RPAPL § 732(3): Appellate Division, First Department, Holds That RPAPL Prohibits Routine Scheduling of Inquests Prior to Signing Default Judgments in Residential Summary Nonpayment Proceedings

Scott R. Saks

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REAL PROPERTY ACTIONS AND PROCEEDINGS LAW

RPAPL § 732(3): Appellate Division, First Department, holds that RPAPL prohibits routine scheduling of inquests prior to signing default judgments in residential summary nonpayment proceedings

RPAPL section 732 contains special provisions governing summary proceedings for the nonpayment of rent whereby judges must render judgment for a landlord when a tenant fails to respond within five days from the date of service. Judges may stay the issuance of a warrant for no longer than ten days from the date of service. During the past ten years, however, Manhattan and Brooklyn judges have routinely ordered an inquest before signing a default judgment in order to ensure that the statutory requirements applicable to summary nonpayment proceedings have been satisfied. Recently, in Brusco v. Braun, the Appellate

1 RPAPL § 732(3) (McKinney 1979). RPAPL § 732 provides in part:

[T]his section shall be applicable in... a proceeding brought on the ground that the respondent has defaulted in the payment of rent....

3. If the respondent fails to answer within five days from the date of service, the judge shall render judgment in favor of the petitioner and may stay the issuance of the warrant for a period of not to exceed ten days from the date of service.

Id. The Uniform Rules for Trial Courts provide that RPAPL § 732 is applicable to the New York City Civil Court. N.Y. Cty Civ. Ct. Act § 208.42(d) (McKinney 1994).

Article 7 of the RPAPL was enacted “to afford a ‘simple, expeditious and inexpensive’ means” for recovering real property, thereby serving as a substitute for an action to recover real property, which was “an expensive and dilatory proceeding which in many instances amount[s] to a denial of justice.” 2 Joseph Rasch, New York Landlord and Tenant Including Summary Proceedings § 29:5 (3d ed. 1998) (emphasis added) (citations omitted). Similarly, § 732(3) was added to the RPAPL to prevent an unnecessary workload on judges and to diminish “chaos.” Letter from Thomas F. McCoy, State Administrator, to Hon. Sol Neil Corbin, Counsel to the Governor (July 9, 1965) (Governor’s Bill Jacket 1965 Chapter 910) [hereinafter Letter from McCoy]. Critics argue, however, that RPAPL § 732 violates tenants’ rights. See Ken Karas, Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York, 24 Colum. J.L. & Soc. Probs. 527, 537 n.91 (1991) (arguing that “conspicuous place service” is inadequate notice). But see Velazquez v. Thompson, 321 F. Supp. 34 (S.D.N.Y. 1970), aff’d, 451 F.2d 202 (2d Cir. 1971).

2 RPAPL § 732(3).

3 See Cerisse Anderson, Use of Inquests Struck in Nonpayment Suits; Appellate Panel Voids Widespread Practice, N.Y. L.J., Dec. 13, 1993, at 1 [hereinafter Anderson, Inquests Struck]. Approximately ten years ago, Manhattan Civil Court judges began the practice of ordering a special inquest before signing a default judgment against a tenant in a summary nonpayment proceeding. Id. at 4. According to Justice Jacqueline W. Silbermann, administrator of the New York City Civil Court, approximately
Division, First Department, held that the practice of routinely scheduling a special inquest prior to rendering a default judgment violates section 732(3) of the RPAPL.\(^5\)

In *Brusco*, the landlord-petitioner initiated a summary proceeding for the nonpayment of rent pursuant to section 711(2) of the RPAPL in order to recover possession of real property plus

80% of Manhattan Civil Court judges and 50% of Brooklyn Civil Court judges routinely require a special inquest before signing a default judgment. *Id.* Bronx, Queens, and Staten Island Civil Court judges have not adopted this practice. Cerisse Anderson, *Judges Devise Modifications in Rent Cases; Requests for Defaults Now Require Affidavits*, N.Y. L.J., Dec. 20, 1993, at 1-2.

In May, 1992, Manhattan established a separate inquest part (Part K) to clarify the process. *See Anderson, Inquests Struck, supra*, at 1. When a tenant defaults, the case is sent to Part K where a judicial hearing officer conducts an inquest and reports the results to Acting Justice Charles E. Ramos, the supervisor of the Civil Court in Manhattan. *Id.* Judge Ramos then decides whether to sign the judgment. *Id.* Since its creation, approximately 1000 cases per month have been referred to Part K in Manhattan alone. *Id.* Such inquests avoid the entry of default judgments based on defective notice. *See S.P.S.G., Inc. v. Collado, 113 Misc. 2d 167, 448 N.Y.S.2d 385 (N.Y. Civ. Ct. N.Y. County 1982)* (rejecting application for default judgment because process server's single attempt to serve tenant was insufficient).

In 1989, the Supreme Court of New York County upheld this procedure. *Park Holding Co. v. Arber, 145 Misc. 2d 39, 545 N.Y.S.2d 1000 (Sup. Ct. N.Y. County 1989)*. In *Park Holding*, the petitioner-landlord initiated a summary nonpayment proceeding against his tenant for the tenant's nonpayment of three months' rent. *Id.* at 40, 545 N.Y.S.2d at 1001. The petition alleged that the tenant was served two days earlier by conspicuous place service. *Id.* After the tenant did not appear and answer within the required five day period, the petitioner requested a warrant of eviction. *Id.* When notified that an inquest was scheduled to occur in more than two months, the petitioner appealed for an order directing the entry of judgment for petitioner in the nonpayment proceeding on the ground that the delayed inquest violated RPAPL § 732. *Id.*

The New York Supreme Court, however, denied the petition. *Id.* at 42-43, 545 N.Y.S.2d at 1002-03. The court held that CPLR 3215(b), which governs the procedure for the entry of default judgments, applies to summary proceedings. *Id.* at 42, 545 N.Y.S.2d at 1002. The court then stated that "rendering . . . judgment" pursuant to RPAPL § 732(3) is a judicial process governed by CPLR 3215(b) rather than a ministerial act governed by CPLR 3215(a). *Id.* at 43, 545 N.Y.S.2d at 1003. The court ruled that CPLR 3215(b) requires the court to "do more than merely transfer the ministerial act of signing the judgment from the clerk to itself." *Id.* Finally, the court observed that if the legislature truly intended final judgments of possession to be signed without inquest, the statute would have stipulated "that such judgments could be granted and entered by the clerk and that application to a judge for the rendering of a judgment was not necessary." *Id.* Nevertheless, the court agreed that an inquest delayed for two months was too long and directed the Clerk of the Civil Court to schedule the inquest two weeks earlier. *Park Holding, 145 Misc. 2d at 44-45, 545 N.Y.S.2d at 1003-04.*


5 *Id.* at 27-28, 605 N.Y.S.2d at 13-14. The court ordered Civil Court Judge Richard F. Braun to sign a default judgment in a summary nonpayment proceeding without conducting a special inquest. *Id.*
legal fees. On March 27, after the tenant failed to answer the petition within the five days required by RPAPL section 732(1), the petitioner requested an entry of judgment pursuant to sections 732(3) and 747(1) of the RPAPL. Civil Court Judge Richard F. Braun scheduled an inquest for May 1. Judge Braun's practice was to hold a special inquest in every application for default judgment in a residential nonpayment proceeding. The landlord-petitioner applied to the Supreme Court of New York County for judgment without an inquest. Following the supreme court's denial of judgment without an inquest, the landlord-petitioner appealed.

The First Department rejected the supreme court's reliance on Park Holding Co. v. Arber, which stated that mandamus does not lie for the discretionary act of scheduling an inquest prior to the rendering of a default judgment. The court held that RPAPL section 732(3) requires the entry of judgment for the petitioner

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6 Id. at 28, 605 N.Y.S.2d at 14. RPAPL § 711 provides in pertinent part:

   A tenant shall include an occupant of one or more rooms in a rooming house or a resident, not including a transient occupant, of one or more rooms in a hotel who has been in possession for thirty consecutive days or longer; he shall not be removed from possession except in a special proceeding. A special proceeding may be maintained under this article upon the following grounds: . . .

   2. The tenant has defaulted in the payment of rent . . . and a demand of the rent has been made, or at least three days' notice in writing requiring, in the alternative, the payment of the rent, or the possession of the premises, has been served upon him as prescribed in section 735.


The tenant lived in a ten unit brownstone at 115 West 74th Street in New York City. Anderson, Inquests Struck, supra note 3, at 1. The petition was for the non-payment of four months' rent. Id.

7 According to the attorney's affidavit of service, the attorney personally served the tenant with the petition and notice of petition at 8:00 p.m. on March 16. Id.

8 Id. RPAPL § 747(1) provides in part that "[t]he court shall direct that a final judgment be entered determining the rights of the parties." RPAPL § 747(1) (McKinney 1979).

9 Brusco, 199 A.D.2d at 28, 605 N.Y.S.2d at 14.

10 Id. at 28-29, 605 N.Y.S.2d at 14. See supra note 3 and accompanying text (discussing frequency in which civil court judges schedule special inquests before signing default judgments in summary nonpayment proceedings).

11 Brusco, 199 A.D.2d at 28, 605 N.Y.S.2d at 14.

12 Id.


14 Brusco, 199 A.D.2d at 29, 605 N.Y.S.2d at 14.
upon the default of a tenant. Discretion is only permitted in determining whether to grant “a stay in issuance of the warrant of eviction for up to ten days.” The court stated that “RPAPL 732 constitutes an exception to the general rule that a summary proceeding shall be decided at a hearing.” Additionally, the court rejected Park Holding’s conclusion that “the term ‘render’ [in RPAPL section 732(3)] denotes ‘not a mere ministerial act’ but ‘a judicial process which should be performed in accordance with CPLR 3215(b).’” The First Depart-

15 Id. at 29, 605 N.Y.S.2d at 15 (citing N.Y. Real Prop. Law § 177 (McKinney 1971)).
16 Id. (citing RPAPL § 749(3) (McKinney 1979) and J.A.R. Management Corp. v. Foster, 109 Misc. 2d 683, 694, 442 N.Y.S.2d 723, 724 (Sup. Ct. App. T. 2d Dep’t 1980)).
17 Id. at 29-30, 605 N.Y.S.2d at 15 (holding that RPAPL § 732 permits hearing only if tenant responds to petition). Two residential summary eviction proceedings exist in New York: (1) the holdover proceeding pursuant to RPAPL § 711(1) or RPAPL § 713; and (2) the nonpayment proceeding pursuant to RPAPL § 711(2). Park Holding, 145 Misc. 2d at 41, 545 N.Y.S.2d at 1001-02. RPAPL § 731(2) governs the procedure for holdover proceedings. Id. at 41, 545 N.Y.S.2d at 1002 (citing RPAPL § 731(2) (McKinney 1979)). Since RPAPL § 731(2) requires that “the notice of petition shall specify the time and place of the hearing on the petition,” holdover proceedings are always placed on the calendar whether or not the tenant answers. Id. (quoting RPAPL § 731(2) (McKinney 1979)). If the tenant fails to respond, the case is scheduled “for an inquest at which the petitioner must establish a prima facie case to obtain a default judgment.” Id.

Nonpayment proceedings are governed by RPAPL § 732. Brusco, 199 A.D.2d at 29-30, 605 N.Y.S.2d at 14-15. According to RPAPL § 732(1) and (2), a nonpayment proceeding is only placed on the calendar “in the event that the tenant answers ‘before the clerk.’” Id. (quoting RPAPL § 732(1), (2) (McKinney 1979)). Since RPAPL § 732(3) requires that judgment be entered for the petitioner if the tenant fails to respond within five days, a hearing is only scheduled if the tenant responds. Id. at 30, 605 N.Y.S.2d at 15 (citing RPAPL § 732(3) (McKinney 1979)). The Brusco court noted that if the Park Holding rationale were correct, then summary nonpayment proceedings would be no different than other summary proceedings to recover real property, thus rendering RPAPL § 732(3) unnecessary. Id. (citing Sanders v. Winship, 57 N.Y.2d 391, 396, 442 N.E.2d 1231, 1234, 456 N.Y.S.2d 720, 723 (1982) and N.Y. Real Prop. Law § 98(a) (McKinney 1971)).

18 Brusco, 199 A.D.2d at 30, 605 N.Y.S.2d at 15 (citing Park Holding v. Alber, 145 Misc. 2d 39, 43, 545 N.Y.S.2d 1000, 1003 (Sup. Ct. N.Y. County 1989)). Park Holding ruled that because CPLR 3215 governs default judgments, when dealing with summary proceedings for the recovery of real property, both CPLR 3215 and RPAPL § 732 must “be interpreted together and in a manner in which they are consistent.” Park Holding, 145 Misc. 2d at 43, 545 N.Y.S.2d at 1003.

CPLR 3215 provides in part:

(a) Default and entry. When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, . . . the plaintiff may seek a default judgment against him. If the plaintiff’s claim is for a sum certain . . ., application may be made to the clerk . . . [who] shall enter judgment for the amount demanded in the complaint or stated in the notice
ment ruled that summary nonpayment proceedings are governed solely by section 732(3) of the RPAPL, and thus, CPLR 3215 is not applicable.\footnote{19} The court cited the general maxim that the provi-

\begin{quote}
\footnotesize
Where the case is not one in which the clerk can enter judgment, the plaintiff shall apply to the court for judgment. . . .
\end{quote}

\textbf{(b) Procedure before court.} The court, with or without a jury, may make an assessment or take an account or proof, or may direct a reference. When a reference is directed, the court may direct that the report be returned to it for further action or, except where otherwise prescribed by law, that judgment be entered by the clerk in accordance with the report without any further application.

CPLR 3215(a), (b) (McKinney 1992). \textit{Park Holding} concluded that because “RPAPL § 732(3) requires the Judge to \textit{render} a judgment, not merely \textit{enter} one,” to \textit{render} judgment must not be “a mere ministerial act which can be performed by a clerk.” \textit{Park Holding}, 145 Misc. 2d at 43, 545 N.Y.S.2d at 1003. As a result, the court held that rendering judgment is a judicial process governed by CPLR 3215(b), not CPLR 3215(a). \textit{Id.}

The \textit{Brusco} court dismissed distinctions between the terms “render” and “grant” as “purely semantic” and noted that the terms are actually synonyms for the purpose of entering of judgment. \textit{Brusco}, 199 A.D.2d at 30, 605 N.Y.S.2d at 15 (citing \textsc{Brian A. Garner}, \textsc{A Dictionary of Modern Legal Usage} 474 (1987)). The \textit{Brusco} court reasoned that RPAPL § 732(3) requires that “the judge shall render judgment” not because the rendering of judgment is discretionary, but rather because the provision in RPAPL § 732(3) permitting the judge to “stay the issuance of the warrant for a period of not to exceed ten days from the date of service” is discretionary. \textit{Id.} Thus, the provision permitting the stay of issuance of the warrant is the only part of the statute that is not “within the authority of the clerk.” \textit{Id.}

\textit{Brusco}, 199 A.D.2d at 31, 605 N.Y.S.2d at 16. The court noted that § 1402 of the New York City Civil Court Act, which governs the entry of default judgments, refers only to CPLR 3215, not RPAPL § 732. \textit{Id.} Thus, “[a]pplying the principle \textit{expressio unius est exclusio alterius},” the court reasoned that the omission indicates that the RPAPL is governed by neither the New York City Civil Court Act nor the CPLR. \textit{Id.} (citing \textsc{N.Y. Real Prop. Law} § 240 (McKinney 1971)).

Since CPLR 3215 does not apply to proceedings governed by the RPAPL, the court further rejected the ruling in \textit{Park Holding} that CPLR 3215(e) does not permit a default judgment based on the pleadings verified by an attorney without personal knowledge of the facts. \textit{Id.} at 30-31, 605 N.Y.S.2d at 15-16 (citing \textit{Park Holding}, 145 Misc. 2d at 44, 545 N.Y.S.2d at 1003. The court stated that the procedures governing motions for summary judgment apply to special proceedings and that summary proceedings to recover possession of real property are special proceedings. \textit{Id.} at 31-32, 605 N.Y.S.2d at 16 (citing \textit{In re Port of N.Y. Auth.}, 18 N.Y.2d 250, 255, 219 N.E.2d 797, 799, 273 N.Y.S.2d 337, 340 (1966), \textit{cert. denied sub nom. McInnes v. Port of N.Y. Auth.}, 385 U.S. 1006 (1967)).

Nonetheless, the court agreed with the result in \textit{Park Holding}, but for a different reason. \textit{Brusco}, 199 A.D.2d at 32, 605 N.Y.S.2d at 16. Although RPAPL § 741 permits the landlord’s attorney to verify the petition, the affidavit of counsel must be “accompanied by documentary evidence . . . from someone in the position of landlord or managing agent, attesting to the amount of rent currently due and owing.” \textit{Id.} (citing \textit{Zuckerman v. City of New York}, 49 N.Y.2d 557, 563, 404 N.E.2d 718, 720-21, 427 N.Y.S.2d 595, 598 (1980); \textit{Hasbrouck v. City of Gloversville}, 102 A.D.2d 905, 905, 477 N.Y.S.2d 486, 487 (3d Dep’t), \textit{aff’d}, 63 N.Y.2d 916, 472 N.E.2d 1042, 483 N.Y.S.2d 214 (1984); \textit{Farragut Gardens No. 5, Inc. v. Milrot}, 23 A.D.2d 889, 260 N.Y.S.2d 597 (2d
sions of a directory statute can be disregarded only with justification in extreme circumstances, particularly when a statute affects public interests or individual rights. In Brusco, however, the lower court provided no justification for disregarding the statute.

Finally, the First Department stated that because the RPAPL provides many safeguards to ensure that a tenant is notified prior to being evicted, and because the Housing Part has broad equitable powers to vacate a final judgment of eviction, a special inquest prior to default judgment is unnecessary. In light of these safe-
guards, the court ruled that an additional stage of review is both unnecessary and contrary to the purpose of Article 7 of the RPAPL, which was enacted to increase the speed and reduce the expense of actions to recover real property.\(^{23}\)

In a dissenting opinion, Justice Ellerin argued that because mandamus does not lie to enforce the performance of a discretionary act, the appellate division could not compel the respondent judge to sign a default judgment without ordering a special inquest.\(^{24}\) Justice Ellerin claimed that the language "render judgment" in section 732(3) of the RPAPL indicated the legislature's intent that the judge do more than merely perform a ministerial act which could be performed by a clerk.\(^{25}\)

The legislative history to section 732(3) indicates that the Brusco court was correct in concluding that "render[ing] judgment" pursuant to RPAPL section 732(3) was intended to be a ministerial act, prohibiting the routine scheduling of an inquest prior to signing a default judgment and permitting an order of

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1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; . . . .

(b) On stipulation. The clerk of the court may vacate a default judgment entered pursuant to section 3215 upon the filing with him of a stipulation of consent to such vacatur by the parties personally or by their attorneys.

(c) On application of an administrative judge. An administrative judge, upon a showing that default judgments were obtained by fraud, misrepresentation, illegality, unconscionability, lack of due service, violations of law, or other illegalities or where such default judgments were obtained in cases in which those defendants would be uniformly entitled to interpose a defense predicated upon but not limited to the foregoing defenses . . . .

CPLR 5015 (McKinney 1992).

The First Department further noted that courts have, in certain circumstances, reinstated tenants even after a warrant of eviction was executed. \(^{23}\) Brusco, 199 A.D.2d at 34, 605 N.Y.S.2d at 18 (citing Solack Estates, Inc. v. Goodman, 78 A.D.2d 512, 432 N.Y.S.2d 3 (1st Dep't 1980); Central Brooklyn Urban Dev. Corp. v. Copeland, 122 Misc. 2d 726, 471 N.Y.S.2d 989 (N.Y. Civ. Ct. Kings County 1984)).

\(^{24}\) Id. at 35-36, 605 N.Y.S.2d at 18 (citing Lynde v. Noble, 20 Johns. 80, 82 (N.Y. Sup. Ct. 1822)); see supra note 1 (discussing purpose of Article 7 of RPAPL).

\(^{25}\) Id. at 35, 605 N.Y.S.2d at 19 (Ellerin, J., dissenting) (quoting Donaldson v. State, 156 A.D.2d 290, 293, 548 N.Y.S.2d 676, 678 (1st Dep't 1989), appeal dismissed in part, denied in part, 75 N.Y.2d 1003, 556 N.E.2d 1115, 557 N.Y.S.2d 308 (1990)).

\(^{26}\) Id. at 35, 605 N.Y.S.2d at 19 (Ellerin, J., dissenting). Justice Ellerin noted "that 'to render judgment' is a judicial act, while 'to enter judgment' is a ministerial one." Id. (quoting Evarts v. Kiehl, 102 N.Y. 296, 6 N.E. 592 (1886)).
mandamus.26 Furthermore, a review of the legislative intent behind CPLR 3215 indicates that the Brusco holding is consistent with that statute.27 Finally, it is submitted that the policy considerations of summary proceedings for the recovery of real property support such a ruling, but such policies would be better accomplished if the statute were amended to permit a court discretion to stay the issuance of a warrant for a period longer than ten days.28

In a memorandum, the Joint Legislative Committee on Court Reorganization ("JLCCR") noted that prior to the enactment of RPAPL section 732(3) courts typically deferred entry of the judgment for several days (normally eleven) and then issued the judgment and warrant simultaneously.29 The JLCCR objected to section 732(3) of the RPAPL because the provisions for judgment in five days and a stay of five days would have required a two-step process whenever a court wished to stay the issuance of a warrant beyond the five days in which the judgment was to be rendered.30 Legislative intent to restrict a court's discretion in staying a warrant for up to ten days is further evidenced by the fact that criticism of the statute focused on this limitation rather than the re-

[Footnotes]
26 See infra notes 29-31, 39 and accompanying text (discussing legislative history of § 732(3) of the RPAPL).
27 See infra notes 33-36 and accompanying text (discussing legislative purpose behind CPLR 3215).
28 See infra notes 38-40 and accompanying text.
29 Memorandum of Joint Legislative Committee on Court Reorganization regarding Senate Intro. 4714 (Governor's Bill Jacket 1965 Chapter 910) [hereinafter Memo 4714]. This memorandum was submitted along with a Memorandum of Joint Legislative Committee on Court Reorganization regarding Senate Intro. 4536 (Governor's Bill Jacket 1965 Chapter 910), reprinted in [1965] N.Y. LEGIS. ANN. 162 [hereinafter Memo 4536]. Memo 4714 recommended a bill, Senate Intro. 4714, which would have amended RPAPL § 732, but was never reported out. Memo 4536, supra.
30 Memo 4714, supra note 29. Fearing that RPAPL § 732(3) as enacted would unduly "reduce the court's margin of flexibility," the Joint Legislative Committee on Court Reorganization ("JLCCR") unsuccessfully recommended that RPAPL § 732(3) be amended to "preserve such flexible powers in the court . . . ." Id.; see also Letter from Daniel M. Kelly, Chairman, State of New York Assembly Taxation Committee, to Hon. Neil Corbin, Counsel to the Governor (July 13, 1965) (Governor's Bill Jacket 1965 Chapter 910) [hereinafter Letter from Kelly]. Because the proposed amendments to RPAPL § 732 were not reported for a vote, Assemblyman Kelly recommended that RPAPL § 732(3) be vetoed. Id. Assemblyman Kelly reiterated the argument of the JLCCR that RPAPL § 732(3) would restrict "the discretion of a Justice of the Civil Court with respect to the length of the stay . . . ." Id. Although Assemblyman Kelly noted that the stay to be permitted by RPAPL § 732(3) was the same length as stays granted prior to enactment of the statute, he argued that justices do occasionally grant stays for periods greater than those referred to in the statute. Id.
quirement that judgment be rendered within five days of default.\textsuperscript{31}

Contrary to the conclusion reached in \textit{Park Holding},\textsuperscript{32} a review of the purpose of CPLR 3215(b) indicates that the practice of routinely holding an inquest prior to rendering a default judgment in a summary nonpayment proceeding is not permitted if performed after ten days from the date of service. Although CPLR 3215(b) permits the court to make an assessment for the purpose of determining the sum of the plaintiff's claim, it does not sanction the ordering of an inquest solely to ensure compliance with the statute.\textsuperscript{33} Since the statute sets an outer limit of ten days from the date of service in which the warrant must be executed, judgment by definition must be rendered prior to the issuance of the warrant, and a procedure of scheduling an inquest greater than ten days from the date of service violates RPAPL section 732(3).\textsuperscript{34} Thus, even if an inquest is deemed necessary to determine whether the statutory requirements have been met, this inquest must be scheduled prior to ten days from the date of service.

\textsuperscript{31} See supra notes 29-30, infra note 38 and accompanying text (reviewing criticisms of RPAPL § 732(3)).

\textsuperscript{32} 145 Misc. 2d 39, 44, 545 N.Y.S.2d 1000, 1003 (Sup. Ct. N.Y. County 1989). \textit{Park Holding} held that CPLR 3215(b) permits a court to make an assessment before rendering a default judgment; therefore when RPAPL § 732(3) is applied with CPLR 3215(b), the court is permitted to hold an inquest in a summary nonpayment proceeding prior to rendering a default judgment. Id. at 42-43, 545 N.Y.S.2d at 1002-03 (citing CPLR 3215 (McKinney 1992) and RPAPL § 732(3) (McKinney 1979)).

\textsuperscript{33} CPLR 3215(b) (McKinney 1992). CPLR 3215(a) and (b) establish the procedure for rendering default judgment. CPLR 3215(a), (b) (McKinney 1992). CPLR 3215(a) governs the entry of default judgment for claims in which the amount is readily ascertainable. CPLR 3215(a) (McKinney 1992). CPLR 3215(a) provides that "[i]f the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default." CPLR 3215(a) (McKinney 1992) (emphasis added). If, however, "the case is not one in which the clerk can enter judgment, the plaintiff shall apply to the court for judgment." Id.

CPLR 3215(b) governs the process for entering default judgment \textit{by the court} when the amount of the claim is not readily ascertainable. See CPLR 3215(b) (McKinney 1992). The commentaries to CPLR 3215(b) state that when a claim is not clear on its face, the court may determine the damages itself or direct a jury or referee to assess such damages. CPLR 3215(b) commentary at 549 (McKinney 1992).

\textsuperscript{34} RPAPL § 732(3) (McKinney 1979). RPAPL § 732(3) states that "[i]f the respondent fails to answer within five days from the date of service... the judge shall render judgment in favor of the petitioner and may stay the issuance of the warrant for a period of not to exceed ten days from the date of service." Id. (emphasis added). Thus, one could argue that the statute does not place an outer time limit within which judgment must be rendered, but rather precludes the judge from rendering judgment until a tenant has failed to respond for at least five days from the date of service.
Finally, the policy considerations surrounding default judgments entered in summary nonpayment proceedings reveal that the statute would better accommodate the competing interests if it were amended to provide judges a longer period of discretion in which to stay the issuance of the warrant. Section 732(3) of the RPAPL was enacted primarily to ease the burden on the court's limited judicial resources, caused by the large number of summary proceedings to recover realty. Thus, as the Brusco court noted, the creation of another level of judicial scrutiny in the default judgment process would counteract the intended effects of the statute. At the same time, the special inquest's purpose of ensuring that tenants receive proper notification is effectuated through the statutory safeguards, affidavit requirement, and vacatur of default judgments upon an order to show cause. It is submitted, however, that extending the discretionary period during which judges may stay issuance of the warrant would better protect those tenants who receive defective or no notification prior to issuance of the warrant because they would then have greater time to procure an order to show cause. Such an amendment

35 See Letter from McCoy, supra note 1, at 2 (stating that all 300,000 summary proceedings processed in New York City Civil Court each year could not be handled if judges were forced to process default cases). State Administrator McCoy further noted that RPAPL § 732(3) was enacted so court clerks would be permitted to process summary nonpayment proceedings, thus improving calendar control. Id.; see also Memorandum from Louis J. Lefkowitz, Attorney General, to the Governor 3 (June 30, 1965) (Governor's Bill Jacket 1965 Chapter 910) (noting RPAPL § 732(3) was designed to facilitate processing of summary nonpayment proceedings in courts which handle large number of cases each year); Memo 4536, supra note 29.


37 See id. at 34, 605 N.Y.S.2d at 18 (citing various statutory safeguards, including three-day demand for rent, postcard notice, 72-hour notice of eviction, and vacatur of default judgment upon order to show cause). An additional safeguard, as noted by the Brusco court, is “the submission of ‘additional proof’ in the form of an affidavit from someone in the position of landlord or managing agent, attesting to the amount of rent currently due and owing” at the time default judgment is requested. Id. at 32, 605 N.Y.S.2d at 16-17 (quoting CPLR 409(a) (McKinney 1990)); see also supra note 22 and accompanying text (reviewing various safeguards designed to ensure tenants receive notification prior to eviction).

38 Cf. Memo 4714, supra note 29 (arguing that RPAPL § 732(3) as enacted would hamper judges’ discretion to grant stay of issuance of warrant which is usually 11 days); Letter from Kelly, supra note 30, at 2 (noting that judges occasionally stay issuance of warrants in excess of 10 day period mandated by RPAPL § 732(3)). Expressing concern that some judges could construe RPAPL § 732(3) as precluding vacatur of a default judgment, Assemblyman Kelly noted that because the notification of service indicates that issuance of the warrant can only be stayed for 10 days as per RPAPL § 732(3), after reading the notification of service, tenants away from home for
would not require any additional use of precious judicial resources except in those truly meritorious cases in which a tenant receives defective or no notification and seeks to vacate the default judgment. Although courts already have the power to reinstate tenants even after eviction, if the legislature extended the discretionary period during which the warrant may be stayed, tenants would be spared the hardships associated with eviction.

Scott R. Saks

Editor’s note: Before this issue went to print, the New York Court of Appeals in Brusco v. Braun, 84 N.Y.2d 674, 621 N.Y.S.2d 291 (1994), affirmed the First Department’s holding. The court of appeals held that CPLR 3215(b), which permits an assessment prior to rendering a default judgment, does not apply because RPAPL 732(3) superseded the statute in the area of summary proceedings for the recovery of real property. Id. at 681, 621 N.Y.S.2d at 293-94. The court cited the notification requirements found in Article 7 and the civil court’s equitable power to vacate eviction warrants as further safeguards of tenants’ rights. Id. at 681-82, 621 N.Y.S.2d at 294. Judge Ciparick dissented, arguing that “to render judgment” as used in RPAPL 732(3) is a judicial act and not ministerial, and as such RPAPL 732(3) should be read consistently with CPLR 3215(b). Id. at 682-84, 621 N.Y.S.2d at 294-95 (Ciparick, J., dissenting).

more than five days might be unaware that a judge “could in a proper case open the default” judgment. Id. It is submitted that increasing the court’s discretion to stay issuance of the warrant might protect those tenants who are away from home during the short 10 day period in which the warrant may be stayed pursuant to § 732(3) of the present RPAPL.

See Letter from McCoy, supra note 1, at 3 (arguing that proposed RPAPL § 732(3) would require judicial involvement only if tenant appeared or requested vacatur of default judgment, rather than in all motions for default judgment). Extending the court’s discretion to stay the issuance of a warrant would not require the added cost and time associated with ordering a special inquest in every summary nonpayment proceeding prior to rendering a default judgment. Id. Rather, such an amendment would continue the present practice under RPAPL § 732(3) in which the burden rests on the tenant to initiate a show cause order in those meritorious cases where notification was defective. Id.

State Administrator McCoy noted that a tenant can obtain a show cause order to stay the marshal from eviction. Id. Once the tenant does obtain a show cause order, “the judge, upon testimony by or in behalf of the tenant manifesting any reasonable ground, such as defective service of the papers . . . can stay all further proceedings. That stay is in effect a dismissal of the proceedings.” Id.
