2020-04-06

JERICHO PROJECT LESSEE v. Marte-Travera

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

----------X L&T Index # 32182/19

JERICHO PROJECT LESSEE,

Petitioner-Landlord,

-against-

ANTONIO MARTE-TRAVERA, **DECISION & ORDER**

Respondent-Tenant,

"JOHN DOE" and/or "JANE DOE",

Respondent-Undertenants.

1910 University Avenue, Apt #4-D, Bronx, NY 10453

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Hon. Diane E. Lutwak:

Recitation, as required by CPLR Rule 2219(a), of the papers considered in the review of Respondent-Tenant's Motion to Dismiss (Motion Seq #1) and Petitioner's Cross-Motion for Leave to Amend Petition, for Discovery and for Use and Occupancy (Motion Seq #2):

Papers	Numbered
Respondent's Attorney's Affirmation, Exs A-E & Memorandum of Law	1
Petitioner's Notice of Cross-Motion, Attorney's Affirmation, Affidavit & Exs A-G	2
Respondent's Memorandum of Law in Reply and Opposition to Cross-Motion	3

Upon the foregoing papers and for the following reasons, Respondent-Tenant's pre-answer motion to dismiss[1] and Petitioner's cross-motion to amend the petition, for discovery and for use and occupancy are consolidated for disposition and decided as follows.

[1] While the papers filed with the court by Respondent's attorney are self-described as a motion, as can be seen from the court's recitation pursuant to CPLR Rule 2219(a) of the papers considered, they do not actually include a Notice of Motion form. While this omission could have resulted in the motion being rejected by the clerk's office at the time of filing, apparently it did not. At this point the court discerns no prejudice to Petitioner and disregards this irregularity pursuant to CPLR § 2001.

BACKGROUND AND PROCEDURAL HISTORY

This is an eviction proceeding brought by Petitioner Jericho Project Lessee against Respondent-Tenant Antonio Marte-Travera based upon failure to cure an alleged violation of a substantial obligation of the tenancy due to illegal sublet. The petition also names "John Doe" and/or "Jane Doe" as Respondent-Undertenants.[2] The petition asserts that Petitioner is the landlord authorized to bring this proceeding (Petition at ¶¶ 1, 2) and Respondent is the tenant who entered into possession of Apartment #4D at 1910 University Avenue in the Bronx (the subject premises) under a one-year written rental agreement running from July 26, 2018 through July 25, 2019 (Petition at ¶¶ 3, 5). The petition further states that the apartment is not subject to Rent Stabilization "because the Petitioner rents the unit from the owner of the building in order to provide its clients, the Respondent(s) herein, with supportive housing" (Petition at ¶ 13).

Attached to and incorporated by reference in the petition are a Notice to Cure and a Notice of Termination (Petition at ¶¶ 6-11). The Notice to Cure alleges that Respondent was "violating a substantial obligation of your tenancy" by subletting or assigning his "rights of occupancy" to others without his landlord's permission and in violation of certain paragraphs of his "license agreement" and Real Property Law Section 226-b. The Notice to Cure alleges facts to support the illegal sublet claim in five numbered paragraphs, as follows:

(1) On February 22, 2019, the landlord was informed by building staff that you are not residing in your apartment; renting your apartment to unauthorized persons without the landlord's consent; and collecting monthly fees without the landlord's consent from said occupants.
(2) Building staff was informed by a previous unauthorized tenant of yours that you rented your apartment to him for approximately $1,100 on January 14, 2019. Said person further advised that he rented your apartment from January 14, 2019, until February 10, 2019. Furthermore, said person informed building staff that the day he vacated the premises, new occupants were moving in.
(3) The landlord and/or its employees have observed "JOHN DOE" AND/OR "JANE DOE", in or about the premises. It appears that said persons have keys to the subject apartment and building, are receiving mail and packages and are residing in the premises, without the consent of the landlord.
(4) The landlord and its employees have not seen you in or about the subject premises for a period in excess of several months and the Petitioner believes that the tenant's actual place of residence is at an address the landlord has been unable to ascertain.

[2] As the Respondent-Tenant was the only Respondent to appear, he will be referred to herein simply as Respondent.

(5) You neither requested nor received permission to sublet and/or assign your rights of occupancy. Similarly, you never advised the landlord that any other additional occupants would be residing in the apartment as may be permitted by law.

The Notice to Cure, dated April 3, 2019, further advises Respondent that he must cure the default by May 3, 2019 and to do so he must "immediately and permanently" remove all unauthorized occupants from the apartment and cease and desist subletting.

The Notice of Termination, dated May 23, 2019, terminates Respondent's tenancy effective June 7, 2019 due to his failure to comply with the Notice to Cure, which is incorporated by reference. More specifically, the Notice of Termination alleges that Respondent failed to remove "John Doe" and/or "Jane Doe" from the apartment and that, "[o]n May 15, 2019, during a routine visit from your case worker, the landlord's agent observed 'Jane Doe' in the apartment and new furniture placed in the apartment."

Both predicate notices assert, as does the petition, that the apartment is not subject to Rent Stabilization because Petitioner "rents the unit from the owner of the building in order to provide its clients, the Respondent(s) herein, with supportive housing."

This proceeding was filed on July 19, 2019, noticed for August 5 and adjourned initially to August 26 for Respondent to seek legal assistance and then to October 2 for Respondent's newly-retained counsel to investigate the case. Respondent's counsel prepared a motion to dismiss and, according to the attached affidavit of service, sent it to Petitioner's counsel by Federal Express on September 30. On October 2 the proceeding was adjourned to November 21 with a briefing schedule which was extended first to January 7 and then to February 7 when Petitioner filed its opposition and cross-motion. On February 7 the motion and cross-motion were adjourned for further briefing to March 13, at which time the court heard argument and marked the motion submitted, decision reserved.

Respondent seeks dismissal of the petition under CPLR Rules 3211(a)(1) and (7), arguing the following points:

(1) The termination notice is defective because it does not sufficiently state how Respondent failed to cure the alleged breach of his lease;
(2) The petition is defective because it fails to adequately state the parties' interests in the premises as required by §§ 741(1) and (2) of the Real Property Actions and Proceedings Law ("RPAPL") and impermissibly refers to Petitioner as both landlord and lessee;
(3) The petition is defective because it fails to state the correct regulatory status of the apartment as required by RPAPL § 741(4) by alleging that the apartment is not subject to the Rent Stabilization Law of 1969; Rent Stabilization applies under the Emergency Tenant Protection Act of 1974 ("ETPA") §§ 5(a)(10) and (11) as amended by Part J of the Housing Stability and Tenant Protection Act of 2019 (HSTPA).

Alternatively, Respondent requests leave to file an answer to the petition, although no proposed answer is attached to the moving papers.

Petitioner opposes Respondent's motion to dismiss, arguing the following points:

(1) The termination notice is sufficient as it specifically advises Respondent that he failed to cure in that he did not remove "John Doe" and/or "Jane Doe" from the apartment and that his case worker observed "Jane Doe" and new furniture in the apartment on a specific date following the end of the cure period;
(2) The petition properly states the parties' interests in the premises as (a) Petitioner is and legally can be Respondent's landlord without being the owner of the premises and the petition states that Petitioner "rents the unit from the owner of the building in order to provide its clients … with supportive housing"; and (b) Respondent is Petitioner's tenant pursuant to a "written rental agreement" between the parties;
(3) The petition correctly describes the apartment's regulatory status as it pertains to Respondent, who is not a Rent Stabilized tenant but rather a subtenant with a license to use the apartment granted to him by Petitioner, which is "currently the [Rent Stabilized] tenant of record in legal possession". Petitioner asserts that the HSTPA is not relevant because "the Legislature specifically clarified … that rent stabilization rights do not revert to any subtenant until after the not-for-profit vacates", pointing to a New York State Assembly Memorandum in Support of Legislation which states in its summary of Part J that this section, "Ensures that units rented by nonprofits to provide housing to homeless or previously homeless people revert to rent regulation at the end of the use by the nonprofit, and that the previously homeless person or persons are treated as tenants for purposes of the law."

Further, Petitioner cross-moves for various relief. First, Petitioner seeks leave to amend its petition, and although it includes no proposed amended petition, its attorney explains:

> The proposed amendment to the Petition will amend Paragraph "13" of the Petition and the incorporated predicate notice to read as follows: "The apartment in this proceeding is rent stabilized. The rent stabilized apartment is rented by a non for profit organization hereinafter 'Petitioner', which provides supportive housing. The Petitioner subleases and/or licenses the apartment to under-tenants who are the Respondent(s) in this proceeding. The under-tenants do not have rent stabilization rights because the Petitioner is the rent stabilized tenant in legal possession of the apartment."

Attorney's Affirmation at ¶ 36. Petitioner also seeks discovery in the form of a deposition and production of documents and an order compelling Respondent to pay retroactive and prospective use and occupancy.

Petitioner's papers include its agent Rebecca Cruz's affidavit, asserting that Petitioner is "a not-for-profit corporation, which provides affordable housing for unskilled single adults with substance abuse problems or emotional disabilities who have become homeless," Cruz Affidavit at ¶ 3, and that Petitioner leases the subject apartment from the building owner "1910 Bldg LLC", Cruz Affidavit at ¶ 4. Attached to and referenced in Ms. Cruz's affidavit are copies of Petitioner's lease with the owner and the owner's deed (Exhibits B & C).

Ms. Cruz also asserts that Respondent is "the undertenant/occupant in possession of the subject premises, who entered into possession pursuant to a written rental 'license agreement' with Petitioner for a one-year term", Cruz Affidavit at ¶ 5, a copy of which is attached (Exhibit D). The four-page License Agreement is dated July 26, 2018 and runs from that date through July 25, 2019. Petitioner is denominated as "licensor" who leases the subject premises and is "a non-profit organization that provides housing and supportive services." Respondent is denominated as "licensee" and described as "a homeless person with disabilities who is in need of appropriate housing and supportive services." The agreement provides for a monthly "license fee" of $215 to be paid by Respondent and includes thirteen numbered provisions. Relevant herein are the following:

- Provision (1), entitled "Occupant is a Licensee", states *inter alia* that Respondent "occupies his/her apartment as a licensee" and that he may not assign the agreement or sublet any part of the apartment or permit any other person to use the apartment.
- Provision (2), entitled "Licensee's Duty to Obey Rules and Regulations", states *inter alia* that Respondent must comply with Petitioner's "House Rules and Regulations" and noncompliance "can result in the termination of the license".
- Provision (3), entitled "Eviction", states: "If the licensee ceases to be a client in good standing of the Jericho Project, the licensor will commence a licensee holdover eviction proceeding in the Housing Part of the Civil Court to obtain a warrant of eviction and cause a subsequent lawful eviction by a Marshal of the City of New York."
- Provision (4), entitled "Use", states: "The Apartment is to be used only as a private residence of the licensee, no roommate, family member, or any other person may live in the Apartment."
- Provision (8), entitled "Assignment and Subletting", states: "The licensee shall not assign this Agreement or sublet any portion of the premises without the prior written consent of the licensor."

On reply and in opposition to Petitioner's cross-motion Respondent reiterates his original arguments and further argues that Petitioner relies on the incorrect section of the HSTPA in concluding that Respondent cannot claim Rent Stabilization rights while Petitioner is the tenant of record with legal possession of the apartment; Petitioner's cross-motion to amend the petition should be denied because a proposed amended pleading is not attached and failure to allege the apartment's proper regulatory status is a non-amendable defect;

ample need for discovery has not been shown; and payment of use and occupancy under RPAPL § 745(2) is unwarranted.

DISCUSSION

A motion to dismiss under CPLR R 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." *Goshen v Mut Life Ins Co* (98 NY2d 314, 326, 774 NE2d 1190, 1197, 746 NYS2d 858, 865 [2002]); *Leon v Martinez* (84 NY2d 83, 88, 638 NE2d 511, 513, 614 NYS2d 972, 974 [1994]). On a motion to dismiss under CPLR R 3211(a)(7) for failure to state a cause of action the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any "cognizable legal theory". *Leon v Martinez, supra*.

As a preliminary matter, Respondent's argument that Petitioner cannot be both landlord and lessor is simply incorrect. *See, e.g., Halle Realty Co v Abduljaami* (42 Misc3d 148[A], 986 NYS2d 865 [App Term 1st Dep't 2014])("Proof of ownership is not a prerequisite to the maintenance of a summary proceeding pursuant to RPAPL § 721, which authorizes the maintenance of such a proceeding by 'landlord or lessor'"); *Ferber v Salon Moderne, Inc* (174 Misc2d 945, 668 NYS2d 864 [App Term, 1st Dep't 1997]). Whether the petition as drafted is impermissibly confusing and incurably inaccurate for other reasons is a different question, which is addressed in greater detail below.

Further, the Notice of Termination sufficiently alleges Respondent's failure to comply with the Notice to Cure. Unlike cases cited by Respondent such as *2704 Univ Ave Realty Corp v Thompson* (63 Misc3d 1222[A], 114 NYS3d 823 [Civ Ct Bx Co 2019]), and *Hew-Burg Realty v Mocerino* (163 Misc2d 639, 622 NYS2d 187 [Civ Ct Kings Co 1994]), the termination notice here does more than simply state a failure to cure and does "actually allege the facts on which it is basing its conclusion that the tenant failed to cure its default", *76 West 86th Corp v Junas* (55 Misc3d 596, 599-600, 45 NYS3d 921 [Civ Ct NY Co 2017]), as it states that Respondent failed to remove "John Doe" and/or "Jane Doe" from the apartment as required by the Notice to Cure and that his case worker observed "Jane Doe" and new furniture in the apartment on a date following the end of the cure period. While certainly more would be required at trial, when read in combination with the Notice to Cure the termination notice here is sufficient "to meet the tests of reasonableness and due process". *Jewish Theological Seminary of America v Fitzer, supra*. That the termination notice is dated almost three weeks after the end of the cure period indicates that Petitioner did not treat it as a "mere formality". *Junas, id.* (in dismissing illegal sublet cause of action noting a mere two-day gap between notices).

Respondent also argues that under Part J of the Housing Stability and Tenant Protection Act of 2019 (L 2019, ch 36) (HSTPA), as amended by the New York State Legislature's "clean up"

bill (L 2019, ch 39, Part Q, § 17),[3] Petitioner "can no longer claim that the apartment is not subject to the Rent Stabilization Law" and that this is a "fatal defect that requires dismissal." Part J of the HSTPA relates to "not-for-profits' use of certain residential dwellings", *Bill Summary*, and, along with the "clean-up" bill, is comprised solely of amendments to three subsections[4] of Section 5(a) of the ETPA. The ETPA, which dovetails with the New York City Rent Stabilization Law, broadly provides "for the regulation of all housing accommodations which it does not expressly except, including previously unregulated accommodations." *Salvati v Eimicke* (72 NY2d 784, 791, 533 NE2d 1045, 1047, 537 NYS2d 16, 19 [1988]). Section 5(a) of the ETPA contains the list of exceptions, that is, exemptions from regulation, with the caveat that some of those exemptions themselves contain their own exceptions which are, accordingly, regulated.

The HSTPA amends three of the ETPA Section 5(a) exemptions, as follows:

- ETPA § 5(a)(6) – this is the exemption for "housing accommodations owned or operated" by a list of non-profit organizations; there are two categories of exceptions to this rule, the second of which (denominated "(ii)") was added by the HSTPA for "permanent housing accommodations with government contracted services … to vulnerable individuals or individuals with disabilities who are or were homeless or at risk of homelessness";
- ETPA § 5(a)(10) – this exemption is similar to subsection (6) except it applies where the housing accommodations are in "buildings operated exclusively for charitable purposes on a non-profit basis"; as with subsection (6), the HSTPA adds a new exception to the rule where the building provides "permanent housing accommodations with government contracted services … to vulnerable individuals or individuals with disabilities who are or were homeless or at risk of homelessness";
- ETPA § 5(a)(11) – this is the exemption for housing accommodations that the tenant of record does not occupy as their primary residence[5]; the HSTPA adds a sentence

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[3] The provisions of Part J of the HSTPA, as well as the related provisions in Part Q, § 17 of the "clean-up" bill, were effective immediately upon the passage of the HSTPA on June 14, 2019, *see* Laws 2019, ch 36 at Part J, § 2 and Laws 2019 ch 39 at Part Q, § 38. As this proceeding was commenced in July 2019, the court must apply these provisions of the HSTPA if relevant.

[4] Part J of the HSTPA significantly amends subsections (10) and (11) of ETPA § 5(a); Part Q, § 17 of the "clean-up" bill significantly amends subsection (6) and makes an additional minor change to subsection (10).

[5] The Rent Stabilization Law also includes this exemption from coverage for apartments "not occupied by the tenant, not including subtenants or occupants, as his or her primary residence", NYC Administrative Code § 26-504(a)(1)(f); *Katz Park Ave Corp v Jagger* (11 NY3d 314, 898 NE2d 17, 869 NYS2d 4 [2008]), and the Rent Stabilization Code provides the mechanism for a landlord to recover possession of such an apartment, 9 NYCRR § 2524.4(c); *Glenbriar Co v Lipsman* (5 NY3d 388, 392, 838 NE2d 635, 638, 804 NYS2d 719, 722 [2005]).

that provides "[f]or the purposes of this paragraph, where a housing accommodation is rented to a not-for-profit for providing … permanent housing to individuals who are or were homeless or at risk of homelessness, affiliated subtenants authorized to use such accommodations by such not-for-profit shall be deemed to be tenants."

A close reading of these three amended subsections of ETPA § 5(a) reveals that the only one that may have any relevance to the within proceeding is (6):

- Subsection (10) does not apply because it is limited to where the entire building is operated for charitable purposes on a nonprofit basis; the petition here alleges that Petitioner "rents the unit from the owner of the building" and neither side has presented any facts to indicate that the entire building is "operated exclusively for charitable purposes on a non-profit basis".
- Subsection (11) does not apply because it simply clarifies that where the tenant of record is a nonprofit organization providing housing to certain types of individuals, it is those individuals – not the nonprofit organization - who are "deemed to be tenants" for the purpose of determining if the tenant of record is occupying the apartment as its primary residence.
- Subsection (6)(ii), added by the HSTPA's "clean-up" bill (*see* fn 3, *supra*), appears to apply because it refers to housing accommodations "owned or operated" by nonprofit organizations that provide "government contracted services … to vulnerable individuals or individuals with disabilities who are or were homeless or at risk of homelessness".[6]

Acknowledging now that its own tenancy is subject to Rent Stabilization, Petitioner seeks by cross-motion to amend its petition to include this allegation, and also to state that it is a nonprofit organization which provides supportive housing and that Respondent is an undertenant who does not have Rent Stabilization rights. It is well-settled that, pursuant to CPLR R 3025(b), leave to amend pleadings is to be freely given, absent significant prejudice to the opposing party. *Edenwald Contracting Co v New York* (60 NY2d 957, 459 NE2d 164, 471 NYS2d 55 [1983]); *McCaskey, Davies & Assoc v New York City Health & Hosps Corp* (59 NY2d 755, 450 NE2d 240, 463 NYS2d 434 [1983]). This standard of liberal amendment of pleadings applies to summary proceedings under CPLR Article 4, including holdover eviction proceedings

[6] The court uses the phrase "appears to apply" because the petition lacks any allegations as to whether Petitioner is a for-profit or not-for-profit corporation, whether the "supportive housing" it provides Respondent constitutes "government contracted services" and whether Respondent is a "vulnerable individual[] or "individual[] with disabilities who are or were homeless or at risk of homelessness". It is only in the affidavit of Petitioner's agent Ms. Cruz that Petitioner asserts that it "is a non-profit corporation, which provides affordable housing for unskilled single adults with substance abuse problems or emotional disabilities who have become homeless." Cruz Affidavit at ¶ 3.

under RPAPL Article 7. *Jackson v New York City Housing Authority* (88 Misc2d 121, 122, 387 NYS2d 38, 39 [App Term 1st Dep't 1976]). To conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated, *Zaid Theatre Corp v Sona Realty Co* (18 AD3d 352, 355, 797 NYS2d 434, 436 [1st Dep't 2005]), and the court's purpose is not to resolve disputed factual issues, but simply to ensure that the amended allegations establish a *prima facie* cause of action, *Digital Broadcast Corp v Ladenburg, Thalmann & Co, Inc* (19 Misc3d 1130[A], 866 NYS2d 91 [Sup Ct NY Co 2008]).

As an initial matter, Petitioner fails to attach to its cross-motion a copy of its proposed amended pleading as required by CPLR Rule 3025(b), warranting denial of that motion due to this technical error. *Zishan Asi v Lenox Hill Hosp* (2018 NY Misc LEXIS 6680, 2018 NY Slip Op 33366[U][Sup Ct NY Co 2018]), *citing Scialdone v Stepping Stones Assoc, LP* (148 AD3d 950, 952, 49 NYS3d 543, 546 [2nd Dep't 2017]). Even if the court were to overlook this omission and either deem the pleading amended as stated in Petitioner's attorney's affirmation or allow the motion to be refiled with the proposed amended pleading, such amendment will not salvage the petition as it both goes too far and does not go far enough; "ay, there's the rub!" William Shakespeare, *Hamlet* (Act III, Scene 1).

It goes too far in that Petitioner proposes to "amend Paragraph '13' of the Petition ***and the incorporated predicate notice***", Attorney's Affirmation at ¶ 36 (emphasis added), which of course it cannot do as it is black-letter law that predicate notices are not amendable. *Chinatown Apts Inc v Chu Cho Lam* (51 NY2d 786, 412 NE2d 1312, 433 NYS2d 86 [1980]). It does not go far enough because RPAPL § 741 requires that the petition state the interests of the parties in the premises, the respondent's relationship to those premises, a description of the premises, the facts upon which the proceeding is based and the relief sought. Despite its amendability as discussed above, a petition that fails to sufficiently state the facts upon which it is based may be dismissed, *Giannini v Stuart* (6 AD2d 418, 420, 178 NYS2d 709, 711 [1st Dep't 1958]); *East 168th St Assocs v Castillo* (60 Misc3d 774, 783, 79 NYS3d 485 [Civ Ct Bx Co 2018]); *PCMH Crotona, LP v Taylor* (57 Misc3d 1212[A], 2017 NY Misc LEXIS 3994 [Civ Ct Bx Co 2017]); *Westchester Gardens, LP v Lanclos* (43 Misc3d 681, 982 NYS2d 302 [Civ Ct Bx Co 2014]), not as a matter of subject matter jurisdiction, *433 West Assocs v Murdock* (276 AD2d 360, 715 NYS2d 6 [1st Dep't 2000]), but because a tenant is entitled to a concise statement of the ultimate facts upon which the proceeding is predicated so that the issues are properly raised and can be met. In other words, while one or two or possibly even more errors might be subject to amendment on a proper motion, there is a point at which a petition is so far afield from the requirements of RPAPL § 741 that it must be dismissed.

Here, the documents annexed to Petitioner's own cross-motion papers reveal that the proposed amendment to paragraph 13 of the petition does not address the numerous errors and omissions that render the petition palpably insufficient and essentially a nullity. Petitioner's contract with Respondent, Exhibit D to its cross-motion, is a "License Agreement", not a lease, which denominates Petitioner, a nonprofit organization, as "the licensor" who

leases the subject premises to Respondent who is "the licensee" with a "license to use" those premises as a residence. While the Notice to Cure does mention the license agreement, other than that, the rest of this critical information and terminology about the parties' interests in the premises, and respondent's relationship to them, is not found in the petition or predicate notices, which instead refer to Petitioner simply as "the landlord" who is "authorized to maintain this proceeding" and Respondent as the "tenant" with "a written rental agreement" whose "tenancy" was being terminated due to his violation of a substantial obligation thereof. Further, the License Agreement also states that Petitioner "provides housing and supportive services" and that Respondent "is a homeless person with disabilities who is in need of appropriate housing and supportive services," and Petitioner's agent explains that Petitioner "provides affordable housing for unskilled single adults with substance abuse problems or emotional disabilities who have become homeless." Cruz Affidavit at ¶ 3. However, the petition only cursorily mentions that Petitioner provides "supportive housing" in the paragraph that also states that the premises are not subject to Rent Stabilization.[7]

Moreover, Petitioner appears to have brought the wrong type of proceeding, in light of the "Eviction" provision of the parties' License Agreement which states that Petitioner's remedy in the event Respondent "ceases to be a client in good standing" is to "commence a licensee holdover eviction proceeding". While the petition does not state which provision of the RPAPL it is brought under, the Notice to Cure indicates it is based on the allegation that Respondent was "violating a substantial obligation" of his tenancy as he "sublet and/or assigned [his] rights of occupancy to another or others" without Petitioner's permission. Clearly, this proceeding was not brought as a licensee holdover pursuant to RPAPL § 713(7): It was not based on a ten-day notice to quit as required by the opening language of RPAPL § 713 and does not reference any of the terminology generally used in such a proceeding.

CONCLUSION

For the reasons stated above, Respondent's motion to dismiss is granted, Petitioner's cross-motion to amend the petition is denied and this proceeding is dismissed without prejudice pursuant to CPLR R 3211(a)(1) based on documentary evidence and CPLR R 3211 (a)(7) for failure to state a cause of action. Accordingly, there is no reason to reach Petitioner's cross-motion for discovery and use and occupancy. This constitutes the Decision and Order of this Court, copies of which will be emailed to the parties' respective counsel.

Diane E Lutwak, HCJ

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Diane E. Lutwak, HCJ

Dated: Bronx, New York
April 6, 2020

[7] *See* fn 6, *supra*.

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