

**Pimor Assoc. LLC v Delvalle**

2023 NY Slip Op 33884(U)

October 31, 2023

Civil Court of the City of New York, Queens County

Docket Number: Index No. LT-301055-21/QU

Judge: Enedina Pilar Sanchez

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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF QUEENS: HOUSING PART O

Mot. Seq. No. 3

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PIMOR ASSOCIATES LLC,  
Petitioner,

L&T Index No. 301055-21/QU

against

**Decision and Order**

CASSIE DELVALLE,  
Respondent.

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HON. ENEDINA PILAR SANCHEZ,

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers		Numbered/NYSCEF
Respondent’s Notice of Motion, Affirmation and Affidavits 1		Doc. No. 43-48
Petitioner’s Cross Motion/Answering Affirmation	2	Doc. No. 49-61
Respondent’s Replying Affidavit and Affirmation	3	Doc. No. 62-63
Petitioner’s Reply	4	Doc. No. 64

Procedural History

This is a holdover proceeding predicated upon a notice of termination dated June 10, 2020 in April 2021. This is the second holdover proceeding pursued by petitioner based on the same predicate notice. The first holdover proceeding (Index No. LT-056524-20) was dismissed pursuant to the *Decision/Order of March 31, 2021 by Hon. Ressos*.

Petitioner filed its Petition, Notice of Petition, Notice to Terminate and Affirmation of Service to *NYSCEF as Doc. No. 1-4*. Petitioner further stated that a COVID-19 Hardship Declaration was not proper due to the nature of the holdover. *NYSCEF Doc. No.5*

Queens Legal Services filed its Notice of Appearance, *NYSCEF Doc. No.10*. On May 5, 2021, Respondent filed a COVID-19 Hardship Declaration. Respondent’s counsel filed an Answer with Counterclaims, *NYSCEF Doc. No.12*

Petitioner filed an Order to Show Cause (Motion Seq. No. 1) seeking to vacate the Hardship Declaration, striking the First, Second, Third and Sixth Affirmative Defenses.

The *July 7, 2021 Decision/Order of Hon. Guthrie* did not vacate the stay created by the *COVID-19 Emergency Eviction and Foreclosure Prevention Act (CEEFPFA)* (L 2020, ch 381, as amended by L 2021, ch 104). The Court held in abeyance the decision on the balance of the relief sought by petitioner. *NYSCEF Doc. No. 27 and 28*

Upon the expiration of the stay created by *CEEFPFA*, the balance of petitioner’s order to show cause was deemed submitted. The *February 10, 2022 Decision/Order of Hon. Guthrie* dismissed the first affirmative defense as moot and restored the proceeding for all purposes including trial. The order to show cause was denied in all other respects. *NYSCEF Doc. No. 29*

Trial and Motions Presented

The proceeding was transferred to the trial part. The trial was to commence on August 4, 2022. Before the trial commenced, respondent filed a motion seeking summary judgment dismissing the proceeding and in the alternative disqualifying petitioner's counsel. (Mot. Seq. No. 2) Respondent's motion was denied without prejudice due to "short service."

The trial commenced. Petitioner called its first witness, Rafael Cabrera. Mr. Cabrera was sworn in. He testified that he resides in Apartment 22 at the subject building, he moved in sometime in 2016. In 2019 he reported noise from the apartment above. Mr. Cabrera stated he hears running and banging from the upstairs apartment. In 2020 he wrote a letter to the landlord, it is dated May 7, 2020. The letter was entered into evidence as *Petitioner's 1*. The witness testified he has heard screaming, ball playing, and has problem sleeping because of the noise.

On cross-examination, Mr. Cabrera stated he is aware that a child 5- or 6-years old lives above him. He has seen the child outside and coming out of the building. He has not been to the upstairs apartment. He stated the noise is made by the child and sometimes the mother.

Aside from the May 7, 2020 document showing entries, the witness testified that he did not make entries for April 2020, March 2020, February 2020, January 2020, or December 2019. The witness stated that he did not know to keep logs prior to May 2020. He was asked about the age of the building, and he believes it is an old building and that there is "floor-crackling noise."

Cross-examination of Mr. Cabrera continued on October 25, 2023. He was asked further questions about the noise he described that emanates to his apartment. He does not recall the time he made the entry but stated the entry was done toward the end of the month, he does not recall making an entry every day. The witness confirmed that the entry did not specify the type of noise he heard, but that he heard this noise between 3:30 PM and 8:00 PM. There were no video recordings or sound recordings of the noise heard. The witness stated that he has banged on the ceiling 2 or 3 times when he hears noise, maybe late at night and in the afternoon.

On re-direct, Mr. Cabrera stated that the noise is loud enough that he cannot sleep at night and the noise continues at same loudness.

The next witness, Felipe (Philip) Orner, affirmed before testifying. He is an attorney and has an ownership interest in the subject property. He testified as to the deed, certified documents from DHCR, Multiple Dwelling Registration, the lease for the subject premises, rent ledger and notice of termination. The documents were marked for identification and not all entered as evidence. The matter was continued to permit petitioner to provide certified documents.

By the continued trial date, the litigants had filed motions. Respondent filed a notice of motion to dismiss. Petitioner filed a notice of cross-motion for costs, sanctions and payments of use and occupancy immediately. Arguments were heard and decision reserved.

Respondent argues the termination notice of June 10, 2020 was vitiated when petitioner issued a rent demand during the pending trial. Respondent seeks relief pursuant to *CPLR* §§3211(a)(2), (7) and/or (8) and/or granting summary judgment pursuant to *CPLR* § 3212. The rent demand and rent notices served after the termination notice renders the termination unclear, ambiguous, and equivocal.

Petitioner's cross-motion seeks cost and sanctions under 22 *NYCRR Sec. 130-1.1* against respondent and her legal counsel. Petitioner also seeks an immediate order of rent or use and occupancy to be paid to petitioner or deposited in court pursuant to *CPLR 3025(b)* and/or *RPAPL§745*.

*Discussion and Legal Conclusion*

It is undisputed that the subject premises are governed by the Rent Stabilization Law.

The eviction sought on this matter was predicated upon a claim of noise, nuisance, and alleged late payments of rent. Petitioner issued a termination notice dated June 9, 2020. A termination notice, which is a predicate notice, must be clear and unequivocal. The predicate notice cannot be amended, and it is a necessary document to proceed with a summary holdover proceeding. *Chinatown Apartments, Inc. v. Chu Cho Lam*, 51 NY2d 786 [1980]

A predicate notice sets the course of the proceeding. A subsequent notice, issued after the initial predicate notice, may call into question the initial predicate notice and the holdover proceeding by necessity. This is what petitioner has done by virtue of issuing a 14-day rent demand and seeking to enforce the rent demand.<sup>1</sup> *Aqua Realty LLC v. Truesdale*, 79 Misc 3d 1217[A], 2023 NY Slip Op 50653[U] [Civ Ct, Bronx County]; see also, *McKay v. Farquharson*, 75 Misc 3d 1223[A], 2022 NY Slip Op 50646[U] [Civ Ct, Queens County 2022]

Respondent demonstrated after this trial commenced, petitioner issued a 14-day rent demand. The rent demand seeks rent at the monthly sum of \$1,300.00, for a total sum of \$36,400.00. It states, "unless we receive this rent past due in full on or before October 20, 2022, a dispossession will be served without further notice." *NYSCEF Doc. No. 48* The language of the subsequent notice indicates that unless you pay all the rent, you will be evicted. While a rent demand is a notice a landlord is entitled to issue, in the context of a pending holdover proceeding a rent demand works to change the underlying notice, and to vitiate the termination notice. The rent demand premised upon an enforceable agreement to pay rent is inconsistent with a notice of termination. See, *Buffalo Urban Renewal Agency v. Lane Bryant Queens, Inc.*, 90 AD2d 976, *aff'd* 59 N.Y.2d 825 [1982]. See also, *Azour, LLC v Tax Sister, Inc.*, 29 Misc 3d 29 [App Term, 2d Dept 2010] (Term vacated the final judgment in favor of petitioner and found "the holdover judgment based solely upon the court's finding that tenants failed to pay rent, which failure was not the basis for the landlord's holdover proceeding.")

Petitioner's subsequent notice to respondent states, "notice of failure to pay your rent as required by your lease as such obligation continues." It further states that respondent has already been served with the 14-day rent demand. *NYSCEF Doc. No.48* Unlike the situation where a holdover proceeding is pursued after the non-payment proceeding, here the clear attempt to infuse a non-payment proceeding in the holdover matter is not permitted and petitioner's position renders the termination notice equivocal and ambiguous.

Petitioner's cross-motion argues the 14-day rent demand is juxtaposed as "subject to the holdover proceedings now in pending trial at the housing court," *NYSCEF Doc. No.48*

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<sup>1</sup> Petitioner seeks to enforce the rent demand via its holdover proceeding by filing an Order to Show Cause for rent payment in full pursuant to the rent demand.

After considering all the points of law and arguments presented by both sides, the Court agrees and disagrees with each side on different points. Foremost, the Court concurs that the COVID-19 pandemic has affected innumerable events and procedures. The Hardship Declaration, the ERAP and the LRAP applications, the loss of employment, and the directives to shelter in place caused litigation matters to be on pause.

The rules governing a predicate notice and legal principals, however, did not change.

Petitioner's issuance of a 14-day rent demand is contrary to its posture in the holdover proceeding. The rent demand is indeed a predicate notice and incompatible to the termination notice. Petitioner must plead one or the other: it's a termination of leasehold or it's a demand to pay the rent. The rent demand, the last notice issued, right in the middle of the trial, would be the notice that governs. The rent demand notice was not retracted<sup>2</sup>. The Court cannot speculate what was believed or not believed to cause the issuance of such a notice.

Summary proceedings are statutory and must be strictly construed. There is no room for multiple interpretations and the Court is compelled to find the termination notice was vitiated.

Accordingly, the holdover proceeding is dismissed without prejudice.

The cross-motion is denied as moot. The Court does not find a continuous or willful misrepresentation of facts as alleged by petitioner. The parties have opposing interest and are expected to disagree. Seeking sanctions as part of an opposition to a motion is something the court may consider *sua sponte* as sanctionable. 22 NYCRR 130-1.1.

The parties may retrieve their exhibits from Part O.

This Decision and Order will be filed to NYSCEF.

This constitutes the Decision and Order of the Court.

Dated: October 31, 2023  
Queens, New York

SO ORDERED,

APPROVED  
upsanchez , 10/31/2023, 4:36:43 pm

ENEDINA PILAR SANCHEZ  
Judge, Housing Court

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<sup>2</sup> Petitioner continues to rely upon the 14-day rent demand to file its Order to Show Cause seeking to strike respondent's motion to dismiss, to obtain an order for rents, an order of a default if the rent is not paid and even asking for access.

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