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When Your Adversary May Be A Few Cards Short Of A Complete Deck, What's the Deal?

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How often it is observed that a lawyer who represents himself has a fool for a client! Yet wise as that aphorism is, it is all the more striking when the lawyer is not only self-representing, but perhaps sufficiently mentally ill as to be "an adult incapable of adequately prosecuting or defending his rights."2 This illness will, in the context of landlord-tenant law, most often first show up in the cause of action that is being prosecuted against this unfortunate person. It will most typically be some species of nuisance proceeding. However, in the case of the pro se attorney, the illness will also show up in papers he prepares and serves which leave all rational views of the CPLR and the RPAPL behind in the dust.

When dealing with such a person, one can be expected to be "papered,"3 if not out of malice, then out of the very mental malaise that caused the proceeding to be brought in the first place. If one does not act early to protect oneself against such papering, one can ring up huge bills for one's client before getting off the starting block.

Fortunately, for this scenario, the most effective technique for stopping the papering is complete in line with what many courts have recognized as one's ethical obligations. It has long been public policy of the State of New York, and of the Court, that litigants have an obligation to alert the court that an adverse party may have diminished capacity thereby requiring a guardian ad litem to defend his rights, particularly where his home is in controversy.4

Symposium: The New York City Housing Court in the 21st Century: Can it better address the problems before it? Protecting the rights of litigants with diminished capacity in the New York City Housing Courts, 3 Cardozo Pub. L. Pol'y & Ethics J. 733 (January 2006) is particularly instructive. It states:

> **1. A Litigant is Obligated to Disclose to the Court any Information About Another Party's Inability to Prosecute or Defend a Proceeding**
>
> In *Oneida National Bank and Trust Co. Central N.Y. v. Unczar*,5 one of the first cases to interpret a plaintiff's obligations under CPLR Article 12, the Fourth Department read CPLR 1201 and 1203 together to require "the appointment of a guardian ad litem in every case where the defendant is an adult incapable of adequately protecting his rights, before a default judgment may be entered against him."6 According to the court, "this places the burden upon a plaintiff who has notice that a defendant in his action is under a mental disability, to bring that fact to the court's attention and permit the court to determine whether a guardian ad litem should be appointed to protect such defendant's interests."7 The plaintiff creditor in Oneida was aware that the defendant debtor was hospitalized in an institution for the mentally ill, yet served a summons and complaint on the defendant in the hospital without obtaining prior approval of the court as required by New York's Mental Hygiene Law.8 The Fourth Department held that based on the plaintiff's failure to "safeguard

the interests of its mentally ill debtor,"9 the court below properly exercised its inherent power to open [*750] its judgment in the interest of justice by vacating both a default judgment and the resulting sale of the defendant's home.10

Other appellate decisions have uniformly applied the Oneida court's holding that a plaintiff who is aware or has reason to be aware that a defendant is incapable of defending his or her interests at the time when the action was begun and when the default judgment was entered has the burden of disclosing this information to the court.11 Moreover, it is not enough for the plaintiff to merely notify the court that a defendant's mental condition is at issue - the plaintiff must be diligent in bringing the matter to the court's attention.12 Similarly, in an often-cited and closelyreasoned decision, the Housing Court in *New York Life Insurance Co. v. V.K.,* stated the "need for 'a petitioner, in any proceeding, to be extremely diligent' in determining whether a party may be under a disability requiring a guardian ad litem and, if there is any question, giving the court an opportunity for an investigation and report regarding that need."13 The plaintiff's obligation is triggered once the [*751] plaintiff has notice that a defendant is under a mental disability, even if the plaintiff determines that he or she lacks sufficient proof to make a motion for the appointment of a guardian ad litem.14

This last point is crucial. At this stage in the proceedings, typically a Petitioner will have neither specific information nor legal access to information other than the reports it has received with respect to the tenant's apartment and the wild and erratic civil procedure methods the pro se attorney tenant has employed. Based on that information alone, the landlord cannot *establish* that the Tenant is in need of a guardian ad litem. The Petitioner's counsel can only abide by its ethical obligation to advert the Court that this appears to be a matter worth the Court's inquiry. If, however, the Court determines that there is no need for a guardian ad litem, the very least the Petitioner's counsel should expect to achieve is that the Court will direct the pro se respondent to abide by the rules of litigation on pain of sanctions.

(Endnotes)

1 Ms. Rualo is an associate in Adam Leitman Bailey, P.C..

2 CPLR 1201.

3 Served with large volumes of pleadings, demands, and motions of various kinds.

4 *124 MacDougal St. Assocs. v. Hurd*, 28 HCR 54A, NYLJ 2/2/00, 28:4 (Civ NY Scheckowitz) HCR Serial #00011713; *Parras v. Ricciardi*, 28 HCR 434A, NYLJ 6/28/00, 33:4 (Civ Kings Silber) HCR Serial #00012008; *Surrey Hotel Assocs., LLC v. Sabin*, 28 HCR 437A, NYLJ 6/29/00, 28:4 (Civ NY Lau) HCR Serial #00012009; *NYCHA v. Beverly B*., 33 HCR 261A, NYLJ 4/13/05, 20:1, HCR Serial #00014895 (Civ Kings Finkelstein); *New York Life Insurance Co. v. V.K*., 184 Misc.2d 727, 711 N.Y.S.2d 90; 1999 N.Y.Misc.LEXIS 659; *Matter of Bobst*, 234 A.D.2d 7 (1st Dept. 1996), *Matter of Bacon*, 169 Misc.2d 858, 645 N.Y.S.2d 1016, 1996 N.Y.Misc. LEXIS 274; Symposium: The New York City Housing Court in the 21st Century: Can it better address the problems before it? Protecting the rights of litigants with diminished capacity in the New York City Housing Courts, 3 Cardozo Pub. L. Pol'y & Ethics J. 733 (January 2006).

5 *Oneida Nat'l Bank and Trust Co. Cent. N.Y. v. Unczar, 326 N.Y.S.2d 458 (App. Div. 1971).* Footnotes 19 through 28 of this Memorandum are the original authors' footnotes.

6 *Id. at 461.*

7 *Id. at 461-62.*

8 *Id. at 459-60.*

9 *Id. at 462.*

10 ee also *Barone v. Cox, 379 N.Y.S.2d 881, 883-884 (App. Div. 1976).*

11 See, e.g., *State v. Kama, 699 N.Y.S.2d 472, 473 (App. Div. 1999)* ("The record reveals that the plaintiff was on notice thatthe defendant suffered from a mental disability. Accordingly, the burden was on [the plaintiff] to bring that fact to the

attention of the court to make a suitable inquiry into whether a guardian ad litem was needed before judgment could be entered. As [the plaintiff] failed to do so, the judgment must be vacated" (citation omitted)); *Sarfaty v. Sarfaty, 443 N.Y.S.2d 506, 507 (App. Div. 1981)* (vacating default judgment where plaintiff husband and his attorney knew that defendant wife had been receiving psychiatric care and failed to bring "the condition of defendant's mental state to the court's attention sothat it could make suitable inquiry and determine whether a guardian should have been appointed for her to protect her interests and before a default judgment could be entered against her"); *Barone, 379 N.Y.S.2d at 883-85* (vacating default judgment entered after creditor's failure to make requisite disclosure to court, and stating "when a creditor becomes aware that his alleged debtor is or apparently is incapable of protecting his own legal interests it is incumbent upon him to advise the court thereof so that the court may ... in its discretion appoint a guardian ad litem to protect the defendant's interests." (citation omitted)).

12 *In re Foreclosure of Tax Liens by Ithaca, 724 N.Y.S.2d 211, 212-13 (App. Div. 2001)* (reversing foreclosure judgment where plaintiff had only notified court that a special guardian had been appointed for defendant in a prior proceeding and failed to disclose additional details regarding defendant's competency, and stating that plaintiff "should have been more diligent in bringing this matter to the court's attention.").

13 *N.Y. Life Ins. Co. v. V.K., 711 N.Y.S.2d 90, 97 (N.Y. Civ. Ct. 1999)* (citing *In re Bacon, 169 Misc. 2d 858, 864 (Sur. Ct. 1996));* see also, *Parras v. Ricciardi, 710 N.Y.S.2d 792 (N.Y. Civ. Ct. 2000)* (denying application for judgment and warrant on default where plaintiff landlord knew defendant tenant was mentally incapacitated and in a nursing home, and noting that plaintiff's attorney had not only a moral obligation to inform the court of the tenant's diminished capacity, but also a legal obligation); *Jackson Gardens L.L.C. v. Osorio,* N.Y.L.J., July 11, 2001, at 25 (N.Y. Civ. Ct. 2001) (vacating default judgment and eviction warrant on finding that guardian ad litem had been appointed for defendant tenant in prior proceeding brought by plaintiff landlord and landlord had sought default judgment in instant proceeding without notifying the court of the appointment of a guardian in the prior case); *Surrey Hotel Assocs., L.L.C. v. Sabin,* N.Y.L.J., June 29, 2000, at 28 (N.Y. Civ. Ct. 2000) (vacating default judgment upon finding that plaintiff landlord had notice of defendant tenant's disability because rent payments were made by Protective Services for Adults on behalf of tenant, and where landlord's attorney described tenant's conduct as "strange" and landlord had complained that tenant's conduct altered the quality of life for other building tenants).

14 *State v. Getelman*, N.Y.L.J., Sept. 7, 1993, at 26, (Sup. Ct. 1993).