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2021-04-05

### Site 15 Affordable Associates LLC v. Merkinson

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

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Site 15 Affordable Associates LLC

L & T INDEX NO.: 056885/19

Petitioner

-against-

DECISION/ORDER

Douglas Merkinson

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-----
ANSWERING AFFIRMATION .....	---3-----
REPLYING AFFIRMATION.....	---4-----
EXHIBITS.....	
OTHER .....Memo of Law.....	5.....

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

Petitioner commenced this nuisance holdover proceeding seeking possession of the subject rent stabilized apartment, 3G, at 211 West 148<sup>th</sup> Street, New York, NY 10039, based on its claims in the predicate notices. The Ten (10) Day Notice to Cure states in part:

1. Commencing in or about March 2018 and continuing to date you and/or your guests/visitors/invitees have been causing a nuisance at the subject premises;
2. The complained of conduct includes: a) Excessive knocking or banging upon the door(s) of other apartments in the building as well as banging on your apartment ceiling; b) Verbal harassment and/or yelling/screaming at other Tenants and/or visitors in the building. This conduct occurs in the common areas of the building; c) Upon information and belief you have threatened to “shoot” another Tenant in the building;
3. One or more affected Tenants in the building have temporarily moved out due to your behavior;
4. The New York City Police Department has been called to the premises on numerous occasions regarding the aforementioned behavior;
5. More specifically, on March 17, 2019 the NYPD was called by an occupant in the building alleging that you “...continue to annoy and alarm complainant every time she walks or makes a noise in her apartment...would go to her apartment and make threats like I will have the Bloods come and get you...scared to do anything in the apartment...”
6. Management has received numerous complaints regarding the aforementioned conduct;
7. The complained of nuisance behavior continues to create a nuisance condition which interferes with your fellow tenant’s enjoyment of their homes and threatens the health and safety of all building residents, visitors and employees.
8. The above complained conduct has been ongoing and continuous.

The notice to cure is dated January 11, 2019. The Ten (10) Day Notice of Termination states that respondent failed to cure, and “More specifically, and subsequent to the expiration of the cure period, management has received additional complaints in connection with the behavior alleged and complained of in the notice to cure.”

Respondent moves by notice of motion for an order, pursuant to CPLR 3211(a)(7) and CPLR 3211(a)(2), dismissing the petition for failure to state a claim and lack of subject matter jurisdiction. Petitioner opposes the motion in all respects.

Respondent argues that none of the allegations in predicate notices contain dates, other than the general range of March 2018 onward. In addition, respondent states there are no factual details of any specific incidents or the identities of the tenants who were affected by respondent’s behavior. Respondent argues that there is no indication of the number or frequency of the alleged incidents. The notice to cure fails to contain facts of the incident for which the NYPD was called, nor does it claim the NYPD responded. Respondent states the notice of termination is insufficient to put respondent on notice of the claims against him as it merely states that subsequent to the cure period, “management received additional complaints in connection with the behavior alleged and complained of in the notice to cure.” The termination notice fails to state any dates or any facts to explain the nature of the complaints, or who the complaints were from.

In opposition to the motion, petitioner argues that because the predicate notice alleges that respondent engaged in violent and disruptive behavior on a daily basis, it is not realistic to require each and every instance of violent and disruptive behavior to be recorded or set forth in the predicate notice.

Petitioner argues that the predicate notices provide sufficient facts to permit respondent to discern the particular allegations against him and mount a defense. Petitioner relies on the holding in *Pinehurst Constr. Corp v. Schlesinger*, 38 AD3d 474 (1<sup>st</sup> Dept. 2007) to support its position that the predicate notices herein are sufficient. *Pinehurst* was an appellate decision, after a trial, wherein the trial judge relied on witness credibility regarding specific factual allegations of nuisance behavior. Petitioner argues that the predicate notices provide respondent with sufficient details/information to fashion a defense.

Respondent argues in reply that petitioner fails to explain why the predicate notices are not inexcusably vague and conclusory where the allegations fail to state when the activity occurred, where the activity occurred, the extent and frequency of the activity, and who committed the alleged activities. The termination notice fails to state any substantive or factual allegations and merely states that the landlord received additional complaints in connection with the behavior alleged in the notice to cure. There is no indication in the termination notice as to dates, times, or factual basis for any on going activity. Respondent states there is no indication given as to which behavior alleged in the notice to cure has continued after the cure period expired. Respondent's counsel argues that respondent, who appears with a guardian ad litem cannot navigate the proceeding and form a defense with predicate notices that fail to allege dates, times or facts other than stating there has been bad behavior on any given day from March 1, 2018 through January 2019. The predicate notices allege the behavior is being committed by respondent and/or his guests and visitors without stating who, on any particular date, engaged in the offending behavior.

### **Discussion**

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 (1<sup>st</sup> 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, 1<sup>st</sup> Dept. 2009); *69 EM LLC v. Mejia*, 49 Misc3d 152[A] (AT, 1<sup>st</sup> 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 86<sup>th</sup> Street Corp v. Junas*, 55 Misc3d 596,598 (Civ Ct, NY Cty 2017) In this proceeding, the notice to cure alleges one date, “in or about March 2018” and continuing to date, without stating one date/time, and the notice to terminate fails to allege one date or time, or any facts, to support a claim that the offending behavior continued after the cure date. The one date in the notice to cure, March 17, 2018, refers to a date an occupant in the building called the NYPD to complain of respondent’s behavior without stating the exact behavior, if the NYPD responded, and what if anything, was the result.

Respondent is a rent stabilized tenant with a section 8 voucher who appears with the assistance of a guardian ad litem. It is true that there is no absolute requirement that a predicate notice contain dates and times of alleged incidents of offending behavior. However, failing to give provide dates, times, and any specific facts to support the claims, is a relevant consideration. *297 Lenox Realty Company v. Babel*, 19 Misc3d 1145[A], (Civ Ct, Kings Cty, 2008) Predicate notices in nuisance holdover proceeding, where the alleged conduct is subject to being specifically identified by date and time, have been held to be fatally defective for failing to include such specifics. *Carriage Court Inn, Inc v. Rains*, 138 Misc2d 444, 447 (Civ Ct, NY Cty 1988) Petitioner relies on the holding in *Anzora v. 81 Saxon Avenue Corp*, 146 AD3d 848 (2<sup>nd</sup> Dept. 2017) which dealt with a complaint in a wrongful death suit, and not with the sufficiency of predicate notices in a nuisance holdover proceeding. The *Pinehurst* decision, also relied on by petitioner, involves a finding of sufficiency in a notice by the trial court after hearing testimony from witnesses. It is undisputed that the notice to terminate herein fails to contain any incidents of nuisance behavior after the cure period that is supported by dates/times, or any facts whatsoever. Petitioner argues that it is not possible to lay bare each occurrence with dates/times. In this case, none of the incidents are supported by dates/times or specific facts.

It is not reasonable to expect that a tenant can fashion a defense based on vague claims of nuisance behavior by him, and/or guests/visitors, without dates/times of alleged acts, who committed the acts, and without factual allegations of where the offending behavior occurred. The predicate termination notice fails to contain one incident of offending behavior supported by date/time or specific facts to put respondent on notice of alleged offending behavior occurring after the cure period. Based on the foregoing, respondent’s motion to dismiss the petition pursuant to CPLR 3211(a)(7) and 3211(a)(2) for failure to state a claim and subject matter jurisdiction, is granted and the petition is dismissed without prejudice. This constitutes the decision and order of the court.

DATED: April 5, 2021

  
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Marcia J. Sikowitz, JHC