2022-03-23

Shalom Aleichem LLC v. Duche

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

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SHALOM ALEICHEM LLC,

Petitioner,

-against-

EDGAR DUCHE, LORENA MALDONADO, JOHN DOE, JAND DOE,

Respondents.

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Index No. L&T 50160/19

DECISION/ORDER

Motion seq no. 1

HON. KISHA L. MILLER:

Moss & Tapia Law, LLC, for Petitioner.
The Legal Aid Society, Inc., for Respondents.

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of this motion to dismiss the proceeding.

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

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

Petitioner commenced this holdover summary eviction proceeding to recover possession of the premises located at 3470 Cannon Place, Apt. G11, Bronx, New York, on the basis that Respondents are violating a substantial obligation of their tenancy. The Notice to Cure alleges Respondents have installed a "built in" partition, creating an extra bedroom in the apartment, in violation of Paragraph 7 of the lease and "in violation of the City of New York Department of Housing Preservation and Development building code." The Notice of Termination repeats the allegations in the Notice to Cure, and further alleges that the partition creates a fire hazard, adds stress to the infrastructure, and may cause permanent damage to the premises.

Respondents move pursuant to CPLR §3211(a)(7), RPAPL §741(4), and Rent Stabilization Code §2524.2(b) for pre-answer dismissal of the proceeding for failure to state a cause of action or, in the alternative, for an order granting leave to file a late answer pursuant to CPLR §3012(d). Respondents deny erecting a partition, stating in a supporting affidavit by co-Respondent Maldonado that the walls have been the same since they moved into the apartment in 2009. Respondents claim they first learned of an illegal partition when the superintendent entered the apartment in September 2019 and Petitioner has refused to remove the partition despite their requests. Respondents further claim that Petitioner is a new owner and has not visited the apartment since September 2019.

In seeking dismissal of the proceeding, Respondents present two grounds. First, the Notice to Cure is defective in that it fails to cite a specific violation issued by the New York City Department of Housing Preservation and Development ("HPD") and fails to state what actions Respondents must take to avoid eviction. Respondents contend they found no violations or complaints after searching the websites of HPD, the New York City Department of Buildings ("DOB"), and The City of New York Environmental Control Board ("ECB"). Respondents also contend that since the Notice to Cure was mailed, they should have been afforded an additional five days to cure before the termination notice was served. Second, Respondents argue, the Notice of Termination contains conclusory language that Respondents failed to cure the condition and does not state how Petitioner arrived at its conclusion.

Petitioner opposes the motion, urging the court to accept the allegations in the petition as true and afford Petitioner every reasonable inference in determining whether the facts alleged fit within a legal theory. Petitioner claims both the Notice to Cure and Notice of Termination are sufficient when applying the appropriate standard, which is one of reasonableness in view of all attendant circumstances. Petitioner argues that the Notice to Cure clearly states the lease

provision Respondents are violating; that the Notice of Termination provides sufficient facts establishing the ground for removal; and that both notices contain enough facts to allow Respondents to frame a defense to this proceeding.

Rent Stabilization Code §2524.2(b) requires that every predicate notice state the ground upon which the owner relies for removal of the tenant, and the facts necessary to establish the existence of such ground of removal. As stated in the Notice of Termination, Petitioner commenced this proceeding pursuant to Rent Stabilization Code §2524.3(a), which provides as a ground for eviction that Respondents violated a substantial obligation of their tenancy. The opposition papers now allege that Respondents were engaging in illegal activity by erecting the partition, citing to Rent Stabilization Code §2524.3(b) which allows an owner to evict if a tenant is committing a nuisance. No such theory of recovery was alleged in the predicate notices and Petitioner cannot rely upon a nuisance claim, at this juncture, to seek recovery of the premises or to oppose Respondents' motion (*H&H Realty Property LLC v Rodriguez*, 32 Misc 3d 126[A], 2011 NY Slip Op 51164[U] [App Term, 1st Dept 2011]). As a predicate notice is not amendable (*Chinatown Apts., Inc. v Chu Cho Lam*, 51 NY2d 786 [1980]), Petitioner cannot attempt to inject a new cause of action in this proceeding.

On a motion to dismiss for failure to state a cause of actions pursuant to CPLR §3211(a)(7), the "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion to dismiss will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). The court must afford the pleading a liberal construction, accept its allegations as true, and accord Petitioner the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83 [1994]). "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 cause of action" (*Riverbay Corporation v Guerrant*, 2022 WL 698282, 2022 NY Slip Op 50182[U] [Civ Ct, Bronx County 2022]). In determining whether a predicate notice meets the applicable standards of sufficiency, "the appropriate test is one of reasonableness in view of the attendant circumstances" (*Hughes v Lenox Hill Hosp*., 226 AD2d 4 [1st Dept 1996]).

A notice to cure must "specifically apprise the tenant of claimed defaults in its obligations under the lease and of the forfeiture and termination of the lease if the claimed default is not cured within a set period of time" (*Filmtrucks, Inc. v Express Indus. & Term. Corp*., 127 AD2d 509 [1st Dept 1987]). It must inform the tenant unequivocally and unambiguously how the tenant has violated the lease and the conduct required to prevent eviction" (*200 West 58 St. LLC v Little Egypt Corp*., 7 Misc 3d 1017[A], 2005 NY Slip Op 50640[U] [Civ Ct, New York County 2005]).

Here, the Notice to Cure fails to meet the standard of reasonableness. It alleges Respondents installed a "built in" partition in violation of the lease, specifically referencing Paragraph 7. But the notice also alleges Respondents' conduct is "in violation of the City of New York Department of Housing Preservation and Development building code" without citing any prohibition in the building code. By including this unspecific ground for termination, the notice to cure fails to sufficiently apprise Respondents of claimed noncompliance with a government authority. Respondents are expected to take remedial action by the cure date, but the notice does not "unequivocally and unambiguously" inform Respondents what conduct is required to comply and avoid eviction, especially concerning the alleged building code violation. A notice to cure should not mislead, confuse, or hinder the preparation of a tenant's defense (*Oxford Towers Co., LLC v Leites*, 41 AD3d 144 [1st Dept 2007]). Moreover, Respondents state there are no HPD,

DOB, or ECB violations or complaints concerning the subject premises. Petitioner does not address this issue in its opposition papers.

The Notice of Termination is equally deficient and fails to meet the standard of reasonableness by failing to state the grounds upon which Petitioner seeks eviction. A termination notice that "merely recites the legal ground for eviction, but fail[s] to set forth any of the facts upon which the ensuing proceeding would be based" cannot serve as a predicate notice for an eviction proceeding (*Kaycee West 133th Street Corp. v Diakoff*, 160 AD2d 573 [1st Dept 1990]; *Berkeley Associates Co. v Camlakides*, 173 AD2d 193 [1st Dept 1992]).

The termination notice, which repeats the allegations in the Notice to Cure and states, in a conclusory manner, that the partition creates a fire hazard and adds stress to the infrastructure, offers no facts indicating how Petitioner determined the condition remained after the cure period expired. A notice to cure is not a mere formality to termination of a tenancy (*Hew-Burg Realty v Mocerino*, 163 Misc 2d 639 [Civ Ct, Kings County 1994]). Unless a landlord has determined that a tenant has in fact failed to cure the condition, a termination notice should not be served (*76 West 86th St. Corp. v Junas*, 55 Misc 3d 596, 2017 NY Slip Op 27027 [Civ Ct, New York County 2017]). It is quite possible that Respondents, who deny installing the partition, were able "cure the violation," as instructed by the notice. Whether Petitioner conducted a cursory visit or a thorough investigation of the premises after the October 18 deadline date is unclear as the notice merely states that Respondents did not comply. Petitioner's failure to state specific facts raises the question whether Petitioner simply concluded, without a good faith inquiry, that Respondents failed to cure within the specified time period.

Petitioner's opposition papers are silent on whether any investigation took place after October 18. Petitioner does not address Respondents' claim that no agent has visited the apartment since September 2019 or that the partition existed when Respondents moved into the

apartment. Also, Petitioner failed to include an affidavit from someone with personal knowledge of the facts, including the superintendent who, according to Respondents, first made Respondents aware of the partition.

Absent sufficient facts in the Notice of Termination that Respondents failed to cure, the notice is defective, and Petitioner is deprived of a predicate for reclaiming possession of the subject premises (*Hew-Burg Realty*, supra).

Accordingly, it is

ORDERED that Respondents' motion seeking dismissal of the proceeding for failure to state a cause of action pursuant to CPLR §3211(a)(7), RPAPL §741(4), and Rent Stabilization Code §2524.2(b) is granted. The proceeding is hereby dismissed.

This constitutes the decision and order of the court.

Dated: March 23, 2022

APPROVED
KMILLER , 3/23/2022, 1 56 03 PM

KISHA L. MILLER, J.H.C.