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As of: Dec 05, 2012

**40 East 68th Street Co., Petitioner-Landlord, against Hani Jamil Saud Habbas, Respondent-Tenant, "John Doe" and/or "Jane Doe," 40 East 68th Street, Apt 5A New York, NY 10021 Respondent-Undertenants.**

**65902/07**

**CIVIL COURT OF THE CITY OF NEW YORK, NEW YORK COUNTY**

***17 Misc. 3d 1101A; 851 N.Y.S.2d 57; 2007 N.Y. Misc. LEXIS 6485; 2007 NY Slip Op 51789U***

**September 10, 2007, Decided**

**NOTICE:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

**SUBSEQUENT HISTORY:** Subsequent appeal at 40 E. 68th St. Co. v. Habbas, 2009 N.Y. Misc. LEXIS 347, 2009 NY Slip Op 50284U (N.Y. App. Term, Feb. 20, 2009)

**CORE TERMS:** notice, cure, termination, tenancy, default, landlord, notice of termination, terminate, predicate, holdover, lease, misleading, vacate, signature line, recover possession, subject matter jurisdiction, termination date, accomplished, unequivocal, tenant, date of service, ambiguity, summary proceedings, fatal defects, unambiguous, commencing, expiration, terminated, materially, equivocal

**HEADNOTES**

**[\*1101A] [\*\*57]** Landlord and Tenant--Summary Proceedings--Sufficiency of Notice to Cure.

**COUNSEL:** [\*\*\*1] For Petitioner: Mitofsky Shapiro Neville & Hazen, LLP, BY: M. David Fonseca, Esq., New York, New York.

For Respondent: Lambert & Shackman, PLLC, BY: Steven Shackman, Esq., New York, New York.

**JUDGES:** Pam Jackman Brown, J. H. C.

**OPINION BY:** Pam B. Jackman Brown

**OPINION**

Pam B. Jackman-Brown, J.

Petitioner commenced the within holdover proceeding to recover possession of Apt. 5A, a rent-stabilized apartment in the building located at 40 East 68th Street, New York, New York 10021, on grounds of substantial violations of the lease and the tenancy. Prior to commencing the proceeding, Petitioner served Respondent with a notice to cure which stated, in pertinent part:

17 Misc. 3d 1101A, \*1101A; 851 N.Y.S.2d 57, \*\*57;  
2007 N.Y. Misc. LEXIS 6485, \*\*\*1; 2007 NY Slip Op 51789U

Please take further notice, that in accordance with the Rent Stabilization Laws of 1969 as amended, and Paragraph "17" of your lease agreement, you are hereby given ten (10) days from the date of service of this Notice to cure the noted default. If you fail to cure said default on or before March 26, 2007, a day which is not less than ten (10) days after the service of this Notice upon you, the Landlord will elect to terminate your tenancy in accordance with the applicable provisions of the law and your Lease.

After the expiration of the cure period, Petitioner [\*\*\*2] served Respondent with a notice to terminate, which stated:

Please take notice, that your tenancy in Apartment 5A, in the premises located at 40 East 68th Street, New York, New York 10021, is hereby terminated effective April 9, 2007, for the reasons that you failed to comply with the Notice to Cure, dated March 7, 2007, a copy of which is annexed hereto and made a part hereof and incorporated herein as if fully set forth below.

Please take further notice, that you are hereby required to quit, vacate and surrender possession of the demised premises to the landlord, on or before April 9, 2007, and that upon your failure to so quit, vacate and surrender possession, the landlord will commence appropriate proceedings to recover possession of the premises.

Dated: New York, New York

April 27, 2007

40 East 68th Street Co.

(Landlord)

By: s/s

Bernard Friedman, Partner

Petitioner subsequently commenced the instant holdover proceeding.

Respondent now moves, pursuant to *CPLR 3211 (a) (2)*, for an order dismissing the petition on the ground that the court lacks subject matter jurisdiction over this proceeding because of fatal defects in the notice to cure and notice of termination.

Subject matter jurisdiction [\*\*\*3] refers to the categories of actions which a court is empowered to adjudicate. This court has been granted subject matter jurisdiction over, *inter alia*, summary proceedings to recover possession of real property (*CCA §§ 204, 110*). Failure to serve a proper predicate notice does not deprive the court of subject matter jurisdiction over residential holdover proceedings (*see 170 West 85th Street Tenants Assoc. v Cruz, 173 A.D.2d 338, 339, 569 N.Y.S.2d 705; Katz Park Ave Corp. v Olden, 158 Misc 2d 541, 545, 601 N.Y.S.2d 757*). However, since service of a proper predicate notice is a condition precedent to commencing a holdover proceeding, the court will treat Respondent's motion as a motion to dismiss pursuant to *CPLR 3211 (a) (7)* for failure to state a cause of action on grounds that service of inadequate predicate notices rendered the holdover proceeding fatally defective.

#### **Notice To Cure**

The purpose of a notice to cure is to inform a tenant of its alleged defaults under the lease, and to state the consequences of failure to cure by a specific date (*see Cohn v White Oak Cooperative Housing Corp., 243 A.D.2d 440, 663 N.Y.S.2d 62; Filmtrucks, Inc. v Express Indus. & Terminal Corp., 127 A.D.2d 509, 510-510, 511 N.Y.S.2d 862*). A notice to cure which is equivocal, [\*\*\*4] internally inconsistent, or ambiguous about the date by which the cure must be accomplished is not legally sufficient.

Respondent contends that there is an internal inconsistency between the statement "you are hereby given ten (10) days from the date of service of this Notice to cure the noted default" and the next sentence: "If you fail to cure said default on or before March 26, 2007, a day which is not less than ten (10) days after the service of this Notice upon you ..." Respondent asserts that the "date certain" of March 26 conflicts with the possibility that "10 days from the date of service" might mean March 19 (ten days after the postmark on the envelope in which the notice was mailed, and the date on the affidavit of service) or March 24 (10 days plus 5 days for mailing), and therefore the notice does not provide an unequivocal date by which the cure must be accomplished. Assuming this analogy is correct, Respondent would have the benefit of relying on the extended time period to March 26, 2007, to cure, the date given in the body of the notice to cure.

However, this Court finds the single sentence: "If

you fail to cure said default on or before March 26, 2007, ... the Landlord [\*\*\*5] will elect to terminate your tenancy ..." provides a clear specified date within the body of the notice by which the cure must be accomplished, and the notice states the consequences of failure to cure by that date. There is no other date mentioned in the body of the notice to create confusion about the deadline for cure. Respondent's examples of other ways the date for cure might be calculated are mere conjecture which do not demonstrate that the notice is facially deficient on grounds of ambiguity.

Respondent's motion to dismiss the petition for failure to serve a sufficient notice to cure is therefore denied.

### **Notice of Termination**

A notice of termination must be clear, unambiguous, and unequivocal (*see Ellivkroy Realty Corp v HDP 86 Sponsor Corp.*, 162 A.D.2d 238, 556 N.Y.S.2d 339). A misstatement in a notice about the termination date will lead to dismissal if the error is materially misleading or if it is prejudicial (*see 290 Riverside Company v Bottero*, 2003 NY Slip Op 51428 [U], 2003 N.Y. Misc. LEXIS 1478).

Respondent contends that the notice of termination herein is defective because the date of termination given in the body of the notice, April 9, 2007, is more than two weeks before the date at the bottom of the notice next [\*\*\*6] to the signature line, April 27, 2007. Respondent characterizes the date set forth at the end of the notice as the "effective date" of the notice, and asserts that a notice setting a termination date prior to the effective date on the signature line is itself inherently unclear.

Notices which specify more than one date as a "termination date" have been found to be ambiguous, unclear, and misleading (*see 290 Riverside Company v Bottero*, *supra* [notice headed "Notice to Terminate tenancy as of November 30, 2002," while body of notice gives the date of lease expiration as October 30, 2002, found to be defective as materially misleading]; *Riverside LLC v Riverside Construction Corp.*, NYLJ, Apr. 6, 1999, at 26, col 2 [App Term, 1st Dept] [court found a

notice of termination which was dated December 8, 1997, terminated a tenancy as of December 1, 1997, "one week earlier," and stated that the tenant was required to vacate by December 16, 1997, was "by its own terms ... equivocal, inconsistent, and insufficient as a predicate for eviction proceedings."]).

In contrast to the above-cited cases, the notice at issue herein contains only a single date which could be construed as the date of termination: [\*\*\*7] the date of termination and the date by which Respondent was required to vacate are the same -- April 9, 2007. There are no inconsistencies in the body of the notice itself. The Court finds that the date on the signature line of the notice is outside the substantive provisions of the notice, and does not create ambiguity about the date of termination. (Since the affidavit of service and mailing receipts for the Notice of Termination are dated March 27, 2007 [Petitioner's affirmation in opposition, Exhibit C], which is the day after March 26, 2007, the cure date given in the Notice to Cure, the date "April" 27, 2007 at the end of the Notice of Termination is a typographical error as conceded by Petitioner.) The date on signature line poses no fatal defect to the predicate notice and creates no ambiguity of the termination date in the body of the notice.

The Court further finds that the notice of termination is unclear, unambiguous, unequivocal, and not misleading about the date of termination. Respondent's motion to dismiss for failure to serve a proper notice to terminate is denied.

Consequently, Respondent's motion to dismiss is denied in its entirety.

This proceeding is adjourned to [\*\*\*8] Part F, Room 830 at 9:30 a.m. on October 11, 2007, for all purposes.

The foregoing constitutes the Decision and Order of this court.

Dated: New York, New York

September 10, 2007 Pam Jackman Brown, J. H. C.