Supreme Court, Appellate Term, New York, First Department.
Franklin TEICHMAN and Elba Teichman, Petitioners-Appellants,
v.
Corey CIAPI, Respondent-Respondent, "John Doe" and/or "Jane Doe", Respondent-Respondent.

Feb. 4, 1994.

Landlords brought holdover proceeding against tenant. The Civil Court, New York County, Braun , J., dismissed petition. Landlords appealed. The Supreme Court, Appellate Term, held that notice of nonrenewal of lease so that landlords could make apartment their retirement home was sufficient as preliminary notice.

Reversed.

Glen, J., dissented and filed opinion.

West Headnotes

Landlord and Tenant 297(2)
233k297(2) Most Cited Cases
Notice of nonrenewal of lease so that landlords could make rent-controlled apartment their retirement home was sufficient as preliminary notice, even though landlords did not explicitly state intent to occupy premises as primary residence. Rent Stabilization Code, § 2524.2(b), McK.Unconsol.Laws.

****294 *183** Finkelstein, Borah, Schwartz, Altschuler & Goldstein, P.C., New York City (Paul N. Gruber, of counsel), for appellants.

Himmelstein, McConnell & Gribben, New York City (Samuel J. **Himmelstein** and Elizabeth Donoghue, of counsel), for respondents.

Before OSTRAU, P.J., and MILLER and GLEN, JJ.

PER CURIAM:

Order dated May 24, 1993 (Richard F. Braun, J.) reversed, with $10 costs, respondent's motion to dismiss the petition is denied, the petition is reinstated, and respondent is granted leave to conduct disclosure.

Antecedent to commencement of this "owner use" holdover proceeding (Rent Stabilization Code [9 NYCRR] § 2524.4[a]), landlords served a notice of nonrenewal, or termination notice (Rent Stabilization Code § 2524.2), as follows:

> As you already know my husband and I plan to move to 259 West 90th and make the garden apartment our retirement home. Your present lease which expires on October 31, 1992 will not be renewed. Believe it or not, my husband and I take no joy in doing this, but the economy is such that we have no other way out.

Civil Court dismissed the proceeding upon its conclusion that the quoted predicate notice is defective, principally because "a retirement house is not necessarily a primary residence" and it cannot be ascertained from the notice whether landlords intend to occupy the premises as their primary residence. We do not agree, and find that the subject notice adequately alerts the tenant to both the underlying legal ground for recovery of the premises and essential factual reason why the apartment is being sought, in compliance with the specificity requirements imposed by Rent Stabilization Code § 2524.2(b) and controlling precedent (see *Berkeley Assoc. v. Camlakides*, 173 A.D.2d 193, 569 N.Y.S.2d 629, *aff'd.* 78 N.Y.2d 1098, 578 N.Y.S.2d 872, 586 N.E.2d 55). The absence of the words "primary residence"--a legal term of art--is not fatal to the efficacy of a

preliminary notice in an owner occupancy proceeding, particularly where the characterization of the intended use of the premises for retirement purposes is not inconsistent with its use as a primary residence. Ultimately, this is an element to be established at trial, as is the element of whether landlords are proceeding in good faith. To the extent tenant requires further particulars to defend against the proceeding, that concern is met by the order of disclosure which we now grant.

OSTRAU, P.J., and MILLER, J., concur.

***184** KRISTIN BOOTH GLEN, Judge, dissenting:

The Rent Stabilization Code (9 NYCRR) § 2524.2, "Termination Notices," provides, in relevant part:

> (b) Every notice to a tenant to vacate or surrender possession of a housing accommodation shall state *the ground* under section ... 2525.4 (Grounds for Refusal to Renew Lease....) of this Part, [FN1] upon which, the owner relies for removal or eviction of the tenant, the facts necessary to establish the existence of such ground, and the date when the tenant is required to surrender possession (emphasis added).
>
> > FN1. Rent Stabilization Code § 2524.4, entitled "Grounds for refusal to renew lease, ... without order of the DHCR" contains three grounds upon which renewal of a lease may be refused: (a) Occupancy by owner or member of owner's immediate family, (b) Recovery by a not-for-profit institution, and (c) Primary residence.

****295** The meaning of the underscored language has been hotly contested and widely disputed, compare, e.g., the majority, concurring and dissenting opinions in the Appellate Term and Appellate Divisions in *Berkeley Associates v. Camlakides* (NYLJ, Feb. 15, 1990, at 26, cols 4, 5 [App Term, 1st Dept 1990, McCooe, J., concurring; Parness, J.P., dissenting], 173 A.D.2d 193, 195-201, 569 N.Y.S.2d 629, *aff'd.* 78 N.Y.2d 1098, 578 N.Y.S.2d 872, 586 N.E.2d 55 (1991). However, with the Court of Appeals' affirmance of the Appellate Division majority opinion in *Berkeley Associates*, strict compliance with the statutory language has become the clear legal requirement for a proper predicate notice. As the Appellate Division majority wrote:

> In any event, regardless of what we perceive to be the wisdom of the underlying policy, we are constrained by the plain language of the Rent Stabilization Code to enforce it as written (cites omitted) *id.*, 173 A.D.2d at 195, 569 N.Y.S.2d 629.

Although *Berkeley Associates* involved a non-primary residence notice, the statutory requirement of "facts necessary to establish the ground [for nonrenewal]" applies equally to owner occupancy notices fn. 1, *supra,* e.g., *Berkeley Associates v. Camlakides, supra* 173 A.D.2d at p. 200, 569 N.Y.S.2d 629 (dissenting opinion of Sullivan, J.)

RSC § 2524.4(a)(1) defines what is meant occupancy by owner or a family member:

> An owner who seeks to recover possession of a housing accommodation *for such owner's personal use and occupancy as his or her primary residence in the City of New York* and/or for the use and occupancy of a member of his or her immediate family as his or her primary residence in the City of New York ... (emphasis added)

Thus, in order to comply with RSC § 2524.2, a termination notice based on ***185** owner occupancy must, at a bare minimum, set forth facts demonstrating the owner's present intention to use the property sought to be recovered for her "personal use and occupancy" *and* as her "primary residence in the City of New York."

As the Court below found, the termination notice in this case was fatally flawed in its omission of a statement of facts which would establish the second requirement of primary residence. The term "retirement home" is an ambiguous one which permits interpretations other than that required by RSC § 2524.4(a)(1). This is particularly so since the apartment sought to be received is a very small one which the owners might well intend to occupy only sporadically while travelling, residing primarily in some other place, or otherwise.

The cases cited by Appellant owners and relied upon by the majority, while concededly approving less specific language, [FN2] were all decided prior to the Appellate Division decision in *Berkeley Associates* (and, of course, the Court of Appeals affirmance) and so are not controlling. Indeed given the strict compliance required under RSC § 2524.2 after *Berkeley Associates,* it would appear that omission of "the date when the tenant is required to surrender possession" (Rent Stabilization Code § 2524.2[b]) [FN3] also renders the notice here defective.

> FN2. See, e.g., *Fidalgo v. Schumm,* NYLJ 6/12/90 p. 25, col 1 (AT 2 & 11) *Pichardo v. Taverez,* NYLJ 5/30/91 p 27, col 1 (AT 2 & 11) *Ohayon v. Rosenbloom,* NYLJ 2/8/91 p 21, col 3 (AT 1). Interestingly many of these cases relied on *Dominguez v. Corniell,* 148 Misc.2d 297, 298, 565 N.Y.S.2d 369, which upheld a notice which stated only that, "the owner seeks in good faith to recover possession for his own personal use and occupancy." Judge McCooe, who concurred in *Berkeley Associates,* dissented, analogizing to the non-primary residence cases and relying on the Appellate Term *Berkeley* decision, stating: This notice fails to set forth the "facts necessary" to establish the ground. Furthermore, it fails to allege, even in this conclusory form, that the premises were to be used for his primary residence as required by Rent Stabilization Code (9 NYCRR) § 2524.4(a)(1).
> *Id.* pp. 298-299, 565 N.Y.S.2d 369.
> Unlike *Berkeley Associates, Dominguez* was not appealed to the Appellate Division, but after that latter decision *Dominguez* would no longer appear to be good law.

> FN3. This is particularly so since the notice does not contain any facts about the owners' intended retirement date, and includes an offer to help the tenant relocate. This strongly suggests that despite the nonrenewal of the lease, the tenant actually has a substantially and perhaps virtually indefinite period before which surrender will be required.

***186** The Civil Court correctly dismissed the petition and should be affirmed.

160 Misc.2d 182, 612 N.Y.S.2d 293

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