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LANDLORD-TENANT

Predicate Notices Issued By Agents of the Landlord

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A decision issued in October of this year by Judge Scott Fairgrieve of District Court, Nassau County in *Karron v. Karron*[1] revisits the issue of when is it appropriate for an attorney or agent of the landlord to issue a notice to cure or notice of termination on the landlord's behalf. In light of this decision, we thought it would be useful to summarize the law in the area.

We start with the 1964 decision of Supreme Court, New York County in *Granet Construction v. Longo*.[2] In that case, the two separate landlords had delivered two letters purporting to terminate the tenant's lease. Both of the letters were signed by attorneys, as "attorneys for the landlords." The court ruled that "unless the lease provides otherwise a notice must be given by the landlords themselves; a notice given by an attorney will not do," with the proviso that "a letter from an attorney, if authenticated or if disclosing authority, will be recognized."[3]

Proof of Authority

The court found that the termination notices at issue were defective, because the mere statement by the attorneys in the notices of termination that they were the "attorneys for the landlords" was insufficient to disclose the attorneys' authority to issue the notice. The court stated as follows in ruling against the landlords:

> the letter of October 16 indicates that the conclusions as to the amounts due, defaults and breaches, are conclusions reached by the attorneys as a result of information they had received and of their investigations. It was they who concluded that "the landlords have the right to terminate the lease and to reenter the premises and repossess the same," and it was they who stated that unless the defaults were cured within ten days "the landlords shall consider the lease terminated." And it was the attorneys who in the second letter declared the lease "canceled and terminated." The fact that the letters came from the attorneys is of significance here in view of the contents. …I think I should follow the practice of requiring a notice of this sort to come from the landlords themselves. The tenant cannot be asked to determine for itself and at its peril the extent of the attorneys' authority.

Similarly, in *747 So. Blvd. Realty v. Wein-Rose*,[4] the court held that the subject termination notice issued by an attorney was ineffective, following the rule that "in the absence of a provision in the lease authorizing landlord's attorney to give the notice of termination, it is ineffective."[5] The court found that the notice was invalid because it was given by the attorney for the landlord, "not indicating his authority nor reciting that it was given on behalf of the landlord."[6]

The Appellate Division then had the opportunity to rule on this issue in its 1985 decision in *Siegel v. Kentucky Fried Chicken of Long Island*,[7] In *Siegel*, the landlord's attorney sent a notice of default to the tenant, in which he had identified himself as the landlord's attorney, which notice gave the tenant five days to cure the defaults enumerated therein. When the tenant failed to cure, the landlord's attorney sent a notice of termination to the tenant, in which he "reiterated his status as the landlord's attorney." The landlord then commenced a summary holdover proceeding in District Court, Nassau County based on the notice of termination. The District Court granted the tenant's motion to dismiss the petition, holding that the notice of termination, which was sent by counsel, was "defective as a matter of law." On appeal, the Appellate Term reversed and reinstated the petition, holding that the notice of termination was not invalid "inasmuch as it adequately disclosed [the attorney's] authority and purported to emanate from the landlord."

The Appellate Division reversed the Appellate Term, and reinstated the District Court's decision dismissing the petition on the ground that the termination notice was defective. In so holding, the court stated the rule as follows as to whether a notice of termination signed by an attorney or agent of landlord is valid:

> A notice of termination signed by an agent or attorney who is not named in the lease as authorized to act for the landlord in such matters, and which is not authenticated or accompanied by proof of the latter's authority to bind the landlord in the giving of such notice, is legally insufficient to terminate the tenancy.[8]

The court stated that "the mere assertion of authority on the face of the notice by a total stranger to the transaction that he is the landlord's attorney and that he is authorized to act on the latter's behalf," without more, "cannot be deemed to provide the tenant with the surety of notice to which he is contractually entitled."[9]

In stating the rationale for the rule, the court observed that:

> While it may be true that a tenant who is in default under the terms of his lease has no cause to complain about the messenger who delivers his landlord's notice to cure, the fact remains that he is entitled to know whether his landlord is insisting upon the strict performance of all of the covenants of the lease, i.e., whether the only person who is entitled to insist upon full compliance actually desires that these often technical defaults be cured. In addition, and more important, a tenant is also entitled to know "with safety" whether the notice to terminate emanates from a person with the requisite authority, for if he acts upon such notice to vacate the premises, he may later be found to have acted at his peril should the landlord prevail in a claim that the notice was unauthorized.[10]

The court therefore concluded that because the attorney that gave the notice of termination at issue was not named in the lease, and the notice "was not authenticated or accompanied by proof of the [attorney's] authority to bind the landlord in the giving of such notice, it follows that the

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District Court did not err in ordering that the proceeding be dismissed."[11] This determination was affirmed by the Court of Appeals.[12]

'Owego' Rule

Thus, *Siegel* appeared to announce a bright-line rule that, in the absence of the attorney or agent being specifically named in the lease as authorized to act for the landlord, a notice of termination could not properly be signed by an attorney or agent of landlord unless the notice itself was "authenticated or accompanied by proof of the [attorney's] authority to bind the landlord in the giving of such notice."[13]

The bright-line rule announced in *Siegel*, however, then became murky when the Appellate Division, Third Department rendered its 1992 decision in *Owego Properties v. Campfield*.[14]

In *Owego*, the landlord had served a notice to cure on the tenant, which was signed by David Sarkisian who was an officer of a different entity, Sarbro Realty. According to the decision, Sarkisian had "previously been authorized…to act" on the landlord's behalf with regard to the subject property. Because the tenant failed to cure, the landlord sent a termination notice to the tenant, which notice Sarkisian also signed. Neither the notice to cure nor the termination notice was accompanied by proof of Sarkisian's authority to bind the landlord in the giving of the notice.

The landlord commenced a summary holdover proceeding and, following a trial, was awarded possession. The Appellate Division affirmed, rejecting the tenant's contention that the notice to cure was ineffective because it was signed by Sarkisian, "who was neither the landlord nor an agent named in the lease, and was not physically accompanied by any authorization by petitioner designating Sarkisian as its agent." In so holding, the Appellate Division found that:

> [t]he record amply demonstrates that [tenant] knew at the time he received the notice to cure that Sarkisian was authorized to act as petitioner's agent. Specifically, in direct response to an objection by respondent to a December 1989 notice of termination signed by Sarkisian, respondent was notified in writing by petitioner in January 1990 that Sarbro Realty Corporation and its officers had authority to act on behalf of petitioner with regard to the subject property. Thereafter, in the absence of any notice terminating that agency authority, [tenant] was entitled to rely on Sarkisian's authority to act as an agent for petitioner in matters concerning the leased premises. Accordingly, the fact that the May 1990 notice to cure was not accompanied by authentication or proof of agency did not, in our view, negate the validity or effectiveness of the notice.[15]

Thus, under *Owego*, even if the attorney or agent's authority to act on the landlord's behalf does not accompany the predicate notice, a notice signed by an attorney or agent may nevertheless be effective where there is proof that the tenant knew at the time he received the notice that the signatory was authorized to bind the landlord.

The Appellate Division, Second Department thereafter, in its 1996 decision in *Prime Realty Holdings v. Alpine Group*,[16] seemed to reject the bright-line rule previously announced in *Siegel*—which required that proof of the attorney or agent's authority to act on the landlord's behalf be part of the notice—in favor of the more relaxed rule announced by the Third Department in *Owego*, which permits the court to consider proof as to whether the tenant was otherwise aware of the agent's authority to act on the landlord's behalf at the time the notice is given.

Under 'Owego,' even if the attorney or agent's authority to act on the landlord's behalf does not accompany the predicate notice, a notice signed by an attorney or agent may nevertheless be effective where there is proof that the tenant knew that the signatory was authorized to bind the landlord.

In *Prime Realty*, although the subject notice of termination was not accompanied by proof of the attorney's authority to bind the landlord in the giving of such notice, the court, relying on *Owego*, nevertheless sustained the validity of the notice. In so holding, the court found that "[t]he record amply supports the Supreme Court's determination that the [tenant] was aware, at the time it received the notice of cancellation, that the [landlord's] attorney was authorized to act as its agent in matters concerning the leased premises."[17]

The *Owego* rule was later applied by the Appellate Term, 9th and 10th Judicial Districts in *Smith v. Country Service*,[18] although *Smith* reached the opposite result from *Owego*. In *Smith*, the court held that the subject termination notice issued by an attorney was ineffective because the attorney was not named in the lease, the notice was not accompanied by proof of the attorneys' authority to issue the notice, and there was no "claim or proof showing that tenant had reason to know of the attorneys' authority to act."[19]

Most recently, in October of this year, Fairgrieve issued his decision in *Karron* which, following *Owego*, found that the subject termination notice signed by the landlord's attorney was valid.

In *Karron*, the tenant, relying on *Siegel*, argued that the subject termination notice was invalid because it was signed by an attorney not named in the lease and the notice was not authenticated or accompanied by proof of authority to bind the landlord in the giving of the notice. The court, in rejecting the tenant's contention, stated that "[o]nly when the party issuing the notice is a 'total stranger' to the lease and is a person with whom the party receiving the notice has never previously interacted" will the notice be found insufficient to terminate the tenancy. The court, finding that the case was "analogous" to *Owego*, concluded that the notice of termination was valid. The court explained:

> Respondent had ample reason to know that the attorney was authorized to act because there have been two previous Landlord Tenant proceedings brought with the same parties in this case, and both Notices of Termination listed the attorney's name and contact information. Since Petitioner's attorney and Respondent are not total strangers and have had previous dealings, the 30-day notice claim is valid.[20]

Conclusion

Certainly in order to avoid these issues, predicate notices should be signed by the landlord himself, and not by an attorney or an agent thereof. Nevertheless, there may be instances where it is impossible or impracticable for the landlord to sign the notice.

The above cases instruct that unless the lease expressly gives an agent or attorney authority to issue notices on the landlord's behalf, such an agent or attorney may issue a predicate notice only where (1) the notice itself is accompanied by proof of the attorney or agent's authority to issue the notice, or (2) there is sufficient evidence showing that the tenant had reason to know of the attorney's authority to issue the notice on the landlord's behalf. Because, however, the case law does not give clear guidance as to the level of proof required to establish the attorney or agent's authority to act, wise practitioners will ensure that predicate notices are signed only by the landlord himself, except in the most extraordinary circumstances.

1. *Karron v. Karron*, NYLJ, 1202625535742 (Dist. Ct. Nas. Co. Oct. 18, 2013).
2. 42 Misc. 2d 798 (Sup. Ct. N.Y. Co. 1964).
3. Id. at 802-03.
4. 201 Misc. 552 (Mun. Ct. Bronx, First Dist. 1951).
5. Id. at 554.
6. Id.
7. 108 A.D.2d 218 (2d Dept. 1985).
8. Id. at 220.
9. Id. at 221 (italics in original).
10. Id. at 222 (internal citation omitted).
11. Id. at 226.
12. 67 N.Y.2d 792 (1986).
13. 108 A.D.2d at 226
14. 182 A.D.2d 1058 (3d Dept. 1992).
15. Id. at 1059 (internal citations omitted).
16. 225 A.D.2d 533 (2d Dept. 1996).
17. Id. at 534.
18. 13 Misc.3d 134(A), 2006 WL 3025476 (App. Term, 9th and 10th Jud. Dists. 2006).
19. 2006 WL 3025476 at *1.
20. *Karron* at *2