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985 Bruckner Blvd. Owners LLC v Fuentes
2022 NY Slip Op 51054(U)
Decided on October 27, 2022
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
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As corrected in part through October 31, 2022; it will not be published in the printed Official Reports.

Decided on October 27, 2022

Civil Court of the City of New York, Bronx County

985 Bruckner Boulevard Owners LLC, Petitioner,

against

Daisy Fuentes, Respondents (Tenants).

L & T Index No. 305193-2022

For Petitioner: Gutman, Mintz, Baker & Sonnenfeldt, P.C.

For Respondent: Mobilization for Justice, Inc.

Shorab Ibrahim, J.

RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION BY THE RESPONDENT TO DISMISS THE PROCEEDING: NYSCEF Document No. 11.[FN1]

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

PROCEDURAL POSTURE

Petitioner commenced this holdover proceeding alleging respondent breached her lease because of alleged repeated objectionable conduct. Respondent seeks dismissal for failure to state a cause of action. The motion is unopposed.

On a motion to dismiss the complaint pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*see Leon v Martinez*, 84 NY2d 83, 87, 614 NYS2d 972 [1994]; *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704, 864 NYS2d 70 [2nd Dept 2008]). A CPLR 3211 (a) (7) motion "must be denied 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it.'" (*Sokol v Leader*, 74 AD3d 1180, 1182, 904 NYS2d 153 [2nd Dept 2010] *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]).

Respondent seeks dismissal on three (3) grounds:

(a) that the notice to cure does not advise what must be done to cure the alleged reach/conduct;

(b) that the notice of termination fails to state sufficient facts to conclude the allegations in the notice to cure were, in fact, not cured, and;

(c) that the notice(s) do not properly plead a continuous course of conduct required to support the nuisance claim.

The court addresses each argument in turn.

DISCUSSION

"A notice to cure that forms the basis for a petition initiating a holdover proceeding must set forth sufficient facts to establish grounds for the tenant's eviction, and inform the tenant as to how the tenant violated the lease, *as well as the conduct required to prevent eviction*." (*Westhampton Cabins & Cabanas Owners Corp. v Westhampton Bath & Tennis Club Owners Corp.*, 62 AD3d 987, 988, 882 NYS2d 124 [2nd Dept 2009] [emphasis added] *citing Domen Holding Co. v Aranovich*, 1 NY3d 117, 769 NYS2d 785 [2003]).

The October 7, 2021 notice to cure alleges the respondent engaged in verbal and physical altercations with other tenants and building employees, acted aggressively toward both, made unfounded allegations against employees, and was observed without pants and/or

a shirt numerous times. Eight (8) numbered paragraphs allege objectionable acts on specific dates through June 21, 2021. Paragraph nine (9) alleges the respondent continues to engage in such behavior. (*see* NYSCEF Doc. 1, p. 3-5). The notice advises respondent that she "must correct the above conditions by October 23, 2021, otherwise the landlord shall be forced to commence legal proceedings against you to terminate your tenancy." (*id.*)

A predicate notice is sufficient if it is reasonable in view of all attendant circumstances. (*see 542 Holding Corp v Prince Fashions, Inc*, 46 AD3d 309, 310, 848 NYS2d 37 [1st Dept 2007]; *Oxford Towers Co, LLC v Leites*, 41 AD3d 144, 837 NYS2d 131 [1st Dept 2007]). Here, advising respondent to "correct" the objectionable conduct [by a date certain] warns her to stop such conduct. A cure occurs when the specified conduct stops. (*see Woodlawn 278-305, LLC v Barnett*, 72 Misc 3d 1208(A), *6, 2021 NY Slip Op 50675(U) [Civ Ct, Bronx County 2021]).

As such, affording petitioner every favorable inference, dismissal on this ground is denied.

The November 21, 2021 termination notice restates the allegations in the notice to cure and *adds*, "You continue to engage in anti-social, disruptive, destructive, and dangerous behavior in and around the building after the Notice to Cure expired. Other tenants and building employees have advised that they are concerned for their safety and well being due to your presence [sic] violent and aggressive behavior in the building. You were observed smashing a glass door on your floor of the building. You have exhibited abusive and dangerous conduct on an on-going basis as of November 15, 2021." (*see* NYSCEF Doc. 1 at p. 33).

In view of all the attendant circumstances, the termination notice sufficiently alleges the respondent's failure to comply with the notice to cure. Though more specificity is preferable, its absence is not necessarily fatal. (*see McGoldrick v DeCruz*, 195 Misc 2d 414, 415 758 NYS2d 756 [App Term 1st Dept 2003] ("A predicate notice in a holdover summary proceeding need not lay bare a landlord's trial proof, and will be upheld in the face of a 'jurisdictional' challenge where, as here, the notice is 'as a whole sufficient adequately to advise ... tenant and to permit it to frame a defense'")).

The allegations in the termination notice are sufficient to allow the respondent to prepare a defense. (*see 69 EM LLC v Mejia*, 49 Misc 3d 152[A], 29 NYS3d 849 [App Term, 1st Dept 2015]). Given the relative detail of the allegations listed in the notice to cure and

restated in the [*2]notice of termination,[FN2] the termination notice meets the minimum standard of reasonableness, at least to survive a CPLR § 3211(a)(7) motion.

In *Pinehurst Constr. Corp. v Schlesinger,* the Appellate Division found that a notice of termination "setting forth no names, dates or specific instances of the misconduct," described "a nuisance ... with sufficient detail to have allowed tenant to prepare a defense." (38 AD3d 474, 475, 833 NYS2d 428 [1st Dept 2007]).

This court also agrees with the thoughtful analysis in *1123 Realty LLC v Treanor*, (62 Misc 3d 326, 332-333, 86 NYS3d 381 [Civ Ct, Kings County 2018]), where the court found the "reasonableness" standard (as noted in *Hughes v Lenox Hill Hosp.*, 226 AD2d 4, 18, 651 NYS2d 418 [1st Dept 1996]) is not susceptible to a bright-line rule. Rather, "reasonableness" is a fact- specific determination based on a totality of the circumstances.

Here, the termination notice, in conjunction with the notice to cure, adequately apprises the tenant of the grounds upon which it was based, thus permitting her to prepare a defense. (*see 1123 Realty LLC v Treanor*, 62 Misc 3d at 332). The four-week delay in issuing the notice of termination (which includes language that the alleged behavior continues post-cure period) indicates that petitioner did not reflexively issue the termination notice. (*see id.* at 333; *see also Jericho Project Lessee v Marte-Travera*, 67 Misc 3d 1204(A), *5, 2020 NY Slip Op 50391(U) [Civ Ct, Bronx County 2020]; *compare 76 W. 86th St. Corp. v Junas*, 55 Misc 3d 596, 599, 45 NYS3d 921 [Civ Ct, New York County 2017] (notice of termination dated just two days after the date respondent was required to cure); *31-67 Astoria Corp. v Landaira*, 54 Misc 3d 131(A), 52 NYS3d 248 [App Term, 2nd Dept 2017] (one-day gap between cure date and service of notice of termination where grounds were for nuisance and failure to give access)).[FN3]

Respondent may also request amplification of the post-cure allegations through a bill of particulars. (*see Chelsea 19 Assocs. v Coyle*, 22 Misc 3d 140(A), 881 NYS2d 362 [App Term, 1st Dept 2009] ("Further information concerning the tenant's alleged failure to properly cure the noise condition was appropriately provided in landlord's bill of particulars."); *City of New York v Valera*, 216 AD2d 237, 238 628 NYS2d 695 [1995]).

This court is not persuaded that *31-67 Astoria Corp. v Landaira* represents any change in law, notwithstanding that many courts, including this one, have cited to it for the proposition that a notice of termination must include new facts that confirm that a respondent failed to cure. (*see e.g. Reinozo v Eskander*, 2017 NYLJ LEXIS 2151 [Civ Ct, Queens

County 2017]; *Bell v Han*, 2017 NYLJ LEXIS 2395 [Civ Ct, Queens County 2017]; *BEC Continuum Owners v Taylor*, [*3]2018 NYLJ LEXIS 1821 [Civ Ct, Kings County 2018]; *ML 1188 Grand Concourse LLC v Khan*, 60 Misc 3d 1215(A), 2018 NY Slip Op 51139(U) [Civ Ct, Bronx County 2018]; *Rochdale Vil., Inc. v Stone*, 66 Misc 3d 737, 116 NYS3d 553 [Civ Ct, Queens County 2019]; *2704 Univ. Ave. Realty v Thompson*, 63 Misc 3d 1222(A), 2019 NY Slip Op 50652(U) [Civ Ct, Bronx County 2019]; *Fen Xiu Chen v Salvador*, 71 Misc 3d 1225(A), 2021 NY Slip Op 50499(U) [Civ Ct, Queens County 2021]).[FN4]

First, the termination notice in *Landaira literally* failed to state that that the tenant had not cured. (54 Misc 3d 131(A) ("The notice to terminate, served one day after the cure period had expired, did not allege that tenant had failed to cure the alleged defaults specified in the notice to cure."). Dismissal was expressly granted on this "narrow ground." (s*ee 1123 Realty LLC v Treanor*, 62 Misc 3d at 334).

In any event, just months ago, the Appellate Term, First Department, opined (albeit in dicta) that notices (including the notice of termination) "were reasonable 'in view of the attendant circumstances' since they set forth case-specific allegations tending to support landlord's nuisance claim with sufficient detail to have allowed respondents to prepare a defense and otherwise satisfied the specificity requirements" the Rent Stabilization Code. (*Shwesinger v Perlis*, 75 Misc 3d 135(A), 2022 NY Slip Op 50550(U) [App Term, 1st Dept 2022] (internal citations omitted).

The June 8, 2018 notice to cure in *Schwesinger* is eleven (11) pages and lists more than fifty (50) specific allegations of objectionable conduct occurring from 2013 through May 2018. (*see* NYSCEF Doc. 77 under Index No. 67376/18). The notice of termination lists the *same* conduct set forth in the notice to cure, and states,

> PLEASE TAKE FURTHER NOTICE, that your tenancy of the Apartment is hereby terminated effective July 16, 2018, upon the grounds that you are violating a substantial obligation of your lease and tenancy and you have failed to cure such violation after written notice from the landlord dated June 8, 2018 (the "Notice to Cure") that the violation or violations cease by June 27, 2018, that date having been more than ten (10) days after service of the Notice to Cure (a copy of the Notice to Cure, together with proof of service is annexed hereto and made a part hereof. (NYSCEF Doc. 76 under Index No. 67376/18).

The notice of termination contains no new facts. It merely alleges failure to comply with the notice to cure. However, just as termination notices ought not be mere formalities reflexively issued immediately after the cure period expires, dismissal should not be granted just because

a notice to termination does not include post-cure period facts.

For these reasons, and affording petitioner every favorable inference, this second branch of the motion to dismiss is denied.

Nuisance imports a continuous invasion of rights—"a pattern of continuity or recurrence of objectionable conduct" (*Domen Holding Co. v Aranovich*, 1 NY3d at 124, *quoting Frank v Park Summit Realty Corp.*, 175 AD2d 33, 34 [1st Dept 1991], *mod on other grounds* 79 NY2d 789 [1991]). Respondent argues the notices do not adequately plead a continuous course of conduct.

The court disagrees. The notices detail multiple incidents from January 2020 through November 2021, an almost two-year period. These allegations of respondent's conduct are of the type that may render the enjoyment of the building especially uncomfortable—indeed, they may even be threatening and frightening—for other tenants and building staff. (*Domen Holding Co. v Aranovich*, 1 NY3d at 124).

Aranovich is illustrative:

> "While surely a high threshold of proof would be required for eviction, we cannot conclude as a matter of law, as the courts below did, that dismissal of the complaint was warranted. The notice clearly provides that nuisance is the ground upon which plaintiff relies for tenants' eviction and sets forth the facts necessary to establish that ground (see 9 NYCRR 2525.2 [a], [b]; 2524.3 [b]). The notice provides fact-specific examples of Sanders' outrageous conduct and details his use of profanity, racial epithets and threats of violence against Ellis, his threats to physically harm DeRosa and his actual use of violence against the superintendent." (*id.*)

The court notes that the notice in *Aranovich* had only three (3) specific allegations and the conduct took place over a five (5) year period. Here, there are more than twice as many alleged bad acts over a two-year period. In *129th St. Cluster Assoc. v Levy*, the court held that even if the "underlying incidents were 'sporadic,' the severity and circumstances under which the incidents took place display an intolerance and aggression toward those living within the building, and suggest that tenant is easily incensed and prone to threatening and frightening outbursts, conduct that places the comfort and health of others in the building." (54 Misc 3d 128(A), *2-3, 50 NYS3d 27 [App Term, 1st Dept 2016]; *see also Peters v Owens*, 48 Misc 3d 128(A), 2015 NY Slip Op 50930(U) [App Term, 1st Dept 2015] (affirming trial court's holding that the "tenant's belligerent and aggressive behavior placed an intolerable burden on neighboring tenants and building staff.")).

The notices here indicate respondent's objectionable conduct is far from "sporadic."

For these reasons, and giving affording petitioner every favorable inference, the third branch of the motion to dismiss is denied.

Answer

Respondent's request to file an answer is granted. The court notes the request is unopposed. In any event, respondent should have the full benefit of counsel. (s*ee E. 168th St. Assocs. v Castillo*, 60 Misc 3d 774, 780 79 NYS3d 485 [Civ Ct, Bronx County 2018])

CONCLUSION

Based on the foregoing, respondent's motion to dismiss the proceeding is denied in all respects. The motion for leave to serve and file an answer is granted. The proposed answer attached to NYSCEF Doc. 11 is deemed served and filed. The matter is adjourned to November 22, 2022 at 9:30 AM for a pre-trial conference. Any motions must be made returnable on that date. This constitutes the decision and order of the court. It will be posted on NYSCEF.

Dated: October 27, 2022
SO ORDERED,
Bronx, NY
SHORAB IBRAHIM, JHC

Footnotes

Footnote 1: Respondent did not file each document individually. Thus, NYSCEF Doc. 11 includes the notice of motion, memorandum of law, attorney affirmation, and proposed answer.

Footnote 2:see Respondent's Memorandum of Law, NYSCEF Doc. 11 at p. 9 ("For each of the allegations which predate the cure period, the Termination Notice includes specific dates, as well as relatively detailed descriptions of the specific persons and behavior involved with each allegation.").

Footnote 3:*see also 340 Clifton Pl. LLC v Legette*, 2018 NYLJ LEXIS 2830 [Civ Ct, Kings County 2018] (one-day gap in nuisance claim based on harassment and drug use); *CDC E 105th St Realty LP v Mitchel*, 2017 NYLJ LEXIS 1195 (Civ Ct, NY County 2017) (two-day gap for unsanitary and unsafe conditions ground); *Second Hous. Co. Inc. v Davis,* 2016

NYLJ LEXIS 4845 (Civ Ct, Queens County 2016) (finding lack of good faith on curable nuisance ground where termination notice served one day after cure date)).

Footnote 4: This court in no way suggests any of these cases were incorrectly decided. After all, determining the sufficiency of each notice requires a fact-specific analysis.

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