

### LANDLORD-TENANT

# Tendering of Renewal Lease Vitiates the Right to Evict



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**R**ent Stabilization Code (RSC) Section 2523.5 requires that with respect to rent-stabilized leases, the owner must notify the tenant not more than 150 days and not less than 90 days prior to the end of the lease term, of the expiration of the lease, and must offer to renew the lease at the legal regulated rent and otherwise on the same terms and conditions of the expiring lease. The statute provides that the tenant may then accept the offer by signing the prescribed renewal lease form and returning same to the owner, who must then execute the renewal lease form and return same to the tenant.

### Split of Authority

A recent decision by the Civil Court, Kings County (Judge Jeannine Baer Kuzniewski), in *757 Miller Owners v. Smith*, NYLJ 1202780573592 (Civ.

Kings Feb. 17, 2017) (*Smith*), highlights the problems which may arise when an owner tenders a renewal lease to a tenant as required under the RSC, after the owner had previously served on the tenant a notice of termination based on the tenant having violated a substantial obligation of the tenancy. In *Smith*, the court held that the owner's tendering and execution of a renewal lease as required under the RSC, without any reservation of rights or other conditioning language, vitiates the previously served termination notice, thereby requiring the dismissal of the owner's summary holdover proceeding.

At the outset, the court in *Smith* observed that there is apparently a split of authority between the First and Second Departments as to the effect of tendering a renewal lease after a previously issued notice of termination. The court stated that "[t]he Appellate Term First Department has been quite clear that the tender of a renewal lease after a notice of

termination was served in holdovers based on violation of a substantial obligation of the lease does not vitiate the holdover proceeding." The court cited to the decision of the Appellate Term, First Department in *Coleman v. Dabrowski*, 163 Misc. 2d 763 (App. Term. 1st Dept. 1994), where the court held that "[t]he transmittal and/or execution of a new lease in this proceeding" did not revive the termination of the tenancy in that it "plainly resulted from procedures implemented by landlord to comply with the Rent Stabilization Code mandates with respect to the tender of offers to renew to tenants named in expiring leases."

The court also cited to *Kibel v. Appel*, 147 Misc. 2d 141 (Civ. Ct. N.Y. Co. 1990), which held that "[t]he fact that the petitioner landlord was required by regulatory authority to send the renewal lease is not construed as vitiating the notice of termination when the act of renewing the lease was

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not one of free will but of adhering to the requirements of law.”

The court went on to explain that the “appellate authority in [the] Second Department, however, has found to the contrary.” The court observed that in *Carroll St. Properties v. Puente*, NYLJ, July 13, 2005, p. 30, col. 6 (App. Term, 2d and 11th Dists.), the court held that the termination notice was vitiated because the parties subsequently entered into a lease renewal and the landlord did not expressly reserve rights under the pending litigation. The court also relied upon *Ambassador Realty v. Wachtel*, 139 Misc.2d 965 (Civ. Ct. Qns. Co. 1988), which found that “by offering a renewal lease after service of a termination notice the landlord waived the effect of a termination notice.” The court in *Wachtel* went on to state that “[t]here is no requirement under either the Rent Stabilization Law or applicable precedent to serve a lease renewal offer after unilaterally terminating a tenancy pursuant to a notice served on the tenant of record.”

In addition, the court in *Smith* observed that “case law further supports an inquiry into the actions of the parties, especially the landlord, to consider what reliance, if any, was given to the renewal.” The court noted that in *Kew Gardens v. Camacho*, 3 Misc.3d 135(A) (App. Term 2d and 11th Dists. 2004), the tenant had “executed a renewal lease and returned

it to the landlord together with the increased security deposit demanded by landlord, which deposit landlord accepted and did not return.” The court in *Camacho* found that the “landlord’s ratification of the renewal lease subsequent to the issuance of the warrant vitiated its right to evict pursuant to the final judgment.”

In holding that the landlord’s tendering and execution of a renewal lease vitiated the termination notice and required the dismissal of the

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landlord’s holdover proceeding, the court in *Smith* found that there was: absolutely nothing contained within the ‘renewal lease form’ which can reasonably be said to have alerted the named ‘tenant’ that the lease renewal was forwarded and executed by the landlord merely...to comply with the mechanical requirements of the lease renewal provisions of the Rent Stabilization Code, i.e., there is nothing which would indicate to a reasonable person that the lease renewal offer, unambiguous on its face, is not what it appears to be.

Significant to the court’s determination was its finding that the landlord

“did not even attempt to place any kind of conditional clause into that lease contract (which was prepared by the landlord and forwarded to the tenant for execution, and in due course returned to the tenant fully executed), either within the printed or typewritten sections thereof.” Nor was there any assertion by the landlord that the renewal lease was sent “inadvertently.” As such, the court found that the tenant “was entitled to rely upon the renewal and anticipate the reinstatement of the tenancy.”

### Conclusion

*Smith* instructs that at least in the Second Department, when a landlord delivers a renewal lease to a stabilized tenant in accordance with the RSC after having served a notice of termination, it is incumbent for the landlord to include language in the renewal offer expressly preserving the landlord’s rights under the notice of termination and any pending proceeding. Landlords should of course consult with their own counsel to determine the appropriate language to be included with the renewal lease offer in each instance. As *Smith* makes clear, the failure to include such language may result in the vitiation of the termination notice and the dismissal of any proceeding based thereon.