

New York Law Journal

Real Estate Trends

WWW.NYLJ.COM

VOLUME 259—NO. 108

An ALM Publication

WEDNESDAY, JUNE 6, 2018

LANDLORD-TENANT LAW

Amending Petitions In Nonpayment Cases



By
**Warren A.
Estis**



And
**Michael E.
Feinstein**

New York Real Property Actions and Proceedings Law §711(2) provides that a special proceeding may be maintained when a tenant defaults on the rent due under a lease agreement and the rent has been demanded from the tenant in person or pursuant to written notice. The service of a “rent demand” is considered a “predicate notice” to the commencement of such a summary “nonpayment” proceeding, and is required to contain a “good faith approximation” of the rent that a tenant would have to pay to avoid litigation. See *Dendy v. McAlpine*, 27 Misc.3d 138(A) (App. Term 2d Dep’t 2010).



RAMIN TALAEI/BLOOMBERG NEWS

NEW YORK Real Property Actions and Proceedings Law §711(2) provides that a special proceeding may be maintained when a tenant defaults on the rent due under a lease agreement and the rent has been demanded from the tenant in person or pursuant to written notice.

The Question

Needless to say, subsequent to a rent demand being served and the nonpayment petition being filed, unpaid rent may continue to accrue up through the date of trial. The question which then arises is

whether a new rent demand must be served in order to amend the petition to obtain judgment for unpaid rent which accrued subsequent to the filing of the petition. This question was addressed just last month by Judge Sabrina Kraus of Civil Court, Bronx County, in *576 E. 187th St. Bronx LLC v. Hizan Deli Grocery Corp.*, Index No. LT-900546/17 (Civ. Ct. Bronx Co. May 9, 2018)

(“*Hizan*”). In *Hizan*, the Court held that it is appropriate to amend the petition to include all rents due through the date of trial, without the need for a new rent demand.

‘Hizan’

At the outset, the court in *Hizan* observed that the Appellate Term, First Department had previously held, in a 1979 decision in *1587 Broad-*

WARREN A. ESTIS is a founding member at Rosenberg & Estis. MICHAEL E. FEINSTEIN is a member at the firm.

way Rest. Corp. v. Magic Pyramid, NYLJ, Dec. 19, 1979, at 10, col. 2 (App. Term, 1st Dept. 1979), that a new rent demand must be served in order for the landlord to amend the petition to include rent which accrued after the date of the petition. The court noted that while some trial courts thereafter followed the Appellate Term's decision in *1587 Broadway*, others declined to do so, finding that there is no statutory basis to require multiple rent demands in a single proceeding, and that such a requirement is contrary to the speedy nature of summary proceedings.

Judge Kraus then went on explain that more recent Appellate Term decisions had held that a motion to amend the petition in a nonpayment proceeding to include all rent due through the date of trial is properly granted, without having to serve a new rent demand. The court cited a 1994 decision in *CF Monroe v. Nemeth*, NYLJ, Oct. 25, 1994, at 25, col. 1 (App. Term, 1st Dept.), in which the Appellate Term found that "[t]he court's amendment of the petition to include all past due rent up to and including the date of trial" was consistent with established practice in landlord-tenant court. The court also relied upon a 1996 decision in *GSL Enterprises v. Newlinger*, NYLJ May 24, 1996, p. 25, col 6 (App. Term 1st Dept.), in which the court, citing to *Nemeth*, held that the amendment of a nonpayment petition to include all the rent due through the date of trial was permissible and should be granted. The court in *GSL Enterprises* held that there was "no good reason why all claims for

rent arrears ... should not be determined in a single proceeding...".

The court therefore concluded "based on the more recent Appellate Term decisions and the language of the applicable statutes that a rent demand is a jurisdictional prerequisite to the maintenance of a summary nonpayment proceeding," that once the jurisdictional prerequisite is satisfied:

'Hizan' clarified that in a summary nonpayment proceeding, it is proper for the court, absent a showing of prejudice or surprise, to permit the landlord to amend the petition to include the unpaid rent which accrued subsequent to the filing of the petition, without having to serve a new rent demand.

there is no reason to treat a motion to amend the pleadings to include all rent due through the date of the trial any differently than any other motion to amend the pleadings. Absent prejudice or surprise the motion should be liberally granted.

Thus, the court permitted the landlord to amend the petition to include any rent or additional rent which accrued subsequent to the petition, without having to serve a new rent demand for such accrued rent.

The court agreed with the tenant, however, that the landlord should be precluded from using at trial an amended rent demand which it had served on the tenant, which included

certain amounts for real estate taxes not sought in the original rent demand. The court found, based in part on the decision of the Civil Court in *Solow v. Wellner*, 142 Misc.2d 383 (Civ. Ct. N.Y. County 1989), that a rent demand may not be amended and therefore the landlord's amended rent demand was a nullity.

Conclusion

In *Hizan*, the Civil Court clarified that in a summary nonpayment proceeding, it is proper for the court, absent a showing of prejudice or surprise, to permit the landlord to amend the petition to include the unpaid rent which accrued subsequent to the filing of the petition, without having to serve a new rent demand. Given that the purpose of summary proceedings is to expeditiously resolve landlord-tenant disputes, this is a logical and appropriate result.