2021-07-23

1356 Walton Ave LLC v. Santos

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

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1356 WALTON AVENUE, LLC,

Petitioner-Landlord, L&T Index No. 54979/2019

-against- **DECISION/ORDER**

MARIA SANTOS,
1356 Walton Avenue
Apartment 44-B
Bronx, New York 10452

Respondent-Tenant,

"JOHN DOE" and/or "JANE DOE",

Respondent-Undertenants.

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HON. MALAIKA N. SCOTT-MCLAUGHLIN, J.H.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion by respondent seeking dismissal of the proceeding:

Papers	**Numbered**
Notice of Motion, Affirmation, and Exhibits Annexed	1
Opposition Affirmation and Exhibits Annexed	2
Reply Affirmation and Exhibits Annexed	3

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

1356 Walton Avenue, LLC ("Petitioner"), commenced this holdover proceeding to recover possession of Apartment 44-B located at 1356 Walton Avenue, Bronx, New York 10452 ("Subject Premises") from the rent stabilized tenant of record Maria Santos ("Respondent"), and "John Doe" and/or "Jane Doe", based upon the alleged wrongful acts of Respondent.

Petitioner issued a Notice of Termination, dated November 13, 2019, ("Notice of Termination") and served it upon Respondent on or about November 14, 2019. The Notice of Termination, incorporated into the Petition, states in pertinent part:

> "YOU ARE HEREBY NOTIFIED that your landlord elects to terminate your tenancy on the grounds that you have breached § 2524.3(b) of the Rent Stabilization Code for Rent Stabilized apartments in New York City, and your original lease agreement, commencing May 1, 2007, entered into between you and your Landlord, and renewed thereafter as recently as April 9, 2019.
>
> "PLEASE TAKE FURTHER NOTICE, that the facts upon which the within termination is based are as follows:
>
> > "(a) In contravention of your original lease, as mentioned above, you have breached paragraph 8 of said agreement. Said paragraph requires you to take good care of the apartment and all equipment and fixtures therein. You have caused substantial damage to the subject premises. As is depicted in the annexed photographs you have intentionally, willfully and with wanton disregard caused damage to the interiors doors of the subject premises. You have also removed your smoke/carbon monoxide detector. You have also caused a cockroach infestation to exist in your apartment due to your failure to keep a clean housing accommodation. You have also removed and/or failed to replace light bulbs throughout the apartment. As a direct result of your above referenced conduct, you have created conditions for which Department of Housing Preservation and Development (DHPD) issued violations. Annexed hereto and made a part hereof are copies of violations in your apartment. Likewise, following an inspection New York City Housing Authority (NYCHA) Section 8 has also issued Housing Quality Standards (HQS) violations due to the conditions that you have created as a result of your conduct, set forth above. One such HQS violation is due to a lack of electrical work, which when inspected by your Landlord showed that you failed to install working light bulbs or removed working light bulbs, which resulted in the issuance of the aforesaid HQS violation.
> >
> > "(b) More egregious is the fact that many of the existing conditions, placed by violations by DHPD or Section 8, have previously been repaired by your Landlord. Specifically, and by way of an example, DHPD previously issued a violation for living room floor. Please see annexed report showing the violations previously issued in your apartment and results thereof. The Landlord had previously repaired

the living floor, certified same with DHPD and said violation was verified to have been complied by DHPD inspector(s) following inspection. However, now, said condition is again cited as in need of repair. Furthermore, in May 2019, DHPD issued violations for interior doors in your apartment. Said violations were cured and doors were replaced. However, as is depicted in the annexed photographs, the doors of your apartment are again damaged after having been fixed. Furthermore, this condition was cited by Section 8 as a HQS violation.

"(c) Additionally, as a result of your failure to maintain the apartment Section 8 has suspended subsidy paid on your behalf. You have failed to comply with the terms, conditions, and requirements of your New York City Housing Authority Section 8 program and the New York City Housing Authority Section 8 lease, and as a consequence, your subsidy was terminated. More specifically, you failed to meet your obligations to continue your participation with the New York City Housing Authority Section 8 program, in that you have caused damage to your apartment causing suspension of subsidy payments by Section 8 to the Landlord. Moreover, Section 8 has notified the Landlord, by letter on October 28, 2019, that certain HQS conditions were discovered and that unless corrected within 24 hours and/or 20 days, as applicable, subsidy would be terminated. Annexed hereto and made a part hereof is a copy of said notification received by the Landlord. As set forth above, the conditions cited by Section 8 were previously corrected by the Landlord. As a result, the Landlord has been deprived of subsidy payments, in violation of a substantial obligation of your afore-said lease agreement and the Section 2524.3(a) and/or Section 2524.3(b) of the Rent Stabilization Code for Rent Stabilized apartments in New York City. Suspension of subsidy payments by NYCHA Section 8 was due solely to your actions. The afore-said conduct constitutes a valid basis for termination of your tenancy pursuant to your lease agreement, the HAP contract, and the tenant addendum made part and parcel of your lease agreement in accordance with State and Federal Law and Legislation.

"(d) The above described conduct is in breach of your lease agreement, as mentioned above, which requires that you maintain the apartment. It is also a breach of your lease to fail to carry out any portion of the agreement. See paragraph 16(A)(5).

"(e) Above conduct is also in breach of Section 2524.3(b) of the Rent Stabilization Code, which prohibits conduct that "maliciously, or by reason of gross negligence, substantially damaging the

> housing accommodation; or the tenant engages in a persistent and continuing course of conduct evidencing an unwarrantable, unreasonable or unlawful use of the property to the annoyance, inconvenience, discomfort or damage of others, the primary purpose of which is intended to harass the owner . . .".
>
> "PLEASE TAKE FURTHER NOTICE that continuous tender of Section 8 subsidy by the New York City Housing Authority Section 8 program is a material and mandatory condition of your lease agreement, as entered between you and your Landlord, and renewed to date. Suspension of Section 8 subsidy, as a result of your failure to maintain the apartment and cease causing intentional damage thereto, constitutes a material breach of the afore-said rental agreement and HAP contract.
>
> "PLEASE TAKE FURTHER NOTICE, that your conduct described above, does not lend itself to a meaningful cure and therefore no notice to cure is served upon you.
>
> "PLEASE TAKE FURTHER NOTICE, that unless you move from the above premises by December 5, 2019, the date on which your tenancy expires, the landlord will commence summary proceedings under the statute to remove you therefrom.
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> "PLEASE TAKE FURTHER NOTICE, that this notice is being served upon you pursuant to §§ 2524.2, 2524.3(b) and § 2524.3(c) of the Rent Stabilization Code for Rent Stabilized apartments in New York City, and paragraphs 4, 8 and 16(A)(4) and 16(A)(5) of your original lease, as mentioned above."

Thereafter, Petitioner commenced this proceeding by service of a Notice of Petition and Petition on or about December 24, 2019. The Petition, dated December 9, 2019 ("Petition"), provides, in pertinent part, that:

> "8. That the term of which said premises were to be occupied by the Respondent(s) expired on December 5, 2019, pursuant to the attached ten day notice to terminate. Said notice to terminate and affidavit of service are attached hereto and made a part hereof. The basis of this termination was due to the fact that Respondent has caused damage to the subject premises that was willful and/or wanton resulting in issuance of violations and suspension of Section 8 subsidy in contravention with the parties' lease agreement, Section 2524.3(a) and Section 2524.3(b) of the Rent Stabilization Code, as more fully said forth in the annexed ten day notice to terminate and notice to cure. Said notice is attached hereto and made a part hereof."

Respondent appeared in this proceeding and has retained The Legal Aid Society as counsel.

Respondent now pre-answer moves to dismiss, pursuant to CPLR 3211(a)(7) and 3211(a)(2), for failure to serve a Notice to Cure and, pursuant to CPLR 3211(a)(7), for failure to state a cause of action. In the alternative, Respondent requests leave, pursuant to CPLR 3012(d) or CPLR 3211(f), to interpose a late Answer.

Respondent argues that she was not served with a predicate Notice to Cure prior to the commencement of this proceeding. Respondent argues that her alleged behavior and the allegations are curable and that, pursuant to 9 NYCRR § 2504.1(d)(1), Rent Stabilization Code ("RSC") § 2504.2(a), and RSC § 2524.3, she was entitled to a Notice to Cure prior to receiving a Notice of Termination. Respondent asserts that Petitioner does not provide sufficient support for it deeming the allegations incurable and dispensing with the Notice to Cure requirement.

Respondent also argues that Petitioner has failed to state a cause of action in accordance with Real Property Actions and Proceedings Law ("RPAPL") § 741(4) and that Petitioner has failed to state the necessary facts in accordance with RSC § 2524.2(b). Respondent asserts that the Notice of Termination is insufficient because it is vague as well as conclusory and it does not show that Respondent was committing or permitting a nuisance pursuant to RSC § 2524.2(b).

In opposition, Petitioner argues that it commenced this proceeding based upon a nuisance claim and that a predicate Notice to Cure was not required. Petitioner asserts that it deemed Respondent's conduct a violation of RSC § 2524.3(b) and that said conduct was not curable. Petitioner acknowledges that while Respondent's conduct alleged in the Notice of Termination did in fact substantially violate provisions of the parties' lease agreement, it did not terminate Respondent's lease pursuant to RSC § 2524.3(a) or based on a claim of substantial lease violation. Petitioner argues that it seeks to recover possession of the Subject Premises because Respondent

has engaged in conduct that rises to the level of a nuisance. Additionally, Petitioner argues that the pleadings are sufficient to sustain a nuisance claim. Petitioner also opposes Respondent's request to file a late Answer.

In reply, Respondent argues that as a rent stabilized tenant she must be served with a Notice to Cure prior to the commencement of a holdover proceeding based on alleged curable conduct regardless of whether the case is based upon a nuisance claim under RSC § 2524.3(b) or a breach of lease claim under RSC § 2524.3(a). Respondent argues that, pursuant to the predicate Notice of Termination, Petitioner seeks to recover possession of the Subject Premises on the dual grounds of nuisance under RSC § 2524.3(b) and substantial violation of the lease under RSC § 2524.3(a) and, as a result, Petitioner's failure to serve a notice to cure upon Respondent is a fatal defect requiring dismissal of the Petition.

Discussion

Motion to Dismiss

CPLR 3211(a)(2) provides that "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (2) the court has not jurisdiction of the subject matter of the cause of action." CPLR 3211(a)(7) provides that "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (7) the pleadings fail to state a cause of action."

On a motion to dismiss, the pleadings must be viewed in the light most favorable to the nonmoving party (*see 182 Fifth Ave. LLC v Design Dev. Concepts, Inc.*, 300 AD2d 198 [App Div, 1st Dept 2004]). The court must afford the pleadings a liberal construction, accept the facts alleged in the pleadings as true, accord petitioner the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v*

Martinez, 84 NY2d 83, 87–88 [1994]; *see also 922 Westchester Owner LLC v Telfair*, 2019 NY Slip Op 52150[U][Civ Ct, Bronx County 2019]). "However, allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration" (*Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233–234 [App Div, 1st Dept 1994]).

The appropriate standard of review of a predicate notice is "one of reasonableness in view of the attendant circumstances" (*Hughes v. Lenox Hill Hospital*, 226 AD2d 4, 18 [App Div, 1st Dept 1996]; *see Oxford Towers Co., LLC v Leites*, 41 AD3d 144 [App Div, 1st Dept, 2007]). "A predicate notice must provide the necessary information to enable the tenant to frame a defense and meet the tests of reasonableness and due process" (*Broadhurst Willows Apts. v Wooten*, 2021 Slip Op 50335[U][Civ Ct, NY County 2021]; *see Oxford Towers Co., LLC v Leites*, 141 AD3d 144; *see also University Towers Assoc. v Gibson*, 18 Misc3d 349, 351 [Civ Ct, Kings County 2007]). "Broad, conclusory or unparticularized allegations will not properly provide information necessary to enable the tenant to mount a defense to the proceeding or possibly avoid the litigation altogether" (*B&K 236 LLC v DiPremzio*, 2018 NY Slip Op 51952[U][Civ Ct, Bronx County 2018]; *see Greenfiled v Etts Enterprises, Inc.*, 177 AD2d 365 [App Div, 1st Dept 1991]). "To satisfy the requirement of factual specificity, a landlord needs to conduct a 'through facts-investigation before commencing a holdover proceeding'" (*Broadhurst Willows Apts. v Wooten*, 2021 NY Slip Op 50335[U] citing *Concourse Green Assocs., LP v Patterson*, 53 Misc3d 1206[A][Civ Ct, Bronx County 2010]). The predicate notice, however, "need not lay bare a landlord's trial proof" (*McGoldrick v De Cruz*, 195 Misc2d 414, 415 [App Term, 1st Dept 2003]).

Courts have consistently held that the RSC should be interpreted pursuant to its "plain meaning" and that "it must be 'enforce[d] . . . as written'" (*Hirsch v Stewart*, 63 AD3d 74, 77 [App

Div, 1st Dept 2009]; *see Berkeley Assoc. Co. v Camlakides*, 173 AD2d 193, 194 [App Div, 1st Dept 1991]). "The Rent Stabilization Code provides that no tenant shall be evicted 'unless and until the owner [gives] written notice to such tenant … [which states] [1] the ground under section 2524.3 upon which the owner relies for removal or eviction of the tenant, [2] the facts necessary to establish the existence of such ground, and [3] the date when the tenant is required to surrender possession'" (*Domen Holding Co. v Aranovich*, 1 NY3d 117, 123 [2003]; 9 NYCRR § 2524.2[a], [b]; *see B&K 236 LLC v DiPremzio*, 2018 NY Slip Op 51952[U][Civ Ct, Bronx County 2018]).[1]

RSC § 2524.3 governs eviction proceedings based upon the wrongful acts of a tenant and provides, in pertinent part, that:

> "Without the approval of the DHCR, an action or proceeding to recover possession of any housing accommodation may only be commenced after service of the notice required by section 2524.2 of this Part, upon one or more of the following grounds, wherein wrongful acts of the tenant are established as follows:
>
> > "(a) The tenant is violating a substantial obligation of his or her tenancy other than the obligation to surrender possession of such housing accommodation, and has failed to cure such violation after written notice by the owner that the violations cease within 10 days; or the tenant has willfully violated such an obligation inflicting serious and substantial injury upon the owner within the three-month period immediately prior to the commencement of the proceeding . . .
> >
> > "(b) The tenant is committing or permitting a nuisance in such housing accommodation or the building containing such housing accommodation; or is maliciously, or by reason of gross negligence,

[1] Rent Stabilization Code § 2524.2 provides that: "(a) [e]xcept where the ground for removal or eviction of a tenant is nonpayment of rent, no tenant shall be removed or evicted from a housing accommodation by court process, and no action or proceeding shall be commenced for such purpose upon any of the grounds permitted in section 2524.3 or 2524.4 of this Part, unless and until the owner shall have given written notice to such tenant as hereinafter provided; (b) [e]very 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."

> substantially damaging the housing accommodation; or the tenant engages in a persistent and continuing course of conduct evidencing an unwarrantable, unreasonable or unlawful use of the property to the annoyance, inconvenience, discomfort or damage of others, the primary purpose of which is intended to harass the owner or other tenants or occupants of the same or an adjacent building or structure by interfering substantially with their comfort or safety . . .
>
> "(c) Occupancy of the housing accommodation by the tenant is illegal because of the requirements of law and the owner is subject to civil or criminal penalties therefor, or such occupancy is in violation of contracts with governmental agencies."

Furthermore, it has been held that a notice to cure "is not a jurisdictional prerequisite for a landlord's cause of action in nuisance" (*Lexington Ave. Properties v Charrier*, 1986 NY App Div LEXIS 63707 [App Div, 1st Dept 1986]; RSC § 2524.3[b])

Additionally, "[s]ection 2504.1 of the Division of Housing and Community Renewal's Emergency Tenant Protection Regulations set forth restrictions regarding the removal of a tenant in a rent-stabilized housing accommodation" (*ATM One, LLC v Landaverde*, 2 NY3d 472, 474 [2004]). Pursuant to 9 NYCRR §2504.1(d), "[p]rior to commencing a proceeding to recover possession based on a tenant's wrongful acts, an owner must give the tenant written notice to cure" and said notice "must state the wrongful acts of the tenant, the facts necessary to establish such acts and 'the date certain by which the tenant must cure said wrongful acts or omission, which date shall be no sooner than 10 days following the date such notice to cure is served upon the tenant'"

(*ATM One, LLC v Landaverde*, 2 NY3d 472, 474; 9 NYCRR §2504.1[d]).[2] "A proceeding may not be maintained if the tenant cures the specified wrongful acts" (*ATM One, LLC v Landaverde*, 2 NY3d 472, 474; 9 NYCRR § 2504.1[d][1][ii]).

Pursuant to 9 NYCRR §2504.1(d)(2),[3] there are limited instances where a Notice to Cure is not required, such as when the tenant's wrongful act by its nature is not curable, for example a nuisance claim based upon chronic late payment of rent (*see Garfield v O'Donnell*, NYLJ, Jun. 8, 1994, at 28, col 3, 1994 NYLJ LEXIS 9371 [Civ Ct, NY County 1994]) or when the tenant's wrongful act is a willful violation, inflicting serious and substantial injury on the property of the landlord, for example a tenant who on twenty (20) separate occasions repeatedly allows water to overflow from his bathtub causing water penetration to a unit below (*see 57-59 Second Ave. Corp v Yeung*, 2002 NY Slip Op 50124[U][App Term, 1st Dept 2002]).

The question presented to the Court is whether Respondent was entitled to a cure period prior to the termination of her rent stabilized tenancy. In this instance, pursuant to the Notice of Termination, the grounds for the termination of Respondent's rent stabilized tenancy were based

[2] 9 NYCRR § 2504.1(d)(1) provides that: "[i]n addition to any other limitations imposed by these regulations, no proceeding to recover possession of any housing accommodation based upon any wrongful acts or omission of a tenant, pursuant to section 2504.2 of this Part, may be maintained unless: (i) the landlord has given the tenant written notice (the notice to cure) stating the following: (a) the wrongful acts or omission of the tenant pursuant to section 2504.2 of this Part; (b) the facts necessary to establish the existence of said wrongful acts or omission; and (c) the date certain by which the tenant must cure said wrongful acts or omission, which date shall be no sooner than 10 days following the date such notice to cure is served upon the tenant. (ii) the tenant fails to cure the wrongful acts or omission specified in the notice to cure by or before the date specified in clause (i)(c) of this paragraph."

[3] 9 NYCRR § 2504.1(d)(2) provides that: "[t]he requirements of subparagraphs (1)(i) and (ii) of this subdivision shall not apply where the wrongful act or omission: (i) is, by its nature, not curable; or (ii) consists of the reoccurrence or continuation of a violation or condition which was the subject of a prior notice to cure transmitted to the tenant no more than six months previously; or (iii) consists of the willful violation of an obligation of the tenant inflicting serious and substantial injury on the landlord or the property of the landlord."

upon Respondent's alleged wrongful acts, which constituted a nuisance in violation of RSC § 2524.3(b) and a breach of the parties' lease agreement. Furthermore, Petitioner deemed that said conduct was incurable. Additionally, the Petition provides that a Notice to Cure and Notice of Termination were annexed to said Petition, however only a Notice of Termination was included.

It is undisputed that Petitioner did not serve a notice upon Respondent to cure the conduct alleged prior to the commencement of this proceeding and it served only a notice informing Respondent of its election to terminate Respondent's tenancy effective December 5, 2019. The parties did not provide the Court will a copy of the parties' original lease agreement, and Respondent annexed a copy of the HAP contract between Petitioner and New York City Housing Authority ("NYCHA") Section 8 to her motion papers. Pursuant to the NYCHA Section 8 Notices, dated October 30, 2019, November 19, 2019, and June 10, 2020, respectively, Respondent's voucher has remained in effect and NYCHA Section 8 suspended subsidy payments to Petitioner effective December 1, 2019 due to non-compliance with Housing Quality Standards. The predicate Notice of Termination stated that NYCHA Section 8 subsidy payments to Petition had been suspended as of November 13, 2019 and that Respondent's subsidy had also been terminated by said date.

Here, based on the foregoing and the documentary evidence, the Court finds that Respondent was entitled to a Notice to Cure prior to the termination of her rent stabilized tenancy. Petitioner commenced this proceeding based upon Respondent's alleged wrongful acts and three different Rent Stabilization Code sections, RSC § 2524.3(b), RSC § 2524.3(a) and RSC § 2524.3(c), are mentioned in the predicate Notice of Termination as a basis for the terminating Respondent's tenancy. Thus, based on the cited Rent Stabilization Code sections in the predicate

Notice of Termination, a cure period was required prior to the termination of Respondent's tenancy.

Petitioner acknowledged in its' opposition papers that Respondent's alleged conduct did in fact substantially violation provisions of the parties' lease agreement. The Notice of Termination references Respondent's various alleged breaches of the parties' lease agreement with citation to said lease provisions and said notice states that NYCHA Section 8's suspension of subsidy payments to Petitioner violated a substantial obligation of Respondent's lease agreement and RSC § 2524.3(a) and/or RSC § 2524.3(b). Furthermore, Petitioner did not present sufficient evidence to show that Respondent's alleged wrongful acts fall within the parameters of 9 NYCRR § 2504.1(d)(2) where a Notice to Cure is not applicable.

Therefore, based on the foregoing, Respondent's motion to dismiss is granted and the petition is dismissed without prejudice. Respondent's remaining arguments for dismissal are rendered moot by the foregoing Decision and Order and are not addressed.

Conclusion

Accordingly, Respondent's motion to dismiss is granted and the petition is dismissed without prejudice.

The foregoing constitutes the Decision and Order of this Court, copies of which are being sent to all parties.

Dated: July 23, 2021

Malaika N. Scott-McLaughlin, J.H.C.

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