

# **9 THINGS RESIDENTIAL LEASES SAY THAT ARE NOT TRUE**

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# RESIDENTIAL LEASE HOT LIST

## 9 Things Your Residential Lease Says That You Should Know Are Lies or Half-Truths

By Michelle A. Maratto

Banks are still not lending and, therefore, more professionals than ever have found themselves in the rental market. In fact, in Manhattan, the current residential vacancy rate stands at a mere 1.2%. Professionals working in New York City tend to be busy, and do not have a ton of free time to find the perfect apartment in this saturated market. They also tend to assume that their landlord will act professionally. If a problem does arise, many renters do not want to create trouble, or even worse, be forced to go to Landlord and Tenant court. Thus, many young professionals that have a problem during their tenancy often end up grinning and bearing it.

The lease document perpetuates this problem—it reads as if you are powerless. You are not. Just knowing that you have legal rights, contrary to what the lease may say, is more than half the battle. Just knowing your rights will make a huge difference in your rental experience.

What follows are nine fallacies that many residential renters have regarding the written terms of their lease.

### **(1) You cannot have a roommate or, your family cannot move in.**

Under New York Real Property Law § 235(f), often referred to as the Roommate Law, a residential lease entered into by one tenant implicitly permits that tenant to share the apartment with either his/her immediate family or unrelated persons “for reasons of economy, safety and companionship.” RPL § 235(f)-3. This is true even if your lease says otherwise.

The law was specifically designed to prevent landlords from prohibiting tenants to share their apartments!

**(2) You cannot sublet.**

Under New York Real Property Law 226-b, a tenant renting a residence in a building with four or more residential units has a right to sublease the apartment subject to the written consent of the landlord in advance of the subletting. Furthermore, the landlord is prohibited from unreasonably withholding consent.

There is a specific procedure that the tenant must follow which is detailed in RPL § 226-b, subparagraph 2, when requesting the landlord's permission to sublet the apartment.[1] Landlords are also required to respond in accordance with the procedure set forth in this subsection and a landlord's failure to respond is deemed to constitute consent authorizing the sublet.

Finally, whether a landlord's withholding of consent is "reasonable" is naturally a fact-sensitive question but a court will objectively evaluate the proposed sublet based on the character and financial status of the subtenant as relevant factors. See *Vance v. Century Apartments Associates*, 93 A.D.2d 701, 703-04 (1st Dep't 1983) ("Where a lease affords to a tenant a right to assign or sublet subject to the consent of the landlord, the reasonable ground to support a withholding of consent has always been tested by an objective standard, relating to the acceptability of the proposed subtenant or assignee. Thus, among the relevant criteria from the point of view of the landlord is the character and financial responsibility of the proposed tenant and the nature of the occupancy or purposes for which the property is to be used.")

**(3) If you lose a dispute with your landlord you will have to pay for landlord's attorneys' fees.**

Yes, but the converse is also true. That is, if you win a dispute with your landlord, New York Real Property Law § 234 specifically authorizes the tenant to collect reasonable attorneys' fees from the landlord even if the Lease only references the landlord's right to recover attorneys' fees. The law effectively converts this one-sided clause in favor of the landlord into a "reciprocal covenant".

**(4) You agree that your unit is not Rent Stabilized, so it is not Rent Stabilized.**

You do not have the power (or the knowledge) to enter into such an agreement. Rent Stabilization is a status that travels with the unit and depends on many factors, including, but

not limited to, the size and age of the building. Any clause that attempts to contract around Rent Stabilization Laws or waive their protection is void under New York Rent Stabilization Code § 2520.13, i.e. Courts are bound to give such language no effect.

**(5) You might forfeit your entire security deposit if you try to apply any portion of it to the rent.**

Many leases contain a clause that prohibits tenants from applying the security deposit to the rent due and owing. While this is fair, if the clause goes on to state that a breach of this provision will result in the forfeiture of the entire security deposit to landlord, the clause is unenforceable. A court will read this provision as a “liquidated damages” clause, which must bear a reasonable proportion to the probable loss and where the actual loss is incapable or difficult of precise estimation. See *Gordon v. Eshaghoff*, 60 A.D.3d 807, 808 (2d Dep’t 2009).

**(6) You have to pay your rent even if your apartment needs repairs.**

Every residential lease implicitly carries with it the “warranty of habitability” as articulated in New York Real Property Law §235-b. Under this law, landlords have a duty to maintain the premises in a habitable condition and courts have recognized that the tenant’s obligation to pay rent is dependent on the landlord satisfying its duty. See *Fourth Federal Savings Bank v. 32-22 Owners Corp.*, 236 A.D.2d 300, 301 (1st Dep’t 1997). Thus, if your apartment needs repairs, you may be able to deposit your rent in escrow and hold it there until repairs have been completed.

**(7) The guaranty automatically renews.**

If your lease has a guarantor—for example, your parents—and the guaranty states that your parents are liable for tenant’s (i.e. your) obligations under “the Lease”, then their obligation expires when the Lease expires. However, if the guaranty also has “survival” language that states that the guaranty will remain in full force and effect notwithstanding any extensions of time or renewals of the lease, or, is so indefinite that it simply guaranties tenant’s obligations in connection with “a” Lease with landlord, then your parents may be held liable for your defaults under the Lease. Compare *Abart Holdings LLC v. Laasch*, 15 Misc.3d 142(A) at \*1 (1st Dep’t 2007) (holding that guaranty had lapsed since there was no extension of lease) with *1374 Boston Road, LP v. Fountain House*, 8 Misc.3d 1020(A) at \*4 (N.Y. Civ. Ct. Kings Cty. 2005) (finding guaranty in effect because its terms were indefinite as to scope of commitment).

**(8) You cannot raise a counterclaim in a legal proceeding.**

If your lease contains a “No Counterclaims” provision that bars you from asserting counterclaims in a legal proceeding brought against you by the landlord, this provision will be unenforceable if your counterclaim has to do with landlord’s failure to maintain habitable conditions in the apartment or, if they are otherwise “inextricably intertwined” with the landlord’s entitlement to rent or possession. *Chinatown Preservation HDFC v. Yu Hua Chen*, 27 Misc.3d 1213(A) at \* 3 (N.Y. Civ. Ct. N.Y. Cty. 2010). Typically, this exception will implicate the “warranty of habitability discussed in point #5 above.

**(9) Excessive late fee provisions will be upheld against you.**

Check your rent bill. If your landlord is charging you a late fee, there is a chance it is excessive and you have grounds to contest its enforceability. Courts consistently strike down late fee charges as excessive when they amount to 4-5% per month late rent. In *Spring Valley Garden Associates v. Earle*, 112 Misc.2d 786, (Co. Ct. Rockland Co. 1982), a late fee of \$50 if rent of \$405 per month was over ten days late was found to be “liquidated damages and a penalty which cannot stand.” That Court also ruled that the same late fee “is unconscionable and is void.” A 5% per month late rent “surcharge,” amounting to 60% per year was “unreasonable and confiscatory in nature and therefore unenforceable.” *943 Lexington Avenue, Inc. v. Niarchos* 83 Misc.2d 803, (App Term, 1st Dept 1975). A late charge equal to 4% per month, amounting to 49% per year “is clearly a penalty disproportionate to any probable loss. Accordingly, the court finds this provision of the lease unenforceable.” *Raanana Realty Corp. v. Louis J. Rotondi Restaurant Corp.*, 1/9/91 N.Y. Law Journal 23, col 3 (1st Judicial Dept, N.Y. Co). Late fees of \$32.50 per month on rent of \$650 per month (5%) were struck down as unreasonable, excessive and unenforceable in *Parkchester Apartments Co v. Lewis*, 4/22/98 N.Y. Law Journal (1st Judicial Dept, Bronx Co).

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[1] RPL § 226-b(2) reads in pertinent part:

(a) A tenant renting a residence pursuant to an existing lease in a dwelling having four or more residential units shall have the right to sublease his premises subject to the written consent of the landlord in advance of the subletting. Such consent shall not be unreasonably withheld.

(b) The tenant shall inform the landlord of his intent to sublease by mailing a notice of such intent by certified mail, return receipt requested. Such request shall be accompanied by the following information: (i) the term of the sublease, (ii) the name of the proposed sublessee, (iii) the business and permanent home address of the proposed sublessee, (iv) the tenant's reason for subletting, (v) the tenant's address for the term of the sublease, (vi) the written consent of any cotenant or guarantor of the lease, and (vii) a copy of the proposed sublease, to which a copy of the tenant's lease shall be attached if available, acknowledged by the tenant and proposed subtenant as being a true copy of such sublease.

(c) Within ten days after the mailing of such request, the landlord may ask the tenant for additional information as will enable the landlord to determine if rejection of such request shall be unreasonable. Any such request for additional information shall not be unduly burdensome. Within thirty days after the mailing of the request for consent, or of the additional information reasonably asked for by the landlord, whichever is later, the landlord shall send a notice to the tenant of his consent or, if he does not consent, his reasons therefor. Landlord's failure to send such a notice shall be deemed to be a consent to the proposed subletting. If the landlord consents, the premises may be sublet in accordance with the request, but the tenant thereunder, shall nevertheless remain liable for the performance of tenant's obligations under said lease. If the landlord reasonably withholds consent, there shall be no subletting and the tenant shall not be released from the lease. If the landlord unreasonably withholds consent, the tenant may sublet in accordance with the request and may recover the costs of the proceeding and attorney's fees if it is found that the owner acted in bad faith by withholding consent.