

Kick ‘em Out!

The Law of Ejectment in New Jersey



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INTRODUCTION

At some point, a client will ask you for advice on how to legally get rid of a freeloading, pain in the neck co-inhabitant of a house, condo or apartment who has “worn out his welcome at Bushwood!”

Rather than eviction, the process for getting rid of unwanted inhabitant is an ejectment. The following materials and forms will provide you with what you need to know to change your client’s life for the better!

A) In General

1) Ejectment, aka a writ of possession, is an ancient common law remedy that allows the owner of real property to obtain a court order authorizing the removal of occupants of the property. It is to be distinguished from an eviction which is the procedure used to remove tenants and their co-inhabitants. People subject to ejectment do not have any type of lease, pay no rent and are not in a landlord-tenant relationship with the property owner. As a practical matter, New Jersey ejectments often involve efforts to remove family members, friends, squatters, former romantic partners and other pests for whom consent to remain on the property has been revoked. Sometimes, an ejectment action can be instituted to remove former property owners who have remained in a residence following a bank foreclosure sale. Likewise, ejectment is available as a remedy in those instances where a property that belongs to a decedent’s estate is occupied by a person who refuses to leave after the owner dies.

2) The occupier may have originally been granted permission to occupy the premises temporarily by the owner/landlord, tenant or by the decedent during his life, but permission is subsequently rescinded, and that occupier refuses to leave or move out.

3) Historically, the writ of possession action was plenary and heard in the Law Division (or Chancery Division in cases involving farmers). The litigation tended to be both time-consuming and highly contested, especially as the date for removal (lockout) approached.

However, recent changes to the Rules of Court have improved the process by making ejectment actions summary in nature with venue assigned to the Special Silly Part of Law Division.

4) Successful litigation by the plaintiff will result in the issuance of a Writ of Possession which will authorize the county sheriff to execute on a writ of possession, i.e., the order of the Court will authorize the physical removal of the defendant(s), at the request of the plaintiff, by a Sheriff Officer.

B) Preliminary Analysis

1) Has there ever been a written or oral lease between you and the person(s) you are seeking to remove? Y or N

2) Have you ever accepted rent, cash or services in lieu of rent during the occupancy of the person(s) you are seeking to remove? Y or N

3) Is there a pending domestic violence complaint between you and the person(s) you are seeking to remove? Y or N

4) Is the person a sub-tenant, based upon a written/verbal lease, which allows subleasing? Y or N

5) Did you purchase the property from the party you are seeking to remove? Y or N

If the answer is “No” to all of questions, then a Writ of Possession application may be the proper course of action for your client. However, if the answer was “yes” to any of the questions, a Landlord/Tenant action may be the more appropriate course of action for your beleaguered client.

C) Rules of Court

Rule 4:67-1(a) – Authorizes summary actions in general [“This rule is applicable (a) to all actions in which the court is permitted by rule or by statute to proceed in a summary manner”]

Rule 6:1-2(a)(4) – Venue in Special Silly Part - (Summary actions for the possession of real property pursuant to N.J.S.A. 2A:35-1 et seq., where the defendant has no colorable claim of title or possession, or pursuant to N.J.S.A. 2A:39-1 et seq.

Note: This Rule has been subject to frequent amendment over the past 25 years with last occurring in 2022. Consistent with prior common and statutory law, ejectment actions had entitled the parties to a trial by jury. These cases are now tried in a summary manner before a judge of the Superior Court in Special Silly Part.

D) Statutory Authority

1) N.J.S.A. 2A:35-1 - Jurisdiction in real property possessory actions - Any person claiming the right of possession of real property in the possession of another, or claiming title to such real property, shall be entitled to have his rights determined in an action in the Superior Court .

Common law ejectment in New Jersey has been replaced by a statutory remedy under N.J.S.A. 2A:35-1, entitling any person claiming the right of possession of real property in the possession of another, or claiming title to such real property to have his rights determined in an action in the Superior Court. J & M Land Co. vs. First Union Nat'l Bank ex rel. Meyer, 166 N.J. 493, 520, 766 A. 2d 1110(2001). The vast majority of the published New Jersey case law came about in the 19th and early 20th Centuries.

There can be no doubt that N.J.S.A. 2A:35-1 is intended to allow a remedy to one who claims title to property in the possession of another. The statute replaces the common law action of ejectment, which generally was maintained against a defendant in possession of the property in question, but which could be maintained where the land was vacant and unoccupied if the defendant claimed title thereto. [citations omitted.] The trial court was correct, therefore, in stating that the statutory action, N.J.S.A. 2A:35-1 could not presently lie against defendant since it was not in possession and did not claim

title to the property. Marder vs. Realty Construction Company, 84 N.J. Super 313, 320-21(App.Div. 1964) (Affirmed Marder vs. Realty Construction Company, 43 N.J. 508(1964)).

2.) N.J.S.A. 2A:35-2 Damages & Limitations - In any such action, the plaintiff shall be entitled to recover from the defendant any and all incidental damages, including *mesne* profits, and the full value of the use and occupation of the premises for the time, not exceeding 6 years, before the commencement of the action, during which the defendant was in possession thereof.

This statute codifies an ancient common law remedy. Typically, *mesne* profits include those derived by the defendant during the time period of his wrongful possession of the property. See discussion in Marder vs. Realty Construction Company, 43 N.J. 508(1964).

3) N.J.S.A. 2A:35-3 – Set-offs and counter-claims - Where permanent improvements have been made on the premises in good faith, under circumstances entitling the defendant to have the value thereof allowed to him, the court may allow the same to be set off against the damages of the plaintiff, but only to the extent of such damages.

4.) N.J.S.A. 2A:39-6 - Any forcible unlawful entry and detainer, forcible detainer and unlawful detainer as defined in this chapter shall be cognizable before the Superior Court, and the court may hear and determine an action therefor in a summary manner.

5) N.J.S.A. 2A:39-7 Title and affirmative defense - Title shall not be an issue in any action commenced under this chapter. 3 years peaceable possession by the defendant shall be a defense to the action.

[Note that all the New Jersey case law related to this statute stems from the 18th and 19th Centuries.]

6) N.J.S.A. 2A:39-8 Recovery and damages - In any action under this chapter, a plaintiff recovering judgment shall be entitled to possession of the real property and shall recover all damages proximately caused by the unlawful entry and detainer including court costs and reasonable

attorney's fees. When a return to possession would be an inappropriate remedy, treble damages shall be awarded in lieu thereof. The judgment may be enforced against either party in a summary manner by any process necessary to secure complete compliance therewith, including the payment of the costs.

Most of the scant New Jersey case law related to recovery and damages stem from the 19th century. In one published Law Division case, the plaintiffs brought suit based upon wrongful “lockout.” The matter was tried before a jury and treble damages were awarded to the plaintiffs, less pasty-due rent. Truesdell vs. Carr, 351 N.J.Super 317(Law Div.2002).