

**15 Fla. L. Weekly Supp. 496a**

**Landlord-tenant -- Public housing -- Eviction -- Notice -- Defects -- As fifteen-day notice, notice is defective for giving only four days to pay or vacate and seeking to terminate rental agreement in middle of monthly rental period -- As three-day notice, notice is defective for demanding money other than and in excess of rent by demanding rent not yet in default and late fee and giving less than three business days to pay or vacate -- Subsequent notice rendered prior notice a legal nullity -- Prior notice was defective for demanding late fee and giving less than required time to pay or vacate -- Both notices violated federal Fair Debt Collection Practices Act where notices were given by attorney who is not creditor and failed to give thirty-day validation period -- Complaint dismissed without leave to amend**

LAUDERHILL HOUSING AUTHORITY, Plaintiff, vs. PATRICK HOUSER, Defendant.  
County Court, 17th Judicial Circuit in and for Broward County. Case No. 08-05508 COWE (81).  
March 6, 2008. Jane D. Fishman, Judge. Counsel: Angel Petti Rosenberg, Hall & Rosenberg,  
Fort Lauderdale. Charles L. Simon, Law Offices of C.L. Simon, P.A., Sunrise, for Defendant.

*ORDER GRANTING DEFENDANT'S MOTION  
TO DISMISS PLAINTIFF'S COMPLAINT FOR  
TENANT EVICTION WITHOUT LEAVE TO AMEND  
AND GRANT DEFENDANT'S MOTION FOR  
JUDGEMENT ON THE PLEADINGS*

THIS CAUSE, having come before the Court on Defendant's Motion to Dismiss Plaintiff's Complaint for Tenant Eviction Without Leave to Amend and Defendant's Motion for Judgment on the Pleadings and the Court having reviewed the pleadings and the exhibits attached thereto and otherwise being fully advised in the premises, the Court does hereby

ORDER, ADJUDGE AND FIND as follows:

1. It is clear from Plaintiff's Complaint for tenant eviction that Defendant is now a month to month tenant with his rent due *on the 12th* of each month in the sum of \$1,000.00 with the remaining terms of the expired lease in effect. Paragraph 3-D entitled, Late Payments provides, "All rent payment are due on the twelfth (12th) day of each month. For any rent payment not received by the landlord by 5:00 p.m. on the twelfth (12th) day of the month, the tenant shall be assessed a late fee in the amount of THIRTY DOLLARS (\$30.00)." Paragraph 31 of the lease entitled NOTICES also provides, "If a party hereto desires to give notice to the other or to make tender to the other, such notice or tender shall be in writing and shall be deemed given when it shall have been deposited in the United States Mails, certified and addressed to the party for whom it is intended as follows: For the landlord: Lauderhill Housing Authority 3800 Inverrary Blvd #209 Lauderhill, FL 33319 For the Tenant Patrick Houser 5203 NW 18th Place Lauderhill FL 33313." *It is also clear that Plaintiff has failed to lawfully terminate Defendant's rental agreement and has no lawful right to commence an action for eviction pursuant to Section 83.59(1) of the Florida Statutes as both the November 7, 2007 notice and the October 15, 2007 Three-Day Notice incorporated therein are fatally defective on their face in numerous respects and legally insufficient as a matter of law.*

(a) As a Fifteen-Day Notice terminating Defendant's rental agreement effective immediately and giving the tenant until November 25, 2007 to vacate, *the November 7, 2007 notice is clearly fatally defective on its face as Section 83.57(3) of the Florida Statutes requires that Plaintiff's notice be given "not less than 15 days prior to the end of any monthly period;" and Plaintiff's notice was given only four (4) days in advance of the end of the monthly rental period which would be November 11, 2007 at 11:59 p.m.* The November 7, 2007 notice is also fatally defective on its face as Florida law does not allow a landlord to terminate a month to month tenancy in the middle of any monthly rental period. Thus, the earliest Plaintiff could have terminated Defendant's rental agreement would have been December 11, 2007 at 11:59 p.m. and accordingly, whether the Court deems Plaintiff's November 7, 2007 notice as terminating Defendant's month to month tenancy effective immediately or terminating same on November 25, 2007, the notice was legally insufficient as a matter of law to terminate Defendant's rental agreement. *The November 7, 2007 notice may also be viewed by the Court as a Three-Day Notice to pay rent or vacate as it states, "The Lauderhill Housing Authority has been very patient with your failure to timely make payments. This practice is over. You are now significantly past due in your rent and the balance of \$3,090.00 must be paid by November 12, 2007 before 4:30 p.m."*

(b) As a Three-Day Notice to pay rent or vacate by November 12, 2007 before 4:30 p.m., the notice is fatally defective on its face for demanding money other than rent and money in excess of the rent owed in violation of Section 83.56(3) of the Florida Statutes. Both the October 15, 2007 and November 7, 2007 notices confirm that only the September 12, 2007 rent of \$1,000.00, late fee for September of \$30.00 and October 12, 2007 rent of \$1,000.00 and late fee for October of \$30.00 totaling \$2,000.00 rent and \$60.00 in late fees were due when Plaintiff gave the November 7, 2007 notice demanding \$3,090.00. Section 83.56(3) of the Florida Statutes only allows a landlord to demand the rent in default. *Clearly, the November 12, 2007 rent was not in default on November 7, 2007 when the notice was given. Further, Florida Law is also very clear that late fees are not rent and may not be demanded in a Three-Day Notice unless there is a written lease which defines same as "rent" or "additional rent"*. Paragraph 3-D of the written lease agreement fails to define late fees as rent or additional rent. Not only does the November 7, 2007 notice demand the November 12, 2007 rent not in default but, it also demands a \$30.00 late fee for the November 12, 2007 rent which was clearly not owed on November 7, 2007.

(c) The November 7, 2007 notice is also defective and fails to comply with the statutory requirements of Section 83.56(3) of the Florida Statutes as it gives less than three (3) full days excluding Saturday, Sunday and legal holidays to pay or vacate. November 7, 2007 was a Wednesday. Thursday, November 8, 2007 was day number one. Friday, November 9, 2007 was day number two. Saturday and Sunday, November 10th & 11th are excluded as being a weekend. November 12, 2007 was day number three and accordingly, the notice was required to give the tenant through 11:59 p.m. to pay or vacate and Plaintiff prematurely demanded payment by 4:30 p.m. in November 12, 2007.

(d) The October 15, 2007 notice is also defective for demanding \$60.00 in late fees thereby demanding money other than rent and money in excess of the rent owed. On February 7, 2007 the Appellate Court for Broward county ruled on this very issue when it adjudged in part that the tenant was not required to post rent into the Court Registry and dismissed Plaintiff's Complaint

without leave to amend where the landlord included a \$25.00 late charge in addition to the rent. *Elitaine Roche, Appellant/Plaintiff vs. Muoi Nguyen, Appellee/Defendant*, Case No: 06-12904 CACE 03 [14 Fla. L. Weekly Supp. 432a]. The 4th DCA affirmed the Appellate Court decision when on April 12, 2007 it dismissed the landlord's appeal on the merits.

(e) The November 7, 2007 notice also rendered the October 15, 2007 notice a legal nullity as the November 7, 2007 notice requested additional sums, \$3,090.00 as opposed to \$2,060.00 and gave the tenant a later date to pay, to wit, November 12, 2007 at 4:30 p.m.

(f) The October 15, 2007 Three-Day Notice was also fatally defective as it required payment or possession *no later than 4:30 p.m. on October 19, 2007*. Pursuant to Section 31 of the parties' lease agreement any notice shall only "be deemed given when it shall have been deposited in the United States Mails, certified. . ." Even if Defendant received the mailed copy of the October 15, 2007 notice on October 16, 2007, the notice was required to give the tenant through 11:59 p.m. on October 19, 2007 and the notice demanded payment or possession on or before 4:30 p. .m. on October 19, 2007. This does not even take into account the additional five (5) days that must be provided for the tenant to pay or vacate when the notice is served by mail.

2. In order for a landlord to maintain an action for tenant eviction for non-payment of rent, the landlord must first give a three-day notice that complies with the statutory requirements of Section 83.56(3) of the Florida Statutes, and second properly terminate a tenant's rental agreement prior to filing a complaint for eviction. If the landlord gives the statutorily required three-day notice, and properly terminates the rental agreement, prior to filing the eviction action, then if the tenant raises any defense other than payment, the tenant must post the rent into the Court Registry or the landlord is entitled to a default judgment pursuant to Section 83.60(2) of the Florida Statutes. *Park Plaza Associates Ltd. vs. Glenn D. Paraday and Deborah A. Paraday*, Case No. 99-05843 COWE (81) [6 Fla. L. Weekly Supp. 730c], decided by the Honorable Jane Fishman on August 20, 1999.

3. Due to the fatally defective Three-Day Notice, and Plaintiff's failure to terminate the rental agreement, prior to filing the Complaint for tenant eviction, an essential element of Plaintiff's cause of action was missing, and there was no requirement for Defendant to pay rent into the Court Registry. *Rihena Hodgson vs. Gurlet M. Jones*, 6 Fla. L. Weekly Supp. 758a, *Carl Coleman, Appellant, vs. Cabino Rentals, Appellee*, 9 Fla. L. Weekly Supp. 134 (Circuit Court 3rd Judicial Circuit, Columbia County), *Daniel Gamo, Appellant vs. Bruce Heller, Appellee*, 8 Fla. L. Weekly Supp. 549 (17th Circuit Court, Broward County Appellate Division, June 19, 2001), *Juan Pablo Tobar and Luis Tobar, Appellants vs. Maurice Bernard, Appellee*, Case No: 04-8785 CACE (03) [12 Fla. L. Weekly Supp. 130a] (Circuit Court, Broward County Appellate Division, November 30, 2004).

4. A valid three-day notice that substantially complies with the statutory requirements of Section 83.56(3) of the Florida Statutes must be given to the tenant prior to the commencement/initiation of a tenant eviction lawsuit. Plaintiff may not give a new three-day notice and file an amended complaint in this action. Since less than all the requisite elements of the cause of action for tenant eviction were in existence when the Complaint was filed, the Trial Court must dismiss without leave to amend. *Rolling Oaks Homeowner's Association vs. Dade County*, 492 So.2d 686 (3d

DCA 1986). The statutory right of an action for possession only accrues upon the termination of the tenancy. *Investment and Income Realty Inc. vs. Bentley*, 480 So. 2d 219, 220 (Fla. 5th DCA 1985). The dismissal of this action will be with prejudice and without leave to amend in that the notice being improper, the Plaintiffs did not have a valid cause of action on the facts existing at the time the action was commenced. *Lee v. Graham*, 1 Fla. L. Weekly Supp. 493 (Sarasota Co. 1993); *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So. 2d 607, 610 (Fla. 4th DCA 1975). A statutory cause of action cannot be commenced until the Plaintiff has complied with all conditions precedent. *Ferry-Morse Seed Co. v. Hitchcock*, 426 So.2d 958, 961 (Fla. 1983).

5. On November 30, 2004 the Appellate Court reversed a decision by Judge Robert Lee when he entered a default final judgment for eviction when the tenant failed to pay the rent owed into the Court Registry. In the case of *Juan Pablo Tobar and Luis Tobar, Appellants, vs. Maurice Bernard, Appellee*, Case No: 04-8785 CACE (03) [12 Fla. L. Weekly Supp. 130a] Judge Patti Englander Henning wrote her appellate opinion finding in part: “A statutory cause of action cannot be commenced until the claimant has complied with all the conditions precedent.” *Investment & Income Realty v. Bentley*, 480 So. 2d 219 (Fla. 4th DCA 1985), citing *Ferry-Morse Seed Co. v. Hitchcock*, 426 So. 2d 958 (Fla. 1983). Based on the foregoing, this Court finds that the lower court was in error in its issuance of a Final Judgment for Eviction and Writ of Possession. Accordingly, the Final Order and Writ of Possession in favor of the Appellee, Maurice Bernard, is REVERSED and REMANDED to the trial court to dismiss Appellee's action, without leave to amend and with prejudice. Appellee may file a new cause of action when the proper statutory condition precedent is met.

6. As was stated in the Appellate decision in Broward County on September 24, 1999 by the Honorable Leonard L. Stafford in the case of *Rihena Hodgson vs. Gurlet M. Jones*, 6 Fla. L. Weekly Supp. 758a, Appeal No. 99-5583 (02), Section 83.59(1), Florida Statutes, clearly makes termination of a rental agreement a condition precedent to filing suit for possession. Since the rental agreement in this case was not terminated prior to suit because the Three-Day Notice was defective, “Appellee had no cause of action for eviction at the time of filing suit. Consequently, with no right to bring an action for eviction, no judgment could be entered in her favor.” “. . .the Court finds that such error is nonetheless reviewable on appeal.” “Finally, the defects in Appellee's Notice cannot be corrected on remand. Where an action requires statutory notice prior to suit and that notice is defective, the defects cannot be corrected in the same case.” *Carl Coleman, Appellant, vs. Cabino Rentals, Appellee*, 9 Fla. L. Weekly Supp. 134 (Circuit Court 3rd Judicial Circuit, Columbia County), *Daniel Gamo, Appellant vs. Bruce Heller, Appellee*, 8 Fla. L. Weekly Supp. 549 (17th Circuit Court, Broward County Appellate Division, June 19, 2001).

7. The Court is not unmindful of the 4th District Court of Appeal's recent decision in *Bell vs. Kornblatt*, 23 Fla. L. Weekly D264 (Fla. 4th DCA January 21, 1998), which held that a court retains jurisdiction to adjudicate a case regardless of any lack of notice. This Court has based its decision on Plaintiff's defective Three-Day Notice, and failure to terminate Defendants' rental agreement, and thereby failing to state a cause of action upon which this Court could grant Plaintiff any affirmative relief.

8. Defendant's Motion to Dismiss Plaintiff's Complaint without leave to amend is hereby granted.

9. Defendant is the prevailing party in this action.

10. Defendant's counsel, Charles L. Simon, is entitled to recover costs, including reasonable attorneys' fees of and from Plaintiff.

11. The Court retains jurisdiction to award Defendant's counsel costs including reasonable attorneys' fees of and from Plaintiff.