2020-01-24

WFHA CRESTON AVENUE, LP v. VOTAW

CIVIL COURT OF THE CITY OF NEW YORK

COUNTY OF BRONX: HOUSING PART F

x

WFHA CRESTON AVENUE, LP,

Petitioner,

-against-

CHARLES VOTAW, II,

Respondent-Tenants.

x

L&T Index No.: 33058/19

DECISION/ORDER
Mot. Seq. 2

Hon. Shorab Ibrahim

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 Affidavit & Exhibits A-H].....	1
Affirmation in Opposition	2
Reply Affirmation	3

After oral argument held on January 16, 2019 and upon the foregoing cited papers, the decision and order on this motion is as follows:

FACTUAL AND PROCEDURAL HISTORY

This summary non-payment proceeding was commenced by substitute service of the petition and notice of petition on August 5, 2019, with a mailing to the respondent done on August 6, 2019.[1] The petition, dated July 25, 2019, alleges service of a 10-day rent demand, ("Demand").[2] Respondent's pro-se answer raises a "general denial."[3]

Respondent obtained counsel through the Universal Access to Counsel program, ("UAC"), and now moves for dismissal pursuant to CPLR § 3211(a)(7) and § 3211(a)(2) for petitioner's failure to serve a fourteen (14) day rent demand.

[1] See affidavit of service for the petition and notice of petition.
[2] See petition at par. 8.
[3] See answer at #14.

Petitioner opposes the motion and argues that respondent's "general denial" waived objections to the propriety of the Demand.

DISCUSSION

Pursuant to the Housing Stability and Tenant Protection Act of 2019 ("HSTPA"), RPAPL § 711(2) now requires a 14-day written rent demand prior to commencement of a summary non-payment proceeding. (HSTPA, 2019 NY SB 6458, pt. M, § 12). § 711(2), as amended, became effective upon enactment and applies to actions *commenced* on or after June 14, 2019. (*id*, at § 29 [emphasis added]). Though the Demand here was served prior to the amendment of § 711(2), the proceeding was *commenced* after its enactment.[4] (*see* NYC CCA Sec. 400; *ABN Assoc., LLC v Citizens Advice Bur, Inc.*, 27 Misc. 3d 143[A], 910 NYS2d 760 [App Term, 1st Dep't 2010]); and *92 Bergenbrooklyn, LLC v Cisarano*, 50 Misc. 3d 21, 21 NYS3d 810 [App Term, 2nd Dep't 2015]).

Petitioner does not argue that the Demand remains proper because it was served prior to enactment of the HSTPA or that, on its face, the Demand affords respondent at least fourteen (14) days to make payment. Rather, petitioner opines that any objections to the Demand have been waived. Petitioner argues that "[w]hile the RPAPL was amended in June 2019, most long-standing principles of litigation were not amended" and that "[o]ne of those principles is than an affirmative defense not raised in an answer is deemed waived.

Petitioner is correct, of course, that general denials are insufficient to raise triable issues, (*Iandoli v Lange*, 35 AD2d 793, 315 NYS2d 752 [1st Dept 1970]; *Bank of New York Mellon v Aiello*, 164 AD3d 632, 633, 83 NYS3d 135 [2nd Dept 2018]), and that affirmative defenses are waived when not specifically raised in the responsive pleading. (CPLR 3018(d); *Kuhl v Piatelli*, 31 AD3d 1038, 1039, 820 NYS2d 149 [3rd Dept 2006]; *Butler v Catinella*, 53 AD3d 145, 150, 868 NYS2d 101 [2nd Dept 2008]). But the analysis cannot end here. The court must examine whether an objection based on § 711(2) must be pled in an answer, presumably as an affirmative defense.

[4] The petition and notice of petition were filed on or about July 30, 2019 as indicated by a date stamp appearing on the original in the court file.

Affirmative defenses are those defenses that "if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading." (CPLR § 3018(b); *Island Cash Register, Inc. v Data Terminal Systems, Inc.*, 244 AD2d 117, 120-121, 676 NYS2d 146 [1st Dept 1998]). Consequently, petitioner's argument fails.

Compliance with § 711(2), by its very terms, is a condition precedent to a summary non-payment proceeding. As such, it remains petitioner's burden to prove compliance with the statute as part of its prima facie case. (*see Second & E. 82 Realty LLC v 82nd Street Gily Corp.*, 192 Misc. 2d 55, 57, 745 NYS2d 371 [Civ Ct, New York County 2002] (compliance with the statutory prerequisites to a summary eviction proceeding, including service of an adequate predicate notice, constitutes a fact on which the proceeding is based and which a petitioner therefore must plead and prove as part of petitioner's *prima facie* case) [emphasis added]).

It cannot be reasonably argued that petitioner is caught by unfair surprise by its own noncompliance with a statutory requirement. (*see Second & E. 82 Realty LLC v 82nd Street Gily Corp.*, 192 Misc. 2d at 57 ["[t]he fact that the notice was deficient in its execution or content may have been a surprise to petitioner, but not the unfair surprise contemplated by CPLR § 3018"), *citing Stevens v Northern Lights Assocs.*, 229 AD2d 1001, 1002, 645 NYS2d 193 [4th Dept 1996]). Additionally, respondent's general denial raises no issue of fact not appearing on the face of the pleadings. Consequently, disputing the propriety of the Demand cannot be deemed an affirmative defense. As such, this court holds that petitioner must prove compliance with RPAPL § 711(2) as part of its *prima facie* case and that respondent's general denial sufficiently denies the allegations of the petition. (*id.*; *Hee Ja Yang v Macadji*, 61 Misc. 3d 1211[A] at *4, 2018 NY Slip Op 51465[U] [Civ Ct, Bronx County 2018). To find differently, this court would upend "long standing principles of litigation."

The court further notes that a motion under CPLR § 3211(a)(7) can be made post-answer, "irrespective" of whether respondent "has made a pre-answer motion *or asserted the defense in the answer*, because the motion to dismiss based upon a ground that the complaint failed to state a cause of action can be made *at any time*." [emphasis added]. (*Butler v Catinella*, 58 AD3d at 151; *Kales v City of New York*, 169 AD3d 585, 586, 95 NYS3d 58 [1st Dept 2019]).

As to the alleged failure to state a cause of action, the court, when considering a motion under CPLR § 3211(a)(7), must afford the pleadings a liberal construction. The court must deem the 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. (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). In assessing a motion under CPLR § 3211(a)(7), "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]). Thus, "a motion to dismiss made pursuant to CPLR § 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, 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, 827 NYS2d 231 [2nd Dept 2006]; *see Leon v Martinez*, 84 NY2d at 87-88).

When the court considers respondent's evidentiary material, the criterion then becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v Ginzburg,* 43 NY2d at 275). A respondent may only succeed if they establish conclusively that [the plaintiff] has no cause of action. *(Lawrence v Graubard Miller,* 11 NY3d 588, 595, 873 NYS2d 517 [2008], *citing Rovello v Orofino Realty Co.*, 40 NY2d 633, 636, 389 NYS2d 314 [1976]). That is the case here. The petition states in par. 8, "Said rent has been demanded BY 10 DAY NOTICE IN WRITING from the tenant(s) since same became due." The purpose of this statement is to allege compliance with RPAPL § 711(2). Respondent has established with its submissions[5] that petitioner did not comply with the statute when it served a 10-Day Notice. Thus, the case must be dismissed for failure to state a cause of action.[6]

[5] See the petition and rent demand.

[6] The court has considered the CPLR § 3211(a)(2) argument and finds it to be without merit. As this is a landlord-tenant summary proceeding, the court has the subject matter jurisdiction to hear it. This court's subject matter jurisdiction is conferred by statute. (*see Duncan v Caldwell*, 64 Misc. 3d 1229[A] at *2, 2019 NY Slip Op 51370[U] [Civ Ct, Bronx County 2019], *citing Birchwood Towers No. 2 Associates v Schwartz*, 98 AD2d 699, 700, 469 NYS2d 94 [2nd Dept 1983] (deficiency in a summary proceeding pleading does not render the proceeding jurisdictionally defective)).

CONCLUSION

Based on the foregoing, it is so ordered, respondent's motion to dismiss the proceeding pursuant to CPLR § 3211(a)(7) is granted and the clerk is directed to enter a judgment of dismissal in respondent's favor. This constitutes the decision and order of the court.

SO ORDERED,

Dated: January 24, 2020

Bronx, NY

SO ORDERED

Hon. Shorab Ibrahim
Housing Court

SHORAB IBRAHIM, JHC

To:

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