Golub Notice

Reuse After Discontinuance of Proceeding
Warren A. Estis, a founding partner at Rosenberg & Estis, and William J. Robbins, a partner at the firm, write that summary proceedings are creatures of statute, with specific rules as to, for example, the content and manner of service of the notice of petition and petition. As a result, summary proceedings frequently are dismissed or discontinued without prejudice and not on the merits.

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Summary proceedings are creatures of statute, with specific rules as to, for example, the content and manner of service of the notice of petition and petition. As a result, summary proceedings frequently are dismissed or discontinued without prejudice and not on the merits. Where the type of proceeding is one that requires a predicate notice, and the discontinuance or dismissal is not based on a defect in the notice, the question arises whether the petitioner can rely in commencing a second proceeding on the notice that was used as a predicate to the discontinued or dismissed first proceeding.

We discussed this topic approximately a year ago, highlighting cases which made the point that to reuse a notice as the predicate to a second proceeding, that second proceeding had to be commenced before the first proceeding was terminated.[1] In a recent decision by New York County Housing Judge Marc Finkelstein (See Profile) in *808 West End Avenue LLC v. Pomeranz*[2], the court showed flexibility as to that rigidly "bright line" test. The case also demonstrates that there can be a factual issue as to when a particular proceeding is terminated for purposes of applying the "bright line" rule.

808 West End Avenue involved a landlord's attempt to terminate a rent-stabilized tenancy on the grounds that the respondents did not occupy the apartment as their primary residence. Prior to commencing a holdover proceeding on such grounds, a landlord is required to serve, in a period from 150 to 90 days prior to expiration of the lease, a notice (commonly referred to a Golub notice) of intention not to renew the tenant's lease, as well as a 30-day notice of termination. The two notices may be combined in a single notice.

In *808 West End Avenue*, the respondents moved to dismiss the proceeding on the grounds that the petitioner allegedly "improperly utilized the identical Golub notice as had been used as a predicate for commencing a prior non-primary residence proceeding which was discontinued without prejudice." The court considered it "undisputed" that the proceeding at issue was filed on Aug. 8, 2006 and that, on Aug. 9, 2006, a stipulation was entered into in the prior proceeding which provided that the parties consented to the landlord's voluntary discontinuance of the first proceeding without prejudice to the second proceeding, which was returnable on Aug. 25, 2006.

The court commented that the parties' arguments had been "diverted to a dispute between the two attorneys as to which is being accurate and truthful in regard to the time sequence of the discontinuance of the first proceeding and the commencement of the instant proceeding." The court's decision summarized the respective positions.

Respondents' counsel asserted that the first proceeding was discontinued without prejudice by notice of discontinuance dated Aug. 7, 2006, a day before the second proceeding was brought. Therefore, respondents argued, the second

proceeding should be dismissed because "courts have consistently held that when a proceeding is discontinued without prejudice, prior to the commencement of the second proceeding, the petitioner may not rely on the predicate notice used in the first proceeding". Respondents cited *Colavolpe v. Williams*.[3] In that 1974 Civil Court, Kings County decision, the court stated:

> *When the prior action was withdrawn without prejudice, the entire proceeding was terminated, including the 30-day notice. Without a 30-day notice, a subsequent summary proceeding must fail. It was not intended that the 30-day notice could hang like the sword of Damocles over the head of the tenant, to be used at some future date, at the whim of the landlord.* [4]

Respondents recognized that the case of *Arol Development Corp. v. Goodie Brand Packing Corp.*[5] permitted reliance in a second proceeding on the same notice that had been a predicate to a discontinued first proceeding - but only where the second proceeding had been commenced before discontinuance of the first proceeding. That was not the factual situation in 808 West End Avenue, respondents asserted, meaning *Arol* was distinguishable.

According to petitioner, however, he received respondents' answer in the first proceeding on or about Aug. 8, 2006 and, upon reviewing it, realized that the notice of petition and petition had been served at the wrong address. Therefore, on Aug. 8, 2006, he prepared and served a notice of discontinuance, which he mistakenly dated Aug. 7, 2006.

The first case was really discontinued, petitioner asserted, on Aug. 8, 2006, or even Aug. 9, 2006 when the stipulation of discontinuance was entered into. That meant the circumstances are precisely those of *Arol*, i.e., the second proceeding commenced before the first proceeding was discontinued and re-use of the original predicate notice permitted. Petitioner emphasized that when respondents stipulated, on Aug. 9, 2006, to the discontinuance of the first proceeding, they "were fully aware that petitioner had already commenced a new proceeding based upon the same predicate notice."

In *808 West End Avenue*, Judge Finkelstein "assume[d] arguendo that respondents' version of the time sequence is the accurate one; to wit, the first proceeding was discontinued on Aug. 7, 2006 and the instant proceeding was brought on Aug. 8, 2006 (one day later) . . . and yet petitioner seeks to rely on the predicate notice of the first proceeding." Nevertheless, the court continued, "the Court does not apply the holding of *Colavolpe v. Williams* [citation omitted] to grant respondents' motion to dismiss."

The court focused on two decisions subsequent to *Colavolpe* and *Arol*, one each from the Appellate Terms of the First and Second Departments, which the court characterized as "very pertinent to the circumstances herein, even accepting respondents' version of the time sequence involved." In *DiCara v. Cecere*[6], a holdover proceeding was dismissed because the petition was unverified, which, the *808 West End Avenue* court commented, was "much like the first proceeding here [which] was discontinued because process was served at the wrong address." The landlord commenced a second proceeding the very next day based upon the predicate notice from the first proceeding, which, Judge Finkelstein noted, was "exactly as the landlord here did in the time sequence put forth by respondents themselves." As summarized in *808 West End Avenue*, the ruling in *DiCara* was as follows:

> *The Appellate Term affirmed the lower court and found that under these circumstances the landlord was not required to serve a second predicate notice and the absence of the service of a second notice was not a bar to the proceeding.*[7]

The second case relied on by the court in *808 West End Avenue* was the Appellate Term, First Department decision in *Voldstad v. Ashley*[8], where it was held that:

> *It was not required that a second notice of non-renewal be served in this owner occupancy proceeding, given that the second holdover proceeding was brought shortly after the first proceeding was dismissed for nonappearance [citation omitted].* [9]

Expressly relying on *DiCara* and *Voldstad*, the court in *808 West End Avenue* concluded that, under the "worst scenario for petitioner" (namely, that the second proceeding was commenced the very next day after the first proceeding had been discontinued), "since the second proceeding was brought immediately after the first proceeding was discontinued, petitioner could similarly [to *DiCara* and *Voldstad*] rely upon the original predicate notice."

The court emphasized that, unlike in *Colavolpe*, the predicate notice was not hanging like a sword of Damocles over the head of the respondents because "[a]t worst, it was used the very next day after the mistaken service was recognized" and respondents "suffered little prejudice thereby". The court also noted that the respondents had agreed, per the Aug. 9, 2006 stipulation, that the petitioner's voluntary discontinuance was without prejudice to a new proceeding which respondents

knew had already been brought on Aug. 8, 2006 and was returnable on Aug. 25, 2006.

In support of its analysis, the *808 West End Avenue* court also cited *Fromme v. Simsarian*[10] and *West 38th Street Garage, Inc. v. Wehbe*.[11] As relevant to the matter at issue in *808 West End Avenue*, the facts in *Fromme* involved a notice to cure and notice of termination based on subletting without the landlord's consent, a holdover proceeding dismissed without prejudice for nonappearance by the petitioner, and a new proceeding commenced 15 days later without service of a new predicate notice. The tenant moved to dismiss for failure to serve a necessary predicate notice. The Civil Court (Richard S. Lane, J.) held that the tenant was correct.

After citing *Colavolpe* and other cases which "painted the picture of [a] tenant lulled into a false sense of security while, like the sword of Damocles, the earlier notice continued to hang over his head," and the *Arol* case which "carved out an exception when the second proceeding was commenced prior to discontinuance of the first," Judge Lane in *Fromme* stated:

Subsequent to Arol . . . I thought it might be the entering wedge for a broader exception . . . [However, w]ith one exception where the lapse between the two proceedings was only one day (DiCara v. Cecere [citation omitted]), mine was a lone voice and all my colleagues held Arol [citation omitted] to be sui generis . . . And on reflection, in matters procedural perhaps a rule of certainty is preferable to deciding on an ad hoc basis in each case whether the lapse between the two proceedings is reasonable or unreasonable.[12]

In the 1992 Civil Court, New York County case of *West 38th Street Garage, Inc. v. Wehbe*, then-Civil Court Judge Louis B. York granted a tenant's motion to dismiss a holdover proceeding where the petitioner relied on a 30-day notice of termination that had been the predicate to a prior proceeding dismissed without prejudice. The court refused petitioner's request that the motion be denied based on *Arol*, stating:

"Subsequent decisions [to Arol] have emphasized that Arol is an exception, triggered only when a petitioner starts a second proceeding prior to the termination of the first. Once the initial proceeding ends, a bright-line rule applies, mandating that a new notice of termination be served on the tenant. See Fromme [citation omitted] (fifteen-day lapse between dismissal of first proceeding and commencement of second required second notice); Weinberger v. Driscoll [citation omitted] (two-month lapse triggered requirement). But see DiCara v. Cecere [citation omitted] (notice from first proceeding sufficient where the lapse between proceedings was one day)." [13]

In West 38th Street Garage, the second proceeding was commenced six days after dismissal of the first proceeding, which the court found to be fatal to the petitioner's position, stating:

Clearly, in this instance, the bright-line rule consistently followed by courts applies. Pursuant to that rule, petitioner should have served a second notice of termination. Because it failed to do so, I dismiss the proceeding.[14]

Presumably, Judge Finkelstein cited *Fromme* and *West 38th Street Garage* because, even though those courts ruled against the landlord, in both instances the courts had noted the *DiCara* decision and its conclusion that the predicate notice to a prior proceeding dismissed without prejudice could be relied upon when the lapse between proceedings was just one day.

Finally, although the court in *808 West End Avenue* made clear that it would not dismiss the proceeding even accepting the respondents' time sequence, the court did note that "[i]n the instant proceeding the time sequence is disputed." Under the "best scenario for petitioner," the second proceeding was brought on the same day as the first proceeding was discontinued (Aug. 8, 2006) or the day before the first proceeding was discontinued (using the Aug. 9, 2006 stipulation of discontinuance date as the date for discontinuance), and the *Arol* exception applies.

Given the above analysis, the court in *808 West End Avenue* denied the respondents' motion to dismiss and held that the petitioner could rely upon the original predicate notice in the subsequent proceeding.

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

808 West End Avenue involves a Golub notice. Where a proceeding is predicated on a Golub notice, the option to serve a new notice immediately after discontinuance or dismissal without prejudice of a first proceeding is not possible. By the time any proceeding has been commenced after lease termination, it is too late to serve another Golub notice, which must be

served from 150 to 90 days prior to lease expiration. The petitioner must wait until 150 to 90 days before expiration of the renewal term before serving a new Golub notice. Did that influence the 808 West End Avenue court in its determination to show flexibility, and permit re-use of a Golub notice, where there was a one-day gap between proceedings? Or, would the court have reached the same conclusion no matter what kind of predicate notice was involved? (In DiCara, for example, a thirty-day notice was involved.)

In terms of negating the sword of Damocles concern, is a gap of two, three or four days between discontinuance of a holdover proceeding and commencement of a new holdover proceeding materially different from one day? Will *808 West End Avenue* be an opening for expanding the Arol exception? Or, will courts opt to preserve the bright-line test rather than become involved in an ad hoc determination of what gap between proceedings is sufficiently short to dull the sword of Damocles?

Only time will tell, but *808 West End Avenue* demonstrates an approach that considers the individual facts of the particular case before the court to determine whether there is any prejudice to the tenant from reuse of a predicate notice.

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Endnotes:

1. Warren A. Estis and William J. Robbins, "Predicate Notice: Timing Is Of The Essence in Ability to Re-Use", NYLJ, Feb. 1, 2006, at p. 5, col. 2. See also Estis and Robbins, "Summary Proceedings: Can A Predicate Notice Be The Basis For A Subsequent Action?" NYLJ, Oct. 18, 1995, at p. 5, col. 2.

2. NYLJ, Jan. 10, 2007, p. 23, col. 1 (Civ. Ct. N.Y. Co.).

3. 77 Misc.2d 430, 354 N.Y.S.2d 309 (Civ. Ct. Kings Co. 1974).

4. 77 Misc 2d at 431.

5. 83 Misc.2d 477, 372 N.Y.S.2d 324 (Civ. Ct. Bronx Co. 1975), aff'd 84 Misc.2d 493, 378 N.Y.S.2d 231 (App. Term 1st Dep't 1975), aff'd 52 A.D.2d 538, 382 N.Y.S.2d 215 (1st Dep't 1976), app. dism. 39 N.Y.2d 1057.

6. NYLJ, April 18, 1979, p. 13, col. 5 (App. Term 2nd Dep't).

7. NYLJ, Jan. 10, 2007, p. 23. col. 1, at col. 2.

8. NYLJ, Nov. 27, 1989, p. 26, col. 6 (App. Term 1st Dep't).

9. Id.

10. 121 Misc.2d 792, 468 N.Y.S.2d 990 (Civ. Ct. N.Y. Co. 1983)

11. NYLJ, Dec. 24, 1992, p. 25, col. 4, 20 HCR 768 (Civ. Ct. N.Y. Co.).

12. 121 Misc.2d at 794.

13. 20 HCR at 769. The citation for Weinberger v. Driscoll, cited in the quoted passage, is 89 Misc.2d 675, 392 N.Y.S.2d 236 (Civ. Ct. N.Y. Co. 1977).

14. Id.