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New Prospect NY LLC v Garcia
2022 NY Slip Op 34465(U)
December 22, 2022
Civil Court of the City of New York, Bronx County
Docket Number: Index No. L&T 313931/22
Judge: Kisha L. Miller
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART J

-----X
NEW PROSPECT NY LLC, BY CERTIFICATE
OF MERGER DATED 9/8/2021, MERGING
NEW PROSPECT HOLDING CORP INTO
NEW PROSPECT NY LLC,
Petitioner,

Index No. L&T 313931/22

DECISION/ORDER

Motion seq no. 1

-against-

ROSA GARCIA, JOHN DOE, JANE DOE,
Respondents.

-----X
HON. KISHA L. MILLER:

Stern & Sterns, Esqs., for Petitioner.
Mobilization For Justice, Inc., for Respondent.

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of this motion to dismiss.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	NYSCEF Doc. Nos. 10-24
Answering and Affidavits Annexed.....	NYSCEF Doc. Nos. 25-27
Reply Affidavit.....	NYSCEF Doc. Nos. 28-31

Upon the foregoing cited papers, the decision and order on this motion is as follows:

Petitioner commenced this holdover summary eviction proceeding to recover possession of the premises located at 504 East 183rd St., Unit 1, Bronx, New York. The “Ninety (90) Day Notice” alleges Respondent is a month to month tenant. After retaining counsel and filing an answer, Respondent filed a motion to dismiss the proceeding pursuant to CPLR 3211(a)(3) and CPLR 3211(a)(7), which Petitioner opposes.

In support of the motion, Respondent states the most recent deed indicates the owner of the premises is New Prospect Holding Corp. (“Holding Corp.”), an inactive corporation that has not conveyed the premises to Petitioner. Respondent states there is no landlord-tenant relationship with Petitioner, and that the only parties to the expired lease were Respondent and Holding Corp., which still receives NYCHA Section 8 payments on behalf of Respondent. As a

result, Respondent argues, Petitioner lacks standing to maintain this proceeding in accordance with RPAPL §721.

As a second ground for dismissal, Respondent argues Petitioner failed to serve a new predicate notice pursuant to RPAPL §711(1) and RPL §226-c(2)(d). The “Ninety (90) Day Notice” served in this proceeding is the same predicate notice from a prior holdover summary eviction proceeding, which Respondent argues is improper.

In response to Respondent’s claim of lack of standing, Petitioner states it filed a Certificate of Merger with the NYS Department of State on September 8, 2021, indicating that Holding Corp. and Petitioner merged into one entity. Business Corporation Law §906, Petitioner argues, does not require a new deed, and because of the merger, Petitioner is the owner of the premises and the proper party to this proceeding. Regarding the termination notice, Petitioner does not deny serving the same ninety-day termination notice from the prior holdover proceeding. Instead, Petitioner argues Respondent was not prejudiced by the notice since this proceeding was commenced only three days after the prior holdover was dismissed.

Discussion

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the “sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion to dismiss will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). The court must afford the pleading a liberal construction, accept its allegations as true, and accord Petitioner the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83 [1994]). Where a termination notice is a required condition precedent to a holdover proceeding, and a valid notice is not served, the proceeding must be dismissed for failure to state a cause of action (*Chinatown Apts. v Chu Cho Lam*, 51 NY2d 786 [1980]).

In the prior holdover proceeding, Petitioner failed to appear at a scheduled conference and the court dismissed the proceeding.¹ While Petitioner claims it defaulted because notice was sent to a different law firm, Petitioner never moved to vacate the default and restore the proceeding to the calendar. Instead, Petitioner filed the petition in this proceeding days after the dismissal, utilizing the same termination notice from the prior holdover. Petitioner should have served a new notice. Since the prior holdover was dismissed, the termination notice upon which the prior holdover was predicated “cannot be revived” to support this proceeding (*Kaycee W. 113th St. Corp. v Diakoff*, 160 AD2d 573 [1st Dept 1990]; citing *Weinberger v Driscoll*, 89 Misc 2d 675 [Civ Ct, NY County 1977]; *Haberman v Wager*, 73 Misc 2d 732 [Civ Ct, NY County 1973]).

To support its claim that a new notice is not required, Petitioner relies upon two cases: *Great Location New York, Inc. v Seventh Ave. Fine Foods*, 46 Misc 3d 150[A], 2015 NY Slip Op 50267[U] [App Term, 1st Dept 2015], and *Marie France Realty Corp. v 325 East 14th St. Corp.*, 67 Misc 3d 135[A], 2020 NY Slip Op 50506[U] [App Term, 1st Dept 2020]). Both cases are inapposite, as they involve commercial tenants. Summary holdover proceeding against residential tenants are creations of statute, governed by separate regulatory schemes where strict compliance with all statutory provisions is required (*MSG Pomp Corporation v Jane Doe*, 185 AD2d 798 [1st Dept 1992]; *Berkeley Assocs Co v Di Nolfi*, 122 AD2d 703 [1st Dept 1986]).

Even if this court were to consider the timing of this proceeding, specifically that it was commenced “shortly” after the prior holdover was dismissed (see *Bresciani v Corsini*, 32 Misc 3d 463, 2011 NY Slip Op 21114 [Civ Ct, Kings County]), the substance of the notice is problematic. David Dilmanian, as President of “New Prospect Holding Corp-Landlord,” signed the notice on January 14, 2021. When the notice was served in the prior holdover, Holding Corp.

¹ The prior holdover summary eviction proceeding was commenced under Index No. L&T 300761/22. Petitioner’s opposition papers incorrectly state the index number as L&T 308981/22, which does not involve either party.

was still the deed holder of the subject premises. Based on the documentary evidence and Petitioner's own admissions, Holding Corp. became an inactive corporation on September 8, 2021, and merged into Petitioner *prior to* commencement of this proceeding. By serving the identical notice in this proceeding, Petitioner purportedly terminated Respondent's tenancy by the President of an inactive corporation. If, as Petitioner contends, it is the proper owner and the proper party to this proceeding, the termination notice should have been signed by the appropriate individual on behalf of Petitioner, and not by a member of an inactive corporation bearing a different name than Petitioner.

Real Property Law §226-c provides that if a landlord intends not to renew a tenancy, the landlord must provide at least ninety days' notice if the tenant has occupied the unit for more than two years or has a lease term of at least two years. Since the notice served upon Respondent fails to satisfy the requirements of the statute, and a predicate notice is not amendable (*Chinatown Apts. v Chu Cho Lam*, *supra*), the petition fails to state a cause of action.

The court need not address Respondent's remaining argument concerning Petitioner's standing.

Accordingly, it is

ORDERED that Respondent's motion to dismiss the petition based upon CPLR 3211(a)(7) is granted. The petition is hereby dismissed without prejudice.

This constitutes the decision and order of the court.

Dated: December 22, 2022



KISHA L. MILLER, J.H.C.