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MARIA LOPEZ, L.P. v. GUZMAN

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

-----X
MARIA LOPEZ, L.P.,

Petitioner,

-against-

ALICE GUZMAN; DOMINGO DE LA CRUZ;
DAYRY DE LA CRUZ; DISAIRY DE LA CRUZ; :
DARIELY DE LA CRUZ; DILENNY DE LA
CRUZ, :

Respondents.
-----X

L&T Index No.
307515/22

Motion Seq. No. 2

DECISION/ORDER

Present:

Hon. HOWARD BAUM
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the motion by Respondent Alice Guzman:

Papers

Numbered

Notice of Motion; Affirmation and Affidavit in Support;	
Memorandum of Law; and Exhibits A through K	<u>NYSCEF Doc # 16 - 33</u>
Affirmation in Opposition; and Exhibits A and B	<u>NYSCEF Doc # 36</u>
Affirmation in Reply	<u>NYSCEF Doc # 37</u>

After oral argument and upon the foregoing cited papers, the decision and order on this motion is as follows:

This summary non-payment proceeding was commenced by Maria Lopez, L.P.

(“Petitioner”) seeking a possessory and monetary judgment against Alice Guzman

(“Respondent”)¹ in the amount of \$9,283 for alleged rent arrears from August 2021 through

¹ Domingo De La Cruz, Dayry De La Cruz, Disairy De La Cruz, Dariely De La Cruz, and Dilenny De La Cruz are also named in the petition as respondents and alleged tenants of the apartment, pursuant to a written rental agreement, but they have not appeared in this proceeding.

January 2022. The petition, dated March 15, 2022, alleges there is a written lease agreement between the parties in which Respondent agreed to pay \$1,747 per month as rent and that the “premises are not subject to rent stabilization or rent control because they are a multi-family housing project regulated by HUD...[and] are part of the Section 8 Substantial Rehab Program.”

Respondent answered the petition as a self-represented litigant and has since obtained counsel. In this motion, Respondent seeks an order, pursuant to CPLR 3025(b), granting leave to interpose a proposed amended answer (NYSCEF Document No. 20) that is annexed as Exhibit A to the motion. Also, Respondent moves for an order, pursuant to CPLR 3211(a)(7), dismissing the proceeding based on Petitioner’s alleged failure to state a cause of action. Additionally, Respondent seeks an order granting her a hearing on the counterclaims she has raised in her proposed amended answer. Petitioner opposes the motion.

Discussion

Motion to Amend Answer

Leave of court is freely given to amend a pleading absent prejudice or surprise resulting from any delay in its interposition (*McCaskey, Davies and Assoc., Inc. v. New York City Health and Hosps. Corp.*, 59 NY2d 755 [1983]) so long as the claims or defenses and counterclaims sought to be included in the pleading are not clearly devoid of merit and palpably insufficient. *Favia v. Harley-Davidson Motor Co., Inc.*, 119 AD3d 836 (2d Dept 2014); *Mosaic Caribe, Ltd. v. Allsettled Group, Inc.*, 117 AD3d 421 (1st Dept 2014).

Petitioner's opposition to Respondent's motion, to the extent it addresses that aspect of the motion seeking leave to amend the answer, argues Respondent has not proven her defenses.² In making these arguments, Petitioner has not demonstrated the defenses and counterclaims raised are devoid of merit.

Moreover, where, as here, a self-represented litigant filed an answer and subsequently retains an attorney at which time she learns of other defenses she may have to the proceeding, justice and fairness require that leave be granted to allow the amendment of the answer that was interposed without the assistance of legal counsel. *Harlem Restoration Project v. Alexander*, NYLJ, July 5, 1995, at 27, c 2 (Civ Ct NY County) citing *Pignataro v. Balsamo*, 108 AD2d 1086 (3d Dept 1985); *RRL, LLC v. Narasin*, NYLJ, August 14, 2000 at 28, c 1 (App Term 1st Dept).

For these reasons, Respondent's motion is granted to the extent it seeks leave to interpose an amended answer. Accordingly, the proposed amended answer (NYSCEF Document No. 20) is deemed interposed and served.

Motion to Dismiss

The dismissal of this proceeding is sought based on various bases corresponding to objections in point of law and affirmative defenses raised in the proposed amended answer.

Corresponding with the "Fourth Objection in Point of Law and Fourth Affirmative Defense," and "Third Objection in Point of Law and Third Affirmative Defense," and on the ground that, pursuant to CPLR 3211(a)(7), Petitioner has failed to state a cause of action,

² It is noted, Petitioner argues Respondent has waived a lack of personal jurisdiction defense when such a defense was not raised in the answer she filed as a self-represented litigant. However, lack of personal jurisdiction is not a defense raised in the proposed amended answer.

dismissal is sought based on Petitioner's alleged utilization of a defective demand for rent that does not accurately reflect the months for which rent arrears are owed and Petitioner's alleged failure to serve the demand for rent in a manner required by law.

Respondent argues this demand for rent is defective because it does not properly account for the rent payments made by Respondent that are earmarked as payments of rent for specific months. In support of this argument Respondent has annexed to the motion copies of money orders, in various amounts, which are plainly marked as being intended to cover rent and parking charges for the months of December 2020 through May 2021 and July 2021 through June 2022.³

Also, corresponding with the "First Objection in Point of Law and First Affirmative Defense," dismissal, pursuant to CPLR 3211(a)(7), based on Petitioner's asserted failure to state a cause of action and RPAPL § 741(4) is sought, in that Respondent alleges the petition incorrectly states Respondent agreed to pay \$1,747 in a lease agreement. Instead, Respondent alleges the last lease between the parties set her monthly rent at \$433.

Petitioner opposes the motion to the extent it seeks the dismissal of the proceeding. Petitioner argues Respondent has not demonstrated that the monthly rent claimed in the petition is improper. Further, Petitioner argues that the \$9,283 claimed owed in the petition represents a good faith statement as to the amount owed in rent arrears at the time the petition was issued, that the amount claimed in the demand for rent, and the rent ledger annexed to the demand, is based on a monthly rent charged to Respondent that was calculated properly, and that credit was given for the rent payments that have been made.

³ One money order is provided for each of these months except for December 2020 and March 2021 for which two money orders have been provided.

In reviewing a motion, pursuant to CPLR 3211(a)(7), seeking the dismissal of a proceeding for failure to state a cause of action, the court must afford the petition a liberal construction, accept all facts alleged in the petition as true and accord the petitioner the benefit of every possible inference. *Leon v. Martinez*, 84 NY2d 83 (1994); *Nationwide Insulation Sales, Inc. v. Nova Casualty Co.*, 74 AD3d 1297 (2d Dept 2010); *Breytman v. Olinville Realty, LLC*, 54 AD3d 703 (2d Dept 2008). In performing this review, a determination must be made whether the factual allegations within the petition state a legally cognizable cause of action. *Leon v. Martinez*, 84 NY2d 83 (1994); *Clarke v. Laidlaw Transit, Inc.*, 125 AD3d 920 (2d Dept 2015); *Fishberger v. Voss*, 51 AD3d 627 (2d Dept 2008).

Respondent's motion is granted to the extent it seeks the dismissal of this proceeding based on the utilization of a defective demand for rent. A proper demand for rent is a condition precedent to the commencement of a summary non-payment proceeding. RPAPL § 711(2); *36 Main Realty Corp. v. Wang Law Office, PLLC*, 49 Misc 3d 51 (App Term 2d, 11th & 13th Jud Dist 2015); *Sella Props. V. DeLeon*, 25 Misc 3d 85 (App Term 2d Dept 2009); *Kentpark Realty Corp. v. Lasertone Corp.*, 3 Misc 3d 28 (App Term 2d Dept 2004). If the demand is defective it cannot be amended (*Chinatown Apartments Inc. v. Chu Cho Lam*, 51 NY2d 786 [1980]) and will result in the dismissal of the proceeding for failure to state a cause of action in that Petitioner will have failed to meet a condition precedent to the proceeding. *170 W. 85th St. Tenants Assn. v. Cruz*, 172 AD2d 338 (1st Dept 1991); *Tzifil Realty Corp. v. Temammee*, 46 Misc 3d 144(A) (App Term 2d, 11th & 13th Jud Dist 2015); *322 W. 47th St. HDFC v. Loo*, 52 Misc 3d 1217(A) (Sup Ct NY County 2016); *156-158 Second Ave., LLC v. Delfino*, 18 Misc 3d 144(A) (Civ Ct NY County 2008).

A written demand must afford the tenant notice of the monthly periods for which a rent payment is allegedly in default and a good faith estimation of the rent owed for each period. *100 Audubon Holdings LP v. Hernandez*, 28 Misc 3d 140(A) (App Term 1st Dept 2010); *542 Holding Corp. v. Prince Fashions, Inc.*, 46 AD3d 309 (1st Dept 2007); *ShopRite Supermarkets, Inc. v. Yonkers Plaza Shopping, LLC*, 29 AD 3d 564 (2d Dept 2006); *Dendy v. McAlpine*, 27 Misc 3d 138(A) (App Term 2d, 11th & 13th Jud Dist 2010).

Where rent payments have been earmarked as payment for a specific month they must be credited in the manner requested by the payor. *EOM 106-15 217th Corp. v. Severine*, 62 Misc 3d 141(A) (App Term 2d, 11th & 13th Jud Dist 2019); *Neptune Development Corp. v. Kalogiannis*, 63 Misc 164(A) (App Term 9th & 10th Jud Dist); *Lopez v. Guzman-De La Cruz*, 68 Misc 3d 1221(A) (Civ Ct Bronx County 2020).

Here, the demand for rent utilized by Petitioner states that the “sum of \$9,766” is owed and, in pertinent part, that the sum “is detailed in the attached resident ledger...included in this notice and made a part hereof.” Annexed to the demand of rent is a running rent ledger whose first entry is dated December 1, 2008, and whose last entry is dated January 1, 2022, with a balance of \$9,766.

Petitioner does not contest that the money orders annexed to the motion by Respondent were earmarked by Respondent for the months stated on the money orders. Further, Petitioner does not contest that at least a portion of the amounts of the money orders, if not the full amounts, were paid toward the rent for the months Respondent wrote they were intended on the money orders. Although the money orders paid by Respondent state the payment is intended for rent and parking for a specific month, without providing a breakdown of how much is intended

for rent and how much is intended for parking, considering the money orders are for more than the \$50 the ledger annexed to the rent demand states is the monthly parking charge, at least a portion of the payment in the money orders was required to be attributed to the rent for the month stated on the money order for which the payment was intended.

Under these circumstances, Petitioner was required to accurately detail in a rent demand how much is owed for each month for which rent is claimed by deducting from the lawful rent that can be charged for the apartment the amount that was paid toward the rent by the earmarked money orders. This was not done by Petitioner.

Preliminarily, only two of the earmarked money orders provided by Respondent for the months for which the petition alleges rent is owed, August 2021 through January 2022, are dated prior to January 26, 2022, the date of the rent demand – the money orders earmarked for August and September 2021, both of which are dated October 20, 2021. The other earmarked money orders that are provided for the months covered by the petition are dated after the rent demand was issued on January 26, 2022. Consequently, Petitioner cannot be faulted for not accounting for them in the rent demand, by applying them to the rent that was due for the month the money orders were earmarked, and are irrelevant for purposes of this motion challenging the sufficiency of the demand.

However, as to the earmarked money orders for August and September 2021, the rent ledger annexed to the rent demand provides no indication they were credited for the months intended by Respondent. Both are merely listed in the running rent ledger as credited on October 21, 2021. The same can be said for the only other rent payment listed in the rent ledger as of August 1, 2021. The money order earmarked by Respondent for July 2021, for \$384, is credited

in the rent ledger on September 15, 2021, and gives no indication it was credited specifically to the rent and parking charges for July 2021.⁴

Therefore, the demand for rent utilized by Petitioner which only gives a lump sum amount of rent allegedly owed and relies on a running rent ledger, that does not provide Respondent with notice of the monthly periods for which a rent payment is allegedly in default and a good faith estimation of the rent owed for each period, is fatally defective and cannot service as the predicate of this non-payment proceeding. *AK Houses TP4 LLC v. Thurman*, 2023 WL 3311755 (Civ Ct NY County 2023); *Meisels Family, Inc. v. Crittleton*, 78 Misc 3d 1236(A) (Civ Ct Kings County 2023).

For these reasons, Respondent's motion is granted to the extent it seeks the dismissal of this proceeding based on Petitioner's failure to state a cause of action.

However, Respondent has not demonstrated this proceeding should be dismissed for failure to state a cause of action because the petition allegedly states an incorrect amount for the monthly rent stated in the most recent lease between the parties. A motion to dismiss on this basis should be based on a request for summary judgment, pursuant to CPLR 3212, on the appropriate objection in point of law and/or defense raised in the proposed amended answer. Accordingly, the motion is denied to the extent Respondent asserts the monthly rent stated in the petition is incorrect.

⁴ The running balance in the rent ledger annexed to the rent demand states \$334 was owe in rent and parking fees through the end of July 2021. Accordingly, even though the ledger gives no indication that the \$384 money order Respondent earmarked for July 2021 was specifically applied to the rent and parking charges for that month, the payment eliminated any arrears from the month.

Further, Respondent's motion seeking a hearing on the counterclaims raised in her proposed amended answer is granted to the extent that this proceeding is placed back on the court's calendar, for a pre-trial conference on the counterclaims, to be held on July 17, 2023, at 9:30 a.m.

Petitioner is required to file its reply to the counterclaims by July 10, 2023.

This constitutes the decision and order of the court.

Dated: Bronx, New York
June 20, 2023

HON. HOWARD BAUM, J.H.C.