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Tegford Realty LLC v. Berroa

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART J

-----X
TEGFORD REALTY LLC,

Index No. L&T 32070/19

Petitioner,

DECISION/ORDER

-against-

Motion seq no. 1

OLGA BERROA,

Respondents,

ELINA LOZADO BERROA,
ELIZABETH GONZALEZ, and
PEDRO PENALVER,

Respondents/Undertenants.
-----X

HON. KISHA L. MILLER:

Emmanuelli & Pilotti, Esqs., for Petitioner.
Mobilization for Justice, Inc., for Respondent Berroa.

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of this motion granting partial summary judgment on Respondent's first affirmative defense.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Reply Affidavits.....	3

Upon the foregoing cited papers, the decision and order on this motion is follows:

In this holdover summary eviction proceeding, Petitioner served a 10-day Notice of Termination alleging the Respondents have engaged in conduct constituting a nuisance.

Specifically, the notice alleges:

You are keeping the above premises in an unsanitary condition unfit for human habitation and is a health and safety risk to the other tenant(s) including a fire hazard more specifically on May 20th, 2019 [sic] an inspection of your apartment by the building superintendent revealed that your apartment is filled with bags of debris, including loose papers, assorted appliances, furniture, clothing and intravenous needles. The floors of the apartment are not visible and the debris is piled waist high restricting movement within the apartment.

PLEASE TAKE FURTHER NOTICE, that the landlord has determined the conditions that you have created in your apartment are a nuisance and your conduct constitutes an unwarrantable, unreasonable or unlawful use of the premises creating a health and safety risk to other tenant(s) at the subject premises.

PLEASE TAKE FURTHER NOTICE, that such objectionable conduct on the part of yourself and the occupant(s) of your apartment constitute a nuisance and renders you an objectionable tenant in violation of paragraph 12 of your lease and New York City Rent Stabilization Code section 2524.(3)(b). This notice is being served upon you pursuant to Section 2524.2(c)(2) of the code.

Appearing by counsel, Respondent Berroa filed an amended answer interposing several affirmative defenses and counterclaims. Following several adjournments, where the court appointed a guardian ad litem for Respondent and the parties agreed to inspect the apartment, Respondent moved for partial summary judgment dismissing Petitioner's breach of lease claim for failure to serve a notice to cure. Respondent argues that Petitioner should have served a notice to cure prior to commencing this proceeding since the notice of termination alleges, in part, that Respondent's conduct is a violation of the lease agreement.

There is no dispute that Petitioner served only a notice of termination. A landlord is not required to serve a notice to cure if a tenant's conduct constitutes a nuisance (Rent Stabilization Code §2524.3[b]). If the proceeding is based upon a theory of breach of substantial obligation of the tenancy pursuant to Rent Stabilization Code §2524.3(a), service of a notice to cure must precede a notice of termination (*Kast Realty LLC v Houston*, 2003 NY Slip Op 50892(U), 2003 WL 21175992 [App Term, 1st Dept 2003]). Petitioner argues that the claim against Respondent is framed solely as a nuisance due to a hoarding condition in the apartment. But the termination notice also describes Respondent as an "objectionable tenant," specifically identifying the alleged conduct as a violation of paragraph 12 of the lease. Annexed to Petitioner's opposition is the lease agreement. Paragraph 12 provides, in pertinent part:

Objectionable conduct means behavior which makes or will make the Apartment or the Building less fit to live in for You or other occupants. It also means anything which interferes with the right of others to properly and peacefully enjoy their Apartments, or causes conditions that are dangerous, hazardous, unsanitary and detrimental to other tenants in the Building. Objectionable conduct by You gives Owner the right to end this Lease.

The notice expressly states that Respondent's conduct is a violation of paragraph 12 *and* the Rent Stabilization Code. It is reasonable under the attendant circumstances to read the notice as stating two grounds for terminating Respondent's tenancy (*Hughes v. Lenox Hill Hospital*, 226 AD2d 4 [1st Dept 1996], lv denied 90 NY2d [1997]). Despite Petitioner's assertions that only a nuisance cause of action is alleged, the notice provides facts to support the allegation of objectionable conduct and, on its face, sufficiently apprises Respondent that this proceeding is based, in part, on conduct that is a violation of a specific provision of the lease (*Oxford Towers Co., LLC v Leites*, 41 AD3d 144 [1st Dept 2007] [a notice must "state the nature of petitioner landlord's claim and the facts necessary to establish the existence of grounds for eviction"]). Based on the breach of lease claim, Petitioner was required to serve a notice to cure in accordance with Rent Stabilization Code §2524.3(a).

Assuming *arguendo* that no notice to cure was required by the Rent Stabilization Code, as Petitioner contends, Petitioner still needed to follow certain notice procedures in accordance with the lease when a tenant has engaged in objectionable conduct. Paragraph 17- entitled "Default"- describes the termination process for certain types of defaults, including where the tenant acts in an objectionable manner. Subsection 1 states the "Owner may serve you with a written notice to stop or correct the specified default within 10 days." If the default has not been corrected, subsection 2 provides that the "Owner may give you a second written notice that this Lease will end six days after the date the second written notice is sent to you."

Where the parties' lease agreement provides for more stringent notice requirements than the Rent Stabilization Code, the lease terms will be enforced (*751 Union Street, LLC v Charles*, 56 Misc 3d 141[A], 2017 NY Slip Op 51104[U] [App Term, 2d Dept, 2nd, 11th & 13th Jud Dists 2017]). Based on the plain language of the lease, Petitioner was required to serve a notice to cure, and the lease's use of the words "may serve" did not relieve Petitioner of that obligation (*M. 1695 G.C. LLC v Perez*, 66 Misc 3d 320, 2019 NY Slip Op 29355 [Civ Ct, Bronx County 2019] [the court rejected the landlord's argument that the lease's use of "may serve" does not impose an obligation to serve a notice to cure prior to termination]; *2301 First Ave., L.P. v Ortiz*, 27 HCR 368A [Civ Ct, NY County, No. 69366/97, J. Friedman, Aug. 4, 1997] ["same or similar lease provisions have consistently been construed to require a notice to cure for nuisance-type behavior"]).

A predicate notice is a condition precedent to termination of a tenancy under a lease and failure to serve a proper notice warrants dismissal of the proceeding (*Chinatown Apt. Inc. v Chu Cho Lam*, 51 NY2d 786 [1980]). Here, Petitioner's failure to serve a notice to cure based on its breach of lease claim does not invalidate the entire notice of termination, Petitioner may still proceed on the ground that Respondent's conduct constitutes a nuisance in accordance with Rent Stabilization Code 2524.3(b). "The assertion of separate theories or causes of action is authorized [CPLR 3014], and the insufficiency of one alternative does not affect the sufficiency of the remainder pleading" (*Lambert Houses Redevelopment Co v Adam & Peck Org. Inc.*, 169 Misc 3d 667 [App Term, 1st Dept 1996]).

Accordingly, Respondent's motion for partial summary judgment on the first affirmative defense dismissing Petitioner's breach of lease claim is granted.

The parties are directed to appear virtually on June 23, 2021 at 11:00 a.m. The court will transfer the proceeding to Part X for trial.

This constitutes the decision and order of the court.

Dated: May 26, 2021



KISHA L. MILLER, J.H.C.