2022-11-14

Gloreen Realty LLC v. Wright

Gloreen Realty LLC v Wright
2022 NY Slip Op 33884(U)
November 14, 2022
Civil Court of the City of New York, New York County
Docket Number: Index No. L&T 306504/21
Judge: Travis J. Arrindell
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NEW YORK CITY CIVIL COURT
COUNTY OF NEW YORK: PART C

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GLOREEN REALTY LLC,
Petitioner - Landlord,

v.

SCOTT WRIGHT
Respondent – Tenant
"JOHN DOE" AND "JANE DOE"
Respondents – Undertenants.

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DECISION AND ORDER

L&T 306504/21

TRAVIS J. ARRINDELL, J.:

Recitation, as required by CPLR §2219(A), of the papers considered in the review of Respondent's Motion to Dismiss or in the alternative for Discovery:

Papers	Numbered
Respondent's Motion (Numbered 11 - 20 on NYSCEF)	1
Petitioner's Opposition (Numbered 22 - 26 on NYSCEF)	2
Respondent's Reply (Numbered 27 on NYSCEF)	3

TRAVIS J. ARRINDELL, J.:

Procedural History and Statement of Facts

On September 10, 2021, Petitioner commenced this holdover proceeding seeking to evict Respondent based on their alleged breach of a substantial lease obligation by committing or permitting a nuisance at the subject premises. Before Petitioner filed this proceeding, they served a Notice to Cure and a Notice of Termination upon Respondent on June 11, 2021 and July 21, 2021, respectively. The Notice to Cure alleges that Respondent is smoking in their apartment and "allowing the cigarette smoke to emanate into the common areas of the building which is also making its way into other apartments, seriously disturbing other tenants in the building." The notice alleges that the building is a smoke free building and that "numerous tenants are inhaling cigarette smoke in the building due to [Respondent] smoking in [their] apartment," resulting in "the building being less fit to live in for other occupants and tenants in the building." The Notice of Termination alleges Respondent failed to cure the violation on the basis that management received an additional complaint of "cigarette smoke emanating from [Respondent's] apartment," after the cure period expired.

The proceeding was calendared in Part A on October 15, 2021, and was transferred to Part C, Respondent having already retained Housing Conservation Coordinators, Inc. as counsel. Thereafter, Respondent filed an Answer alleging several defenses including, Petitioner failed to state a cause of action, that Respondent cured the alleged nuisance, harassment, and legal fees.

Respondent now moves for dismissal under CPLR 3211, and in the alternative, for discovery and inspection. Respondent argues that Petitioner's predicate notice lacks sufficient specificity and is conclusory. Respondent alleges that Petitioner failed to identify any individual who either, observed or was affected by Respondent's alleged behavior. Respondent claims

Petitioner failed to alleged any fact which demonstrates how Respondent's conduct disturbed or interfered with other tenants. Additionally, Respondent argues that nuisance requires a continuous invasion of rights, and that Petitioner's notice fails to show objectionable conduct that is recurring, frequent and continuous. Finally, Respondent argues that Petitioner fails to cite to any provision of the lease which prohibits smoking in the apartment. Petitioner in opposition states that their predicate notice was factually sufficient and there is no requirement that the notice must include the exact time of every incident or name every accuser or witness. In support of their claims Petitioner's opposition provided emails which were the source of the complaints alluded to in the predicate notice. In reply, Respondent first argues that Petitioner's predicate notice may not be cured by a later recitation of the offending conduct. Alternatively, Respondent argues that none of the 17 complaints Petitioner provided identify Respondent's apartment as the source of the smoke. Most of the complaints are from one tenant who indicates the smoke source as coming from Apartment 9 and 12, not Respondent's apartment.

Legal Discussion

When deciding a motion to dismiss pursuant to CPLR 3211 (a)(7) for failing to state a cause of action, the court must liberally construe the pleadings, accept all facts alleged in the pleading as true and determine only whether the facts fit within any cognizable legal theory.[1] A motion to dismiss pursuant to CPLR 3211 (a)(7) must be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law."[2] "Whether a plaintiff can ultimately establish its allegation is not part of the calculus in determining a motion to dismiss."[3]

> "To constitute a nuisance the use of property must interfere with a person's interest in the use and enjoyment of land. The term 'use and enjoyment' encompasses the pleasure and comfort derived from the occupancy of land and the freedom from annoyance. However, not every annoyance will constitute a nuisance. Nuisance imports a continuous invasion of rights 'a pattern of continuity or recurrence of objectionable conduct.' "[4]

In evaluating the factual sufficiency of a predicate notice in a summary proceeding, "the appropriate test is one of reasonableness in view of the attendant circumstance."[5] A notice to cure that forms the basis for a petition initiating a holdover proceeding must set forth sufficient facts to establish the grounds for the tenant's eviction."[6] The alleged defaults must be stated with particularity, so that the tenant may know what to defend against and how to impose valid legal defenses against the landlord's claim."[7] Those facts must be case specific … instead of generic

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[1] See Leon v. Martinez, 84 NY2d 83 [Ct App 1994].
[2] See 511 West 232nd Owners Corp v. Jennifer Realty Co, 98 NY2d 144, 152 (2002).
[3] See EBC I. Inc. v. Goldman Sachs & Co., 5 NY3d 11 (2005).
[4] See Domen Holding Co. v. Aranovich, 1 N.Y.3d 117, 123-124 (Citations Omitted).
[5] See Hughes v. Lenox Hill Hospital, 226 A.D.2d 4 [1st Dept. 1996].
[6] See Westhampton Cabins & Cabanas Owners Corp. v. Westhampton Bath & Tennis Club Owners Corp., 62 A.D.3d 987, 988; See also RSL 2524.2(b); See also London Terrace Gardens, L.P. v Heller, 40 Misc. 3d 135(A).
[7] See Carriage Court Inn, Inc. v. Rains, 138 Misc. 2d 444, 445.

or conclusory statements.[8] There is no "absolute requirement" that specific facts such as dates, times and individuals involved be included in the predicate notice, but failure to provide such specific facts is a relevant consideration.[9]

Petitioner's Notice to Cure fails to identify any individual who complained to Petitioner about Respondent's conduct. They fail to allege any apartments which were affected by Respondent's alleged smoking. Petitioner simply alleges in conclusory language that Respondent's smoking made the building "less fit to live;" and "seriously disturbed other tenants in the building." Petitioner's Notice to Cure fails to provide any specific factual allegation supporting these conclusions. The "notice to cure makes clear that Petitioner although in possession of complaints from specific tenants, chose to serve a notice replete with generalizations rather than a notice alleging with specificity the conduct of which it complains."[10] Petitioner rightly states that there is no requirement that the notice must include the exact time of every incident or name every accuser or witness. However, Petitioner fails to allege any individuals, or identify any apartments affected for even one allegation. "If at least some allegations were set forth with specificity, the [Notice to Cure] may have been sufficient."[11] Petitioner's failure to include them here is unreasonable, considering this information would be required so as Respondent could provide a meaningful cure and to prepare a defense.[12] Furthermore, Petitioner's claim that the building is a smoke free building and Respondent's smoking violates NYC Smoke Free Air Act is without merit. Petitioner's Notice to Cure fails to cite any provisions within Respondent's lease that prohibits smoking within his apartment and classifies the subject premises as a "smoke free building." Additionally, the NYC Smoke Free Air Act does not prohibit an individual from smoking within their own apartment.[13] Finally, Petitioner's inclusions of the actual complaints in their opposition papers, to support their assertions in their Notice to Cure, are unable to retroactively cure the defect in their predicate notice.[14] And even if they could cure the defect to the predicate notice, the 17 complaints provided by Petitioner, fail to identify Respondent or his apartment as the source of the offending smoke condition. Nor do the complaints show a pattern of continuity or recurrence of objectionable conduct by Respondent.

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[8] See Second 82nd Corp v. Veiders, 34 Misc. 3d 130.
[9] See 297 Lenox Realty Co. v. Babel, 19 Misc. 3d 1145(A), 1145A (N.Y. Civ. Ct. June 10, 2008).
[10] See Zagorski v Koenigsamen, 2019 N.Y. Misc. LEXIS 4087, *8.
[11] See 297 Lenox Realty Co. v. Babel, 19 Misc. 3d 1145(A), 1145A (N.Y. Civ. Ct. June 10, 2008).
[12] Id.
[13] See NYC Administrative Code 17-505; See also NYC Administrative Code 17-506.1(a) (5) (providing the smoking policy adopted by the owner shall not be binding on any rent stabilized tenant in occupancy prior to the adoption of the smoking policy.)
[14] See Chinatown Apts. v Chu Cho Lam, 51 NY2d 786, 788.

Conclusion

Based on the foregoing, the motion to dismiss is granted. The Court need not consider Respondent's alternative motion for discovery.

This constitutes the decision and order of the court.

Dated: November 14, 2022
New York, New York

TRAVIS J. ARRINDELL
JHC