

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

[All Decisions](#)

[Housing Court Decisions Project](#)

2022-11-03

Citiwide Preservation LLC v. Barnes

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

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

CITIWIDE PRESERVATION LLC

Index No. 307430-21

Petitioner,

DECISION/ORDER

-against-

Motion Sequence Nos. 1

SHALETTA BARNES, JOHN DOE,
JANE DOE

Respondents.

HON KAREN MAY BACDAYAN, JHC

Cullen & Associates, PC (Robert James Marino, Esq.), for the petitioner
The Legal Aid Society (Brea Claire Davis, Esq.), for the respondent-Shaletta Barnes

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by NYSCEF Doc No: 8-18.

PROCEDURAL HISTORY AND BACKGROUND

This is a holdover summary proceeding brought against Shaletta Barnes (“respondent”) based on the allegation that she is illegal subletting her apartment in violation of her lease and the Rent Stabilization Code (9 NYCRR) § 2524.3 (a) and § 2525.6 (f).

The notice to cure (NYSCEF Doc No 1 at 13) states in relevant part:

- 1. You have not been observed residing in the apartment nor observed in the building common areas;
- 2. Management has observed multiple unknown/unidentified occupants residing in your apartment and entering/exiting both your apartment and the building;
- 3. Occupants other than yourselves, to wit "JOHN DOE" and/or "JANE DOE", are presently residing in the apartment;
- 4. A handwritten letter was left on the mailbox corresponding to your apartment and read as follows "Just moved in please ring buzzer I didn't get mailbox key yet!";
- 5. You did not request the landlord's permission to sublet the apartment and the landlord has never given its permission allowing the aforementioned individual(s) to occupy and/or sublet the subject premises.

The notice of termination (*id.* at 6) states:

“[S]ubsequent to expiration of the cure period, you have continued to not be observed residing in the apartment nor observed in the building common areas and, management has continued to observe multiple unknown/unidentified occupants residing in your apartment and entering/exiting both your apartment and the building. The unknown individuals have been observed entering/exiting the apartment on multiple/various dates including but not limited to September 13, 2021, September 15, 2021, September 16, 2021, September 17, 2021 and September 20, 2021.”

Respondent moves to dismiss the proceeding pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, and CPLR 3211 (a) (8) and RPAPL § 735 for failure to properly serve her with the notice of petition and petition. In the alternative, respondent moves to dismiss the proceeding on the basis that the notice to cure and notice of termination are vague, conclusory and lack specificity.

Respondent avers that she lives alone with her granddaughter. (NYSCEF Doc No. 9, at 13, Barnes affidavit ¶ 2.) She knows she was not home during the first attempt at personal service on Friday, November 19, 2021 because she was following her regular radiation treatment routine of leaving for her appointments at 11:15 a.m. on Fridays, and returning home by 4:30 p.m. (*Id.* ¶ 6.) On Mondays respondent receives radiation treatment and follows the same routine. Thus, she states she was home on Monday evening, November 22, 2021 at 6:20 p.m. recovering from her appointment when the second attempt at personal service is alleged. (*Id.* ¶ 9.) Further, she knows that a notice was not posted to the door on Tuesday, November 23, 2021 because she is always home on Tuesdays recuperating from radiation therapy. (*Id.*)

With regard to the predicate notices, respondent points to the description of the unknown individuals who come and go from the apartment, and argues that petitioner has failed to indicate how or why it believes that these unidentified persons actually reside in the premises. Respondent further points to petitioner’s failure to include any details regarding the alleged sublessees’ identities. These notices, respondent posits, which are not amendable, cannot serve to support a cause of action for illegal sublet. Respondent’s affidavit, duly sworn and based on personal knowledge, states that she has resided in the apartment since 1996, that she lives in the apartment with her 11 year old granddaughter, and that no one else lives with them. (NYSCEF Doc No. 9 at 1–11, petitioner’s attorney’s affirmation; *id.*, Barnes affidavit at 12–14.)

Petitioner, through its attorney, opposes on the basis that the notices are “reasonable under the attendant circumstances,” and that respondent has not met the standard to rebut a sworn process server’s affidavit. Petitioner has not submitted affidavit from an individual with personal knowledge.

DISCUSSION

On a motion to dismiss 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 and determine only whether the facts as alleged fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87 [1994].)

A predicate notice served pursuant to the Rent Stabilization Code must state the facts necessary to establish the ground for eviction. (Rent Stabilization Code [9 NYCRR] § 2524.2 [b].) “[B]road, unparticularized allegations” that are “generic and conclusory” neither satisfy the level of specificity required by Section 2524.2 (b) of the Rent Stabilization Code, nor do they enable the tenant to prepare a defense. (*69 E.M. LLC v Mejia*, 49 Misc 3d 152 [A], 2015 NY Slip Op 51765[U] [App Term, 1st Dept 2015], citing *Berkeley Assoc. Co. v Camlakides*, 173 AD2d 193 [App Div, 1st Dept 1991], *affd* 78 NY2d 1098 [1991].) The Appellate Term has written that the “salutary purpose” of requiring specific facts within predicate notices is “to discourage baseless eviction claims founded upon speculation and surmise, rather than concrete facts.” (*London Terrace Gardens, L.P. v Heller*, 40 Misc 3d 135[A], 2009 NY Slip Op 52858[U] [App Term, 1st Dept 2009] [generic and conclusory allegations do not satisfy requirement to set forth facts necessary to establish grounds for claim of nonprimary residence].)

Predicate notices must satisfy a “reasonableness in view of all attendant circumstances” standard. (*Hughes v Lenox Hill Hosp.*, 226 AD2d 4, 17 [1st Dept 1996].) This means that the notice must “provide the necessary additional information to enable the . . . respondent to frame a defense to meet the tests of reasonableness and due process.” (*Jewish Theological Seminary of America v Fitzer*, 258 AD2d 337, 338 [1st Dept 1999].) Predicate notices are not amendable, and must be adequate to support a cause of action. (*Chinatown Apts. Inc. v Chu Cho Lam*, 51 NY2d 786 [1980].)

For the following reasons, Respondent's motion to dismiss this proceeding on the grounds that the predicate notices are fatally insufficient as required by 9 NYCRR Section 2524.2 (b) is granted.

Petitioner’s notice to cure states, *without a time-frame*, that respondent “has not been observed residing in the apartment nor observed in the building common areas.” The notice further alleges that “[m]anagement has observed multiple unknown/unidentified occupants residing in your apartment and entering/exiting both your apartment and the building.”¹ Finally, petitioner calls the court’s attention to a letter that it believes makes the case that it is reasonable to assume that someone besides respondent and her granddaughter are living in the apartment. (NYSCEF Doc No 1 at 13.)

Petitioner’s notice of termination, which incorporates the notice to cure by reference, states that after the expiration of the cure period the “unknown individuals” were observed “entering/exiting” the apartment during the week of September 13, 2021 through September 20, 2021. (*Id.* at 6.)

No further details or specific factual allegations are provided in the notice to cure to support an illegal sublet claim. Petitioner does not attempt to identify the alleged “multiple unknown/unidentified persons,” or demonstrate efforts to discover the names of any of these persons. Nor does Petitioner provide information as to who has made the observations, or even an approximation of how many individuals are allegedly residing in the apartment. Petitioner’s own portrayal of the indefinite number persons who enter and leave the apartment as “unknown” and “unidentified” is no description at all. It merely describes strangers to whom petitioner’s (*also* unidentified) agents have not spoken, and whom petitioner knows nothing about. Petitioner also conspicuously fails to allege that it believes respondent lives elsewhere, and proffers no details connecting respondent to an alternate address. Petitioner’s conclusory assertion that respondent has not received permission to sublet the premises merely recites an element of the claim which petitioner surmises exists. The ostensible “smoking gun” --- a handwritten letter observed by an unidentified individual in the vicinity of respondent’s mailbox on an unspecified date --- is inadequate to rehabilitate the insufficiency of the notice. Nor does the nod to detail in the notice of termination, provided in the form of dates on which unidentified individuals saw an unidentified number of persons entering and exiting the apartment, provide grounds to terminate respondent’s 16-year tenancy for illegally subletting the subject premises.

¹ “Management” is collective noun which does not specify who within the management community has observed respondent’s alleged absence. Moreover, “multiple” describes *any* group “involving more than one,” in and of itself defying specificity. See Merriam-Webster’s Collegiate dictionary (11th ed, 2020) (Note: online version).

At least a modicum of specificity is required in order for the notice to be sufficient to support an illegal sublet proceeding. (See e.g. *Perle v Ross*, 1150 Misc 2d [App Term, 1st Dept 1991] [notice is sufficient where alleged illegal sublessee is *identified by name*]; *Amin Mgt LLC v Martinez*, 55 Misc 3d 144[A], 2017 NY Slip Op 50664[U] [App Term, 1st Dept 2017] [notices are sufficient in an illegal sublet proceeding where *the number of individuals* occupying apartment are cited]; *East Vil. RE Holdings v McGowan*, 57 Misc 3d 155[A], 2017 NY Slip Op 51623[U] [App Term, 1st Dept 2017] [notice in illegal sublet proceeding that alleges tenant *living at another specified address and gives subtenant's name* meets standard for specificity]; *235 W. 71st St., LLC v Checkak*, 16 AD3d 242 [App Div, 1st Dept 2005] [dismissing an illegal assignment proceeding on summary judgment where "[t]he only evidence proffered by petitioner was that the apartment *may not be* [the tenant's] primary residence (emphasis added)"]; *ML 1188 Grand Concourse LLC v Khan*, 110 NYS3d 224 [Civ Ct, New York County 2018] [finding that predicate notices which merely alleged that the Respondent had "sublet or assigned all of part of the premises to 'a number of persons'" without any supporting facts were fatally defective as being vague and conclusory".])

Here, petitioner's predicate notices provide no concrete facts, and the allegations in the aggregate do not serve to bolster each other enough to rise to the standards of reasonableness and specificity required by law. While the notices provide a semblance of additional information, the information does not enable respondent to prepare a meaningful defense.

CONCLUSION

Accordingly, it is ORDERED that respondent's motion is GRANTED and the petition is dismissed.

The court need not reach that branch of respondent's motion to dismiss based on lack of personal jurisdiction.

This constitutes the decision and order of this court.

Dated: November 3, 2022
New York, NY

So Ordered:


Hon. Karen May Bacdayan

HON. KAREN MAY BACDAYAN
Judge, Housing Part