Songlin Ye v Cruz
2022 NY Slip Op 32770(U)
May 3, 2022
Civil Court of the City of New York, Queens County
Docket Number: Index No. 307359-21
Judge: Clifton A. Nembhard
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART B

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Songlin Ye,

Petitioner,

-against-

Juan Carlos Cruz, Belen Jimenez, Belen Cruz, Thomas Cruz JOHN DOE and JANE DOE,

Respondents.

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Index No. 307359-21

DECISION AND ORDER

Present:

Hon. Clifton A. Nembhard
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondents' motion to dismiss for improper predicate notice and petitioner's cross-motion for use and occupancy pendente lite and any other relief as the court may find appropriate:

Papers	**Numbered**
Order to Show Cause.....	
Notice of Motion and Affidavits Annexed	1 (NYSCEF 15)
Notice of Cross Motion	2 (NYSCEF 16)
Answering Affirmations/Affidavits	3, 4 (NYSCEF 17, 21)
Replying Affirmations.....	5 (NYSCEF 20)
Exhibits	
Memorandum of law.....	

This is a holdover proceeding where Songlin Ye (petitioner) seeks possession of the premises located at 149-27 22nd Avenue, 1st Floor, Whitestone, NY 11357 based on an alleged breach of the lease or alleged nuisance behavior that substantially infringes on the use and enjoyment of others or causes a substantial safety hazard to others. There are two motions before the court, first a motion to dismiss for an inappropriate and lack of predicate notice and a cross-motion seeking a default judgment against the non-appearing parties. This proceeding was

commenced on October 28, 2021, and first appeared on the IP part on December 2, 2021 where respondent was referred to a legal provider. The matter was sent to this resolution part for an appearance on January 6, 2022 and was subsequently adjourned to February 16, 2022 for motion practice. The instant motions were submitted, and the litigants presented their oral argument on March 22, 2022. This decision/order now resolves both motions which were fully briefed and argued before the court.

Motion to Dismiss – Failure to provide a Notice of Termination

Respondent moves for CPLR §3211 relief arguing the petition should be dismissed for failure to provide the respondent with a notice of termination as required pursuant to RPAPL §711(1) or in the alternative RPL 232-a. In the event the court finds a notice of termination was not required, the respondent argues the petition should be dismissed as the notice to cure is defective due to its vagueness, and in the alternative deeming the proposed answer served Nunc Pro Tunc.

Petitioner procedurally contests the motion claiming CPLR 3211(a) requires the motion to be brought before the date on which the movant is required to serve its answer or other responsive pleadings. CPLR 3211(e) states that "at any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted…A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted;"

Under RPAPL § 743 an answer is due when the petition is to be heard. The statue has routinely been interpreted by the courts to mean that the time to file an answer is extended by

adjournment unless "arrangements to the contrary" have been made. *Aviles v Santana* 56 Misc.3d 1206(A)(Civ Ct. Bronx Co 2017). In this case the matter has been adjourned for the purposes of referring the respondent to obtain legal counsel, and for motion practice. This case has not been sent out for trial, nor has the court ordered a set date for an answer to be filed. Therefore, the court will render a decision on the motion to dismiss.

In a motion to dismiss the burden would fall on the moving party, the non-moving party is given all possible positive inferences. See CPLR §3211; *Leon v. Martinez*, 84 NY2d 83 (1984). The moving party bears the prima facie burden of proof to obtain the relief sought. *Matter of Stop & Shop Cos. Inc. v. Assessor of the City of New Rochelle*, 32 Misc.3d 496 (Sup. Ct. Westchester Co, 2011).

In this matter it is not contested that petitioner did not serve the respondent with a notice of termination. In fact, petitioner acknowledges a notice of termination wasn't served but instead argues one was not required by the terms of the expired lease.

The parties entered a landlord tenant relationship by way of lease, with the last lease dated July 15, 2019, said to have expired on July 14, 2020. Upon the lease expiration the respondent remained in possession and continued to pay rent on a monthly basis.

Petitioner argues that the notice to cure is sufficient because it informs the respondent that no further termination notice will be required. The notice to cure states, "you are required to stop and cure the nuisance on or before the expiration of TEN (10) days from the date of service of this notice pursuant to Paragraph 20 of the lease. No further three-day Termination Notice will be provided by the Landlord, and you must surrender possession of the Premises to the Landlord, if you fail to cure in the given period."

Paragraph 20 of the lease lists four (4) instances in which the landlord may find the tenant in default and describes the landlord's available remedies. Paragraph 20 (a)(iii) allows the landlord to serve a 5-day written notice to correct improper conduct by tenant or other occupant of the apartment. Paragraph 20 (b) states that if the tenant fails to correct any of the alleged defaults from Paragraph 20(a) the landlord may cancel the lease by giving a written three (3) day notice stating the date the term will end.

RPAPL 711(1) allows the commencement of a holdover only after the expiration of the tenancy. "In a holdover proceeding, the petition must demonstrate that the tenancy expired prior to the commencement of the proceeding. Where a proceeding is based on a breach of a lease, the petition must allege that a notice of termination was served." *Parkview Apts. Corp v. Pryce* 95 N.Y.S.3d (App Term 2d Dept, 2019). In *Parkview* the court dismissed the petition where the petitioner, a cooperative corporation, only served a 10-day notice to cure alleging objectional conduct and did not allege to serve a notice of termination nor attached a notice of termination to the petition.

When a notice to cure is served based on curable allegations, a notice of termination is required to apprise the respondent that the objectionable conduct was not cured and that their tenancy will be terminated on a date certain. In *31-67 Astoria Corp. v. Landaira* 54 Misc. 3d 131(A) (App Term 2d Dept, 2017) the court decided the termination notice was defective because it failed to allege that the defaults specified in the notice to cure, which were curable, had not been cured during the cure period. By not serving a notice of termination the petitioner failed to put the respondent on notice that the time to cure has passed and provide details on how the respondent failed to cure the alleged nuisance behavior.

Petitioner further contends that a notice of termination was not required because Paragraph 20(b) of the lease states that the landlord "may" cancel the lease by a written three (3) day notice. Petitioner asserts the word "may" gives the landlord the option not to serve a notice of termination. The court does not agree with that interpretation of the lease. The sentence clearly states the landlord may "cancel the lease" and sets forth a condition of serving a three (3) day notice if electing to do so. The lease permits the petitioner the right to exercise their option of terminating the lease based on any of the enumerated circumstances. However, by doing so they are required to serve a written 3-day notice of termination.

Petitioner claims respondents do not have the option to stay on the premises as the alleged nuisance and illegal activities fall under the definition of AO/340/2020. Administrative Order 340/2020 directs the court not to stay proceedings where a petitioner has alleged that a tenant is persistently and unreasonably engaging in behavior that substantially infringes upon the use and enjoyment of other tenants, or occupants, or causes a substantial safety hazard to other. This portion of the directive simply allows for the case to go forward on its normal course. Although an ERAP application was filed on this matter, the court has not stayed the proceeding and has allowed it to continue its course.

Finally, citing *751 Union St. LLC v. Charles*, 56 Misc. 3d 141(A) (App. Term, 2 Dept) petitioner argues that a notice of termination is not required as the alleged behavior is illegal activity that voids the lease. In *751 Union St. LLC* the court stated that in general a landlord is not required to serve a notice to cure if the alleged conduct constitutes nuisance. Citing the Rent Stabilization Code §2524.3. The court goes on to say that if the terms of the lease impose more stringent requirements than that of the rent stabilization code then those additional lease requirements must be complied with. This is not a rent stabilized building therefore the court

cannot apply the Rent Stabilization Code. Here the lease does impose its own requirements, the service of a five (5) day notice to cure the default, and in the event the default was not cured a three (3) day notice stating the date the term will end.

It is worth noting that although petitioner has brought this action as a breach of lease, the lease expired more than one year before the commencement of this action. It is undisputed that the respondent continued to pay rent for a period after the expiration of the lease and therefore created a month-to-month tenancy. Under the *Housing Stability and Tenant Protection Act of 2019*, (HSTPA) and RPL 232-a a landlord is required to serve a notice of termination of at least 30, 60, or 90 depending on the length of the tenancy to terminate a month-to-month tenancy. Petitioner has also failed to comply with this requirement.

Conclusion and Petitioner's Cross-motion

Based on the foregoing, Respondent's motion is granted for the reasons set forth above. Petitioner's motion is denied as moot. The clerk is instructed to grant a judgment of dismissal in favor of the respondent. This constitutes the Decision and Order of the Court.

Dated: May 3, 2022
Queens, New York

SO ORDERED

HON. CLIFTON A. NEMBHARD

Clifton A. Nembhard, JHC

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