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### Hillside Park 168 LLC v. Anwar MD

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[\*1]

<b>Hillside Park 168 LLC v Anwar MD</b>
2023 NY Slip Op 50661(U)
Decided on June 6, 2023
Civil Court Of The City Of New York, Queens County
Ressos, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on June 6, 2023

Civil Court of the City of New York, Queens County

<p style="text-align: center;"><b>Hillside Park 168 LLC, Petitioner</b></p> <p style="text-align: center;"><b>against</b></p> <p style="text-align: center;"><b>Anwar MD a/k/a MOHAMMED ANWAR HOSSAIN; BADRUL H. CHOWDHURY; RAHENA CHOWDHURY; HAZBULLAH HOSSAIN; OMAR HOSSAIN; "John" "Doe"; "Jane" "Doe"; ANWAR MD HOSSAIN, Respondent(s).</b></p>
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Index No. LT-052047-20/QU

Maria Ressos, J.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers/Numbered — NYSCEF Doc. No  
Notice of Cross-Motion 1\_\_\_ No. 38  
Affidavits /Affirmations annexed 2\_\_\_ No. 39  
Answering Affidavit / Opposition 3\_\_\_ No. 43, 44  
Reply Affirmation 4\_\_\_ No. 51  
Exhibit(s) 5\_\_\_ No. 39 through 42, 45 through 47  
Court File No. 1 through 51

Upon the foregoing cited papers, the Decision/ Order on the (*cross-motion* / order to show cause) is (*granted* /denied) for the following reason(s):

This summary holdover proceeding was commenced by Notice of Petition and Petition dated February 4, 2020, seeking possession of the subject rent-stabilized premises located at 88-15 168th Street, Apt. 5K, Jamaica, New York 11432. This proceeding was predicated on a "Notice of Non-Renewal and 30-Day Notice", hereinafter referred to as the "Nonprimary Notice" or "Notice", allegedly served on or about October 19, 2019. The Nonprimary Notice notified respondents that the landlord did not intend to renew their lease for the premises due to expire on January 31, 2020, because the respondent, leaseholder, failed to occupy the premises as his primary residence as required by Rent Stabilization Code ("RSC") (9 NYCRR) § 2524.4 (c).

This proceeding was first scheduled on the court calendar on February 19, 2020, where it [\*2] was adjourned once more before respondent, MD Anwar Hossain, retained Queens Legal Services ("QLS") to represent him. QLS formally appeared by notice of appearance e-filed on June 14, 2021. Respondent filed a COVID-19 hardship declaration and a notice of a pending Emergency Rent Assistance Program ("ERAP) application (Application No. JUQHQ). The hardship and filing of ERAP, respectively, triggered statutory stays which kept the case off the court's active calendar for several months. Petitioner attempted to restore the case to calendar by challenging respondent's filing of an ERAP (Seq. 02). By Order dated August 4, 2022, this Court denied petitioner's request finding a determination was not reached, and there was no basis to lift the stay prior to one. Petitioner refiled their motion in September 2022 then showing that the application got denied. In the interim, respondent filed the instant cross-motion to dismiss. By Order dated November 30, 2022, the Court restored the matter and ordered respondent to pay use and occupancy for December 2022 and January 2023. See, NYSCEF Doc. No. 50. The Court heard oral argument on respondent's cross-motion on February 9, 2023 and reserved decision.

By counsel, respondent moves to dismiss pursuant to CPLR 3211(a)(1), (2) and (7) for failure to state a cause of action. The pleadings in a motion to dismiss pursuant to CPLR § 3211 are afforded a liberal construction. *CPLR § 3206*. The facts alleged on the petition must be accepted as true and granted the benefit of every possible inference. The determination is whether the facts alleged fit within any cognizable legal theory. *Leon v. Martinez*, 84 NY2d 83 (1994); *Fishberger v. Voss*, 51 AD3d 627 (2nd Dep't 2008). A dismissal is warranted only if the documentary evidence submitted conclusively establish a defense to the asserted claim as a matter of law. In a pre-answer motion to dismiss, the Court does not consider whether the petition would survive a motion for summary judgment, or if petitioner will ultimately be able to prove his claims. [\*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker\*](#).

[LLP, 38 AD3d 34](#), 38 (Appellate Division, 2nd Dep't 2006), see also, [Sokol v Leader, 74 AD3d 1180](#) (App Div 2nd Dept 2010).

In a summary eviction proceeding, the "four corners" of the petition incorporate predicate notices by reference. See CPLR 3014. Predicate notices are conditions precedent to a summary proceeding and are not amendable. If a predicate notice is insufficient, the proceeding must be dismissed without prejudice. See, *Chinatown Apts Inc v. Chu Cho Lam*, 51 NY2d 786, 412 NE2d 1312, 433 NYS2d 86 (1980), and *Kaycee W 113th St Corp v. Diakoff*, 554 NYS2d 216, 217 (1st Dep't 1990). Amending or supplementing the petition with post-notice allegations cannot operate retroactively to remedy a defective notice. See, [Woodlawn 278-305, LLC v. Barnett, 72 Misc 3d 1208\(A\)](#) (Civ Ct Bronx Co 2021), [Goodhue Residential Co v Lazansky \(1 Misc 3d 907\[A\]](#), 781 NYS2d 624 [Civ Ct NY Co 2003]); and also *Carriage Court Inn, Inc v Rains* (138 Misc 2d 444, 446, 524 NYS2d 647, 649 [Civ Ct NY Co 1988]).

Prior to commencing a summary proceeding to "remove or evict" a tenant from a rent-stabilized premises, a "notice to vacate or surrender possession," that includes one of the enumerated grounds permitted by RSC §§ 2524.3 or 2524.4, must be served. Respondent seeks dismissal alleging there is no cause of action here where petitioner relied on a defective predicate notice to vacate or surrender. To start, respondent alleges the Notice is conclusory in that it merely mimics the statute that is the basis for this type of action under the RSC. The Notice reads: "you have not occupied the premises as your primary residence for at least 182 days." [\*3] Petitioner alleges respondent has instead resided at an alternate address ("the Bellerose residence") listed on the Notice. Respondent points out that the only supporting information surrounding this address is that the landlord "employed an independent investigation company" who allegedly observed respondent "entering/exiting" that property on 5 different dates. Lastly, the second paragraph of the Notice alleges that an employee of the landlord, who is only familiar with respondent's appearance based on the superintendent's identification of respondent "in another" video, did not observe respondent "either enter or exit the premises" and lists 18 different dates on which that happened in a 6-month period.

In his affidavit in support, respondent proffered reasonable explanations for the allegations in the Notice. See, NYSCEF Doc. No. 39. The Bellerose address is of a property that is owned by respondent's son, Osman Hossain. In support, respondent attaches a copy of the deed. Respondent attests that he regularly visits his son, as any parent would, but he has never resided at that one-family house. Instead, respondent resided at the building where the subject premises is located since 1999 and at the subject apartment since 2009. Furthermore,

respondent attests that he is unemployed and often ill, and as such, it is not out of the ordinary for him not to leave his apartment for a 24-hour period some days. In sum, respondent argues that even taking every allegation in the predicate notice as true, the predicate refers to 23 days where petitioner alleges respondent possibly resided elsewhere, which falls very short of meeting the standard of a non-prime under the RSC.

Petitioner's affirmation in opposition highlights that respondent admits he was at the Bellerose residence albeit to "just visit." Petitioner rejects respondent's factual assertions and instead declares that they "*may* [emphasis added] exist but cannot be stated without conducting an oral examination of respondent Hossain." See, NYSCEF Doc. No. 43. In reply, respondent correctly points out that petitioner did not provide any substantive arguments to the sufficiency of the papers. Instead, petitioner "seek[s] a continuance" on the motion to dismiss to permit some type of discovery or disclosure. In Housing Court, "discovery is inextricably entwined with proper pleading." *Groschlaude v. Lawlor*, 2023 NY Slip Op 23009, 78 Misc 3d 679 (Civ Ct, NY Co 2023), citing to *Farkas*, 121 Misc 2d at 647 (*[A] fishing expedition utilized by the landlord for the purpose of formulating a cause of action or by the tenant to establish [facts to support] a defense, should never be permitted*). The Court notes that petitioner never moved for discovery. Discovery in a summary proceeding is *only* available by leave of court, after demonstrating ample need. *CPLR 408. New York Univ. v. Farkas*, 121 Misc 2d 643, 647 (Civ Ct, NY County 1983).

The Court finds that, viewed in the light most favorable to the non-moving party, the predicate Notice relied upon in this proceeding is defective and as such petitioner has failed to state a cause of action. Petitioner's predicate included two main allegations, the first was respondent's "entering/exiting" an alternate residence, and the latter is that respondent was not observed entering or existing his apartment on several days. Petitioner failed to provide *any* arguments or case law that supports the legal sufficiency of the predicate notice on its face. Even so, the Court agrees with respondent that taking the allegations in the Notice to be true, a total of 23 days "out" of the subject premises or simply seeing respondent enter or not enter another location, does not support a cause of action for a non-primary holdover where the statute [\*4] delineates occupancy of a housing accommodation for an aggregate of *less than 183 days* in the most recent calendar year *may be considered* [emphasis added]. *NY Comp. Codes R. & Regs. tit. 9, § 2500.2*. The Notice does not declare that respondent is using an alternate address as a place of residence on some type of government identification or tax return nor does it suggest respondent is subletting the premises.

In conclusion, it is ordered that this proceeding is dismissed without prejudice. A copy

of this Decision/Order to be uploaded to NYSCEF.

Date: June 6, 2023

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