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### HOPE EAST OF FIFTH HDFC, INC. v. Cruz

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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: HOUSING PART H

-----X  
HOPE EAST OF FIFTH HDFC, INC.

L&T Index #81052/18

**Petitioner,**

**DECISION/ORDER**

**against**

JUDITH CRUZ,

**Respondent-Tenant,**

MIGUEL FALCON,

**Respondent-Undertenant.**

-----X  
HON. EVON M. ASFORIS

Recitation, as required by CPLR 2219(a), of the papers considered in the review of Respondent's motion to dismiss the Petition:

| <u>Papers</u>                               | <u>Numbered</u> |
|---|-----------------|
| Notice of Motion, & Affidavits Annexed..... | 1               |
| Answering Affirmation, and Exhibits.....    | 2               |
| Reply Affirmation, and Exhibits.....        | 3               |
| Sur-reply Affirmation, and Exhibits.....    | 4               |

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Relevant Procedural History

Hope East of Fifth HDFC, Inc. ("petitioner"), commenced this alleged illegal sublet holdover proceeding against Judith Cruz, the tenant of record and Miguel Falcon, undertenant (collectively "respondents") to recover possession of Apartment 4D located at 8 East 110<sup>th</sup> Street, New York, New York ("subject premises"). Petitioner served a Ten-Day Notice to Cure dated October 30, 2018 on respondents. The Notice to Cure asserts that Judith Cruz has illegally sublet and assigned her rights to the apartment to Miguel Palcon<sup>1</sup> without the permission of the landlord. The Notice further states that Judith Cruz left the country and is

<sup>1</sup>The Notice refers to Miguel Palcon however respondent's correct name is Miguel Falcon.

unable to return to the United State and Miguel Falcon remains in possession of the subject premises without the permission of the landlord. The Notice to Cure provided respondents with ten-days to cure the default (on or before November 16, 2018). On November 19, 2018, petitioner served a Ten-Day Notice of Termination asserting that respondents have failed to comply with the Notice to Cure. The Notice of Termination states that respondents are required to vacate and surrender possession of the subject premises on or before December 10, 2018 or the landlord will commence a summary proceeding against you to recover possession of the subject premises. Upon expiration of the Notice of Termination, petitioner served respondents with a Notice of Petition and Petition dated December 11, 2018.

Respondent, Miguel Falcon, retained counsel, and now moves by Notice of Motion dated April 30, 2019, to dismiss the proceeding pursuant to Civil Practice Law and Rules (“CPLR”) § 3211 (a)(1), (3) and (7), and Real Property and Proceedings Law (“RPAPL”) §§ 721 and 741. Respondent argues in his pre-answer motion, that petitioner lacks the legal capacity to sue him because the named petitioner is not the owner or landlord of the subject premises, that the predicate notices fail to state a cause of action and are lacking in specific facts to support the Petition and that petitioner improperly commenced an illegal sublet proceeding based upon non-primary residence grounds. Judith Cruz has not appeared in this proceeding.

In opposition, petitioner argues that respondent Falcon, does not have standing to bring this motion. Petitioner argues that there is no landlord-tenant relationship between petitioner and Falcon and that he is not a necessary party to this proceeding. Petitioner argues that Hope East of Fifth HDFC Inc. has standing to commence this proceeding as the legal owner of the premises, as nominee for Hope East of Fifth LLC, and that the predicate notices herein are legally sufficient and state a valid cause of action.

### Motion to Dismiss

“On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as 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” (Leon v Martinez, 84 NY2d 83, 87 [1994]; see also, Morone v Morone, 50 NY2d 481, 484; Rovello v Orofino Realty Co., 40 NY2d 633, 634). “However, allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration” (Caniglia v Chicago Tribune-N.Y. News Syndicate, 204 AD2d 233, 233 - 234 [App Div, 1<sup>st</sup> Dept 1994]; see also Skillgames, LLC v Brody, 1 AD3d 247, 250 [App Div, 1<sup>st</sup> Dept 2003]).

In a pre-answer motion based upon CPLR § 3211 (a)(7), the standard the court considers is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (Sokol v Leader, 74 AD3d 1180 [App Div, 2nd Dept, 2010]; Leon v Martinez, 84 NY2d 83, 88; Guggenheimer v. Ginzburg, 43 NY2d 268, 275 [1977]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus” (Sokol v Leader, 74 AD3d 1180; see EBC I, Inc. v. Goldman, Sachs & Co., 5 NY3d 11 [2005]).

Rent Stabilization Code (“RSC”) § 2525.6 (f) provides that “an owner may terminate the tenancy of a tenant who sublets contrary to the terms of [RSC 2525.6]” and may commence a proceeding to recover possession of the housing accommodation, after service of the notice as required by RSC § 2524.2. RSC § 2524.2(b) requires that the predicate notice state the ground for removal, and state “the facts necessary to establish that ground, and the date when the tenant must surrender possession” (Shimko v Chao, 28 Misc3d 1212[A] \*1 [Civ Ct, NY County 2010]; 9 NYCRR 2524.2 [b]).

## Analysis

### *Notice to Cure*

Respondent argues that the predicate notices in this case are jurisdictionally defective because petitioner fails to allege specific facts sufficient to support its claim of an illegal sublet. The Notice to Cure herein states that you are violating a substantial obligation of your tenancy, in that: (1) without permission of your landlord Judith Cruz has illegally sublet and/or assigned her rights to Miguel Falcon; (2) this is a violation of paragraph 16 of your lease agreement; (3) if the persons occupying the apartment are not subtenants, you are violating Section 235(f) of Real Property Law in that you are allowing those persons to occupy the apartment, when you are not actually occupying the apartment as your primary residence; (4) management has received information from Falcon that you have left the country and unable to return to the United States; (5) you have left Miguel Falcon in the apartment without the permission of the landlord.

Pursuant to RSC § 2524.2, the court finds that the Notice to Cure is sufficiently detailed to inform respondents of the ground upon which possession is sought and it states sufficient facts to enable respondents to formulate a defense. The Notice to Cure asserts case-specific facts to establish the grounds for petitioner's illegal sublet claim and it states more than just the legal ground for eviction.

### *Notice of Termination*

A termination notice must state facts necessary to establish the ground upon which possession of the premises is sought and state facts upon which the special proceeding is based (RSC § 2524.2; RPAPL § 741(4)). If a notice is too generic and conclusory it will fail to meet the required standards for notices. The standard by which the sufficiency of a predicate notice is to be measured is one of reasonableness in light of attendant circumstances (Hughes v Lenox

Hill Hospital, 226 AD2d 4, 18 [1<sup>st</sup> Dept 1996], *lv to app den*, 90 NY2d 829 [1997]; see also, Domen Holding Co. v Aranovich, 1 NY3d 117 [2003]; London Terrace Gardens, L.P. v Heller, 40 Misc3d 135 [1<sup>st</sup> Dept 2009]). Evaluating the totality of the allegations set forth in the Notice of Termination, the court finds that the Notice fails to allege sufficient facts regarding respondents failure to cure.

Here, the Notice to Cure provides respondents until November 16, 2018 to cure the alleged condition of the unlawful sublet. The court notes that November 16, 2018 is a Friday and Petitioner's Notice of Termination is dated Monday, November 19, 2018, which in and of itself is not the problem. The problem lies in petitioner's failure to provide respondents and the court with facts to support its claim that respondent have failed to cure.

The Notice of Termination states "that your tenancy in Apartment 4D in the premises known as and located at 8 East 110<sup>th</sup> Street, New York, New York 10029, is hereby terminated effective December 10, 2018 for the reasons that you failed to comply with the Notice to Cure dated October 30, 2018 . . ." The court finds that the allegations stated in the termination notice are conclusory and vague. The termination notice fails to explain the basis of the landlord's belief that respondents failed to cure. Petitioner simply states a conclusion that respondent "failed to comply with the Notice to cure" without offering any supporting facts.

Consequently, the court finds that a Notice of Termination is insufficient and the proceeding must be dismissed. A summary proceeding is statutory in nature and in order for a party to recover possession of real property pursuant to RPAPL Article 7, the party must abide by the terms of the statutes. RPAPL § 741(4) requires that every petition shall: "state the facts upon which the special proceeding is based." Herein, the predicate notices are incorporated into the Petition and thus, the Petition fails to state sufficient facts to support the termination of

respondents rent regulated tenancy. A proper notice is a condition precedent to a summary proceeding, and if the notice of termination is insufficient the proceeding must be dismissed Chinatown Apts. Inc. v Chu Cho Lam, 51 N.Y.2d 786, 788 [App. Term 1<sup>st</sup> Dept 1980].

Therefore, the portion of respondent's motion seeking to dismiss the Petition because the termination notice fails to state a cause of action is granted, and the Petition is dismissed. The remaining portions of respondent's motion for dismissal are moot.

Conclusion

Accordingly, respondent's motion to dismiss is granted and the Petition is dismissed with out prejudice to petitioner's claims for possession.

The foregoing constitutes the decision and order of this court.

Dated: New York, New York  
January 10, 2020



EVON M. ASFORIS  
JUDGE HOUSING COURT

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