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[*1]

75 Wall Assoc. LLC v Zordan
2023 NY Slip Op 50435(U)
Decided on April 14, 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This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on April 14, 2023

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

<p>75 Wall Associates LLC, Petitioner,</p> <p>against</p> <p>Monique Zordan, JOHN DOE, JANE DOE, Respondents</p>

Index No. LT-316118-22/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 of motion to dismiss:

Papers Numbered [NYSCEF Doc. No.]

Notice of Motion (Seq No.1) Affidavits/Affirmations in Support & Exhibits 11, 12, 13, 14, 15

Affidavit/Affirmation in Opposition 16, 17, 18

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

75 Wall Associates, LLC. (Petitioner), commenced this summary nonpayment proceeding against Monique Zordan (Respondent), John Doe, and Jane Doe on October 21, 2023 seeking possession of Unit #34C (Subject Premises) located in the building known as 75 Wall Street, New York, NY 10005 (Subject Building). The Petition (NYSCEF Filing [NYSCEF] Doc Nos. 1, 3, and 4) and Notice of Petition (NYSCEF Doc No. 2) were allegedly served on Respondent at the subject premises on October 26, 2022 (NYSCEF Doc No. 5, Affidavit of Service for the Notice of Petition and Petition []) and claim arrears in the amount of \$26,028.64 through September 7, 2022.

Respondent filed a *pro se* answer on November 2, 2022, and the proceeding was [*2] scheduled on the court's Part A calendar for November 22, 2022. Respondent appeared on November 22, 2022, represented by counsel, and the proceeding was adjourned to December 19, 2022, as per the court's order dated November 22, 2022 (NYSCEF Doc No. 8). Respondent filed an amended answer (NYSCEF Doc No. 9) on December 16, 2022. On December 19, 2022, the proceeding was adjourned for settlement or trial to February 3, 2023. The court's order dated December 19, 2022 (NYSCEF Doc No. 10) provided that any motions must be filed on or before the February 3, 2023 return date.

Respondent filed the instant motion returnable on February 3, 2023 (NYSCEF Doc Nos. 11 -15), seeking an order granting summary judgment in favor of Respondent and dismissing the underlying proceeding pursuant to Civil Practice Law and Rules (CPLR) §§ 3212, 3211(a)(7), and 3211(a)(8) on the grounds that (1) the Petition fails to state a cause of action because Petitioner's rent demand is defective and (2) the court lacks jurisdiction because Petitioner failed to serve the rent demand in accordance with RPAPL § 711. (NYSCEF Doc No. 11). Petitioner filed opposition (NYSCEF Doc Nos. 16-18) to Respondent's motion, and the court reserved decision after argument on February 3, 2023.

Respondent seeks dismissal based on Petitioner's alleged failure to properly demand the rent, which is a failure to comply with a condition precedent to maintaining a summary proceeding for the nonpayment of rent under Real Property Actions and Proceedings Law

(RPAPL) § 711(2). It is settled law that "failure to [comply] with a condition precedent is the equivalent of a dismissal for failure to state a cause of action, and is not a jurisdictional defect." (*Fleming v Long Is. R.R.*, 130 AD2d 59 [2d Dept 1987]). Therefore, the court applies the standards of CPLR 3211(a)(7) to Respondent's motion. On a motion to dismiss pursuant to CPLR § 3211(a)(7), the court's role is limited to determining whether the pleading states a cause of action that fits within any cognizable legal theory, while accepting the allegations in the pleading as true and affording the proponent of the pleading the benefit of every possible inference. (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118 [1st Dept 2002]).

Respondent argues that this proceeding should be dismissed as the rent demand (NYSCEF Doc No. 4) is fatally defective. The basis of this contention is that the amount sought in the rent demand, which states a total dollar amount and refers to an annexed rent history, does not apprise Respondent of how payments made by the Emergency Rental Assistance Program (ERAP) were applied to the balance therein, and that the rent demand includes non-rent fees that are prohibited from being sought in a summary nonpayment proceeding. Respondent argues that by demanding the rent in this fashion, Petitioner failed to make a good faith approximation of the rent owed that fairly apprises the tenant of the periods for which rent is allegedly due and in what amount.

Petitioner argues, in opposition, that the rent ledger attached to the rent demand is a good faith approximation of the rent owed as it gives a detailed accounting of the charges and credits on Respondent's rental account. Petitioner argues that all of the late fees were removed reducing the balance to \$26,028.64, and that the credit due to Respondent as a result of the ERAP payment is clearly delineated in the ledger and the sum demanded. Furthermore, Petitioner argues that Respondent had the ERAP approval letter and knew which months were paid by ERAP.

The court must examine the specific ledger annexed to the rent demand in order to determine if the amount demanded "clearly inform[s] the tenant of the particular period for which a rent payment is allegedly in default and of the approximate good faith sum of rent [*3] asserted due for each such period," ([542 Holding Corp. v Prince Fashions, Inc.](#), 46 AD3d 309 [1st Dept 2007] quoting *Schwartz v Weiss-Newell*, 87 Misc 2d 558 [Civ Ct, NY County 1976]). Annexed to the Petition as Exhibit B (NYSCEF Doc No. 4) is the rent demand, an exhibit to the rent demand which is a copy of Respondent's ledger, and its affidavit of service.

The ledger incorporated in the rent demand is dated September 12, 2022 and shows a

total amount due of charges in the amount of \$26,028.64, identical to the sum sought in the rent demand. The Petition also demands payment of \$26,028.64, referring to it as rent due through September 7, 2022. The last zero balance on the ledger is in March 2021. There are no payments listed on the ledger other than a payment from ERAP for the total amount of \$128,177.20. The ERAP payment amount matches the amount in the ERAP approval notification received by Respondent, which is attached to Respondent's moving papers as Exhibit A (NYSCEF Doc No. 14). The late fees are removed from the ledger after the ERAP payment is credited.

The balance of \$26,028.64 in the ledger contains a total of \$2,105.84 in electric charges, although it is unclear from reviewing the ledger how much of those charges were paid by ERAP, if any at all. A review of the ERAP breakdown attached to Respondent's moving papers suggests that ERAP paid a total of \$1,427.20 in excess of the monthly rent of \$8,450.00 from April 2021 through March 2022. ERAP also paid three months of prospective rent for July, August, and September 2022 at \$8,450.00 per month. This analysis is complicated by the ERAP breakdown provided by Respondent, which states "if you applied for assistance to help pay for utilities and are approved for a utility payment, you will receive a separate notice . . ." and goes on to state that the amounts listed in the breakdown are "the total amount of rental-arrears (back-rent) to be paid per month" (NYSCEF Doc No. 14, page 3). Examining the ledger in conjunction with the ERAP approval letter, the total arrears of \$26,028.64 could include as little as \$678.64 in electric charges, and as much as \$2,105.84. Herein lies the issue with Petitioner's demand for rent.

The court cannot determine in reviewing the ledger alone, what amount of the total sum demanded is rent, what amount are electrical charges, and what portion of the \$128,177.20 that ERAP paid should be applied to rent or utilities. The demand itself must apprise the Respondent of the rents owed and for what time periods, not, as Petitioner argues, the demand in combination with whatever documents the Respondent may possess.

Prior to enactment of the Housing Stability and Tenant Protection Act of 2019 (HSTPA) (L 2019, ch 36), such a discrepancy or the inclusion of non-rent fees as sought in this rent demand may not have rendered such a demand defective. However, the lack of clarity and the inclusion of non-rent fees in Petitioner's rent demand is compounded by the amendment of the Real Property Actions and Proceedings Law (RPAPL) resulting from the enactment of the HSTPA. In pertinent part, the HSTPA added RPAPL § 702 which states:

"1. In a proceeding relating to a residential dwelling or housing accommodation, the term "rent" shall mean the monthly or weekly amount charged in consideration

for the use and occupation of a dwelling pursuant to a written or oral rental agreement. No fees, charges or penalties other than rent may be sought in a summary proceeding pursuant to this article, notwithstanding any language to the contrary in any lease or rental agreement."

This amendment amounts to an absolute bar to Petitioner seeking non-rent fees as part of the basis to commence a summary proceeding relating to a residential dwelling. After reviewing the ledger annexed to the rent demand, it is clear that Petitioner seeks non-rent fees in clear [*4]contravention of RPAPL § 702(1). Even viewing this in a light most favorable to Petitioner, the fact that the amounts sought in the rent demand contain non-rent fees, defeats Petitioner's contention that the rent demanded was a good faith approximation of the rent arrears.

Petitioner has failed to make a proper demand for rent and has not established that it has satisfied the condition precedent to maintain this proceeding pursuant to RPAPL § 711(2). The court does not address the balance of Respondent's motion at this juncture as it is moot. Accordingly, it is:

ORDERED, Respondent's motion is granted and this proceeding is dismissed.

This constitutes the decision and order of the court.

Dated: April 14, 2023
New York, NY

/s/
HON. VIJAY M. KITSON
Judge, Housing Court

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