Issues Involving the Signing of Predicate Notices

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John Hancock was a man who became famous for how he signed a critical document, the Declaration of Independence. While no one is ever likely to become famous for signing predicate notices to summary proceedings, two recent cases demonstrate that the particulars concerning the manner in which such notices are signed can be of determinative significance.

In *QPII 143-45 Sanford Ave. v. Spinner*,[1] a non-payment proceeding was predicated on a five-day notice served on the tenant. It set forth that monthly rent of $556.12 was due for each month from January 2008 through April 2009, plus a December 2007 balance of $150, for a total due of $9,047.92. The notice was signed by "Cathy McGovern, agent for QPII-143-45 Sanford Avenue LLC Landlord." After the proceeding was commenced, the tenant moved to dismiss the petition on the ground, among others, that the notice was defective because it was signed by someone purporting to be the landlord's agent, but the lease required the notice to be signed by the landlord, and there was no proof of the agent's authority to act on the landlord's behalf. The Civil Court, Queens County (Bruce Kramer, J.) issued an order denying the motion. After further motion practice and a non-jury trial, a final judgment was entered awarding the landlord possession and $11,678.52.

In a 2-1 decision, the Appellate Term, Second, Eleventh and Thirteenth Districts, in affirming the final judgment, held that the tenant's motion was properly denied. Justices Michelle Weston and Michael L. Pesce concurred in the majority opinion (the "opinion"). In dissenting, (hereinafter, "the dissent"), Justice Jaime A. Rios voted to reverse the final judgment, vacate the order and grant the tenant's motion to dismiss.

The 'Spinner' Opinion

The opinion began its analysis by quoting what it considered the applicable provision of the lease, namely, the default provision, which stated in relevant part that:

16. Tenant's default A. Landlord must give Tenant written notice of default stating the type of default. The following are defaults and must be cured by Tenant within the time stated:

(1) Failure to pay rent or added rent on time. 5 days.

If Tenant fails to cure the default in the time stated…, Landlord may cancel the Lease by giving Tenant a cancellation notice.[2]

Citing *Shaw v. Hunter*,[3] the opinion stated that the above-quoted provision was applicable to the rent notice served in the case before the court, i.e., a notice predicate to a non-payment proceeding, not just to a notice predicate to a holdover proceeding.

The opinion then discussed the seminal case of *Siegel v. Kentucky Fried Chicken*.[4] In that case, in a passage quoted in the opinion, the Appellate Division, Second Department, held that:

a notice of termination signed by an agent or attorney who is not named in the lease as authorized to act for the landlord on 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.[5]

The majority in *Spinner* emphasized what it considered to be the "particular circumstances" of *Siegel*. The lease contained a provision defining the term "landlord," and had four printed provisions referring to the "landlord or landlord's agent," but the default provision referred only to "the landlord" serving the required notice. Further, a rider to the lease referred to a named attorney for the landlord but did not authorize him to sign notices of default or termination on the landlord's behalf.

The opinion quoted the following passage from the Appellate Division decision in *Siegel*, which it characterized as "highlight[ing] the factual peculiarities of the lease in *Siegel*:

Accordingly, where, as here, the lease provides that certain of the rights and immunities arising thereunder may be exercised and enjoyed by either the "Landlord or Landlord's agents," and where it elsewhere designates a named third

party, other than [the attorney who served the notice], as the landlord's attorney, it appears only reasonable that a forfeiture provision calling for cancellation of the lease upon only three days' written notice emanating specifically from the "Landlord" should be strictly construed against its drawer to require unequivocal notice by either the landlord himself or his authorized agent, accompanied by proof of the latter's authority to bind the landlord in the giving of such notice.[6]

Repeatedly, the opinion pointed to the importance of the particular circumstances of the *Siegel* case to the outcome of that case. Thus, it viewed the Court of Appeals as "highlight[ing] the particular facts of the lease" in *Siegel* when, in affirming the Appellate Division, the Court of Appeals held that:

[u]nder such a lease notices of default and of termination signed not by the owner or the attorney named in the lease, but by another attorney with whom the tenant had never previously dealt, were insufficient and the tenant was entitled to ignore them as not in compliance with the lease provisions concerning notice.[7]

It also quoted the statement in the concurring opinion of Justice Joseph P. Sullivan in *Kwong v. Eng*[8] that, in his view, "the Court of Appeals' affirmance in *Siegel* was on such narrow grounds," namely, "a contract interpretation based on the factual peculiarities of the particular lease."

The opinion concluded that the holding in *Siegel* was not applicable to *Spinner* because the lease there "does not contain the 'factual peculiarities' that were present in *Siegel*." It also found the *Siegel* holding inapplicable as invalidating a "'forfeiture notice'," whereas "[a]s a predicate to a non-payment proceeding, the rent notice [at issue in *Spinner*] is not a 'forfeiture' notice and does not call for cancellation of the lease."

The opinion pointed out the rationale that the Appellate Division gave for its holding in *Siegel*: "since '[t]he tenant is [required] to act upon such notice at the time it is given…it ought to be such a one as he can act upon with safety'."[9] It viewed this rationale as inapplicable to *Spinner* because:

the rent notice itemized the amounts due and the periods for which it was due, and called upon tenant to pay his rent to landlord or surrender possession. As a tenant may be expected to know whether he has paid his rent, the notice put him in no particular peril in calling upon him to pay the arrears to landlord or move out.[10]

Thus, the majority concluded, the tenant could rely on the rent notice with safety in determining whether to pay rent or surrender possession, and the notice was not invalidated by the fact that it was signed by an agent on behalf of the landlord.

The Dissent

The dissent emphasized that the purported agent of the landlord who had signed the predicate notice not only was not named in the lease and not listed with New York City as the registered managing agent for the building, but also there was no indication of any prior contact between that person and the tenant. Citing *Siegel*, the dissent pointed out that these were precisely the circumstances where proof of the agent's authority to bind the landlord in the giving of a notice is mandated and, in the absence of such proof, the notice was insufficient.

In *HSBC Bank, N.A. v. Tavarez*,[11] a Civil Court, Queens County case (Anne Katz, J.) reported in the New York Law Journal about a week before *Spinner*, the court granted respondent's motion to dismiss a post-foreclosure holdover proceeding on the ground that the predicate notices were defective because of how they were signed. There were two notices at issue, a 90-day Notice to Vacate and a 10-day Notice to Quit.

Respondent alleged that the notices were improper because they were not signed by petitioner but by purported agents lacking authority to do so. The 90-day notice was signed by Johnna Miller, under the title "Authorized Signer." The 10-day notice was signed by Jolene A. Stratton, under the title "Supervisor, Repurchases, Compliance & Claims." A limited power of attorney was attached to each of the notices authorizing Ocwen Loan Servicing LLC to act on behalf of HSBC Bank.

Respondent argued that petitioner's alleged agents had not demonstrated their authority to sign and the titles under which they signed were not specific enough to ascertain their authorization. He also contended that the limited power of attorney authorized Ocwen to act on behalf of HSBC Bank only during the foreclosure process and that it did not explicitly extend to any post-foreclosure actions.

Petitioner asserted in response that although the signers of the notices were not specifically named in the limited power of attorney, they were employees of Ocwen and therefore authorized to sign the notices as agents of petitioner. HSBC Bank attached to its papers Ocwen's Certificate of Secretary naming its various employees and their positions. (This document was not attached to the notices.) Petitioner argued that signing authority was an issue for trial. It also contended that respondent's effort to have the limited power of attorney treated as invalid as to post-foreclosure actions because it failed explicitly to mention them was "too far a stretch of the current case law."

The court agreed with the last proposition as to the applicability of the limited power of attorney but otherwise adopted respondent's arguments. It quoted the same passage from *Siegel* as did the *Spinner* court (see endnote 5 above). It also cited *HSBC Bank USA, N.A. v. Jeffers*[12] for the proposition that where a notice to quit is executed by an individual with no clear designation of employment status or employer, but only a "blank" or vague title, the notice is defective.

The court concluded that "absent any clear indication of employment status or official title," the designation "Authorized Signer" was not specific enough, making the 90-day notice to vacate defective. In line with the same reasoning, the court also found the 10-day notice to quit defective.

The court rejected petitioner's effort to analogize to the situation in *Bronx Park South II Assoc. v. Aballe*.[13] In that case, a notice to quit was signed by an individual identified as "General Partner" of the petitioner. The court in *Bronx Park South II* held that it was not necessary to annex to the notice proof that the petitioner was a partnership and that the signatory of the notice was a partner with authority to bind the petitioner.

It stated that a "partnership is a legal entity that can function only through acts of the individuals who comprise its membership." Thus, in signing the notice to quit as a general partner, the individual who signed the notice by operation of law was authorized to act on behalf of and bind the partnership. It viewed the issues of whether the petitioner Bronx

Park South II Associates was in fact, a partnership, and whether the individual signing the notice was in fact, a partner, as matters to be presented at trial.

The petitioner in *HSBC USA, N.A. v. Tavarez* argued that the partnership agreement in *Bronx Park South II* would be akin to the Certificate of Secretary, i.e., something that need not be attached to the notice. The court rejected that argument. It reasoned that there was no operation of law as to the binding of the bank petitioner by the notice signatories as there was with respect to the partnership and the general partner.

Additional Points

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

The two recent cases focused on both involved situations where the notices were signed by an agent of the landlord. From a landlord's perspective, it reduces the likelihood of challenge for notices to be signed by the landlord himself. That may not always be practical, however, given the nature of a particular landlord's business.

Whatever the opinion may emphasize about the factual peculiarities of the *Siegel* case, that case certainly has had vitality. It is one of the best-known and often-cited cases in the landlord-tenant area.

What these cases undoubtedly do show is that predicate notices, like Maxwell House coffee, must be "good to the last drop" if they are to be effective. In other words, they must comply with the governing standards not just as to the content of the body of the notice but also through and including the signature block at the end of the notice.

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Endnotes:

1. NYLJ, 1202517672074, at *1 (AT, 2d, 11th and 13th Judicial Districts, decided Sept. 27, 2011).

2. Id. at *3.

3. NYLJ, Dec. 27, 1990, at p. 26, col., 4, 18 HCR 611 (AT 2d and 11th Judicial Districts).

4. 108 A.D.2d 218, 488 N.Y.S.2d 744 (2d Dept. 1985), aff'd 67 N.Y.2d 792, 501 N.Y.S.2d 317 (1986).

5. 108 A.D.2d at 220, 488 N.Y.S.2d at 746, quoted at NYLJ 1202517672074, at *4.

6. 108 A.D.2d at 221, 488 N.Y.S.2d at 746, quoted at Id.

7. 67 N.Y.2d at 794, 501 NY.S.2d at 318, quoted at Id. at *5 [emphasis added at Id. at *5].

8. 183 A.D.2d 558, 583 N.Y.S.2d 457 (1st Dept. 1992).

9. The *Siegel* court, 108 A.D.2d at 220, 488 N.Y.S.2d at 746, was quoting from *Reeder v. Sayre*, 70 N.Y. 180, 187, 188 (1877)

10. NYLJ, 1202517672074 at *5.

11. NYLJ, 1202517141983 at *1 (Civ. Ct. Queens Co., decided Sept. 15, 2011).

12. 30 Misc.3d 1209(A)(Dist. Ct. Nassau Co. 2011).

13. 136 Misc.2d 755, 519 N.Y.S.2d 289 (Civ. Ct. N.Y. Co. 1987).
