

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

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STATE BANK OF INDIA

Petitioners,

Index No. L&T 61878/2012

-against-

DECISION and ORDER

RITA GAGLIANI  
KAVITA GAGLIANI

Respondents

-and-

“JOHN DOE” and/or “JANE DOE”,

Respondents.

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PETER M. WENDT, J.

Following trial in this summary holdover proceeding, held on September 19 and 24, 2012 and on October 1, 2012, the court sets forth below its findings of fact and conclusions of law.

Petitioner commenced this proceeding in April, 2012, to recover possession of cooperative Apartment 9-F at 310 East 49<sup>th</sup> Street, New York, New York 10017 (the subject apartment). Petitioner Bank of India obtained the shares relating to the subject premises following respondents' default on a loan against which the shares were pledged as collateral. Respondents were the former cooperative share owners and occupants of the subject premises. Upon default on the loan, petitioner commenced a foreclosure action against respondents and was awarded a judgment in Supreme Court. Respondents' cooperative stock was sold pursuant to the foreclosure and judgment, and on March 7,

2012, a new stock certificate for the cooperative shares and a new proprietary lease in petitioner's name were issued to petitioner by the owners of the cooperative corporation, 310 East 49<sup>th</sup> Owners Corp.

Although petitioner obtained the cooperative shares and proprietary lease, and the Supreme Court ruled that respondents no longer have any legal interest in the subject premises, respondents have remained in possession thereof. Pursuant to Real Property Actions and Proceedings Law §713(7), petitioner commenced this holdover proceeding to obtain possession by first serving a "Notice of Termination of License and/or Notice to Quit," on March 19, 2012. When respondents held over after expiration of the Notice to Quit, petitioner served the Notice of Petition and Petition on respondents, alleging that respondents had no current written lease for the premises and that any license that may have existed was revoked by the Notice of Termination of License/Notice to Quit.

Respondents did not answer the petition, but moved to dismiss for lack of personal jurisdiction. Petitioner opposed the motion. By decision dated July 9, 2012, the Honorable John H. Stanley set the matter down for a traverse hearing on August 15, 2012 at 9:30 a.m. When respondent's attorney had not appeared by 12:00 p.m., the Court issued an order striking respondent's traverse objection, and the matter was adjourned for trial to September 19, 2012. Respondent's attorney moved to vacate the order striking the traverse hearing, and on September 6, 2012, that motion was denied. The trial began on the following adjourned date of September 19, 2012. At no time before or during the trial

did respondents move to file an answer to the petition. After both sides rested, respondents' counsel conceded that no written answer had ever been filed, and that respondents were interposing a general denial.

Mr. Sujit Kumar Varma, an employee of the Bank of India, testified that petitioner State Bank of India owns the stock certificate for the subject premises. Admitted into evidence through Mr. Varma were the following: the proprietary lease signed by the President of the cooperative naming Bank of India as the Proprietary Lessee (Exhibit 1), the share certificate for the subject premises naming State Bank of India as owner (Exhibit 2), proof of payments of the maintenance charges by petitioner from March, 2012 through the time of trial (Exhibit 3).

Mr. Varma testified that respondents have paid nothing to petitioner since March 7, 2012, the date petitioner and the cooperative signed the stock certificate and the proprietary lease was transferred to petitioner. Mr. Varma added that petitioner has been paying the monthly maintenance for the subject premises in the amount of \$932.97 since March 7, 2012. He testified that respondents were in possession of the subject premises when the Bank of India became owner of the shares, but that once petitioner was awarded the share certificate and proprietary lease petitioners retained possession without their permission, Mr. Varma further testified that respondents remained in possession of the subject premises after the Notice of Termination of License and the Notice to Quit expired. The Court took judicial notice of the "Notice of Termination of License and/or Notice to Quit" attached to the Petition in this matter.

Respondents do not dispute that their tenancy and ownership rights were terminated upon entry of the judgment in the Supreme Court (See Respondents' Post trial Memorandum of Law, Page 4). Although respondent's attorney pointed out at trial that petitioner had not introduced an assignment document into evidence, this court held that petitioner could prove his prima facie case with the documents he chose to introduce, which in this case were the proprietary lease and the share certification naming petitioner as owner. In summation, respondents' counsel conceded that respondents are no longer the cooperative tenants of the subject premises, and that petitioner owns the subject cooperative shares and is the proprietary lessee.

Moreover, when respondent Kavita Gagliani testified in her case, her testimony consisted of a historical account of how she and her mother lost their home after they allowed her uncle to use the subject premises as collateral on a loan and he then defaulted, as well as how they unsuccessfully challenged that loss in Supreme Court, but she did not raise any legal defenses to the proceeding. Ms. Gagliani claimed not to have understood the entirety of the Supreme Court action leading to the loss of ownership rights in the subject premises, but she did not deny that they occurred. Moreover, her lack of understanding may have been a defense in the Supreme Court action but not to the instant proceeding.

On rebuttal, petitioner presented evidence of the Supreme Court proceedings that led to the judgment against respondents and the sale of their cooperative shares to petitioner. Admitted into evidence on rebuttal without objection were the

following: A certified copy of the Order of Justice Louis B. York in Supreme Court, denying a preliminary injunction against sale of respondents' cooperative shares (Exhibit 7), a certified copy of Petitioner's Order to Show Cause and affidavit that preceded Justice York's Order (Exhibit 8), and a certified copy of the judgment in the Supreme Court case (Exhibit 9).

Petitioner proved by a preponderance of the credible evidence, through its witness Mr. Varma and through its documentary evidence, that it is the owner of the cooperative shares and proprietary lessee of the subject premises and that respondents are licensees whose license to occupy the subject premises terminated upon the expiration of the Notice to Terminate License/Notice to Quit dated March 14, 2012 and served March 19, 2012.

Although respondents raised no defenses in their answer or at trial, they argued through counsel in summation that the petition should be dismissed due to "irregularities" in the Notice of Termination/Notice to Quit.

Specifically, respondents first allege that the Notice of Termination of License/Notice to Quit is facially deficient, in that it did not detail that respondents were the proprietary lessees who lost their tenancy and ownership rights to petitioner following the default and ultimate foreclosure on a loan against which respondents pledged their shares and lease as collateral. Respondents argue that the omission of these facts causes the predicate notice to be deficient and the proceeding must therefore be dismissed.

Second, respondents allege that the predicate notice is ambiguous in that petitioner stated

that respondents had a license to occupy the premises “upon information and belief.”

Third, respondents claim that petitioner’s failure to introduce into evidence an assignment dated January 3, 2006, which was referenced in the notice, makes the prima facie case deficient. Finally, respondents argue that petitioner incorrectly based the instant proceeding upon RPAPL §713(7), when it should have been grounded upon RPAPL §713(1).

Petitioner argues that by failing to file and serve an answer or include that defense in their pre-trial CPLR 3211(a) motion, respondents waived their right to challenge the predicate Notice of Termination of Licensee and/or Notice to Quit.

Petitioner argues that this defense should have been pled in an answer or at least in the pre-answer motion to dismiss pursuant to CPLR 3211(a)(7), and that respondent’s failure to raise it previously constitutes a waiver of any challenge to the Notice. Petitioner further argues that it would be severely prejudiced if the court entertains respondents’ motion to dismiss based on a deficient notice of termination of license/notice to quit at this late date, particularly when the trial has already occurred, and the issue was not raised until respondents’ counsel’s summation.

The facts in this case are not unlike those in *Priel v. Priel* (NYLJ March 5, 1993, at 25, col 3 (App Term, 1<sup>st</sup> Dept), in which the Appellate Term held that tenant waived the right to object to the lack of an adequate predicate notice after the case was fully tried and the tenant sought to dismiss the petition in a post-trial motion to reargue, based on the lack of a correct predicate notice. Here, where the case was also fully tried

and respondents are first attempting to raise a defective notice defense in summation and the post-trial memorandum, respondents do not allege that the Notice of Termination of License/Notice to Quit was untimely or was never served, but that it contained “irregularities.” Certainly in this instance, in which the implications of “irregularities” in the notice have much less of a potential impact than the complete lack of notice, the Appellate Term’s holding similarly applies and this court finds that respondents have waived their right to challenge the predicate notice in this matter. *See also 433 West Associates v. Murdock*, 276 A.D.2d 360 (1<sup>st</sup> Dept. 2000).

Significant in the instant matter is that there was a trial on the merits. Courts have held that when a respondent appears and goes to trial on the merits, any alleged defects in a notice are waived. *Kennedy v. Deignan*, 90 Misc. 2d 238 (N.Y. Dist Ct., 1977), *D’Agostino v. Bernabel*, 269 A.D. 853 (2d Dept 1945)

Even if respondents hadn’t waived their right to challenge the Notice of Termination of License and/or Notice to Quit by failing to timely raise their objections to it, the “irregularities” in the notice alleged by respondents do not rise to the level of deficiencies or defects that would render the predicate notice invalid.

With respect to respondents’ first argument, that the predicate Notice is facially deficient because it fails to detail all of the circumstances leading to respondents’ loss of their tenancy and ownership rights in the cooperative shares, such detail is not necessary in the Notice to Quit, and the facts set forth in said notice are sufficient. The predicate notice must have enough facts to put the responding party on notice of the

grounds for the proceeding against them. The Notice of Termination of License and/or Notice to Quit in the instant proceeding states that,

**PLEASE TAKE NOTICE**, that the State Bank of India is the owner of the above apartment and the six hundred thirty six shares of the cooperative corporation known as 310 East 49<sup>th</sup> Owners Corp and the assignee pursuant to an assignment effective March 7, 2012 of the proprietary lessee for the premises dated January 3, 2006. Upon information and belief, you had a license to occupy the above premises. That license has terminated.

You remain in possession without State Bank of India's permission or the permission of anyone authorized to allow you to occupy the premises. You have no current written lease for the premises. Any license you might claim from the State Bank of India is hereby revoked. In accordance with §713(7) of the Real Property Actions and Proceedings Law, you are required to quit, vacate and surrender possession of the premises not later than March 30, 2012, that being more than ten (10) days after the service of this notice upon you, and upon your failure to so quit, vacate and surrender possession, the licensor will commence summary proceedings to remove you from possession of the premises.

Respondents were already aware that they lost their cooperative shares and tenancy rights through a judgment in the Supreme Court foreclosure matter, as they were parties represented by counsel in that case. (See Exhibit 8 and 9). They were also aware that the Supreme Court denied their Order to Show Cause and accompanying affidavit for an injunction preventing the transfer of their cooperative stock (Exhibit 7). They do not deny in the instant matter, in which they are also represented by counsel, that they were aware that the cooperative corporation transferred the stock certificate and proprietary lease to petitioners prior to being served with the predicate notice. Respondents were well aware that they had no tenancy rights, as they had been litigating in Supreme Court in an attempt to keep those rights over the course of two years.



The only facts the predicate notice in this summary licence proceeding was required to contain were the grounds on which petitioner is relying in its attempts to gain possession of the subject premises. Respondents were advised in the notice that: petitioner is the owner of the subject apartment and the its cooperative shares and the assignee of the proprietary lease and is now seeking to recover the subject premises; respondents license to occupy the subject premises has terminated, that respondents remain in possession without permission, and that they are required to quit, vacate and surrender possession within ten days. Petitioner complied with the predicate notice requirements and with the requirements of RPAPL 741 by stating a cause of action in a clear and unambiguous predicate notice and in the petition that followed.

Respondents' argument that the predicate notice is ambiguous in that it states that respondents had a licence to occupy the subject premises "upon information and belief" is similarly without merit. Petitioner is a corporation. Using the words "upon information and belief" is reasonable and not uncommon in a licensee holdover.. It certainly does not render a predicate notice invalid. There is no requirement that the predicate notice be sworn to. Thus, the use of "information and belief" is entirely proper.

The third alleged "irregularity" raised by respondents is petitioner's failure to introduce into evidence an actual Assignment of shares dated January 3, 2006, which was referenced in the predicate notice. However, a close reading of the predicate notice shows that the January 3, 2006 date refers to the date of respondents' proprietary lease (Respondents' trial Exhibit A), and the predicate notice refers to the assignment of that

lease to petitioner, not to a separate "Assignment" document that petitioners failed to produce. Moreover, it was petitioner's burden to prove its prima facie case with the evidence it chose to introduce. Petitioner introduced into evidence the Share Certificate in which it is named as owner, and which Mr. Varma from the State Bank of India testified was transferred by the cooperative corporation to petitioner (Exhibit 2), as well as the proprietary lease naming petitioner as lessee. The actual assignment of the cooperative shares is implied from the existence of these documents and the court finds that petitioner proved its prima facie case without any such document, if one so exists. Petitioner was not required to produce an assignment document under this clarified review of the predicate notice and the predicate notice is therefore not defective, and thus invalid, based on its failure to do so.

Respondents' final argument is that petitioner commenced this action pursuant to RPAPL 713(7) and should have instead commenced pursuant to RPAPL 713(1). In support of their position, respondents cite two cases, *Emigrant Mortgage Co., Inc. v. Greenberg*, 34 Misc. 3d 1236(A), (District Ct, Nassau Co. 2012) and *Sloves Associates v. Elaine Boudouris*, 156 Misc. 2d 165 (Civ. Ct., NY County 1992). However, the court in *Emigrant Mortgage Company* actually held that a petitioner could, upon facts very similar to those in the instant matter, commence an action under RPAPL §713 (1) or §713 (7). The Court there held that,

Based upon the foregoing, the Court concludes that it has jurisdiction to grant an eviction pursuant to RPAPL §701, and that RPAPL 713(1), and perhaps RPAPL §713 (7), may be used by secured party, which obtains ownership of the cooperative apartment after a non judicial sale of the defaulting tenant's interest, to evict the tenant who no longer has any interest in the cooperative. As between the secured party and the defaulting tenant, the secured party has a superior right to the apartment and may seek to evict the defaulting tenant when his/her interest has been extinguished.

In *Sloves Associates v. Boudouris*, although respondents brought an eviction action pursuant to RPAPL §713(1), the facts were different from those here and the court never addressed whether or not an action could have been brought RPAPL §713 (7) under facts such as those in the instant matter.

In conclusion, not only is respondents' request for dismissal based on an alleged defective predicate notice untimely, and waived by not having been raised in the answer or in the initial CPLR 3211(a) Motion to Dismiss, but the Notice is not, in fact, defective. As such, all of respondents' arguments fail.

On balance, after trial, based on the documentation and credible testimony presented, the Court finds petitioner sustained its burden of proving by a preponderance of the evidence that it is the owner of the subject premises and cooperative shares, that respondents have no ownership interest in the property or tenancy rights, and that petitioner is entitled to possession.

Accordingly, the Court hereby awards petitioner a final judgment of possession against the respondent. The issuance of the warrant of eviction shall be forthwith, with execution stayed three months after entry of judgment herein, on

condition that use and occupancy is timely paid in the monthly amount payable under petitioner's proprietary lease.

This constitutes the decision and order of the Court.

**Dated: New York, New York  
February 8, 2013**

  

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**PETER M. WENDT, J.H.C.**