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FILLMORE GARDENS COOPERATIVE INC. v. ROBINSON

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**CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART E**

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FILLMORE GARDENS COOPERATIVE INC.

**L&T Index No 300600/20
Mot. Seq. Nos. 1,2**

Petitioner,

**AMENDED
DECISION AND ORDER**

-against-

KURT ROBINSON,

Respondent

JOHN DOE and JANE DOE,

Respondents-Undertenants.

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HONORABLE DAVID A. HARRIS, J.H.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of petitioner’s motion to restore for entry of judgment, and order to show cause by respondent’s counsel to be relieved, listed by NYSCEF number:

16,17,18,19,20,21,22,26,27,28,29

Upon the foregoing cited papers, the Decision and Order on these Motions is as follows:

On the court’s own motion, the previously issued decision and order on Motion Sequence Nos. 1 and 2 is withdrawn and this amended decision and order is issued in its place.

By stipulation dated September 10, 2021, the parties, each represented by counsel, settled this holdover proceeding premised on a claim of nuisance (NYSCEF No. 15)

(Stipulation). The Stipulation provided that although respondent denied all of the allegations in a notice of termination dated February 11, 2020 (Termination Notice), respondent consented to a probationary period of six months commencing September 9, 2022 during which respondent agreed to “refrain from engaging in any of the alleged conduct, acts or omissions contained in the termination notice.” The probation was to end on March 9, 2022.

By motion filed on March 4, 2022, petitioner moves to restore the proceeding to the court’s calendar for entry of both a monetary and a possessory judgment. Counsel for respondent opposes the motion and simultaneously cross-moves by order to show cause to be relieved as respondent’s counsel. The order to show cause seeking to be relieved as counsel has, however been withdrawn.

The Stipulation is built upon the allegations of the Termination Notice, essentially incorporating them when establishing a probationary period; although it includes no concession that any of the conduct set forth in the Termination Notice occurred, it is the conduct described in the Termination Notice that the Stipulation proscribes. The Stipulation further provides that \$16,128.74 is due to petitioner and sets forth a schedule of payment. The Stipulation, however, includes no provision contemplating restoration to the calendar or entry of a judgment upon a failure to make payment. Rather, the Stipulation provides that “[i]n the event Petitioner alleges that Respondent has engaged in behavior that constitutes a breach during the Probationary Period, Petitioner may restore the proceeding to the court’s calendar upon 8-days’ notice to respondent’s attorney for a hearing on the issue. The allegations forming the good faith basis for petitioner’s motion shall be supported by affidavit(s) made by one or

more persons with personal knowledge specifically stating the dates, times and nature of all incidents alleged to be in breach of this agreement.”

The incidents that formed the basis of the Termination Notice were all of a similar character: May 21, 2019 – banging and stomping; May 29, 2019 – screaming, banging, stomping, slamming; June 21, 2019 – banging/stomping; July 2, 2019 – stomping and banging; August 25, 2019 – yelling, screaming, arguing, banging and complaints of yelling, screaming arguing and banging; September 5, 2019 – loud television and stereo, banging, screaming; September 14, 2019 – banging and slamming; and September 29, 20-19 – screaming and doors slamming.

The motion to restore is premised on the assertions that respondent failed to pay as stipulated and has engaged in further objectionable conduct by “routinely le[aving] the front entrance door to the building open, creating a safety risk for his neighbor.” The affidavit in support of the motion is submitted by the managing agent. Respondent argues that the motion should be denied both because it does not include an affidavit based on personal knowledge and because the alleged conduct does not form a basis for restoration.

All of the conduct alleged in the Termination Notice as constituting nuisance has undue and elevated noise, created in a variety of ways, as a common theme. The allegations that petitioner asserts form a basis for restoration have no connection whatsoever to the allegations of the Termination Notice. The stipulation further requires that affidavits cite the date and time of events petitioner alleges violated the Stipulation.

The language employed in the stipulation is binding, as stipulations are

essentially contracts (*Matter of Meccico v Meccico*, 76 NY2d 822 [1990]), and "strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process." (*Hallock v State*, 64 NY2d 224, 230 [1984]).

Here, the only affidavit is provided by an agent. The affidavit does not state that any of its allegations are made on information and belief, requiring that petitioner so establish. But in that regard it is not insufficient. However, its failure to either state the dates and times of alleged breaches of the Stipulation, or to allege conduct consistent with the Notice of Termination or the Stipulation is a fatal and irremediable flaw. Absent any allegation of conduct consistent with the Notice of Termination or the Stipulation, there is no basis for restoration of this proceeding to the court's calendar. Petitioner's motion to restore the proceeding is therefore denied.

This is the decision and order of the court.

Dated: Brooklyn, New York
November 16, 2022

DAVID A. HARRIS, J.H.C.

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