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2022-08-30

### ACMH INC. v. ALVAREZ

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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: HOUSING PART F

ACMH INC.

Index No. 305355/20

Petitioner,

**DECISION/ORDER**

-against-

Motion Sequence No. 2 and 4

NAMOI ALVAREZ ET AL

Respondent.

HON KAREN MAY BACDAYAN, JHC

*Novick Edelstein Pomerantz (Matthew Gordon, Esq.), for the petitioner*  
*Manhattan Legal Services (Jonathan Saxton, Esq.), for the respondent*

Recitation as required by CPLR 2219 (a) of the papers considered in review of this motion by NYSCEF document numbers: 12-28.

**PROCEDURAL HISTORY AND BACKGROUND**

This is a holdover proceeding brought against Naomi Alvarez (“respondent”), a resident of a supportive housing facility operated by ACMH, INC., a supportive housing provider. The petition describes the relationship between itself and respondent as follows: “[R]espondent is a subtenant of petitioner, who took occupancy as part of a Community Residential Apartment Treatment Program operated by [p]etitioner, and licensed by the New York State Office of Mental Health.” (NYSCEF Doc No. 1, petition ¶ 9.) It is not disputed that petitioner commenced this proceeding by notice of petition and petition seeking respondent’s eviction on the basis that she has breached her occupancy agreement in that she has not complied with program rules. (NYSCEF Doc No. 1, petition; NYSCEF Doc No. 3, notice of petition assigned.)

Attached to the notice of petition is a notice of termination. The notice of termination states that respondent’s tenancy will be deemed terminated as of October 23, 2020 “[b]ecause you have failed to meet your residency responsibility, as demonstrated in the Preliminary Notice of Intent to Terminate Residency, dated November 8, 2019 (annexed hereto and made a part hereof); Final Notice of Intent to Terminate Residency, dated December 19, 2019 (annexed hereto and made a part hereof). . .” (NYSCEF Doc No. 1 at 4-5.) The record of this proceeding

on NYSCEF, does not include these purported attachments with the petition and notice of termination that was served and filed.

In April 2022, petitioner made a motion for use and occupancy. (NYSCEF Doc Nos. 12-16.) On February 17, 2022, the court appointed a guardian *ad litem* for respondent. (NYSCEF Doc No. 17.) On the hearing date of the motion for use and occupancy, petitioner defaulted, the proceeding was dismissed without prejudice and petitioner, subsequently moved to restore the proceeding to the calendar. (NYSCEF Doc Nos. 18-19, motion sequence 3.) On June 17, 2022, Manhattan Legal Services appeared and opposed petitioner's motions for use and occupancy and to restore, and also cross-moved for dismissal of the proceeding. (NYSCEF Doc Nos. 21-22.) On, June 21, 2022 the court held a conference. The motion to restore was granted, and a briefing schedule was ordered. (NYSCEF Doc No. 23.)

Respondent argues that the proceeding must be dismissed as the petitioner has failed to state a cause of action. The basis for this argument is two-fold: 1) Respondent argues that petitioner has failed to cite with particularity what the regulatory program requirements for termination of a tenancy are, and that the program requirements were followed (NYSCEF Doc No. 22, respondent's attorney's affirmation in support ¶¶ 41-50); and 2) Respondent argues that this is a breach of lease proceeding, and as is apparent from the record before the court, no notice to cure was provided. (Id. ¶¶ 51-53.) As a result, respondent argues, respondent was prejudiced, and this court was not made aware of potential defenses to the proceeding, specifically that this is a supportive housing facility, that respondent is a disabled, elderly woman who has been determined to need assistance with daily living, and that there are specific pre-termination of residency requirements to which facilities licensed by OMH must adhere.

In reply, petitioner argues that it adequately pleaded the regulatory status of the premises, and attaches the predicate notices to cure as exhibits A and B to its reply affirmation. (NYSCEF Doc No. 26.) The court held oral argument virtually and on the record on August 29, 2022.

### **DISCUSSION**

Petitioner's failure to attach the predicate notices to cure is a fatal defect and requires dismissal of the proceeding. Petitioner cannot rectify the deficiency by submitting them as exhibits to reply papers some 20 months after the commencement of a proceeding, and only after respondent was fortunate enough to retain a free legal services attorney to litigate this proceeding. "It is elementary that the predicate notice cannot be amended" (*Singh v Ramirez*, 20

Misc 3d 142 [A], 2008 NY Slip Op 51680 [U] [App Term, 2d Dept 2008], citing *Chinatown Apts. v Chu Cho Lam*, 51 NY2d 786 [1980]) “and that [a] landlord is bound by the notice served.” (*Id.* quoting *One E. 8th St. Corp. v Third Brevoort Corp.*, 38 AD2d 524 [1st Dept 1971] [internal quotation marks omitted]); *see also Federal v Ortiz*, 139 Misc 2d 274, 276 [Civ Ct, Kings County 1988] [finding that a factually deficient notice “cannot be cured by a recitation in a party’s papers in opposition to a motion to dismiss.”].)

Moreover, “AMCH is under contract with Medicaid Health Homes, health systems and DOHMH [Department of Health and Mental Hygiene] to assist adults in managing chronic mental health, substance use, and medical conditions through community outreach, engagement, and care coordination.” (ACMH website, [Programs – ACMH \(acmh.nyc.org\)](http://acmh.nyc.org), last accessed August 30, 2022.) As ascertained from the belatedly provided predicate notices to cure, part of respondent’s occupancy agreement provides: “I will regularly attend psychotherapy sessions and all other treatment appointments and take medication as prescribed by my psychiatrist.” (NYSCEF Doc No. 26.) Thus, under the circumstances, pleading that this premises is subject to the relevant supportive housing rules and regulations, and compliance therewith, alerts the court and the parties to additional protections needed and intended to safeguard vulnerable residents from unnecessary displacement or premature eviction.<sup>1</sup> Requiring a landlord who receives government funds to operate a facility like ACMH to properly plead the facts supporting an eviction proceeding, and its compliance with governing supportive housing regulations and procedures, also ensures all stakeholders that, as a recipient of government funds, ACMH is meeting the program’s interrelated goals and obligations to “provide . . . a safe haven for our neighbors with mental illness” and “commit[ment] to the mental and physical wellbeing of vulnerable New Yorkers.” (ACMH website, [Programs – ACMH \(acmh.nyc.org\)](http://acmh.nyc.org), last accessed August 30, 2022.)

**CONCLUSION**

Accordingly, it is

ORDERED that the petition is dismissed with prejudice; and it is further

ORDERED that petitioner’s motion for use and occupancy is denied as moot.

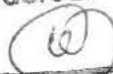
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<sup>1</sup> The court notes that petitioner did not move for the appointment of a guardian *ad litem*; rather, the Office of Legal Affairs (“OLA”) made the motion, and petitioner submitted opposition to OLA’s statement that it did not have standing to contest the appointment. (NYSCEF Doc No. 11.) Ultimately, petitioner did not oppose the appointment. However, it is not clear from the record that the appointing judge would have known that a guardian *ad litem* was necessary in this particular case.

This constitutes the decision and order of this court.

Dated: August 30, 2022  
New York, NY

So Ordered:



~~Hon. Karen May Bacdayan~~

HON. KAREN MAY BACDAYAN