



Kopelowitz and Corde Rosenberg & Estis reps. 159 23rd LLC in Civil Court

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Manhattan, NY Rosenberg & Estis, P.C. continues its representation of landlord 159 West 23rd LLC in a holdover proceeding against its commercial tenant Spa Ciel De NY Corp. to recover the basement, ground floor and second floor of 159 West 23rd St.

Rosenberg & Estis member Joshua Kopelowitz and associate Richard Corde represented 159 West 23rd LLC. The landlord seeks a judgment of possession predicated upon tenant's failure to properly maintain insurance during the lease term.

On April 15th, honorable Judy Kim of the Civil Court of the City of New York issued a decision denying, in total, tenant's pre-answer motion to dismiss the proceeding on the grounds that (i) landlord did not serve a notice to cure required by the lease and (ii) landlord's service of the notice of petition and petition was improper because tenant's store is closed for business.

In pursuing the case, R&E made the strategic decision to forego serving a notice to cure as provided pursuant to the lease and, instead, serve only a notice of termination. R&E sought to avoid the potential for a Yellowstone Injunction and accelerate the issues to trial based upon the law that an insurance defect is not curable. In commencing the proceeding, R&E served the notice of petition and petition at the premises sought and the residential home of tenant's president in an effort to ensure proper service. Tenant moved to dismiss the proceeding predicated upon the claim that landlord was required to serve a notice to cure pursuant to the lease, or, in the alternative, that the service of the notice of petition and petition was defective because landlord knew that the premises was closed and, therefore, service at the premises was destined to fail.

R&E, on behalf of landlord, opposed tenant's motion and argued that when there is no possibility of a cure, as exists here, then there is no need for the service of a formal notice to cure. With regard to service, R&E argued that service of the notice of petition and petition at the premises was sufficient because, *inter alia*, tenant continues to occupy the premises (even if they are not open for business) and tenant did not provide an alternate address for service.

Court adopted R&E's arguments in full and denied tenant's motion in total. The favorable decision from the Civil Court, dated April 15th, 2019, is noteworthy because it demonstrates that courts will not require commercial landlords to comply with lease requirements mandating the service of a notice to cure where the tenant has committed an incurable default, such as the failure to maintain insurance. Furthermore, the decision affirms that service of process in summary proceedings by

conspicuous place service is proper, even if the commercial tenant is not open for business, provided that the landlord attempted service at the known addresses of the tenant.

"The court correctly understood the facts and the law in denying tenant's motion. We look forward to securing the premises for our client," Kopelowitz said.

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