

# Motions to Transfer Eviction Actions

by Gary K. Wolinetz

You represent a commercial landlord. Your client's tenant has failed to pay rent for several months, and when the tenant did pay it was often late. The reasons are unclear; perhaps it is simply the state of the economy, although you know the tenant has long complained the landlord overcharged for common area maintenance fees several years ago.

**Y**ou send a demand letter to the tenant's attorney and threaten to file an eviction action. The tenant's lawyer advises you that if you file an eviction action, she will remove the case to the Law Division and keep your client tied up in litigation for years.

The tenant's counsel has not made an idle threat. Once an eviction action is removed to the Law Division, she can do just that. What do you advise your client to do?

This article examines the law governing motions to transfer summary dispossess actions to the Law Division. Practical considerations and strategy will be discussed, especially in the context of commercial matters.

## Background Considerations

Summary dispossess actions filed in the special civil part are intended to dispense swift justice and ensure that landlords obtain speedy recovery of the premises if warranted.<sup>1</sup> To accomplish this goal, parties may not file answers or counterclaims, nor engage in discovery, and jury trials are unavailable.<sup>2</sup>

As anyone who has ever appeared in landlord-tenant court knows, court procedures are informal, and litigants often appear

*pro se*. Judges and their staff are adept in disposing of dozens of cases, if not more, in a single morning. In simple cases involving nonpayment of rent, the public benefits from the summary nature of the proceedings.

Commercial tenancy disputes are often a different matter. For example, the summary nature of the typical dispossess action may prejudice a commercial tenant who legitimately needs discovery to mount a defense. To avoid such prejudice, a tenant may file a motion to remove a summary dispossess action to the Law Division.<sup>3</sup> Once a case is transferred, the tenant has the opportunity to file an answer and counterclaim, engage in discovery, and, if not barred by the lease, demand a jury trial.

Unfortunately, some commercial tenants (and some sophisticated residential tenants) file transfer motions as part of a strategy to delay the proceedings, extract concessions from the landlord, and frustrate the landlord's demand for possession. These tenants' real grievance may simply be that they cannot, or will not, pay the rent. Nevertheless, by claiming they need discovery regarding various grievances, whether current or not, and by bombarding the court with paper to demonstrate why a case should be heard in the Law Division, some tenants use transfer motions to achieve a tactical advantage over the landlord.

A tenant primarily seeking delay may also: 1) file its own action in the Law Division before any action has been taken by the landlord as a preemptive strike, and 2) once an eviction action is filed, move to transfer that action and consolidate it with the existing Law Division case.

As often happens in litigation, a chess match ensues. In the end, however, a court deciding a transfer motion must balance the competing interests of a tenant seeking discovery and other rights available in the Law Division against a landlord's interest in obtaining the speedy recovery of its premises.

## The Standards for a Transfer

Courts have offered various tests to determine when a case should be transferred. For example, as transfer to the Law

Division is contrary to the very premise underlying summary proceedings, the Appellate Division has held that a transfer “should only be granted for exceptional circumstances extant in the individual case.”<sup>4</sup>

In *Fromet Properties*, the Appellate Division explained:

By their very nature, summary dispossession proceedings are designed to permit dispossession of non-paying tenants in a *summary* fashion. Transfer of a routine case to the Law Division in order to permit pretrial discovery is cumbersome, time consuming, costly and disregards the reality of calendar control.<sup>5</sup>

Alternatively, N.J.S.A. 2A:18-60, the statute governing transfer motions, provides that a summary dispossession action may be transferred if the court “deems it of sufficient importance.” Obviously, since every tenant facing eviction believes his or her case is of sufficient importance, this provision offers little guidance.<sup>6</sup> However, the Appellate Division noted that because summary eviction proceedings were once heard before justices of the peace, N.J.S.A. 2A:18-60 merely “reflects a legislative judgment that substantial matters should be heard before courts of appropriate dignity.”<sup>7</sup>

Several courts have commented on what constitutes a case of sufficient importance. These decisions have focused on whether the tenant expended substantial amounts of time, effort and money improving the premises, and otherwise established its reputation and goodwill at the location.<sup>8</sup> Indeed, the court in *Lopez v. Medina* noted that a tenant who made a substantial investment in the property may have a “*per se*” case of “sufficient importance” to justify a transfer.<sup>9</sup>

No published decision has followed the *per se* transfer criteria. That is not surprising, as it would compel a transfer in virtually every commercial tenancy dis-

possess action. Instead, as the Appellate Division explained in *Bloomfield Tp. v. Rosanna's Figure Salon*, a court considering a motion to transfer must weigh the prejudice to both landlord and tenant, not merely focus on how much money a tenant has invested in the premises.

In general, a motion for transfer should be granted whenever the procedural limitations of a summary action (other than the unavailability of a jury trial) would substantially prejudice substantial interests either of the litigants or of the judicial system itself, and because of the particular facts and circumstances of a specific case, those prejudicial effects would outweigh the prejudice that would result from any delay caused by the transfer.<sup>10</sup>

The Appellate Division in *Bloomfield* explained that a number of factors previously articulated in *Morocco v. Felton*<sup>11</sup> were relevant in a transfer motion:

- The complexity of the issues and the need for discovery;
- The presence of multiple actions for possession arising out of the same transaction or series of transactions;
- The appropriateness of class relief;
- The need for uniformity of results if separate proceedings are simultaneously pending in the special civil part and the Law Division; and
- The need to join additional parties or claims to reach a final result.<sup>12</sup>

In *Bloomfield*, the Appellate Division added another factor a court evaluating a transfer motion should consider—the likelihood of another lawsuit between the parties.<sup>13</sup>

Previously, *Morocco* suggested that the presence of even one of these factors justifies a transfer.<sup>14</sup> This language has been described as “questionable *dicta*.”<sup>15</sup> Whatever its status, *Bloomfield* made clear that a court faced with a transfer

motion should focus on: 1) the complexity of the issues pending in landlord tenant court, 2) whether such issues require procedures available in the Law Division (*i.e.*, discovery<sup>16</sup>), and 3) the prejudice to either of the parties based on a decision to transfer or not transfer the case.<sup>17</sup> In the end, practitioners should be wary of putting all their eggs in one basket by citing to only one or two of the *Morocco/Bloomfield* factors to justify a transfer. The better practice would be to cite as many factors as possible, and focus on the prejudice to the client by having the case remain in the special civil part.

### Types of Disputes That Merit a Transfer

It is impossible to catalogue each and every case that may necessitate a transfer. Ultimately, transfer motions are fact-specific and must be evaluated on a case-by-case basis, based on the complexity of the issues and the prejudice to the parties. The amount in dispute is not necessarily the primary factor.

For example, a dispute between two huge commercial entities involving hundreds of thousands of dollars in rent, which at its heart concerns the validity of a default notice and does not require any discovery, may be handled quite capably in the special civil part without a transfer. Alternatively, eviction proceedings brought against various residential tenants of an apartment complex because they failed to pay late fees, even though those fees were relatively small, would likely be transferred if the tenants claimed the fees were racially motivated and they needed discovery to prove their case.

As a general matter, the Appellate Division explained in *Ivy Hill* that cases involving “legal or equitable issues of complexity, such as title disputes, constructive trusts, class actions [and] injunctions” are likely candidates for transfer.<sup>18</sup> So are cases where final resolution of the

issues cannot be achieved without the joinder of additional parties.<sup>19</sup>

Further, as noted in *Bloomfield*, a court will also consider the likelihood of another lawsuit between the parties in evaluating a transfer motion.<sup>20</sup> There, the tenant alleged the municipal landlord could obtain possession of the premises only by condemning its leasehold interest. The landlord disagreed, and after terminating the tenant's lease, instituted a summary dispossess action. The tenant sought a transfer to the Law Division.

The court in *Bloomfield* reiterated that issues decided in a summary dispossess action have no preclusive effect in subsequent litigation.<sup>21</sup> Accordingly, even if the landlord in that case were successful in the summary dispossess trial, the issues decided there would have no preclusive effect upon an inverse condemnation suit the tenant would likely file.<sup>22</sup> As a consequence, the failure to order a transfer would result in a huge waste of time for the parties and the court.<sup>23</sup>

Thus, where subsequent litigation is almost certain, a transfer may be appropriate.

### **When a Transfer is Inappropriate**

A summary dispossess action should not be transferred if "the defaults alleged are straightforward and simple, calling for straightforward and simple cure or factual response by way of denial and explanation."<sup>24</sup> Accordingly, absent "extraordinary circumstances" or "substantial prejudice to the tenant," a summary dispossess action should not be transferred merely because a landlord seeks to raise the rent or impose changes to a lease.<sup>25</sup>

To justify a transfer, a tenant will often try to complicate even the most simple eviction application, because once a case is transferred, the tenant is able to delay matters—an important weapon in the tenant's arsenal in dealing with the landlord. One method a commercial tenant may utilize to 'com-

plicate' the dispute is to raise old grievances against the landlord. As in the residential context, defenses to a summary eviction action should, however, be limited to those that allegedly occurred in the months that a tenant is in default.<sup>26</sup>

In *Fargo Realty, Inc. v. Harris*, the Appellate Division explained that "[t]o allow the tenant to assert as a defense that the premises were uninhabitable during months wholly unrelated to the month for which rent is claimed would contravene the essential purpose of the summary dispossess proceeding."<sup>27</sup>

Thus, in the example raised earlier in this article, a tenant facing a summary dispossess action for nonpayment of rent may attempt to justify a transfer by arguing that years ago the landlord allegedly overcharged it for common area maintenance expenses, and it needs discovery on this issue. The tenant should not be entitled to a transfer under these circumstances. Instead, the eviction action should proceed in a timely fashion with the tenant maintaining its right to institute a separate Law Division action for damages. By doing so, the landlord will be able to obtain speedy recovery of the premises, assuming it is able to prove that it is entitled to the rent, and the tenant will have the ability to pursue its claim for damages for matters unrelated to its current default.<sup>28</sup>

### **Litigation Strategies to Consider**

As noted above, a tenant seeking a transfer will often employ various strategies to convince the court the case belongs in the Law Division. When a tenant's counsel believes an eviction action is inevitable, one method is to strike first and commence an action in the Law Division alleging a host of grievances against the landlord (assuming the claims are legitimate) and seeking a declaration that the tenant does not owe the landlord any rent. The tenant may also elect to immediately serve

discovery on the landlord.

A landlord faced with this situation may, of course, elect to proceed with a summary dispossess action. However, the tenant will likely move to transfer the summary dispossess case and consolidate it with the existing Law Division action. Often, a tenant will submit a lengthy certification attaching a host of materials to demonstrate the complexity of the case. The landlord will then have an uphill battle trying to explain why this 'complex' eviction action should proceed in the special civil part in light of the pending Law Division case.

All is not lost, however, for the landlord. The landlord must identify the real issues at stake (the tenant's failure to pay rent) and demonstrate that the tenant is merely employing procedural games to achieve delay. Needless to say, the landlord's papers must be short and concise, in contrast to the mountain of materials often submitted by a tenant seeking a transfer.

### **How to File a Transfer Application**

As detailed in Rule 6:4-1(g), a tenant seeking to transfer a summary dispossess action to the Law Division must file a motion with the clerk of the special civil part "no later than the last court date prior to the date set for trial." The motion may be heard on the trial date, or, if additional time is sought by the landlord to prepare a response, on a date set by the court. As a practical matter, this means the judge deciding the transfer motion will be the trial judge if the case is not transferred. Once the motion is filed, the special civil part cannot take any action regarding the case until the motion is decided. If the motion is not decided on the original trial date, the special civil part may order the tenant to deposit rent with the court.

The payment of rent into the court (or an escrow fund established by the parties) should occur in all but the most extraordinary cases. Moreover, to prevent tenants from withholding rent as

leverage, or even paying money into court to accomplish the same purpose, courts should require tenants in appropriate cases to pay some or all of the disputed rent directly to the landlord.

## Conclusion

Summary dispossess actions are designed to ensure that landlords quickly obtain the premises from tenants who have defaulted. In complex landlord tenant disputes, a summary proceeding may prejudice tenants legitimately needing discovery to defend the suit. Those cases should be transferred to the Law Division. However, courts should be especially wary of sophisticated tenants, both commercial and residential, who use transfer motions in simple default cases as leverage to delay the proceedings and deny the landlord rent. ☪

## Endnotes

1. *C.F. Seabrook Co. v. Beck*, 174 N.J. Super. 577, 589-90 (App. Div. 1980). See generally, *Housing Authority of the Town of Morristown*, 135 N.J. 274, 280-81 (1994).
2. See R. 6:3-1; R. 6:3-4; R. 6:4-3(a); *Peterson v. Albano*, 158 N.J. Super. 503, 506-07 (App. Div.), cert. denied, 78 N.J. 337 (1978).
3. N.J.S.A. 2A:18-60; R. 6:4-1(g).
4. *Fromet Properties, Inc. v. Buel*, 294 N.J. Super. 601, 613 (App. Div. 1996).
5. *Fromet Properties*, 294 N.J. Super. at 612.
6. *Marini v. Ireland*, 56 N.J. 130, 140 (1970).
7. *Bloomfield Tp. v. Rosanna's Figure Salon, Inc.*, 253 N.J. Super. 551, 562 (App. Div. 1992).
8. *Master Auto Parts, Inc. v. M & M Shoes, Inc.*, 105 N.J. Super. 49, 53-54 (App. Div. 1969), (quoting), *McCrary Stores Corp. v. S.M. Braunstein, Inc.*, 99 N.J.L. 166, 169 (E & A. 1923); *Lopez v. Medina*, 262 N.J. Super. 112,

- 117 (Law Div. 1992).
9. *Lopez*, 262 N.J. Super. at 118.
10. *Bloomfield*, 253 N.J. Super. at 563. See also, *Ivy Hill Park Apartments v. GNB Parking Corp.*, 237 N.J. Super. 1, 4 (App. Div. 1989) (transfer denied because tenant was not prejudiced by summary dispossess trial).
11. *Morocco v. Felton*, 112 N.J. Super. 226, 235-36 (Law Div. 1970) (court also considered the importance to the public good of the issues presented).
12. *Bloomfield*, 253 N.J. Super. at 562-63.
13. *Bloomfield*, 253 N.J. Super. at 565.
14. *Morocco*, 112 N.J. Super. at 136.
15. *Ivy Hill*, 237 N.J. Super. at 4. See also *Housing Auth. of the City of Jersey City v. Jackson*, 749 F. Supp. 622, 633 n.13 (D.N.J. 1990) (transfer is not "mandatory whenever discovery is sought"). But see *Carr v. Johnson*, 211 N.J. Super. 341, 348-49 (App. Div. 1986) (noting the court should order a transfer *sua sponte* if "one or more of those [Morocco] factors" are present).
16. *Rules Governing the State of New Jersey*, 2009 Edition, at 2145.
17. *Bloomfield*, 253 N.J. Super. at 563.
18. *Ivy Hill*, 237 N.J. Super. at 3. See also *Carr v. Johnson*, 211 N.J. Super. 341, 348-49 (App. Div. 1986) (reversed special civil part's failure to transfer case involving issues "that relate to the question of ownership").
19. *Morocco*, 112 N.J. Super. at 235.
20. *Bloomfield*, 253 N.J. Super. at 565.
21. *Bloomfield*, 253 N.J. Super. at 563-64; *C.F. Seabrook*, 174 N.J. Super. at 590 ("matters decided in summary dispossess actions are not *res judicata* in subsequent actions between landlord and tenant, even over the same subject matter").
22. *Bloomfield*, 253 N.J. Super. at 565.
23. *Bloomfield*, 253 N.J. Super. at 564-65.
24. *Ivy Hill*, 237 N.J. Super. at 3.
25. *Fromet Properties*, 294 N.J. Super. at 613 (whether a rent increase is

- "unconscionable").
26. *C.F. Seabrook*, 174 N.J. Super. 589 (tenant was barred from asserting habitability defense in suit for possession concerning months she was not in default because "it cannot be said that the defense grows out of the identical cause of action which furnished the landlord's cause of action").
27. *Fargo Realty, Inc. v. Harris*, 173 N.J. Super. 262, 267 (App. Div. 1980).
28. *Fargo Realty*, 173 N.J. Super. at 267; *Academy Spires, Inc. v. Jones*, 108 N.J. Super. 395, 403 (Law Div. 1970)(applying principles and denying transfer in residential context).

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