2020-04-08

Windy Realty Assocs. LLC v. Hiciano

Civil Court of the City of New York
County of New York
Part: Part F, Room: 830

Index #: **LT-051048-19/NY**
Motion Seq #: 2

Decision/Order

Windy Realty Associates, LLC
Petitioner(s)
-against-
Adelina Duran Hiciano; "John" "Doe"; "Jane" "Doe"
Respondent(s)

Present: Frances A. Ortiz
Judge

Recitation, as required by CPLR 2219(A), of the papers considered in the review of this Motion for:
Dismiss

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	
Stipulations	
Other	

Upon the foregoing cited papers, the Decision/Order in this Motion is as follows:

This is a holdover proceeding involving a rent stabilized apartment. The notice of termination indicates that respondent, Adelina Duran Hiciano, ("Ms. Duran-Hiciano") violated and continues to violate a substantial obligation of her tenancy. Specifically, the notice states that Ms. Duran-Hiciano is in violation of paragraph 42 of her lease. The language of paragraph 42 is quoted in the notice. According to such paragraph,

> ....Renter, their families, guests, employees, or visitors shall not engage in any conduct which makes the apartment or building less fit....Renter shall not make or permit any disturbing noises....Renter shall not play a musical instrument or operate or allow to be operated audio or video equipment so as to disturb or annoy any other occupant of the building.

The notice alleges that Ms. Duran-Hiciano is allowing constant loud noises and music to emanate from her apartment and that management has received numerous complaints for loud music parties on 11/25/18, 11/24/18, 10/28/18, 10/21/18, 8/17/18, and 8/18/18.

Petitioner states that respondent was not provided with an opportunity to cure the default, before the notice of termination was served because such conduct is not curable pursuant to paragraph 17 of the lease. According to paragraph 17, in the event that a renter does not comply with any lease, creates a nuisance, engages in conduct detrimental to the safety of other renters, then the owner may terminate the tenancy and lease upon ten days written notice. The Notice of Termination indicates that Ms. Duran-Hiciano's tenancy is terminated based on a violation of substantial obligation of her tenancy in violation of her lease, that she is engaging in objectionable conduct which interferes with the comforts or rights of other tenants in the building. Lastly, the notice of termination indicates that it is being served pursuant to *9 NYCRR §2524.3 (a).*

THE MOTION ARGUMENTS AND OPPOSITION

Now, respondent moves for summary judgment arguing that petitioner failed to serve her with a required Notice to Cure for breach of her rent stabilized lease. Specifically, respondent contends that petitioner terminated her tenancy pursuant to *9 NYCRR §2524.3 (a)* which requires that a landlord before commencing an eviction proceeding pursuant to that section must first serve a Notice to Cure. According to *9 NYCRR §2524.3 (a),*

> Without the approval of the DHCR, an action or proceeding to recover possession of any housing accommodation may only be commenced after *service of the notice required by section 2524.2 of this Part,* upon one or more of the following grounds, wherein wrongful acts of the tenant are established as follows:
> (a) The tenant is violating a substantial obligation of his or her tenancy other than the obligation to surrender possession of such housing accommodation, and has failed to cure such violation after written notice

> by the owner that the violations cease within 10 days; *or the tenant has willfully violated such an obligation inflicting serious and substantial injury upon the owner within the three-month period immediately prior to the commencement of the proceeding.* If the written notice by the owner that the violations cease within 10 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.

Respondent asserts that the only exception to the rule occurs when a landlord contends that the tenant has willfully violated such an obligation inflicting serious and substantial injury upon the landlord within the three-month period immediately prior to the commencement of the proceeding. Respondent indicates that this exception is not applicable because nowhere in the pleadings (notice of termination, petition or response to Bill of Particulars) does petitioner allege that respondent inflicted "serious and substantial injury" upon the owner within the three month period prior to the commencement of the proceeding.

Additionally, respondent argues that petitioner admits in the Notice of Termination that it does not need to service a Notice to Cure because such conduct is not curable pursuant to paragraph 17 of the lease. Ms. Duran-Hiciano in her affidavit in support of the motion indicates that she never received a Notice to Cure nor any warning letters from her landlord about the loud music parties. However, she indicates that she received a notice of termination which came as a complete surprise to her. *(Duran-Hiciano Aff'd ¶ 9).*

Further, respondent argues that petitioner's argument that it not need to service a Notice to Cure pursuant to paragraph 17 of the lease is against public policy. She relies on statutory authority and common law for this proposition. According to this *9 NYCRR § 2520.13,*

> An agreement by the tenant to waive the benefit of any provision of the RSL or this Code is void; provided, however, that based upon a negotiated settlement between the parties and with the approval of the DHCR, or a court of competent jurisdiction, or where a tenant is

> represented by counsel, a tenant may withdraw, with prejudice, any complaint pending before the DHCR.

Respondent argues that an agreement that waives the benefit of a statutory protection is unenforceable as a matter of public policy. *Drucker v Mauro, 30 A.D.3d 37 (1st Dep't 2006), appeal dismissed 7 N.Y.3d 844 (2006).* Accordingly, respondent claims that paragraph 17 of her lease is against public policy. As such, since the petitioner failed to serve a Notice to Cure nor did it plead in the notice of termination that the respondent inflicted "serious and substantial injury," the notice of termination is invalid and summary judgment should be granted in her favor.

Petitioner in opposition argues that respondent's motion for summary judgment should be denied as respondent has failed to attach necessary proof and that it was not required to provide respondent with a notice to cure. First, petitioner contends that respondent did not state any relevant facts to the motion. Petitioner claims that its notice of termination fulfils the requirements of *9 NYCRR §2524.3* because it clearly states "specific dates of Respondent's continuous nuisance emanating from her apartment...." *(Kahan Aff'rm ¶18).* Second, petitioner argues that no notice to cure was required because respondent inflicted serious and substantial injury upon it. For instance, other tenants constantly complained about the noises from respondent's apartment throughout the day and night, that three months prior to the commencement of this holdover, respondent's behavior failed to subside, and that there were five more complaints made every month by neighboring tenants. Petitioner then stretches its cause of action to characterize this behavior of inflicted serious and substantial injury as "nuisance." As a result, petitioner then argues that nuisance behavior even if brought as a substantial violation of the lease is incurable.

DISCUSSION

Summary judgment is appropriate where the movant establishes the claim by tender of evidentiary proof in admissible form sufficiently to warrant the court as a matter of law to direct judgment in its favor. *Rodriguez v. City of New York, 31 N.Y.3d 312, 317 (2018)*; *Friends of Animals, Inc. v Associated Fur Manufacturers, Inc., 46 N.Y.2d 1065 (1979).* The failure to make such a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers. *Alvarez v Prospect Hospital, 68 N.Y.2d 320 (1986).* "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v Prospect Hospital, 68 N.Y.2d at 324.* In determining the motion, the Court must be mindful that summary judgment is a drastic remedy and should not be granted when there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v Ceppos, 46 N.Y.2d 223, 231 (1978).* The evidence must be considered in the light most favorable to the party opposing the motion, *Henderson v City of NY, 178 A.D.2d 129, 130 (1st Dept 1991)*, and the motion must be denied where conflicting inferences may be drawn from the evidence. *Nowacki v Metropolitan Life Ins. Co., 242 A.D.2d 265, 266 (2nd Dept 1997).*

Here, respondent has demonstrated entitlement to judgment as a matter of law. The salient and undisputed facts are that before the notice of termination was served, respondent was not provided with an opportunity to cure the alleged default, and that this proceeding was brought as a violation of substantial obligation of her tenancy and lease. *(Duran-Hiciano Aff'd ¶ 9 & Exhibit A).* It is also undisputed that *9 NYCRR §2524.3 (a)* requires a landlord before commencing an eviction proceeding for breach of a substantial obligation of a tenancy to first

serve a Notice to Cure. Alternatively, it is also undisputed that petitioner did not explicitly allege in any of the pleadings (notice of termination, petition or response to Bill of Particulars) that respondent inflicted "serious and substantial injury" upon it within the three month period prior to the commencement of the proceeding. Therefore, any exception to serving a notice to cure is inapplicable.

Petitioner cannot paint a predicate notice with several variables on the guise of finding the correct theory. "A predicate notice cannot be based on 'catch all' theories but must be specific enough to apprise Respondents of the grounds upon which termination is based." *425 Third Ave. Realty Co. v. Greenfield, 13 Misc. 3d 1207(A) (NY Cty Civ. Ct. 2006).* This is exactly what petitioner attempted to do with this predicate notice and in the opposition papers. At first, petitioner in the instant notice of termination claimed a violation of substantial obligation of respondent's tenancy and lease. Thereafter, in the opposition papers petitioner for the first time claimed termination based on alternative theory of infliction of "serious and substantial injury."

Lastly, petitioner in its opposition has failed to rebut respondent's claim that she was not served with a Notice to Cure. Actually, petitioner admits in the Notice of Termination that it does not need to service a Notice to Cure because such conduct is not curable pursuant to paragraph 17 of the lease. However, a lease provision like paragraph 17 of respondent's lease that waives the benefit of a statutory protection is unenforceable as a matter of public policy. (*Drucker v Mauro, supra,; 9 NYCRR § 2520.13).*

Accordingly, respondent's motion for summary judgment dismissing the proceeding is granted for the reasons discussed above, and the proceeding is hereby dismissed.

This is the decision and order of this court. Copies of this decision will be emailed and mailed to the parties indicated below.

ORDERED: Respondent's motion for summary judgment is granted and the petition is dismissed.

Judge, Civil/Housing Court
Frances Ortiz

Date: April 8, 2020

Sperber Denenberg & Kahan, P.C.
Eric Kahan, Esq.
48 West 37th Street, 16th floor
New York, NY 10018
(917) 351 - 1335
ekahan@sdkpc.com

Manhattan Legal Services
John Briggs, Esq.
5030 Broadway, Ste 664
New York, NY 10034
(646) 442 – 3187
jbriggs@lsnyc.org