Hot Tips on Ways to Lose Your Summary Proceeding

In their Landlord-Tenant column, Warren A. Estis and William J. Robbins of Rosenberg & Estis discuss cases where notices sent to tenants with deficiencies were fatal to summary proceedings, and ways to make practitioners aware of some of the myriad details that need to be considered in laying the groundwork for, and in litigating, summary proceedings.

Warren A. Estis and William J. Robbins

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Notices sent to tenants are an integral part of landlord-tenant law. There are numerous kinds of notices, with notices to cure and notices of termination being among the most common. Deficiencies in the content of such notices, and in how they were served, can be fatal to a summary proceeding. This article focuses on cases where deficiencies have been found. We also discuss a particular situation where leave of court is required to bring the proceeding. Our goal is to make practitioners alert to some of the myriad details that need to be considered in laying the groundwork for, and in litigating, summary proceedings.

Improper Service

In *Perry v. Perry*,[1] the Civil Court, Richmond County (Orlando Marrazzo, J.) dismissed the petition after a traverse hearing. The court held that the petitioner had failed to establish by a preponderance of credible evidence that service of the predicate 30-day notice of termination was properly made. The service at issue was conspicuous place service.

One of the deficiencies found by the court concerned the mailings. The court stated the applicable standard as follows:

It is well-settled that mailings of notices in a landlord tenant holdover proceeding must be addressed to the respondent at the property sought to be recovered. However, if the premises do not comprise the respondent's current place of residence, or if other addresses are known to the petitioner, then additional mailings should also be made to those alternate locations.[2]

The court noted that the process server had testified that the premises sought to be recovered was uninhabitable, lacked electricity and heat and appeared to be abandoned. He acknowledged that he did not attempt any service at any other locations for the respondents.

The court noted that there was "a companion holdover proceeding filed at the same time when this very holdover proceeding was filed involving the same exact parties." The petitioner in the *Perry* case before Judge Marrazzo was also the petitioner in the companion case. The subject property in that other proceeding was also in Staten Island. Judge Marrazzo held that because the petitioner, in the case before him, had failed to do a mailing to that other property, as a matter of law, service of the 30-day notice of termination was insufficient.

The court also found that the process server had not posted in a conspicuous place. Quoting *161 Williams Assoc. v. Coffee*,[3] the court stated:

[G]eneral principles concerning service lead to the conclusion that in a conspicuous place service the place of posting must be on the premises in a location, preferably the entrance door, which, in the reasonable opinion of the process server, is sufficiently obvious to the occupant so to be expected to be seen.[4]

In *Perry*, the process server attached copies of the notice of termination to interior doors. The court reasoned that, since the process server had testified that the premises appeared abandoned, he should have also attached copies of the notice of termination to the building's exterior entrance doors.

In *Treeline 100-400 GCP LLC v. Computer Career Center Inc.*,[5] another commercial holdover proceeding, the District Court, Nassau County (Scott Fairgrieve, J.) similarly granted a tenant summary judgment dismissing the petition for failure to properly serve a predicate notice. In that case, the notices at issue were a 30-day notice to cure and a termination notice.

The section in the lease on notices provided that a notice "will be deemed to have been given" when served in a specified manner addressed to the party for whom it is intended at its "address(es) set forth in Section 1.1" of the lease. That section specified the tenant's address and further provided for a copy "at the same time" to an attorney, at a different specified address. The petitioner failed to send a copy of the notices to that attorney.

The court held that the failure to serve copies of the notices on the attorney named in the lease was a fatal defect in service. The landlord argued that the language in the notice section of the lease concerning service was "neither mandatory nor exclusive" and that nowhere did the lease "say that notices must only be given in that manner and to the stated addresses, only that it will be deemed given if sent in the manner to those addresses." The court did not find the argument persuasive. It noted that "[e]ven if [this Court] were to find that [said] section…was ambiguous, the ambiguity must be determined to be in favor of the tenant and against the landlord so as not to allow for abrupt [termination] of valuable commercial leases."

Defective Notice to Quit

In *HSBC Bank USA NA v. Jeffers*,[6] another Nassau County District Court decision, also by Judge Fairgrieve, the court granted the respondent's motion to dismiss a holdover proceeding, holding that a 10-day notice to quit was "jurisdictionally defective." There, HSBC Bank had become the owner of the subject property pursuant to a referee's deed after bringing a foreclosure action. A 90-day notice to vacate was served upon the respondents. It was executed on behalf of HSBC Bank by Kathryn Cross of Wells Fargo. Attached to that notice was a limited power of attorney by which HSBC appointed Wells Fargo, the servicer, as its "lawful agent and attorney-in-fact" to execute in its name all documents necessary and appropriate for various tasks, including obtaining any interest in the property and buildings which were the subject of the mortgages and other security instruments and taking possession of such property.

Thereafter, a 10-day notice to quit with the same limited power of attorney was served on respondents. The court held that the limited power of attorney did allow Wells Fargo to execute a 10-day notice if properly done. As set forth in the court's decision, the execution was as follows:

HSBC Bank USA, National Association

Joyce Reynolds

By: Joyce Reynolds

Title: ???[7]

Apparently, something was set forth next to the title, but the court stated it was "unsure of the title designation used by the signer Joyce Reynolds, which is indiscernible." The court held that the execution of this particular notice was improper "because it was executed by a Joyce Reynolds with no indication by whom she is employed and provides no clear designation of her employment status."

The court relied on the Appellate Division, Second Department decision, which was affirmed by the Court of Appeals, in *Siegel v. Kentucky Fried Chicken of Long Island*,[8] quoting the following passage from that case:

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.[9]

Stating Facts of Service

In *200 West 112th Street HDFC v. 1842 7th Avenue Delicatessen Corp.*,[10] the Civil Court, New York County (Manuel J. Mendez, J.) dismissed a commercial holdover proceeding. The court cited RPAPL 741(4), which requires that the petition in a summary proceeding "state the facts upon which the special proceeding is based." It noted that, pursuant to this provision, a "[f]ailure to set forth facts in the petition regarding service of the predicate notices renders the petition deficient."

The notice at issue in *200 West 112th Street HDFC* was a notice to cure. That is a notice under the lease. The court stated that "[w]hen the written lease between the parties contains requirements for service, the lease provisions must be complied with for service to be proper." A petition must contain information about service so it can be determined whether there has been such compliance.

In that case, the purported notice to cure did not state the manner it was served. The petitioner did not attach to its opposition papers to respondent's motion for summary judgment, nor to the petition, an affidavit of service detailing the manner of service of the notice to cure. The court held that "[f]ailure to allege that the notice to cure was served and give the details of its service render[ed] the petition defective and it must be dismissed."

Inadequate Notice to Cure

In *496 Broadway Realty LLC v. Kyung Sik Kim*,[11] one of the cases cited by the court in *200 West 112th Street HDFC*, the Civil Court, New York County (Manuel J. Mendez, J.) dismissed a petition in a commercial holdover proceeding, because, among other things, the content of the notice to cure was inadequate. In succinctly summarizing what was lacking in the notice to cure, the court made clear what must be included in such a notice:

In conclusion, the Notice to Cure is defective because it failed to unequivocally and unambiguously inform the tenant how the lease has been violated, the consequences of its failure to cure and the conduct required to prevent eviction.[12]

Leave of Court

The cases discussed above reflect the common situation where notices must be served before a summary proceeding is commenced. *Pires v. Williams*[13] is an example of an infrequent situation where leave of court has to be obtained before a summary proceeding can be brought. *Pires* was a holdover proceeding brought in Civil Court, Kings County to recover possession of a residential apartment located in a building that was the subject of a mortgage foreclosure proceeding. That foreclosure proceeding was commenced and a receiver was appointed before the holdover proceeding was started. One of the petitioners in the holdover proceeding was the lead defendant in the foreclosure proceeding.

The respondent moved to dismiss the holdover proceeding on the grounds that, given the appointment of the receiver, the petitioners purportedly lacked standing. Judge Gary Marton rejected that argument, noting that:

It is well established that petitioners might have sought from the mortgage foreclosure court leave to bring the instant proceeding. Had they done so, they might have obtained that relief.[14]

The court also pointed out that a foreclosure sale had not yet occurred and until there was an actual sale under a judgment of foreclosure, the owner/mortgagor retains the equity of redemption, and thus "petitioners' interest here is not speculative but real."

The court stated that the petitioners' failure to seek leave to bring the holdover proceeding from the court that had appointed the receiver did not mandate dismissal of the holdover for their lack of standing or otherwise. Rather, any such dismissal—and the court did grant dismissal—was in the court's discretion "and not available as a matter of right."

The court looked to the Court of Appeals' decision in *Copeland v. Salomon*[15] for a statement of the basis for the requirement of getting approval to sue from the court that had appointed the receiver. In *Copeland*, the court stated:

The rule that leave of the appointing court be obtained before suing such a receiver was devised in order to protect the receiver and the estate against the harassment and expense of possibly unnecessary litigation and to preserve the estate in the hands of the receiver for the benefit of all creditors equally… It arose also from the fact that, because the property is held by the receiver as an officer of the court…interference with the property by the bringing of an action without leave may constitute contempt…[16]

In *Copeland*, the court specified three possible approaches where leave to sue had not been obtained, as follows:

[First,] the defect not being jurisdictional, the court in which the action had been begun was free to consider it regular and permit it to continue subject to the later order of the appointing court…or…[second], to stay the action pending an application to the appointing court for leave nunc pro tunc…or [third], to dismiss the action without prejudice to recommencement after such leave had been obtained.[17]

In *Pires*, the court declined to use the first approach on the grounds that if petitioners were "allowed to prosecute this proceeding to terminate an occupancy that generates income, [it] very well might interfere with the receiver in the performance of his duties." The court also rejected the second approach. Applying that approach, stated the court, would mean marking the holdover proceeding off-calendar so petitioners could move in the foreclosure proceeding nunc pro tunc and, then, if successful on that motion, bringing a motion in Civil Court to restore the holdover proceeding to the court's calendar. The court concluded that approach would be inconsistent with the legislative mandate that RPAPL Article 7 proceedings were to be summary. Accordingly, the court adopted the third approach, dismissing the proceeding without prejudice to the commencement of another proceeding upon securing appropriate leave.

In short, failing to adhere to the above requirements and standards is a way to insure lack of success in bringing a summary proceeding. These cases show that the only thing that will be summary about a summary proceeding may well be its dismissal if, where there are necessary predicates to such a proceeding, those predicate steps are not properly followed.

Warren A. Estis *is a founding partner at Rosenberg & Estis, and* **William J. Robbins** *is a partner at the firm.*

Endnotes:

1. 30 Misc.3d 1223(A), 2011 WL 539383 (Civ. Ct. N.Y. Co. 2011).

2. Id. at *1.

3. 122 Misc.2d 37, 469 N.Y.S.2d 900 (Civ. Ct. N.Y. Co. 1983).

4. 2011 WL 539383 at *2, quoting *161 Williams Assoc. v. Coffee*, 122 Misc.2d 37 at 39-40 (Civ. Ct. N.Y. Co. 1983).

5. 30 Misc.3d 1212(A), 2011 WL 167616 (Dist. Ct. Nassau Co. 2011).

6. 30 Misc.3d 1209(A), 2011 WL 91379 (Dist. Ct. Nassau Co. 2011).

7. 2011 WL 91379 at *1.

8. 108 A.D.2d 218, 488 N.Y.S.2d 744 (2d Dept. 1985) aff'd 67 N.Y.2d 792 (1986).

9. 2011 WL 91379 at *1-2, quoting 108 A.D.2d at 220, 488 N.Y.S.2d at 746.

10. 30 Misc.3d 1216(A), 2011 WL 294287 (Civ. Ct. N.Y. Co. 2011).

11. 18 Misc.3d 1119(A), 2008 WL 199755 (Civ. Ct. N.Y. Co. 2008).

12. Id. at *2.

13. —N.Y.S.2d—, 2011 WL 1661385 (Civ. Ct. Kings Co. 2011).

14. Id. at *1.

15. 56 N.Y.2d 222, 451 N.Y.S.2d 682 (1982).

16. 56 N.Y.2d at 228.

17. 56 N.Y.2d at 230.