Garden State CLE Presents:

<u>Fifteen Ways of Preventing Your Client From Being Evicted!</u>

Instructors

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<u>Lesson Plan</u>

1) **Bankruptcy:** This is the nuclear option, and it almost always works, provided you qualify (Bankruptcy Rules have strict filing requirements). Generally, tenants who qualify can file for Chapter 13 and once the Landlord's lawyer and court are notified, the case has to be dismissed. Later, the Landlord gets "super priority" by the Trustee in terms of who gets paid first via the Ch. 13 payment plan. I often see tenants who file for Chapter 13 due a "bare bones" petition that gets dismissed a few months later. That said, they don't notify the landlord, who assumes the bankruptcy is still pending. In fact, the landlord should file a motion to reinstate the eviction once the Chapter 13 gets dismissed, but most landlords don't do that. This option is widely abused by tenants and there could be major repercussions for a lawyer who misuses it. So, it should only be used if it's an absolutely legitimate bankruptcy case. Refer these to qualified bankruptcy attorneys. Of course, this will totally destroy your client's credit and ability to rent a new apartment, buy a house or a car and should not be the first card you play.

2) Habitability: Marini vs. Ireland, 56 N.J. 130(1970). This is a defense on the livability and/or quiet enjoyment of the rental. You use it as a defense against a claim of non-payment of rent. In order to get the hearing, you have to deposit all the outstanding rent into a court escrow account. Be careful about arguing habitability in non-payment cases because many judges will short-circuit your testimony about the validity of the debt claimed by landlord, if you even mention habitability and they will stop the proceedings and order you to pay the back rental funds into escrow. I have seen cases where the landlord was overcalculating the amount of rent due, and the tenant, rather than challenging that (which they would have prevailed at), made habitability arguments and eventually got a Judgment of Possession against them because they couldn't make the escrow payment. In my opinion, if you genuinely have a habitability matter, it's far better to keep paying your rent and file a lawsuit in the Special Civil Part or Law Division and use it as an affirmative claim. Be careful, though, as Landlord-Tenant judges tend to get very possessive. However, if the landlord can prove that the tenant caused the damages, then the Landlord can amend the eviction complaint and evict you on other grounds, so you have to be careful and ascertain if the landlord already knows about the damage and what the cause of said damage was.

3) Equitable Interest: Good defense if you had a purchase option with landlord prior to sale of building to new owner, and you feel prior landlord violated the agreement by selling to the new purchaser. Basically, you're arguing that you made certain improvements under the agreement, which were permitted, and that you didn't waive your right to equitable relief, because the breach was the landlord's and not yours. Of course, if your client breaches the contract, they may waive their claim to equitable reimbursement.

4) Ineffective Service of Process. This is the number one thing that messes up landlords. Basically, there are 14 basic "cause based" eviction grounds in NJ, and 27 in total (variations of same), all found in N.J.S.A. 2A:18-61.1. Each different cause of action requires a different form of notice. Some, like substantial breach of lease, require a 30-day notice to "Cease" sent via certified and regular mail. After the 30 days pass, and the behavior continues, Landlord has to send out a 30-day notice to quit. Only after the tolling period for each of those letters has fully passed, can the Landlord then file the eviction on this ground. Also, the letter must have the magic language "Demand for Possession." Most of the causes of action have totally different notice requirements, for no reason (the variations once made sense decades ago but are now arbitrary and essentially nonsense) and its easy to get confused.

5) "Right of Re-Entry." This is needed in all lease agreements if the Landlord wishes to evict the tenant for substantial breach of lease or covenants/agreements. Most lawyers forget about this requirement, as do most judges.

6) DCA Funds: If a tenant receives DCA money for a covered bracketed period of time, the tenant cannot be evicted for non-payment of rent owed from said period of time. Furthermore, there is a roughly 3-month period of time after the receipt of the money when the landlord cannot file any eviction action against the tenant on non-payment, or habitual late payment of rent grounds. Basically, a grace period. Please note that these DCA rules are constantly changing and may not hold water in the near-future.

7) Delay Game: Clarence Darrow, in the Leopold and Loeb case had his client plead guilty and tried to win the case in the sentencing phase, by making a big emotional appeal to the judge based upon an attack on the morality of capital punishment. The same sort of tactic can be used in Landlord-Tenant Court. Basically, if you're being evicted for a certain reason and have no defense, you can argue for the mercy of the Landlord, the mediator, or the judge. What often happens is that you can persuade the mediator and landlord's attorney by saying that you don't oppose the Judgment of Possession, it's only that you have a horrible hardship and need more time to move. This can get you more time during the settlement stage of the case. Often, you can get more time this way than you could from the judge at trial. If the case does go to trial, you can ask the Judge to postpone the date when the landlord can apply for a Warrant of Removal. Then, when the Warrant of Removal is issued, you then apply for an Order to Show Cause for a Hardship Stay, which can get you an additional six (6) months in the rental. That said, agreeing to a JOP can be a very risky move, because your client's credit will be totally destroyed by the entry of the judgment of possession. I have only seen very lengthy hardship stays issued when the occupant is extremely sick (cancer, waiting to go on hospice), or when the tenant has children who need to finish the school year without interruption, regardless of whether because they are in high school and trying to keep their grades up for college, or because they are younger and have major psychological/emotional problems.

8) Rent Control Ordinance/Rent Increase: If you're being evicted for not signing a new lease, or agreeing to a rent increase, you can see if the local municipal code has a rent control ordinance and if the landlord followed the local rules about rent control and the permissible increase rates. Some cities, like Camden, require the local Rent Control Board to approve all private sector residential rent increases before the landlord can issue them. Most NJ towns are in the process of phasing-out rent-control boards and ordinances, but there is pressure by tenant-groups to halt this trend.

9) Property Was Sold to a New Resident: When a tenant is being evicted because the house is being sold to another who wishes to reside there (N.J.S.A. 2A:18-61.1(l)), you need to make sure that there is a valid, signed sales contract (signed by both partis), and that the only thing the parties are waiting on is the closing. Many landlords "put their house under contract" with a real estate company to show the building or say, rhetorically, that they are "in the process of selling," but no contract with a seller has been signed. That's how you defeat these evictions. Always send an informal discovery request to the Landlord's Attorney requesting this when the client is facing that kind of eviction. Also note that these are often used pretextually by landlords who wish to renovate the rental unit and re-rent at a higher price. There are massive legal penalties for landlords who do this, such as a claim of constructive eviction, fraud, as well as costs and attorney fees.

10) Illegal Apartments. Often, elderly landlords will rent out a room above a garage or an outdoor kitchen (that has electricity and plumbing) in order to make money on the side. When this happens, they may find that the unit is illegal and that the township refuses to grant them a certificate of occupancy or Landlord Registration, usually because the rental could never be habitable under any sense of the word. If the landlord tries to evict the tenant, they will be forced to pay the tenant 6 times the monthly rent plus moving expenses. Plus, the landlord has to give the tenant a 3 month notice to quit. The prospect of heavy penalties like these are sometimes so scary to landlords (especially elderly ones) that they do nothing for years and let the illegal tenant live in the place rent-free.

11) <u>Ejectments</u>: Make sure the so-called landlord who is evicting the tenant actually has a written or oral lease agreement with them. I often encounter situations where the client is a roommate, lover, a partner, an adult child living with his parents, a family member, or the owner of a foreclosed-upon property. Here, the property owner will often seek to remove the tenant by way of an eviction complaint. This is improper. If you can prove that there's some sort of lease agreement in effect between the owner and the inhabitant, then you can get the eviction case dismissed. The owner will have to re-file an ejectment action. However, please note that evictions are still taking enormous amounts of time due to COVID-related backlog (could take you 3-4 months to be seen in some counties, still). Ejectments, which are filed by way of a Verified Complaint for an Order to Show Cause, are given heightened priority by the court and your client's case will be considered within a month or so. So, if your client is being wrongfully evicted, you should use the ejectment defense, but don't do it until the day of court. This will give your client more time to stay in the rental unit. As Napoleon said, "Never interrupt your enemy when he is making a mistake." Here, if you notify the landlord too soon of his error, he can quickly retract the eviction and file an ejectment, with the result that your client will be booted too soon in an uncomfortably expeditious manner.

12) Ejectment Defenses: If the property owner is trying to eject your client, you can get the case dismissed if you could prove that there's an oral or written lease agreement. This is critically important, because the NJ Anti-Eviction Act, N.J.S.A. 2A:18-61.1 *et seq*. (if it applies) can provide major protections to your client in terms of the speed with which he will be locked out, and whether the grounds even exist for him to be evicted (based on the cause of action asserted by the owner). If your clients are legitimately being ejected, good defenses revolve around the filing of a counterclaim for an Equitable Interest in the property, or on Unjust Enrichment/Equitable Lien grounds, such as if your client were making improvements to the property that benefit the owner, that the owner knew about. If you're lucky, the Judge will boot the case up to Chancery from Landlord-Tenant Court and this will gain your client some major time.

13) Owner-Occupied: If the property is, then the NJ Anti-Eviction Act's protections don't apply to your client. Rather than the eviction being governed by N.J.S.A. 2A:18-61.1, your eviction will be governed by N.J.S.A. 2A:18-53. This is the older landlord-tenant law that was superseded by the anti-eviction act. It only applies to certain types of rentals these days, such as commercial properties, owner-occupied residences with fewer than 2 residential units.

14) COVID Issue: The COVID-19 Eviction Moratorium was between March 1, 2020, and Aug. 31, 2021. The rules were muddled and confused and were changing constantly.

What you need to know for now is this:

a) You cannot be evicted if the eviction is based on rental debt accrued from 3/1/2020 and 8/31/2021. You need to do a DCA certification, though, to get these protections. Here's the link for the DCA application. https://covid19.nj.gov/renter. This applies to low and median renters. It applies to all people who make less than 120% of the county's AMI.

b) If you do the DCA cert, and they show that you are a qualifying low-income individual (making less than 80% of Area Median income (based on your county)), then these protections extend to non-payment of rent debt that runs to 12/31/2021 (rather than 8/31/2022 for median income earners).

c) Regardless of income status and DCA cert, if the landlord has a "cause" based ground against the tenant (substantial breach of lease, sale of house, committing crimes, etc.), then the DCA Moratorium protections are irrelevant for a current or future eviction.

d) If your rent is higher than 120% AMI, and you owe rent from the pandemic period, you get no protections at all.

e) Going forward, most Landlord Attorneys are looking to get around the Covid Protections by filing Cause-Based evictions, in order to avoid the automatic DCA dismissal. Lawyers representing tenants need to make sure the notice rules were strictly followed, otherwise they can get the case easily dismissed.

15) <u>Certificates of Occupancy</u>: The easiest way to get an eviction case dismissed is if there is no Certificate of Occupancy for the current tenant at the current unit. This is not the same thing as a Landlord Registration.