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2022-04-25

### 2186 Realty NY LLC v. Martinez

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<b>2186 Realty NY LLC v Martinez</b>
2022 NY Slip Op 31054(U)
April 25, 2022
Civil Court of the City of New York, New York County
Docket Number: L&T Index No. 12396/20
Judge: Norma J. Jennings
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This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: Housing Part F

2186 REALTY NY LLC,

L & T Index #12396/20

Petitioner,

DECISION/ORDER

-against-

YESENIA MARTINEZ,

Respondent.

**HON. NORMA J. JENNINGS**

Recitation, as required by CPLR 2219(a), in the papers submitted in support of respondent’s motion to dismiss the proceeding.

PAPERS	NUMBERED
Respondent’s Motion to Dismiss, Affidavits, Memorandum of Law, and exhibits	1
Affirmation in Opposition	2
Reply Memorandum of Law	3

Upon the foregoing cited papers, the decision/order in this motion is as follows:

Petitioner commenced this holdover proceeding to recover possession of apartment 1F located at 2186 Grand Concourse, Bronx, New York. Petitioner seeks possession on the ground that respondent is breaching a substantial obligation of her tenancy. Petitioner served a Notice to Cure dated January 20, 2020 which provides:

PLEASE TAKE NOTICE that you are violating a substantial obligation of your tenancy and of your lease, as renewed, other than the obligation to surrender possession of such housing accommodation, entered into between you and the landlord for the occupation of the premises described above in that you have installed a “built in” partition (a sheetrock wall erected from floor to ceiling creating an interior room in the 4<sup>th</sup> room from east) creating an extra room in the premises, without the prior consent of the landlord, in violation of Paragraph 10 of your lease dated May 15, 2013, as renewed December 28, 2017, and in violation of the City of New York Department of Housing Preservation and Development building code (violation #13316526).

PLEASE TAKE FURTHER NOTICE that you must cure such violation on or before February 11, 2020 and unless you cure such violation on or before said date, you will be Required to remove from and surrender possession of the demised premises.

The Notice of Termination dated, February 12, 2020, provides:

PLEASE TAKE NOTICE that the undersigned landlord has elected to and does hereby terminate on March 4, 2020, your lease and your tenancy, and the tenancy of all those claiming under you, with respect to those certain premises situated at 2186 Grand Concourse, in the Borough of Bronx, County, City and State of New York, more particularly described as apartment 1F in said premises.

The grounds under Section 2524.3 (a) of the Rent Stabilization Code upon which the landlord relies for your removal or eviction are the termination of your tenancy and the fact that you have violated and are still violating a substantial obligation of your lease dated May 15, 2013, as renewed, and of your tenancy other than the obligation to surrender possession of such housing accommodation and have failed to cure such violation after written notice by the landlord, dated January 20, 2020, that such violation cease on or before February 11, 2020, which notice has been duly served upon you and is annexed hereto

The facts that establish the existence of such grounds are:

1. That you installed a "built in" partition (a sheetrock wall erected from floor to ceiling creating an interior room in the 4<sup>th</sup> room east) creating an extra room in the premises, in violation of Paragraph 10 of your lease and the DHPD building code (DHPD violation #13316526) and contrary to the obligation of your tenancy.
2. Such partition creates a fire hazard in that it divides rooms in a way that easy access to and from the exit is blocked.
3. Such partition adds stress to the infrastructure of the premises by adding wall weight where the floor was not designed to hold such weight.
4. The addition of such partition may cause permanent damage to the walls, floor and ceiling of the subject premises dependent on how much partitions were built in.

The Notice of Petition and Petition is dated March 9, 2020, due to the Covid-19 Pandemic the proceeding first appeared on the court's calendar on September 27, 2021, after petitioner moved for a default judgment of possession against respondent. On October 4, 2021, Mobilization for Justice, Inc. filed a Notice of Appearance on behalf of respondent, Yesenia Martinez. On November 24, 2021, respondent filed a verified answer raising affirmative defenses and counterclaims. On January 14, 2022, respondent filed opposition to petitioner's motion for a default motion and cross-moved to dismiss the proceeding. Respondent moves to dismiss, pursuant to CPLR 3211(a)(8), for petitioner's failure to effectuate service in accordance with RPAPL Section 735, dismissing the proceeding, pursuant to CPLR 3211(a)(7), for petitioner's failure to serve an adequate predicate notice, in accordance with Rent Stabilization Code section 2524.2, and dismissing the proceeding, pursuant to CPLR 3211(a)(7), for failure to state a cause of action in accordance with RPAPL section 741. On February 14, 2022, petitioner cross-moved for a *nun pro tunc* order accepting as timely, the affidavit of service for the Notice of Petition and Petition.

Respondent, in her cross-motion, argues that the proceeding must be dismissed because she has cured by removing the partition, and in fact, the superintendent came to the apartment on February 11, 2020, the date she had to cure by, and removed the partition. Since the removal of the partition, HPD has inspected and there has not been a violation placed for the partition. Respondent argues that a sufficient predicate

notice is essential to maintaining a summary proceeding, and the Notice of Termination in this proceeding, is defective as it failed to comply with Rent Stabilization Code section 2524.2 and RPAPL 741(4) because it does not allege specific facts, and cannot be amended, requiring dismissal of the proceeding. Specifically, the Notice of Termination, dated February 12, 2020, did not allege any additional facts indicating that respondent failed to cure the condition, that an inspection was made after the cure period ended, which found that the alleged condition continued. Respondent further argues that the Notice of Termination is defective because they incorrectly cite the lease provision, respondent is purportedly in violation of, as paragraph 10 of her lease refers to "Leased premises does-not- have an operative sprinkler system," and does not refer to installing a partition. Respondent argues that the proceeding must be dismissed, pursuant to CPLR 3211(a)(8), and RPAPL section 735(1), as petitioner did not attempt to personally serve the respondent or comply with the alternative service requirements of 735(1) by knocking on the door. Petitioner also failed to file the affidavits of service within three days of mailing the papers in accordance with RPAPL 735(2).

Petitioner argues in opposition that the Notice of Termination, as well as the petition sufficiently state a cause of action for a holdover proceeding based upon a breach of a substantial obligation of respondent's tenancy. The Notice of Termination details respondent's conduct and how that conduct is both a lease violation as well as being a serious health and safety concern, and the damage the partition has and is still causing to the premises. Petitioner also properly served respondent by substitute service, however, due to a clerical error by the process server, petitioner is unable to verify whether the Affidavit of Service was filed with the clerk, but petitioner believes the process server filed the Affidavit, which the court lost or the court shut down before it could be filed.

Respondent's motion to dismiss must be denied, petitioner argues, because in a Notice of Termination, all that is necessary is for a landlord to allege facts sufficient for the tenant to prepare a defense, dates and times need not be alleged. The notice of termination here, petitioner argues, states that the violation of a substantial obligation of the lease is the grounds of eviction, and a description of respondent's specific violations that respondent "built in" a partition which is a fire, health and safety hazard and "adds stress to the infrastructure of the premises causing permanent damage to walls, floors, and ceilings. Petitioner further argues that the use of the phrase "permanent damage" indicates that even if respondent removed the partition, she would still be in violation of her lease, and it is immaterial whether DHPD found a violation. Further, the predicate notice does not mention the incorrect lease provision, the notice states that respondent is "violating a substantial obligation of {their} lease dated May 15, 2013" Article 10 of respondent's *original* lease, dated May 15, 2013 states "You cannot build in, add to, change or alter, the Apartment in any way, including wallpapering, repainting, or other decorating, without getting Owner's written consent before you do anything."

#### DECISION:

Respondent moves to dismiss, pursuant to CPLR 3211(a)(7) for failure to state a cause of action. On a motion to dismiss, pursuant to CPLR 3211, the court must afford the pleading a liberal construction, accept all facts as true and determine only whether the alleged facts fit within any cognizable legal theory. *Leon v. Martinez*, 84 NY2d 83 (1991). The sole criterion on a motion to dismiss is whether the pleading states a cause of action, and if from the four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 NY2d 268 (1977). In evaluating the facial insufficiency of a predicate notice in a holdover proceeding, "the appropriate test is one of reasonableness in view of the attendant circumstances." *Hughes v. Lenox Hill*

*Hosp.*, 226 AD2d 4 (1<sup>st</sup> Dept. 1996). The notice must “provide the necessary additional information to enable the tenant to frame a defense...to meet the test of reasonableness and due process. *Jewish Theological Seminary of America v. Fitzer*, 258 AD2d 337 (1<sup>st</sup> Dept. 1999). An adequate predicate notice is a condition precedent to maintaining a summary proceeding, a defective predicate notice cannot be amended, and the proceeding must be dismissed. *Chinatown Apts., Inc. v. Chu Cho Lam*, 51 NY2d 786 (1980).

Respondent moves to dismiss based upon petitioner’s failure to cite to the proper lease provision that respondent is allegedly violating. The Notice to Cure and Notice to Terminate allege that respondent is violating paragraph ten (10) of her lease by installing a partition in the subject apartment. Respondent states that paragraph ten of respondent’s lease refer to a “sprinkler system” and not construction of a partition. Respondent attaches two renewal leases where paragraph ten refers to a sprinkler system. Petitioner argues in opposition that respondent’s original lease refers to construction of anything that would illegally separate the room, however, petitioner has not provided a copy of the original lease to show that paragraph 10 refers to the installation of a partition.

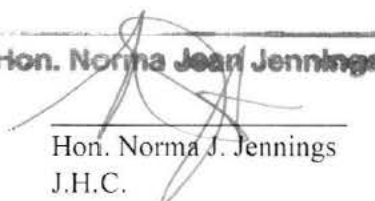
Respondent also moves to dismiss alleging that the Notice of Termination is insufficient in that it fails to provide specific facts that respondent failed to cure the alleged lease violation after the expiration of the cure period. In a breach of a substantial obligation of a tenancy a Notice to Cure is required to be served, if the tenant fails to cure, a Notice of Termination must be served. Pursuant to RSC Section 2524.2(b) any notice served upon a tenant seeking removal or eviction of the tenant must state 1) the ground under 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. A Notice of Termination which merely recites the legal ground for the eviction but fails to set forth any of the facts upon which the ensuing proceeding would be based,” is insufficient and cannot serve as a predicate notice for an eviction proceeding. *Berkeley Assoc. Co. v. Camlakides*, 173 AD2d 193, *affirmed*, 78 NY2d 1098 (1991). The Notice to Cure and the Notice of Termination are independent notices, both of which must allege a legal ground for the claim and set forth sufficient facts to support that claim. *Bellstell 140 East 56<sup>th</sup> St., v. Layton*, 180 Misc.2d 25 (Civ.Ct. N.Y. Co. 1998). The Notice of Termination should include facts that the alleged violation continued after the cure period and how petitioner knew that respondent did not cure.

Here, the Notice to Terminate fails to state sufficient facts to establish grounds for eviction. The Notice to Terminate must allege the tenant failed to cure the alleged default specified in the Notice to Cure after expiration of the cure period, and additional affirmative acts by the tenant, separate from those already alleged in the Notice to Cure, are necessary for the tenant to have failed to cure. Therefore, the Notice to Terminate must state facts with sufficient particularity alleging objectionable acts by the tenant after the cure period. *Hew-burg Realty v. Mocerino*, 163 Misc.2d 639 (Civ. Ct. Kings County 1994). The Notice to Cure in this proceeding gave respondent until February 11, 2020, to remove the partition. The Notice of Termination is dated, February 12, 2020, one day after the cure period ended and although it states that respondent did not cure it does not allege how petitioner discovered in one day how respondent did not cure the alleged lease violation. *31-67 Astoria Corp v. Landaira*, 3 Misc.3d 1131(A) (2<sup>nd</sup> Dept. 2017). In her affidavit in support, respondent states that the superintendent, who is employed by petitioner, removed the partition on February 11, 2020, the date by which respondent was required to cure, therefore, the Notice of Termination is defective. Service of a valid termination notice is a prerequisite to commencement of a holdover proceeding, which cannot be amended, and requires dismissal of the proceeding. *Chinatown Apts. v. Chu Cho Lam*, 51 NY2d 786 (1980).

Accordingly, respondent's motion is granted, and the proceeding is dismissed for failure to state a cause of action. The court need not reach respondent's remaining arguments and petitioner's motion is denied as moot.

This constitutes the decision and order of the court. The court will email a copy of this order to both sides and upload a copy to NYSECF.

Dated: April 25, 2022  
Bronx, New York

  
Hon. Norma J. Jennings  
J.H.C.

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