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Uptown Realty Unlimited LLC v. Pichardo

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

Motion Seq #: 4

UPTOWN REALTY UNLIMITED LLC

L&T Index # 80235/18

Petitioner-Landlord

-against-

DECISION/ORDER

ESTRELA M. PICHARDO
128 Fort Washington Avenue, Apartment 3E
New York, New York 10032

Hon. Clifton A. Nembhard

Respondent-Tenant

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondent's motion for an order pursuant to CPLR 3212 granting leave to amend her answer; and/or granting summary judgment; and putting the matter on the calendar for the purpose of litigating respondent's counterclaim.

Papers	Numbered
Notice of Motion and Affidavits Annexed	<u>1</u>
Order to Show Cause and Affidavits Annexed	<u> </u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Exhibits	<u> </u>
Other	<u> </u>

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

Background

Petitioner commenced the instant nonpayment proceeding by petition dated December 5, 2018 to recover rent arrears and other fees totaling \$5,884.32. Prior to commencement petitioner served a rent demand which sought an \$89.05 balance for August 2018, rent for September 2018 through November 2018 at \$797.90 a month, washing machine charges of \$1,680.77 and security of \$797.90. Respondent interposed a pro se answer alleging, inter alia, that the rent or a part of the rent has already been paid and that petitioner has harassed her. Respondent, having now

retained counsel, moves for leave to amend her answer and/or for summary judgment. She also seeks a hearing on her proposed counterclaim for harassment.

Discussion

Leave to amend a pleading should be freely granted absent prejudice or surprise. CPLR § 3025(b); *Fahey v. County of Ontario*, 44 NY2d 934 [Ct App 1978]. Leave shall be granted provided that the proposed amendment is not palpably insufficient or patently devoid of merit. *Edenwald Contracting Co. v. New York*, 60 NY2d 957 [Ct App 1983]. Here respondent's proposed amended answer asserts five affirmative defenses and three counterclaims. The former include payment, defective rent demand, tender and refusal, lack of subject matter jurisdiction and impermissible fees. The counterclaims seek judgment for harassment, frivolous prosecution and legal fees.

The proposed defenses cannot be said to be patently devoid of merit. Moreover, the assertions in the amended answer should not come as a surprise to petitioner as many of these claims were alluded to in the pro se answer. Finally, petitioner does not allege that it would be prejudiced by allowing the amendment.

Respondent seeks summary disposition on the grounds of tender and refusal and defective predicate notice. As a general rule, a tender must include everything to which the creditor is entitled or else it is not legally effective. *Nat'l Sav. Bank v. Hartmann*, 179 AD2d 76 [3rd Dept 1992]. The party asserting the defense has the burden of showing that the tender was fairly made and deliberately and intentionally refused by the creditor. Respondent here has met this burden.

Respondent asserts that she always pays her rent by the first of each month. However, petitioner generally delays a couple weeks before cashing the checks. At the time the petition was drafted she had paid the rent through December. As proof of this respondent attaches copies of the cancelled checks for August through December 2018.

Petitioner in opposition asserts that at least one month's rent is due and owing to date and was due when the petition was served. Petitioner notes that it returned respondent's check for November 2018 rent because it was not signed. In addition, it returned respondent's May 2018 rent payment on or about September 14, 2018 because it was more than ninety days old. Respondent's records however show that upon receipt of the November check respondent signed and returned it to petitioner who cashed it on December 5, 2018. She also replaced the May payment with another check dated November 25, 2018 which was also cashed on December 5, 2018.

Respondent is also entitled to summary judgment based on a defective predicate notice. A proper rent demand is a condition precedent to maintaining a nonpayment proceeding. RPAPL § 711(2). The lack of a proper demand renders the proceeding fatally defective. The standard for assessing the adequacy of a demand is reasonableness in view of all attendant circumstances. *Hughes v. Lenox Hill Hosp.*, 226 AD2d 4 [1st Dept 1996]. The purpose of the rent demand is

allow the tenant an opportunity to make a payment to avoid having petitioner commence a nonpayment proceeding. The demand therefore must clearly inform the tenant of the particular periods for which rent is in default and the approximate good faith sum allegedly due for each period so as to permit the tenant to adequately defend the action and prevent forfeiture of the leasehold. *Schwartz v. Weiss-Newell*, 87 Misc 2d 558 [Civ Ct NY 1976]. If the demand is inaccurate the tenant is not in a position to remedy the default and avoid litigation. *Shimon Realty, Inc. v. Stosko*, NYLJ, June 24, 2002 at 24 col 6 [Civ Ct, Kings 2002].

Here, the November 16, 2018 rent demand alleges that respondent owed September, October and November's rent plus a small balance for August 2018. However, a review of petitioner's rent ledger and respondent's cancelled, earmarked checks shows that this was not the case. Of the months demanded, only November's rent was owed at the time the predicate was drafted. Accordingly, the demand was not a good faith estimation of the rent outstanding.

Finally, respondent's counterclaim for harassment does not relate to nor is it intertwined with petitioner's action for rent. *Coronet Props. Co. v. Lederer*, NYLJ, Feb. 21, 1986, at 12, col 2 [App Term 1st Dept]. Accordingly, it is not heard in this proceeding.

Conclusion

Based on the foregoing the motion is granted and the petition dismissed. Petitioner's counterclaim is severed for a separate plenary action.

This constitutes the decision and order of the Court.

Date: February 11, 2020
New York, New York

SO ORDERED
HON. CLIFTON A. NEMBHARD
Hon. Clifton A. Nembhard, JHC