Predicate Notice

Timing Is of the Essence in Ability to Reuse

BY WARREN A. ESTIS AND WILLIAM J. ROBBINS

It is not uncommon for a summary proceeding to be dismissed or discontinued without a finding on the merits. For example, there might be a problem with service of the notice of petition and petition, a defective description of the premises or deficiencies in the content of a predicate notice. In such circumstances, there is no bar to bringing another proceeding on the same grounds.

Where the type of proceeding is one that requires a predicate notice, as long as the dismissal or discontinuance was not because of deficiencies in the predicate notice, it presumably would be advantageous to the petitioner bringing a new proceeding to be able to rely on the predicate notice already served in connection with the first proceeding. That is because the time for getting into court increases if a new notice has to be served. Moreover, any time a new notice is involved, there is the potential for service problems or errors in content.

Two recent Civil Court cases, *Atlantic Westerly Co. v. Cohen*[1] and *West Bushwick NRP Associates LP v. Bushwick Cooperative Federal Credit Union*,[2] with diametrically opposite outcomes given their contrasting facts, both highlight the same point. A petitioner seeking to rely in a second proceeding on a notice that was used as a predicate to a discontinued or dismissed first proceeding has to commence the second proceeding before the first is terminated.

LANDLORD-TENANT

Warren A. Estis

William J. Robbins

'Atlantic Westerly'

Atlantic Westerly involved a landlord's attempt to terminate a rent-stabilized tenancy on the ground 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 as a *Golub* notice) of intention not to renew the tenant's lease, as well as a thirty-day notice of termination. The two notices may be combined in a single notice.

In *Atlantic Westerly*, the landlord served a *Golub* notice dated Aug. 30, 2004. Subsequently, the landlord served a thirty-day notice of termination (the "2004 Thirty-Day Notice") and, in December 2004, commenced a holdover proceeding (the "2004 Proceeding"). The initial return date of the 2004 Proceeding was Dec. 17, 2004. On that date, the petitioner discontinued the 2004 Proceeding. The court noted the discontinuance on the file; there was no separate stipulation of discontinuance. Several days later, the landlord served a new thirty-day notice of termination, dated Dec. 18, 2004 (the "2005 Thirty-Day Notice"). Thereafter, it commenced a second proceeding (the "2005 Proceeding"), filing the petition therein in court on Feb. 10, 2005.

The tenant moved to dismiss that second proceeding. The tenant asserted that the petition was fatally flawed because it contained no allegation that a *Golub* notice had been served, that such a notice was a condition precedent to the commencement of the proceeding and that the service of such a notice had to be alleged in the petition. In response, the petitioner asserted that the 2005 Thirty-Day Notice referred to the *Golub* notice, that the proceeding was premised on the allegations of that notice and that no prejudice would result from amending the petition to include the *Golub* notice and the affidavit of service of that notice.

Civil Court, New York County Judge Laurie Lau, granted the tenant's motion to dismiss and denied the petitioner's cross-motion to amend the petition to include the *Golub* notice. She rejected the petitioner's contention that the 2005 Thirty-Day Notice referred to the *Golub* notice, finding that it "contain[ed] no reference, explicit or implicit, to the *Golub* Notice." In any event, the court continued, the *Golub* notice was a nullity, having been vitiated, as was the 2004 Thirty-Day Notice, by the petitioner's failure to commence the second proceeding prior to termination of the first.

Citing the cases of *Kaycee West 113th Street v. Diakoff*,[3] *Nicolaides v State Division of Housing and Community Renewal*[4] and *Arol Development Corp. v. Goodie Brand Packing Corp.*,[5] Judge Lau stated the legal basis for her finding as follows:

> With a limited exception, neither a Thirty-Day Notice... nor a *Golub* Notice... survives the dismissal of the proceeding. The limited exception exists when a petitioner, prior to the termination of one proceeding, commences another proceeding on the same grounds; if the second proceeding is commenced prior to the termination of the first, it may be premised upon the notices used to support the first proceeding.[6]

'West Bushwick'

The *West Bushwick* case involved a commercial holdover proceeding based upon termination of a month-to-month tenancy by service of a thirty-day notice of termination under Section 232-a of the Real Property Law. When the landlord moved for summary judgment, an argument raised by the tenant in opposition was that "petitioner's reliance on a five month old prior termination notice and its failure to utilize a new thirty day notice constitute a violation of the subject matter jurisdiction prerequisite." The tenant asserted that "a landlord cannot 'recycle' an already used prior termination notice as the basis for commencing a new holdover proceeding."

A petitioner seeking to rely in a second proceeding on a notice that was used as a predicate to a discontinued or dismissed first proceeding has to commence the second proceeding before the first is terminated.

Civil Court, Kings County Judge George J. Silver cited a 2005 Appellate Term, First Department decision in *Hudson Waterfront Associates IV, LP v. MTP 59 St. LLC*[7] for a statement of the governing law, namely, that a petitioner's use of a notice of termination is sufficient to serve as the predicate for a second eviction proceeding "where the prior holdover proceeding had not been terminated at the time of the commencement of [the second] proceeding and where tenant was caused no discernible prejudice."

On the facts before it, the court in *West Bushwick* rejected the tenant's argument that the landlord could not "reuse" its notice of termination. The court noted that the second holdover proceeding was commenced on Aug. 9, 2005, when the respondent's principal was served with the notice of petition and petition. The landlord only thereafter discontinued the prior holdover proceeding, by a notice of discontinuance dated Aug. 11, 2005. Here, in contrast to *Atlantic Westerly*, the prior holdover proceeding had not already been terminated when the second holdover proceeding was commenced.

The court in *West Bushwick* found unpersuasive the tenant's argument of purported prejudice from the landlord's reuse of the termination notice. As summarized by the court, the prejudice claimed by the tenant was "its payment of 'post termina-

Warren A. Estis *is a founding partner at Rosenberg & Estis, specializing in commercial litigation and transactions.* **William J. Robbins** *is a partner at the firm.*

tion rent' to petitioner, its re-hiring of legal counsel and its substantially altered position." The court stated that such prejudice would have occurred even if the petitioner had served the tenant with a new notice of termination. The court further noted that the tenant's counsel had conceded at oral argument that the tenant had found another premises in which to relocate its business but had been unable to take possession because of delays by its contractor in renovating the other premises. Thus, the court concluded, "none of the prejudice respondent claims it has suffered has resulted from petitioner's 'recycling' of the notice of termination, making the notice legally sufficient to serve as the predicate for the instant holdover proceeding."

Points to Consider

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

Why should it make a difference in terms of a landlord reusing a predicate notice whether or not the second proceeding is commenced before termination of the first proceeding? Based on the *Arol Development* case, the answer would seem to be related to the different inferences the tenant can draw in the two contexts about the landlord's intentions as to the predicate notice.

If the initial proceeding is terminated before a second proceeding is brought, then the tenant can legitimately be uncertain whether the landlord thereafter still intends to seek to evict him. Having created such uncertainty, the landlord is required to serve a new predicate notice upon deciding to continue pursuing eviction.

By contrast, if the landlord, prior to termination of the first proceeding, brings a second proceeding—such that there are two proceedings each alleging reliance on the same predicate notice, then the tenant, upon termination of the first proceeding, cannot have any question as to the landlord's view of and intention with respect to the predicate notice. Accordingly, the landlord can reuse the predicate notice.

Given the principle of law discussed above, a landlord seeking to reuse a predicate notice would need to have more than one proceeding pending at the same time, at least temporarily. However, any time there are multiple simultaneous proceedings, an opportunity is presented for a tenant's attorney to initiate motion practice based on alleged confusion from such a procedural posture.

Therefore, as to notices which can be re-served (for example, notices under a lease), if the notice period of the predicate notice is short, a landlord should give some thought to whether it might be a more efficient approach just to serve a new notice rather than embark down the road of having multiple simultaneous proceedings in an effort to be able to reuse a predicate notice. In the case of a proceeding predicted on a *Golub* Notice this choice is not possible because, by the time the 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.

In short, while there are circumstances where predicate notices have been held to survive termination of a proceeding, in general a predicate notice might be said to have more in common with a "one shot wonder" than it does with a nine-lived cat.

1. NYLJ Oct. 5, 2005, p. 18, col. 1, 33 HCR 874A (Civ. Ct. N.Y. Co.)
2. NYLJ Nov. 18, 2005, p. 24, col. 1, 33 HCR 1046(A) (Civ. Ct. Kings Co.)
3. 160 A.D.2d 573, 554 N.Y.S.2d 216 (1st Dep't 1990).
4. 231 A.D.2d 723, 647 N.Y.S.2d 866 (2d Dep't 1996).
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. 33 HCR at 874.
7. 8 Misc.3d 136(A), 803 N.Y.S.2d 18 (App. T. 1st Dep't 2005).