

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

All Decisions

Housing Court Decisions Project

2022-09-23

CROSS BRONX PRESERVATION LLC v. DESAPPIO

Follow this and additional works at: https://ir.lawnet.fordham.edu/housing_court_all

Recommended Citation

"CROSS BRONX PRESERVATION LLC v. DESAPPIO" (2022). *All Decisions*. 624.
https://ir.lawnet.fordham.edu/housing_court_all/624

This Housing Court Decision is brought to you for free and open access by the Housing Court Decisions Project at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in All Decisions by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

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

-----X

CROSS BRONX PRESERVATION LLC,

L&T Index No. 301827/22

Petitioner,

-against-

DECISION/ORDER

JAMES DESAPPIO,
"JOHN" "DOE,"
"JANE" "DOE,"

Respondents.

-----X

Present: Hon. OMER SHAHID
Judge, Housing Court

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in the review of Respondent’s Motion to Dismiss (Motion #1 on N.Y.S.C.E.F.):

Papers	Numbered
Notice of Motion (Motion #1 on N.Y.S.C.E.F.).....	<u>1</u>
Affirmation in Opposition (Entries 16-18 on N.Y.S.C.E.F.).....	<u>2</u>
Affirmation in Reply (Entry 19 on N.Y.S.C.E.F.).....	<u>3</u>

Petitioner commenced this holdover proceeding seeking possession of 1881 Schieffelin Place, Apt. 5C, Bronx, N.Y. 10466 (the “subject premises”) from Respondents on the ground that Respondents are committing or permitting a nuisance by their conduct. The subject premises is subject to the Rent Stabilization Law. The Notice of Petition and Petition were filed on N.Y.S.C.E.F. on January 26, 2022. Respondent James Desappio obtained the Legal Aid Society as counsel on April 19, 2022 and filed the instant motion to dismiss on N.Y.S.C.E.F. on June 27, 2022. A motion schedule ensued and the fully briefed motion was marked submitted for decision on August 25, 2022.

Respondent’s motion seeks the following relief: (a) dismissing the proceeding pursuant to C.P.L.R. § 3211(a)(7) for failure to state a cause of action because the Notice of Termination does not identify the grounds for eviction listed under 9 N.Y.C.R.R. § 2524; and/or (b) dismissing the proceeding pursuant to C.P.L.R. § 3211(a)(2) for lack of subject matter jurisdiction because the Notice of Termination is vague, conclusory, and, thus, insufficient; and/or (c) dismissing this proceeding pursuant to C.P.L.R. §3211(a)(7) for failure to state a cause of action because the Notice of Termination does not allege facts that would constitute a

nuisance, even if true; and/or (d) granting such other and further relief that the court may deem to be just and proper. Petitioner opposes the motion.

The termination notice provides, in pertinent part:

In violation of your lease, you have engaged in improper conduct and a course of conduct which creates and/or constitutes a nuisance. Further, said conduct is of such a nature as to be 'non-curable' and thus Petitioner has elected not to serve any cure notice which might otherwise be required by lease or statute, if the conduct in question was curable.

The conduct includes engaging in persistent and continuing course of conduct evidencing an unwarrantable, unreasonable or unlawful use of property to the annoyance, inconvenience, discomfort or damage of others and which interferes with the comfort or safety of fellow Tenants/occupants/building staff, and as a result of said nuisance you are interfering substantially with the comfort and safety of the landlord and of other tenants and occupants of the subject building. In this regard, upon information and belief, the facts which form the basis for this notice are as follows:

- a) Tenant, who is wheelchair bound, and requires the use of oxygen tanks, habitually and continually smokes in the subject apartment;
- b) The use of oxygen tanks while smoking creates a clear and substantially dangerous condition;
- c) On at last [sic] one occasion (November 3, 2021) Tenant dropped a lit cigarettes [sic] which he could not retrieve/extinguish and as result Tenant screamed/yelled for help from a neighbor in order to avoid a fire;
- d) Tenant routinely leaves his apartment door open so that neighboring tenants can assist him in case of an emergency arising from his smoking in the unit;
- e) The aforementioned conduct threatens the health and safety of all building residents, guests, visitors employees, etc.

Respondent maintains that this termination notice is defective. Respondent argues that the termination notice fails to cite to any provision of the Rent Stabilization Code pursuant to 9 N.Y.C.R.R. § 2524.2(b) which provides that "[e]very 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." 9 N.Y.C.R.R. § 2524.2(b). Respondent avers that due to Petitioner's failure to cite to any provision of the Rent Stabilization Code upon which Petitioner seeks possession, a dismissal is warranted because the termination notice is defective. Respondent argues that the notice both states that Respondent has violated his lease and that he is engaged in nuisance conduct. By failing to state whether the notice is pursuant to 9. N.Y.C.R.R. §§ 2524.3(a) (violating substantial obligation of tenancy) or 2424.3(b) (committing or permitting a nuisance), such ambiguity does not apprise Respondent upon which ground Petitioner seeks possession and, thus, the proceeding should be dismissed.

Respondent also argues that the allegations are vague, lack specificity, and are conclusory in nature. Respondent argues that the notice does not provide any dates, times, or details to substantiate how Petitioner knows that Respondent smokes on a regular basis and does not state

any facts concerning its knowledge of Respondent's oxygen tank. Because Petitioner has stated allegations that lack detail, Respondent is not apprised of sufficient facts to formulate a defense to this proceeding.

Respondent also argues that the allegations do not rise to the level of nuisance conduct. Respondent states that smoking in the privacy of one's own apartment does not arise to the level of nuisance, even if done around a potentially flammable device or substance. Respondent stresses that the notice only provides one instance of specificity when, on November 3, 2021, Respondent asked a neighbor for help when he dropped a lit cigarette and could not pick it up. Furthermore, Respondent states that the allegations require a notice to cure since such behavior can be cured upon such a notice. Based upon these defects, Respondent maintains that this proceeding should be dismissed.

Petitioner opposes the motion. Petitioner maintains that the termination notice adequately informs Respondent of the facts necessary to sustain a nuisance cause of action and alleges that the facts are sufficient to allow Respondent to formulate a defense. Petitioner argues that the termination notice states nuisance as the basis for recovery and supports that ground with the facts necessary to establish such. Petitioner maintains that it would be unrealistic for it to list instances of the smoking around the oxygen tank which occurs daily. Accordingly, Petitioner argues that the proceeding should not be dismissed.

On a motion to dismiss for failure to state a cause of action pursuant to C.P.L.R. § 3211(a)(7), the pleading is afforded a liberal construction and the court will accept the facts as alleged therein as true and determine whether those facts fit within any cognizable theory of law. See Leon v. Martinez, 84 N.Y.2d 83 (1994).

A notice seeking to terminate a rent-stabilized tenancy must state the ground for removal and the facts necessary to support that ground. See 9 N.Y.C.R.R. § 2524.2(b); see also Berkeley Assoc. Co. v. Camlakides, 173 A.D.2d 193 (1st Dep't 1991), aff'd 78 N.Y.2d 1028 (1991). The notice must state specific facts and not allegations that are too broad, vague, or conclusory that would prevent a tenant from formulating a defense. See 69 E.M. L.L.C. v. Mejia, 49 Misc. 3d 152(A) (App. Term, 1st Dep't 2015). "[W]ith respect to the adequacy of notice, the appropriate test is one of reasonableness in view of the attendant circumstances." Hughes v. Lenox Hill Hosp., 226 A.D.2d 4, 18 (1st Dep't 1996). An adequate predicate notice is a condition precedent to maintaining a petition. See Chinatown Apts. v. Chu Cho Lam, 51 N.Y.2d 786 (1980).

The Rent Stabilization Code permits a landlord to commence a proceeding against a rent-stabilized tenant who commits or permits a nuisance that affects the safety and comfort of other building residents. See 9 N.Y.C.R.R. § 2524.3(b). "Nuisance imports a continuous invasion of rights – a pattern of continuity or recurrence of objectionable conduct." Domen Holding Co. v. Aranovich, 1 N.Y.3d 117, 124 (2003) (internal quotations omitted), citing Frank v. Park Summit Realty Corp., 175 A.D.2d 33, 35 (1st Dep't 1991), modified on other grounds 79 N.Y.2d 789 (1991). The tenant's conduct must affect other building tenants or occupants. See Roxborough Apts. Corp. v. Kalish, 22 Misc. 3d 130(A) (App. Term, 1st Dep't 2009).

The court finds that the termination notice is sufficient in detail to establish a nuisance cause of action and that it apprises Respondent of the facts necessary to allow him to prepare a defense to this proceeding. The notice states nuisance as the basis for recovery and the facts, as alleged, sufficiently fit within that cognizable legal theory and satisfy the specificity requirement. The allegations as stated are reasonable in view of the attendant circumstances.

Respondent's reliance upon 922 Westchester Owner L.L.C. v. Telfair, 66 Misc. 3d 1216(A) (Civ. Ct., Bronx Co. 2019) is unavailing. The Telfair court stated: "It is unclear from

the contents of this Notice [to Cure] alone whether Petitioner seeks to proceed with a holdover proceeding grounded in nuisance, pursuant to § 2524.3(b) of the Rent Stabilization Code, or based on a violation of a substantial obligation of Respondent's tenancy pursuant to § 2524.3(a), as plead. Petitioner's subsequent Notice of Termination and Petition fail to provide any clarity as to Petitioner's chosen course of action, as both fail to cite any provision of the Rent Stabilization Code pursuant to which this proceeding was commenced." 922 Westchester Owner L.L.C. v. Telfair, 66 Misc. 3d 1216(A) at *3.

Telfair is distinguishable from the facts of this proceeding since in that case a notice to cure was served. Here, the termination notice provides that the cause of action is based upon nuisance and that Petitioner is not serving a notice to cure because it believes that the objectionable conduct alleged is "non-curable." Although the termination notice does not explicitly state the provision of the Rent Stabilization Code upon the ground on which Petitioner seeks recovery, it is not ambiguous by the language of the notice that Petitioner seeks recovery pursuant to § 2424.3(b) (nuisance) and not § 2524.3(a) (breach of substantial obligation of tenancy) of the Rent Stabilization Code since the latter requires service of a notice to cure. Even though Petitioner states in the predicate notice that Respondent has breached the terms of the parties' lease, Petitioner stresses that it is seeking recovery of the subject premises based upon Respondent's alleged ongoing conduct based upon nuisance and is not serving a notice to cure because such conduct is "non-curable." Hence, the notice should not lead Respondent to believe that Petitioner is seeking recovery pursuant to § 2524.3(a) of the Rent Stabilization Code.

Similarly, a notice to cure is not required to be served if a landlord alleges conduct that constitutes a nuisance. See 751 Union St. L.L.C. v. Charles, 56 Misc. 3d 141(A) (App. Term, 2d Dep't, 2d, 11th & 13th Jud. Dists. 2017). See also Strata Realty Corp. v. Pena, 57 Misc. 3d 156(A) (App. Term, 1st Dep't 2017). Respondent does not argue that the lease requires Petitioner to serve him with a notice to cure. Hence, Petitioner is not required to serve Respondent with such a notice to maintain this proceeding.

The court also finds that the termination notice is not overly broad. The fact that Petitioner provides only one specific date of an instance is not fatal. The allegation containing the date states that the date is of "at least one occasion" where the objectionable conduct occurred. Petitioner need not list down dates and times of smoking next to an oxygen tank when such conduct allegedly occurs on a continuous and daily basis. Information as to Petitioner's knowledge surrounding the oxygen take and the dates and times of the conduct in question may be obtained through a demand for bill of particulars. See Pinehurst Const. Corp. v. Schlesinger, 38 A.D.3d 474 (1st Dep't 2007) (finding that the tenant complaints referred to by the landlord in its termination notice based upon nuisance were appropriately provided in the bill of particulars). Petitioner need not bare its trial proof in its predicate notice. See McGoldrick v. DeCruz, 195 Misc. 2d 414 (App. Term, 1st Dep't 2003).

Lastly, the court determines that Petitioner has stated a cause of action based upon nuisance. Respondent is correct in arguing that smoking in one's own apartment does not rise to the level of nuisance. See Ewen v. Maccherone, 32 Misc. 3d 12 (App. Term, 1st Dep't 2011). See also Jovic v. Blue, 56 Misc. 3d 136(A) (App. Term, 2d Dep't, 2d, 11th & 13th Jud. Dists. 2017). Here, however, the basis of Petitioner's claim is not that Respondent smokes within the confines of the subject premises, but that his smoking next to an oxygen tank threatens the safety of other tenants in the building. Certainly, smoking next to an oxygen tank with the apartment door open threatens the safety of others.

On January 9, 2022, a fire in a Bronx apartment building killed 17 people, including 8 children. See Kelly McCleary, Air Vera, and Liam Reilly, “All 17 victims of Bronx apartment fire, including 2-year old, died of smoke inhalation, NYC medical examiner rules,” C.N.N. (updated January 13, 2022, 12:15 A.M.), <http://www.cnn.com/2022/01/11/us/new-york-bronx-apartment-fire-tuesday/index.html>. The cause of the fire was due to a defective space heater which caused smoke to spread because the apartment door and the door to the stairwell were left open even though these doors were supposed to be self-closing. Here, the notice states that Respondent leaves the door open while he smokes near an oxygen tank. Such a scenario poses a considerable threat to other residents because a fire from a lit cigarette burns fast in an oxygen-enriched environment due to oxygen acting as an accelerant. See “Fatal Fires Associated with Smoking During Long-Term Oxygen Therapy – Maine, Massachusetts, New Hampshire, and Oklahoma, 2000-2007,” Center for Disease Control and Prevention (August 8, 2008), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5731a3.htm>. The predicate notice also states that Respondent, in at least one occasion, dropped a lit cigarette on the ground and had to call out for help to a neighbor because he was unable to retrieve it. What may result if a neighbor is not there to heed the call for help and Respondent is unable to pick up a lit cigarette in an oxygen-enriched environment?

Hence, this court determines that the predicate notice is sufficient to apprise Respondent that Petitioner is seeking possession of the subject premises based upon a nuisance cause of action due to continually smoking next to an oxygen tank and that this conduct threatens the safety of other residents.

Based on the foregoing, Respondent’s motion to dismiss is denied in its entirety. The matter shall appear on the court’s calendar on October 21, 2022 at 11:15 A.M. in Part B (Room 360) for an in-person, pre-trial conference. A written answer shall be served and filed on N.Y.S.C.E.F. on October 7, 2022.

The foregoing constitutes the decision and order of the court.

Dated: September 23, 2022
Bronx, N.Y.



Omer Shahid, J.H.C.