

Tenants Beware: Your Cure Period May Not Be as Long as You Think

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***Editor's Note:** Following the publication of the below article, the New York State Legislature signed into law the Housing Stability and Rent Protection Act, which impacts this article in the following way: No longer is the statutory notice to cure a three-day notice. All notices by statute must now be 14 days.

Tenants often successfully use a landlord's failure to comply with notice requirements of a lease to seek dismissal of summary proceedings. See *Parkchester Apts. Co. v. Walker*, 1995 N.Y. Misc. LEXIS 738, at *2 (Civ. Ct. Bronx Cty. 1995) (dismissing non-payment petition because landlord failed to prove that proper predicate notice had been served, which the court held was a jurisdictional prerequisite to a non-payment petition). It is important for tenants to know, however, that, depending on the language of their lease, they may not be able to rely on the notice

period provided in conditional limitation provisions as a defense in a non-payment proceeding. This is true even if the *only* notice provision contained in the entire lease is that found in the conditional limitation provision. Rather, a landlord can elect *not* to enforce a conditional limitation related to non-payment of rent and instead, commence a non-payment proceeding upon only the three-day notice required by New York's Real Property Actions and Proceedings Laws (RPAPL), leaving tenants a shorter window to respond to landlord's claims.

In a lease, a conditional limitation traditionally serves to automatically end the term of the lease upon the occurrence of a prescribed event. See 4 NY Practice Guide: Real Estate §27.04 (2018). Typically, conditional limitations include a requirement that the landlord give notice and an opportunity to cure prior to the automatic termination of the lease by operation of the conditional limitation. See *id.* In New York commercial leases, the cure period provided by a conditional limitation is often longer than the three-day written



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notice period required by statute prior to a landlord initiating a non-payment proceeding. Parties typically use conditional limitations to cover certain important potential breaches of the lease. See *id.* Such breaches can, but do not always, include failure to pay rent or late rent payments. See *id.*

Separately, §711(2) of the New York's RPAPL separately provides in relevant part that:

The tenant has defaulted in the payment of rent, pursuant to the agreement under which the premises are held, and a demand of the rent has been made, *or at least three days' notice in writing* requiring, in the alternative, the payment of the rent, or the possession of the premises, has been served upon him as prescribed in section 735.



See RPAPL §711(2) (emphasis added).

In other words, prior to instituting a summary non-payment proceeding, a landlord must make an oral demand or at least three days' written notice requiring payment or surrender of the premises. See *id.* New York allows landlords and tenants to contractually modify the amount of notice required by a landlord before instituting a non-payment proceeding. See *Oak Plaza LLC v Oak St. Check Cashing, Inc.*, LT-005388-12, 2013 N.Y. Slip Op. 50213(U), at 2 (Dist. Ct. Nassau Cty. Feb. 11, 2013) (“A landlord is required to provide a tenant with a predicate notice prior to the commencement of a non-payment summary proceeding. Pursuant to RPAPL §711(2), the notice must be made either by oral or a three (3) day written demand, *unless otherwise required pursuant to the terms of the parties’ lease.*” (emphasis added)); 626 E.

9 St. Hous. Dev. Fund Corp. v. Collins, 712 N.Y.S.2d 261, 264 (N.Y. Civ. Ct. N.Y. Cty. 2000) (“Even in a rent-regulatory setting, the parties may negotiate terms of a lease that provide a tenant with greater rights than are otherwise required by law.”). Critically, however, absent express and specific language to

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the contrary, the notice period provided in a standard conditional limitation provision will not impact the statutory notice required under RPAPL §735(2). Instead, a landlord can elect to *either* comply with the notice requirements of the lease’s

conditional limitation provision or to comply with the terms of RPAPL §735(2). Of course, if the lease specifies longer than the statutory three-day period for non-payment actions, the written lease agreement—and not the statute—will dictate landlord’s notice requirement.

The landlord’s choice has an important effect on the tenant. If the landlord elects to comply with RPAPL §711, the landlord-tenant relationship will be preserved while the landlord proceeds with a non-payment proceeding. Contrarily, if the landlord chooses to use a lease’s conditional limitation, the tenancy will be immediately and automatically terminated upon the expiration of the notice period, and the landlord need only bring a holdover proceeding if the tenant refuses to vacate the premises.

Several decisions by New York courts reinforce a landlord’s ability

to elect between usage of the conditional limitation and the statutory non-payment mechanics provided in the RPAPL.

In *Frost Equities Co., LLC v. New York Brasserie Ltd.*, 61467/2004, 2004 NY Slip Op 51196(U) (N.Y. Cnty. Civ. Ct. April 22, 2004), the parties agreed in their lease that the “[t]enant shall not be deemed to be in default pursuant to this Lease by reason of its failure to pay rent unless [the landlord] shall give [t]enant notice of such failure and [t]enant fails to cure such failure to pay rent within five days thereafter.” The lease further stated that “upon service of the notice to cure and expiration of the five days without a cure, the lease will terminate.” Landlord did not provide five days’ notice; instead, landlord sent a rent demand and then, four days later, initiated a non-payment proceeding. The tenant argued that the rent demand provided by landlord prior to instituting a non-payment proceeding was insufficient given five-day requirement in the lease.

The court held that the landlord was allowed to elect to proceed by non-payment proceeding rather than the conditional limitation in the lease. Indeed, the court noted that the landlord’s “choice to pursue a nonpayment proceeding under [RPAPL] §711(2) [was] in fact the very antithesis of declaring respondent’s default and terminating the lease” because a nonpayment proceeding is premised on the tenant still being a tenant under an unexpired rental agreement. A major difference,

noted the court, was that in the nonpayment proceeding, the tenant still had the right to honor the lease and pay any judgment for rent to avert a warrant of eviction and keep the rental agreement in effect. Accordingly, the landlord was not required to provide the extended notice required by the conditional limitation and could, instead, institute a non-payment proceeding on three-days’ notice.

Similarly, in *Reckson Operating Partnership, L.P. v. LJC Corp.*, 2007-142 N.C., 2007 NY Slip Op 52335(U) (N.Y. App. Div. 2d Dep’t. 2007), the parties agreed in the lease that “upon the occurrence ... of any one or more of the following events ...: (i) If Tenant shall default in the payment when due of any installment of rent ... and such default shall continue for a period of ten (10) days after notice by Landlord to Tenant of such default ... then ... Landlord, at any time thereafter, at Landlord’s option, may give to Tenant a five (5) days’ notice of termination of this lease” The Landlord commenced a non-payment proceeding and provided three-days’ notice. Like in *Frost Equities*, the court held that nothing in the lease prevented landlord from maintaining a nonpayment proceeding without serving a 10-day notice.

Given the foregoing cases, it is clear that a tenant must be wary of relying on the defense of improper notice in a non-payment proceeding if the landlord provides three days’ notice under the RPAPL but does not comply with the notice

required by a conditional limitation in the lease. If the parties to a lease desire to extend the notice period required for both termination of the lease by conditional limitation and the initiation of a non-payment proceeding, they must do so using express language. For example, in *Hendrickson v. Lexington Oil Co.*, 340 N.Y.S.2d 963 (2d Dep’t. 1973), the lease stated that the landlord would give the tenant 30 days’ notice “before the landlord shall be entitled to commence any proceeding to enforce its rights [under the lease,] ... except, however, for default in rent for which the tenant shall be entitled to only 10 days’ notice.” The landlord did not provide 10 days’ notice prior to instituting a non-payment proceeding. The court held that the 10 days’ notice was required because of the “any proceeding” language in the lease.

In sum, parties to a lease must be clear about the notice requirements for both conditional limitations and any amendments to the statutory notice required under RPAPL prior to instituting a non-payment proceeding. Absent such clarity, a landlord will likely be able to elect whether to comply with the conditional limitation notice requirements or, if it wants to use a shorter period, whether to comply with the three-day statutory requirement in RPAPL 711(2) before instituting a non-payment proceeding.