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HOME STREET MANAGEMENT LLC v. Merino

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CIVIL COURT of the CITY of NEW YORK
BRONX COUNTY
HOUSING COURT: PART C

-----X

HOME STREET MANAGEMENT, L.L.C.,
Petitioner-Landlord,

L & T Index No. 19/4842

-against-

 MERINO,
Respondent-Tenant,

Decision & Order

“JOHN DOE” & “JANE DOE”,
Respondents-Undertenants.

-----X

Hon. Brenda S. Spears, J., H.C.:

Recitation, as required by CPLR 2219(A), of the papers considered in this motion to dismiss

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affirmation Annexed.....	1
Answering Affirmation.....	2
Replying Affirmation.....	3
Exhibits.....	4

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

The petitioner commenced this holdover proceeding to regain possession of the subject rent-stabilized apartment on the grounds that the lease had been terminated because the respondent

failed to cure the nuisance conditions set forth in the notice to cure. Specifically, the petitioner alleged that since on or about May 1, 2018, the respondent, her occupants and/or guests have engaged in conduct that constitutes a breach of the lease by utilizing the subject premises as a commercial kitchen used to prepare and sell food in large quantities. The notice to cure, incorporated in the notice of termination, alleges the following additional conditions: the respondent's use of the kitchen has resulted in a mice and rat infestation and the destruction of a kitchen cabinet; oil is being spilled down the kitchen drain, causing blockages all the way to the sewer line; and, that several people are in and out of the premises. In addition, the petitioner alleges that the respondent has improperly installed a washing machine in the apartment, causing water from the sewer lines to come up in the drains of apartments in the respondent's apartment line and that the respondent is harboring dogs in violation of the lease. The notice to cure further alleges that the respondent has failed to provide access to the petitioner to make necessary repairs.

The respondent initially appeared *pro se* but has subsequently obtained legal representation. The respondent filed an answer wherein she alleged, *inter alia*, that the petitioner fails to state a cause of action because the predicate notices are defective. The answer further alleges that: the petitioner accepted rent during the "window" period, thereby vitiating the notice of termination; that the petitioner's offer of a renewal lease and acceptance thereof vitiates the notice of termination; and that the respondent has not breached the lease by maintaining a pet.

The respondent has now moved to dismiss the petition pursuant to C.P.L.R. §3211 on the grounds that the petition fails to state a cause of action because the predicate notices are vague and fail to allege facts with specificity. The petitioner has opposed the motion. For the reasons set forth herein, the respondent's motion is granted.

Every petition must state the facts upon which the proceeding is based to ensure that the tenant will be informed of the factual and legal claims that he or she will have to meet and enable the tenant to interpose whatever defenses are available. R.P.A.P. §741(4). *MSG Pomp Corp. v. Doe*, 185 A.D. 2d 798, 586 N.Y.S. 2d 965 (1st Dep't 1992).

The purpose of a notice to cure is to apprise the tenant of the facts upon which the action is predicated so that the tenant can properly raise issues and sufficiently defend against the accusations. It must be sufficiently specific to apprise the tenant of the conditions that the landlord alleges is a default of the tenant's obligations. *Cosmopolitan Broadcasting Corp. v. Miranda*, 143 Misc. 2d 1, 539

N.Y.S. 2d 265 (N.Y.City Civ. Ct. 1989). The notice to cure must also clearly advise the tenant of what must be done to cure the breach and it must inform the tenant of the consequence of failing to cure the alleged conditions. 76 West 86th Street Corp. v. Junas, 55 Misc. 3d 596, 45 N.Y.S. 3d 921 (N.Y.City Civ. Ct. 2017). A notice that fails to set forth any of the facts upon which the proceeding is based is ineffective and cannot serve as a predicate for an eviction proceeding. Kaycee W. 113th St. Corp. v. Diakoff, 160 A.D. 2d 573, 554 N.Y.S. 2d 216 (1st Dep't 1990).

The notice to cure in the instance proceeding states, in pertinent part, that the respondent has unreasonably refused access to the premises to permit the petitioner to make necessary repairs, included, but not limited to the correction of violations issued by the New York City Department of Housing Preservation and Development (“HPD”). The notice to cure also states that since May 1, 2018, the respondent has utilized the premises as a commercial kitchen and that such use has caused a rat and roach infestation and damaged a kitchen cabinet. There is also an allegation that oil is being spilled down the kitchen drain; that the respondent has improperly installed washing machine.

The notice directs the respondent to provide access so that the necessary repairs can be made, cease and desist from using the kitchen for commercial purposes, remove the two dogs and remove the washing machine.

This notice is insufficiently specific in that it provides no information as to why petitioner has concluded that the premises is being utilized as a commercial kitchen. There is also no information to support the statement that the respondent was pouring oil down the kitchen drain. Moreover, no specific information has been provided with respect to the petitioner’s claims that several people are in and out of the subject premises and that the respondent is preparing and serving large quantities of food.

The petitioner attaches two documents in apparent support of the claims set forth in the notice to cure and the notice to terminate. There is a copy of a violation report issued by the New York City Department of Housing Preservation, which contains no notice of any improper or commercial use of the kitchen. The second document is a memorandum from Rommel Rodas relating to a single instance where he was in the apartment. Mr. Rodas states that on October 10, 2018, he went to the subject premises to make repairs needed to cure the violations. He stated that the respondent let him into the premises but would not permit him to make repairs. He further

stated that the respondent “runs an illegal kitchen” in the apartment. He provides to no information to support this conclusion.

The notice of termination must also set forth sufficient facts to establish grounds for the landlord to recover possession and must, if a breach of lease is alleged, set forth the specific lease provision involved. Chinatown v. Chu Cho Lam, 51 N.Y. 2d 786, 433 N.Y.S. 2d 86, 412 N.E. 2d 1312 (1980). Such a notice must set forth “the who, what, when and where” of the grounds for eviction. 510 East 5th Street Assocs. v. Gothchell, NYLJ 9/20/89 22, col. 2 (Civ. Ct. N.Y.); Spivack Realty Co., Inc v. Svobodny, 21 Misc. 2d 1147(A), 875 N.Y.S. 2d 824 (Dist. Ct. 2008). The test for determining the sufficiency of a termination notice is reasonable depends upon the particular circumstances in the case. Brooklyn Home for the Aged People Housing Development Fund v. Selby, 32 Misc. 3d 130(A), 932 N.Y.S. 2d 759 (App. Term 2111).

The courts have further held that a notice that fails to set forth specific facts and simply sets forth legal conclusions is inadequate. 3528 Broadway Corp. v. Cepin, 12/11/91 NYLY 25, col. 3 (Civ. Ct. N.Y. Co.); Foster Arms Apt. Corp. v. Schreiber, 6/6/2001 NYLJ 24, col. 5 (Civ. Ct. Kings Co.); 297 Lenox Realty Co. v. Babel, 19 Misc. 3d 1145(A), 867 N.Y.S. 2d 21 (N.Y. City Civ. Ct. 2008).

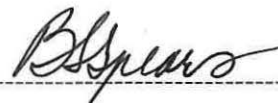
For the most part, the notice of termination in the instant proceeding parrots the notice to cure. The petitioner sets forth conclusory allegations that there is a commercial kitchen in the premises but provides no information as to how the petitioner reached that conclusion. There is no information as to when and how the petitioner became aware that the respondent was pouring oil down a kitchen drain, when and how the petitioner became aware that several people were coming in and out of the apartment and how the conduct impacted the other residents. There is also no information given with respect to when and how the petitioner became aware that there was a washing machine incorrectly installed in the subject premises. The notice of termination contains no specific examples of the misconduct, names, dates and times the alleged nuisance occurred. This renders such a notice defective. Domen Holding Co. v. Aranovich, 1 NY3d 117, 769 NYS2d 785 (2003); Spivack Realty Co. v. Svobodny, *supra*.

Since the notice of termination in this proceeding fails to provide dates, times, names of tenants affected by the alleged nuisance, it cannot serve as a proper notice to the respondent to advise her of the conduct over a several month period and permit her to frame a defense to the same. The proceeding cannot as a matter of law continue because the predicate notice is defective.

Defects in the predicate notice are not subject to cure by amendment and require dismissal of the proceeding. See, e.g., *St. James Court LLC v. Booker*, 176 Misc. 2d 693, 673 NYS2d 821 (Civ. Ct. Kings Co. 1998); *Spivak Realty Co., Inc. v. Svobodny*, *supra*.

The petition is therefore dismissed.

This constitutes the decision and order of this court.



Brenda S. Spears, J.
BRENDA S. SPEARS
JUDGE, HOUSING PART

Dated: Bronx, New York

November 20, 2019

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