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2023-06-22

Soto v. Soler

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Civil Court of the City of New York
County of Bronx: Housing Part K-SPP



Index #: **LT-308962-23/BX**

Motion Seq #: 1

-----x
Myriam Esther Soto

Petitioner

DECISION/ORDER

-against-

Madeline Soler; James Unchester; Shakeem Holmes

Respondents.
-----x

Recitation, as required by CPLR R 2219(A), of the papers considered in the review of Respondent Soler’s Motion to Dismiss:

| PAPERS | NUMBERED |
|---|-----------------|
| Notice of Motion/Corrected Notice of Motion | 17/19 |
| Attorney Affirmation in Support | 18 |
| Attorney Affirmation in Opposition | 22 |
| Exhibits A-H in Opposition | 23-31 |

BACKGROUND AND PROCEDURAL HISTORY

This is a holdover eviction proceeding commenced by petition dated February 21, 2023 entitled “Holdover, Non-Payment, Nuisance”. The petition states that petitioner and respondent Madeline Soler entered into a lease in October 2017; when that lease ended respondent Soler became a month-to-month tenant; respondent Soler stopped paying rent in January 2022; respondent Soler does not reside in the premises but subleases the apartment to the other named respondents, without petitioner’s permission; respondent Soler has made false reports of building violations; respondent Soler was arrested for harassing petitioner, who has an Order of Protection against respondent Soler; and petitioner served a ten-day notice to quit before commencing this proceeding. The notice to quit, an exhibit to the petition, is dated February 3, 2023, states that petitioner elects to terminate respondent Madeline Soler’s “occupancy/possession” of the premises as of February 21, 2023 and is signed by petitioner’s attorney.

Now before the court is respondent Soler’s motion to dismiss under CPLR R 3211(a)(1) based on documentary evidence and CPLR R 3211(a)(7) for failure to state a cause of action. Respondent claims that petitioner failed to comply with Real Property Law §§ 232-a and 226-c which require a 90-day termination notice prior to commencing a holdover proceeding against a tenant who has resided in the premises for more than two years. Alternatively, respondent seeks dismissal as the notice to quit was signed by petitioner’s attorney, not by petitioner, in violation of *Siegel v Kentucky Fried Chicken, Inc* (67 NY2d 792, 501 NYS2d 317, 492 NE2d 390 [1986]), and its progeny.

In opposition, petitioner in her sworn affidavit reiterates the facts of the petition and further asserts that after respondent Soler stopped paying rent in January 2022 petitioner informed respondent that she could remain in the apartment rent free as she planned to sell the property “and that respondent Soler was now my licensee.” Petitioner’s Affidavit at ¶ 9. Petitioner asserts that after this she revoked respondent Soler’s license. Petitioner’s attorney argues that a ten-day notice to quit is proper for an eviction proceeding against a licensee, under RPAPL § 713(7).

DISCUSSION

The New York State Real Property Actions and Proceedings Law establishes two categories of eviction proceedings: those where a landlord-tenant relationship exists, governed by RPAPL § 711, and those where no landlord-tenant relationship exists, governed by RPAPL § 713. Grounds for eviction under RPAPL § 711 include where a tenant continues in possession after the expiration of their term, RPAPL § 711(1); grounds for eviction under RPAPL § 713 include where a licensee’s license has been revoked by the licensor, RPAPL § 713(7). Predicate notices are required for most RPAPL eviction proceedings, with the type and number of days’ notice dependent upon various factors such as whether it is an RPAPL § 711 or § 713 proceeding, and whether the apartment is subject to any type of government regulation such as State Rent Control or Rent Stabilization or a Federal housing subsidy.

When a landlord or lessor seeks to evict a month-to-month tenant from an unregulated tenancy, a predicate notice under RPL §§ 232-a and 226-c(2) is required, with the amount of notice determined by the cumulative amount of time the tenant has occupied the residence: 30 days’ notice where the occupancy was for less than one year and there was no lease for at least one year; 60 days’ notice where such occupancy and/or lease was for at least one year and less than two years; and 90 days’ notice where such occupancy and/or lease term was for two years or more. When a licensor seeks to evict a licensee, a ten-day notice is required under RPAPL § 713.

As explained by the Appellate Division, First Department, “The nature of the transfer of absolute control and possession is what differentiates a lease from a license or any other arrangement dealing with property rights ... Whereas a license connotes use or occupancy of the grantor's premises, a lease grants exclusive possession of designated space to a tenant, subject to rights specifically reserved by the lessor. The former is cancellable at will, and without cause. Where one party's interest in another's real property exists for a fixed term, not revocable at will, and terminable only on notice, a landlord-tenant relationship has been created.” *Am. Jewish Theatre v Roundabout Theatre Co* (203 AD2d 155, 156, 610 NYS2d 256, 257 [1st Dep’t 1994]).

Here, while the petition does not cite to any of the above-referenced statutory provisions, it does include factual allegations that respondent is an unregulated tenant whose tenancy began in October 2017 pursuant to a one-year written lease and, after that lease expired, continued on a month-to-month basis. As of January 2022, petitioner no longer wished to allow the tenancy to continue, for various reasons spelled out in the petition, including respondent’s nonpayment of rent and subletting without petitioner’s permission and petitioner’s desire to sell the building. At that point, as a predicate to commencing an eviction proceeding against her tenant, petitioner was required to provide respondent with a 90-day termination notice, pursuant to RPL § 226-c(2)(d). However, petitioner did not do this and instead provided respondent with a 10-day notice to quit.

Petitioner was not permitted to unilaterally convert the relationship from that of landlord-tenant to licensor-licensee; rather, when petitioner decided to end the landlord-tenant relationship, she was required to do so by serving respondent with the required notice under RPL §§ 232-a and 226-c(2) and then, if respondent failed to vacate the premises, commencing a holdover proceeding pursuant to RPAPL § 711(1). As petitioner did not do that, and instead served a ten-day notice to quit and brought a proceeding under RPAPL § 713(7), this proceeding must be dismissed, without prejudice to filing a proper proceeding under RPAPL § 711(1).

CONCLUSION

For the reasons stated above, it is hereby ORDERED that respondent's motion is granted and this proceeding is dismissed, without prejudice. This constitutes the Decision and Order of the court, which is being uploaded on NYSCEF.



DIANE E. LUTWAK, HCJ

Dated: Bronx, New York
June 22, 2023