

THE UNLAWFUL DETAINER PROCESS

An Invitation to Reflect Before You Proceed:

The unlawful detainer process is neither simple nor “standard.” Every landlord/tenant dispute is unique, and a misstep in the review and evaluation of litigation and non-litigation options can have significant financial consequences. In this article, we will review some of the critical decision-making points and the questions you need to ask yourself and your attorney before you step into the “Unlawful Detainer Process.”

The Unlawful Detainer Process is designed to expedite recovery of possession of real property when a tenant has violated his/her lease and/or the rental term has ended. However, “expedite” is a term which has a legal meaning that differs from the usual meaning we associate with things “moving quickly.” In situations where there is no contest (meaning the tenant does not dispute the grounds for eviction), the process of filing and serving an unlawful detainer (once the notice to perform or vacate has expired) takes at least another 30-45 days depending on how quickly the Complaint for unlawful detainer is served. While the State Legislature has seen fit to give the Unlawful Detainer Process priority in the court, the fact is that a number of procedural delays can occur, including court holidays and congested calendars. The consequence: If there is a contested unlawful detainer, then you can be looking at trial dates and final return of possession 60 to 90 days from date of filing of the complaint—and that is the expedited process when compared to the normal civil action, which can take between 6 months and a year to resolve unless

The Steps (“Hurdles”) of Unlawful Detainer:

1. Determination of Grounds: Breach of lease, non-payment of rent, desire to terminate the tenancy, or increased rent which the tenant does not agree to pay are all possible reasons for serving a notice terminating tenancy. However, prior to serving that notice, you and your counsel need to review whether or not there might be grounds for fighting the unlawful detainer such as retaliation, discrimination, or habitability issues. If you come to the point of having to serve a notice, the “flag” has gone up: You have a potential problem and someone needs to evaluate what course of action to take and what notice option is best to pursue. It is at this time that you can also try to negotiate an agreed date of move-out which can be documented. Too often the notices are sent without this review in an attempt to save money and costs. We encourage a more thorough review of options before the “notice” is even sent. This includes review of the history of the tenant and any complaints that have been made by the tenant concerning the leased premises or their other “rights.”

2. Preparation and Service of Notice: Once the decision is made to serve the notice, you need to make sure the grounds are clearly stated, all tenants and subtenants in possession named, and a copy sent to the guarantor and/or assignor, if any. While these last two “interested parties” are not necessary for the unlawful detainer process, they have contractual rights that should be reviewed since you may be looking to them for eventual

payment of rents and other costs. The issue of how to preserve your claims as to those other than the tenant is a subject of extensive litigation and should be reviewed at this time (the topic of our next article). Once the proper parties are named, then service is a “code requirement,” and a misstep here will invalidate the entire process, even if they owe you money or breached their lease.

3. Filing of Unlawful Detainer: Once the notice has expired, the Complaint is filed with the Superior Court. At this juncture, any communications with the tenant should be run, if not controlled, by counsel. Settlement, waiver issues, and potential defense issues need to be reviewed prior to filing. If you haven’t looked at the form Answer to an unlawful detainer Complaint to see the boilerplate defenses available, you should get a copy from the court, or email us and we will copy and send to you. The Complaint will need to anticipate to some degree the potential defenses that can be raised, and at the very least, the filing should reflect the fact that you and counsel have elected to proceed understanding the costs and potential risks of proceeding. The “form Complaint” (also worth reviewing) will also trigger a number of questions as to proper parties, assignment and subletting issues, rent unpaid, and what if any problems related to rent and habitability have arisen. While these topics are discussed prior to serving the notice, they should again be reviewed. If the decision is to proceed, assuming no practical settlement has been reached, then it is served, either by personal or substituted service. At this time, the issue of serving unknown persons who might claim a right to possession will be discussed and forms appropriate to that issue will also be prepared.

4. Post-Service: Service can be accomplished within a couple of days, or if substituted service is required, up to 20 days depending on defendants and court response to request for order to post and mail. In any event, once all parties are served, the wait begins for the tenant response.

5. Tenant’s Response: The tenant will either answer or file a demurrer and/or motion to strike. If answered, then a settlement conference and trial date will be set within 20-30 days. If a demurrer or motion to strike is filed (these are challenges to the allegations of the Complaint), then the hearing can be delayed for up to 35-40 days, and trial will not be set until those motions are heard. There are options available to advance these motions for hearing, but the delay can cause weeks to pass.

6. Negotiations and Settlement Options: Whether the tenant has counsel or not, there is the option to settle. Terms and conditions will vary and the economics will have to be considered. A thorough evaluation of options and litigation strategy is not inexpensive, but the consequences of losing (always a risk) is not just lost rent and delay in recovering possession, but exposure to attorney fees and costs to the tenant and his/her counsel. (Another issue to consider is whether or not to have an attorney fees provision in the lease.)

7. Settlement Conference and Trial: If not settled in the early stages, the court will require a mandatory settlement conference, and a trial will be set. The settlement conference will take several hours. A settlement master is appointed, who will

try to work out a negotiated settlement, often involving waivers of rent and fees if the tenant is likely to be unable to pay even if you get a judgment. Settlement will be impacted by whether you have assignors or guarantors who also might be liable. These complications will need to be considered (again, this will be discussed in our next article). If not settled, then a trial will go forward. The trial can be either a court trial (with a judge deciding) or a jury trial. A court trial usually takes less than a day. A jury trial will take at least 3-4 days depending on issues alleged. The costs of a jury trial can be several thousands of dollars a day. Preparation time for a jury trial involves the same cost depending on what issues are raised and how many witnesses must be called. The consequence of a jury trial is to delay further the final decision on the case.

8. Post Trial Delays: Whether decision is by court or jury, the fact is that a judgment may not be entered immediately for a number of procedural reasons. Delays in motions and requests for statements of decisions (when appropriate) can take up to weeks to resolve, and a judgment cannot be entered until these matters are concluded. Even with judgment entered, certain motions for relief from default and request for reinstatement can be made. It is also possible that a bankruptcy filing will delay final return of possession and add to the cost of the eviction. These potential issues should also be evaluated at time of filing and settlement conference.

Conclusion: The “process” is no easy road, and thorough evaluation and preparation is time-consuming and expensive. The best offense is a good defense: be thorough in your evaluation of tenants, maintenance of your property, and documentation of your management and tenant files. Pro-active management practice can mitigate unlawful detainer expense and save a lot of time.

Good Luck to All,

David Grokenberger