

Civil Court of the City of New York
County of Kings, Housing Part O

Guo Hui Wen and Guo Qiang Wen,

Petitioner,

Decision/Order

against

Index No. L&T 57922/07

Miranda Chu,

Respondent.

Hon. Dawn M. Jimenez

Recitation, as required by CPLR 2219 (A), of the papers considered in the review of this motion.

Notice of Motion and Affidavits Annexed.....	
Order to Show Cause and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	
Stipulations.....	
Other.....	
.....	

Upon the foregoing cited papers, the decision/order in this motion is as follows:

This summary holdover proceeding was commenced against respondent based upon the alleged termination of a month to month tenancy. On November 30, 2006, respondent was served with a Thirty Day Notice of Termination which advised respondent that her tenancy would terminate as of December 31, 2006. Respondent failed to vacate and on February 16, 2007 respondent was served with a Notice of Petition and Petition.

The matter first appeared on the Part D Resolution calendar on February 23, 2007. Respondent failed to appear and the case was adjourned for inquest to March 13, 2007. When respondent did not appear on March 13, 2007, the case was referred to Trial Part O for an inquest. After an inquest in which petitioner Wen testified (K36565, 3945-4069), a final

judgment of possession was entered against respondent.

An eviction occurred in or about the end of April, 2007. Subsequently, respondent retained counsel and moved this court on June 1, 2007 for an order vacating the March 13, 2007 default judgment, restoring respondent to possession and dismissing the action for defective pleadings. The order to show cause was adjourned to June 4, 2007 for petitioners to oppose the motion, and on June 4, 2007, the order to show cause was again adjourned for respondent to reply.

Respondent asserts that the notice of termination used as the predicate to this proceeding was the same predicate notice used in a previous holdover proceeding under index number L&T 055400/07 that was dismissed. Respondent further asserts that the earlier proceeding was dismissed on February 7, 2007 while the pleadings in this proceeding were not served until February 16, 2007.

A comparison of the Notice of Termination herein and the Notice of Termination in the proceeding under index number L&T 055400/07 reveals that they are in fact the same notice. The court file indicates that the previous proceeding was dismissed on February 7, 2007 based upon petitioner's failure to appear.

Petitioners do not deny any of these facts. (See Xue affirmation paragraphs 12-14). Rather, petitioners' attorney merely argues that there were only nine days between the dismissal of one proceeding and the commencement of the present proceeding, and therefore, no unfair surprise to respondent (See Xue affirmation paragraph 17).

Petitioners' argument is not persuasive nor does it have any merit. The case law is clear. A predicate notice does not survive the dismissal of the first holdover, and can not be used as the

predicate for a second proceeding. *Kaycees West 113th Street Corp. v. Diakoff*, 160 A. D. 2d 573, 554 N. Y. S. 2d 216; *In the Matter of Nicolas Nicolaidis v. State of New York Division of Housing and Community Renewal*, 231 A. D. 723, 647 N. Y. S. 2d 866; *20 Mott Place Corp. v. Maldaonado*, 20 HCR 570A, N. Y. L. J. 9/30/92, 27: 1 (A. T. 2 & 11); *Katzman v. The City of New York*, 27 HCR 653A, N. Y. L. J. 11/18/99, 29: 5 (A. T. 1). A new notice of termination was required to be served before the new proceeding could be commenced. *NRP LLC II v. El Gallo Meat Market, Inc.*, 31 HCR 585B, N. Y. L. J. 10/23/03, 27: 2 (A. T. 1).

This holdover proceeding is therefore jurisdictionally defective. Petitioners were never entitled to the final judgment of possession, and said judgment would never have been granted if the court had been aware of the previously dismissed case and the recycled notice of termination. It does not help petitioners that they relied upon the final judgment awarded by this court as petitioners improperly obtained that judgment. The court finds that respondent was wrongfully evicted.

Petitioners further argue that respondent should not be restored to possession because the premises were rented for storage purposes only. Petitioners' papers acknowledge that the subject building is a two family home. However, petitioners allegedly did not receive a permit to allow for the basement to be used as a residential unit. Petitioners state that the premises did not contain fixtures that would allow respondent to live there, and that there was no bathroom or kitchen. Further, respondent allegedly filled the apartment with 'junk'.

Respondent denies all of petitioners' allegations. Respondent asserts that the premises were rented for residential purposes. Further, respondent states that there was a kitchen and bathroom and attaches colored pictures of the condition of the apartment after the petitioners

allegedly removed the fixtures in January, 2007 in an attempt to force her from the subject apartment (See exhibit B of respondent's reply). Respondent also points out that petitioners do not submit any documentation to support their assertion that the subject apartment is an illegal unit.

Both the affirmation and affidavit submitted in opposition to the order to show cause are not credible, and are self-serving. Petitioners now claim that the premises are not residential and were rented for storage only. This is not a commercial proceeding. The Notice of Petition and Petition both indicate in the caption that this is a residential proceeding. The subject building is a two family home. The caption also refers to respondent as a tenant. Paragraph 2 of the petition acknowledges that respondent is under a month to month tenancy. Paragraph 7 of the petition seeks use and occupancy arrears as well as future use and occupancy which petitioners are only entitled to if the premises are legal. The Notice of Termination in the first paragraph refers to respondent's *occupancy* of the subject premises. Petitioner Wen testified at the inquest and never advised the court that the premises were rented for storage purposes or that the subject premises were allegedly illegal. In fact, petitioners proceeded in a manner that was quite contrary to these allegations.

But most telling are the photographs submitted by respondent. There is a refrigerator in the subject apartment. The photographs clearly show areas at the floor and wall in the kitchen where the tile is missing to allow for the sink. Likewise, there is an area of bathroom floor tile that is missing to allow for the tub. The bathtub faucets are still in place! The plumbing is clearly visible in both the bathroom and kitchen for all the fixtures. The ceramic soap dish and toothbrush holder are still on the wall where the bathroom sink was previously installed. The toilet left a clear outline on the tile floor where it was once installed. In light of these photographs, the court finds it

incredible that petitioners would claim that there were no fixtures in the premises.

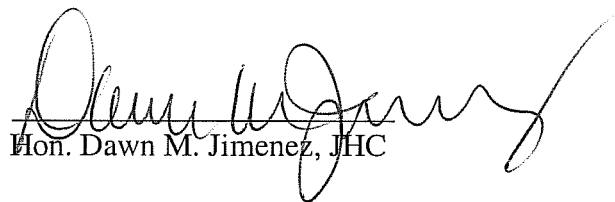
The removal of appliances and fixtures does not bar restoration where good cause is shown. *Eberhart v. Areinoff*, 23 HCR 540B, N. Y. L. J., 9/5/95, 29:3 (A. T. 1).

Though petitioners now claim that the premises are illegal, they do not submit any documentation to support this assertion. Up until this point in the litigation, petitioners proceeded as if the premises were legal and residential. Since this claim is part of petitioners' 'legal argument' as to why the court should not restore respondent to possession, it is incumbent upon petitioners to submit documentation to support the claim. Petitioners fail to do so.

Based upon the papers submitted, the court grants respondent's order to show cause in its entirety. Specifically, the default judgment entered March 13, 2007 is vacated. Respondent is restored to possession as she was wrongfully evicted. The proceeding is dismissed as jurisdictionally defective since petitioners failed to serve a new thirty day notice of termination and could not rely on the recycled notice. Respondent is free to pursue any other claims against petitioners in the appropriate forum, including any declaratory claims and plenary claims.

This constitutes the decision and order of the court.

Date: June 19, 2007
Brooklyn, N. Y.


Hon. Dawn M. Jimenez, JHC