



Cited

As of: Dec 05, 2012

**49 West 12 Tenants Corp., Appellant-Respondent, v. Pearl Seidenberg,
Respondent-Appellant.**

3372

**SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST
DEPARTMENT**

6 A.D.3d 243; 774 N.Y.S.2d 339; 2004 N.Y. App. Div. LEXIS 4519

April 15, 2004, Decided

April 15, 2004, Entered

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff residential cooperative corporation appealed, and defendant tenant shareholder cross-appealed, the order of the Supreme Court, New York County (New York), granting the shareholder's motion to dismiss the complaint pursuant to *N.Y. C.P.L.R. 3211(a)(7)*, denying the shareholder's motion for attorneys' fees, and denying the corporation's cross motion to amend the complaint.

OVERVIEW: The corporation's 1995 letter to the shareholder, which was advanced as proof that the corporation notified the shareholder of its intention to terminate her proprietary lease did not meet the termination notice requirements set forth in the proprietary lease. The letter did not reference the proprietary lease, much less specify the lease provision violated by the shareholder. Furthermore, the letter did not warn the shareholder that the lease was terminable upon her failure to cure. The letter was also defective as a termination notice, as it was not from the corporation or

an attorney named in the lease, but from an attorney with whom the shareholder had not previously dealt. Since the notice required as a condition of terminating the proprietary lease was not provided, the corporation's action to recover possession of the shareholder's apartment on termination grounds for objectionable conduct was properly dismissed. The corporation's attempt to terminate the shareholder's lease was not without substantive basis. Thus, the shareholder was not entitled to attorneys' fees under *N.Y. Real Prop. Law § 234* or under *N.Y. Comp. Codes R. & Regs. tit. 22, § 130-1.1*.

OUTCOME: The order was affirmed.

CORE TERMS: proprietary lease, lease, cooperative, termination, shareholder, tenant, attorneys' fees, residential, terminate, notice, notice requirements, recover possession, objectionable conduct, properly dismissed, substantive basis, technically, terminated, apartment, validly, nominal

6 A.D.3d 243, *; 774 N.Y.S.2d 339, **;
2004 N.Y. App. Div. LEXIS 4519, ***

HEADNOTES

[***1] Condominiums and Cooperatives--Proprietary Lease--Notice of Termination.--Since residential cooperative corporation's letter to tenant shareholder did not meet termination notice requirements of proprietary lease, action seeking to recover possession of apartment upon ground that proprietary lease had been validly terminated for objectionable conduct was properly dismissed.

Costs--Sanctions--Counsel Fees.--While plaintiff's action was technically defective, since plaintiff's attempt to terminate defendant's lease was not without substantive basis, and defendant's success in action may be little more than nominal, award of attorneys' fees to defendant would not be appropriate.

COUNSEL: Friend & Reiskind, New York (Edwin M. Reiskind, Jr. of counsel), for appellant-respondent.

Lambert & Shackman, PLLC, New York (Thomas C. Lambert of counsel), for respondent-appellant.

JUDGES: Concur--Buckley, P.J., Tom, Sullivan and Williams, JJ.

OPINION

[*243] [***340] Order, Supreme Court, New York County (Leland DeGrasse, J.), entered March 20, 2003, which granted defendant's motion insofar as it sought dismissal of the complaint pursuant to *CPLR 3211 (a) (7)* but denied the motion to the extent that tenant shareholder sought an award of attorneys' fees, and denied plaintiff's cross motion to amend the complaint, unanimously affirmed, without costs.

The motion court properly considered defendant's motion to dismiss as against the proffered amended complaint (*see Sage Realty Corp. v Proskauer Rose, 251*

A.D.2d 35, 38, 675 N.Y.S.2d 14 [1998]).

[*244] Plaintiff residential cooperative corporation's 1995 letter to defendant tenant shareholder, advanced as proof that plaintiff residential cooperative corporation duly notified defendant tenant shareholder of its intention to terminate [***2] her proprietary lease, did not meet the termination notice requirements set forth in paragraph 31 (g) of the proprietary lease. The letter did not reference the proprietary lease, much less specify the lease provision violated by defendant, and did not warn defendant that the lease was terminable upon her failure to cure (*see Chinatown Apts., v Chu Cho Lam, 51 N.Y.2d 786, 412 N.E.2d 1312, 433 N.Y.S.2d 86 [1980]; Filmtrucks, Inc. v Express Indus. & Term. Corp., 127 A.D.2d 509, 510, 511 N.Y.S.2d 862 [1987]*). The letter was also defective as a termination notice since it was not from plaintiff or an attorney named in the lease, but from an attorney with whom defendant had not previously dealt (*see Siegel v Kentucky Fried Chicken of Long Is., 67 N.Y.2d 792, 794, 492 N.E.2d 390, 501 N.Y.S.2d 317 [1986]*). Accordingly, since the notice required as a condition of terminating the proprietary lease was not provided, this action seeking, inter alia, to recover possession of defendant's apartment upon the ground that her proprietary lease had been validly terminated for objectionable conduct was properly dismissed.

While plaintiff's action is technically defective, the record provides strong indication that its attempt to terminate defendant's [***3] lease was not without substantive basis and that defendant's success in this action may be little more than nominal. Accordingly, an award of attorneys' fees to defendant, pursuant to either *22 NYCRR 130-1.1* or *Real Property Law § 234*, would not be appropriate.

Concur--Buckley, P.J., Tom, Sullivan and Williams, JJ.