

**Evictions and the Judicial Process**

**By: Ryan O. Luminais**

**Sher Garner Cahill Richter Klein & Hilbert, LLC**

**909 Poydras Street, Suite 2800**

**New Orleans, Louisiana 70112**

**Telephone: (504) 299-2106**

**Facsimile: (504) 299-2306**

**E-mail: [rluminais@shergarner.com](mailto:rluminais@shergarner.com)**

## II. THE EVICTION AND JUDICIAL PROCESS

### A. Overview of Eviction Process

1. Against Tenants/Lessees (Louisiana Code of Civil Procedure article 4701)
  - a. When a lessee's right of occupancy has ceased because of termination of the lease by (1) expiration of its term; (2) action of the lessor; (3) nonpayment of rent; or (4) any other reason (such as nonmonetary defaults).
  - b. Caveat: A court may modify various terms of the lease based upon the course of dealing between the landlord and the tenant. The consistent late payment of rent by tenant may serve to extend the date for payment of rent. *Credeur v. Credeur Credit Corporation*, 385 So.2d 926 (La. App. 3<sup>rd</sup> Cir. 1980). *Saxton v. Para Rubber Company of Louisiana*, 117 So. 235 (La. 1927). *Bonnabel v. Metairie Cypress Company*, 57 So. 27 (La. 1911).
2. Against Occupants (Louisiana Code of Civil Procedure article 4702)
  - a. Against an occupant who no longer has a right to be on the leased property. An occupant is "a sharecropper, half hand, day laborer, former owner, and any person occupying immovable property by permission of accommodation of the owner, former owner, or another occupant, except a mineral lessee, owner of a mineral servitude, or a lessee of the owner." Louisiana Code of Civil Procedure article 4707
  - b. Basically, an occupant is anyone who at one time had permission to be on the property without paying rent (Such as your brother in law, college buddy, etc.)
  - c. \*\*\*Remember, oral leases are allowed. If someone is paying rent, they are a lessee, and the landlord's obligations are governed by the civil code lease rules. (Civ. Code articles 2668 *et. seq.*)

3. Against persons/entities with a title claim
- a. Every state appellate court has rejected the use of summary eviction to determine ownership or possession.
- i. *Betts v. Hoffman*, 975 So. 2d 200 (La. App. 3 Cir. 1/10/2008) (“[L]egal issues of whether or not Mr. Betts owns the property and can legally evict defendants effectively remove this matter from summary proceedings and rightfully relegate it to an ordinary proceeding”). *See also Matthews v. Horrell*, 977 So. 2d 62 (La. App. 1 Cir. 11/17/2007).
- ii. *Champagne v. Broussard*, 401 So. 2d 1060 (La. App. 3 Cir. 1981) (“Summary eviction procedure is not appropriate to try disputed title to property but is designed for situations where the possessor has no semblance of claim to title or possession.”).
- iii. *J&R Enterprises-Shreveport, L.L.C. v. Sarr*, 43,364 (La. App. 2 Cir. 8/13/2008) (“[T]his summary eviction proceeding morphed from an action on a delinquent lease into an action involving questions of ownership of two separate immovables.”).
- iv. *Fradella Constr. Inc. v. Roth*, 503 So. 2d 25 (La. App. 4 Cir. 1987) (“Summary eviction procedure is not appropriate to try disputed title to property.”).
- v. *Carrier v. Occhipinti, Inc.*, 570 So. 2d 43 (La. App. 5 Cir. 1991) (“Disputes as to ownership of property must be adjudicated in an ordinary proceeding and not in a summary eviction proceeding.”).
- b. If there is no tenant or occupant (as defined in the summary eviction rules), then the person on the property is a squatter or trespasser. In those cases, the property owner must file a possessory, petitory, or declaratory judgment action.
- i. Louisiana Code of Civil Procedure article 4705: “Nothing in this title shall be construed to conflict with the provisions of Articles 3651 through 3664.

4. To Evict or Accelerate.
- a. Does the lease give the lessor the right to acceleration the rent upon default?
- i. If so, the lessor must choose between acceleration and eviction. *Henry Rose Mercantile & Mfg. Co. v. Stearns*, 98 So. 429 (La. 1923); *Richard v. Broussard*, 495 So. 2d 1291 (La. 1986);
- \* Lessor warrants peaceful possession of the leased premises (Civ. Code arts. 2700 *et seq.*). Evicting the lessee and barring his access to the property terminates the lease, preventing the lessor from accelerating the rent for the unexpired lease term.
- ii. Acceleration = lessee's right to continue possessing the leased property. *Henry Rose Mercantile & Mfg. Co. v. Stearns*, 98 So. 429 (La. 1923). ("If the lessee fails to pay his rent as it matures, the lessor may hold him liable for the rent due for the expired term of the lease, and may sue to dissolve the contract and evict the lessee, or, if he should so elect, he may hold the lessee for the rent, both for the expired and the unexpired terms of the lease, and may sue accordingly. If, however, he elects to avail himself of the latter right, he elects to continue the contract in force, notwithstanding the default of the lessee in his payments, and thereby accords to the latter the right to remain on the premises and to use them in accordance with the terms of the lease, and continues in force the obligation imposed by law upon him to maintain the lessee in the peaceable possession of the property.")
- iii. NOTE: if the landlord evicts the tenant, he can still file an ordinary action to obtain all past due rentals owed before the eviction.

5. Collection of Rent and Lessor's Privilege.

- a. Lessor must bring an ordinary action for delinquent rentals
  - i. You cannot get a money judgment against a tenant in summary eviction. The Lessor must file a separate ordinary process action to get money judgment.
  - ii. Practice Tip: File both eviction and ordinary action at the same time.
- b. The Lessors privilege (Civil Code article 2707)

What does it cover?

- i. Movables that are found in or upon the leased property (CC Art. 2707).

\*This includes the property of any sublessee, but only to the extent the sublessee owes rent to his sublessor (Art. 2708).

- ii. Property belonging to third parties (CC Art. 2709)

\*Must be on the leased property

\*Lessor must be in good faith (cannot have knowledge that property does not belong to lessee)

\*The third party must intervene and assert his ownership, or the property can be sold as though it belonged to the lessee.

\*Self Storage Units have special rules (La. R.S. 9:4756-60)

\*Crop leases have special rules (Civ. Code Art. 2707)

- iii. The lessors privilege is destroyed in bankruptcy (11 USC 545(3)).
- iv. The lessors privilege is always subordinate to a UCC Article 9 security interest (even if that security interest is not perfected) (LARS §9:4770(B)).
- v. Always include a UCC security interest in your lease (and a confession of judgment) and perfect it with a UCC-1 Financing Statement. This will give you the right to executory process

## B. The Judicial Process

### 1. Determining Jurisdiction:

- a. There is overlapping jurisdiction between parish, city, and district courts based on the amount of rents due. *See* Louisiana Code of Civil Procedure article 4844.
- b. Venue
  - i. Louisiana Code of Civil Procedure article 80: Parish of Immovable Property to Defendant's Domicile

“The following actions may be brought in the parish where the immovable property is situated or in the parish where the defendant in the action is domiciled: (3) an action arising from the breach of a lease of immovable property, including the enforcing of a lessor’s privilege or seeking the payment of rent. **The venue authorized this Subparagraph shall be in addition to any other venue provided by law for such action.**”

- ii. But *See* La. Code Civ. Proc. art 45 (1): “Article . . . 80 . . . governs the venue exclusively, if this article conflicts with any of the articles 42 and 71 through 77.”

2. The Summons and Complaint

a. **Generally, before filing suit, send notice to Vacate/Notice of Termination** (La. Code Civ. Proc articles 4701(tenants) and 4702 (occupants )

i. Caveat: The Notice to Vacate and Notice of Termination of the lease are separate requirements. However, both notices can generally be combined in a single document.

*What must it contain?*

i. The notice of vacate must give the lessee or occupant “**not les than five days for the date of delivery to vacate the leased premises.**” (La. Civ. Code. arts. 4701 and 4702)

ii. **Caveat**: This five day calculation does not include weekends and holidays. *See Lichtentag v. Burns*, 258 So. 2d 211, 212 (La. App. 4 Cir. 1972) (“We note that all of the articles referred to are parts of the Code of Civil Procedure. The provision of art. 5059 applies to the time periods set generally throughout the Code, unless such periods are specifically exempted. We find no exemption here. Thus, we are of the opinion that the provisions of art. 5059 govern the time periods involved here, and that legal holidays are to be excluded from the computation of the period because the period involved is less than seven days.”)

\*All the more reason to get a waiver of the notice to vacate in the lease.

*When is it required?*

i. General rule: Always

ii. **Exception: When it has been waived in a written lease.**

La. Code Civ. Proc. art. 4701: “A lessee may waive the notice requirements of this article by written waiver contained in the lease, in which case, upon termination of the lessee’s right of occupancy for any reasons, the lessor or his agent may immediately institute eviction proceedings . . . .”

*When can you send notice to vacate?*

- i.* The rules governing when a notice to vacate can be sent to a lessee or occupant depend solely on whether or not there has been a default on the lease.

*Default based Notices*

- i.* Look to the lease itself to see what is required for notices of default. These notices can generally be sent at any time upon an event of default.
- ii.* Louisiana Civil Code article 2719: “When a party to the lease fails to perform his obligations under the lease or under this Title, the other party may obtain dissolution of the lease pursuant to the provisions of the Title of “Conventional Obligations or Contracts.”
- iii.* **Caveat:** \*\*Remember the rules regarding putting the obligor in default (CC arts 1989 through 1993), damages (CC arts. 1994 through 2010), and dissolution (CC arts. 2013 through 2024).
  - 1. Civil Code article 2017: “The parties may expressly agree that the contract shall be dissolved for the failure to perform a particular obligation. In that case, the contract is deemed dissolved at the time it provides for or, in the absence of such a provision, at the time the obligee

gives notice of the obligor that he avails himself of the dissolution clause.

2. Civil Code article 2010: “An obligee may not avail himself or a clause stipulating damage for delay unless the obligor has been put in default.”
  - i. Issue: How does this affect an automatic late fee provision?

Non-default based notices to vacate

- i. When there has been no default on the lease, the timing of the notice to vacate depends on whether or not the lease has a fixed term.
- ii. *Leases with a Fixed Term.* Louisiana Code of Civil Procedure article 4701: “If the lease has a definite term, notice to vacate may be given not more than thirty days before the expiration of the term.”

Notice of Termination. Louisiana Civil Code article 2720: leases with a fixed term expire automatically. As a result, there is no requirement for a notice of termination.

**Caveat:** Be careful of reconduction. A lease can be reconducted if a notice of termination or notice to vacate has not been sent. (Civ. Code art. 2721).

**Practice Note:** Always send a notice to vacate within 30 days of the lease’s expiration to prevent reconduction.

- iii. *Leases with an indefinite term*

Combined Notice to Vacate/Notice to Terminate. Louisiana Code of Civil Procedure article 4701: “If the lease has no definite term, the notice required by law for

its termination shall be considered as a notice to vacate under this article.”

b. The Rule to Evict

- i. La. Code Civ. Proc. art. 4731: “If the lessee or occupant fails to comply with the notice to vacate required under this Title, or if the lessee has waived his right to notice to vacate by written waiver contained in the lease, and has lost his right of occupancy for any reasons, the lessor or owner, or agent thereof, may cause the lessee or occupant to be cited summarily by a court of competent jurisdiction to show cause why he should not be ordered to deliver possession of the premises to the lessor or owner. **The rule to show cause shall state the grounds upon which the eviction is sought.**”

**Caveat:** The rule to evict cannot be filed until the 5 day delay, which is five business days, not including weekends, has expired.

2. The Eviction Trial

- a. The eviction hearing cannot occur earlier than three days after service of process on the tenant.

- i. La. Code Civ. Proc. Art. 4732: “The court shall make the rule returnable not earlier than the third day after service thereof, at which time the court shall try the rule and hear any defense which is made.”

b. Practice Note:

- i. You can “tack” service on the leased premises if you cannot find your tenant. La. Code Civ. Proc. art. 4703 (“If the premises are abandoned or closed, or if the whereabouts of the lessee or occupant is unknown, all notices, process, pleadings, and orders required to be delivered to served on the lessee or occupant . . . may be attached to the door of the premises, and this

shall have the same effect as deliver to, or personal service on, the lessee or occupant.”).

*i.* Always have the sheriff tack service in addition to regular service. It will save you a ton of headache in the long run.

**c. Caveat:**

*i.* A lease generally becomes part of the bankruptcy estate. Always check for a bankruptcy filing before filing for eviction to avoid violating the automatic stay.

**3. Judgment and writ of possession/appeal**

**a. Answering the Rule to Evict and the Suspensive Appeal**

*i. Louisiana Code of Civil Procedure article 4735*

“An appeal does not suspend execution of a judgment of eviction unless the defendant has answered the rule under oath, pleading an affirmative defense entitling him to retain possession of the premises, and the appeal has been applied for and the appeal bond filed within twenty-four hours after the rendition of the judgment of eviction.”

*ii. Answer Delay*

There is no provision governing the delay for answering a rule to evict. Thus, it can technically it can be filed at any time before the judgment is rendered.

*Newport-Nichols Enterprises v. Grimes, Austin, and Stark, Inc.*, 463 So. 2d 111 (La. App. 3 Cir. 1985). “There is ordinarily no requirement for an answer to a rule. LSAC.C.P. Art. 2593. In eviction proceedings, however, LSA-C.C.P. Art. 4735, mandates a sworn answer asserting an

affirmative defense as a prerequisite for a suspensive appeal. Article 4735 contains no provision concerning the time for filing the answer. Therefore, the rules applicable to ordinary proceedings govern. Under the rules applicable to ordinary proceedings, Louisiana Code of Civil Procedure Article 1001 provides in pertinent part: “The court may grant additional time for answering.” After the hearing on the rule for eviction, the defendant notified the plaintiff of its intent to seek leave of court to file an answer. The plaintiff did not object and the court granted the leave. The defendant's answer was filed before the judgment was rendered. Because the court granted additional time for answering, the defendant's answer was timely for the purpose of applying for a suspensive appeal under Louisiana Code of Civil Procedure Article 4735.

**Practice Note:** If the eviction is set for hearing so that the general answering delays could be followed, do so. Better safe than sorry. As a general rule, always file an answer before the eviction hearing.

- b. The verification requirement
  - i. The Answer must be **signed under oath by the client** or the right to a suppressive appeal is waived!! (La. Code Civ. Proc. art. 4735)
  - ii. Merely having the tenant show up and testifying under oath is insufficient. *See St. Landry Homestead Ass’n v. Bertrand*, 497 So. 2d 31 (La. App. 3 Cir. 1986).
- c. The affirmative defense requirement. The answer must plead an affirmative defense entitling him to retain possession of premises.
  - i. “An affirmative defense is one which raises a new matter not covered by the plaintiff's

petition and which will defeat the plaintiff's demand on its merits, even if the plaintiff proves all of the allegations in his petition.” *Newport-Nichols Enterprises v. Grimes, Austin, and Stark, Inc.*, 463 So. 2d 111 (La. App. 3 Cir. 1985).

*ii.* “The assertion of merely complying with all terms and conditions of the lease is nothing more than a general denial of plaintiff's allegation of non-payment of rent. There is no question that if the lessee had proved he paid the rent, his proof would defeat the plaintiff's action for eviction. It does not follow, however, that such a plea constitutes an affirmative defense. Every allegation in an answer which if proven would defeat plaintiff's suit does not constitute an affirmative defense.” *Modicut v. Bremer*, 398 So.2d 570 (La. App. 1st Cir.1980).

*d.* *The Appeal Bond requirement.* The tenant must move for an appeal and post its appeal bond within twenty-four hours of the judgment of eviction.

*i.* La. Code. Civ. Proc. art. 4735: “The amount of the suspensive appeal bond shall be determined by the court in an amount sufficient to protect the appellee against all such damage as he may sustain as a result of the appeal.”

*ii.* La. Code Civ. Proc art. 2121: “An order of appeal may be granted on oral motion in open court, on written motion, or on petition.”

**Practice Note:** Have the suspensive appeal bond and a notice of appeal already prepared when you go into court for the eviction hearing. The bond and appeal must be filed with twenty-four hours of the judgment anyway, so there is no need to scramble after the ruling to gather the paperwork. If the Judge grants the eviction at the hearing, immediately move for suspensive appeal in

open court and present the notice of appeal for signature.

4. Evicting the Tenant

a. The warrant of possession

- i.* La. Code of Civil Procedure article 4733:  
The tenant/occupant has twenty four hours to deliver possession of the leased premises, or the court must issue a warrant of eviction to the sheriff to have the tenant/occupant removed.

b. Executing the warrant of possession

- i.* La. Code of Civil Procedure article 4734

The warrant must be executed in the presence of two witnesses.

The premises must be cleared of any property therein.

The sheriff is allowed to break open windows and doors if necessary.