Notices to Tenant

When Do They Become Effective?

NOTICES sent to tenants are an integral part of landlord-tenant law. There are multiple varieties of notices, e.g., notices to cure, notices of termination, notices of non-renewal for rent stabilized apartments (commonly referred to as Golub notices). Whatever the type of notice, it is imperative that the requisite period of notice be given to the tenant. The Court of Appeals decision last year in *ATM One, LLC v. Landaverde*,[1] and its progeny, show that determining that period of time is not necessarily an easy matter.

In *Landaverde*, the tenant leased a rent stabilized apartment in Freeport. The landlord served the tenant with a "Notice of Default; Ten Days' Notice to Cure; Thirty Days' Notice of Cancellation," alleging overcrowding in violation of the lease. The notice was sent by certified and regular mail on Sept. 8, 2000, and provided that the tenant had to cure the violation by Sept. 18, 2000. The tenant received the notice on Sept. 9, 2000. The tenant did not cure, and the landlord subsequently commenced a holdover proceeding.

Section 2504.1(d)(1) of the Division of Housing and Community Renewal's Emergency Tenant Protection Regulations sets forth the requirements for a notice to cure to such a tenant. It provides, in relevant part, that the date certain set forth in the notice to cure by which the tenant must cure "shall be no sooner than ten days following the date such notice to cure is served upon the tenant."[2]

LANDLORD-TENANT

WARREN A. ESTIS

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The tenant moved to dismiss the petition on the basis that she did not receive that mandated 10-day opportunity to cure, since she had received the notice only nine days before the Sept. 18 date to cure. The landlord opposed the motion, arguing that the 10-day period commenced upon mailing of the notice on Sept. 8 and that the tenant therefore had received the requisite time to cure. Although §2508.1 of the Emergency Tenant Protection Regulations is captioned "When a notice of paper shall be deemed served," it does not define when a mailed notice to cure shall be deemed served.

District Court Dismissal

The District Court, Nassau County (Norman Janowitz, J.), granted the tenant's motion to dismiss. CPLR 2103(b)(2) adds five days to the prescribed period "where a period of time prescribed by law is measured from the service of a paper and service is by mail." The District Court applied that concept to the 10-day period prescribed by Section 2504.1(d)(1) of the Emergency Tenant Protection Regulations for service of a notice to cure. In other words, it concluded that five days must be added to the 10-day minimum cure period when the notice to cure was served by mail. That meant that the notice at issue, which set the cure period exactly 10 days after the mailing date, afforded an inadequate time in which to cure the breach.[3]

The Appellate Term affirmed.[4] (The Appellate Term panel was justices Marquette L. Floyd, Robert W. Doyle and Allan L. Winick.) It agreed with the District Court's rationale "insofar as it understood that the regulatory purpose was to afford a tenant the full 10 days prescribed in which to cure a breach." However, it disagreed with the District Court's application of CPLR 2103(b)(2) to a notice to cure.

The Appellate Term pointed out that, by its express terms, that statutory section applied to "papers to be served upon a party in a pending action." Therefore, [illegible] was inapplicable to a notice to cure, which is served before the commencement of a proceeding. The Appellate Term rejected the addition of five days for service by mail in favor of a rule that the notice to cure was deemed given upon delivery, not upon mailing. That reasoning, too, rendered the notice at issue defective since it gave the tenant only nine days from the date the notice was received in which to cure the alleged default.

By a 3-2 decision, the Appellate Division, Second Department, also affirmed the dismissal of the petition.[5] (Justices A. Gail Prudenti, David S. Ritter and Daniel F. Luciano constituted the majority.) It agreed with the Appellate Term that CPLR 2103(b)(2) did not apply. It expressed the view that "to define service in terms of receipt rather than in terms of mailing is more consistent with the policies underlying the regulations." It believed that such a practical construction of the regulations was advantageous because 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."

Two Appellate Division judges, Justices Sandra J. Feuerstein and Thomas A. Adams, dissented and voted to reinstate the petition. They viewed the plain meaning of the regulations as being that "the date of service is the date it was mailed as evidenced by a contemporaneous affidavit of service executed by the landlord." They stated that any other interpretation "would render the provision allowing service by ordinary mail meaningless as the landlord will never be able to know when the notice is actually received."

The Court of Appeals affirmed the Appellate Division order. In a decision by Judge Victoria A. Graffeo, dated June 3, 2004, the Court concluded that the notice was not a valid predicate for terminating the lease because "the date certain as established by owner, when paired with the chosen service method [mail], did not provide tenant the minimum 10-day cure period."

The Court of Appeals pointed out that the regulations left a significant issue unanswered:

> As every court to consider this case thus far has recognized, the regulation that purports to answer the question when service of a notice is complete [9 NYCRR 2508.1(a)] does not actually do so. It identifies permissible service methods and what constitutes proof of service but fails to specify when such service is deemed to have occurred if service by mail is utilized.[6]

Concluding that the District Court's approach "best effectuates the regulatory purpose to afford tenants a 10-day cure period," the Court of Appeals held that:

> ... [O]wners who elect to serve by mail must compute the date certain by adding five days to the 10-day minimum cure period. ...[7]

The Court rejected the approach advocated by the owner, i.e., that the act of mailing was completion of service, without adding any days for mailing. The Court stated that such an approach "is inconsistent with [the] regulatory purpose to provide tenants a 10-day opportunity to cure." The Court of Appeals also viewed as "flawed" the Appellate Division and Appellate Term rule, which deemed service complete upon a tenant's receipt of the notice. The fallacy with [illegible]

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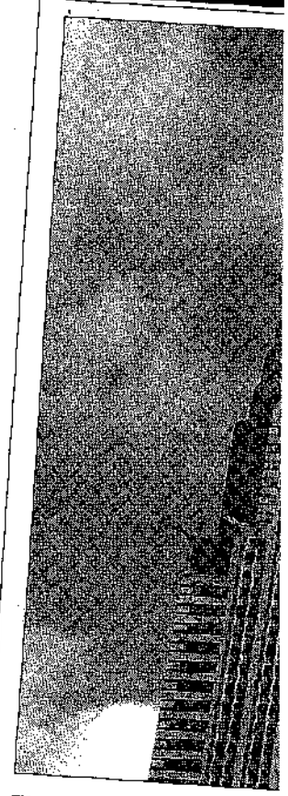

The Chrysler Building

The law firm **Moses & S** offices in the Chrysler Buildi pied by **Swidler Berlin She**

Moses & Singer signed a l Speyer Properties, which ov last month.

Under the lease, Moses & S square feet on three floors, v expand. The firm will occupy floors and half of the 11th.

The firm plans to move int located at 405 Lexington Ave August. Asking prices in the per square foot.

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Moses & Singer's new space by the New York office of Was Berlin Shereff & Friedman. Th ly acquired by **Dechert** when l Swidler Berlin's New York at 2005).

Swidler Berlin surrendered i early under a mutual terminat but is retaining half of the 11th

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"We're going to refurbish and deal," with new lighting, carpet, said.

The Chrysler Building, construct called the world's most identifiabl stainless-steel domed tower. The Ar designed by architect William Va floors.

This column is by Elizabeth Stull. To

thus permitting reliable computation of a date certain for curing to be inserted in the notice. By adding a definite number of days for service by mail, this approach would "ensure that tenants are not disadvantaged by an owner's choice of service method." The Court of Appeals described its approach as "provid[ing] a practical and fair solution to [the] regulatory ambiguity."

The Court cited CPLR 2103 as an example of a situation where such an addition of days was used to deal with mailing. However, the Court pointed out that by its terms CPLR 2103 applied to pending actions, and expressly stated that the Court was "not extend[ing] its applicability to the commencement of summary proceedings." In other words, the Court's approach was analogous to that in CPLR 2103; it was not, however, an implementation of CPLR 2103.

Landaverde involved a notice to cure with respect to a rent-stabilized apartment subject to the DHCR's regulations enacted under the Emergency Tenant Protection Act. In decisions since the Court of Appeals decision in *Landaverde*, courts have struggled with whether to apply the *Landaverde* rule in the context of different types of notices and different housing contexts.

In *KSLM Columbus Apartments Inc. v. Bonnemere*,[8] the Civil Court, New York County (Kevin C. McClanahan, J.), held that the *Landaverde* holding should not be expanded to apply to service of a Golub notice. The court reasoned that the same equitable considerations do not apply to a Golub notice as to a notice to cure. Cure periods are generally of short duration, whereas the Golub period is 90 to 150 days. A notice to cure "demands that the tenant take affirmative steps to cure the lease violation upon pain of the premature termination of the lease term." By contrast, a Golub notice "does not contemplate or require any affirmative steps by the tenant."

Judge McClanahan did not view the Court of Appeals in *Landaverde* as intending a "bright line rule" covering all notices governed by the Rent Stabilization Code. In support of that conclusion, he pointed out that the Court of Appeals in *Landaverde* had encouraged the DHCR to amend its regulations consistent with the Court of Appeals decision "in order to provide better guidance to parties who elect to serve notices to cure by mail". That wording, reasoned the court in *KSLM Columbus Apartments*, "suggests that the *Landaverde* holding was limited solely to notices to cure."

Similarly, in *Gnann v. Crawford*,[9] the Civil Court, New York County (Lydia C. Lai, J.), declined to extend the *Landaverde* rule to a Golub notice. Here, too, as in *KSLM Columbus Apartments*, the court stated that a notice of non-renewal, unlike a notice to cure, did not require affirmative action by the tenant. The court here similarly emphasized the lengthy notice period for a Golub notice. Since that period was already so lengthy, it was unclear, stated the court, how the *Landaverde* rule adding five days would be a benefit to a tenant who received a Golub notice. By contrast, application of the *Landaverde* rule would "substantially prejudice" "would compel renewal of the lease and foreclose prosecution of the cause of action for up to two years."

The *Gnann* court expressed another reason for narrowly construing *Landaverde*. Since "[s]ummary proceedings are governed by statute and the requirements for their use must be strictly construed," the court was "reluctant to impose additional procedural requirements not explicitly required by precedent or enacted by the legislature or an administrative agency." It believed "uniformity in the service requirements for notices in summary proceedings is desirable" but regarded the achievement of that goal as the legislative domain on which it would not encroach.

In contrast to *KSLM Columbus Apartments* and *Gnann*, the Civil Court, New York County (Jean Schneider, J.), in *Lynch v. Dirks and Wolfe*[10] held the *Landaverde* rule applicable to a Golub notice. The court noted that the purpose of the regulatory scheme at issue in the case before it, the Rent Stabilization Code, was identical to the purpose of the Emergency Tenant Protection Regulations at issue in *Landaverde*. The court stated that "no persuasive reason [has been suggested] why [the court] should not hold that service under a virtually identical regulation, where the legislative and regulatory purpose is the same, should not be deemed to be complete at the same time and in the same fashion" as in *Landaverde*.

The court conceded that the length of the notice period for a Golub notice was longer than the notice to cure period in *Landaverde*, so the tenant in *Landaverde* was "perhaps more disadvantaged" by the choice of mailing as a means of service. However, commented the court, "the degree of disadvantage does not appear to have been the central concern of the Court in *Landaverde*." The court in *Lynch* also rejected, as predicated on a factually inaccurate premise, the argument that a different rule should apply to a Golub notice than to a notice to cure because the tenant receiving a Golub notice purportedly did not have to take any affirmative act during the Golub period. Quite the contrary, stated the court, the tenants did have to act within that time. They had to "decide whether or not to contest the petitioner's case, consulting counsel in the process if they wish, and, if they elected not to contest, relocate their household to alternative housing."

In *Kerrin Realty Corp. v. Cruz*,[11] the Civil Court, New York County (Lydia C. Lai, J.), considered the applicability of the *Landaverde* rule to a proceeding to recover possession based upon a persistent course of conduct alleged to constitute a nuisance, predicated upon service of a notice of termination under section 2524.2(c)(2) of the Rent Stabilization Code.[12] (A cure period is not required for such a proceeding; a notice of termination can be served without a predicate notice to cure.) The Civil Court held that, in accordance with *Landaverde*, when mailing is used as the method of service for such a termination notice, "an additional five days must be added in order to allow the tenant the full termina-

The cases discussed so far all involve different kinds of notices than the notice to cure involved in *Landaverde*. In *Southbridge Towers, Inc. v. Frymer*,[13] the Civil Court, New York County (Gerald Lebovits, J.), considered the applicability of *Landaverde* to the same kind of notice (i.e., a notice to cure), but in a different housing context. As the *Southbridge* court pointed out, "[b]y its terms, *Landaverde* applies only to rent-stabilized apartments subject to the DHCR's regulations enacted under the Emergency Tenant Protection Act (ETPA)." In *Southbridge*, what was involved, though, was a Mitchell-Lama housing co-operative regulated by the DHCR, but not subject to the ETPA.

The court held that "[n]onetheless, the principles behind *Landaverde* apply to Mitchell-Lama co-operatives." It based that conclusion on the fact that the "stated purposes of the ETPA are similar to those behind the Mitchell-Lama program. Both were created to address a housing problem." Moreover, continued the court, "[b]oth rationales the court stressed in *Landaverde* — 'the need for orderly and efficient resolution of lease violations [and] the stated legislative purposes of the ETPA' [citation omitted] — exist in relation to Mitchell-Lama co-operatives."

In short, the Court of Appeals decision in *Landaverde* is only eight months old. At this early stage of interpreting and applying that decision, it is obvious there is and will be disagreement among lower court judges. The Court of Appeals concluded its decision by expressly "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." Until there is appellate authority addressing the applicability of *Landaverde* to notices other than the particular type of notice involved in that case, or until the agency promulgates unequivocal rules on the issue of notices served by mail, it would seem that lower courts will continue to differ on the subject.

1. 2 N.Y.3d 472, 779 N.Y.S.2d 808 (2004).
2. 9 NYCRR 2504.1(d)(1)(c).
3. The only reported District Court decision/order is at 29 HCR 26, N.Y.L.J., Jan. 10, 2001, p. 32, col. 1. The Appellate Term decision refers to a District Court order dated Nov. 30, 2000, that was superseded by an order of March 1, 2001.
4. 190 Misc.2d 76, 736 N.Y.S.2d 833 (A.T. 2nd Dep't 2001).
5. 307 A.D.2d 922, 763 N.Y.S.2d 631 (2nd Dep't 2003).
6. 2 N.Y.3d at 477, 779 N.Y.S.2d at 811.
7. Id.
8. N.Y.L.J. Jan. 5, 2005, p. 19, col. 1 (Civ. Ct. N.Y. Co.). Rosenberg & Estis, P.C. are the attorneys for petitioner in the case.
9. Civil Ct., N.Y Co., Dec. 1, 2004, Index Nos. L&T 73194/04, 73195/04, 73196/04.
10. N.Y.L.J., Jan 5, 2005, p. 19, col. 3 (Civ. Ct. N.Y. Co.).
11. Civil Ct., N.Y. Co., Aug. 25, 2004, Index No. L&T 81894/03.
12. 9 NYCRR 2524.2(c)(2).
13. 4 Misc. 3d 804, 781 N.Y.S.2d 207 (Civ. Ct. N.Y. Co. 2004).

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Death Penalty Deadline

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JUDGMENT RECOR

Bronx County

JANUARY 21, 2005

Rivera, Deanna; Unifund CCR Partners; $905.
Linder, Kecia; Fleet Services Corp.; $2,504.
Pytrom, Barbara; Same; $2,843.
Shawn, John; Same; $6,207.
Moncrieffe, Dennis; Chase Manhattan Bank; $3,231.

THE FOLLOWING WERE FILED BY THE NYS TAX DEPT:
Alvarez, Andres; $517.
Ralles, Llon; $1,019.
$1,564.
McDuffie, Darryl; Ford M
Co.; $1,248.
Trujeque, Micaela; Same
Delvalle, Alicia; RAB Per
Recoveries; $4,239.
Brantley,Elizabet; Same;
Chang, Michael; Same; $
Farfan, Manuel; Same; $
Passafiume, Maria; Same
Hinson, John; Same; $1,
Duberry, Caleb; Same; $
Rotbert, Edith; Dennis G
$1,775.
Thomas, Sahrainia; The