Notice to Cure

Scope of Demand May Make Proceeding Defective
Warren A. Estis and William J. Robbins, partners at Rosenberg & Estis, review a recent decision in which the court held that the substance of the notice to cure was defective and, therefore, dismissed the proceeding. What makes the case interesting is that the flaw which the court found was that, on the facts of the case, the scope of the cure demanded was unjustified.

Warren A. Estis and William J. Robbins

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There are frequently predicate notice requirements to commencing a summary proceeding. For example, where the tenancy is terminated before the expiration of the lease for a violation of a substantial obligation of the lease, the landlord is usually required to serve a notice to cure specifying the nature of the default, and providing for termination in the event the default goes uncured within the time period stated in the notice. Service of an inadequate notice makes the proceeding defective. A recent decision by New York County Civil Court Judge Marc Finkelstein in *Leopold v. Eckles*[1] is an example of just such a case.

There, the tenant had been served with a notice to cure, followed by a notice terminating his tenancy due to his alleged failure to comply with the notice to cure. The landlord then commenced a summary holdover proceeding predicated on the claim that the tenant was violating a substantial obligation of his tenancy. The court held that the substance of the notice to cure was defective and, therefore, dismissed the proceeding. What makes the case interesting is that the flaw which the court found was that, on the facts of the case, the scope of the cure demanded was unjustified.

The court's decision began with a summary of the pertinent content of the notice to cure. The notice relied on, and quoted from, two lease provisions. One lease provision, set out in its entirety in the court's decision, provided that:

> Tenant must take good care *of the Apartment* and all equipment and fixtures in it. Landlord will repair the plumbing, heating and electrical systems. Tenant must, at Tenant's cost, make all repairs and replacements whenever the need results from Tenant's act or neglect. If Tenant fails to make a needed repair or replacement, Landlord may do it. Landlord's reasonable expense will be added rent (emphasis added [by the Court]).[2]

The second lease provision, as quoted in the court's decision, provided in pertinent part that:

> Tenant must, at Tenant's expense, promptly comply with all laws, orders, rules, requests, and directions, of all governmental authorities, Landlord's insurers Board of Fire Underwriters, or similar groups.[3]

The notice to cure indicated that the certificate of occupancy provided that the live load of the floor is 60 pounds per square foot. It specified that the tenant was violating the lease and the certificate of occupancy because:

> The tenant has placed numerous items on the floor of the Subject Premises, including, but not limited to, a cast iron

aluminum tub, an old oak China cabinet, large urns and several bookcases that *have caused said floor to buckle and sink into the ceiling of the space below*. Tenant's placement of these items on the floor of the Subject Premises has structurally damaged the wooden beams that comprise the floor structure of the Subject Premises and has placed a weight upon said floor that exceeds 60 pounds per square foot (emphasis added [by the Court]).[4]

The court stated that the notice itself was "silent" as to what the tenant specifically had to do to effectuate a cure, "essentially end[ing] with the requirement that respondent cure [the] default by February 1, 2006." However, at a court conference, the landlord made its position clear. The tenant, without admitting any of the allegations, had indicated that he would agree to effectuate a cure by moving or removing any items in the apartment that were in violation of the lease or certificate of occupancy. The landlord viewed that as insufficient and asserted that, in order for the tenant to cure and avoid eviction, he would have to do more, namely:

. . . expend an estimated $45,000 and repair, himself, the structural damage allegedly caused by his placing a weight upon his apartment floor that exceeds 60 pounds per square foot, including the substantial damage which allegedly has occurred outside of the confines of his apartment and in the 'space' below.[5]

Thus, the issue in dispute as to the notice to cure - an issue upon which the parties agreed to submit the proceeding to the court for summary determination - was the following:

In a holdover proceeding based upon lease violation, can a notice to cure not only require the ceasing of the lease violation, but also require, *as a condition to avoid eviction*, the repairing of structural damages not within the apartment, assuming they were caused by the lease violation? (emphasis in original).[6]

The court rejected the landlord's argument, which it characterized as "novel" and one as to which "it would appear that there is little case law to look to for guidance." The court commented that the landlord was asserting that "in order to avoid eviction from his home of some 35 years," the tenant "must pay for and effectuate repairs, allegedly caused by the excessive load on his floors, in areas of the building outside the confines of the space he is renting, outside of his dominion and control, and regardless of the cost."

The court stated that the lease was never intended to allow, let alone impose a duty on, tenants to access structural areas of the building in order to make repairs necessary to cure possible breaches of lease provisions. Such an approach, the court observed, could lead to tenants "run[ning] rampant through the building, altering electrical, plumbing and other elements of infrastructure, which would not only be unsafe, but would often be illegal for them to access."

In support of its analysis, the court discussed and quoted from *Havens v. Hartshorn*.[7] In that Supreme Court, Genesee County case, a tenant's employees injured by the collapse of the second floor portion of the leased premises sued the landlord for negligence and nuisance. The landlord impleaded the tenant, alleging that the tenant negligently stored property on the premises which overloaded the second floor, supports and beams beyond their capacity, causing the floor to collapse and resulting in the plaintiffs' injuries. The impleaded tenant moved to vacate the orders which had granted permission for impleader.

In determining the motion, the court in *Havens* considered what repair duty the impleaded tenant owed to the defendant landlord under the lease. The repair clause of the lease obligated the tenant to do the following:

To weatherproof Building No. 1, the lumber shed, with building paper, at their own cost and expense, and to keep the leased premises in repair except for ordinary wear and tear and depreciation from use, it being understood that the party of the second part will take care of all minor and incidental repairs to the interior of said premises, as and when they become necessary, during the term of this lease.[8]

The *Havens* court interpreted the tenant's duty under that repair clause to be as follows:

It is apparent that their only duty was to make minor or incidental repairs to that portion of the premises occupied by it, to wit: 'the floor space on the second and third floors actually occupied' by it. There is no agreement to make structural repairs such as the beams and supports of the flooring. As well might it be claimed that the impleaded defendant contracted to repair the foundations of the building.[9]

In addition to relying on *Havens* to support his analysis of the lease in *Leopold*, Judge Finkelstein also pointed out that the case before him was "not a holdover case based on the more common scenario of substantial alteration of the premises, where, without the knowledge or permission of landlord, a tenant makes structural alterations *within* the subject apartment

or non-structural alterations which are inconsistent with the contemplated use of the premises" (emphasis added). Such cases, the court, stated, typically are within the realm of the duty to repair clause in the standard residential lease "because the remedial work is to be done within the tenant's apartment."

The court also pointed out that the case was "not a nuisance or objectionable conduct case where the tenant's unreasonable behavior is recurring, frequent, or extremely dangerous" and where the tenant might not even be entitled to an opportunity to cure the nuisance conduct at all. Rather, Judge Finkelstein characterized the case as one "based upon alleged accidental damage of a structural element of the building outside of the premises being leased."

So viewing the case, the court in *Leopold* considered it relevant to note that "[t]here are a long line of cases in which courts have found tenants could not be evicted on the basis of an isolated instance of objectionable conduct, even though the consequences of that conduct could be substantial." The court cited as an example *James v. New York City Housing Authority*.[10] In that case, the Housing Authority had terminated Ms. James' tenancy on the grounds on non-desirability following her arrest after admitting that she set a fire in her apartment. She petitioned the Supreme Court to annul that termination, and the Supreme Court denied her motion.

The Appellate Division, First Department vacated the Supreme Court's order. The appellate court emphasized that no other incidents involving the tenant had been reported; the tenant was participating in counseling sessions and was taking medication; and there was no indication from the record that she had returned to illicit drugs or alcohol. Thus, the Appellate Division held, "the severe sanction of eviction was not warranted."

Based on the above analysis, the court in *Leopold* concluded that the cure demanded by the landlord was unjustified, stating:

> . . . [U]nder the facts and circumstances of this holdover proceeding, the notice to cure cannot go beyond requiring the respondent to cease the lease violation by also requiring, as a condition to avoid eviction, that respondent repair the structural damage outside the apartment (assuming they were indeed caused by the lease violation), regardless of the cost.[11]

Accordingly, the court continued, the notice was defective and the proceeding could not be sustained:

> As the Court has decided that a notice to cure a lease violation may not require, as a condition to avoid eviction, the repairing of structural damage not within the subject apartment, and the notice to cure herein requires exactly that, as confirmed by petitioner's stated position at oral argument, the notice to cure is fatally defective. Accordingly, the petition is dismissed.[12]

Judge Finkelstein noted that the landlord was not necessarily without remedies. If the landlord had the necessary proof of causation and damage, the landlord might "have appropriate remedies to recover the cost of repairing the alleged structural damage under the lease and/or negligence law." In other words, the tenant might have financial liability for the damage to the structure of the building, but, the court stressed, the landlord "cannot create a new basis for eviction by requiring not only the cessation of the violation, but further, that the tenant pay for, and effectuate, the extensive structural repairs to the building upon penalty of eviction."

The following is an additional point to consider in reviewing the reasoning of the court in *Leopold*.

The court recognized that a lease could be written so as to impose a duty to repair structural damage outside a tenant's premises or risk eviction, but concluded that the lease at issue did not so provide. The court stated:

> That is not to say that a lease containing a clear clause imposing a duty upon a tenant to repair structural damage outside of his apartment might not be grounds for eviction if a default on such provision were not cured. However, since no such provision exists here, and all attempts made by petitioner to interpret paragraph 8 of the 1988 lease as extending to these ends have stretched the bounds of plausibility concerning an understanding between the parties at the formation of the lease, the Court cannot but see that the duty the petitioner seeks to impose here was not contracted for, and therefore cannot form the basis of respondent's eviction.[13]

To put it another way, litigators reap what transactional attorneys have sown. By the time a dispute reaches the stage of a notice to cure, the rights of the parties are very much a function of what occurred at the time of lease negotiation. While at the outset of a landlord-tenant relationship the parties may optimistically look forward to a trouble-free relationship, good lawyering on both sides requires focusing during lease negotiations on the scope of remedies for breach of lease.

Warren A. Estis *is a founding partner at Rosenberg & Estis.* **William J. Robbins** *is a partner at the firm.*

Endnotes:

1. N.Y.L.J., Sept. 19, 2007, p. 26, col. 1 (Civ. Ct. N.Y. Co.).

2. Id.

3. Id.

4. Id.

5. Id. at col. 2.

6. Id.

7. 184 Misc. 310, 55 N.Y.S.2d 698 (Sup Ct. Genesee Co. 1945).

8. 184 Misc. at 313.

9. 184 Misc. at 314.

10. 186 A.D.2d 498, 589 N.Y.S. 331 (1st Dep't 1992).

11. N.Y.L.J., Sept. 19, 2007, at p. 27, col. 1.

12. N.Y.L.J., Sept. 19, 2007, at p. 27, col. 2.

13. N.Y.L.J., Sept. 19, 2007, at p. 26, col. 4.
