

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

-----X  
BEACON 109 118-120 LLC,

Petitioner,

Index No. L&T 63428/13

-against-

**DECISION & ORDER**

LUZ PATRICIA GARCIA,

Respondent,

JOHNATHAN VARGAS, "JOHN DOE" AND  
"JANE DOE"

Respondents-Undertenats

-----X  
**HON. BRENDA S. SPEARS, J.H.C.**

Recitation, as required by CPLR §2219(a), of the papers considered in the review of petitioner's motion for discovery and use and occupancy; and respondent's cross-motion to dismiss:

Papers	Numbered
Notice of Motion & Affidavits Annexed	<u>1</u>
Order to Show Cause and Affidavits Annexed	<u>2</u>
Notice of Cross-motion and Affidavits Annexed	<u>3</u>
Answering Affidavits	<u>4</u>
Replying Affidavits	<u>5</u>
Exhibits	<u>6</u>

Upon the foregoing cited papers, the decision and order on this motion and cross-motion is as follows:

In April 2013, petitioner commenced this holdover proceeding against respondents to recover possession of apartment 3W (the "Apartment") in the building located at 130 West 109<sup>th</sup> St, New York, NY (the "Building") on the basis that respondent, Luz Patricia Garcia, does not occupy the Apartment as her primary residence. Respondent, represented by counsel, filed an answer denying

the allegations and asserting three affirmative defenses and a counterclaim. In September 2013, Petitioner filed a motion pursuant to CPLR §408 for discovery, and for payment of use and occupancy. In November 2013, respondent filed a cross-motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), and for lack of personal jurisdiction pursuant to CPLR §3211(a)(8). Following multiple adjournments, the motion and cross-motion were both submitted to this Court.

The Notice of Non-Renewal (“notice”) alleges Ms. Garcia “is currently residing at an address unknown to the landlord in Arizona as her primary residence,” and that Ms. Garcia “has occupied the subject premises for an aggregate of less than 183 days in the most recent calendar year.” Respondent cross-moves to dismiss the petition for failure to state a cause of action, claiming the notice fails to contain fact-specific allegations to establish respondent’s alleged nonprimary residence. Respondent argues that the notice contains vague and conclusory statements, and does not meet the basic pleading requirements of RSC 2524.4(c) and 2524.2(b). This Court agrees.

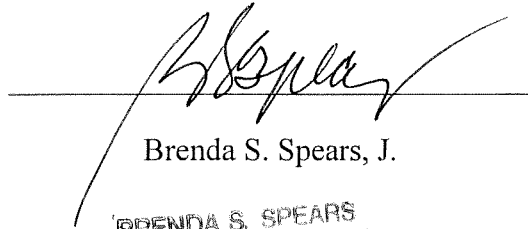
It is well settled that the test for determining the sufficiency of a predicate notice in a summary proceeding “is one of reasonableness in view of the attendant circumstances.” (*Hughes v Lenox Hill Hospital*, 226 AD2d 4 [1<sup>st</sup> Dept 1996]). Applying this test, the notice in this proceeding does not provide facts necessary to support petitioner’s claim that respondent does not occupy the Apartment as her primary residence. Petitioner’s conclusory statements that respondent lives at an “unknown address” in Arizona, and that she has not lived at the Apartment for an “aggregate of more than 183 days” does not adequately apprise respondent of the factual basis of this proceeding. Inasmuch as service of a proper notice is a condition precedent to termination of a tenancy, and deficiencies in a predicate notice are not amendable, the petition must be dismissed (*Chinatown Apartments Inc. v Chu Cho lam*, 51 NY2d 786 [1986]).

Accordingly, the portion of respondent’s cross-motion to dismiss the petition for failure to

state a cause of action is granted.

Petitioner's motion for discovery, and for payment of use and occupancy is denied as moot.

This constitutes the decision and order of this Court.

  
Brenda S. Spears, J.  
BRENDAS. SPEARS  
JUDGE, HOUSING PART

Dated: June 3, 2014  
New York, New York

Counsel for Petitioner  
Horing Welikson & Rosen, PC  
11 Hillside Avenue  
Williston Park, NY 11596  
(516) 535-1700

Counsel for Respondent  
SRO Law Project  
51 West 109<sup>th</sup> St.  
New York, New York 10025  
(212) 799-9638