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AK Houses TP4 LLC v. Thurman

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Civil Court of the City of New York
County of New York

Index # **LT-300809-22/HA**


AK Houses TP4 LLC

Petitioner(s)

Decision / Order

-against-

Davena Thurman; Amel Haynes; "John" "Doe";
"Jane" "Doe"

Respondent(s)

JUDGE FRANCES A. ORTIZ,

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Order to show Cause/ Notice of Motion and Affidavits /Affirmations annexed	1/NYSCEF 8- 17
Answering Affidavits/ Affirmations	2/NYSCEF 18- 22
Reply Affidavits/ Affirmations	_____
Memoranda of Law	_____
Other	_____

Upon the foregoing cited papers, the Decision/ Order on this motion is as follows:

This is a non-payment proceeding brought by Petitioner, AK Houses TP4 LLC, against Respondent/Tenant, Davena Thurman, and Respondents/Undertenants, Amel Haynes, John Doe and Jane Doe. The Petition seeks possession of 112-126 East 128th Street, apt. 7B, New York, NY 10035 (“the subject premises). Respondent/Tenant, Davena Thurman, appears by counsel.

Here, the rent demand is dated May 19, 2022 and is addressed to Respondents-Davena Thurman, Amel Haynes, John Doe and Jane Doe ¹. It states, “PLEASE TAKE NOTICE that you are indebted to the Landlord in the sum of \$3199.00 for rent and additional rent, if any.” It further indicates, “The sum is detailed in the attached resident ledger (non-HAP), included in this notice and made a part hereof.” Upon a close review of the ledger, it begins January 1, 2019 with a monthly breakdown in rent charges and ends in May 15, 2022. The ledger also contains a charge described as “Agreement #854078060517 Tenant Monthly Repayment” for \$50 monthly from January 1, 2019 through May 15, 2022.

Now, Respondent moves to dismiss the Petition pursuant to *CPLR § 3211 (a) (1), (2), (7) and/or (8)* for failure to state a cause of action in that the underlying rent demand fails to state the facts upon which the proceeding is brought in accordance with *RPAPL § 741*. The remaining relief seeks an order regarding *RPAPL § 235-e* which was withdrawn by Respodent’s counsel at oral argument.

Under *CPLR § 3211 (a) (1)*, a dismissal is warranted only if the documentary evidence

¹ Amel Haynes, John and Jane Doe are identified on the Petition and Notice of Petition as - Respondents/Undertenants,- as such it is unclear why Petitioner would be demanding collection of rent from Undertenants who are not leaseholders and not contractually obligated to pay rent to Petitioner.

submitted conclusively establishes a defense to the asserted claim as a matter of law. *Heaney Purdy*, 29 N.Y.2d 157 (1971). Further, on review of a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR §3211 (a) (7), the court must accept all of the allegations in the complaint as true, and, drawing all inferences from those allegations in the light most favorable to the plaintiff or petitioner, determine whether a cognizable cause of action can be discerned therein, not whether one has been properly stated. *Leon v. Martinez*, 84 N.Y.2d 83 (1994); *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633 (1976); *Dulberg v. Mock*, 1 N.Y.2d 54, 56, (1956). Lastly, the complaint or petition must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory. *MatlinPatterson ATA Holdings LLC v. Fed. Express Corp.*, 87 A.D.3d 836, 839 (1st Dep't 2011), leave to appeal denied, 21 N.Y.3d 853 (2013).

To state and maintain a cause of action for nonpayment of rent, the petition must state the facts upon which the proceeding is based. RPAPL § 741(4). Further, the predicate rent demand required by RPAPL § 711(2) must “clearly inform the tenant of the particular period for which a rent payment is allegedly in default and the approximate good faith sum of rent assertedly due for each such period.” *Schwartz v. Weiss–Newell*, 87 Misc.2d 558 (Civ Ct. N.Y. Cty 1976).

A written demand for rent must notify the tenant of the amount claimed due and the period for which such amount is due. After reviewing the instant rent demand sent to Respondent, the Court concludes that the rent demand does not satisfy RPAPL § 711(2) nor the relevant case law. *Schwartz v. Weiss–Newell*, *supra*.

Here, the Petitioner’s rent demand indicated a lump sum amount of \$3,199 without even including a monthly and breakdown. This type of rent demand fails to apprise the Respondent of the correct amount due for each month. Respondent is then expected to review the attached rent ledger referred to in the rent demand. Upon a review of that ledger, there is a reference to non-rent items described as “Agreement #854078060517 Tenant Monthly Repayment” for \$50 monthly. There is no proof that those repayment charges are considered as additional rent, entitling Petitioner to seek those charges in the rent demand. Moreover, the *Housing Stability and Tenant Protection Act of 2019* prohibits the recovery of fees, charges, or penalties. RPAPL § 702. As such, the rent demand is defective as it seeks non-rent items.

Also, the rent demand fails to give Respondent notice of the actual claims nor does it afford her an opportunity to prepare her defenses to this action. By failing to give her a clear calculation of the rental arrears, the Respondent is uninformed as to how she should proceed in order to avoid litigation or if the action is commenced, how to proceed with the case. The instant rent demand is too indefinite and not unequivocal enough to serve as a predicate for a summary eviction proceeding. *J.D. Realty Assocs. v. Scoullar*, 169 Misc. 2d 292 (AT 1st Dep’t 1996).

Proof of a proper rent demand is a jurisdictional requisite to maintain a summary proceeding for non-payment of rent. *Solack Estates Inc. v. Goodman*, 102 Misc.2d 504, (AT 1st Dep’t 1979) *aff’d* 78 A.D.2d 512 (1st Dep’t 1980). The failure to comply requires dismissal of the action. Defects in the predicate notice are not subject to cure by amendment and require dismissal of the proceeding. *Chinatown Apts. v. Chu Cho Lam*, 51 N.Y.2d 786 (1980).

As such, here, dismissal is warranted for failure to state a cause of action under *CPLR 3211(a)(7)* because the rent demand alleges a lump sum of rent arrears for \$3,199 without asserting facts which the proceeding is based under *RPAPL § 741(4)*, contain non-rent items and do not fit within any “cognizable legal theory,” under which Respondent could owe said sum. *Leon v. Martinez, supra.*

After reviewing all motion papers by both sides, the Court dismisses the Petition without prejudice based on an improper rent demand.

ORDERED: Respondent's motion to dismiss is granted and the proceeding is dismissed without prejudice.

This is the decision and order of this court. Copies of this decision will be uploaded to NYSCEF.

Date: May 3, 2023



Judge of the Civil Court/Housing Part
Frances A. Ortiz

Frances A. Ortiz
Judge, Housing Court