

Third Hous. Co., Inc. v Donnelly
2021 NY Slip Op 32899(U)
December 28, 2021
Civil Court of the City of New York, Queens County
Docket Number: Index No. 61751/19
Judge: Sergio Jimenez
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART D

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THIRD HOUSING COMPANY, INC,

Petitioner,

Index No. 61751/19

-against-

DECISION AND ORDER

SHAEANA DONNELLY, THERESA DONNELLY,
“JOHN” LOWE, JOHN DOE and JANE DOE,

Respondents,

-----X

Present:

Hon. Sergio Jimenez
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Petitioner’s motion to strike the defenses of Respondent “John” Lowe and Respondent-“John” Lowe (Motion Seq. 2), motion for summary based on an allegations of an inappropriate predicate notices (Motion Seq. 3), and any other relief as the court may find appropriate:

Papers	Numbered
Order to Show Cause.....	
Notice of Motion and Affidavits Annexed	<u>1 (NYSCEF 4-8)</u>
Notice of Cross Motion	<u>2 (NYSCEF 10)</u>
Answering Affirmations/Affidavits	<u>2, 3 (NYSCEF 10, 11-12)</u>
Replying Affirmations.....	<u>3, 4 (NYSCEF 11-12, 13)</u>
Exhibits	
Memorandum of law.....	

This is a holdover proceeding where Third Housing Company (petitioner) seeks possession of the premises located at 65-82 160th Street, Apartment 2F, in Flushing, New York 11365 from Sheana Donnelly, Theresa Donnelly, John Lowe, John Doe and Jane Doe (respondents). Petitioner, Respondent-Sheana Donnelly, Theresa Donnelly and GAL Nick DeMarco for “John” Lowe all appear by counsel in this proceeding. The two motions before the

court were fully briefed and argued virtually on December 22, 2021. Following argument, the court reserved decision.

Motion to Dismiss Defenses

Petitioner moves, pursuant to CPLR §3211(b), to dismiss respondent-Lowe's answer, namely the first six paragraphs as well as the affirmative defense. In order to succeed on a CPLR §3211(b) motion the movant has to show that the defenses are "without merit as a matter of law because they do not apply under the factual circumstances or that they fail to state a defense." *Shah v. Mitra*, 171 AD3d 971 (App Div 2d Dept, 2019). Petitioner argues that the defenses constitute bare legal conclusions. Respondent counters stating that there are no factual statements that could amplify the defenses because the defenses are dependent on the petition and predicate notices. Petitioner replies that they would not have a way to prepare for trial given the lack of specificity set forth in the answer.

The court agrees with respondent with regard to all of the defenses, excepting Paragraph 6 of the answer. In a situation where there is any doubt as to the availability of a defense, the appellate courts have found that the defense should not be dismissed. *Wells Fargo Bank, N.A. v Rios*, 160 AD3d 912 (App Div 2d Dept, 2018). Petitioner has to prove the propriety of the predicate notices in their case-in-chief and all of these defenses reserve the respondents' right to attack this aspect of petitioner's case. In this situation, all of the respondent's defenses, excepting Paragraph 6, are challenges to the various predicate notices. Paragraph 6 is not a defense at all, merely a restatement of the law and, as such, unnecessary. For that reason, petitioner's motion is denied excepting Paragraph 6, which is stricken.

Motion for Summary Judgment – Predicate Notice

Respondent-Lowe moves for summary judgment on the propriety of both predicate notices. In the first instance, he claims that the notice to cure does not describe incidents which could rise to the level of an evictable offense. Secondly, he argues that the notice of termination does not speak as to any post-cure period facts that would allow the respondent to know that they have not cured the situation. Petitioner opposes stating that the notices need not lay their case bare from the outset. Respondent replies by alleging that the law mandates that some facts be in the notice of termination. Neither party, despite the court's question, raised whether movant had the standing to assert these claims as against predicate notices which he may not be entitled to receive. As such, the court need not analyze this issue. A motion for summary judgment requires that there be no facts in dispute for a finding on the law. CPLR §3212.

The court agrees with petitioner that they need not lay bare their case, but notwithstanding that fact, respondent argues that the allegations do not rise to the level of evictable offenses because they are not serious enough or consistent enough. However, the standard for this type of case is not a nuisance standard, but rather a breach of substantial breach of the lease. Petitioner sets forth the allegations, with sufficient specificity, in the notice to cure to meet the low standard of substantial breach of lease. The branch of the motion seeking to dismiss based on the appropriateness of the behaviors alleged is denied.

Secondly, respondent argues that the notice of termination does not state enough facts after the expiration of the notice to cure to maintain a holdover. The court agrees with respondent, there is no factual allegation that the course of conduct complained of continued beyond the cure period. The notice of termination itself only states that the respondent "failed to comply with the Notice to Cure dated March 19, 2019, a copy is annexed hereto together with

the Affidavit of Service, which is incorporated herein.” See Notice of Termination dated April 25, 2019. The second department has stated clearly that a termination notice is defective when it fails to allege that defaults specified in the notice to cure, which were curable, had not been cured during the cure period. *31-67 Astoria Corp. v. Landaira*, 54 Misc.3d 131(A)(App Term 2d Dept, 2nd, 11th and 13th Jud Dists, 2017). Petitioner wants the court to infer that the behavior had continued after the date of the cure period. However, the court can do that no more than it can make an analogous substantive determination that moneys were paid in a nonpayment because the owner did not bring a nonpayment during the time period where money was owed.

The court also notes that petitioner’s notice to cure attempts to plead in the alternative, both that the behavior should be cured and that the behavior is an incurable nuisance. This is permitted by statute and case law. CPLR §3014; *Rockaway One Co. v. Califf*, 194 Misc.2d 191 (App Term 2d Dept, 2002). However, while this pleading alternative or hypothetical theories is clearly allowed by law, it must allow the respondent a clear directive of what to do in order to avoid litigation. In other words, notices must be “clear, unambiguous and unequivocal” *SAAB Enterprises, Inc v. Bell*, 198 A.D.2d 342 (App Div 2nd Dept., 1993); *Ellivkroy Realty Corp. v. HDP 86 Sponsor Corp.*, 162 AD2d 238 (App Div 1st Dept., 1990) . In the instant notice of termination, which incorporates the notice to cure, two successive clauses state both that the behavior must be cured and that the owner does not think the behavior is curable and may terminate the tenancy nonetheless. A reasonable tenant could interpret this as a confusing directive. This would make the notice to cure a mere formality, which the courts have not allowed. *Hew-Burg Realty v. Mocerino*, 163 Misc.2d 639 (Civ Ct Kings Co, 1994). Under a test of reasonableness under the attendant circumstances, the problems¹ with the predicate notice,

¹ The court does not consider the issue of a conditional limitation as neither party brought forth the argument and/or presented the lease for court analysis.

both as matters of law, mandate that the court grant this motion. As such, the second branch of petitioner's motion is granted. While the court, in the interest of fairness, is hesitant to dismiss this two-year old proceeding on the eve of trial due to a deficiency in the predicate notice, the delay in bringing forward this argument must be weighed against the capacity of the movant, as well as the extraordinary situation of the tragic global pandemic. Though not done lightly, in this case, the court finds the equities lay with the movant. The part of the motion seeking to disqualify the notice of termination is granted.

Conclusion

Petitioner's motion is granted in part and denied in part. The part of the motion seeking to dismiss paragraph 6 of the motion is granted as it is a restatement of the law. The motion is denied as to the rest of the paragraphs as they merely challenge aspects of petitioner's prima facie case which would have to be proven at trial and, as such, respondent will be able to attack the notice in the same way a general denial would. Respondent's cross-motion is denied in part and granted in part for the reasons set forth above. The proceeding is dismissed. The clerk is instructed to enter a judgment of dismissal in favor of the respondents This constitutes the Decision and Order of the Court.

Dated: December 28, 2021
Queens, New York


Sergio Jimenez
Judge, Housing Court

Sergio Jimenez, JHC

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