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### Woodside 50 LLC v. Baird

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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF QUEENS HOUSING PART E

-----X  
WOODSIDE 50 LLC

*Petitioner,*

INDEX # 300287/21

-against-

SOL BAIRD  
"JOHN DOE & JANE DOE"

DECISION / ORDER

*Respondents.*  
-----X

Present: Kimon C. Thermos, JHC

Recitation, as required by CPLR 2219(a), of the papers considered in the review of the instant moving papers.

<b>Papers</b>	<b>Numbered</b>
Notice of Motion, NYSCEF # 11-15.....	1
Opposition, NYSCEF #16.....	2
Reply NYSCEF #17.....	3

Appearing for the Petitioner: Horing Welikson Rosen & Digrugilliers, P. C.  
by: Matthew Rosen Esq.

Appearing for Respondent Sol Baird: The Legal Aid Society  
by: Benjamin Levine Esq.

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

In this holdover proceeding Petitioner seeks to terminate the tenancy and regain possession of the subject rent stabilized apartment on grounds that Respondent is allegedly improperly subletting the premises while permanently residing in the state of Georgia.

Respondent moves for an order of dismissal pursuant to CPLR 3211 (a) (7) challenging the sufficiency of the Notices to Cure and Termination which form the basis of Petitioner's cause of action on grounds that the allegations in the notices do not support the elements of an illegal sublet cause of action and since these defects are not amendable the petition would have to be dismissed. Additionally, it is argued that the allegations are prejudicially too vague in that they fail to state any specific individuals to which the premises were sublet, or the nature of the sublet agreements ostensibly entered into, preventing Respondent from formulating a proper defense

and otherwise fail to meet the “reasonableness under the attendant circumstances test” required by the law. Respondent further posits that as constituted the pleadings seem to allege grounds that sound in a nonprimary residence rather than an illegal sublet cause of action. Alternatively, Respondent seeks an opportunity to interpose an answer as permitted by CPLR 3211(f).

In opposition, Petitioner argues that the Notices to Cure and Termination contain sufficient factual allegations to apprise the Respondent of the grounds for the illegal sublet cause of action and to enable the formulation of defenses. Petitioner further posits that the notices do not have to provide specificity of every factual allegation intended to be proven at trial and that the allegations sufficiently plead the elements of the illegal sublet cause of action. Petitioner further argues that under CPLR 3211 (a)(7) the pleadings are to be afforded a liberal construction and that every favorable inference on the sufficiency of the pleadings and the notices it incorporates must be afforded by the court. Lastly Petitioner puts forth that although the notices comprising the factual allegations are sufficiently specific, should more clarity be required Respondent could avail himself of a Demand for a Bill of Particulars which would serve to flush out more of the details in support of the pleadings.

The notice to cure setting February 29, 2020, as the deadline to cure the conduct constituting the breach of lease obligation and a violation of the Rent Stabilization Code, contains 11 enumerated allegations in support of the Petitioner’s grounds that an illegal sublet exists as follows:

1. SOL BAIRD is renting rooms/space in the subject premises to individuals whose names are unknown to the Landlord.
2. SOL BAIRD has a motor vehicle registered to himself at 2258 Cummins Road, Augusta, GA 30904.
3. SOL BAIRD has cellular telephone service listed to himself at 2258 Cummins Road, Augusta GA 30904.
4. SOL BAIRD has banking and credit card records listing his home address as 2258 Cummins Road, Augusta, GA 30904.
5. SOL BAIRD currently receives mail at 2258 Cummins Road, Augusta, GA 30904.
6. SOL BAIRD was for drug trafficking in North Augusta, GA on December 6, 2018.
7. SOL BAIRD currently works at the Augusta Players Group located at 1301 Green Street, Augusta, GA 30904
8. SOL BAIRD has been cast and is scheduled to appear, in The Augusta Players performance of “Mamma Mia!” on February 21-23, 2020.
9. SOL BAIRD has not been seen in or around the premises in several months.
10. Building personnel has witnessed unknown individuals, who are not authorized to reside at the Subject Premises, coming and going from the premises on a daily basis.
11. Allowing individuals unknown to the landlord presents a security risk to the other occupants.

The Notice of Termination served upon failure to cure the alleged sublet, restates the allegations in the Notice to Cure and supplements the following in support of the alleged continuing breach:

1. The building superintendent has knocked on your apartment door on more than one occasion since February 29, 2020, in an attempt to obtain access to your apartment to determine who is residing therein. To date, no one has allowed the superintendent access to the premises.
2. Building personnel has not seen SOL BAIRD at or around the Premises or Subject Building after February 29, 2020.
3. Building personnel has witnessed unknown individuals, who are not authorized to reside at the Subject premises, coming and going from the premises on a daily basis after February 29, 2020.

When considering a motion to dismiss pursuant to CPLR §3211(a)(7), the court must determine whether the pleadings state a cognizable cause of action or defense. In doing so, the Court must “afford the pleadings a liberal construction, take the allegations in the [pleadings] as true and afford the [pleadings] the benefit of every possible inference”, *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005). “The motion must be denied if, from the pleadings’ four corners, factual allegations are discerned which taken together manifest any cause of action [or defense] cognizable at law.” *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002), quoting *Polonetsky v. Better Homes Depot*, 97 N.Y.2d 46 (2001). See also *Guggenheimer v. Ginzburg* 43 NY2d 268, (1977).

In the context of a summary proceeding, RPAPL §741(4) requires that a petition must “[S]tate the facts upon which the special proceeding is based.” In a holdover proceeding, the sufficiency of the pleadings in stating a cause of action depends upon the facial sufficiency of the predicate notices, which terminate the tenancy and serves as the basis of the holdover. *Chinatown Apts. v. Chu Cho Lam*, 51 N.Y.2d 786 (1980). This is particularly true when, as here, the petition incorporates the allegations of the predicate notices. A petition predicated on a defective notice must be dismissed for failure to state a cause of action. *Chinatown Apts. v. Chu Cho Lam*, *supra*. See also, *Golub v. Frank*, 65 N.Y.2d 900 (1985); *520 East 81 St. Associates v. Lenox Hill Hospital*, 77 N.Y.2d 944 (1991); *Ansonia Associates v. Consiglio*, 163 A.D.2d 98 (1<sup>st</sup> Dept. 1990).

A notice to terminate a rent-stabilized tenancy "shall state the ground . . . upon which the owner relies for . . . eviction of the tenant," and must "state . . . the facts necessary to establish the existence of such ground." (Rent Stabilization Code [9 NYCRR] § 2524.2 [b].) Notices that do not allow a tenant to prepare a defense because they are broad, conclusory, and/or

unparticularized have been considered inadequate. *Berkeley Assoc. Co. v Camlakides*, 173 AD2d 193, 569 N.Y.S.2d 629 [1st Dept 1991], *aff'd* 78 NY2d 1098, 586 N.E.2d 55, 578 N.Y.S.2d 872 [1991]; *see* 69 *E.M. LLC v. Mejia*, 49 Misc 3d 152[A], 29 N.Y.S.3d 849, 2015 NY Slip Op 51765[U] [App Term, 1st Dept 2015]

In evaluating the facial sufficiency of a predicate notice in a summary eviction proceeding, the appropriate test is one of reasonableness in view of the attendant circumstances (*see Oxford Towers Co., LLC v Leites*, 41 AD3d 144, 837 N.Y.S.2d 131 [2007])” *157 Broadway Assoc., LLC v Berroa*, 2018 N.Y. Misc. LEXIS 6562, \*1, 2018 NY Slip Op 51942(U), 1, 62 Misc. 3d 136(A), . *Cruz v. Davis*, 20 Misc.3d 1135A (Civ. NY 2008); *297 Lenox Realty Co. v. Babel*, 19 Misc.3d. 1145A (Civ. Kings 2008); *Black Veterans for Social Justice, Inc. v. Killeen*, 2007 N.Y. Misc. Lexis 982 (Civ. NY 2007). Courts will not uphold a predicate notice unless it sufficiently advises the tenant of the claimed allegations to enable the tenant to prepare a defense. *Black Veterans for Social Justice, Inc. v. Killeen, supra.*; *Domen Holding Co. v. Aranovich*, 1 N.Y.3d 117 (2003); *297 Lenox Realty Co. v. Babel, supra.*

A Notice of Termination "must be clear, unambiguous and unequivocal in order to serve as the catalyst which terminates a leasehold." *Ellivkroy Realty Corp. v HDP 86 Sponsor Corp.*, 162 AD2d 238, 238, 556 N.Y.S.2d 339 [1st Dept 1990]

The predicate notice to cure must include allegations as to the incidents, dates, times and the identities or at least a description of the individuals involved, in order to sufficiently apprise the recipient of the notice a means of knowing how to cure the alleged breach of the lease. This is required not only to enable the formulation of defenses but also to “discourage baseless eviction claims founded upon speculation and surmise rather than concrete facts” *London Terrace Gardens, L.P. v. Heller*, 40 Misc. 3d 135(A) (App. Term 1<sup>st</sup> Dept. 2009).

For an illegal sublet notice to cure to be sufficient it must at least provide information to identify the alleged sublessee *see Amin Mgt LLC v. Martinez*, 2017 NY slip op 50664(U)App Term 1<sup>st</sup> Dept. 2017). The notice to cure survived a challenge to sufficiency when in addition to indicating that Respondent tenant lived elsewhere, as sufficiently plead in this case, it also stated

the name of the ostensible sublessee. See *E. Vill. Re holdings, LLC v. McGowan*, 57 Misc.3d 155(A),(App. Term 1<sup>st</sup> Dept. 2017)

Occupancy of an apartment by someone, when the tenant of record does not also reside there, does not alone evince an illegal sublet. Rather, if there is no evidence or factual allegation that the occupant had the right to occupy for a non-revocable fixed period of time then all that is pleaded is a mere license to occupy *445/86 Owners Corp. v. Haydon*, 300 A.D. 2d 87 (App Div. 1st, 2002), which is not a prohibited act under the section of the RSC relied upon by Petitioner for terminating the tenancy.

Although the notices are replete with indicia of Respondent's having a primary residence in Georgia, which Respondent does not refute, the subject notices do not contain any factual allegations of an agreement to convey possession for a nonrevocable term with specifically identified individuals which is an element of a cause of action for illegal sublet. Respondent correctly points out the allegations in the predicate notices more likely make out grounds for a non-primary residence rather than an illegal sublet case, which requires a notice of nonrenewal of lease under the rent stabilization Code to be served during the appropriate window period for the delivery of renewal leases. See *PLWJ Realty, Inc. v. Gonzalez*, 285 A. D. 2d 370 (2001).


Petitioner's reliance on the established principle that a "predicate notice in a holdover proceeding need not lay bare a landlord's trial proof" *,75 Monroe Street LLC v Moy*, 12 Misc. 3d 1175 (A) (Civ. Ct. NY CO. 2006), is only a general principle in assessing the viability of the cause of action. However, the pleadings must contain some factual allegations to support the specific theory under which the cause of action is brought. Petitioner's retort that this can be corrected through a bill of particulars is unavailing when from the inception there is a lack of key allegations required to support the intrinsic elements of the cause of action, See *128 Second Realty LLC v Dobrowolski*, 51 Misc. 3d 147(A) (App. Term 1<sup>st</sup> Dept. 2016). The notices in the instant proceeding wholly fail to allege any indicia of Respondent's illegal sublet activity, and are bereft of any allegation of an agreement, the duration of the occupancy, or at a minimum provide the identity of the purported sublessees. Since predicate notices are not amendable, the

proceeding is fatally defective and must be dismissed without prejudice. In light of the petition's dismissal, the remaining branch of the motion, seeking to file an answer, is denied as moot.

This constitutes the Decision and Order of the Court.

Dated: May 19, 2022

Queens, New York



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Hon. Kimon C. Thermos, JHC