

# COMMON MISTAKES IN MULTIFAMILY LEASING

What is missing from your multifamily residential lease? Filling in the blanks that are not there.

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Itkowitz PLLC  
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***COMMON MISTAKES IN RESIDENTIAL LEASING:  
What's Missing from your Multi-Family Lease, Filling in the Blanks that Aren't There!***

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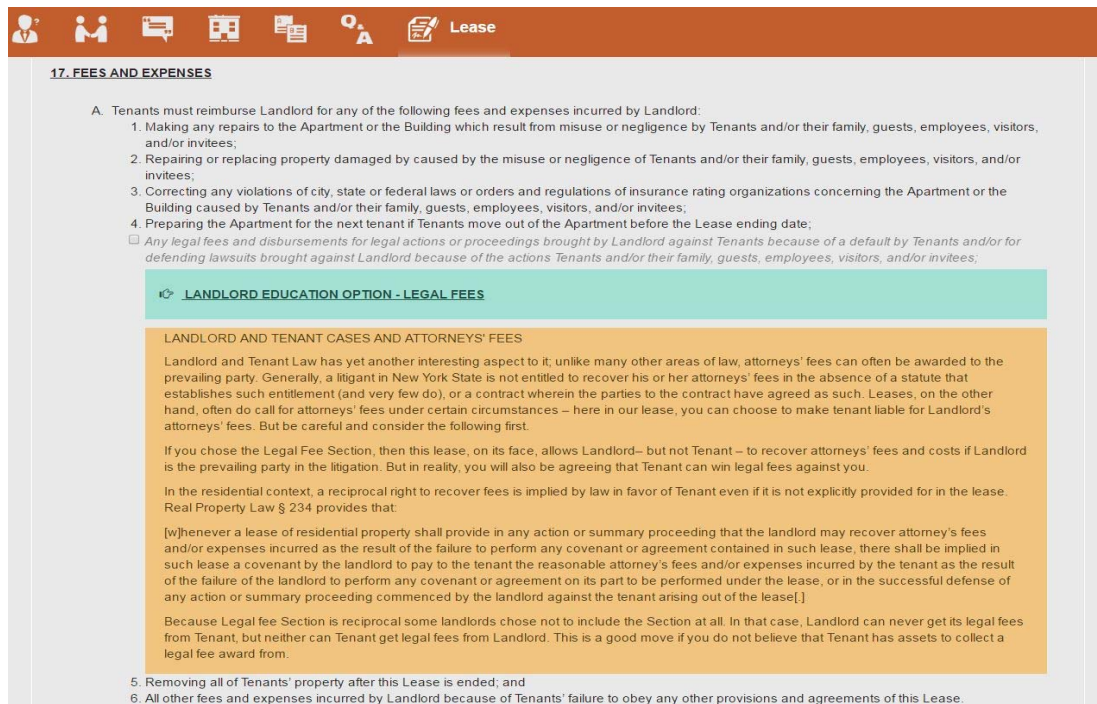
***By the way: YES! This is legal advertising. And we hope it works!***

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## I. INTRODUCING THE LANDLORDS NY RESIDENTIAL LEASE FOR USE IN MULTI-FAMILY BUILDINGS THAT YOU CAN FILL OUT ONLINE!

LandlordsNY and Michelle Maratto Itkowitz of Itkowitz PLLC have collaborated to draft and create a residential lease for use in multi-family buildings that you can fill out online.

- This new lease is comprehensive and is drafted to take into consideration many recent developments in the law, including things such as preventing tenants from engaging in short-term rentals, such as are typically arranged via Airbnb.
- The online interface for the LLNY Lease is easy to use. No weird PDF form fillers here!
- As you use the LLNY Lease, you are prompted to make choices, which result in a customized the lease to fit your needs. Some of these choices alert landlord to “silent lease issues”, of which landlord should be aware. Each choice presented comes with an educational pop-up section, which helps you make the best choice.



The screenshot shows the online lease interface with a navigation bar at the top containing icons for a person, a group, a document, a building, a checklist, a magnifying glass, and a pencil, with the word "Lease" next to the pencil icon. Below the navigation bar is a section titled "17. FEES AND EXPENSES". Under this section, there is a sub-section "A. Tenants must reimburse Landlord for any of the following fees and expenses incurred by Landlord:" followed by a list of five items. Item 4 is "Preparing the Apartment for the next tenant if Tenants move out of the Apartment before the Lease ending date;". Below item 4 is a checkbox with the text "Any legal fees and disbursements for legal actions or proceedings brought by Landlord against Tenants because of a default by Tenants and/or for defending lawsuits brought against Landlord because of the actions Tenants and/or their family, guests, employees, visitors, and/or invitees;". Below this is a teal header for "LANDLORD EDUCATION OPTION - LEGAL FEES". Under this header is a yellow box titled "LANDLORD AND TENANT CASES AND ATTORNEYS' FEES" containing text explaining that in New York State, attorneys' fees are not automatically awarded to the prevailing party. It states that if the landlord chooses the Legal Fee Section, it allows the landlord to recover attorneys' fees and costs if the landlord is the prevailing party in litigation. It also notes that in the residential context, a reciprocal right to recover fees is implied by law in favor of the tenant. The text concludes with a bracketed statement: "[w]henver a lease of residential property shall provide in any action or summary proceeding that the landlord may recover attorney's fees and/or expenses incurred as the result of the failure to perform any covenant or agreement contained in such lease, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorney's fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease, or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease[.]". Below this text is another sub-section "5. Removing all of Tenants' property after this Lease is ended; and" followed by item 6: "All other fees and expenses incurred by Landlord because of Tenants' failure to obey any other provisions and agreements of this Lease."

## **II. COMMON MISTAKES IN RESIDENTIAL LEASING**

A lease is a contract, a written instrument memorializing the conveyance of real property from landlord to tenant and the covenants between them.<sup>1</sup> The lease governs the relationship between the landlord and tenant, thus the lease is so important. Owners and managers sometimes get a bit lax when it comes to leasing, and that is a mistake.

The author is a landlord and tenant lawyer in the City of New York. As such, I work with leases all day long. I see all kinds of crazy things. The following are common mistakes I see in multi-family leasing.

### **A. Mistake: Drafting Your Multi-Family Lease Yourself From Free Bits and Pieces on the Internet.**

It is a mistake for a multi-family owner or manager to draft their own lease from bits and pieces collected on the internet. Ideally, a lawyer drafting a residential lease would: (a) know residential leasing, (b) know the jurisdiction, i.e. New York City, and (c) know landlord and tenant law in New York City. Many lease drafters, in fact, without the benefit of litigation experience, spend a lot of time working on clauses without a clear conception as to how such clauses can be enforced.

If an owner or manager is not going to hire an experienced leasing attorney, than he or she should use one of the popular forms for New York City residential leases out there (such as the LLNY Lease!).

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<sup>1</sup> Black's Law Dictionary.

## B. Mistake: Over-Duplicating Your Lease Form

Some owners and managers copy, PDF, fax, and duplicate, duplicate, duplicate their lease form so often that it becomes illegible. Again, the lease governs the relationship between the landlord and the tenant, it is a vitally important document. You need to be able to read it.

A better approach is to create a new lease for each tenant.

### Family Member's Renewal Lease and Eviction Protection Rights

1. For rent-stabilized and rent-control apartments (except in New York City, except when occupancy is restricted by another law) pursuant to federal, state or local law, regulation or order, their government agency requirements, where a tenant permanently vacates an apartment, any family member of the tenant residing below shall have the right to a renewed lease (rent stabilization), or to protection from eviction (rent control), provided that such family member has resided with the tenant as a primary resident in the apartment for 2 years (1 year for "senior citizens" or "disabled persons") immediately prior to the permanent vacating of the apartment by the tenant, or from the receipt of a tenancy or common carrier of the relationship, if the tenant is a graduate.

Upon the vacating of the family member who enters into a renewed lease (rent stabilization) or is protected from eviction (rent control) on or after June 23, 1997, where a "second generation" family member is entitled to a lease or is protected from eviction pursuant to these provisions, the owner is entitled to collect from the "second generation" family member the vacancy allowance as authorized by the rent stabilization and rent control laws as amended by the Rent Regulation Reform Act of 1997.

2. For all housing accommodations, the minimum residency requirement shall not be deemed to be interrupted by any period during which a family member temporarily relocates from the housing accommodation because he or she:

- (i) is engaged in active military duty;
- (ii) is enrolled as a full-time student;
- (iii) is not in residence at the housing accommodation pursuant to a court order not involving any grounds specified in the Rent Protection Act, or any Pending Law;
- (iv) is engaged in employment requiring temporary relocation from the housing accommodation;
- (v) is hospitalized for medical treatment; or
- (vi) has other reasonable grounds that shall be determined by the DHCJ upon application by the family member.

3. Definitions:

a. "Family Member" is defined as:

(i) A spouse, son, daughter, stepson, step daughter, father, mother, stepfather, stepmother, brother, sister, grandfather, grandmother, grandchild, full brother-in-law, mother-in-law, son-in-law or daughter-in-law of the tenant (or permanent tenant for New York City rent stabilized hotels).

(ii) In addition to such "traditional" family members, for the purpose of renewed lease and eviction protection rights, a family member shall include those persons (non-traditional family members) who have resided with the tenant, as set forth in item 1 above, in a familial relationship based upon emotional and financial commitments and interdependence with the tenant or permanent tenant.

**MAKE SURE YOUR LEASE IS NOT SO OVER-DUPLICATED  
THAT IT BECOMES ILLEGIBLE!**

**C. Mistake: The Rider is the Tail that Wags the Lease**

As time goes by, an owner's or manager's, favorite lease form gets antiquated. New laws are passed and new interpretations of old laws arise, and/or as people get new and better ideas about lease language. Therefore, this new material is included in a rider annexed to the standard lease form. Over time, the rider gets longer and longer, until the rider is longer than the lease. This is not the end of the world, but it is not elegant or efficient either.

The LLNY Lease is very much up-to-date, and will be kept that way. A great example of this is the inclusion in the LLNY Lease of a prohibition against Airbnb, which we will examine below.

**D. Mistake: The Lease Misses the Opportunity to Define Landlord's Expectations of Tenant**

A lease is a contract, a legal document. But this author also has always seen the lease as the first opportunity for the landlord to really inform the tenant of landlord's strong expectations of tenant. Again, a great example of this is the inclusion in the LLNY Lease of a prohibition against Airbnb, which we will examine below. Tenants read the lease (presumably) BEFORE they agree to become tenants. If a tenant has an idea in her head that she is renting the apartment for Monday through Friday, but she plans to be back at her parents' house on Long Island every weekend, at which point she is excited to subsidize her rent via short-term leasing, such as Airbnb gigs, then when she reads the clear prohibition against short-term rentals in the LLNY Lease, she will think again. She may well not enter into the lease or she may sign it and adjust her expectations of what she can get away with in your building.

### III. LLNY LEASE SECTION: NO AIRBNB

There still seems to be a great deal of confusion surrounding the prohibition in New York City against short-term leasing. Let us demystify what can and cannot be done, by starting with the relevant statutes – the New York State Multiple Dwelling Law (“MDL”) and the New York City Housing Maintenance Code (“HMC”).

#### A. The Statutes<sup>2</sup>

A “multiple dwelling” is a dwelling which is rented as the residence or home of three or more families living independently of each other.<sup>3</sup> Therefore, because **the prohibition on short-term leasing is codified in the definitions section of the MDL, it applies only to buildings that legally have three or more units.** MDL § 4(8)(a) is the relevant section of the statute and we need to read it closely.

Multiple Dwelling Law § 4(8)(a):

A “class A” multiple dwelling is a multiple dwelling [3 units] that is occupied for permanent residence purposes...**A class A multiple dwelling shall only be used for permanent residence purposes. For the purposes of this definition, “permanent residence purposes” shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more** and a person or family so occupying a dwelling unit shall be referred to herein as the permanent occupants of such dwelling unit. The following uses of a dwelling unit by the permanent occupants thereof shall not be deemed to be inconsistent with the occupancy of such dwelling unit for permanent residence purposes:

**(1)(A) occupancy of such dwelling unit for fewer than thirty consecutive days by other natural persons *living within the household of the permanent occupant such as house guests or lawful***

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<sup>2</sup> For those of you who are bored by the in-depth statutory analysis sections of my articles, skip to Section I(B) below.

<sup>3</sup> MDL § 4(7).



***boarders, roomers or lodgers; or (B) incidental and occasional occupancy of such dwelling unit for fewer than thirty consecutive days by other natural persons when the permanent occupants are temporarily absent for personal reasons such as vacation or medical treatment, provided that there is no monetary compensation paid to the permanent occupants for such occupancy.***

[Emphasis supplied.]

Next, we need to make sure that we understand what the statute means by “*lawful boarders, roomers or lodgers*”. MDL § 4(5) defines “***Lawful boarders, roomers or lodgers***” as “***a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein.***” That definition still leaves us with some questions, for example: How many lawful boarders, roomers or lodgers can you have and still be ok under MDL § 4(8)(a)? And what does “living within a household” mean? For these answers we need to turn to the New York City Housing Maintenance Code (“HMC”) and the administrative decisions interpreting it.

The HMC applies to all dwellings.<sup>4</sup> Under HMC § 27-2004(14), an “*Apartment shall mean one or more living rooms, arranged to be occupied as a unit separate from all other rooms within a dwelling, with lawful sanitary facilities and a lawful kitchen or kitchenette for the exclusive use of the family residing in such unit.*” Under HMC § 27-2004(4), a “*family*” is:

- (a) A single person occupying a dwelling unit and maintaining a common household with not more than two boarders, roomers or lodgers; or
- (b) Two or more persons related by blood, adoption, legal guardianship, marriage or domestic partnership; occupying a dwelling unit and maintaining a common household with not more than two boarders, roomers or lodgers; or
- (c) Not more than three unrelated persons occupying a dwelling unit and maintaining a common household;

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<sup>4</sup> N.Y. ADC. LAW § 27-2003.

Moreover, under HMC § 27-2078, ***“a family may rent one or more rooms in an apartment to not more than two boarders, roomers or lodgers, and a rental to more than two boarders, roomers, or lodgers constitutes an unlawful use as a rooming unit”***.

In *NYC v. Carrey*<sup>5</sup>, the Environmental Control Board (“ECB”) held that in an apartment with two roommates, when one roommate went away and rented his room to two (2) tourists for less than thirty days, that this constituted the guests, *“living within the household of the permanent occupant”*. This works in light of the above statutes. The roommates were a “family” according to the HMC (not more than three unrelated persons occupying a dwelling unit and maintaining a common household) with not more than two lodgers.

Although see *NYC v. 488 West 57<sup>th</sup> Associates*<sup>6</sup>, where the ECB held that in an apartment with two roommates, when they rented parts of the apartment simultaneously to four (4) tourists for less than thirty days, that this did NOT constitute, *“living within the household of the permanent occupant”*. Four boarders were two too many and, thus, the apartment was being improperly utilized as an unlawful rooming unit.

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<sup>5</sup> ECB Appeal Nos. 1300602 & 1300736, 9/26/2013.

<sup>6</sup> ECB Appeal No. 1400043, 3/27/2014, LVT No. 25476.

**B. The Bottom Line – What You Can and Cannot Do**

Therefore, it is it is NOT permissible in an apartment located in a New York City multiple dwelling to have a paying guest or guests for less than thirty (30) days when:

- (1) no permanent resident is present in the apartment; or
- (2) the guests number three or more.

Stated another way, it is only permissible for not more than two guests to stay within the household of a permanent occupant of a multiple dwelling for less than 30 days under two circumstances:

- (1) If the guest is (or two guests are) “living within the household of the permanent occupant”, i.e. the tenant is home. For example, this could encompass the classic bed and breakfast gig, where a guest lives with the permanent occupant for a few days.
- (2) Or if the permanent occupant is temporarily away and the guest does NOT pay. For example, if the tenant is on vacation for a week and lets her cousin stay in the apartment and does not take any money for the favor, then there is no violation of the short-term leasing law.

**C. Rent Stabilized Tenants Have Further Prohibitions Against Short-Term Leasing**

**When an apartment is Rent Stabilized, using it as a hotel room and profiteering off it is an incurable ground for eviction, as it undermines a purpose of the Rent Stabilization Code.** In *Bpark v. Durena*<sup>7</sup>, Judge Lau held that the tenant had "engaged in profiteering by renting out the apartment or allowing his children to rent out the apartment, to a series of short-term transient tenants for commercial purposes on Airbnb." The Court explained that, "[s]uch brazen and commercial exploitation of a Rent Stabilized apartment significantly undermines the purpose and integrity of the Rent Stabilization Law and Code and is therefore incurable."

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<sup>7</sup> 100145/2014, NYLJ 1202725492875, at \*1 (Civ., KI, Decided April1, 2015).

**D. Do NOT Confuse Short-Term Leasing with a Tenant's Right to a Roommate or to Sublet**

Nothing protects a tenant's right to do short-term leasing in the way that a tenant's right to a roommate or a subtenant is protected by other statutes. Under certain very specific circumstances, a residential tenant has the right to a roommate and/or to sublet his or her apartment.

**Neither the right to a roommate nor the right to sublet, however, exists when the terms is for less than thirty days.** The prohibition on short-term leasing trumps the roommate law or the sublet law by defining who may occupy a Multiple Dwelling. In *3357 LLC v. Stelle*<sup>8</sup>, tenant had rented her three-bedroom apartment to over 100 guests from all over the world for two-and-one-half times the rent, and gave each of these guests the access code for the front door of the building. Tenant claimed she did not illegally sublet the apartment, but that she needed help making the \$2,700.00 rent and these 100 folks were her "temporary roommates". The court held that the 100 guests could not be roommates because they stayed for less than 30 days.

**E. The LLNY Lease Addresses Short-Term Leasing HEAD ON**

The LLNY Lease contains this use clause in Section 3:

USE OF THE APARTMENT

- (A) Tenants shall use the Apartment for living purposes only.
- (B) Tenants shall not violate Real Property Law § 235(f) or similar statute, commonly known as "the Roommate Law".
- (C) Tenants shall not violate New York City's Administrative Code Section 27-2075 or similar statute, which, among other things, limits the number of people who may legally occupy an apartment of this size.

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<sup>8</sup> LVT Number 26563, Index No. 77007/2011 NYLJ No. 1202736933498 (Civ. Ct. NY Cty. 8/6/2015, J. Saxe).

(D) **Tenants shall not violate Multiple Dwelling Law § 4(8)(a) or similar statutes, which, among other things, prohibit short-term leasing of an apartment. The Apartment may not at any time be used for occupancy by any person on a transient basis, including, without limitation, the use of the Apartment as a party space, hotel, motel, dormitory, fraternity house, sorority house, rooming house, hospital, nursing home, sanitarium, or rest home, nor may Tenant or anyone on Tenant's behalf advertise for any such use of the Apartment on Airbnb.com or any other website, newspaper, periodical or other medium.**

(E) Tenants shall not violate Zoning Resolution of the City of New York § 12-10, which, among other things, proscribes the ability to carry on a business inside an apartment.

(F) Tenants shall not assign this Lease or sublet the Apartment without Landlord's advance written consent in each instance to a request made by Tenant in the manner required by Real Property Law § 226-b or similar statute.

(G) There are \_\_\_\_ Tenants in this Lease. There are \_\_\_\_ bedrooms in the Apartment. Landlord has and will have no involvement in the assigning of bedrooms within the Apartment to the Tenants. Each Tenant is a tenant of the entire Apartment. Each Tenant is jointly and severally liable for all obligations under this lease.

(H) Tenants shall not cause or permit the installation of any lock, deadbolt or other locking device or mechanism that controls the entrance door to any individual bedroom ("Bedroom Door") within the Apartment. Tenants may use previously installed locking doorknob to lock an individual Bedroom Door from the inside, while such person(s) is/are in the bedroom. Tenants shall not change or replace any such locking doorknob.

[Emphasis supplied.]



Two LLNY Symposiums ago my training section as entitled, “*THERE ARE TOO MANY PEOPLE IN THAT APARTMENT! Who, besides the tenant on the lease, has a right to be in an apartment and for how long?*” and at the last LLNY Symposium my talk was entitled, “*EVICTING TENANTS FOR SHORT-TERM LEASING VIOLATIONS: It’s good for your building!*” Both of these booklets are on my site at [itkowitz.com](http://itkowitz.com) if you want more in depth information on the Airbnb, roommate, or subtenant topics.

#### IV. LLNY LEASE SECTION: GETTING AWARDED LEGAL FEES IN LANDLORD AND TENANT LITIGATION

##### A. You Need a Lease Provision that Supports an Award of Attorneys' Fees

Generally, a litigant in New York State is not entitled to recover attorneys' fees in the absence of a statute that establishes such entitlement, or a contract wherein the parties have agreed as such.<sup>9</sup>

Most lease forms are drafted to allow landlord – but *not* tenant – to recover attorneys' fees and costs if Landlord is the prevailing party in the litigation.<sup>10</sup>

##### B. In the Residential Context an Attorneys' Fees Provision in a Lease is a Reciprocal Covenant

In the *residential* context, a reciprocal right to recover attorneys' fees is implied by law in favor of tenant even if it is not explicitly provided for in the lease. Real Property Law (“RPL”) § 234 provides that:

[w]henever a lease of residential property shall provide in any action or summary proceeding that the landlord may recover attorney's fees and/or expenses incurred as the result of the failure to perform any covenant or agreement contained in such lease, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorney's fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease, or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease[.]

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<sup>9</sup> See e.g. *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 NY3d 592, 597 (2004) (“It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule.”)

<sup>10</sup> *Nestor v. McDowell*, 81 N.Y.2d 410, 415-416 (1993) (prevailing party entitled to fees and costs); *Peachy v. Rosenzweig*, 215 A.D.2d 301, 302 (1st Dept. 1995).

This is, obviously, a very powerful statute. Unsuspecting residential landlords and their attorneys might think, if they take a one-sided lease at face value without considering RPL § 234, that a vigorous litigation position held against a tenant has no downsides beyond the landlord's legal fees to prosecute the case. Such litigants can end up not only having to pay their own fees, but, if they lose, the tenant's as well.

### **C. Rent Stabilization – Legal Fees Available but Never “Possessory”**

The Rent Stabilization Law makes it unlawful to charge any “rent” in excess of the legal regulated rent.<sup>11</sup> Thus, lease clauses deeming legal and late fees to be additional rent have been held unenforceable against Rent Stabilized tenants for the purposes of obtaining a possessory judgment.<sup>12</sup> Note that landlord may sue a Rent Stabilized tenant for attorneys' fees, but a landlord may only obtain a money judgment against a tenant for such amounts, not a possessory judgment.<sup>13</sup>

### **D. Prevailing Party Status**

If attorneys' fees are a legally available remedy in a landlord and tenant litigation (you checked the lease and the relevant statutes), the big question then becomes – *Who is the prevailing party?* It wouldn't be fair for the loser to get legal fees! This is an oft-litigated issue and not as straightforward as you think at first blush.

The determination of which party should be accorded the status of “prevailing party,” thereby allowing recovery of attorneys' fees, requires a two-step analysis: (1) an initial consideration of the true scope of the dispute litigated, followed by, (2) a comparison of what was achieved within that scope.<sup>14</sup>

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<sup>11</sup> See RSL § 26-512 (a); RSC 9 NYCRR 2525.1.

<sup>12</sup> *Brusco v. Miller*, 167 Misc.2d 54 (App Term, 1st Dept. 1995).

<sup>13</sup> See *Silber v. Schwartzman*, 150 Misc.2d 1 (App Term, 1st Dept. 1991) (“[I]n a proceeding such as this brought under RPAPL § 711(2) for nonpayment of rent by the landlord of residential, rent-stabilized premises, attorneys' fees may not be considered ‘rent’ or be awarded as ‘additional rent’ in order to enable the landlord to obtain a possessory judgment, and a lease clause to that effect is unenforceable[.]”); *Crystal World Realty Corp. v. Sze*, 01-328, 2001 WL 1635430 (App Term 1st Dept. 2001).

<sup>14</sup> *Excelsior 57<sup>th</sup> Corp. v. Winters*, 227 A.D.2d 146 (1st Dept. 1996); *Solow v. Wellner*, 205 A.D.2d 339 (1st Dept. 1994), *aff'd*, 86 N.Y.2d 582 (1995).



It is not necessary that a party prevail on every contention to be determined a prevailing party.<sup>15</sup> For example, in the *Glorious 84 Realty Co.* case<sup>16</sup>, the landlord was found to be the prevailing party notwithstanding the fact that the tenant proved a warranty of habitability claim. In the *Excelsior 57<sup>th</sup> Corp.* case<sup>17</sup>, the landlord was found to be the prevailing party when it was awarded 49.5 months of the 54 months of rent it sought. In the *Peachy* case<sup>18</sup>, the court found that the landlord had obtained the status of prevailing party after ten days of trial during which time the tenant had imposed thirteen affirmative defenses and all but one of those defenses had been defeated. In *Peachy* the tenant's only successful affirmative defense was for breach of the warranty of habitability that resulted in an abatement of \$4,800.00, which was deducted against a \$62,000.00 judgment for the landlord.<sup>19</sup>

If you want legal fees, you need to be prepared to explain why you won most of what you sued for, and/or defeated most of the claims you were sued for.

#### **E. Timing for Going After Attorneys' Fees**

If a proceeding or action has been filed, then the time to go after attorneys' fees is *in that proceeding or action*. You can't wait, or you run afoul of cause-of-action-splitting. In *930 Fifth Corporation v. King*<sup>20</sup> (this case came through the First Department, i.e. Manhattan), the Court of Appeals observed that:

In a prior summary proceeding the defendant was found to have willfully violated a house rule restricting the harboring of pets on the premises....No claim for attorney's fees was raised in that proceeding. By this separate

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<sup>15</sup> *Botwinick v. Duck Corp.*, 267 A.D.2d 115, 117 (1st Dept. 1999); *Senfeld v. I.S.T.A.*, 235 A.D.2d 345 (1st Dept. (1997); *See also, Glorious 84 Realty Co. v. Daly*, N.Y.L.J., Mar. 7, 2001, p. 25, col. 1 (1st Dept. 2001).

<sup>16</sup> *Glorious 84 Realty Co.*, *supra* at 25.

<sup>17</sup> *Excelsior*, *supra*, 227 A.D.2d at 146.

<sup>18</sup> *Peachy*, *supra*, 215 A.D.2d at 302.

<sup>19</sup> *Id. But see, Bldg. Management Co. v. Antollino*, 570218-02 2002 WL 1770690, (App Term 1st Dept. 2002) (standing for the proposition that when both parties succeed in part and fail in part, neither should obtain legal fees).

<sup>20</sup> *930 Fifth Corporation v. King*, 42 N.Y.2d 886, 887-88 (1977).

action the plaintiff now seeks to recover reasonable attorney's fees incurred in that summary proceeding pursuant to the above lease provision.

The clauses of the lease are interdependent. The lessee covenants to obey the house rules. The right to re-enter and to remove the tenant arises on default of any covenant; and default by the lessee renders him liable for reasonable attorney's fees on demand. All these facets of the lease are interrelated and constitute but separate integral parts of the whole. The lease entails a single obligation, which thus requires the plaintiff to assert its entire claim in one action. **Failure to make a claim for attorney's fees in the initial summary proceeding results in the splitting of a cause of action, which is prohibited.**

[Emphasis supplied.]

I occasionally see the following. A landlord goes after a tenant for rent. Landlord files a proceeding and recovers the rent. The landlord does not want to pursue the legal fees at that time, she wants the case to be over. Six months later the tenant falls behind again and the landlord goes after the tenant a second time. This time, the landlord is angry and wants to pursue ALL her legal fees – the fees for the second proceeding and the fees for the first proceeding. In order to get the fees from the first proceeding, Landlord needs to make a motion within the context of the first proceeding. Landlord cannot sue for the first proceeding's legal fees as part of the second proceeding.

Landlords need to understand that the time to pursue attorneys' fees is when they are in court. A claim for attorneys' fees is not something you can hold in reserve for a later day.

#### **F. The Attorneys' Fee Hearing – More Fun!**

Think about what you are asking the court to do here. You are asking the court to award you “reasonable legal fees”. It makes sense, therefore, that the burden is upon you to demonstrate to the court what those “reasonable” attorneys' fees are. The foundational evidence of what the attorneys' fees amounted to is the legal bills. Let us talk about the legal bills.

It is vital here to note that attorneys are required to maintain contemporaneous time entries. It is not acceptable for attorneys or support staff to go back and “recreate” time spent on a

case after the day on which the task took place. Civil Practice Laws and Rules (“CPLR”) 4518(a) states:

Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.

Accordingly, for billing records to be admissible in an attorneys’ fee hearing, they must be made contemporaneously.<sup>21</sup>

“Block Billing” is the practice of assigning a one-time charge to multiple tasks. An example looks like this:

June 10, 2008: Telephone conferences with client, retained expert; legal research; meeting with expert and associate = 4.00 hours.

Block Billing is a frowned upon practice and legal bills submitted into evidence containing Block Billing often result in a diminution of a legal fee award if one is achieved. The reason for this is that Block Billing entries impede the court’s efforts to evaluate the reasonableness of any of the listed activities.<sup>22</sup>

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<sup>21</sup> See, e.g. *Shaw, Licitra, Eisenberg, Esernio and Schwartz, P.C. v. Gelb*, 221 A.D.2d 331, 331-32 (2nd Dept. 1995), *leave to appeal denied* 87 N.Y.2d 810 (1996).

<sup>22</sup> *Silverstein v. Goodman*, 113 A.D.3d 539 (1<sup>st</sup> Dept. 2014); *Community Counseling & Mediation Services v Chera*, 115 A.D.3d 589 (1st Dept 2014). Both cases upheld a Ten Percent (10%) reduction in fees due to Block Billing.

**G. Wait A Minute! Should I Bother Going After My Attorneys' Fees? Does a Legal Fees Clause in a Residential Lease Create More Exposure than it Does Landlord Any Good?**

**This question probably should have been asked FIRST. But no one ever does.** *Is it WORTH going after attorneys' fees?* Is it possible to collect from the opposing party? Or is the opposing party judgment-proof?

I recently represented a tenant against Stuyvesant Town on a non-primary residence case. Stuy Town is the biggest multi-family landlord in New York City. The case I was working on was very thin. I wanted to use the standard line on landlord's counsel, "*Hey, you better drop this fishing expedition of a case or else when tenant wins, landlord will have to pay tenant's legal fees!*" I could not use that line because the Stuy Town lease does NOT have a legal fees provision in it!

Which makes a lot of sense for them! Stuy Town isn't getting rich on trying to collect legal fees from tenants it evicts. It can't get a possessory judgment for legal fees against any Rent Stabilized tenants it has to sue for arrears, even assuming it would be held to be the prevailing party in such a litigation. So what's the point? On the other hand, the lack of a legal fee clause in the case I was working on allowed Stuy Town the luxury of being able to pursue a nonprimary case as far as it wants to, with only the cost of its own attorneys to worry about. That's pretty smart.

Please note! We are not saying that a landlord should never have a legal fees clause in a multi-family lease. Not at all! We are just saying that it is a decision to be *considered*. If you have a market-rate and/or luxury tenant or a tenant with a meaningful guaranty, a legal fees provision in the lease may make a lot of sense because such tenants are collectible.

For these reasons, the LLNY Lease gives landlords the OPTION of including a legal fee clause! And the option is supported by a drop down box that educates the landlord about these pros and cons.

## **H. TIPS: Ask for Attorneys' Fees From The Other Side And Be Careful With Stipulations Of Settlement.**

When representing landlords, I often ask that tenants pay landlords' attorneys' fees as part of a settlement agreement. This works sometimes. It doesn't hurt to ask.

Every stipulation should explicitly mention the deal between the parties regarding attorneys' fees. If the intention is that no party should pay the other party's attorneys' fees, then both parties should explicitly waive any right to such fees through the date of the stipulation.

## **V. LLNY LEASE SECTION: PETS**

Landlord can have a "No Pets" clause, but if the tenant gets a pet and keeps it for more than three months, this section is waived. Likewise, if Landlord allows a pet and utilizes the pet section we offer in the LLNY Lease, then Landlord is stuck with the pet unless the pet becomes a nuisance ("nuisance" as defined by the law, NOT by the Landlord).

N.Y.C. Admin Code § 27-2009.1 (Rights and responsibilities of owners and tenants in relation to pets) states that a landlord waives the right to evict a tenant that has violated a pet restriction when the following four elements are met:

- the animal has been harbored in a residential unit;
- in an open and notorious manner;
- with the lessor's knowledge, or that of its officers, principals, agents, and/or employees; and
- a holdover proceeding has not been commenced against the unit's occupants within a three month window period.


See *19 East 80th Street Associates v. Karman*, N.Y.L.J., 4/14/98, p. 25, col. 4 (App.Term, 1st Dep't) ("Landlord waived enforcement of the 'no pet' lease covenant ... by not commencing a summary proceeding within three months after it learned that tenant harbored a dog in the subject apartment."); *Landmark Properties v. Olivo*, 5 Misc. 3d 18, (App. Term 2<sup>nd</sup> 2004) ("[L]andlord's prolonged toleration of the dog indicated that the lease's no-pet clause was not a substantial obligation of the tenancy.").

This waiver is ineffective if the pet is a nuisance, damages the premises, or "substantially interferes with the health, safety or welfare of other tenants or occupants of the same or adjacent building or structure."

In *Linden Hill No. 1 v. Kleiner*, 124 Misc.2d 1001 (NYC Civ. Ct. Queens Cty 1984), the Court held that the statute which provides for a waiver of any provision in a lease prohibiting household pets in multiple dwellings unless the landlord commences a summary proceeding within three months of knowledge of the fact, applies to residential co-operatives.

## VI. FURTHER CUSTOMIZATION ON THE WAY

We are contemplating further automation of and inclusion of landlord education in the LLNY Lease. Let us know your feedback and suggestions!



### RESIDENTIAL APARTMENT LEASE

Not rent stabilized  Rent stabilized

Landlord and Tenants make this apartment Lease agreement as follows.

#### 1. IMPORTANT TERMS

Landlord and Tenants agree that the following important terms shall have the following meanings.

Date of Lease	<input type="text"/>		
Landlord	<input type="text"/>	(“ Landlord” or “Landlord”)	
Tenant 1	<input type="text"/>	Contact Email	<input type="text"/>
Tenant 2	<input type="text"/>	Contact Email	<input type="text"/>

(Collectively referred to as “the Tenants”.)

#### LANDLORD EDUCATION OPTION – HOW MANY TENANTS SHOULD I PUT ON THE LEASE?

##### ROOMMATES AND FAMILY MEMBERS

Under New York Real Property Law § 235(f), often referred to as the “Roommate Law”, a residential lease entered into by one tenant implicitly permits that tenant to share the apartment with either his/her immediate family or unrelated persons. This is true even if a residential lease says otherwise.

If a landlord violates the Roommate Law, a tenant may seek an injunction to enjoin and restrain such unlawful practice and, the tenant can recover actual money damages sustained as a result of such unlawful practice, including tenant’s court costs and, depending on the lease, attorney fees.

##### A Lease for One Tenant

A landlord may not restrict occupancy of an apartment to a tenant or even to such tenant and his or her immediate family. Any such restriction in a lease is unenforceable as against public policy. The court will simply ignore it.

Any residential lease entered into by one tenant shall be construed to permit occupancy by:

- the tenant
- immediate family of the tenant
- one additional occupant, and
- dependent children of the occupant

##### A Lease for MORE THAN One Tenant

Any residential lease entered into by two or more tenants shall be construed to permit occupancy by:

- tenants
- immediate family of tenants

## ABOUT THE AUTHOR

Michelle Maratto Itkowitz is the owner of Itkowitz PLLC. She practices real estate litigation. Michelle has over twenty years of experience, and is best known for her work in the area of commercial and complex-residential landlord and tenant law in the City of New York. Michelle's core competencies include: Rent Stabilization and Rent Control, the Loft Law, Yellowstone injunctions, tenant buyouts, clearing buildings so that construction projects can go forward, and Rent Stabilization Due Diligence. She also is very experienced in general commercial litigation.

Michelle publishes and speaks frequently on legal issues in real estate. The groups that Michelle has written for and/or presented to include: Lawline.com; The Columbia Society of Real Estate Appraisers; LandlordsNY; Lorman Education Services; The Association of the Bar of the City of New York; The New York State Bar Association, Real Property Section, Commercial Leasing Committee; Thompson Reuters; The Cooperator; The New York State Bar Association CLE Publications; The TerraCRG Brooklyn Real Estate Summits; The Association of the Bar of the City of New York; and BisNow

Michelle regularly creates and shares original and useful content on real estate and law, including booklets, videos, articles, and podcasts. She is frequently quoted in the press on a variety of real estate and legal issues. As the "Legal Expert" for LandlordsNY.com, the first social platform exclusively for landlords and property managers, Michelle answers member's questions, guest blogs, and teaches. Michelle recently developed a seven-part, eight-hour continuing legal education curriculum for Lawline.com entitled "New York Landlord and Tenant Litigation". Over 16,000 lawyers have purchased Michelle and Jay Itkowitz's earlier CLE classes from Lawline.com, and the programs have met with the highest reviews. Jay and Michelle are currently co-authoring a chapter on lease remedy clauses for the New York State Bar Association, Real Property Section, Commercial Leasing Committee.

Michelle is admitted to practice in New York State and the United States District Court for the Southern District of New York. She received a Bachelor of Arts in Political Science in 1989 from Union College and a Juris Doctor in 1992 from Brooklyn Law School. She began her legal career at Cullen & Dykman.

There are many ways to keep up with Michelle. When Michelle tweets, which is not an obnoxious amount, she does so in an easy to understand manner about useful stuff regarding real estate, business, the legal industry, and organic herb gardening. Feel free to contact Michelle; she would be happy to speak to you.



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