

'Danyluk' Court Helps Clarify Requirements

There are frequently predicate notice requirements to commencing a summary proceeding. For example, where the tenancy is terminated before the expiration of the lease for a violation of a substantial obligation of the lease, the landlord is usually required to serve a notice to cure specifying the nature of the default, and providing for termination in the event the default goes uncured within the time period stated in the notice.

In New York City, Real Property Law §232-a prohibits landlords from bringing holdover proceedings to remove a monthly or month-to-month tenant unless a written 30-day notice of termination is served on the tenant.

The regulations pertaining to eviction of rent-stabilized tenants in New York City are found in Part 2524 of the Rent Stabilization Code. Section 2524.3 specifies grounds for termination of a rent-stabilized lease. These include the tenant's violation of a substantial obligation of the tenancy, the tenant's refusal to renew the lease, nuisance or objectionable conduct, illegal occupancy, illegal or immoral use, illegal subletting, and not occupying the premises as a primary residence.

A predicate termination notice must be served before commencing a holdover proceeding based on the grounds specified in Rent Stabilization Code §2524.3.

Real Property Actions and Proceedings Law (RPAPL) §713 makes clear that a holdover proceeding can also be brought to remove occupants where no landlord-tenant relationship exists. These include proceedings to remove squatters; to remove licensees no longer entitled to possession; and to remove occupants after sale of the property for unpaid taxes or in foreclosure and delivery of an appropriate deed to the purchaser. Generally, a 10-day notice to quit must be served as a predicate to a proceeding based on RPAPL §713.

'Danyluk'

The failure to serve a required predicate notice before commencing a summary proceeding, or service of an inadequate notice, clearly makes the proceeding defective. A recent decision by the Civil Court, New York County (Lucy A. Billings, J.) in *Danyluk v. Glashow*¹ includes a thorough and detailed discussion of how to classify what kind of defect is thereby involved, and what the implications are for the court and the parties of how the defect is categorized.

In *Danyluk*, the petitioner leased to the respondent commercial premises at 159 East 74th Street in Manhattan. There was no dispute that the respondent's tenancy had terminated, but the respondent still remained in possession of the premises. The respondent moved for summary judgment dismissing the holdover proceeding on the grounds that the petitioner had failed to serve a predicate notice under RPAPL §713(9). That statutory provision allows a holdover proceeding after service of a 10-day notice to quit on the grounds that:

A vendee under a contract of sale, the performance of which is to be completed within ninety days after its execution, being in possession of all or a part thereof, and having defaulted in the performance of the terms of the contract of sale, remains in possession without permission of the vendor.

The respondent asserted that it was a contract vendee arising out of its exercise, prior to the termination of the tenancy, of an option of first purchase provided for in the lease in the event the landlord elected to sell the premises to a third party. The respondent argued that the petitioner's

failure to give the predicate 10-day notice to quit deprived the court of subject matter jurisdiction.

The court denied the respondent's summary judgment motion, ruling that the respondent had failed for various reasons to show that RPAPL §713(9) applied. There was no evidence that the petitioner had accepted the third-party's offer to buy, which was necessary for commencement of the respondent's right to exercise the option of first purchase. Even if the right to exercise the option had commenced, the respondent failed to show that it had exercised the option as required by the contract, i.e., by certified mail, return receipt requested. (The court stated that there

was no evidence demonstrating that the petitioner had actually received the respondent's notice of its intent to exercise the option, so the respondent's failure to mail the notice of exercise as required could not be considered de minimis.)

Furthermore, noted the court, the facts presented did not even fall within the express language of RPAPL §713(9). That statutory section requires that the vendee in possession has "defaulted in the performance

of the terms of the contract of sale." The respondent, however, had neither alleged nor presented evidence that it had defaulted on the contract of sale.

Subject Matter Jurisdiction

The *Danyluk* court went further, however, than just ruling that the respondent had failed to establish the applicability of RPAPL §713(9). The court addressed why, even if the respondent were to prevail on its notice issue at trial, that would not deprive the court of subject matter jurisdiction. It would be fatal to the proceeding, but not, the court concluded, because the court lacked subject matter jurisdiction.

Referring to two 2003 Civil Court cases, namely, *Montgomery Trading Co. v. Cho*² and *Palumbo v. Donalds*,³ from New York County and Kings County, respectively, Judge Billings conceded that "[a]t least two recent decisions have held that failure to serve a predicate notice to quit deprived the court of subject matter jurisdiction."

In *Montgomery Trading*, the court stated that "[f]or summary holdover proceedings, the failure to serve a Notice of Termination deprives the court of subject matter jurisdiction."

In *Palumbo v. Donalds*, the court stated that "[f]or summary holdover proceedings, at least, the failure to serve the notice [a 30-day notice to quit provided for by RPL §232-a] deprives the court of subject matter jurisdiction."

In *Danyluk*, the court explained why it did not accept how these two Civil Court cases categorized the failure to serve a predicate notice. First, these holdings "were dicta in light of each decision's ultimate conclusion that no notice was required." Second, both cases relied exclusively on a 1979 Civil Court, New York County, decision in *Rosen v. Wade*⁴ for the proposition that a defect in a predicate notice deprived the court of subject matter jurisdiction.

Superseding Decisions

The *Danyluk* court concluded that *Rosen* and its progeny, however, had "been definitively superseded by more recent controlling authority such as 433 *West Associates v. Murdock*⁵ and 170 *West 85th Street Tenants Association v. Cruz*.⁶

In 433 *West Associates*, a 2000 decision by the Appellate Division, First Department, the court stated that the failure to serve a predicate notice was "[one] of the 'essential elements' to [a] landlord's prima facie case ... and, accordingly, non compliance therewith constituted [a] defense[] to the holdover petition ... [but] did not implicate the court's subject matter jurisdiction."

170 *West 85th Street Tenants Association*, a 1991 First Department decision, stated: "[W]e note that

LANDLORD-TENANT

WARREN A. ESTIS



WILLIAM J. ROBBINS

The failure to serve a required predicate notice before commencing a summary proceeding, or service of an inadequate notice, clearly makes the proceeding defective.

Civil Court is vested with subject matter jurisdiction over housing matters by statute (CCA 110). The failure of a petitioner to comply with a statutory notice requirement, where applicable, represents merely the failure to comply with a condition precedent to suit and cannot properly be said to affect the court's jurisdiction."

RPAPL §741(4) provides that every petition shall "[s]tate the facts upon which the special proceeding is based." The *Danyluk* court concluded that recent case authority categorized complying with notice requirements as satisfying one of the facts upon which the special proceeding is based as referred to in RPAPL §741(4). Thus, presumably, a failure to comply with the notice requirement would constitute a failure to state a cause of action [see CPLR 3211(a)(7)].

The *Danyluk* court commented that the cases that had labeled defects in predicate notices as "jurisdictional" defects were "confus[ing] non-amendable defects with jurisdictional defects," and then pointed out that "[w]hile all jurisdictional defects are non-amendable, not all non-amendable defects are jurisdictional." Noting that "a landlord may not retroactively serve a predicate notice," the court viewed the failure to serve a required predicate notice as a non-amendable defect — but one that did not implicate the court's jurisdiction.

As the *Danyluk* court recognized, where a predicate notice is required, the failure to serve such a notice is fatal to the summary proceeding whether the defect is characterized as a jurisdictional defect or as a non-amendable defect not implicating the court's jurisdiction. What difference, then, does it make how the failure to serve a predicate notice is characterized?

The *Danyluk* court pointed out various differences. Subject matter jurisdiction pertains to the court's power to adjudicate the proceeding. Therefore, the court explained, if the failure to serve a predicate notice implicates subject matter jurisdiction, then "petitioner would not be permitted to bring another such proceeding in this court alleging proper service of an adequate predicate notice."

By contrast, the court said, if the defect is viewed as a non-amendable

defect not implicating the court's jurisdiction, then such a defect "may be amended in a future proceeding within the Court's jurisdiction, by properly serving an adequate predicate notice and pleading the omitted facts upon which the special proceeding is based." R.P.A.P.L. §741(4)."

The *Danyluk* court pointed out that a case such as *Rosen*, while using the language of lack of subject matter jurisdiction, reached a result that was inconsistent with the necessary implication of such a classification, i.e., that any other proceeding in the same court would be barred.

In *Rosen*, the court found that a notice to quit was untimely, having been served less than 30 days before expiration of the term as required by RPL §232-a. It held that such defect deprived the court of subject matter jurisdiction and dismissed the proceeding, but did so "without prejudice to the petitioner to institute a new proceeding if he wishes to do so." That, said the *Danyluk* court, shows it is a misnomer to classify the defect as lack of subject matter jurisdiction because if subject matter jurisdiction were really involved, a new Civil Court proceeding could not be brought.

The *Danyluk* court also emphasized the non-waivability of lack of subject matter jurisdiction. In other words, an assertion of lack of subject matter jurisdiction can be made at any stage of the proceeding, even post-judgment, by a party or by the court sua sponte. As the court stated: "[W]ere respondent to stipulate to a judgment, if the notice issue implicated subject matter jurisdiction, that claim would not be waived by the stipulation, and respondent could resuscitate the notice issue post-judgment as grounds to vacate the stipulated judgment."

Of course, since the *Danyluk* court held that "failure to serve a notice to quit... does not affect the Court's subject matter jurisdiction," it would seem that such post-judgment maneuvering is not something the court would consider feasible in a case involving failure to comply with predicate notice requirements.

Other Points

Additional points to consider in reviewing these issues raised by, and the reasoning of, the court in *Danyluk* include:

Litigation concerning predicate notices often focuses exclusively on whether the notice is adequate or defective, because it is unquestionable that a predicate notice is required and one has been served. However, there are situations, which sometimes are even more problematic, and *Danyluk* illustrates it, where the question is rather whether a notice is required.

Clearly, a respondent not served with a notice should carefully review whether there are arguable grounds for claiming, as a defense to the proceeding, that a notice was required — and, if so, assert them. It is much more difficult for a landlord facing a situation of uncertainty as to whether a notice is required in the first place. Should he opt to send a notice as a precaution against a defense of notice improperly not being sent? Or, does sending a notice create rights the landlord would prefer not to create? Does sending a notice risk slowing down any subsequent summary proceeding with motion practice addressed to the adequacy of the notice? No generally applicable answers can be given to these questions; their resolution depends on the circumstances of the particular situation.

As for the courts' varying categorization of the failure to serve a required predicate notice, the following comment by Weinstein, Korn & Miller in their treatise on New York Civil Practice is pertinent: "[T]he courts have alternately and disparately categorized a motion by a defendant foreign country to dismiss on the grounds of sovereign immunity ... as an asserted lack of jurisdiction over the subject matter; a lack of jurisdiction of the person, and even as a failure to state a cause of action."

Apparently, disparate classification of a particular ground for dismissing a lawsuit is a difficulty not limited to landlord-tenant law.

(1) New York Law Journal, Oct. 29, 2003, at p. 20, col. 1 (Civ. Ct. N.Y. Co.).

(2) NYLJ, April 9, 2003, at p. 23, col. 2, 31 HCR 166 (Civ. Ct. N.Y. Co.).

(3) 194 Misc.2d 675, 754 N.Y.S.2d 856 (Civ. Ct. Kings Co. 2003).

(4) 99 Misc.2d 1114, 418 N.Y.S.2d 258 (Civ. Ct. N.Y. Co. 1979).

(5) 276 A.D.2d 360, 715 N.Y.S.2d 6 (1st Dept. 2000).

(6) 173 A.D.2d 338, 569 N.Y.S.2d 705 (1st Dept. 1991).