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Subletting in New York

Gerald Lebovits

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Lake George
Site of the 2006 Summer Meeting
Subletting in New York Law
By Gerald Lebovits

I. Introduction

Residential tenants are permitted to sublease an apartment if they follow the procedures outlined in New York Real Property Law (RPL) § 226-b, frequently referred to as New York’s “Sublet Law.” This article explores the common illegal sublet scenarios, the steps a landlord must follow to commence an alleged illegal-sublet holdover proceeding, the holdover proceeding itself along with motion practice and disclosure, and a tenant’s opportunity to cure an illegal sublet.

A sublease is “a lease by a lessee to a third party, conveying some or all of the leased property for a shorter term than that of the lessee, who retains a reversion in the lease.” In a sublease, the tenant is the “prime tenant” and the sublessee is the “subtenant” for the duration of the sublease. The main characteristic of a sublease is that the tenant conveys less than the entire interest in the property and retains either a reversionary interest in the whole property or a possessory interest in part of the property. The prime tenant conveys the rights to occupy and enjoy the rental unit for the sublease term and regains possession when the term ends.

Sublets are different from assignments. An assignment is “the transfer of rights or property.” The main characteristic of an assignment in this context is that the tenant conveys his entire interest in the property, either possessory or reversionary, and retains nothing. An assignment may or may not be coupled with a release of the original tenant from all obligations under the original lease, depending on the original lease’s provisions.

Courts distinguish between roommates and subtenants. When the prime tenant shows that an occupant is merely a roommate and not a subtenant in possession of the rental unit for a specified duration, the landlord cannot maintain a cause of action premised on an illegal sublet. A tenant’s right to sublet is governed by RPL § 226-b and, when applicable, New York’s Rent Stabilization Code § 2525.6, but the parties may affirmatively agree to expand a tenant’s right to sublet. Examples of affirmative agreements include a lease provision or a stipulation of the parties permitting the tenant to sublet at will. When a tenant’s lease is silent about the right to sublet or assign, the silence may not be construed as conferring greater rights on the tenant than those a statute affords.

The following are the most common illegal-sublet scenarios. First, a tenant may sublet a rental unit without complying with relevant statutory provisions like RPL § 226-b. Second, a tenant may choose to sublease a rental unit without asking for the landlord’s consent. Third, a tenant may ask for the landlord’s consent and then sublease the unit, even though the landlord had withheld consent. Fourth, a tenant may sublet without meeting a primary-residence requirement. Fifth, a tenant may attempt to sublet continuously, called “piggybacking.”

II. Common Illegal Sublet Scenarios

A. RPL § 226-b Requirements

If a lease or a regulation requires it, tenants must obtain the landlord’s consent before they sublet an apartment. Once a tenant informs the landlord of the proposed sublease, the landlord may not withhold consent unreasonably. RPL § 226-b gives tenants who have an “existing lease in a dwelling having four or more residential units” the right to sublease an apartment after a tenant has obtained the landlord’s written consent. The Sublet Law does not protect all tenants. It exempts from its coverage tenants in buildings with fewer than four units; tenants with periodic rental agreements, such as month-to-month tenants; and rent-controlled tenants without current leases, because a current lease governs a tenant’s right to sublease.

To obtain consent, a tenant must mail a notice of intent to the landlord by certified mail, return receipt requested. The notice of intent must include the term of the proposed sublet; the tenant’s reason for subletting; the proposed sublessee’s name, business address, and permanent home address; and a copy of the proposed sublease. A landlord has several choices once a sublet request is made. The landlord may choose to accept or reject the sublet request within 30 days of either the mailing of the tenant’s request or the mailing of the additional information requested by the landlord, whichever is later. A landlord that does not do so is deemed to consent, and the tenant may proceed with the proposed sublease. The landlord may also ask for additional information about the sublet within 10 days, or reject the sublet request as defective within 10 days. The landlord may request additional information from the tenant so long as this request is not unduly burdensome. The landlord that wants to request additional information must do so within 10 days of the tenant’s mailing the notice of intent.

Because landlords owning rent-regulated units may not unreasonably withhold consent to sublet, case law...
has interpreted reasonable and unreasonable grounds for rejection. Tenants seeking to sublet their rent-stabilized apartments should be mindful of the various inquiries landlords are permitted to make of prime tenants regarding a proposed sublet despite the unreasonable consent rule being in their favor.18

B. Landlord’s Consent Unnecessary

A rent-regulated tenant may sublet an apartment to statutorily defined family members without a landlord’s consent.19 Family members and roommates are not characterized as illegal subtenants but rather as additional “occupants.”20 New York’s Rent Stabilization Code (RSC) contains a list of family members who qualify for no-consent sublets.21 The RSC further provides that other individuals who use the housing accommodation as a primary residence may qualify if they can show emotional and financial commitment and interdependence between themselves and the tenant.22 The RSC lists several factors to determine the existence of emotional and financial commitment and interdependence, including (1) the relationship’s longevity; (2) the intermingling of funds with the tenant; (3) holding themselves out as family members; and (4) regularly performing family functions.23 Although no factor is determinative, courts have interpreted this provision by emphasizing an individual’s long-standing connection to the rental unit.24

C. Landlord Withholds Consent

When a tenant alleges that a landlord unreasonably withholds consent to sublet a unit, courts must determine whether the landlord’s actions were unreasonable.25 Absent this determination, the proposed sublease does not by itself confer any occupancy to a subtenant.26 This lack of entitlement means that a subtenant has no “peaceable” or “constructive” possession required to maintain an action for possession and treble damages.27

Under New York’s rent-regulatory scheme, a landlord may not unreasonably withhold consent to sublet.28 In a recent case, the court was faced with a landlord who had rejected a prime tenant’s sublet request for three reasons: (1) the prime tenant would have been away from the country for the entire proposed sublease term; (2) the proposed subtenant had insufficient means of income or support; and (3) the proposed sublease term would extend beyond the current lease term.29 The prime tenant had complied with all subletting requirements RPL § 226-b. The court held that none of the landlord’s reasons constituted a reasonable withholding of consent. The court went on to hold that nothing requires a prime tenant to reside in the same country during the sublease period. The court also found that the proposed subtenant provided proof of sufficient income or support to fund rent and utility obligations. Finally, the court found that

New York’s Rent Stabilization Code allows a sublease to extend beyond the term of the prime tenant’s lease and prohibits withholding consent solely on that ground.30

A sublease or an assignment undertaken without the landlord’s prior consent is a ground for eviction. Approval of the New York State Division of Housing and Community Renewal (DHCR) is not required for rent-regulated tenancies.31 When a landlord reasonably withholds consent to sublet or assign a rental unit, the tenant has no remedy. A distinction between subleases and assignments arises when a landlord unreasonably withholds consent. If a landlord unreasonably withholds consent to assign an apartment, a tenant’s remedy is to request to be released from the lease; the landlord must comply with this request within 30 days’ notice.32 In contrast, a landlord may not unreasonably withhold consent to sublet.33

D. The Primary-Residence Requirement

A rent-stabilized tenant must comply with the requirements in RPL § 226-b as well as with the primary-residence requirement.34 The tenant’s housing accommodation must be maintained as a primary residence at all times, and the tenant must intend to occupy the unit as a primary residence at the termination of the sublease.35 An agreement to sublease may still be illegal even if the tenant maintains the housing accommodation as a primary residence.36 For example, when a tenant is permitted to have a roommate who contributes to rent payments,37 a tenant may not reconfigure and rent separate parts of the apartment.38 An illegal sublease also arises when the prime tenant conveys an interest in the roommate’s space to an immediate family member long connected to the apartment.39

When a prime tenant illegally sublets a rental unit to an immediate family member long connected to the apartment, the proper remedy is a nonprimary-residence claim, not an illegal-sublet claim.40 Although proof of a prime tenant’s violation of the nonprimary-residence rule alone is insufficient in an illegal-sublet holdover,41 courts permit landlords to maintain illegal sublet proceedings against family members who have no long-term connection with the apartment.42

A landlord has the option of bringing either a nonprimary-residence claim or an illegal sublet claim. Under the Omnibus Housing Act,43 the right to sublet requires a tenant currently to reside, and intend to return, as the rental unit’s primary resident when the proposed sublease term expires.44 But differences exist between a nonprimary-residence claim and an illegal sublet claim, including the items of proof necessary to support each claim and the availability of a tenant’s right to cure.45

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E. Piggybacking

Tenants subject to New York’s Sublet Law are prohibited from continuously subletting an apartment. A rent-stabilized tenant is limited to subletting an apartment for a maximum of two years, including the term of the proposed sublease, out of the four years preceding the proposed sublease’s termination date. Violating this “no piggybacking” rule results in an illegal sublet.

III. Notice to Cure

To evict a rent-stabilized tenant, the landlord must first serve the tenant with a written notice to cure providing at least 10 days for the tenant to cure the wrongful acts or omissions. This procedure also applies to loft tenants. A landlord that gives a tenant an inadequate time to cure is unable to maintain a summary proceeding for an illegal sublet.

The requirement to serve the tenant with a notice to cure does not apply if (1) the violation is continuous or recurrent and the landlord has previously served the tenant with a notice to cure within the last six months; or (2) the violation is a willful breach of an obligation that results in serious and substantial injury to the landlord or the property.

IV. Notice to Terminate

Assuming that the landlord complies with the timing requirements of the notice to cure and that the tenant fails to cure the violation, the landlord may then serve the tenant with a termination notice requiring the tenant to vacate or surrender, subject to certain timing requirements before the intended termination date. A landlord must serve the tenant at least seven days before the cited surrender date. This termination notice may be combined with the notice to cure, such that the termination period includes the 10-day period specified in the notice to cure. The notice to cure must state the grounds on which the owner relies for terminating the tenancy, the facts necessary to establish that ground, and the date by which the tenant is required to surrender possession.

A landlord will not establish a sufficient predicate notice to maintain an eviction proceeding if the notice of termination “merely recite[s] the legal ground for the eviction, but fail[s] to set forth any of the facts upon which the ensuing . . . proceeding would be based.” The requirements ensure that tenants are informed of the legal and factual claims asserted and provides them with the opportunity to “interpose any available defenses.” When a termination notice is deficient because it fails to contain all required information, the petition might be dismissed. Strict compliance with these statutory provisions is mandated because a summary holdover proceeding is “entirely the creation of statute.”

At least for rent-stabilized tenants, a landlord must add five days to the combined cure notice and termination notice if the combined predicate notice is served by mail. The adequacy of the notice is material, courts will assess the adequacy of the notice in view of its reasonableness and all the attendant circumstances.

V. The Eviction Proceeding

After a landlord serves a timely and sufficient predicate notice, the landlord’s remedy is to commence a summary eviction proceeding based on an illegal sublet. This proceeding can be instituted before a rent-stabilized lease expires. The RSC further supports a landlord’s right to evict a tenant for an illegal sublet by providing that a landlord may evict when the tenant sublets or assigns without obtaining prior written consent. A landlord may not engage in a “self-help” eviction.

Courts are split on whether a landlord or owner may assert in the petition alternative grounds for the tenant’s removal from the rental unit. Some courts have permitted alternative pleadings in the context of an illegal sublet or assignment if the asserted theories are consistent. Other courts have held that because the elements of each ground are “intrinsically different,” the notices and pleadings may not combine theories.

A landlord will not prevail on an illegal-sublet claim by asserting only that the prime tenant is no longer using the rental unit as a primary residence. But a landlord need not allege a tenant’s alternative residence to prevail. A landlord may be successful by asserting one of the following: (1) breach of the lease; (2) statutory violation(s); (3) lack of consent for the sublet; (4) primary-residence violation.

VI. Motion Practice and Disclosure

There is some debate, at least in the First Department, about when summary judgment is appropriate in an eviction proceeding based on an illegal sublet. A court might find that a tenant’s summary-judgment motion seeking to dismiss a landlord’s petition is premature and not grant it until the landlord has the opportunity to prove an illegal sublet at trial. Courts debate over how much evidence a landlord must produce for an illegal sublet and how much rebuttal evidence a tenant must allege. Most New York courts agree that when the only evidence a landlord offers is in terms of a primary-residence violation, a tenant’s motion for summary judgment should be granted because the proper remedy is a nonprimary-residence holdover proceeding.

Landlords and tenants must follow distinct processes when facing an alleged illegal-sublet proceeding.
Disclosure will be permitted, in limited circumstances, to ascertain the nature of the parties’ relationship when the tenant asserts that the alleged illegal subtenant is a roommate. When disclosure is more closely related to proof of nonprimary residence than to proof of an illegal sublet, however, the motion for leave for disclosure will be denied. Courts will determine whether discovery is warranted by applying the ample-need requirement.

When a tenant’s defense to an illegal sublet claim is that the alleged illegal subtenant is a roommate, discovery may be permitted to ascertain the true nature of the parties’ relationship.

**VII. Defenses**

Once the tenant receives the notice to cure, the tenant may assert a defense alleging that there is no illegal sublet, that the landlord consented to the sublet, or that the alleged illegal subtenant is a family member or a roommate.

Tenants may also question whether a notice to cure was timely served or argue that the illegal sublet was cured. After the landlord meets this burden and makes out a prima facie case of an illegal sublet, the summary proceeding may be maintained.

**VIII. Period to Cure**

A landlord must give the tenant adequate notice and a specified amount of time to cure the illegal sublet, either by express agreement in the lease or by statute. If the defect is not cured, the landlord may serve the tenant with a notice of termination, which ends the tenancy as of a particular date. If the tenant does not vacate the premises as of that date, the landlord may institute a summary eviction proceeding.

When a landlord proves its case and secures a final judgment on consent or after trial, courts will issue a stay of the execution of the warrant of eviction for 10 days to allow the tenant to cure the illegal sublet. If the tenant does not cure, the court may stay the execution of the warrant for up to six months, in the court’s discretion.

A prime tenant may be able to cure both an illegal sublet and, unless grossly excessive, a rent overcharge or profiteering. One court found that a rent overcharge may be cured if the prime tenant cures the illegal sublet and returns all rent overpayments to the illegal subtenant. This scenario is possible even if the lease is silent about rent overcharges. Landlords may assert that the overcharges caused a tenant to forfeit all rights to the rental unit because of unlawful profiteering. Note that RSC § 2525.6 permits tenants to charge a subtenant a 10 percent surcharge over the legal rent when the apartment is fully furnished.

**IX. Tenant’s Options**

The tenant has the option of affirmatively commencing an action seeking a declaratory judgment alleging that the landlord waived the written-consent requirement for subletting. This type of declaratory relief will be granted only if the tenant can allege specific facts proving the waiver. If the landlord properly served the notice to cure and the tenant had the opportunity to cure within the 10-day notice period, a court will likely deny injunctive relief. If material issues of law or fact are present, Supreme Court may grant a Yellowstone injunction, temporarily tolling the time to cure the lease violation.

**X. Consequences of Illegal Sublets**

A landlord may be entitled to increase a prime tenant’s rent as a result of an illegal sublet if an illegal sublet exists and the tenant cures to avoid eviction. A rent increase is not automatic and will be analyzed factually on a case-by-case basis.

**XI. Conclusion**

The law of subletting in New York has twists and turns that reflect the labyrinthian nature of landlord-tenant proceedings, especially for rent-regulated premises. But the rules make sense and comport the legislative will: to allow sublets of limited duration when a tenant does not abuse the right to sublet.

**Endnotes**

2. Id. at 46.
4. Rima 106, L.P. v. Alvarez, 257 A.D.2d 201, 205, 690 N.Y.S.2d 40, 43 (1st Dep’t 1999) (mem.). The Rima court found that RPL § 226-b (5) and (6) provide that subleases and assignments must be in statutory compliance to avoid breaching the lease and being null and void. Any lease clause permitting a tenant to sublet and assign freely “confers benefits in direct violation” of the statute’s constraints. It is not the purpose of New York’s rent-regulation laws and codes “to create a class of mini-landlords who can profitize in housing units placed under the law’s protection.” Id.
10. Id.
11. Id.
12.  Id. § 226-b(2)(b).
13.  Id. § 226-b(2)(c).
14.  Id.
15.  Id.
16.  Id.
17.  Id. § 226-b(2)(a).
19.  RPL § 235-f(2).
20.  Id.
21.  See 9 N.Y.C.R.R. § 2204.6(d)(3)(i) (providing that family members include prime tenant’s husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, or daughter-in-law).
22.  Id.
23.  Id.
25.  Runquist v. Koeppel, 146 Misc. 2d 569, 571, 551 N.Y.S.2d 765, 767 (Hous. Part Civ. Ct., N.Y. Co. 1990) (“Until such time as a court determines the withholding of consent to the sublet was unreasonable, as only a court may determine and not the parties, the sublease does not confer any right of occupancy.”); see Finkelstein & Ferrara, supra note 5, at § 3:18, at 3-11.
27.  RPL § 226-b(2)(a).
29.  See 9 N.Y.C.R.R. § 2525.6(c).
30.  9 N.Y.C.R.R. §§ 2524.3(h), 2525.6(f); see Finkelstein & Ferrara, supra note 5, at § 18:197, at 18-89.
31.  RPL § 226-b(1).
32.  Id. at § 226-b(2)(a).
33.  9 N.Y.C.R.R. § 2505.7(a).
34.  Id.

74. See Hartsdale Realty Co. v. Santos, 170 A.D.2d 260, 260, 565 N.Y.S.2d 527, 527-28 (1st Dep’t 1991) (mem.) (limited discovery permitted to identify apartment’s current occupants); Houston Village Apt. Co. v. Zitin, 2001 WL 1470310, at *1 (App. Term 1st Dep’t) (per curiam) (finding that with presumption favoring discovery, landlord established “ample need” to depose the tenant’s wife); see also Finkelstein & Ferrara, supra note 5, at § 15:530, at 15-312.


76. See Hartsdale, 170 A.D.2d at 260, 565 N.Y.S.2d at 527-28 (“[A] ample need has been demonstrated for limited discovery into the identification of the present occupants of the apartment.”); see Finkelstein & Ferrara, supra note 5, at § 15:530, at 15-312.


80. 9 N.Y.C.R.R. § 2524.3(a); see Benoît, 226 A.D.2d at 197, 640 N.Y.S.2d at 540 (“In a summary holdover proceeding to recover possession upon the ground of an illegal sublet, the landlord is required to prove as part of its prima facie case that a notice to cure was served and that the tenant has failed to cure.”).

82. 9 N.Y.C.R.R. § 2504.1(d)(1)(ii).


85. Id. at 16/5-16/6.

86. RPL § 753(4).

87. Id. § 753(1).


91. Id. at 102-03.

92. Id. at 102-03.

93. Id. at 104.

94. 9 N.Y.C.R.R. § 2202.6; see generally Guy McPherson, It’s the End of the World as We Know It (and I Feel Fine): Rent Regulation in New York City and the Unanswered Questions of Market and Society, 72 Fordham L. Rev. 1125 (2004).

The Lebovits Trilogy

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part in Manhattan and an adjunct professor at New York Law School. He gratefully acknowledges the assistance of Alexandra Standish, his court attorney, and New York Law School students Dana Agabiti, Shahab Ghahambor, and Rosalie Valentino.