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Marshall v. Simmons

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Marshall v Simmons
2020 NY Slip Op 20249
Decided on September 23, 2020
Civil Court Of The City Of New York, Kings County
Barany, J.
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Decided on September 23, 2020

Civil Court of the City of New York, Kings County

<p>Michael Marshall, Petitioner- Landlord,</p> <p>against</p> <p>Janet Simmons 'JOHN DOE' AND 'JANE DOE', Respondents- Tenants</p>

080571/19

Kenneth T. Barany, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Respondent's Motion to Dismiss.

PAPERS NUMBERED

Respondent's Order Notice of Motion, Affirmation in Support, Affidavit in Support & Exhibits ("A" - "G") 1, 2,3

Affirmation in Opposition, Affidavit in Opposition & Exhibit ("1") 4,5

Affirmation in Reply & Exhibit ("A") 6

Upon the foregoing cited papers, the Decision and Order is as follows

In this Licensee Holdover the respondent moves for dismissal on numerous technical grounds regarding the insufficiency of the pleadings Respondent also moves to dismiss claiming protection from a summary proceeding prosecution under the limited "family" exception to a summary licensee proceeding carved out by the courts under RPAPL §713(7) The court addresses the issues raised concerning the sufficiency, of the prerequisite notice, the notice of petition and the petition

This court rejects respondent's argument that the fact that the underlying notice lists it as a "termination of license and/or notice to quit" somehow creates an ambiguity. Both headings would be correct and the fact that an additional five days were provided to vacate beyond the 10 days required by statute is of little import and only served to benefit respondents. There are, however, several significant deficiencies in the pleadings both noted in respondent's moving papers, as well as noted by the court.

CPLR Section 3013 specifically states:

Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved *and the material elements of each cause of action* or defense (emphasis supplied)

This statute reflects the doctrine of law espoused by the courts of this state years ago that a pleading that only cites general conclusions is insufficient as a matter of law. *See Kalmanash v. Smith*, 291 NY 142, 153 (1943). Here, the Notice of Termination does not contain the material elements that would establish a cause of action for a licensee holdover. The prerequisite notice contains no "facts" at all explaining why respondents are licensees and the basis for the termination of the license. The totality of the allegation states "any license permitting you to occupy the subject premises is hereby revoked by the owner".

A licensee proceeding takes many forms e.g. the relative/friend of a deceased tenant remaining in occupancy with no succession rights; an invited guest refusing to leave once their welcome has expired or in this case the breaking up of a romantic relationship. A predicate notice, "must be clear, unequivocal and unambiguous." (See *Parkchester Apts. Co. v. Walker*, 213 N.Y.L.J. 123 (NY Civ. Ct. 1995) (citing *Steinmetz v. Barnett*, 155 Misc 2d 98 (Civ. Ct. NY Co. 1992)). Legal precedent makes it clear that an improper predicate notice cannot support a proceeding (see *Chinatown Apartments, Inc. v. Chu Cho Lam*, 51 NY2d 786, 787 (1980); *Oppenheim v. Spike*, 107 Misc 2d 55 (App. Term 1st Dep't 1980).

Similarly, RPAPL §741 requires that the petition in a summary proceeding to recover possession of real property "state the facts upon which the special proceeding is based" (subd [4]). Petitioner attempts to meet this requirement by incorporating the notice of termination within the petition by reference, but as noted that notice of termination is devoid of any "facts". Additionally, RPL §741 requires the Petition to "state the interest of the petitioner in the premises" (subd [1]). As noted by respondent, an ambiguity exists as to whether or not petitioner is litigating as the owner of the property or as the "landlord", the latter implying a tenancy and not a licensee relationship^[FN1]. Failure to strictly comply with the statutes governing summary proceedings deprives the court of jurisdiction and mandates dismissal, *MSG Pomp Corporation v Jane Doe*, 185 AD2d 798 (1st Dept. 1992); [582 Gates, LLC v Farmer 65 Misc 3d 156](#)[A] (App Term, 2nd Dept. 2019).

More glaring, however, is the deficiency of the notice of petition dated October 1, 2019 which fails to comport with the current pleading requirements. A new form for the Notice of Petition in Holdover proceedings was promulgated under 22 NYCRR §208.42(b) and (c) pursuant to Administrative Order No. 163 dated August 7, 2019 issued by the Honorable Lawrence K. Marks Chief Administrative Judge of the State of New York^[FN2]. As part of [\[*2\]](#)Administrative order no. 163 Judge Marks directed that "Use of these forms shall be optional up to and including September 30, 2019, *and mandatory thereafter* (emphasis supplied). I further repeal all former versions of the form notice of petition in nonpayment and holdover proceedings".

The reason for the change in form is clear as evidenced by the development and institution of various court programs over the last several years intent on assisting pro-se litigants and increasing attorney representation of such individuals. Programs such as the Assigned Counsel Project, have been specifically put in place to accomplish this purpose.

Within the context of the newly adopted Notice of Petition for Holdover proceedings is notice to respondents on where to seek assistance on Legal help, Language help, ADA Help, Financial Help, Help at the Courthouse and Online Help. It also advises respondents as to their right to a postponement, and the Rent Deposit Law. In many cases this has led to representation prior to the first court date, approvals for money in process prior to the first court date etc.

In the proceeding at bar the notice of petition dated October 1, 2019 is not the approved form which was mandatory for use as of that date. It fails to contain any of the information now required by court administrative directive [\[EN3\]](#) . Therefore, respondent's motion is granted dismissing this proceeding as to all respondents without prejudice to petitioner commencing a new action or proceeding. As the dismissal is not on the merits and is without prejudice, the balance of respondent's motion seeking legal fees is denied. Such denial is without prejudice to respondent's right to renew the application for legal fees in any future action or proceeding commenced by petitioner. In light of the foregoing the court need not address the alleged deficiency of the date omission in the notice of petition or reach a determination as to whether respondent qualifies for the "family" exception under RPAPL §713(7). This constitutes the Decision and Order of the Court.

SO- ORDERED

DATED September 23, 2020

KENNETH T. BARANY

J.H.C

Footnotes

Footnote 1: In the context of the petition the petitioner is constantly referred to as "landlord" and paragraph "9" of the petition claims the notice of termination terminated the "tenancy" and refers to respondent as the "tenant".

Footnote 2: Judge marks also directed that a similar notice of petition be promulgated for nonpayment proceedings and posted on the Unified Court website.

Footnote 3: The use of the correct form cannot be understated. For example, the rent deposit law allows a landlord to request a deposit of rent after sixty days of adjournments requested solely by a respondent. Both of the first two adjournment stipulations in this proceeding indicated that it was respondent's request to obtain counsel. Had respondent received the proper form it is quite possible she could have obtained representation for the first court date thereby avoiding having a total of two months of adjournments charged against her. The fact that she ultimately obtained counsel does not absolve petitioner from this pleading form obligation.

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