DEFECTIVE SERVICE VOIDS LANDLORD'S FIVE-DAY NOTICE

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Attorneys routinely advise landlords and property managers that a defect in the service of a statutory Notice to Pay Rent or Quit is cured by establishing that the tenant actually received the Notice. This has been the rule since the first of a series of cases was decided in 1962. This line of court cases is also widely referenced in most leading treatises for the general proposition that proof that a tenant received actual notice will cure defective service.

On June 14, 2010, a Court of Appeal in Southern California limited the application of this general rule. In the case of *Culver Center Partners East #1*, the Court held that a tenant's actual receipt of an emailed Notice to Pay Rent or Quit did not satisfy the lease requirement that notices be delivered to the tenant's designated street address.

Under the terms of the commercial lease between Culver City Partners East #1, and Baja Fresh Westlake Village, Inc., notices could be (1) delivered by mail; (2) transmitted by telegraphic or electronic means; or (3) delivered in person. The lease also provided that "in any event" in order for service of a notice to be effective, it had to be delivered to the address provided in the lease or otherwise designated by the tenant. In May 2008, Baja sent Culver a change of address notice, signed by Baja's leasing manager, advising Culver of Baja's new address for service of notices, now located in Anaheim.

On January 9, 2009, Culver attempted to serve Baja with a Notice to Pay Rent or Quit. Culver transmitted the Notice to Baja's leasing manager, Deborah Larson, by three separate means: (1) certified mail to Larson's business address in Cypress (not Anaheim); (2) fax mail transmission to her business address in Cypress (not Anaheim); and (3) as an attachment to an email sent to Larson's business email account. Culver also attempted to effect substitute service on a restaurant manager at the leased premises. However, Culver conceded it neither personally served anyone at the Anaheim address nor mailed the Notice to that address. Regardless, Larson acknowledged receipt of the email.

After Baja failed to timely cure the default, Culver filed an unlawful detainer action in Superior Court. Baja filed a motion for summary judgment, which was ultimately granted by the trial court. The trial court held Culver's service of the Notice did not comply with the notice provisions in the lease because it was not delivered to Baja's new address in Anaheim (as directed in the tenant's 2008 change of address notice). The Court of Appeal affirmed.

Culver argued that whether or not its service of the Notice complied with the lease, the evidence was undisputed that Larson received the Notice by email on January 9, 2010. Culver argued that Baja's actual receipt of the Notice cured the deficiency in service or resulted in "a forfeiture of any right to contest the deficiencies in service." The Court disagreed, noting "[t]o be effective, however, no matter what means is used to accomplish it, the [default] Notice must be delivered to the address provided in the lease … in this case the [Anaheim] address." The Court concluded that because there was no evidence that the email was sent to or even could have been received by Larson at the Anaheim address, there was no proof of service at the correctly designated address.

The Court distinguished the existing line of cases by stating that, in those cases, the tenant received the notice by mail at the designated address and that such admission cured the landlord's failure to personally serve the notice. Culver, on the other hand, did not mail or attempt personal service on Baja at its designated address in Anaheim. Culver presented no evidence that the email was received, or could have been received, at the designated Anaheim address. The Court reasoned, "[t]hus, the email delivery of the Notice was in no way tantamount to personal service or to any other means of service authorized under the Lease."

This decision is somewhat logical in its application. If a company has moved its lease administration office to another location, and provides proper notice to the Landlord of that fact, should a notice actually received by someone at the old address be proper notice to the tenant? This ruling should serve as a reminder to all landlords and property managers to always read each lease carefully before serving a notice to pay rent or quit or other form of notice and also to make sure the tenant has not modified or changed the notice address during its tenancy. Do not provide tenants with an opportunity to defeat or delay an eviction!