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Cross Bronx Preserv. LLC v. Varona

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[*1]

Cross Bronx Preserv. LLC v Varona
2022 NY Slip Op 51312(U)
Decided on December 27, 2022
Civil Court Of The City Of New York, Bronx County
Lutwak, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on December 27, 2022

Civil Court of the City of New York, Bronx County

Cross Bronx Preservation LLC, Petitioner-Landlord,

against

**Christina Varona and MARKIEM J. BLACK, Respondents
(Tenants),
and BRIAN MOORE, "JOHN DOE" and "JOHN DOE",
Respondents (Undertenants).**

Index No. 303387/22

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Diane E. Lutwak, J.

Recitation, as required by CPLR Rule 2219(A), of the papers considered in the review of Respondent-Tenant Markiem J. Black's Motion to Dismiss:

Papers NYSCEF Doc #
Respondent's Notice of Motion 14
Attorney's Affirmation in Support 15
Exhibits A-D in Support 16-19
Attorney's Affirmation in Opposition to Motion 23
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PROCEDURAL HISTORY AND BACKGROUND

This is a holdover eviction proceeding against Rent Stabilized respondent-tenants Christina Varona and Markiem J. Black, as well as respondent-undertenants Brian Moore, "John Doe" and "Jane Doe". The petition incorporates by reference an attached seven-day termination notice, dated May 24, 2021, which alleges illegal use of the premises for narcotics dealing as the basis for the proceeding. The notice cites to RPAPL § 711(5) and RPL § 231(1) and describes the arrest on June 26, 2020 at the premises of respondent-tenant Black by the NYC Police Department (NYPD), as well as seizure from the apartment of various items, described in accompanying NYPD Property Clerk's Invoices and Laboratory Reports, including two plastic bags containing, in the aggregate, 103.281 grams of crack

cocaine; a scale with cocaine residue; twenty ziplock bags of alleged marijuana; numerous empty small and medium sized clear ziplock bags; twenty-five cartridges of ammunition for a 9MM gun; and \$9101 in cash. The notice also mentions an attached letter dated August 11, 2020 from the Bronx County District Attorney's Office, advising petitioner that it was required to commence eviction proceedings against the tenant.

Respondent-tenant Black, by counsel, moves to dismiss for failure to state a claim under CPLR R 3211(a)(7) arguing that the termination notice is defective because it cites to only a "single incident" and fails to assert a "customary and habitual" illegal use of the premises. Petitioner opposes the motion, arguing that the notice is sufficient to allow respondents to prepare a defense as it includes the facts of arrest and recovery of illegal narcotics in the apartment which are the basis of this proceeding.

DISCUSSION

To state a cause of action in a proceeding commenced pursuant to RPPAL § 711(5) the petition must allege that the subject premises are used for an illegal business or trade. Case law holds that an essential element of such a cause of action is that the illegal use made of the premises be customary and habitual. *Solow Bldg Co, II, LLC v Banc of Am Sec LLC* (13 Misc 3d [*2]55, 56, 823 NYS2d 815, 816 [App Term 1st Dep't 2006])(reversing lower court and dismissing holdover petition based upon unlawful use of the premises by engaging in fraudulent securities practices where petitioner's documents showed that the trading improprieties complained of were largely carried out by a single staff member); *Lituchy v Lathers* (35 Misc 2d 556, 557, 232 NYS2d 627 [App Term 1st Dep't 1962])(reversing lower court and dismissing holdover petition based upon a "single, isolated conviction for possessing policy slips").

There is no strict test as to what constitutes a "customary and habitual" illegal use of the premises. Where the alleged illegal use involves narcotics, factors courts consider include who was arrested and where; the quantity and location in the apartment of the narcotics; whether the tenant of record knew or should have known of the narcotics; how much cash was recovered; whether drugs and/or ammunition were found; and the presence and quantity of narcotics paraphernalia such as scales and glassine envelopes. [*See, e.g., 855-79 LLC v Salas* \(40 AD3d 553, 837 NYS2d 631 \[1st Dep't 2007\]\)](#)(reinstating lower court's dismissal of drug holdover after trial where there was no evidence that the elderly, vision- and hearing-impaired, long-term Rent Stabilized tenant was aware of either her non-resident grandson's arrest outside the apartment or the presence in the apartment of illegal drugs and

paraphernalia, which were not found "in plain view"); [NYC Hous Auth v Otero \(5 Misc 3d 134\[A\]](#), 799 NYS2d 162 [App Term 1st Dep't 2004])(affirming trial court's conclusion that apartment was being used for illegal business purposes where NYPD observed a package of "288 bags of cocaine" being thrown from a window and recovered digital scales, a speed loader, a stun gun, multiple rounds of ammunition, a metal safe, over \$6,000 in cash, and marijuana from two bedrooms in tenant's apartment that previously had been occupied by her two sons, who visited on a daily basis and were arrested inside the apartment); *1895 Grand Concourse Assocs v Ramos* (179 Misc 2d 508, 512, 685 NYS2d 580, 583 [Civ Ct Bx Co 1998])(drug holdover dismissed after trial where the NYPD recovered a small quantity of drugs, drug paraphernalia and cash and the respondent-tenant's husband — the only family member out of six who were arrested against whom the charges were not dropped - testified that these items belonged to him and he used them for personal consumption, kept his use secret and stored the items in a locked closet).

Accordingly, a single arrest of a tenant in their apartment may be sufficient to state a claim. *See, e.g., NY County Dist Attorney's Office v Oquendo* (147 Misc 2d 125, 131, 553, NYS2d 973, 777 [Civ Ct NY Co 1990])(finding allegations of the petition more than sufficient to state a cause of action under RPAPL § 711(5) where they specified that "respondents were arrested inside the subject premises" and the police seized 73 tinfoil packets of cocaine, plastic bags containing cocaine and heroin, 212 glassine envelopes each containing heroin, a .32 calibre semiautomatic pistol, live ammunition, alleged drug records, a rubber stamp containing the words "Block Buster" and \$ 4,445 in cash).

On a motion to dismiss under CPLR R 3211 the court must afford a liberal construction to the pleading, *Leon v Martinez* (84 NY2d 83, 87-88, 638 NE2d 511, 513, 614 NYS2d 972, 974 [1984]), and "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Id.* "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." [EBC I, Inc v Goldman Sachs & Co \(5 NY3d 11](#), 19, 832 NE2d 26, 31, 799 NYS2d 170, 175 [2005]); [TIAA Global Invs. LLC v One Astoria Sq LLC \(127 AD3d 75](#), 85, 7 NYS3d 1 [1st Dep't 2015]).

For Rent Stabilized tenancies, RSC § 2524.2(a) requires a landlord to give a tenant [*3]written notice of intent to terminate the tenant's lease before bringing a holdover proceeding. Where a predicate notice is a required condition precedent to a holdover proceeding, it must meet the applicable standards of sufficiency; if not, the proceeding must be dismissed for failure to state a claim under CPLR R 3211(a)(7) as predicate notices are not

amendable. *Chinatown Apts Inc v Chu Cho Lam* (51 NY2d 786, 412 NE2d 1312, 433 NYS2d 86 [1980]).

Under RSC § 2524.2(b), every notice to a tenant must state the ground for eviction, the facts necessary to establish the existence of such ground and the date when the tenant is required to surrender possession. *See, e.g., Kokot v Green* (14 Misc 3d 1224[A], 836 NYS2d 493 [Civ Ct NY Co 2007]). Further, New York State courts evaluate the sufficiency of predicate notices based on a standard of reasonableness "in view of all attendant circumstances". *Oxford Towers Co, LLC v Leites* (41 AD3d 144, 837 NYS2d 131 [1st Dep't 2007]); *Avon Bard Co v Aquarian Found* (260 AD2d 207, 210, 688 NYS2d 514, 517 [1st Dep't], *app dism'd*, 93 NY2d 998, 717 NE2d 1080, 695 NYS2d 743 [1999]); *Hughes v Lenox Hill Hospital* (226 AD2d 4, 17, 651 NYS2d 418, 427 [1st Dep't 1996], *app dism'd*, 90 NY2d 829, 683 NE2d 17, 660 NYS2d 552 [1997]). The notice must provide sufficient information to meet the tests of reasonableness and due process. *Jewish Theological Seminary of America v Fitzer* (258 AD2d 337, 338, 685 NYS2d 215 [1st Dep't 1999]). A predicate notice "need not lay bare a landlord's trial proof" and will be upheld where it is sufficient as a whole to advise the tenant of the claim and permit the tenant to frame a defense. *McGoldrick v DeCruz* (195 Misc 2d 414, 758 NYS2d 756 [AT 1st Dep't 2003]).

On this motion to dismiss pursuant to CPLR R 3211, the Court need not make a factual or credibility determination, or address the likelihood of success, but need only determine whether a cause of action for illegal use under RPAPL § 711(5) has been stated after viewing the pleadings in the light most favorable to the non-moving party. Here, the termination notice and supporting documents from the Bronx County District Attorney's Office allege that one of the tenants of record was arrested in the apartment following a search of the apartment that resulted in the seizure of 103.281 grams of crack cocaine; a scale with cocaine residue; twenty ziplock bags of alleged marijuana; numerous empty small and medium sized clear ziplock bags; twenty-five cartridges of ammunition for a 9MM gun; and \$9101 in cash. The notice meets the test of reasonableness and is sufficient to withstand a motion to dismiss as it provides enough detail to allow respondents to prepare a defense to petitioner's claim that the apartment was being used for an illegal business or trade.

CONCLUSION

For the reasons stated above, it is ORDERED that respondent-tenant Black's motion to dismiss is denied. Those respondents who have not yet answered the Petition are hereby ORDERED to file their Answers by January 20, 2023 and the case will proceed to a pre-trial,

in-person settlement conference in Resolution Part C on **January 27, 2023 at 12:00 noon**. This constitutes the Decision and Order of the Court, copies of which are being uploaded on NYSCEF and mailed to the unrepresented respondents ("John Doe"/"Jane Doe") at the premises.

Diane E. Lutwak, HCJ

Dated: December 27, 2022

Bronx, New York

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