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The Limits of 'Landaverde'

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When in mid-2004 the New York Court of Appeals came down with ATM One, LLC v. Landaverde,1 it clearly knew that it was stirring a hornet's nest of controversy.

That the Court was affirming an already controversial holding of the Second Department did nothing to lessen the controversy because the highest court's ruling staked out entirely different theoretical territory, clearly inviting many questions as to what the scope of this decision was to be.

Early commentaries2 and cases3 construing this decision recognized that Landaverde would be applied to more than it addressed, but there was no agreement on what the limits of Landaverde's reach were to be.

With the passage of two and half years, there is still no agreement on a conceptual framework for defining Landaverde's limits, although we are beginning to see as through a mirror, darkly, the outlines of some borders.

By its terms, Landaverde addressed one of the most common concepts of landlord-tenant relationships, the "notice to cure," by which a landlord requires a tenant to stop a purported violation of the lease on pain of lease termination and eviction.

Landaverde's notice was in Nassau County, under the Emergency Tenant Protection Regulations (ETPR)4 regulating tenancies in several communities in several suburban counties. These regulations differ in several regards from the closely related Rent Stabilization Code5 applicable inside New York City, but not significantly when it comes to notices to cure.6 By its terms, the Landaverde rule is simply that under the ETPA, when a landlord sends a 10-day notice to cure by mail, five days must be added for a total of 15 days.

'Landaverde' Extended

Landaverde itself is silent on the question of how far it is to be extended, with the exception of its statement, "By its terms, of course, CPLR 2103 applies to pending actions, and we therefore do not extend its applicability to the commencement of summary proceedings."7 That is the single place that Landaverde discusses what its full reach is to be. Interestingly, although alluding to it, no reported cases have quoted that passage.8

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No sooner had Landaverde come down, than lower courts were extending its holdings beyond notices to cure under the ETPA. Notable in this controversy were cases like Wing Lee Realty, Inc. v. Man Yee Yon9 where lower courts held that any time mailing was a "component" of service upon a notice, one would have to add the five days for mailing.10 By its terms, Wing Lee was about a notice to quit under Real Property Actions and Proceedings Law (RPAPL) Â§713, which opens with the words, "A special proceeding may be maintained under this article after a 10-day notice to quit has been served upon the respondent in the manner prescribed in Â§735 . . . " The Â§735 in question is the RPAPL's service statute for summary proceedings, that statute which at the time of Landaverde was used for "the commencement of summary proceedings."

So, while the Court of Appeals refused to extend Landaverde to Â§735 for the purposes of commencing a summary proceeding, cases like Wing Lee extended it to those situations where some other kind of notice is borrowing Â§735's service methods.11 Particularly in light of the quoted language from Landaverde itself, clearly the better view is that five days are not to be added for service effected by nail and mail.12

Other places tenants have sought to apply Landaverde have included commercial proceedings,13 Mitchell-Lama proceedings,14 reminder notices under the Â§8 programs,15 nonprimary residence proceedings, personal use proceedings, termination notices,16 and as in Wing Lee, supra, non-landlord-tenant proceedings under RPAPL Â§713.17

Question of Brevity of Time

A simple look at the list of proceedings should make apparent that not all of the notices in issue are 10 days in length. This brings us to an important point in our analysis of the Landaverde cases - the question of brevity of time.

Landaverde itself appears to require the full 10 days because it sees an urgency to the situation.18 Naturally, one questions whether there is the same level of urgency if the notice in question is for 30 or even 90 or 150 days.19

However, in one of the rare appellate rulings on the extensibility of Landaverde, the Appellate Term for the First Department has held the five-day rule inapplicable to Golub notices.20 In dicta, that same case declines to extend the rule to anything other than notices to cure. However, in Kerrin Realty Corp. v. Cruz,21 there is a termination notice with only a seven-day period. Clearly from an "urgency" point of view,22 this is even more so than in Landaverde and the court does find the addition of five days for mailing therefore required.

New York City Notices to Cure

It is now settled law in the Appellate Term First Department, inside the city of New York, that Landaverde extends its reach to notices to cure under the Rent Stabilization Code as well as such notices under the Emergency Tenant Protections under which it was decided.23

This is too readily assumed to be a foregone conclusion, however. Landaverde itself speaks of the necessity of the plus-five-for-mailing rule in order to effect the "regulatory purpose to provide tenants a 10-day opportunity to cure and would lead to unpredictable results."

However, no matter how short the service is inside New York City, the tenant will always have more than a 10 day opportunity to cure because once the summary eviction proceeding is brought, even if the tenant loses, the tenant is given an additional 10 days to cure after judgment.24 One could readily argue that the fact that New York City has such a statute when the rest of the state does not makes Landaverde readily distinguishable and inapplicable within New York City.25 Yet, the Appellate Term decisions have unanimously ruled that Landaverde applies inside New York City, without reportedly considering the effect of RPAPL Â§753(4) on their logic.26

The Future

There is a need to finding out if Landeverde is really about urgency. Does it only apply to notices

where the real effect is that the occupant has a very brief time to do something serious? We need an appellate answer to that question. Until then, all sensible attorneys, just to keep their bases covered, should be adding five days for mailing everything.

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Endnotes:

1. 2 NY3d 472, 812 NE2d 298, 779 NYS2d 808 (Ct of Appeals).

2. See, for example, Estis & Robbins, "Notices to Tenant - When Do They Become Effective," NYLJ Feb. 5, 2005, p. 5.

3. See, for example, 135 PPW Owners LLC v. Schwartz, 33 HCR 337A, 7 Misc3d 1016(A) (Civ Kings Heymann) which describes the cases as being "all over the map."

4. 9 NYCRR Part 2500.

5. 9 NYCRR Part 2525.

6. 9 NYCRR 2504.1[d][1][i] for the ETPA; 9 NYCRR 2524.3(a), also known as Rent Stabilization Code (RSC) Â§2524.3(a), for rent stabilization.

7. We remind the reader that the "commencement of summary proceedings" at the time of Landaverde was effected by the service under RPAPL Â§735 of a notice of petition and petition which authorizes amongst its service methods, service by "nail and mail." Thus, by this sentence, the court implies that the five days should not be added to the "and mail" component of service.

Pursuant to Chapter 452 of the Laws of 2005, some courts of the state, including the New York City Civil Court, commence summary proceedings by filing the petition while other courts commence summary proceedings by serving the petition and notice of petition. At the time of Landaverde, all the local courts where one would expect to commence a summary proceeding were still under commence-by-service rather than commence-by-filing.

8. Neither the Court of Appeals nor anyone else has pointed to the Court's earlier ruling in Fiedelman v. New York State Department of Health, 58 NY2d 80, 445 NE2d 1099, 459 NYS2d 420, TLC Personal Jurisdiction 15, TLC Serial #0078 (Court of Appeals 1983), which refused to extend the "add five days" rule to anything under any regulations anywhere in the state.

9. 33 HCR 901B, 9 Misc3d 1104(A), decision dated June 29, 2005, Index #101272/04, HCR Serial #00015300 (Civ NY Milin).

10. Hab Clinton Assocs. v. Marsh, 33 HCR 901A, 9 Misc3d 1103(A), decision dated 8/23/05, Index #050238/05, HCR Serial #00015299 (Civ NY Milin).

11. 170 East 77th 1 LLC v. Berenson, 34 HCR 776A, 12 Misc3d 1017, NYS2d, HCR Serial #00016063 (Civ NY Jackman-Brown 2006), discussed Wing Lee and declined to follow its lead in applying Landaverde to RPAPL Â§735 nail and mail services.

12. 135 PPW Owners LLC v. Schwartz, supra; 170 East 77th 1 LLC v. Berenson, 34 HCR 776A, 12 Misc3d 1017, NYS2d, HCR Serial #00016063 (Civ NY Jackman-Brown 2006).

13. Landaverde is not applicable to commercial cases. Montgomery Trading Co. v. Cho, 34 HCR 207A, 11 Misc3d 1058(A), NYLJ March 15, 2006, 19:3, HCR Serial #00015648 (Civ NY Torres); Nick & Duke LLC v. John Hollings, Inc., 34 HCR 329B, 11 Misc3d 1063(A), NYS2d, HCR Serial #00015751 (Civ NY Jaffe 2006).

14. Southbridge Towers, Inc. v. Frymer, 32 HCR 502A, 4 Misc3d 804, 781 NYS2d 207, HCR Serial #00014481 (Civ NY Lebovits).

15. Lower East Side I Assocs. LLC v. Estevez, 33 HCR 229A, 6 Misc3d 632, 787 NYS2d 636, HCR Serial #00014870 (Civ NY Lebovits 2004), held that reminder notices do not require five additional days for mailing.

16. Kerrin Realty Corp. v. Cruz, 33 HCR 555A, n.o.r., decision dated Aug. 25, 2004, Index #L&T81894/03, HCR Serial #00015083 (Civ NY Lai).

17. RPAPL Â§713 presents a grab bag of proceedings where there is no landlord-tenant relationship. 135 PPW Owners LLC v. Schwartz, 33 HCR 337A, 7 Misc3d 1016(A), NYLJ May 4, 2005, 28:1, HCR Serial #00014949 (Civ Kings Heymann), unlike Wing Lee, supra, held the five days addition for mailing inapplicable to such proceedings. This is clearly the better rule.

18. In order to justify a ruling that requires five days added for a Golub notice, Lynch v. Dirks & Wolfe, 33 HCR 4A, NYLJ Jan. 5, 2005, 19:3, HCR Serial #00014706 (Civ NY Schneider), emphasizes that urgency was not a consideration in Landaverde. We respectfully disagree with that characterization of Landaverde and as noted below, the Appellate Term disagreed with the Court's conclusion that Landaverde should be applied to Golub notice.

19. RSC Â§2524.2, Golub notices.

20. Skyview Holdings LLC v. Cunningham, 34 HCR 875A, NYLJ Oct. 24, 2006, 22:1, HCR Serial #00016133 (AT1 McCooe; Davis, Gangel-Jacob).

21. 33 HCR 555A, n.o.r., decision dated 8/25/04, Index #L&T81894/03, HCR Serial #00015083 (Civ NY Lai).

22. But, see the discussion of RPAPL Â§753(4) immediately following.

23. W54-7 LLC v. Schick, 34 HCR â€" , -Misc3d-, NYS2d, NYLJ Dec. 20, 2006, 32:3, HCR Serial #00016258 (AT1 McCooe; Davis, Schoenfeld)

24. RPAPL Â§753(4).

25. Shoshany v. Goldstein, 33 HCR 81A, NYLJ 2/9/05, 18:3, HCR Serial #00014769 (Civ NY Capella), takes this very argument and turns it inside out in ruling that Golub notices require the additional five days (a rule later rejected by the First Department Appellate Term.) Shoshany sees Landaverde as monolithically applying to all notices to cure under rent regulation and notes that the presence of RPAPL Â§753(4) means that there really is no urgency with regard to notices to cure in New York City. Neither Shoshany's logic nor its holding have been followed in subsequent cases.

26. In South Park Estates Co. v. Hilverdink, 34 HCR 805A, Misc3d, NYS2d, NYLJ Sept. 28, 2006, 47:6, HCR Serial #00016088 (AT1 Davis; Gangel-Jacob), the court wrote:

While Landaverde was decided under the Emergency Tenant Protection Regulations (ETPR), no sound basis appears why the rule enunciated in that case - requiring the addition of five days to the 10-day statutory cure period for service by mail "to ensure that tenants are not disadvantaged by an owner's choice of service method" (id. at 478) - should not apply with equal force to cure notices that are similarly mailed, but governed by the Rent Stabilization Code, a regulatory scheme which, as landlord itself appropriately acknowledges, "serves a similar purpose as the ETPR."