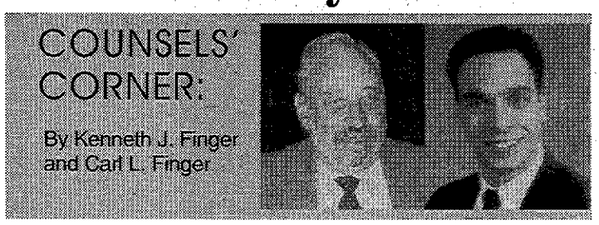
When Is 10 Days Not 10 Days?



WHITE PLAINS - In landlord tenant law, the obvious may not always be the law.

In cases of troublesome tenants, the Emergency Tenant Protection Act (ETPA) of 1974 requires a landlord to provide the offending, or in some cases offensive, tenant an opportunity to cure. The law specifically states that 10 days have to be provided to the tenant. (9 NYCRR §2504.1(d)(1)(i)).

In other situations, there are time limits set forth in the law which have to be provided a tenant before legal action can be taken. For example, when a notice is given that a lease will not be renewed, there are strict time limitations. A tenant has to be offered a lease renewal or a notice of non-renewal, under the Rent Stabilization Law, or under the Emergency Tenant Protection Act, with at least 90 days notice being provided. There are other time limits and constraints set forth in various provisions of the law relative to landlord-tenant proceedings.

Prior to June 2, 2004, 10 days meant just that – the landlord had to provide the tenant with a 10-day notice to cure and if the tenant did not cure within the 10 days, the landlord could then serve or effectuate a notice terminating the tenancy.

Last June, the Court of Appeals, New York's highest court, in the case of ATM One LLC v. Landaverde, 2 N.Y.3d 472 (2004) held that 10 days is not always 10 days, but, in some situations, 15 days.

Specifics

The factual situation was as follows. On September 8, 2000, the owner served the tenant with a "Notice of Default; Ten Days' Notice to Cure, including a Thirty Days' Notice of Cancellation," alleging overcrowding in violation of the lease. The notice was sent by certified and regular mail on September 8, 2000, and set a "date certain" of September 18, 2000 for cure of the overcrowding. It is undisputed that tenant received the notice on September 9, 2000, thus affording her only nine days to cure, however, the law provided that service by mail was complete upon mailing.

The tenant did not cure by September 18, 2000 and after expiration of the 30-day cancellation period, the owner commenced a holdover proceeding against the tenant. The tenant moved to dismiss the petition on the basis that she did not receive the mandated 10 days' notice.

The landlord opposed the motion, arguing that since the law provides that "service is complete upon mailing," the 10 days included the 8th of September, and thus, including the 8th (which one might argue is not defensible in any case), the owner technically complied with the law and provided the requisite 10 days' notice to cure.

Proving once again that "bad cases make bad law," the lower courts, on various grounds, dismissed the Petition on either the ground that service was complete upon delivery, in this case the 9, only nine days before the 18 (the cure date) or borrowed a concept from the Civil Practice Law and Rules which adds five days to the requisite time frame when legal papers are mailed.

The Ruling

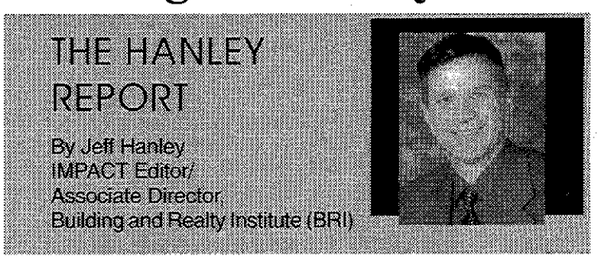
The Court of Appeals held that:"...owners who elect to serve by mail must compute the date certain by adding five days to the 10-day minimum cure period, see e.g. CPLR 2103[b] [2]). In this manner, service will be deemed complete upon mailing, and a properly executed affidavit of service will raise a presumption that proper mailing occurred (see Kihl v. Pfeffer, 94 N.Y.2d 118, 122, 700 N.Y.S.2d 87, 722 N.E.2d 55 [1999]; Engel v. Lichterman, 62 N.Y.2d 943, 944- 945, 479 N.Y.S.2d 188, 468 N.E.2d 26 [1984]). "Mere denial of receipt is not enough to rebut this presumption" (Kihl, 94 N.Y.2d at 122, 700 N.Y.S.2d 87, 722 N.E.2d 55)."

While one would think that this is simple, and five days should always be added to the service of notices, in view of the multiplicity of notices and the types of notices, cases since Landaverde have been all over the lot. If fact, in situations involving notices of non-renewal of leases, courts have issued diametrically opposite determinations as to whether five days have to be added to the requisite 90 days set forth in the statute. And when papers are served personally, with additional mailings, five additional days presumably do not have to be added.

A careful practitioner is on notice that caution is required and whenever a notice is mailed and there is a statutory time period, whether 10, 30 or 90 days, at this stage in Landeverde's history given the varying interpretations, one would be prudent to add five days to each required time limit if the only service is by mail.

Editor's Note: Kenneth J. Finger, Esq., is chief counsel to the Building and Realty Institute of Westchester and the Mid-Hudson Region (BRI). He is also a principal of Finger and Finger, A Professional Corporation, of White Plains. Carl L. Finger, Esq., is also with Finger and Finger. Daniel S. Finger also contributed to this article.

Serving Important Messages to Building and Realty Industry Members



ARMONK – Reminders.

The current edition of IMPACT contains a series of them for building and realty industry members. Whether it's a call for assistance to help industry initiatives, or stories on upcoming programs and events, our latest issue delivers some important messages.

Our lead report on page one highlights how the Cooperative and Condominium Advisory Council (CCAC) of the Building and Realty Institute (BRI) is stressing its stiff opposition to two proposed bills that, according to realty industry officials, will produce devastating consequences for the co-op and condo sector.

The CCAC is voicing its strong resistance to A04901 and S2439, two bills that are calling for the amendment of the real property tax law and the real property law in relation to the assessment of specific condos and co-ops. The proposal, realty industry officials said, calls for changes in the assessments of complexes of three stories or under. The proposed changes, those officials stress, will produce significantly higher property taxes for co-ops and condos, with taxes, in some cases, doubling.

"The legislation, if passed, will increase the assessment of the cooperatives and condominiums many fold, and would be a significant additional expense to co-ops and condos (and to the individual unit owners)," said Ken Finger, chief counsel to the CCAC and the BRI.

Finger added that the passage of the legislation will result in "a huge drag on the real estate market and would, very detrimentally, affect co-op and condo unit owners, many of whom are on limited incomes and bought their units some years ago."

"The monies that would ordinarily go for maintenance, upkeep and replacement - and many of these buildings are of an age where significant work has to be done - would now have to go for real estate taxes," Finger said.

> **"This bill is a disaster to the cooperative and condominium community." — Ken Finger, chief counsel, Building and Realty Institute (BRI).**

Finger stressed that the involved co-ops and condos, if the legislation passes, will, in effect, be subsidizing single family homeowners as a result of the new assessment methods.

"This bill," Finger added, "is a disaster to the cooperative and condominium community."

The Call for Immediate Help

Accordingly, CCAC officials said that the association last week conducted an emergency membership mailing on the proposed legislation. The mailing stressed the urgent need for co-ops and condos to voice their strong opposition to the proposal to members of the State Assembly and Senate. The mailing was also sent to members of the Advisory Council of Managing Agents (ACMA), an affiliate organization of the CCAC. ACMA represents more than 75 property managers in the Westchester and Mid-Hudson Region.

"We need the immediate cooperation of CCAC and ACMA members on this issue," said Albert Annunziata, executive director of the BRI. "As realty industry analysts have said, the passage of this legislation will be a complete disaster to the co-op and condo sector."

Herb Rose, a well-known co-op and condo consultant, termed the bills as "another series of ill-advised attacks on co-op and condo forms of ownership." He stressed that taxes on the co-op and condo sector are consistently unfair and out of proportion to taxation on private homes.

"These new legislative attempts may put many co-ops and condos in danger of bankruptcy by raising taxes under some yet-to-be created formula," Rose said. "A new, more costly and untried assessment formula is being thrust into being on these complexes. Whatever happened to public hearings on new taxes? These bills need to be defeated, or vetoed."

Another Request

Another call for assistance from building and realty industry members is coming from the Apartment Owners Advisory Council (AOAC) of the BRI.

As they do each year, AOAC representatives have begun preparations for the realty

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