

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 65

Index No.: L & T 071248/10
Motion Calendar Date: Jan. 14, 2011
Motion Calendar No.:40 Part 52

200 WEST 112TH STREET HDFC

Plaintiff(s)/Petitioner(s),

-against-

DECISION/ORDER

Present: HON. MANUEL J. MENDEZ

Judge, Civil Court **RECEIVED**

1842 7TH AVENUE DELICATESSEN CORP.,

Defendant(s)/Respondent(s).

FEB 02 2011

BUSSON & SIKORSKI

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1-2 _____
Answering Affidavits/Affirmations.....	3-4 _____
Reply Affidavits/Affirmations.....	5 _____
Memoranda of Law.....	_____
Other.....	_____

Upon a reading of the foregoing cited papers on this motion for summary judgment dismissing this Commercial Summary Holdover Proceeding, it is the decision and order of this court that the motion is granted and the petition is dismissed.

In this Commercial Summary Holdover Proceeding Respondent moves for summary judgment dismissing the petition for failure to serve a notice to cure and for failure to allege in the petition that there was service of a notice to cure or to attach an affidavit of service of the same. Petitioner opposes the motion alleging that there was service of a notice to Cure (see Exh. 2 opposition papers) and that the acts as alleged by the petitioner do not rise to a level of a conditional limitation.

The lease in its paragraph Twelfth states the manner in which notices must be served. It states: " any notice or demand which under the terms of this lease or under any statute must or may be given or made by the parties hereto shall be in writing and shall be given or made by mailing the same by certified or registered mail addressed to the respective parties at the addresses set forth in this lease".

The purported notice to cure dated January 20, 2010 does not state the manner it was served. Petitioner does not attach to its opposition papers or to the petition an affidavit of service detailing the manner of service of the notice to cure or that it was served in accordance with the terms of the lease. When the written lease between the parties contains requirements for service, the lease provisions must be complied with for service to be proper (496 Broadway Realty LLC., v. Kyung Sik Kim, 18 Misc. 3d 1119(A), 856 N.Y.S. 2d 498 [NY Civ. Ct. 2008]; Bogatz v. Extra Touch International, Inc., 179 Misc. 2d 1029, 687 N.Y.S. 2d 558 [Civ. Ct. Kings 1999]; Century Paramount Hotel v. Rock Land corp., 68 Misc. 2d 603,

327 N.Y.S. 2d 695[1971];Scherer, Residential Landlord Tenant Law §8:243).

The petition must allege that the appropriate predicate notices have been served and contain details of the service or have a copy of the appropriate predicate notice attached (Scherer, Residential Landlord Tenant Law § 7:139; Kentpark Realty Corp., V. Lasertone Corp., 3 Misc. 3d 28, 779 N.Y.S. 2d 324 [App. Term 2nd. 2004]). Failure to set forth facts in the petition regarding service of the predicate notices renders the petition deficient under RPAPL § 741 (4) which requires that "the petition state the facts upon which the special proceeding is based."

There was no mention of service of the notice to cure in the petition, there was no affidavit of service of the notice to cure attached to the petition. The notice of termination did not make any mention of service of the notice to cure. Failure to allege that the notice to cure was served and give the details of its service render the petition defective and it must be dismissed.

Accordingly, for the foregoing stated reasons it is the decision and order of this court that Respondent's motion for summary judgment is granted, the petition is dismissed.

This constitutes the decision and order of this court.

Dated: January 31, 2011

MANUEL J. MENDEZ

Manuel J. Mendez
Judge Civil Court