LANDLORD-TENANT

After Notice, Accrual Date Is Key to Rent Acceptance Issue

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The issue of whether to accept rent once a notice of termination has been served is an important one for a landlord and its counsel. Any landlord is reluctant, of course, to forego money in hand. No landlord, however, wants to be penny wise and pound foolish, i.e., to take rent and then be held to have waived a termination notice. Conversely, a tenant served with a holdover petition based on lease termination, and its counsel, need to be able to analyze whether the tenant has a viable defense if the landlord has accepted rent after serving a notice of termination. A recent well-written decision by Judge Sabrina B. Kraus of the Civil Court, New York County, in the case of *Broadcom West Development Co. v. Lumpkin*[1] highlights some of the factors involved in analyzing this issue.

In *Broadcom*, the notice of termination was issued and served on the tenant by mail on July 2, 2008. It provided that the tenancy was terminated effective July 21, 2008. The petition was filed on Aug. 1, 2008 and was personally served on the tenant on Aug. 5, 2008. The landlord accepted a payment of rent for July 2008 on July 2, 2008. It also accepted a payment for August 2008 rent, mailed by the tenant on July 31, 2008 and received by the landlord on Aug. 4, 2008.

The tenant alleged as an affirmative defense that this acceptance of rent vitiated the notice of termination and, at the close of trial, moved to dismiss the proceeding based, among other things, on that affirmative defense. The court held that this affirmative defense "must be dismissed with prejudice, as the acceptance of the July and August rent payments did not vitiate the termination notice upon which this proceeding is predicated."

Addressing the issue of acceptance of the July rent, the court noted that such acceptance was subsequent to service of the notice of termination but prior to the termination date set forth in the notice. However, the rent payment which was accepted, being for the period July 1, 2008 through and including July 31, 2008, covered a period subsequent to the July 21, 2008 termination date.

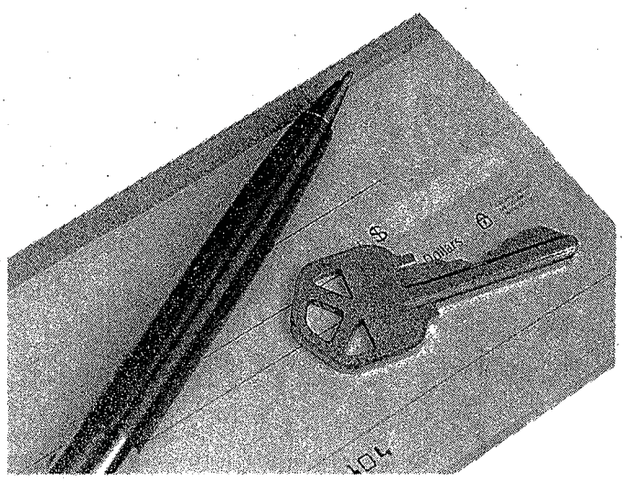
The court reasoned as follows in concluding that these circumstances did not vitiate the termination of the tenancy. The court emphasized that the tenant's lease provided that rent was payable, in advance, on the first day of each month. Thus, the court continued,

> ...his tenancy had not been terminated. He had not even received notice of termination, and his obligation to pay rent for the entire month of July, had already ripened pursuant to the parties' lease agreement.[2]

The court found two Appellate Term, First Department decisions, *Intell 157 West 57th Street Realty v. Block*[3] and *1251 Americas Associates II LP v. Rock 49th Rest. Corp.*,[4] to be "directly on point." In *Intell*, the court held that the Civil Court had "correctly found that landlord's acceptance of January 2001 rent did not vitiate its prior notice terminating the commercial tenancy as of January 10, 2001." The *Intell* court stated:

> Since the parties' lease provided that rent was payable in advance on the first of the month, tenant was obligated to pay for the entire month, whether or not it used the premises for the full period...[5]

In *1251 Americas*, the lease similarly required the tenant to pay rent in advance on the first day of each calendar month. Citing *Intell*, the court in *1251 Americas* held that "[l]andlord's acceptance of tenant's tender of the April 2005 rent on April 6, 2005 did not vitiate the notice terminating the commercial tenancy as of April 5, 2005."



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on July 2, 2008, when the tenant made payment of July rent,

It reinstated the petition, reversing a Civil Court order which had granted the tenant's motion to dismiss.

A third case cited by Judge Kraus in *Broadcom* in her analysis of the issue of the landlord's acceptance of July rent is *A.J. Richard & Son Inc. v. America's Imaging Center Inc.*[6] There, the Appellate Term, Second and Eleventh Judicial Districts, stated that:

> Contrary to the holding of the court below, the record does not clearly establish an acceptance, during the window period between the alleged termination of the lease and the commencement of this holdover proceeding, of rent accruing for a period after the alleged termination of the lease [citation omitted] inasmuch as May 2004 rent had accrued prior to the termination date set forth in the notice.[7]

The court in *Broadcom* acknowledged that there "are some decisions from courts of concurrent jurisdiction which do specifically hold that acceptance of rent by the landlord vitiates a predicate notice, even if acceptance of the payment is prior to the termination date set forth in the notice, if the payment covers a period after the termination date." The court cited *Associated Realties v. Brown*[8] and *N.Y.C.H.A. v. Padmore*[9] as examples of such cases. However, the court continued, the Appellate Term cases of *Intell* and *1251 Americas* "were issued after these earlier Civil Court decisions and are binding precedent on this Court."

Judge Kraus also reasoned that the rationale behind *Associated Realties* did not apply to the facts of the case before her. In *Associated Realties*, the court was concerned about the confusion that might be caused to the tenant by a landlord's acceptance of rent after having issued the notice terminating the tenancy. A tenant might believe that his tenancy had not been terminated and that he was no longer required to surrender possession.

By contrast, the court pointed out in *Broadcom*, it was "clear from the testimony and evidence presented at trial, that there was no such confusion on the part of the Respondent in this case." The court found that the respondent was "well aware" that he had defaulted under the lease, and that he never believed that petitioner did not intend to pursue his eviction if he did not cure the default.

On the issue of acceptance of the August rent, the *Broadcom* court concluded that such acceptance did not

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require dismissal of the proceeding because it occurred after the proceeding had already been commenced, which is expressly permitted by statute. The court noted that RPAPL §731(1) provides that a special proceeding is commenced by petition and notice of petition, and §400 of the New York City Civil Court Act provides that a special proceeding is commenced by filing a notice of petition and petition. Thus, the *Broadcom* proceeding commenced on Aug. 1, 2008, when the notice of petition and petition were filed.

Petitioner did not receive and accept the August rent until three days later, on Aug. 4, 2008. As the court noted, pursuant to RPAPL §711(1) with respect to a special proceeding based on a tenant continuing in possession of the premises after the expiration of his term without the permission of the landlord, "[a]cceptance of rent after the commencement of the special proceeding...shall not terminate such proceeding, nor affect any award of possession to the landlord..."

Finally, the court in *Broadcom* noted that from November 2007 through August 2008 the tenant had sent each rent payment to the landlord by certified mail return receipt requested, either at the beginning of the month, or at the end of the preceding month in which the rent was due. The court found that the tenant "did so intentionally, in preparation for this litigation" and to support its affirmative defenses. The court continued:

> To hold that under these circumstances, the notice of termination was vitiated would be contrary to the well established principle that "[t]he creation of a landlord-tenant relationship should not be reduced to a matter of gamesmanship, seduction and artifice."[10]

The following are additional points to consider in reviewing the reasoning in the cases discussed above.

The *Broadcom* case, and the Appellate Term authority it cites, stand for the proposition that, after a termination notice has been served and before a holdover proceeding is commenced, rent can be accepted without voiding the termination notice even if a portion of that rent applies to the period after the lease termination date as long as the obligation to pay that rent accrued prior to the termination date. Another Appellate Term case standing for this proposition is *Subway Restaurants Inc. v. Manetti*.[11]

These cases do *not* stand for the proposition that rent accruing after the termination date can be accepted without vitiating the termination notice. There is a 1993 Appellate Division, First Department decision, *205 East 78th Street Associates v. Cassidy*,[12] holding that acceptance of such after-accruing rent warrants dismissal of the proceeding.

In that case, the landlord served the tenant of rent stabilized premises with a notice of non-renewal of the lease and termination of the tenancy as of July 31, 1990 on the grounds that the tenant was not occupying the premises as her primary residence. The landlord subsequently accepted the tenant's check for August 1990 rent by depositing it in a bank. On Aug. 10, the landlord sent the tenant a letter stating that acceptance of the August rent check was "inadvertent" and that it still intended to terminate the tenancy. However, the landlord did not return the August rent nor attempt to explain the "inadvertence."

The tenant moved to dismiss the proceeding on the grounds of landlord's acceptance of the August rent after expiration of the tenancy but prior to the commencement of the proceeding. The Civil Court granted the motion to dismiss. The Appellate Term reversed and reinstated the petition, with a dissent by Justice William P. McCooe which stated, in relevant part, that the "landlord's acceptance and retention of the August rent nullified the termination date of the *Golub* notice..." The Appellate Division reversed the Appellate Term "for the reasons stated by Gans, J. at Civil Court and McCooe, J. at the Appellate Term."

In a 2005 decision, in *184 West 10th Corp. v. Westcott*,[13] the Appellate Term, First Department, cited the Appellate Division decision in *205 East 78th Street Associates v. Cassidy* in support of its determination that:

> The holdover petition was properly dismissed upon tenant's undisputed showing that landlord accepted and deposited rent checks for at least three months after termination of the tenancy, but prior to the commencement of the instant nonprimary residence holdover proceeding, vitiating the predicate nonrenewal notice.[14]

In short, *Broadcom* and the Appellate Term authority it cites define a narrow fact situation in which, after a termination notice is served and before a holdover proceeding is commenced, rent can be accepted for a period after lease termination without vitiating the termination notice. A very cautious landlord, however, might still choose, even in a case involving the narrow fact situation to which *Broadcom* applies, not to accept rent. Such acceptance would likely generate motion practice by the tenant once a proceeding is brought, which would delay the holdover proceeding. Legal right and pragmatism are not always coterminous.

1. NYLJ, Jan. 8, 2009, at p. 27, col. 1 (Civ. Ct. N.Y. Co.).
2. Id.
3. 2002 WL 243391, 2002 N.Y. Slip Op. 50058(U) (App. Term, 1st Dept. 2002).
4. 13 Misc.3d 142(A), 831 N.Y.S.2d 360 (App. Term, 1st Dept. 2006).
5. 2002 WL 243391, 2002 N.Y. Slip Op. 50058(U) (App. Term, 1st Dept. 2002).
6. 9 Misc.3d 130(A), 808 N.Y.S.2d 916 (App. Term, 2nd and 11th Judicial Districts 2005).
7. Id.
8. 146 Misc.2d 1069, 554 N.Y.S.2d 975 (Civ. Ct. N.Y. Co. 1990).
9. 140 Misc.2d 912, 531 N.Y.S.2d 873 (Civ. Ct. N.Y. Co. 1988).
10. NYLJ, Jan. 8, 2009, at p. 27, col. 1, quoting *Berkeley Associates v. Revere Garage Corp.*, NYLJ, Oct. 22, 1981, at p. 6, col. 4 (App. Term, 1st Dept.), and citing *Coronet Properties Company v. Greenberg*, NYLJ, Nov. 8, 1984, at p. 4, col. 1 (App. Term, 1st Dept.)
11. NYLJ, July 17, 2003, at p. 25, col. 5, 31 HCR 394B (App. Term, 9th and 10th Judicial Districts).
12. 192 A.D.2d 479, 598 N.Y.S.2d 699 (1st Dep't 1993), rev'g, NYLJ, Sept. 27, 1991, at p. 21, col. 4 (App. Term 1st Dept.).
13. 8 Misc.3d 132(A), 2005 WL 1712215 (App. Term, 1st Dept. 2005).
14. Id.