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Procedural Issues

Avoiding Dismissal on Non-Substantive Grounds

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When litigating a matter, many practitioners immediately focus on the issues of substantive law involved in the case. The merit of the underlying claims is what primarily concerns them. It is critical, however, also to pay attention to what might be called non-substantive, procedural issues. No matter how strong a case may be on the merits, that aspect may never even be reached if the case is dismissed for failure to satisfy a procedural requirement. Most of our past articles have dealt with substantive areas of landlord-tenant law. Since we feel it is important for practitioners also to be aware of non-substantive issues that can arise, we begin now a series of articles focusing on such issues. We discuss here (1) the issuing of the notice of petition, (2) questions related to whether mailings of predicate notices and pleadings have properly been made in accordance with statutory and/or lease requirements, and (3) counterclaim waivers.

LANDLORD-TENANT

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A defense to a summary proceeding that clearly falls in the procedural category is that the notice of petition as served lacks the stamp or signature of the court clerk. In a February 2005 decision in *225 5th LLC v. Fiori Fiori, Inc.*,[1] Judge Ellen Gesmer of Civil Court, New York County, granted a tenant's motion to dismiss a commercial non-payment proceeding on that ground. In that case, the copy of the notice of petition that was served on the tenant included a signature line for the "Clerk of the Civil Court of the City of New York," but it did not bear either the stamp or the signature of the clerk of the court above the line.

Notice of Petition

The court referred to the applicable statutory provisions. Section 731(1) of the Real Property Actions and Proceedings Law (RPAPL) provides that a notice of petition may be issued by an attorney, as well as a judge or the clerk of the court. Section 401(c) of the New York City Civil Court Act (NYCCA), however, states that notwithstanding RPAPL 731 providing for issuance by an attorney, "the notice of petition in a summary proceeding to recover possession of real property shall be issued only by a judge or the clerk of the court." It also requires that the original petition be filed with the clerk at the time the notice of petition is issued. Pursuant to NYCCA §403 and RPAPL §735, service of the notice of the petition and petition is made by serving a "copy" of those documents on the tenant.

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In *225 5th LLC*, the court noted that the copy of the notice of petition served on the respondent was not an accurate copy, since it lacked the signature of the clerk of the court. The court issued, since an index number is only assigned when the clerk issues the notice of petition. The court, however, emphasized that the index number was handwritten and concluded that "a handwritten index number does not provide the tenant with adequate notice that the notice of petition was properly issued."

In a decision approximately two months earlier in *First Avenue Owners Corp. v. Riverwalk Garage Corp.*,[2] Judge Cynthia Kern of Civil Court, New York County, had reached an opposite conclusion from that reached by Judge Gesmer in *225 Fifth LLC*. In *First Avenue Owners Corp.*, one of the respondent's affirmative defenses alleged that the notice of petition received by the respondent was defective because it was undated and lacked the clerk of the court's stamp. Judge Kern noted that the notice of petition filed in the proceeding "was duly issued by the clerk of the court." She granted the petitioner's motion to dismiss the affirmative defense, and explained that the claim that the notice of petition as served was undated and lacked the clerk's stamp did not warrant the case being dismissed because:

"The rule is that the papers served in an action 'conform in all important respects to the papers filed.' [Citation omitted.] The notice of petition served on respondent conformed in all important respects to the notice of petition filed with the court."[3]

The court in *First Avenue Owners Corp.* thereby addressed the requirement that the notice of petition and petition served be a copy of what was filed. It did not deal with whether the tenant could reasonably have known, without the clerk's stamp on the notice of petition served, that the notice of petition had been properly issued. (From the face of the court's decision, we are unable to tell if that lack of certainty was specifically raised by the tenant as justification for its affirmative defense.)

There are not many cases discussing the consequences of the absence of a court stamp or signature. By contrast, another procedural issue, namely, whether mailings of predicate notices or the pleadings have properly been made, is a procedural area that generates a significant amount of motion practice in landlord-tenant cases. Three recent cases present a sample of the range of questions that can arise under the general rubric of mailing-related concerns.

Service by Mail

260-261 Madison Avenue LLC v. Victor's Garden District Inc.[4] was a holdover proceeding brought after service of a 30 day notice to quit terminating the respondent's purported month-to-month tenancy. Pursuant to Real Property Law (RPL) §232-a, a notice terminating such a tenancy in New York City must be served "in the same manner in which a notice of petition in summary proceedings is now allowed to be

held that the "petitioner's failure to have served respondent with a true, conformed copy of a notice of petition issued by the Clerk of the Court deprives the Court of personal jurisdiction over the respondent." The court emphasized that this defect was more serious than defects which courts have held to be amendable because, having been served with a notice of petition which bore no official stamp, the tenant had no way of knowing that the notice of petition had been properly issued.

In opposing the motion, the landlord had argued that the presence of an index number on the papers had given adequate notice to the tenant that the notice of petition was properly served by law." RPAPL §735 governs how a notice of petition must be served. It provides that when service is made by other than personal delivery (i.e., by suitable age and discretion service or by posting), then an additional copy of the papers must be mailed to the respondent "both by registered or certified mail, and by regular first class mail."

The respondent in *260-261 Madison Avenue LLC* argued that the proceeding should be dismissed because the notice to quit was served not by certified mail, but rather by certified mail return receipt requested. In other words, the question the court had to determine was whether certified mail return receipt requested constituted a certified mailing as contemplated by RPAPL §735.

In a February 2005 decision, Judge Eileen A. Rakower of Civil Court, New York County, held that the mailing was sufficient. She rejected the respondent's claim that petitioner's inclusion of a return receipt request constituted a more restrictive type of mail delivery and, therefore, should not be permitted. The court stated:

> The signature of the recipient of a certified letter is obtained at the time of delivery, regardless of whether there is a return receipt requested. The return receipt complained of here by the respondent merely provides a copy of that signature to the sender after delivery ... Thus, there is no such delay.[5]

Citing the Court of Appeals decision in *ATM One, LLC v. Landaverde,*[6] the court also noted that "it is well settled that service by mail is complete upon the mailing, and that an affidavit of service by mail raises the presumption that a proper mailing occurred."

First Avenue Owners Corp., the case discussed above in the context of omission of a court stamp or signature, is also relevant in the context of mailing-related issues. There, the lease required that service of the petition and notice of petition be made at the respondent's address specified on the first page of the lease. When the petitioner initially served respondent with the petition and notice of petition commencing the nonpayment proceeding, it failed to mail a copy to respondent at that specified address. Instead, it mailed a copy of the papers to an alternate address. The petitioner realized its error after it had already filed its affidavit of service. Rather than commencing a new proceeding, the petitioner served the papers again, this time mailing them to the correct address specified in the lease, and then filed a second affidavit of service.

The respondent moved to dismiss the proceeding on the ground that the petitioner had re-served the notice of petition and petition after it had already filed an initial affidavit of service with the court. The issue before the court was whether such re-service of papers in the same proceeding is permissible. The court noted that "there is no case law addressing the issue of whether the RPAPL permits a petitioner to reserve a petition and notice of petition in order to cure a defect in service after it has already filed an affidavit of service with the court."

The court commented, however, that there is case law holding that such re-service is permitted under CPLR §308(2) so long as the statute of limitations has not expired and such re-service does not constitute commencement of a second action.[7] Judge Kern viewed RPAPL §735(2) and CPLR §308(2) as analogous service provisions. Therefore, she concluded that the "same reasoning applies under the RPAPL as the CPLR." Since the statute of limitations had not yet run, and there was a defect in the initial service which the petitioner was required to cure, the court held that the petitioner should be permitted to re-serve the petition.

In *Ring v. Arts International Inc.*,[8] a nonpayment proceeding, the commercial tenant raised various affirmative defenses centered around the claim that it was not obligated to pay rent and additional rent until the landlord had repaired the premises which had been damaged by flooding from burst sprinklers. Civil Court, New York County Judge Lucy A. Billings summarized the issue before the court as follows:

> The question thus boils down to whether respondent's use of regular rather than registered or certified mailing to notify petitioner of the premises' condition bars the tenant's substantial rent abatement claim for a condition that rendered the premises wholly unusable.[9]

Paragraph 9 of the lease provided for a rent abatement if the premises were totally damaged or rendered wholly unusable by casualty. That same lease paragraph required, as a condition precedent to any such rent abatement, that "Tenant shall give immediate notice thereof [of the damage] to Owner." Another lease provision (paragraph 28) provided that "[a]ny notice by Tenant to Owner must be served by registered or certified mail ... ."

The landlord admittedly received a notice from the tenant, sent by regular mail, advising of the damage and that the tenant was abating all rent. The landlord responded, objecting to the tenant's notice on the grounds that the premises were fully useable, but never specifically objecting to the regular rather than registered or certified mailing. The court held that the landlord had thereby waived any defect in the mailing.

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The court also stated that any noncompliance with paragraph 28's method of service of notice was technical and insufficient to invalidate the tenant's exercise of the rent abatement remedy. It based that conclusion on the fact that the landlord had received notice immediately and had an opportunity to inspect the premises. The court further pointed out that the landlord had never claimed or showed any adverse effect from any such noncompliance.

In any event, the court continued, "under a reasonable construction of the lease, ¶28's registered or certified mail requirement does not govern ¶9's notice requirement." Paragraph 9 simply required that the notice be immediate, without specifying that it had to be in writing, let alone mailed in a particular manner. That focus on immediacy of notice was "consistent with the exigent circumstances being addressed." To impose writing and mailing requirements would "engraft a different procedure not specifically intended for the circumstances of a casualty" and "absent from ¶9's plain terms." The court also reasoned that the phrase, "Except as otherwise in this lease provided," found in lease ¶28 qualified that paragraph's provision for tenant's notice to the owner, and thus "except[ed] ¶9's notice requirement from ¶28's application."

Counterclaim Waivers

Another area of procedural concern is whether there is a counterclaim waiver provision in the lease. In addition to affirmative defenses, tenants sometimes also assert counterclaims. Often, however, leases have provisions whereby the tenant waives any counterclaims. A March 2005 decision by Civil Court, New York County Judge Arthur F. Engoron in *First Flatiron LLC v. Irizarry*[10] includes a good overview of the topic.

He noted at the outset that "[i]t is hornbook law that such clauses are enforceable." The decision then includes a long quotation from the Appellate Term, First Department decision in *Bomze v. Jaybee Photo Suppliers, Inc.*,[11] which makes, among others, the following points:

- Enforcing a counterclaim waiver does not deprive the tenant of a cause of action, but merely relegates the tenant to asserting the cause of action in a plenary action; and
- Courts have permitted tenants to assert counterclaims for breach of warranty in residential nonpayment proceedings, notwithstanding a lease counterclaim waiver clause. The basis for so holding is that RPL 235-b "expressly provides that tenants of residential premises must be provided habitable premises" and "damages flowing from a breach of warranty of habitability are inextricably intertwined with the landlord's entitlement to rent."[12]

In *First Flatiron*, the court also "note[d] in passing" the Supreme Court, Nassau County decision in *W & S Associates L.P. v. Absolute Greek, Inc.*,[13] in which the court held that counterclaim waiver clauses are not enforceable where the landlord has brought a plenary action rather than a summary proceeding. (The substantive issue addressed by Judge Engoron in

First Flatiron, concerning the converting of commercial tenancies to residential use, is beyond the scope of this article. That aspect of the case will be discussed in a future installment of Warren A. Estis' and Jeffrey Turkel's "Rent Regulations" column.)

In this first of a continuing series on non-substantive, procedural issues that practitioners should be aware of in handling landlord-tenant litigation, we have just touched on a few examples. As to each, our intent has been to give only an idea of what is involved. Obviously, each could be the subject of a much more detailed discussion. Our goal, however, is to bring as many such issues to the practitioners' attention as possible. In our next article, we will consider other examples of non-substantive, procedural issues.

1. New York Law Journal, Feb. 16, 2005, p. 22, col. 3 (Civ. Ct. N.Y. Co.).
2. NYLJ, Dec. 1, 2004, p. 25, col. 1 (Civ. Ct. N.Y. Co.).
3. See note 2 at col. 2. The citation omitted from the quoted passage was to *Gershel v. Porr*, 89 NY2d 327, 653 NYS2d 82 (1996).
4. NYLJ, Feb. 16, 2005, p. 23, col. 1 (Civ. Ct. N.Y. Co.).
5. See note 4.
6. 2 NY3d 472, 779 NYS2d 808 (2004).
7. The case law to which the court cited was *Dashew v. Cantor*, 85 AD2d 619, 445 NYS2d 24 (2nd Dept 1981), and *Messina v. County of Nassau*, 147 Misc.2d 889, 557 NYS2d 837 (Sup. Ct. Nassau Co. 1990).
8. NYLJ, Dec. 8, 2004, p. 18, col. 1 (Civ. Ct. N.Y. Co.).
9. See note 8 at col. 3.
10. NYLJ, March 30, 2005, p. 23, col. 1 (Civ. Ct. N.Y. Co.).
11. 117 Misc2d 957, 460 NYS2d 862 (App. T. 1st Dep't 1983).
12. 117 Misc2d at 958.
13. 186 Misc2d 170, 718 NYS2d 131 (Sup. Ct. Nassau Co. 2000).

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