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

RIVERWALK 8, LLC

Petitioner,

-against-

SHAMEEKA SMITH; SABION ALLEN; JOHN DOE; JANE DOE

Respondents.

Index No. 313117/22

DECISION/ORDER

Motion Sequence No. 1

HON KAREN MAY BACDAYAN, JHC

Rose and Rose (*James Elwood McKeon Bayley, Esq.*), for the petitioner
Mobilization for Justice (*Mary Kathryn Orsini, Esq.*), for respondent Shameeka Smith

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by NYSCEF Doc No: 8-19.

PROCEDURAL HISTORY AND BACKGROUND

This is a holdover proceeding commenced against Shameeka Smith ("respondent"), Sabion Allen ("Allen"), and two unnamed respondents, based upon respondent's failure to cure a breach of her lease agreement and "Affordable Housing Program regulations by allowing an unauthorized individual to occupy the premises . . . ." (NYSCEF Doc No. 1, petition ¶ 5a.) More precisely, petitioner alleges that respondent allowed Allen, her boyfriend, to reside with her in the subject premises without receiving prior authorization or recertifying her household information, as required under the regulatory regime and agreements governing occupancy of the subject building. (*Id.* ¶¶ 10b, 10e – 10n.) The notice to cure, dated April 28, 2022, alleges petitioner "first learned that [Allen] was residing in the [subject] [p]remises in or about the beginning of March 2022. Since that time, [Allen] has been continuously observed in the [subject] [p]remises and the [b]uilding, both in your company and alone, under circumstances indicating [Allen] is residing in the [subject] [p]remises." (NYSCEF Doc No. 12, respondent's exhibit A, notice to cure.) The notice to cure states respondent did not request prior approval from petitioner for Allen to reside in the subject premises, and that respondent did not contact a senior compliance manager after she received a letter from the manager to discuss Allen's

occupancy . (*Id.*) Respondent was directed to "remove [Allen] (and any other individuals who are residing in the [p]remises without authorization) from the [p]remises and the [b]uilding[]" by May 17, 2022. (*Id.*)

Petitioner subsequently served a notice of termination by which petitioner alleged that building staff had "regularly seen an individual leaving the [b]uilding in the morning hours having taken the elevator down from the 16th floor, the floor on which the [p]remises is located." (NYSCEF Doc No. 13, respondent's exhibit B, termination notice.) The notice further states that building staff observed respondent and the unnamed individual leave the subject building together between 10:00 a.m. and 11:00 a.m. on one occasion; that another tenant complained to the building staff that respondent and her "boyfriend" were fighting; that "Public Safety Department" officers went to the subject premises on July 13, 2022, due to "the history of domestic disputes in the [subject] [p]remises" and advised building staff that respondent refused to open the door; and that building staff saw the unnamed individual leave the subject building the following day at an unspecified time. Nowhere in the notice of termination does petitioner state that Allen is the individual in question. The notice of termination directed respondent to vacate and surrender possession of the subject premises by August 23, 2022. (*Id.*)

Petitioner commenced the instant proceeding in October 2022. (NYSCEF Doc No. 1, petition; NYSCEF Doc No. 4, affidavit of service.)[1] One day prior to the initial appearance, respondent's counsel filed a notice of appearance. (NYSCEF Doc No. 5, notice of appearance.) On the first appearance, the court issued an order adjourning the proceeding for respondent to file an answer and for the parties to comply with a briefing schedule on respondent's anticipated motion to dismiss. (NYSCEF Doc No. 6, November 10, 2022 adjournment and briefing schedule order.) Respondent filed her answer on November 28, 2022, raising seven affirmative defenses (general denial; failure to provide required time to cure; notice to cure is vague; notice of termination is vague; failure to plead regulatory status; failure to state a cause of action; and lack of entitlement to use and occupancy under Multiple Dwelling Law § 301) and two counterclaims (harassment and attorneys' fees). (NYSCEF Doc No. 7, verified answer.)

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[1] The court takes judicial notice that prior to commencing this proceeding, petitioner commenced three (3) proceedings against respondent in 2022: (a) a nonpayment proceeding in April 2022 under Index Number LT-305056-22/NY; (b) a holdover based upon breach of respondent's lease for harboring dogs in May 2022 under Index Number LT-307399-22/NY; and (c) a nuisance holdover proceeding in June 2022 under Index Number LT-308440-22/NY.

Now before the court is respondent's motion to dismiss the proceeding pursuant to CPLR 3211 [a] [1] and 3211 [a] [7], or in the alternative, to grant discovery pursuant to CPLR 408. (NYSCEF Doc No. 8, notice of motion.) Respondent seeks dismissal on four bases: both the notice to cure and the notice of termination are impermissibly vague under the Rent Stabilization Code ("RSC") because they fail to assert sufficient facts to place respondent on notice as to what conduct must be cured or to assert a defense to this proceeding; the vague and conclusory content of the predicate notices render the petition dismissible for failure to state a cause of action, and the petition fails to plead the regulatory status of the subject premises. (NYSCEF Doc No. 9, respondent's attorney's affirmation ¶ 13.) As is relevant for the purposes of the instant motion, respondent argues that the notice to cure contains "vague and cryptic observations made by an unknown source" of an "alleged[ly] unauthorized occupant" and lacks any "further information or detail . . . [thus] mak[ing] it entirely unclear what conduct [respondent] must cure." (NYSCEF Doc No. 11, respondent's attorney's memorandum of law at 6.) Respondent further argues the notice of termination is vague and conclusory because it lacks details beyond four dates on which petitioner's agents observed the "alleged[ly] unauthorized occupant . . . during a five-day span" to support petitioner's conclusion that the occupant is residing in the subject premises with proper authorization. (*Id.* at 7.)

In opposition, petitioner contends respondent has mischaracterized the predicate notices, from which she has selectively quoted to portray the notices as vague and conclusory. Petitioner argues the notice to cure's "clear language" advised respondent she can cure the breach by "permanently remov[ing] the [u]nauthorized [o]ccupant (and any other individuals who are residing in the [p]remises without authorization) from the [p]remises and the [b]uilding." (NYSCEF Doc No. 15, petitioner's attorney's affirmation ¶ 10.) Petitioner argues the notice of termination details specific dates and instances where the "unauthorized occupant was seen with the [r]espondent in the [b]uilding and believed, on good evidence, that he was in the [p]remises." (*Id.* ¶ 12.)

In reply, respondent notes that petitioner failed to provide any specific facts in either the notice to cure or the notice of termination to support the basis for this holdover proceeding. Respondent argues that "mere sightings of an individual visiting the [s]ubject [b]uilding does not warrant the conclusion that the individual resides there[,]" and that "additional 'sightings' in a

five-day period" does not "equate[] to [Allen] residing in the [s]ubject [p]remises." (NYSCEF Doc No. 17, respondent's attorney's memorandum of law in reply at 3-4.)

DISCUSSION

On a motion to dismiss for failure to state a cause of action, the court must accept as true all of the factual allegations in the petition. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) "The sole criterion is whether the pleading states a cause of action, and if from its four comers factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." (*Guggenheimer v Ginzburg*,43 NY2d 268, 275 [1977].) "Whether a [petitioner] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBCI, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].)

Predicate notices to recover possession of rent-stabilized apartments must "state the ground" for termination of the tenancy, provide "the facts necessary to establish the existence of such ground, and the date when the tenant is required to surrender possession." (RSC 2524.2.) A landlord may serve a termination notice based on a tenant's violation of a substantial obligation of their tenancy after providing the tenant with a written ten (10) day notice to cure the alleged violation. (*Id.* 2524.3 [a].) Predicate notices may be incorporated by reference to a petition, and as such, are subject to examination of all four corners of a petition on a motion to dismiss for failure to state a cause of action. (CPLR 3014 ["A copy of any writing which is attached to a pleading is a part thereof for all purposes."]; *Amin Mgt LLC v Martinez*, 55 Misc 3d 144 [A] [App Term, 1st Dept 2017]; *350 Cabrini Owners Corp. v Merkel*, 69 Misc 3d 145 [A] [App Term, 1st Dept 2020].) The purpose for requiring predicate notices to state the "facts necessary to establish the existence" of the grounds is to "ensure[] that a tenant will be informed of the factual and legal claims that he or she will have to meet and enables the tenant to interpose whatever defenses are available." (*Bellstell 140 East 56th Street, LLC v Layton*, 180 Misc 2d 25, 27 [Civ Ct, New York County 1999], citing *MSG Pomp Corp. v Jane Doe*, 185 AD2d 798, 800 [1st Dept. 1992].)

"[T]he appropriate standards for assessment of the adequacy of notice is one of reasonableness in view of all attendant circumstances." (*Hughes v Lenox Hill Hosp.*, 226 AD2d 4, 17 [1st Dept 1996].) "A predicate notice in a holdover summary proceeding need not lay bare a landlord's trial proof, and will be upheld in the face of a jurisdictional challenge where. . . the notice is as a whole sufficient adequately to advise . . . tenant and to permit it to frame a

defense." (*McGoldrick v DeCruz*, 195 Misc 2d 414, 2003 NY Slip Op 23498 [App Term, 1st Dept. 2003], quoting *Rascoff/Zsyblat Org., Inc. v Directors Guild of AM., Inc.*, 297 AD2d 241, 242 [1st Dept 2002] [internal quotation marks omitted].) Conversely, a predicate notice that is not sufficiently particularized and is found to be "too generic and conclusory" does not satisfy the requirements for notices under the Rent Stabilization Code and will lead to dismissal of the proceeding. (See *London Terrace Gardens, L.P. v Heller*, 40 Misc 3d 135[A], 2009 NY Slip Op 52858[U] [App Term, 1st Dept 2009]; *157 Broadway Assoc., LLC v Berroa*, 62 Misc 3d 136 [A] [App Term, 1st Dept 2018] [dismissing nuisance proceeding where predicate notice did not contain any facts to support "broad, unparticularized allegations [that] were too generic and conclusory" to support nuisance holdover "with sufficient detail to have allowed tenant to prepare a defense . . . .] [internal citations omitted]; *128 Second Realty LLC v Dobrowolski*, 51 Misc 3d 147 [A] [App Term 1st Dept 2016] [dismissing holdover proceeding due to "absence of any specific factual allegations" to support landlord's conclusion that respondent used subject apartment as "unlawful hotel" or underutilized subject apartment]; *Chinatown Apt Inc. v Chu Cho Lam*, 51 NY2d 786 [1980].) Indeed, allowing such notices would "undermine" the "salutary purpose" of the Rent Stabilization Code "to discourage baseless eviction claims founded upon speculation and surmise, rather than concrete facts." (*Heller*, 40 Misc 3d 135[A], at *1.)

Here, the notice to cure does not contain any specific facts to support petitioner's claim that Allen is residing in the subject premises; petitioner's entire argument that respondent breached her lease by failing to seek prior authorization from petitioner to add Allen as a household member and to certify his income is based upon this conclusory allegation that Allen is a member of the household. (*See Dobrowolski*, 51 Misc 3d at *1.) Petitioner only claims that it first discovered Allen allegedly resided in the subject premises in or about the beginning of March 2022" and that Allen had "been continuously observed in the [subject] [p]remises and the [b]uilding, both in [respondent's] company and alone, under circumstances indicating [Allen] is residing in the [subject] [p]remises." (NYSCEF Doc No. 12, respondent's exhibit A, notice to cure.) Petitioner does not specific any "circumstances" that led to conclude Allen is residing in the subject premises, nor does petitioner's letter to respondent, referenced in the notice to cure and attached to the petition, contain any factual allegations to support petitioner's vague conclusion that respondent allowed Allen to reside in the subject premises. The notice to cure is also ambiguous in that it solely refers to Allen as the unauthorized occupant, but directs

respondent to remove Allen "and any other individuals who are residing in the [p]remises without authorization[.]" The notice to cure therefore does not put respondent on clear notice of what actions she must take in order to avoid petitioner's termination of her tenancy.

Curiously, the termination notice does not name Allen in any of its purported allegations as the unauthorized individual respondent residing in the subject premises. The termination notice does not provide any dates as to when the unnamed individual had taken the elevator from respondent's floor, at what "morning hours" the individual was observed leaving the building, or how petitioner drew the conclusion that the unnamed individual resides in the apartment based on witnessing said individual leave the building with respondent on one occasion. Indeed, respondent avers Allen has always lived elsewhere and is a mere visitor, and questions how petitioner concluded Allen resided in the apartment solely based upon witnessing someone visit respondent at the subject premises. (NYSCEF Doc No. 10, Smith affidavit in support of motion ¶ 14, 16; NYSCEF Doc No. 19, Smith affidavit in reply ¶ 10.) The court further questions how alleged "domestic disputes" are somehow indicative of an unauthorized occupant residing in an apartment, as opposed to visiting the apartment as the tenant's guest. The court also does not see the relevance of a visit to the subject premises by officers of the "Public Safety Department" to a holdover premised upon respondent's alleged breach of her lease. Petitioner appears to be conflating this breach of lease holdover proceeding with the nuisance proceeding pending in another part. (*Supra*, n 1.)

CONCLUSION

Accordingly, for the foregoing reasons, it is

ORDERED that respondent's motion to dismiss is GRANTED and the petition is dismissed without prejudice; and it is further

ORDERED that respondent's motion for discovery is denied without prejudice as academic.

This constitutes the decision and order of this court.

Dated: May 4, 2023
New York, NY

So Ordered:
Hon. Karen May Bacdayan
HON. KAREN MAY BACDAYAN
Judge, Housing Part