

SH 333 LLC v South

2024 NY Slip Op 30591(U)

February 19, 2024

Civil Court of the City of New York, New York County

Docket Number: Index No. LT-315517-22/NY

Judge: Joan Rubel

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This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK : HOUSING PART D
-----X
SH 333 LLC

L & T Index # 315517/22 NY

Petitioner-Landlord,

-against-

DAVID SOUTH
Respondent/Tenant

DECISION / ORDER
(motion seq. # 1 and 2)

“JOHN DOE and/or JANE DOE”
Respondents-UnderTenants
-----X

**PRESENT: HON. JOAN RUBEL, J.H.C.
JUDGE, HOUSING COURT**

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Respondent’s motion for summary judgment dismissing the proceeding and Petitioner’s cross-motion to strike Respondent’s affirmative defenses and for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Affidavits & Exhibits.....	1-3
Cross-motion and Opposition Papers	10-13
Affirmation / Affidavit in Opposition to Cross	
Reply Papers	25-26; 27
Exhibits	4-9; 14-24; 28-30

David South (“Respondent”), through his attorney, moves pursuant to CPLR 3212(b) for summary judgment dismissing the underlying lease expiration holdover. Respondent seeks dismissal as a matter of law based on the allegation that Petitioner failed to properly terminate his tenancy as mandated by RPL 226-C. (mot. seq. # 1). (NYSCEF # 12-20).

Petitioner cross-moves to strike Respondent’s affirmative defense, which is predicated on the allegation that a proper Notice of Termination was not provided. Petitioner also seek summary

judgment against Respondent with an immediate warrant of eviction and a money judgment in the amount \$57,500.00 for use and occupancy through July 2023 plus monthly use and occupancy pending a determination herein. (NYSCEF # 22-35). (mot. seq. # 2).

Both Respondent's motion and Petitioner's cross-motion are addressed within this decision and order.

CPLR 3212(b), which delineates the elements for summary judgment, provides that "the motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." The function of summary judgment is issue finding, not issue determination. *Stillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957).

A summary judgment application must set forth *prima facie* showing of entitlement of the relief as a matter of law laying bare admissible evidence sufficient to eliminate material issues of fact that must be tried. CPLR 3212(b). *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Winegard v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985). Moreover, "...where there is no genuine issue to be resolved at trial, the case should be summarily decided..." *Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974). Furthermore, a favorable inference is to be made with respect to the opponent for summary judgment. *Consolidated Edison v. Jet Asphalt Corp.* 132 A.D.2d 296, 299 (1st Dept., 1987).

In considering a summary judgment motion, the court's function "is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact ... granting a summary judgment application "is the procedural equivalent of a trial" ... "A shadowy semblance of an issue is not enough to defeat the motion.'" *S.J. Capelin Associates, Inc.*

v. Globe Mfg. Corp., 34 N.Y.2d 338, 313 N.E.2d 776, 357 N.Y.2d 478 (Court of Appeals, 1974)
(Omitted internal citations).

After reviewing the record, this court is constrained to grant Respondent's summary judgment application and dismiss the proceeding, albeit without prejudice. Pursuant to RPAPL 741(5), the petition must state facts upon which the proceeding is based, and the underlying petition fails to do so.

The petition herein alleges that Apartment # 3-E located at 333 Grand Street, New York, New York 10002 ("subject dwelling"), is not rent regulated. Paragraph 3 of the petition states that Respondent took occupancy in October 2017 pursuant to a written agreement with prior owner Tiara Realty Co., LLC and that the most recent lease expired September 30, 2022. Paragraph 4 of the pleadings alleges that Respondent was offered a renewal lease on June 23, 2022 with an increase greater than 5% and that Respondent failed to return a signed renewal or vacate. (NYSCEF # 1). Paragraphs 7 of the petition asserts that Respondent's lease expired on its own terms on September 30, 2022, and paragraph 8 states that Respondent continues in possession, after termination of said tenancy, without permission of Petitioner.

However, a termination notice was not annexed to the petition or filed with the court. (NYSCEF # 1). "In a summary eviction proceeding, the "four corners" of the petition include any required predicate notices that are annexed and incorporated by reference." *Jewish Board of Family & Children Services Inc. v. S.B.*, 73 Misc.3d 956, 157 N.Y.S.3d 338 (Civ. Ct., Bx Cty, 2021). Thus, germane components of asserting the underlying holdover cause of action, such as a proper predicate notice and manner of service, were not incorporated in the petition. See RPAPL 741(5). The failure to do so did not accord Respondent due process and fundamentally compromised Respondent's ability to understand the claims being asserted and to formulate a defense. In fact,

because a termination notice was not part of the petition herein, Respondent believed emails he received from Petitioner in September 2022, and not the June 2022 communication, were the basis for the underlying eviction proceeding. In his motion for summary judgment, Respondent consistently argues that the proceeding should be dismissed as a matter of law because Petitioner's emails in September 2022 emails did not provide sufficient notice under RPL 226-c. (NYSCEF # 13, 14). Therefore, Petitioner's failure to annex a predicate notice to the petition herein is fatal.

Petitioner first provided a termination notice when Petitioner's counsel attached a copy of a letter, dated June 23, 2022, from Tiara Realty Co., LLC c/o Tower Brokerage Inc., presumably Petitioner's predecessor, to Respondent, as an exhibit to Petitioner's cross-motion. (NYSCEF # 26). However, even if the purported termination notice was attached to the petition, the letter would not have been sufficient. The June 2023 letter offered Respondent to renew his tenancy at new rent of \$8,250.00. Notably, nothing within the letter notifies Respondent of Petitioner's intention to terminate the tenancy at the end of the ninety days in the event Respondent failed to return a signed lease. "A notice of termination of a lease must be clear, unambiguous and unequivocal if it is to function as the catalyst which terminates the leasehold." *McKay v. Farquharson*, 75 Misc.3d 1223(A), 171 N.Y.S.3d 351 (Qns Cty, 2022) citing *Spencer v. Faulkner*, 65 Misc.3d 298 (Civ. Ct., Kings Cty, 1971).

An eviction petition must be dismissed where a proper predicate notice, which is a condition precedent to the termination of a tenancy, is lacking. See *Chinatown Apartments, Inc. v. Chu Cho Lam*, 51 N.Y.2d 786, 412 N.E.2d 1312 (Court of Appeals, 1980). Respondent's admission of receipt of the initial renewal lease offer did not alleviate Petitioner's burden to comply with predicate notice requirements within an eviction proceeding. A summary proceeding is a statutory remedy and as such, strict compliance is required for jurisdiction. See e.g., *MSG*

Pomp Corp. v. Doe, 185 A.D.2d 798, 586 N.Y.S.2d 965 (App. Div., 1st Dept., 1992); *Zenila Realty Corp. v. Masterandrea* 1984, 123 Misc.2nd 1, 472 N.Y.S.2nd 980 (Civ. Ct., N.Y. Cty, 1984).

Moreover, according to Respondent, after receiving the initial lease offer in June 2022, the building was sold and Petitioner, new owner, offered Respondent a subsequent renewal lease offer at a lower rate. (NYSCEF # 7). Petitioner attached a copy of two emails, each dated September 28, 2022, to Respondent, wherein Petitioner offered to renew the subject tenancy at a lower rate of \$6,750.00. (NYSCEF # 19, 20). Petitioner's own exhibit corroborated Respondent's assertions that, one month before commencing the underlying holdover proceeding, Petitioner offered to continue the tenancy under new terms than what were previously offered in June 2022.


The mere offer to renew a tenancy is sufficient to vitiate a prior predicate notice especially where Petitioner was not legally obligated to offer renewal lease. See e.g., *Wang v. Yelverton*, 81 Misc.3d 218, 197 N.Y.S.3d 472 (Civ. Ct., N.Y. Cty 2023); (*distinguish Grandview Park Assoc LLC v. Lundy*, 64 Misc.3d 914, 105 N.Y.S.3d 815 (City Ct, Mt. Vernon, 2019). In the case herein, Petitioner alleged that the subject dwelling was free market and, as such, Petitioner was not obligated to extend Respondent a renewal lease offer in September 2022.

In fact, the September 2022 email communications were the first time Petitioner made it very clear that Respondent's options were to either accept the new renewal offer and continue the tenancy or vacate at the end of the lease term. However, the emails did not provide the required length of notice prior to commencement of the underlying proceeding as mandated under RPL 226-c (2). As Respondent resided at the subject dwelling for more than three years prior to the commencement of the underlying eviction proceeding, Petitioner was required to give Respondent at least ninety days' notice. The emails only provided two days' notice. Therefore, as a matter of law, the petition is defective.

Accordingly, based on the foregoing, the petition herein is dismissed without prejudice, and all other reliefs sought herein are denied as moot.

This constitutes the decision and order of this court. The Part Clerk to upload a copy to NYSCEF.

New York, New York
Dated: February 19, 2024



Hon. Joan Rubel, J.H.C.