

## Advocate's VIEW

# Obtaining a money judgment in a summary eviction proceeding

New York's Real Property Actions and Proceedings Law (RPAPL) authorizes courts to hear summary proceedings for the recovery of real property. Summary proceedings are often commenced by landlords seeking to evict defaulting tenants. By commencing a RPAPL summary proceeding, a landlord may obtain a warrant of eviction to recover its premises.

In theory, landlords may also obtain a money judgment against the tenant for past due rent.

But many courts have required personal service of the summary proceeding papers on a tenant before issuing a money judgment. Sometimes personal service on a defaulting tenant (in both residential and commercial contexts) is not realistic, especially given the expedited nature of a summary proceeding and the tight service window provided by the RPAPL.

This article explores when courts award money judgments against defaulting tenants in summary proceedings. Before deciding to commence a summary proceeding, landlords and attorneys should carefully consider the goals of the specific case and the expectation of collecting a money judgment.

### Statutory requirements

Summary proceedings are commenced by a petition and a notice of petition, to be served on the tenant. *See*



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the tenant), or (3) affixing copies of the papers to a conspicuous part of the subject property (and subsequently mailing to the tenant). The latter two methods are often referred to as “leave and mail” and “nail and mail” respectively. (Note that before relying on “nail and mail” service, a landlord must first exercise “due diligence” in its earlier attempts at personally serving the tenant. *See Dolan v. Linnen*, 195 Misc. 2d 298, 300 (Civ. Ct. Richmond Co. 2003)).

The RPAPL does not state that a landlord may only obtain a money judgment when it personally serves the tenant. It also does not state that different rights are available to the landlord based on the method of service. Nevertheless, as discussed below, courts have ruled that personal service is a prerequisite to issuing a money judgment for past due rent.

RPAPL § 731. RPAPL § 735(1) establishes three acceptable methods of service: (1) personally delivering the papers to the tenant, (2) leaving copies of the papers with a person of suitable age and discretion who resides or is employed at the property (and subsequently mailing to

the tenant), or (3) affixing copies of the papers to a conspicuous part of the subject property (and subsequently mailing to the tenant). The latter two methods are often referred to as “leave and mail” and “nail and mail” respectively. (Note that before relying on “nail and mail” service, a landlord must first exercise “due diligence” in its earlier attempts at personally serving the tenant. *See Dolan v. Linnen*, 195 Misc. 2d 298, 300 (Civ. Ct. Richmond Co. 2003)).

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### Courts disagree on the requirement of personal service

Despite the language of the RPAPL, one court observed that “[i]n practice, RPAPL § 735 is not given its literal effect” and held that “money judgments upon default should continue to be entered only upon a showing that the respondent was served by personal delivery.” *Ressa Family, LLC v. Dorfman*, 193 Misc. 2d 315, 323 (Nassau Co. Dist. Ct. 2002).

The *Ressa* court relied heavily on *In re McDonald*, 225 AD 403 (4th Dept. 1929) as establishing that personal service is required for money judgments and concluded that legislative action or appellate determination was required to change the precedent. *See Ressa*, 193 Misc. 2d at 323; *Arnold v. Lyons*, 2003 WL 2004246, at \*5 (Nassau Co. Dist. Ct. 2003) (“*Ressa* advocates only leaving an alteration of this magnitude to long-standing practice to the legislature.”).

Other courts have expressly rejected this analysis, finding that the state legislature has acted several times since *McDonald* was decided in 1929. *See Dolan*, 195 Misc. 2d at 300 (finding *McDonald* never applied to noncommercial cases involving residents and that *McDonald* no longer applies to commercial cases); *Avgush v. Berrahu*, 17 Misc. 3d 85, 92 (2d Dept. App. Term 2007) (“Money judgments shall be available upon a

tenant's default in a summary proceeding, without regard to the manner of service effected therein, upon a showing that such service would be sufficient to support the entry of a money judgment in a plenary action.”).

#### Recent local case

The conflicting views of whether personal service is a prerequisite to a money judgment in a summary proceeding were recently argued locally. A 2016 Rochester City Court decision denied the issuance of a money judgment against a defaulting tenant and referred to the *McDonald* case as establishing “the black letter rule that a petitioner in a summary proceeding cannot obtain a money judgment against a defaulting respondent who was served by other than personal delivery.” *Cornhill LLC v. Sposato*, 51 Misc. 3d 840, 842 (Rochester City Ct. 2017). The Court found “the rules of statutory construction, the judicial doctrine of stare decisis, and considerations of fairness and equity would still compel the application in this action of the ... Fourth Department’s longstanding *McDonald* rule.” *Id.* at 844.

On appeal, the Monroe County Court reversed and rejected the City Court’s analysis, finding that the language of RPAPL 735 was unambiguous. *See*

*Cornhill LLC v. Sposato*, 55 Misc. 3d 685, 689 (Monroe Co. Ct. 2017) (“jurisdiction in a proceeding under the RPAPL is obtained, for purposes of obtaining a money judgment, when the service requirements of [RPAPL 735] are met.”).

Interestingly, on remand, the Rochester City Court again denied entry of a money judgment in favor of the landlord, finding that the personal service attempts made prior to “nail and mail” service were inadequate to satisfy the due diligence requirement. *Cornhill LLC v. Sposato*, 56 Misc. 3d 364, 369 (Rochester City Ct. 2017).

This local case highlights the potential challenges of summary proceedings for landlords.

#### Careful consideration is warranted

Despite the recent Monroe County Court decision, the issue is not fully settled, even in this area. Courts may continue to reach varying conclusions until there is a clear precedent from the Appellate Division.

Summary proceedings are intended to be more efficient than a traditional court action. *See Barstow Rd. Owners, Inc. v. Billing*, 179 Misc. 2d 958, 962 (Nassau Co. Dist. Ct. 2002) (primary purpose of summary proceeding is speedy and expeditious disposition of

the issue as to the right of the landlord to the immediate possession of his real property). If the landlord is primarily concerned with obtaining a quick eviction of a defaulting tenant, a summary proceeding remains an efficient option in most cases. A landlord may not value a money judgment against a tenant or may consider the potential to collect a potential judgment futile.

If the landlord seeks an additional money judgment for past due rent, then the landlord and attorney should carefully evaluate the likelihood of personally serving the tenant. This muddled area of law creates the possibility of an unfavorable outcome (or inefficient appeal) for a landlord that followed the language of the RPAPL. If personal service on the tenant is not likely, the landlord may choose to bring an action at law instead to avoid the uncertainty of a summary proceeding.

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