

### LANDLORD-TENANT

## Failure to Cite Lease Provision In Notice to Cure Can Be Fatal



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Thirty-five years ago, the Court of Appeals issued its landmark decision in *Chinatown Apartments v. Chu Cho Lam*.<sup>1</sup> In that case, the court held that the landlord's failure to cite in its notice to cure (used as a predicate to termination of the lease) the specific lease provision which the landlord claimed was being violated, was a fatal defect requiring the dismissal of the summary holdover proceeding based on the offending notice. The Court of Appeals ruled as follows:

The deficiency in the notice arises from its failure to cite any specific prohibition in the lease which had been violated by the construction of the 'cube.' Although several covenants of the lease were mentioned in the notice, none of the cited clauses prohibited the erection of a freestanding structure such as that built by respondent. Since respondent could not be expected to take remedial action by removing the 'cube' unless his landlord first demonstrated that such remedial action was required by the lease, the omission in the notice must be considered a fatal defect. Inasmuch as service of a proper notice of intention to terminate occupancy was a condition precedent to the termination of the tenancy under the lease, the deficiency in the notice deprived petitioner of a predicate for reclaiming possession of the premises. Accordingly, the petition to dispossess was properly dismissed.<sup>2</sup>

An application of the rule set forth in *Chinatown Apartments* was at issue in a recent decision issued by Judge Peter Wendt of Civil Court, New York County in *Fabria Houses Assoc. v. Fontanetta*.<sup>3</sup> *Fontanetta* serves as a recent, potent reminder that the failure to identify in the notice to cure the specific lease provisions being violated will have fatal consequences.

### 'Fontanetta'

The facts as recited by the court in *Fontanetta* are as follows. Fabria Houses Associates was the landlord, and Linda Fontanetta was the tenant in the building located at 426-8 East 11th Street

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in Manhattan. The tenant had been receiving a Section 8 rent subsidy by the New York City Housing Authority.

In or about December 2013, the landlord served a document titled "10-Day Notice to Cure" (the cure notice). The cure notice asserted that the tenant violated "a substantial obligation of your tenancy, constituting a material non-compliance with your lease agreement," but failed to assert any specific provision of the lease which had been violated. The cure notice further asserted that (1) respondent had violated "federal, state and local law that imposes

obligations on you in connection with the occupancy or use of the premises," (2) respondent had violated "contracts with government agencies" and (3) landlord had "a business/economic reason to terminate" the tenancy.<sup>4</sup>

The cure notice went on to assert that the conduct of tenant which supported landlord's assertions was the tenant's alleged failure to complete "recertification" of her Section 8 benefits with the New York City Housing Authority, which resulted in the termination of the tenant's Section 8 rent subsidy. The cure notice alleged that as a result of the termination of the Section 8 subsidy, the lease "automatically terminated pursuant to Section 10 of the tenancy addendum" to the HUD Housing Assistance Payments (HAP) contract. The cure notice asserted that the landlord's "economic reason" for the termination of the lease "was the lost rental income as a consequence of the termination of the subsidy payments." The cure notice demanded correction of the condition by Dec. 11, 2013.

After the expiration of the cure notice, the landlord served a "30-day notice to terminate" which expired on Jan. 31, 2014. The landlord thereafter commenced a summary holdover proceeding based upon the termination of the lease pursuant to the termination notice. The tenant's answer alleged, in addition to general denials, affirmative defenses challenging the sufficiency of the cure notice and the notice of termination, as well as asserting that the petition failed to state a cause of action.

After answering the petition, the tenant moved to dismiss the petition pursuant to CPLR 3211. The tenant maintained that the petition failed to state a cause of action because of the

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insufficiency of the cure notice. The tenant argued that the cure notice's failure to recite any lease provision upon which the termination was premised was a fatal flaw. The tenant further argued that the landlord's assertion in the cure notice that the tenant's violation of the HAP contract resulted in the automatic termination of the lease, rendered it "impossible" that the tenant violated any provision of the lease itself.

In opposition to the tenant's motion, the landlord argued that the petition stated a cause of action and should not be dismissed because the cure notice's recitation of a provision of the HAP contract, which landlord contended became a part of the lease, was "sufficient under the circumstances." The landlord further argued that "because of the integration of the provision of the HAP contract into the lease, respondent has undertaken a continuing obligation to recertify and that the failure to do so constitutes an actionable breach of the lease."<sup>5</sup>

Wendt granted the tenant's motion and dismissed the petition.

### Fundamental Flaw

At the outset, the court noted the governing standards of review on a motion to dismiss under CPLR 3211, stating that while all the facts in the petition are accepted as true, a dismissal is warranted "if the documentary evidence establishes a defense to the asserted claims as a matter of law."<sup>6</sup> The court observed that while the tenant's motion sought dismissal on several grounds, "at their core they have in common an assertion that the cure notice...is so fundamentally flawed as to warrant dismissal."<sup>7</sup>

The court stated that the standards governing the sufficiency of predicate notices is "well established." Citing to the decision of the Appellate Division, First Department in *Hughes v. Lenox Hill Hospital*,<sup>8</sup> the court observed that "the appropriate standard for assessment of the adequacy of notice is one of reasonableness in view of all attendant circumstances" and that "only in circumstances where such a notice contains substantial and prejudicial misstatements will it be subject to 'strict construction as a matter of equity.'"<sup>9</sup>

The court further observed, however, that: [w]hile the principle of reasonableness generally governs the assessment

of the sufficiency of notices, in order to merit such analysis, notices must satisfy certain more concrete standards before a court need engage in the more nebulous analysis of their reasonableness under the particularized circumstances of a specific case. A notice can be marred by a fundamental defect so significant that it cannot be salvaged.<sup>10</sup>

The notice must be sufficiently clear and specific so as to apprise the tenant of the condition which the landlord wishes to have cured, so that the tenant knows what it must do to prevent the termination of the lease.

Relying on *Chinatown Apartments*, the court observed that "[t]he failure of a notice to identify the lease provisions that are alleged to have been violated was held to be a defect so significant that the notice was incapable of serving as a predicate to the proceeding, despite its recitation of lease covenants that the petitioner alleged had been violated." The court further observed that a "predicate notice to cure, which is not a pleading when it is served, but an essential fact of the case, is of course not subject to amendment."

The court found that in violation of the rule in *Chinatown Apartments*, the subject cure notice made "no reference whatsoever to any specific provision of respondent's lease which is claimed to have been violated." The court found that, in fact, the cure notice made no mention of any "substantive provision of the lease" nor was there any mention of any of the provisions of the lease with respect to service of notices or the methods to be employed in serving them.

The court also rejected the landlord's reliance on the cure notice's reference to a provision of the HAP contract, which is required to be annexed to the lease, which stated that the lease terminates automatically upon the termination of the subsidy. The court found that reliance on that provision:

in a notice seeking to have a tenant cure an alleged breach in order to avoid termination of the tenancy, only serves to cloud, rather than clarify, the basis for

the cure notice, since the relied-upon provision suggests that no cure can be effected. When it states that the lease terminates automatically, this would make the claimed default in the lease a conditional limitation not subject to cure.<sup>11</sup>

Thus, the court concluded that "[t]he vagueness of the cure notice, as well as its inconsistency and the contradiction ascertained by this court, render the cure notice inherently flawed at such a fundamental level that it cannot support a summary eviction proceeding." Thus, the motion was granted and the petition dismissed.

### Conclusion

*Fontanetta* reminds us that landlord's counsel must be very careful in drafting notices to cure being used as predicates to termination of the lease pursuant to a lease's conditional limitation clause. As set forth above, the notice must specifically identify the provisions of the lease which are claimed to have been violated. In addition, the notice must be sufficiently clear and specific so as to apprise the tenant of the condition which the landlord wishes to have cured, so that the tenant knows what it must do to prevent the termination of the lease. As observed by the court in *Fontanetta*, a defective predicate notice to cure cannot be amended, such that a summary proceeding based on such a notice will ultimately fail.

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1. 51 N.Y.2d 786 (1980).
  2. 51 N.Y.2d at 788.
  3. NYLJ 1202735592856 (Civ. Ct. N.Y. Co. 7/29/15).
  4. *Id.* at \*2.
  5. *Id.* at \*3.
  6. *Id.* at \*4.
  7. *Id.*
  8. 226 A.D.2d 4 (1st Dept. 1996).
  9. NYLJ 1202735592856 at \*6.
  10. *Id.*
  11. *Id.* at \*7.