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### WEST FARMS ESTATES COMPANY, L.P. v. RODRIGUEZ

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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF BRONX: HOUSING PART B

-----X  
WEST FARMS ESTATES COMPANY, L.P.,

L&T Index No. 309088/21

Petitioner,

-against-

**DECISION/ORDER**

NANCY RODRIGUEZ RIVERA,  
RAMON A. ROSADO,  
“JOHN” “DOE,”  
“JANE” “DOE,”

Respondents.

-----X

Present: Hon. OMER SHAHID  
Judge, Housing Court

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in the review of Respondent’s Motion to Dismiss (Motion #4 on N.Y.S.C.E.F.):

<b>Papers</b>	<b>Numbered</b>
Notice of Motion (Motion # 4 on N.Y.S.C.E.F.).....	<u>1</u>
Affirmation in Opposition (Entries 29-30 on N.Y.S.C.E.F.).....	<u>2</u>
Affirmation in Reply (Entries 33-37 on N.Y.S.C.E.F.).....	<u>3</u>
Affirmation in Sur-reply (Entry 38 on N.Y.S.C.E.F.).....	<u>4</u>

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Petitioner commenced this holdover proceeding seeking possession of 1027 Freeman Street, Apartment #5K a/k/a Unit 110-5K, Bronx, N.Y. 10459 (the “subject premises”) from Respondents on the ground that Respondent Nancy Rodriguez Rivera is in material non-compliance with the terms of the parties’ lease. The 30-day termination notice states that Petitioner elects to terminate the tenancy due to Respondent’s “knowing submission of inaccurate information on the income and composition of [her] household, by [her] permitting unauthorized occupants of the subject premises and by [her] allowing others to occupy the subject premises without prior authorization from the landlord.” Entry #1 on N.Y.S.C.E.F. The subject premises is a project-based Section 8 apartment subject to the rules and regulations of the Department of Housing and Urban Development (“H.U.D.”).

Respondent moves to dismiss the instant proceeding pursuant to C.P.L.R. § 3211(a)(7) on the ground that the termination notice is defective and, thus, the Petition fails to state a cause of action. Petitioner opposes the motion. Both parties are represented by counsel.

The facts set forth in the termination notice to support Petitioner’s claim that Respondent is in material non-compliance with the parties’ H.U.D. lease are as follows: “On the annual recertifications for the subject premises, Nancy Rodriguez Rivera represented that she is the only

occupant of the subject premises. Despite same, building management staff have learned that an unauthorized individual named Ramon A. Rosado is residing in the subject premises. On February 5, 2021 at approximately 11:30[am, the site management spoke with Nancy Rodriguez Rivera regarding same as well as regarding complaints from other residents regarding loud and disturbing noise at the subject premises, at which time Nancy Rodriguez Rivera admitted that Ramon A. Rosado was in fact residing in the subject premises. Nancy Rodriguez Rivera had not listed or otherwise reported Ramon A. Rosado as an occupant of the apartment on her annual recertifications and never sought nor obtained the landlord or HUD's consent for the occupancy of Ramon A. Rosado at the subject premises prior to permitting his occupancy therein. Moreover, upon information and belief, Ramon Rosado is a registered sex offender...and the landlord's Tenant Selection Plan prohibits admission of a household member that is subject to such a registration requirement under a state sex offender registration program." *Id.* Based upon these facts, Petitioner alleges that Respondent is in material non-compliance because she knowingly submitted inaccurate information on the annual recertifications by allowing Ramon A. Rosado, an unauthorized occupant, to reside at the subject premises.

Respondent, who is 71 years old with health issues, argues that the facts as stated above do not amount to a material non-compliance of the H.U.D. lease to allow Petitioner to terminate her long-term tenancy of over 25 years. Furthermore, Respondent argues that Petitioner did not conduct a thorough investigation prior to serving the termination notice when it suspected that Respondent failed to submit accurate or complete information in the annual recertifications. Because the termination notice fails to plead such, Respondent maintains that the predicate notice is defective, and the proceeding must be dismissed.

Petitioner opposes the motion. Petitioner maintains that the termination notice adequately informs Respondent of the facts necessary to sustain a cause of action based upon material non-compliance and alleges that the facts are sufficient to allow Respondent to formulate a defense. Petitioner argues that the termination notice states material non-compliance as the basis for recovery and supports that ground with the facts necessary to establish such. Petitioner also argues that it investigated when the site manager spoke with Respondent on February 5, 2021 at approximately 11:30 A.M. and pleaded such in the predicate notice.

On a motion to dismiss for failure to state a cause of action pursuant to C.P.L.R. § 3211(a)(7), the pleading is afforded a liberal construction and the court will accept the facts as alleged therein as true and determine whether those facts fit within any cognizable theory of law. *See Leon v. Martinez*, 84 N.Y.2d 83 (1994).

A notice seeking to terminate a tenancy subject to H.U.D. regulations must state the ground for removal and the facts necessary to support that ground. *See H.U.D. Handbook*, ch. 8, ¶ 8-13(B)(2)(c). The notice must state specific facts and not allegations that are too broad, vague, or conclusory that would prevent a tenant from formulating a defense. *See id.*; *see also 69 E.M. L.L.C. v. Mejia*, 49 Misc. 3d 152(A) (App. Term, 1st Dep't 2015). "[W]ith respect to the adequacy of notice, the appropriate test is one of reasonableness in view of the attendant circumstances." *Hughes v. Lenox Hill Hosp.*, 226 A.D.2d 4, 18 (1st Dep't 1996). An adequate predicate notice is a condition precedent to maintaining a petition. *See Chinatown Apts. v. Chu Cho Lam*, 51 N.Y.2d 786 (1980).

The H.U.D. Handbook provides that a tenancy may be terminated when the tenant is in material non-compliance with the lease. *See H.U.D. Handbook*, ch. 8, ¶ 8-13(A). A tenant is in material non-compliance with the lease if a tenant commits a substantial lease violation, fraud, repeated minor violations, nonpayment of rent, failure to disclose and provide verification of social security number(s), and/or failure to sign and submit consent forms. *See H.U.D. Handbook*, ch. 8, ¶ 8-12(C), Figure 8-2. The H.U.D. Handbook additionally provides that if a tenant "knowingly provides inaccurate or incomplete information" then the tenant has committed fraud which constitutes a material non-compliance with the lease. *H.U.D. Handbook*, ch. 8, ¶ 8-13(A)(3)

(emphasis in original). The court notes that in response to Respondent's claim that the facts as alleged only support a de minimus violation of the lease, Petitioner counters that "when a tenant knowingly provides inaccurate or incomplete information on the recertifications [it] is considered a fraudulent act and a material act of noncompliance." ¶ 25 of Affirmation in Opposition (Entry #29 on N.Y.S.C.E.F.).

Prior to commencing an eviction proceeding, an owner must distinguish between fraud and a tenant error. See H.U.D. Handbook, ch. 8, ¶ 8-13(A)(3)(c). When fraud is suspected, an owner must first conduct an independent investigation prior to serving a termination notice. See Henry Phipps Plaza South Associates Ltd., Partnership v. Quijano, 137 A.D.3d 602 (1st Dep't 2016), revg for reasons stated in dissenting op. of Schoenfeld, J., 45 Misc. 3d 12 (App. Term, 1st Dep't 2014). "If an owner suspects that a tenant has inaccurately supplied or misrepresented information that affects the tenant's rent or eligibility, the owner must investigate and document the tenant's statements and any conflicting information the owner has received." H.U.D. Handbook, ch. 8, ¶ 8-18(C)(1). The owner must then provide a written notice to the tenant informing them that they have an opportunity to meet with the owner's representative not involved in the investigation and provide a final decision within 10 days of the meeting. See H.U.D. Handbook, ch. 8, ¶ 8-18(D). Only when the owner determines that fraud is present, then the owner is authorized to terminate the tenancy based upon material non-compliance due to the tenant "knowingly providing incomplete or inaccurate information." H.U.D. Handbook, ch. 8, ¶ 8-19(D)(1).

The court finds that the termination notice is defective because it does not provide that Petitioner followed the procedures outlined above. Upon Respondent's admission that an unauthorized occupant was residing at the subject premises, which was obtained by a site manager in regards to whether such was the case and noise complaints, Petitioner was supposed to conduct a pre-termination, independent investigation concerning Respondent's statement and determine whether Respondent, who is 71 years old with health issues, "knowingly" provided false information on her annual recertifications or made an unintentional error based upon forgetting or misunderstanding the rules. See H.U.D. Handbook, ch. 8, ¶ 8-18(B). Respondent was not sent a written notice concerning Petitioner's suspicion that Respondent "knowingly" provided inaccurate information, as the predicate notice alleges Respondent did, and Petitioner did not provide Respondent an opportunity to be heard prior to the termination. Upon learning that there was an unauthorized occupant in the subject premises based upon Respondent's statement, instead of investigating thereafter and documenting additional facts surrounding the statement in its relation to Respondent intentionally providing inaccurate information on the recerts, Petitioner proceeded to terminate the tenancy as the staff did in Quijano. See Quijano, 45 Misc. 3d 12, 15.

Viewing the facts as set forth in the predicate notice in a light most favorable to Petitioner only shows that Petitioner did not conduct a pre-termination investigation. The February 5, 2021 discussion between the site manager and Respondent, where the latter admitted that an unauthorized occupant resides at the subject premises, is not a pre-termination investigation concerning whether Respondent "knowingly" provided inaccurate information on the recerts. The admission, as stated in the predicate notice, is only limited to whether an unauthorized occupant resides at the subject premises, not that Respondent admitted to intentionally providing inaccurate information on the recerts. The February 5, 2021 discussion with the site manager concerned noise complaints and the suspicion that an unauthorized occupant resides at the subject premises. It cannot be viewed as an investigation to determine whether Respondent intentionally provided inaccurate information on the recerts. After the February 5, 2021 discussion, where Petitioner first learned of an unauthorized occupant, Petitioner was to commence a pre-termination investigation concerning the statement, not terminate the tenancy without conducting such an investigation first, as Petitioner did here. Viewing the facts in the light most favorable to Petitioner only shows that Petitioner did not comply with the procedures set forth by the H.U.D. Handbook because in the opposition papers, Petitioner states that

the only “investigation” it conducted to determine that Respondent is in material non-compliance due to knowingly providing inaccurate information was on that date when the site manager was, in fact, investigating noise complaints and the possibility of an unauthorized occupant. Even if the February 5, 2021 discussion is considered to be an investigation concerning Respondent’s intentional submission of inaccurate information, neither the predicate notice nor the Petition provide that a written notice, prior to termination, was sent to Respondent to meet with a member of Petitioner’s staff not involved in the investigation and give her an opportunity to be heard as required by the H.U.D. regulations.

Compliance with H.U.D. regulations concerning a fraud investigation is mandatory prior to commencing an eviction proceeding, the failure of which shall result in a dismissal of that proceeding. See Quijano, 137 A.D.3d 602; see also Kingsbridge Court Associates, L.P. v. Hamlette, 25 Misc. 3d 1238(A) (Civ. Ct., Bronx Co. 2009). A predicate notice that fails to comply with the H.U.D. regulations, if not reasonable in view of the attendant circumstances, subjects a proceeding to dismissal. See 2013 Amsterdam Avenue Housing Association, L.P. v. King, 63 Misc. 3d 36 (App. Term, 1st Dep’t 2019).

Here, as stated above, the predicate notice is defective because it fails to set forth Petitioner’s compliance with the H.U.D. regulations in terminating Respondent’s long-term tenancy based upon material non-compliance due to Respondent knowingly submitting inaccurate information on the annual recerts. The predicate notice does not establish that a pre-termination investigation took place and does not provide that Respondent was sent a written notice concerning Petitioner’s belief that Respondent knowingly provided inaccurate information and that she has an opportunity to be heard which “eviscerated the procedural safeguards intended to prevent improper termination of a Section 8 tenancy.” King, 63 Misc. 3d 36, 38. These are the requirements Petitioner must have satisfied prior to terminating the tenancy. The predicate notice fails to set forth such and, thus, is not reasonable in view of the attendant circumstances.

Based upon the foregoing, Respondent’s motion to dismiss is granted and the proceeding is hereby dismissed without prejudice.

The foregoing constitutes the decision and order of the court.

Dated: March 6, 2023  
Bronx, N.Y.



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Omer Shahid, J.H.C.