

12 Misc.3d 369  
Supreme Court, Kings County, New York.

Larry **KOSA**, Plaintiff,  
v.  
Detria **LEGG**, Defendant.

Feb. 10, 2006.

**Synopsis**

**Background:** Landlord brought ejectment action to recover possession of apartment and for money judgment against tenant for rent and/or use and occupancy. Tenant counterclaimed for damages for illegal eviction. Landlord moved to strike tenant's affirmative defenses, sever her counterclaims, and for summary judgment on its ejectment action. Tenant cross-moved to dismiss action and for summary judgment on counterclaims.

**[Holding:]** The Supreme Court, Kings County, Wayne P. Saitta, J held that common law requirement of six-month notice to quit before tenant may be removed through ejectment action applies to month to month tenancies.

Defendant's motions granted.

West Headnotes (6)

[1] **Judgment** ➡ Landlord and tenant

Landlord's summary judgment affidavit asserting ownership shifted burden to tenant, in ejectment action, to show that there was actual question as to ownership.

Cases that cite this headnote

[2] **Landlord and Tenant** ➡ Actions in which estoppel is effective

Having taken possession under lease, tenant could not challenge landlord's title in ejectment action.

Cases that cite this headnote

[3] **Landlord and Tenant** ➡ Tenant holding over after expiration of term

**Landlord and Tenant** ➡ Tenant holding over after expiration of term

Tenant who held over past expiration of lease term, and thereafter paid rent which was accepted by landlord, was month to month tenant, not tenant at will. McKinney's Real Property Law § 232-c.

1 Cases that cite this headnote

[4] **Landlord and Tenant** ➡ Summary proceedings

**Landlord and Tenant** ➡ Sufficiency

Summary proceeding legislation neither bars owners from using ejectment action to remove month to month tenant, nor does its 30-day notice requirement replace common law notice requirements for ejectment action. McKinney's Real Property Law § 232-a.

1 Cases that cite this headnote

**[5] Landlord and Tenant** ↔ Necessity

Common law requirement of six-month notice to quit before tenant may be removed through ejectment action applies to month to month tenancies.

1 Cases that cite this headnote

**[6] Statutes** ↔ Liberal or strict construction

Statutory modifications of common law must be strictly construed.

Cases that cite this headnote

**Attorneys and Law Firms**

**\*\*841** Rizpah A. Morrow, New York City, for plaintiff.

Paul Block, New York City, for defendant.

**Opinion**

WAYNE P. SAITTA, J.

**\*370** The Plaintiff, **LARRY KOSA**, moves to strike defendant's affirmative defenses, sever her counterclaims, and for summary judgment on its ejectment action. Defendant, **DETRIA LEGG**, cross-moves to dismiss the action and for summary judgment on her counterclaims for illegal eviction.

Upon review and consideration of Plaintiff's Notice of Motion dated August 15, 2005, the attached Affidavit of **LARRY KOSA**, dated August 15, 2005, the affirmation of Rizpah Morrow Esq. dated August 15, 2005, Memorandum of Law and exhibits annexed thereto, the Notice of Cross-Motion dated November 29, 2005, the Affirmation in Support of Paul Block Esq., dated November 29, 2005, the Affidavit in Support of **DETRIA LEGG**, dated November 29, 2005 and the exhibits annexed thereto, the Reply Affirmation, of Rizpah Morrow Esq., dated December 14th, 2005 and Reply Affidavit of **LARRY KOSA** dated December 15, 2005; upon all the proceedings heretofore had herein and after argument of counsel and due deliberation thereon, Plaintiff's motion for summary judgment is denied and Defendant's cross-motion to dismiss to action and for summary judgment as to liability on her counterclaims is granted, for the reasons set forth below.

This is an ejectment action brought pursuant to Article 6 of the RPAPL in which plaintiff seeks to recover possession of an apartment occupied by defendant and for a money judgment against defendant for "rent and/or use and occupancy". Defendant counterclaimed for damages from an illegal eviction stemming from an earlier summary proceeding, in which the Civil Court restored defendant to possession after she was evicted by the plaintiff.

Defendant entered into possession pursuant to a written lease for one year. After the expiration of the lease the defendant remained in possession and continued to pay rent which plaintiff accepted. At some point thereafter, the defendant

**\*\*842** ceased paying rent. Plaintiff served upon Defendant a 30 notice pursuant to RPL 232-a dated April 28, 2005 and commenced the present ejectment action by service of a summons and complaint dated June 2, 2005.

Defendant argues that plaintiff should not be granted summary judgment because he has failed to submit the documentary evidence, such as the deed, to support his claim. Defendant also argues that the Thirty Day Notice of Termination served by the plaintiff is defective.

As to her counterclaims, Defendant states that the Civil Court has already determined that plaintiff had illegally evicted the defendant and ordered her restored to possession. Plaintiff states that he is appealing the Housing Court determination, but admits there is no stay of that decision. Plaintiff seeks to sever the hearing on damages on Defendant's counterclaims.

[1] [2] Defendant's objection that plaintiff failed to submit documentation to support his motion for summary judgment is misplaced. Plaintiff having put in an affidavit asserting ownership, shifts the burden to the defendant to show that there is an actual **\*371** question as to the ownership. Also, defendant having taken possession under a lease with plaintiff, can not at this point challenge his title.

Defendant's objection to the 30 day notice is more complicated. The Defendant asserts that a notice pursuant to RPL 232-a is not a proper notice for an ejectment action, because it states that if the tenant does not remove after 30 days the landlord will commence a summary proceeding.

There is inconsistency in the recent case law as to whether any notice to quit is required in an ejectment action, and if so, what kind of notice is required.

RPAPL Article 6 modified the common law action of ejectment, but did not replace it. "The common law principles governing the ejectment action are unchanged, unless specifically modified by statute." *Alleyne v. Townsley*, 110 A.D.2d 674, 487 N.Y.S.2d 600 (2nd Dept.1985); *Aponte v. Santiago*, 165 Misc.2d 968, 630 N.Y.S.2d 869 (Civ.Ct.Bx.Co., 1995). RPAPL Article 6 did not add any notice requirements, but neither did it abolish those notices required under common law.

The common law did not require a notice to terminate a tenancy of a definite term, but did require a notice to quit to remove a tenant of an indefinite term, by an ejectment action. *Gerolemou v. Soliz*, 184 Misc.2d 579, 710 N.Y.S.2d 513 (App. Trm. 2nd Dept.2000); *Alleyne v. Townsley*, 110 A.D.2d 674, 487 N.Y.S.2d 600; *Hsui v. Trujillo*, 192 Misc.2d 147, 744 N.Y.S.2d 652 (Su.Ct.Bx.Co.2002),

There have been some recent cases which have held that no notice to quit is required before commencing an ejectment action. *Southside Development v. Mitchell*, 156 A.D.2d 268, 548 N.Y.S.2d 656 (1st Dept.1989); *Aponte v. Santiago*, 165 Misc.2d 968, 630 N.Y.S.2d 869. *O'Connor v. Gallier*, 7 Misc.3d 1016(A), 801 N.Y.S.2d 237 (Su.Ct.Kings, 2005); *Fazio v. Kelly*, 2003 WL 22227363 (N.Y. City Civ.Ct.2003). However upon closer examination these do not provide adequate support for that position.

In *Southside Development v. Mitchell*, the Appellate Division in the last line of its decision found that a "belated" challenge to the service of the notice of termination is both untimely and irrelevant in an ejectment action, citing the case of *Alleyne v. Townsley*. However, *Alleyne* does not stand for the proposition that a notice to quit of notice of termination is never required in an ejectment action. The Second Department held in *Alleyne* that:

**\*\*843** "The common-law principals governing the ejectment action are unchanged, unless specifically modified by statute. No statute **\*372** abrogates the common-law rule that notice is unnecessary to maintain an ejectment action against a tenant who wrongfully holds over after expiration of a fixed and definite term." *Alleyne*, at 675, 487 N.Y.S.2d at 601.

In this present case, it is not alleged that defendant wrongfully held over after the expiration of the fixed term of one year in the lease, but that she continued to pay rent for a time after the expiration and the plaintiff accepted rent after the expiration of the lease term which created a month to month tenancy pursuant to RPL 232-a.

The court, in *Aponte v. Santiago*, which held that common law does not requires a notice of termination in order to bring an ejectment action relied on *Alleyne* and *Southside Development*. *Aponte*, at 968, 630 N.Y.S.2d at 869. However, as discussed above *Alleyne* (on which the Court in *Southside* relied), held only that no notice is required where a tenant holdovers over after expiration of a fixed term.

The court in *Aponte* also cites 13 *Carmody-Wait 2d* § 89-118,119 for the proposition that common law did not require a notice to quit in order to commence an action to recover real property. However, 13A *Carmody-Wait 2d* § 89-114, explains that no notice to quit is required where a tenant holds over past a definite term, but is required where the tenancy is at will, or at sufferance, or month to month. As to month to month tenancies it states: "Notice to quit must be given where the tenancy is month to month, under common law and pursuant to statute ..." 13A *Carmody-Wait 2d* § 89-114.

RPAPL Article 6, which partially codified common law ejectment contains no requirement for a notice to quit or terminate. However, at common law notice was required in cases of indefinite tenancies, but not in cases of tenancies of fixed and definite terms.

The logic of the distinction is that the parties had notice of the termination of a tenancy of a definite term by the very terms of the lease which set forth the date of termination. However, an indefinite tenancy, whether year to year, or a tenancy at will or sufferance would continue until one party to it chose to terminate it. It is axiomatic that the party terminating the tenancy had to make its decision to terminate manifest and known to the other party.

Similarly in *O'Connor v. Gallier*, 7 Misc.3d 1016(A), 801 N.Y.S.2d 237, cited by plaintiff, the court relied on \*373 cases that did not actually hold that no notice was required at common law prior to commencing an ejectment action. The court in *O'Connor* relied on *Alleyne* and *East 82 LLC v. O'Gormley*, 295 A.D.2d 173, 743 N.Y.S.2d 473 (1st Dept.2002). As discussed above *Alleyne* held only that where a tenant held over past a fixed and definite term no notice was required. The matter in *East 82 LLC* involved an ejectment action of a tenant from a cellar apartment. The court held that a notice of termination pursuant to the Rent Stabilization Code 9 NYCRR §§ 2524.2 and 2524.3[c] was not required. The decision does not indicate whether any other notice to quit or termination was served. The notices pursuant to rent stabilization apply only to rent stabilized apartments and thus have no relevance to the question presented here.

In *Fazio v. Kelly*, 2003 WL 22227363, the Court rejected the holding of the Appellate Term 2nd Department in *Gerolemou v. Soliz*, 184 Misc.2d 579, 710 N.Y.S.2d 513, that a notice of termination is required in an ejectment action against a tenant of an indefinite tenancy, citing \*\*844 *Aponte*, *Alleyne* and *Hsiu v. Trujillo*, 192 Misc.2d 147, 744 N.Y.S.2d 652.

However as discussed above, *Alleyne* does not that hold that a notice to quit is not required in an ejectment action, of an indefinite tenancy. Similarly, *Aponte* relied on *Alleyne* and other cases which in turn relied on *Alleyne*.

The Court in *Hsiu v. Trujillo* considered the apparent contradiction between *Aponte* and *Gerolemou* but did not conclude that a notice was never required in an ejectment action. That Court, in fact found that *Aponte* and *Gerolemou* are not inconsistent. It did so first by noting that the holding in *Alleyne*, on which *Aponte* is based, states that notice is unnecessary to maintain an ejectment action against a tenant who wrongfully holds over after expiration of a fixed and definite term. *Hsiu*, at 151, 744 N.Y.S.2d at 656. The Court then reconciles the two cases by stating:

"The correct rule of law would appear to require that when there exists a subsisting landlord tenant relationship, a notice to terminate is required, as was the case in *Gerolemou*, which involved a month-to-month tenant. In those cases in which there is a holding over after the expiration and no new landlord-tenant relationship is created (such as when

the landlord does not accept rent after the expiration of the lease), as appeared to be the case in *Aponte*, no notice to terminate is required.” \*374 *Id.*, at 152, 744 N.Y.S.2d at 656.

The Court in *Fazio* correctly notes that the cases relied upon in *Gerolemou* were in fact summary proceedings and not common law actions. *Gerolemou* cited the third Department decision in *Hungerford v. Wagoner*, 5 A.D. 590, 39 N.Y.S. 369 (3rd Dept. 1896), and the Court of Appeals in *People v. Darling*, 47 N.Y. 666, 1872 WL 9780 (1872). Both of these cases were statutory summary proceedings in which there was a statutory requirement for a 30 day notice of termination. The statutory notice requirement in a summary proceeding is not relevant to the question of whether notice is required in an ejection action or if it is required, how much notice is required.

The confusion on this issue stems from several sources. First, New York State has provided a statutory summary proceeding as an alternative to common law ejectment since 1820 and the common law action has been rarely since then. Second, the early summary proceedings were often referred to as ejectment proceedings rather than the more formal title of “Summary Proceedings to recover the Possession of Land.” This has obscured the fact that those statutes were the lineal ancestors of RPAPL Article 7, not Article 6.

Also, contributing to the confusion is the fact that RPAPL Article 6 only partially codified the action of ejectment. The action is governed partially by the statute and partially by common law procedures that have become enshrouded by time, and the laminations of oral tradition. Article 6 did not create any notice requirements, but also did not abolish the notices required at common law.

When cases and treatises from before the enactment of the original 1820 summary proceeding statute are examined, the notice requirements for ejection at common law are clear.

The preeminent treatise on the common law of the period is *Blackstone's Commentaries*, which divided estates “less than freehold” into three types: (1) estates for years, (2) estates at will and (3) estates by sufferance. *Blackstone's Commentaries*, Book II, Chapter Ninth, p. 140.

Blackstone noted that for the purposes of termination notice requirements, an estate \*\*845 or tenancy at will was treated as a year to year tenancy, stating:

“The law is however careful, that no sudden determination of the will by one party shall tend to the manifest and unforeseen prejudice of the other. This \*375 appears in the case of emblements before-mentioned; and, by a parity of reason, the lessee after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils. And, if rent be payable quarterly or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half-year. And, upon the same principle, courts of law have of late years leant as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved: in which case they will not suffer either party to determine the tenancy even at the end of the year, without reasonable notice to the other.” *Blackstone's Commentaries*, Book II Chapter 9, Section 2 page 147.

After the American Revolution, St. George Tucker, a law professor at the University of William and Mary and a Judge of the General Court of Virginia, republished *Blackstone's Commentaries* with annotations relating to American law. Commenting on the above quoted passage on the requirement of reasonable notice to terminate a tenancy at will or from year to year, he comments “they will not suffer either party to determine the tenancy even at the end of the year, without reasonable notice to the other, which is generally understood to be six months.” *Blackstone's Commentaries: with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, Vol. 3, Chapter 9, St. George Tucker, 1803.

This 6 month notice of termination or notice to quit is consistent with the New York cases involving common law ejectment, before the enactment of summary proceedings.

In the case of *Jackson v. Bryan*, 1 Johns. 322 (May Term 1806) the majority upheld a lower court decision to nonsuit [dismiss] a plaintiff's ejectment action for failing to serve a notice to quit. Writing for the majority, J. Spencer held "[a] lease at will is now considered a lease from year to year which can not be vacated without half a year's notice to quit," explaining,

"Tenancies at will exist nominally, and good policy, as well as common justice, seems to demand, that a holding, for an indefinite period should be construed \*376 a tenancy from year to year; that no sudden determination of the estate, by the lessor, should immediately dispossess the tenant." *Id.*, at 322.

Tenancies at will were treated as estates from year to year for purposes of notice to quit only, but for other purposes, were still tenancies at will. *Phillips v. Covert*, 7 Johns. 1 (Nov. Term 1810); *Jackson v. Wilsey*, 9 Johns. 267 (Oct. Term 1812); *Jackson v. Miller*, 7 Cow. 747 (Oct. Term 1827).

In an ejectment action brought against a mortgagor by a mortgagee, the majority held that because a mortgagor held for an indefinite period he was entitled to a notice to quit and "[i]f a notice be requisite, to be reasonable it should be delivered six calendar months previous to the service of a declaration," *Jackson v. Laughhead*, 2 Johns. 75 (Nov. Term 1806). (Ejectment actions were not confined to landlord tenant relationships. They had, through the use of legal fictions, come to be used to resolve questions of title.)

\*\*846 In response to the delay engendered by the common law notice requirements the legislature created the summary proceeding as an alternate to an action for ejectment. *Rowan v. Lytle*, 11 Wend. 616 (1834).

The first summary proceeding statute was enacted in 1820 and allowed a landlord to make an oath in writing of a holding over by a tenant and apply for a summons requiring the tenant to appear within five days to show cause why the landlord should not be put in possession. *Session Laws of New York 1820*, Chapter CXCIV. The act also provided "[t]hat in case of a tenancy at will or sufferance, the landlord or lessor shall give three months notice in writing to the tenant or tenants of the premises, requiring him to remove therefrom, before applying to a magistrate for relief under this act." *Session Laws 1820*, Chapter CXCIV, p. 177.

The legislature chose to deal with the perceived problems of the lengthy common law notice requirements, not by shortening the notice requirements for an ejectment action but by creating a summary proceeding as an alternative to it. Although the summary proceeding was available in cases of a "tenant at will or at sufferance, or for part of a year, or one or more years or from year to year", it established the three month notice provision only for tenancies at will or at sufferance. The act contained no notice requirement in the case of tenancies for one or more years or from year to year. *Id.*, p. 176–177.

The legislature did not include year to year tenancies within the provision requiring only 3 month notice to quit, or \*377 otherwise reduce or eliminate the common law rule of a 6 month notice to quit. The common law notice requirements as to such tenancies was thus retained as was the common law rule that no notice was required for tenancies that had a definite termination date.

The New York Supreme Court interpreted the new statute as applied to a tenancy at will in the case of *Bradley v. Covel*, 4 Cow. 349 (Feb. Term 1825). The court held that the statutory three month notice to quit merely converted the tenancy at will to a tenancy from year to year, and that the owner must in addition serve the 6 month common law notice to quit before he can recover possession. The court expressed some frustration at the rule commenting:

“This manner of terminating a tenancy at will is of but little use; for it leaves the landlord, as to the rent in the same situation as before, and imposes the necessity of a six months notice to quit on the day of the year corresponding to that on which the first notice expires. Without this the Landlord would still be unable to sustain an ejectment (*Doe v. Bell*, 5 T.R. 471.) With this consequence, however, we have nothing to do.” *Covel*, at 349.

In 1828 the Legislature acted to reverse the *Covel* decision. They first amended the summary proceeding act, so that it no longer provided a specific time period for a notice to quit for tenancies at sufferance and at will. *Revised Statutes*, Part 3, Chapter VIII Title 10, Article 2 § 31 (1828). As amended, Section 31 required only that the tenancy be terminated by giving notice in the manner prescribed by law. The Legislature then enacted a separate statute which reduced the notice period from three months to one month for tenancies at will or at sufferance. *Revised Statutes* Volume I, Part 2, Chapter I, Title 4, § 7 p. 745 (1828).

They also enacted a statute that eliminated the requirement, imposed by *Covel*, that in the case of tenancies at will or sufferance an owner serve both a notice \*\*847 under the summary proceeding statute and the 6 month notice to commence an ejectment action. The new act provided that:

“At the expiration of one month from the service of such notice, the landlord may re-enter, or maintain ejectment, or proceed in the manner prescribed by law to remove such tenant *without any further or other notice to quit.*” *Revised Statutes* Volume I, Part 2, Chapter I, Title 4, § 9, p. 745 (1828).

\*378 According to the Revisors' Notes, the addition of the phrase “without any further or other notice to quit.” was adopted in direct response to *Bradley v. Covel*, to reverse its rule that although a tenancy at will is terminated by the three month notice, a further notice of 6 month was necessary to remove the tenant. *Revised Statutes Revisors' Notes* 3d Vol. 2d Ed. p. 599 (1835).

These new statutes thus allowed tenancies at will and at sufferance to be terminated on one months notice and allowed the landlord to remove such a tenant either by summary proceeding or ejectment without further notice.

Thus, the specific requirements for notices to quit were no longer contained in the summary proceeding statute, but in the new §§ 7 and 9 of Part II Chapter I, Title 4 of the *Revised Statutes*. These sections also ended the common law rule that tenancies at will be treated as a tenancy from year to year for notice purposes. From this point on, the notice requirements for ejectment actions in cases involving tenancies at will and at sufferance would be governed by statute, while those involving tenancies from year to year would remain governed by common law.

The Legislature did not apply either to § 7 which provided one month notice, or § 9 which allowed the landlord to recover possession without further notice, to tenancies at from year to year. This may be explained by the fact that these new sections were enacted in response to *Covel* which only required the second notice in cases of tenancies at wills. Additionally, the original 1820 statute which the court in *Covel*, was interpreting, only dealt with notices to quit requirements for tenancies at will, and at sufferance, not tenancies from year to year.

Significantly, the same year the legislature enacted Part II, Chapter I, Title 4, §§ 7 and 9, it also retained the action of ejectment. It provided that “[t]he action of ejectment is retained, and may be brought in the cases and the manner heretofore accustomed, subject to the provisions herein after contained.” *Revised Statutes* Vol. 2, 1st ed., Part III, Chapter V, Title I, § 1 (1828). The remainder of Title I did not provide any new notice requirements, nor did it abolish any common law notices.

By this time, New York had two alternate routes to recover possession. One was the 1820 summary proceeding act which was amended as Part III, Chapter VII, Title 10, Article 2, §§ 28 and 31 of the *Revised Statutes*. The other was the common law action of ejectment as modified in *Revised Statutes* Vol. 2, 1st ed., Part III, Chapter V, Title I, § 1.

**\*379** The only statutory notice requirements that applied to either the summary proceeding or action for ejectment, were the requirements relating to tenancies at will and at sufferance contained in §§ 7–9 of Part II, Chapter I, Title 4, of the *Revised Statutes*. The notice requirements at to other tenancies were still governed by the common law.

The 1820 summary proceeding act, as amended by §§ 28 and 31 of Part III, Chapter VIII Title 10, Article 2 of the *Revised Statutes*, was replaced by Code of Civil Procedure §§ 2231–2265 in 1876, then **\*\*848** by Article 83 §§ 1420–1447 of the Civil Practice Act, and eventually by Article 7 of the RPAPL.

The notice requirements for tenancies at will and at sufferance of §§ 7, 8 and 9 of Part II, Chapter I, Title 4, of the *Revised Statutes* were recodified in 1896 as § 198 of the Real Property Law without any substantive change. By 1909, they were renumbered as the current RPL 228. This section was never amended to cover any tenancies in addition to tenancies at will and at sufferance.

Title I of Chapter V, of Part III of the *Revised Statutes*, which partially codified ejectment actions, was repealed in 1875 and replaced by the Code of Civil Procedure §§ 1496–1531. This in turn was replaced by Civil Practice Act §§ 990–1011, and then finally by Article 6 of the RPAPL. None of the various partial codifications of the action of ejectment ever entirely replaced the common law action. Neither did any of the codifications modify the common law notice requirements, except the above sections relating to tenancies at will and at sufferance, now embodied in RPL 228.

[3] In this present case, the initial lease was for one year and contained an yearly rent of \$13,800. The defendant herein held over past the expiration of the term of the lease and the plaintiff accepted rent past the expiration. Pursuant to RPL 232–c, the defendant is a month to month tenant, not a tenant at will, under these circumstances.

The issue that must be addressed is what are the common law notice requirements to remove a month to month tenant through an ejectment action. A difficulty in resolving this issue is that month to month tenancies were not known at common law, but were created by statute.

RPL 232–a provides for a 30 day notice of termination in the case of a month to month tenant. However, **\*380** RPL 232–a by its express terms applies only to summary proceedings. It requires the notice of termination to specifically state that if the tenant does not remove on the day the notice indicates the term expires the landlord will commence summary proceedings. It makes no provision for a landlord commencing an action for ejectment pursuant such a notice. RPL 232–a.

This notice requirement was originally enacted in 1882 and was entitled “*An Act in relation to summary proceedings to remove monthly tenants in the city of New York for holding over*” and contained the same requirement as RPL 232–a, that the notice of termination state that “the landlord elects to terminate the tenancy and the unless the tenant removes from said premises on the day which the term expires, the landlord will commence summary proceedings under the statute to remove such tenant therefrom.” *Session Laws of New York* Chapter 303 p. 369 (1882).

This act originally required only a 5 day notice to terminate a monthly tenancy. It was amended in 1889 to extend its coverage to Brooklyn (*Session Laws of New York*, Chapter 357 [1889] ). The act was amended again in 1920 to cover month to month tenancies and to extend the notice period from 5 days to 30 days. *Session Laws of New York* Chapter 209 (1920). The amended act was replaced by the adoption of RPL 232–a in 1939.

It is clear from text of RPL 232–a, its predecessors acts, and the original title of the 1882 act, that its notice of termination provisions applied only to summary proceedings. The section specifically provides that notice must state that if the tenant does not remove the landlord will commence summary proceedings to remove **\*\*849** him. There is no reason for the



legislature to have required the notice to explicitly state that the landlord would bring a summary proceeding in the event the tenant did not remove, if they intended that the notice could be used for an ejectment action.

The Legislature could have provided that if the tenant did not remove after 30 days, the landlord could commence either summary proceedings or an ejectment action, as they had done for cases of tenancies at will through RPL 228 and its predecessors. However, the legislature did not do so. Although the act was amended several times, it was never amended to cover ejectment actions.

A literal reading of RPL 232-a would support the conclusion that a month to month tenant can only be **\*381** removed by summary proceedings not by a common law ejectment action. Since the month to month tenancy was created by statute, [RPL 232-c] and unknown at common law, it could only be terminated by the statutory summary proceedings as provided in RPL 232-a.

While such an interpretation gives the text its plainest meaning, there is an insufficient basis to hold that the legislature intended to bar owners from removing a month to month tenant through an ejectment action. Ejectment actions are available to anyone claiming a superior right to possession. There were never any amendments to RPAPL Article 6 or the prior CPA §§ 990-1011 to bar owners from removing month to month tenants through an ejectment action.

**[4]** An interpretation of RPL 232-a, consistent with the long history of both the common law and summary proceeding legislation, is that it applies only to summary proceedings and has no applicability to ejectment actions. It neither bars owners from using an ejectment action to remove a month to month tenant, nor does its 30 notice requirement replace the common law notice requirements for an ejectment action.

There is one case in which the Civil Court of Kings County held that a 232-a notice is applicable to ejectment actions. *Ricciardo v. Ricciardo*, 6 Misc.3d 223, 785 N.Y.S.2d 903 (Civ.Ct. Kings Co.2004). That case involved the question of the proper manner of service of a notice of termination in an ejectment action. The Court starts with the assumption that the proper notice in an ejectment action is a 30 day notice pursuant to RPL 232-a. The Court in *Ricciardo* notes that courts have,

“in essence interpreted NYRPL § 232-a as being a two part statute: one part of the statute addresses the notice requirement and its manner of service, the other addresses the contents of the notice.” *Id.*, at 225-226, 785 N.Y.S.2d at 904-905.

The Court then discusses the manner of service requirements but cites no authority for the proposition that RPL 232-a applies to ejectment actions. The Court opines that:

“the manner of service of the 30 day termination notice in an ejectment action where a month to month tenancy exists is governed by NYRPL § 232-a which is the only statute that specifically addresses the manner of service of a 30 day termination notice in this situation.” *Id.*, at 226, 785 N.Y.S.2d at 905.

There are three problems with this conclusion. First, it starts from the assumption that the notice required in an ejectment **\*382** action involving a month to month tenancy is 30 days, without stating a basis for that assumption.

Second, it concludes that since RPL 232-a is the only statute containing requirements for notices of termination in **\*\*850** cases of month to month tenancies, it must apply to ejectment actions. This assumes that notices of termination in ejectment actions must be governed by a statute. It ignores the fact that ejectment actions are only partially codified and much of the procedure for such actions, are not governed by statute, but by common law. The notice to quit requirements, as to tenancies other than at will and at sufferance, are among those procedures never codified.

Third, decision ignores the text and history of RPL 232-a and its predecessor statutes, which demonstrate that they were enacted to apply only to summary proceedings.

[5] In this present case, the lease between the parties was for one year and reserved an annual rent. Further, defendant heldover past the expiration of the lease and the plaintiff accepted rent after the expiration of the lease. Under these circumstances, the resulting tenancy would have been considered a tenancy from year to year at common law.

Further, the year to year tenancy is the common law estate most closely analogous to a month to month tenancy. Both the year to year and month to month tenancies differ from a tenancy for years in that they are not for a definite term but continue indefinitely until they are terminated by a party. Since they are indefinite tenancies they are entitled to notice to quit at common law. Both also differ from a tenancy at will or at sufferance, which can be terminated at any time. Unlike tenancies at will or sufferance, they can only be terminated at the end of a recurring term. Once the tenant from year to year or month to month holds over past the last term, and the owner accepts rent, then a new term is imposed by operation of law. Neither side may terminate the tenancy before the end of that term.

[6] Most importantly, statutory modifications of common law must be strictly construed. The statutory notice requirements in the *Revised Statutes* and later RPL 228, abrogated the common law 6 month notice requirement in the cases of, tenancies at will and sufferance, only. Those sections by their terms, did not apply to year to year tenancies. The derogation from common law should not be extended to apply to month to month tenancies, absent the express intent of the \*383 legislature. Similarly, the notice requirements from summary proceedings in RPL 232-a should not be read to replace common law notice requirements in ejectment actions, absent clear legislative language and intent.

The Legislature has not adopted any notice requirements for removing month to month tenants through ejectment actions, nor has it specifically abolished the common law 6 month notice requirements for ejectment actions in cases involving month to month tenants.

By reason of the foregoing, the common law requirement of a 6 month notice to quit before a tenant may be removed through an ejectment action, applies to month to month tenancies.

As plaintiff did not give the defendant 6 months notice to quit, but only served a 30 day notice of termination pursuant to RPL 232-a, plaintiff is not entitled to summary judgment. As plaintiff did not give the 6 month notice required by common law, the complaint must be dismissed.

As to defendants counterclaims, plaintiff concedes that the finding of the Civil Court that plaintiff illegally evicted defendant, is *res judicata*; and that there is no stay of that decision pending appeal. By reason of the foregoing, the court grants Defendant summary judgment, as to liability on her illegal eviction counterclaim.

**\*\*851** WHEREFORE, by reason of the foregoing, plaintiff's motion for summary judgment is denied, and the Court grants Defendant summary judgment dismissing the complaint, as well as, summary judgment as to liability on her counterclaims. Defendant's counterclaim will be tried as to damages only. This opinion shall constitute the decision and order of this Court.

#### All Citations

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