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### 266 WASHINGTON AVENUE INVESTOR LLC v. DAVIS

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**CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS: PART J**

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**266 WASHINGTON AVENUE INVESTOR LLC,**

**L&T Index No. 66535/19  
Mot. Seq. No. 1,2**

**Petitioner,**

**DECISION AND ORDER**

**-against-**

**JOBE DAVIS,**

**Respondent-tenant,**

**CLAUDINE DAVIS, CLAUDINE ROSALINE  
DAVIS, BRENDA BENNETT, MICHAEL "DOE,"  
THOMAS "DOE" a/k/a TOMMY "DOE,"  
"JOHN DOE" and/or "JANE DOE,"**

**Respondents-undertenants.**

-----X  
**HONORABLE DAVID A. HARRIS, J.H.C.:**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of respondent's motion to dismiss and petitioner's cross-motion for disclosure and use and occupancy

<b>Papers</b>	<b>Numbered</b>
Notice of motion & Affidavits Annexed	<u>1</u>
Cross-motion and Affidavits Annexed	<u>2</u>
Answering Affidavits	<u>3</u>
Replying Affidavits	<u>4</u>
Exhibits	<u>5</u>
Corrected Exhibit	<u>5</u>
Supplemental affirmation	<u>6, 7</u>

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Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

After the expiration, on May 6, 2019 of a Ten (10) day notice of termination

dated April 17, 2019 (Notice of Termination) served subsequent to the expiration, on March 30, 2019 of a Ten (10) Day Notice To Cure dated March 8, 2019 (Notice to Cure), petitioner commenced this summary proceeding seeking possession of apartment B15 (Apartment), a rent stabilized apartment, in the building located at 266 Washington Avenue, in Brooklyn (Building). The Notice to Cure alleges that the total number of occupants in the Apartment exceed the number of tenants specified in the lease, and that in violation of Section 2525.7 of the Rent Stabilization Code, respondent has engaged in profiteering, setting forth the amount petitioner alleges was charged to each respondent. The Notice of Termination restates 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]....”

The proceeding first appeared on the court’s calendar on May 28, 2019 and was adjourned on several occasions. On August 1, 2019, respondents Jobe Davis and Claudine Davis, represented by counsel, interposed written answers, identical in substance, setting forth, in addition to general denials, affirmative defenses that the petition fails to state the facts upon which it is based and that the Notice of Termination fails to contain sufficient factual allegations, that the occupancy of the apartment complies with the requirements of the lease and of Real Property Law Section 235-f, that respondents timely cured all allegations specified in the Notice to Cure, that petitioner has breached the warranty of habitability, and counterclaims for an order to correct conditions, and for breach of the warranty of habitability.

Respondent now moves for dismissal pursuant to Civil Practice Law and Rules (CPLR) 3211(a)(7) and Real Property Actions and Proceedings Law (RPAPL) Section 741(4),

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on the grounds set forth in respondent's first affirmative defense, specifically that the Notice of Termination, in derogation of the requirements of the Rent Stabilization Code (RSC), lacks specific factual allegations in support of the conclusion that respondents failed to comply with the notice to cure. Petitioner cross-moves for disclosure from all respondents in the form of production of documents and examination before trial, and for an order directing the payment of use and occupancy.

Here, respondents argue that the Notice of Termination contains no specific factual allegations supporting its assertion that respondents failed to comply with the notice to cure. Respondent asserts that petitioner "simply alleges without any supporting facts that 'based upon your failure to cure as stated in the Ten (10) Day Notice to Cure served upon you, you are hereby required to quit, vacate and surrender possession of the premises.'" In response, petitioner asserts that both the Notice to Cure and the Notice of Termination are sufficiently specific, that profiteering is not subject to cure, and that because the Notice of Termination alleges that respondents "have and continue to" engage in the conduct alleged, it sufficiently asserts that they engaged in the alleged conduct after the expiration of the Notice to Cure.

It has been held that " 'the right to terminate the tenancy pursuant to the terms of the lease was dependent upon service of an adequate notice,' which is a condition precedent to the termination of the landlord-tenant relationship (*Chinatown Apartments v Chu Cho Lam*, 51 NY2d 786, 787)' " (*Domen Holding Co. v Aranovich*, 302 AD2d 132, 134 [1st Dept 2003]). It has been held that "The test for determining the sufficiency of a termination notice is whether it is 'reasonable ... in view of [the] attendant circumstances' (*Hughes v Lenox Hill Hosp.*, 226 AD2d 4, 17 [1996]; see *Fanny Grunberg & Assoc. v Hyatt*, 193 Misc 2d 797 [App Term, 1st

2006]). A notice is sufficient when its “fact-specific allegations, if proven, are sufficient to establish that tenant” (*Id.*) is engaging in the proscribed conduct. It has been held that “[t]ermination notices ‘must be clear, unambiguous and unequivocal in order to serve as the catalyst which terminates a leasehold’ ” (*SAAB Enterprises, Inc. v Bell*, 198 AD2d 342, 343 [2d Dept 1993][citations omitted]).

The Notice of Termination restates the substantive allegations of the Notice to Cure, which themselves are explicitly based upon information and belief, but discloses neither the source or sources of information nor the basis of belief. The only factual allegations contained in the Notice of Termination are verbatim restatements of the allegations in the Notice to Cure. 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 eighteen days between the expiration of the Notice to Cure and issuance of the Notice of Termination other than restating that “[u]pon information and belief, you have and continue to charge [the occupants] more than their proportionate share.” The principal statement of the Notice of Termination regarding the failure to cure is “[p]lease take notice that based upon your failure to cure as stated in the Ten (10) Day Notice to Cure served upon you, you are hereby required to quit, vacate and surrender possession of the Subject Premises....” While the Notice of Termination states a conclusion, it fails to state any facts that support the conclusion.


The absence of any factual support for the assertion that respondent did not

comply is a fatal flaw. While the Notice to Cure, as petitioner observes, provides that it “is being served upon you without prejudice to petitioner’s rights to declare the foregoing defaults of Tenant to be incurable as a matter of law and in equity,” that reservation is of no consequence here. The Notice of Termination explicitly asserts that it was served because of the failure to cure, without any assertion that the claimed breaches were incurable. By asserting the failure to cure as a basis for termination, petitioner has acknowledged that the claimed breaches were capable of cure. Petitioner’s reliance on the language in both notices that respondents “have and continue to” engage in proscribed conduct is misplaced. In so stating, both the Notice to Cure and the Notice of Termination state a conclusion, rather than facts in support of the conclusion. It has been held that a termination notice is defective because “it failed to allege that the defaults specified in the notice to cure, which were curable, had not been cured during the cure period (see *Hew-Burg Realty v Mocerino*, 163 Misc 2d 639 [Civ Ct, Kings County 1994])” (*31-67 Astoria Corp. v Landaira*, 54 Misc 3d 131(A) [App Term 2d, 11<sup>th</sup> & 13 Jud Dists 2017]). Here, the Notice of Termination is equally infirm, setting forth only a conclusion unsupported by factual allegations.

The insufficiency of the Notice of Termination requires that respondent’s motion be granted. This proceeding be dismissed. Petitioner’s cross-motion is denied as moot.

This is the decision and order of the court.

Dated: Brooklyn, New York  
December 6, 2019

  
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David A. Harris, J.H.C.

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