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GIVE ME FIVE!

Those of you who have read our book, or attended one of our CLE seminars, are aware of our take on the Court of Appeals's decision in *Matter of ATM One v. Landaverde* and its expanding application to different kinds of predicate notices used in a summary proceeding.

For those of you who are unfamiliar with our "dog-and-pony show," here's a quick rundown.

In 2004, the New York State Court of Appeals addressed a dispute involving a rent-stabilized tenant subject to the Emergency Tenant Protection Regulations (or "ETPR"). According to that law, before a landlord may bring an eviction proceeding, a tenant must be given a 10-day period within which to cure a wrongful act or omission. In this particular instance, Ms. Landaverde was given only nine days to address purported "overcrowding" in her one-bedroom apartment in Freeport, New York.

When the landlord brought its holdover proceeding, the tenant moved to dismiss the case on the grounds that she had not been given the required 10-day cure period. The local District Court agreed, as did the Appellate Term, and, Appellate Division. The question considered by the state's highest court was whether service of such a notice is considered complete as of the date of mailing ("as evidenced by a contemporaneous affidavit of service") or upon the notice's receipt by the tenant. Although the regulations were silent on that issue, the Court of Appeals opted for the former standard–date of mailing–but espoused a requirement that five days be added to every 10-day ETPR cure notice served by regular mail.

Since the Court of Appeals's decision in the *Landaverde* case, lower courts have grappled with whether the additional five days for mailing should be applied to other forms of rent regulation and other types of predicate notices.

Several months ago, in *South Park Estates Co. v Hilverdink*, the Appellate Term, First Department, finally chimed in and concluded that five days should be added to cure notices served pursuant to the Rent Stabilization Code. Weeks later, in *Skyview Holdings, LLC v. Cunningham*, the Appellate Term, First Department, determined that *Landaverde* does not apply to notices which do not require corrective action by a tenant. As the appellate court observed:

> Unlike a 10-day notice to cure, a 90/150 day 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

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LUCAS A. FERRARA SELLS OUT!

On October 19, 2006, partner Lucas A. Ferrara was the keynote speaker at a dinner event sponsored by The Judicial Title Insurance Agency LLC at the Grand Hyatt New York (Park Avenue at Grand Central Terminal).

For two hours straight, Lucas waxed eloquent on such timely topics as the Office of Court Administration's proposed regulations regarding attorney advertising and solicitations, and provided a critical look at the latest cases impacting cooperatives, condominiums, regulated housing, and other real estate.

Lucas's presentation was lively, entertaining, informative and–based on the reaction of those in the ballroom that evening–enthusiastically received. Many described his performance as "controversial," "energetic," "enthusiastic," "thought-provoking" and "witty."

In addition to some very insightful analysis, the standing-room-only crowd of some 275 attendees also received an added bonus of two CLE credits.

After the event, representatives of The Judicial Title Insurance Agency informed us that this was their most successful event to date. And, if you've ever seen Lucas in action, it's no wonder why. His passion for the law is indefatigable and is relayed with a healthy dose of humor and sarcasm.

Well done and congratulations!

Note: Finkelstein Newman Ferrara LLP is an accredited CLE provider of an eight credit course on landlord-tenant law. To arrange for a presentation, please contact Managing Partner, Jonathan H. Newman, for additional details.

GIVE ME FIVE!

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a landlord's possessory claim following a lease termination date 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 reasonably be said to be "disadvantaged by an owner's choice of service method"...Nor are we aware of any "unpredictable results"...that potentially may be caused by a tenant's delayed receipt of a properly mailed 90/150 day notice of nonrenewal. In sum, neither a textual analysis of the Landaverde opinion nor an examination of the policy concerns raised in the context of that breach of lease proceeding requires us to extend the "10 plus 5" rule adopted therein so as to invalidate the otherwise timely served notice of nonrenewal underlying this nonprimary residence proceeding.

While the Appellate Term's guidance is clear and unequivocal, that particular court does not have the final say on the subject. Since additional appellate activity is likely, practitioners may still elect to add five days to all predicate notices served by mail. (Better safe, than sorry!)

If you have any questions or comments about this article, please contact Partner Lucas A. Ferrara at 212-619-5400 x 211 or email him at LFerrara@FinkelsteinNewman.com. To join the debate, visit us at www.nyreblog.com.

TENANT LIABLE FOR TREBLE DAMAGES

In the March 2006 edition of firm's newsletter, in a piece entitled "Deciphering the Code," we reported about the case of *Gboizo v. State of New York Division of Housing and Community Renewal*, wherein New York County Supreme Court Justice Edward H. Lehner was unable to reconcile two sections of the Rent Stabilization Code. One provision automatically entitles a subtenant to "treble damage" when overcharged by a tenant, while another affords property "owners"–faced with a similar allegation–an opportunity to establish that the conduct was not willful. This latter showing allows owners to have the penalty reduced to the amount of the overcharge plus interest. However, according to the State Division of Housing and Community Renewal ("DHCR"), this "lack of willfulness" demonstration is only available to property owners (rather than overcharging tenants).

In *Gboizo*, the prime tenant leased a Manhattan apartment to a subtenant for rents ranging from $900 to $1,100 per month. Within a year, the subtenant filed a rent-overcharge complaint with the DHCR claiming that the legal regulated rent was only $225 per month. Ultimately, the claim was successful and the overcharge determination, which totaled $29,631 when trebled, upheld. The DHCR's position was that when a tenant collects overcharges from a subtenant, the treble-damage penalty was "mandatory" and the issue of "willfulness" could not be considered.

In an Article 78 proceeding started in the New York County Supreme Court, the prime tenant asserted that it had been his belief that the unit was exempt from rent regulation. Despite some unique factual underpinnings as to the unit's status, Justice Lehner was asked to decide whether subleasing tenants could avoid treble-damage liability by establishing the inadvertence of an overcharge. Since there was "nothing in the statute...that would bar a sublessor from this statutory right to present evidence of the absence of willful conduct," the Court concluded (in a decision dated January 31, 2006) that the agency's sublessor-hostile interpretation of the regulations was "invalid."

In an interesting twist, DHCR later asked Justice Lehner to reconsider his decision–by way of a process called "reargument" –and, after reviewing the parties' submissions, the judge concluded that he had made an error.

Upon further examination, the court discovered that Judge David Saxe–now an Associate Justice of the Appellate Division, First Department–had analyzed the sections in question over two decades prior, in the case of *Kolbert v. Clayton*, and had concluded that the treatment differential was deliberate. As Judge Saxe then observed:

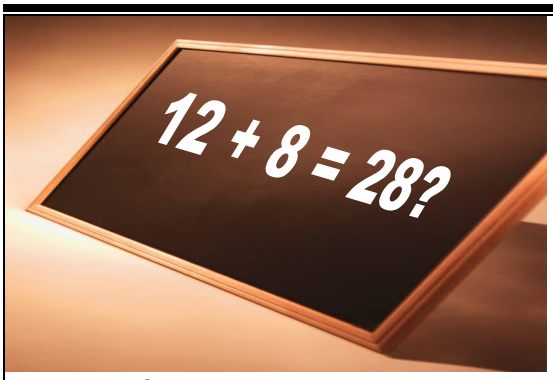
> On reflection, the reasoning of the Legislature is evident–the procedure in arriving at the legally chargeable amount of rent by a landlord is extremely complicated, and mistakes in calculation are not necessarily always the fault of the landlord. The tenant on the other hand, need not follow any complicated procedure or apply any intricate formulas to discover the amount of rent he may lawfully charge to a subtenant–he need only look to his lease and, if applicable, add a 10% charge. It is for this reason, I am certain, that the Legislature did not believe it necessary to equip the sublessor who overcharges with the same defense that is available to the landlord-owner.

Faced with this precedent, and in the absence of a constitutional infirmity, Justice Lehner recalled his prior decision.

Kudos to Justice Lehner for acknowledging his error and making it right.

"I as free forgive you As I would be forgiven...." Shakespeare, *Henry VIII*, Act II, Scene I

If you have any questions or comments about this article, please contact Partner Jonathan H. Newman at 212-619-5400 x 205 or email him at JNewman@FinkelsteinNewman.com. To join the debate, visit us at www.nyreblog.com.



YOUR LEASE ENDS ON...?

Leases can be pretty complicated documents, with many provisions being downright confusing or incomprehensible, even to those of us with the requisite legal background and training. But of all the terms and conditions one typically finds in these documents, you would think the start and end date of a lease would be relatively easy to determine. Yet, regrettably, something as simple as when a lease agreement will expire is often the subject of protracted litigation.

By way of example, in *Rachel Bridge Corp. v. Dishi*, the first page of the "standard store lease" executed by the parties contained handwritten notations reflecting that the lease was for a 20-year term, beginning December 1, 1991 and ending November 30, 2011. Interestingly, paragraph 40 of the parties' agreement contained a twelve-year rent schedule which provided the tenant with the right to renew "for an additional eight years" at a delineated rate (that is, "the same rate specified in connection with the initial 12-year term set out in the rider").

Last time we checked, 12 + 8 = 20. So, if the renewal were properly exercised, the wording of paragraph 40 would be consistent with the term listed on the lease's cover sheet. And, no matter how you slice or dice it, it would appear that the parties did not intend the lease to extend beyond 2011. Yet, inexplicably, the Appellate Term, First Department, was left with the impression that the parties' agreement was "ambiguous" and that the wording raised a "question of fact" which required a formal hearing or trial. To complicate matters further, the appellate court suggested that the parties may have contemplated a 28-year term.

While we accept that an "ambiguity" exists when a contract's language is susceptible to differing interpretations, and that it's the court's purview to resolve these kind of disputes (whether it be within the landlord-tenant context or otherwise), we respectfully submit that this case's outcome just doesn't add up.

If you have any questions or comments about this article, please contact Partner Robert Finkelstein at 212-619-5400 x 227 or email him at RFinkelstein@FinkelsteinNewman.com. To join the debate, visit us at www.nyreblog.com.

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