

A blue surgical mask is partially visible at the top of the frame, resting on a dark surface. Below it, a white document is laid out, featuring the title "EVICTIION NOTICE" in large, bold, black capital letters, with "(Notice to Quit)" in smaller text underneath. The document is slightly out of focus, with some faint, illegible text visible in the background.

EVICTIION NOTICE

(Notice to Quit)

Alternatives to Eviction: Legal Remedies When Faced With a Mentally Ill Tenant

By Carolyn Reinach Wolf and Jamie A. Rosen

Whether representing condominium boards, homeowners' associations, cooperatives, or landlords, attorneys practicing real property law, or in related areas, should be familiar with the use of various New York Mental Hygiene Law tools when faced with worrisome conduct of a symptomatic mentally ill individual in a building or residence.¹ The behaviors exhibited in an apartment building due to an underlying mental illness can be extremely difficult to manage. Complaints may range from a pattern of behavior that infringes upon the neighbors' quiet enjoyment of their home to behavior that is seriously dangerous and threatens the safety of others. Depending on the behaviors and symptoms observed, mental health legal interventions are feasible alternatives to eviction proceedings.

THE CHALLENGES OF AN EVICTION PROCEEDING

While an eviction proceeding may ultimately be required, the process is time-consuming, adversarial, and expensive. As the months, and potentially years, pass by during a pending eviction proceeding, the mentally ill tenant is likely still suffering, and quite possibly escalating in his or her symptoms or behaviors. Initiating an eviction proceeding may only further complicate a situation when dealing with a mentally ill tenant. In our experience, the court may refer the individual to Adult Protective Services, appoint a guardian ad litem, or take other steps outside the control of the petitioner, prolonging the eviction even further.

Certain legal remedies may not even be available to clients during the COVID-19 pandemic. Within days of declaring a state disaster emergency in New York, Executive Orders by New York Governor Cuomo and Administrative Orders by the New York State courts limited court operations to essential matters and specifically prohibited the enforcement of an eviction or foreclosure in New York through June 20, 2020.² Subsequent Orders and the New York State Tenant Safe Harbor Act, enacted on June 30, 2020, extended the "eviction moratorium," only allowing courts to resume certain non-essential operations and further protecting certain residential tenants from eviction through January 1, 2021.³ As recently as October 2020, the governor and chief administrative judge issued new orders allowing eviction cases to proceed, but there are still significant caveats protecting certain tenants. Additionally, the backlog of cases and restrictions on courthouse foot traffic will result in extraordinary delays. The mental health legal system, however, has continued to operate largely uninterrupted during the COVID-19 pandemic. Most mental hygiene matters in New York are considered essential. These essential

court conferences and hearings are conducted virtually using Skype for Business, and now, Microsoft Teams, in counties across New York, involving multiple parties, attorneys, and court personnel.

Another challenge in choosing to initiate an eviction proceeding against a symptomatic mentally ill tenant is communication, or rather, the inability to engage in a meaningful discussion about behavior that violates a lease agreement, shareholder agreement, or other contract. The tenant may escalate or retaliate when confronted by neighbors, staff, the board, or its counsel. A mentally ill tenant who lacks insight into the consequences of the dangerous or disruptive behaviors may dismiss verbal requests to change behaviors and ignore letters or other legal notices, leaving the board and its counsel no option but to turn to court proceedings.

The question here, however, is which court proceeding is appropriate? When faced with a mentally ill and symptomatic tenant and advising clients of the legal options, consider alternatives to eviction. Specifically, consider how the various mental health legal tools explained in further detail below can provide an outcome that would better serve the tenant, his or her family and neighbors, building management, and staff. It has been our experience that most boards and neighbors want to be compassionate and supportive while also balancing the needs and safety of all tenants.

MENTAL HYGIENE LAW ARTICLE 81 GUARDIANSHIP PROCEEDINGS

Guardianship, pursuant to N.Y. Mental Hygiene Law Article 81, is a legal proceeding by which a court appoints and oversees a legal decision maker, or "guardian," for another adult, who due to incapacity or other disability, is unable to manage his or her



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own affairs.⁴ The court, specifically, the state Supreme Court, can appoint a personal needs guardian and/or a property management guardian to manage multiple aspects of the individual's affairs.⁵ Generally, a family member or close friend petitions the court for the appointment of a guardian for an at-risk individual who would otherwise suffer harm without assistance. If a family member or friend is unavailable or unwilling to intervene, or perhaps when there is no one else to call upon, the building, through its board or management with the assistance of legal counsel, can serve as the petitioner in a guardianship action.

Regardless of an actual diagnosis of a mental illness, which the building management, board, and/or its counsel may not be privy to, when determining whether an individual requires a guardian, it is

ous. A property guardian can be authorized by the court to hire and pay for a heavy-duty cleaning service, maintenance cleaning services and/or an exterminator service. The court can grant a property guardian the authority to access the apartment, including maintaining a copy of the keys, as well as the authority to grant access to the superintendent or others for emergencies, necessary repairs, and maintenance.

A personal needs guardian might also be helpful in the context of a mentally ill tenant's unsafe or objectionable behaviors. Neighbors or staff may observe that an individual is unkempt, neglecting personal hygiene issues, dressed inappropriately, and/or showing signs of dehydration or malnutrition, all examples of an inability to manage the "activities of daily living."⁶ An individual who suffers from dementia or some other

Initiating an eviction proceeding against a symptomatic mentally ill tenant can be extremely expensive, time-consuming, and adversarial and not lead to the desired or preferred outcome.

important to focus on the individual's symptoms and behaviors. A variety of different property management issues may be caused or exacerbated by the symptoms of a mental illness, psychological disorder, or substance abuse issue. Examples of these property issues are hoarding, refusing to clean an apartment, neglecting kitchen appliances, and/or neglecting plumbing issues. These behaviors may affect neighbors as the smell or water infiltrates the hallways or other apartments. There might be a bed bug infestation or other rodent problem that is not remedied. In the past, our clients have had issues where, among other things, the tenant refused to allow access to the apartment for necessary repairs, emergencies, fire alarm, and smoke alarm checks. The individual may be engaging in behavior that has caused destruction to the property, such as flooding the bathroom or punching holes in the walls. In these situations, what type of legal intervention is appropriate outside of a typical eviction proceeding when the individual refuses to cooperate and remedy the issue? An eviction proceeding, which could take years, would not provide any immediate relief to the building staff or neighbors during the pending proceeding. In our experience, a guardian appointed by the court can safely manage these issues in a timely manner. The court can even grant interim relief, before a hearing, in the form of a temporary guardian who can immediately work to remediate a problem in the building that is disruptive or danger-

cognitive impairment might unintentionally engage in unsafe behaviors such as leaving the stove on unattended. The individual's impaired judgment and lack of insight into the need for assistance may necessitate the appointment of a personal needs guardian. This guardian can use the individual's funds to hire and monitor the appropriate professional required to safely maintain the tenant in his or her own apartment, such as a companion, home health aides, visiting nurse service, and/or a case manager. Last, but certainly not least, the guardian would be a liaison between the building and the tenant, allowing for meaningful discussions about compliance with building rules to enable the tenant to remain in his or her apartment without disrupting or threatening the lives of others.

It is important to note, however, that a guardian's authority is limited as it relates to psychiatric treatment in the community. A guardian cannot consent to psychiatric treatment over the individual's objection and cannot force the individual to see a psychiatrist or attend other treatment programs.⁷ A guardian can, however, play a crucial role in ensuring compliance with treatment within the limitations of the statute. For example, the guardian can identify the appropriate mental health professionals available, ensure health insurance coverage, if appropriate, make the appointments, arrange for transportation, and encourage the individual to participate. The guardian can access protected health information, such as medical or mental

health records, and speak with treatment providers. If a guardian can accomplish these tasks and assist the individual in maintaining treatment, the behavioral disturbances in the building and other objectionable conduct may be significantly reduced or stabilized.

MENTAL HYGIENE WARRANT

If the tenant is acutely ill, exhibiting dangerous behaviors that pose an imminent risk to self and/or others in or around the building, the individual may require a psychiatric evaluation and treatment in a hospital. Hospitalization would allow for a psychiatrist or other physician to evaluate any mental health or medical issues, establish a diagnosis, and recommend a treatment plan. The principal statute governing the inpatient hospitalization of mentally ill patients in New York is MHL Article 9. This statute contains the legal standards and procedures for voluntary, involuntary, and/or emergency admissions to a hospital, as well as retention of psychiatric patients pursuant to a court order.

If the individual has decompensated and requires hospitalization, a family member or other concerned individual, such as a landlord or president of the co-op or condo board, can initiate a request for a mental hygiene warrant pursuant to Article 9.⁸ This civil proceeding involves petitioning the Supreme Court in the county where the individual resides, alleging that the individual is “apparently mentally ill and is conducting himself or herself in a manner which in a person who is not mentally ill would be deemed disorderly conduct or which is likely to result in serious harm to himself or herself.”⁹ The desired and anticipated effects of this intervention would be to obtain a psychiatric evaluation and treatment in a hospital to reduce psychiatric symptoms and return him or her to an improved level of functioning in the community.

The verified petition must include information about the individual and the behaviors or symptoms that demonstrate a risk of harm to self and/or others. This behavior might manifest itself as harassment to others in the building, depriving them of the quiet enjoyment of their home. For example, the individual may be verbally abusive to staff or neighbors, spending time in common areas such as the lobby, mail room or laundry room, berating others and making threats. The individual may demonstrate an incoherent or disorganized thought process, ranting or frequently changing topics without any connection, or may be observed talking to him or herself. In extreme cases, the individual may threaten to, attempt to, or actually physically harm someone. The individual might also exhibit behaviors that pose a substantial risk of harm to self, such as self-harm or not taking care of the

activities of daily living, not sleeping or eating appropriately, or neglecting a serious medical condition.

Based upon that verified petition, the court has authority to issue a civil warrant directing that the individual be brought before the court for a hearing. Executing the warrant requires coordination and collaboration with the sheriff’s department in the county where the individual resides. At the hearing, which takes place the same day as the execution of the warrant, the petitioner has the burden of proof by clear and convincing evidence. The subject of the proceeding, the respondent, is entitled to legal counsel, appointed through the Mental Hygiene Legal Service (MHLS).¹⁰ A neighbor, staff member, or board member who has personally observed the concerning, dangerous behaviors can testify in court to support the petition. The respondent is afforded the opportunity to cross-examine the witnesses and testify in his or her defense.

The court then determines if the respondent suffers from a mental illness “which is likely to result in serious harm to himself or herself or others.”¹¹ The court has the authority to direct the sheriff to bring the individual to a specific hospital, identified in the order, for a psychiatric evaluation. The court does not have the authority to order the involuntary admission of the individual to a hospital or require psychiatric medication. The hospital, following its protocols, must determine whether or not that individual should be admitted for psychiatric treatment.

At this point, when the individual is evaluated and/or admitted to the hospital, he or she is afforded certain rights, including those protecting personal health information under HIPAA laws. The petitioner (e.g., building management or the board) and its legal counsel will not have access to information about the individual’s diagnosis and treatment while in the hospital without the individual’s consent. More importantly, the petitioner and legal counsel will likely not be able to participate in discharge planning or even receive notice of the discharge date. This is one of the reasons it may be helpful to simultaneously initiate a guardianship proceeding, as described above. A guardian would be able to access HIPAA-protected health information and assist in the transition from the hospital back into the community.

Hospitalization would hopefully allow for the treatment of any acute symptoms and resolution of inappropriate or disruptive behaviors occurring in the building. Once stable and discharged from the hospital, the goal would be to return to the building at an improved level of functioning, enabling the individual to think more clearly and rationally, gain insight into the extent of the illness and concerning behaviors, and live safely in the community.

ASSISTED OUTPATIENT TREATMENT

Non-compliance with psychiatric treatment in the community may be a contributing factor causing the objectionable conduct in the building or other dangerous behaviors. If the individual has a history of non-compliance with outpatient psychiatric treatment, the board, landlord, or other concerned individual can make a referral for Assisted Outpatient Treatment (AOT) in the county where the individual resides.¹² Known as Kendra's Law in New York, AOT is court-ordered psychiatric treatment and supervision in the community with the goal of preventing "a relapse or deterioration" in the individual's psychiatric condition.¹³

One of the benefits of AOT is that the program provides for case management services, either an Intensive Case Manager (ICM) or an Assertive Community Treatment (ACT) Team to coordinate the individual's psychiatric care in the community.¹⁴ This team is directed by court order to meet with the individual in the community, usually four to six times per month, follow the plan for the administration of psychiatric medication, and monitor medication compliance. The AOT program can provide alcohol or substance abuse counseling, as well as require blood tests or urinalysis to monitor the presence of alcohol or illegal drugs.¹⁵ If there is evidence of non-compliance with the treatment plan, the team has the authority to call the police or a mobile crisis team to bring the individual to a hospital for an examination.¹⁶ The hospital, in following its protocols, must then determine if the individual requires admission to the hospital.

One obstacle in choosing this intervention is the inability to access protected health information to complete the referral application. The board or landlord may have to collaborate with family members or friends who know the mentally ill individual's diagnosis and history of previous hospitalizations. If he or she has a guardian, as described above, the guardian can access the protected health information to complete the referral application. This information is essential, since in order to be eligible for AOT, the application must demonstrate that the individual is 18 years of age or older, suffers from a mental illness, and has a history of non-compliance with psychiatric treatment.¹⁷ An individual meets criteria for participation in the AOT program if said non-compliance has resulted in a hospitalization at least twice within the last 36 months or has resulted in an act of violence toward self or others, or threats of, or attempts at physical harm to self or others within the last 48 months.¹⁸ After a hearing, the court can authorize up to one year of Assisted Outpatient Treatment.¹⁹

AOT is a valuable tool for mentally ill individuals who refuse mental health services in the community, decompensate leading to dangerous or inappropriate behaviors in a residence or other apartment building, and are frequently hospitalized as a result.

CONCLUSION

In pursuing one or more of these mental health legal options as alternatives to eviction proceedings, the tenant can hopefully receive the assistance needed, whether in the form of a guardian and/or psychiatric treatment, so that he or she can live safely in the community. Early intervention is the key to effectively addressing any underlying mental health concerns of a disruptive tenant. Initiating an eviction proceeding against a symptomatic mentally ill tenant can be extremely expensive, time-consuming, and adversarial and not lead to the desired or preferred outcome. The best way to manage these complicated situations is with the consultation and advice of a mental health law attorney who can help navigate the mental hygiene laws, explain the benefits and drawbacks of each intervention relating to persons with mental illness, and come up with a creative solution that benefits all.

1. Hereinafter, the word "tenant" is used universally to refer to the individual of concern residing in an apartment, whether he or she is a shareholder, tenant or other type of resident.
2. See N.Y. Exec. Order No. 202.8 (Mar. 20, 2020), <https://www.governor.ny.gov/news/no-2028-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.
3. See N.Y. Exec. Order No. 202.28 (May 7, 2020), <https://www.governor.ny.gov/news/no-20228-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>; New York Tenant Safe Harbor Act, S819B (June 30, 2020), <https://www.nysenate.gov/legislation/bills/2019/s8192/amendment/b>; N.Y. Exec Order No. 202.66 (Sept. 29, 2020), <https://www.governor.ny.gov/no-20266-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>; N.Y. AO/231/20, chief Admin. Judge Lawrence K. Marks, <https://nycourts.gov/whatsnew/pdf/EvictionsMemo-10-09-20.pdf>.
4. MHL § 81.02(a). In New York, incapacity refers to functional limitations rather than a mental or physical condition. MHL § 81.02(c).
5. See MHL § 81.22.
6. *Id.* § 81.03(h).
7. The Mental Hygiene Law compensates for this gap through the procedures outlined in Article 9 of the Mental Hygiene Law as well as through case law such as *Rivers v. Katz*, that provides authority for the involuntary administration of medication in the hospital. 67 N.Y.2d 485, 504, N.Y.S.2d 74 (1986).
8. MHL § 9.43.
9. *Id.*
10. See *id.* § 47.01.
11. *Id.* § 9.43(a).
12. *Id.* § 9.60.
13. *Id.* § 9.60(a), (c)(6).
14. *Id.* § 9.60(a)(1).
15. *Id.*
16. *Id.* § 9.60(n).
17. *Id.* § 9.60(c).
18. *Id.* § 9.60(c)(4).
19. *Id.* § 9.60(j)(2).