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2019 NY Slip Op 50448(U)

JASPER, L.P., Petitioner-Landlord,
v.
LOVE DAVIS, "JOHN DOE" and "JANE DOE", Respondents-Licensees.

[23196/18.](#)

Civil Court of the City of New York, Bronx County.

Decided March 11, 2019.

Sperber Denenberg & Kahan, P.C., 48 West 37th Street, 16th Floor, New York, NY 10018, for Petitioner.

Mobilization for Justice, Inc., 540 East Fordham Road, Bronx, NY 10458, for Respondent.

SHORAB IBRAHIM, J.

The decision and order on this motion is as follows:

BACKGROUND & PROCEDURAL POSTURE

Petitioner commenced the instant licensee holdover proceeding against Love Davis ("Respondent") who resides in the premises located at 1863 Melrose Ave, Apt. 5-B, Bronx NY 10451 ("Premises"). Respondent entered into possession of the premises through her mother, tenant of record Georgeanne Davis ("Tenant"). This proceeding first appeared on the court's calendar on May 14, 2018. It was then adjourned several times and eventually marked off the calendar on July 31, 2018. The case was thereafter restored to the calendar on October 11, 2018. It was again adjourned several more times for possible settlement and then for the instant motion.

Respondent now moves to dismiss the proceeding pursuant to C.P.L.R. § 3211(a)(7) for failure to state a cause of action. She alleges the predicate 10 Day Termination notice is impermissibly vague and therefore fatally defective. She further moves under C.P.L.R. § 3211(a)(7) and R.P.A.P.L § 741(4) arguing the petition fails to properly plead the regulatory status of the premises. The petition pleads the unit as rent stabilized. Respondent asserts that the premises is subject to additional regulatory schemes that are omitted in the petition, namely a regulatory agreement with the New York City Department of Housing Preservation and Development ("HPD"), the Shelter Plus Care program ("S+C"), project-based Section 8, and Low-Income Housing Tax Credits ("LIHTC"). Petitioner argues the pleading is sufficient, but in any event, cross-moves to amend the petition to reflect the regulatory status.

DISCUSSION

Failure to Plead the Regulatory Status

A petition that commences a summary proceeding is required to state the facts upon which the proceeding is based. (RPAPL § 741(4)). The tenant is entitled to a concise statement of the ultimate facts upon which the proceeding is based. ([Giannini v Stuart](#), 6 AD2d 418, 178 NYS2d 709 [1st Dept 1958]). To be entitled to relief in a summary proceeding, it is necessary that a landlord "plead rent regulatory status and compliance with the appropriate statutes and codes . . . and actually be in compliance therewith." ([Villas of Forest Hills Co. v Lumberger](#), 128 AD2d 701, 702 [2nd Dept 1987]). A petition must plead government contracts to which petitioner is a party as the contract may provide the tenant with certain potential defenses. ([Volunteers of Am.- Greater New York, Inc. v Almonte](#), 65 AD3d 1155, 886 NYS2d 46 [2d Dept 2009]). The Appellate Division in *Almonte* noted:

[P]ursuant to RPAPL 741, in the petition the petitioner was required to allege the existence of the contract between the DHS and the petitioner, because without that allegation, the Civil Court and the tenant would be unaware that the City owned the building in which the subject premises were located. The contract provided the tenant with certain potential defenses, and the Civil Court could not have properly adjudicated this proceeding without that contract.

See also, [Park Props. Assoc., L.P. v Williams](#), 38 Misc 3d 35 [App Term 2012] (A petition which fails to satisfy this requirement [pleading the regulatory status in the petition] is subject to dismissal.)

Here, Respondent claims that Petitioner's failure to plead all the rules and laws governing the instant tenancy renders the petition fatally defective as the regulatory status is an essential fact which must be stated in the petition. Respondent claims there are several regulatory frameworks at play. She attaches to her moving papers a copy of the regulatory agreement between Petitioner and HPD. (Respondent's exhibit A). The agreement states that in addition to the regulatory agreement itself, the premises is subject to the S+C program and that Petitioner receives LIHTC. Respondent also maintains that the premises is subject to project-based Section 8. She provides copies of several HPD Project Based Section 8 "Rent Breakdown" notices mailed to the Tenant which detail Tenant and HPD's respective portions of the monthly rent. (Respondent's exhibit F). Respondent also annexes a record of "HAP Payments" made to Petitioner on the Tenant's behalf. (Respondent's exhibit D).

According to Respondent, the petition must plead the full extent of the regulatory status to put her on notice of the scope of her potential rights and defenses. She argues that, as the daughter of the Tenant — the head of the Section 8 household, she had the right to seek succession to the subsidy. Additionally, she asserts the S+C program is a federal program which provides additional due process rights to program participants including those regulating the process for terminating the subsidy. Therefore, she claims, failure to include a reference to these regulations in the petition

prevented her from adequately formulating her defenses.

Petitioner opposes arguing that the petition is legally sufficient as it pleads that the premises is subject to rent stabilization. It further claims that the failure to name any other regulations is "at most a de minimis error" that may be cured by amendment. Petitioner acknowledges that in addition to rent stabilization, there is a regulatory agreement in effect between Petitioner and HPD and that the premises is subject to the S+C program and HOME program. However, it denies that the premises is subject to project-based Section 8. Petitioner alleges that Respondent conflates the purported Section 8 program with the "Continuum of Care Shelter Plus Care Program Rental Subsidy." In support of this contention, Petitioner annexes to its papers a notice titled "Notice of Section 8 Rent Subsidy Termination" which in small print states that the Tenant's "Continuum of Care Shelter Plus Care Rental Subsidy" has been terminated. (Petitioner's exhibit F). Petitioner offers no explanation as to why Respondent or the Tenant received the several notices from HPD specifically referencing the Tenant's project-based Section 8 subsidy. Further, Petitioner acknowledges its termination notice states that the premises is subject to a "project based subsidy."

Petitioner also argues that the failure to reference the regulatory status between it and HPD has not caused Respondent undue prejudice or surprise. Petitioner points to the fact that Respondent, through counsel, filed an answer which includes the failure to plead the regulatory status as a defense and concludes that Respondent was aware of the existence of the regulatory agreement from the commencement of the proceeding. Therefore, it maintains, Respondent was unprejudiced by the omission in the petition. Petitioner also argues that Respondent cannot claim prejudice because she is not the tenant of record and, as such, is not the "participant" of the S+C program and therefore does not derive rights from the regulatory agreement. Petitioner in its affirmation does note, however, that pursuant to S+C rules, family members remaining after the death, long-term incarceration, or long-term institutionalization are entitled to remain in the premises until the expiration of the lease in effect at the time of the participant's vacatur. (*See, 24 CFR § 578*).

In light of the facts and applicable law, this court agrees that Petitioner's failure to fully plead the regulatory status pursuant to RPAPL § 741(4) renders the petition fatally defective and warrants dismissal of the petition. Petitioner's description of the regulatory status as merely being rent stabilized significantly understates the breadth of regulation applicable to the tenancy. It fails to note that a regulatory agreement exists between Petitioner and New York City through HPD. By neglecting to include this fact in the pleadings, Petitioner fails to put Respondent *and the court* on notice that the premises is subject, at the very least, to the S+C program, HOME program, and LIHTC program pursuant to that agreement. (*Almonte, supra*; See also, [Westchester Gardens L.P. v Lanclos](#), 43 Misc 3d 681, 687, 982 NYS2d 302 [Civ Ct, Bronx County 2014] ("the insufficient petition caused prejudice to tenant who could not know the regulatory thicket involved with her tenancy or the availability of defenses")). The parties agree that there are at least some protections offered to Respondent as a remaining family member under the S+C program. There is no dispute^[1] that the regulatory agreement requires the premises to be used "exclusively as housing accommodations for persons of low income not less than sixty percent (60%) of whom shall be Homeless Tenants." (Petitioner Exhibit A, ¶ 2). The Regulatory Agreement also refers to the Owner being

"responsible for implementing and overseeing the provision of necessary on-site social services" (*id.* at ¶ 10). It further makes clear that thirty-one (31) two bedroom units are subject to the Shelter Plus Care Program. (*id.* at ¶ 5). The Shelter Plus Care program "provides rental assistance for homeless people with disabilities, primarily those with serious mental illness, chronic problems with alcohol and/or drugs, and acquired immunodeficiency syndrome (AIDS), and other related diseases."^[2] This court must be made aware of the proper regulatory status to know any of the above.

Based on the documentary evidence produced by Respondent, the unit may also be subject to a HPD project-based Section 8 subsidy. Petitioner does not point to any reason why the unit could not be subject to both the S+C program and project-based Section 8. This is especially true considering the language of the regulatory agreement which states that the S+C program is the HUD funding source for the loan HPD provided to Petitioner for acquiring or rehabilitating the premises. It is conceivable that Petitioner received S+C funds in order to acquire or rehabilitate the premises, and, in addition, receives project-based Section 8 funding to subsidize the rent for the subject tenancy.

Given the number of regulating frameworks, Petitioner was obligated to put Respondent and the court on notice of the scope of Respondent's rights and possible defenses. The fact that Respondent was able to retain counsel who could raise defenses to the proceeding after its commencement does not absolve Petitioner from the requirements under the RPAPL.

Petitioner cites to [*OLR ECW, L.P. v. Myers*, 59 Misc 3d 650](#) [Civ Ct, Bronx County 2018] in support of its contention that Respondent must prove she suffered prejudice in order for the petition to be fatally defective. This court notes that the Appellate Division in *Almonte* did not consider prejudice when it held the petition fatally defective for failing to state the regulatory status. Even so, the facts herein are not inconsistent with the holding in *Myers*. For example, the Respondent in *Myers* did not dispute "Petitioner's claim that they are mere licensees of the tenant of record."

The court finds that Respondent is prejudiced by the omissions in the petition. First, as noted above, the S+C regulations contain protections for remaining family members like Respondent. As such, Respondent should have been given notice of the program at the onset of the case. Second, there is clear confusion as to which regulations are applicable to the tenancy. Respondent alleges that the tenancy is subject to project-based Section 8 and points to the notices from HPD to the Tenant and Respondent's attempt to succeed to the HPD subsidy. Petitioner insists that the premises is subject only to an S+C "Continuum of Care" subsidy despite the notices from HPD to the Tenant expressly describing the tenancy as subject to project-based Section 8. The evidence suggests Petitioner had knowledge of the purported HPD Section 8 notices being sent to Respondent as it does not deny Petitioner's receipt of an October 2017 notice to Petitioner from HPD annexed to Respondent's motion. (Respondent's exhibit F-10/19/17 "PROJECT BASED SECTION 8 RENT BREAKDOWN"). The notice is addressed to Petitioner Jasper LP, 42 West 39th Street, Floor 14, New York, NY 10018. That address is the current address on the required building registration on file with the Department of Housing Preservation and Development.^[3] It is also the address (without floor number) indicated for the "HAP Payee." (Respondent's exhibit

D). Petitioner's knowledge that Section 8 notices were going to the premises highlights the importance to clearly allege in the petition that the premises are not, in reality, subject to Section 8, but to the S+C program alone. Failure to do so misleads Respondent and prevents her from formulating defenses stemming from the actual regulatory status of the premises. Just as importantly, the court is unable to fully assess the matter before it when it is not provided the proper regulatory frameworks.

Even if this court were to find there was no prejudice to Respondent and permitted Petitioner to amend the pleadings, the petition would still warrant dismissal. Petitioner's proposed amendment to the regulatory status states only that "[t]he apartment is subject to a Regulatory Agreement dated November 16, 2005, and as amended on February 10, 2010 and March 10, 2010." This amendment, too, is deficient as it does not give any indication as to the parties to the regulatory agreement nor that the tenancy is subject to the S+C, HOME, or LIHTC programs pursuant to the terms of the contract.

As the court dismisses the petition on the stated grounds it does not reach the balance Respondent's arguments or the cross-motion.

CONCLUSION

Based on the foregoing, it is hereby,

Ordered, Respondent's motion is granted, and the proceeding is dismissed without prejudice. This constituted the Order/Decision of the Court.

SO ORDERED,

^[1] Each party attaches a copy of the Regulatory Agreement to their papers.

^[2] <https://www.hud.gov/hudprograms/spc>, last accessed March 11, 2019.

^[3] https://hpdonline.hpdnyc.org/HPDOnline/select_application.aspx, last accessed March 11, 2019.