Tenants Not Always Afforded 'Mandatory' 10-Day Stay

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It is now almost 30 years since Real Property Actions and Proceedings Law (RPAPL) Section 753 was amended on July 29, 1982 to add a new subdivision 4. This subdivision provides that in a residential summary holdover proceeding in the city of New York:

based upon a claim that the tenant or lessee has breached a provision of the lease, the court *shall* grant a ten day stay of issuance of the warrant, during which time the respondent may correct such breach (emphasis supplied).

The language of the statute—stating that the court "shall" grant a 10-day stay—is mandatory on its face and does not give courts discretion with respect to the issuance of the stay. Indeed, in the Court of Appeals' seminal 1984 decision *Post v. 120 East End Ave. Corp.*,[1] the Court interpreted RPAPL 753(4) as "impress[ing] its terms on residential leases" and providing for a "*mandatory* stay of removal" (emphasis supplied) from possession and an "opportunity to cure," by:

authorizing Civil Court at the conclusion of summary proceedings to impose a permanent injunction in favor of the tenant barring forfeiture of the lease for the violation in dispute if the tenant cures within 10 days. Under this interpretation the statute would necessarily protect against any other losses incident to forfeiture…[2]

As the Court of Appeals stated in *Post*, RPAPL 753(4) "[i]n effect…gives the losing tenant what he would receive with a *Yellowstone* injunction in a Supreme Court action after losing, a period of time to cure the violation before being subject to removal."[3]

Following *Post*, numerous appellate courts have observed that the 10-day stay is a mandatory requirement imposed by the statute.[4] Nevertheless, as the Appellate Division, First Department recently reminded us in its unanimous decision in *259 West 12th, LLC v. Grossberg*, 89 A.D.3d 585, 933 N.Y.S.2d 256 (1st Dept. 2011), courts have declined to afford the tenant the benefit of the "mandatory" 10-day stay in certain circumstances, particularly where the court finds that the default is incapable of being cured within the 10-day period.

'Grossberg'

In *Grossberg*, the landlord had commenced a summary holdover proceeding against the tenant of a rent-stabilized apartment in Manhattan, based on the tenant having made substantial alterations to the bathroom without the landlord's consent and in violation of law. The Civil Court (Lebovits, J.), after trial, found that the tenant's unauthorized "demolishing and replacing of the bathroom walls was a substantial alteration" that violated the lease, in that it "caused a lasting or permanent injury to the premises." The court also found that the tenant substantially violated the lease by having renovated the bathroom walls in violation of Department of Buildings' and Landmarks Preservation Commission's regulations by, inter alia, having failed to (1) file plans and secure necessary permits or approvals, (2) conduct an asbestos test before removing the walls, and (3) insure that the new walls had the proper fire rating to contain a fire.[5] Thus, the court awarded a judgment of possession in favor of the landlord, but held that the tenant was "entitled to a 10-day stay to cure the substantial violations" under RPAPL 753(4).[6]

The landlord appealed to the Appellate Term, First Department from the portion of the Civil Court's judgment that afforded the tenant a post-judgment opportunity to cure under RPAPL 753(4). In a unanimous opinion, the Appellate Term vacated so much of the Civil Court's judgment that provided the tenant with the 10-day stay, finding that the tenant's prohibited alterations, which "'caused a lasting and permanent injury' to the landlord's reversionary interest," was "not capable of any meaningful cure." The court stated:

[t]he unlawful alterations effected by the tenant's demolition of the existing bathroom—alterations which were not shown to be necessary to make the apartment premises usable, but which merely reflect an "attitude of personal preference and vagarious choice in arbitrary interior reconstruction and decoration" [citation omitted]—were not capable of any meaningful cure.[7]

On the tenant's appeal, the Appellate Division, First Department, in a unanimous opinion issued by Justices Richard Andrias, David Friedman, Dianne Renwick, Leland DeGrasse and Sheila Abdus-Salaam, affirmed the Appellate Term, finding that it had correctly determined that the "lasting or permanent injury to the premises by demolition of the existing bathroom was not capable of any meaningful cure."[8] The court was careful to note that the tenant's unauthorized alterations "exposed the residents of the building to dangers like asbestos and fire, and the landlord to numerous

violations, fines and lawsuits."[9]

The court emphasized that "implicit in [the] mandatory directive" set forth in the statute "is that the breach may be cured." In so stating, the court referred to the sponsor's memorandum in support of the amendment adding subdivision (4), which stated that it was designed to cover breaches "temporary in nature correctable within the ten day period."[10] Thus, the court held that:

[b]ecause the tenant in this case caused a lasting or permanent injury to the premises, she was not entitled to any stay for the purpose of correcting an uncorrectable breach.[11]

Pre-'Grossberg' Decisions

Prior to *Grossberg*, there had been decisions from other courts holding that the RPAPL 753(4) "mandatory" 10-day stay is unavailable to tenants in other contexts, such as where the tenant has engaged in a pattern of chronic rent defaults or has illegally sublet the premises.

In *Adams Tower Ltd. Partnership v. Richter*,[12] the Appellate Term, First Department held that the tenant was not entitled to a "post-judgment cure" under RPAPL 753(4) in a holdover proceeding based on the tenant's history of chronic late rent payments and repeated nonpayment proceedings, in that the "cumulative pattern of tenant's course of conduct was incapable of 'cure' within ten days."[13] The court noted that "[t]he fact that a lease or statute provides time for a cure 'does not necessarily imply that a means or method to cure must exist in every case.'"[14]

In *Ocean Farragut Assocs. v. Sawyer*,[15] the Kings County Civil Court held similarly in a holdover proceeding based on the tenant's chronic late payment of rent. Discussing the applicability of RPAPL 753(4) to chronic rent defaults, the court stated:

The question herein is: can Tenant's failure to pay rent on time causing the Landlord to issue numerous non-payment dispossesses and Tenant's issuance of numerous bad checks the type of default that can be cured within the ten day grace period set forth in RPAPL 753(4)? While the removal of an illegal condition can be cured within ten days, the Court cannot fathom how you can cure a prior course of wrongful conduct.

Thus, the Civil Court concluded that:

the course of conduct of the Tenant has been such that it is not curable in ten days and it is in fact incurable. Therefore, RPAPL Section 753(4) does not apply, especially as this proceeding is based upon the irresponsible course of conduct of the tenant and upon a breach of the lease per se.[16]

In *151-155 Atlantic Ave. Inc. v. Pendry*[17] the Appellate Division, Second Department held in a different context that where the rent stabilized tenant had violated the anti-subletting provision of the subject lease and overcharged the subtenants for the use of the premises, the tenant was not entitled to the benefit of the RPAPL 753(4) 10-day stay, notwithstanding that the tenant had "cured her breach by removing the subtenants from the premises."[18] The court held that:

RPAPL 753(4) is not to be mechanically applied to defeat the purpose of the rent stabilization provisions…. Where, as here, there has been a substantial surcharge by the tenant, the tenant should not be able to cure the lease violation.[19]

The court went on to state that "[t]he conduct of a profiteering rent-stabilized tenant 'is not to be condoned by permitting the tenant to remain after the fraud has been found out.'"[20]

In *Continental Towers Ltd. Partnership v. Freuman*,[21] the Appellate Term, First Department reached the same conclusion with respect to a rent stabilized tenant who was found to have been overcharging a subtenant in violation of the Rent Stabilization Law. The Appellate Term observed that "[t]he cure provision contained in subdivision 4 of RPAPL §753 is not to be rotely applied in all cases" and that "a cure in these circumstances would not be in furtherance of the public interest."[22]

Thus, the RPAPL 753(4) stay is clearly not automatic. One must examine the nature of the default, and what is required to cure, in order to determine whether the tenant will be afforded the benefit of the 10-day stay.

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Endnotes:

1. 62 N.Y.2d 19, 475 N.Y.S.2d 821 (1984).

2. 62 N.Y.2d at 27.

3. Id. at 26.

4. See e.g., *Thompson v. 490 West End Apartments Corp.*, 252 A.D.2d 430 at 436, 676 N.Y.S.2d 73 at 77 (1st Dept. 1998) ("[t]he case law has made clear that the tenant must be afforded 10 days from the judgment of possession to cure the violation" [italics supplied]); *1225 Realty Corp. v. Bethea*, 10 Misc. 3d 143(A), 814 N.Y.S.2d 891 (App. Term 1st Dept. 2006) ("tenant was entitled to the benefit of the mandatory cure provision of RPAPL 753(4)"); *Landmark Properties v. Olivo*, 10 Misc. 3d 1, at 3, 805 N.Y.S.2d 774, at 776 (App. Term 9th and 10th Jud. Dists. 2005) ("RPAPL 753(4) provides a mandatory 10-day post-judgment cure period for holdover proceedings involving breach of substantial obligations of the tenancy").

5. 14 Misc. 3d 1234(A), at *3-4, 836 N.Y.S.2d 504 (Civ. Ct. N.Y. Co. 2007).

6. Id.

7. 28 Misc. 3d 132(A), 2010 WL 2927202 (App. Term 1st Dept. 2010).

8. 89 A.D.3d at 585.

9. Id.

10. Id.

11. Id.

12. 186 Misc. 2d 620, 717 N.Y.S.2d 825 (App. Term 1st Dept. 2000).

13. 186 Misc. 2d at 621.

14. Id.

15. 119 Misc. 2d 712, 464 N.Y.S.2d 346 (Civ. Ct. Kings Co. 1983).

16. Id.

17. 308 A.D.2d 543, 764 N.Y.S.2d 852 (2d Dept. 2003).

18. 308 A.D.2d at 543.

19. Id. at 543-44.

20. Id. at 544.

21. 128 Misc. 2d 680, 494 N.Y.S.2d 595 (App. Term 1st Dept. 1985).

22. 128 Misc. 2d at 681.
