Once a warrant of eviction has issued, the warrant must be delivered to an enforcement officer, along with the appropriate fees. A warrant of eviction will be executed by a city marshal in New York City and by the county sheriff's office in counties outside New York City. The sheriff or marshal must issue a final notice at least 72 hours before removal. City marshals in New York City serve notice at least six business days before the warrant is executed. Sheriffs or marshals typically serve these notices, commonly known as "eviction notices," by posting them to the door of the subject premises.

K. The Courts in which Summary Proceedings are Adjudicated

The courts in which a summary eviction proceeding may be brought depend on the geographic location of the real property. Below is a breakdown of summary-proceeding courts by geography:

(a) Statewide: Supreme Court in the applicable county has jurisdiction to hear the proceeding. As a practical matter, summary proceedings are almost never brought in Supreme Court. When another type of action is brought seeking relief that can be awarded in a summary proceeding, Supreme Court will typically exercise its discretion to decline to adjudicate the matter in favor of requiring the petitioner to commence a summary proceeding in the appropriate local court.[xiv]

(b) New York City: Civil Court of the City of New York (governed by the New York City Civil Court Act). In Civil Court, each of New York City's five boroughs has a Civil Court courthouse. In each borough, non-residential summary proceedings are commenced in a commercial landlord-tenant part known as Part 52. All commercial summary proceedings are initially

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on the calendar in Part 52. In Manhattan, Part 52 is just a calendar part that will entertain applications for adjournments or pendente lite use and occupancy. Trials, hearings, and motions will either be adjourned in Part 52 or, if not adjourned, sent out to another Civil Court "back up part" to be heard, tried, and decided by another judge. In the outer boroughs, the entire disposition of the case, including motions and trials, will often occur in Part 52 itself.

(c) Long Island: District Court (governed by the Uniform District Court Act). Nassau County and most of Suffolk County (with the exception of the four east-end towns of Riverhead, Southold, Shelter Island, Southampton, and East Hampton) are under the jurisdiction of the two counties' respective District Courts, which are Long Island's jurisdictional equivalents of the New York City Civil Court. The District Court has a designated landlord-tenant part, in which commercial and residential summary proceedings are adjudicated.

(d) Any city outside New York City: City Court (governed by the Uniform City Court Act). City Court is the jurisdictional equivalent, in the State's other cities, of the New York City Civil Court and the District Court.

(e) Any town or village other than on Long Island (and also within Suffolk County's four east-end towns on Long Island): town or village Justice Court (governed by the Uniform Justice Court Act). These courts are typically in session only once or twice a week, frequently in the evening, and are presided over by part-time judges who usually hold full-time day jobs, often as non-lawyers. Eviction proceedings, particularly in smaller towns and villages, will often be on the same calendar as traffic tickets, violations, infractions, and small claims.

(f) Surrogate's Court: In the limited situation in which the real property at issue is the subject of a pending probate proceeding, a summary proceeding relating to that property may be commenced in the Surrogate's Court for the applicable county.

Appeals from the above-listed courts are directed as follows:

(a) To the Appellate Term: In the First and Second Departments, appeals from (i) New York City Civil Court, (ii) District Court in Nassau County and Suffolk County, and (iii) any City Court or Justice Court in Westchester, Rockland, Putnam, Orange, Dutchess, Nassau, and Suffolk Counties are taken to an appellate part of the Supreme Court, known as the Appellate Term.

(b) To the County Court: In the Third and Fourth Departments, appeals from City Court and Justice Court are taken to the County Court for the county in which the city, town, or village is located.

(c) To the Appellate Division: Appeals from Supreme Court and Surrogate's Court are taken to the Appellate Division for the judicial department in which the county is located.

III. PLENARY ACTIONS BETWEEN COMMERCIAL LANDLORDS AND TENANTS

A. Ejectment Actions

Before the New York Legislature's codification of the summary proceeding in 1820, recovering possession of real property through the judicial process could be effectuated only through a common-law action for ejectment.

While rare, common-law ejectment actions are still available and commenced on occasion, usually based on strategic considerations. These include a plaintiff's desire to have the matter adjudicated before the Supreme Court's Commercial Division if the plaintiff deems it a more favorable forum; a plaintiff's wish to conduct disclosure, which is available as of right in Supreme Court ejectment actions; to cause the litigation to be more expensive for the respondent; or when a petitioner is unable to maintain a summary proceeding, as when the property lacks an MDR statement.

B. Actions for Rent or Use and Occupancy

When a tenant vacates with remaining rent arrears, damages may be recovered in an ordinary contract action for unpaid rent for the term of the lease.

When an occupant was or is in possession of real property and the landlord is not limited to recovering a reserved rent under a lease or rental agreement, RPL § 220 authorizes an action to recover use and occupancy.

If the building in which the property is located is destroyed or so severely damaged by the elements so as to be effectively destroyed and unusable, the tenant is entitled to break its lease, abandon the property, and be relieved of any further obligation for the duration of the lease.[xv]

C. *Yellowstone* Injunction Actions

The opportunity to avoid eviction by effectuating a post-judgment cure after a landlord prevails in a holdover proceeding predicated on a breach of lease and a failure to cure is available only to residential tenants in New York City.[xvi] Commercial tenants are not entitled to a statutory cure period once the court in a holdover proceeding rules in the petitioner's favor and grants a judgment of possession. To challenge the breach alleged in the notice to cure, a tenant's only option under RPAPL Article 7 is to litigate the holdover proceeding and risk eviction if the petitioner prevails. Even if the respondent is willing and able to cure the breach, the RPAPL does not afford a commercial tenant an opportunity to cure once the holdover proceeding has been adjudicated in the petitioner's favor.

When a petitioner issues a notice to cure or notice of default to a commercial tenant and the commercial tenant disputes that it has breached the lease and thus refuses to cure an alleged breach that the respondent maintains does not exist, the respondent may assert in defense to the holdover proceeding that no breach occurred in the first place. If the court agrees with the respondent, the tenant will prevail, and the holdover petition will be dismissed.

If the court disagrees and the petitioner prevails, the respondent will have no opportunity to cure and will lose the tenancy. Recognizing the preference against forfeiting tenancies,[xvii] New York law has developed the *Yellowstone* injunction to prevent the tenant from being forced to roll the dice in the high-stakes gamble that is a commercial breach-of-lease holdover proceeding. In addition to commercial tenants who receive a notice to cure or notice of default and argue that there has been no breach, those that do not dispute the breach and wish to cure but which are incapable of doing so within the limited cure period a lease will afford may obtain an extension of their time to cure by a *Yellowstone* injunction.

Yellowstone injunctions are limited to tenants who have been issued a notice to cure as a predicate to a holdover proceeding and are unavailable to a tenant who has been issued a rent demand as a predicate to a nonpayment proceeding to extend its time to pay.

In *First National Stores, Inc. v. Yellowstone Shopping Center, Inc.*,[xviii] the Court of Appeals held that a tenant may prevent forfeiting a tenancy by obtaining an injunction, now commonly known as a "*Yellowstone* injunction," before the expiration of the notice to cure and issuance of the notice of termination. The injunction, if granted, will stay the landlord from terminating the lease while the court determines whether a breach has occurred. *Yellowstone* actions are brought in Supreme Court, typically by filing an order to show cause seeking a preliminary *Yellowstone* injunction simultaneously with the summons and complaint and request for judicial intervention (RJI).

The order to show cause should contain a request for a temporary restraining order to toll the cure period and prohibit the landlord from terminating the tenancy pending a determination of the motion, as the cure deadline will come before the return date of the order to show cause and the order deciding it.

A *Yellowstone* injunction "maintain[s] the status quo" to permit the tenant to "challenge the landlord's assessment of [its] rights without . . . forfeiting its valuable interest in the leasehold."[xix] Although a *Yellowstone* injunction is a form of preliminary injunction, courts have held that the "standards normally applicable to temporary injunctive relief have little application to a *Yellowstone* situation."[xx] Courts have dispensed with the requirement that the tenant demonstrate a likelihood of success on the merits; courts have shown a willingness to grant the injunction without that showing.[xxi]

A tenant seeking a *Yellowstone* injunction must establish four elements to be entitled to the injunction: (i) it is the tenant under a commercial lease, (ii) it has received a notice to cure or notice of default, or the landlord has threatened to terminate the lease, (iii) the tenant's application for a *Yellowstone* injunction was made before the termination of the lease, and (iv) the tenant has the desire and current ability to cure the alleged lease breach by any means short of vacating the premises.xxii To obtain a *Yellowstone* injunction, a tenant must demonstrate in Supreme Court that it is ready, willing, and able to cure if the Supreme Court ultimately finds that the tenant's conduct constitutes a default under the lease and that the notice to cure is valid.[xxiii]

If the tenant's conduct at issue breaches a lease incurably, *Yellowstone* relief is unavailable.[xxiv]

In the Second Department, there is an absolute bar against an application for a *Yellowstone* injunction made after a cure period has expired.[xxv] Although this is generally the rule in the First Department, when the lease requires the tenant to commence curing the breach within the cure period and the tenant has done so but cannot complete a cure within the cure period, a *Yellowstone* injunction may be granted even if it is brought after the expiration of the notice to cure.[xxvi] Nonetheless, even in the First Department, a tenant's attorney is well-advised to bring the *Yellowstone* injunction application before the expiration of the cure period rather than to rely on this narrow exception.

As a condition of a *Yellowstone* injunction, courts will typically require the tenant to pay ongoing use and occupancy during the pendency of the *Yellowstone* action, based on the rate of the monthly rent in the lease.[xxvii] In addition to use and occupancy, upon the defendant-landlord making a showing of its potential damages the court may also, it its discretion, direct the posting of an undertaking rationally related to the landlord's potential damages.[xxviii] It is also properly in the court's discretion, if the tenant obtaining the *Yellowstone* injunction has made substantial capital improvements to the property, to direct a minimal undertaking or dispense with an undertaking altogether.[xxix]

Courts have also granted *Yellowstone*-type injunctive relief in other contexts, such as when a landlord threatens a tenant's time to exercise a purchase option or right of first refusal.[xxx]

D. Declaratory Judgments to Excuse a Failure to Renew Timely

Excusing a failure to exercise a renewal option: If a respondent fails to timely exercise a lease renewal option, Supreme Court may exercise its equitable powers to excuse an inadvertent failure to renew under some circumstances in a tenant-commenced action for a declaration of the tenant's right to continue its tenancy, in particular if the failure to exercise the option resulted from an honest mistake, the tenant has invested substantial sums of money to improve the property, and the landlord suffers no prejudice.[xxxi]

E. Collateral Effect of Bankruptcy Proceedings on Landlord-Tenant Proceedings

Although not technically a proceeding commenced against a landlord by a tenant, a tenant's filing of a bankruptcy petition in the United States Bankruptcy Court has critical implications on landlord-tenant proceedings.

Under Bankruptcy Code § 362, a respondent's filing a bankruptcy petition effectuates an automatic stay of all proceedings against the debtor-respondent to enforce any of the creditor-petitioner's existing claims, including staying the commencement or continuation of any nonpayment or holdover proceeding.[xxxii]

Two exceptions to this automatic stay arise. First, under Bankruptcy Code § 362(b)(22), a respondent's eviction in a pending summary proceeding may go forward if a judgment of possession has already been issued before the bankruptcy petition was filed. Second, under Section 362(b)(23), an eviction based on endangering the subject property or illegally using controlled substances may go forward if the endangerment or illegal use occurred within thirty days before the bankruptcy petition was filed.[xxxiii]

If the respondent-debtor has personal property remaining in the premises after the bankruptcy petition is filed and the Section 362 stay takes effect, the stay must be vacated because the remaining property might be available as funds to pay creditors in connection with the bankruptcy proceeding.xxxiv A petitioner seeking to claim an exception to the Section 362 automatic stay must file with the Bankruptcy Court and serve on the respondent-debtor a certificate setting forth the basis for the exception. The tenant-debtor then has the opportunity to object to the certificate claiming an exception, in which case the Bankruptcy Court must hold a hearing to determine the petitioner's claimed exception.[xxxv]

Once a commercial tenant files a bankruptcy petition, it must assume or reject an unexpired lease.xxxvi A tenant that assumes the lease must pay all outstanding arrears and continue to pay the rent as it comes due. If the tenant rejects the lease and continues in occupancy, the landlord is entitled to damages for the lease rejection.[xxxvii]

IV. CONCLUSION

Commercial landlord-tenant law is a field in which seemingly minor and inconsequential details are often crucial, or even dispositive. We hope that this three-part article has identified the more important details and most commonly litigated issues, both procedural and substantive, so that practitioners can obtain favorable outcomes for their clients.

i *Chinatown Apts., Inc. v. Chu Cho Lam*, 51 N.Y.2d 786, 787, 412 N.E.2d 1312, 1313, 433 N.Y.S.2d 86, 87 (1980).

ii *United States v. Schmitt,* 999 F. Supp. 317, 371 (E.D.N.Y. 1998) (finding that petitioner waived default where rent is accepted with knowledge of particular conduct claimed to be a default); *In re Duplan Corp.*, 473 F. Supp. 1089, 1091-93 (S.D.N.Y. 1979); *In re City Stores Company*, 42 B.R. 685, 691-93 (S.D.N.Y. 1984); *Jefpaul Garage Corp. v. Presbyterian Hosp.*, 61 N.Y.2d 442, 446-48, 462 N.E.2d 1176, 1178-79, 474 N.Y.S.2d 458, 459-60 (1984); *Atkin's Waste Materials, Inc. v. May*, 34 N.Y.2d 422, 427, 314 N.E.2d 871, 873, 358 N.Y.S.2d 129, 132 (1974) ("When rent is accepted with knowledge of particular conduct which is claimed to be a default, the acceptance of such rent constitutes a waiver by the landlord of the default. The acceptance of the rent is in effect an election by the landlord to continue the relationship of landlord and tenant.") (internal citation omitted); *Woollard v. Schaffer Stores Co.*, 272 N.Y. 304, 312, 5 N.E.2d 829, 832 (1936); *P&D Cards & Gifts, Inc. v. Matejka*, 150 A.D.2d 660, 662, 541 N.Y.S.2d 533, 535 (2d Dep't 1989) (finding waiver where commercial landlord had accepted rent before attempting to terminate lease); *201 E. 37 Owners Corp. v. Cass*, 3 Misc. 3d 1102(A), 787 N.Y.S.2d 682, 2004 N.Y. Slip Op. 50339(U), **2-3 (Civ. Ct. N.Y. County 2004).

iii *TSS-Seedman's, Inc. v. Elota Realty Co.*, 72 N.Y.2d 1024, 1027, 531 N.E.2d 646, 648, 534 N.Y.S.2d 925, 927 (1988) ("[W]e reject defendant's contention that, because the leases contained 'nonwaiver' clauses, acceptance of the withheld rents did not prevent it from terminating the leases."); *Madison Ave. Leasehold, LLC v. Madison Bentley Assoc.* LLC, 30 A.D.3d 1, 6, 811 N.Y.S.2d 47, 51 (1st Dep't 2006) ("[A] no-waiver clause is waived by the acceptance of rent."); *Lee v. Wright*, 108 A.D.2d 678, 680, 485 N.Y.S.2d 543, 544 (1st Dep't 1985) ("[I]t has long been the rule that parties may waive a 'no-waiver' clause.").

iv *Graff v. Billet*, 64 N.Y.2d 899, 902, 477 N.E.2d 212, 213, 487 N.Y.S.2d 733, 734 (1985); *151 W. Assoc. v. Printsiples Fabric Corp.*, 61 N.Y.2d 732, 733-34, 460 N.E.2d 1344, 1344-45, 472 N.Y.S.2d 909, 910 (1984); *Syed v. Normel Constr. Corp.*, 4 A.D.3d 303, 304, 773 N.Y.S.2d 345, 346 (1st Dep't 2004); *Fabulous Stationers, Inc. v. Regency Joint Venture*, 44 A.D.2d 547, 547, 353 N.Y.S.2d 766, 768 (1st Dep't 1974).

v *Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 81-85, 256 N.E.2d 707, 709-11, 308 N.Y.S.2d 649, 652-54 (1970); *Johnson v. Cabrera*, 246 A.D.2d 578, 578-79, 668 N.Y.S.2d 45, 45 (2d Dep't 1998); *Joylaine Realty Co. LLC v. Samuel*, 100 A.D.3d 706, 706-07, 954 N.Y.S.2d 179, 180 (1st Dep't 2012); Serge Joseph, *Defending the Commercial Tenant in Summary Proceedings* 9-10 (N.Y. City Civ. Ct. Bd. of Judges, Jud. Conf., Oct. 22, 2013).

vi *Minjak Co. v. Randolph*, 140 A.D.2d 245, 247-49, 528 N.Y.S.2d 554, 556-57 (1st Dep't 1988); *E. Haven Assoc. v. Gurian*, 64 Misc. 2d 276, 279, 313 N.Y.S.2d 927, 929-30 (Civ. Ct.. N.Y. County 1970).

vii *Fifth Ave. Bldg. Co v. Kernochan*, 221 N.Y. 370, 372-77, 117 N.E. 579, 580-82 (1917).

viii *Camatron Sewing Machine, Inc. v. F.M. Ring Assoc., Inc.*, 179 A.D.2d 165, 168-69, 582 N.Y.S.2d 396, 398-99 (1st Dep't 1992); *Sidereal Studios v. 214 Franklin LLC*, 18 Misc. 3d 1110(A), 856 N.Y.S.2d 26, 2008 N.Y. Slip Op. 50004(U), *10.

ix George Locker, Outside Counsel, *Defending the Commercial Tenant in Civil Court*, NYLJ, Feb. 1, 2002, at 4, col. 1.

x *U.B.O. Realty Corp. v. Mollica*, 257 A.D.2d 460, 460, 683 N.Y.S.2d 532, 533 (1st Dep't 1999); *379 E. 10th St., LLC v. Miller*, 23 Misc. 3d 137(A), 886 N.Y.S.2d 72, 2009 N.Y. Slip Op. 50864(U), *1 (App. Term 1st Dep't 2009); *Benroal Realty Assoc., LP v. Lowe*, 9 Misc. 3d 4, 5-6, 801 N.Y.S.2d 114, 115-17 (App. Term 2d Dep't 2005); *A Real Good Plumber, Inc. v. Kelleher*, 191 Misc. 2d 94, 95-96, 740 N.Y.S.2d 745, 746-47 (App Term 2d Dep't 2002).

Rebecca Rose Woodland Inducted as The Ninety-Ninth President of The BBA

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word, remarkable."

Next up was President Woodland's law partner and husband, Past President John Lonuzzi. Past President Lonuzzi opened his remarks with one of the funniest jokes I have ever heard in all my years of attending BBA events. It was too well delivered to repeat effectively herein, but the punch line involved one of the BBA's favorite Justices, Hon. George Silver, and it brought down the house with laughter. He then went on to praise his wife as one of the smartest persons he has ever met, who helped him build a law practice from a one laptop operation to what it is today. He remarked that not only is she able to be a vital part of their successful law practice, but she does so while having a successful second career as a television personality (President Woodland regularly appears as a legal analyst and commentator on NBC, CNN and Fox, as well as other networks). The Lonuzzis are longtime friends of recently deceased Hon. Theodore Jones and his family; John expressed his belief that, "today Ted Jones would have been just as proud of you as I am." Certainly, it is no easy task to address a luminous crowd and speak about one's wife and her accomplishments with objectivity, candor and style, but Past President Lonuzzi managed to do so in a way that genuinely expressed his appreciation for having Rebecca, not only as his wife and law partner, but also as the person set to lead our Brooklyn Bar Association for the next twelve months.

Hon George Silver spoke next and said that President Woodland has vision and predicted that it will be a great year for the BBA. He praised our incoming President as being, "kind, intelligent, brilliant and my good friend." Hon. Cheryl Chambers next related to the assembled that she met Rebecca Woodand eight years ago at the Kings County Inns of Court and described Rebecca as, "passionate about making a difference in the lives of the less fortunate." Judge Chambers was certain that President Woodland, at the end of her term, "will have made her mark and made a difference."

In addition to the induction of our new President, the evening also honored the newly installed Officers and Trustees. Hon. Cheryl Chambers inducted the following officers: Arthur L. Aidala, President-Elect, Hon. Frank R. Seddio, First Vice President, Aimee L. Richter, Second Vice President, David M. Chidekel, Secretary and Hon. Frank V. Carone, Treasurer. Judge Chambers also inducted the Trustees of the Class of 2017: Marianne Bertuna, Joseph R. Costello, Dewey Golkin, Hemalee J. Patel, Steven J. Harkavy, Jeffrey Miller and Stefano A. Filipazzo. Also inducted was Michael Farkas, Trustee Class of 2015.

The last to speak, after her induction by Judge Chambers, was our new President, Rebecca Rose Woodland. She first thanked Andrew M. Fallek for all his help over the past weeks in working on the transition. She thanked everyone on the dais and, in particular, her husband, and expressed that she is grateful to have him and apologized for all the time she will miss from their law practice in carrying out her duties as the Association's President. She thanked her parents and noted that her father, early in her career, urged her to join the Brooklyn Bar Association, "because there is no better way to learn and grow than to be active with those that are accomplished." President Woodland stated that one of the goals of her presidency was to work through community outreach toward diversity and noted that to further this goal she has scheduled meetings with the Brooklyn Borough President and General Counsel. Certainly, this is a laudable goal, different from the goals pursued by recent Past Presidents of the organization, and the Association as a whole should do everything it can to help our President with this task as any progress in this regard will shine an extremely positive light on our Association.

At the close of the ceremony, all retired to the Rotunda of the Borough Hall for food and drink. It was a wonderful evening and a great start to the Presidency of Rebecca Rose Woodland.

Rebecca Rose Woodland, President of the Brooklyn Bar Association. Photo by Mario Belluomo

New York State Commercial Landlord-Tenant Law—Part III

xi *Helsam Realty Co., Inc. v. H.J.A. Holding Corp.*, 4 Misc. 3d 64, 66-68, 781 N.Y.S.2d 554, 556-57 (App. Term 2d Dep't 2002).

xii *Madison 45 Co. v. Travel Overseas, Inc.*, NYLJ, Nov. 7, 1999, at 28, col. 4 (Civ. Ct. N.Y. County) (determining after trial whether petitioner had a good-faith demolition consistent with the lease-demolition clause and termination notice).

xiii *Brusco v. Braun*, 84 N.Y.2d 674, 679-81, 645 N.E.2d 724, 725-27, 621 N.Y.S.2d 291, 292-94 (1994).

xiv *Post v. 120 E. End Ave. Corp.*, 62 N.Y.2d 19, 28-29, 464 N.E.2d 125, 129, 475 N.Y.S.2d 821, 825 (1984); *A1 Entertainment LLC v. 27th St. Prop. LLC*, 60 A.D.3d 516, 516-517, 875 N.Y.S.2d 463, 463-64 (1st Dep't 2009); *All 4 Sports & Fitness, Inc. v. Hamilton, Kane, Martin Enters., Inc.*, 22 A.D.3d 512, 513, 802 N.Y.S.2d 470 (2d Dep't 2005); *44-46 W. 65th Apt. Corp. v. Stvan*, 3 A.D.3d 440, 441, 772 N.Y.S.2d 4, 5 (1st Dep't 2004); *Lexington Ave. Assoc. v. Kandell*, 283 A.D.2d 379, 379, 724 N.Y.S.2d 864, 864-65 (1st Dep't 2001); *E. 41st. St. Assoc. v. 18 E. 42nd St.*, 248 A.D.2d 112, 114, 669 N.Y.S.2d 546, 548 (1st Dep't 1998); *Phillips-Beirne v. Classic Residences*, 203 A.D.2d 151, 152, 610 N.Y.S.2d 252, 253 (1st Dep't 1994); *Parksouth Dental Group v. E. River Realty*, 122 A.D.2d 708, 709, 505 N.Y.S.2d 633, 635 (1st Dep't 1986).

xv RPL § 227 ("Where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause as to be untenantable, and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his or her fault or neglect, quit and surrender possession of the leasehold premises, and of the land so leased or occupied; and he or she is not liable to pay to the lessor or owner, rent for the time subsequent to the surrender. Any rent paid in advance or which may have accrued by the terms of a lease or any other hiring shall be adjusted to the date of such surrender."); Locker, *supra* note 9.

xvi RPAPL 753(4).

xvii *JNA Realty Corp v. Cross Bay Chelsea, Inc.*, 42 N.Y.2d 392, 399-400, 366 N.E.2d 1313, 1317-18, 397 N.Y.S.2d 958, 962-63 (1977); *57 E. 54 Realty Corp. v. Gay Nineties*, 71 Misc. 2d 353, 354, 335 N.Y.S.2d 872, 873 (App. Term 1st Dep't 1972).

xviii 21 N.Y.2d 630, 634-638, 237 N.E.2d 868, 689-871, 290 N.Y.S.2d 721, 722-26 (1968).

xix *See, e.g., Post v. 120 E. End Ave. Corp.*, 62 N.Y.2d 19, 25-26, 464 N.E.2d 125, 1237-28, 475 N.Y.S.2d 821, 823-24 (1984);); *Xiotis Rest. Corp. v. LSS Leasing, LLC*, 50 A.D.3d 678, 678-79, 855 N.Y.S.2d 578, 579 (2d Dep't 2008). *Lexington Ave. & 42nd St. Corp. v. 380 Lexchamp Operating*, 205 A.D.2d 421, 423, 613 N.Y.S.2d 402, 403 (1st Dep't 1994).

xx *E.g., Finley v. Park Ten Assoc.*, 83 A.D.2d 537, 538, 441 N.Y.S.2d 475, 476 (1st Dep't 1981).

xxi *TSI W. 14, Inc. v. Samson Assoc.*, 8 A.D.3d 51, 53, 778 N.Y.S.2d 29, 31 (1st Dep't 2004); *Herzfeld & Stern v. Ironwood Realty Corp.*, 102 A.D.2d 737, 738 , 477 N.Y.S.2d 7, 8 (1st Dep't 1984); *Ameurasia Int'l Corp. v. Finch Realty Co.*, 90 A.D.2d 760, 760, 455 N.Y.S.2d 900, 90 (1st Dep't 1982); *Podosky v. Hoffman*, 82 A.D.2d 763, 763, 441 N.Y.S.2d 238, 239 (1st Dep't 1981).

xxii *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assoc.*, 93 N.Y.2d 508, 514, 715 N.E.2d 117, 120, 693 N.Y.S.2d 91, 94-95 (1999); *Purdue Pharma, LP v. Ardsley Partners, LP*, 5 A.D.3d 654, 655, 774 N.Y.S.2d 540, 541 (2d Dep't 2004); *WPA/Partners LLC v. Port Imperial Ferry Corp.*, 307 A.D.2d 234, 236-37, 763 N.Y.S.2d 266, 268-69 (1st Dep't 2003); *Lee v. TT & PP Main St. Realty Corp.*, 286 A.D.2d 665, 666, 729 N.Y.S.2d 775,776 (2d Dep't 2001); *Empire State Bldg. Assoc. v. Trump Empire State Partners*, 245 A.D.2d 225, 227-28, 667 N.Y.S.2d 31, 34-35 (1st Dep't 1997); *225 E. 36th St. Garage Corp. v. 221 E. 36th Owners Corp.*, 211 A.D.2d 420, 421, 621 N.Y.S.2d 302, 303-04 (1st Dep't 1995); *Herzfeld & Stern*, 102 A.D.2d at 738, 477 N.Y.S.2d at 8-9.

xxiii *51 Park Place LH, LLC v. Consolidated Edison Co. of N.Y.*, 34 Misc. 3d 590, 592-93, 939 N.Y.S.2d 255, 256-57 (Sup. Ct. N.Y. County 2011); *Fifth Ave. Restaurant Corp. v. RCPI Landmark Props, LLC*, 13 Misc. 3d 1206(A), 824 N.Y.S.2d 753, 2006 N.Y. Slip Op. 51708(U), **1-2 (Sup. Ct. N.Y. County 2006).

xxiv *Excel Graphics Tech. v. CFG/AGSCB 75 Ninth Ave.*, 1 A.D.3d 65, 70-71, 767 N.Y.S.2d 99, 103-04 (1st Dep't 2003).

xxv *Korova Milk Bar of White Plains, Inc. v. PRE Props., LLC*, 70 A.D.3d 646, 647-48, 894 N.Y.S.2d 499, 500-01 (2d Dep't 2010); *King Party Ctr. of Pitkin Ave. v. Minco Realty*, 286 A.D.2d 373, 375, 729 N.Y.S.2d 183, 185 (2d Dep't 2001).

xxvi *Vill. Ctr. for Care v. Sligo Realty & Serv. Corp.*, 95 A.D.3d 219, 220-22, 943 N.Y.S.2d 11, 11-13 (1st Dep't 2012).

xxvii *Metropolitan Transit Auth. v. 2 Broadway LLC*, 279 A.D.2d 315, 315, 720 N.Y.S.2d 12, 13 (1st Dep't 2001); *401 Hotel, L.P. v. MTI/The Image Group, Inc.*, 271 A.D.2d 228, 230, 705 N.Y.S.2d 364, 366 (1st Dep't 2000); *Phillips & Huyler Assoc. v. Flynn*, 225 A.D.2d 475, 475, 640 N.Y.S.2d 26, 27 (1st Dept. 1996).

xxviii *Medical Bldgs. Assoc. v. Abner Props. Co.*, 103 A.D.3d 488, 488-89, 959 N.Y.S.2d 476, 476-77 (1st Dep't 2013); *Sportsplex of Middletown, Inc. v. Catskill Regional Off-Track Betting Corp.*, 221 A.D.2d 428, 428-29, 633 N.Y.S.2d 588, 588 (2d Dep't 1995); *61 W. 62nd Owners Corp. v. Harkness Apt. Owners Corp.*, 173 A.D.2d 372, 372-73, 570 N.Y.S.2d 8, 8-9 (1st Dep't 1991).

xxix *John A. Reisenbach Charter Sch. v. Wolfson*, 298 A.D.2d 224, 224, 748 N.Y.S.2d 247, 247-48 (1st Dep't 2002).

xxx *Syndicom Corp. v. Shoichi Takaya*, 275 A.D.2d 676, 677-78, 714 N.Y.S.2d 256, 256-57 (1st Dep't 2000); *S.B.R.'s Rest. v. Towey*, 130 A.D.2d 645, 647, 515 N.Y.S.2d 573, 575 (2d Dep't 1987).

xxxi *Godnig v Belmont Realty Corp.*, 124 A.D.2d 701, 702, 508 N.Y.S.2d 213, 214-15 (2d Dep't 1986); *Tritt v. Huffman & Boyle Co.*, 121 A.D.2d 531, 531, 503 N.Y.S.2d 842, 843 (2nd Dep't 1986); Joseph, *supra* note 5, at 12-13.

xxxii *Homeside Lending, Inc. v. Watts*, 16 A.D.3d 551, 552-53, 792 N.Y.S.2d 513, 513-14 (2d Dep't 2005); Lewis A. Lindenberg, *A Commercial Tenant's Perspective to Defending its Leasehold Interest in a Summary Proceeding* 3-4 (N.Y. City Civ. Ct. Bd. of Judges, Jud. Conf., Oct. 22, 2013).

xxxiii Lindenberg, *supra* note 32, at 4.

xxxiv *Id.* at 3.

xxxv *Id.* at 4-5.

xxxvi *Id.* at 5-6.