**COMMONWEALTH OF MASSACHUSETTS**

**TRIAL COURT**

**DEFENDANT’S MOTION FOR SUMMARY JUDGEMENT/MOTION TO DISMISS FOR FAILURE TO PROPERLY TERMINATE TENANCY**

(No Notice to Quit Received)

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|  | Docket Number: {{ docket\_number }} |
|  |  |
| {{ plaintiffs }} |  |
|  |  |
| v. |  |
|  |  |
| {{ defendants }} |  |

The Defendant moves pursuant to Rule 56 of the Massachusetts Rules of Civil Procedure for summary judgment in his/her favor on the issue of possession or, in the alternative, for dismissal of this action.

In support of this motion, the Defendant states the following:

1. Plaintiff never terminated the tenancy and thus may not proceed with a summary process action under G.L. c. 239 §1 and G.L. c. 186 §11.

2. The Defendant never received a notice of termination of any kind from the Plaintiff.

3. Under Ryan v. Sylvester, 358 Mass. 18, 260 N.E.2d 148 (1970), a tenant must receive actual notice of the termination of the tenancy from the landlord. Under Ryan, while a constable’s return of service is prima facie evidence sufficient to support a landlord’s summary process action where uncontraverted–see G.L. c. 41, § 94–it is insufficient to show actual receipt where the tenant affirmatively asserts that the notice was not received, and it is the Landlord’s burden to show actual receipt of the notice. See also Harris v. Munro, 1999 Mass. App. Div. 75, 1999. Mass. App. Div. LEXIS 31 (where tenant testified that there was no receipt of notice to quit, and constable did not testify, error to enter judgment for owner–judgment for possession for tenant); Clegg v. Vaughan, 1997 Super. LEXIS 338 (Cowin, J., May 13, 1997) (reversing District Court’s judgment in favor of owner); Beacon v. Attia, Boston Housing Court No. 03-SP-01937 (Pierce, J., July 15, 2003); Pemberton v. Ghazaleh, Boston Housing Court No. 99-SP-01937 (Winik, J., May 13, 1999); Marchena and DeJesus v. Jones, Boston Housing Court No. 07-SP-03080 (Muirhead, J., Sept. 11, 2007). See also Boston Housing Authority v. Mitchell, Boston Housing Court No. 98-SP-04893 (Winik, J., Dec. 17, 1998) (to prove service by first class mail, landlord must prove proper return address and have a system of business records that can prove notice properly sent out); Corder v. Herbert, Boston Housing Court Summary Process Action No. 11110 (King, J., June 12, 1978) (where tenant’s testimony contradicted constable’s return of service, effect of return of service as prima facie evidence rebutted, and tenant’s testimony of non-receipt sole evidence–judgment for possession for tenant); Quincy Housing Authority v. Linscott, Quincy District Court No. 3761 (Criss, J., May 21, 1987).

Wherefore, the Defendant respectfully requests that this Court dismiss the Plaintiff's case because the Plaintiff failed to terminate the tenancy.

Respectfully submitted,

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I hereby certify that a

true copy of the above

document was served upon

Plaintiff (or Attorney,

if represented) by mail on

\_\_\_\_\_\_\_\_\_\_\_\_ (date) by

VERIFICATION

The Defendant states that all facts asserted herein are true and correct and based on the Defendant's own personal knowledge, any documents attached hereto are true and correct copies, and the Defendant is competent to testify as to the factual matters stated herein.

Signed under penalty of perjury on {{ signature\_date }}.

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{{ defendants }}