

**SUPERIOR COURT JUDGE BIFFERATO  
TRIAL PRACTICE FORUM**

**RESIDENTIAL LANDLORD – TENANT ISSUES**

*Presented by*

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## ***RESIDENTIAL LANDLORD – TENANT ISSUES***

### **A. Pre-lease Considerations:**

#### **1. Rental application:**

- § 5514(d) authorizes fee to determine the tenant's credit worthiness which code calls application fee;
- Cannot exceed greater of 10% of monthly rent or \$50.00;
- If more charged/demanded, then tenant can get double the fee as damages;
- Landlord must retain for 2 years.

#### **2. The Lease – do you need one? What should be included?**

- § 5141 (22) definition of rental agreement includes written or oral agreements;
- If more than one year must be in writing (5106(a));
- Where no term is provided, month to month (5106(b));
- LL/T Code shall regulate and determine legal rights, remedies and obligations of all parties to rental agreement. Any provision conflicting with Code shall be unenforceable. (5101);
- Code provides essential obligations of landlord and tenant and is broken down into sections according to landlord obligations, tenant obligations, general provisions and summary possession;
- In order to charge late fee, written rental agreement must provide for it (5501(d));
- Responsibility for utilities clearly defined as rent (5312);
- Address for rent and notices (landlord's address essential) (5105);
- Access to show rental unit at end of term (5509);

- No Attorney Fees (5111);
  - Include Landlord/Tenant Summary (5118);
  - Landlords must register the rental unit with the City of Wilmington, NCC and obtain a business license;
  - See 5301 which lists what you cannot put in a rental agreement
    - Waive any rights under the Code;
    - Confession of judgment;
    - No limitation of liability;
    - Waive a jury trial;
    - Subject to treble damages if try to enforce.
3. Checklist of conditions:
- Video?
4. Security and pet deposits (25 *Del. C.* §5514):
- Cannot exceed one month's rent, unless furnished;
  - Placed in Delaware escrow bank account;
  - Purpose is to reimburse for actual damages caused by tenant that exceed normal wear and tear, unpaid rent;
  - Procedure at termination or expiration of lease – Forwarding address in writing;
  - Penalties – e.g. double deposit;
  - Pet deposit – cannot be non-refundable;
  - Security Deposits
    - Surety Bond 5514A-
      - Cannot require in lieu of deposit
      - Amount subject same rules as deposit.
5. Applicability of Code:
- Commercial – only chapter 57 applicable.
  - Not applicable for beach season rentals;
  - Conditional Sales Agreements (5122) JP and Chancery concurrent jurisdiction, incorporate 25 *Del. C.* §314, which establish/define terms of Agreement;

- **Manufactured Home Owners & Community Owners Act (Ch 70)**
  - **Applicability:** lease of lots for manufactured home in manufactured home community (7001(b))
  - **“Manufactured Home Community”** is parcel of land where two lots rented or offered for rent for placement of manufactured home. (7003(12))
  - **Lease Requirements & Prohibitions:** 7006 requires written lease, mandatory & prohibited terms.
  - **Gap-filler:** Residential LL-T Code (7002(c))
  - **Rent justification**
  - **Termination (7010 & 7010A):** Non-renewal or termination requires “Due Cause”:
    - **Change in land use of community** - require 1-year notice; forbids subsequent rent increase
    - **Immediate Termination:** cause or threaten immediate and irreparable harm, conviction w/ immediate and irreparable harm, material misrepresentation on application, fail notify landlord of sale or transfer where home remains in community.
    - **Curable Violations:**
      - Conduct Disrupts Quiet Enjoyment - specific written notice, landlord may terminate if substantially same conduct within 6 months
      - Noncompliant Condition on/of Community Premises - 12-day written notice to cure
      - Rent Nonpayment - 7-day written notice
    - **Repeated Noncompliance:**
      - 4 times out of 12 months late rent requires 7-day notice but landlord must include warning in 3<sup>rd</sup> notice
      - 2 times out of 12 months tenant fails to reimburse landlord for paying tenant’s utilities within 7-day notice
      - 2 times out of 12 months dishonored check/draft
      - 4 separate events within 12 months of Disrupt Quiet Enjoyment or Noncompliant Condition
      - Any combo of 4 separate events within 12 months

**B. Landlord Obligations (25 Del. C. §5301, et seq.) – highlighting important obligations:**

1. **Provide a fit unit:**
  - 5305 – which shall not endanger health, welfare or safety of tenants; complies with applicable housing codes; landlord must maintain.
2. **Provide possession of entire unit at beginning of the term (5303):**
  - See also 5302, tenant remedies at beginning of term.
3. **Metering (5312):**
  - Charging tenant separately for utility services that landlord pays for

- Lease has to provide for it and has to be done in compliance with 5312 of Code;
  - Okay if metering systems already in use prior to July 17, 1996;
  - Thereafter, landlord shall not separately charge for utility service unless separately metered;
  - Tenant's charges cannot exceed what landlord pays;
  - Landlord must retain bills for one year and make available for tenant to inspect during regular business hours;
  - Landlord shall not bill less frequently than monthly and must make reasonable efforts to obtain actual readings.
4. Provide essential services:
- Hot water, heat, water or electricity (5308);
  - Remedies for 2/3 rent abatement for each day.
5. No unlawful ouster:
- 5313 – cannot remove or exclude tenant from premises without valid court order;
  - Constructive ouster;
  - Remedies;
  - Forthwith summons (5115) - available to tenant and landlord for substantial and irreparable harm; usually waste, casualty, lack of essential service, or lock-outs.
6. Landlord required to give summary of L/T Code to new tenant at beginning of rental term:
- Failure to do so allows tenant to use ignorance of the law as a defense; e.g., tenant fails to follow the proper notice procedure outlined in the code regarding lack of essential services.
7. Early Termination (5314):
- With 30 days written notice – limited basis.
8. Delegations to Tenant - landlord and tenant may agree that tenant will do specified repairs, maintenance if:
- Conspicuous writing, separate from lease;

- Work primarily benefits rental unit;
  - Work not needed to bring unit into compliance with housing or building code;
  - Tenant gets adequate consideration or reduction in rent but lease provisions cannot be consideration;
  - Good faith; i.e., purpose not for landlords to avoid their obligations.
9. Permissible Fees - security deposit, pet deposit, surety bond fee or premium, application fee:
- No assurance money (5310);
  - Optional service fees okay but no non-refundable fees;
  - Taxes paid by Tenant (5315) - setoff against rent.
- C. Tenant Obligations (25 Del. C. §5501, et. seq.):
1. Pay rent (5501):
    - Unless otherwise agreed, entire rent payable at the beginning of the month;
    - Late charges cannot exceed 5% of monthly rent, shall not be imposed within 5 days of the agreed time for payment of rent, landlord must maintain office for receipt of payments so that rent can be timely paid (failure to do so extends agreed on time by 3 days), late charge considered as rent, if landlord accepts cash payment must give receipt with 15 days, money orders(?);
    - Remedies to be discussed under summary proceeding.
  2. Provide notice of termination (mutual obligation if either wants to terminate not for cause) (5106):
    - 60-days written notice prior to expiration regardless of month to month or year lease;
    - Notice begins to run on the first day of the month following the day of actual notice;
    - No notice prior to end of year lease, converts to month to month;
    - Procedure for renewal but with rent increase (5107);
  3. Maintain a fit unit/defense to action for waste (summarize 1-7 under 5503):
    - Defense to action for waste (in other words that the tenant has violated one of the provisions of 5503 and landlord has filed in court to evict for waste) if

tenant has notified landlord within reasonable time of the condition caused by the tenant and repair is one which reasonable prudent owner would make or condition has not reduced the market value of the property. If so, then court can require tenant to post security and remain in possession.

4. Report defective conditions:
  - Conditions that tenant reasonably believe are the duty of landlord to repair must be reported in writing as soon as practicable. Tenant shall be responsible for any liability or injury resulting to landlord as a result of failure to timely report (5505).
    - Tenant can repair and deduct with proper notice (5307).
5. Notice of extended absence:
  - 5506 – only if landlord requires in the rental agreement does the tenant have to notify the landlord in writing of any anticipated extended absence from the premises no later than the first day of such absence (if landlord does not define the code defines as more than 7 days);
  - Remedies for tenant's breach – indemnify landlord for any resulting harm; landlord permitted to enter and secure.
6. Permit reasonable access for landlord (5509):
  - Tenant shall not unreasonably withhold consent for landlord to enter in order to inspect, make repairs, etc.;
  - Tenant required to provide key if change of locks;
  - Landlord cannot abuse right of access and must give 48 hours notice of intent to enter except for repairs requested by tenant; between 8 am – 9 pm;
  - If emergency, landlord can enter at any time.
7. Room Rentals (5512):
  - Immediate termination upon notice for material violation that was given to tenant at time of contract if building is landlord's primary residence, no more than 3 rooms rented and no more than 3 tenants.

#### D. Notice

1. How given/certificate of mailing (25 Del.C. § 5113):
  - Personal service upon tenant or other adult; on landlord at landlord's address with adult;
  - Or certificate of mailing or certified/registered mail; return receipt unclaimed or certificate of mailing is prima facie evidence of service;

2. Rent increase (see above);
  3. Non-renewal/termination (see above);
- E. Summary Possession (25 *Del. C.* §5701, et. seq.):
1. Jurisdiction and venue:
    - Action in Justice of the Peace Court may be commenced if jurisdiction (grounds set out in 5702) and must be brought in court nearest to the rental property – Wilmington, Middletown, Dover or Georgetown.
  2. Grounds for eviction (5702 – 11 grounds):
    - Holdover (5515)
      - Tenant remains after expiration of rental agreement (and proper 60-day notice has been provided);
      - Tenant can be subject to double the rent if properly notified.
    - Non-payment of rent
      - 5502 – remedies for failure to pay rent; tenant remains in default following 5-day notice;
      - Payment after 5-day notice but before landlord files in court; if no reservation of rights letter, then landlord may not file summary proceeding;
      - Payment of all rent, late charges, court costs after the action has been filed, if no reservation of rights letter, landlord may not maintain action of rent due (stating the obvious; even if reservation of rights letter cannot seek rent due if paid).
    - Lease violation
      - 5513 – breach of rule or covenant which is material to lease;
      - 7-day notice (from receipt) to correct violation;
      - Contents of notice – substantially specify rule breached (not substantially unless sufficient facts alleged as to the manner in which rule violated; not enough simply to state the rule breached); if substantially similar breach within one year, landlord can rely upon such notice as grounds for summary proceeding;
      - If breach can be remedied by landlord by cleaning, repairing, replacing, landlord may do so and bill tenant for actual and reasonable costs of remedy;
        - Billing shall be due and payable as additional rent immediately upon receipt (if no payment, then 5-day notice);
      - Can tenant make the repairs with the 7 days?;
      - Breach causing or threatening to cause irreparable harm to any person or property or tenant convicted of Class A misdemeanor or felony during term of tenancy which caused or threatened to cause irreparable harm to person or property, no 7 day notice need be sent. Landlord

may immediately terminate and bring action (If proceeding under this section, landlord cannot delay in filing or not really irreparable harm case).

3. Filing an action:

- Contents of complaint
  - 5707 for nonpayment case (review statute);
  - 5707 and 5708 for breach of lease (review statute).
- Jury versus bench trial (5713)
  - Plaintiff may demand at time action is commenced and defendant may demand with 10 days after service of summons/complaint;
  - Jury of 6;
  - Bench trial before single justice of the peace.

4. Defenses:

- Defects in complaint
  - 5707 or 5708;
  - Pretrial motion to dismiss; without prejudice so landlord can refile but buys tenant time to pay rent if nonpayment case; leverage to settle;
  - Urban decision;
  - Failure to file pretrial may constitute waiver.
- Defects in notice
  - If bad 5-day notice, then possession cannot be awarded;
  - Bad if landlord jumps the gun on filing before the expiration of the 5 days; demands an inflated amount of rent (improper rent increase, inflated late fee, notice does not contain statutory requirements), court should simply enter judgment for rent owed but no possession;
  - 7-day notice – doesn't comply with statutory requirements; no possession.
- Retaliatory acts prohibited (5516).
  - Defined as an attempt by landlord to pursue an action for summary possession, cause tenant to involuntarily vacate unit, demand rent increase or decrease services after tenant has exercised legal remedies;
  - Landlord has enumerated statutory defenses;
  - Tenant establishing retaliatory act(s) by landlord shall be entitled to three (3) months' rent or treble actual damages, whichever greater.
- Assertion of counterclaim
  - For retroactive rent abatement due to landlord's failure to make repairs that were requested resulting in interference with tenant's use and enjoyment of rental unit or portion thereof. Asking court to retroactively reduce the rent to an amount that takes into account the interference with tenant's use and enjoyment. Not very scientific.

- Good faith disputes
    - 5716 – if default in payment of rent the result of a good faith dispute e.g. timing of rent increase, excess late fees, rent abatement claims, then court can enter judgment against tenant but stay possession on the condition that tenant pay within 10 days.
5. Appeals:
- Jury versus bench trial
    - 5717 – for jury, within 5 days after judgment must appeal, three judge panel reviews record for errors of law. Appellant must designate with particularity the errors of law;
    - For bench, within 5 days must appeal, three judge panel hears matter de novo;
    - Appeal stays possession if ordered below except where no bond filed but landlord assumes the risk if possession executed on;
    - Claims or counterclaims not raised below can be asserted at trial de novo if bill of particulars filed with 5 days of appeal;
    - Stay of execution of writ of possession (unless no bond, but...).
6. Executing on writ of possession (5715).
7. Eviction:
- General -
    - Custom: WOP not issued until 11<sup>th</sup> day after judgment entered to accommodate appeal or motion to vacate;
    - Minimum 24-hour Notice.
8. Manufactured Homes -
- Prepay 7-day storage fee but can't occupy home; home stored for 30 days before landlord may dispose thru further legal action; tenant must pay judgment & subsequent storage costs before removing home;
  - Other Rentals – 7-day storage period; tenant may be required to pay reasonable storage fee but not judgment; after 7 days, property deemed abandoned;
  - Enforcement Procedures - generally left to parties but landlord risks replevin if refuses access;
  - Death of Sole Tenant (5719) - landlord may reclaim unit without lawsuit if conditions met.

SEE: [HTTP://COURTS.DELAWARE.GOV/](http://courts.delaware.gov/)  
[HTTP://ATTORNEYGENERAL.DELAWARE.GOV/](http://attorneygeneral.delaware.gov/)