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### WEST 173rd REALTY LLC v. LAMBERT

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

WEST 173<sup>RD</sup> REALTY LLC

Index No. 051284/20

Petitioner,

**DECISION/ORDER**

-against-

Motions Sequence No. 1 and 4

ELIZABETH LAMBERT; "JOHN DOE"; "JANE DOE"  
Respondents.

CIVIL COURT OF THE  
CITY OF NEW YORK

HON KAREN MAY BACDAYAN, JHC

APR 20 2023

*Kaplain & DuVal, LLP (Leonard Kaplain, Esq.)* for the petitioner  
*The Legal Aid Society (Sherly Luong, Esq.)*, for Elizabeth Lambert

ENTERED  
NEW YORK COUNTY

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by  
NYSCEF Doc No: 24-31.

**PROCEDURAL HISTORY AND BACKGROUND**

This is a holdover nuisance proceeding commenced against Elizabeth Lambert ("respondent") and two unnamed respondents. The predicate notice to cure, dated November 6, 2019, states that pursuant to both Sections 2524.3 (a) and 2524.3 (b) of the Rent Stabilization Code ("RSC"), respondent had both violated a substantial obligation of her tenancy and her lease agreement, as well as committed or permitted a nuisance, by "allow[ing] the subject premises to become filled and cluttered with various items and debris including, but not limited to: 'junk', refuse, books, magazines, files and other papers, clothing, cardboard boxes, and accumulated household items and furnishings." (NYSCEF Doc No. 10, respondent's exhibit A.) The notice to cure stated that "[t]his situation poses a severe health and safety hazard to you, other occupants, and employees of the building premises" and advised respondent to cure the "violations" on or before November 25, 2019. (*Id.*) Petitioner subsequently served a notice of termination, dated December 16, 2019, which tracked the language of RSC 2524.3 (b) regarding nuisance, as well as the alleged conduct from the notice to cure, alleging that respondent "continues to" allow the conditions to persist. (*Id.*)

Petitioner commenced the proceeding in January 2020; the proceeding had one pre-pandemic appearance in February 2020, at which time the proceeding was adjourned for Adult

Protective Services to evaluate respondent.<sup>1</sup> In March 2021, respondent filed a COVID-19 hardship declaration. (NYSCEF Doc No. 1, case summary.) Respondent's counsel filed a notice of appearance in January 2022 and filed an answer in July 2022, raising five objections in point of law and three affirmative defenses. (NYSCEF Doc No. 3, notice of appearance; NYSCEF Doc No. 8, answer.)

Now before the court is respondent's motion to dismiss the proceeding for failure to state a cause of action in that the notice of termination does not describe a nuisance with sufficient detail to allow respondent to prepare a defense. Respondent also claims that petitioner fails to allege sufficient specific facts upon which it bases its conclusion that respondent did not cure the alleged breach.<sup>2</sup> In the alternative, respondent moves for leave to serve and file a proposed answer, or deem said proposed answer served and filed. (NYSCEF Doc No.24, notice of motion [sequence 4].)<sup>3</sup>

Respondent contends that the notice to cure only contains a single allegation, which both fails to describe in detail the alleged clutter and to allege dates and times when the conditions allegedly existed, thus "constitute[ing] [a] fatal defect[] in [the] predicate notices." (NYSCEF Doc No. 25, respondent's attorney's affirmation ¶ 23.) Although the notice to cure states that the alleged condition of the subject premises "poses a severe health and safety hazard to you, other occupants, and employees of the building premises[,] it does not detail *how* the alleged conditions pose such a threat to the health and safety of respondent and other tenants and employees in the building. (*Id.* at ¶ 26.) In addition, respondent contends that the notice of termination does not provide any specific allegations that would support petitioner's claim that respondent failed to cure the alleged conditions. (*Id.* at ¶¶ 31-32.)

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<sup>1</sup> The court appointed a guardian *ad litem* for respondent in January 2023. NYSCEF Doc No. 23, order appointing guardian *ad litem*.

<sup>2</sup> Respondent cites to CPLR 3211 [a] [2] in her notice of motion, which is the provision that allows for dismissal for lack of subject matter jurisdiction. The failure to serve proper predicate notices does not deprive the Housing Court of subject matter jurisdiction over a holdover proceeding. *433 W. Assocs. v Murdock*, 276 AD2d 360, 360-361 [1st Dept 2000]; *170 W. 85th St. Tenants Assn. v. Cruz*, 173 AD2d 338, 339 [App Term, 1st Dept 1991] ["The failure of a petitioner to comply with a statutory notice requirement, where applicable, represents merely the failure to comply with a condition precedent to suit and cannot properly be said to affect the court's jurisdiction."] The court shall disregard the mistaken citation under CPLR 2001 and notes petitioner never raised any objection to or claim prejudice from the mistaken citation.

<sup>3</sup> Given that respondent's attorney filed an answer in July 2022, the court deems the branch of respondent's motion seeking leave to file an answer as leave to file an amended answer pursuant to CPLR 3025.

In opposing the motion, petitioner argues that the predicate notices set forth sufficient facts to establish petitioner's grounds to terminate respondent's tenancy and to allow respondent to prepare a defense; petitioner also notes that respondent did not submit an affidavit in support of her motion to dismiss. (NYSCEF Doc No. 28, petitioner's attorney's affirmation in opposition ¶¶ 8-11.) In reply, respondent argues that an affidavit from respondent is not necessary on a motion to dismiss for failure to state a cause of action. (NYSCEF Doc No. 30, respondent's attorney's affirmation in reply ¶ 3.)<sup>4</sup>

Petitioner also correctly notes the court has not issued a decision on its prior motion for use and occupancy filed in February 2020. (NYSCEF Doc No. 28, petitioner's attorney's affirmation in opposition ¶ 12.) The court notes that petitioner's motion for use and occupancy was marked off the calendar on February 2, 2021 by the Hon. Marcia Sikowitz and, indeed, remains pending.

## **DISCUSSION**

### **Standard to dismiss for failure to serve proper predicate notice**

"On a motion to dismiss for failure to state a cause of action, the court must accept as true all of the factual allegations in the petition." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].)

"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 for dismissal will fail." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977].)

"Whether a [petitioner] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBCI, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].)

"On a motion made pursuant to CPLR 3211 (a) (7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party." (*Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976] ["[u]nless the motion to dismiss is converted by the court to a motion for summary judgment [a plaintiff] will not be penalized because he has not made an evidentiary showing in support of his complaint"]

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<sup>4</sup> Respondent did not need to submit an affidavit in support of the motion to dismiss, "as the motion is addressed to the face of the pleadings and based upon an objective standard of review . . . (citation omitted)." *Woodlawn 278-305, LLC v Barnett*, 72 Misc 3d 1208 (A), \*6 (Civ Ct, Bronx County 2021) citing *Oxford Towers Co, LLC v Leites* (41 AD3d 144 (1<sup>st</sup> Dept 2007)).

Predicate notices to recover possession of rent-stabilized apartments must “state the ground” for termination of the tenancy, provide “the facts necessary to establish the existence of such ground, and the date when the tenant is required to surrender possession.” (RSC § 2524.2.). The purpose for requiring predicate notices to state the “facts necessary to establish the existence” of the grounds is to “ensure[] that a tenant will be informed of the factual and legal claims that he or she will have to meet and enables the tenant to interpose whatever defenses are available.” (*Bellstell 140 East 56th St., L.L.C. v Layton*, 180 Misc 2d 25, 27 [Civ Ct, New York County 1999], citing *MSG Pomp Corp. v Doe*, 185 AD2d 798, 800 [1st Dept 1992]; *Woodlawn 278-305, LLC v Barnett*, 72 Misc 3d 1208 [A], at \*4 [Civ Ct, Bronx County 2021] [“Predicate notices must provide the necessary additional information to enable the tenant respondent to frame a defense to meet the tests of reasonableness and due process.”], citing *Jewish Theological Seminary of America v Fitzer*, 258 AD2d 337, 338 [1st Dept 1999].) “[T]he appropriate standards for assessment of the adequacy of notice is one of reasonableness in view of all attendant circumstances.” (*Hughes v Lenox Hill Hosp.*, 226 AD2d 4, 17 [1st Dept 1996].)

With regard to nuisance behavior, courts have defined a nuisance as a “continuous invasion of rights ... a pattern of continuity or recurrence of objectionable conduct.” (*Frank v Park Summit Realty Corp.*, 175 AD2d 33, 34 [1st Dept 1991]; *Domen Holding Co. v Aranovich*, 1 NY3d 117 [2003].) To establish whether certain behavior is so egregious as to rise to the level of nuisance, the court must weigh the quantitative and qualitative aspects under a specific set of facts to determine whether a nuisance occurred. (*Metropolitan Life Ins. Co. v. Moldoff*, 63 NYS2d 385, 386 [1st Dept 1946].) The tenant’s conduct must affect other residents’ health and safety for the alleged conduct to amount to nuisance behavior. (RSC § 2524.3 [b]; *Roxborough Apts. Corp. v Kalish*, 22 Misc 3d 130 [A] [1st Dept 2009] [landlord failed to state actionable claim for nuisance, where landlord did not claim that tenant’s alleged conduct in any way affected other building residents]; *Sumet I Assocs., LP v Irizarry*, 103 AD 3d 653, 654 [2d Dept 2013] [after trial finding that landlord failed to demonstrate that the criminal activity of vandalizing walls in common area threatened the health, safety, or right to peaceful enjoyment of the premises by other residents].)

That the behavior affects other residents is the hallmark of claim sounding in nuisance. (*Id.*)<sup>5</sup> A notice of termination for nuisance behavior comprising excessive clutter and unhygienic conditions will withstand judicial scrutiny if it is objectively obvious that the nuisance affects other tenants.

For example, in *12 Broadway Realty, LLC v Levites*, 44 AD3d 372 (1<sup>st</sup> Dept 2007), the Appellate Division First Department found a predicate notice sufficient in part because “[a]lthough respondent argues that the items about which petitioner complains affected only her apartment (as opposed to other tenants), the mice in her apartment could spread to other parts of the building.” (*Id.* at 373.) (*See also Courtney House, LLC v Goetz*, 51 Misc. 3d 146 [A] [App Term, 1<sup>st</sup> Dept 2016] [finding sufficient a notice of termination that stated “the apartment is in an extremely cluttered and unhygienic condition, with empty food cans, refuse and other unidentifiable items completely covering most of the flat surfaces and floors ... and piled several feet high throughout the apartment . . . [and] that a moth infestation spread from tenant's apartment to other apartments (internal quotations omitted)”]; *1123 Realty LLC v Treanor*, 62 Misc 3d 326, 336-337 [Civ Ct, Kings County 2018] [denying motion to dismiss nuisance holdover, where predicate notices alleged “newspapers, clothing, bikes, furnishings, boxes, refuse, papers, garbage, and miscellaneous debris that [] obstructed passage through the apartment and the windows, attract[ed] vermin, and constitute[d] a fire hazard (internal quotation marks omitted).”])

Here, the predicate notices do not contain any factual assertions as to how the alleged presence of “refuse, books, magazines, files and other papers, clothing, cardboard boxes, and accumulated household items and furnishings” pose any threat to the health and safety of other residents in the subject building; nor can the court infer this essential element from the face of the pleadings..

### **CONCLUSION**

Accordingly, for the foregoing reasons, it is

ORDERED that respondent’s motion to dismiss the proceeding is GRANTED and the petition is dismissed without prejudice; and it is further

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<sup>5</sup> The notice of termination no longer cites to RSC § 2524.3 (a) (breach of substantial obligation of tenancy) thus narrowing the scope of petitioner’s claims to nuisance behavior pursuant to RSC § 2524.3 (b).

ORDERED that petitioner's motion for use and occupancy is DENIED as moot.

This constitutes the decision and order of this court.

Dated: April 20, 2023  
New York, NY

*So Ordered*   
\_\_\_\_\_  
HON. KAREN MAY BACDAYAN, JHC  
*Hon. Karen May Bacdayan*