LJN LAW JOURNAL NEWSLETTERS

NEW YORK REAL ESTATE LAW REPORTER®

Volume 19, Number 11 • October 2005 ALM

A Possible Need to Amend CPLR § 6501

By Joel David Sharrow

A recent decision of the Supreme Court, N.Y. County, in a landlord-tenant dispute has highlighted the extreme difficulty facing an owner when a notice of pendency is filed against its realty in an action arguably affecting the title to, possession, use or enjoyment of, the owner's real property, CPLR § 6501. New York SMSA L.P. v. 225 5th LLC, 8 Misc. 3d 1019(A); 2005 N.Y. Misc. LEXIS 1564; 2005 N.Y. Slip Op. 51194 (U) (Sup., N.Y. Co.). For earlier discussion of these issues, *see,* Sharrow, "The Powerful Impact of the Non-Foreclosure Notice of Pendency", *N.Y. Real Estate Law Reporter,* Vol. 18, No. 9, July 2004; Sharrow, "Notice of Pendency in Courts Again; Recent Rulings Underscore the Power of This *Ex Parte* CPLR Article 65 Tool", N.Y.L.J., 4/12/04, p. 31.

The *New York SMSA* decision, when carefully analyzed, discloses that the 1993 amendment to CPLR § 6501 — enacted in response to an appellate decision — still has "loopholes". It may be time for the Legislature once again to revisit, and possibly revise, CPLR § 6501.

The Case in Point

New York SMSA LP, supra, involved a plenary action seeking a declaratory judgment and an injunction. The issue concerned the owner's authority to interrupt the tenant-plaintiff's use of a portion of the leased premises. There, the plaintiff-lessee made a *prima facie* showing that it had a long-term written lease permitting it to use a portion of the roof of the demised premises for a communications facility, its business would be irreparably damaged if the landlord re-located the facility, and that the equities favored the tenant. The IAS court preliminarily enjoined the landlord's efforts to relocate the tenant's communications facility.

The IAS court held that the lessee's complaint, which sought "a determination that [the tenant] has the right under its lease to maintain its communication facility on the roof of the property", met the statutory requirements for filing a Notice. The court rejected the landlord's contention that the action related to interpretation and enforcement of the clauses in the lease, not to the possession, use, or enjoyment of real property. The court relied upon several older cases wherein tenants sought either restoration to, or an injunction to enjoin ouster from, leased premises, *eg, 220 East 56th St. Corp. v. Excelsior Svgs. Bk.*, 253 App. Div. 345; *Lafayette Forwarding Co. v. Rothbart Garage Operators, Inc.*, 205 App. Div. 247.

Nadeau v. Tuley

Nadeau v. Tuley, 160 A.D. 2d 1130, at 1130-1131, *app. dsm.*, 76 N.Y.2d 846, *recon. den.* 76 N.Y.2d 890 (1990) provided the impetus for the 1993 amendment to CPLR § 6501. The opinion in *Nadeau,* while seemingly restricted to its facts, clearly holds that in a landlord-tenant fight, the fact that the tenant's complaint seeks use, possession or enjoyment of the leased premises, alone does not authorize the filing of a Notice.

In *Nadeau* (which was cited by the Court in *New York SMSA LP, supra*), a 3-2 split panel of the Appellate Division affirmed cancellation of a Notice that had been filed in a plenary action. There, the out-of-possession plaintiff had a 30-day month-to-month, oral tenancy. She sought to be restored to and have use of the apartment she had occupied. The court noted that the First and Second Departments permitted Notices when a tenant claims a right to possession and use of an apartment. But, the majority of the Third Department's panel refused to do so in a month-to-month tenancy plenary action.

The majority's opinion turned, primarily, upon practicality. It recognized a tenant's ease of obtaining a Notice and the serious adverse impact it has upon an owner's realty compared to the tenant's short-term and easily terminated 30-day month-to-month leasehold interest — although CPLR § 6501 then made (and still makes) no such distinctions between short-term 30-day oral tenancies and long-term written leases.

The majority also cited an earlier Court of Appeals decision, *Ft. Hamilton Manor, Inc. v. Boyland, 4 N.Y.2d 192, 197,* which had labeled a leasehold interest as "a chattel real which is Personal property." This notion — that a leasehold should be treated as personal property, not real property — finds support in other legal contexts. *See, eg, Grumman Aircraft Engineering Corp. v. Board of Assessors,* 2 NY2d 500, rem, amend, 2 NY2d 1012 (1957) [taxation]. In other words, notwithstanding the use and possessory claims raised by the plaintiff in *Nadeau, supra*, which normally would have entitled the plaintiff to file a Notice under CPLR § 6501 since the Court of Appeals had held in *Ft. Hamilton Manor* that a leasehold interest is personalty, the majority could have concluded, without more, that in a plenary action brought by a tenant, a Notice was not within the scope of

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CPLR 6501. Yet, as noted above, the majority's decision appears to have relied, in the most part, on the exigencies of the circumstances.

The dissent rejected that approach. It concluded that since "CPLR § 6501 is clear and unambiguous on its face." *Id*. At 1132. The dissent went on to state "that the filing of a [Notice] is proper where, as here, a tenant claims that she was wrongfully dispossessed." *Id*. at 1132, 1133. The dissent, however, "call[ed] upon the Legislature to consider amending CPLR 6501 so as to exclude tenancies *of limited duration* from its coverage" (emphasis added). *Id*.

The Amendment to CPLR § 6501

CPLR § 6501 was amended. *See* L. 1993, c. 657, § 1. Legislative history discloses that the Amendment was in response to *Nadeau, supra*, and, in particular to the dissent. *See* 1993 Report of Adv. Comm. on Civil Practice, McKinney's N.Y. Session Laws, 1993, Vol. 2, pp. 2982-2983. As a result, now the statute bars Notices — but, only in summary proceedings to recover the possession of real property (brought either by tenant or landlord). The amendment did not bar Notices in plenary actions — the issue in *Nadeau* itself.

CPLR § 6501, as amended, makes no distinction between short-term or long-term, oral or written, tenancies. On its face, the statutory bar to a Notice applies only to possessory summary proceedings. Thus, if a tenant seeking possession for any reason wants, or actually needs, to file a Notice and thereby encumber an owner's realty pending judicial resolution of the dispute, all that the tenant has to do is commence a plenary action in Supreme Court, not a summary proceeding in the local jurisdiction's landlord-tenant court. So long as the tenant alleges a basis for a judgment affecting the title to, possession, use or enjoyment of, the realty, then under CPLR § 6501, as amended, the tenant may file a Notice even if the tenant has only an oral 30-day month-to-month interest in the demised premises.

The Conundrum

What happens when a tenant commences a plenary action, alleges a basis for and files a Notice, and the landlord finds a way to convert that action to a possessory summary proceeding? Although there appears to be no case directly on point, *Nastasi v. Nastasi,* NYLJ 1/02/04, p. 19., col. 1. (Sup. Ct., Qns. Cty), suggests, by analogy, the Notice filed in the earlier commenced plenary action will be sustained — absent a finding under CPLR § 6514(b) of bad faith by the tenant.

In *Nastasi*, the court sustained the Notice filed by the seller of realty who sought either the imposition upon the realty of a constructive trust or to set aside the land's sale and have it reconveyed. The procedural question in *Nastasi* arose out of the fact that the contracts underlying the action provided for arbitration, not a lawsuit. CPLR Art. 75 does not authorize the filing of a Notice as one of its provisional remedies. Nevertheless, the IAS Court sustained the filed Notice. It held that CPLR § 6501 provided for filing a Notice in appropriate actions (based upon analysis only of the complaint's allegations) and severely restricted an owner's interim remedies to a few grounds (*see* CPLR §§ 6514 and 6515) — none of which ameliorative provisions were made out in the *Nastasi* case. And, since CPLR Art. 75 was silent as to whether a Notice had to be cancelled upon commencement of arbitration if such Notice properly had been filed (in an earlier commenced action), the court allowed the Notice to remain.

Applying, by analogy, the *Nastasi* holding to the problem presented here, *to wit*: the effect of converting into a summary proceeding a commenced plenary action wherein a Notice validly has been filed, the Notice might be sustained. Assuming that a plaintiff-tenant acts in good faith in filing a Notice in a commenced plenary action, a pre-emptively acting plaintiff-tenant should not lose the protection of its interests that it had when it first commenced its plenary action.

On the other hand, CPLR § 6501 expressly bars Notices in summary proceedings, whereas CPLR Art. 75 is silent. Therefore, at present it may be just as appropriate for a landlord-defendant who successfully converts a plenary action into a summary proceeding to urge that *Nastasi* is inapplicable to the situation where a tenant's possessory plenary action has been converted into a summary proceeding.

Conclusion

Given the foregoing, it may be appropriate for the Legislature to re-address the scope and timing of coverage of CPLR § 6501. The Legislature may consider whether CPLR § 6501 Notices ought to: 1) be barred in all landlord-tenant disputes, not just possessory summary proceedings; and 2) depend on whether the tenancy is short-term or long-term and/or based upon an oral or a written lease.

In the meantime, the present "loophole" in CPLR § 6501, and the Third Department's extant decision in *Nadeau, supra,* without a statewide Court of Appeals holding, provides fertile ground for litigious parties, their counsel and for the courts.

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