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181st Wash. Hgts. Assoc. LLC v Children's Place, Inc.
2021 NY Slip Op 50734(U)
Decided on July 28, 2021
Civil Court Of The City Of New York, New York County
Marcus, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on July 28, 2021

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

<p>181st Washington Heights Associates LLC, Petitioner,</p> <p>against</p> <p>The Children's Place, Inc., Respondent-Tenant, "XYZ CORP.," Respondent-Undertenant.</p>

LT-306323-20/NY

For Petitioner: Raymond Arron Cohen Address: 1000 Pennsylvania Avenue, Brooklyn, NY 11207

For Respondent: Erez Glambosky, Rivkin Radler, Address: 477 Madison Ave Fl 20, New York, NY 10022 Phone: (212) 455-9555

Ilana J. Marcus, J.

In this nonpayment proceeding involving a commercial tenancy, respondent The Children's Place, Inc., brings the instant motion to dismiss pursuant to CPLR §3211(a)(1) and (8). Petitioner submitted opposition, to which respondent replied. The parties appeared for oral argument virtually over the MS Teams platform in Part 52 on July 14, 2021. The decision and order is as follows:

The Petition seeks possession of a commercial premises and demands a money judgment in the amount of \$621,311.48 with interest and attorneys' fees (*id.*). Respondent puts forward [*2]two grounds for dismissal: (1) there was improper service of RPL [FN1] § 235-e(d) notice; and (2) the description of the subject premises, as stated in the Petition and the Rent Demand, is defective. In opposition, petitioner contends that the past due notice was timely and that the description of the subject premises is sufficient.

On a motion to dismiss pursuant to CPLR 3211(1) and (8), respondent seeks dismissal on the ground that it has a defense founded upon documentary evidence (*see* CPLR 3211(1)), and that this court does not have jurisdiction (*see* CPLR 3211(8)).

Addressing RPL § 235-e(d), respondent asserts that a Failure to Receive Rent Notice was served by petitioner prematurely, and prior to the expiration of the five day grace period prescribed by RPL §235-e(d). This notice, dated November 2, 2020, refers to respondent's failure to pay rent for certain months of base rent and additional rents totaling \$621,630.57 (Glambosky Aff, Exh C, Failure to Receive Rent Notice). The demand includes the base rent month for November, which was due on November 1, 2020. Respondent argues that this demand, served on November 3rd by email and November 5th by certified mail, was prior to the five day grace period allowable by statute.

Adopted as part of the Housing Stability and Tenant Protection Act of 2019 ("HSTPA"), the title of RPL § 235-e, is "Duty to provide a written receipt." The first sentence of RPL § 235-e extends protections to "residential" tenants in New York State who do not receive a rent receipt for cash payments or payments made by personal check. Subsection (d), which is silent as to its application to residential or commercial premises, provides that a tenant has an affirmative defense in a nonpayment proceeding where the landlord fails to mail a warning that the rent is more than five days overdue.

A fundamental principle of statutory construction is that legislative intent is derived from looking to the "natural and most obvious sense," of the words used "without resorting to

an artificial or forced construction" (NY Statutes Law § 94). As noted by another Judge of this Court "[w]hile each provision of Real Property Law § 235-e does not reiterate the fact that it only applies to residential tenancies, the intent seems clear as all the following provisions pertain to receipts for rent" ([see 41 E. 11th St., LLC v WSIP Realty Corp., 66 Misc 3d 834](#), 837 [Civ Ct, NY Cty 2020]). Generally, in the commercial landlord-tenant context, the parties are sophisticated businesspeople or entities, represented by attorneys, who maintain business records of rental payments. The text of the statute and the context here suggest that this provision is aimed at residential tenancies and is not applicable in commercial settings.

Assuming arguendo that RPL § 235-e(d) was relevant here, the base rent demand included the period from June through October 2020; this demand was made well after the five day grace period provided by the statute. As such, the motion to dismiss on this ground is denied.

The other ground for dismissal raised by respondent is that the description of the subject premises, as stated in the Petition and the rent demand, is defective. The Petition provides that the subject premises is a "certain ground floor store (on the corner of 181st Street and St. Nicholas Avenue) having a street address of 600 West 181st Street, New York, New York 10033, and a portion of the basement (collectively the "Premises") in the building known as, and [*3]located at, 600-614 West 181st Street, New York, New York 10033 a/k/a 1409-1419 St. Nicholas Avenue, New York, New York 10033" (Glambosky Aff, Exh A, Petition).

Respondent explains that the initial lease, dated April 14, 1999, included a floor plan. On May 1, 2004, the parties agreed to an Amendment of Lease (the "First Amendment"), which expanded the premises to include other square footage on the ground floor and basement space in the Building (the "Expansion Premises") (Glambosky Aff, ¶ 39). On May 31, 2019, there was another Amendment of the Lease (the "Second Amendment") where respondent surrendered certain space located on the ground floor (the "Recapture Space") (Glambosky Aff, ¶ 40). Respondent supplied a diagram that was annexed to the Second Amendment, which depicts the Recapture Space (Glambosky Aff, Exh E, Floor Plan Annexed to Second Amendment). Notably, the floor plan is one page and only depicts the ground floor space — it does not address the basement level. Respondent argues that the description in the Petition and the Rent Demand without more, including but not limited to a floor plan, is vague and ambiguous.

Every summary proceeding petition must describe the premises from where removal is sought (*see* RPAPL § 741(3)). The description must be specific enough to allow a Marshal executing a warrant of eviction to locate the premises without seeking any additional information (*see* 3 Rasch's NY Landlord & Tenant Incl. Summary Proc. § 41:14 [5th ed.]; [5670 58 St. Holding Corp. v ASAP Towing Services, Inc.](#), 57 Misc 3d 137(A) [App Term, 2nd, 11th, and 13th Jud Dists 2017]). The information must be precise as a Marshal, unfamiliar with the premises, must have sufficient information to evict the correct tenant and possess the correct premises. Failure to include a proper description is grounds to dismiss the petition (*see* [US Airways, Inc. v Everything Yogurt Brands, Inc.](#), 18 Misc 3d 136(A) [App Term, 2nd and 11th Jud Dists 2008]).

An address itself without further information may be deemed vague and insufficient even when it conforms to the lease (*see* [Sixth St. Community Ctr., Inc. v Episcopal Social Services](#), 19 Misc 3d 1143(A) [Civ Ct, NY Cty 2008]). The wording alone is not essential to the analysis, but rather, it is the practical application of the descriptive words to the physical space(s) of the subject premises. For example, a premises described as 'all rooms in a building known as 123 Main Street, New York, New York' may be adequate for a stand-alone one-story building bearing the street address of 123 Main Street, New York, New York. However, the same wording is vague when describing one unit inside of a multi-story building with multiple storefronts, tenants, and various entrances and exits.

Here, the description is sufficient. As petitioner states in opposition, there is only one corner store located at, and only one premises that has a street address of 600 West 181st Street, New York, New York, which is the respondent's space (Cohen Aff in Opp, ¶28). Respondent attempts to create an ambiguity by raising the Second Amendment to the lease and a diagram that shows the landlord reclaimed certain square footage on the ground floor. The reclaimed space does not render the description defective here; it does not create confusion given that respondent's store location has not changed. Respondent's moving papers do not raise any other allegation of confusion regarding other tenants on the ground floor or the use of the basement space. Therefore, the description provided in the Petition is sufficient to allow a Marshal to locate and possess the subject premises.

Accordingly, it is ORDERED, that respondent's motion to dismiss is denied.

The matter shall be returned to the Part 52 calendar for all purposes on August 16, 2021, at 9:30 in the forenoon. Petitioner shall serve a copy of this order on respondent with a notice

of entry within 20 days.

This constitutes the decision and order of the court.

Dated: July 28, 2021

New York, New York

ILANA J. MARCUS

Judge of the Civil Court

Footnotes

Footnote 1: Respondent's motion sometimes incorrectly referred to this section as "RPAPL § 235 e(d)," which does not exist

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