

# **EVICTION CASES FROM START TO FINISH**

March 20, 2018

Hon. David W. Butler

Residential, commercial and farm evictions are governed by the Illinois Evictions Act – formerly the Forcible Entry And Detainer Act 735 ILCS 5/9-101 et. seq.

The FED statute was amended to the Eviction Act effective 1-1-18.

Only changes are the name of the statute and the requirement that Eviction Orders be entered on the form created by the Ill. Sup. Ct.. Orders of Possession are no longer entered.

## **RELATED STATUTES**

Condominium Property Act, 765 ILCS 605/1-32

Controlled Substances and Cannabis Nuisance Act, 740 ILCS 40/11. (Provides for expedited evictions when controlled substances are found in leased premises).

Landlord and Tenant Act, 765 ILCS 705/5 et. seq. (Provides for expedited eviction when tenant or occupant is charged with committing a class X felony on the premises during the term of the lease).

Illinois Human Rights Act, 775 ILCS 5/1-101 et. seq. (Prohibits unlawful discrimination in rental housing).

Illinois Residential Tenant's Right To Repair Act, 765 ILCS 742/5 et. seq. (Allows tenant to repair and deduct from rent under named circumstances).

Mobile Home Landlord and Tenant Rights Act, 765 ILCS 745/1-26.

Rental Property Utility Service Act, 765 ILCS 735/1-5. (Provides that tenant may pay utilities which are the Landlord's obligation which have not been paid and to deduct payments from rent).

Retaliatory Eviction Act, 775 ILCS 720/1.

765 ILCS 705/16. (Right of tenants in the military to terminate lease).

735 ILCS 5/2-1301(c). (Prohibits residential Landlords from obtaining confession of judgment).

65 ILCS 5/11-13-15. (Provides various forms of relief to tenant for Landlord's failure to comply with building, health, and safety codes).

Security Deposit Return Act, 765 ILCS 715/12.

Security Deposit Interest Act, 765 ILCS 715/1,2.

735 ILCS 5/13-206. (10-year statute of limitations on actions based on a written lease).

5 ILCS 70/1.11. (Establishes method for computing time within which any act provided by law is to be done).

**When action for eviction may be maintained.**

Section 5/9-102 identifies the circumstances under which an Eviction action may be brought. 735 ILCS 5/9-102

The most common Eviction action is based on breach by a tenant of the terms of an oral or written lease. 5/9-102(5).

## **PREREQUISITE TO FILING EVICTION ACTION**

Where the parties have entered into a written or oral lease, the tenancy must be terminated before a landlord may file an Eviction action against the tenant.

A lease can terminate by its own terms e.g. one year lease, or by a breach of the lease.

In the case of a breach of the lease by the tenant, the landlord must give the tenant notice of landlord's intent to terminate the lease.

## **NOTICES REQUIRED BY EVICTION ACT TO TERMINATE LEASE**

### **Most Common Residential Leases:**

1. Fixed term – typically one year
2. Month to Month oral lease
3. Month to Month following holdover after the end of a fixed term lease with terms of written lease still applicable

### **Commercial leases are usually for a fixed term.**

Duration of commercial leases are often longer than one year.

**TYPE OF LEASE OR TYPE OF BREACH DERTIMINES  
THE TYPE OF NOTICE OF TERMINATION REQUIRED  
BY EVICTION ACT**

No notice is required to terminate tenancy at the end of a fixed term lease. 735 ILCS 5/9-213.

**Month-to-Month Lease.** Landlord may terminate the tenancy by 30 days' notice in writing with no reason or breach required.

**Failure To Pay Rent Due.** Landlord may terminate the lease when the full rent due has not been paid by notifying tenant in writing that unless payment is made within 5 days after service of notice the tenancy will be terminated (5 Day Notice). 735 ILCS 5/9-209.

Eviction Act provides for specific language of the 5-Day Notice. Only applies to rent, not failure to pay for damages or security deposit. If statutory language of notice is used, acceptance of a partial payment by landlord will not invalidate the notice of termination.

Collection of rent after eviction action filed does not invalidate notice of termination.

Notice must state the amount due.

**Default of lease terms (other than payment of rent).**

Landlord may terminate the tenancy if tenant defaults on any of the terms of the lease upon giving tenant a 10-Day Written Notice To Quit. 735 ILCS 5/9-210.

Form of notice is set out in the statute and must be signed by lessor or lessor's agent.

Any notice to terminate tenancy must be in writing and describe the premises with reasonable particularity.

## **SERVICE OF NOTICE OF TERMINATION**

**Notice of termination of tenancy (5, 10 and 30 day notices) pursuant to 735 ILCS 5/9-211 must be served by:**

- (1) delivering a written copy to the tenant; or
- (2) by leaving the notice with a person 13 years old or older residing on or in possession of the premises; or
- (3) by sending the notice to tenant by certified or registered mail, with return receipt from addressee, or
- (4) by posting on the premises if no one is in possession of the premises.

### **Landlord's common mistakes in serving Notice of Termination:**

1. Serving someone other than the tenant who is not residing in or in possession of the premises.
2. Posting or sliding the notice under the door when the tenant is still in actual possession of the premises.

### **Consequence of Improper Service Of Notice Of Termination.**

There is some disagreement among Illinois Appellate Courts as to the acceptable means of serving the notice.

In re Prairie Mgmt. Corp. v. Bell, 289 Ill. App. 3d 746 (1<sup>st</sup> Dist. 1997), held that the methods of service set out in 735 ILCS 5/9-211 are not exhaustive and if the tenant acknowledges receipt of the notice, any defect in the landlord's method of service is cured.

A later 1<sup>st</sup> District case, Figueroa v. Deacon, 404 Ill. App. 3d 48 (1<sup>st</sup> Dist. 2010), held that where the statute includes a requirement that written demand is made prior to filing a

complaint, the demand must be made in strict compliance with the statute or jurisdiction will not attach.

In Figueroa, landlord posted the 5-day notice and slid a copy under the door while tenant was in actual possession of the premises. The court found that the service of notice of termination did not comply with the statute and, therefore, the trial court was without jurisdiction even though the tenant actually did receive notice.

The Third District Appellate Court reached the same conclusion in American Management v. Carter, 392 Ill. App. 3d 39 (3<sup>rd</sup> Dist. 2009).

In Carter, the court held that Section 9-211 (765 ILCS 5/9-211) is an exclusive list of permissible delivery methods of the notice of termination and must be strictly enforced. The court ruled that without proper service of notice, defendant's due process rights were violated and the court could not go forward on the purely statutory proceeding of forcible entry.

## **COMPLAINT FOR EVICTION**

A complaint for eviction based on either termination or violation of a lease can be brought by the landlord for possession of the premises and rent.

Most written leases also provide that the tenant may be required to pay certain utilities, reimbursement for physical damage to the premises and for attorney's fees incurred by the landlord in connection with the eviction action and court costs.

### **Complaint founded upon a written lease:**

Pursuant to 735 ILCS 5/2-606, if a claim is founded upon a written instrument, a copy thereof must be attached to the complaint.

The complaint, along with any attachments and a summons, must be served on the tenant.

**Summons:** In any action for eviction (formerly forcible entry and detainer) the summons shall be in the form set out in Ill. SCR 101 (b)(1) and shall require each defendant to appear on a day specified in the summons not less than 7 or more than 40 days after the summons is issued by the Circuit Clerk. Ill. SCR 101(b)(2).

Commonly referred to as a day certain summons.

**Summon Return Date (Initial Appearance):** The return date on the summons may not be less than 7 days nor more than 40 after the issuance of the summons by the Circuit Clerk. Ill. SCR 101(b)(2).

### **Service of Summons.**

Service of the complaint and summons may be made on the defendant tenant by the following methods:

1. **Personal** service by leaving a copy with the defendant personally. 735 ILCS 5/2-203(a)(1).
2. **Substitute** service by leaving a copy at the defendant's usual place of abode, with some person of the family or a person residing there, of the age of 13 years or upwards, and informing that person of the contents of the summons and mailing a copy to the defendant at his usual place of abode. 735 ILCS 5/203(a)(2).
3. **Constructive** service by posting and mailing or by publication and mailing. 735 ILCS 5/9-107.

### **Return of Service – Personal Service**

The return of service (certificate) must: (1) identify the sex, race, and approximate age of the person served; and (2) state the place where (whenever possible the exact address); and the date and time when the summons was left with defendant. 735 ILCS 5/2-203(b).

This requirement becomes an issue if the defendant denies having been served.

### **Substitute (Abode) Service.**

To obtain jurisdiction of defendant by substitute service, the process server must:

1. Leave a copy of the summons at defendant's abode;
2. with a family member or a person residing there at least 13;
3. inform the person served of the contents' and
4. mail a copy to defendant at his usual abode.

735 ILCS 5/203(a)(2).

A judgment entered without service of process or waiver of process is void. State Bank of Lake Zurich v. Thill, 113 Ill. 2d 294, 308 (1986).

Where personal jurisdiction is based upon substituted service of a summons, the **return or affidavit of service** must affirmatively state: (1) that a copy of the summons was left at the usual place of abode of the defendant with some person of the family of age 13 years or upwards, (2) that such family member was informed of the contents of the summons, and (3) that the officer or other authorized person making service sent a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his usual place of abode. Thill, p. 310.

Failure to recite any of these particulars required by statute renders the return defective. Thill, p. 310.

Defects in the return of service may be corrected by an additional affidavit or testimony of the process server, but not by recital in the judgment of proper service contrary to the defective return. Thill, p. 310.

### **Constructive Service:**

If landlord is unable to obtain personal or substitute service on the defendant, the landlord can serve the tenant by either posting and mailing or by publication and mailing of the complaint and summons to defendant. 735 ILCS 5/9-107.

### **Prerequisites To Constructive Service**

1. Landlord must attempt personal service and file a return showing that personal service cannot be obtained.
2. Plaintiff or Plaintiff's agent or attorney must file an affidavit stating: (a) defendant is not a resident of this State; or (b) has departed this State; or (c) on due inquiry cannot be found; or (d) is concealed within the State so that process cannot be served upon him or her and stating defendant's address or that plaintiff is unable to ascertain defendant's place of residence.

Notice of the eviction proceedings may be posted by the sheriff in 3 public places in the neighborhood of the court where the cause is to be tried:

Notice must be posted at least 10 days before the return date.

Sheriff must file an endorsement (essentially a return) stating the date and places where the notices were posted and reciting that a copy was mailed to the defendant.

If defendant is served by posting, judgment can be for possession only, and not for money damages.

Boilerplate affidavit repeating the language of the statute is insufficient to allow service by posting.

The court in Urban Partnership Bank v. Ragsdale, 2017 IL App. (1<sup>st</sup>) 160773, in ruling on the sufficiency of an affidavit filed pursuant to 735 ILCS 5/2-203.1 for service by special order of the court stated that the affidavit must set forth facts that demonstrate a diligent inquiry as to the location of the defendant. The affidavit must state facts, not conclusions.

### **Pleadings: 735 ILCS 5/9-106**

Landlord's complaint must state a right to possession of the premises, describing the premises, and that the defendant unlawfully withholds possession.

Several tenants under the same lease can be joined in the same Eviction suit. 735 ILCS 5/9-113.

The defendant may under a general denial of the allegations of the complaint offer in evidence any matter in defense of the action. 5/9-106.

Defendant is not required to file an Answer to the Complaint.

Defendant can raise any defenses without pleading them.

### **Confession of Judgment**

A provision in a lease that grants the landlord or someone else the power to confess judgment against a residential tenant is unenforceable. 735 ILCS 5/2-1301(c).

A tenant may not waive by a provision in a lease the right to defend a forcible entry and detainer suit. (now Eviction suit). Brooks v. LaSalle National Bank, 11 Ill. App. 3d 791 (1<sup>st</sup> Dist. 1973).

**Venue:** The Complaint for Eviction must be filed in the county where the premises are situated. 735 ILCS 5/9-106.

### **Discovery**

Discovery is available in Eviction cases as in other civil actions pursuant to SCR 201-219.

The court has the discretion to limit discovery and to expedite discovery time frames.

### **Trial**

Most Eviction trials are conducted as bench trials.

In any case relating to premises used for residence purposes, either party may demand **trial by jury**, notwithstanding any waiver of jury trial contained in any lease or contract. 735 ILCS 5/9-108.

Plaintiff must request a jury trial when the complaint is filed. 735 ILCS 5/2-1105.

Defendant must request a jury trial on or before the return date (first appearance). First Bank of Oak Park v. Carswell, 111 Ill. App. 3d 71 (1<sup>st</sup> Dist. 1982).

### **Standard of Proof**

The Plaintiff's burden of proof in an Eviction action is preponderance of the evidence. 735 ILCS 5/9-109.5.

### **Landlord's Duty To Mitigate**

A landlord or his or her agent shall take reasonable measures to mitigate the damages recoverable against a defaulting lessee. 735 ILCS 5/9-213.1

If a judgment is entered for the Plaintiff for possession, rent, or both, an Eviction Order is to be entered (replaces Orders For Possession).

The Eviction Act mandates that the form of Eviction Order drafted by the Illinois Supreme Court be entered.

## **COMMON DEFENSE TO EVICTION ACTIONS**

### **NOTICE OF TERMINATION OF LEASE**

(5 day, 10 day, 30 day Notice)

The right to receive a Notice of Termination can be waived in a lease. Sandra Frocks Inc. v. Ziff, 397 Ill. 497 (1947). If Notice is not waived, it must be in the form and served as required by statute.

### **Possible Defects in Form or Service of Notice**

- Failure to serve Notice of Termination
- Notice does not give full statutory period to comply
- In the case of a month- to- month tenancy requiring a 30-day Notice to terminate the tenancy, care must be taken in determining the effective date of service. When rent is due on the first day of the month, the notice must terminate the lease on the last day of the month. Hoefler v. Erickson, 331 Ill. App. 577 (1<sup>st</sup> Dist. 1947).

In months that have 30 days, the Notice must be served not later than the last day of the month before.

In months having 31 days, the Notice must be served not later than the 1<sup>st</sup> day of the month in which the tenancy is terminated.

A Notice of Terminating a month- to- month tenancy in February must be served no later than January 29 in non-leap years and by January 30 in leap years.

The same method of counting applies when rent is due on any other day of the month.

- Eviction Suit filed before termination date
- 5 Day Notice (Rent) must notify tenant that if rent is not paid in 5 days the tenancy will be terminated – Statutory language required 735 ILCS 5/9-209
- 10 Day Notice (lease violation other than rent) landlord accepting rent for period after 10 day Notice
- Improper service of Notice of Termination 735 ILCS 5/9-211 e.g. posting notice when tenant is in actual possession

### **Improper Service of Summons or Defective Return of Service**

#### **Substitute Service:**

- (1) not left at defendant's abode;
- (2) with resident or family member 13 or older,
- (3) server did not inform person served of the contents,
- (4) server did not mail a copy to defendant.

### **Defective Return of Service**

Process server's return must indicate that he/she did all of the things listed above.

Note: A defective return may be corrected by affidavit or testimony, but defective service cannot unless waived.

### **Constructive Service**

- No attempt of personal service first
- Affidavit insufficient
- Defendant can contest facts alleged in the affidavit
- Posting less than 10 days before return date
- Posting not in compliance with statute
- Sheriff did not mail defendant a copy
- No endorsement (return) filed by sheriff showing compliance

### **Personal Service**

Return does not indicate the sex, race and approximate age of person served and the place and date and time of service. 735 ILCS 5/2-203(b).

While defects in return of service may be corrected by affidavit or testimony at a hearing, the result can be a delay in entry of a default judgment or in the setting of a trial date.

### **Defenses To Eviction Based on Non-Payment of Rent**

- Rent was not due at time of 5-Day Notice
- Rent was accepted by or tendered to landlord within the 5 day period (full amount due)
- Amount claimed was not entirely rent (security deposit, utilities, attorney's fees)

### **Implied Warranty of Habitability**

Illinois implies a warranty of habitability in all residential leases, oral or written.

Jack Spring, Inc. v. Little, 50 Ill 2d 351 (1972). (created the warranty as to multiple unit dwellings).

Pole Realty v. Sorrells, 84 Ill 2d 178 (1982). (extended the implied warranty of habitability to single units where the municipality had a building code).

Glasoe v. Trinkle, 107 Ill 2d 1 (1985). (extended the warranty to jurisdiction with no building code).

Landlord is required to maintain the residence in compliance with applicable building codes.

Breach of the warranty may be a defense in Eviction action or defense to the amount of rent due.

Conditions that render the unit unfit for its intended use.

Conditions that make the premises unsafe or unsanitary.

Conditions of premises does not have to be perfect.

### **Some Factors To Consider**

Nature of defect

Length of defect

Tenant's knowledge of defect before entering into lease

Effect on habitability

Landlord's knowledge of the defect

Tenant can file suit against landlord for breach of the lease or raise violation of the warranty as a defense to an Eviction action.

### **Measure of Damages**

Difference in Value:

1. Difference between fair rental value without the unfit condition and the value of the premises while in the unfit condition.
2. Difference between agreed rent and fair value of premises in the unfit condition.

#### Percentage Reduction in use

Rent is reduced by the diminution of value caused by the unfit condition.

Glasoe v. Trinkle, 107 Ill 2d 1, 15-17.

#### **Expiration of Eviction Orders**

No judgment for possession obtained in an action brought under this Article (Eviction Act) may be enforced more than 120 days after judgment is entered, unless upon motion by Plaintiff the court grants extension of the period of enforcement of the judgment. 735 ILCS 5/9-117.

Section 9-117 provides for the form of notice of the motion and conditions for granting or denying the motion.

#### **Stay of Enforcement of Eviction Order for Possession**

The defendant, after a judgment for possession is entered, may file a motion for a stay (extension) of the date by which possession can be affected by the sheriff.

Granting of an extension is within the discretion of the court.

#### **Hold Over Tenants**

Some leases provide that if the tenant remains in the premises after the expiration of the lease term, that either the lease will be renewed for another term of the same length or become a month-to-month lease with the same terms of the lease to apply.

Without a hold over agreement in a lease, if the tenant holds over after the lease period, the landlord can file an Eviction suit or elect to treat the holdover as a month-to-month tenancy.

If the tenant willfully holds over and the landlord makes a demand for possession, the tenant will be liable to the landlord for double the rent. 735 ILCS 5/9-202.

Where tenant remains in possession for colorably justifiable reasons, tenant should not be charged double rent under the hold over statute. J.M. Beals Enterprises, Inc. v. Industrial Hard Chrome, Ltd. App. 1 Dist. 1995.

### **Lockouts**

Sometimes a landlord will resort to self-help to remove a tenant by changing the locks, removing doors, turning off utilities, or seizing tenant's property.

In Illinois, the Forcible Entry and Detainer Act (now Eviction Act) provides the sole means for settling disputes over possession of real property. Russell v. Howe, 293 Ill. App. 3d 293 (1<sup>st</sup> Dist. 1997), Circle Management, LLC v. Beverly Oliver, 378 Ill. App. 3d 601, (1<sup>st</sup> Dist. 2007).

If the landlord wrongfully removes or withholds tenant's property, the tenant may have a cause of action for Conversion. Cirrincone v. Johnson, 184 Ill 2d 109, (1998).

Even if the tenant holds over after termination of a lease, it is not a defense. The landlord must still obtain a judgment for possession. Meyer v. Cohen, 260 Ill. App. 3d 351, (1<sup>st</sup> Dist. 1993).

In the event of a lockout, the tenant may seek a temporary restraining order pursuant to 735 ILCS 5/11-102 et. seq. even if the tenant has not paid rent. Brooks v. LaSalle National Bank, 11 Ill. App. 3d 791, (1<sup>st</sup> Dist. 1971), Russell v. Howe, 293 Ill. App. 3d 293, (2<sup>nd</sup> Dist. 1997).

**Computing Whether Number of Days in Notice Complies with the Eviction Act.**

5 ILCS 70/1.11.

**70/1.11. Time, computation**

§ 1.11. The time within which any act provided by law is to be done shall be computed by excluding the first day and including the last, unless the last day is Saturday or Sunday or is a holiday as defined or fixed in any statute now or hereafter in force in this State, and then it shall also be excluded. If the day succeeding such Saturday, Sunday or holiday is also a holiday or a Saturday or Sunday then such succeeding day shall also be excluded.

**Excessive Damages For Breach Of Lease**

An agreement setting damages in advance of a breach is an unenforceable penalty unless: (1) the amount so fixed is a reasonable forecast of just compensation of the harm that is caused by the breach; and (2) the harm caused is difficult or impossible to estimate. Hidden Grove Condominium Association v. Crooks, 318 Ill. Spp. 3d 945 (3d Dist. 2001).