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1951 SOUTHERN BLVD. REALTY CORP. v. BARIO

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

1951 SOUTHERN BLVD. REALTY CORP.,

L & T Index No. 308702/21

Petitioner,

-against-

DECISION/ORDER

RAISA BARIO AND PABLO TALAVERA,

Respondent,

“JOHN DOE” AND “JANE DOE,”

Respondents.

HON. NORMA J. JENNINGS:

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

PAPERS	NUMBERED
Respondent’s motion, affirmation, affidavit, and exhibits annexed	1
Petitioner’s affirmation in opposition and exhibits	2
Reply Affirmation	3

After argument and upon the foregoing cited papers, the decision in this motion is as follows:

PROCEDURAL BACKGROUND:

Petitioner commenced this holdover proceeding in July 2021 after service of a “10 Day Notice to Terminate,” to obtain possession of apartment #11 located at 1951 Southern Boulevard, Bronx, New York. Petitioner commenced this proceeding, pursuant to RPAPL Sections (711(5), 715 (1), and RSC Section 2524.3(d). The Notice to Terminate states that petitioner terminated respondents’ tenancy:

Based upon the fact that you have been and are knowingly using or permitting the use of the premises in the distribution and sale of controlled substances as more fully explained and described below, as well as in the annexed documentation from the District Attorney of the County of the Bronx, which is annexed and incorporated into this notice and made a part thereof.

The facts to establish the existence of such grounds are that on or about January 20, 2021, The New York City Police Department executed a search warrant at the subject premises. During the search, The New York City Police Department recovered evidence that the tenants and/or occupants have been knowingly using and/or permitting the use of the premises for an illegal activity/trade/business and/or immoral or illegal purpose by using or permitting the use of the premises in the distribution and sale of controlled substances, in violation of law, as more fully set forth in the annexed Criminal Compliant and Police Laboratory Controlled Substances Analysis Report and other documentation provided by the District Attorney of the County of The Bronx, annexed and incorporated hereto, made a part hereof as if fully set forth at length herein.

PROCEDURAL HISTORY AND RESPONDENT'S MOTION:

The proceeding first appeared on the court's calendar on July 26, 2021 and adjourned for respondents to obtain counsel. Respondent, Bario, is represented by Mobilization for Justice, Inc ("MFJ"), and respondent, Talavera, is represented by The Legal Aid Society. On October 25, 2021, respondent, Bario, filed a Hardship Declaration, and the proceeding was stayed to January 15, 2022. The proceeding next appeared in court on January 28, 2022, in Part F, and adjourned to March 15, 2022, for motion practice. Respondent, Talavera, now moves to dismiss the proceeding, pursuant to CPLR 3211(a)(7), for failure to state a cause of action, failure to set forth the facts for an illegal use termination of tenancy, pursuant to NY RPL Section 231(1). Respondent also moves to dismiss based upon petitioner's failure to meet the requirements of NY RPAPL section 711(5) by showing that the premises were used for any illegal trade, manufacture, or other business, or that said illegal use of the premises was customary or habitual.

Respondent moves to dismiss, pursuant to CPLR 3211(a)(7), RSC section 2524.2(b) and RPAPL Section 741(4) for failure to state a cause of action as the Notice of Termination only refers to a single incident. Respondent argues in order to warrant eviction for illegal use, the alleged illegal activity must be "customary and habitual," and a single conviction, let alone a single arrest, is insufficient to establish customary and habitual use as the petitioner must also show some continuity and permanence. Here, respondent argues there are no allegations of ongoing or continual trade of illegal drugs, no weapons, ammunition, scales, or money indicating an ongoing drug business, no allegation of foot traffic, customer lists or sales inventory found in the apartment, and respondent, Talevera, has no criminal record. Further, respondent argues, petitioner has failed to show that the alleged nuisance conduct is recurring, pursuant to RSC section 2524.3(b), or to show a continuing pattern of objectionable conduct that threatens the comfort and safety of others in the building. In the alternative, if the court denies the motion to dismiss, respondent moves, pursuant to CPLR Section 3012(d) and RPAPL section 743, to file a late answer.

In opposition, petitioner argues, that one arrest is sufficient to show an illegal trade and cites several cases in support of its argument that a single incident/arrest, based on a search warrant, is enough to maintain a cause of action for illegal trade of drugs. Petitioner argues that courts have granted judgments of possession based upon one incident/arrest and cites *1165 Broadway Corp. v. Alawie*, 1995 NYJL LEXIS 9766 (Civ. Ct. NY Co.), in support where a respondent was arrested with 100 glassine envelopes containing 3.809 grams of Fentanyl, and 1030 milligrams of cocaine. Petitioner argues that the existence of a search warrant and probable cause is a critical element that must be at the forefront of the court's analysis. Petitioner also cites *855-79 LLC v. Salas*, 40 AD3d 553 (1st Dept. 2007), in support, where the arrest took place outside of the home and the landlord was unable to prove that the tenant knew or should have known about the illegal activities. Petitioner also distinguishes from the present case, *1895 Grand*

Concourse Assoc. v. Ramos, cited by respondent where only about 500 milligrams of heroin was found, and the landlord failed to prove that the tenant knew or had reason to know about the illegal activities. *Ramos* and *Salas*, petitioner argues, can be distinguished from this case because both proceeded to trial.

Petitioner further argues that pursuant to Rent Stabilization Code Section 2524.2(b), the Notice of Termination in this case is clear, unequivocal, and states sufficient facts that would enable the respondents to interpose a defense. Petitioner further argues that under the Bawdy House Law, an inference of habitual or customary illegal use may be made on the basis of the results of the execution of a single search warrant, rather than repeated drug incidents or repeated executed search warrants. It is the indicia of the drug trade that is determinative of a habitual drug trade, not the number of drug incidents or the number of executed warrants. The court must be mindful, petitioner argues, that the equities are not in respondent's favor, as the sale and use of illegal drugs, if unchecked, will flourish and irreparably affect the entire neighborhood by disrupting its tranquility and increasing the crime-rate. Petitioner argues that this case is more than just a nuisance, and even a single incident is sufficient in light of its egregiousness and seriousness. Petitioner also opposes respondent's request to file a late answer.

DECISION:

Respondent moves to dismiss the proceeding, pursuant to CPLR Section 3211(a)(7), for failure to state a cause of action. On a motion to dismiss, pursuant to CPLR 3211, the pleading is to be afforded a liberal construction, the facts accepted as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable theory. *Leon v. Martinez*, 84 NY2d 83 (1994). The standard the court considers is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. *Guggenheimer v. Ginzburg*, 43 NY2d 268 (1977).

Real Property Law Section 231 renders void a lease or agreement for occupancy of any premises that is used in whole or in part for any illegal trade, manufacture or business. The statute renders the lease void, it contains no provision creating a cause of action for a summary eviction proceeding. Petitioner commenced this proceeding, pursuant to RPAPL sections 711(5) and RPAPL 715(1), based upon the premises being used as an illegal trade after respondent, Talevera was arrested. RPAPL section 711(5) provides that a tenant shall not be removed from possession except in a special proceeding maintained under said article upon the following grounds:

The premises, or any part thereof, are used or occupied as a bawdy house, or house or place of assignation for lewd persons, or for purposes of prostitution, or any illegal trade or manufacture, or other illegal business.

RPAPL Section 715(1) cites grounds and procedures where use or occupancy is illegal as:

An owner or tenant, including a tenant of one or more rooms of an apartment house, tenement house or multiple dwelling, of any premises within two hundred feet from other demised real property used or occupied in whole or in part as a bawdyhouse, or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade, business, or manufacture.

The Rent Stabilization Code permits eviction where the “tenant is using or permitting such housing accommodation to be used for an immoral or illegal purpose. Rent Stabilization Code Section 2524.3(d). A proceeding brought on this ground must be preceded by a seven-day notice of termination. RSC section 2524.2(b) provides that “every 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 fact necessary to establish the existence of such ground, and the date when the tenant is required to surrender possession. If the notice fails to state the necessary facts, it is defective, which cannot be amended, and requires dismissal of the proceeding. *Chinatown Apts. v. Chu Cho Lam*, 51 NY2d 786 (1980).

Respondent argues that the one arrest fails to show that there is an illegal drug trade in the subject apartment. Petitioner argues that courts have held that one arrest is sufficient and cites several cases in support including *1165 Broadway Corp. v. Alawie*, 1995 NYLJ Lexis 9766 (Civ. Ct. NY Co. 1995), however, these cases can be distinguished from the present case. In *1165 Broadway v. Alawie*, there were six holdover proceedings where search warrants were executed, and the police recovered counterfeit goods. Although the court held for the petitioner, the court noted that an isolated use of a premises even in the commission of the most heinous of crimes would not constitute an illegal use of a premises for purposes of RPL 231(1) and RPAPL 715(1). In *New York City Housing Authority v. Eaddy*, the Honorable Marian Doherty awarded the petitioner a final judgment of possession which was affirmed by the Appellate Term, where a search warrant was executed, and the police found strainers with cocaine residue, marijuana, a gun, and materials for the packaging and resale of narcotics. At trial, the witnesses were unable to rebut the police officer’s testimony of a firearm in the apartment, and materials associated with the packaging of narcotics. In *1895 Grand Concourse v. Ramos*, there were two separate warrants executed, in one there was plastic bags containing alleged cocaine, but only one tested positive for cocaine, a digital scale, plastic strainer, funnel, and pestle. The second included 54 grains, cash, totaling \$2,023.00. The police officer testified that the street value of the cocaine was less than \$60.00. The court held that petitioner failed to show by a preponderance of the evidence that drugs sales were being made from the apartment or that respondent was aware of the drugs in the apartment or the sale of drugs from the apartment.

Petitioner’s inclusion of cases where judgments were entered after inquest does not sway the court as these decisions are based upon respondent’s failure to appear and not where respondent raised defenses. In the two decisions by the Honorable Marian Doherty *New York City Housing Authority v. Eaddy*, and *ML Realty v. Fesce*, both were after trial. In *ML Realty v. Fesce*, cocaine, crack-cocaine and marijuana were found on the respondent and in his home, crack cocaine, marijuana, a scale, drug records and money in the apartment which the court held provided overwhelming evidence of an illegal trade or business. In *54 West 16th Street Apartment Corp. v. Dawson*, there were multiple occasions where police officers brought drugs from the tenant of the apartment.


The term “use” has been held to mean doing something customarily or habitually upon the premises. *Grosfield Realty Co. v. Lagares*, 150 Misc.2d 22 (1st Dept. 1989). In a holdover proceeding petitioner must show the premises have been used not once or twice but “customarily or habitually” for an illegal trade or business such as drugs. Here, the Notice of Termination alleges one arrest. There are no allegations that there has been unusual traffic or specific complaints regarding the sale of drugs or traffic in and out of the apartment, no customer lists, scales, or materials used for the packaging or sale of drugs, no weapon or any other proof of an ongoing drug trade. Any indicia of a drug business, which petitioner argues is determinative of a habitual drug trade, with the apartment as the focal point, is not alleged in the

pleadings. The court understands the effect drugs have on a community, however, the court cannot overlook that the notice in this case, fails to show that there has been an illegal trade or manufacture, or illegal business from the subject premises, pursuant to RPL Section 231 and RPAPL Section 711(5) and 715(1), or that the alleged nuisance behavior, is recurring and persistent. Therefore, the notice fails to state a cause of action as required by CPLR Section 3211(a)(7) and the proceeding is dismissed. The court does not need to reach respondent's remaining arguments.

Accordingly, respondent's motion to dismiss the proceeding is granted and the proceeding is dismissed without prejudice.

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

Dated: May 25, 2022
Bronx, New York



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

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