

Braswell v Nimons

2024 NY Slip Op 33196(U)

September 9, 2024

Just Ct of the Town of Greenburgh, Westchester County

Docket Number: Index No. 24060365

Judge: Delores Scott Brathwaite

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This opinion is uncorrected and not selected for official publication.

**TOWN COURT OF GREENBURGH
COUNTY OF WESTCHESTER**

ELAINE BRASWELL,

Petitioner-Landlord

Index No. 24000365

-against-

DECISION

CRYSTAL NIMONS, DIJUAN CROMARTIE,

And DESINIQUE NIMONS

7 BROOKDELL DRIVE
HARTSDALE, NY 10530

Respondents-Tenants,

X

Brathwaite, J.

In the instant matter, the Petitioner-Landlord, Elaine Braswell, ("Landlord") filed a Holdover Petition, dated June 8, 2024, seeking a judgment of \$10,109 in rent arrears with interest, along with an award of possession and the issuance of a warrant of eviction related to 7 Brookdale Drive, Hartsdale, NY ("Premises"). Landlord claims that the lease expired on March 31, 2024, and that the Respondent-Tenants ("Tenants") were served with notice at least 90 days prior to expiration of the lease, advising Tenants that the tenancy would be terminated. An initial appearance was scheduled for June 27, 2024, at which an attorney appeared on behalf of Tenants and filed an Answer. The matter was adjourned to July 8, 2024, and on that date a non-attorney representative of the Landlord appeared. A motion schedule was set by the court and on July 22, 2024, Tenants filed a Motion for Partial Summary Judgment and Dismissal. The motion was scheduled to be heard on August 5, 2024. Prior to that date, on or about August 4, 2024, Landlord, appearing *Pro Se*, filed an Affidavit in Opposition. The August 5, 2024 court date was adjourned due to Tenant, Crystal Nimons' inability to appear. Shortly thereafter, on August 8, 2024, Landlord sent the court and Tenants' counsel an email objecting to a Motion to Renew, Reargue and Vacate a July 8, 2024 order and requesting sanctions. Landlord also filed a Supplemental Amended Affidavit.

BACKGROUND

The Petition and the Notice of Petition were served on Tenants on June 13, 2024. As stated earlier, the Petition was made returnable on June 27, 2024. On the return date, Tenants filed an Answer. In that Answer, Tenants assert several affirmative defenses: 1) that Tenants were not properly served with the predicate 90 day notice of non-renewal; 2) that the notice to cure by the Landlord was not properly served; 3) that the Notice of Petition and Petition, as well as all the predicate notices, were not served on the White Plains Housing Authority (“WPHA”); 4) that the 90 day notice was defective, in violation of RPAPL Sec. 226-c(2)(d); 5) that the notice to cure was defective; 6) that the notice to quit and notice of termination were defective; 7) that the Petition is defective because it fails to state that Tenants are enrolled in Section 8; 8) that the Holdover Petition was filed in retaliation for Tenants’ repair complaints; 9) that the Petition seeks payment of rent that is covered by Section 8; and 10) that the warranty of habitability has been breached by the Landlord.

The Answer also contains counterclaims requesting an order to repair hazardous conditions in the Premises and payment of Tenants’ attorney fees. As mentioned, Tenants have filed a motion to dismiss, along with an Affidavit from Tenant, Crystal Nimons, and an Affirmation from Counsel, both in support of the motion.

Landlord filed an Affidavit in Opposition and subsequently filed, without leave of court, a Supplemental Amended Affidavit in Opposition. The paragraphs contained in the Affidavit are not numbered, but for purposes of citation to any relevant language the Court will reference them in sequential order. In summary, Landlord responds that the Lease does not reference Section 8 housing but admits to accepting the subsidy payments. With respect to the Section 8 subsidy, Landlord also states that such payments ended in March, 2024 upon expiration of the Lease, along with violations that were found at the Premises. Landlord also avers that it wasn’t until Tenants were served with the termination notice that they started complaining about the condition of the Premises.

Generally, Landlord’s Affidavit references several complaints regarding the conduct of Tenants and their use of the Premises. Landlord basically argues Tenants are responsible for the

condition of the Premises and any of the damage that has occurred. Landlord asserts that such conditions and the Tenants' complaints coincide with the termination notice. Landlord also states that the reason for non-renewal of the Lease was based on the conduct of Tenants and breaches of the Lease. Landlord claims substantial compliance with all applicable laws and regulations referencing her use of the *Pro Se* Landlord Tenant Holdover Petition form provided by the New York State Office of Court Administration for this proceeding. In opposition to the movants' claim for attorney fees, Landlord appears to argue that, since Tenants' counsel's services are provided free of charge, Tenants have not incurred any cognizable legal expenses.

DISCUSSION

90 Day Notice of Non-Renewal

Based on the parties' pleadings and supporting documentation, it is undisputed that Tenants have been leasing the Premises for more than two years. *See, Supp. Opp. Aff., Lease dated 8/23/2018*. According to RPAPL Sec. 226-c(2)(d) with respect to a Notice of Non-Renewal, "[i]f the tenant has occupied the unit for more than two years or has a lease term of at least two years, the landlord shall provide at least ninety days' notice." The movants claim that instead of providing 90 days' notice, Landlord only provided 82 days' notice. The notice is dated January 8, 2024, and self-referenced as a 90 DAY DEMAND TO VACATE written to Tenant, Nimons demanding that she vacate the premises in "90 days – by March 30th." *See, Affirm In Supp, Ex. B*. Based on the date of the notice, the Court must assume that it was served on or after January 8, 2024. The movants acknowledge receipt of this notice by email and Landlord, in her response, does not specify or otherwise state that the notice was served on an earlier date. As Tenants' counsel points out, January 8th to March 30th amounts to 82 days. Even if the Court were to accept that the Landlord's citation to March 30th as opposed to March 31st as a clerical error, the notice still falls short of the statutorily required 90 days' notice.

As much as the Court may sympathize with this Landlord's plight as alleged in her papers, it cannot ignore this failure to provide timely notice of non-renewal. By Landlord's own admission and the documentary evidence, this notice was untimely. *See, DLB of NY, LLC v. Billan*, 70 Misc. 3d 143 (N.Y. App. Term 2021) ("Landlord is "bound by the notice served" (*Singh v Ramirez*, 20 Misc 3d 142[A], 2008 NY Slip Op 51680[U], * 2 [App Term, 2d Dept, 2d & 11th Jud Dists 2008] [internal quotation marks and citation omitted]), which is not subject to

amendment (*see Chinatown Apts. v Chu Cho Lam*, 51 NY2d 786, 788 [1980]).” The Lease has a two-year term that expires on March 31, 2024. *See, Affirm In Supp, Ex. A.* The Landlord references the same lease in her Affidavit. *See, Opp Aff, para. 5.* The non-renewal of this lease and its expiration are the basis of the Holdover Petition in this case.

To maintain this holdover proceeding, a valid statutory notice of a certain duration is required. “In the absence of a valid predicate notice, petitioner has failed to sustain its prima facie case.” *See e.g. 1646 Union, LLC v. Simpson*, 62 Misc 3d 142[A], 2019 NY Slip Op 50089[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019]; *Kings Highway Realty Corp. v. Riley*, 35 Misc 3d 127[A], 2012 NY Slip Op 50572[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2012]. *Gheewala v. Wesley*, 79 Misc. 3d 1221 (N.Y. Civ. Ct. 2023). “Insofar as ‘[c]ompliance with a statutory notice requirement represents a condition precedent to maintenance of a summary eviction proceeding, and the burden remains with the landlord to prove that element of its case’ (*Mautner-Glick Corp. v Glazer*, 148 A.D.3d 515, 515—516, 48 N.Y.S.3d 587 [2017] [internal quotation marks omitted]), the proceeding must be dismissed for failure to serve the respondents with a valid 90-day notice prior to commencement.” *Mohegan Vista Props. LP v. Mazo*, 76 Misc. 3d 500, 503 (N.Y. Cnty. Ct. 2022). Based on the Landlord’s failure to provide at least 90 days’ notice to Tenants of her decision not to renew the lease, the petition must be dismissed.

Section 8 Regulatory Status

Tenants also request dismissal based on the Landlord’s failure to include a material fact in her petition, namely that she was receiving Section 8 subsidy payments. As Tenants’ counsel argues, Landlord’s participation in this program, along with the acceptance and receipt of these payments for rent, implicates the regulatory status of the Premises. The Housing Choice Voucher Program, Section 8, is governed by the U.S. Department of Housing and Urban Development regulations contained in 24 CFR Part 982. The Section 8 regulatory status triggers certain obligations and affirmative defenses that the Court must be aware of when reviewing Landlord’s request for relief. Courts have found that,

“Section 8 status is one that must be pled. (*see 433 W. Assoc. v Murdock*, 276 A.D.2d 360, 715 N.Y.S.2d 6 [1st Dept 2000]). Failure to do so can lead to dismissal since proper pleading is an “essential element” of a landlord’s *prima facie* case. (*see*

id. at 360; *see also Sam Burt Houses v Smith*, 2015 NYLJ LEXIS 5953, *5 [Civ Ct, Kings County 2015] (When a tenant receives a rent subsidy under the Section 8 program, the petitioner's failure to identify the particular program applicable to the tenancy and the governing statutes and regulations in the petition is "'fatal' to the proceeding's maintenance.") (citations omitted)).”

1068 Gerard P'ship L.P. v. Laroche, 2022 N.Y. Slip Op. 51062 (N.Y. Civ. Ct. 2022)

According to Landlord she “agreed to accept Section 8 payments for partial payments of the agreed upon rent monies.” *See, Opp Aff., para 6, pg. 2.* Landlord appears to infer that she did not intend to provide “Section 8 Housing” based on the absence of any such references in the residential Lease. *See, Id. at para. 6.* However, Landlord admits to accepting the subsidy payments since 2018 and states that the payments stopped due to expiration of the Lease.

Landlord clearly benefitted from the subsidy payments and, based on a letter dated August 28, 2018, was aware that Tenants would have their rent obligation subsidized by Section 8. As mentioned earlier, the Petition requests rental arrears in the amount of \$10,109. This is an amount based on the entire rent, not just the Tenants’ portion. Based on the federal regulations governing Section 8 vouchers, Tenants are not responsible for that portion of the rent that is covered by the subsidy. *See, 24 CFR Sec. 982.451(b)(4)(iii)* (“The family is not responsible for payment of the portion of rent to owner covered by the housing assistance payment under the HAP contract between the owner and the PHA.”)

Tenants also claim that Landlord did not serve any of the notices or the petition on the WPHA, the entity that administers the Section 8 subsidy. While Landlord, in her opposition, claims that she complied with all applicable law and regulations, Landlord does not specifically state her compliance with this regulatory obligation. *See, 24 C.F.R. Sec. 982.310(e)(2)(ii)* (“The owner must give the PHA a copy of any owner eviction notice to the tenant.”). *See, Cosmopolitan Assoc v. Fuentes*, 11 Misc. 3d 37, 38 (N.Y. App. Term 2006) (“As a general rule, a party that accepts the benefit of a statute is estopped from seeking to avoid the obligations imposed by the statute (*see Pavone v. Aetna Cas. Sur. Co.*, 91 Misc 2d 658, 662-663; 31 CJS, Estoppel and Waiver § 124). Thus, since landlord receives the benefit of the J-51 program, it

may not avoid its obligation under the program to accept section 8 subsidy payments on behalf of tenant.”).

As Tenant’s counsel correctly observes, RPAPL Section 741 governs the pleading requirements for summary proceedings which include regulatory status. Misstatements regarding the regulatory status of the Premises impacts the Court’s jurisdiction and can lead to dismissal of the petition. As the First Department stated in *MSG Pomp Corp. v. Doe*,

“On review of landlord-tenant proceedings, this court has uniformly applied the rule that the failure strictly to comply with the statutes governing summary proceedings deprives the court of jurisdiction and mandates dismissal. “[A] summary proceeding is a special proceeding governed entirely by statute [citations omitted] and it is well established that there must be strict compliance with the statutory requirements to give the court jurisdiction [citations omitted].” (*Berkeley Assocs. Co. v. Di Nolfi*, 122 A.D.2d 703, 705, quoting *Goldman Bros. v. Forester*, 62 Misc.2d 812, 814-815; see, *Matter of Blackgold Realty Corp. v. Milne*, 69 N.Y.2d 719, 721; *Giannini v. Stuart*, 6 A.D.2d 418.)”)

185 A.D.2d 798, 799-800 (N.Y. App. Div. 1992)

The Second Department also requires the pleading of the Premises’ regulatory status and Landlord, in the case at bar, did not seek leave of court to amend her petition to address this defect. See, *Villas of Forest Hills Company v. Lumberger*, 128 A.D.2d 701, 702 (N.Y. App. Div. 1987) (“the need to plead rent regulatory status and compliance with the appropriate statutes and codes and to actually be in compliance therewith is necessary for a court to order the requested relief (see, *251 E. 119th St. Tenants Assoc. v. Torres*, 125 Misc.2d 279, 282; *Darnet Realty Corp. v. Markley*, 63 Misc.2d 29, 31; *United Institutional Servicing Corp. v. Santiago*, 62 Misc.2d 935, 936).”) Landlord’s failure to state the regulatory status of the tenancy and the Premises in her petition is a fatal defect that mandates dismissal under RPAPL Sec. 741(4).

CONCLUSION

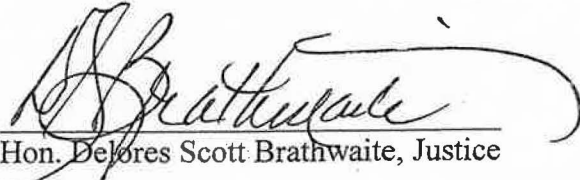
The Court grants Respondent-Tenants motion to dismiss based Petitioner-Landlord's failure to provide the required 90-day Notice of Non-Renewal and to plead the Section 8 regulatory status of the subject Premises. This order is made pursuant to CPLR Section 3211(a)(1), (2) and (7) as

well as RPAPL Sections 226-c and 741. The Court declines to order attorneys' fees because it finds that Tenants have not shown a right to such a recovery under RPAPL Section 234(1). Additionally, the Court orders the repair and amelioration of any hazardous conditions forthwith and Tenants shall cooperate with all such efforts by Landlord. Based on all the above, other issues that have been raised by the parties during this proceeding are considered moot and any rulings on such items are no longer necessary.

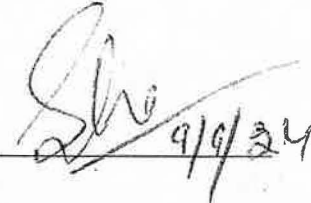
Dated: White Plains, NY

September 9, 2024

SO ORDERED


Hon. Delores Scott Brathwaite, Justice

ENTER:



Clerk of Court