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### MBD Silva Taylor LLC v. Percy

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

\_\_\_\_\_  
MBD SILVA TAYLOR LLC,

L & T Index No. 311681/21

Petitioner,

DECISION/ORDER

-against-

JAYSON PERCY, FRANKIE GARCIA,  
"JOHN DOE" AND "JANE DOE"

Respondent.

**HON. NORMA J. JENNINGS:**

Recitation, as required by CPLR 2219(a), of the papers considered in respondent's motion to dismiss the proceeding and petitioner's cross-motion to strike the jury demand.

PAPERS	NUMBERED
Notice of Motion, Affidavits and Exhibits	1
Memorandum of Law	2
Petitioner's opposition and cross-motion	3
Respondent's Reply/opposition to Cross-Motion	4

Upon the foregoing cited papers, the decision/order of this court is as follows:

**PROCEDURAL HISTORY:**

Petitioner commenced this holdover proceeding in October 2021 to recover possession of apartment 1E located at 1671 Bryant Avenue, Bronx, New York. Petitioner terminated the tenancy, pursuant to RPAPL Section 715(1) and 711(5) as respondents were arrested in the subject premises on July 21, 2021, after the New York Police Department executed a search warrant.

"The Seven (7) Day Notice of Termination of Tenancy Pursuant to RPAPL sections 715(1), 711(5)," dated September 22, 2021, provides that Jason Percy and Frankie Garriga were arrested in apartment<sup>1</sup>:

For criminal sale of a controlled substance, knowingly and unlawfully possessing a narcotic drug with intent to sell it; knowingly and unlawfully possessing a controlled substance with intent to sell it; knowingly and unlawfully possessing a controlled substance; knowingly and unlawfully possessing one or more preparations, compounds, mixtures or substances containing Methamphetamine, Ketamine, Cocaine and the preparations, compounds mixtures or substances

<sup>1</sup> The Criminal Court and search warrant has Frankie Garriga, the petition has Frank Garcia.

are of an aggregate weight of more than twenty-five grams and knowingly and unlawfully possess same. (See documentation evincing the basis for this claim against you attached hereto and made a part hereof.).

The foregoing clearly shows that you are in violation of RPAPL sections 711 and 715, in that you have been either using or permitting others to use your apartment for the illegal business of narcotics dealing, which does constitute a public nuisance, to wit: the sale and possession of a controlled substance as defined in Penal Law Article 220 or 221.

The proceeding first appeared on the court's calendar on November 3, 2021, in the Intake Part, and adjourned to November 17, 2021, for respondent Percy, to obtain counsel<sup>2</sup>. Respondent, Percy, subsequently retained Bronx Defenders to represent him in this proceeding. On November 17, 2021, respondent filed a Hardship Declaration to stay the proceeding which petitioner challenged. The proceeding was adjourned, pursuant to a briefing schedule for petitioner to challenge respondent's Hardship Declaration and for respondent to move to dismiss.<sup>3</sup> Respondent filed a jury demand and now moves to dismiss the proceeding, or in the alternative, to file an answer and schedule a traverse hearing. Petitioner has cross moved to strike respondent's jury demand.

Respondent moves to dismiss, pursuant to CPLR 3211(a)(7), for failure to state a cause of action, as the Notice of Termination is defective and untimely. Specifically, respondent moves to dismiss because petitioner terminated respondent's tenancy, based on a single occurrence, and failed to demonstrate that the premises were used habitually for an illegal business. The petition also failed to set forth any basis for termination of the tenancy under the Rent Stabilization Code and the Notice of Termination is untimely because it was served less than seven days prior to termination.

#### **DISCUSSION:**

Respondent argues that pursuant to RPAPL section 711(5) and 715, the petition must sufficiently plead that the alleged use constituted illegal trade or business and the petition seeks an eviction under the illegal use laws based on a single alleged occurrence, thereby failing to demonstrate that the premises were used *habitually* for an illegal business. Further, pursuant to RPAPL section 741(4), the petition must set forth *sufficient facts* to support that the premises were used for an illegal trade or business. The criminal complaint also does not state with specificity where the alleged sale took place or that it took place at the subject premises. Respondent further argues that the proceeding should be dismissed because the Notice of Termination is defective because it does not state the grounds, pursuant to RSC sections 2524.3 or 2524.4, for termination of respondent's tenancy. Respondent is a rent stabilized tenant, which petitioner acknowledges in paragraph 8 of the petition, and in a holdover proceeding the petition must state the provision of the Rent Stabilization Code ("RSC") that authorizes removal.

Respondent argues that the Notice of Termination is defective as the process server swore to service of the Notice of Termination only four days prior to the expiration date of the tenancy, rather than the required seven. RSC section 2524.2 states the method of service for a Notice of Termination which must be by personal delivery or mail. Here, on September 25, 2021, service was by conspicuous place service

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<sup>2</sup> Hereinafter referred to as respondent.

<sup>3</sup> The filing of a Hardship Declaration to stay a proceeding expired on January 15, 2022, rendering petitioner's challenge moot.

and by first class mail. Further, the Court of Appeals in *ATM One, LLC v. Landaverde*, 2 NY3d 472 (2004) held that five days must be added to the mailing of a Notice of Termination, and in this proceeding the Notice of Termination was mailed on September 30, 2021, terminating the tenancy as of October 4, 2021, four days prior to termination and not seven as required.

Respondent requests a traverse hearing as petitioner did not make a “reasonable application” to personally serve him. Respondent has submitted a sworn affidavit that he was home at the time personal service was allegedly attempted. Respondent states he never received a copy of the Notice of termination by mail and only received one, wedged between the door. If the motion to dismiss is denied, respondent requests leave to file an answer and for the court to deem the annexed verified answer filed and served.

Petitioner cross moves to strike respondent’s jury demand and opposes respondent’s motion to dismiss. Petitioner argues that pursuant to CPLR section 3211(a)(7), pleadings are to be liberally construed and the allegations taken as true. The sole criteria is whether the pleadings state a cause of action not whether one has been stated. The standard for determining if a preliminary notice is sufficient, petitioner argues, is one of “reasonableness in view of the attendant circumstances,” and the petition in this proceeding gives the “who what when where.” Specifically, the predicate notices informed the respondent that his objectionable conduct included destroying building property AND attached pictures of the same.<sup>4</sup> The Notice of Termination, petitioner argues, additionally and unequivocally states that the conduct is in violation of the Penal Law Articles 220 and 221. Petitioner also argues that the Notice of Termination is in full compliance with the CPLR, RPAPL, and RSC as the predicate notices referenced the applicable lease provisions which respondent is allegedly violating.

Petitioner further argues that contrary to respondent’s claim under CPLR 3211(a)(1), this court has subject matter jurisdiction to preside over this drug holdover summary proceeding, pursuant to Civil Court Act Section 110. RPAPL sections 711(5) and 715 permits a landlord to evict a tenant engaged in an illegal use, whereas here, the respondents were arrested in the apartment. The basis for the arrest breaches the terms of the licensee agreement, sections 711(5) and 715(1) of the Real Property and Proceedings Law, and the provisions of the Rent Stabilization Law, and courts have granted final judgment of possession where there has only been one search of an apartment and/or one buy of an illegal substance by a police officer. Petitioner also argues that the cases cited by respondent can be distinguished from the present case as the tenants in those cases were afforded a full trial.

Petitioner argues that respondent should not be permitted to file a late answer as the respondent has not provided an affidavit which attests to the merits of the potential defenses and counterclaims. A mere denial of receipt of process is insufficient to rebut the presumption of delivery raised by the sworn affidavit of the process server, which is prima facie evidence of proper service. Petitioner argues that respondent did not properly notice the motion of when and the time or that it would be virtual. Petitioner also opposes respondent’s Jury Demand as he agreed to a jury waiver in his lease.

#### **DECISION:**

Respondent’s motion was properly noticed. Respondent moves to dismiss the proceeding, pursuant to CPLR 3211(a)(7), for failure to state a cause of action. On a motion to dismiss, pursuant to CPLR Section

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<sup>4</sup> Petitioner served a Notice of Termination in this proceeding, but it did not include any allegations of objectionable conduct.

3211, the pleading is to be afforded a liberal construction, accept the facts 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*, 43NY2d 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 RPAP 711(5) and RPAPL 715(1), based upon the premises being used as an illegal trade after the respondents were arrested. RPAPL Section 711(5) specifies 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 term “use” has been held to mean doing something customarily or habitually upon the premises. *Grosfield Realty Co., v. Lagares*, 150 Misc.2d 22 (1<sup>st</sup> 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, on July 21, 2021. The document provided from Criminal Court indicates the respondents were observed and committed the alleged offenses in front of the subject premises. This statement is repeated word for word in the Notice of Termination.<sup>5</sup> 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. Any indicia of a drug business, with the apartment as the focal point is entirely missing from these pleadings. Further, the pretrial release for Frankie Garriga states that he resides with his girlfriend on East 182<sup>nd</sup> Street, Bronx, New York.

Petitioner argues that since the proceeding was commenced, pursuant to RPAPL 711(5) they do not have to comply with the requirements of the Rent Stabilization Code but also argues that the Notice to Terminate cited the sections of the Rent Stabilization Code respondent is violating. However, where a tenancy is subject to rent stabilization, the right to commence an eviction proceeding is dependent upon the service of an adequate notice, *Kaycee West 113 Street Corp. v. Diakoff*, 160 AD2d 573 (1<sup>st</sup> Dept. 1990). Pursuant to the rent stabilization code, a landlord can recover possession of a rent stabilized apartment only on one of the grounds set forth in the Rent Stabilization Code, 9 NYCRR section 2524.1, after service of a termination notice specified in section 2524.2.

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<sup>5</sup> Document from the Criminal Court Bronx County, dated July 22, 2021.


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 facts necessary to establish the existence of such ground, and the date when the tenant is required to surrender possession. This defect cannot be cured, requiring dismissal of the proceeding. *Chinatown Apts. v. Chu Cho Lam*, 51 NY2d 786 (1980). Where a notice seeks to terminate a rent stabilized tenant, the notice must be unequivocal, definite and state the grounds upon which the landlord relies for termination. The Notice of Termination must comply with the requirements of the Rent Stabilization Code regarding specificity of factual allegations, and not merely recite conclusory allegations. *Dowarp Realty Co v. Acevedo*, 1990 N.Y. App.Div. Lexis 16865 (1<sup>st</sup> Dept. 1990).

Here, the Notice of Termination is conclusory and is devoid of specific allegations. The Notice to Terminate recites word for word the allegations in the Criminal Court document of the arrest on July 21, 2021. The Notice to Terminate does not even mention respondents, the address, or dates and times of alleged illegal trade of drugs in the premises. Further, respondent is a rent stabilized tenant, despite petitioner’s attorney argument that the provisions of the Rent Stabilization Code and the lease were cited in the Notice of Termination, he is incorrect. The Notice to Terminate fails to cite to any provision of the Rent Stabilization Code that this proceeding is commenced pursuant to or the provisions of the lease respondent is purportedly violating.

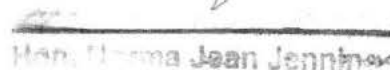
Affording the petitioner every favorable inference, it has not shown the minimal required element, as required by RPAPL Section 711(5), that there is an ongoing business of manufacturing or selling drugs at the premises. Petitioner has also failed to allege the provision of the Rent Stabilization Code or the lease respondent is violating. Therefore, the petition fails to state a cause of action, pursuant to CPLR 3211(a)(7) and the proceeding is dismissed without prejudice. The court does not need to reach respondent’s remaining arguments and petitioner’s cross-motion is denied as moot.

This constitutes the decision and order of this court. The court to email and mail a copy of this decision to petitioner, respondents, and upload a copy to NYSECF.

Dated: March 3, 2022  
Bronx, New York



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



Hon. Norma Jean Jennings

Petitioner's Counsel:

Waide Law Offices, PLLC  
87-14 116th Street  
Richmond Hill, New York 11418

Respondent's Counsel:

Angela Cancel, Esq.  
Bronx Defenders  
360 East 161st Street  
Bronx, New York 10451