

**ANATOMY OF A SUMMARY NON-PAYMENT
PROCEEDING FOR COMMERCIAL TENANTS**

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TABLE OF CONTENTS

STATEMENT OF PURPOSE.....	3
ANATOMY OF A NONPAYMENT PROCEEDING.....	4
I RENT DEMAND.....	4
II PETITION.....	5
III SERVICE OF PROCESS.....	5
IV ANSWER AND DEFENSES.....	6
V SETTLEMENTS V. TRIAL.....	7
VI JUDGMENTS & WARRANT OF EVICTION.....	7
VII ORDERS TO SHOW CAUSE.....	8
CONCLUSION.....	9

STATEMENT OF PURPOSE

This document is designed to provide a brief overview of the dynamics of a non-payment summary proceeding. It is not intended as a comprehensive treatise on the multiple and varied issues which may arise in the course of a specific litigation.

ANATOMY OF A NONPAYMENT PROCEEDING

I RENT DEMAND

Prior to filing a complaint (known as a Petition) against a tenant in Housing Court for nonpayment of rent, the tenant is entitled to a predicate notice, commonly known as the Rent Demand. While a Rent Demand may be given orally to the tenant, it is advisable to do so in writing with service by a process server. See Section III *infra*. If the Rent Demand is improper, any proceeding commenced based on that Rent Demand will be defective, resulting in a dismissal of the case.

A tenant is entitled to a rent demand which affords the tenant no less than three (3) days in which to pay the outstanding arrears (unless otherwise provided for in the lease and/or rider).

Many commercial leases set forth a different notice period (from as little to three (3) days to as many as thirty (30) days). As such, it is vital that when a rent demand is prepared for a commercial tenant, you must provide a full copy of the lease and rider to ensure that a proper Rent Demand is prepared.

What items can be included in the Rent Demand?

1. Monthly base rent
2. Additional rent
(E.g.- a/c charges; surcharges, fuel charges; MCI charges, real estate taxes; water/sewer charges; insurance charges, etc;).

NOTE: When including charges on a Rent Demand other than the monthly base rent reserved in the lease or most recent lease renewal, it is imperative that you provide us with documentation which establishes your right to collect such charges. Such proof may be copies of the actual bills, DHCR orders, etc.

General Rule of Thumb: Our firm will provide you with a nonpayment information sheet which should be filled out completely. The more information you provide relating to any claimed arrears, the faster the Demand can be prepared and easier it is for the attorney to prepare for any trial.

NOTE: In general, nonpayment Demands are prepared within two (2) days from the receipt of the written request. If three (3) business days pass, you can assume that the request was not received.

NOTE: Unless all of the rent sought in the Rent Demand is paid, you may proceed. For example, if the Rent Demand seeks rent for June and July, and the tenant pays only the June portion, you may proceed with the case. You do not have to serve a new Rent Demand seeking only July's rent.

II PETITION

If the tenant pays the outstanding rent in full, the Rent Demand is satisfied, and there is no need to commence a nonpayment proceeding.

If the tenant does not pay the outstanding rent in its entirety, the next step is to serve and file a Petition. The Petition is a formal complaint in court which seeks a judgment of possession based upon the tenant's failure to pay the outstanding rent. Like the Rent Demand, the Petition must be served by a process server.

Once the tenant has been served with the Petition, there are three possible courses which the case may take:

(1) The tenant immediately pays the rent in full. (Admittedly rare, but not unheard of);

(2) The tenant files an Answer with the court. See Section IV, *infra*. The court then places the case on the calendar to see if the case can be settled short of a trial. The court notifies us by postcard of the scheduled hearing date. See Section V, *infra*; or

(3) The tenant does nothing. Thereafter, 11 days after completion of service (See Section III, *infra*) we can request that the court enter a default judgment against the tenant, based upon failure to answer the Petition. When we request that the court enter a default judgment, we are now required to submit an affidavit of default, wherein you swear that the petition has not been satisfied. This affidavit should be filled out completely, as failure to do so creates a risk that the court will decline to issue the warrant. The original needs to be delivered to us so we can submit it to the court. The court will not accept copies. See Section VI, *infra*.

III SERVICE OF PROCESS

As discussed *supra*, the Rent Demand and Petition must be served by a licensed process server. The process server is required to make two attempts at personal service upon the tenant, and then may resort to one of the alternate forms of service.

Service must be attempted at the subject premises, with additional mailings to all other known addresses for the tenant. (This is typically an issue in commercial cases, where the commercial tenant has a corporate address other than the subject building).

There are three types of acceptable service:

(a) Personal Service.

This is the preferred method of service, where the documents are personally delivered to the tenant.

(b) Substitute Service.

This is the second best method of service, where the process server delivers copies of the documents to a person of suitable age and discretion at the subject premises, who agrees to accept service on behalf of the tenant of record.

(c) Conspicuous Service

Commonly known as a “Nail and Mail”, if the process server is unable to effect either Personal or Substitute Service, he or she may affix the documents to the door of the subject premises, and then mail additional copies by both regular and certified mail to the tenant at the subject premises and any alternate address.

NOTE: For an additional charge, the process server will wait at a desired location to ensure Personal Service. If this is desired, the signed Rent Demand should be returned to us with a note specifically requesting this service.

IV ANSWER AND DEFENSES

When the tenant files an answer to the Petition with the court, they may answer in several ways: “General Denial” or by raising specific “Affirmative Defenses” and/or Counterclaims.

A General Denial is exactly what it appears to be: a nonspecific answer which flatly denies the allegations of nonpayment contained in the Petition. This is the type of Answer commonly filed by unrepresented tenants (*pro se*).

Conversely, more sophisticated tenants, as well as those who retain legal counsel, often interpose an Answer with specific “Affirmative Defenses” and/or “Counterclaims”. Among the more common Affirmative Defenses are the following:

- i. Payment of all or a portion of the rent demanded;
- ii. Improper service of the Rent Demand;
- iii. Improper service of the Petition;

Often these defenses are interposed to either delay the proceeding (to afford more time to raise the outstanding arrears) or to be used as a bargaining chip in settlement discussions.

NOTE: If a tenant challenges service of the Demand and/or Petition, this is called a Traverse. If this defense is raised, the court may set the case down for a Traverse Hearing, to determine if the process server complied with the rules of service. After this hearing (at which the process server testifies about his efforts to serve the documents), the court may either (a) Deny the traverse, in which case the case proceeds; or (b) Grant the traverse, and dismiss the case.

V SETTLEMENTS V. TRIAL

Once an answer has been filed by the tenant, the case is initially assigned to a Calendar Part. The Judge and court personnel in the Calendar Part are trained to explore the issues in the case to see if an agreement can be reached without resorting to trial. Often this involves a give and take between the parties on the amount owed (if disputed) and a time frame in which the arrears are to be paid.

Each Judge has his/her own specific rules regarding settlements and what terms they find acceptable. For example, some Judges will not allow the forthwith entry of a judgment and/or issuance of a warrant of eviction unless the payout schedule is very lengthy.

If the parties cannot reach agreement, the case will be scheduled for trial before a different Judge, at which time the Landlord is required to prove the elements contained in the Petition (also known as the *prima facie*). Among the proof that the landlord must present are ownership of the building, proper registration of the building and the subject apartment; and the outstanding rent. Once this is done, the burden shifts to the tenant to establish any defenses (e.g.- payment of the rent claimed, necessary repairs in the apartment, etc;).

After the trial, depending on the evidence and testimony presented, the Judge may either (a) enter judgment in favor of petitioner for some or all of the claimed arrears; or (b) dismiss the proceeding. If the court enters a judgment in favor of the landlord, the tenant has five (5) days pursuant to law in which to pay the judgment amount. However, if the tenant fails to timely pay, the eviction will still not occur until several weeks later. See Section VI, *infra*.

VI JUDGMENTS & WARRANT OF EVICTION

A Judgment may be entered in any of three ways.

(A) On Default.

When the tenant fails to answer the Petition or to appear for a scheduled trial;

(B) By Stipulation

Where the parties reach agreement and the tenant consents to the entry of a judgment; or.

(C) After Trial

When the Judgment is entered, the court also provides for issuance of a Warrant of Eviction. The Warrant is issued to a New York City Marshal, and generally takes between two and three weeks to issue, depending on how diligently the court clerks process the warrant requests.

Once the Warrant issues, the landlord-tenant relationship is legally severed. So, after the court has issued the Warrant, it is important not to accept, deposit or hold rent payments because a court could determine that by doing so the landlord-tenant relationship was restored and the owner would have to start the whole process all over again. If the judgment amount has not been paid in full, the Marshal may execute the Warrant. This is a two step process commonly known as “Serving and Scheduling”:

- a) First, the Marshal serves a Notice of Eviction upon the tenant;
- b) Second, the marshal takes a legal possession.

Although the Marshal can technically take a legal possession on the day after the date stated in the Notice of Eviction, typically the actual eviction does not take place until several days later, on the first available date the marshal has open in his schedule to perform the eviction.

VII ORDERS TO SHOW CAUSE

A tenant may make ask the court for additional time in which to make a required

payment, or to put a temporary “stay” on his or her eviction. This is done by obtaining an Order to Show Cause. Often, the court will (in its discretion) sign an order to show cause temporarily staying the eviction and scheduling a hearing seven to ten days later based upon the excuse offered by tenant. Our office vigorously opposes these motions, which are often used by tenants merely as a delay tactic.

On the hearing date, the parties may either reach a new agreement re: payment of the rent, or the case can be argued before the court, which may issue an order either granting the tenant a brief extension of time to pay the judgment amount, or denying the tenant’s motion and allowing the eviction to proceed.

CONCLUSION

While it is axiomatic that each case is unique, this memorandum was designed to serve both as an introduction to summary nonpayment proceedings in New York City for the beginning landlord, and as a reference guide for the more sophisticated property manager. Specific questions or concerns may be directed to William Neville.

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