2021-04-12

Broadhurst Willows Apts LLC v. Wooten

CIVIL COURT OF THE CITY OF NEW YORK

COUNTY OF NEW YORK: HOUSING PART F

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Broadhurst Willows Apartments, LLC,

L & T INDEX NO.: 68866/19

Petitioner

-against- DECISION/ORDER

Corey D. Wooten

Respondent

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J. SIKOWITZ:

RECITATION, AS REQUIRED BY CPLR SECTION 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIRMATION AND AFFIDAVITS ANNEXED.....	-------1----------
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	----------
ANSWERING AFFIRMATION	---2----------
REPLYING AFFIRMATION.....	--3----------
EXHIBITS.....	
OTHER	

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

Petitioner commenced this lease violation holdover proceeding based on claims respondent violated the parties' lease, the Rent Stabilization Code (RSC), the Multiple Dwelling Law (MDL) and the Administrative Code of the City of NY, based on the claims in the predicate Ten Day Notice of Termination. The predicate notice states in part:

(a) In violation of, inter alia, your written Lease Agreement, RSC 2524.3(b) and 2524.3(c), MDL 4(8)(a), and NYC Admin Code 28-210.3, since at least June 6, 2019, you have been unlawfully operating the Premises as a hotel, and illegally subletting the Premises to various individuals for short term rentals at rates exceeding those permitted by law, all without Landlord's knowledge or prior written consent.

(b) In violation of, inter alia, your written Lease Agreement, RSC 2524.3(b) and 2524.3(c), MDL 4(8)(a), and NYC Admin Code 28-210.3, since at least June 6, 2019, your Landlord received New York City Department of Buildings summons number 35425144K (a copy of which is annexed hereto) which states "apartment 4J (4th Floor) is used/converted to transient use for 2 guests staying for less than 30 days without the owner or host staying with the guest."

(c) …..your Landlord received New York City Department of Buildings summons number 35425145M (a copy of which is annexed hereto) which states "failure to maintain building in code compliant manner lack of a automatic sprinkler system where is required...for transient use for apartment 4J (4th floor)." Said violation was placed as a result of your unlawful use of the subject apartment as an Airbnb.

(d) ...since at least June 6, 2019, your Landlord received New York City Department of Buildings summons number 35425146Y (a copy of which is annexed hereto) which states "failure to maintain building in code compliant manner....failure to provide...required means of egress...for transient use for apartment 4J (4th floor). Said violation was placed as a result of your unlawful use of the subject apartment as an Airbnb

(e) ….Said violation was placed as a result of your unlawful use of the subject apartment as an Airbnb.

(f)...since at least June 6, 2019, member of the Building's staff have observed, among other things, that: (I) you are operating the Premises as an illegal short-term rental property, for durations shorter than 30 days, to individuals who are not permanent occupants of the Premises; and (b) numerous unknown individuals, purporting to be "renting" the Premises, have accessed the utilized the Premises in your absence on numerous occasions, without Landlord's prior written consent.

(g) ….your persistent and continuing illegal use of the Premises for commercially exploitive purposes constitutes a nuisance that is detrimental and damaging to Landlord and the Building's other occupants and is primarily intended to harass Landlord and the Building's other occupants.

(h) ...your persistent and continuing illegal use of the Premises for commercially exploitative purposes constitutes an obvious fire and safety hazard that seriously and immediately threatens the Building and the health, safety and well-being of the Building's occupants.

Respondent moves by notice of motion for an order, pursuant to CPLR 3211(a)(1)(7), dismissing petitioner's claims brought under Rent Stabilization Code (RSC) 2425.3(b) on the grounds that the notice of termination fails to state a cause of action for nuisance, and under RSC 2425.3(c) on the grounds the predicate notice fails to state a cause of action for unlawful occupancy. Respondent seeks an order dismissing of all of petitioner's claims based on any breach of the lease, dismissing claims for

use and occupancy (U&O), or in the alternative dismissing claims for U&O without prejudice to a plenary action. Petitioner opposes the motion in all respects.

It is undisputed that the parties' tentative settlement agreement fell apart as the Covid 19 pandemic hit NYC in early 2020. Respondent's employment opportunities disappeared, he believed he could not afford the apartment, and he vacated. On June 20, 2020 respondent sent the petitioner a notarized surrender of tenancy and mailed the keys to petitioner's registered address. It is undisputed that respondent was in possession of the subject apartment when the case commenced in September 2019, and he returned the keys to petitioner in June 2020. The parties agree that possession is not an issue since June 2020, and the remaining claims are for U&O.

In support of the motion respondent states the petitioner's nuisance claim, pursuant to RSC 2524.3(b), must be dismissed because the notice of termination is fatally defective as it fails to allege sufficient non-conclusory facts, and fails to allege a continuous course of conduct. Respondent argues that RSC 2524.2(b) requires that a notice of termination include "facts necessary to establish the existence of the grounds for eviction under 2524.3. A notice that merely recites the legal ground for eviction but fails to set forth facts to support the claims is ineffective, and cannot serve as a predicate notice in a holdover proceeding. Respondent states the language in the notice must be definite and unequivocal, unambiguous, and specifically describe the objectionable conduct. The predicate notice must state facts with sufficient specificity to "discourage baseless eviction claims founded upon speculation and surmise, rather than concrete facts." *London Terrace Garden, LP v. Heller*, 40 Misc3d 135[A](AT, 1st Dept. 2009) Respondent argues that a predicate notice must provide additional information to enable the tenant to frame a defense and to meet the test of reasonableness and due process, citing *Jewish Theological Seminary of Am. V. Fitzer,* 258 AD2d 337, 338 (1st Dept. 1999) Respondent states that if a landlord does not have concrete facts to support its claim, then it should not commence litigation until it has conducted an investigation to ascertain facts to support its claims.

In opposition to the motion, petitioner argues that the predicate termination notice states four (4) Department of Buildings (DOB) violations, issued solely due to respondent's actions, and directly related to the subject apartment, were issued due to respondent using the apartment for unlawful transient rental. Petitioner states the termination notice also provided additional information regarding the nuisance and breach of lease committed by the tenant, including personal observations made by building staff. Petitioner argues that respondent engaged in illegal conduct which resulted in the issuance of DOB violations, and that petitioner's rights to outstanding use and occupancy (U&O) are not extinguished by respondent surrendering his possessory rights to the apartment.

Petitioner argues that without the landlord's permission, respondent broke the law and the lease by using the apartment for illicit monetary gains, while placing petitioner at risk of the issuance of civil fines and penalties, and now respondent makes a frivolous motion. Petitioner states each of the DOB violations were directly related to the subject apartment, 4J, and were issued due to respondent using the apartment for unlawful transient use on June 6, 2019. Petitioner argues it has the inherent power to stop any tenant that is committing illegal conduct especially when the conduct results in the issuance of DOB violations, and that it has the right to pursue its claims for U&O. It is undisputed that respondent remained in possession of the apartment for a year after this proceeding commenced. Petitioner states that rather than filing an answer to the petition, dated September 21, 2019, respondent waits a year to submit a pre-answer motion to dismiss the petition.

Petitioner argues that CPLR 3211(a)(1) allows for a claim to be dismissed upon "documentary evidence" being provided by the moving party that establishes the lawful ground for the defense. Petitioner states that the respondent makes no argument as to the grounds and basis for dismissal pursuant to CPLR 3211(a)(1) and that branch of the motion should be denied. In deciding the branch of the motion seeking dismissal pursuant to CPLR 3211(a)(7), the court must accept the facts alleged in the petition as true, and accord the petitioner the benefit of every possible favorable inference, and determine whether the facts as alleged fit within any cognizable theory. The question presented to the court is whether petitioner has stated a cause of action, and it is not a motion for summary judgment. Petitioner argues that unless it has been shown that a material fact alleged by petitioner is not a fact at all, and there is no significant dispute regarding it, the petition shall not be dismissed. Petitioner relies on the holding in *Rabos v. R&R Bagels, Inc et.al.*, 100 AD3d 849, 851 (2nd Dept. 2012) stating, "A motion to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1) may be appropriately granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law."

Petitioner argues that dismissal under RSC 2524.3(b) is not proper as the landlord has stated a cause of action and a notice to cure is not required herein. Petitioner states that its claims support a cause of action for nuisance as it pled facts to support its claim that respondent interfered with the landlord's interest in the use and enjoyment of land, including freedom of annoyance. The landlord argues that the termination notice sets forth factual grounds demonstrating that respondent was in breach of RSC 2524.3(b) as the notice included four violations issued by DOB due solely to respondent illegally using the unit for short-term stays. In addition, the notice states that building employees observed respondent running an unlawful "hotel" and observed numerous unknown individuals entering the apartment on numerous occasions. These claims as alleged fit within a cognizable legal theory, the facts are not vague or conclusory, and provide respondent with sufficient information to fashion a defense. Petitioner states there is nothing confusing about its claim that using the rent regulated apartment for Airbnb and illegal short term stays violates RSC 2524.3(b) and that this conduct creates an on-going nuisance. Petitioner argues it has stated a cause of action under RSC 2524.3[c] where the occupancy is illegal or the owner is subject to civil fines and penalties. This claim is supported by the four DOB violations placed, and petitioner incurred legal fees and the prospect of civil penalties due to respondent's illegal use of the apartment.

In reply, respondent states that based on petitioner's opposition papers, it is undisputed that a necessary element of a claim under RSC 2524.3[c], ie, the actual imposition of civil penalties or fines, is missing from this case. Respondent argues that petitioner's opposition provides no authority for the proposition that the existence of violations relating to a single date can support a nuisance claim, and fails to refute respondent's position that the petition lacks sufficient factual specificity to withstand a motion to dismiss. Respondent seeks dismissal of the petition pursuant to CPLR 3211(a)(1) and (7).

Respondent argues in reply that in order for a rent stabilized tenant to be subject to eviction under RSC 2524.3[c], the occupancy of the unit must be unlawful, and the landlord must be subject to civil or criminal penalties as a result. Respondent relies on the holding in *Cadim Stonehenge LLC v. Gekht*, NYLJ, P. 5, C. 2 (Civ Ct, NY Cty, 1999) that the mere existence of a violation in and of itself does not entitle the landlord to an order of eviction. No vacate order has been issued nor has the landlord sufficiently demonstrated that the violation cannot be cured without removing the tenant. In the *Gekht* case, it was undisputed that the violation was not created by some act of the tenant. Respondent argues that

the violation and the offending condition in this case could have been easily cured, and an eviction under RSC 2524.3[c] is not proper herein.

Respondent argues that petitioner concedes in its opposition papers that a necessary element for an illegal occupancy claim, ie, that the landlord is actually subject to civil penalties, is missing from this case. Respondent states that petitioner argued that the use of the apartment for unlawful purposes placed the landlord "at risk" of civil penalties as a result of respondent's conduct. The mere risk of civil penalties without penalties actually being imposed does not satisfy the requirements of RSC 2524.3[c] according to respondent. Respondent cites to the holding in *210 West 94 LLC v. Concepcion,* 2003 NY Slip Op 50612[U], App Term, 1st Dept. 2003) to support his position. In *Concepcion,* unlike the instant case, there was no allegation that a violation had been placed for the offending behavior.

Respondent also argues that petitioner relies on cases dealing with illegal short term rentals that were brought by landlords under statutes that are not part of this proceeding, and were never pled by the petitioner. Respondent states that petitioner's reliance on *2328 Unilave Corp v. Beheler*, 2003 NY Slip Op 51135(U)(Civ Ct, Bx Cty 2003) is misplaced as the court in *Beheler* dealt with a substantive claim for breach of a substantial obligation of the tenancy under RSC 2524.3(a), a statute not raised in this proceeding. The tenant in *Beheler* was given an opportunity to cure the alleged substantial breach of a material clause of the lease (ie subletting). Respondent states that the holding in *Beheler* is not applicable herein as this petition rests on different grounds, and petitioner did not plead this case under RSC 2524.3(a) and did not afford respondent an opportunity to cure.

Respondent states that the conduct alleged in the notice of termination is based on conclusory allegations without any specific facts to support its claim. The termination notice states that unnamed building employees observed unidentified guests entering the apartment. Respondent argues that petitioner fails to cite any authority for the proposition that the existence of violations based on one date, standing alone, can constitute a nuisance. Respondent states that petitioner's reliance on *Brookford, LLC v. Penraat,* 47 Misc3d 723 (S Ct, NY Cty, 2014) is also misplaced as the case was based on a breach of a substantial obligation of the tenancy, and has no relevance to whether the landlord herein stated a claim of nuisance. The landlord in *Penraat* conducted an extensive an factual investigation to obtain specific facts/evidence before commencing a case based on an AirBnB claim. Respondent states that there are no specific factual allegations pled herein that would support a cause of action for breach of a substantial obligation of a tenancy, and that such a claim is not part of the petition. Assuming arguendo that this claim was a cause of action herein, respondent would be entitled to a cure period unless substantial profiteering was established.

Respondent states in reply that he is not arguing a landlord has no power to stop AirBnB activity or illegal short term rentals, as petitioner alleges in its opposition papers. Respondent argues that evidence that where AirBnB activity occurred on one single date, the landlord can plead a cause of action based on breach of a substantial obligation of tenancy with an opportunity to cure. If a landlord chooses to forego the cure period, and commence a holdover with a termination notice it should conduct an investigation to produce facts to justify termination based on nuisance and illegal occupancy theory, or waiting to see if the DOB would actually impose civil penalties as a result of unlawful conduct by respondent.

Discussion

The grounds for termination of the rent stabilized tenancy are based on violations of RSC 2524.3(b) and 2524.3[c] as stated in the predicate Notice of Termination, dated August 27, 2019. The grounds to support the termination of tenancy pursuant to the RSC are based on violation of the lease, MDL 4(8)(a) and NYC Admin Code 28-210.3. Under RSC 2524.2(b), a notice of termination shall include "facts necessary to establish the existence of [the grounds for eviction under 2524.3]." A notice that merely recites the legal ground for eviction but fails to set forth the facts upon which the proceeding is based is ineffective and cannot serve as a predicate notice for an eviction proceeding. The sufficiency of a predicate notice in a holdover proceeding is evaluated based on a standard of "reasonableness in view of all attendant circumstances." *157 Broadway Assoc v. Berroa*, 62 Misc3d 136[A] (App Term, 1st Dept. 2018) A predicate notice must provide the necessary information to enable the tenant to frame a defense and to meet the tests of reasonableness and due process. *Oxford Towers Co., LLC v. Leites*, 41 AD3d 144, (1st Dept. 2007); *Jewish Theological Seminary of Am. V. Fitzer*, 258 AD2d 337, 338 (1st Dept. 1999) To satisfy the requirement of factual specificity, a landlord needs to conduct a "thorough facts-investigation" before commencing a holdover proceeding. *Concourse Green Assocs., LP v. Patterson,* 53 Misc3d 1206[A] (Civ Ct, Bx Cty, 2016)

The court in *128 Second Realty LLC and Stellar 128 Second LLC, v. Dobrowolski,* 51 Misc3d 147[A], (App Term, 1st Dept. 2016), held that the landlord's claim the tenant is using the stabilized apartment as an "unlawful hotel" or causing the apartment to be used on a transient basis in violation of the law, without supporting specific factual allegations to support these claims, is a patently defective predicate notice. The *Dobrowolski* court makes clear that a thorough facts-investigation should be undertaken before starting an eviction proceeding where the law allows free, short term housing sitting stays when a tenant is away for legitimate personal reasons. The termination notice herein is deficient as it fails to allege specific factual allegations similar to the predicate notice in *Dobrowolski.* Paragraphs (f) through (h) of the termination notice state allegations based on observations of the building staff without giving dates/times, names or frequency of observations. The allegations track the language of the statute without providing supporting facts describing what observations, or conversations led the building staff to conclude respondent was operating the apartment as a short term rental. There is no description of the people who allegedly were renting the apartment, how many people were observed, or dates or times of observation. There is no allegation that respondent advertised the subject apartment for short term rental, what the rates were, other than petitioner claiming the charges were in excess of those permitted by law. The claims in the termination notice state respondent caused an "obvious fire and safety hazard" "primarily intended to harass" petitioner without stating one specific fact. The predicate notice is defective and fails to state a claim for nuisance behavior. The DOB violations are based on a single incident on one date, June 6, 2019, and do not support a cause of action based on nuisance or harassment. The other allegations of nuisance are based on conclusory, vague "observations" by petitioner's employee(s) without providing one fact to support or describe the claims. There are no specific facts describing a continuing or recurrent course of conduct. Based on the foregoing, the branch of respondent's motion seeking an order dismissing the nuisance claim under RSC 2524.3(b) is granted.

The notice of termination cites to RSC 2524.3[c] which permits termination of a rent regulated tenancy on the ground that "[o]ccupancy of the housing accommodation by the tenant is illegal because of the requirements of law and the owner is subject to civil or criminal penalties therefor." Eviction pursuant to RSC 2524.3[c] is a last resort that can be used only when an apartment cannot be safely or lawfully

occupied. *Cadim Stonehenge LLC v. Gekht*, NYLJ 7/14/9, p.5, col. 2 (Civ Ct, NY Cty, 1999) "...the mere existence of a violation in and of itself does not entitle the landlord to an order of eviction. " *Price v. Garcia,* NYLJ, 4/25/85, p.7 col. 1 (App Term, 1st Dept. 1985) In the instant case there is no claim that petitioner or a prior owner created the illegality, however, petitioner fails to establish an illegal nuisance condition in the subject apartment. The predicate notice is defective under RSC 2524.3[c] to support an eviction as petitioner fails to claim any unlawful occupancy is/was permanent, or that it could not be cured, and there were no civil penalties imposed against petitioner by DOB. The DOB violations refer to one date only, and there is no allegation or claim that petitioner was actually subjected to a civil penalty or fine. *Rubin v. Glasner,* 2002 NY Misc Lexis 2095 (Civ Ct, NY Cty 2002)

Any claims under RSC 2524.3(a) intended to be asserted by petitioner cannot survive as petitioner failed to serve a notice to cure and has failed to identify an specific lease provision alleged to have been breached by respondent.

Based on the foregoing, respondent's motion is granted in all respects and the petition is dismissed. This constitutes the decision and order of the court.

DATED: April 12, 2021

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Marcia J. Sikowitz, JHC