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[*1]

Alir, Inc. v Jimenez
2020 NY Slip Op 51385(U)
Decided on November 16, 2020
Civil Court Of The City Of New York, Bronx County
Lutwak, J.
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Decided on November 16, 2020

Civil Court of the City of New York, Bronx County

<p>Alir, Inc., Petitioner-Landlord,</p> <p>against</p> <p>Perla Jimenez, Respondent-Tenant, ROBERT ENCARNACION, "JOHN DOE" and "JANE DOE", Respondents-Undertenants.</p>
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Diane E. Lutwak, J.

Recitation, as required by CPLR Rule 2219(a), of the papers considered in the review of Respondent's Motion to Dismiss, for Leave to Interpose a Late Answer and for Other Relief:

Papers/Numbered

Notice of Motion, Supporting Affirmation, Affidavit & Exhibits A-G 1, 2, 3, 4-10

Affirmation in Opposition & Exhibits A-B 11, 12-13

Affirmation in Reply 14

BACKGROUND & PROCEDURAL HISTORY

In this holdover eviction proceeding petitioner-landlord seeks to recover possession of respondent-tenant's Rent Stabilized apartment based on her loss of her Section 8 housing [*2]voucher, which previously had subsidized her rent payments. [FN1] It is undisputed that respondent's rent subsidy, administered by the New York City Housing Authority (NYCHA), was terminated by that agency effective November 30, 2018 due to her failure to recertify. [FN2] Petitioner asserts that respondent's maintenance of her Section 8 housing subsidy is a term and condition of her tenancy and that her failure to do so constitutes a violation of a substantial obligation of her tenancy in violation of her lease and Rent Stabilization Code (RSC) § 2524.3(a), warranting her eviction.

Respondent, appearing by counsel, moves to dismiss pursuant to CPLR R 3211(a)(7), arguing that the predicate ten-day notice to cure and seven-day notice of termination, which are attached to and incorporated by reference in the petition, are incurably defective. The notice to cure, dated October 8, 2019, advised respondent that she had violated a substantial obligation of her tenancy by having lost her Section 8 rent subsidy due to her failure to recertify and that her "inability to continue to qualify for NYCHA Section 8 benefits has resulted in the landlord no longer receiving a rent subsidy for you and therefore the landlord is no longer receiving the full proper rent for your apartment." To prevent termination of her tenancy, the notice advises respondent of the necessity to correct the problem, as follows:

PLEASE FURTHER NOTE, that you must cure this violation no later than the 4TH day of NOVEMBER, 2019 (i.e. cause the retroactive reinstatement of your Section 8 subsidy, from November 30, 2018, and have all outstanding subsidies paid retroactively to your landlord) this date being at least ten (10) days from the date this notice is served on you.

The termination notice, dated December 6, 2019, refers to the notice to cure and states that respondent failed to comply with it because, "As confirmed by the landlord, as of December 6, 2019 you have failed to cause the retroactive reinstatement of your Section 8 subsidy, from November 30, 2018, and have all outstanding subsidies paid retroactively to your landlord."

Respondent argues that the predicate notices are defective as they do not cite to a lease provision authorizing petitioner to terminate the tenancy for failure to maintain a Section 8 subsidy, citing to *1900 Albemarle, LLC v Solon* (57 Misc 3d 159[A], 72 NYS3d 517 [AT 2nd Dep't 2017]). Without such a conditional limitation in the lease requiring the tenant to maintain the Section 8 subsidy, respondent argues that her loss of her Section 8 subsidy is not a lease violation warranting eviction. Respondent also argues that a tenant's participation in the federal Section 8 program is voluntary, termination of a Section 8 subsidy alone is not grounds for eviction and under the Rent Stabilization Law and Code landlords have an obligation to offer their tenants renewal leases unless one of a limited number of grounds for nonrenewal exist, none of which are present here. Accordingly, respondent argues, the notice to cure is defective as it does not provide her with the option of curing her default by signing a new lease for the full contract rent.

In opposition, petitioner argues that the predicate notices reasonably and sufficiently state [*3] how the terms of the lease were violated and the notice to cure "specifies the time for compliance, the consequences for a failure to comply, and what was required of the tenant to prevent eviction." Affirmation in Opposition at ¶ 7. Petitioner argues that, just as the landlord's acceptance of the Section 8 subsidy is a term and condition of respondent's tenancy that must be a part of all renewal leases regardless of whether it is stated in the lease, citing RSC §§ 2522.5(b) and (g)(1) and [Rosario v Diagonal Realty, LLC \(8 NY3d 755, 762, 872 NE2d 860, 840 NYS2d 748 \[2007\]\)](#), respondent is obligated to maintain the subsidy and failure to do so warrants eviction. Should a tenant lose their Section 8 subsidy, while the landlord cannot charge the tenant the full rent absent a new agreement to do so, [Prospect Place HDFC v Gaildon \(6 Misc 3d 135\[A\], 800 NYS2d 355 \[AT 1st Dep't 2005\]\)](#), "among the potential remedies available to landlord is the commencement of a holdover summary

proceeding based upon an alleged breach of lease stemming from tenant's failure to recertify for Section 8 eligibility." *Pinnacle Bronx W, LLC v Jennings* (29 Misc 3d 61, 910 NYS2d 335 [AT 1st Dep't 2010]).

Further, petitioner asserts that respondent's lease does contain a lease clause with a conditional limitation permitting termination of the lease in the event the tenant violates any of its terms and conditions, pointing to paragraph 19 of the lease entitled "Early Termination". Just as a landlord may terminate a tenancy based upon a tenant's chronic nonpayment or late payment of rent regardless of whether the lease contains an explicit condition permitting termination for this reason, by analogy petitioner asserts that the same principle applies here.

Finally, petitioner argues that there is no legal requirement for the landlord to offer the tenant a new lease without the Section 8 subsidy as a term and condition as a means of curing the lease violation.

On reply, respondent acknowledges petitioner's obligation to accept a Section 8 subsidy as a term and condition of her tenancy but argues that there is no reciprocal mandate for her to maintain that subsidy. Rather, she is entitled to remain as a Rent Stabilized tenant upon losing her subsidy and be offered a new lease that does not include the Section 8 subsidy as a term and condition. As a Rent Stabilized tenant, respondent argues she should have been—but was not—offered the opportunity to cure the violation and prevent termination of her tenancy not only by securing retroactive reinstatement of her Section 8 subsidy but, alternatively, by signing a new lease at the full contract rent without a Section 8 subsidy. Regarding petitioner's argument that there is a specific lease provision that contains a conditional limitation, respondent points out that the predicate notices do not mention this lease provision, further rendering them insufficient. DISCUSSION

Violation of a substantial obligation of the tenancy is one of the limited grounds for eviction that may be the basis for an eviction proceeding against a Rent Stabilized tenant. *See* RSC §§ 2524.1 and 2524.3(a). Such an eviction proceeding may only be commenced after the tenant is first given an opportunity to cure the violation in a written ten-day notice and then, if the violation has not been cured, served with a seven-day written termination notice. *See* RSC §§ 2524.2 and 2524.3(a). Adequate predicate notices are a required condition precedent to a holdover eviction proceeding against a Rent Stabilized tenant and, if they are insufficient, the proceeding must be dismissed. *Chinatown Apts Inc v Chu Cho Lam* (51 NY2d 786, 412 NE2d

1312, 433 NYS2d 86 [1980]); *Filmtrucks, Inc v Express Industries & Terminal Corp* (127 AD2d 509, 511, 511 NYS2d 862, 864 [1st Dep't 1987]); *London Terrace Gardens, LP v Heller* (40 Misc 3d 135[A], 975 NYS2d 710 [AT 1st Dep't 2009]).

New York State courts evaluate the sufficiency of predicate notices in eviction [*4]proceedings based on a standard of reasonableness "in view of all attendant circumstances". *Oxford Towers Co, LLC v Leites* (41 AD3d 144, 837 NYS2d 131 [1st Dep't 2007]); *Hughes v Lenox Hill Hospital* (226 AD2d 4, 17, 651 NYS2d 418, 427 [1st Dep't 1996], *appeal dismissed*, 90 NY2d 829, 660 NYS2d 552 [1997]). The notice must "provide the necessary additional information to enable the tenant respondent to frame a defense to meet the tests of reasonableness and due process." *Jewish Theological Seminary of America v Fitzer* (258 AD2d 337, 338, 685 NYS2d 215 [1st Dep't 1999]).

A substantive defect in a notice to cure renders the entire notice deficient. *542 Holding Corp v Prince Fashions, Inc* (46 AD3d 309, 310, 848 NYS2d 37, 39 [1st Dep't 2007]). As explained by the Honorable Paul Feinman, then sitting in the Civil Court of the City of New York,

The purpose of a notice to cure is to apprise the tenant specifically of claimed defaults in its lease obligations and of the forfeiture and termination of the lease if the claimed default is not cured within a certain period of time (*Filmtrucks, Inc. v Express Indus. and Terminal Corp.*, 127 AD2d 509, 510, 511 N.Y.S.2d 862 [1st Dept. 1987]). Such notice must be clear, unambiguous and unequivocal (*Ellivkroy Realty Corp. v HDP 86 Sponsor Corp.*, 162 AD2d 238 [1st Dept. 1990]). A notice to cure must be sufficiently specific to demonstrate what remedial action is required and which lease provision requires it (*White Angel Realty v Asian Bros. Corp.*, 28 HCR 143A, NYLJ, March 13, 2000, at 31, col. 3 (Dist. Ct., Nassau County [Gartner, J.])).

Jamay v Chung Wah Cheung Sang Funeral Corp (2002 NY Misc LEXIS 760, *4-5, 2002 NY Slip Op 40284[U], 3 [Civ Ct NY Co 2002]).

Here, as in *3162 Realty v Bautista* (L & T Index No 68859/17 [Civ Ct Bx Co 2017, Baum, HCJ]), "[t]he arguments made by the parties on this motion implicate the confluence of two fundamental concepts" related to Rent Stabilized tenancies which are subsidized by Section 8 vouchers. The first is based on the fact that when a Rent Stabilized tenant's rent is subsidized by a Section 8 voucher the landlord and the agency administering the subsidy

enter into a contract that, *inter alia*, limits the tenant's payment responsibility to that portion of the rent not covered by the subsidy. [See, e.g., *Vincenzi v Strong* \(16 Misc 3d 1121\[A\], 847 NYS2d 905 \[Civ Ct Bx Co 2007\]\)](#). In [Rosario v Diagonal Realty, LLC \(8 NY3d 755, 762, 872 NE2d 860, 840 NYS2d 748 \[2007\]\)](#), the Court of Appeals held that this payment limitation becomes part of the lease between the landlord and tenant which, under RSC §§ 2522.5(b) and 2522.5(g)(1), landlords are required to renew "on the same terms and conditions" as the expiring lease, whether or not participation in the Section 8 program is otherwise specifically mentioned in the lease.

A corollary to this rule is that should a Rent Stabilized tenant lose their Section 8 voucher, the landlord cannot demand that the tenant pay the portion of the rent previously paid by the Section 8 program, or commence a nonpayment proceeding against the tenant for it, absent a "new agreement" to pay the full legal rent. [Soumas v Gregg \(57 Misc 3d 135\[A\], 66 NYS3d 655 \[App Term 1st Dep't 2017\]\)](#); [MPlaza, LP v Corto \(35 Misc 3d 139\[A\], 953 NYS2d 551 \[App Term 1st Dep't 2012\]\)](#); [Prospect Place HDFC v Gaildon \(6 Misc 3d 135\[A\], 800 NYS2d 355 \[App Term 1st Dep't 2005\]\)](#). This is because "there is no law, order, rule, request or direction that imposes upon a Section 8 recipient the obligation to preserve his subsidy. Participation in the program is *voluntary*." [Grand Concourse E HDFC v DeJesus \(61 Misc 3d 403, 405, 84 NYS3d 318, 319 \[Civ Ct Bx Co 2018\]\)](#)(emphasis in original).

The required "new agreement" cannot be in the form of a renewal lease, which necessarily must be on the "same terms and conditions" as previously governed the parties' relationship; rather, the landlord must terminate the original agreement and offer a tenant in this situation a new one. Then, if the tenant fails to sign the new lease, or to pay the full rent as agreed to in a signed new lease, the landlord can bring an eviction proceeding. The mechanics of what a landlord can do in this scenario have been described as follows:

Petitioner's remedy, when faced with a termination of the subsidy based on Respondent's failure to recertify, was to commence a holdover proceeding based on Respondent's breach of a substantial obligation of the tenancy. Only after a legal termination of Respondent's rent stabilized tenancy, could the parties contemplate a "new agreement" which would make Respondent responsible for a new rent, or the entire rent without subsidy.

[835-37 Trinity Ave HDFC v Royal \(26 Misc 3d 1240\[A\], 907 NYS2d 436 \[Civ Ct Bx Co 2010\]\)](#). [See also Heywood Towers Assoc v Hussain \(36 Misc 3d 128\[A\], 953 NYS2d 549 \[AT](#)

1st Dep't 2012], *aff'g for the reasons stated by the court below at 31 Misc 3d 1235[A]*, 932 NYS2d 760 [Civ Ct Bx Co 2011]; [*Pinnacle Bronx W, LLC v Jennings* \(29 Misc 3d 61](#), 910 NYS2d 335 [AT 1st Dep't 2010]).

Given this set of rules, landlords must proceed carefully when faced with Rent Stabilized tenants who have lost their Section 8 rent subsidies. Instructive is the case of *Bautista, supra*, in which the court denied the tenant's motion to dismiss a holdover based on violation of a substantial obligation of the tenancy due to the termination of the tenant's Section 8 subsidy for cause. A critical distinction, however, is that in *Bautista*, unlike in this case, the predicate notice to cure "makes clear that Respondent may continue her tenancy as a rent stabilized tenant, without Section 8 as a term and condition of the tenancy, as long as she signs a new lease establishing such a tenancy."^[FN3]

Here, the predicate notice advised respondent that her only option for curing the violation was to secure retroactive reinstatement of her Section 8 voucher, despite the rule stated above that a Rent Stabilized tenant who loses a Section 8 voucher has the right to remain so long as they sign a new agreement to pay the full rent. The notice fails to apprise respondent of her right to enter into a "new agreement" with petitioner making her responsible for the entire rent without the subsidy to prevent forfeiture of her leasehold. Petitioner's failure to offer respondent a new lease as a means of curing her default is a substantive defect in the notice to cure which renders it insufficient and warrants dismissal. *542 Holding Corp v Prince Fashions, Inc, supra*.

CONCLUSION

For the reasons stated above, the predicate notices fail to provide an adequate basis for this proceeding which, accordingly, is dismissed without prejudice for failure to state a cause of action pursuant to CPLR R 3211(a)(7). Accordingly, the court does not need to reach the other [*5] arguments and issues raised in respondent's motion. This constitutes the Decision and Order of this Court, copies of which will be emailed to the parties' respective counsel.

Diane E. Lutwak, HCJ

Dated: Bronx, New York

November 16, 2020

Footnotes

Footnote 1: While the petition also names Robert Encarnacion, "John Doe" and "Jane Doe" as respondent-undertenants, as none of them have appeared the term "respondent" hereinafter refers only to the respondent-tenant Perla Jimenez.

Footnote 2: Respondent's efforts to secure reinstatement of the Section 8 subsidy through an Article 78 proceeding filed during the pendency of this case were unsuccessful.

Footnote 3: Also instructive is Housing Court Judge Scheckowitz's decision in *Harlem Valley HDFC v Williams* (2010 NYLJ LEXIS 7041, *6 [Civ Ct NY Co 2010]), also a holdover proceeding against a Rent Stabilized tenant who lost her Section 8 voucher and to whom the landlord failed to offer a new lease. Finding that the petition failed to state a valid cause of action, the court noted, "Petitioner's attempt to evict respondent due to the termination of Section 8 is against public policy as it would discourage tenants from trying to become self-sufficient."

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