

Combat delay tactics in unlawful detainer lawsuits

By Nicholas Kanter

Property owners are often faced with a tenant unwilling to vacate a property despite no longer having a legal right to remain in possession. This situation requires the owner to file an unlawful detainer lawsuit to obtain possession of the property.

While unlawful detainers are entitled to priority over other lawsuits and intended to be summary proceedings, a savvy defendant can use a number of tactics to delay the lawsuit for months. However, there are ways to help your client significantly reduce, or even avoid, common delays in the unlawful detainer process.

Work out an agreement with the defendant: If you are unable to work out an arrangement for the transition of possession of the property with the tenant and are forced to file an unlawful detainer lawsuit, you may be able to reach an agreement once a lawsuit is filed and served. Lawsuits can be expensive and burdensome to both plaintiff and defendant, especially if there is an attorney fees clause in a lease.

Additionally, an eviction and unlawful detainer judgment can negatively impact a defendant's credit and future ability to find a place to lease.

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To avoid the time and expense of an unlawful detainer lawsuit and the adverse impact of an unlawful detainer judgment and eviction, a move-out agreement is often the best solution for both parties. A properly drafted and executed agreement can provide a definitive date by which the owner will be able to recover possession of his or her property.

At the same time, a defendant can avoid the negative impacts of an unlawful detainer filing, judgment and uncertainty of an eviction date. While a defendant may require the owner to make a "cash-for-keys" payment to move out voluntarily, often times the payment is significantly less than the cost to litigate the unlawful detainer to judgment. Moreover, once a lawsuit is filed, the defendant's performance under an agreement can be secured by a stipulated judgment, which will help avoid the delay tactics discussed below.

Serve a prejudgment claim of right to possession: An unlawful detainer plaintiff has the option of serving a "Prejudgment Claim of Right to Possession" on unnamed occupants when serving the summons and

complaint. The Prejudgment Claim puts the burden on any occupant not named in the complaint to add themselves as a defendant to the lawsuit. If a Prejudgment Claim of Right to Possession is not served, a plaintiff will be unable to evict any occupant not named in the complaint (and ultimately the judgment) when the sheriff performs an eviction.

Even if your client knows the identity of every occupant, it is still a good idea to serve a Prejudgment Claim with the summons and complaint.

To prevent an owner from obtaining possession of their property, a defendant may, e.g., have a friend move in to the property unbeknownst to the owner. If a Prejudgment Claim is not served and the defendant's friend is not identified in the complaint, the sheriff will not be able to immediately evict the friend. (While the friend will ultimately have to prove to a judge that he or she has a right to occupy the property, the owner's ability to recover possession of the property can be delayed for at least 15 days).

Use ex parte filings to obtain earlier hearing dates: As mentioned above, unlawful detainers are summary proceedings. Under Code of Civil Procedure Section 1170.5, a trial in an unlawful detainer matter must be set no later than 20 days after a trial date is requested. However, generally courts will not set a trial date until a defendant files an answer.

Instead of filing an answer, a defendant may attempt to delay trial by filing a demur, motion to strike or other pre-answer response. And many times a court will not schedule a hearing on a demur or motion to strike for at least 30 days after the filing date.

To reduce the 30 day delay, you can file an ex parte application to advance the hearing on the pre-answer response to an earlier date. With the proper ex parte application, some courts will deny the defendant's pre-answer response immediately (instead of merely advancing the hearing to an earlier date). Such a ruling will substantially reduce the delay caused by the pre-answer response.

Monitor bankruptcy filings by the defendant: Filing a bankruptcy petition automatically stays all proceedings in the unlawful detainer action.

If a judgment has already been entered, the bankruptcy filing will generally stay the eviction process. Once a defendant files a bankruptcy petition, the plaintiff must get relief from the bankruptcy court before continuing with the unlawful detainer. Obtaining relief can take up to 30 days or more depending on the bankruptcy judge's self-calendaring procedures and availability.

However, before moving for relief from stay, the plaintiff must first be aware of the bankruptcy. Often a plaintiff does not know that the defendant filed for bankruptcy until the trial date, or if the bankruptcy is filed post-judgment, until the eviction date.

By monitoring bankruptcy filings on PACER, a plaintiff can usually dis-

cover if the defendant filed for bankruptcy within 24 hours of the filing. Once discovered, a plaintiff can file a motion for relief from the automatic stay immediately. Filing for relief immediately, rather than waiting days (and sometimes weeks) until discovering a bankruptcy, can save your client significant expense and delay.

However, there are ways to help your client significantly reduce, or even avoid, common delays in the unlawful detainer process.

File a motion for summary judgment while waiting for a trial date: While trials are required to be set within 20 days after a trial request is made, this does not always happen. Alternatively, a motion for summary judgment can be set on as little as five days' notice, and usually without clearing the date with the court in advance. While waiting for the court to set trial, you can file a motion for summary judgment and usually have it heard before the trial date. If the motion is granted, you will avoid the time and expense associated with a trial. If the motion is denied, you will know what issues will be contested at trial.

The unlawful detainer process is often frustrating for property owners who have been deprived of rent as well as the ability to utilize their property. The process is even more frustrating when the defendant is intentionally delaying through improper filings and other tactics. The above suggestions can significantly reduce the time and cost to recover possession of a wrongfully detained property.

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