

**Ricketts v Holloway**

2025 NY Slip Op 31857(U)

May 23, 2025

Civil Court of the City of New York, Kings County

Docket Number: Index No. 313527-24

Judge: Madalina Danescu

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS: HOUSING PART C

-----X  
DOROTHY RICKETTS,

Petitioner,

-against-

Index No. 313527-24

DECISION/ORDER  
Motion Seq. 2

ANTHONY HOLLOWAY,  
PAMELA DEL CARMEN PENA,  
"JOHN DOE" & "JANE DOE,"

Respondents.

**CIVIL COURT OF THE  
CITY OF NEW YORK  
May 23, 2025  
ENTERED  
KINGS COUNTY**

-----X  
Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of this motion.

**Papers Numbered**

Notice of Motion with Affirmations in Support  
[With Exhibits A-B] [NYSCEF Doc. Nos. 11-15] ..... 1  
Affirmation in Opposition [With Exhibit A]  
[NYSCEF Doc. Nos. 17-18] ..... 2  
Affirmation in Reply [With Exhibit C]  
[NYSCEF Doc. Nos. 20-21] ..... 3

After oral argument on May 6, 2025, and upon the foregoing cited papers, the decision and order on this motion is as follows:

**FACTUAL AND PROCEDURAL HISTORY**

This is a summary holdover proceeding commenced by Dorothy Ricketts ("petitioner") in April 2024 against Anthony Holloway, Pamela Del Carmen Pena, John Doe and Jane Doe ("respondents"). Petitioner seeks possession of 1511 Fulton Street, Second Floor, Apartment No 2, Brooklyn, New York 11216, (the "subject premises"), on the basis that respondents are month to month tenants whose lease expired on March 31, 2024. (*see* Petition and Termination Notice at NYSCEF Doc. 1).

Petitioner defaulted at the initial court date on January 2, 2025 but moved to restore and vacate any dismissal later that month. In the meantime, respondent Pena retained counsel and, by two attorney stipulation dated January 29, 2025, petitioner's motion was granted on consent, the case was restored to the calendar and adjourned for respondent's counsel to file an answer.

On February 24, 2025, respondent interposed an answer alleging, in relevant part, that the predicate notice and petition fail to properly describe the premises as respondent resides on the

3<sup>rd</sup> floor, in apartment 3, not on the 2<sup>nd</sup> floor in apartment 2, and that another tenant unrelated to respondent resides on the 2<sup>nd</sup> floor. Relatedly, respondent alleged the petition was served on the tenants on the second floor below her, given the description in the affidavit of service and the fact that her downstairs neighbor brought the petition he was served with to the respondent. (*see* Answer at NYSCEF Doc. 10).

Also on February 24, 2025, respondent filed the instant motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7) due to the improper description of the premises.

Respondent alleges there are 4 floors in the building: a 1<sup>st</sup> floor commercial unit and three residential units on the second, third and fourth floors. She states that she has always lived in apartment 3, on the third floor, that the second-floor apartment 2 is occupied by several adult men, and the fourth-floor apartment above her is occupied by a woman and her child.

Respondent alleges there are 4 mailboxes in the building labeled as follows: 1. MAIL Aleksandr Misyuk, Overstock Goods Liquidators, Eyes NYC Eyeman; MDHSAN 2-; PENA 3-; RINU 4, that the keys given to her by the landlord are for the mailbox labeled PENA 3-, that the label “3” has been on her mailbox for “as long as [she] can remember,” that she believes petitioner placed the label there, and that the front door to her apartment is labeled with the number 3.

Respondent states the label “3” has been on her mailbox for “as long as [she] can remember” and that she believed petitioner placed the label there.

However, the termination notice and petition both state that petitioner is seeking to evict her from the second floor, apartment 2. Respondent argues that this is the incorrect description for respondent’s apartment, as underscored by the fact that the petition was served on a male whose description does not match anyone in her apartment, as she lives there with her children only (Anthony Holloway moved out in 2021).

Based on the foregoing, respondent argues that the petition should be dismissed as she lives on an entirely different floor and apartment number from those alleged in the termination and petition. That she resides in apartment 3, third floor, is further underscored, respondent alleges, by the nonpayment proceeding the landlord preciously commenced against her. In that case, Index No. 75907/19, petitioner described respondent’s apartment as “1511 Fulton St. Apt 3, Entire 3rd Floor, Bklyn, NY 11216.”

Due to the inaccuracies in describing her apartment, respondent argues, a marshal executing the warrant would be unable to identify the subject premises as the pleading documents allege inconsistent apartment and floor numbers from what is listed on the mailboxes and on the label of respondent's front door. In fact, the marshal would likely evict an entirely different group of people, the men residing in the 2<sup>nd</sup> floor apartment 2. This is especially possible, according to respondent, as one of the men was served with the petition and the marshal could rely upon that description in executing an eviction.

In opposition, petitioner's sole argument is that "respondent's lease dated August 2021 states that the apartment correct number is 2," that the lease was signed by the respondent, and therefore, respondent's motion should be denied. (*see* NYSCEF Doc. 17 at Par. 6). Petitioner attaches a 2012 lease between petitioner and respondent for apartment 2 in the building. (*see* NYSCEF Doc. 18). This argument is made by petitioner's attorney and no affidavit from anyone with personal knowledge is offered to refute respondent's detailed factual allegations.

In reply, respondent argues that the 2012 lease between the parties for apartment 2 is a mistake and is contradicted by respondent's sworn allegations of what apartment she actually resides in, apartment 3, and that she has never resided in any other apartment in the building. Respondent attaches the first page of what is allegedly a 2019 lease between petitioner and respondent for apartment 3 in the building. (*see* NYSCEF Doc. 21). This document does not contain any signature pages.

Respondent points out that petitioner does not provide an affidavit from anyone with personal knowledge contesting respondent's allegations, nor does petitioner's opposition allege that respondent is actually residing in apartment 2.

### DISCUSSION

#### STANDARD ON A CPLR § 3211(A)(7) MOTION TO DISMISS

When considering a CPLR § 3211 motion, the court must afford the pleadings a liberal construction, deem facts alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Thus, "a motion to dismiss made pursuant to CPLR § 3211(a)(7) will fail if...the complaint states in some recognizable form any cause of action known to our law." (*Shaya B.*

*Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2<sup>nd</sup> Dept. 2006]; *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]).

It is of no present concern whether the petitioner will be ultimately able to prove the allegations in the pleading. (see *Howard Stores Corp. v Pope*, 1 NY2d 110, 114 [1956]; *Victory State Bank v EMBA Hylan, LLC*, 169 AD3d 963, 965 [2<sup>nd</sup> Dept. 2019]).

However, where the moving party challenges the factual basis of the claims, by submitting sufficient extrinsic evidence on a motion to dismiss such as affidavits from individuals with personal knowledge or documentary evidence, the standard of proof shifts and the proponent of the claim must show that he actually has a cause of action, not merely that he has stated one. (see *Biondi v Beekman Hill House Apt., Corp.*, 257 AD2d 76, 80-81 [1st Dept 1999], *aff'd* 94 NY2d 659 [2000]; *Leonard v Leonard*, 31 AD2d 620, 621 [1<sup>st</sup> Dept. 1968]; see also *Grandelli v City of NY*, \_\_\_AD3d\_\_\_, 2025 NY Slip Op 02154, \*1 [1<sup>st</sup> Dept 2025]); *Becker v Elm A.C. Corp.*, 143 AD2d 965, 965-966 [2d Dept 1988]; *De Paulis Holding Corp. v Vitale*, 66 AD3d 816, 818 [2d Dept 2009]).

Here, respondent has submitted sufficient evidence challenging the description of the premises, requiring petitioner to come forward with evidence in support of her cause of action.

FAILURE TO PROPERLY DESCRIBE THE PREMISES PURSUANT TO RPAPL §741(3)

An inadequate description of the premises may require dismissal for failure to state a cause of action.

Every petition in a summary proceeding must “[d]escribe the premises from which removal is sought.” (RPAPL §741(3)). “The description of the premises must be accurate enough to allow the marshal, when executing the warrant of eviction, to locate the premises without additional information.” (*JS Realty Inv. LLC v Izquierdo*, 2025 NY Slip Op 50602[U], \*2 [Civ Ct, Queens County 2025]; see also *Elul Realty Corp. v Java NY Ltd.*, 12 Misc.3d 336, 337 [Civ Ct, Kings County 2006]; *US Airways, Inc. v Everything Yogurt Brands, Inc.*, 18 Misc.3d 136[A], \*1 [App Term, 2nd & 11th Jud Dists 2008]).

“The description of the premises cannot be vague, ambiguous or inaccurate,” (217 *Malcolm X Blvd LLC v Naughton Bros. Funeral Home Inc.*, 43 Misc.3d 1214[A], \*4 [Civ Ct, Kings County 2014]), as “[a] defective description of the premises will subject the petition to dismissal” (2212 *Prop. LLC v Bernal*, 83 Misc.3d 1294[A], \*3 [Civ Ct, Queens County 2024], citing *Clarke v. Wallace Oil Company, Inc.*, 284 AD2d 492, 493 [2d Dept 2001] and *US*

*Airways, Inc. v. Everything Yogurt Brands, Inc.*, 18 Misc.3d 136[A], \*2-3 [App Term, 2d Dept, 2d & 11th Jud Dists 2008]).

Where there is an incorrect description or where the premises are misidentified, (*see Elul Realty Corp. v Java NY Ltd.*, 12 Misc.3d at 337-338 [internal citations omitted]), or where description are vague or likely to cause confusion, (*see JS Realty Inv. LLC v Izquierdo*, 2025 NY Slip Op 50602[U] at \*2), dismissal is warranted.

“[T]he analysis is less about the actual wording of description but rather more so as to the words in functional relation to the physical building structure containing the leasehold premises.” (*New York City Economic Dev. Corp. v Kings Action Group, Corp.*, 66 Misc.3d 1221(A) at \*10).

Here, although the petition adequately describes the premises at issue by the street address and physical description thereof in relation to the building structure, as “2<sup>nd</sup> Floor – Apt. #2,” at “1511 Fulton Street, Brooklyn NY 11216” (*see* NYSCEF Doc. 1), this physical description is inaccurate and insufficient as a matter of law.

Respondent has offered detailed factual allegations in her affidavit that (i) she lives in apartment 3, 3<sup>rd</sup> floor; (ii) she has always lived there; (iii) she does not reside in apartment 2, 2<sup>nd</sup> floor; (iv) she has never lived in apartment 2, 2<sup>nd</sup> floor; (v) a group of men live in the 2<sup>nd</sup> floor apartment 2; (vi) the process server actually served one of the men living in apartment 2, 2<sup>nd</sup> floor with the petition; and (vii) the individual in the second floor, apartment 2 brought the papers to her. (*see* NYSCEF Doc. 13).

Respondent also offered detailed factual allegations that (i) her apartment is labeled “3” on the front door; (ii) her mailbox is labeled as “3” with her last name on it; (iii) the mailbox labeled as “2” has a different name; (iv) the labels on the mailboxes and apartment doors have been there as long and she can remember and were not placed by her; and (v) the petitioner knew she lived in apartment 3, 3<sup>rd</sup> floor, because she commenced a nonpayment proceeding against respondent under Index No. 75907/19. (*see* NYSCEF Doc. 13).

In support of these allegations, respondent offered evidentiary proof in the form of photos of the mailboxes and apartment doors as well as the petitioner under Index No. 75907/19 listing respondent’s address as “1511 Fulton. St., Apt 3, Entire 3rd Floor.” (*see* NYSCEF Docs. 14-15).

Petitioner, however, has not come forward with any proof in contravention of the detailed factual allegations or documentary evidence offered by respondent. She has not shown that she actually *has* a cause of action, not merely stated one. (*see Biondi v Beekman Hill House Apt.*,

*Corp.*, 257 AD2d at 80-81; *Leonard v Leonard*, 31 AD2d at 621; *Grandelli v City of NY*, \_\_\_ AD3d \_\_\_; *Becker v Elm A.C. Corp.*, 143 AD2d at 965-966; *De Paulis Holding Corp. v Vitale*, 66 AD3d at 818).

Petitioner has not offered any affidavits from anyone with personal knowledge. The sole opposition has been offered through an attorney affirmation, made without personal knowledge, that the description of the subject premises is correct because it was the same apartment and floor in the 2012 lease.

However, an affirmation by counsel, without personal knowledge is insufficient and cannot be given any weight, (*see Arriaga v Michael Laub Co.*, 233 AD2d 244,244 [1<sup>st</sup> Dept 1996]; *Lott-Coakley v Ann-Gur Realty Corp.*, 23 Misc. 3d 1114(A), \*12 & 16 [Sup Ct, Bronx County 2009]; *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2d Dept 2006]).

As to the 2012 lease offered by petitioner, the sole piece of evidence presented in support of her claim that the subject premises are correctly and accurately described, it is insufficient to defeat the motion to dismiss. Courts have held that even descriptions which mirror the lease may be insufficient. (*see NY City Economic Dev. Corp. v Kings Action Group, Corp.*, 66 Misc.3d 1221[A], \*3 [Civ Ct, Kings County 2020] [“even where description is verbatim identical to that contained within lease, courts have nevertheless found description violative of RPAPL § 741 (3)”], *citing Sixth St. Community Ctr., Inc. v Episcopal Social Servs.*, 19 Misc.3d 1143[A], \*2 [Civ Ct, New York County 2008] [“Petitioner has not cited any cases for the proposition that a description of a subject premises is always legally sufficient for a summary proceeding pursuant to RPAPL section 741(3) as long as it mirrors the description in the lease.”])).

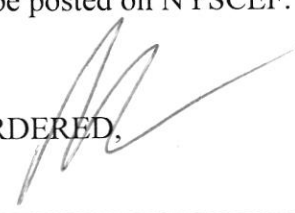
### CONCLUSION

Based on the foregoing, it is So Ordered that respondent’s motion to dismiss is granted. Judgment dismissing the petition is granted in favor of respondent.

This constitutes the decision and order of the court. It will be posted on NYSCEF.

Dated: May 23, 2025  
Brooklyn, New York

SO ORDERED,

  
\_\_\_\_\_  
HON. MADALINA DANESCU  
Judge, Housing Part