★ 30 PILOT STREET CORP. v. WILLIAMS—This proceeding concerns one of two residential apartments occupied by respondents on the same floor of the same building. The petition alleges, in paragraph 6, that, "... the premises are subject to regulations of the N.Y.S. Division of Housing and Community Renewal (DHCR)." These regulations include the Rent Stabilization Code. Respondent also asserts that the subject premises are subject to the Rent Stabilization Code, and annexes a copy of a cooperative offering plan which states that all 79 apartments in the building are subject to rent stabilization. The premises are therefore concededly subject to the Rent Stabilization Law and Code.

Petitioner claims that respondent's tenancy is residential, but the use is commercial, and that the lease, if any, has expired. For these reasons, petitioner contends that respondent is no longer entitled to possession of the apartment.

Respondent moves for an order pursuant to CPLR 3211(a)(2) dismissing this proceeding for lack of subject matter jurisdiction, on the ground that no notice of intention of non-renewal was served between 150 and 120 days before the expiration of the lease term. Respondent also claims that if petitioner wished to terminate respondent's tenancy for violation of the residential requirements thereof, a notice to cure was required. Concededly, no notice of non-renewal pursuant to Sections 2524.2 and 2524.4 of the Rent Stabilization Code was sent. Also, no notice to cure is claimed to have been sent pursuant to Section 2524.3(a) of the Rent Stabilization Code.

Petitioner contends that because respondent is allegedly using the apartment for commercial purposes, it need not send a "Golub" notice pursuant to Sections 2524.2 and 2524.4 of the Rent Stabilization Law. See Golub v. Frank, 65 NY 2d 900 (1985) and Crow v. 83rd Street Associates, 68 NY 2d 796 (1986). Petitioner cites two pre-Golub cases for the proposition that a tenancy in a residential rent stabilized apartment used for commercial purposes can be termined merely upon service of a thirty (30) day notice. See Tuba Corp. v. Laurence S. Freundlich, Inc., 128 Misc.2d 337, (Civ. Ct., N.Y. Co. 1985); Coronet Properties Company v. Jennie & Co. Film Productions, 121 Misc.2d 873, (Civ. Ct., N.Y. Co. 1983). These cases are both superseded by Golub, supra, and Crow, supra. Sections 2524.2 and 2524.4 of the RSC, effective May 1, 1987, now control.

Section 2524.2 of the Rent Stabilization Code provides, in pertinent part:

Section 2524.2 *Termination notices.*

(a) Except where the ground for removal or eviction of a tenant is non-payment of rent, no tenant shall be removed or evicted from a housing accommodation by court process, and no action or proceeding shall be commenced for such purposes upon any of the grounds permitted in section 2524.3 (Proceedings for Eviction — Wrongful Acts of Tenant) or section 2524.4 (Grounds for Refusal to Renew Lease, ...) of this Part, *unless and until the owner shall have given written notice to such tenant as hereinafter provided.* (Emphasis Supplied.)

(c) Every Such notice shall be served upon the tenant:

(2) in the case of a notice ... pursuant to subdivision (c) of Section 2524.4 of this Part (Primary Residence), *at least 120 and not more than 150 days prior to the expiration of the lease term;* (Emphasis Supplied).

In is evident under RSC §2524.2 that if a landlord wishes to evict a rent stabilized tenant upon a ground other than non-payment of rent, it must give tenant written notice as required by this section. If the ground is non-primary residence, a notice of non-renewal is required to be served between 120 and 150 days before the expiration of the lease (RSC §2524.2[c][2]). If the ground is violation of a residential rent-stabilized tenancy by virtue of commercial use of an apartment, a written notice to cure must be given pursuant to RSC §2524.3(a). Neither of these notices was given in the instant case.

Because the premises are subject to the RSC, petitioner cannot claim that the alleged commercial use exempts it from the notice requirements of the Code. See, Melohn v. Harari, N.Y.L.J., May 4, 1988, p. 7 col. 1 (App. Term, 1st Dept.). The premises are concededly subject to the RSC. Petitioner cannot ask the Court to assume as a fact it seeks to prove herein, and thus excuse petitioner from the legal notice requirements. The rider to petitioner's thirty (30) day notice, made part of the pleadings herein, states that the ground claimed is that respondent does not reside in the premises and makes his primary residence elsewhere. If this is the case, a 150-120 day non-renewal notice would be required pursuant to RSC §2524.2(c)(2). If the ground is violation of a residential tenancy by virtue of alleged commercial use, a notice to cure would be required pursuant to RSC §2524.3(a). Failure to serve either of these notices in accordance with the RSC deprives this Court of subject matter jurisdiction over this eviction proceeding against a rent stablized tenant. The petition is therefore dismissed. This constitutes the decision and order of this court.

## A

NYLJ July 27, 1988 p. 21, c. 5
Civ. Kings per Judge Lewis

Abuse of process; affirmations; attorneys; attorneys' fees; CPLR R3212(e), R3217(c); deceptive practices; delay; GBL Article 22-a, Article 29H, §349, §601, §601(8); Gramford defense; laches; motions; res judicata; RPL §234; summary judgment.

VIGILANCE v. BASCOMBE—The respondent-tenant, Daphney Bascombe, moves for an order granting partial summary judgment awarding costs and attorneys' fees of this motion, pursuant to section 3212(e) of the CPLR. The motion for partial summary judgment relates to eight of the tenant's affirmative defenses or counterclaims. She seeks summary judgment with regard to the affirmative defenses of laches, res judicata and collateral estoppel, as well as on the counterclaims of abuse of process, unfair and deceptive business practices in violation of General Business Law Article 22-A and on the issue of attorneys' fees.

In support of her motion, the tenant has submitted an affidavit and an affirmation by her attorney, together with copies of the petition and notice of petition, notice of appearance, verified answer, jury demand and a determination in Vigilance v. Bascombe (L & T No. 90576/87). Two supplemental affirmations were also filed. The landlord filed an affidavit in opposition, together with a sur reply affidavit, a supplemental sur reply affirmation and a supplemental affirmation which were written by his attorney.

A summation of the facts alleged follows. The landlord is currently suing to recover rent for the period beginning March, 1986 and continuing for twenty-three months to February, 1988. The monthly rent is $350.00 and the total sued for is $8,050.00 plus $100.00 for legal fees. The tenant was first sued by this landlord in 1984 for $5,950. That proceeding was concluded, after the tenant produced a statement from the New York City Office of Management indicating that she owed no rent through July 31, 1984, in a judgment for $507.00 against the tenant.[1] Thereafter, eight more proceedings were initiated by the landlord, including the present one. Each proceeding sought more rent.[2]

Of the eight, three were holdover proceedings. One of these was discontinued and two were dismissed, no appearance landlord. Five of the proceedings were for non-payments, two of which were discontinued and two which were dismissed no appearance landlord and this one remains.

Ms. Bascombe states that between her daughter and herself they had to appear in court at least thirty times to defend in the prior proceedings and that because of her age she has suffered extreme aggravation, annoyance and hardship. The tenant also states that in this and in prior proceedings she has defended, in part, on the grounds that her apartment is in need of repair. Finally for the tenant, her papers state that the landlord is limited in his ability to sue for rent by the determination made in Vigilance v. Bascombe (L & T No. 90576/87 wherein the court restricted recovery to three months.

The landlord put forward the following facts.[3] The tenant has failed to pay rent for twenty-three months and "seeks ... to be rewarded for her wrong." Mr. Vigilance states that he has demanded the rent on numerous occasions and that he had been unsuccessful in the legal action which he took to recover the past due rent. He asserts that the tenant was "on notice" that he was actively seeking the rent, that he has been more than accommodating to the tenant. He has provided the tenant with

heat, hot water and a safe dwelling in good repair "to the extent of normal wear and tear and deterioration for a building of that age and expectant condition." Vigilance aff. Para. 3. Mr. Vigilance also indicated that he was always "ready to complete any and all repairs which the tenant brings to my attention."

Finally, with regard to the question of delay, the landlord admits that he "may have delayed" but did not abandon his cause of action. He asserts that discontinuance was by leave of court and that the court would not have allowed discontinuance to bypass a prior court order or to avoid trial loss.

It is well established that summary judgment "may not be granted whenever the pleadings raise clear, well-defined and genuine issues; nor may it be granted whenever there is doubt as to the existence of a triable issue or when the issue is arguable . . ." (Falk v. Goodman, 7 NY2d 87, 91 [1959]). When the movant tenders evidentiary proof in admissible form establishing its cause of action sufficiently to warrant a direction by the court for judgment in the movant's favor the burden then falls to the opposing party to show by admissible proof that there are facts sufficient to require trial of any issue of fact, or at least to demonstrate some acceptable excuse for the failure to do so (Heath v. Soloff Const., Inc., 107 AD2d 507 [4th Dept., 1985]). If even the color of a triable issue is thereby shown, summary judgment is foreclosed (Newin Corp. v. Hartform Acc. & Indemn. Co., 62 NY2d 916 [1984]).

To defeat a motion for summary judgment a party must lay bare his proof in an affidavit by one having actual and personal knowledge of the facts. "The affidavit of [an] attorney submitted in opposition to the motion is without evidentiary value and raises no triable issue of fact" (citations omitted). (GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc., 108 AD2d 86, 91 [2nd Dept., 1985]). Although the landlord, through his counsel, has put forth several affidavits and affirmations, only the landlord's affidavit is sufficient for consideration on these issues. An affidavit submitted by an attorney without knowledge has no probative value on a summary judgment motion. David D. Siegel, New York Practice Section 281. Conclusory assertions will not defeat a motion for summary judgment. To defeat the motion the landlord must present evidentiary facts sufficient to raise a triable issue of fact (Freedman v. Chemical Const. Corp., 43 NY2d 260, 401 NYS2d 176 [1977]). The relevant information — that which can be considered on this motion appears above.

The tenant contends that the landlord has delayed inexcusably and unreasonably such that he should be limited to suing for no more than three months. It is the defense of laches.

As noted in Dedvukaj v. Madonado (115 Misc. 2d 211), the defense of laches is composed of four elements:

"(1) conduct on the part of the defendant . . . for which the complainant seeks a remedy; (2) delay in asserting the complainants rights, the complainant having had knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute a suit; (3) lack of knowledge or notice on part of the defendant that complainant would assert the right he bases his suit and (4) injury or prejudice to the defendant in the event that relief is accorded to the complainant or that the suit is not held to be barred." Furthermore, "[1] laches will not bar recovery where there is a reasonable excuse for one's failure to take action in the assertion of his rights." Dedvukaj v. Madonado, at 214 (citing 36 NY Jur. Limitations & Laches sections 153 p. 141; 160 p. 147). The initial burden is on the tenant to show that each of the conditions have been met. Normally, a delay of three months would satisfy the first two conditions. Here we must look at the second. The landlord has not waited for twenty-three months to sue, starting in 1984, he has brought nine different proceedings. The first was brought for thirteen months, the next for two months, the next was a holdover with six months rents alleged to be outstanding. Each of these were discontinued. Except for the first, the court has not been been enlightened as to the reason for the discontinuance. Four other proceedings were dismissed because the landlord failed to appear. It is clear that while not delaying in bringing suit the landlord delayed the prosecution of his rights such that the second condition is satisfied.

As to the third condition, the landlord made initial assertions, that is, he began proceedings. There is not, strictly speaking, a lack of knowledge that he would do so, rather the assertion came to have little meaning for the tenant who could not determine from the commencement of a lawsuit that the landlord intended to actually assert his rights. This is particularly so since the landlord apparently chose not to continue when he could have decided to go forward. Here the commencement of lawsuits had the same effect as would have occurred had the tenant had no knowledge that the landlord would commence proceedings. Finally, evidence that the tenant is poor and does not have the resources with which to pay such a large arrearage is enough to meet the last condition.

The tenant, having met her burden and shown that laches has attached, the burden shifts to the landlord to either disprove the conditions or to prove that the delay should be excused as reasonable. There is neither the offer of an excuse, reasonable or othewise as to the delay nor a challenge to the conditions. The tenant has shown laches. The question remains how much rent may the landlord sue for?

In a recent decision the Appellate Term reiterated its position that it does not favor an absolute three month limitation to the collection of rent in a summary proceeding (C.H.L.C. Realty v. Gottleib, Slip Op., May 11, 1988 [App. Term 2d & 11th Jud. Dists.). Therein the court said that "the tenant [must] establishes that the demand for rent is not stale." Stale rent has been established here. A delay in prosecution is as effective as a delay in bringing suit. The delay herein is twenty-three months with no showing of excuse. This delay, together with other action on the part of the landlord which might suggest the landlord's desire to proceed only when there was a large amount alleged to be owned, convince me that rents which may be owed for a period beyond three months is stale.

The landlord may not get a judgment of possession upon the claim for rent which is stale. Fur such rent, the petition need not be dismissed (City of New York v. Betancourt, 79 Misc. 2d [App. Term, 1st Dept., 1974]). As to that portion of the claimed rent which is stale, this litigation shall be deemed an action at law and non-possessory judgment may issue. Dedvukaj v. Madonado, supra.

Ms. Bascombe also seeks summary judgment with regard to the defenses of res judicata and collateral estoppel based upon a decision in Vigilance v. Bascombe (L&T No. 90576/87) which limited the landlord's possible recovery to three months rent. The doctrine of res judicata applies to summary proceedings Rasch, Landlord & Tenant, §1365 (2nd. 2d. 1971; Fairview-Chase Corp. v. Scharf, 254 NY55 [1930]; Reich v. Cochran, 151 NY 122 [1896]). The landlord had the option to exercise his right to appeal that decision but did not do so. The decision is now binding upon him. CPLR Section 3217(c). The landlord is limited in his quest for a possessory judgment to rents due for the month following July, 1987.[4]

And has the landlord been abusive of the process which allows the swift adjudication of rights as between himself and this tenant. The question must be answered in the affirmative. The landlord has commenced nine proceedings. He failed to appear for most of them and he discontinued the remainder, with the exception of one, without resolution. As noted by Counsel for the landlord, "abuse of process requires . . . regularly issued process; an intent to do harm, without excuse or justification by the plaintiff; and the use of process in a perverted manner to obtain a collateral objective or goal" (Board of Education v. Farmingdale Classroom Teachers Association, Inc., 38 NY2d 397, 380 NYS2d 635 [1975]). Memorandum in Opposition, p. 10.

Neither Counsel nor the landlord have set forth any excuse for petitioner actions in bringing the eight prior proceedings. It appears that he intended to punish the tenant who sought to have repairs made in her apartment. The tenant or her daughter appeared some thirty times to defend against the landlord's allegations. It was also necessary to make numerous trips to her attorney's office. Without consideration of the probably stress or anxiety that was created by these many proceedings, the totality of circumstances here shows a

perversion of the purpose for which summary proceedings may be initiated. Abuse of process has been shown.

Summary judgment is also sought for unfair and deceptive business practices. The motion is based in the General Business Law, Articles 29-H (Section 601) and 22-a (Section 349). Section 601(8) of the GBL prohibits the assertion of a right to a sum when the collector knows or has reason to know that no right exist, i.e. the collector has no right to the sum sought to be collected. The tenant's argument is that a violation of (GBL. Art. 29-H) and the Deceptive Practices Act (GBL Art. 22-A) were designed to protect all consumers, including residential tenants.

I am in agreement with this contention. There seems to be no bar to the application of these statutes to a Housing Court summary proceeding. I do not find however, that the actions of the landlord arise to the level anticipated in GBL Section 601(8) to be a "prohibited practice." It was determined that the landlord could only sue for rent for the three months immediately prior to the filing of Vigilance v. Bascombe (L&T #90576/87). That proceeding was discontinued, perhaps as suggested by the tenant, to avoid the limitation. The three proceedings which followed show that the landlord intended to collect in excess of that amount. But, the landlord did not go forward with that attempt in the two cases prior to the instant case. With regard to the instant proceeding, the impact of the determination made in Vigilance, L&T #90576/87 has first been decided in this case.[5]

Finally, the motion for attorney's fees is dismissed with leave to renew at the conclusion of these proceedings. The motion should be determined at the termination of these proceedings, inasmuch as the Real Property Law Section 234 tags the award of such fees to a success in the summary proceeding

Summary judgment is granted on the defenses of laches, res judicata and collateral estopppel, as well as for abuse of process; it is denied on the issue of unfair and deceptive practices. A hearing shall be scheduled for a determination of damages upon the initiative of Counsel for the tenant. The claim for unfair and deceptive business practice survives for trial and the claim for attorney's fee may be renewed after trial. This constitutes the decision and order of this court.

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(1) This information is related by the tenant's attorney in his supplemental affirmation. Although information given by an attorney on summary judgment motion, is usually insufficient for consideration on such a motion, the exception to that rule prevails here The matter related is supported by documentary evidence attached to the affirmation in exhibits A, B and C.

(2) There is one exception in 1987 wherein the landlord sued for only three months rent but the case was dismissed when the landlord did not appear on the return date. It is noted that this information is given generally in the tenant's affidavit and more specifically in her attorney's affirmation. The Court accepts it as given by "someone with knowledge," and therefore worthy of consideration. In any event, it is not denied by the landlord.

(3) This summation excludes entirely the supplemental sur-reply and so much of the sur-reply as relates facts which could not be of his own knowledge, e.g., he states the intentions ofthe tenant.

(4) The Court notes that the limitation periods are nearly the same whether the limitations is made pursuant to the laches of res judicata.

(5) It is noted here that the discontinuance of that case puts into question the landlord's right to claim the rent alleged to be owed for period beyond three months; a reasonable person—even a reasonable lawyer--might have been confused

## A

NYLJ July 28, 1988 p. 17, c. 4
Sup NY per Justice Ramos

### Abatements; intentional infliction of emotional distress; noise; nuisance; punitive damages; warranty of habitability.

. STROH v. SHOPWELL, INC.—The plaintiffs, residents of a cooperative apartment ownedby the defendant, 69th Tenants Corp. (hereinafter "Co-op"), have commenced this action seeking equitable and legal relief against the Co-op and Shopwell, Inc. (hereinafter "Shopwell") because of noise which is alleged to emanate from the Shopwell store at night.

The credible evidence establishes that the plaintiffs purchased shares of the Co-op and were granted a proprietary lease to an apartment in a multiple dwelling owned by 69th Tenants Corp. This apartment contains two bedrooms and is located on the second floor on the Third Avenue side of the Co-op, at 69th Street. The second floor of the Co-op is the lowest residential floor, the first floor being occupied solely by commercial tenants or used as public or common areas.

Prior to the events in issue, Shopwell maintained a store substantially smaller in size, which was located under a part of the plaintiffs' apartment.

In 1982, Shopwell and the Co-op entered into a new lease pursuant to which the Shopwell store was expanded in size. Thereafter, Shopwell began to operate on a twenty-four (24) hour basis.

After the store expansion, but before the twenty-four (24) hour operation, the plaintiffs began to hear noise from the store during normal sleeping hours (10 P.M. to 7 A.M.). The noise was disturbing and prevented sleep. The problem was being caused by Shopwell's employees engaged in restocking the store shelves during the time the store was closed to customers.

The plaintiffs complained to the Co-op's Board of Directors and Shopwell and although steps were taken to respond to the plaintiffs' legitimate complaints, those steps were only marginally effective. The problem continues virtually without abatement. The credible evidence shows that the plaintiffs are suffering repeated disturbances because of the nature of Shopwell's operation, particularly re-stocking of shelves and the movement of carts in the store.

There is no doubt that the plaintiffs are entitled to some relief. The lease between the Co-op and Shopwell specifically provides that "any unseemly or disturbing noises which may disturb or interfere with the other occupants of the building" are prohibited.

The possible solutions are:

(1) soundproofing the plaintiffs' apartment;

(2) soundproofing the Shopwell store; or

(3) discontinuing night-time activities in the Shopwell store.

The proofs reveal that the soundproofing of the plaintiffs' apartment (the first alternative) is neither practical nor guaranteed to work and that the most effective method of dealing with noise is to eliminate the source of the noise, rather than to contain it. The testimony of the experts who testified made it clear that the ability of sound to travel through solid structures, such as the building in question, renders it difficult and expensive to control noise once it has been created.

Alteration of the plaintiffs' apartment to render it soundproof would require building false walls, ceilings and floors which would intrude unreasonably into their living space and would substantially diminish the value of their apartment.

The second alternative would be to require Shopwell to install such soundproof materials on the floor and shelves of the store as would be necessary to prevent noise from being created in the first place and would isolate whatever sounds are created. This alternative would be acceptable, but for its cost. The parties have stipulated that its cost might far exceed $150,000.

The third alternative is to require that *all* operations in the store cease at 10 P.M. and resume only after 7 A.M. on weekdays, 9 A.M. on weekends. The record does not contain any proof that such a restriction would result in any substantial harm to the defendants or that it would otherwise be unreasonable.

Store shelves can be stocked during the day, with only minor inconveniences to the public and Shopwell would thereby be spared the enormous expense of alteration which it would be forced to undertake with no guarantee of success.

Accordingly, this Court will direct in the order to be settled herein that Shopwell cease all operations and close the store (except for emergencies) during the hours set forth above, immediatelv. In the event Shopwell determines that it wishes to attempt to cure by soundproofing its operation, it shall notify plaintiffs' attorneys, alter and re-commence twenty-four (24)

This appeal involves one of several nonpayment summary proceedings instituted by landlord against various tenants involved in a rent strike. The matters were settled pursuant to a stipulation which provided for entry of final judgments against the tenants, with a stay of issuance of the warrants to permit tenants to pay the judgments. The stay was extended to June 8, 1987 and at that time tenant herein owed landlord the sum of 4700.13. By letter dated June 12, 1987 tenant's attorney indicated he would release the sum of $320 to landlord's attorney. No reason was given for failure to tender the entire sum due. This tender was not accepted and a warrant was issued, resulting in tenant's motion and the court's order conditionally vacating the judgment and warrant.

In our opinion, inasmuch as tenant did not tender the full amount due under the judgment, there was no good cause shown for vacating the warrant (see, 133-24 Sanford Avenue Realty Corp. v. Paterson, NYLJ, June 3, 1988, App. Term, 2d and 11th Jud. Dists.). The motion should therefore have been denied. In view of this, there was no basis for the later orders staying execution of the warrant and, after tenant was eventually evicted, restoring him to possession.

## A

NYLJ May 25, 1989 p. 30, c. 1
A.T. 2 & 11th Jud. Dist. per Monteleone, J.P.; Pizzuto, and Santucci, J.J.

Stipulations; vacatur.

134-38 MAPLE REALTY INC., ll-ap, v. ASHLEY, ten-res—Appeal by landlord from an order of the Civil Court, Queens County (Sparks, J.) dated Aug. 1, 1988, vacating a default judgment and restoring tenant to possession.

Order unanimously reversed without costs and tenant's motion to vacate, to be restored to possession, and for other relie denied.

Tenant failed to adequately explain her noncompliance with the requirements of the stipulation. Specifically, she failed to adequately explain why the checks that she sent to landlord in satisfaction of the payment requirements of the stipulation were dishonored by her bank, if, as she claimed, she did not remove the funds from her account until twelve days after the checks were dishonored.

## B

NYLJ May 25, 1989 p. 30, c. 1
A.T. 2 & 11th Jud. Dist. per Monteleone, J.P.; Pizzuto, and Santucci, J.J.

*Gramford*; laches; stale rent.

VIGILANCE, pet-ap, v. BASCOMBE, res-res—Appeal by petitioner from an order of the Civil Court, Kings County (Lewis, J.) dated July 5, 1988 granting partial summary judgment in favor of tenant.

Order affirmed with $10 costs.

While, as previously stated (see, e.g., C.H.L.C. Realty Corp. v. Gottlieb, App Term, 2d and 11th Jud Dist, NYLJ Oct. 19, 199) this court had disapproved of the establishment of an absolute time limitation on the collection of rent in a summary proceeding (see Moskowitz v. Simms, App Term, 2d and 11th Jud Dist, NYLJ April 28, 1975), under the circumstances disclosed by the record herein, the court below did not err in holding that landlord may not get a judgment of possession for more thar three months' rent and in relegating landlord to an action at law for the remainder.

All concur.

## C

NYLJ May 25, 1989 p. 30, c. 5
Civ Kings per Judge Cannizzaro

"Day"; GCL §25(a)(1); personal jurisdiction; RPAPL §735, §735(1); service of process

SORKIN v. De COSTA — At a traverse hearing held by order of this court dated April 10, 1989; and the court having heard all of the evidence and examined the relevant documents and exhibits, makes the following findings and conclusions of law:

This is a commercial holdover matter relating to premises known as "8 Buffalo Avenue, Apt. store front." The testimony adduced at the hearing discloses that service was allegedly achieved by methods other than personal service.

The process server testified that in effectuating service of the 30 day notice he visited the premises on August 26, 1988 at approximately 1:30 P.M. and then again between 4:00-5:00 P.M. On the second time the door was open, he entered and asked for the respondent and receiving negative results left the notice on a counter on the inside of the premises next to the door. Hie then mailed a copy by registered mail and a copy by regular mail. August 26, 1988 being a Friday, he mailed the aforesaid documents on Monday, August 29, 1988 addressed to 8 Buffalo Ave., Apt. store front.

He further testified that on November 22, 1988 he again called at the premises, at approximately 9:08 A.M., to effectuate service of the Notice of Petition and Petition, and received no response. He returned at approximately 2:30 P.M., found the door to the premises open, entered and saw four or five people therein. He inquired of the respondent, got a negative result and once again left the envelope contain ing the Notice of Petition and Petition on the counter. The next day he mailed one set by certified mail and one set by regular mail addressed to 8 Buffalo Ave., Apt. store front.

All conspicuous place services were made at what he believed to be 8 Buffalo Avenue, Brooklyn; and that the premises he entered upon had a yellow sign with LARGE black letters *"Hosea De Costa"* with a small number 12 thereon and a number 12 on the door. (Emphasis by the court.)

Respondent testified that he never received any documents except for a 72 hour notice of eviction given to him by a "kid"; and that he does business at 12 Buffalo Avenue, as the sign indicated and not at 8 Buffalo Avenue; and further contends that the petitioner did not comply with section 735 of RPAPL in that the mailing of the 30 day notice was not timely made as prescribed by the statute.

In the case at bar the respondent alleged that this court lacks jurisdiction claiming lack of service of the 30 day notice, and the Notice of Petition and Petition; and that the petitioner has failed to comply with section 735 of the Real Property Actions and Proceedings Law.

It has been established that even in the extreme case where a tenant admits receipt of the petition and notice of summary proceeding to receover possession of real property, failure of process server to comply with the requirements of section 735 RPAPL setting forth the methods of permissable service is fatal to jurisdiction. (Palumbo v. Clark's Estate, 1978, 94 Misc 2d 1, 403 HYS 2d 874.)

RPAPL 735(1) requires that in a summary proceeding, the mailing of the notice of petition and petition must be accomplished within one day after delivery of affixing such papers to the premises sought to be recovered. (MTA v. Terminal Drago Stands, 119 Misc 2d 10.)

A summary proceeding is governed entirely by statute requiring strict compliance therewith. The requirements of RPAPL § 735 are jurisdictional and a late mailing beyond the one day requirement does not come within the purview of strict compliance with the statutory requirements. (Olivero v. Mercedes Duran, 70 Misc 2d 882; MTA v. Terminal Drago Stands, supra; Goldman Bros. v. Forester, 62 Misc 2d 812; Handshke v. Loysen, 203 AD 21; Matter of Smith v. Norton, 204 AD 248.)

Respondent argues that the petitioner did not effectuate timely mailing of the 30 day notice; and states that if the notice was affixed on Friday, August 26, 1988 as alleged, the envelopes used for mailing (plaintiff's exhibits 1 and 2) were postmarked Monday, August 29, 1988; and therefore, beyond the one day requirement established' by statute.

The petitioner responds that the one day requirement refers to within one "business day" after affixing to the premises; and relies upon General Construction Law section 25a(1) which provides as follows:

When any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day and if the period ends at a specified hour, such act may be done at or before the same hour of such next succeeding business day, except that where a period of time specified by contract ends on a Saturday, Sunday or a public holiday, the extension of such period is governed by section twenty-five of this chapter.

In a summary proceeding strict compliance with the statute is necessary but it has not been said that we must construe