

Appellate Court Permits Money Judgment in Summary Proceeding Without "Personal" Service Process on Tenant

COUNSEL'S CORNER

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WHITE PLAINS—Avoiding the process server in a summary proceeding, until recently, has permitted tenants the opportunity to avoid a money judgment and "skip out" on the landlord.

In other words, the Landlord, in the absence of personal service, has been able to obtain possession of the rented premises, but not a money judgment against the tenant for the arrears. In such situations the Landlord has been required to commence a new action to recover the monies from the tenant. Of course, this entails finding the tenant who has moved out, frequently without notice, or been evicted. In either event the tenant most certainly will not provide a forwarding address to the Landlord and the Landlord may never secure a money judgment.

The genesis of the rule against the granting of money judgments in summary proceedings in the absence of personal service is the case of *Matter of McDonald*, 225 App.Div. 403, 233 N.Y.S. 368

[1929]. That case actually predated the currently applicable laws and regulations. In that case the Court held that without personal service the Court only obtained jurisdiction over the "rem," the property, not the "res," the person. This interpretation was predicated on requirements of service and the civil practice rules then in effect, in 1929.

Despite the evolution of the law over the past 80 years, and the adoption of new laws, both the Civil Practice Law and Rules (CPLR) and the Real Property Actions and Proceedings Law (RPAPL), the status of the rule set forth in the McDonald case has remained unchanged. That is, although possible to meet the standard for a money judgment under the CPLR in a plenary or regular action, because the summary proceeding was brought under the RPAPL, the Courts have generally held that a money judgment is not available in the absence of personal service in a summary proceeding.

Challenges

Notable challenges have been lodged over the years. In 2003, Judge Lebovits, of the Civil Court of the City of New York, in *Dolan v. Linnen*, 753 NYS2d 682, held that substituted or duly diligent conspicuous service conferred personal jurisdiction for a court to grant a money judgment. In that case, the Court issued a lengthy opinion noting that neither "the Second Department's Appellate Term nor its Appellate Division has considered the issue."

The Court held that with that in mind the prior decisions, in a different Appellate Department, were not binding on Courts in the Second Department. The Judge concluded that "default rents to not waft away. They translate into higher costs for other tenants..." and based on the statutes, determined to award the Landlord in that case a money judgment against the tenant even without personal service.

Unfortunately, Courts continued to adhere to the rule requiring personal service. The rationale for that rule was enunciated in detail by Judge Gartner in *Arnold v. Lyons*, 4/

23/2003 NYLJ 20 (col. 3). In substance the Court in that case held that although the policies and statutes seemed outdated, that the long standing practice and rule required action by the Legislature.

A Key Date

On Oct. 10, 2007, the Appellate Term 9th and 10th Judicial Districts (within the Second Department) held that "money judgments shall be available upon tenant's default in a summary proceeding, without regard to the manner of services effected therein, upon a showing that such service would be sufficient to support the entry of a money judgment in a plenary action" *Avgush v. Berrahu*, 2007 WL 3014972. The Appellate Term, as the Court in *Dolan v. Linnen*, *supra*, recognized that "the denial of such judgments only encourages tenants in arrears to actively evade personal delivery, knowing that the landlord might never commence a separate, costly, plenary action to recover the rent.

"Beating the rent," in this manner, has arguably become a significant cost of doing business for landlords, and is passed on to all tenants accordingly.

The Appellate Term also held that "with the incentive to evade personal delivery removed, tenants might be more inclined to come to court to present any defenses that they might have, resulting in a more complete record, enhancing the quality of adjudications in summary pro-

ceedings, and making settlement possible, to the benefit of the parties and the court. In addition, the availability of a money judgment upon a tenant's default advances the interest of judicial economy, by alleviating the need to litigate the same transaction multiple times in multiple forums to obtain complete relief."

The Importance

To understand the import of the decision one must finally consider the practical application. In order to obtain the benefit of the money judgment, the Landlord must be prepared to meet the higher burden relative to service as to same. That means that additional attempts at service over a longer period of time and dates would be required. This would have two effects, a higher cost for service and perhaps a longer time period to get into court. Landlords will now have to analyze the impacts of these issues in determining how to proceed both generically and in each instance.

However, the tool now exists for Landlords to prosecute their claim for possession and money to their ultimate conclusion in one case.

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Realty Groups Planning 2008 Schedules

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regular schedule of meetings and seminars," said AOAC chairman Jerry Houlihan.

Houlihan added the association is continuing to monitor issues affecting owners and managers in the region.

"Those efforts never stop — it's a consistent effort on our part," he said.

Future meetings and seminars of the AOAC will be an-

nounced in the weeks ahead, Houlihan added.

The CCAC, ACMA and AOAC are affiliate organizations of the Building and Realty Institute of Westchester and the Mid-Hudson Region (BRI). The BRI is a building, realty and construction industry membership organization with more than 1,700 members in 14 counties of New York state.

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