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M&S Queens Realty LLC v. London

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M&S Queens Realty LLC v London
2023 NY Slip Op 23121
Decided on April 25, 2023
Civil Court Of The City Of New York, Queens County
Schiff, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
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Decided on April 25, 2023

Civil Court of the City of New York, Queens County

<p>M&S Queens Realty LLC, Petitioner-Landlord,</p> <p>against</p> <p>Kim London, JOE DOE, AND JANE DOE, Respondents-Tenants</p>
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Index No. L&T 312871/22

Logan J. Schiff, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Respondent's motion to dismiss and Petitioner's cross-motion to amend:

Papers NYSCEF DOC.

Notice of Motion & Affirmation/Affidavits/Exhibits Annexed 6-10

Notice of Cross-Motion & Affirmation/Affidavits/Exhibits Annexed 11-23

Reply Affirmation 24-25

Upon the foregoing cited papers, the court's decision and order is as follows: Petitioner M&S Queens Realty LLC ("Petitioner") commenced the instant expiration of lease holdover proceeding against Kim London, John Doe, and Jane Doe ("Respondents") by filing of a Notice of Petition and Petition on August 25, 2022. Respondents now move to dismiss on the basis of improper use of an outdated Notice of Petition form, failure to exercise reasonable

application in serving the predicate 90-day notice of non-renewal and termination, and improper use of a pseudonym as to Respondent Jane Doe. Petitioner cross-moves to amend the Petition to substitute Respondent Bernard Birtha for Jane Doe.

On August 7, 2019, over three years before this proceeding was commenced, then-Chief Administrative Judge Lawrence K. Marks issued Administrative Order 163/19 amending 22 NYCRR § 208.42(b) to provide for a standardized "form notice of petition for mandatory use in eviction proceedings involving residential property under Article 7 of the Real Property Actions and Proceedings Law [for use in holdover proceedings]." Unlike the prior court rule, which merely provided guidance on the type of language needed for a Notice of Petition to comply with Real Property Actions and Proceedings Law ("RPAPL") 731, the current regulation attaches a sample Notice of Petition with the precise required words. The new Notice of Petition form was initially optional and became mandatory for all filings as of October 1, 2019.

The Chief Administrative Judge has the authority to regulate the form of the Notice of [*2]Petition as part of her constitutionally delegated power to supervise the unified court system and to regulate its policies and procedures (NY Const. Article VI §§ 28(b) and (c); Judiciary Law § 212(2)(d); 22 NYCRR § 80.1).

The new Notice of Petition form includes significant new language not included in prior iterations, including information on accessing free counsel and requesting an interpreter, a disability accommodation, and an adjournment of the initial appearance. Given these substantive changes, several trial courts have held that the use of an outdated Notice of Petition is a material defect in commencement that mandates dismissal without prejudice (*see, e.g. NY Hous. Auth. v Destin*, 2020 NYLJ LEXIS 1460 at *3-*4 [Civ Ct, Kings Co 2020] [rejecting a lack of prejudice argument and citing *Parker v Mack*, 61 NY2d 114 [1984] for the proposition that actual notice is not a substitute for compliance with statutory prescriptions]; *Marshall v Simmons*, 2020 NYLJ LEXIS 1515 at *5-*6 [Civ Ct, Kings Co 2020]; *Mannapova v Mannapova*, 2020 NYLJ LEXIS 2733 at *4-*5 [Civ Ct, Richmond Co 2023]; *Jeannot v Molier*, Index No. 50309/22 [Civ Ct, Queens Co 2023]).

In its opposition Petitioner concedes that it made an error in its Notice of Petition, which does not include any of the new required language, and asks this court to treat the defect in form as a non-prejudicial technical infirmity that may be disregarded pursuant to CPLR 2101(f) (*see, e.g., e.g. 1700 York Assocs. v. Kaskel*, 182 Misc 2d 586, 588-589 [Civ Ct, NY Co 1999] [holding that a Notice of Petition that omitted the court's street address was non-

prejudicial where the respondent otherwise appeared in court]). This court disagrees.

While the Second Department, in which this court sits, utilizes a prejudice analysis rather than a strict compliance approach in assessing defects in the commencement of summary proceedings (*see Siedlecki v Doscher*, [33 Misc 3d 18](#), 20 [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2011] [failure to timely file affidavit of service with the clerk at commencement, where papers were otherwise properly served, was not a fatal defect]; *cf. Riverside Syndicate, Inc. v Saltzman*, [49 AD3d 402](#) [1st Dept. 2008]) a substantive error or omission in a Notice of Petition, as occurred here, is akin to a defective predicate notice, as it provides important information to the respondent in advance of the first court date and is a part and parcel of commencement itself (*see Chalfonte Realty Corp. v Streater, Inc.*, 142 Misc 2d 501, 503 [Civ Ct, NY Co 1989] [concluding that the Notice of Petition may not be amended and citing to the analogous proposition in the context of a summons, as held in *Ciaschi v Town of Enfield*, 86 AD2d 903, 904 [3rd Dept. 1982]]).

Instructively, predicate notices are non-amendable (*Chinatown Apartments Inc. v Chu Cho Lam*, 51 NY2d 786 [1980]; *Bray Realty, LLC v Pilaj*, [59 Misc 3d 130\(A\)](#) [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2018]), and as such the appellate courts, including in the Second Department, have not hesitated to find prejudice warranting dismissal based on even modest technical defects that misstate the law or otherwise fail to fully apprise respondents of their rights (*see, e.g. 582 Gates, LLC v Farmer*, [65 Misc 3d 156\(A\)](#) [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2019] [predicate notice to quit which stated respondent was prior owner but did not state the specific subsection of the RPAPL under which the proceeding was commenced was defective]; *1646 Union v Simpson* [62 Misc 3d 142\(A\)](#)) [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2019] [15-day predicate notice for failure to sign a rent-stabilized renewal lease that stated tenant *would be* terminated if it failed to sign the lease was not sufficiently unequivocal to constitute a termination notice and mandated dismissal]; *see also EOM 106-15 217th Corp. v Severine*, [62 Misc 3d 141\(A\)](#) [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2019]; *Bayview [*3] Loan Servicing, LLC v Lyn-Jay, Inc.*, [54 Misc 3d 140\(A\)](#) [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2017]; *Sing v Ramirez*, 20 Misc 3d 142(A) [App Term 2d Dept 2008]).

Accordingly, the court finds that Petitioner's failure to utilize the court-mandated Notice of Petition form over three years after its implementation by the Chief Administrative Judge is a fatal defect in the commencement of this proceeding, which requires dismissal without prejudice. In light of the foregoing, the court does not reach the remaining branches of Respondent's motion and denies Petitioner's cross-motion to amend as moot. This constitutes

the decision and order of the court.

Dated: April 25, 2023

Queens, New York

HON. LOGAN J. SCHIFF, J.H.C.

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