

Legal Opinion: GCH-0016

Index: 2.245

Subject: PH Due Process Determination: New York

December 3, 1991

Honorable Mario M. Cuomo
Governor of New York
Albany, New York 12224

Dear Governor Cuomo:

I am happy to advise you of a new public housing "due process determination" for the State of New York.

Under Federal law, if the Secretary of the Department of Housing and Urban Development (HUD) determines that law of the jurisdiction requires a pre-eviction court hearing with the basic "elements of due process" (42 U.S.C. 1437d (k), as amended in 1990), a public housing agency (PHA) is not required to provide an administrative grievance hearing before evicting a public housing tenant for:

1. Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the PHA; or
2. Any drug-related criminal activity on or near such premises.

In accordance with the law, HUD has recently issued a regulation which revises HUD's definition of due process elements at 24 CFR 966.53(c) (56 Federal Register 51560, October 11, 1991).

Pursuant to the revised regulation, HUD has determined that the law governing summary eviction proceedings under Article 7 of the New York Real Property Actions and Proceedings Law requires that the tenant have the opportunity for a pre-eviction hearing in court containing the elements of due process as defined in 24 CFR 966.53(c) of the HUD regulations. The basis of this determination is explained in the legal analysis enclosed with this letter.

In accordance with HUD's determination, a PHA operating public housing in the State of New York may exclude from its administrative grievance procedure any grievance concerning an eviction or termination of tenancy which involves any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the PHA, or any drug-related criminal activity on or near such premises.

When a PHA evicts a tenant pursuant to summary eviction proceedings under Article 7 of the New York Real Property Actions and Proceedings Law for the reasons set forth above, the PHA is not required to afford the tenant the opportunity for an administrative hearing on the eviction under 24 CFR Part 966, and may evict a public housing tenant pursuant to a decision in such judicial action.

Very sincerely yours,

Jack Kemp

Enclosure

HUD DUE PROCESS DETERMINATION

for the

STATE OF NEW YORK

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ANALYSIS

I. Jurisdiction: State of New York

II. Elements of Due Process

Section 6(k) of the United States Housing Act of 1937 (42 U.S.C. 1437d (k), as amended by section 503(a) of the National Affordable Housing Act of 1990, Pub. L. 101-625, approved November 28, 1990), provides that:

For any grievance concerning an eviction or termination of tenancy that involves any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the public housing agency or any drug-related criminal activity on or near such premises, the agency may . . . exclude from its grievance procedure any such grievance, in any jurisdiction which requires that prior to eviction, a tenant be given a hearing in court which the Secretary determines provides the basic elements of due process

The statutory phrase "elements of due process" is defined by HUD at 24 CFR § 966.53(c) as:

. . . an eviction action or a termination of tenancy in a State or local court in which the following procedural safeguards are required:

- (1) Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction;
- (2) Right of the tenant to be represented by counsel;
- (3) Opportunity for the tenant to refute the evidence presented by the PHA including the right to confront and cross-examine witnesses and to present any

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affirmative legal or equitable defense which the tenant may have; and

- (4) A decision on the merits.

HUD's determination that a State's eviction procedures satisfy this regulatory definition is called a "due process determination."

The present due process determination is based upon HUD's analysis of the laws of the State of New York to determine if available eviction procedures under those laws require a hearing which comports with all of the regulatory "elements of due process," as defined in 966.53(c).

HUD finds that the requirements of New York law governing summary eviction proceedings under Article 7 of the N.Y. Real Property Actions & Proceedings Law ("RPAPL") include all of the elements of basic due process, as defined in 24 CFR 966.53(c). This conclusion is based upon requirements contained in the New York Constitution, statutes, case law and court rules.

III. Overview of New York Eviction Procedures

Special proceedings to recover possession of real property are governed by Article 7 of the RPAPL.

Such proceedings may be brought in a county court, the court of a police justice of a village, a justice court, a city court of civil jurisdiction, or a district court. RPAPL 701(1). Summary eviction proceedings are also within the concurrent jurisdiction of the Supreme Court.

Article 7 of the RPAPL governs summary eviction proceedings in all State courts. Such proceedings are also subject to provisions of the New York Civil Practice Law and Rules ("CPLR").

Article 7 proceedings are subject to the due process guarantee under Article 1, Section 6 of the New York State Constitution. Article 1, Section 6 provides that "no person shall be deprived of life, liberty or property without due process of law."

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IV. Analysis of New York Eviction Procedures for Each of the Regulatory Due Process Elements

- A. Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction
(24 CFR 966.53(c)(1))

A summary eviction proceeding is commenced by service of a petition and a notice of petition. RPAPL 731.

Service

Service of the petition and notice is governed by RPAPL 735, which requires personal delivery to the respondent or substituted service, meaning personal delivery to "a person of suitable age and discretion" who resides or is employed at the premises sought to be recovered.

If the respondent or a person of suitable age and discretion cannot be served "upon reasonable application", service may be made by affixing copies of the petition and notice of petition to a conspicuous part of the premises sought to be recovered "or placing a copy under the entrance door of such premises." RPAPL 735(1) (known as "nail and mail" service until the quoted portion was added by L. 1980, ch. 370; we will refer to the amended procedure as "nail and mail" as well). When either substituted service or nail and mail service is used, additional copies of the papers must be mailed to the respondent within one day of service by regular first class mail and also by registered or certified mail.

Nail and mail service may be used only after reasonable efforts to find the respondent or a person of suitable age and discretion have failed. *Brooklyn Heights Realty Co. v. Gliwa*, 459 N.Y.S.2d 793 (App. Div. 1983). Before substituted service may be used, "there must be a showing that 'upon reasonable application' admittance to the premises cannot be obtained and/or a proper person cannot be found to whom the process may be delivered." *Eight Associates v. Hynes*, 476 N.Y.S.2d 881 (App. Div. 1984), aff'd. 492 N.Y.S.2d 15 (1985). See also *Fourth Avenue Management v. Brosnahan*, 498 N.Y.S.2d 441 (App. Div. 1986). A single attempt at personal delivery on a weekday afternoon has been found insufficient to meet the statutory requirement of reasonableness. *Eight Associates*, 476 N.Y.S.2d 881; *S.P.S.G. Inc. v. Collado*, 448 N.Y.S.2d 385 (Civ.Ct., N.Y. Co. 1982). While "due diligence" is not required in a summary proceeding to evict, RPAPL 735(1), service must be attempted at a time when the process server can "reasonably expect the tenant

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to be at home" *Parkchester Apts. Co. v. Hawkins*, 447 N.Y.S.2d 194 (App.T. 1981). Under the *Parkchester* holding, a single unsuccessful attempt at personal delivery at a reasonable

time is sufficient to justify the use of "nail and mail" service.

It has been held that the procedure provided by RPAPL 735 satisfies minimum standards of due process. *Velazquez v. Thompson*, 451 F.2d 202 (2d Cir. 1971).

Notice of Petition

The notice of petition must specify the time and place of the hearing on the petition. Unless the summary eviction is for nonpayment of rent, the return date of the hearing must be at least five days, but no more than twelve days after service. RPAPL 733(1). According to RPAPL 731(2) the notice of petition:

Shall specify the time and place of the hearing on the petition and state that if respondent shall fail at such time to interpose and establish any defense that he may have, he may be precluded from asserting such defense or the claim on which it is based in any other proceeding or action.

RPAPL 733(2) allows for 2-hours notice of an order to show cause commencing an eviction proceeding where a lease has expired and the order is sought on the last day of the term or the day thereafter. However, this statute is used essentially in commercial rentals and would not be available in public housing evictions. See, *Shelton Holding Corp. v. John Klinger & Son, Inc.*, 282 N.Y.S. 401 (App.T. 1935).

The Petition

The petition in an eviction proceeding must comply with RPAPL 741 which requires the petitioner to:

1. State the interest of the petitioner in the premises from which removal is sought.
2. State the respondent's interest in the premises and his relationship to petitioner with regard thereto.
3. Describe the premises from which removal is sought.
4. State the facts upon which the special proceeding is based.

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5. State the relief sought.

In order to "state the facts upon which the special proceeding is based," the petition must allege with "particularity the alleged violations or defaults under the lease upon which the landlord claims to rely." *Olivero v. Duran*, 334 N.Y.S.2d 930, 935 (Civ.Ct., Queens Co. 1972). In construing language similar to that contained in 741(4), the courts have

held that "a tenant is entitled to a concise statement of the ultimate facts upon which the proceeding is predicated so that the issues, if any there be, are properly raised and can be met." *Giannini v. Stuart*, 178 N.Y.S.2d 709, 711 (App. Div., 1958); See also *Carriage Court Inn, Inc. v. Rains*, 524 N.Y.S.2d 647 (Civ.Ct., N.Y. Co. 1988); *Harris v. Bigelow*, 515 N.Y.S.2d 176 (Civ.Ct., N.Y. Co. 1987); and *Schreier v. Albrecht*, 482 N.Y.S.2d 674 (Civ.Ct., Queens Co. 1984).

Taken together, the requirements for valid service, for the notice of petition, and for the petition itself, clearly provide notice which apprises the respondent of the landlord's grounds for seeking eviction. They also give the respondent a reasonable opportunity to appear and present a defense.

Adequate notice of the eviction proceeding is also required by the due process clause of the State Constitution. Article 1, Section 6.

Conclusion

HUD concludes that State law governing New York's Article 7 summary eviction procedure, as applied by the courts, requires adequate notice of the grounds for eviction as required by HUD's due process definition at 24 C.F.R. 966.53(c)(1).

B. Right to be represented by counsel (24 CFR 966.53(c)(2))

The right of a civil litigant to be represented by counsel at a litigant's own expense is guaranteed by CPLR 321(a): " a party may prosecute or defend a civil action in person or by attorney" Therefore, New York law meets the requirements of 24 CFR 966.53(c)(2).

The right to representation by counsel is also mandated by the due process clause of the State Constitution. Article 1, Section 6.

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C. Opportunity for the tenant to refute the evidence presented by the PHA including the right to confront and cross-examine witnesses (24 CFR 966.53(c)(3))

New York law provides an opportunity for the respondent to refute PHA evidence.

RPAPL 743 provides that the respondent in an summary proceeding may answer "orally or in writing." Statements in the petition known or believed by the respondent to be untrue may be denied, and the respondent tenant may state that the tenant lacks knowledge or information sufficient to form a belief, as appropriate. This statement "shall have the effect of a denial." CPLR 3018.

New York case law also holds that the respondent in an

eviction hearing must be afforded the opportunity ". . . to challenge the evidence upon which the public authority relies in making its determination." *Sherman v. Kopach*, 347 N.Y.S.2d 140, 142, 75 Misc.2d 18 (1973). New York law also specifically affords the respondent in an eviction hearing the opportunity to confront and cross-examine witnesses. In an eviction proceeding the tenant must be afforded minimal procedural due process in accordance with the due process clause of the State Constitution, including the opportunity to confront witnesses.

Sherman v. Kopach, 347 N.Y.S.2d 140, 142, 75 Misc.2d 18 (1975). Additionally, New York case law holds that a party to an action may be called to testify by his adversary ". . . and, as a general proposition, questioned as to matters relevant to the issues in dispute." *McDermott v. Manhattan Eye, Ear & Throat Hospital*, 255 N.Y.S.2d 65, 70 (1964).

In addition to refuting evidence presented by the PHA, the tenant may refute the PHA's case by presentation of tenant's witnesses and other evidence. A party has the right to obtain evidence and testimony of witnesses at trial through the issuance of a subpoena. CPLR 2302. The attorney for a party may issue a subpoena without a court order, and a party unrepresented by counsel may obtain a subpoena upon application to the clerk of the court. CPLR 2302(a). A party may, with the approval of the court, obtain an adjournment of the trial for ten days if such an adjournment is necessary to procure necessary witnesses. RPAPL 745(1).

In New York a tenant in an eviction proceeding has the right under State law, including the due process clause of the New York Constitution (Article 1, Section 6), to refute evidence and

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confront and cross-examine witnesses as required by HUD's due process definition at 24 CFR 966.53(c)(3).

- D. Opportunity to present any affirmative legal or equitable defense which the tenant may have (24 CFR 966.53(c)(3))

Under New York law, the respondent has a right to present any affirmative legal or equitable defenses. RPAPL 743 provides that respondent's ". . . answer may contain any legal or equitable defenses" In *Dimou v. Cusanelli*, the court cites RPAPL 743 in holding that the ". . . Court has jurisdiction to entertain any legal or equitable defenses interposed in a summary proceeding." *Dimou v. Cusanelli*, 69 Misc.2d. 592, 330 N.Y.S.2d. 484, 491 (1972).

RPAPL 743 and *Dimou* explicitly establish that New York law grants the tenant the opportunity to present any affirmative legal or equitable defense as required by 24 CFR 966.53(c)(3).

- E. A decision on the merits (24 CFR 966.53(c)(4))

New York law requires that a tenant must have the opportunity for a decision on the merits, that is, a decision based upon the facts and the law as presented in the case.

RPAPL 711(1) provides that:

A proceeding seeking to recover possession of real property by reason of the termination of the term fixed in the lease pursuant to a provision contained therein giving the landlord the right to terminate the time fixed for occupancy under such agreement if he deems the tenant objectionable, shall not be maintainable unless the landlord shall by competent evidence establish to the satisfaction of the court that the tenant is objectionable.

Furthermore, according to RPAPL 745, "where triable issues of fact are raised they shall be tried by the court unless, at the time the petition is noticed to be heard, a party demands a trial by jury, in which case trial shall be by jury."

Opportunity for a decision on the merits is also required by the due process clause of the New York State Constitution. Article 1, Section 6.

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V. Conclusion

New York law governing an eviction proceeding under RPAPL Article 7 requires that a tenant must have the opportunity for a pre-eviction hearing in court which provides the basic elements of due process as defined in 24 CFR 966.53(c) of the HUD regulations.

By virtue of this due process determination by HUD under section 6(k) of the U.S. Housing Act of 1937, a PHA in New York may evict a public housing tenant pursuant to an Article 7 eviction proceeding for any grievance involving any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the public housing agency or any drug-related criminal activity on or near such premises, and is not required to first afford the tenant the opportunity for an administrative hearing on the eviction.