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320 E. 73, LLC v Alfredo
2023 NY Slip Op 23144
Decided on April 11, 2023
Civil Court Of The City Of New York, New York County
Kitson, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the printed Official Reports.

Decided on April 11, 2023

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

<p>320 East 73, LLC, Petitioner,</p> <p>against</p> <p>Richard Alfredo, JOHN DOE, Respondents.</p>

Index No. LT-313557-22/NY

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Vijay M. Kitson, J.

Recitation, as required by CPLR § 2219(A), of the papers considered in the review of this motion seeking an order dismissing this proceeding:

Papers Numbered [NYSCEF Doc No.]
Notice of Motion (Mot. Seq No.1) 10
Affirmations/Affidavits in Support 11, 12
Exhibits 13,14
Affirmations/Affidavits in Opposition 15, 16
Exhibits 17
Reply Affirmations/Affidavits 18, 19

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

320 East 73, LLC (Petitioner) commenced this summary nonpayment proceeding against Richard Alfredo (Respondent) and John Doe (collectively Respondents), seeking possession of Apartment 5FW (Subject Premises) located in the building known as 320 East 73rd Street, New York, NY 10021 (Building). The Petition (Ny St Cts Elec Filing [NYSCEF] Doc No. 1) and Notice of Petition (NYSCEF Doc No. 2) were allegedly served on Respondents on October 12, [*2]2022 (NSYCCEF Doc No. 12, Affidavit of Service) and claim \$26,044.25 due and owing through August 2023.

Respondent Alfredo interposed an answer (NYSCEF Doc No. 6) on October 27, 2022, and the proceeding was first calendared in Part A on November 4, 2022. The proceeding was adjourned by stipulation (NYSCEF Doc No. 8) to December 8, 2022. On December 8, 2022, the parties adjourned the case again by stipulation to January 26, 2023 for motion practice or trial. Respondent then filed the instant motion (NYSCEF Doc Nos. 10- 14, Mot. Seq. #1) returnable January 26, 2023, seeking an order "[p]ursuant to CPLR § 3212, granting Respondent's Motion for Summary Judgment of Dismissal because . . . the Petitioner failed to serve the required Five (5) Day Rent Demand pursuant to RPL § 235-E(d); and [f]or such other and further relief as to this Court may [d]eem just and proper." (NYSCEF Doc No. 10, Respondent's Notice of Motion). The court heard oral argument on January 25, 2023.

Respondent argues that service of a five-day rent demand is required pursuant to Real Property Law (RPL) § 234-e(d) prior to the commencement of a summary nonpayment proceeding in addition to a fourteen-day demand for rent pursuant to Real Property Actions and Proceedings Law (RPAPL) § 711(2). Respondent asserts that the Petition makes no mention of the service of a five-day rent demand and that Respondent never received any such five-day demand for rent, thus rendering the Petition "jurisdictionally defective and Petitioner lacks standing to maintain this proceeding" (NYSCEF Doc No. 11, Respondent's Attorney's Affirmation in Support at ¶ 16) warranting dismissal of this proceeding.

In opposition, Petitioner argues that the five-day demand for rent is not a jurisdictional defect and that it did in fact send the required notice in compliance with RPL § 235-e(d). Petitioner attaches a copy of the notice it allegedly sent to Respondents, along with a printout from the United States Postal Service (USPS) Tracking website. (NYSCEF Doc No. 16, Cohen aff. at ¶ 4, exhibit A()).

In reply, Respondent argues that the notice attached to Petitioner's motion was delivered back to the original sender and not to the Respondent, thus rendering the notice defective.

In essence, Respondent argues that this proceeding should be dismissed for two distinct reasons: first, that Petitioner did not serve a notice pursuant to RPL § 235-e(d) on Respondent, and second, that Petitioner failed to allege service of the RPL § 235-e(d) notice in the Petition as a condition precedent to the maintenance of this proceeding.

CPLR § 3212 (b) provides that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." The moving party has the initial burden of establishing a *prima facie* showing that it is entitled to summary judgment as a matter of law and that no material issues of triable fact exist. (*ee Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]). Once this burden has been met, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or [to] demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient," (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The function of the summary judgment procedure is issue finding, not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

In support of the motion, Respondent simply alleges that Respondents never received a [*3]"Five (5) Day Rent Demand" prior to the commencement of this proceeding. (NYSCEF Doc No. 12, Alfredo aff. at ¶ 4). Mara Cohen, an employee of Ogrin Associates LLC, the managing agent for Petitioner, alleges that the "Five Day Notice" was sent to Respondent by certified mail on August 10, 2022. (NYSCEF Doc No. 16, Cohen aff. at ¶ 4). Respondent's allegation is bald and conclusory and is contradicted by Petitioner's affidavit in opposition.

Petitioner also provides a copy of a "Rental Arrears Notice" dated August 10, 2022 with what appears to be a USPS tracking number from a certified mail receipt. However, the

bottom part of the receipt, notably the portion that would contain a postmark and the destination address looks as if it has been cut off. (NYSCEF Doc No. 17). As part of the same exhibit (NYSCEF Doc No. 17), Petitioner attaches a printout containing the same tracking number from the USPS website to show that the purported notice was returned to the original sender on September 14, 2022. The tracking history as presented to the court is incomplete as it is missing page two of three. As it applies to whether Petitioner sent Respondent a notice pursuant to RPL § 235-e(d) (the parties describe it as a "Five Day Rent Demand" or a "Five Day Notice"), neither party has demonstrated entitlement to summary judgment as a matter of law. There are competing sets of facts in the affidavits offered in support of and in opposition to Respondent's motion that clearly demonstrate the existence of a triable issue of fact.

The second issue before the court is whether the failure to plead compliance with RPL § 235-e(d) is a defect warranting dismissal of the Petition. Respondent avers that in omitting a statement of compliance with RPL § 235-e(d), Petitioner failed to comply with RPAPL § 741(4) in that the Petition does not "state the facts upon which the special proceeding is based."

On June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 (HSTPA) was enacted. (L 2019, ch 36). The HSPTA added, *inter alia*, RPL § 235-e(d) (HSTPA §1, Part M, § 9) and amended RPAPL § 711(2) (HSTPA, §1, Part M, §9).

RPL § 235-e(d) entitled "Duty to provide a written receipt" states:

"(d) If a lessor, or an agent of a lessor authorized to receive rent, fails to receive payment for rent within five days of the date specified in a lease agreement, such lessor or agent shall send the lessee, by certified mail, a written notice stating the failure to receive such rent payment. The failure of a lessor, or any agent of the lessor authorized to receive rent, to provide a lessee with a written notice of the non-payment of rent may be used as an affirmative defense by such lessee in an eviction proceeding based on the non-payment of rent..."

RPAPL § 711(2) was amended to state, in pertinent part:

"A tenant shall include an occupant of one or more rooms in a rooming house or a resident, not including a transient occupant, of one or more rooms in a hotel who has been in possession for thirty consecutive days or longer. No tenant or lawful occupant of a dwelling or housing accommodation shall be removed from possession except in a special proceeding. A special proceeding may be maintained under this article upon the following grounds:

2. The tenant has default in the payment of rent, pursuant to the agreement under

which the premises are held, and a written demand of the rent has been made with at least fourteen days' notice requiring, in the alternative, the payment of the rent, or the [*4]possession of the premises, has been served upon him as prescribed in section seven hundred thirty-five of this article."

There is scant authority on whether the failure to plead compliance with RPL § 235-e(d) is fatal to the maintenance of a summary nonpayment proceeding commenced pursuant to RPAPL § 711(2). The court in [*Lawler v Canfield*, 66 Misc 3d 312](#) [Watertown City Ct, Jefferson County 2019] found that the failure to *provide* the notice pursuant to RPL § 235-e(d) was not "jurisdictional in nature and dismissal would not be warranted even upon a finding after trial of noncompliance." (*Lawler* at 317). This court finds the reasoning in *Lawler* persuasive.

It has been established that "[i]t is a fundamental principle of statutory interpretation that a court should attempt to effectuate the intent of the legislature and where the statutory language is clear and unambiguous, the court should construe the statute to give effect to the plain meaning of the words used." (*Eaton v NY City Conciliation & Appeals Bd.*, 56 NY2d 340 [1982] (internal citations omitted.)) When the legislature passed the HSTPA and substantially amended RPAPL § 711(2), it did not require a notice pursuant to RPL § 235-e(d) as a condition precedent to the maintenance of a summary nonpayment proceeding. Nor did the legislature require service of the RPL § 235-e(d) notice as a condition precedent within RPL § 235-e(d) itself (compare this with RPL § 232-a where a condition precedent to maintaining a summary proceeding is clearly articulated). If the legislature sought to add a new or additional condition precedent to the maintenance of a summary nonpayment proceeding, it would have explicitly done so in passing the HSTPA. For these reasons, the court finds that compliance with RPL § 235-e(d) is not an essential fact that must be stated in the petition pursuant to RPAPL § 741(4) for Petitioner to maintain this summary nonpayment proceeding.

Accordingly, it is:

ORDERED that Respondent's motion is denied in its entirety;

ORDERED that the parties are to appear on May 1, 2023 at 9:30am for all purposes including trial.

This constitutes the decision and order of the court.

Dated: April 11, 2023

New York, NY

/s/

HON. VIJAY M. KITSON
Judge, Housing Court

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