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340 S. Third St. HDFC v. Hernandez

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS, HOUSING PART F

-----X
340 SOUTH THIRD STREET HDFC

Petitioner (Landlord)

-against-

**Index No. L&T 804603/19
DECISION AND ORDER**

E. HERNANDEZ
SANTA PENA-ILLEGAL OCCUPANT,
EDGARD HERNANDEZ-ILLEGAL OCCUPANT

Respondent (Tenant)

JOHN DOE, AND JANE DOE,

Respondent (Undertenants)

-----X

THOMAS M. FITZPATRICK, JUDGE

Recitation as required by CPLR 2219(a), of the papers considered in the review of the respondent's motion to dismiss.

| Papers | Numbered |
|--|-----------------|
| Notice of Motion, Affidavit, Affirmation and Exhibits Annexed..... | 1 |
| Affirmation in Opposition..... | 2 |
| Supplemental Memorandum in Opposition..... | 3 |
| Reply Affirmation..... | 4 |

Upon the foregoing cited papers, the Decision/Order of this Court on this motion is as follows:

Petitioner commenced the within holdover proceeding seeking to recover possession of Apartment C5 in the building located at 340 South Third Street, Brooklyn New York. The Ten Day Notice to Cure alleges that respondent is violating a substantial obligation of his tenancy, by illegally subletting, as does the subsequent Ten Day Notice to Terminate.

The proceeding first appeared on the court's calendar December 3, 2019, at which time respondent asked for an adjournment to seek counsel. On the return date, the case was adjourned again at respondent's request. The case was then adjourned one more time on consent.

Respondent Edgard Hernandez, by counsel, now moves to dismiss pursuant to CPLR 3211 [a][7], for failure to state a cause of action.

Respondent argues that the Predicate Notices are deficient, unamendable and require that the petition be dismissed pursuant to CPLR 3211[a][7]. Respondent asserts that the Predicate Notices don't set forth the facts necessary to establish grounds for eviction under the Rent Stabilization Code, and/or that the Predicate Notices fail to set forth facts to establish illegal subletting, and not permissible co-occupancy under RPL 235.

Specifically, respondent asserts that the Predicate Notices, rather than alleging concrete facts in support of illegal subletting, rely instead on generic, conclusory language. Respondent further argues that the Ten Day Notice to Terminate fails to allege that the tenant failed to cure the defaults specified in the Ten Day Notice to Cure. In respondent Edgard Hernandez's affidavit in support of the motion, Edgard Hernandez states that in or around 2004 he succeeded to the prior tenant-of-record's lease, and that he is the rent stabilized lease holder.

In opposition, petitioner's attorney argues that the Predicate Notices herein set forth sufficient facts to support a claim of illegal sublet, and that the petitioner need only prove that the respondent prime tenant is no longer residing at the subject premises. Petitioner's attorney states that Edgard Hernandez's statement in his affidavit in support of the motion that he succeeded the rights to tenancy and is the rent stabilized tenant of record is an issue of fact which must be determined at a trial, is not a basis for dismissal, and is not supported by any documentary evidence. The petitioner asserts that the Notice to Terminate adequately apprises respondents that the breach remains uncured, that it properly terminates the tenancy and that it complies with legal requirements for such notices. Lastly, petitioner argues that pursuant to the "roommate law" RPL 235-f, it is respondent's obligation to inform the landlord with the name of any

occupant within thirty days following the commencement of occupancy by such person, and that the presence of unauthorized occupants does not automatically amount to a legal roommate.

In reply respondent states that the Predicate Notices lack concrete facts, such as an allegation that the tenant has not been observed at the premises, the tenant's alleged alternate residence, a description of the alleged sublessees or assignees, dates or times when the alleged sublessees or assignees were observed, or any observations from anyone with purported personal knowledge in support of the claim. Respondent asserts that the Notice to Terminate is a word-by-word copy of the Notice to Cure and fails to allege any violation of the Notice to Cure. Lastly, respondent says that the notices fail to make clear whether "E.Hernandez" and "Edgard Hernandez" are different parties or the same party perhaps mistakenly captioned as both the tenant and the illegal occupant.

In reviewing a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211[a][7], a determination must be made as to whether the factual allegations within the petition state a legally cognizable cause of action. *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Clarke v Laidlaw Transit, Inc.*, 125 AD3d 920 [2nd Dept 2015]. In performing this review, the court must afford the petition a liberal construction, accept all the facts alleged in the petition as true, and accord the petitioner the benefit of every possible favorable inference. *See Leon supra*; *Nationwide Insulation & Sales, Inc v Nova Casualty Co.*, 74 AD3d 1297 [2nd Dept 2010].

The appropriate test regarding the adequacy of the predicate notices is one of reasonableness in view of all the attendant circumstances. *323 3rd Street LLC v Ortiz*, 13 Misc3d 141[A][App Term 2d 11th & 13th Jud Dists 2006][quoting *Hughes v Lenox Hill Hospital*, 226 AD2d 4, 17 [1st Dept 1996], lv to app den, 90 NY2d 892[1997][alteration in original]. A predicate notice is sufficient when its "fact-specific allegations", if proven are sufficient to

establish then tenant is engaging in the conduct proscribed by Rent Stabilization Code 2524.3,” (Id.). In *Ad Nash & Co. Lp v Phillips*, NYLJ 2/6/2020 at p.21, col.3, the court found that failure to state specific facts including how long the respondent was not seen at the premises or an alternate address in an illegal sublet/assignment case rendered the notice defective. The court in *Ad Nash* stated, “Petitioner could of easily stated facts such as how long the respondent was not seen at the premises, the number of people residing at the premise, alternate addresses for the respondent or the names or description of the individual(s) observed at the premises.”

Here, the Ten Day Notice to Terminate is almost identical to the Ten Day Notice to Cure. The Ten Day Notice to Terminate dated May, 6, 2019 states,

“TEN DAYS NOTICE is hereby given to you, along with the prior notice to Cure served upon you on or about 3/28/19, that the undersigned landlord, **340 SOUTH THIRD STREET, HDFC**, has elected to end the term of your Lease on the grounds that you and/or occupants of the aforesaid apartment, have violated a substantial obligation of your tenancy, in that you and/or occupants of the aforesaid premises have: **SUBLET, AND/OR ASSIGNED THE APARTMENT OR PORTION OF SAID APARTMENT TO OTHERS WITHOUT PERMISSION OF THE LANDLORD.**

PLEASE TAKE NOTICE THAT this notice is given pursuant to RSC 2524.2 (c) (2) and 2524.3(h) in that you are violating a substantial obligation of your tenancy and RSC 2525.6(f) in that without prior written consent of your landlord, you and/or occupants of the aforesaid apartment, have sublet, and/or assigned the above apartment to another or others, to wit: **SANTA PENA-ILLEGAL OCCUPANT AND EDGARD HERNANDEZ-ILLEGAL OCCUPANT, “JOHN DOE”, “JANE DOE”,** who are not lawfully entitled to reside in said premises.

That the landlord has attempted to ascertain the true names of occupants **“JOHN DOE”, “JANE DOE” & ”JANE**, but has been unable to do so.

PLEASE TAKE NOTICE, that your apartment is subject to the Rent Stabilization Law of 1969, as amended pursuant to said law the Landlord has duly registered your apartment with the New York State Division of Housing and Community Renewal (D.H.C.R.).

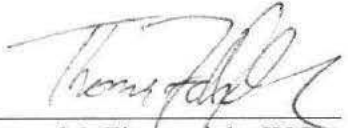
YOU ARE HEREBY NOTIFIED and advised that the landlord/owner does elect to terminate your tenancy of the above described premises now held by you under leasehold hiring. Unless you remove from the premises by 5/27/ 2019 the day on which your term expires, the landlord will commence summary proceedings under the Statute to remove you from the premises for Holding Over after the expiration of your term. You will be subject to the provisions in said lease for damages incurred by you. Your landlord insists upon full performance of all covenants, terms, rules and regulations of the lease, including those violated as aforesaid.”

The Predicate Notices in this proceeding are not reasonable, they are too generic and do not contain specific factual allegations in support of its conclusory statements that respondent is illegally subletting/assigning. The Ten Day Notice to Cure does not state that respondent has not been seen at the premises or that respondent no longer resides at the premises, or contain any observation from anyone with purported personal knowledge of the allegations. Additionally, the Ten Day Notice to Terminate does not say that respondent has failed to cure or contain any factual allegations that the violation alleged in the Ten Day Notice to Cure continued beyond the cure period. In *31-67 Astoria Corp. v Landaira*, 54 Misc3d 131[A], [App Term 2nd Dept 2017] the court found the termination notice defective because it failed to allege that the defaults specified in the notice to cure had not been cured during the cure period. The court in *31-67 Astoria* continued stating that a violation removed during the cure period will not support the termination of a lease based on the tenant's alleged default. See *Reinozo v Eskander*, NYLJ 8/2/17 p 33 (Civ. Ct. Queens Co.); *1025-45 Associates Inc. v Tate*, NYLJ 8/2/17 p 31 (Civ. Ct. Kings Co).

The court finds that the Predicate Notices are insufficient. The Ten Day Notice to Terminate is defective because it fails to state that respondent did not cure during the cure period. The Ten Day Notice to Cure is bereft of specific factual allegations to support an illegal sublet claim. Accordingly, respondent's motion to dismiss pursuant to CPLR [a][7] is granted.

This constitutes the decision and order of the court.

Dated: Brooklyn, NY
December 10, 2020


Thomas M. Fitzpatrick, JHC