'Golub' Notices

Appellate Term Declines to Extend 'Landaverde'

BY WARREN A. ESTIS AND JEFFREY TURKEL

Sections 2524.4 and 2524.5 of the Rent Stabilization Code provide, inter alia, that an owner can refuse to renew a tenant's stabilized lease on such grounds as non-primary residence, owner occupancy and withdrawal from the rental market. Section 2524.2(c)(3) provides that the termination notice to be sent to the affected tenant in such instances shall be served:

> ... at least 90 and not more than 150 days prior to the expiration of the lease term....

These 90/150-day notices are commonly known as "window period" or "Golub" notices. The latter name springs from the case of *Golub v. Frank*, 65 N.Y.2d 900, 493 N.Y.S.2d 451 (1985), wherein the Court of Appeals held that the failure to serve a window period notice bars an owner from proceeding to recover an apartment based on non-primary residence.

RENT REGULATIONS

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In the non-primary residence case of *Skyview Holdings, LLC v. Cunningham*, N.Y.L.J. Oct. 24, 2006, at 22, col. 1 (App. T. 1st Dep't), the landlord mailed the *Golub* notice to the tenant 92 days before the Aug. 31, 2002 lease expiration date. Rent Stabilization Code Section 2524.2(c)(3) was seemingly satisfied.

Housing Civil Court Judge Eardell J. Rashford, however, ruled that the notice was untimely under authority of *Matter of ATM One, LLC v. Landaverde*, 2 N.Y.3d 472, 779 N.Y.S.2d 808 (2004). In *Landaverde*, the Court of Appeals held, with respect to a 10-day notice to cure, that the landlord must allow, in addition to the prescribed period for service, an extra five days for mailing. Judge Rashford reasoned that *Landaverde* imposed the same five-day requirement on the service of *Golub* notices. Because the landlord in *Skyview* had mailed the *Golub* notice on the 92nd day, and not on the 95th, Civil Court declared the notice void and dismissed the proceeding.

The issue then went up to the Appellate Term, which ruled last month that *Landaverde* should not be extended to *Golub* notices. Before addressing *Skyview*, we first turn to *Landaverde*.

'Landaverde'

In *Landaverde*, a Nassau County landlord mailed a notice to cure to a tenant pursuant to Section 2504.1(d)(1) of the Emergency Tenant Protection Regulations, which implement the Emergency Tenant Protection Act outside of New York City. The regulation states in relevant part that a notice to cure must set forth "the date certain by which the tenant must cure said wrongful acts or omission, which date shall be no sooner than 10 days following the date such notice to cure is served upon the tenant."

The tenant in *Landaverde* received the notice with nine days remaining in the cure period. The District Court (Janowitz J.) held that the notice was defective under CPLR 2103(b)(2), which adds five days to certain prescribed periods when service is made by mail. Appellate Term affirmed the result below, but held that CPLR 2103(b) only applied to papers served in a pending action, not to a pre-action notice to cure. Instead, Appellate Term held that because the tenant had only nine days to cure, the notice was defective. 190 Misc.2d 76, 736 N.Y.S.2d 833 (App. T. 2d Dep't 2001).

The Appellate Division, Second Department, by a 3-2 majority, affirmed Appellate Term. 307 A.D.2d 922, 763 N.Y.S.2d 631 (2d Dep't 2003). The majority wrote:

> The principal advantage of the more practical construction placed on the regulation by the Appellate Term is that it avoids the possibility that, in a case involving an abnormally extended delay in the delivery of the mail, a tenant might not be told of the date within which he or she may cure a violation until after that date has actually passed, a possibility that, under the construction advocated by the dissent, cannot be excluded. When the proper construction to be placed on a regulation or statute is open to debate, we should adopt that construction which more reliably tends to avoid 'results which are absurd, unreasonable or mischievous' [citations omitted].[1]

The Court of Appeals thereafter affirmed. The Court first observed that "regulations—like statutes—should be construed to avoid objectionable results."[2] The Court then noted that a primary purpose of the Emergency Tenant Protection Act was to address a serious public emergency as evidenced by "an acute shortage of housing accommodations."[3] Having laid this groundwork, the Court of Appeals ruled:

> Reading the service provision (9 NYCRR 2508.1[a]) together with the notice to cure regulation (9 NYCRR 2504.1[d]), we conclude that District Court's approach best effectuates the regulatory purpose to afford tenants a 10-day cure period before they may be subject to lease termination for designated violations. We therefore hold that owners who elect to serve by mail must compute the date certain by adding five days to the 10-day minimum cure period (see e.g., CPLR 2103[b][2]).[4]

Post-'Landaverde' Confusion

As *Landaverde* progressed toward the Court of Appeals, the question in New York City turned to whether owners serving *Golub* notices under Rent Stabilization Code §2524.2(c)(3) had to add an extra five days for mailing, i.e., whether the window period was in fact between 95 and 150 days. Lower courts split on the issue. In *Lynch v. Dirks*, N.Y.L.J., Jan. 5, 2005, at 19, col. 3 (Civ. Ct. N.Y. Co.), and *Shoshany v. Goldstein*, N.Y.L.J., Feb. 9, 2005, at 18, col. 3 (Civ. Ct. N.Y. Co.), the Courts applied *Landaverde* to the service of *Golub* notices. In *Shoshany*, Judge Joseph E. Capella wrote:

> If the essence of *Landaverde* is to enforce and make meaningful a prescribed minimum period for notices, then a proper *Golub* notice must provide a tenant with a minimum of 90 days to either challenge the grounds for non-renewal or allow the tenant time to make other living arrangements. Therefore, this court finds that the petitioner's *Golub* notice was not served in a timely manner, and the respondents' motion is granted and the proceeding is dismissed.

Given the importance of this issue to the landlord-tenant bar, it is expected that the tenants in the two cases will seek leave to appeal the rulings to the Appellate Division.

In *K.S.L.M. Columbus Apts. Inc. v. Bonnemere*, 8 Misc.3d 1026(A), 806 N.Y.S.2d 445 (Civ. Ct. N.Y. Co. 2004), Judge Kevin C. McClanahan declined to apply *Landaverde* to the service of *Golub* notices, holding:

> Where an owner believes that a dwelling unit is not the tenant's primary residence, the owner can invoke this ground to deny the tenant's right to a renewal lease. The *Golub* Notice is sent during the renewal window period with the purpose of notifying the tenant of the owner's intention not to offer a renewal lease. [Citation omitted.] Unlike both the notice to cure and notice of termination, the *Golub* Notice does not contemplate or require any affirmative steps by the tenant. Any action taken by the tenant immediate or otherwise will not negate the landlord's intent not to renew the lease.

'Skyview'

The *Golub* notice issue was settled, at least for the time being in the First Department, when Appellate Term ruled last month in *Skyview*. The panel, consisting of Justices William J. Davis, Phyllis B. Gangel-Jacob and William P. McCooe, declined to extend *Landaverde* to *Golub* notices. In a per curiam opinion, the court wrote:

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That the *Landaverde* rule was meant to be confined specifically and narrowly to the 10-day cure notice there involved is reflected in several passages of the Court's opinion, including language declining to extend the five-day mailing allowance provided by CPLR 2103 to the commencement of summary proceedings generally...and its concluding statement 'encourag[ing] DHCR to amend its regulations consistent with this determination in order to provide better guidance to parties who elect to serve notices to cure by mail (id.).'

Echoing Judge McClanahan in *K.S.L.M. Columbus Apts.*, the panel focused on the length of the 90/150 day window period:

Nor are any of the policy concerns giving rise to the 'practical and fair solution' fashioned by the *Landaverde* court implicated in this situation where, as here, a 90/150 day notice of nonrenewal is served by mail. Unlike a 10-day notice to cure, a 90/150 notice of nonrenewal does not require a tenant to undertake an affirmative act within narrow time constraints, but instead merely calls upon a tenant to elect whether to contest the merits of a landlord's possessory claim following a lease termination set months in advance or to vacate the demised premises in the interim. Thus, unlike a tenant who potentially may be deprived of the full benefit of the mandated 10-day cure period by a landlord's mailing of a notice to cure, a tenant who is served by mail with a nonrenewal notice within the 90/150 day period prescribed by the code —even a notice whose delivery is unusually delayed—cannot be reasonably said to be 'disadvantaged by an owner's choice of service method' (*Landaverde*, 2 N.Y.3d at 478).

In a separate opinion, Justice McCooe concurred only in the result. Justice McCooe held that *Skyview* was distinguishable from *Landaverde* in that the tenant in *Landaverde* actually received the notice with just nine days remaining in the cure period, whereas the tenant in *Skyview* did not assert that she received the *Golub* notice with less than 90 days remaining before the lease expired.

Given the importance of this issue to the landlord-tenant bar, it is expected that the tenants in *Skyview*, and its companion case, *Shoshany v. Goldstein*, N.Y.L.J., Oct. 20, 2006, at 32, col. 1 (App. T. 1st Dep't), will seek leave to appeal to the Appellate Division.

1. 307 A.D.2d at 924-25.
2. 2 N.Y.3d at 477.
3. Id.
4. 2 N.Y.3d at 477-78.