
Rent Demands Revisited

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In a decision rendered in June 2012 by Civil Court Judge Peter Moulton in [JDM Washington St. v. 90 Washington Rest. Associates \(JDM\)](#),¹ the question before the court was whether a landlord may, at trial, amend the petition to recover the rent accruing after service of the predicate rent demand, without having to serve a new rent demand. The court in *JDM* answered that question in the affirmative. *JDM* also clarified the rule that a predicate rent demand that does not contain a good faith estimate of the amount due at the time of the demand will be deemed defective, thereby requiring dismissal of the petition, regardless of whether the tenant is prejudiced by the improper demand.

'1587 Broadway'

In the 1979 decision of the Appellate Term, First Department *1587 Broadway Rest. v. Magic Pyramid*,² the court held—in the context of a pretrial motion for leave to amend the petition to include rent that accrued subsequent to service of the rent demand—that the petition could not be so amended in the absence of an additional rent demand seeking such rent. The Appellate Term stated:

The court below did not improperly deny landlord's application to amend its petition to include a claim for September and October rent, insofar as the record does not establish the requisite demand by the landlord for such additional rent. The landlord is, however, granted leave to renew its motion to so amend the petition at the time of trial, upon a proper showing of demand for the September and October rent.³

Numerous courts have followed the court's decision in *1587 Broadway*. For example, in [Walsam Fifth Ave. Dev. v. Lions Gate Capital](#),⁴ the landlord in a commercial non-payment proceeding moved for, inter alia, summary judgment and for leave to amend the petition to include rents that accrued after the petition was served. The court (Judge Richard F. Braun), relying on *1587 Broadway*, denied the landlord's motion for leave to amend, finding that "such a request must be predicated upon an additional demand for the subsequently accruing rent."⁵

Similarly, in *501 Seventh Ave. Associates v. 501 Seventh Ave. Bake*,⁶ the landlord, prior to trial, moved for leave to amend its petition to include a claim for rent accruing after service of the petition. In denying the motion, the court (Judge Cynthia Kern), relying on *1587 Broadway*, held that such a request for leave to amend must be based on proof that a demand for the subsequently accruing rent had been served on the tenant:

Pursuant to CPLR §3025, leave to amend a pleading should be freely given unless the pleading is devoid of merit or will result in undue prejudice or surprise to the other party. Petitions in summary proceedings are equivalent to pleadings in any other type of civil case and are equally amendable. The Appellate Term, First Department has held that a petitioner is entitled to amend its petition to include rents that have accrued subsequent to service of the original petition only if the request is predicated upon an additional demand for the subsequently accruing rent. A request to amend a petition to add rents that have accrued after service of the petition must be denied with the ability to renew upon service of the proper papers or at trial."⁷

'JDM'

In *JDM*, the landlord had commenced a commercial nonpayment proceeding against the tenant, 90 Washington Rest. Associates. After the landlord presented its prima facie case at trial, the landlord moved to conform the pleading to the proof adduced at trial. The primary purpose of the motion to conform was to seek the rent that had accrued since the service of the predicate rent demand.

The tenant opposed the motion and moved to dismiss the petition on the ground that the amount of rent and additional rent set forth in the predicate rent demand was not a good faith estimate of the amount of rent due at the time the rent demand was served.

Landlord's Motion to Conform the Pleading to the Proof. With respect to the landlord's motion to amend the pleading to conform to the proof, the tenant argued, relying on *1587 Broadway* and its progeny, that the landlord was required to serve an updated demand for any rent and additional rent that had accrued subsequent to service of the predicate rent demand. According to the tenant, under *1587 Broadway* and its progeny, the landlord could not amend the petition at trial because the landlord never served an additional rent demand while the proceeding was pending.

The court (Judge Peter H. Moulton) disagreed with the tenant, holding that the landlord was entitled to amend the petition after trial to seek the rent that accrued after service of the rent demand, despite having never served an additional rent demand.

Moulton observed that neither the *1587 Broadway* decision itself, nor the other decisions following *1587 Broadway*, concerned a motion to conform pleadings to the evidence at trial, as opposed to a pretrial motion for leave to amend the petition. Moulton noted that in one of the decisions that the tenant cited which relied on *1587 Broadway*—[RCPI](#)

[Landmark v. Chasm Lake Management Services](#)⁸—the court "assumes that a motion made at the time of trial would be on a different footing."⁹

Moulton further found that while the *1587 Broadway* decision's "expansive language" appeared to provide that an updated rent demand is a "necessary predicate before a petitioner may amend a petition," and that the decision "did not limit its holding to the procedural frame before it, a pretrial motion," to interpret that decision as requiring a new rent demand before the petition can be amended at trial "is contrary to common practice in the Civil Court." As Moulton explained:

a landlord never submits an additional rent demand in a commercial nonpayment action. Instead, the landlord moves to amend the petition at the time of trial to reflect the inevitable accrual of rent that results from the passage of time.¹⁰

Moulton further found that his decision was supported by Real Property Actions and Proceedings Law (RPAPL) §711 (2), which "provides for 'a demand of rent'—not plural demands for rent" (emphasis in original). Moulton noted that the RPAPL, in fact, "makes no provision for an updated demand for rent in a nonpayment proceeding."¹¹

The court also observed that "under the CPLR a motion to amend a pleading at trial must be freely granted absent surprise or prejudice resulting from the delay." Moulton found that "it can be no surprise to a tenant that a landlord in a nonpayment proceeding will seek all the rent she claims is owed up to the time of trial."¹²

The court therefore concluded that based on the absence of any "clear statutory or appellate authority, this court cannot read into the RPAPL a requirement that rent demands must be updated before a petitioner may seek to amend its petition to reflect rent allegedly accrued at the time of trial." In so concluding, the court observed that:

"[s]uch a requirement would graft another element onto a petitioner's prima facie case. A host of new disputed issues would arise from a requirement for updated rent demands, for example: Is the updated demand sufficiently detailed? Was the updated demand properly served? How many days after the updated demand was served may a petitioner seek to amend the petition?"¹³

Tenant's Motion to Dismiss the Petition. Although the landlord was permitted to amend the petition to conform to the proof, Moulton agreed with the tenant that the amount of rent and additional rent set forth in the predicate rent demand was not a "good faith estimate" of the amount due at the time the demand was served. Thus, the court granted the tenant's motion to dismiss the petition without prejudice.

As Moulton observed, the sum demanded in the predicate rent demand must be "a good faith approximation of the rent that a tenant would have to pay to prevent litigation."¹⁴ Citing to the decision of the Appellate Term, Second Department in [Dendy v. McAlpine](#),¹⁵ the court further observed that the "[f]ailure to demand a good faith approximation of rent renders the predicate demand defective" and, as stated by the Court of Appeals in [Chinatown Apts. v. Chu Cho Lam](#),¹⁶ "[p]redicate notices cannot be amended and a defective predicate notice requires dismissal of a summary proceeding."¹⁷

Moulton found that the rent demand contained erroneous real estate tax escalations and electrical charges totaling \$34,982.08. The court therefore found that because the total demanded in the rent demand was \$105,552.10, "33 [percent] of the rent and additional rent sought in the rent demand was incorrectly calculated."¹⁸ The court further found that the trial evidence indicated that the "incorrect components" of the rent demand could have been ascertained by the landlord prior to service of the rent demand. Thus, the court concluded that the calculation of the rent owed as set forth in the rent demand was not a "good faith estimation," thereby rendering the rent demand defective and requiring the dismissal of the petition.

In so holding, Moulton rejected "two policy arguments that could be made in opposition to dismissal." First, the court found that the fact that the tenant never raised the issue of the defective rent demand prior to trial (either in the tenant's pre-answer motion to dismiss or in a motion for summary judgment) was not a bar to dismissal. The court observed that "the service of a valid predicate notice is a condition precedent for a nonpayment proceeding, and nothing in the RPAPL precludes respondents from raising the issue at trial."¹⁹

Second, the court rejected any assertion that the lack of prejudice to the tenant should prevent dismissal of the petition. The court found that whether or not the tenant was prejudiced by the improper rent demand (and the court found it unclear whether the tenant suffered any prejudice), there is no requirement, by statute or caselaw, "that a tenant whether residential or commercial, be prejudiced by an improper demand."²⁰

Conclusion

With *JDM*, there is now at least one court decision that has formally approved the typical practice in commercial nonpayment proceedings in the Civil Court, whereby a landlord moves to amend the petition at the time of trial to seek the rent that accrued since the time the predicate rent demand was served. It is only a matter of time before an appellate court rules on this issue.

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Endnotes:

1. 2012 N.Y. Slip. Op. 22158 (Civ. Ct. N.Y.Co.)
2. *NYLJ*, 12/19/79, p. 10, col. 2 (App. Term 1st Dept.).
3. *Id.*
4. 163 Misc. 2d 1071, 623 N.Y.S.2d 94 (Civ. Ct. N.Y. Co. 1995).
5. 163 Misc. 2d at 1074.
6. 2002 N.Y. Slip. Op. 50362(U) (Civ. Ct. N.Y. Co.).
7. *Id.* (internal citations omitted).
8. 32 Misc. 3d 405, 926 N.Y.S.2d 267 (Civ. Ct. N.Y. Co. 2011).

9. 2012 N.Y. slip op. 22158 at *2.

10. Id.

11. Id.

12. Id.

13. Id.

14. Id. at *4

15. 27 Misc. 3d 138[A] (App. Term, 2d Dept. 2010).

16. 51 N.Y.2d 786 (1980).

17. 2012 N.Y. Slip Op. 22158 at * 4.

18. Id.

19. Id.

20. Id. at *5.

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