

A COMMERCIAL TENANT'S GUIDE TO LANDLORD DISPUTES

UNDERSTANDING COURT PROCEDURE AND ANSWERING
PETITIONS OR COMPLAINTS IN NEW YORK CITY



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ACKNOWLEDGMENTS

This document was prepared by attorneys at Manhattan Legal Services, 1 West 125th St., 2nd Floor, New York, New York 10027, 646-442-3100. This document is for general informational purposes only and is not intended to provide legal advice. The information in this guide is current as of June 9, 2021 and does not constitute legal advice.

INTRODUCTION

If you've received court papers from the landlord of your commercial space claiming you owe rent, this guide may help you understand the court process better.

A landlord may generally bring two types of legal actions to quickly recover possession of a property – a holdover proceeding or a nonpayment eviction proceeding. These types of cases are called “summary proceedings.” A landlord can bring a summary proceeding if a tenant continues in possession of a property after the expiration of a lease term or fails to timely pay rent or other charges, among other reasons.

Commercial landlord-tenant cases are handled in the General Civil Part of New York City Civil Court. For more information about how the court handles commercial landlord-tenant cases, you can visit the court's website here:

<http://www.courts.state.ny.us/courts/nyc/housing/commercial.shtml>.

Because of the coronavirus pandemic, landlords have been subject to an eviction moratorium which generally prohibits them from bringing summary proceedings to evict tenants as long as the tenant fills out a COVID-19 Hardship Declaration Form:

http://www.nycourts.gov/eposba/PDF/Commercial_Eviction_Hardship_Declaration-English.pdf.

The moratorium will expire on August 31, 2021.

If your landlord has resorted to “self-help” and is physically preventing you from accessing your property, you should contact a lawyer to help you determine whether this is an illegal lockout. Your landlord also may not unlawfully evict you using the threat of force.

There are other types of cases that a landlord may file against a commercial tenant. A landlord may file a type of case called an ejectment action to try to recover possession of a property. Ejectment actions are usually filed in New York Supreme Court. A landlord may also file a case for breach of contract, claiming some amount of debt owed, in New York City Civil Court (for amounts up to \$25,000) or Supreme Court (for amounts greater than \$25,000).

Even after a tenant gives up possession of a commercial property, if the property remains vacant, a landlord may still file a claim against the tenant for outstanding debt owed, e.g. sue for rent due for the remainder of lease term in addition to rent arrears.

GUIDE TO THE COURT PROCESS

What document did I receive? What does the document mean?

- **Rent Reminder Notice by Certified Mail** – The law requires landlords to notify tenants by certified mail if rent is not received within 5 days of the due date. If a landlord fails to serve this reminder notice before starting a nonpayment proceeding, a tenant may raise that failure as an affirmative defense.
- **14-Day Written Rent Demand** – Before a nonpayment case can be started, the landlord or someone working for the landlord must demand the overdue rent from the tenant and warn the tenant that if the rent is not paid, the tenant can be evicted. The demand must be in writing and must be correctly “served” on the tenant at least 14 days before the court case is started. If you receive this document, your landlord is likely preparing to sue you for eviction, and you should contact an attorney as soon as possible for legal advice. Depending on your specific circumstances, an attorney may be able to advise you on options for gaining more time to cure alleged lease defaults (e.g. seeking a *Yellowstone* injunction), including nonpayment.
- **Nonpayment Petition** (or simply “Petition”) – If a tenant still has not paid rent after the landlord has sent the required written notices, then the landlord can start a nonpayment eviction proceeding by serving a Nonpayment Petition on the tenant. The Petition will include information about how much rent is owed. If a landlord fails to include all of the legally required information in the Petition, a tenant may raise that failure as an affirmative defense.
- **Notice of Nonpayment Petition** – This Notice must be served together with the Petition. The Notice of Petition includes information about when the tenant must go to court for a hearing. If a landlord fails to include all of the legally required information in the Notice, a tenant may raise that failure as an affirmative defense.
- **Complaint** – A Complaint is a legal document which officially starts a lawsuit. It explains the legal reasons you are being sued, describes the relevant facts, and outlines what the landlord wants the court to give them (a judgment for money or possession of the premises). A Complaint is similar to a Petition, but in commercial lease cases, a Complaint is used in general breach of contract or ejectment actions, while a Petition is used in summary eviction proceedings.
- **Summons** – Like a Notice of Petition, a Summons is a legal document formally notifying you of your required appearance in court. It must be served with a copy the Complaint or with a notice describing the nature of the Complaint.

I received a Petition or Complaint, what next?

What information should I take note of?

- What court is this proceeding in? Where do I file my paperwork?
 - **Civil Court** – This is the City court which consists of 3 parts: general civil (including commercial landlord-tenant), housing, and small claims. The commercial landlord-tenant and housing parts of the New York City Civil Court are known as the “L&T Court” (landlord and tenant court). The L&T Court conducts proceedings pursuant to Article 7 of the New York Real Property Actions and Proceedings Law (“RPAPL”).
 - The General Civil part hears commercial landlord-tenant and consumer debt cases. It also has jurisdiction over ejectment actions for possession of property valued at \$25,000 or less.
 - The Housing part handles residential nonpayment summary proceedings and holdover summary proceedings.
 - The Small Claims part hears proceedings for monetary compensation up to \$10,000 in New York City and \$5,000 outside NYC.
 - **Supreme Court** – This is the state-wide trial court which can hear almost any type of case, except cases against the state. Because of the delay in processing cases in Civil Court during the COVID-19 pandemic, many landlords have gone to Supreme Court. For instance, the Supreme Court handles general breach of contract cases (e.g. disputes over lease terms) and ejectment actions for possession of real property.
 - You will need to file all of your documentation with the correct court. Look for the address on any notices and court papers you receive.
 - To find the Civil Court address and contact information for your borough, visit: <https://www.nycourts.gov/courts/nyc/civil/addresses.shtml>
 - To look up any court address by county and court type, use the court locator tool at: <https://www.nycourts.gov/courts/>
- Who sued you – was it the landlord?
- Who was sued – you, your business or both?
- If you were sued, is it because you signed a lease in your own name or because you have a personal guaranty?
- What were you sued for – eviction, money or both?
- What is the date of the document?
- What date did you receive the document?

- How long do you have to file a response in court?

What do I have to do next?

- If your business was sued, you need legal representation in court. In New York, an individual cannot appear “pro se” (for oneself) on behalf of their business.
- After receiving the Petition or Complaint, you will need to “Answer” it. The “Answer” is a formal court document that must be served on the landlord and filed in court.
- You can Answer orally by going in person to the clerk’s office at the court or use [the court’s form](#) to submit a written Answer. If you opt to Answer orally, be sure to prepare your defenses and counterclaims ahead of time before visiting the court.
 - Only use this form if you have been sued as an individual who signed the lease or an individual who has a personal guaranty or was otherwise named in the complaint. This Answer form is for individuals who are self-represented and are Answering on their own behalf, or “pro se.”

What do I write in my Answer?

- An Answer contains legal reasons, or “defenses,” explaining to the court why you should not be evicted or do not owe the money that the Landlord is claiming. You can Answer by stating a General Denial and also raising specific Affirmative Defenses.
- An Answer may also contain “counterclaims,” or allegations you have against the landlord if you believe the landlord has violated the law or any terms of their agreement with you.
- Review “Explanation of Defenses” and “Asserting Counterclaims in Your Answer” below for general descriptions of various possible defenses and counterclaims for commercial tenants. Identify the defenses and counterclaims you believe are applicable to your situation and include them in your Answer.

How long do I have to file an Answer?

- The amount of time you have to file an Answer depends on the type of case that was filed against you and how you were served with the court papers.
 - **Notice and Petition** – You have 10 days to answer a Nonpayment Petition after you are served with the Notice of Petition, although the court may be allowing litigants more time because of the pandemic.
 - **Summons and Complaint** – You have 20 days to answer a Complaint if the court papers were personally delivered to you. You have 30 days to answer if you were served by other methods, such as substituted service or “nail and mail” (see part 2 under “Explanation of Defenses” below for more information about service).
- If you want to amend your Answer after filing it, you generally have 20 days to do so without having to ask the court for permission, although the court may be allowing

litigants more time because of the pandemic. After 20 days, you can file a motion with the court asking for permission to amend your Answer.

- Generally, in summary nonpayment eviction proceedings, the court will set a date for trial or a hearing for between 3 and 8 days after you Answer, although the court may be allowing litigants more time because of the pandemic.

Where should I file an Answer?

- Your Answer should be filed with the same court where the Petition or Complaint against you was filed. To find out where to Answer based on the court where the proceeding was filed (listed on the papers you received), refer to this webpage: <https://www.nycourts.gov/courts/nyc/housing/locations2.shtml>.

How do I properly serve and file an Answer?

- Sign the Answer and Verification in front of a notary,
- Have the notary sign the Verification,
- Have someone 18 years or older send **a copy** of the Answer to the landlord's attorney (the address should be listed in the Petition or Complaint),
- Have the person who "served" (sent a copy of) the Answer fill out an Affidavit of Service and sign it in front of a notary,
 - <https://www.nynd.uscourts.gov/sites/nynd/files/forms/AffidavitofServicebyMailFILEABLE.pdf>
 - <http://www.nycourts.gov/courthelp/GoingToCourt/affidavitService.shtml>
- File the original Answer with the Affidavit of Service with the clerk's office at the court where the case was filed. You can file these court papers by going to the courthouse in person or by mailing them to the court clerk's office. For location information, visit: <https://www.nycourts.gov/courts/nyc/housing/locations2.shtml>
- For more information about the process, visit the court's website:
 - <https://www.nycourts.gov/courts/nyc/housing/answering.shtml#serving>
 - <https://www.nycourts.gov/courts/nyc/housing/forms/civlt69.pdf>

What happens after the Answer is filed?

- Once you file an Answer, the court will schedule a court date to hear your case. It is important that you attend your court date. If you do not, the court may enter a **Default Judgment** against you (see "What happens if I do not respond to a Petition?" below for more information).
- If the court issues a judgment against you and issues a warrant of eviction, the warrant must state the earliest date the eviction can occur. A tenant must be given at least 14 days' notice prior to eviction.

- An eviction warrant *may* be stayed (delayed) or vacated for good cause at the discretion of the court. To obtain a stay, a tenant must fill out an Order to Show Cause.
- An eviction warrant *must* be stayed in a nonpayment proceeding if a tenant pays all rent due to the landlord before the eviction actually occurs. The tenant may obtain the stay by depositing the full amount of rent due, plus the costs of the proceeding, with the court clerk. The amount deposited will be turned over to the landlord upon request.
- For more information about staying an eviction warrant, visit:
https://www.nycourts.gov/courts/nyc/housing/staysafterjudg_nonpay.shtml

What happens if I do not respond to a Petition?

- If you do not answer the Petition, the party suing you can ask the court to enter a **Default Judgment** against you. The default judgment may be a possessory judgment and/or a money judgment. Typically, a landlord seeking to evict a tenant will apply for a default judgment and an eviction warrant at the same time. If the landlord is granted a default judgment and eviction warrant, then the landlord will be able to evict you. If the landlord is awarded a money judgment, then they may be able to garnish your wages or levy your bank account.
- If you answer the Petition but then fail to appear at the time of your scheduled hearing, the landlord may also ask the judge to enter a default judgment and issue an eviction warrant. In this case, there is usually a 5-day stay before the eviction warrant is issued, and the judge may require the landlord to serve you with a copy of the default judgment first.
- If you receive notice of a default judgment, you may be able to vacate your default and/or stop the eviction. Read more here:
<http://nycourts.gov/COURTS/nyc/housing/vacatingjudg.shtml>

Where can I get legal assistance?

- **Legal Services NYC** is providing consultations for commercial tenants facing nonpayment proceedings. You can contact their hotline at (646) 442-3100.
- **New York City Bar** – you can request a lawyer at: <https://www.nycbar.org/get-legal-help/article/landlord-tenant/evictions/>

Where can I get more information?

- More information about the court process can be found online:
 - <http://nycourts.gov/courthelp//GoingToCourt/courtBasics.shtml>
 - http://ww2.nycourts.gov/courts/1jd/supctmanh/Self_Rep_Forms_Link.shtml
 - <http://ww2.nycourts.gov/courts/6jd/tompkins/ithaca/webpageLandlordTenantInst.shtml>

- For cases that were filed in New York Supreme Court, you can contact the New York Supreme Court for assistance:
 - http://ww2.nycourts.gov/courts/1jd/supctmanh/Help_Center.shtml

EXPLANATION OF DEFENSES

The following is a list of affirmative defenses you may assert in an Answer to a Nonpayment Petition or a Complaint. This list is not comprehensive, and a legal consultation will help you explore which defenses apply to your specific situation and possible additional defenses you may have.

Note that different defenses may be appropriate for Answering different proceedings. Some of the below defenses are applicable to multiple types of proceedings. You should assume that a defense is generally applicable unless noted otherwise.

1. General Denial

- This is a catch-all defense broadly denying that the landlord's claims are true. Including a General Denial helps to ensure that you do not accidentally admit to an allegation that you did not specifically address in your Answer.

2. Improper Service

- In order to properly begin a lawsuit, the party who is starting the lawsuit (the petitioner or plaintiff) must notify and "serve" (give) the party that is being sued (the respondent or defendant) the necessary court papers in a way that meets all of the legal requirements. If a landlord does not properly serve you as the tenant, you can raise "Improper Service" as an affirmative defense in your Answer. The judge may then decide to set a date for a special "traverse hearing" to decide whether the service of the court papers was proper. If the court decides that you were not properly served, then the case against you will be dismissed "without prejudice", meaning that the landlord can re-file the case against you but will need to restart the process and serve you properly.
- If the landlord failed to follow any of the below rules regarding service, include information in your Answer stating why you are alleging Improper Service. Before completing your Answer, you can ask the court to see a copy of the Affidavit of Service that was filed in your case. If you see information in the Affidavit of Service that is incorrect, you should say that in your Answer. For example, if the Affidavit of Service says that the court papers were personally delivered to someone at your apartment, but the description and name does not match you or anyone you know, you should include that information in your Answer.
- General Rules
 - **Who may serve**
 - Cannot be the landlord
 - Can be anyone over 18 years old who is not a party to the lawsuit (and has not served process more than 4 other times in the past year)
 - A process server

- **When to serve** – Papers may not be served on Sunday. Papers may be served during three time periods:
 - Non-working hours: 6:00 a.m. - 7:59 a.m.
 - Working hours: 8:00 a.m. - 6:00 p.m.
 - Non-working hours: 6:01 p.m. - 10:30 p.m.

- **Where to serve** – If court papers are not served by directly handing them to the defendant or respondent, then there are rules about where the papers can be served. In a civil case (e.g. consumer debt or breach of contract), papers can be served at the defendant or respondent’s home or place of work. In a commercial landlord-tenant case, papers can be served at the property sought to be recovered.

- **How to serve** – There are a few [different](#) acceptable methods of service:
 - **Personal Service** – The documents are directly handed to the defendant or respondent.
 - **Substituted Service** – The documents are handed to someone else at the defendant or respondent’s home or work. The person who is served must be someone of “suitable age and discretion,” meaning someone who is responsible and likely to give the court papers to the defendant or respondent. The server must also mail one copy of the papers to the defendant or respondent’s last known residential address or actual place of business (in landlord-tenant cases it must be done by the next business day and by regular and certified mail).
 - **Nail and Mail** – This method is only acceptable after several attempts at personal or substituted service have already failed.
 - **Conspicuous Place Delivery:** If the server is unsuccessful on the first try to serve the papers either by personal delivery or substituted service, then the server must make a second attempt during a different time period (see time periods above). For example, if no one is home during working hours, the server can return at 7:30 p.m. during non-working hours. After two unsuccessful attempts have been made to serve the person at home either by personal delivery or substituted service, the server may then use Conspicuous Place Delivery, which is also known as “nail and mail.”
 - This method of service requires that a copy of the papers be affixed to the door of the actual residence or place of business of the defendant or respondent, or alternatively that the papers be slipped under the entrance door of the residence. The server must

then mail one copy of the papers to the Respondent (in landlord-tenant cases it must be done by the next business day and by regular and certified mail). The envelope must be marked “Personal and Confidential” if being mailed to someone’s workplace.

- After service, an **Affidavit of Service** must be filled out and returned to the court clerk (within 3 days for landlord-tenant cases).
- **What to serve**
 - RPL Sec. 235-e Reminder Notice
 - Landlords must notify tenants by certified mail if rent is not received within 5 days of the due date under New York Real Property Law.
 - RPAPL Sec. 711 Written 14-Day Rent Demand
 - Unless there is a lease agreement which indicates otherwise, before a landlord can start a summary nonpayment proceeding, the landlord must make a written demand for rent giving the tenant at least 14 days to pay the rent or surrender possession of the premises. This written demand must be properly served by law, and an Affidavit of Service must be signed before a Notary Public by the person that served the 14 day notice.
 - COVID-19 Notice
 - Due to the coronavirus pandemic, landlords are currently also required to include a COVID-19 Notice along with their Notice and Petition.
 - Hardship Declaration Form
 - During the coronavirus pandemic, landlords must also send a hardship declaration form along with any required notices before commencing an eviction proceeding. If a tenant submits a hardship declaration, the landlord cannot commence an eviction proceeding until August 31, or else the proceeding will be tolled.
 - Notice of Petition and Petition
 - These are the main court documents in a summary nonpayment proceeding and similar to a “Summons and Complaint” in other lawsuits. A Notice of Petition may be issued only by an attorney, judge or the clerk of the court.

- Summons and Complaint
 - These are the court documents which officially begin a non-summary legal proceeding (e.g. a general ejectment action or breach of contract/lease).

3. The 14-Day Rent Demand is Legally Deficient (*summary nonpayment proceedings*)

- This defense applies if the landlord did not include all of the information that was legally required to be included in the 14-Day Rent Demand. The 14-day notice must state the amount of the rent due and the period of time for which the amount is due. Of course, the 14-Day Rent Demand must also give the tenant at least 14 days from service to pay the rent due.

4. The Notice of Petition is Legally Deficient (*summary nonpayment proceedings*)

- This defense applies if the landlord did not include all of the information that was legally required to be included in the Notice of Petition. The Notice of Petition must state that if Respondent shall fail at the time of hearing to interpose and establish any defense that he may have, he may be precluded from asserting such defense or the claim on which it is based in any other proceeding or action. In other words, you as the Tenant must raise your defenses at the time you Answer, and you may not be able to raise them later.

5. The Petition is Legally Deficient (*summary nonpayment proceedings*)

- This defense applies if the landlord did not include all of the information that was legally required to be included in the Nonpayment Petition. The Petition is a form that must be completed by the landlord and attached to the Notice of Petition and the 14-day Rent Demand notice, which should have previously been served on the tenant.
- The Petition must state the Respondent's interest in the property (i.e. whether the Respondent is a tenant, a sub-tenant, or someone in possession of the property for some other reason). The Petition should also state if there is a written lease or a verbal agreement to lease, and if so, the terms of such an agreement, such as the length of lease term and payment schedule.
- A Petition must be signed by either an attorney, or by the landlord before a Notary.

6. Lack of Standing

- Only a proper party may bring a lawsuit against you as a tenant. This is usually the person or entity with whom you have a lease or other contractual relationship. If you do not have or are unaware of having a contractual relationship with the Petitioner or Plaintiff, you may assert this as an affirmative defense.

7. Termination Procedure in Lease Not Followed

- Some commercial leases will describe a specific procedure that must be followed in order to lawfully evict a tenant or terminate a lease agreement. Review your lease for

such a “termination” clause and read it carefully to see if the procedures described have been followed. If not, you may list this as an affirmative defense in your Answer.

8. Statute of Limitations

- In New York, a landlord has six (6) years to bring a claim for a breach of contract based on unpaid rent or additional rent. This statute of limitations applies to each rent payment or installment payment due and does not only run from the last payment.

9. Failure to Properly State the Facts

- This defense applies if, for any reason at all, you disagree with the statement of facts as described in the Petition or Complaint. This includes if you disagree with the amount of rent that the landlord alleges that you owe.

10. Debt is Not Owed

- This defense applies if you do not believe there is a valid agreement between you and the Petitioner that you owe them the debt or rent claimed.
- In your Answer, explain why you believe this to be the case. Some possible reasons include:
 - Your Landlord re-let the premises to another tenant during the relevant time period.
 - A warrant of eviction was already issued, terminating the landlord-tenant relationship and releasing you as the tenant from your rent obligation.
 - The Landlord is seeking rent under a lease extension agreement, but your individual obligation as a personal guarantor does not apply to the lease extension agreement.
 - Good Guy Guaranty: You already vacated and surrendered the premises, so you are no longer individually obligated as a guarantor to pay any additional rent accruing during the remainder of the lease term. However, the commercial tenant may still be responsible for this rent.

11. Disputes Debt Owed and Amount of Debt (*summary nonpayment proceedings or contract claims based on rent arrears or debt owed*)

- This defense applies if you believe that the Landlord is requesting an incorrect amount of rent. The landlord must provide correct amounts for all payments requested, including Rent, Interest, Taxes, Collection Costs, and Attorneys’ Fees.
- Due to the ongoing declaration of a State disaster emergency due to COVID-19, commercial tenants currently may not be charged late fees for rent. Under the most recent applicable Executive Order 202.105 (dated April 27, 2021) this applies from the time period between March 20, 2020 and May 27, 2021.

- In your Answer, explain why you believe the amount the Landlord has requested is incorrect. Some possible reasons include:
 - You have paid the rent.
 - You have paid partial rent.
 - Your rent amount is not what is listed in the lease.
 - The Landlord previously agreed to a rent abatement.
 - Your security deposit should be applied to offset the balance of your rent arrears.
 - The Petitioner/Landlord is not entitled to the attorneys' fees sought because the amount sought is not reasonable.

12. Accord and Satisfaction – Payment Made and Accepted in Full Satisfaction of the Claim

- This defense may apply if you have already paid, and the landlord accepted, an amount of money that was understood by both parties to fully satisfy your rent obligation.

13. The Debt has been Discharged in Bankruptcy

- This defense applies if you have received a court order in a bankruptcy proceeding which discharges you from your debts.

14. Personal Guaranty

- Due to the COVID-19 pandemic, New York City passed a law that prohibits commercial landlords from enforcing personal guaranty provisions in commercial leases or rental agreements for breaches that occurred between March 7, 2020 through June 30, 2021. This means that commercial landlords cannot sue individuals as personal guarantors for rent and other debts (taxes, utility expenses, fees and charges) due during this period.
- In order for this law to apply, each of the following must be satisfied:
 - The guarantor must be a natural person who is a different person than the tenant (the tenant is the business entity under the commercial lease being guaranteed);
 - The tenant's business was a food, beverage or retail establishment or certain other business that was affected by COVID-19 and subject to closure or restrictions under Governor Cuomo's Executive Orders 202.3, 202.6, or 202.7; and
 - The lease default triggering the guarantor's personal liability must have occurred between March 7, 2020 and June 30, 2021 (inclusive).
- If you are being sued as a personal guarantor and this law applies, you may state as an affirmative defense that "Petitioner/Plaintiff Seeks to Enforce Guaranty for Alleged Default Rent Due During Period."

15. Res Judicata

- *Res judicata* refers to a legal principle which prevents a party from re-litigating an issue in court which has already been decided on the merits. This defense applies if the Petition or Complaint asserts a claim or cause of action based on an issue that has already been resolved by a court.

16. Equitable Estoppel

- Under the principle of equitable estoppel, a commercial landlord may be prevented (“estopped”) from bringing a nonpayment proceeding or a case seeking rent arrears against a tenant if the reason for nonpayment is that the tenant has reasonably relied on the landlord’s previous voluntary promise to reduce or waive the rent. Equitable estoppel requires showing that there was: (1) conduct [by the Landlord] which amounts to false representation or concealment of material facts, (2) the intention or reasonable expectation that such conduct will be relied upon by the other party [the Tenant], and (3) knowledge, actual or constructive, of the real facts.

17. Unconscionability

- This defense may apply if the lease is so shockingly unfair that it should not be enforced. This defense will require proving substantive unconscionability (unfair terms) and procedural unconscionability (unfair bargaining process). The tenant will need to prove that there was an absence of a meaningful choice when the lease was signed and that the contract terms are unreasonably favorable to the landlord. Keep in mind that this is a high bar to meet.
- For example, the court might find that a lease is procedurally unconscionable if there was misrepresentation, fraud, high-pressure sales tactics, refusal to bargain on key terms, failure to disclose terms, terms hidden in fine print, or unequal bargaining power because one party could not speak English.

18. Fraud and Duress

- A lease can be declared void if it was entered into under circumstances of fraud or duress. Fraud occurs if one party made false and important misrepresentations to another party to induce an agreement. Duress generally applies when one party is compelled to perform an act, e.g. sign a contract, under threat.

19. Constructive Eviction

- A commercial tenant may not have to pay the full amount of rent due if they have been actually or “constructively evicted” (the landlord significantly interferes with your ability to use the space) from either the whole or a part of the premises. However, for this defense to apply, the commercial tenant must have been constructively evicted before the period for which rent arrears are sought.

20. Breach of Covenant of Quiet Enjoyment

- A commercial tenant may be relieved of an obligation to pay the full amount of rent due if there has been serious interference with the tenant’s ability to enjoy the property for the

purposes for which it was leased. Due to the COVID-19 pandemic, tenants may be able to argue that a commercial landlord's failure to make the leased premises safe from dangerous conditions constitutes a breach of the covenant of quiet enjoyment.

21. Impossibility

- This affirmative defense may be available if an unanticipated event that could not have been foreseen or guarded against makes it impossible for one party to a contract to perform their obligations. Performance must be objectively impossible, not just burdensome. For example, the doctrine of impossibility was triggered in some cases in the aftermath of 9/11.
- In the wake of COVID-19, commercial tenants may attempt to assert impossibility as an affirmative defense by arguing that an unforeseeable pandemic made performance, such as payment of rent, objectively impossible. They may also argue that unforeseeable government actions made performance objectively impossible.
- Note that courts have largely not accepted impossibility arguments relating to COVID-19, although these cases are still working their way through the system.

22. Frustration of Purpose

- This defense is available to a commercial tenant when the purpose for which the tenant entered into the commercial lease is “substantially frustrated.” To have a valid frustration of purpose claim, a tenant must show:
 - A supervening event that hurt the value of the party's interest in the contract;
 - The supervening event was not caused by the tenant;
 - The parties assumed the supervening event would not occur;
 - The contract language or surrounding circumstances did not give the tenant a heightened duty to perform.
- If the frustration of purpose is only temporary, you may include “Temporary Impracticability” as an affirmative defense. A tenant's duty to perform its obligations under a lease may be temporarily suspended for the duration of the existence of the frustration of purpose.

23. Force Majeure

- Your lease may contain a “force majeure” clause. A force majeure clause may relieve parties of their obligations under a contract if unforeseen circumstances (such as a natural disaster) render performance impossible. Courts are now considering cases involving force majeure clauses and whether the COVID-19 pandemic has triggered them. If your lease has a force majeure clause potentially releasing you from an obligation to pay rent, you can include this as an affirmative defense.

24. Co-Tenancy

- Co-tenancy clauses provide some protection to commercial tenants if surrounding businesses are not operating. If your lease includes a co-tenancy clause, you may argue that there is a basis for you to reduce your rent or terminate your lease. You may include this as an affirmative defense if your lease contains such a clause.

25. Violation of Duty of Good Faith and Fair Dealing

- This defense may be applicable if you believe the Petitioner or Plaintiff has not been fair or honest in handling the dispute at issue. Examples might be if the Petitioner's actions are contrary to the terms or spirit of the agreement, the Petitioner has abused its power in negotiating the terms of the agreement, or the Petitioner prevented you from upholding their end of the bargain.

26. Unjust Enrichment

- This defense may be applicable if the debt claimed in the Petition or Complaint is much higher than what the Tenant believes is owed. An unjust enrichment claim is based on the idea that one party has unfairly benefited at another party's expense, and that it would be against equity and good conscience to permit the party who has benefited to retain those benefits. Unjust enrichment is usually only possible to claim in unusual circumstances, and usually cannot apply if there is a contract governing the subject matter under dispute.

ASSERTING COUNTERCLAIMS IN YOUR ANSWER

If you are a commercial tenant who has been sued, you also have an opportunity to include counterclaims in your Answer. Counterclaims are the claims you have against your Landlord or the party who brought the case against you. For example, if your Landlord has violated their obligations under your lease, an Answer may be an opportunity for you to raise those issues.

However, some commercial leases include a clause which prevents you from making counterclaims in your Answer if the Landlord starts a summary proceeding (e.g. nonpayment petition) against you. Review your lease for such a clause when preparing your Answer. If your lease has such a clause and you would like to make a claim against your Landlord, you might have to bring a separate legal action against them unless your counterclaims are “inextricably intertwined” with the Landlord’s claims.

Keep in mind that some counterclaims may also overlap with affirmative defenses.

Examples of counterclaims you may assert in a Nonpayment Petition include *but are not limited to*:

1. Petitioner Overcharged and Owes Debt to Respondent

- Include this counterclaim to offset your rent obligation if your Landlord owes you money. This might be the case if your Landlord has taken actions such as withholding your security deposit or overcharging you for taxes as additional rent.

2. Breach of Contract (Lost Business Damages)

- Include this counterclaim if you believe that your Landlord has violated your lease in a way that has caused you to lose profits for your business.

3. Landlord’s Negligent Maintenance

- For example, if your Landlord is required to maintain the elevator in your commercial space, you may counterclaim that your Landlord’s failure to maintain the elevator has resulted in your Lost Business Damages.

4. Security Deposit Account

- Section 7-103(2-a) of the General Obligations Law requires that a security deposit for rental of property in a building that contains six or more residential units be placed in an interest-bearing account. You should also be notified in writing of the name and address where your security deposit is held.

5. Constructive Eviction

- See explanation above of Defense #19.

6. Breach of Covenant of Quiet Enjoyment

- See explanation above of Defense #20.

7. Harassment

- The Landlord has engaged in harassment against the tenant in violation of § 22-902 of the N.Y.C. Administrative Code. Commercial tenant harassment is an act or omission by or on behalf of the landlord that would reasonably cause a commercial tenant to vacate the property or to surrender or waive any rights in relation to the property.
- Harassment does not include actions such as lawful termination, reentry, or repossession.
- Harassment may include attempting to enforce a personal liability provision that the Landlord knows or reasonably should know is not enforceable pursuant to N.Y.C. Admin. Code Section § 22-1005.
- Harassment may include the unlawful termination of a tenant's lease for nonpayment of rent in violation of Governor Cuomo's Executive Order No. 202.28 issued on May 7, 2020 and thereafter extended.
- Harassment may include causing repeated interruptions or discontinuances of essential services or causing an interruption or discontinuance of an essential service for an extended period of time.

8. Violation of Duty of Good Faith and Fair Dealing

- See explanation above of Defense #25.

9. Unjust Enrichment

- See explanation above of Defense #26.