Supreme Court, Appellate Division, First Department, New York.
W.T. ASSOCIATES,
Plaintiff-Appellant-Respondent,
v.
Jerrold GLAUBER,
Defendant-Respondent-Appellant.

Aug. 24, 1989.

Landlord sought declaratory judgment that tenant's apartment was not tenant's primary residence. Tenant brought motion to dismiss the action. The Supreme Court, New York County, Saxe, J., granted tenant's motion, and landlord appealed. The Supreme Court, Appellate Division, held that letter sent by landlord to tenant failed to meet statutory 30-day notice requirement and, thus, landlord was estopped from denying tenant renewal of lease based on nonprimary residency.

Affirmed as modified.

West Headnotes

[1] Landlord and Tenant 86(1)
233k86(1) Most Cited Cases
Letter sent to tenant by landlord which provided notice of landlord's request that tenant vacate or surrender possession of tenant's apartment under 120-150- day notice provision, the grounds for such request, the facts underlying the grounds, and date when tenant was required to surrender possession did not provide requisite 30-day notice that landlord would not be required to offer renewal lease to tenant since apartment was not occupied by tenant as his primary residence and, thus, landlord was estopped from denying tenant renewal of his lease based upon nonprimary residency, or from seeking declaratory judgment that apartment was not tenant's primary residence. McKinney's CPLR 3211(a), pars. 2, 7; Rent Stabilization Code, §§ 2524.2(c)(2), 2524.4, 2524.4(c).

[2] Declaratory Judgment 389
118Ak389 Most Cited Cases
In an action for a declaratory judgment, the proper remedy is to declare the successful party, not to dismiss the complaint.
****612** H.J. Hazenberg, New York City, for plaintiff-appellant-respondent.

Jo Ann Douglas, of counsel, Lansner, **Himmelstein & McConnell**, New York City, for defendant-respondent-appellant.

***539** Before KUPFERMAN, J.P., and CARRO, ASCH, WALLACE and SMITH, JJ.

MEMORANDUM DECISION.

***538** Judgment (denominated an order), Supreme Court, New York County (David B. Saxe, J.), entered July 21, 1988, which granted defendant's motion pursuant to CPLR 3211(a)(2) and (7) to dismiss plaintiff's action seeking a declaratory judgment that defendant's apartment is not his primary residence, unanimously modified, on the law, to declare that, because of its failure to serve the thirty-day notice required by Rent Stabilization Code [9 NYCRR] § 2524.4(c), plaintiff is estopped from denying defendant renewal of his lease based upon non-primary residency and is directed to offer a renewal lease to defendant and, as so modified, the judgment is otherwise affirmed, without costs.

[1] Section 2524.4, which became effective May 1, 1987, provides that an owner shall not be required to offer a renewal lease to a tenant where the housing accommodation ****613** is not occupied by the tenant as his or her primary residence; provided, however, that no action or proceeding shall be commenced seeking to recover possession

on such grounds unless the owner shall have given thirty days written notice to the tenant of his or her intention to commence such action or proceeding. The Section 2524.4 notice may be combined with the written notice required to be given to the tenant pursuant to Section 2524.2(c)(2), requesting him or her, at least 120 and not more than 150 days prior to the expiration of the lease term, to vacate or surrender possession, the grounds for such request, the facts underlying the grounds, and the date when the tenant is required to surrender possession.

As the IAS court properly found, the letter dated July 6, 1987 fulfilled the requirements of Section 2524.2(c)(2), but did not include the thirty day notice required by § 2524.4(c).

***539** Plaintiff landlord seeks to avoid this latter requirement by styling his action as one merely seeking a declaration of rights and not one to recover possession of the premises. This rationale has been rejected by this court in cases involving both the 150-120-day and the thirty-day notice requirements. (*See, 615 Company v. Mikeska,* 146 A.D.2d 452, 536 N.Y.S.2d 690, *lv to appeal granted,* 148 A.D.2d 1018, 545 N.Y.S.2d 631; *Park House Partners, Ltd. v. De Irazabal,* 140 A.D.2d 84, 532 N.Y.S.2d 249; *Metzendorf v. 130 W. 57 Company,* 132 A.D.2d 262, 522 N.Y.S.2d 533; *Sutton Associates v. Bush,* 125 Misc.2d 438, 479 N.Y.S.2d 952, *aff'd* 108 A.D.2d 1106, 487 N.Y.S.2d 452, *lv. to appeal den.* 65 N.Y.2d 606, 493 N.Y.S.2d 1028, 483 N.E.2d 134). Although technically a declaratory judgment action is not one to recover possession, and actual recovery of possession cannot be achieved in this action alone, it is apparent that it is a step taken towards that end, and to permit this action to proceed despite plaintiff's failure to provide the requisite thirty-day notice would effectively allow it to circumvent the notice requirement yet conceivably achieve the same result--recovery of possession. (*Sutton Associates v. Bush, supra,* 125 Misc.2d at 439, 479 N.Y.S.2d 952).

[2] In so ruling, we do not express any opinion regarding the merits of the non-primary residency issue. We also note that, since this is an action for a declaratory judgment, the proper remedy is to declare for the successful party, not to dismiss the complaint. (*Cohen v. Employers Reinsurance Corp.,* 117 A.D.2d 435, 437, 503 N.Y.S.2d 33).

153 A.D.2d 538, 544 N.Y.S.2d 612

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