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The Nuisance of Nuisance: When Will Courts Allow Tenants to Cure?

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One of the unusual features of rent control and rent stabilization is the ability to evict a tenant based on nuisance, even if the lease doesn't give you the right to do so. The cause of action has been defined as "a continual course of conduct over a period of time performed by the tenant which poses a threat to the comfort, safety, health and peaceful enjoyment of the premises by others" [Copart Industries v. Con Ed, 41 NY2d 564 (1977)].

Evicting a tenant based on nuisance can be a nuisance due to the difficulties of proof and the latitude the courts in New York City have in allowing a tenant to cure the nuisance, even post-judgment.

Two Types of Nuisance Cases

Some nuisances evictions are based on a breach of the lease (that is, you claim that the tenant is violating a specific lease clause by creating the nuisance in question). In this type of eviction case, you're required to send the tenant a notice to cure before starting the case and the court *must* grant an opportunity to cure [RPAPL §753(4)]. Other nuisance evictions are based on a fundamental breach of the tenancy itself. These cases (known as "nuisance holdovers") require a higher standard of proof. You must show very egregious conduct by the tenant. In this type of nuisance case, you're not required to send

a notice to cure and the court has discretion to grant an opportunity to cure before ordering the tenant's eviction, but it's not required to do so [Ritz v. Bitner: NYLJ 11/25/83; p. 12 col. 2 (App. Term 1st Dept.); Lincoln Terrace Assocs. v. Snow: NYLJ 11/28/83 p. 5 col. 3 (App. Term, 1st Dept.)].

However, that discretion is not unbridled and requires sensitive consideration not only of the rights and interests of the tenant, but of the health, safety, and welfare of the other tenants in the building and of the building staff [Domen Holding Co. v. Aranovich, 1 NY3d 117 (threats to health, safety, and welfare of other tenants *and staff* held actionable nuisance)].

If Case Brought Based on Both Types of Nuisance

Your attorney may decide to bring the case based on both types of nuisance. This is legally called "pleading in the alternative." In this situation, your attorney should send the tenant a notice to cure. However, if the court rules that the tenant has committed the more egregious type of nuisance (not based on a breach of the lease), the mere fact that you sent the notice to cure doesn't require the court to give the tenant a post-judgment cure period.

For example, an appeals court rejected one tenant's claim that the court was required to give the tenant a cure period because the owner had sent a notice to cure. The court noted:

"We disagree with tenant's contention that landlord's service of the notice to cure required by … the Rent Stabilization Code … for the maintenance of a holdover proceeding based upon a violation of a substantial obligation of the lease required that tenant be afforded either a pre-termination or post-judgment … cure period for the nuisance ground sued

upon by landlord in the alternative …. Where, as here, grounds exist for the maintenance of both a nuisance holdover and a holdover based on breach of a substantial obligation of the lease, a landlord should be permitted to proceed on both grounds in the alternative … without the procedural pre-requisites of the one becoming engrafted on the other. If nuisance be established, the service of the notice to cure required for the alternative ground of violation of the lease should not mandate the affording of an opportunity to cure the nuisance if the proof shows that such opportunity is otherwise unwarranted [Rockaway One Co., LLC v. Calif: 194 Misc2d 191 (App. Term, 2nd Dept.)] .

Factors Court Considers When Deciding Whether to Grant Post-Judgment Cure

When deciding whether to grant a post-judgment cure for nuisance, the courts all consider the *source* of the nuisance. If the source of the nuisance is something extrinsic to the tenant himself, the removal of that source solves the problem. If however, the source of the nuisance is *intrinsic* to the tenant himself, the removal of the source means the removal of the tenant--eviction [City of NY v. Rodriguez: NYLJ 4/24/90, p. 22, col. 2 (App. Term, 1st Dept.); Sedgwick Ave. Assocs. v. Kehaya: NYLJ 6/21/94, p. 21, col. 4 (App. Term, 1st Dept.)].

So, for example, the keeping of a large number of animals in the apartment is curable by the simple removal of the animals [445 E 86th Owners Corp. v. Kayatt, NYLJ 3/13/87, p. 12, col. 1 (App. Term, 1st Dept.)].

The permanent removal of an offensive relative of the tenant's from the premises cures the nuisance caused by that offensive relative [Bessler v. Kandil: NYLJ 3/15/93, p. 29, col. 1 (App. Term, 2nd Dept.); 15th Assocs. v. Cintron: NYLJ 7/17/98, p. 21, col. 1 (App. Term, 1st Dept.)].

By contrast, if the tenant's own mental condition makes continued occupancy a threat to other tenants in the building, the court will find that there is to be no opportunity for the tenant to cure after judgment has been rendered. [Lexington Ave Props. v. Charrier, NYLJ 1/29/86, p. 11, col. 4, HCR Serial #00020496 (App. Term, 1st Dept.)].

How, then, shall a court determine whether the nuisance in question is curable? The first question the court will have to answer for itself is whether the nuisance as described in the court papers, is the kind that is subject to cure, such as the exclusion of an objectionable relative or of the kind that is not intrinsically curable, such as the tenant's predilection for flashing genitals to neighbors. Once the court has made that intellectual study of what is alleged by the owner – the first cut, as it were – then the court has to go on to see if it is convinced by the balance of the testimony that the behavior in question really is as the owner claims.

However, given the law's abhorrence for forfeiture, the court may well wish to verify the truth of the matter. Under New York City Civil Court Act §110(c), the court has the power to go directly to the apartment in question and see for itself. That section empowers the housing part to "employ any remedy, program, procedure or sanction authorized by law for the enforcement of housing standards, if it believes they will be more effective to accomplish compliance or to protect and promote the public interest." Since the very nature of nuisance proceedings speaks to "enforcement of housing standards… to protect and promote the public interest," it is clear that such proceedings serve as an appropriate predicate for the invocation of §110(c) power. Using this power, not only does the court have the more common senses of sight and hearing at its disposal, but, as may often be necessary in nuisance cases, the sense of smell as well.

The court may employ this procedure as a continuation of the trial, a reopening of the trial, a post-trial hearing, or a hearing specifically directed to the issue of post-judgment cure. But, however one regards it, it is a "procedure" under §110(c) to test whether there is a continuing threat to public health to be found in this apartment.

In a sense, the court may reduce the question, "Is the tenant entitled to post-judgment cure?" to "Did the tenant take advantage of all the other opportunities to cure?" Where, as is so unfortunately common in these cases, the tenant simply does not appreciate that there really is a problem, the question is not the cure of the apartment's offending conditions, but the cure of the offender's unawareness of the offense.

Nuisance proceedings lie outside of the normal scope of landlord-tenant litigation. They have their own special rules, considerations, and procedures. Mastering all of that is feasible enough, but can be something of a nuisance.

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