

Representing Respondent As Guardian Ad Litem In A Summary Eviction Proceeding

I. Point of Entry

- A. GAL usually appointed after default of a respondent, or appearance of an unrepresented respondent, who is incapable of adequately defending his/her rights. CPLR §1201
- B. Respondent has significant impairments due to age or disability which required appointment of GAL
- C. GAL appointment is not effective until written consent of proposed guardian submitted to appointing court together with affidavit stating facts showing ability to answer for any damage sustained by negligence or misconduct. CPLR §1202(c)
- D. Time is of the essence: CPLR prohibits entry of default judgment against person for whom GAL appointed “unless twenty days have expired since the appointment”. CPLR §1203

II. Assessing the Case

- A. Grounds for Eviction
 - 1. Nonpayment of Rent - RPAPL §711(2)
 - a. Prior to initiating proceeding, landlord must make oral or written demand for rent or give 3 days notice requiring payment or delivery of possession of premises.
 - i. 3 day demand must be served per RPAPL §735
 - b. Tenant may stop eviction by paying rent prior to issuance of a warrant of eviction per RPAPL §751
 - 2. Holdover against tenant - RPAPL §711(1)
 - a. After expiration of tenancy's term.
 - i. Cannot maintain if tenant has right to lease renewal.
 - b. After termination of lease due to tenant breach of substantial obligation of tenancy (objectionable conduct)
 - c. After bankruptcy - RPAPL §711(4)
 - i. May be protection for federally subsidized tenancies?
 - d. Maintaining bawdy house (drug holdovers)- RPAPL §711(5),715
 - e. After receiving violation for removing smoke detector and failing to cure. RPAPL §711(6)
 - 3. Holdover against non-tenant - RPAPL §713 (requires 10 day notice to quit

prior to instituting)

- a. Squatter - RPAPL §713(3)
- b. Licensee - RPAPL §713(7)
- c. "Super" (former employee of landlord) - RPAPL §713(11)

B. Procedure: Art. 7 RPAPL, N.Y.C. Civil Court Act & Rules, CPLR (Art.4)

1. Special proceeding - discovery only with permission of court CPLR§408
 - a. Demand for Bill of Particulars allowed CPLR §3042
 - b. Notice to Admit allowed CPLR §3123
2. RPAPL §721 specifies who may maintain proceeding
 - a. Does not permit attorney or managing agent to be petitioner
3. Commence by service of Notice of Petition (or OTSC) & Petition
 - a. Notice of Petition must be issued by judge/clerk of court RPAPL §731, NYCCCA §401(c)
 - b. Content and manner of service of Notice of Petition prescribed by RPAPL §731, 732, 733, 735
 - c. Content of petition (which must be verified) - RPAPL §741
 - i. Petitioner's interest in premises
 - ii. Respondent's interest in premises & relationship to petitioner
 - iii. Describe premises from which removal sought
 - A. If subject to Multiple Dwelling Law or rent regulation, must allege compliance with those laws
 - iv. Facts upon which proceeding based
 - v. Relief sought
4. Answer may be oral or written - RPAPL §743
 - a. In nonpayment, must be made within 5 days of service of Notice of Petition and Petition
 - b. In holdover, answer may be made on return date, unless NOP served at least 8 days prior and demands answer 3 days before return date
5. Adjournments governed by RPAPL §745
 - a. Deposit requirement upon landlord demand at 2nd adjournment or 30 days after first appearance (when adjournment requested by respondent) unless
 - i. Petitioner not actual owner
 - ii. Tenant actually or constructively evicted
 - iii. Tenant has Spiegel law defense SSL§143-b
 - b. Failure to make required deposit
 - i. Court must dismiss defenses/counterclaims

C. Defenses

1. Lack of personal jurisdiction

- a. Failure to properly serve Notice of Petition and Petition
- b. Traverse hearing
- 2. Lack of subject matter jurisdiction
 - a. Failure to serve predicate notices, satisfy conditions precedent
 - i. Notice of Termination of Tenancy
 - ii. Notice to Cure
 - iii. Notice of Intent Not to Renew Lease
 - iv. Certificate of Eviction from DHCR or HPD
 - v. NYCHA's consent (Section 8 tenant)
 - vi. Rent demand
- 3. Failure to state a cause of action (if insufficient facts pled)
- 4. Nonpayment defenses
 - a. Payment
 - b. Statute of Limitations/laches (stale rent)
 - c. Rent overcharge
 - d. Warranty of Habitability
 - e. No rent demand
 - f. No Multiple Dwelling registration
 - g. No Certificate of Occupancy
 - h. No rent registration (if Rent Stabilized/Controlled)
- 5. In holdovers: retaliatory eviction, reinstatement of tenancy by acceptance of rent prior to commencement of proceeding, succession rights of remaining family member, denial of facts upon which termination of tenancy or refusal to renew lease is based.

III. Investigating the Facts

- A. Interviewing respondent and potential witnesses
 - 1. Home visit may be necessary
 - 2. Review client's documents
 - 3. Determine whether family, friends or social services agencies working with respondent can provide information relating to underlying facts in proceeding
 - i. FOIL requests for records of public agencies
- B. Reviewing and researching elements of landlord's case
 - 1. Title search, corporate filings
 - 2. Lease, respondent's history as resident of premises (DHCR, other records)
 - 3. Rent registration (if required), certificate of occupancy
 - 4. Predicate notices (to cure, quit, rent demand, terminating tenancy)
 - 5. Evidence of facts alleged by landlord (nonpayment of rent, nuisance)
 - 6. Social Services payment records, bank records, money order receipts
- D. Determining whether respondent requires social services or financial assistance to address facts alleged by petition
 - 1. Public assistance to pay rent arrears

2. Medical treatment or services such as home care, housekeeping
3. Financial management
4. Protective services or orders

IV. Developing a Strategy

- A. Motion practice
 1. Motion to dismiss based on lack of personal jurisdiction, subject matter jurisdiction, failure to state a cause of action, laches
 2. Summary judgment
 3. Discovery (to permit)
 4. Motion to Preclude (Bill of Particulars)
 5. Extend time to answer/to amend answer
 6. Jury demand *nunc pro tunc*

- B. Answer or Amended Answer
 1. Counterclaims

- C. Negotiating Settlements
 1. Making realistic assessment of what is possible
 2. Putting the pieces in place for obtaining payment of back rent, or other compliance with stipulation

- D. Preparing for Trial
 1. Will landlord be able to prove *prima facie* case?
 - a. Burden of proof on petitioner to prove facts stated in petition
 - b. Allegations of petition may be amended during trial to conform pleadings to proof
 - i. Amendments allowed only if *de minimus*, nonprejudicial and do not correct jurisdictional defects
 2. Who are your witnesses and what evidence do you have?
 - a. Respondent has burden of proof on affirmative defenses
 - b. Subpoena records/witnesses?
 - i. Attorney may issue subpoena CPLR §2302
 - ii. Judicial subpoena required to get certain records (of library, municipal/state government agency, certified copies admissible in evidence)

V. Trial of the Proceeding (Powerpoint presentation)

Trial of a Summary Eviction Proceeding

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Who Is Present at the Trial?

- Housing Court Judge
- Court Attorney
- Court Officer
- Court Clerk
- Landlord's attorney
- Landlord (or agent)
- Tenant (if able)
- Guardian ad Litem
- Tenant's attorney
- Court interpreter
- Stenographer or recording device
- Witnesses (usually excluded until testimony taken)
- Spectators and other litigants
- Jury (sometimes)

What Happens?

- Parties/attorneys check in with Clerk or answer calendar call
- May conference case with court attorney or judge to consider possibility of settlement
- Judge may adjourn or commence trial



Beginning the Trial

- Parties and their attorneys sit at table in front of Judge (GAL, interpreter also)
- Judge states name of case, tape number (if recorded) and takes appearances for record
- If Respondent (Tenant) does not have an application or preliminary motion, the Petitioner goes first and has the burden of proving the facts stated in petition

Conduct of the Trial

- Landlord must present evidence through testimony of witnesses and introduction of documents – rules of evidence apply
- In nonpayment, landlord's managing agent may be only witness
- All witnesses sworn in
- When landlord's attorney questions own witness this is "direct examination" – cannot ask leading questions
- Tenant has opportunity to "cross-examine" landlord's witness – limited to scope of direct

Trial Tip: Protecting the Record



- Trials in Housing Court are audio recorded – not video: shaking your head will not appear in the record therefore
- Speak up, but not over another speaker
- Object when necessary to protect the record
- Narrate any event which may affect the trial

Traverse Hearing

- If Tenant claims s/he was not served, landlord will have to prove that service was proper in order to establish "personal jurisdiction"
- Affidavit of service of process server not sufficient for this
- Process server will have to testify
- Process server must have all records relating to service: log book + license, if any
- If you are challenging personal jurisdiction, prepare for traverse hearing - visit premises and do traverse research (court records of petitions filed before & after petition in your case)

Petitioner's Prima Facie Case

- The petitioner must present sufficient evidence to prove facts in petition and right to possessory judgment
- First element of petitioner's case is proving interest in premises and standing to bring proceeding RPAPL 721 (must be landlord, lessor, etc.)
- If petitioner is owner of property, might offer certified copy of deed - which is admissible under CPLR 4518(c)

Procedure for Offering Document Into Evidence at Trial

- Attorney asks to have document marked for identification
- Attorney asks witness to identify document, and may question witness to "lay a foundation" for its admission into evidence
- Attorney asks to have document entered into evidence as exhibit
- Opposing party may object and state grounds
- "Hearsay" - third party statement - is not admissible, but there is a business record exception (and others)

Elements of Petitioner's Case

- Petitioner must prove respondent's interest in premises and relationship to petitioner
- Must prove rent regulated status of premises, compliance with registration requirements, Multiple Dwelling registration
- Must prove that any predicate notices/rent demand served
- Must prove facts that establish grounds for eviction: tenant's nonpayment of rent, objectionable conduct, expiration of term of tenancy, etc.

Nonpayment Case

- If petitioner claims rent due under written agreement original document is "best evidence" – testimony must be offered to prove authenticity of signatures
- Landlord's ledger may be used to prove non-payment and may be admitted as business record or recorded recollection

Testimony by a Witness



- Witness must answer question asked unless Judge sustains objection to question
- Testimony limited to facts personally known to witness – only "expert witness" whose qualifications proven may be asked for opinion

Cross Examining the Witness

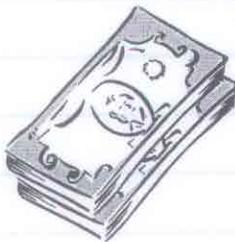
- Never ask question on cross unless you know answer already
- Leading questions are permitted on cross
- Do not "fill in" elements of petitioner's case



What Happens When Petitioner Finishes Presenting Its Case?

- If petitioner has not established a prima facie case, you should ask the Court to dismiss the petition
- If the Court finds that petitioner has established a prima facie case, or if respondent has counterclaims, then respondent has the opportunity to present testimony of witnesses and documentary evidence to support the defenses to the petition and counterclaims, if any

Presenting the Tenant's Defenses: Payment of Rent



- Payment of rent may be proven by the introduction of receipts or cancelled checks and testimony of the tenant or landlord (a hostile witness)
- HRA records may be subpoenaed and used

Evidence of Other Defenses

- Rent overcharge may be established with certified records from DHCR of the legal registered rent, or
- Certified records from NYCHA, HPD or DHCR showing a subsidy and tenant's share of the rent
- HPD computer records may be prima facie evidence of violations recorded against the premises
- Photographs of the apartment may also be introduced with testimony to identify them

When the Trial Ends

- Court may dismiss or render judgment in favor of petitioner or respondent
- Court required to issue decision within 60 days



Judgment of Possession

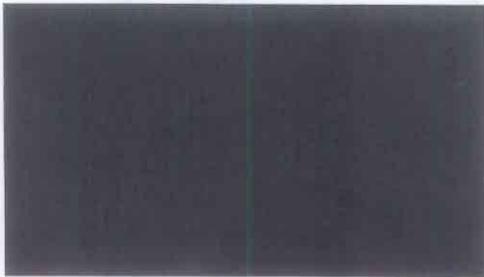
- In a nonpayment case, if respondent pays judgment prior to issuance of a warrant, maintains possession
- Issuance of warrant may not be stayed more than 5 days after judgment RPAPL 732
- Issuance of a warrant of eviction on a judgment in a holdover proceeding may be stayed for up to 6 months conditioned upon payment of use and occupancy RPAPL 753

Notice of Eviction



- After warrant of eviction is obtained, City Marshal must serve 6 days notice of eviction
- Marshal's failure to properly serve does not vitiate eviction
- Marshal should notify APS prior to executing warrant if tenant appears to be very elderly or disabled

Other Resources



Other Resources

- New York Landlord-Tenant Law (the Tan Book published by LexisNexis)
- www.lawhelp.org for legal services
- NYC Department for the Aging (212)442-1000
- <http://www.nyc.gov/html/dfta/home.html>
- Adult Protective Services: 212-630-1853
- <https://a069-webapps1.nyc.gov/psa/referral.asp>
- Department of Homeless Services: Dial 311