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Procedural Issues

Practitioners' Focus Should Extend Beyond Merits
Warren A. Estis, a founding partner at Rosenberg & Estis, and William J. Robbins, a partner at the firm, review the recent decision in *Third Lenox Terrace Associates v. Jones*, where the motion to dismiss was denied in its entirety. The court's discussion, however, is a useful primer on the criteria and legal principles relevant to the particular defenses that were raised.

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A recent decision by Acting Justice Ruben A. Martino of the Civil Court, New York County in *Third Lenox Terrace Associates v. Jones*[1] is a reminder that practitioners need to be concerned about more than just the merits of the underlying substantive claim in a particular proceeding. Attention also must be paid to what might be called non-substantive, procedural issues. We discuss here the particular procedural issues that the court addressed in *Third Lenox Terrace* and the court's reasoning in dealing with those issues.

The case was a non-primary residence holdover proceeding initially commenced against the tenant of record Raymond Jones and against John Doe/Jane Doe. The respondent moved to dismiss pursuant to CPLR 3211 on the grounds that: (1) the pendency of a non-payment proceeding between the parties purportedly required dismissal of the holdover proceeding, (2) petitioner supposedly could not use a John Doe/Jane Doe designation because it was aware of the true identity of the occupant, and (3) service of the notice of petition and petition was allegedly improper. Petitioner cross-moved to strike the personal jurisdiction defense and to add Keith Raymond Jones as a party respondent.

On the issue of the effect, if any, of the non-payment proceeding on the petitioner's ability to go forward with the holdover proceeding, the court began its analysis by setting forth certain relevant legal propositions. The court stated that:

> Generally, if a landlord initiates a holdover proceeding and then commences a nonpayment proceeding, the nonpayment case operates as a waiver of the right to proceed with the holdover because it reaffirms the tenancy.

In support of that proposition, the court cited a 1987 Appellate Term, First Department decision in *Berkeley Associates Co. v. Gersten*[2] where the appellate court stated that "the commencement of the later nonpayment proceeding vitiated the dormant holdover."

The court then noted the following exception to that general proposition:

> However, where a nonpayment proceeding is brought prior to the termination of the lease, a landlord may continue with the nonpayment as long as its actions do not suggest that the tenancy is still in effect.

In support of that principle, it cited a 2006 Supreme Court, New York County decision in *1050 Tenants Corp. v. Lapidus*.[3]

In *1050 Tenants Corp.* the defendants argued that the plaintiff had purportedly waived the right to bring a Supreme Court ejectment action because, after termination of the lease on June 15, 2005, plaintiff had continued a 2004 non-payment proceeding against them and obtained a money judgment which included rent through the beginning of September 2005. Justice Marilyn G. Diamond rejected that argument, stating:

> The fact that while a nonpayment proceeding is pending, an event occurs which the landlord believes terminates the tenancy hardly requires that the landlord discontinue the pending proceeding so long as the landlord, after the attempted termination of the lease, does not make any representation or assert any argument in the nonpayment proceeding which suggests that the lease is still in effect.[4]

The court in *1050 Tenants Corp.* noted that far from making any representation or argument in the non-payment proceeding suggesting that the lease was still in effect, the landlord had advised the judge handling that proceeding of its decision to terminate the defendants' tenancy.

The *1050 Tenants Corp.* court also found "no significance" to the fact that the money judgment issued by the Civil Court in the non-payment proceeding included monies due up to and including a date approximately two and one-half months after termination of the lease. The court pointed out that under RPAPL 711(1), the landlord could accept rent after the commencement of a holdover proceeding without waiving its right to assert that the lease had been terminated. The court reasoned that "[i]f a landlord may accept rent after commencing a holdover proceeding, a Civil Court may surely issue an order in a pending nonpayment proceeding directing the payment of monies which became due after the commencement of the holdover proceeding."

Similarly, the court in *Third Lenox Terrace* held that under the facts of the case before it, the petitioner "did not reaffirm the tenancy and waive its right to continue the holdover." The court noted that the non-payment proceeding had been commenced before service of the termination notice and only sought rent due while the lease was still in effect. Moreover, a stipulation entered into between the parties required the tenant to pay only rent due prior to the expiration of the lease and that rent was to be paid on the last day of the term.

When the tenant failed to pay that rent, the tenant "obtained an order to show cause to avoid an eviction and sought an extension." The matter was adjourned a number of times in hope of settlement, with petitioner "maintain[ing] the position that it did not want to continue the tenancy or waive its rights under the pending holdover." When the court, over petitioner's objection, had extended the respondent's time to pay to avoid an eviction, it "did so without prejudice to the holdover proceeding as requested by the petitioner."

Given these circumstances, Acting Justice Martino held that the petitioner had not waived its right to proceed in the holdover case and had not reaffirmed the tenancy. Accordingly, the court denied that part of the motion seeking dismissal based on the non-payment case.

As to the second ground of respondent's motion to dismiss, i.e., the issue of using the John Doe/Jane Doe designation, CPLR 1024 provides that:

> A party who is ignorant, in whole in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known.

Typically, in a summary proceeding, a landlord will name as respondents not only the tenant of record but also all occupants of the premises. That is done so that if a judgment of possession is obtained, all those actually occupying the premises can be evicted. As the Appellate Division, First Department, stated in *170 West 85th Street Tenants Association v. Cruz*,[5] a 1991 case cited by the court in *Third Lenox Terrace*:

> The rights of a person whose claim to possession derives from the lessee are subordinate and are extinguished by a judgment of possession in favor of the lessor. Due process requires only that, for the warrant to be effective against a subtenant, licensee or occupant, he be made a party to the proceeding, either by naming him in and serving him with the petition and notice of petition or by joining him as a party during the pendency of the proceeding (CPLR 401; NYCCCA §110[d].[6]

When the landlord is not certain who may be in possession of an apartment in addition to the tenant of record, the landlord will generally name John Doe and Jane Doe as respondents-undertenants of the tenant and allege that the tenant and respondents-undertenants are in possession of the premises without the landlord's permission. In *Third Lenox Terrace*, the respondent alleged, however, that petitioner could not use a John Doe/Jane Doe designation for the respondent other than the tenant of record because "[p]etitioner was made aware of the identity of the occupant by letter, prior court proceedings and respondent's attorney's representation."

Citing *Triborough Bridge and Tunnel Authority v. Wimpfheimer,*[7] a 1995 Appellate Term, First Department decision, the court stated that "[a] petitioner may not use a fictitious name for a party under CPLR 1024 if it knows the name of that party." In *Triborough Bridge and Tunnel Authority*, a commercial holdover proceeding, the Civil Court had granted summary judgment dismissing the petition on the ground that subtenants whose names and identities were known to the landlord prior to commencement of the proceeding were improperly designated as John Doe and Jane Doe, and that the subtenants were necessary parties without whom complete relief could not be accorded.

The Appellate Term agreed that a fictitious name designation could not be used under such circumstances and that dismissal was warranted against the subtenants. However, the Appellate Term held that the subtenants were only "proper" parties to the holdover proceeding, not "necessary" parties whose presence was indispensable to the according of complete relief as between landlord and tenant. Accordingly, the Appellate Term held that the petition should not have been dismissed against the tenants, and the court reinstated the petition against the tenants. The court further noted that "[l]andlord, if so advised, may apply for joinder of the subtenants as additional named parties, so that any warrant obtained in this proceeding will be effective against them."

In *Third Lenox Terrace*, the court noted that by cross-moving to join Keith Raymond Jones, the petitioner in essence had conceded that it could not use a fictitious name if it knew the real name. The court, however, did not find that concession fatal, stating:

> A court should allow joinder of a necessary party without dismissal when possible . . . . Dismissal is not mandated in this case because Keith Raymond Jones' rights are subordinate to that of the tenant of record and due process requires only that he be made a party so that the warrant, if obtained, would be effective against him.[8]

Based on this analysis, the court granted the petitioner's cross-motion to the extent of joining Keith Raymond Jones as a respondent and directed that the caption and papers were amended accordingly. Noting that a copy of the petition and notice of petition were annexed to the cross-motion which had been served on respondent Keith Raymond Jones, the court deemed that to be sufficient. It denied that part of the motion seeking dismissal of the proceeding for use of a fictitious name.

The third ground on which respondent sought dismissal was a service-related defense. There were two parts to that defense, i.e., that Keith Raymond Jones had not been served and that the petition and notice of petition allegedly were not properly served at the premises that petitioner claimed was the tenant's primary residence. The court held that the first part of the service defense was mooted out by the granting of petitioner's cross-motion to join Keith Raymond Jones.

The court held that the second part of the service defense was "conclusory and insufficient to require a hearing." The court explained:

> The process server's affidavit claims that requisite mailings were made to the alternate address as required by [RPAPL] 735(1)(a). Respondent provides no facts alleging how or why that service was improper. He merely claims that service was not made at the alternate address. Without alleging detailed and specific allegations, the defense is not properly raised and there is no need for a hearing.[9]

Accordingly, the court denied respondent's motion to dismiss for lack of service and granted petitioner's cross-motion to strike the personal jurisdiction defense.

In short, the motion to dismiss in *Third Lenox Terrace* was denied in its entirety. The court's discussion, however, is a useful primer on the criteria and legal principles relevant to the particular defenses that were raised.

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Endnotes:

1. NYLJ April 2, 2008, p. 27, col. 3 (Civ. Ct. N.Y. Co.).

2. 15 HCR 142B, NYLJ, May 7, 1987, p. 13, col. 3 (A.T. 1st Dep't).

3. 12 Misc.3d 1196(A), 824 N.Y.S.2d 769, 2006 WL 2367490 (Sup. Ct. N.Y. Co. 2006).

4. 2006 WL 2367490 at 5.

5. 173 A.D.2d 338, 569 N.Y.S.2d 705 (1st Dep't) 1991).

6. 173 A.D.2d at 339-40, 569 N.Y.S.2d at 707.

7. 165 Misc.2d 584, 633 N.Y.S.2d 695 (A.T. 1st Dep't 1995).

8. NYLJ April 2, 2008, p. 27 at col. 4.

9 Id.

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