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WITHER 'SOFIZADE'? Many Courts Reject Ruling; First Department Silent

By Adam Leitman Bailey and Dov Treiman

Although beginning the process in 1848 [FN1] of leading the English speaking world in the development of civil procedure designed to achieve justice based on the deeds and misdeeds of the litigants, New York did not achieve any kind of genuine system to accomplish that goal until 1963. Under the civil practice reforms effective that year, the Legislature combined the Civil Practice Act and the Rules of Civil Practice to produce the generalized Civil Practice Law and Rules and the specialized statutes applicable to particular areas, notably for the landlord-tenant practitioner, the Real Property Actions and Proceedings Law. That history remains vital to understanding how these laws were intended and still are intended to function with each other.

Crucial to the Legislature's design was the provision written into the CPLR to prevent these statutes from bumping into each other. Section 101 states:

The civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute (emphasis supplied).

When looking at stays in summary proceedings, we find that they are governed by Real Property Actions and Proceedings Law sections 747-a, 751, 753, 755, and 756. Section 747-a deals with New York City nonpayment proceedings. Section 751 deals with undertakings and foreclosures. Section 753 specifies the stays in holdover proceedings inside New York City. Section 755 stays nonpayment proceedings where repairs are an issue. Section 756 stays nonpayment proceedings for the landlord's nonpayment of utilities.

Our focus, for this article is on the five paragraphs of Section 753. Paragraph 1 allows a maximum stay of six months in residential proceedings. Paragraph 2 calls for the payment of use and occupancy. Paragraph 3 makes the stay inapplicable to proceedings for the purpose of demolishing a building or where the tenant is 'objectionable.' Paragraph 4 gives a tenant 10 days after judgment to cure a lease violation. Paragraph 5 makes waiver of Section 753 void as against public policy.

While we present the contents of these paragraphs in schematic form, it is important to understand that each of the paragraphs is worded with great detail.

In general civil practice, on the other hand, we find CPLR 2201 which states simply, ' Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just' (emphasis supplied).

Enter 'Sofizade' [FN2]

In 2002, the Appellate Term for the First Department rocked the New York City landlord-tenant world with its decision in Sofizade, [FN3] a proceeding brought on the basis that the tenant had repeatedly and unjustifiably defaulted in paying rent -- the so called 'chronic nonpayment proceeding.' While prior to this case, it was commonplace for a landlord to enter into a stipulation allowing the tenant a probationary period, typically six months to two years in duration, during which time the tenant would have to pay its rent on time or be evicted, Sofizade was unique in finding authority in CPLR 2201 for the court ordering such a probationary period over the landlord's objection. [FN4]

Although a First Department case, its influence rapidly spread to the Second Department, especially to the Brooklyn Housing Court and to a lesser extent in Queens and Staten Island. Some courts seized upon Sofizade as a way of forcing landlords into all kinds of settlements, giving the landlord the reason, 'You might as well agree to it. The judge is going to order it anyway.'

At first blush, Sofizade seemed like a welcome addition to the literature. It dealt with the sui generis problem of chronic nonpayment and appeared to impose an orderly way of making it fit into the general scheme of landlord tenant litigation. However, soon it became apparent that there were some courts who were using Sofizade as a license to regard all of the strictures found in Article 7 of the RPAPL, particularly as regards the issuance of stays in holdover proceedings, as mere guidelines. Statutes which seemed to set maximum periods and terms for stays now seemed to be setting minimum periods and it became clear that some courts were emboldened to simply do as they pleased [FN5] 'upon such terms as may be just.' [FN6] So, for example, one court found implied authority for it to give the tenant a payout schedule in an ordinary nonpayment proceeding in spite of the five day stay set forth in RPAPL Â§747- a. [FN7]

'Sofizade' Shunned

The Appellate Term in the First Department has been silent on the subject of Sofizade except to enforce it. It has never revisited the underlying logic. The Appellate Division in the First Department has been completely silent on the subject -- not a peep.

Not so, the other Appellate Terms. Neither the Appellate Term for the Second and Eleventh Judicial District covering three counties inside New York City nor the Appellate Term for the Ninth and Tenth Judicial Districts covering seven suburban counties has mentioned Sofizade by name.

However, in Landmark Properties v. Olivo, [FN8] the Appellate Term for the Ninth and Tenth Judicial

Districts looked at the underlying logic of Sofizade and utterly rejected it. [FN9] We recall that CPLR 101 declares the CPLR inapplicable 'where the procedure is regulated by inconsistent statute.' We also recall that CPLR 2201 grants generalized stays, 'except where otherwise prescribed by law.' Finally, we recall that Real Property Actions and Proceedings Law sections 747-a, 751, 753, 755, and 756 are places where stays are 'otherwise prescribed by law.' Thus, it appears that by its own terms, CPLR 2201 cannot supplement the stays found in the cited RPAPL sections.

The Appellate Term notes in Olivo:

The only statutory provision for a post termination 'cure period' applies to proceedings brought in the City of New York, for which RPAPL 753(4) provides a mandatory 10 day post judgment cure period for holdover proceedings involving breach of substantial obligations of the tenancy.

Contrary to tenant Olivo's argument, CPLR 2201's authority, 'except where otherwise prescribed by law,' to grant a stay of proceedings upon such terms as may be just (and which the trial court cited in the decision and order after trial), cannot operate to revive a lease. Moreover, in the landlord tenant context, specific statutes, as well as appellate case law, govern the circumstances of stays and other remedial action.

The Olivo court's argument that CPLR 2201 cannot 'revive a lease' is clearly a reference to the Yellowstone [FN10] doctrine that once a lease is terminated a court of equity has no authority to undo the termination. Olivo's reference to 'specific statutes' is a clear invocation of CPLR 101's self limitation of the CPLR against applicability in the presence of an 'inconsistent statute.'

Although one could argue the phrase 'specific statutes, as well as appellate case law, govern the circumstances of stays' allows for the possibility that Sofizade could be a valid holding as a bit of common law development, or as Olivo calls it, 'appellate case law,' one has to read this phrase in the context from which it comes. That context is to say that CPLR 2201 is not a grant of authority for stays in summary proceedings. So, it would seem that the reference to appellate case law is more properly understood as referring to the many cases that have construed RPAPL Â§753(4) which by its terms grants a curative stay for lease violations, but has acquired a common law development extending its benefit to nuisance proceedings as well. [FN11] This, one immediately notes, takes the summary proceeding stays statute and applies it to summary proceedings without dragging the CPLR in to the mix.

In Starrett City, Inc. v. Granthan, [FN12] the Appellate Term for the Second and Eleventh District answers the Sofizade questions for Queens, Brooklyn, and Staten Island. Sofizade does not apply. It does so, once again, with no reference to Sofizade itself, but simply with the sentence '(T)he court below properly held that it had no authority to grant further stays in the matter. ' The 'further' refers to stays beyond those authorized by RPAPL Â§753(4). Clearly, then, the entire Second Department sees no authority in CPLR 2201 to go beyond the stays available for summary proceedings in Article 7 of the RPAPL. In short, it rejects Sofizade.

But what about the First Department?

The First Department has never given any indication that it will abandon Sofizade. Yes, the trial courts no longer seem to be applying it to anything but chronic nonpayment proceedings, but the Appellate Courts have not said a word. In order for them to do so, it would require that a trial judge granted a Sofizade stay and that the Appellate Term either says 'we were wrong' or the Appellate Division accepts a further appeal and renounces the doctrine. While this would be a boon to landlords, there is no particular reason that any landlord is leaping at the chance to bring up such a case right now. Most landlords will continue

to stipulate to the very kind of probation that Sofizade orders. So, not only would it take the right set of facts to take it to the Appellate Division, it would also take the right landlord.

Whither Sofizade? For now, Manhattan and the Bronx. Nowhere else. In the Second Department, it has already withered.

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FN1. The Field Code, enacted by the New York State Legislature in 1848, served as the prototype for other states and the Federal Rules of Civil Procedure in codifying and revising the rules of civil practice in their respective courts. Prior to this New York enactment, no uniform rules existed for the commencement of an action in an English speaking court. Each common-law form of action and each equity action had its own rigid procedural requirements to be satisfied and the language of such pleadings was highly formalized and verbose. http:// www.answers.com/topic/field-code-of-new-york.

FN2. 326-330 East 35th St. Assocs. v. Sofizade, 30 HCR 193B, 191 Misc2d 329, 741 NYS2d 380 TLC Chronic Nonpayment 13 (AT1).

FN3. Soh-fiz-zah-dee.

FN4. If certain criteria, not pertinent to this article, were met.

FN5. Intriguingly, this phenomenon was repeatedly reported to us by word of mouth, but did not result in much writing on the subject. Courts using Sofizade reasoning did not get their decisions published and landlords who might be inclined to fight it realized it would be a pyrrhic victory to spend months on an appeal in order to find out that those same months were improperly given as a stay by the trial court.

FN6. CPLR 2201, supra. Some courts seemed to be inclined to interpret the word 'just' to mean 'disadvantageous to the landlord.'

FN7. 6 West 238 Realty Corp. v. Horn, 31 HCR 82A, NYLJ 2/26/03, 24:3 (Civ Bx Rodriguez).

FN8. 33 HCR 894A, NYLJ 10/12/05 28:5 (at 9 & 10).

FN9. Using the same principles of analysis, one of us, Treiman, had used some years earlier to come to the conclusion that no matter how good an idea it might be, Sofizade does not withstand legal or historical analysis.

FN10. First National Stores v. Yellowstone Shopping Center, 21 NY 2d 630.

FN11. E.g., Harran Holding Corp. v. Johnson, 11 HCR 229A. NYLJ 12/1/83 6:3 (AT1).

FN12. 34 HCR 1045A, 13 Misc3d 140(A) (at 2 & 11).

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