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Litchmore-Smith v. Lewis

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

Florence F Litchmore-Smith,

Petitioner,

L&T 59517-20

- against -

DECISION & ORDER
Mot Seq 1 & 4

Patricia Lewis; "John Doe 1," "John Doe 2,"
"John Doe 3," "John Doe 4," "John Doe 6," and "Jane Doe".

Respondents.

Hannah Cohen, J.:

Recitation pursuant to CPLR § 2219 (a) of the papers considered in the review of this motion:

Papers	Numbered
Order to Show Cause and Affidavits/Notarized Letters of Florence F Litchmore-Smith in Support of request for a Final Eviction Order	1
Notice of Cross-Motion, Attorney Affirmation, and Affidavit of Patricia Lewis	2
Petitioner's Response to the Cross-Motion	3

Petitioner commenced this lease expiration holdover with the filing of a notice of petition and petition on August 5, 2020, alleging that Respondents' one-year lease terminated on January 30, 2020, that Respondents continue in possession of the premises, and that they are engaging in nuisance-type behavior. Prior to the filing of the petition, on July 28, 2021, Petitioner served a 60-day notice terminating the tenancy, requiring Respondents to vacate on or before September 30, 2020, and alleging the aforementioned nuisance-type behavior. The matter was initially stayed for 60-days after the passage of the Covid-19 Emergency Eviction Prevention Act (CEEPPA) in late December 2020. On April 14, 2021 Respondent, Patricia Lewis, filed a hardship declaration.

After the initial 60-day stay, Petitioner moved by order to show cause to restore the matter to the calendar on March 19, 2021. Petitioner then supplemented this order to show cause with affidavits/notarized letters to the court dated March 19, 2021, March 26, 2021, and April 15, 2021, seeking an order permitting the eviction of Respondents, alleging continuing nuisance behavior, and objecting to the filing of the hardship declaration or its effectuating a stay of this proceeding. Petitioner specifically alleged that the hardship declaration or Respondent's financial hardship is not the "cause of the eviction", and that reason for seeking the eviction was Respondents behavior, such as threats of bodily harm to Petitioner and property damage.

Respondents opposed the motion alleging that the Court should stay the proceeding pursuant to §6 of the CEEFPA, and simultaneously cross-moved for dismissal of the proceeding pursuant to CPLR §§ 3211(a)(1) and /or 3211(a)(7) on the grounds that Petitioner created a month-to-month tenancy by acceptance of rent after the end of the lease period pursuant to RPL §232-c, and Petitioner failed follow the predicate notice rules under RPL §§ 226-c and 232-a before commencing the proceeding. Alternatively, Respondents seek leave to interpose and amended answer pursuant to CPLR §3012(d).

CPLR 3211(a)(1) and (a)(7) respectively permit a party to move for judgment dismissing one or more causes of action on the ground that a defense is founded upon documentary evidence or the pleadings fail to state a cause of action. In assessing a motion to dismiss under CPLR §3211(a)(7), the court must determine whether the pleadings state a cause of action (*Connolly v LIPA*, 30 NY3d 719 [1977]). In doing so, the court must accept all allegations as true, and afford Petitioner the benefit of every possible favorable inference (*Connolly*, 30 NY3d at 728).

When a landlord accepts rent after the expiration of a lease, unless there is an agreement express or implied providing otherwise, they create a month-to-month tenancy under the terms of

the former lease which commences on the first day of the month following the expiration of such term (*see* RPL §232-c; *City of New York v Pennsylvania RR Co*, 37 NY2d 298, 300 [1975]). Pursuant to RPL §232-a as amended by the Housing Stability and Tenant Protection Act, in order to terminate a month-to-to month tenancy on the grounds for holding over, a notice must be served pursuant to § 226-c-2 which requires the following: at least 30-days' notice if a tenant has occupied the unit for less than one year and does not have a lease term of at least one year; at least 60-days' notice if the tenant has occupied the unit for more than one year but less than two years or has a lease term of at least one year but less than two years; and at least 90-days' notice for a tenant who has occupied the premises for more than two years or has a lease term of at least two years

In this matter, Respondents entered into possession pursuant to a one-year lease beginning on February 1, 2019 and ending on January 30, 2020. It is undisputed that Petitioner accepted and cashed ongoing public assistance payments on behalf of Respondents after expiration of the lease, thereby creating a month-to-month tenancy. At a minimum, Petitioner was required to serve a 60-day notice terminating the tenancy. While the petition does not specifically allege that such notice was served, it appears that Petitioner did serve a proper notice of termination on July 28, 2020 providing Respondents with the minimum 60-days to vacate, by September 30, 2020. However, Petitioner failed to allow the allotted time to run before commencing this proceeding with the filing of the notice of petition and petition on August 5, 2020. As stated in the notice itself, "unless you remove from the said premises on September 30, 2020, the day in which your 60-day term expires, the landlord will commence summary proceedings under the statute to remove you from said premises..." Accordingly, Petitioner's filing of the notice of petition and petition was premature, and therefore the matter must be dismissed without prejudice to bring a new proceeding after

service of the proper notices of termination and allowing the statutory time frames to run before filing a petition.

Pursuant to §6 of the CEEFPA, where there is a pending proceeding in which a warrant has not been issued, the matter shall be stayed through August 31, 2021 if a tenant provides a hardship declaration to the petitioner or the court. An exception to this rule arises under §9 of the CEEFPA, which states that “this act shall not apply if the tenant is persistently and unreasonably engaging in behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes a substantial safety hazard to others.” Mere allegations of the behavior are insufficient evidence to establish that the person has engaged in such behavior and if a petitioner fails to establish that the tenant persistently and unreasonably engaged in such behavior, and the tenant provides a hardship declaration, the proceeding shall be stayed until at least August 31, 2021 (CEEFPA §9 (3) and (4)). If, however, the petitioner establishes that the tenant persistently and unreasonably engaged in such behavior, the proceeding may continue pursuant to Article 7 of the RPAPL, and it does not appear that a hearing is required to make such determination pursuant to this section (CEEFPA §9 (5)).

In this matter, Petitioner alleges continuing nuisance-type behavior in both the notices of termination and petition, including allegations of property damage and threats of bodily harm. To support these allegations Petitioner submitted police reports dated July 17, 2019, July 17, 2020, July 23, 2020, August 25, 2020, along with photographs of alleged damages to the apartment door and common areas. In addition, Petitioner raises issues with continuing nuisance behavior in her affidavits/notarized letters supplementing this order to show cause. While mere allegations are insufficient to establish that Respondents have engaged in such persistent and unreasonable behavior, unlike the Petitioner in *Regency Gardens Co. v Yoshevayev*, Petitioner herein stated

specific instances of alleged ongoing behavior, in detail, and submitted additional evidence to support her allegations (*see Regency Gardens Co. v Yoshevayev*, 71 Misc3d 1046 [Civ Ct Queens County 2020]). While these facts and this evidence may remain in dispute, which would normally require a hearing to resolve the dispute, a hearing here is not needed as there is a procedural defect requiring dismissal. Accordingly, there is no compelling reason to stay issuance of this order.¹

This Court has considered the remainder of the arguments raised on the motion, cross-motion and oppositions and considers them to be moot or without merit. Accordingly, it is

ORDERED that Petitioner's motion for a judgment is denied in its entirety; and it is further

ORDERED that Respondent's cross-motion is granted and the matter is dismissed without prejudice; and it is further

ORDERED that the CEEFPA §6 stay is not applicable, and this decision and order may issue forthwith.

Dated: July 23, 2021

ENTER:



Hon. Hannah Cohen

HANNAH COHEN
JUDGE, HOUSING COURT

¹ While the CEEFPA legislation instituted stays in many cases, with limited exceptions, the act was designed to "avoid as many evictions and foreclosures as possible for people experiencing financial hardship during the Covid-19 pandemic or who cannot move due to an increased risk of severe illness or death from Covid-19. Even assuming a stay were applicable under the facts of this case, a dismissal of a summary proceeding against a tenant, when warranted, does not negatively impact a tenant, or strip them of the protections provided by the CEEFPA.

FILED: KINGS CIVIL COURT - L&T 07/27/2021 09:45 AM