



Recovery of Possession: Factors affecting landlords when a tenant passes

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Landlords face situations where their residential tenants die. Various scenarios give rise to different paths enabling the landlord to recover possession of their apartments. A primary factor dictating the landlord's path is whether there was a lease in effect at the time of the tenant's demise. Where the tenant's demise occurs during a period in which there is a lease whose term has not yet expired, the leasehold passes to the Estate, which remains liable for the payment of rent. Where the demised tenant's occupancy was without a lease, (which could include a rent controlled tenant) then the landlord may be entitled to immediate possession of the apartment. Landlords sometimes utilize self-help and simply change the locks. Caution should be exercised in this regard. Self-help must be exercised peacefully. Peaceful self-help generally means the premises have been abandoned. Therefore if there is any evidence that other occupants such as sub-tenants, roommates or family resided in the premises the landlord should not exercise self-help.

Notwithstanding the recovery of possession, the Estate still has a right to recover the decedent's property. Thus, the landlord is required to hold the deceased's personal property for a reasonable period of time. Some courts have interpreted this to mean thirty days. A landlord who exercises self-help should try to contact family members and afford them an opportunity to remove the decedent's belongings which should be supervised by the building staff. A personal representative of the Estate should also provide a general release or indemnification before permitted to enter the premises. The Estate may obtain court order to enter the premises where the purpose is a search of a will. So it is better practice that the landlord not remove the property immediately.

Where the deceased tenant leaves occupants in the apartment with no lease the landlord can immediately commence a summary holdover proceeding against the occupants. Any license or sublease would cease upon the expiration of the tenant. If the deceased tenant was either rent controlled or they occupied a rent stabilized apartment, an occupant might assert a defense of "succession," as defined by the Rent Stabilization or Rent Control Laws. That defense would assert that as a family member (as defined by law), having occupied the premises with the decedent for a period of two years (or one year if the occupant is either disabled or over 62 years), is therefore entitled to succeed as the tenant of record. The burden rests on the occupant to prove the relationship and length of co-occupancy. As these facts are usually within the sole confine of the occupant's knowledge the defense is subject to discovery, including depositions and documentation. In this situation no rent should be accepted.

If the apartment is unoccupied, and no representative of an Estate has been appointed, then 90 days after the date of death the landlord may commence a summary non-payment proceeding against a next of kin or distributee, RPAPL §711(2). The pivotal requirement is locating a next of kin or distributee and their address to enable service of process. Commencing this proceeding may trigger the appearance of the lawyer for the Estate to resolve the issues of possession.

Where the apartment is occupied, no rent is being paid, and no representative has been appointed by the court the landlord is relegated to petition for the appointment of an administrator. This first requires obtaining the death certificate and then conducting a due diligence search for family members. In some jurisdictions this process can take several months. Good practice suggests that if the lease will expire in less than six months a landlord may decide to wait until the lease expires and then commence an action for possession. The filing of a petition in Surrogates Court, again could trigger an appearance by an attorney to resolve possession.

As the Estate is liable for the rent during the remaining lease term the landlord has the remedy of a summary non-payment proceeding against the executor or administrator. During the lease term the Estates representative may not live in the premises, nor may they sublet or assign the lease without the landlords' consent RPAPL §236. Such occupancy would be unlawful and grounds for a summary holdover proceeding.

If there was a pre-existing occupant in the subject premises with the tenant it cannot be automatically said that the continued occupancy of that person is a sublet or assignment. It is the landlord's burden to prove that such occupant was paying rent or providing some other consideration to the decedent or their Estate. If the Estate is paying the rent then that pre-existing family member or guest may be able to remain in the premises through the duration of the lease so long as the remaining terms of the lease and any relevant laws are not being violated by them.

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