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

----------X

289 & 305 ASSOCIATES LP,

Index No. 70128/2015

Petitioner,

DECISION/ORDER

-against-

FRANCISCA BLANCO ET AL.,

Respondents.

----------X

Present: Hon. Michael Weisberg
Judge, Housing Court

Todd Rothenberg, Esq., New Rochelle, for Petitioner.
MFY Legal Services, New York City, for Respondent Francisca Blanco.

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of this motion.

Papers	**Numbered**
Notice of Motion and Affidavits Annexed……..	1
Notice of Cross-Motion and Affidavits Annexed……	2
Answering Affidavits in opposition to Cross-Motion.…….……...	3
Reply Affidavits in support of Cross-Motion…...…….……..	4

Upon the foregoing cited papers, the decision and order on this motion are as follows:

This holdover summary eviction proceeding is premised on the allegation that Respondent is not using her rent stabilized apartment as her primary residence. Petitioner's notice of nonrenewal contains the following allegations:

> You do not reside in the [premises] the majority of time as evidence in public records;
>
> You have maintained your primary residence in another location;
>
> It is the Landlord's belief that neither [Respondents] reside in the subject premises at least 183 days a year as their primary residence;

> [T]he landlord has observed you removing the contents of your apartment and thereafter unknown parties moving new furnishings into your apartment such as a mattress, as well as other furniture;
>
> Thereafter there has been a steady stream of individuals entering and exiting the subject premises, after residing in the premises for a short period of time, generally less than a week; and
>
> Said events have also been corroborated by building personnel, who report that you have not been seen in or around the subject premises for a substantial amount of time. You have taken permanent residence elsewhere and are not residing in the subject premises for quite some time;

Petitioner has moved for leave to conduct discovery and for an order directing payment of use and occupancy. Respondent Francisca Blanco has cross-moved to dismiss the petition, arguing that the notice lacks sufficient facts. The motions are consolidated for disposition.

A notice of nonrenewal alleging nonprimary residence must "state the facts necessary to establish the existence such ground" (9 NYCRR § 2524.2[b]; *see Berkeley Assoc. Co. v. Camlakides*, 173 AD2d 193 [1st Dept 1991], *affd for reasons stated below* 78 NY2d 1098 [1991]). A satisfactory notice must include "case-specific allegations" that support a claim of nonprimary residence (*see e.g. Second 82nd Corp. v. Veiders,* 34 Misc 3d 130[A], 2011 NY Slip Op 52311[U] [App Term, 1st Dept 2011]). In *London Terrace Gardens, L.P. v. Heller* (40 Misc 3d 135[A], 2009 NY Slip Op 52858[U] [App Term, 1st Dept 2009]), the Appellate Term considered the sufficiency of a notice that alleged:

> the tenant "has not maintained an ongoing, substantial, physical nexus with the premises for actual living purposes;"
>
> the tenant has "failed to spend more than 183 days out of the preceding year residing at the premises, as confirmed and substantiated" by unidentified building employees; and
>
> "no building personnel have seen the tenant at the subject premises for more than one year."

The court affirmed dismissal of the petition because "[i]n such unparticularized form, the termination notice was too generic and conclusory to satisfy" the requirement that it set forth the facts necessary to establish the existence of a claim of nonprimary residence (*id.*).

One may question the necessity of requiring case-specific facts in a case based on alleged nonprimary residence. After all, the tenant doubtlessly knows whether or not she is using her apartment as her primary residence. But the Appellate Term has stated that the purpose of requiring facts in a predicate notice is "to discourage baseless eviction claims founded upon speculation and surmise, rather than concrete facts" (*London Terrace Gardens, L.P.*, 40 Misc 3d 135[A]). Upholding a notice like that in *London Terrace* would "eviscerate the plain language of the governing notice regulation" (*id.*).

Petitioner's notice contains the nearly the same generic and conclusory claims as the notice in *London Terrace*. But Petitioner's notice also includes four additional allegations: 1) Respondents moving out the contents of the apartment; 2) other individuals then moving furnishings "such as a mattress;" 3) recurring incidents of short-term visitors; and 4) unspecified "public records" that are evidence of Respondents residing somewhere other than the apartment. Broadly speaking, these allegations are case-specific. The question for the court is whether they are sufficiently case-specific and whether there are enough of them to render the notice satisfactory.

As is often the case with any predicate notice or pleading, Petitioner could have included more details in its allegations with little effort and no prejudice. "The purpose of litigation is to achieve a just result and not to spring surprise on one's adversary" (*Zayas v. Morales*, 45 AD2d 610, 613 [2d Dept 1974]). In the light thereof, and especially in proceedings where parties regularly challenge the sufficiency of predicate notices, a party might tactically choose to include

more facts instead of less to decrease the likelihood of dismissal. Here, the allegations about the removal of the contents of the apartment and then the moving in of new furnishings left plenty of room for amplification. The claim regarding the new furnishings particularly stands out: by choosing to only specify a single mattress as an example of the furnishings moved in to the apartment, Petitioner highlights the shallowness of its allegation. With respect to the claims of short-term visitors, Petitioner could have included facts as to whom observed the short-term visitors and on what basis they concluded that the visitors were residing in the apartment.

But just because Petitioner could have included more facts does not mean that more facts are required. Petitioner argues that the notice is satisfactory because it is reasonable under the attendant circumstances, citing *Hughes v. Lenox Hill Hosp.* (226 AD2d 4 [1st Dept 1996]). *Hughes* was a declaratory judgment action commenced by the son of the deceased tenant of record, in which the son sought to succeed to his mother's tenancy. He commenced the action subsequent to the landlord's notice of nonrenewal, in which the landlord alleged that the tenant of record was not residing in the apartment as her primary residence because she had died. In light of that allegation it was obviously not necessary to allege any other facts in support of the claim that the tenant of record was not using the apartment as her primary residence. Yet when *Hughes* is cited for the "reasonable under the attendant circumstances" standard it is regularly done without any reference to the facts of the case. When that happens the very particular and singular fact that the landlord's claim was predicated on the tenant's death is lost.

The attendant circumstances here are different. First, the building has 43 residential units, according to the website of the Department of Housing Preservation and Development. The number of units in a building could affect a landlord's ability to know what is happening in any given apartment on a weekly basis. Second, and related to the first, Respondent alleges that there

are cameras in the building the footage of which would show Respondent going in and out of her apartment. Third, Respondent also alleges that the apartment had a bedbug infestation and as a result she threw out her mattress. She claims that Petitioner was aware of the bedbug infestation and that it made arrangements for extermination. Petitioner does not deny or otherwise address Respondent's allegations, not does it argue why its notice is reasonable under these particular attendant circumstances.

A final attendant circumstance is raised in the notice: the supposed existence of public records that support the claim that Respondents are not living in the apartment "the majority of the time." Generally, a notice of nonrenewal will pass muster if it specifies an alternate address at which the tenant is supposedly residing and the facts to support that claim (*see e.g. Second 82nd Corp.*, 34 Misc 3d 130[A] [notice alleged specific street address of alternate residence and identified telephone number at that address]; *449 Second Corp. v. Napoli*, 12 Misc 3d 135[A], 2006 NY Slip Op 51225[U] [App Term, 1st Dept 2006] [notice alleged two specific street addresses of alternate residences and identified utility, telephone, and car-related documents issued to tenant listing those addresses]). To be sure, such an allegation is not required if other sufficient and case-specific allegations are made. But if the records point to one or more alternate addresses at which Respondents might be residing, then in light of the Appellate Term case law, including a description of the nature and substance of the records in the notice would significantly increase the likelihood of a court sustaining the adequacy of Petitioner's notice. Yet, beyond their alleged existence, Petitioner included no details at all about the records.

In light of the attendant circumstances, Petitioner's allegations are not sufficient. In a building with 43 units and video cameras, Petitioner must do more than glibly allege that "there has been a steady stream of individuals entering and exiting the subject premises, after residing

in the premises for a short period of time, generally less than a week." Petitioner should have included more fact-specific details regarding the visitors and in support of the conclusion that they reside in the apartment for a short period. These allegations could come from the video footage or from first-hand observations. At the very least Petitioner should identify who made the observations on which the allegations are based. And where an apartment has suffered a bedbug infestation, it is insufficient to allege that new furnishings were moved into the apartment but specify only a mattress. Petitioner should have provided a more detailed list of furnishings in support of its implicit claim that these furnishings were being used by new occupants of the apartment. Finally, it is insufficient to allege the existence of records purporting to support a claim of nonprimary residence without providing details as to what those records are and what information they contain. To sanction such an allegation would risk encouraging claims based on speculation and surmise, instead of concrete facts.

Respondent's cross-motion is therefore granted and the petition is dismissed. Petitioner's motion is denied as moot.

This constitutes the decision and order of the court.

Dated: January 4, 2016

_____

Hon. Michael Weisberg
J.H.C.