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Capmar Realty Corp. v. Novak

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK, HOUSING PART F

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CAPMAR REALTY CORP.

Petitioner, Landlord,

Index No. L&T 67028/19

-against-

DECISION & ORDER

MARGRET NOVAK

Respondents,

MARYANN MEDAGLIA

JOHN DOE and JANE DOE

Respondents /Undertenants.

-----X

FRANCES A. ORTIZ, JUDGE

Recitation as required by *CPLR 2219(a)*, of the papers considered in the review of the respondent’s motion to dismiss pursuant to *CPLR § 3211*.

Papers	Numbered
Notice of Motion, Affirmation & Memorandum of Law.....	1
Affirmation in Opposition.....	2
Reply Affirmation in Support.....	3

This is a holdover proceeding. The premises at issue is a rent-controlled apartment. Petitioner alleges in the notice of termination that it may recover possession of the premises because respondent is committing or permitting a nuisance in her apartment. Specifically, the allegation is that respondent is permitting a “horrific bed bug infestation to develop....” in her apartment which has spread to neighboring apartments.

Respondent, Margret Novak, moves to dismiss the petition pursuant to *CPLR* §3211 (a) (1) arguing that petitioner failed to serve the district office with a copy of the notice of termination within 48 hours, after service of the notice on her, as required by 9 *NYCRR* § 2204.3 (c).

According to 9 *NYCRR* § 2204.3 (a), except where the ground for removal or eviction of a rent controlled tenant is nonpayment of rent, no rent controlled tenant shall be removed or evicted from a housing accommodation by court process, and no action or proceeding shall be commenced for such purpose upon any of the grounds stated in *section* 2204.2 of this Part, unless and until the landlord shall have given written notice to the tenant and to the district rent office as hereinafter provided. Further, 9 *NYCRR* § 2204.3 (c) provides, that the written notice must be given within 48 hours after the notice is served upon the tenant, an exact copy thereof, together with an affidavit of service, shall be filed with the district rent office. In computing such 48-hour period, any intervening Saturday, Sunday or legal holiday shall be excluded.

The landlord's failure to allege and prove compliance with 9 *NYCRR* § 2204.3 (c) requiring the timely filing with the district rent office of a copy of the predicate notice served upon the tenant and an affidavit of service, has been found to be fatal to landlord's right to maintain a holdover proceeding. *Kent Equities Corp. v. Paez*, 17 Misc. 3d 127(A), (AT 1st Dep't 2007); [see *Grant v. Morris*, 18 A.D.2d 896 (1st Dep't 1963); *Garvin v. Cole*, 53 Misc. 2d 647 (AT 1st Dep't 1967); *Shahid v. Carillo*, 8 Misc. 3d 134(A) (AT 2nd Dep't 2005)]. 9 *NYCRR* § 2204.3 (c) may neither be waived by the parties nor can their consent confer jurisdiction. *Garvin v. Cole*, *supra.*; *Ferber v. Apfel*, 113 App.Div. 720, 723 (2nd Dep't 1906).

The pleading in a motion to dismiss pursuant to *CPLR* 3211 is afforded a liberal construction. *CPLR* 3026. The facts alleged on the complaint or petition must be accepted as

true and afford the plaintiff or petitioner the benefit of every possible inference and determine only whether the facts alleged fit within any cognizable legal theory. *Leon v Martinez*, 84 N.Y.2d 83 (1994). Under *CPLR 3211 (a) (1)*, a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law. *Heaney v. Purdy*, 29 N.Y.2d 157 (1971).

Here, the documentary evidence submitted does sufficiently and conclusively establish a defense to the asserted holdover claim as a matter of law because the landlord failed to comply with the provisions of 9 NYCRR § 2204.3 (c). *CPLR 3211 (a) (1)*; *Heaney v. Purdy*, *supra*. Specifically, *Exhibit A* in support of the motion contains the relevant documentary evidence, namely the notice of termination and affidavit of service for the notice. According to the affidavit of service, the notice of termination was **personally** served on respondent, Margret Novak, on August 12, 2019 at 2:24 p.m. at the subject premises. Since service of the termination notice on respondent was completed by personal delivery ¹ on August 12, 2019, petitioner under 9 NYCRR § 2204.3 (c) was required to file with the district rent office the exact copy of the notice and its affidavit of service no later than **August 14, 2019**. However, the affidavit of service for the notice of termination has a stamp marked “RECEIVED” from the Division of Housing and Community Renewal (“DHCR”) at the Lower Manhattan Borough Rent Office and

¹ *RPAPL* §735 personal service provisions do not require additionally mailing of legal papers by registered or certified mail and by regular first class mail. This is required with conspicuous place service. Contrary to petitioner’s contention, service of the notice of termination was not completed by mailing it on August 13, 2019. Also, petitioner cites absolutely no legal authority for its contention. However, here, service was completed on August 12, 2019, upon the personal delivery of the notice to respondent, Margret Novak.

dated August 15, 2019.² Since petitioner filed with the district rent office, the documents on August 15, 2019, it did not comply with the 48 hour filing notice.

Furthermore, the appellate case law cited above establishes that untimely filing with the district rent office of a copy of the notice of termination and affidavit of service is fatal to landlord's right to maintain a holdover proceeding and warrants dismissal of the proceeding. *Kent Equities Corp. v. Paez, supra.* Additionally, contrary to petitioner's contention, this 9 *NYCRR* § 2204.3 (c) defense created by statute may neither be waived by the parties nor can the parties' consent confer jurisdiction. *Garvin v. Cole, supra., Ferber v. Apfel, supra.* Lastly, petitioner's further contention that an "allegedly missed" 48 hour deadline is *de minimis* and non-prejudicial to respondent is unavailing. Clearly, the legislature in enacting the 48 hour filing deadline in 9 *NYCRR* § 2204.3 (c), considered the narrow time frame for filing and found it was compelling enough to justify the ramifications of untimeliness. There is a strong public policy interest in protecting the notice requirements of rent controlled tenants facing termination of their tenancy's. In turn and as a further extension of the statute, the appellate courts in the case law cited herein have applied, interpreted and validated such strict interpretation of the deadlines that the legislature enacted.

Accordingly, for the reasons discussed above, the respondent's motion to dismiss pursuant to *CPLR 3211 (a) (1)* based on documentary evidence is granted. The petition is dismissed.

ORDERED the respondent's motion to dismiss is granted.

² The Court notes that August 12th was a Monday and August 15th was a Thursday nor was there a legal holiday between August 12 and 15, 2019.

This is the decision and order of the Court, copies of which are being emailed and mailed to those indicated below.

Dated: New York, New York

January 4, 2020

_____/S/_____
Frances A. Ortiz, JHC

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