

Predicate Notices Revisited: Termination Notices Must Contain Sufficient Facts

In their Landlord Tenant column, Warren Estis and Michael Feinstein discuss the recent decision "266 Washington Ave. v. Davis," which "stands as an important reminder to landlords and their counsel of the harsh consequences of failing to include adequate factual allegations in a notice of termination."



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We have previously discussed in this column the critical importance of including in a notice terminating a lease, based on the failure to cure defaults set forth in a notice to cure, sufficient facts establishing that the tenant failed to cure. A recent decision by Judge David Harris of the Kings County Civil Court in *266 Washington Ave. Inv. LLC v. Davis*, Index No. L&T 66535/19 (Civ Ct Kings Co, Dec 6, 2019) (*Davis*) stands as an important reminder to landlords and their counsel of the harsh consequences of failing to include adequate factual allegations in a notice of termination, particularly in circumstances involving the termination of a rent stabilized tenancy.

'Davis'

In *Davis*, the landlord sought possession of a rent stabilized apartment in the building located at 266 Washington Avenue in Brooklyn. The subject 10-day notice to cure served on the tenants, Jobe Davis and Claudine Davis, alleged, "upon information and belief," that the number of occupants in the apartment exceeded the number of tenants specified in the lease, and that the tenant had engaged in "profiteering" in violation of Section 2525.7 of the Rent Stabilization Code (the "RSC"). The notice to cure further set forth the amount that the landlord alleged was charged to each respondent.

After the expiration of the notice to cure, the landlord served a notice of termination. As found by the court in *Davis*, the notice of termination merely "restate[d] the

allegations of the notice to cure, adding an allegation that respondents failed to cure and terminating the tenancy based upon your failure to cure as stated in the notice to cure served upon you, you are hereby required to quit, vacate and surrender possession of the apartment."

After the expiration of the notice of termination, the landlord commenced a summary hold-over proceeding against the tenants. The tenants answered the petition, and thereafter moved to dismiss the petition pursuant to Civil Practice Law and Rules Section 3211(a)(7) and Real Property Actions and Proceedings Law Section 741(4) on the grounds that "in derogation of the requirements of the [RSC]," the notice of termination lacked "specific factual allegations in support of the conclusion that respondents

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failed to comply with the notice to cure.”

In Judge Harris’s decision, the court granted the tenants’ motion and dismissed the petition. At the outset, the court recited the well-settled law that “the right to terminate the tenancy pursuant to the terms of the lease [is] dependent upon service of an adequate notice, which is a condition precedent to the termination of a landlord-tenant relationship.” The court further observed that “[t]he test for determining the sufficiency of a termination notice is whether it is reasonable in view of the attendant circumstances.” The court explained that the law requires that a termination notice “be clear, unambiguous and unequivocal in order to serve as the catalyst which terminates a leasehold.”

In the matter before it, the court found that while the notice of ter-

mination restated the substantive allegations contained in the notice to cure, which were themselves based “upon information and belief,” it disclosed “neither the source or sources of information nor the basis of belief.” The court further observed that the notice of termination “does not state how or when petitioner learned who occupied the apartment after the expiration of the notice to cure, and contains no allegation regarding amounts paid by occupants of the apartment in the 18 days between the expiration of the notice to cure and issuance of the notice of termination other than restating that ‘upon information and belief, you have and continue to charge the occupants more than their proportionate share.’”

As such, the court held that the absence of any factual support in the notice of termination for the

assertion that the tenant did not comply with the notice to cure was a “fatal flaw” requiring the dismissal of the petition.

Conclusion

Davis stands as an important reminder of the requirement to allege sufficient factual allegations in both the predicate notice to cure and the notice of termination. Merely stating in the notice of termination that the tenant failed to cure the defaults set forth in the notice to cure is not enough. Rather, the notice of termination must state sufficient facts establishing that the prohibited conduct set forth in the notice to cure was not cured, and continued, after the expiration of the notice to cure. The failure to satisfy this standard will likely lead to the same result which the landlord suffered in *Davis*.