Procedural Issues

Avoiding Non-Substantive Litigation Land Mines
Warren A. Estis, a founding partner of Rosenberg & Estis, and William J. Robbins, a partner at the firm, write that there are myriad procedural issues that can give rise to motion practice in a summary proceeding. They are a mine field for attorneys representing landlords and a gold mine for counsel to tenants.

Warren A. Estis and William J. Robbins

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This continues our series on non-substantive, procedural issues that practitioners should be aware of in handling landlord-tenant litigation.[1] We discuss here (1) deficiencies in the content of a predicate notice to cure; (2) failure to timely file an affidavit of service in order to complete service under Real Property Actions and Proceedings Law (RPAPL) §735; and (3) failure to comply with the notice publication requirements of the Limited Liability Company Law in connection with the formation of such a company. Our intent is to alert practitioners to examples of the multiple kinds of details they should consider in handling a summary proceeding, rather than exhaustively to discuss any particular procedural issue.

Notice to Cure

In a decision in *200 West 58th Street LLC v. Little Egypt Corp.*[2], Judge Lucy A. Billings of Civil Court, New York County, addressed the consequences of a partially deficient notice to cure. In that case, the notice to cure cited three alleged lease violations as grounds for terminating the tenancy. The court found two of the violations to be insufficiently alleged and one to be adequately stated. The issue the court confronted, which it described as an issue of first impression, was "whether [the] sufficiently alleged ground for termination saves the notice to cure and permits petitioner to proceed on this ground while disregarding the other deficient grounds."

Before discussing the court's holding, it is worth noting the basis on which the court distinguished between the sufficiently alleged and the insufficiently alleged defaults. Citing the Court of Appeals decision in *Chinatown Apts. v. Chu Cho Lam*[3] and various Appellate Division, First Department decisions[4], the court stated that a notice to cure "must inform the tenant unequivocally and unambiguously how it has violated the lease and the conduct required to prevent eviction." The purported lease violation the court found to be sufficiently stated in the notice to cure satisfied that two-fold requirement, while the other two purported violations did not.

For example, one of the violations the court found to be inadequately set forth in the notice to cure claimed that the respondent had interfered with co-tenants' quiet enjoyment of their premises "by blocking access to other stores and by utilizing the space in front of the barber shop." The court explained the deficiency as follows:

While referring to the barber shop, the notice does not identify any of the other multiple 'stores' allegedly blocked to which the notice refers in a separate phrase. Thus the notice to cure again fails to notify respondent how to avoid termination of the lease. This . . . is further defective because it does not state how the conduct complained of violates the lease . . . While the lease refers to a covenant of quiet enjoyment, it relates only to petitioner's covenant to the tenants and does not impose that obligation between tenants.[5]

As to the other defectively alleged lease violation, that charged the respondent with "selling merchandise in direct competition" with co-tenants by "selling the same merchandise as other tenants in the building at a substantially lower price." The flaw here, according to the court, is that neither the co-tenants nor the merchandise is identified. Therefore, the respondent "knows neither what the competing merchandise is, nor whether to cease selling the offending merchandise or sell it at a raised price to avoid eviction."

The court held that the partially deficient notice to cure was invalid in full. To allow partial validation of the notice, the court reasoned, would give landlords "license to issue notices containing one sufficient charge and cure among a myriad of unfathomable charges and cures, in the hope that one might stand up." In the meantime, according to the court, the tenant would be put in the precarious position of not knowing what to do to maintain its tenancy. By the time a court determines which grounds for termination are valid and must be addressed, the time for curing and preparing a defense may have passed.

The court noted that because a predicate notice is a condition precedent to a summary eviction proceeding, defects cannot be remedied by amending or supplementing a notice after the proceeding has been commenced. Accordingly, the court granted the motion to dismiss the petition. Since there had been no determination on the merits of the alleged default, the landlord was "free to serve another, adequate notice incorporating the previously adequate charges and remedying the previously inadequate charges."

Acquisition America VI, LLC v. Lamadore[6] is another Civil Court, New York County case where the court viewed itself as addressing a particular procedural question on which "there appears to be no New York authority." The issue there was whether a limited liability company can cure a publication defect after having commenced a summary proceeding.

Publication Defect

Section 206 of the Limited Liability Company Law requires publication, within 120 days after the effectiveness of the initial articles of organization of the company, of a notice containing specified information about the limited liability company. Proof of such publication must be filed with the Department of State within a specified time period. That same section provides that a failure to publish and file "shall prohibit the limited liability company from maintaining any action or special proceeding" in New York "unless and until" it complies.

In *Acquisition America*, the respondents sought dismissal of a non-primary residence holdover proceeding because of the petitioner's failure to comply with these publication requirements. The petitioner did not dispute its non-compliance, but, at oral argument of the motion, stated that it was in the process of curing and expected to be in compliance by the following month.

Judge Joseph E. Capella denied the respondents' motion and held that the petitioner was not precluded from commencing the proceeding and was entitled to cure the publication defect. The court relied on case law involving other statutes. It found support for doing so in the statement by the Appellate Division, First Department in *Barklee v. Pataki*[7] that "Section 206 [of the Limited Liability Company Law], rather than being extraordinary in any way, is typical of similar laws in New York and elsewhere that condition access to state court on compliance with various administrative requirements."

Judge Capella referred to Business Corporation Law §1312, which provides that a foreign corporation doing business in New York without authority shall not maintain any action in this state until it has been authorized to do business in this state and has paid all fees, penalties and franchise taxes for the years it did business in the state without authority. The court noted that there was case law holding that Business Corporation Law §1312 does not preclude such a foreign corporation from commencing an action, nor does it require the immediate dismissal of an already instituted action. Rather, upon compliance with the statute, a previously commenced action may be maintained.[8]

The court also looked to the example of Multiple Dwelling Law §325(2). That statute provides that an owner which fails to properly register a multiple dwelling cannot maintain a summary eviction proceeding. The court cited case authority which it summarized as holding that the statute "does not require an owner to forever forfeit the rent due from the period of non-compliance; instead, the proceeding may be stayed until compliance is complete."[9]

In addition to how these other statutes have been interpreted, the court in *Acquisition America* also based its holding on what it referred to as "the plain language of LLC Law §206." The court did not elaborate on its reference to "the plain language" of the statute. Presumably, what the court was focusing on is that the statute prohibits a non-complying entity from "maintaining" any action or special proceeding, which is defined in the dictionary as "continuing" or "carrying on." The statute does not prohibit a non-complying entity from "commencing" an action or proceeding.

In *K.N.W. Associates v. Parish*[10], Judge Ruben A. Martino of the Civil Court, New York County addressed another procedural issue, namely, whether a failure to comply with the service requirements of RPAPL §733(1) mandates dismissal of the proceeding. That statute provides that, except as to non-payment proceedings governed by RPAPL §732, the notice of petition and petition "shall be served at least five and not more than twelve days before the time at which the

petition is noticed to be heard." RPAPL §735(2)(b) provides that when service is made by suitable age and discretion service or conspicuous place service, proof of service must be filed within three days after mailing, and service is complete upon the filing of proof of service.

In *K.N.W. Associates*, the petitioner relied on conspicuous place service. It nailed on July 17, 2004; mailed on July 19, 2004; filed proof of service on July 23, 2004; and the return date was July 26, 2004. Thus, petitioner failed to comply with both the above-referenced statutory requirements. It filed the proof of service four days after mailing instead of three. Since service was not complete until July 23, 2004, there were only three days between service and the return date, rather than the required minimum of five days.

The respondent moved to dismiss the petition, arguing that the failure to serve within the time constraints mandated by RPAPL §733(1) is a non-curable jurisdictional defect. Petitioner cross-moved for nunc pro tunc filing of the affidavit of service pursuant to §411 of the New York City Civil Court Act. That statute provides that where a summons or a petition or notice of petition has not been filed within the time prescribed by law, the court may order its filing nunc pro tunc. It further provides that in such case, "the time within which the other party must respond thereto shall commence de novo, and shall run from the service upon such other party of a copy of such order with notice of entry thereof."

The court concluded that "the untimely filing of the affidavit of service" is not a jurisdictional defect and respondent had "shown no prejudice" from the filing defect. Accordingly, the court denied the motion to dismiss and granted the petitioner's cross-motion for nunc pro tunc filing of the affidavit of service. In so holding, the court relied on the Appellate Term, First Department decision *Jamal Estates v. Crockwell*[11], and a line of cases it concluded showed that the "Appellate Term has consistently relied on *Jamal*."[12] It described *Jamal* as a case in which "the Appellate Term of this Department specifically held that nunc pro tunc relief under CCA [Civil Court Act] 411 is available to remedy a violation of RPAPL §733 if there is no prejudice." It rejected the respondent's contention that Jamal had been implicitly overruled by a subsequent Appellate Division, First Department decision in *Berkeley Associates Co. v. DiNolfi*.[13]

The *K.N.W. Associates* court concluded, for various reasons, that the respondent had failed to demonstrate any prejudice. The court pointed out that if the petitioner had filed the affidavit of service on either July 19 or July 20, then the return date of July 26 would have been proper, but "there would have been absolutely no change in the notice afforded the respondent since the nailing and mailing dates would not have been affected." It noted that the respondent had apparently received notice and appeared on the first return date. Moreover, the court stated, upon the granting of the nunc pro tunc motion under the New York Civil Court Act §411, the respondent's time to respond commenced de novo, thus "giving them more time to prepare any defenses."

In a decision approximately a year earlier in *445 East 85th Street, L.L.C. v. Phillips*14, Judge Gerald Lebovits of Civil Court, New York County had reached an opposite conclusion from that reached by Judge Capella in *K.N.W. Associates.* (In his decision, Judge Capella acknowledged this earlier decision, but expressed his disagreement with it.) In that case, the court dismissed a non-primary residence holdover proceeding for lack of jurisdiction where the landlord had fallen short of the minimum five-day requirement of RPAPL §733(1). The landlord then moved to permit the nunc pro tunc filing of the petition, notice of petition and affidavit of service to remedy its non-compliance. The court denied that motion.

Judge Lebovits distinguished between late filing under RPAPL §735(2)(b) and short filing in violation of RPAPL §733(1). The court stated that "[t]he jurisprudence is unanimous" that "late filing is a non-jurisdictional defect that a nunc pro tunc order can remedy." It concluded, however, that short filing was quite another matter; it was a jurisdictional defect. In its view, the *Jamal* case (upon which the *K.N.W. Associates* court significantly relied) imprecisely "conflated short-filing analysis with late-filing analysis." The court in *445 East 85th Street* relied on the Appellate Division, First Department decision in *Berkeley Associates*. It described that case as having "flatly overruled *Jamal's* reasoning, rationale and ratio decidendi." It emphasized that "the *Berkeley* majority does not inject a prejudice requirement when it strictly construed RPAPL 733(1) to dismiss the petition."

In any event, Judge Lebovits continued, if prejudice were a factor, dismissal of the petition and refusal of nunc pro tunc relief was appropriate because "landlord's short filing on the eve of the New Year prejudiced tenant." The tenant had not appeared in court on Jan. 2, 2003, the petition's return date, allegedly because she had no idea that a legal action had been commenced. The court seemed particularly troubled by the fact that not only was there short filing, but the particular too-early return date chosen by the petitioner was right before the New Year. The court, at one period, commented that "the tenant could have been forced to spend New Year's Eve and Day scrambling," and noted that the court had clocked in the petition on Dec. 10, 2002, but the landlord "then waited over two weeks before serving tenant."

In short, as shown here and in our prior article, there are myriad procedural issues that can give rise to motion practice in a summary proceeding. They are a mine field for attorneys representing landlords and a gold mine for counsel to tenants.

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

Endnotes:

1. See Warren A. Estis and William J. Robbins, "Procedural Issues: Avoiding Dismissal on Non-Substantive Grounds,"NYLJ, April 6, 2005, p. 5.

2. NYLJ, March 9, 2005, p. 19, col. 1 (Civ. Ct. N.Y. Co.), 33 HCR 168A.

3. 51 NY2d 786, 433 NYS.2d 86 (1980).

4. Greenfield v. Etts Enterprises, Inc., 177 A.D.2d 365, 576 NYS.2d 108 (1st Dept. 1991), Garland v. Titan West Associates, 147 AD2d 304, 543 NYS2d 56 (1st Dept. 1989), Filmtrucks, Inc. v. Express Industries & Terminal Corp., 127 AD2d 509, 511 NYS2d 862 (1st Dept. 1987).

5. NYLJ, March 9, 2005, p. 19, at col. 3, 33 HCR at 168.

6. NYLJ, Sept. 14, 2004, p. 19, col. 1 (Civ. Ct. N.Y. Co.).

7. 309 AD2d 310, 765 NYS2d 599 (1st Dept. 2003).

8. The cases cited were Oxford Paper Co. v. S.M. Liquidation Co., 45 Misc2d 612, 257 NYS2d 395 (Sup. Ct. N.Y. Co. 1965), and McIntosh Builders, Inc. v. Ball, 247 AD2d 103, 678 NYS2d 810 (3d Dep't 1998).

9. The case cited was 128 East v. Kagan, NYLJ, Oct. 6, 1987, p. 14, col. 1 (A.T. 1st Dep't).

10. 5 Misc.3d 1019(A), 2004 WL 2709535 (Civ. Ct. N.Y. Co. 2004).

11. 113 Misc.2d 548, 453 N.Y.S.2d 134 (A.T. 1st Dep't 1982).

12. Those cases were Farm Equities & Mgt. Co. v. Malcolm, NYLJ, Oct. 28, 1996, p. 27, col. 4 (A.T. 1st Dep't); Ardowort Corp. v. Bierly, NYLJ, March 21, 1994, p. 29, col. 6 (A.T. 1st Dep't); Freidlander v. Ramos, 3 Misc.3d 33, 779 N.Y.S.2d 327 (A.T. 2nd & 11th Dept 2004).

13. 122 AD2d 703, 505 NYS 2d 630 (1st Dep't 1986), lv dismissed 69 N.Y.2d 804 (1986).

14. 2063 WL 22170112 (Civ. Ct. N.Y. Co. 2003).
