

Wednesday, July 9, 2003

DOI

Civil Court

DECISION OF INTEREST

Kings County

Judge Pickney

Housing Part F

CHOI v. NICHOLAS - The petitioner commenced this non-payment proceeding against the respondent by service of a petition and notice of petition dated March 25, 2003. Prior to the commencement of the proceeding, the petitioner served a predicate notice entitled Rent Demand dated March 11, 2003, providing the requisite three-day notice pursuant to [RPAPL Section 711\(2\)](#). The petition alleged that the subject premises is located in an unregulated, four-family multiple dwelling.

Respondent has submitted a pre-answer motion to dismiss on the grounds that the rent demand was "not made in accordance with the lease for the subject premises".

Paragraph 19 of the residential lease, entitled "Default" provides in full:

If any default is made in payment of rent, or any part thereof, at the times hereinbefore specified, or if any default is made in the performance of or compliance with any other terms or conditions hereof, the lease, at the option of Lessor, shall terminate and be forfeited, and Lessor may re-enter the premises and remove all persons therefrom. Lessee shall be given written notice of any default or breach, and termination and forfeiture of the lease shall not result if, within 30 days of receipt of such notice, Lessee has corrected the default or breach or has taken action reasonably likely to effect such correction within a reasonable time.

The respondent contends that this lease provision requires the service of a thirty day default notice prior to the commencement of a non-payment summary proceeding.

Courts have held that parties can be bound by the terms of the lease if the requirements are more stringent than the RPAPL. Thus, if a lease requires all notices to be in writing, the Appellate Division Second Department has held that a landlord could not make an oral demand for rent, in spite of statutory authorization permitting such a demand. See [Hendrikson v. Lexington Oil Co. Inc. 41 AD2d 672 \(2nd Dept. 1973\)](#).

However, the lease provision must be clear and unambiguous.

The Court finds that Paragraph 19 of the lease herein does not mandate a thirty-day notice prior to the commencement of a non-payment summary proceeding.

Paragraph 19 involves a default resulting in the "termination and forfeiture" of the leasehold, a common provision in a residential lease involving a tenant in an unregulated building. No such termination or forfeiture occurred herein. The petitioner did not terminate the respondent's tenancy due to the failure to pay rent - petitioner simply commenced a summary non-payment proceeding. The respondent is still the tenant of record for this apartment, and no termination or forfeiture will occur if the arrears are paid as ultimately determined by the court.

Accordingly, the respondent's motion is denied. Respondent is to serve its answer upon the petitioner within thirteen days of the date of this decision. The Court will mail a copy of this decision to both counsel, and will telephone counsel and advise them of the availability of the decision.

The proceeding will appear on the calendar in Part F, Room 612 on July 14, 2003 at 9:30 AM for assignment to a trial part.

This constitutes the decision and order of this Court.

7/9/2003 NYLJ 23, (col. 3)

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