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7121 171st STREET REALTY LC v. BAYBACHAIV

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART B

<p>7121 171ST STREET REALTY LC Petitioner-Landlord</p> <p>-against-</p> <p>ARIEL BAYBACHAIV, ORIT BAYBACHAIV, KESHET BENAN CORP. 71-21 171ST Street, Entire Premises Including Basement Fresh Meadows, New York 11365 Respondents-Tenants</p> <p>“JOHN DOE” & “JANE DOE” Respondents-Undertenants</p>

L&T Index # 306715/21

DECISION/ORDER

Hon. Clifton A. Nembhard

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of petitioner’s motion and respondent’s cross-motion.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits (Cross-Motion, Aff. in Opp.).....	2, 3
Replying Affidavits	4

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

Petitioner commenced this holdover proceeding to recover possession 71-21 171st Street, Fresh Meadows. Prior to commencement petitioner served a Notice to Cure followed by a Ten-Day Notice to Cancel Lease. Petitioner moved for an order setting the matter down for an inquest after respondents failed to answer the petition. Ariel and Orit Bayachaiv (“respondents”) subsequently retained counsel who filed an answer on their behalf. Respondents then cross-moved to amend the answer and dismiss the petition.

Service of a proper predicate notice is a condition precedent to a summary proceeding. The notice must be reasonable in view of all attendant circumstances. *Hughes v. Lennox Hill Hosp.*, 226 AD2d 4 [1st Det 1996]. A notice that “contains only conclusory allegations that fail to allege a factual basis sufficient to support the ground for termination” is deficient. *Hughes, Lennox Hill Hosp., supra*. A deficient notice is not amendable and requires dismissal of the proceeding. *Chinatown Apts. Inc. v. Chu Cho Lam*, 51 NY2d 786 [Ct App 1980].

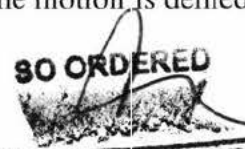
The Court finds that the predicate notices here fail to set forth a ground for terminating respondents' tenancy. The notices allege that respondents illegally sublet the premises and are using it as a Day Care in violation of paragraphs 1 and 13 of their lease. However, it is the public policy of the state to promote the availability of home childcare by restricting government regulation and private covenants. *Marick Real Estate, LLC v. Ramirez*, 11 Misc3d 42 [App Term 2nd Dept 2005]; *See*, SSL § 390. Courts have long held that a tenant has the right to operate a day care center in a residence, even where a lease provision requires that the premises be used solely for residential purposes. *See, e.g., Quinones v. Bd. Of Managers of Realwalk Condominium I*, 242 AD2d 52 [2nd Dept 1988]; *65 Ocean Ave. Assoc. v. Samuel* NYLJ, July 3, 2002 [Civ C Kings]; *Carroll St. Properties v. Puente*, 4 Misc3d 896 [Civ Ct NY 2004]. As the court in *Alpha Dynamics Ltd. v. Martinez*, 2005 NY Misc LEXIS 3323 [Bx Civ 2005] noted, "[i]t is clear that the Social Services Law operates to prohibit a landlord from maintaining an action against a tenant who chooses to run a home based day care center." SSL

Here the notice to cure and the notice of termination do not allege that respondents are operating without a license or otherwise violating the provisions of SSL § 390. Therefore, petitioner's attempt to recover possession of the premises solely on the grounds that respondents are operating a day care in the premises must fail. Accordingly, the cross-motion is granted and the case dismissed for failure to state a cause of action. The motion is denied as moot.

This constitutes the decision and order of the Court.

Date: July 6, 2022

Queens, New York

SO ORDERED

HON. CLIFTON A. NEMBHARD
Hon. Clifton A. Nembhard, JHC