

2150 Creston Ave, LLC v Marte

2023 NY Slip Op 31752(U)

April 24, 2023

Civil Court of the City of New York, Bronx County

Docket Number: L&T Index No. 305806/22

Judge: Howard Baum

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This opinion is uncorrected and not selected for official publication.

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

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2150 CRESTON AVE, LLC,

Petitioner,

-against-

ONEIDA MARTE,

Respondent,

“JOHN DOE;” and “JANE DOE;”

Respondents-Undertenants.
-----X

L&T Index No.
305806/22

Motion Seq. No. 1

DECISION/ORDER

Present:

Hon. HOWARD BAUM
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the motion by Respondent Oneida Marte:

Papers

Numbered

Notice of Motion; Affirmation and Affidavit in Support; and Exhibits A through G	<u>NYSCEF Doc # 9 - 18</u>
Affirmation in Opposition; and Exhibit A	<u>NYSCEF Doc # 19 - 20</u>
Affirmation in Reply; and Exhibit AA	<u>NYSCEF Doc # 21 - 22</u>

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

In this summary holdover proceeding 2150 Creston Ave LLC (“Petitioner”) is seeking to evict Oneida Marte (“Respondent”),¹ a rent stabilized tenant, from the apartment that is the

¹ “John Doe” and “Jane Doe” are also respondents, described in the petition as Respondent’s undertenants, but they have not appeared in this proceeding.

subject of this proceeding, pursuant to RSC § 2524.2(a), alleging she has breached a substantial obligation of her tenancy.

A notice to cure and notice of termination, both of which are incorporated by reference into the petition, serve as the predicate notices to this proceeding. The notice to cure alleges Respondent has breached substantial obligations of her tenancy citing to paragraphs 13 and 27 of the lease between the parties. The notice to cure quotes paragraph 13 as stating, in pertinent part,

CARE OF PREMISES: Tenant shall comply with all rules and regulations of all City Agencies and all City Ordinances relating to this property. The tenant shall make all repairs required to the apartment, including ranges and refrigerators, whenever damage is a result of the misuse or negligence of the Tenant or any occupant or visitor,

and paragraph 27 as stating, in pertinent part,

a) Tenant shall not install a waterbed, laundry machine, dishwasher, air conditioner, refrigerator, sink, kitchen cabinets, stove or other mechanical equipment or an antenna, in or outside the apartment without the written consent of the Landlord...

The notice to cure goes on to allege Respondent “illegally and impermissibly installed altered and/or are maintaining an alteration to the apartment” by having “erected a wall from the floor to ceiling creating an additional room in the apartment in the 3rd room from east.” In relation to this allegation, the notice to cure alleges that Petitioner has been cited for a housing code violation by the Department of Housing Preservation and Development of the City of New York (“DHPD”). Additionally, the notice to cure alleges Respondent is in violation of her lease in that she is “maintaining a washing machine in the apartment without the prior written consent of the landlord...”

As relevant to this motion, the notice of termination repeats the factual allegations as to what Respondent has allegedly done in violation of the referenced lease provisions. Further, the

notice of termination states, “As of the date of this notice, the alteration, HPD violation and washing machine have not been removed.”

Respondent has moved for the dismissal of this proceeding, pursuant to CPLR 3211(a)(7), for Petitioner’s alleged failure to state a cause of action, and/or, pursuant to RPAPL § 741(4), for Petitioner’s failure to state the necessary facts, asserting the predicate notices to the proceeding are legally insufficient. Respondent also cites RSC § 2524.2(b), as a basis to find the notice of termination is defective.

Respondent argues the notice to cure is defective in that it lacks any factual allegations as to matters such as when the conditions that are the basis of the proceeding were first learned of by Petitioner, who observed the alleged conditions, what dates and times the conditions were observed, how these conditions disturb other tenants in the building, or the basis for Petitioner’s belief that Respondent created these alleged lease violations. Further, Respondent argues the notice to cure is defective because, by stating she “must cure such violation, described herein below, on or before [the Cure Date],” it fails to apprise her of which condition was required to be cured or what she must do to cure the alleged breach.

Respondent also seeks dismissal of the proceeding asserting the notice of termination is defective by failing to allege any facts to support Petitioner’s claim that the alleged alterations to the premises remained after the period to cure expired. In the alternative, if the proceeding is not dismissed, Respondent seeks an order, pursuant to CPLR 408, granting leave to conduct discovery.

Petitioner opposes the motion. Petitioner argues the predicate notices are legally sufficient in that they state specific legal and factual allegations and allow Respondent to prepare

a defense. Moreover, Petitioner argues Respondent has failed to demonstrate the ample need required for discovery in a summary eviction proceeding arguing she has neither stated a defense requiring discovery or the actual need for the information or documents she has demanded.

Discussion

In reviewing Respondent's motion to dismiss, pursuant to CPLR 3211(a)(7), for Petitioner's failure to state a cause of action, 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); *Oparaji v. Yablon*, 126 AD3d 443 (1st Dept 2015); *Batas v. Prudential Ins. Co. of America*, 281 AD2d 260 (1st Dept 2001). 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); *Lebedev v. Blavatnik*, 144 AD3d 24 (1st Dept 2016); *539 W 156, L.L.C. v. Hernandez*, 55 Misc 3d 144(A)(App Term 1st Dept 2017).

If a predicate notice to a summary holdover proceeding is defective, Petitioner has failed to state a cause of action in that a condition precedent to the proceeding has not been met. *Chinatown Apartments, Inc. v. Chu Cho Lam*, 51 NY2d 786 (1980); *170 W. 85th St. Tenants Assn. v. Cruz*, 172 AD2d 338 (1st Dept 1991); *Tzifil Realty Corp. v. Temamnee*, 46 Misc 3d 144(A) (App Term 2d, 11th & 13th Jud Dist 2015); *322 W. 47th St. HDFC v. Loo*, 52 Misc 3d 1217(A) (Sup Ct NY County 2016); *156-158 Second Ave., LLC v. Delfino*, 18 Misc 3d 144(A) (Civ Ct NY County 2008).

A predicate notice must be clear and unequivocal. *Ellivkoy Realty Corp. v. HDP 86 Sponsor Corp.*, 162 AD2d 238 (1st Dept 1990); *Hacels, LLC v. TM701 Corp.*, 39 Misc 3d 13

(App Term 1st Dept 2013). Further, 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); *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). Like the sufficiency of a petition (*East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.*, 66 AD3d 122 [2d Dept 2009]), the sufficiency of a predicate notice is measured against what is required of pleadings in a particular case. *2704 Univ. Ave. Realty Corp. v. Thompson*, 63 Misc 3d 1222(A) (Civ Ct Bronx County 2019).

A predicate notice in a summary holdover proceeding must be sufficiently detailed to allow the tenant to prepare a defense. *Rascoff/Zsyblat Org. v. Directors Guild of Am.*, 297 AD2d 241 (1st Dept 2002). A notice to cure that serves as a predicate notice to a summary holdover proceeding like this must inform the tenant how their lease was violated and must be sufficiently specific in stating what the tenant must do to remedy the alleged breach of a substantial obligation of the tenancy. *Westhampton Cabins & Cabanas Owners Corp. v. Westhampton Bath & Tennis Club Owners Corp.*, 62 AD3d 987 (2d Dept 2009); *985 Bruckner Boulevard Owners LLC v. Fuentes*, 76 Misc 3d 1226(A) (Civ Ct Bronx County 2022); *Jamay Ltd. Partnership v. Chung Wah Cheung Sang Funeral Corp.*, 2002 WL NY Slip Op 40284(U) (Civ Ct NY County 2002).

Moreover, pursuant to RSC 2524.2(b), a notice of termination in a holdover proceeding against a rent stabilized tenant must state the ground under the rent stabilization code pursuant to which the tenant’s eviction is being sought and “the facts necessary to establish the existence of

such ground.” *69 E.M. LLC v. Mejia*, 49 Misc 3d 152(A) (App Term 1st Dept 2015) citing *Berkeley Assoc. Co. v. Camlakides*, 173 AD2d 193 (1991), *aff’d* 78 NY2d 1098 (1991).

Applying these criteria to the notices in this proceeding, Respondent’s motion is granted as the notice to cure is defective. By not including a specific statement as to what Respondent was required to do to remedy the alleged breaches of substantial obligations of her tenancy the notice to cure is unacceptably vague and confusing.

The first alleged breach of a substantial obligation of Respondent’s tenancy is that, in violation of Article 13 of the lease between the parties, Respondent failed to comply with housing code regulations by erecting floor to ceiling walls in the apartment to create an additional room resulting in DHPD issuing a violation. Based on the language of Article 13 of the lease quoted in the notice to cure, that “Tenant shall comply with all rules and regulations of all City Agencies and all City Ordinances relating to the property...,” it is critical that the alleged breach of this lease provision constituted a violation of the housing code.

Accordingly, the remedy of this alleged violation of a substantial obligation of the tenancy as pleaded by Petitioner, is whatever is necessary to correct the violation cited by DHPD and bring the apartment in compliance with the housing code.² Yet, as stated above, the notice to cure merely states that Respondent was required to “*cure such violation on or before the Cure Date set forth herein... [emphasis added]*” leaving unacceptably vague and confusing what Respondent needed to do to correct the alleged “violation.” Further, in this context, considering

² The entry for the DHPD issued violation in the DHPD online database of open violations, provided by Respondent as an exhibit, states two ways for the violation to be corrected: filing plans and an application to legalize the alteration or the restoration of the apartment to its condition prior to the placement of the floor to ceiling wall in the apartment.

the mention of the DHPD cited violation in the notice to cure, there is confusion as to what “violation” was being referred to by the notice – the alleged building of the wall, in and of itself, or the DHPD violation. While the alleged building of the wall is what led to the violation of the housing code and DHPD’s issuance of the violation (and in turn the alleged breach of Article 13 of the lease) the action required to remedy the DHPD violation is more nuanced than simply removing the wall.

Moreover, considering the notice to cure alleges two separate and unrelated ways in which Respondent breached a substantial obligation of her tenancy, Petitioner was required to specify what needed to be done by Respondent to cure each alleged breach, the alleged breach of Article 13 of the lease caused by the wall allegedly built and maintained by Respondent in the apartment that resulted in the housing code violation and the breach of Article 27 of the lease caused by maintain a washing machine in the apartment, rather than merely stating, in the singular, that Respondent was required to “*cure such violation* on or before the Cure Date set forth herein...[emphasis added].”

There may be situations in which general language in a notice to cure, like that used by Petitioner, is sufficiently specific in informing a tenant what she must do to remedy an alleged breach of a substantial obligation of a tenancy. However, under the circumstances of this proceeding, such language lacks the specificity required of a notice to cure rendering this notice to cure fatally defective.

The other bases argued by Respondent as to why the notice to cure is defective – because it lacks any factual details such as when Petitioner first learned of the alleged breaches of a substantial obligation of her tenancy, who observed the conditions and on what date and time of

day they were observed, or how Petitioner knows Respondent is responsible for the alleged wall that has been built in the apartment³ – are misplaced. Whereas these facts may be of interest to Respondent in relation to possible defenses she may have to the petition, they are not necessary facts of this proceeding considering the types of breaches of substantial obligations of the tenancy that have been alleged. Petitioner is not required to lay bare within the notice to cure how it will prove its petition at trial. *Sung Yoon Kim v. Hettinger*, 58 Misc 3d 159(A) (App Term 1st Dept 2018); *Gutnick v. Ramos*, 30 Misc 3d 135(A) (App Term 2d, 11th & 13th Jud Dist 2011); *McGoldrick v. Cruz*, 195 Misc 2d 414 (App Term 1st Dept 2003).

For these same reasons, Respondent's argument that the notice of termination is defective, because it does not state how Petitioner knows the relevant conditions that allegedly constitute breaches of Respondent's tenancy remain uncured, lacks merit. The information Respondent asserts is missing from this notice of termination would be obtainable in response to a proper demand for a verified bill of particulars. *Chelsea 19 Assoc. v. Coyle*, 22 Misc 3d 140(A) (App Term 1st Dept 2009), citing to *Pinehurst Constr. Corp. v. Schlesinger*, 38 AD3d 474 (1st Dept 2007). Considering the types of breaches alleged here and the fact that the notice of termination was issued on November 12, 2021, almost two months after the expiration of the cure period stated in the notice to cure, on September 15, 2021, giving Petitioner ample time to investigate, the circumstances presented by this proceeding are readily distinguishable from the cases cited by Respondent in support of her argument that the notice of termination is defective

³ Respondent also argues Petitioner was required to provide factual details in the notice to cure as to how the alleged breaches disturb other tenants in the building. However, the impact any alleged breaches may have on Respondent's neighbors is irrelevant to this type of a holdover based on breaches of substantial obligations of her tenancy.

on this basis, *2704 Univ. Ave. Realty Corp. v. Thompson*, 63 Misc 3d 1222(A) (Civ Ct Bronx County 2019) and *76 W. 86th St. Corp. v. Junas*, 55 Misc 3d 596 (Civ Ct NY County 2017), in which a landlord waited only three days (over a holiday weekend) and two days, respectively, after the expiration of a cure period to issue a notice of termination in holdovers based on allegations of an illegal sublet.

Accordingly, for all the reasons stated above, Respondent's motion is granted, pursuant to CPLR 3211(a)(7), and it is ordered that this proceeding is dismissed, without prejudice, based on Petitioner's failure to state a cause of action. Moreover, Respondent's motion, pursuant to CPLR 408, for leave to conduct discovery is denied, without prejudice, as moot.

This constitutes the decision and order of the court.

Dated: Bronx, New York
April 24, 2023

APPROVED
HBAUM , 4/25/2023, 8:51:56 PM

HON. HOWARD BAUM, J.H.C.