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37 West 72nd Street, Inc v. Dennis Hough

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART F

-----X

37 West 72nd Street, Inc

L & T INDEX NO.: 067317/19

Petitioner

-against-

DECISION/ORDER

Dennis Hough,

Respondent

-----X

J. SIKOWITZ:

RECITATION, AS REQUIRED BY CPLR SECTION 2219(A), OF THE PAPERS
CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS

NUMBERED

NOTICE OF MOTION AND AFFIRMATION AND AFFIDAVITS

ANNEXED..... ----1,2,3-----

ANSWERING AFFIRMATION ----4-----

REPLYING AFFIRMATION....(respondent)..... ----8-----

EXHIBITS.....

OTHERCross Motion.....5,6,7.....

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS
AS FOLLOWS:

Petitioner commenced this failure to provide access holdover proceeding to recover possession of the subject rent stabilized apartment #16 at 37 West 72nd Street, New York, NY 10023, based on the claims in the underlying predicate notices. Respondent moves by notice of motion pursuant to CPLR 3211(a)(2) and/or (7) and RSC (9NYCRR) 2524.2(b) for an order dismissing the allegations of violation of

a substantial obligation of his tenancy because petitioner served a notice of termination that lacks factual allegations regarding how respondent failed to cure as required by law. Petitioner opposes the motion and cross moves for an order granting summary judgment in petitioner's favor pursuant to RPAPL 747, 749, and CPLR 3212 and CPLR 409(b), and awarding petitioner a final judgment of possession as there are no issues of fact. Respondent opposes the cross motion in all respects.

Respondent's motion to dismiss

Respondent argues that the notice of termination lacks factual allegations of respondent's failure to cure the conduct alleged in the notice to cure. The notice to cure alleges in part:

1. On March 25, 2019, building management contacted you requesting that you provide access to the landlord and its contractors to replace the roof drain in your apartment. You were further requested to immediately provide the landlord with access dates. To date, you have failed to comply.
2. In a letter dated May 22, 2019, the landlord's attorney contacted you requesting access to your apartment so that the landlord's plumber and water proofer can inspect and complete the roof drain work needed as well as complete the interior work in the apartment i.e. replace toilet seat and the exposed pipes in the subject apartment. You were reminded that the landlord has made repeated requests both orally and in writing to gain access to your apartment, to no avail. You were further requested to provide access on Wednesday May 29, 2019. To date, you have failed to comply with said requests.
3. On May 29, 2019, you did not permit access to the landlord and/or its' contractors to inspect and repair the needed completion of the roof drain work needed as well as complete the interior work in the apartment i.e. replace toilet seat and the exposed pipes in the subject apartment.

The predicate notice of termination states:

- a. Specifically, on June 27, 2019, the superintendent knocked on your door requesting access to your apartment to fix the stove and make necessary repairs. You refused to allow access;
- b. Furthermore, you have failed to contact the landlord and schedule access dates to allow the landlord and/or its contractors to perform the necessary repairs in your apartment albeit requested. Therefore, you have failed to comply with the Notice to Cure dated June 10, 2019.

Respondent states the notice of termination fails to state factual allegations of respondent's failure to cure the conduct alleged in the notice to cure, and a valid notice of termination is a condition precedent to the commencement of a summary holdover proceeding. Respondent states if the predicate notice is defective, dismissal of the petition is required. *Chinatown Apts v. Chu Cho Lam*, 51 NY2d 786, 787-88 (1980) It is undisputed that the termination notice is based on respondent's alleged failure to provide "access to fix the stove and to make necessary repairs." The notice to cure fails to request access to fix the stove, and the cure notice is limited to repairs of a roof drain, a toilet seat and fixing exposed pipes in the bathroom. Respondent argues that the phrase, "to make necessary repairs" is conclusory and vague and fails to advise the tenant of the landlord's need for access to the apartment. Respondent also argues that the notice of termination fails to properly state the basis in the Rent Stabilization Code (RSC) for eviction, and the petition should be dismissed.

In opposition to respondent's motion to dismiss the petition, petitioner argues that the notice of termination states the same facts as the notice to cure, and goes even further. Petitioner states that the gravamen of the notice to cure is failure to provide access, and not the nature of the work to be performed, or specific requests for access. Petitioner states that adding in different work to be performed in the notice to terminate, that is admittedly not contained in the notice to cure, is irrelevant, and it all adds up to failing to provide access. Petitioner relies on a statement in the notice to cure referencing a May 22, 2019 letter from petitioner's counsel to the respondent requesting access on specific dates and stating respondent failed to comply with the requests. This letter is not attached to the notice to cure, nor is it annexed to the notice of termination. Therefore any factual allegations in the letter are not part of the notice to cure, nor incorporated into the petition.

In its opposition to the respondent's motion, petitioner references an email chain with the tenant instructing respondent to call the landlord and schedule access dates, and states that respondent's failure to call to schedule access constitutes a failure to cure. None of this information or these facts are contained in the notice to cure, or the termination notice. Petitioner argues the specific facts about access for repairs, i.e. the conditions to be corrected, are not relevant to a predicate notice.

Petitioner argues that because the notice to cure references "interior work in the apartment," that phrase covers any and all work petitioner might need to do in the subject apartment at any time. It is undisputed that the notice of termination fails to mention the specific conditions needing repair that are listed in the notice to cure leading one to assume respondent provided access to correct the conditions listed in the notice to cure.

In reply, respondent states the notice to terminate fails to state factual allegations of respondent's failure to cure the conduct alleged in the notice to cure, and the notice of termination fails to specify the ground for removal under the RSC. Respondent argues that the notice of termination must be definite and unequivocal, and alleged defaults stated with particularity to enable a tenant to know what he is defending against and to interpose a valid defense.

Respondent submits a supporting affidavit, and an affidavit in opposition to petitioner's motion for summary judgment. He states he has lived in the subject apartment for thirty years. He states he has never unreasonably refused access to the landlord for repairs or improvements as required by law.

Petitioner's motion for summary judgment and issuance of a final judgment of possession and a warrant

Petitioner seeks an order granting summary judgment in its favor arguing there are no material issues of fact in dispute requiring a trial, and granting a final judgment of possession. Petitioner's agent, Scott Clarke, submits an affidavit in support of petitioner's summary judgment motion, however, he has no personal knowledge of the facts. Mr. Clarke provides hearsay information from the super. The agent states all the repairs have been completed except for a window. The super, Shefki Holaj, states in his affidavit that the main shut off valve for the entire "B" line in the building is located in a closet in the subject apartment. He states that with respondent's permission, he enters the apartment and shuts off the water for the "B" line. The super states that the toilet in respondent's apartment created a leak, he removed the toilet from the bathroom and placed it in another room, and this necessitated repairs to a radiator. Mr. Holaj states that on October 2 and December 16, 2018, respondent denied access. These

claims are contrary to respondent's statements that the super and the workers were in his apartment in 2018 and 2019 doing these repairs. Both parties agree these specific repairs are completed.

In opposition to petitioner's motion seeking summary judgment, and a final judgment of possession, respondent states that the motion should be denied because petitioner fails to comply with RSC (9NYCRR) 2524.2(b) |

Mr. Hough states in his affidavit in opposition to petitioner's cross motion that prior to this holdover proceeding, he provided access to petitioner on multiple occasions. Respondent states that around December 2017, he had a leak in the bathroom ceiling, and he notified petitioner. The super and petitioner's contractors informed respondent there was a problem with the pipelines, and a problem with the roof. Respondent states that for about one year, petitioner's workers came into his apartment to correct the leak in the bathroom, and during this year work was performed to the infrastructure, plumbing and the ceiling. Work was performed in the bathroom to replace the pipelines and new pipelines were installed in July 2018. Respondent states that the leaks continued, he notified the super, Shefki Holaj, and again respondent gave access for the super to inspect. Respondent notified the super that the contractors never finished the work on the bathroom ceiling leaving a hole in the ceiling with the pipeline exposed.

Respondent received a call from petitioner's counsel on May 29, 2019 requesting access to complete the repairs in the bathroom. Respondent informed counsel he would provide access, but stated he wanted to consult with an attorney because the conditions were affecting his health and safety. He requested scheduling mutually convenient access dates as he knew from the prior work done in 2018 in his bathroom, the landlord needed multiple dates and that heavy construction work was involved. This is supported by the affidavit of petitioner's super, Mr. Holaj. Respondent disputes some of the statements of Shefki Holaj, in his affidavit in support of petitioner's motion for summary judgment. Respondent states he has experienced problems with his stove since 2017, and he notified the super about a gas leak from the stove in 2019. In June 2019 respondent notified Con Edison about the gas leak in the stove because petitioner was not responding. On June 26, 2019, Con Edison turned off the gas due to a leak on the range. Petitioner did not replace this stove until January 2020, and respondent states the current stove is defective and improperly installed. Respondent states he provided access from August 2, 2019 through September 3, 2019 to complete the repairs on the bathroom ceiling. After commencement of this proceeding on September 5, 2019, respondent states he continued to provide access for repairs including October, November and December 2019 until the Covid-19 pandemic started in March 2020. Respondent states he is at high risk for severe illness from Covid-19 and he asked petitioner to hold off on access for repairs.

Discussion

Summary judgment shall only be granted where no triable issues of fact exist. *Salino v. IPT Trucking Inc*, 203 AD2d 352 (2nd Dept. 1994); *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Andre v. Pomeroy*, 35 NY2d 351 (1974) The moving party on a summary judgment motion must establish a cause of action or defense by admissible evidence sufficient for the court to direct judgment in his favor as a matter of law. *Friends of Animals, Inc v. Associated Fur Mfrs., Inc*, 46 NY2d 1065 (1979) If the moving party meets that burden, then the burden shifts to the party opposing the summary judgment motion to lay bare its proof to establish that any real and alleged matters are capable of being established at trial.

Zuckerman v. City of New York, et.al., 49 NY2d 557 (1980); *Hasbrouck v. City of Gloversville*, 102 AD2d 905 (3rd Dept. 1984) aff'd 63 NY2d 916 (1984)

Respondent raises a plethora of factual issues in his affidavit in opposition to petitioner's cross motion for summary judgment. Respondent describes multiple dates of providing access and petitioner's agents performing extensive work in the subject apartment in 2017, 2018 and 2019. Petitioner concedes all the repairs that are the subject of the predicate notices have been completed without stating when the work was performed. There are factual issues in dispute, and therefore, petitioner's cross motion for an order granting summary judgment is denied.

In evaluating the facial sufficiency of a predicate notice in a summary eviction proceeding, "the appropriate test is one of reasonableness in view of the attendant circumstances." *Hughes v. Lenox Hill Hospital*, 226 AD2d 4, 18 (1st Dept. 1996) A valid termination notice is a condition precedent to a holdover proceeding, and if it has not been met, a defective predicate notice requires dismissal of the proceeding. *Chinatown Apts v. Chu Cho Lam*, 51 NY2d 786, 787-788 (1980) The termination notice must establish the specific ground under the RSC permitting the landlord to recover possession. RSC (9NYCRR) 2524.2(b) Failure to provide an adequate termination notice bars eviction proceedings. RSC (9NYCRR) 2524.2(b) provides:

Every notice to a tenant to vacate or surrender possession of a housing accommodation shall state the ground under section 2524.3 or 2524.4 of this Part, upon which the owner relies for removal or eviction of the tenant, the facts necessary to establish the existence of such ground, and the date when the tenant is required to surrender possession.

The "salutary purpose" of the regulation governing predicate notices is "to discourage baseless eviction claims founded upon speculation and surmise, rather than concrete facts." *London Terrace Gardens, LP v. Heller*, 40 Misc3d 135[A], (AT, 1st Dept. 2009); *69 EM LLC v. Mejia*, 49 Misc3d 152[A] (AT, 1st Dept. 2015) "Requiring a landlord to actually allege the facts on which it is basing its conclusion that the tenant failed to cure its default would effectuate the regulation's purpose of discouraging baseless eviction claims founded upon speculation and surmise." *76 West 86th Street Corp v. Junas*, 55 Misc3d 596,598 (Civ Ct, NY Cty 2017) In this proceeding, the notice to cure referenced a default in granting access for the purpose of allowing the plumber and water proofer to inspect the repair the roof drain, as well as fixing the toilet and exposed pipes. The notice of termination fails to mention these conditions, and instead refers to failure to grant access to fix the stove and make necessary repairs. In addition, the notice to cure references a letter, dated May 22, 2019, petitioner sent to respondent without attaching the letter. Petitioner presents a summary of part of the letter which requests access on May 29, 2019, and states respondent failed to give access on May 29, 2019, in the notice to cure, which is dated June 10, 2019. The summary of a correspondence allegedly sent to respondent is confusing at best. Assuming respondent received the letter, he could not cure the alleged failure to provide access on May 29, 2019 based on the notice to cure dated June 10, 2019 and mailed on June 10, 2019 first class mail. The termination notice fails to refer to the repair conditions listed in the notice to cure, and one can only guess if access was provided and the conditions cured.

Based on the foregoing, petitioner's notice of termination fails to meet the requirements of the RSC because it does not contain specific factual allegations in support of its conclusion that respondent

failed to comply with the notice to cure. Therefore, respondent's motion is granted and the petition is dismissed without prejudice. This constitutes the decision and order of the court.

DATED: April 2, 2021



Marcia J. Sikowitz, JHC