

## Summary Proceeding: Applicability of the "Three-Month Rule" in Landlord's Action for Arrears in Rent

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tion of malpractice claims.<sup>178</sup> The panel will review all evidence concerning the malpractice action, and will conduct an informal hearing wherein both parties will be represented by counsel. After presentation of all evidence and statements, an appropriate order will be entered if an agreement between the parties to the action can be achieved. In the event the panel is unable to arrive at a satisfactory disposition, the case will be remanded to its regular position on the court calendar.<sup>179</sup>

#### SUMMARY PROCEEDING

*Summary proceeding: Applicability of the "three-month rule" in landlord's action for arrears in rent.*

The summary proceeding, as provided by article 7 of the RPAPL, offers the landlord a simple, inexpensive, and expeditious remedy against a holdover or non-rent paying tenant.<sup>180</sup> Although the original remedy merely contemplated the regaining of possession of the demised premises,<sup>181</sup> the statute now expressly provides for a recovery of rent arrears by the landlord.<sup>182</sup> With this enlargement of the landlord's rights, however, has come a corresponding increase in the potential hardships a tenant may suffer at the hands of his lessor.<sup>183</sup>

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<sup>178</sup> *Id.*

<sup>179</sup> These panels will not conduct themselves as courts. The case stays on the calendar of the court, yet undergoes this procedure before it reaches trial. *Id.*

<sup>180</sup> At common law, where a landlord sought to regain possession of his premises, his sole recourse was an action in ejectment. Chapter 194 of the Laws of 1820 created a far more effective alternative in the summary proceeding. This new remedy was expanded and improved upon by legislative enactments during the next sixty years. In 1880, the proceeding was transferred to the Code of Civil Procedure § 2231 *et seq.*, and later to the CPA 1410 *et seq.* which essentially embraced all the substantive content of the law today. Finally, in 1963, when the CPA was repealed, article 83 was replaced by article 7 of the RPAPL, 2 J. RASCH, NEW YORK LANDLORD AND TENANT LAW § 993 (2d ed. 1971).

<sup>181</sup> See *People ex rel. Terwilliger v. Chamberlain*, 140 App. Div. 503, 125 N.Y.S. 562 (1st Dep't 1910). For the early history of the proceeding, see *Reich v. Cochran*, 201 N.Y. 450, 94 N.E. 1080 (1911).

<sup>182</sup> RPAPL 741(5). A provision permitting a judgment for rent in favor of the landlord was added to the CPA in 1924 by way of amendment, N.Y. SESS. LAWS [1924], ch. 514, amending CPA 1425. See *Byrne v. Padden*, 248 N.Y. 243, 162 N.E. 20 (1928), for an explanation of this amendment.

<sup>183</sup> In an attempt to improve the position of the tenant in the face of this landlord-oriented legislation, the New York Legislature has enacted statutory remedies intended to afford the tenant protection should the landlord fail to perform his duties. New York's rent withholding statute, RPAPL 755, provides for a stay of summary proceedings for eviction or nonpayment of rent or for any action for rent or rental value instituted by the landlord where the tenant establishes the landlord's failure to provide adequate services or to remove a dangerous condition on the premises. Section 302 of the Multiple Dwelling Law provides for rent abatement where the owner of the premises has violated municipal housing regulations. N.Y. MULT. DWEL. LAW § 302-a (McKinney 1974). For a procedural review of these remedies and a criticism of their shortcomings, see N. LEBLANC, A HANDBOOK OF LANDLORD-TENANT PROCEDURES AND LAW, WITH FORMS (2d ed. 1969). In addition, RPAPL 743 permits the tenant, in his answer, to interpose any legal or equitable defense against the landlord in a summary proceeding.

One hazard to the tenant in a summary proceeding is that the landlord may choose to delay bringing the action for nonpayment of rent, thereby increasing the amount of rent in arrears. Recognizing the hardship such a delay could cause, particularly with respect to indigent tenants, the Civil Court, New York County, in *Gramford Realty Corp. v. Valentin*,<sup>184</sup> held that the landlord's delay in bringing summary proceedings amounted to a misapplication of the procedure, warranting dismissal of the action. Taking a similar approach, the Civil Court, Kings County, in *Maxwell v. Simons*,<sup>185</sup> established the "three-month rule," holding that a three-month period was sufficient time for a landlord to institute summary proceedings for nonpayment of rent.<sup>186</sup> Accordingly, his recovery was limited to rent for the three months immediately prior to the commencement of the action.

The equitable approaches of the courts in *Gramford* and *Maxwell* were followed by courts in at least two subsequent cases.<sup>187</sup> Other courts,

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<sup>184</sup> 71 Misc. 2d 784, 337 N.Y.S.2d 160 (N.Y.C. Civ. Ct. N.Y. County 1972), discussed in *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 580, 608 (1973). In this case of first impression, the landlord had allowed the rental arrears of three tenants to accrue for a period of one year before demanding payment. One month later, the bills having been dishonored, the landlord instituted nonpayment proceedings. The tenants raised the equitable argument that the landlord's dilatory tactics were calculated to make it impossible for the tenants to pay the amounts due, his motive being the eviction of the tenants without having to comply with rent and eviction regulations. Although this argument was dismissed for failure of proof, and the court noted that there had been no statutorily sufficient waiver of rent, Judge Younger held that the landlord had forfeited his right to bring the action by his excessive delay.

<sup>185</sup> 77 Misc. 2d 184, 353 N.Y.S.2d 589 (N.Y.C. Civ. Ct. Kings County 1973).

<sup>186</sup> Abuse of the summary proceeding by the landlord was the rationale for the court's decision in this case. The landlord sought to recover rent arrears from four tenants after having delayed for periods of eight to eleven months in each case. The court reasoned that to allow the landlord full recovery would frustrate the legislative intent underlying the proceedings. The court pointed out that the landlord is not without an available remedy for the prior months' rent:

The causes of action for arrears in rent for more than three months should be commenced by an action at law in the other part of this court where a money judgment only can be rendered and not in the landlord and tenant portion of this court where an eviction can take place. It is unconscionable for a landlord to permit his tenant to amass large sums of arrears, which total the tenant cannot be expected to pay in one lump sum within five days.

*Id.* at 187, 353 N.Y.S.2d at 592.

<sup>187</sup> See *City of New York v. Romero*, 170 N.Y.L.J. 94, Nov. 15, 1973, at 18, col. 5 (N.Y.C. Civ. Ct. Bronx County); *142 Equities, Inc. v. Stokes*, 170 N.Y.L.J. 51, Sept. 12, 1973, at 20, col. 1 (N.Y.C. Civ. Ct. N.Y. County).

In *Romero*, the court dismissed the landlord's petition for 17 months rent because of his improper delay. The court rejected the City's attempt to distinguish *Gramford* and *Maxwell* by disclaiming any bad faith or ulterior motive on its part. The court held the landlord's motive or lack of malice to be immaterial. Fearing a perversion of the statutory remedy, the court stated rather emphatically:

The shield of a summary proceeding, to protect a landlord against procrastination and undue delay by a tenant in the payment of rents justly due, cannot be permitted to be turned into a sword to emasculate the right of a tenant to be free

while subscribing to the general principle embodied in the three-month rule, permitted the landlord to recover in excess of three months rent by holding that the landlords in each instance had acted as expeditiously as possible under the circumstances.<sup>188</sup> Recently, the Civil Court, New York County, in *Antillean Holding Co. v. Lindley*,<sup>189</sup> clarified the application of the three-month rule.

The *Antillean* court identified flexibility as an essential consideration in the application of the rule. The landlord in *Antillean* sought to collect seven months rent, three months of which had been the subject of a prior summary proceeding that had been dismissed due to jurisdictional defects. The tenant unsuccessfully moved to dismiss the proceeding, contending that the landlord, through his delay in bringing the present action, had forfeited his right to utilize this remedy. Clarifying the three-month rule, Judge Kassal observed that it should not operate as an automatic bar to any action for more than three months rent, but rather should establish a presumption that the landlord has lacked due diligence in failing to commence the action within three months.<sup>190</sup> The court felt that in most cases a three-month period was sufficient to institute summary proceedings against a defaulting tenant.<sup>191</sup>

The *Antillean* court's approach is consistent with the Legislature's intent to provide an expeditious remedy for the landlord who is unable to collect rent due.<sup>192</sup> At the same time, the landlord may not use the

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of improper legal procedure by his landlord. The landlord has other judicial remedies to collect rents without subjecting a tenant to the risk of eviction. 170 N.Y.L.J. 94, Nov. 15, 1973, at 18, col. 6.

The *Stokes* court granted the tenant's motion to dismiss the landlord's summary proceeding for the recovery of twenty months rent, with leave to the petitioner to institute new proceedings for the last three months rent claimed or an action at law for the full amount of rent already demanded. 170 N.Y.L.J. 51, Sept. 12, 1973, at 20, col. 1.

<sup>188</sup> See *United Artists Corp. v. Seventh Ave. Restaurant, Inc.*, 75 Misc. 2d 717, 348 N.Y.S.2d 277 (N.Y.C. Civ. Ct. N.Y. County 1973), wherein Judge Kassal denied the tenant's motion to dismiss, holding the landlord's proceeding for nine months rent to be reasonably expeditious where it was commenced within one month after an adverse decision in a holdover proceeding; *Malek v. Cruz*, 74 Misc. 2d 448, 345 N.Y.S.2d 367 (N.Y.C. Civ. Ct. N.Y. County 1973), wherein the court held the landlord's delay to be unavoidable and not prejudicial to his right to recover in this summary proceeding. The landlord had been unable to collect rent for a significant portion of the period of nonpayment as a result of judicial appointment of a receiver with the sole power to collect rents. In *Malek*, Judge Blyn went on to say that the use of the *Gramford* and *Maxwell* rules should be restricted to instances where the landlord's conduct has clearly been motivated by an intention to evict a tenant. *Id.* at 452, 345 N.Y.S.2d at 371-72.

<sup>189</sup> 76 Misc. 2d 1044, 352 N.Y.S.2d 557 (N.Y.C. Civ. Ct. N.Y. County 1973).

<sup>190</sup> *Id.* at 1047, 352 N.Y.S.2d at 560.

<sup>191</sup> *Id.*

<sup>192</sup> See 2 J. RASCH, *NEW YORK LANDLORD AND TENANT LAW* § 993 (2d ed. 1971).

summary proceeding to enforce his rights in a situation where he has unreasonably permitted large sums of rental arrears to accrue.<sup>193</sup> Moreover, where a tenant can show bad faith on the part of the landlord, as in the case where he attempts to circumvent eviction procedures and use the nonpayment to evict a tenant from a rent-controlled apartment, or where some other basis for equitable estoppel is present, the *Antillean* decision suggests that the landlord will be denied recovery in the summary proceeding. In instances where the landlord's delay in bringing the summary proceeding is unavoidable, however, Judge Kassal indicates that the three-month rule need not be applied.<sup>194</sup>

In view of the history of landlord-tenant controversies and the confusion surrounding the adoption of the three-month rule, the interpretation given by Judge Kassal seems most equitable. Arbitrary and inflexible rules too often result in injustice. In light of the likelihood of abuse in cases where the landlord has delayed commencing the summary proceeding, the burden of proving reasonable diligence is properly placed upon him. On the other hand, the primary purpose of the three-month rule is to preserve the integrity of the summary proceeding, and, therefore, the rule should not be interpreted to automatically inure to the benefit of the tenant and thus bar the landlord from recovery.

#### DOLE v. DOW CHEMICAL CO.

##### *Actions Against a Village*

CPLR 9801<sup>195</sup> bars any action in negligence against a village unless it is served with a notice of claim pursuant to section 50-e of the Gen-

<sup>193</sup> The language employed by the court in *Maxwell*, in establishing the three-month rule, suggests that the three-month period governing the commencement of summary nonpayment proceedings is similar to a statute of limitations. Thus, when a landlord attempts to recover more than three months rent in a single proceeding, it will be deemed to be for rent which accrued during the three-month period immediately preceding the commencement of the action. Consequently, he will be barred from collecting an amount in excess of three months rent. Yet, when faced with the problem, the courts have followed one of three procedures, all in the name of the three-month rule. They have either (1) dismissed the proceeding altogether with leave to commence an action at law (*Gramford* and *Romero*); (2) dismissed the proceeding without prejudice to the commencement of a summary proceeding solely for three months rent or a plenary action at law for all rent due (*Stokes*); or (3) having excused the delay, permitted recovery for more than three months rent (*Malek* and *United Artists*).

<sup>194</sup> See note 186 *supra*.

<sup>195</sup> CPLR 9801 provides:

1. No action shall be maintained against the village for a personal injury or injury to property alleged to have been sustained by reason of the negligence or wrongful act of the village or of any officer, agent or employee thereof, unless a notice of claim shall have been made and served in compliance with section fifty-e of the general municipal law.