Threadneedle Shipping Corp. v Johnson
2016 NY Slip Op 31390(U)
July 18, 2016
Supreme Court, New York County
Docket Number: 60571/2016
Judge: Jack Stoller
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART C

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THREADNEEDLE SHIPPING CORP.,

Petitioner,

Index No. 60571/2016

- against -

DECISION/ORDER

VICKIE ANN JOHNSON,

Respondent.

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Present:
Hon. Jack Stoller
Judge, Housing Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion.

Papers	**Numbered**
Notice of Motion and Supplemental Affidavit and Affirmation Annexed.....	1, 2, 3
Affidavit In Opposition	4

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

Threadneedle Shipping Corp., the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Vickie Ann Johnson, the respondent in this proceeding ("Respondent"), seeking possession of 444 East 57th Street, Apt. 3B, New York, New York ("the subject premises") on the theory that Respondent is a licensee whose license has been terminated by service of a notice to quit pursuant to RPAPL §713(7) ("the notice to quit"). Respondent interposed an answer. Respondent now moves for summary judgment in her favor dismissing this proceeding.

The notice to quit recites Petitioner's position that Respondent is a licensee. The notice

to quit is executed by Petitioner's attorney "by authorization." Petitioner attached to the notice to quit a resolution ("the resolution") authorizing Petitioner's attorney to execute the notice to quit.[1] The resolution contains three "whereas" clauses, the second of which ("the whereas clause") reads, "WHEREAS [sic.], at present, there is a tenant at will in possession of the [subject premises] …"

Respondent makes two arguments in support of her motion. The first is that the whereas clause compels the conclusion that she is a tenant at will, not a licensee, and that a notice to quit pursuant to RPAPL §713(7) is inadequate. The second is that the whereas clause renders the notice to quit fatally ambiguous, insofar as it clouds the allegation that Respondent is a licensee as opposed to being a tenant at will.

Petitioner actually effectuated service of the notice to quit on Respondent thirty days before the notice to quit demanded that she vacate the subject premises.[2] The function of a predicate notice is twofold: to end an occupant's estate and inform him or her of the consequence associated with not vacating. Raffone v. Schreiber, 18 Misc.3d 925, 927 (Civ. Ct. N.Y. Co. 2008). The notice to quit did both. Even assuming *arguendo* that Respondent is a tenant at will or a tenant at sufferance, she received thirty days' notice of Petitioner's termination of her estate

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[1] The notice to quit includes a notation stating, "ATTACHMENT: Consent" [sic.].

[2] An affidavit of service annexed to the notice quit alleges service by personal delivery on Respondent on March 1, 2016. The notice to quit demands that Respondent quit possession on or before March 31, 2016. The affidavit of service also alleges that the process server mailed the notice to quit on March 2, 2016 for some reason, but service on Respondent was complete upon service to her by personal delivery. RPAPL §735(2)(a). Respondent does not dispute such service in her answer.

and that Petitioner would commence a holdover proceeding against her if she did not vacate. The outcome of Respondent's motion therefore turns on the use of the word "licensee" instead of "tenant at will" on the face of the notice to quit.

The distinction between a licensee and a tenant at sufferance "tend[s] to blur and involve shared concepts." Drost v. Hookey, 25 Misc.3d 210, 212 (Dist. Ct. Suffolk Co. 2009), Rich v. Poole, 24 Misc.3d 1229(A) (Dist. Ct. Suffolk Co. 2009). See Also Hok Kwan Chu v. Lee, 39 Misc.3d 147(A) (App. Term 2nd Dept. 2013), Rodriguez v. Greco, 31 Misc.3d 136(A) (App. Term 2nd Dept. 2011). In theory, it is possible that a recipient of a notice giving thirty days to move out or be sued in a summary proceeding may be confused by the distinction in the predicate notice, but insofar as the notice satisfied the basic requirements of a predicate notice, the Court does not find that such a notice is per se defective as a matter of law. Compare Park Summit Realty Corp. v. Frank, 107 Misc.2d 318, 321 (App. Term 1st Dept. 1980), *aff'd*, 84 A.D.2d 700 (1st Dept. 1981), *aff'd*, 56 N.Y.2d 1025 (1982) (a termination notice pursuant to RPL §232-a must only inform a tenant that a landlord elects to terminate the tenancy and that refusal to vacate will lead to summary proceedings), Hodge v. Gaither, 1 Misc.3d 902(A) (Civ. Ct. Bronx Co. 2003), *citing* 349 East 49th Street Equities v. Vought, N.Y.L.J. May 27, 1982 at 5:4 (App. Term 1st Dept.) (a notice to quit may state alternative theories in describing the recipient as either a squatter or a licensee whose license has expired). This is a summary judgment motion, and Respondent does not aver in support that the notice to quit confused her.

Moreover, the effect of the words "tenant at will" in the whereas clause is not readily apparent. The appropriate standard for assessment of the adequacy of a predicate notice is

"reasonableness under the circumstances." Hughes v. Lenox Hill Hospital, 226 A.D.2d 4, 18 (1st Dept. 1996), *leave to appeal denied*, 90 N.Y.2d 829 (1997). The use of the word "reasonable" implies an objective standard. MHM Sponsors Co. v. Hirsch, 15 Misc.3d 641, 644 (Civ. Ct. N.Y. Co. 2007). Although the notice to quit is not a contract, the Court finds that canons of statutory construction assist in evaluating its reasonableness.

The notice to quit does not incorporate the whereas clause by reference. Attachments to contracts not incorporated by reference raise a fact issue, at best, as to whether they are part of contracts, thus precluding summary judgment. A & Z Appliances, Inc. v. Electric Burglar Alarm Co., 90 A.D.2d 802 (2nd Dept. 1982). See Also Benishai v. Benishai, 2010 N.Y. Misc. LEXIS 4332 (S. Ct. N.Y. Co. 2010). And although a statement in a "whereas" clause may be useful in interpreting an ambiguous operative clause in a contract, it cannot create any right beyond those arising from the operative terms of the document. Grand Manor Health Related Facility, Inc. v. Hamilton Equities, Inc., 65 A.D.3d 445, 447 (1st Dept. 2009). As the use of the term "tenant at will" appears in a whereas clause in a document that the notice to quit does not incorporate by reference, the Court does not find that such a usage fatally compromises the notice to quit as a matter of law, particularly given that Respondent moves to dismiss as a matter of summary judgment, which compels the Court to draw all reasonable inferences in Petitioner's favor. Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012), Gronsky v. County Of Monroe, 18 N.Y.3d 374, 381 (2011), Branham v. Loews Orpheum Cinemas, Inc., 8 N.Y.3d 931 (2007), People v. Greenberg, 95 A.D.3d 474, 484 (1st Dept. 2012), Udoh v. Inwood Gardens, Inc., 70 A.D.3d 563, 565 (1st Dept. 2010).

Accordingly, the Court denies Respondent's motion for summary judgment, without prejudice to the rights, causes of action, defenses, and/or theories of the case of either party upon a trial of this matter. The Court restores this matter to the Court's calendar for trial on September 13, 2016 at 9:30 a.m. in part C, Room 844 of the Courthouse located at 111 Centre Street, New York, New York.

This constitutes the decision and order of this Court.

Dated: New York, New York
July 18, 2016

HON. JACK STOLLER
J.H.C.