

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: HOUSING PART H

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COBB 3240 BROADWAY LLC,

Petitioner,

L&T Index No. 65874/17

Motion Seq. No. 004

-against-

**DECISION/ORDER**

ELSA KEKENAK,

Respondent,

NICHOLAS DUENO, HECTOR D. FRAGUADA,  
"JOHN DOE" and "JANE DOE,"

Respondents-Undertenants.

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Present:

Hon. HEELA D. CAPELL

Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the Petitioner's motion to renew and reargue this court's April 12, 2018 decision and order, and upon the granting of such motion, to deny Respondents' motion to dismiss the proceeding in its entirety.

<b>Papers</b>	<b>Numbered</b>
Notice of Motion & Affidavits Annexed.....	<u>1</u>
Notice of Cross-Motion and Affidavits Annexed .....	
Answering Affidavits .....	<u>2</u>
Replying Affidavits.....	
Exhibits .....	
Memorandum of law.....	

After submission of the foregoing cited papers, Petitioner's motion to renew and reargue the court's April 12, 2018 decision and order, is decided as follows:

Cob 3420 Broadway LLC ("Petitioner") commenced this non-primary residence holdover proceeding against the rent controlled tenant of record, Elsa Kekenak ("Tenant"), Nicholas Dueno and Hector D. Fraguada ("Undertenants"). Petitioner is represented by counsel. Tenant

and Nicholas Dueno (“collectively, “Respondents”) appeared in this proceeding by counsel. Hector D. Fraguada has not appeared in this proceeding.

Petitioner filed a motion for discovery on August 14, 2018, which was adjourned to October 13, 2017. Respondents filed an answer to the proceeding dated September 10, 2017. On October 13, 2017 Petitioner filed a motion to dismiss the affirmative defenses contained in the answer and Respondents filed a cross-motion to dismiss the proceeding. The proceeding was adjourned a few times, until this court heard oral argument on the motions on April 12, 2018. That same date, this court granted Respondents’ motion to dismiss the proceeding on the grounds that Petitioner failed to obtain a certificate of eviction from DHCR prior to commencing this non-primary residence holdover proceeding against a rent controlled tenant pursuant to NYC Administrative Code § 26-408. (“Decision”). The court denied Petitioner’s motions as moot.

Petitioner now seeks to renew and reargue the Decision pursuant to CPLR § 2221 on the grounds that Petitioner was not required to obtain a Certificate of Eviction from DHCR prior to commencing this non-primary residence holdover proceeding. In *25 W. 68th St. LLC v Lynch*, (35 Misc 3d 138[A], [App Term 2012]), the Appellate Term found that the Housing Court properly denied a rent controlled tenant’s motion to dismiss a non-primary residence holdover proceeding even though the landlord had not obtained a certificate of eviction prior to commencing the proceeding. Citing (NYC Administrative Code § 26-403[e][2][i][10]), as amended L 1983, ch 403 § 42, or the “Omnibus Housing Act”, the court held that “[t]he issuance of a certificate of eviction by DHCR was not a *sine qua non* of landlord’s possessory claim, which is properly determinable by a ‘court of competent jurisdiction’ without resort to administrative intervention.” (*25 W. 68th St., LLC v Lynch*, 35 Misc.3d 138[A]; *see also Stahl*

*Assoc. Co. v. State Div. of Housing & Community Renewal*, 148 A.D.2d 258, 264 [1st Dept. 1989] [“The Rent Control and Stabilization Laws were amended in 1983 to grant jurisdiction to a court of competent jurisdiction to determine the issue of primary residence”]).

Petitioner relies upon *Aimco 240 W. 73rd St., LLC v Benoff* (2013 NY Slip Op 30228[U] [Sup Ct, NY County 2013]) for its proposition that it may proceed in a non-primary residence holdover proceeding against a rent controlled tenant without a certificate of eviction, so long as the landlord has complied with the requirements of 9 NYCRR § 2204.3. The court recognizes this proposition, in addition to the aforementioned statutes and cases, and grants Petitioner leave to renew and reargue the Decision. After renewal, the court modifies the Decision to include a determination that the landlord is not obligated to obtain a certificate of eviction prior to commencing a non-primary residence holdover proceeding against a rent controlled tenant, if the landlord has complied with 9 NYCRR § 2204.3. (*see e.g. Stahl Assoc. Co. v. State Div. of Housing & Community Renewal*, 148 A.D.2d 258).

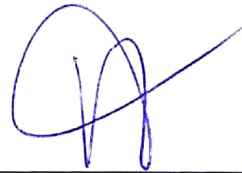
Upon reconsideration, the petition remains dismissed without prejudice, as Petitioner has not demonstrated compliance with 9 NYCRR § 2204.3. It is undisputed that 9 NYCRR § 2204.3 requires that any notice of non-renewal served upon a rent controlled tenant must be filed with the DHCR district office within 48 hours of service of the notice upon the tenant. (*see Shahid v. Carrillo*, 7 Misc.3d 134[A] [App. Term 2nd Dept 2005]; *G. Warhit Real Estate Inc. v. Kraus*, 131 Misc.2d 149 [App. Term 2nd Dept 1985]; *Aimco 240 West 73rd St., LLC v. Benoff*, 2013 NY Slip Op 30228[U] [Civ Ct New York County 2013]). Here, the affidavit of service annexed to the notice of termination states that the notice was mailed to DHCR on the same date that it was mailed to the Tenant. However, the affidavit of service does not provide that the

notice was filed with the DHCR district office within 48 hours of service upon the Tenant as required by 9 NYCRR § 2204.3. The petition also fails to plead compliance with the statute and Petitioner's moving papers do not allege that the Notice was filed with the DHCR within 48 hours after service on the Tenant. Petitioner's failure to allege and prove that it complied with the requirements of 9 NYCRR § 2204.3 is fatal to this proceeding. (*see Garvin v. Cole*, 53 Misc.2d 647 [App. Term 1st Dept 1967]).

Accordingly, the motion is granted to the limited extent herein and otherwise denied. The proceeding is dismissed without prejudice.

This constitutes the decision and order of the court.

Dated: New York, New York  
August 7, 2018



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HON. HEELA D. CAPELL  
J.H.C.

