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

_____X

ST OWNER LP,

Petitioner

-against-

DECISION & ORDER
Index No.: L&T 61627/2013

HON. SABRINA B. KRAUS

MERRICK BURSUK and
DONNA DICKMAN-BURSUK
283 AVENUE C, APT 8D
NEW YORK, NY 100209

Respondent

"JOHN DOE" AND "JANE DOE"
Respondents-Occupants

_____X

BACKGROUND

This summary holdover proceeding was commenced by **ST OWNER LP** (Petitioner) seeking to recover possession of 283 AVENUE C, APT 8D, NEW YORK, NY 10009 (Subject Premises) based on allegations that **MERRICK BURSUK** and **DONNA DICKMAN-BURSUK** (Collectively "Respondents") the rent-stabilized tenants of record, had created a nuisance by their conduct.

PROCEDURAL HISTORY

Petitioner issued a ten day notice of termination dated January 11, 2013. The notice asserted that on December 22, 2012 Merrick Bursuk (Merrick) was walking a dog that bit another tenant and Merrick subsequently punched said tenant in the head.

The petition is dated March 28, 2013, and on April 11, 2013 Merrick appeared *pro se* and filed a written answer. Merrick's answer asserted that the tenant had lied about being bitten by the dog and punched, and that the proceeding had been brought by Petitioner in retaliation for Respondent's refusal to sign a pet rider that had not been approved by DHCR.

The proceeding was initially returnable on April 16, 2013, and after a brief conference with the court the proceeding was adjourned to May 30, 2013. On May 16, 2013, counsel appeared for Respondents and filed a notice of appearance, amended answer and counterclaim.

The amended answer asserted that the allegations in the underlying notice of termination were false and that even if they were deemed to be correct, they failed to set forth a cause of action for nuisance, in that the allegations were regarding a single incident and did not describe a continuous course of conduct. The amended answer also asserted retaliatory eviction.

On May 30, 2013, the court set a trial date for August 13, 2013, and directed that any motions be filed by June 30, 2013. On July 11, 2013, Respondents moved for dismissal of this proceeding, based on their allegation that the pleadings fail to state a cause of action for nuisance and that the notice of termination is defective. On said date the court heard argument and reserved decision on the motion.

DISCUSSION

Petitioner argues that Respondent's motion should be denied as procedurally improper because Respondent moves pursuant to CPLR § 3211 after service of a responsive pleading. Petitioner's argument is mistaken, a motion pursuant to CPLR 3211(a)(7) may be made at any time subsequent to service of an answer(CPLR 3211(e)).

On a motion to dismiss for failure to state a cause of action all of the allegations in the pleading must be accepted as true and the pleading must be viewed in the light most favorable to Petitioner (*Anguita v Koch* 179 AD2d 454).

"Nuisance imports a continuous invasion of rights –'a pattern of continuity or recurrence of objectionable conduct'(*Domen Holdong Co. v Aranovich* 1 NY3d 117, *citing Frank v Park Summit Realty Corp* 175 AD2d 33,34, *mod on other grounds* 79 NY2d 789)."

The notice of termination herein focuses on a single day December 22, 2012. In its bill of particulars, Petitioner acknowledges that the alleged dog bit and punch both took place at the same time on the same day. While the dog bit and the punch were two separate acts, they were both part of a single incident that took place on a single date.

Generally, a single instance of objectionable conduct by a tenant is insufficient as a matter of law to make out a cause of action for nuisance (*Sanford Flushing Assocs v James* NYLJ May 21, 1997p29 col 6; *88-09 Realty LLC v Hill* 190 Misc2d 286; *Metropolitan Life Insurance Co.* v *Moldoff* 187 Misc2d 458 *holding a single suicide attempt by gas inhalation in sufficient to establish nuisance*).

However, there is no black line test as to the number of incidents required to state a cause of action for nuisance, rather the court must look at both the number of incidents and the degree of danger involved in the conduct [*160 West 118th Street Corp v Gray* 7 Misc3d1016(A) (*shooting of a co-tenant so egregious that although a single incident was sufficient to survive a motion to dismiss for failure to state a cause of action*); *Rochester Housing Authority v Ivey* 35 Misc3d 1206(A)].

In *160 West 118th St Corp v Gray* the court denied a motion to dismiss pursuant to CPLR 3211(a)(7) where the predicate notice alleged only a single incident. Specifically, the predicate

notice alleged that on a single date the tenant shot her son inside the apartment. The court in denying the motion to dismiss held that the allegations in the predicate notice were so serious that it was possible that a single incident could make out a cause of action for nuisance.

Additionally, for the most part, the cases which dismiss proceedings based on the failure to establish a continuous course of conduct do so after there has been a trial on the merits (see eg *Pamac Realty Corp v Bush* 101 Misc2d 101 *dismissing after trial because single fire did not constitute a nuisance*; *Goodhue Residential Company v Lazansky* 1 Misc3d 907(A) (*dismissed after trial based on a single non-violent incident*; *Vesey Realty Company v Doherty* 120 Misc2d 721).

If the punch or dog bite in this case resulted in serious physical injury to the other tenant, a single incident might be sufficient to constitute a cause of action for nuisance. While it appears unlikely that this is the case, there is no basis for the court to make such a determination on these motion papers. Petitioner asserts that Respondent was arrested on the date of the incident and that an order of protection has been issued in favor of the tenant allegedly assaulted by Respondent.

Based on the foregoing, the motion is denied. The court finds that the predicate notice is sufficient to apprise Respondent of the facts underlying the proceeding and to allow Respondent to prepare a defense. Reading the notice in the light most favorable to Petitioner as the court is required to do, the court does not find dismissal is warranted as a matter of law .

Trial remains scheduled for August 13, 2013 at 9:30 am.

This constitutes the decision and order of the court.

Dated: July 12, 2013
New York, New York

Hon. Sabrina Kraus

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