2022-03-08

Riverbay Corp v. Guerrant

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Riverbay Corp. v Guerrant
2022 NY Slip Op 50182(U)
Decided on March 8, 2022
Civil Court Of The City Of New York, Bronx County
Lutwak, J.
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Decided on March 8, 2022

Civil Court of the City of New York, Bronx County

Riverbay Corporation, Petitioner-Landlord,

against

Hershel Guerrant, Respondent-Tenant, and "JOHN DOE" and "JOHN DOE", Respondents-Undertenants.

L & T Index No. 303533/21

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Diane E. Lutwak, J.

Recitation, as required by CPLR 2219(A), of the papers considered in the review of Respondent-Tenant's Motion to Dismiss:

Papers	NYSCEF Doc #
Notice of Motion	19
Attorney's Affirmation in Support	20
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Affirmation in Opposition	26

This is a holdover proceeding based upon Respondent's alleged objectionable conduct in [*2]allowing loud screaming, yelling and amplified music to emanate from his apartment in a State-supervised cooperative building subject to Article II of the Private Housing Finance Law ("Mitchell-Lama"). Prior to commencing this proceeding Petitioner served on Respondent first a Notice to Cure, dated October 26, 2020, and then a Notice of Termination, dated March 16, 2021, as follows:

- The Notice to Cure, dated October 26, 2020, advises Respondent he is in violation of Rule 15 of his Cooperative Occupancy Agreement's Rules and Regulations, which prohibits "disturbing noises" and other conduct that interferes with "the rights, comforts and convenience" of others. The Notice describes an incident of "loud screaming and yelling" on one date in March 2018 and five incidents of "loud, amplified music" on specified dates at specified times in August and September 2020, "all of which substantially affected the comfort of at least one of your neighbors." The Notice asserts that, "Community complaints were issued by the Co-op City Department of Public Safety." Article Fifth, Subsection 7(a) of the Occupancy Agreement and State regulation 9 NYCRR § 1727-5.3(b)(1) are cited as authority for the Notice, which warns Respondent he must cure "the violations of your Occupancy Agreement and the conduct which constitutes a nuisance" within ten days (no later than November 12, 2020), or Petitioner would commence summary holdover proceedings to recover the apartment pursuant to 9 NYCRR §§ 1727-5.3(a)(1) and 1727-5.3(b)(2).

- The Notice of Termination asserts that the grounds for terminating the tenancy are that Respondent failed to comply with the Notice to Cure, a copy of which is annexed and incorporated by reference, in that "loud, amplified and disturbing music was heard emanating from his apartment on March 9, 2021, and that, "the landlord deems your conduct and/or the conduct of members of your household, as described in the said Notice to Cure, to be objectionable." Article Fifth, Subsection 7(a) of the Occupancy Agreement and State regulations 9 NYCRR §§ 1727-5.3(a)

(3) and 1727-5.3(b)(2) are cited as authority for the Notice.

Respondent, by counsel, moves to dismiss for failure to state a claim under CPLR R 3211(a)(7), arguing that the predicate notices are equivocal and ambiguous and fail to state good cause for eviction, thereby giving inadequate notice as required by RPAPL § 741(4) and constitutional due process. Respondent points to inconsistent citations of State rules and regulations in the two notices: The Notice to Cure cites to the regulation establishing nuisance as grounds for eviction, 9 NYCRR § 1727-5(a)(1), and the Notice of Termination cites to the regulation establishing unauthorized harboring of an animal as grounds for eviction, 9 NYCRR § 1727-5(a)(3). Respondent also argues that the predicate notices allege facts supporting a claim of lease violation as grounds for eviction, yet do not cite to the relevant regulation, 9 NYCRR § 1727-5(a)(2). Further, Respondent argues that the notices lack the requisite specificity to sustain a holdover based on nuisance allegations: Respondent characterizes the phrase "loud, amplified music was heard" as "boilerplate" and points out that Petitioner did not indicate how many neighbors complained and did not attach copies of the "community complaints" issued by the Department of Safety or provide the complaint numbers. Finally, Respondent argues that insufficient details were provided regarding the one post-cure period incident of noise alleged in the Notice of Termination.

Petitioner opposes the motion, arguing that the predicate notices are sufficient under the [*3]applicable legal standards and that the reference in the Notice of Termination to the regulation relating to the harboring of animals as grounds for eviction was a scrivener's error that should not be regarded as a fatal defect.

STATE REGULATIONS

The regulations applicable to State-assisted buildings subject to Articles II and IV of the Private Housing Finance Law are found in Title 9, Subtitle S, Chapter IV, Subchapter C of the New York Code of Rules and Regulations (NYCRR). Part 1727 covers "Occupancy", and Subpart 1727-5 covers "Termination of Tenancy". Section 1727-5.3(a), entitled "Grounds", lists fourteen grounds for a "housing company" to obtain possession from a "tenant, cooperator or other individual". Relevant herein are the following grounds:

- 1727-5.3(a)(1): "Tenant, cooperator, or other individual commits or permits a nuisance in the apartment."

- 1727-5.3(a)(2): "Tenant, cooperator, or other individual violates a substantial

agreement, covenant or obligation of the lease, or fails to comply with any substantial provision of the by-laws, subscription agreement or other governing document."

• 1727-5.3(a)(3): "Tenant, cooperator, or other individual harbors a dog, cat or other animal in the apartment in violation of the by-laws, subscription agreement, or other governing document."

Section 1727-5.3(b), entitled "Procedure", establishes the requirements for a (1) "Notice to Cure" and (2) "Notice of Termination". A "housing company" must serve a written ten-day Notice to Cure when eviction is sought on any of a specified list of grounds under § 1727-5.3(a), including nuisance (a)(1) and lease violation (a)(2). Notices of Termination are required for all grounds and must conform to specified procedures.

DISCUSSION

On a motion to dismiss under CPLR R 3211 the court must afford a liberal construction to the pleading, *Leon v Martinez* (84 NY2d 83, 87-88, 638 NE2d 511, 513, 614 NYS2d 972, 974 [1984]), and "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Id.* "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc v Goldman Sachs & Co* (5 NY3d 11, 19, 832 NE2d 26, 31, 799 NYS2d 170, 175 [2005]); *TIAA Global Invs, LLC v One Astoria Sq LLC* (127 AD3d 75, 85, 7 NYS3d 1 [1st Dep't 2015]).

For tenancies such as the one at issue herein that are subject to Article II of the New York State Private Housing Finance Law, a predicate Notice of Termination is required in all cases; a predicate Notice to Cure is required in a specified subset of those cases. Where a predicate notice is a required condition precedent to a holdover proceeding, it must meet the applicable standards of sufficiency; if not, the proceeding must be dismissed for failure to state a claim under CPLR R 3211(a)(7) as predicate notices are not amendable. *Chinatown Apts Inc v Chu Cho Lam* (51 NY2d 786, 412 NE2d 1312, 433 NYS2d 86 [1980]).

Under 9 NYCRR § 1727-5.3(b)(1), when a Notice to Cure is required it must be one "setting forth with specificity the violation alleged and stating that the violation must be cured within 10 days or eviction proceedings may be commenced." Under 9 NYCRR § 1727-5.3(b)(2), every Notice of Termination must state "the ground for eviction, the facts supporting such ground, and the date for surrender of possession." Further, New York State

courts evaluate the sufficiency of predicate notices based on a standard of reasonableness "in view of all attendant circumstances". *Oxford Towers Co, LLC v Leites* (41 AD3d 144, 837 NYS2d 131 [1st Dep't 2007]); *Avon Bard Co. v Aquarian Found* (260 AD2d 207, 210, 688 NYS2d 514, 517 [1st Dep't], *app dism'd*, 93 NY2d 998, 717 NE2d 1080, 695 NYS2d 743 [1999]); *Hughes v Lenox Hill Hospital* (226 AD2d 4, 17, 651 NYS2d 418, 427 [1st Dep't 1996], *app dism'd*, 90 NY2d 829, 683 NE2d 17, 660 NYS2d 552 [1997]). The notice must "provide the necessary additional information to enable the tenant respondent to frame a defense to meet the tests of reasonableness and due process." *Jewish Theological Seminary of America v Fitzer* (258 AD2d 337, 338, 685 NYS2d 215 [1st Dep't 1999]). A predicate notice "need not lay bare a landlord's trial proof" and will be upheld where it is sufficient as a whole to advise the tenant of the claim. *McGoldrick v DeCruz* (195 Misc 2d 414, 758 NYS2d 756 [AT 1st Dep't 2003]).

Here, both of Petitioner's required predicate notices — to cure the objectionable conduct and to terminate the tenancy — comply with the State regulations and are sufficient "in view of all attendant circumstances", *Oxford Towers, supra; Hughes v Lenox Hill Hospital, supra*, to allow Respondent to frame a defense. The Notice to Cure clearly warns the tenant that the objectionable conduct complained of is excessive noise emanating from his apartment. Six dates are provided, including specified times on five of those dates. The Notice of Termination clearly advises the tenant that the grounds for termination of his Cooperative Occupancy Agreement is his failure to comply with the Notice to Cure, a copy of which, with proof of service, is attached and incorporated by reference.

Contrary to Respondent's arguments, the Notice to Cure was not rendered deficient because it does not indicate how many neighbors complained, include copies of the Department of Safety's "community complaints" or provide complaint numbers. Such information, along with additional details about the post-cure period incident cited in the Notice of Termination, can readily be acquired by Respondent through either a demand for a bill of particulars or discovery. *McGoldrick v DeCruz* (195 Misc 2d 414, 415, 758 NYS2d 756, 757 [AT 1st Dep't 2003]). The phrase "loud, amplified music was heard" is sufficiently specific to describe the conduct complained and is not merely "boilerplate".

That the Notice to Cure cites to the regulation providing nuisance as grounds for eviction, 9 NYCRR § 1727-5(a)(1), and not to the regulation providing lease violation as grounds for eviction, 9 NYCRR § 1727-5(a)(2), where the factual allegations of objectionable noise can support either or both grounds, is of no moment. The parties to a civil dispute are free to chart their own litigation course, *Mitchell v New York Hospital* (61 NY2d

208, 214, 461 NE2d 285, 288, 473 NYS2d 148, 151 [1984]); *Kass v Kass* (235 AD2d 150, 162, 663 NYS2d 581, 590 [2nd Dep't 1997]); *Mill Rock Plaza Assocs v Lively* (224 AD2d 301, 638 NYS2d 34, 34-35 [1st Dep't 1996]); *Trump v Trump* (179 AD2d 201, 204, 582 NYS2d 1008, 1009 [1st Dep't 1992]); *Riveredge Apt Co v Rosenfeld* (2003 NY Misc LEXIS 470, 2003 NY Slip Op 50814[U] [AT 1st Dep't 2003]), and the course Petitioner has chosen here is to proceed on a nuisance theory. The question of whether Petitioner can succeed on this theory is not before the Court on Respondent's motion to dismiss but rather is an issue for a later day. *See, generally, Sharp v Norwood* (223 AD2d 6, 643 NYS2d 39 [1st Dep't 1996], *aff'd*, 9 NY2d 1068, 659 NYS2d 834, 681 NE2d 1280 [1997]).

It should be noted that, unlike under Rent Stabilization, where a fundamental distinction between the eviction grounds of lease violation and nuisance is that a predicate notice to cure is required for the former but not the latter, *see* Rent Stabilization Code §§ 2524.3(a) and (b), in Mitchell-Lama housing a [*4]predicate notice to cure is required for both grounds, *see* 9 NYCRR §§ 1727-5.3(a)(1), (a)(2) and (b)(1), and Petitioner did comply with this requirement.**[FN1]**

As for the citation in the last paragraph of the Notice of Termination to the State regulation establishing improper harboring of "a dog, cat or other animal" as grounds for eviction, this is clearly a mistake which, "in view of all attendant circumstances", *Oxford Towers Co, LLC v Leites* (41 AD3d 144, 837 NYS2d 131 [1st Dep't 2007]), does not warrant dismissal. The Notice of Termination states in its second paragraph that the grounds for terminating the tenancy are "that you have failed to comply with a Notice to Cure", a copy of which is attached to and incorporated by reference. The Notice to Cure does not cite to the "dog, cat or other animal" regulation and neither notice contains any factual allegations mentioning any animals.

CONCLUSION

For the reasons stated above, Respondent's motion is denied. The case is calendared in Resolution Part C for **April 12, 2022 at 10:00 a.m.** with the following briefing schedule for any further motion practice: March 25, 2022 for motion to be filed on NYSCEF; April 8, 2022 for opposition and/or cross-motion; April 12, 2022 for reply/opposition to cross-motion. This constitutes the Decision and Order of the Court, which is being uploaded on NYSCEF.

Diane E. Lutwak, HCJ
Dated: Bronx, New York
March 8, 2022

Footnotes

Footnote 1: Whether a post-judgment opportunity to cure is available in a case based on a theory of nuisance is a separate question. *Cabrini Terrace Joint Terrace v O'Brien* (18 Misc 3d 1145[A], 859 NYS2d 893 [Civ Ct NY Co 2008]).

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