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Post-Lease Expiration Nonpayment Proceedings

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Summary proceedings were designed to accord a landlord a rapid method for recovering rented premises, whether by the expiration of the tenancy, or for the failure of the tenant to pay rent during that term. Over the past several decades, there has been a controversy as to whether summary nonpayment proceedings (RPAPL §711(2)) may be maintained after the expiration of a lease. In other words, whether the landlord can sue for possession of the property and for any past due rent in the same case at the same time. The issue remains incompletely settled in the First Department, although it has recently come to rest in the Second and Third Departments, with no reported decisions addressing the controversy in the Fourth Department.

After a Lease Expires

As a general proposition, absent rent regulation, a landlord is under no obligation to renew a lease.[1] In unregulated tenancies, when the lease is expired, whether commercial or residential, Real Property Law (RPL) §232-c decrees that the landlord's acceptance of rent after expiration creates a month-to-month tenancy. Inside New York City, under RPL §232-a, the landlord can terminate such tenancies with a 30-day notice served in the same manner as a notice of petition,[2] outside NYC, under RPL §232-b, with a one-month notification (not necessarily in writing).[3]

However, if there is no money paid after the lease expiration, RPL §232-c does not set up a month-to-month tenancy since the statute says that it is the payment of rent that sets up the month-to-month tenancy, nothing else. Thus arises the question after the lease expires whether a nonpayment proceeding lies in the presence and absence of a statutorily created month-to-month tenancy. While historically, that question of whether a month-to-month tenancy was erected was thought to frame the question about whether post-expiration-of-lease nonpayment proceedings can be maintained, as we note below, that preliminary question has become irrelevant under leading law and the nonpayment proceedings may be brought.

The question of whether back rent can be collected in a holdover proceeding (RPAPL §711) brought after the lease has expired has now been completely

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resolved with definitive holdings that while "rent" is uncollectible, the identical amount of money is collectible when characterized as "use and occupancy" rather than rent.[4]

Nonpayment Proceedings

There is a theory that one cannot bring a nonpayment proceeding on an expired lease, but must rather bring a holdover proceeding in which some hold that past due rent cannot be demanded in the lawsuit. While some authors have written that the theory is dead, those authors are mistaken. While there are places in the state of New York where that theory is discredited,5 there remain other holdouts that say that once the lease has expired, the only remedy is a holdover proceeding requiring the landlord to sue for rent in a slower non-summary proceeding after the case for possession has terminated.[6] While there is no defining authority in the First or Fourth Departments, the Second and Third Departments do have authority for allowing the nonpayment and possession proceeding to be brought after the governing lease has expired.

Where such proceedings are allowed, it does not matter whether the sums sought are entirely for post-expiration rents or for a combination of post-expiration rents and pre-expiration rents. However, the theoretical bases for refusing to recognize post-expiration rents' collectability in nonpayment proceedings gives scant theoretical support for refusing such a proceeding where the basis of the proceeding is the debt of rent both immediately before and after the lease expiration.

We say "scant" because the basic theory of non-allowance of the proceeding is that the amount owed in a month-to-month tenancy is supposedly unknowable. Now, if it really is unknowable, then it cannot be demanded with certainty. A lesser, but present body of case law invalidates rent demands that contain sums that are intrinsically uncertain.[7]

However, in 265 Realty v. Trec,[8] in proceedings based on rents that were for both the pre-expiration and post-expiration period, the Appellate Term disallowed the proceeding for July through October, 2009 rent because, "Since there was no payment and acceptance of rent after the expiration of the last lease on Aug. 31, 2009, no month-to-month tenancy was created… Because a nonpayment proceeding must be predicated on a rental agreement that is in effect at the time the proceeding is commenced… and no rental agreement was in effect… the petition must be dismissed."

The Trec understanding that no nonpayment proceeding would lie in the post-expiration-of-lease period seemed to gain traction in the Second Department in Samson Management v. Hubert,9 in which the Appellate Division disallowed a deemed renewal on the basis of Rent Stabilization Code §2523.5(c)(2) to be a basis for a recovery of rent after the lease expiration. That provision of the code holds:

Where the tenant fails to timely renew an expiring lease or rental agreement offered pursuant to this section and remains in occupancy after expiration of the lease such lease or rental agreement may be deemed to have been renewed upon the same terms and conditions at the legal regulated rent together with any guidelines adjustments that would have been applicable had the offer of a renewal lease been timely accepted. The effective date of the rent adjustment under the "deemed" renewal lease shall commence on the first rent payment date occurring no less than 90 days after such offer is made by the owner.

In Samson, the tenant was rent stabilized and had not accepted the last lease renewal offer the landlord sent to the tenant after the lease had expired. For some months, without accepting that lease renewal, the tenant nonetheless paid the higher rate of rent that would have been

renewed for a one-year term. However, in the middle of the deemed term, the tenant moved out and the landlord sued for the balance of the rent on the deemed term.

However, largely overlooked by the landlord-tenant community in analyzing Samson was the fact that the rent that the landlord was seeking to recover was for the period that the tenant was no longer in possession of the premises. Here, Samson found that §2523.5(c)(2) was giving the landlord rights that RPL §232-c forbade by erecting a month-to-month tenancy after the lease expired and, as in Samson, rent was paid. This was not a case about bringing a summary proceeding to collect rent for when the tenant is in possession of the premises. Thus, although lower court authority sought to find in Samson support for refusing the post-lease-termination nonpayment proceeding, in truth Samson is inapposite.

In the very same Judicial Districts as in Trec, two years later, Hernco v. Hernandez,[10] in a commercial proceeding, without mentioning Trec, implied the opposite rule, writing, "Where, as here, the proceeding is based on a month-to-month tenant's failure to pay rent, a three-day notice is appropriate." However, it is not really the opposite rule vis-à-vis month-to-month tenancies because the basis of Trec is that there was no month-to-month tenancy and in Hernco that there was. That said, Hernco (unlike the copious reasoning in the cases disallowing it) does not give a rationale for permitting the nonpayment proceeding when there is a month-to-month tenancy.

In Hernco, the court crosses geographical jurisdictional borders to justify its holding, citing to both the Third Department and the Ninth and Tenth Judicial Districts.[11]

The Third Department rule is to be found in Nadeau v. Tuley[12] where the Appellate Division notes, "Where, as here, the proceeding is based on a month-to-month tenant's failure to pay rent, a three-day notice is appropriate." Since the only three-day notice the court could be referring to is that the predicate notice to an RPAPL §711(2) summary nonpayment proceeding, the irrefutable implication is that the actual proceeding does lie, at least when there is a month-to-month tenancy established after the lease's expiration. But neither Nadeau nor any other Third Department authority speaks to proceedings brought on a combination of pre-lease-expiration and post-expiration rent. The month-to-month tenancy in Nadeau was always such and arose orally.

The Ninth and Tenth Judicial District rule is found in Tricarichi v. Moran,[13] the most cited case for the proposition that summary nonpayment proceedings do lie after a lease expires. It looks at what it characterizes as the leading case to the contrary, a trial court decision from Manhattan in 1994,1400 Broadway Assocs. v. Lee & Co.[14] that "reasoned that a month-to-month tenancy is renewable by the parties' conduct, i.e., by continued payments and acceptance of agreed-upon amounts each month. To maintain a nonpayment proceeding against a month-to-month tenant who fails to pay rent seeking payment at the lease rate would permit a landlord unilaterally to bind a tenant to payment predicated on a continuing agreement, even though there was no longer a meeting of the minds. Such a result would violate the intent of Real Property Law 232–c."

Notably, that line of reasoning does not say that maintaining such proceedings violates RPL §232-c itself, but only its intent. Once it is a question of statutory intent, courts are free to differ.

Tricarichi does indeed differ. It holds that the statute's purpose was merely to overturn the common law rule that holding over binds the tenant to a same term as that which was in the expired lease and replaces it with a monthly tenancy. However, the statute, by its terms does not speak to what the rent due during those monthly tenants are to be and that is where Tricarichi strikes out in different territory from the lower court decisions disallowing the proceedings.

It holds, unlike those cases, that the rent is definitely ascertainable and that the "month-to-month tenancy continues on the same terms as were in the expired lease, if, in fact, the lease has expired." Thus, Tricarichi concludes, "even if the lease has expired, as tenants claim, this nonpayment proceeding should not have been dismissed."

Priegue v. Paulus,[15] builds on Tricarichi, specifically holding that the rental amount is correctly set as the same rent as the expired lease, writing, "Since the written lease had expired, a month-to-month tenancy on the same terms as those in the original lease is implied, inasmuch as tenants remained in possession after the expiration of the lease and continued to pay rent… Consequently, it was proper for landlords to bring a nonpayment summary proceeding against tenants to recover the unpaid rents."

In truth, the First Department has not been entirely silent. In Jemrock Realty v. Valdes,[16] the Appellate Term ruled that in a rent-stabilized tenancy, a landlord could maintain a post-lease-expiration nonpayment proceeding, writing, "Accordingly, landlord may properly maintain a nonpayment proceeding under RPAPL §711, subd. 2 for the rent reserved in the last lease." While there is nothing in that decision limiting its holding to residentially regulated tenancies, both residential and commercial lower court cases in the First Department have been ignoring Jemrock.

Also in the First Department, Sachetti v. Rogers,[17] does accept deemed renewal as a basis for allowing a post-lease-expiration nonpayment proceeding, but the Appellate Division authority of Samson, supra, from six years later casts doubt on the rationale of Sachetti, if not on Sachetti's ultimate holding which, like Samson is entirely supported in the Second Department, but on other grounds.

Conclusion

As a general rule of thumb, when there is a definitive appellate pronouncement on a principle of law in one judicial department and the other departments are silent, the other departments will follow the departments who have spoken to the issue. However, this has not been happening in the lower courts of the First Department who continue to adhere to a position contradicted by authority controlling in the Second and Third Departments: that summary nonpayment proceedings do lie after the expiration of a lease.

Endnotes:

1. Henry Phipps Plaza North v. Savarese, 11 HCR 134B, NYLJ, July 6, 1983, 6:3 (AT1).

2. The methods of service are set forth in RPAPL §735. They should not be mistaken for the procedures in CPLR 308, although there are many similarities between the two service statutes.

3. RPL §232-b. While the statute allows mere notification and thus does not require a writing, better practice is to serve a writing in the same manner as RPAPL §735. While it is not required, it is more likely to be upheld.

4. Commissioner of N.Y. State Office of Mental Hygiene v. Kings Park Yacht Club, 23 HCR 424B, NYLJ, July 12, 1995, 29:4 (AT 9 & 10).

5. Greenpoint Ave. Realty v. Galasso, 36 HCR 546A, 18 Misc3d 135(A), 856 NYS2d 24 (AT 2 & 11 2008).

6. Dashnaw v. Shiflett, 34 HCR 12A, 10 Misc3d 1051(A) (City Plattsburgh Clute 2005); 265 Realty, LLC v. Trec, 41 HCR 524B, 39 Misc3d 150(A), 975 NYS2d 370 (AT 2, 11 & 13 2013).

7. IG Second Generation Partners, LP v. 166 Enterprises Corp. & Urban Outfitters, 31 HCR 423A, NYLJ, Aug. 5, 2003, 18:1 (AT1); Hegeman Asset LLC v. Smith, 32 HCR 432B, NYLJ, July 6, 2004, 28:4 (AT 2 & 11).

8. 39 Misc3d 150(A), 975 NYS2d 370 (AT 2, 11 & 13 2013).

9. 92 A.D.3d 932, 939 N.Y.S.2d 138 (2012).

10. 46 Misc.3d 137(A) (2015).

11. The Second Department is comprised of the 2d, 9th, 10th, 11th, and 13th Judicial Districts. Thus, Hernco, in the absence of an Appellate Division ruling nonetheless makes the rule

throughout the Second Department uniform.
12. 160 A.D.2d 1130, 553 N.Y.S.2d 912 (1990).
13. 38 Misc.3d 31, 959 N.Y.S.2d 372.
14. 16 Misc.2d 497, 614 N.Y.S.2d 704.
15. 43 Misc.3d 135(A) (2014).
16. 21 HCR 168B, NYLJ, April 20, 1993, 21:4 (AT1).
17. 12 Misc.3d 131(A), 820 NYS2d 845, HCR Serial #00015868 (AT1 2006).