LANDLORD-TENANT

Flaws in Content of Notice Doom Summary Proceedings

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In various past articles, we have emphasized the importance of paying attention to what might be called non-substantive, procedural issues because they can be of determinative significance in a case. A recent decision by Kings County Civil Court Judge George M. Heymann in *Williamsen v. Bugay*[1] illustrates the point. The case was a nuisance holdover proceeding. It was based on two predicate notices—a notice to cure and a notice of termination. Deficiencies in the content of the predicate notices resulted in dismissal of the proceeding.

The Ten-Day Notice to Cure alleged in relevant part:

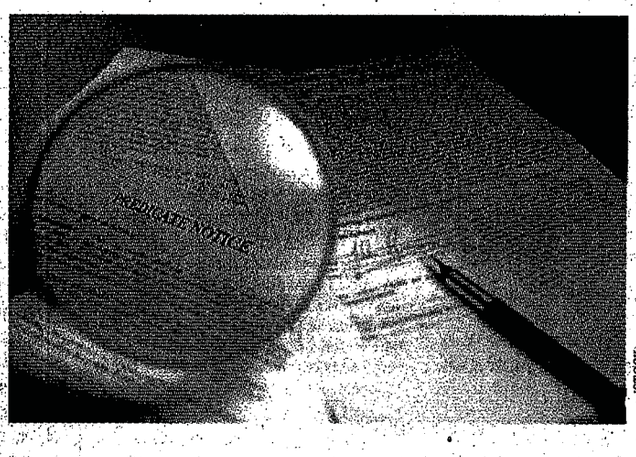
> PLEASE TAKE NOTICE that you are in violation of the terms of your lease in that you have intentionally created a nuisance by your conduct which includes but is not limited to loud noise, criminal activity in the apartment, as well as hosting the presence of a known person of ill repute known as [name was set forth in the notice, but is omitted here], for whom you have illegally sublet the premises.

The Ten Day Notice of Termination began with a paragraph identical to the above-quoted paragraph from the Notice to Cure and then continued:

> PLEASE TAKE NOTICE that YOU HAVE FAILED TO CURE THE [sic] EACH AND EVERY ONE OF THE AFOREMENTIONED CONDITIONS. Therefore any occupancy agreement you have will terminate on March 8, 2008, which is not less than ten (10) days from the date of the service of the Notice to Cure. Therefore, you must vacate and surrender the possession of the premises to the Landlord/Owner forthwith. In the event that you fail to do so, the Landlord/Owner will commence summary proceedings to recover the possession of the premises.

The court granted the tenant's motion, pursuant to CPLR 3211, to dismiss the petition based on flaws in the predicate notices. The court noted that "[a]ny one of the grounds alleged by the respondent, if proven, would be fatal to the prosecution of this proceeding," and found that "every allegation raised has been proven."

One basis asserted for dismissal was the failure to serve a predicate notice issued by the owner. The notice to cure was signed at the bottom "Lee M. Nigen, Attorney for Landlord/Owner William & Florence Williamsen." The notice of termination was also signed by the attorney.



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Section 2524.2 of the Rent Stabilization Code, captioned "Termination Notices," in subparagraph "a," refers to "the owner" as being the one who "shall have given written notice." Similarly, section 2524.3 of the Rent Stabilization Code refers to the tenant "violating a substantial allegation of his or her tenancy" and "fail[ing] to cure such violation after written notice *by the owner* ..." (emphasis added).

In the case of *Siegel v. Kentucky Fried Chicken*,[2] cited by the court in *Williamsen*, the Court of Appeals stated that:

> [A] notice of termination signed by an agent or attorney who is not named in the lease as authorized to act for the landlord in such matters, and which is not authenticated or accompanied by proof of the latter's authority to bind the landlord in giving of such notice, is legally insufficient to terminate the tenancy.[3]

In *Williamsen*, the tenant claimed that prior to receiving the notice to cure, he had no knowledge of who Mr. Nigen, the signer of the notice to cure, was. The court stated that the notice to cure was not accompanied by any letter of authorization signed by the owner nor was any proof submitted that Mr. Nigen had been designated in the lease to sign notices on the owner's behalf.

The court rejected the landlord's attempt to rely on the cases of *152 W. Realty, LLC v. N&G Luggages Inc.*[4] and *Ohday Realty Corp. v. Lupone*[5] to defeat tenant's argument. In those cases, Judge Heymann stated, the courts had refused to dismiss the petitions even though the owner had not signed the notices because "it was established that the agents who signed the notices had previous dealings with the tenants."

By contrast, in *Williamsen*, the court pointed out, the only contact between the tenant and the attorney signing the predicate notices was that after service of the notice to cure, and in response to it, the tenant had e-mailed and sent a handwritten letter to that attorney. The court concluded that such contact "cannot by any stretch of the imagination be considered 'prior dealings' between them establishing the necessary authorization for counsel's signature."

Another basis on which the tenant sought dismissal of the petition in *Williamsen* was the failure of the notice to cure to state the specific lease provision(s) allegedly violated by the tenant. In addressing this argument, among the cases the court cited were *Cohn v. White Oak Cooperative Housing Corp.*,[6] *Stanford Leasing Corp. v. Stewart*[7] and *Build Inc. v. Leonard*.[8] These are all cases in which the courts held notices or letters asserting a violation of a lease or of applicable rules and regulations to be defective because the documents failed to specify the particular provisions alleged to have been breached.

In *Build Inc. v. Leonard*, for example, the Civil Court, New York County (Peter M. Wendt, J.) stated:

> The notice upon which this proceeding rests fails to specify which clause, paragraph or part of the lease has been violated by the conduct specified. Such failure renders the notice ineffective, and the tenancy therefore continues, depriving the proceeding of any basis. The notice, unlike a pleading, cannot be amended nun pro tunc after commencing of the proceeding.[9]

Petitioner sought to overcome this argument by asserting that it was "obvious which provisions of the lease are at issue." The court rejected petitioner's contention as "not meet[ing] the standards for a proper notice to cure pursuant to either statute or decisional law."

The tenant also took the position, as summarized in the *Williamsen* decision, that "since a notice to cure was not needed [for a holdover grounded in nuisance] in the first place, the fact that peti-

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tioners took the extra step to serve such a notice should not jeopardize this proceeding regardless of its deficiencies." The court stated that it "cannot acquiesce in that logic." If a petitioner proceeds on a nuisance theory, no predicate notice to cure is required before serving a notice of termination. Such a notice is required, however, for a proceeding based on lease violation. Contrast, for example, Section 2524.3(b) of the Rent Stabilization Code, dealing with a tenant "committing or permitting a nuisance" as a grounds for eviction (which does not refer to a notice to cure), on the one hand, with Section 2524.3(a), dealing with a tenant "violating a substantial obligation of his or her tenancy" (which provides for a ten day notice to cure).

Citing *Rockaway One Company LLC v. Califf*,[10] the court noted that a petitioner could proceed on alternative grounds where the grounds exist for maintaining both a nuisance holdover and a holdover based on a breach of a substantial obligation of the lease "without the procedural prerequisites of the one becoming engrafted on the other." However, he also quoted a statement from an earlier case he had decided, *Thelen v. Torres*,[11] that:

> The petitioner cannot have it both ways. He made an election as to which theory he wanted to pursue in seeking a possessory judgment and drafted his notices and pleadings accordingly. The inartfully drafted predicate notices...cannot serve as a basis for providing proper notice to the respondent or for giving this Court jurisdiction of this matter.[12]

Thus, the court in *Williamsen* seemed to be stating that the petitioner in that case, having elected to serve a notice to cure that expressly asserted that the tenant purportedly was "in violation of the terms of your lease," therefore had to comply with the requisites for a proceeding based on lease violation, but failed to do so.

In any event, the court noted, if the petitioner sought "to adhere to the position that the specific lease provisions were superfluous because this case is based on nuisance," then the proceeding was still fatally flawed for failing to meet the requisites of a nuisance case. Quoting the Court of Appeals decision in *Domen Holding Co. v. Aranovich*,[13] the court explained that "[n]uisance imports a continuous invasion of rights—a pattern of continuity or recurrence of objectionable conduct." However, in *Williamsen*, the court found that the notice did not state that the tenant's conduct was "consistent" and "continuous," nor did it allege in detail the tenant's conduct, failing to provide sufficient information such as dates, times and locations.

A third ground on which the tenant moved to dismiss the petition in *Williamsen* was that the notice to cure failed to inform the tenant as to a date certain by which the alleged violations must be cured. In response, the petitioner asserted that the denomination of the notice as a "Ten-Day Notice to Cure" was sufficient to alert the tenant that he had to cure the alleged violations within a ten-day period. The court disagreed, stating:

> Without specifically addressing the 10 day time frame within the substantive paragraphs of said notice, the notice is ambiguous and can lead to confusion by the recipient in knowing when to cure in order to avoid potential forfeiture of his tenancy. Is it ten days from the date the notice is written? Is it ten days from the day it is mailed if not served personally? Is it ten days from the day it is received if not served personally?[14]

Another ground on which the tenant in *Williamsen* sought dismissal was that he had not been provided with the full ten-day period in which to cure the alleged violations. (Section 2524.3(a) of the Rent Stabilization Code, to which the tenancy at issue apparently was subject, provides for a ten day cure period.) This argument was based on the Court of Appeals decision in *ATM One, LLC v. Landaverde*,[15] which held that "owners who elect to serve by mail must compute the date certain by adding five days to the 10-day minimum cure period." Since the notice in *Williamsen* was a ten-day notice to cure, there was no issue as to the applicability of *Landaverde* (which itself involved a notice to cure) to the case. As Judge Heymann pointed out in a footnote in *Williamsen*, however, there are conflicting opinions regarding the applicability of *Landaverde* to various types of notices other than a notice to cure.

The court in *Williamsen* agreed with the tenant's assertion that the petitioner had failed to comply with *Landaverde*. The notice to cure was served by conspicuous place service on Feb. 12, 2008, with mailing the next day, Feb. 13, 2008. The court calculated that ten days from the 13th would be Feb. 23, 2008 and, adding an additional five days per *Landaverde*, "makes February 28, 2008 the date by which the alleged violations must be cured before the petitioners can seek to terminate the tenancy for non-compliance with the Notice." Thus, if the termination notice was served prior to Feb. 29, 2008, the court continued, it "would deprive the tenant [of] the full 10 day cure period that he is entitled to"—and that was precisely what happened, since the notice of termination was served on Feb. 26, 2008, three days prematurely.

The tenant in *Williamsen* also moved to dismiss on the ground that the notice of termination failed to state the facts necessary to inform the tenant of the alleged lease violations or the existence of a nuisance in order to establish grounds to commence the summary proceeding. The court agreed, stating that the notice to cure was insufficient as a predicate notice, and since the notice of termination contained "nothing more than a repetition of the Notice to Cure and a statement that the respondent failed to cure 'the aforementioned conditions,'" it, too, was insufficient to maintain the proceeding.

In short, *Williamsen v. Bugay* presents a useful primer on the numerous details to which attorneys must pay attention in drafting predicate notices and on which attorneys representing tenants should focus in assessing whether their clients have defenses to a summary proceeding.

1. NYLJ, Dec. 3, 2008, p. 30, col. 1 (Civ. Ct. Kings Co.).
2. 108 A.D.2d at 218, 488 N.Y.S. 2d 744 (1985).
3. 108 A.D.2d at 220, 488 N.Y.S. 2d at 746.
4. 15 Misc.3d 1121(A) (Civ. Ct. N.Y. Co. 2007).
5. 192 Misc.2d 317, 746 N.Y.S.2d 233 (Civ. Ct. N.Y. Co. 2002).
6. 243 A.D.2d 440, 663 N.Y.S.2d 62 (2nd Dep't 1997).
7. NYLJ, Sept. 22, 1999, p. 32, col. 2 (Civ. Ct. Kings Co.).
8. NYLJ, Dec. 11, 1989, p. 28, col. 5 (Civ. Ct. N.Y. Co.).
9. Id.
10. 194 Misc.2d 191, 751 N.Y.S.2d 670 (A.T. 2nd Dep't 2002).
11. NYLJ, Oct. 21, 1998, p. 29, col. 5 (Civ. Ct. Bronx Co.).
12. Id.
13. 1 N.Y.3d 117, 769 N.Y.S.2d 785 (2003).
14. NYLJ, Dec. 3, 2008, p. 30 at col. 3.
15. 2 N.Y.3d 472, 779 N.Y.S.2d 808 (2004).

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