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

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1240 SHEVA RLTY ASSOC.,LLC,

: L&T Index No.

Petitioner, 300363/21

:

-against- Motion Seq. No. 1

:

JAIME SERRANO,

:

Respondent,

:

-and-

:

"JOHN DOE;" "JANE DOE" **DECISION/ORDER**

:

Respondents-Undertenants.

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Present:

Hon. HOWARD BAUM
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the order to show cause by Respondent Jaime Serrano:

Papers	**Numbered**
Notice of Motion; Memorandum of Law in Support of Motion; Affirmation in Support; and Exhibits A through M …….…..	NYSCEF Doc # 11- 14
Affirmation in Opposition; and Exhibits 1 and 2 ……..…...	NYSCEF Doc # 15 - 17
Memorandum of Law in Further Support of Motion ……..…...	NYSCEF Doc # 18

After oral argument and upon the foregoing cited papers, the decision and order on this motion is as follows:

1240 Sheva Rlty Assoc.,LLC ("Petitioner") commenced this holdover proceeding against Jaime Serrano ("Respondent")[1] in mid-February 2021, seeking his eviction from the rent

[1] "John Doe" and "Jane Doe" are also respondents named in the petition but no respondent other than Jaime Serrano has appeared in this proceeding.

stabilized apartment that is the subject of this proceeding. Within a "7 Day Notice of Termination – Nuisance," (hereinafter "notice of termination") that serves as the predicate notice to this proceeding and is incorporated into the petition, Petitioner alleges that Respondent should be evicted, pursuant to RSC § 2524.3(b), because he has allegedly created a nuisance at the subject premises; pursuant to RSC § 2524.3(d), because he is using the premises for immoral or illegal purposes; and pursuant to RPAPL § 711(5) and RPAPL § 715(1), based on his alleged use of the premises for illegal purposes.

The notice of termination recites the factual allegations that are the basis of this proceeding listing various criminal offenses with which Respondent was charged, and various items found in the apartment upon a search by the New York Police Department ("NYPD"). Also, annexed to the petition were various other documents including a request by the Bronx County Office of the District Attorney that Petitioner commence an eviction proceeding against Respondent, the search of the apartment by the NYPD, and the criminal charges filed against Respondent (NYSCEF Doc. No. 1, pg. 7 – 73).

Petitioner has not contested Respondent's assertion that all the criminal charges against him have been resolved, with four of the charges dismissed and three of the charges settled with Respondent pleading guilty to a disorderly conduct violation. Also, Petitioner does not dispute that the records related to the criminal charges that were filed against Respondent have been sealed pursuant to either CPL § 160.50 or CPL § 160.55.

In this motion, Respondent seeks an order dismissing this proceeding, pursuant to CPLR 3211(a)(7), for Petitioner's failure to state a cause of action or, in the alternative, striking any reference to sealed records contained in the pleadings and record and precluding Petitioner from

introducing any evidence based on sealed records. Additionally, if the proceeding is not dismissed, Respondent seeks an order, pursuant to CPLR 3012, granting leave to file a late answer. Petitioner opposes all the relief sought by Respondent.

Discussion

Dismissal for Failure to State a Cause of Action

In reviewing a motion, pursuant to CPLR 3211(a)(7), a determination must be made whether the factual allegations within the petition state a legally cognizable cause of action. *Leon v. Martinez*, 84 NY2d 83 (1994); *Clarke v. Laidlaw Transit, Inc.*, 125 AD3d 920 (2d Dept 2015); *Fishberger v. Voss*, 51 AD3d 627 (2d Dept 2008). In performing this review, the court must afford the petition a liberal construction, accept all facts alleged in the petition as true and accord the petitioner the benefit of every possible inference. *Leon v. Martinez*, 84 NY2d 83 (1994); *Alden Global Value Recovery Master Fund, L.P. v. Keybank National Association*, 159 AD3d 618 (1st Dept 2018); *Nationwide Insulation Sales, Inc. v. Nova Casualty Co.*, 74 AD3d 1297 (2d Dept 2010). The sufficiency of a petition is measured against what is required of pleadings in a particular case. *East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.*, 66 A.D.3d 122 (2nd Dept 2009).

The standard for determining the sufficiency of a predicate notice is its "reasonableness in view of the attendant circumstances." *Oxford Towers Co., LLC v. Leites*, 41 AD3d 144 (1st Dept 2007); *323 3rd St. LLC v. Ortiz*, 13 Misc 3d 141(A) (App Term 2d & 11th Jud Dist 2006); *D.K. Property Inc. v. Mekong Restaurant Corp.*, 187 Misc 2d 610 (App Term 1st Dept 2001), quoting *Hughes v. Lenox Hill Hospital*, 226 AD2d 4 (1st Dept 1996), *lv denied* 90 NY2d 829 (1997). A predicate notice must provide the facts forming the basis of the proceeding against

which a tenant will have to present a defense. *Rascoff/Zysblat Organization, Inc. v. Directors Guild of America*, 297 AD2d 241 (1st Dept 2002); *Jewish Theological Seminary of America v. Fitzer*, 258 AD2d 337 (1st Dept 1999).

Respondent asserts this proceeding should be dismissed, pursuant to CPLR 3211(a)(7), for Petitioner's alleged failure to state a cause of action, on various grounds: that the pleadings, as filed, fail to state a cause of action; that, upon removal of any reference to the criminal charges filed against Respondent, that have been sealed, pursuant to CPL §§ 160.50, 160.55, from the notice of termination, Petitioner has failed to state a cause of action; and that Petitioner has failed to state a cause of action because it did not serve a notice to cure as is allegedly required by the lease agreement between the parties. Further, if the proceeding is not dismissed in its entirety, Respondent asserts the claim that Respondent has created a nuisance should be dismissed for failure to state a cause of action.

Respondent's motion is denied to the extent dismissal of the proceeding is sought based on the assertion that the "pleadings themselves, standing alone, fail to state a cause of action for a drug holdover."[2] The allegations in the notice of termination that Respondent was found by the police in his bedroom with a large quantity of small plastic bags, a stamp that could be used for labeling, three scales, two grinders, a bottle labeled "lactose," and a drug, Tramadol, and that in the kitchen another container was found containing a large number of glassine envelopes, sufficiently create an inference that the apartment was used on an ongoing basis to facilitate the

[2] It is noted that in asserting this ground for dismissal Respondent cites to Petitioner's failure to "state a cause of action for a drug holdover, pursuant to RPAPL § 711 and § 715" but makes no mention of the ground for eviction, pursuant to RSC § 2524.3(d), stated in the notice of termination.

manufacture and/or preparation of illegal drugs and that Respondent knew or should have known of the illegal drug activity in the apartment thereby stating a cause of action for a "drug holdover" and/or a proceeding pursuant to RSC § 2524.3(d). *Second Farms Neighborhood HDFC v. Lessington*, 31 Misc 3d 144(A)(App Term 1st Dept 2011) citing *855-79 LLC v. Salas*, 40 AD3d 553 (1st Dept 2007). Under these circumstances, allegations of multiple arrests at the apartment are not required for stating a cause of action for the illegal use of the apartment.

Further, Respondent's argument that Petitioner has failed to state a cause of action because the factual allegations in the pleadings are based on records that have been sealed, pursuant to CPL §§ 160.50, 160.55, is misplaced. It would be inappropriate to dismiss this summary holdover proceeding for failure to state a cause of action for this reason considering the petition, as filed, states a cause of action. Petitioner did not include anything inappropriate in the petition at the time it was filed in that the petition was filed months prior to the sealing of the records related to Respondent's arrest and prosecution for the alleged activities that are the basis of this proceeding. *People v. Bundy*, 60 Misc 3d 518 (Justice Ct Monroe County 2018); *M.S. Hous. Assoc. v. Williams*, 13 Misc 3d 1233(A) (Civ Ct NY County 2006).

The sealing of the documents in the criminal case file serves to place limitations on the evidence that Petitioner may present at trial to prove the allegations of Respondent's illegal use of the apartment. It does not retroactively render a proper petition defective. "The sealing of a criminal case will not immunize a defendant of all…consequences of the charges, and [a tribunal] is permitted to consider evidence of the facts leading to those charges when they are independent of the sealed records." *Cochran v. Olatoye*, 183 AD3d 426 (1st Dept 2020) quoting

Matter of Rosa v New York City Hous. Auth., Straus Houses, 160 AD3d 499 (1st Dept 2018); *Matter of 53rd St. Rest. Corp. v. New York State Liq. Auth.*, 220 AD2d 588 (1st Dept 1995).

The motion is also denied to the extent it seeks the dismissal of this proceeding, based on the failure to state a cause of action, because Petitioner did not serve Respondent with a notice to cure prior to the commencement of this proceeding. Citing to a paragraph in the "House Rules and Regulations" annexed to the lease that states, "[e]ach [t]enant guarantees…[n]o illegal drugs will be sold, packaged or stored anywhere in the apartment," Respondent argues lease paragraph 17, that states, in pertinent part, "In the event Tenant fails to comply with any obligations of his lease or fails to comply with rules or regulations in this lease after 10 days notice to cure such failure or creates a nuisance or engages in conduct detrimental to the safety of others or intentionally damages the property, or disturbs other tenants, then the Landlord may terminate the tenancy and lease on seven days written notice to the Tenant," requires Petitioner to have served Respondent with a notice to cure prior to commencing this proceeding.

Respondent's argument is unpersuasive. Paragraph 17 of the lease merely states the types of notices required to be served, tracking the requirements of the rent stabilization code, in various types of holdover eviction proceedings. Without more specific language in the lease mandating that Petitioner provide Respondent with a notice to cure, and an opportunity to cure, the type of activity alleged in this petition (*see, e.g., 221 E. 10th St., Inc. v. Walker*, 1992 NY Misc LEXIS 717 [Civ Ct NY County]) there is no basis for this court to hold the standard form lease between the parties "manifests the parties' agreement that they have adopted a notice requirement different from the otherwise controlling statutory procedure" for his type of proceeding. *Four Star Holding Co. v. Alex Furs*, 153 Misc 2d 447 (App Term 1st Dept 1992).

Respondent has demonstrated that Petitioner has failed to state a nuisance cause of action pursuant to RSC §2524.3(b). RSC §2524.3(b) states, in pertinent part, that a rent stabilized tenant may be evicted where,

> The tenant is committing or permitting a nuisance in such housing accommodation or the building containing such housing accommodation; or is maliciously, or by reason of gross negligence, substantially damaging the housing accommodation; or the tenant engages in a persistent and continuing course of conduct evidencing an unwarrantable, unreasonable or unlawful use of the property to the annoyance, inconvenience, discomfort or damage of others, the primary purpose of which is intended to harass the owner or other tenants or occupants of the same or an adjacent building or structure by interfering substantially with their comfort or safety…

To constitute a nuisance Respondent's use of, or conduct around, the premises must interfere with a person's interest in the and enjoyment of the property encompassing the "pleasure and comfort derived from the occupancy of the land and the freedom from annoyance." *Domen Holding Co. v. Aranovich*, 1 NY3d 117 (2003); *Priceman Family, LLC v. Kerrigan*, 70 Misc 3d 131(A) (App Term 2d, 11th & 13th Jud Dist 2020). The allegations made in the notice of termination make no allegations of Respondent's interference with any other person's use of the premises. There are no allegations of drug sales in the building or any impact that the alleged manufacture and/or packaging of illegal drugs had on other tenants in the building. Based on the factual allegations in the notice of termination, it is inappropriate to infer that the alleged conduct constitutes a nuisance.

Petitioner's assertion that the notice of termination details "excessive noise emanating from the apartment" is not accurate. There is no such allegation in the notice. The notice states the relevant language of RSC §2524.3(b) but does not allege facts that state a nuisance cause of action.

For all these reasons, it is ordered that Respondent's motion to dismiss this proceeding, pursuant to CPLR 3211(a)(7), for Petitioner's asserted failure to state a cause of action, is granted solely to the extent the nuisance cause of action alleged in the petition is dismissed.

Striking of References to Sealed Records in Pleadings and Precluding Evidence Based on Sealed Records

As alternative relief, if the proceeding is not dismissed, Respondent seeks an order striking all pleadings based on records related to the alleged criminal conduct by Respondent at the apartment that have been sealed, pursuant to CPL §§ 160.50 and 160.55. Additionally, Respondent seeks an order precluding the introduction of any evidence based on any such sealed records.

Respondent has provided documentation demonstrating the records related to the criminal offenses for which he was arrested and prosecuted, related to the activities that are the subject of this proceeding, have been sealed. As stated above, Petitioner does not dispute the records have been sealed.

Based on the sealing of these records, Respondent seeks the striking of all the documentation annexed to the petition, as well as the text of the notice of termination, related to Respondent's arrest and prosecution. In opposition, Petitioner asserts that "while the Criminal Court [records] may not be used unless unsealed by motion, Petitioner should still be afforded an opportunity to present evidence in support of the statements made in the Notice of Termination incorporated into the petition."

CPLR 3024 permits a party to "move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." By this standard, Respondent has not demonstrated the

documentation annexed to the petition or portions of the notice of termination should be struck. Having been filed with the court prior to the sealing of any records from the criminal charges against Respondent, they were neither scandalous nor prejudicial when filed with the court. *People v. Bundy*, 60 Misc 3d 518 (Justice Ct Monroe County 2018). Moreover, they are relevant to the proceeding. *Pisula v. Catholic Archdiocese of New York*, 201 AD3d 88 (2d Dept 2021); *New York City Health and Hospitals Corp. v. St. Barnabas Community Health Plan*, 22 AD3d 391 (1st Dept 2005).

Nevertheless, by operation of CPL §§ 160.50 and 160.55, the documentation annexed to the petition, to the extent they consist of copies of official records and papers relating to Respondent's arrest or prosecution for the activities at the premises that are the subject of this proceeding are sealed. CPL § 160.50(1)(c) mandates, in pertinent part, that upon the sealing of records pursuant to the statute, "all official records and papers…relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, *any court*, police agency, or prosecutor's office shall be sealed…" (Emphasis added.) Therefore, it is ordered that Respondent's motion is granted to the extent that the records included as pages 7 – 73 within NYSCEF Doc. No. 1 are sealed. To effectuate the sealing of those documents in this proceeding's NYSCEF file, Petitioner is directed to file another copy of NYSCEF Doc. No. 1 (the petition), removing pages 7 – 73 in accordance with this Decision/Order, and the clerk is directed to seal what is now NYSCEF Doc. No. 1.[3]

[3] The court is unable to partially seal selected pages within what has been filed in NYSCEF as Document No. 1.

Further, Respondent's motion is granted to the extent Petitioner may not offer any records that have been sealed, or evidence based upon a review of these records, at trial. *Matter of Skyline Inn Corp. v. New York Liq, Auth.*, 44 NY 2d 695 (1978); *Property Clerk of N.Y. City Police Dept. v. Taylor*, 237 AD2d 119 (1st Dept 1997); *Trinity Preservation, L.P. v. Roman*, 46 Misc 3d 140(A) (App Term 1st Dept 2015).

However, the text of the notice of termination, to the extent it states the factual allegations that make up the basis for this proceeding, is not sealed in the manner requested by Respondent. The notice of termination is not an official record or paper related to Respondent's arrest or prosecution and was drafted and issued prior to the sealing of the case file (*see, People v. Bundy*, 60 Misc 3d 518 (Justice Ct Monroe County 2018). The type of sealing of the text of the notice of termination requested by Respondent, would result in the inappropriate barring of Petitioner from going forward with this proceeding, on any cause of action that has not been dismissed, by presenting evidence of the facts leading to the allegations made in the notice of termination independent of the sealed records. *Cochran v. Olatoye*, 183 AD3d 426 (1st Dept 2020) quoting *Matter of Rosa v New York City Hous. Auth., Straus Houses*, 160 AD3d 499 (1st Dept 2018); *Matter of 53rd St. Rest. Corp. v. New York State Liq. Auth.*, 220 AD2d 588 (1st Dept 1995).

Nevertheless, it cannot be ignored that the notice of termination serves as a synopsis of the records related to Respondent's arrest and/or prosecution that have now been sealed, and Petitioner has not disputed that the factual allegations in the notice of termination are based on those records. At this juncture, long after the sealing of the records, to allow the use of the notice of termination for any purpose beyond merely serving as a statement of allegations that are the

basis of this proceeding would allow Petitioner to negate the strict mandate of CPL §§ 160.50 and 160.55 and is inappropriate.

Accordingly, so as not undermine the trial court's discretion in determining what evidence should be admitted into the trial record, it is left to the trial court to determine, in whatever manner it deems appropriate, what evidence that is presented at trial should be excluded, pursuant to CPL §§ 160.50 and 160.55, and in accordance with the established caselaw. *See, Matter of Skyline Inn Corp. v. New York Liq, Auth.*, 44 NY 2d 695 (1978); *Property Clerk of N.Y. City Police Dept. v. Taylor*, 237 AD2d 119 (1st Dept 1997); *Trinity Preservation, L.P. v. Roman*, 46 Misc 3d 140(A) (App Term 1st Dept 2015).

Leave to File a Late Answer

Respondent has moved for leave to interpose an answer, pursuant to CPLR 3012(d), in the event this proceeding is not dismissed. In opposition, Petitioner has argued that Respondent's time to answer has long passed[4] and that allowing Respondent to file an answer would cause severe prejudice.

Under the factual circumstances of this proceeding Respondent does not require leave of court to interpose her answer. When a summary holdover proceeding has been adjourned a respondent's time to answer is extended to the next court date. *City of New York v. Candelario*, 156 Misc 2d 330 (App Term 2d & 11th Jud Dist 1993), *rev'd, in part, on other grounds* 223 AD2d 617 (2d Dept 1996); *Rochdale Village Inc. v. Harris*, 172 Misc 2d 758 (Civ Ct Queens County 1997); *Gluck v. Wiroslaw*, 113 Misc 2d 499 (Civ Ct Kings County 1982). This

[4] Petitioner's opposition inaccurately asserts an inquest has been held in this proceeding and a judgment has been issued.

proceeding was adjourned for the filing of this motion and the proposed answer is included in the papers filed with the motion.

In any case, even if a motion is required, it is granted. Respondent was unrepresented by counsel until a short time prior to the filing of this motion. Now that he has retained counsel he should be permitted to interpose any defenses and counterclaims he may have, particularly where, as here, Petitioner has not demonstrated it will be prejudiced. *Harlem Restoration Project v. Alexander*, 1995 NY Misc LEXIS 783 (Civ Ct NY County); *Evens v. Charap*, NYLJ Dec. 18, 1991 at 21, c 1 (Civ Ct NY County).

Accordingly, it is ordered that the "Verified Answer" annexed to Respondent's motion as Exhibit L is deemed interposed and served upon Petitioner, with the third, fourth, fifth, and sixth defenses raised in the answer stricken based on this Decision/Order.

This proceeding is placed on the court's calendar and the parties are to appear "in-person" in Part G (Room 560), at the courthouse located at 1118 Grand Concourse, Bronx, New York, 10456, on April 4, 2023, at 10:00 a.m., for a conference for the settlement of this proceeding or the transfer of this proceeding for a trial.

This constitutes the decision and order of the court.

Dated: Bronx, New York
March 14, 2023

APPROVED
HBAUM , 3/14/2023, 11:24:06 AM

HON. HOWARD BAUM, J.H.C.