



496 Broadway Realty

18 Misc.3d 1119(A) (2008) | Cited 0 times | New York Supreme Court | January 24, 2008

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This opinion is uncorrected and will not be published in the printed Official Reports.

Upon a reading of the foregoing cited papers on this motion and cross motion for summary judgment it is the decision and order of this court that the motion is granted and petition is dismissed. The Notice to cure is inadequate, the Notice of termination was served prior to the expiration of the cure period and fails to contain sufficient facts supporting grounds for termination.

In this Commercial Holdover Summary Proceeding respondent Kyung Sik Kim/Think Soho, Inc., moves for an order granting summary judgment dismissing the proceeding on grounds that the ten (10) day Notice to Cure is equivocal, ambiguous and therefore defective, and on grounds that the Notice of Termination was served on respondent prior to the expiration of the cure period. Petitioner likewise moves for summary judgment on grounds that Respondent has failed to cure the lease violations as contained in the Notice to cure. Petitioner alleges that Respondent's lease was properly terminated in accordance with the terms of the lease and after the Cure period had expired.

Respondent rents premises located at 496 Broadway pursuant to a lease dated December 1, 1999. The Lease was extended on December 11, 2002 for an additional five (5) years and is due to expire on December 14, 2009. On May 29, 2007 Petitioner purchased the building and became the owner of the premises. On July 5, 2007 Petitioner sent Respondent a letter advising him of "a change of address for notices to landlord" and at the same time giving him a "ten (10) day Notice to cure tenant's defaults". The affidavit of service annexed to the notice to cure states as follows:

"On July 5, 2007 I served a 10 day notice to cure tenant's defaults upon Kyum Sik Kim (Think Soho, Inc.) At ground level 496 Broadway New York, New York 10012 the address designated by said individual/ corporation/tenant for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed Express Mail wrapper and an additional copy of same enclosed in a post-paid, properly addressed wrapper by Certified Mail, return receipt requested in an official depository under the exclusive care and custody of the U.S. Postal Service within the State of New York." This affidavit is signed by Grace Giammona.

The lease in Paragraph 4 sets forth the manner for giving notices between Landlord and Tenant. It states:



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" Any bill, statement or notice must be in writing and mailed or hand delivered to the tenant at the premises and to the landlord at the address for notices. Any notice must be sent by certified mail or express mail [signature required]. It will be considered delivered on the day mailed if sent by overnight mail or five days after the date mailed if sent by regular mail or, if not mailed, when left at the proper address..."

In accordance with the lease provision at Paragraph 4, when any notice is sent by mail or when it is left at the address, notice will be considered delivered five (5) days after the date mailed or left at the address. Only when notice is sent by "Overnight mail" is notice considered delivered on the date mailed. The affidavit of service of the notice herein does not state that It was sent by overnight mail, it only states that it was sent by express mail. When the written lease between the parties contains requirements for service, the lease provisions must be complied with for service to be proper (Bogatz v. Extra Touch International, Inc., 179 Misc 2d 1029, 687 N.Y.S. 2d 558 [Civ. Ct. Kings 1999]; Scherer, Residential Landlord Tenant Law §8:243). The notice to cure sent by mail will be considered delivered five (5) days after mailing, which would give Respondent until at least July 20, 2007 to cure any lease violations.

The Notice of termination was mailed on July 17, 2007 in the same manner as the notice to cure. The cure period expired on July 20, 2007, three days after the mailing of the notice of termination. This notice to terminate fails to state the grounds for petitioner's recovery of possession, it simply refers back to the notice to cure. This notice of termination was mailed prematurely and fails to set forth specific facts to establish the grounds for the landlord to recover possession (Chinatown Apartments, Inc., v. Chu Cho Lam, 51 NY2d 786, 433 NY S. 2d 86, 412 N.E. 2d 1312 [1980]; Scherer, Residential Landlord Tenant law,§8:267), it is therefore inadequate, premature and ineffective (542 Holding Corp., v. Prince Fashions Inc., 848 N.Y.S. 2d 37, 2007 NY Slip Op 09869 [1st. Dept. 2007]). Defects in a notice of termination cannot be cured by amendment (Chinatown Apartments, Inc., v. Chu Cho Lam, 51 NY2d 786, Supra) or by submitting details at some later point in the proceeding (Federal v. Ortiz, 139 Misc 2d 274, 528 N.Y.S. 2d 305 [NY City Civ. Ct. 1988]).

The Notice to Cure is also inadequate in that it fails to unequivocally and unambiguously inform the tenant how it has violated the lease and the conduct required to prevent eviction (200 West 58th Street LLC., v. Little Egypt Corp., 7 Misc 3d 1017(A), 801 NY S. 2d 243 [NY City Civ. Ct. 2005]; Chinatown Apartments Inc., v. Chu Cho Lam, 51 NY2d 786, Supra; Greenfield v. Etts Enters., 177 AD2d 365 [1st. Dept. 1991]; Garland v. Titan W. Associates, 147 AD2d 304 [1st. Dept. 1989]; Filmtrucks, Inc., v. Express Indus. & Term Corp., 127 AD2d 510). The notice lacks in specificity in every respect. It fails to tell Respondent what obligations of his tenancy he has breached, what laws, orders, rules and directions of what governmental authorities he has failed to comply with in order to use the premises for a retail store; what violations exist in the premises; what violations he has failed to remove; what permits were required for alterations to the storefront, installation of an awning and a security gate. Defects in the notice to cure may not be remedied by amendment or by supplying additional information after commencement of the proceeding (200 West 58th Street LLC., v. Little



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Egypt Corp., 7 Misc 3d 1017(A), Supra).

Finally, the Notice to cure is inadequate because it fails to inform the tenant of the consequences of its failure to cure, that is, that summary eviction proceedings will be commenced. (Scherer, Residential Landlord Tenant Law §8:239).

In conclusion, the Notice to Cure is defective because it fails to unequivocally and unambiguously inform the tenant how the lease has been violated, the consequences of its failure to cure and the conduct required to prevent eviction . The Notice of Termination is equally deficient and ineffective because it fails to sufficiently state the grounds for Petitioner's recovery of possession and it was served prematurely.

Accordingly, for the foregoing stated reasons Respondents' motion is granted and the Proceeding is dismissed. Petitioner's cross motion is denied in every respect.

This constitutes the decision and order of this court

