

(Cite as: **547 N.Y.S.2d 291**)

C

Supreme Court, Appellate Division, First
Department, New York.
Peter HERRICK, d/b/a Norick Realty Corp.,
Plaintiff-Appellant,
v.
Ellen Douglas DEBARD, Defendant-Respondent.

Nov. 16, 1989.

Landlord brought action for declaratory judgment determining right to possession of rent-stabilized apartment. The Supreme Court, New York County, Fingerhood, J., granted tenant's motion to dismiss, and landlord appealed. The Supreme Court, Appellate Division, held that landlord's timely notice of intent not to renew lease on nonprimary residence grounds was precondition to maintenance of nonprimary residence action under Rent Stabilization Code.

Affirmed.

Sullivan, J., concurred and filed separate memorandum.

West Headnotes

Declaratory Judgment ⚡️186
118Ak186 Most Cited Cases

Landlord and Tenant ⚡️297(1)
233k297(1) Most Cited Cases

Landlord's timely notice of intent not to renew lease on nonprimary residence grounds is precondition to maintenance of nonprimary residence action under Rent Stabilization Code, whether by way of holdover proceeding in housing part of civil court or declaratory judgment action in Supreme Court. Rent Stabilization Code, § 2524.2(c)(2), McK.Unconsol.Laws.

*291 D.J. Fischman, New York City, for plaintiff-appellant.

Lanser **Himmelstein & McConnell** (William Gribben, of counsel), New York City, for defendant-respondent.

Before SULLIVAN, J.P., and ROSS, MILONAS, ELLERIN and RUBIN, JJ.

MEMORANDUM DECISION.

Order of the Supreme Court, New York County (Shirley Fingerhood, J.), entered November 14, 1988, which granted defendant-respondent's motion to dismiss the complaint, unanimously affirmed, without costs.

In this action for a declaratory judgment determining the right to possession of a rent stabilized apartment, plaintiff served and filed its summons and complaint, predicated on an untimely notice of intent not to renew the lease on the ground that the subject premises are not utilized by the tenant as her primary residence. The notice was served prior to 150 days before the expiration of the lease, in contravention of Rent Stabilization Code § 2524.2(c)(2) (9 NYCRR § 2524.2(c)(2)). Plaintiff thereafter, without leave of court, served a second, timely notice of intent not to renew the lease within the 120/150 day period provided for by the regulation.

This court has previously held that a "plaintiff's failure to serve the defendant with notice of nonrenewal precludes consideration of its nonprimary residence allegations" (*Park House Partners, Ltd. v. DeIrazabal*, 140 A.D.2d 84, 89, 532 N.Y.S.2d 249, *mot. for lv. to appeal dsmd.* 73 N.Y.2d 866, 537 N.Y.S.2d 485, 534 N.E.2d 323, *mot. for rearg denied* 73 N.Y.2d 919, 539 N.Y.S.2d 302, 536 N.E.2d 631). In the interest of judicial economy, we consider service of the requisite notice

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a precondition to the maintenance of a nonprimary residence action, whether by way of a holdover proceeding in the Housing Part of Civil Court or a declaratory judgment action in Supreme Court (*Park House Partners, Ltd. v. DeIrazabal, supra*, at 90, 532 N.Y.S.2d 249).

All concur except SULLIVAN, J.P., who concurs in a separate memorandum as follows:

SULLIVAN, Justice (concurring):

I concur on constraint of *Park House Partners, Ltd. v. DeIrazabal*, 140 A.D.2d 84, 532 N.Y.S.2d 249, *mot. for lv. to app. dismd* 73 N.Y.2d 866, 537 N.Y.S.2d 485, 534 N.E.2d 323, *mot. for rearg. den.* *29273 N.Y.2d 919, 539 N.Y.S.2d 302, 536 N.E.2d 631; *but, see, 615 Co. v. Mikeska*, 146 A.D.2d 452, 536 N.Y.S.2d 690, dissenting memorandum, *lv. to app. granted* 148 A.D.2d 1018, 545 N.Y.S.2d 631.