

## Outside Counsel

# Legal Possession: What Does It Mean?

Legal possession” is a term used by the landlord-tenant bar. We recently came upon a settlement agreement which required the tenant to deliver “broom-clean legal possession” to the landlord on or before a date certain. In another situation, a good guy guaranty limited liability to obligations which accrue prior to the date the tenant delivers “legal possession” to the landlord. What exactly is meant by “legal possession?”

### Let's Start With 'Possession'

Possession of real property is a matter of physical fact. Having the *right* or legal *entitlement* to possession, is not possession. Possession is a physical concept, not a right. As stated in Black's Law Dictionary, possession is “the fact of having or holding property in one's power.” That power means having physical dominion and control over the property. That dominion and control may be exercised by excluding others, or letting others in. It is the fact of that physical control that is possession. That power might be exercised legitimately, or it might be exercised wrongfully. It might be exercised in a manner that is a violation of



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law. But either way, it is the physical fact, the fact of having or holding the property in one's power and control, that constitutes possession.

Under New York law a person who has been in peaceable possession for 30 consecutive days or longer may not legally be removed by force, even if that person's possession was obtained wrongfully. It is not a question of what the person's underlying rights may be. Whether the person is a tenant under a lease, a squatter, or even one who himself entered into possession by unlawful means or by force, a person who has been in peaceable possession for at least 30 consecutive days may not legally be removed by force. The owner or other person with a superior *right* of possession must seek the person's eviction by commencing a case in court. RPAPL §711; *Mitchell v. City of New York*, 154 Misc.2d 222 (Civ. Ct. Bx. Co. 1992) (residential occupant in possession for at least 30 days shall not be removed from possession except in a special proceeding); *Sol De Ibiza v. Panjo Realty*, 29 Misc.3d

72 (App. Term 1st Dept. 2010) (a right to self-help specifically reserved in a commercial lease may be utilized only where it is effectuated “peaceably”).

In addition, RPAPL §853 provides: “If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrong-doer.”

In New York City, under §26-521 of the NYC Administrative Code, it is a misdemeanor to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for at least 30 consecutive days by “using or threatening the use of force....”; and New York Police Department Patrol Guide Procedure Number 117-11 states that it is unlawful to evict an occupant of a dwelling unit by methods which involve the use or threat of force.

In the context of landlord-tenant law, the key to the entrance door to the premises is considered a symbol of possession. *American Tract Soc. v. Jones*, 76 Misc. 236, 134 N.Y.S. 611 (App. Term 1st Dept. 1912) (“A key is the symbol of possession. The furnishing a tenant with a key to leased premises is a customary incident to

the giving of possession, just as the surrender of the key by the tenant is evidence of an intent on his part to surrender possession.”). Having the key gives one the power to enter, and the power to exclude others. Thus, where a tenant tenders the keys to the landlord, and the landlord accepts them, the tenant is considered to have given up possession and the landlord is considered to have resumed possession. The physical power has been consensually transferred from the tenant to the landlord.

### Inconsistent Definitions

Returning to the subject, if “possession” is a physical fact, what then is “legal possession?”

Often, the term is used colloquially, as a way of signifying that the possession is of a person who is legally entitled to it. While the phrase “lawful possession” might be clearer, when used in this context the meaning is possession that is not in violation of a statute, a lease, or other agreement, and is therefore rightful under the law. That is perhaps the most obvious meaning, and the meaning most often ascribed to the phrase.

The problem is that the term is also used in other ways, with varied and inconsistent meanings.

One of these meanings is exemplified in eviction by city marshal under *The New York City Marshal’s Handbook of Regulations*, which is published by the New York City Department of Investigations as part of its supervision of New York City marshals pursuant to Joint Administrative Order 453 of the Appellate Divisions for the First and Second Judicial Departments. New York Real Property Actions and Proceedings Law Article 7 provides for a summary proceeding to recover possession of real

property, typically commenced by a landlord against a tenant based on either non-payment of rent or holding over after the expiration or early termination of the term.

Upon the successful prosecution of such a proceeding the landlord is awarded a judgment of possession and a warrant of eviction. RPAPL §747. The warrant commands a New York City marshal to “remove all persons, and...put the [landlord] in full possession.” RPAPL §749. But the judgment only adjudicates the parties’ rights with respect to the real property; it makes no adjudication of any rights with respect to any personal property in the premises. This gives rise to the practical problem of what to do with that personal property when the marshal evicts the tenant and delivers possession of the real property to

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The term has no single, definite, fixed meaning. To the contrary, separate authorities (the courts, and the Marshal’s Handbook which is issued under authority granted by the Appellate Divisions) ascribe different meanings, which are inconsistent with one another.

the landlord. The Marshal’s Handbook gives two options: at the election of the prevailing landlord the marshal will either perform an “eviction,” meaning that both the tenant and its personal property are removed from the premises, or a so-called “legal possession,” meaning that only the tenant is removed and its personal property is delivered into the care and control of the landlord as bailee for the tenant. The marshal then posts on the entrance door a notice entitled

“Marshal’s Legal Possession” which states “The landlord has legal possession of these premises.”

Section 6-4 of The Marshal’s Handbook states “The distinction between an eviction and a legal possession is that in an eviction both the tenant and his or her personal property are removed from the premises, whereas in a legal possession the tenant is removed from the premises and his or her property remains under the care and control of the landlord, as bailee for the tenant. Marshals are required to perform whichever service is desired by the landlord and may not restrict themselves to legal possessions.” The Marshal’s Handbook states that what is meant by “legal possession” is “possession of the tenant’s premises with the contents intact.” Section 6-4 of the Marshal’s Handbook describes “legal possession” as “mere possession of the property rather than having the premises delivered to him or her in ‘broom clean’ condition....”

### Case Law

Another meaning may be found in case law. At common law, absent an express covenant to the contrary in the lease, at the commencement of the term the landlord was required to deliver to the tenant only such possession as the landlord had. The landlord was only required to deliver the “right” to possession, by seeing to it that no one else had a *right* of possession superior to that of the tenant. *Mirsky v. Horowitz*, 46 Misc. 257, 92 N.Y.S. 48 (App. Term 1905). If there was another person who lacked such superior *right* but was nevertheless in actual, physical possession (that is, “possession”), such as a trespasser, that was the tenant’s problem. Having

received the right to possession, the tenant would be obligated to pay the rent and perform its other obligations under the lease, even if it was unable to obtain possession.

In the context of those cases, the right that the landlord was required to deliver, the right to possession, was referred to as “legal possession.” The court said in *Mirsky*: “on the day on which [the] term was to commence someone else was in physical possession of the demised premises.... It was not incumbent on the lessor to put the lessees into actual possession.... All that was incumbent upon the landlord was to put the tenant into legal possession.” That rule was changed in 1962 by the enactment of Real Property Law §223-a which provides “In the absence of an express provision to the contrary, there shall be implied in every lease of real property a condition that the lessor will deliver possession at the beginning of the term” and gives the tenant the remedy of rescission in the event the landlord does not deliver actual possession.

Not only are these two “official” meanings of “legal possession” inconsistent with one another, but in both contexts the phrase “legal possession” is a misnomer. In the case of the Marshal’s Handbook, for either an “eviction” or a “legal possession,” what the marshal is doing is delivering possession of the real property to the landlord. Disposition of the tenant’s personal property may present a difficult practical problem, but it has nothing to do with possession of the real property. In the case of the old common law rule, the landlord was required to convey a right, not possession. Why this right was sometimes referred to as “legal possession” is not entirely clear.

Adding to the muddle, neither of these “official” meanings seems to have anything to do with the way the term is often used by landlord-tenant practitioners. Where a settlement agreement requires the tenant to deliver “broom clean legal possession” to the landlord, it is doubtful that the drafter meant to invoke the meaning of “legal possession” under the Marshal’s

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Handbook. Where a good guy guarantee limits the guarantor’s obligations to those which accrue prior to the date the tenant delivers “legal possession” to the landlord, it is doubtful that the drafter intended to invoke the common law understanding of the phrase such that all the tenant has to do is deliver to the landlord the “right” to possession as against any superior claims.

Rather, it seems that the phrase is sometimes used in the belief that by using the word “legal” the drafter has added something significant to simple “possession.”

It is likely however that the use of this phrase will have the unintended consequence of muddying the waters and unnecessarily creating an ambiguity.

### Conclusion

As we have seen, the term has no single, definite, fixed meaning. To the contrary, separate authorities

(the courts, and the Marshal’s Handbook which is issued under authority granted by the Appellate Divisions) ascribe different meanings, which are inconsistent with one another. Neither of those “official” meanings is consistent with the most common usage, i.e., “lawful possession.” That alone should be more than enough to give any drafter serious pause before using the term, particularly as a measure of performance.

The phrase could even be described as a trap for the unwary. In preparing a surrender agreement that requires the tenant to deliver “legal possession” instead of “possession,” the drafter may be trying to do a thorough, “belt and suspenders” type job, but is instead unwittingly creating an ambiguity. Ironically, in this context, by unnecessarily inserting the word “legal” the drafter may be requiring the tenant to deliver only the right to possession.

Possession is not a legal concept. The term is understood by laypeople just as well as it is understood by lawyers. In most cases involving drafting, use of the term “legal possession” is of no value and is only a hazard.