2020-02-18

1236 Grand Concourse LLC v. Rahman

CIVIL COURT OF THE CITY OF NEW YORK
BRONX COUNTY: HOUSING PART T

----------X L&T Index # 18765/2019

1236 GRAND CONCOURSE LLC,

Petitioner,

-against-

DECISION & ORDER

MUHAMMAD M. RAHMAN,
1236 Grand Concourse, Apt. 32, Bx NY 10456

Respondent-Tenant

MUHAMMAD H. RAHMAN,
BILKIS RAHMAN,

Respondents-Undertenants.

----------X

Hon. Diane E. Lutwak, HCJ:

This is a Holdover Proceeding against a Rent Stabilized tenant based upon unreasonable refusal to provide Petitioner access to make repairs, failure to sign a renewal lease and nuisance. The Petition is predicated upon, and incorporates by reference, a Ten-Day Notice to Cure which gave Respondents an opportunity to cure the alleged violations of their tenancy "by cleaning your apartment, providing access to the Landlord's agents to make necessary repairs and signing and returning your lease renewal to the landlord"[1]. Upon Respondents' failure to cure, a Ten-Day Notice of Termination and this proceeding followed. At a pre-trial conference on January 15, 2020 counsel for Respondents Muhammad M. Rahman and Bilkis Rahman indicated that there was a "*Landaverde*" issue arising from Petitioner's method of service of the predicate Ten-Day Notice to Cure that he believed warranted dismissal of the proceeding. The court asked counsel to brief the issue and now treats the matter as a motion *in limine*.

In *ATM One, LLC v Landaverde* (2 NY3d 472, 812 NE 2d 298, 779 NYS2d 808 [2004]), after acknowledging that the pertinent regulations did not answer the question of when a Ten-Day Notice to Cure is deemed served, the court found that where a landlord serves such a notice by mail, five days must be added to the ten-day minimum cure period "to ensure that tenants are not disadvantaged by an owner's choice of service method". [2]

---

[1] While the Rent Stabilization Code does not require a ten-day cure period where the ground for eviction is nuisance, 9 NYCRR § 2524.3(b), it appears that Petitioner included an opportunity to cure the alleged nuisance behavior in its Ten-Day Notice to Cure because the lease between the parties at paragraph 16(A)(4) includes "[i]mproper conduct by Tenant annoying other tenants" on a list of curable defaults.

[2] The *Landaverde* case, which originated in Nassau County where the Emergency Tenant Protection Regulations apply, subsequently was applied to Rent Stabilized tenancies, *see South Park Estates Co v Hilverdink* (13 Misc3d 62, 823 NYS2d 816 [App Term 1st Dep't 2006]), and then

The relevant undisputed facts before this court are the following:

- Petitioner's Ten-Day Notice to Cure is dated 1/21/19 and requires Respondents to cure the alleged violations of the tenancy by 2/27/19.
- The Affidavit of Service of the Notice to Cure is sworn to 2/14/19 and alleges that a copy of the notice was affixed to Respondents' door on 2/13/19, with additional copies sent by both first class and certified mail on 2/14/19.
- Paragraph 4 of the Respondent-Tenant's lease, entitled "Notices", states that notices to the tenant "must be delivered or mailed to the Tenant at the Apartment" and "will be considered delivered on the day mailed or if not mailed, when left at the proper address."

Given that the Rent Stabilization Code does not mandate a specific method of service[3], the starting point for the court's analysis is the Respondent-Tenant's lease, which permits notices to be either delivered or mailed. The lease does not specify that the delivery option must be by "***personal*** delivery"; rather, it states that if the notice is delivered, it will be considered delivered when it is "left at the proper address." Here, the notice was "left at the proper address" by affixing it to the door to Respondents' apartment on February 13, 2019. As such and given that the notice on its face states February 27, 2019 was the last day of the cure period, the notice gave Respondents a fifteen-day cure period and therefore more than meets the ten-day cure period required by the Rent Stabilization Code and the lease.

Respondents argue service was not complete until the mailings were done on February 14, 2019. Following this logic, Respondents argue that they were given only fourteen days' notice of the cure period, which fails to comply with the mandate of *Landaverde* and the amended Rent Stabilization Code, 9 NYCRR § 2524.3(a), to add five days to the ten-day day cure period when relying upon mailing as the chosen method of service.

The problem with Respondents' argument is that it disregards the import in this case of the affixation of a copy of the Notice to Cure to Respondents' door on February 13, 2019 and the fact that the operative language in the Respondent-Tenant's lease is "**left at the proper address**", not ***personal*** delivery to the tenant. While the Code says nothing about the method of serving the notice, Respondent's lease does and it allows two options: notices can either be mailed or "left at the proper address". Here, Petitioner employed the latter option, which was

---

codified in the Rent Stabilization Code, 9 NYCRR § 2524.3(a), which was amended in 2014 to say: "If the written notice by the owner that the violations cease within ten days is served by mail, then five additional days, because of service by mail, shall be added, for a total of 15 days, before an action or proceeding to recover possession may be commenced after service of the notice required by section 2524.2 of this Part."

[3] While RSC § 2524.3(a) was amended to codify *Landaverde*, the amendment did not alter the fact that the Code does not mandate a specific method of service; rather, it simply states that ***if*** the notice to cure is served by mail, an additional five days must be added.

accomplished by affixing the notice to the door of Respondents' apartment. True, Petitioner also had additional copies sent by first-class and certified mail. However, on the facts of this case, where the lease specifies that notices may be "left at the proper address" as one of two delivery options, since that is what Petitioner did the mailings were extra and need not comply with *Landaverde*.

Cases interpreting the section of the Rent Stabilization Code that apply to an owner's service of a notice of nonrenewal of a lease, such as *Mauro v Thorsen* (NYLJ, Dec 4, 1991, at 24, col 5 [Civ Ct NY Co 1991, Turner, J])[4], are not analogous because that regulation, 9 NYCRR § 2523.5(a), specifies that the notice must be served "by mail or ***personal*** delivery". [Emphasis added.] There having been no allegation of personal delivery, at issue in *Mauro v Thorsen* was the question of "what constitutes notification by mail". Judge Turner concluded that the mailing component of RSC § 2523.5(a) would be met only by "the unrestricted method of regular mailing or what is commonly referred to as ordinary first class mailing."[5]

Similarly inapposite are the decisions in *C&H Mgmt LLC v Scarpelli* (2009 NY Misc LEXIS 2524, 242 NYLJ 4 [Civ Ct Kings Co]) and *Hab Clinton Assoc, LL v Marsh* (9 Misc3d 1103[A], 806 NYS2d 445 [Civ Ct NY Co 2005]), holdover proceedings which were dismissed because the notices to cure did not comply with *Landaverde*. *C&H Mgmt* involved a Rent Controlled tenancy and the court noted that, "like the regulation which was at the center of the decision in Landaverde, the regulation at issue here permits service of notices to cure ***in person*** or by mail." [Emphasis added.] In *Hab Clinton Assoc*, there was a lease provision that required the ten-day notice to cure to "be ***personally*** delivered to the tenant or sent by regular and certified mail." [Emphasis added.] Given that the notices to cure in both *C&H Mgmt* and *Hab Clinton Assoc* were served by conspicuous place – aka "nail and mail" - service, and the affixation step clearly did not meet the "in person" or "personally delivered" alternate service options

---

[4] This court's reference to *Mauro v Thorsen* in a prior decision granting the landlord's motion to dismiss a tenant's proposed affirmative defense of defective service of a predicate notice should not be taken out of context. In *1691 Fulton Ave Assoc, LP v Watson* (55 Misc3d 1221[A], 61 NYS3d 191 [Civ Ct Bx Co 2017]), this court cited *Passolo v Youssef* (2007 NYLJ LEXIS 3268, NYLJ, May, 30, 2007 at p 20, col 3 [Civ Ct Kings Co], which in turn cited *Mauro v Thorsen*, for the proposition that "there is no requirement that predicate notices to cure a lease violation, or terminate a tenancy for failure to so cure, be served pursuant to the RPAPL." In *1691 Fulton Ave Assoc, LP v Watson* this court was not focusing on the fact that *Passolo v Youssef, Mauro v Thorsen* and other cases cited involved holdovers predicated upon notices of nonrenewal of a lease, where the pertinent provision of the Rent Stabilization Code specifically requires service of that notice to be "by mail or personal delivery". Had this court focused on the distinction at the time of writing that prior decision it would have clarified that point.

[5] In prefacing this conclusion with the phrase, "Notwithstanding the provisions of the lease", it is unclear what Judge Turner intended, as he did not mention what the relevant lease provisions said or why he was not giving them any consideration; instead he focusses on the relevant statutes which he construed "in pari materia" to arrive at his conclusion.

available in those cases, it follows that the only part of the "nail and mail" service method that mattered in those cases was the mailings; hence, an additional five days was required.

In other words, the affixation step was irrelevant in the three above-cited cases, which did not answer the question of whether affixing a notice to the door is the equivalent of it being "left at the proper address" as permitted by the Respondent-Tenant's lease in the case now before this court. While not a paradigm of clarity, the notice provision in the parties' lease is sufficiently clear for this court to find that affixation of the notice to cure to the door of Respondents' apartment means it was "left at the proper address". The timing of that delivery gave Respondents more than the minimum required notice and they have not established that it in any way deprived them "of the full 10-day cure period allotted by the governing Code regulation." *South Park Estates Co v Hilverdink* (13 Misc3d 62, 823 NYS2d 816 [App Term 1st Dep't 2006]). That Petitioner subsequently mailed Respondents additional copies of the notice does not mean, in these circumstances, that full conspicuous place service under RPPAL § 735 was required with a fifteen-day cure period to begin at the time of such mailing.

CONCLUSION

Accordingly, the motion *in limine* to dismiss based upon allegedly defective service of the Notice to Cure is denied and this case will proceed to trial on April 6, 2020 at 9:30 a.m., as previously scheduled. This constitutes the Decision and Order of this Court, copies of which will be mailed to the parties' respective attorneys unless picked up in the Part forthwith. Although he did not participate in this motion practice, a copy will also be sent by first-class mail to Respondent-Undertenant Muhammad H. Rahman at the premises.

_____
Diane E. Lutwak, Hsg. Ct. J.

Dated: Bronx, New York
February 18, 2020

Attorney for Petitioner:

Lawrence McCourt, Esq., Heiberger & Associates, P.C.
589 Eighth Avenue, 10th floor, New York, NY 10018 (212) 532-0500

Attorney for Respondents Muhammad M. Rahman and Bilkis Rahman:

Emilio Paesano, Esq., Of Counsel to Jeanette Zelhof, Esq., Mobilization for Justice, Inc.
424 East 147th Street, 3rd Floor, Bronx, NY 10455 (212) 417-3818