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105 Realty 2018, LLC v. East Harlem Council for Community Improvement Inc.

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART F

-----X
105 REALTY 2018 LLC,

Petitioner-Landlord,

-against-

Index No. LT-056709-19/NY

EAST HARLEM COUNCIL FOR COMMUNITY
IMPROVEMENT INC. (E.H.C.C.I.),

NOTICE OF ENTRY

Respondent-Tenant,

CYCYCLE "DOE", "JOHN DOE," AND/OR "JANE
DOE"

Respondent-Undertenants

-----X

PLEASE TAKE NOTICE, that a DECISION/ORDER of the Hon. Karen May Bacdayan,
with Notice of Entry of which the within is a true copy was duly entered in the within named Court
on April 25, 2023.

Dated: April 25, 2023
New York, New York

YOURS, etc.
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART F

105 REALTY 2018, LLC

Index No. 056709/19

Petitioner,

DECISION/ORDER

-against-

Motion sequence 5

CIVIL COURT OF THE
CITY OF NEW YORK

EAST HARLEM COUNCIL FOR COMMUNITY
IMPROVEMENT INC., CYCYLE "DOE"
JOHN DOE, JANE DOE

APR 25 2023

Respondent.

ENTERED
NEW YORK COUNTY

HON KAREN MAY BACDAYAN, JHC

Sidrane, Schwartz-Sidrane, Perinbasekar & Littman, LLP (Miles Altarac, Esq.), for the petitioner

Borah Goldstein Altshuler Hanins & Goidel, PC (Kimberly Dukhan, Esq.), for the respondent East Harlem Council for Community Improvement, Inc.

NYLAG (Samuel Feldman, Esq.), for the respondents "Doe" respondents, now known to be Francisco Jimenez, Dorothy Hope, and Elizabeth Lin but not substituted

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by NYSCEF Doc Nos: 49-57.

PROCEDURAL POSTURE AND BACKGROUND

This is a nonprimary residence proceeding brought against East Harlem Council for Community Improvement, Inc. (hereinafter "EHCCI"), Cycyle "Doe," "John Doe" and "Jane Doe" ("respondents"). EHCCI is the tenant of record, and respondents are their subtenants. Previously, respondents¹ moved to consolidate two other proceedings under the instant index number on the basis that the "content of the [p]etitions in these cases is identical, except for requesting possession of a different subject premises." (NYSCEF Doc No. 40, notice of motion [sequence 4]; NYSCEF Doc No. 41, respondents' attorney's affirmation ¶ 7.)

It is not disputed that EHCCI "is a nonprofit organization which provides services to individuals in need in upper Manhattan. ECCHI is the tenant of record for the subject premises

¹The fictitiously named respondents are now known to be Francisco Jimenez, Dorothy Hope, and Elizabeth Lin. They have not been substituted for Jane or John Doe in this proceeding. It is not known who Cycle "Doe" is, and it is believed they no longer reside in the premises.

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and has paid the [r]esponent-residents’ rent. EHCCI also pays the rent for the other tenants in the subject premises. These [r]espondent-residents also receive social work services from Respondent EHCCI.” (NYSCEF Doc No. 50, respondent’s affirmation in support ¶ 7.) Each respondent has a guardian *ad litem*.²

Now before the court is respondents’ motion to dismiss the proceeding for failure to name necessary parties to the proceeding and misuse of the provision of the Civil Practice Law and Rules (“CPLR”) pertaining to unnamed parties. (CPLR 1024; NYSCEF Doc No. 49, notice of motion [sequence 5].) Respondents argue that petitioner made no diligent efforts to discover the true identities of the fictitiously named parties either before or after the proceeding was commenced, nor has petitioner moved to amend the petition to substitute parties once the true identities were provided by respondents’ counsel. Respondents also provide an affidavit from the director of operations at EHCCI who avers that “[t]he landlord never contacted us to ask for the names of the residents living at 340-48 East 105th Street, New York, NY 10029 prior to the start of this court case, despite being aware that many people live in this apartment” (NYSCEF Doc No. 51, Murray affidavit ¶ 6.)

Petitioner opposes on the basis that it did not know the true identities of the respondents prior to commencing the proceeding and distinguishes case law cited by respondents on that basis. Petitioner argues --- seemingly on behalf of EHCCI who, notably, has not made this argument --- that respondents-Does are protected individuals under the Health Insurance Portability and Accountability Act (“HIPPA”), and that “[EHCCI was] not obligated to inform the [p]etitioner of the names of the occupants prior to the commencement of the proceeding, as doing so could have potentially violated the occupant’s [sic] HIPPA rights to privacy.” (NYSCEF Doc No. 55, petitioner’s attorney’s affirmation ¶ 14.)

In reply, respondents argue that, unlike respondents’ motion, petitioner’s opposition is not supported by an affidavit from an individual with personal knowledge of the facts, that petitioner has erroneously distinguished the gravamen of the case law cited in support of respondent’s arguments, and that petitioner’s alleged HIPPA concerns are, essentially, specious. (NYSCEF Doc No. 57, respondents’ attorney’s affirmation in reply ¶ 17 [“Petitioner does not

² The guardians *ad litem* are as follows: Rudy Ferrara for Francisco Jimenez, Brenda Brown for Dorothy Hope, and Stuart Adler for Elizabeth Lin.

support this contention with citations to the HIPPA law or examples of difficulty actually encountered; it is merely conjecture.”) Respondents argue that “the standard is whether the [p]etitioner used diligent effort[s] to discover the names of the occupants. On the facts at bar, it is indisputable that [p]etitioner did not use any effort.” (*Id.* ¶ 11.)

DISCUSSION

CPLR 1024 states, in relevant part:

“[a] party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly.”

The purpose of CPLR 1024 is to ensure a defendant is properly identified and given notice of and an opportunity to defend in the proceeding. (*See Bumpus v New York City Transit Auth.*, 66 AD3d 26, 30 [2d Dept 2009] [citing *City of Mount Vernon v Best Dev. Co.*, 268 NY 327, 331 [1935]]; Vincent Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C1024 [Note: online version last accessed Apr. 24, 2023].) If the true name [of a respondent] could be discovered upon reasonable investigation, the landlord must name that person using her/his actual name. (*Bumpus*, 66 AD3d at 30 [noting that before resorting to the use of CPLR 1024, permitting a party to be named as a “John Doe,” a party must first exercise “due diligence” to identify the defendant by name].) At the very least, petitioner must make efforts to describe the individuals such that they would know they were the intended recipients of the court papers. “To be effective, a summons and complaint must describe the unknown party in such a manner that the ‘Jane Doe’ would understand that she is the intended defendant by a reading of the papers.” (*Id.* at 29.)

Petitioner distinguishes the cases cited by respondents on the basis that in each of those cases, the respondent’s or defendant’s name was known to the pleader *prior* to the commencement of the proceeding. Respondents argue that the standard is not whether petitioner knew respondents’ names prior to commencing this proceeding, but, rather, whether petitioner effected diligent efforts to ensure that a party named only as Jane Doe or John Doe would know that they are the intended party such that due process has been achieved. (*See Lebowitz v Fieldston Travel Bur., Inc.*, 181 AD2d 481, 482 [1st Dept 1992] [“[A] summons served in a ‘John Doe’ form is jurisdictionally sufficient only if the actual defendants are adequately

described and would have known, from the description in the complaint, that they were the intended defendants” [internal citations and quotation marks omitted]) Here, petitioner could have sought to describe respondents, rather than name them, which would have addressed petitioner’s purported HIPPA or privacy concerns.

There is nothing in the record before the court --- no affidavit of an individual with personal knowledge, no statement by petitioner’s attorney --- that diligent efforts were made to properly name or describe respondents prior to commencing this proceeding. In fact, the record demonstrates that petitioner made no efforts at all. (NYSCEF Doc No. 51, Murray affidavit ¶ 6.)

Moreover, respondents’ guardians *ad litem* have each submitted an affidavit averring that they have visited the facility, and there are numerous residents at the facility who may not know about this court proceeding “because of their condition.” (NYSCEF Doc no. 52, Adler affidavit; NYSCEF Doc No. 53, Brown affidavit; NYSCEF Doc No. 54, Ferreira affidavit.) As stated in *US Airways, Inc. v Everything Yogurt Brands, Inc.*, 18 Misc 3d 136 (A), 2008 NY Slip Op 50279 (U), *1, “[I]f the warrant is to be executed properly, the premises must be identified properly, and with certainty, so that the officer executing the warrant will be enabled to locate the premises from such description (internal citations and quotation marks omitted). It follows that a respondent named as John Doe or Jane Doe must be adequately described to ensure the correct and intended respondent is evicted. “[I]t is not the function of the marshal to guess which tenant is to be evicted.” (*Elul Realty Corp. v. Java New York Ltd.*, 12 Misc 3d 336, 338 [Civ Ct, Kings County 2006].)

While this court has been amenable in some cases under particular circumstances to joining proper parties upon a proper motion, no such noticed motion is before the court despite ample opportunity. Especially, under the circumstances herein, where it is not disputed that respondents are individuals with developmental and intellectual disabilities, the court will not sanction petitioner’s cavalier use of pseudonyms pursuant to CPLR 1024.


CONCLUSION

Accordingly, it is

ORDERED that the proceeding is dismissed as against all Jane and John Does, including those resident-respondents, now known by all parties and to the court, as Francisco Jimenez, Dorothy Hope, and Elizabeth Lin.³

This constitutes the decision and order of this court.

Dated: April 25, 2023
New York, NY

So Ordered:

HON. KAREN MAY BACDAYAN
Judge, Housing Part

³ Although not directly applicable to this proceeding because of its commencement date in March 2019, the Housing Stability Tenant Protection Act, which was enacted in June 2019, amended the relevant provision of the RPAPL to allow, by warrant of eviction, only removal of “all persons *named in the proceeding* (emphasis added).” RPAPL 749, as amended by L 2019, ch 36, part M, § 19. In doing so, the legislature has made clear an intent to ensure that occupants are protected from displacement by careless pleading.