A Landlord's Right to Access a Tenant's Apartment In Emergencies and for Repairs

and

The Laws Regarding Keys and Key Fob Systems

LAWS AND BEST PRACTICES

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ITKOWITZ PLLC
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Laws and Best Practices

A booklet Drafted for LandlordsNY in Spring 2018

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I. A LEASE IS MORE THAN JUST A CONTRACT; IT IS ALSO A CONVEYANCE, A GRANT OF EXCLUSIVE POSSESSION OF A BOUNDED SPACE.

When you lease a residential apartment to a tenant in New York City, you are *conveying* property to them, although on a temporary basis, and you are contracting to give them **exclusive use of a bounded space**.[1] In other words, you cannot just go back in to the apartment whenever you feel like it. This booklet discusses when and under what circumstances a landlord can legally enter a leased residential premises in New York City.

The transfer of absolute possession and control differentiates a lease from a license or any other property-related arrangement.[2] A "lease" grants exclusive possession of designated space to a tenant, usually for a specified rental rate and term, subject to certain rights reserved by the lessor. If the agreement affords the occupant exclusive possession of the premises as against the entire world, including the owner, it is a lease.[3] Some of the typical elements of a lease are: (a) a fixed term, (b) fixed rental amounts, (c) a clearly delineated premises, (d) a grant of exclusive use of the subject premises, and (e) exclusive control by the occupants over subject premises.[4]

[1] *219 Broadway Corp. v. Alexander's, Inc.*, 46 N.Y.2d 506 (1979).

[2] *Feder v. Caliguira*, 8 NY2d 400, 404 [1960].

[3] *C C Vending, Inc. v. Berkeley Educational Services. of New York, Inc.*, 74 AD3d 559 [1st Dept 2010] (plaintiff concessions operator had a license, not a lease, because he had "no control over defendant's premises" and "no tangible interest in the property").

[4] *Davis v. Dinkins*, 206 AD2d 365 [2nd Dept 1994]; *Miller v. City of New York*, 15 NY2d 34 [1964]; *City of New York v. Pennsylvania R. Co.*, 37 NY2d 298 [1975]; *Statement, Inc. v. Pilgrim's Landing, Inc.*, 49 AD2d 28 [4th Dept 1975].

II. AN OWNER'S RIGHT TO ACCESS A RESIDENTIAL APARTMENT IN A MULTIPLE DWELLING

In this section, we explore the basic rules about an owner's right to access a residential apartment in a multiple dwelling (a building with three or more units).

A. Statute Regarding Access

1. The Statute

As always, the best place to start any legal inquiry is by looking at the statute that relates to your question. Owner's right to access a residential apartment contained within a multiple dwelling is governed by the New York City, N.Y., Rules, Tit. 28, § 25-101 (Owner's Right of Access and Requirements for Notification) and states:

> (a)(1) Owner to give notice. Where an owner or his or her representative seeks access to a dwelling unit, suite of rooms or to a room, under the provisions of §27-2008 in order to make an inspection for the purpose of determining whether such places are in compliance with the provisions of the multiple dwelling law or the administrative code, such owner or representative shall notify the tenants not less than **twenty-four hours** in advance of such time of inspection.
>
> (2) Where an owner or his or her representative seeks access to make improvements required by law or to make repairs to a dwelling unit, suite of rooms or to a room, such owner or representative shall give written notice to the tenant not less than **one week** in advance of the time when the improvements or repairs are to be started, except where otherwise provided in paragraph (3) of this subdivision.
>
> (3) Where an owner or his or her representative seeks access to make repairs
>
> > (i) that are urgently needed to a dwelling unit, suite of rooms or a room, as in the case where a class C violation of the Housing Maintenance Code has been issued, except where such class C violation is for the existence of a lead-based paint hazard, or
> >
> > (ii) in the case of an emergency where repairs are immediately necessary to prevent damage to property or to prevent injury to persons, such as repairs of leaking gas piping or appliances, leaking water piping,

stopped-up or defective drains, leaking roofs, or broken and dangerous ceiling conditions,

such owner or representative shall not be required to provide written advance notice, but shall be required to notify the tenant or tenants by such actions as telephone, email, or by knocking on the occupant's door at a reasonable time when he or she would be expected to be present.

(4) Where an owner or his or her representative must make a repair in a public area or other area of a dwelling that may result in an interruption of essential services such as utilities (heat, hot water, cold water, gas, electricity, or elevator) that is expected to continue for more than two hours, the owner or his or her representative shall provide written notice to the tenants by posting a notice in a prominent place within the public part of the building and on each floor of such building at least twenty-four hours prior to such interruption. However, if such interruption is not expected to continue for more than two hours or is due to emergency repairs that were not anticipated and must begin immediately, advance notice is not required, provided that notice shall be posted as soon as possible if such work continues for two or more hours. Such notice shall identify the service to be interrupted, the type of work to be performed, the expected start and end dates of the service interruption, and shall be updated as necessary. Such notice shall be provided in English, Spanish, and such other language as the owner deems necessary to adequately provide notice to the tenants. Such notice shall remain posted until the interruption of essential services interruption ends. A sample notification form is provided in these rules.

(b) Notices to be in writing. Where an owner is required to give notice in advance of seeking access to a dwelling unit, suite of rooms or to a room, as required by subdivision (a) of this section, such notice shall be in writing, dated, and shall contain a statement of the nature of the improvement or repairs to be made, unless specifically stated otherwise in these rules.

(c) Authorization to be in writing. Where a representative of an owner seeks access to a dwelling unit, suite of rooms, or rooms, the authorization of the owner shall be in writing and the representative shall exhibit such authorization to the tenant when access is requested.

(d) Hours when access to be permitted. Except as provided in paragraph (3) of subdivision (a) of this section, access to a dwelling unit, suite of rooms, or rooms, shall be limited to the hours between nine antemeridian and five post-meridian, unless otherwise agreed to by the tenant. Access shall not be required on Saturdays, Sundays or legal holidays, unless otherwise agreed to by the tenant, except as provided in paragraph (3) of subdivision (a) of this section.

Sample Notification Form for Interruption of Essential Services
NOTICE OF INTERRUPTION OF SERVICES
Please be advised that due to repair work in the building located at _____, there will be an interruption in the following building services:
heat hot water cold water gas electricity elevator
The interruption in service is expected to begin on _____ and to end on _____.
The repair work is for the purpose of _____
AVISO DE INTERUPCION DE SERVICIOS
Por favor tenga en cuenta que debido a reparaciones en el edificio localizado en _____ _____, habra una interrupcion en los siguientes servicios del edifico:
Calefaccion Agua Caliente Agua Fria Gas Electricidad Elevador
La interrupcin en servicio se espera comenzar en _____ y terminar en _____.
El trabajo de reparacion es para el proposito de _____

[Emphasis supplied.]

I put the full text of long statutes in my materials when I think they are very important and that people – both real estate professionals and tenants – should read them. Sorry, the law is words, not emojis. In any event, now let us unpack this important statute.

2. Unpacking the Statute – Three Different Types of Access: Inspections, Repairs, Emergencies and Form of Notice

The statute anticipates three different types of access. First, it talks about access for inspections, which require twenty-four hours' notice. Second, it talks about access for repairs, which requires a week's notice.

The notice called for is very specific. The notice must be "in writing, dated, and shall contain a statement of the nature of the improvement or repairs to be made…". The hours access are permitted are between 9:00 am and 5:00 pm on weekdays, excluding holidays.

Third, the statute talks about emergency situations, which require no written advanced notice. In such cases, the person seeking access "shall be required to notify the tenant or tenants by such actions as telephone, email, or by knocking on the occupant's door at a reasonable time when he or she would be expected to be present."

Also, any representative of an owner needs to be able, upon demand by the tenant, to exhibit an authorization by owner, authorize their access.

There is a fourth section of the statute that discusses repairs in public areas, which is beyond the scope of our topic. I leave the full text of that portion of the statute in above anyway.

B. Rent Stabilized Tenants Have Further Rights Regarding Access

When the landlord seeks access to a Rent Stabilized unit in New York City for the purpose of an inspection or a showing, tenant must first be afforded at least five days' advance notice (actually ten, if served by mail) so that the parties may attempt to arrange a mutually convenient appointment.[5] Here is the statute:

> RSC § 2524.3. Proceedings for eviction--wrongful acts of tenant.
>
> [A]n action or proceeding to recover possession of any housing accommodation may only be commenced … upon one or more of the following grounds, wherein wrongful acts of the tenant are established as follows:
>
> (e) The tenant has unreasonably refused the owner access to the housing accommodation for the purpose of making necessary repairs or improvements required by law or authorized by the DHCR, or for the purpose of inspection or showing the housing accommodation to a prospective

[5] 9 NYCRR § 2524.3(e).

> purchaser, mortgagee or prospective mortgagee, or other person having a legitimate interest therein; provided, however, that in the latter event such refusal shall not be a ground for removal or eviction unless the tenant shall have been given at least five days' notice of the inspection or showing, to be arranged at the mutual convenience of the tenant and owner so as to enable the tenant to be present at the inspection or showing, and that such inspection or showing of the housing accommodation is not contrary to the provisions of the tenant's lease or rental agreement. If the notice of inspection or showing is served by mail, then the tenant shall be allowed five additional days to comply, for a total of 10 days because of service by mail, before such tenant's refusal to allow the owner access shall become a ground for removal or eviction.

C. A Lease Provision Regarding Access

Of course, a lease can always make those requirements *more* stringent, so check your leases.

D. Going into a Tenant's Apartment without Tenant's Consent – Just Don't.

There is always a risk when you enter an apartment without the tenant's consent. If the tenant is not there, the tenant could say that your vendor took his original Picasso (I am not being facetious; I have actually know tenants who kept original Picassos in their apartments).

Landlords – put yourself in tenant's position here. Imagine the shock of a stranger opening the door to your home? Under such circumstances, it is not hard to imagine all kinds of bad consequences.

My sincere advice to landlords, after many years in this business, is to never enter an apartment without a tenant's consent unless there is a serious emergency.

III. WHEN A RENT STABILIZED TENANT DENIES ACCESS EVEN AFTER PROPER NOTICE IS GIVEN

A Rent Stabilized tenant's unreasonable refusal to permit the landlord access to the unit to make necessary repairs or improvements required by law, or to show the unit to prospective purchasers or mortgagees, is a ground for termination.[6]

If tenant fails or refuses to provide access, then depending on the terms of the parties' lease agreement, the landlord may need to serve a ten-day written notice to cure the violation.[7] If the breach continues thereafter, the landlord may issue a termination notice at least seven calendar days prior to the intended termination date.[8]

Upon the expiration of the termination notice, Landlord can then bring a summary holdover proceeding against tenant in Housing Court. **As a practical matter, most such holdovers end with tenant stipulating to provide access, under the scrutiny of the Housing Court judge.** If tenant defaults under such stipulation, the stipulation should provide for the case to be restored to the court's calendar for further relief.

IV. ATTEMPTS AT ACCESS ASSOCIATED WITH COURT PROCEEDINGS

A. Tips for Documenting Attempts to Gain Access to an Apartment

The concept of "Access" becomes a big deal in Housing Court – both in residential nonpayment proceedings (where the tenant claims not to be paying the rent due to warranty of habitability issues) and in Housing Part "HP" Proceedings (where the tenant is taking the landlord in to court to get repairs). Landlords must understand the importance of keeping and documenting the circumstances of appointments for access to repair bad conditions in an apartment.

Here are some tips for documenting attempts at access. Please feel free to add more during the presentation!

- If there is an online system for tenants to request repairs and the landlord to arrange access and dispatch repair people, then use the system carefully and make sure you keep all the records created by the system.

- Send letters, certified letters, and/or emails to tenant requesting access as per the above statute; and affix a copy of the request on the door in a sealed envelope and take a picture of the letter taped to the door.

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[6] 9 NYCRR § 2524.3(e).

[7] 9 NYCRR § 2524.3(a); *B.A. Associates Equities Corp. v. Baez*, NYLJ, Jan. 6, 1993, p. 25, col. 2 [Civ. Ct., Kings County].

[8] 9 NYCRR § 2524.2(c)(2).

- Document all your attempts to get in. Take pictures or video of the failed attempts at access.

- Save contractor receipts that show the attempts as well.

- If the matter is very contentious, have your lawyer contemporaneously prepare an affidavit for the super and/or vender to sign regarding their attempts to gain access.

B. Frequent Reasons Tenants Give For Not Allowing Access and Their Legality

I get asked often about two excuses for tenants not wanting to allow access, and neither reason is legitimate.

1. "I'll do the repairs myself and bill you."

Sometimes tenant says, *"I'll do the repairs myself and bill you."* Tenant cannot do her own repairs and bill the landlord. The authority for this comes from the contract between the landlord and the tenant – the lease. Most leases will say that tenant cannot build in, add to, change or alter the Apartment in any way.

The above rule might not hold true, however, if landlord refuses to do required work in the apartment. A leading case here is *Mengoni v. Passy*, 254 AD2d 203 [1st Dept 1998]. In this case, the landlord brought an action seeking to evict rent controlled tenant, based on tenant's replacement of kitchen and bathroom appliances and fixtures without landlord's prior consent. The Civil Court, New York County dismissed the petition and awarded tenant punitive damages. The landlord appealed. The appellate court held that tenant's actions did not constitute substantial breach of no alterations clause of lease because landlord failed to respond to tenant's repeated complaints and demands to have items fixed, warranting tenant's actions.

2. "I need to see the contractor's license."

Sometimes tenant says, *"I need to see the contractor's license and/or Identification."* I cannot find any authority that gives tenant a right to ask for a contractor's license before allowing them to enter the apartment. In fact, I found a DHCR proceeding where a tenant was not allowed to challenge repairs that the landlord did on the basis that the contractor was unlicensed. *In The Matter of the Administrative Appeal of Joann Brown*; DHCR Admin. Rev. Dckt. No. PK210080RT (3/12/02); LVT Number: 15801.

V. WHEN OWNER NEEDS ACCESS FOR BUILDING-WIDE WORK, WHICH WILL BE HIGHLY DISRUPTIVE AND WHICH WILL TAKE A LONG TIME – A CASE STUDY

I represented a LNY member in an interesting case.[9] The building was in Queens and there was a structural problem. The bricks on a load-bearing wall were cracking. Owner had a reputable licensed engineer engaged, who had rendered a report about the crack and a licensed contractor lined up to repair the problem. Four Rent Stabilized tenants of the building would be severely disrupted by the work. For a period of six-weeks, at least, they would need a support beam to shore up their living rooms and contractors would be in and out of their units constantly. Three of the four tenants had agreed to move temporarily, while the work was occurring. The fourth tenant was not only refusing to move temporarily, he was refusing to communicate. The LNY member hired me to work on the matter.

The first thing I did was speak with the engineer. He assured me that the condition was not life threatening. Nevertheless, it would become life threatening if not addressed in the next few years.

I reviewed the New York City Department of Buildings ("DOB") application filed by the contractor. The application indicated that tenants would NOT need to be displaced during the work. I asked the engineer about this, and he agreed that the tenants could remain in place during the work. If the tenants remained in place during the work, however, then (a) the work would take longer and cost more and (b) the tenants would be living through very unpleasant circumstances.

I always start every project with the end in mind. I had to answer the question, if I cannot bring the parties to a mutually beneficial settlement, what do I have to do? What is my endgame? What is my leverage? I did a Legal Project Management analysis and determined that if the tenant did not allow access, that the proper next step legally would NOT be the procedure I outlined above in this booklet so far – to serve tenant with a notice to cure a lease default, followed by (if the default remained uncured) a notice of termination of the tenancy, and a summary holdover proceeding in Housing Court. That procedure works just find most of the time. I determined, however, that it was inappropriate here for a few reasons.

First, owner did not really want to terminate this man's long-term Rent Stabilized tenancy. That was not the goal. The goal was access. I did not wish to start the matter by terminating the tenancy. Second, the Supreme Court has broader powers than the Housing Court. Here, I would be seeking an injunction allowing owner access over a long period of time and for some serious work.

The situation I would need to avoid was as follows – the tenant, in response to a Housing Court order obtained after a long drawn out process, allows access for the first

[9] Some details changed to protect the member's privacy.

few days or weeks of the work. Then, at a crucial stage in this structural work, one day the tenant refuses access to the workers, halting the project and causing all kinds of problems. Then I am left going back, after a default notice, into Housing Court to wait in line, while this critical work remains half done. *THAT, was the situation I was trying to avoid.* I instinctively felt like Supreme was the place to be. The problem, however, is that seeking an injunction in Supreme Court would be extremely expensive for the owner. The goal, of course, was to avoid litigation.

Therefore, I wrote a very carefully drafted letter to the tenant. In my letter, I was very open about the situation, including the engineer's report and the DOB application for a permit. Many owners seem to resist sharing information with tenants, even when, as here, the information is a matter of public record. The DOB application was obviously available online, as was the engineer's report, which was on file with the Landmarks Preservation Commission.

In my letter, I included an "Access Agreement". A Legal Aid attorney would have trouble improving upon my Access Agreement. Owner would pay a licensed mover to move tenant to a newly refurbished apartment within the building. Owner would pay for moving tenant's cable as well. Tenant's rent would be $0 while he was out of his unit. Owner acknowledged that tenant was not in any way relinquishing his rights to the apartment nor his rights under Rent Stabilization. A construction manager would be made available to tenant during the relocation. Owner agreed to pay for tenant's move back to the apartment when the work was done.

In my letter, I strongly encouraged the tenant to bring the letter to an attorney or to his local Legal Aid office. It was essential to me that this tenant be represented. Without a tenant lawyer involved, no agreement to move a Rent Stabilized tenant for major construction is enforceable anyway.

Unfortunately, the tenant still maintained radio silence. I sent a follow up letter, explaining to the tenant that owner was not going to let the building crumble, just because he was being recalcitrant. I again encouraged him to go see Legal Aid, and told him that I would soon have to sue him in Supreme Court.

Thankfully, Legal Aid popped up. They had my letters and my Access Agreement. Nevertheless, they began on a frosty note, noting that the DOB application did not require tenant relocation. I responded with a long email, acknowledging that the tenant had a right to stay, even if would make her life and owner's very difficult. I implored them to review my draft Access Agreement and the circumstances of this matter carefully. I also asked them what they expected me to do if one morning, during the project, the contractor knocked on tenant's door and he, for whatever reason, refused to let the contractor's in. Then we would all be in Supreme Court on an emergency application anyway. This owner was doing everything right. He was trying to fix an ailing building, at great expense. The tenant would be moved to a better apartment in his own building, his rights to his apartment were well preserved, the work would go faster if he was moved, for all involved. "Please", I asked nicely (always a

good legal strategy), “can you work with your client and with the owner and me to achieve a mutually beneficial solution?”

It took time. More time than we had hoped. But we got it done. Tenant wanted his kitchen sink glazed or replaced while the apartment was empty. He also wanted his shower tile fixed, a paint job, and some special work done on his built-in shelving unit. Legal Aid tinkered with my Access Agreement. The move was tricky because the tenant had decades of stuff in the apartment. These were small prices to pay, however, for peace and for getting this important structural work done.

Although the process took longer than my owner-client would have liked it to, it probably was quicker than court would have been and it was far less expensive and far less painful for all involved.

VI. THE HOUSING MAINTENANCE CODE REQUIREMENT TO PAINT APARTMENTS EVERY THREE YEARS AND ACCESS

A landlord must regularly paint a tenant’s apartment. This area is governed by the New York City Housing Maintenance Code (“HMC”) § 27-2013 (Painting of public parts and within dwellings). Note that while the HMC, in general, applies to all dwellings, certain sections of the painting section of the law apply ONLY to multiple dwellings, which means three or more residential units.

It is common, however, to find apartments that have not been painted for many years. It is also common to find tenants who prefer that the landlord not come in to paint. The landlord, however, must paint..

The painting statute, therefore, gives rise to a lot of push and pull around the issue of access, which is why I include it in this booklet.

Here are some key takeaways from the “painting statute”:

- In a multiple dwelling, landlord must paint every three years.

- The lease can shorten this requirement, so be careful if you are cutting and pasting from some other lease! The lease can NOT lengthen the requirement.

- Landlord can get out of the three-year-paint-job if ONE month prior to the expiration of the three year cycle the landlord and tenant agree that the painting requirement can be extended. In that case, the extension can be for up to two years. This needs to be in a separate agreement, however, not part of a lease. I assume this provision is there in case tenants do not want the hassles that come along with a paint job.

- The landlord of a multiple dwelling is required to keep and maintain records relating to the refinishing of public parts and dwelling units showing when

such parts were last painted or papered or covered with acceptable material and who performed the work. Such records shall be open to inspection by the department, and shall be submitted to the department upon request.

VII. KEYS and KEY FOBS

A. Rent Stabilized tenants are entitled to multiple keys, but not an unlimited number of free keys.

A tenant is entitled to multiple keys, but not an unlimited number of free keys.

1. Each Rent Stabilized tenant gets 4 extra fobs for tenant's employees at no charge.

In *Akelius Real Estate Management LLC*, *DHCR Adm. Rev. Docket No. EX210010RO* (5/18/17) LVT Number 27798, landlord asked the DHCR for permission to substitute a traditional wired intercom system with a modernized telephone-based intercom system, and to substitute a traditional key lock system with an electronic key fob system to gain entry to its building. The DRA ruled for landlord while imposing a number of conditions on the service modification. Landlord appealed, objecting to requirements that: (a) tenants receive an unlimited number of free key fobs, including fobs for children if requested; and (b) tenants receive a $15 permanent monthly rent reduction to offset the approximate cost of basic telephone service.

The DHCR ruled against landlord. **The DHCR's standard policy applicable to all system changeovers to key fobs is that tenants may receive up to four additional key fobs or keycards, at no charge, for the use of tenant's employees or the tenant's guests, who are defined as family members or friends who can be expected to visit on a regular basis or visit as needed to care for a tenant or the apartment if tenant is away. Landlord is otherwise free to exercise reasonable guidelines aimed at limiting key fob access to other parties.**

It is also the DHCR's standard policy applicable to all intercom changeovers that the conversion must include a touch-tone landline phone in order to maintain intercom service to an apartment and that tenants receive a rent reduction to offset landline costs. And landlord could file a new application for service modification approval for its now claimed intention to install wireless fixed hardware intercom units in order to potentially eliminate costs associated with maintaining a landline.

2. $25 For Replacement Proxy Cards is the DHCR Rule

In *Demme: DHCR Adm. Rev. Docket No. AO430048RT* (1/17/14) LVT Number 25504, landlord asked the DHCR for permission to replace a building's existing standard lock system with a proxy-card system. The DRA ruled for landlord, setting forth a number of conditions.

Tenants appealed and lost. They claimed that the door wasn't always locked, didn't close all the time, was often ajar, and could be pushed open without the proxy card. They also claimed that the proxy cards were poorly made, that the laminate peeled off quickly, that the $25 replacement fee was excessive, that in October 2011 the key entry system was restored to allow tenants with defective proxy cards to use a regular key, and that not everyone in the building used the new key cards. Landlord denied there were any problems and said that it retained the key cylinder during a transition period that would end in May 2012.

The DHCR found tenants' claims insufficient to revoke the DRA's order. If tenants continued to have problems with the new system, they could file complaints based on the reduction in services.

3. ***When a landlord will not provide an extra key card for a child caregiver of tenant's, the Rent Stabilized rent gets reduced.***

When a landlord will not provide an extra key card for a child caregiver of tenant's, the Rent Stabilized rent gets reduced.

In *50-58 East 3rd Street, LLC, DHCR Adm. Rev. Docket No. BO410018RO* (1/17/14) LVT Number: #25505, a Rent Stabilized tenant complained of a reduction in services because landlord wouldn't give her an extra key card for her child care provider. The DRA ruled for tenant and reduced her rent. Landlord appealed and lost. Landlord claimed that the condition was *de minimis*, or minor, and that, in any event, landlord and tenant had resolved the issue by written agreement before the DRA issued its order. The DHCR noted that this wasn't a minor condition and that long-standing DHCR policy upheld the right of a caregiver to receive keys.

4. ***Non-duplicable key system and a Rent Stabilized tenant.***

This case involved a non-duplicative key system and a Rent Stabilized tenant.

In *Kosova Properties, Inc., DHCR Adm. Rev. Docket No. ET410008RO* (12/15/16) LVT Number 27495, a Rent Stabilized tenant complained of a reduction in services. The District Rent Administrator ("DRA") ruled for tenant and reduced his rent based on landlord's failure to maintain the building entrance door lock. Landlord appealed and lost. When landlord answered tenant's complaint, it stated that the entrance door lock and key had been modified so that only a non-duplicable key was used and tenant wasn't provided two keys unless tenant's co-occupant provided identification. Therefore, the DRA correctly found that there was a decrease in service and that the entrance door modification without prior DHCR approval wasn't *de minimis* (was not minor).

5. ***Each person who get a keyfob for a Rent Stabilized apartment may have to sit for a photo, but not minors.***

In Aulov/Mosheyev, DHCR Adm. Rev. Docket No. DX110002RT (12/21/16) LVT Number 27494, landlord asked the DHCR for permission to modify building-wide services by replacing metal entrance door keys with electronic keycards/fobs to be used at five building entrances and the garage entrance. At the same time, landlord said it would enhance a newly installed CCTV security camera surveillance system consisting of eight cameras with 24/7 monitoring. The DRA ruled for landlord and approved the service modification without any rent reduction. Two tenants appealed and lost. Tenants objected to the DRA provision that each person receiving a key fob/keycard was required to sit for a photo to be electronically associated with the fob. But minors weren't required to have photos taken and tenants' names, addresses, and photos wouldn't be listed on the keycard/fob. The information was for landlord's security system database only.

B. The Conditions for Changing From a Key to a Key Fob System in a rent Stabilized building

In the recent case of *Paul Court, DHCR Adm. Rev. Docket No. DR430034RT* (7/29/16) LVT Number: #27240, the DHCR approved the replacement of entry keys with key fob system, with conditions.

Landlord asked the DHCR for permission to replace the building's existing key entry system with an electronic key fob or key card entry. Some tenants objected, claiming that they preferred metal keys for reasons of safety and convenience. There was no doorman on site and the building super lived three blocks away. The DRA ruled for landlord at no change to the legal rents. The DRA found that the proposed service modification was an adequate substitution of services and not inconsistent with the rent stabilization and rent control laws.

The DRA set conditions:

> (1) the building must still be accessed by metal keys in the event of emergency;
> (2) the system could record entrances, but not departures;
> (3) the system would be monitored by a security camera system;
> (4) during office hours, management would assist tenants with access if needed and during off-hours, tenants would have a number to contact the super;
> (5) management would accommodate religious observers who couldn't operate electronic devices on the Sabbath;
> (6) the system must have a 48-hour battery backup in case of power outage;

(7) tenants would receive key fobs based on file information, to be verified not more than once a year;
(8) occupants, including children, would receive free key fobs, and tenants could also get up to four free key fobs for guests or employees;
(9) key fob replacement costs couldn't exceed $25;
(10) each person who wasn't a minor would sit for a photograph to be electronically associated with the key fob;
(11) individuals receiving key fobs must provide proof of identity, but landlord couldn't record this information;
(12) landlord couldn't request or retain the Social Security Number of more than one tenant or occupant for an apartment;
(13) tenant's name, address, and photo wouldn't be listed on the key fob; and
(14) no additional equipment would be installed in tenants' apartments.

Some tenants appealed on a number of grounds, including that the system was installed prior to DHCR approval, the recording of entrances was an invasion of privacy, it was discriminatory to give metal keys to Sabbath observers only, and tenants shouldn't have to give landlord any information not stated in their leases. The DHCR ruled against tenants. There was no proof that landlord implemented the keyless entry system prior to DHCR approval. Tenants' claim that landlord's provisions for emergencies was inadequate was speculative. The recording of entrances only didn't invade privacy and was consistent with prior DHCR rulings. The discrimination claim didn't represent a violation of the rent stabilization law or code. It also wasn't unreasonable to require tenants to submit a photograph.

C. Landlord Can Track Keyfob Data in a Rent Stabilized Building

In the *Administrative Appeal of Said*, **DHCR Adm. Rev. Docket No. FO430069RT (3/21/18) LVT Number: #28467,** the DHCR found that a key card security system replacing a traditional key-lock system doesn't represent a reduction in building-wide services, a violation of privacy rights, or an unauthorized change in tenant's rent-stabilized lease. Tenant's request that the order be amended to limit key fob information solely to track usage of fobs that were reported missing was denied. Landlord could exercise reasonable discretion aimed at limiting key fob access to third parties who weren't tenants, lawful occupants, guests, or employees, or to address security-related issues. Landlord could charge $25 for key fob replacements. It was also reasonable to require each adult person receiving a key fob to sit for a photo to be electronically associated with the key fob in landlord's security database.

D. Disabled Tenants and Reasonable Accommodations and Keys

In the appellate case of *2132-38 Wallace Avenue Corp. v. Gibson*, NYLJ, March 30, 2009, p. 27, col. 2 [App Div 1 Dept]; LVT Number 21133, tenant complained to the New York State Division of Human Rights ("DHR") that landlord discriminated against him by failing to make a reasonable accommodation for tenant's disability. Tenant was physically disabled and asked for keys to the building's rear entrance, which didn't have steps and was closer than the front entrance to available parking spaces. Landlord initially refused, and didn't provide the keys for more than a year. The DHR ruled for tenant, and ordered landlord to pay tenant $10,000 in compensatory damages. In addition, the DHR fined landlord another $10,000 as punitive damages. Landlord appealed. The court ruled for landlord in part, reducing the amount of compensatory damages to $2,500 for tenant's distress. But the court revoked the punitive damages award.

E. Tenant Can Change Her Own Lock But Must Give Landlord a Key

Tenant can change her own lock but must give landlord a key.

LNY Member Question: "I recently took over a property, and don't have any keys to the apartments, I've asked the tenants to provide a copy to landlord/management, but they refuse. What're my options/rights?"

Michelle Answer: First, I am going to assume that you do not have keys because the tenants changed the locks on their apartment doors. I am not going to assume that the reason you do not have keys because the former owner or manager that you replaced simply failed to give you the keys.

Tenants can change the locks on the doors to their apartments, no matter what the lease says. Multiple Dwelling Law § 51-c (Rights of tenants to install and maintain locks in certain entrance doors) states:

> "Every tenant of a multiple dwelling [3 or more units], except a tenant of a multiple dwelling under the supervision and control of a municipal housing authority, occupied by him, except as a hotel or motel, or college or school dormitory, shall have the right to install and maintain or cause to be installed and maintained in the entrance door of his particular housing unit in such multiple dwelling, a lock, separate and apart from any lock installed and maintained by the owner of such multiple dwelling, not more than three inches in circumference, as an ordinary incident to his tenancy, **provided that a duplicate key to such lock shall be supplied to the landlord or his agent upon his request;** and every provision of any lease hereafter made or entered into which reserves or provides for the payment by

> such tenant of any additional rent, bonus, fee or other charge or any other thing of value for the right or privilege of installing and/or maintaining any such lock, shall be deemed to be void as against public policy and wholly unenforceable."
>
> [Emphasis supplied.]

In *Lavanant v. Lovelace*, 71 Misc 2d 974 [App Term 1st Dept 1972], the appellate court held that, under MDL § 51-c and the lease, the failure of a rent regulated tenant to supply a key to the landlord when the tenant installed his own lock on the entrance door to the apartment constituted a breach of a substantial obligation of the tenancy and warranted eviction. See also *Nyamekye v. Madison*, 17 Misc 3d 127(A) [App Term 1st Dept 2007].

Therefore, you should send the tenants a letter by regular and certified mail, or any other way called for under their leases, and ask for a key. Save proof of mailing of such letters. For the tenants who do not respond, the next step would be a formal notice to cure the default, served pursuant to the lease and the Rent Stabilization Code (assuming they are Rent Stabilized). If they do not cure, then you go to service of the termination notice and then a summary holdover proceeding. Such a case would not likely result in eviction. The court is legally required to give the tenant time to cure through trial, and almost any tenant would do so, as opposed to facing eviction.

Be careful, however. Do not confuse this answer with the issue of *ACCESS*. Just because you have a key does NOT mean you can just enter the apartment without carefully following the steps required to legally request access to a tenant's apartment.

ABOUT THE AUTHOR

Michelle Maratto Itkowitz is the owner and founder of Itkowitz PLLC and has been practicing landlord and tenant litigation (both complex-residential and commercial) in the City of New York for over twenty years. Michelle represents BOTH tenants and landlords and her core competencies include: Rent Stabilization and DHCR Matters; Rent Stabilization and Regulatory Due Diligence for Multi-Family Properties; Rent Stabilization Coverage Analysis for Tenants; Sublet, Assignment, and Short Term Leasing Cases (like Airbnb!); all kinds of Residential Tenant Representation; Good Guy Guaranty Litigation; Co-op Landlord and Tenant Matters; Loft Law Matters; De-Leasing Buildings for Major Construction Projects; Emotion Support Animals in No-Pets Buildings; and Co-Living.

Michelle publishes and speaks frequently on landlord and tenant law. The groups that Michelle has written for and/or presented to include: Lawline.com, Lorman Education Services, Rossedale CLE, The New York State Bar Association, Real Property Section, The Long Island Chapter of the National Appraisal Institute, The Columbia Society of Real Estate Appraisers, LandlordsNY, The Association of the Bar of the City of New York, Thompson Reuters, The Cooperator, and Argo University.

Michelle regularly creates and shares original and useful content on landlord and tenant law, including via booklets, blogs, videos, and live presentations. As the “Legal Expert” for LandlordsNY.com, the first social platform exclusively for landlords and property managers, Michelle answers member's questions, guest blogs, and teaches. Michelle developed and regularly updates a seven-part continuing legal education curriculum for Lawline.com entitled "New York Landlord and Tenant Litigation". Over 20,000 lawyers have purchased Michelle’s CLE classes on Lawline.com (a labor of love for which Michelle gets not a dime) and the programs have met with the highest reviews. Michelle co-authored a chapter on lease remedy clauses and guaranties for the New York State Bar Association, Real Property Section, Commercial Leasing Committee.

Michelle is immensely proud that Itkowitz PLLC was awarded its NYS Women Business Enterprise Certification by the Empire State Development Corp. Michelle’s eponymous law firm is one of the largest women-owned law firms, by revenue, in the State.

Michelle is admitted to practice in New York State and the United States District Court for the Southern District of New York. She received a Bachelor of Arts in Political Science in 1989 from Union College and a Juris Doctor in 1992 from Brooklyn Law School. She began her legal career at Cullen & Dykman.

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