2023-07-17

Columbia Leasing L.P. v. Williams

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Columbia Leasing L.P. v Williams
2023 NY Slip Op 23206
Decided on July 17, 2023
Civil Court Of The City Of New York, Queens County
Schiff, J.
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Decided on July 17, 2023
Civil Court of the City of New York, Queens County

Columbia Leasing L.P., Petitioner-Landlord,

against

Juliane Williams, Respondent-Tenant,
and "John Doe" and "Jane Doe," Respondents-Undertenants.

Index No. L&T 309505/22

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Respondent's motion to dismiss or in the alternative for leave to interpose an amended answer:

Papers NYSCEF Doc.

Notice of Motion & Affirmation/Affidavits/Exhibits 8-12
Affirmation in Opposition 13
Reply Affirmation 14

Upon the foregoing cited papers, the court's decision and order is as follows:

RELEVANT BACKGROUND AND PROCEDURAL HISTORY

Petitioner Columbia Leasing L.P. ("Petitioner") commenced this breach of lease holdover pursuant to 9 NYCRR (Rent Stabilization Code) § 2524.3(a) against Juliane Williams [*2]("Respondent") by filing of a Notice of Petition and Petition on June 29, 2022. Prior to commencement, Petitioner served a Notice to Cure affording Respondent until May 31, 2022, to cure an alleged clutter condition in her apartment. The Notice to Cure contains six paragraphs, all related to an incident on May 5, 2022, during which Petitioner's staff observed a carpet in the hallway of the subject premises and a partially ajar door evidencing an accumulation of items "covering the apartment and stacked throughout." Petitioner subsequently served a Notice of Termination dated June 2, 2023, which duplicates the language in the Notice of Cure with the following addition: "You have been advised to correct these conditions but to date nothing has been resolved."

Respondent interposed an answer on November 4, 2022, and now moves to dismiss pursuant to CPLR 3211 on two primary grounds. First, Respondent argues that Petitioner failed to timely file the affidavit of service of the Petition and Notice of Petition pursuant to Real Property Actions and Proceedings Law ("RPAPL") § 735(2). Second, Respondent argues that the predicate termination notice is defective for lack of specific allegations relating to Respondent's failure to cure after expiration of the cure period. Petitioner opposes the motion.[FN1]

DISCUSSION

Compliance with RPAPL § 735(2)

RPAPL § 735(2) requires the filing of an affidavit of service of the Petition and Notice of Petition within three days after service is effectuated. Here, Petitioner filed the affidavit of service on September 7, 2022, twelve days after completing service on August 26, 2022, seemingly a violation of the statute notwithstanding the lack of any demonstrable prejudice.

In arguing for dismissal, Respondent relies on the First Department's holding in *Riverside Syndicate, Inc. v. Saltzman* (49 AD3d 402 [1st Dept 2008]). In *Saltzman*, the Appellate Division concluded that because summary eviction proceedings are special

proceedings "governed entirely by statute . . . and it is well established that there must be strict compliance with the statutory requirements to give the court jurisdiction" the failure to comply with RPAPL § 735(2) requires dismissal (*id.* at 402 [internal citations omitted]).[FN2] *Saltzman* remains the law in the First Department (*see 129 E. 50th St. v Credo*, 168 N.Y.S.3d 781 [App Term, 1st Dept 2022], *lv denied* 2022 NY Slip Op 73253 [U] [1st Dept 2022]).

Three years after *Saltzman*, the Appellate Term in the Second Department set forth a different rule in *Siedlecki v Doscher* (33 Misc 3d 18, 20 [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2011]). In *Siedlecki*, the Appellate Term held that "the Appellate Division in [the Second Department] has rejected the 'strict compliance' approach to jurisdiction in summary proceedings" (*id.* at 20 [internal citations omitted]). As a result, the Appellate Term concluded that because personal jurisdiction attaches upon delivery and mailing of the petition rather than the filing of an affidavit of service, an untimely filing is a non-prejudicial irregularity that can be disregarded pursuant to CPLR 2001 (*id.*).

The dueling *Saltzman* and *Siedlecki* holdings have placed the trial courts in the Second Department in a predicament. Under the doctrine of hierarchical *stare decisis* "state trial court are bound to follow existing precedent of a higher court" (*People v Rivera*, 5 NY3d 61 at FN2 [2005] [Kaye, J. dissenting]). Here, one such court is the Appellate Term for the Second, Eleventh and Thirteenth Judicial Districts of the Second Department, the court of direct appeal for the Queens County Civil Court, whose holding in *Siedlecki* is therefore binding (*see* 22 NYCRR Part 730, § 730.1(b)(1); *People v Pena*, 36 NY3d 978 at FN4 [2020] [Wilson, J. dissenting], citing *People v Pestana*, 195 Misc 2d 833, 839 [Crim Ct, NY Co 2003]). Yet, it is also true that unlike the Appellate Terms, which serve at the leisure of their respective Appellate Divisions (*see* NY Const, Art VI, § 8), the Appellate Divisions are statewide courts, whose precedents are binding on all trial courts in the absence of a contrary holding by the Appellate Division in their designated judicial department (*see Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984]). This has led some trial courts to conclude that "arguably, the Second Department should [follow *Saltzman*] too" with respect to RPAPL § 735(2) (*McManus v Condren*, 76 Misc 3d 1226 at *8 [A] [Civ Ct, NY Co 2022]).

The court does not have a satisfactory solution for this conundrum. On the one hand, *Saltzman* has not been revisited by any of the Appellate Divisions and presumably remains binding on all trial courts based on the Appellate Division's *Mountain View Coach Lines* reasoning. On the other, when considering competing higher court holdings, the lower courts are generally instructed to follow the "more recent precedent" (*Johnson v New York City Tr.*

Auth., 88 A.D.321, 326 [1st Dept 2011]). Moreover, the Appellate Term in *Siedlecki* specifically considered and rejected *Saltzman*'s strict compliance approach as out of line with Appellate Division precedent in the Second Department.[FN3] Thus, for the court to disregard *Siedlecki* would effectively require substituting its own reasoning for that of a higher court of direct appeal, a step this court is ultimately unwilling to take in the absence of further guidance from the appellate [*3]courts. Accordingly, the court will continue to treat *Siedlecki* as binding precedent and must deny Respondent's motion given the lack of any identifiable prejudice as a result Petitioner's late filing of the affidavit of service.

Sufficiency of Petitioner's Termination Notice

Respondent argues that Petitioner's Notice of Termination is facially defective for failing to allege specific evidence that the clutter condition in Respondent's apartment continued after expiration of the cure period. Respondent further argues the temporal proximity between the Notice to Cure and the Notice of Termination, the latter of which was prepared only two days after the cure period ended, is evidence of a lack of a good faith effort by Petitioner to determine if a cure was effectuated. Respondent's position derives principally from the civil court's holding in *Hew-Burg Realty v. Mocerino* (163 Misc 2d 639, 641 [Civ Ct, Kings Co 1994]), and the Appellate Term's decision in *31-67 Astoria Corp. v. Landaira* (54 Misc 3d 131[A] [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2017]).

In assessing the adequacy of a predicate notice, "the appropriate test is one of reasonableness in view of the attendant circumstances" (*Hughes v. Lenox Hill Hosp.*, 226 AD2d 4, 18 [1st Dept 1996], *lv denied* 90 NY2d 829 [1997]; *see also Tzifil Realty Corp. v. Rodriguez*, 155 N.Y.S.3d 525 [App Term, 2d 11th & 13th Dists, 2d Dept 2021]).

In the context of a nuisance holdover based on objectionable conduct, a landlord need not serve a notice to cure prior to commencement (*see* Rent Stabilization Code ("RSC") § 2524.3(b)). Moreover, the predicate termination notice, while requiring a certain level of detail, need not itemize every incident so long as the notice "adequately apprised [the respondent] as to the grounds upon which it was based, allowing them to prepare a legal defense" (*Domen Holding Co. v Aranovich*, 1 NY3d 117, 125 [2003]).

By contrast, where a landlord of a rent-stabilized apartment elects to treat objectionable conduct as curable by serving a notice to cure, the Rent Stabilization Code requires the landlord to establish that the tenant has "has failed to cure such violation after written notice by the owner that the violations cease within 10 days" (RSC § 2524.3(a)). For this reason, the

civil court in *Hew-Burg* concluded that a termination notice is defective where it lacks any "factual allegations that the course of conduct complained of continued beyond the cure period" (*Hew-Burg Realty v. Mocerino*, 163 Misc 2d 639, 641 [Civ Ct, Kings Co 1994]). The *Hew-Burg* decision has been widely if not universally adopted by the lower courts (*see, e.g., 2186 Realty NY LLC v Martinez*, 2022 NY Slip Op 31054 [U] [Civ Ct, NY Co 2022]; *Fen Xiu Chen v Salvador*, 71 Misc 3d 1225 [A] [Civ Ct, Queens Co 2021]; *Rochdale Vil., Inc. v Stone*, 66 Misc 3d 737 [Civ Ct, Queens Co 2019]; *Sudimac v Beck*, 63 Misc 3d 1208 [A] [Civ Ct, Queens Co 2019]; *2704 Univ. Ave. Realty Corp v Thompson*, 63 Misc 3d 1222 [A] [Civ Ct, Bronx Co 2019]; *cf. Riverbay Corp. v Frere*, 2023 NY Slip Op 50655 [U] [Civ Ct, Bronx Co 2023]; *1123 Realty LLC v Treanor*, 62 Misc 3d 326 [Civ Ct, Kings Co 2019]).

Hew-Burg was first cited by an appellate court over two decades after it was decided in *31-67 Astoria Corp. v. Landaira* (54 Misc 3d 131[A] [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2017]). *Laindaira* was a combined breach of lease and nuisance holdover premised on detailed allegations of a clutter condition in a 10-day notice to cure, and which, like the notice at issue in this proceeding, purported to require the tenant to contact the landlord to coordinate access to determine if the condition was remedied. After serving the notice to cure, the petitioner served a termination notice one day after expiration of the cure period without stating whether the respondent had cured or citing to any new facts. The lower court dismissed the proceeding [*4]noting that the petitioner "did nothing to determine if a cure occurred" and merely "presumed there would be a default and simply served a notice of termination after the notice to cure expired" (*31-67 Astoria Corp. v. Landaira*, Index No. 64908-14/QU [Civ Ct, Queens Co 2015]). In affirming the decision, the Appellate Term held that "the termination notice was defective because it failed to allege that the defaults specified in the notice to cure, which were curable, had not been cured during the cure period" (*Landaira*, 54 Misc 3d 131 [A] at *2 [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2017]).

While one reading of *Landaira* is that it affirmed the lower court's dismissal solely because the landlord did not state in the termination notice that the conduct had not been cured, this court does not read the holding so narrowly for lack of such "boilerplate language" (*2704 Univ. Ave. Realty Corp v Thompson*, 63 Misc 3d 1222[A] at *5 [Civ Ct, Bronx Co 2019]), given that the Appellate Term cited approvingly to *Hew-Burg*. Rather, the court interprets *Landaira* as consistent with the many trial court holdings that have held that where a landlord treats conduct as curable, it must recite specific post-cure evidence that the conduct remains uncured in the termination notice (*see also Tomfol Owner Corp. v Hernandez*, 201 AD3d 453 [1st Dept 2022] [utilizing analogous reasoning in affirming

dismissal of ejectment action in cooperative unit based on objectionable conduct where proprietary lease provided for cure period and the board failed to allege "new allegations about defendant's conduct arising after service of [the notice to cure]"]).

In concluding that a landlord must recite factual allegations after the cure period in a termination notice, this court does not intend to suggest the required showing will be identical in all cases. Whereas proceedings based on an intermittent course of conduct such as unlawful subletting likely require pleading specific evidence of post-cure infractions (*see, e.g. Jericho Project Lessee v. Marte-Travera*, 67 Misc 3d 1204 [A] [Civ Ct, Bronx Co 2020]), in proceedings involving a longstanding static condition where the evidence may be in the exclusive control of the respondent, such as clutter cases, a lower showing may suffice provided the petitioner makes a good faith effort to ascertain if the condition has been cured. For instance, in *Riverbay Corp. v Frere*, the court concluded that the petitioner's allegation that "management observed no activity which would indicate you had taken any steps to comply with the Notice, and the presumption of continuance" while less detailed than ideal, was reasonable under the attendant circumstances in a Colliers case (2023 NY Slip Op 50655 [U] at *3 [Civ Ct, Bronx Co 2023]).

Another consideration in assessing the reasonableness of a notice of termination is its temporal proximity to the conclusion of the cure period. In *Landaira*, the termination notice was prepared only a day after the cure period concluded, evidence that petitioner treated the failure to cure as a fait accompli (*see also 2704 Univ. Ave. Realty Corp v Thompson*, 63 Misc 3d 1222 [A] [Civ Ct, Bronx Co 2019] [service of termination notice two days after cure period ended following holiday weekend "indicat[ed] a lack of good faith in that little to ascertain" whether a cure was effectuated]; *Sudimac v Beck*, 63 Misc 3d 1208 [A] [Civ Ct, Queens Co 2019] [same]), whereas in *Frere* the termination notice was issued over two months after the expiration of the cure period (*Frere,* 2023 NY Slip Op 50655 [U] at *1); *see also Jericho Project Lessee v. Marte-Travera*, 67 Misc 3d 1204 [A] [Civ Ct, Bronx Co 2020] ["That the termination notice is dated almost three weeks after the end of the cure period indicates that Petitioner did not treat it as a "mere formality."']).

In the case at bar, the termination notice was served only two days after expiration of the cure period. Moreover, the notice did not include any post-cure facts or reflect even minimal [*5]efforts by Petitioner to determine if Respondent cured the alleged clutter condition. Under these circumstances, the termination notice did not meet the requirements of RSC § 2524.3(a) and was not reasonable under the attendant circumstances. As a defective predicate notice is non-amendable, this proceeding must therefore be dismissed (*see 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]).

CONCLUSION

For the foregoing reasons, Respondent's motion to dismiss is granted and this proceeding is dismissed without prejudice. This constitutes the decision and order of the court.

Dated: July 17, 2023
Queens, New York
HON. LOGAN J. SCHIFF, J.H.C.

Footnotes

Footnote 1: According to Respondent's affirmation, the parties were until recently litigating a prior nonpayment action (68289-19/QU) in which a guardian *ad litem* ("GAL") was appointed for Respondent. The same GAL was later appointed in this proceeding in November 2022. It appears efforts have been made to engage the services of Adult Protective Services for purposes of a deep cleaning of the apartment, albeit without success.

Footnote 2: The court understands the term "jurisdiction" to be used broadly to refer to the failure to comply with a statutory condition precedent to maintenance of a summary proceeding (*see Lacks v Lacks*, 41 NY2d 71, 74 [1976] ["Jurisdiction is a word of elastic, diverse, and disparate meanings A statement that a court lacks 'jurisdiction' to decide a case may, in reality, mean that the elements of a cause of action are absent."] [internal citations omitted]; *1646 Union v Simpson* 62 Misc 3d 142 [A] [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2019] ["Because a summary proceeding is a statutory proceeding (*see* RPAPL art 7), relief can be granted to a petitioner only where all the elements of the petitioner's cause of action have been made out, a requirement which is sometimes referred to as 'jurisdictional'"] [internal citations omitted]).

Footnote 3: It is worth noting that in support of the proposition that the Second Department has abandoned a strict compliance approach to summary proceedings, the Appellate Term in *Siedlecki* cited two Appellate Division cases from the 1980s, *Lanz v Lifrieri*, 104 AD2d 400 [2d Dept 1984], which found the failure to specify in the body of a petition the manner in which a notice to quit was served to be a de minimis defect, and *Birchwood Towers #2 Assoc. v Schwartz*, 98 AD2d 699 [2d Dept 1983], which held that a petition is no different than any other pleading and may be amended to correct minor infirmities. The Appellate Term also cited to, but presumably found unavailing, the Division's more recent holding in *Clark v Wallace Oil Co.*, 284 AD2d 492 [2d Dept 2001], which explicitly endorsed the "strict compliance" approach to summary proceedings and dismissed a petition that misidentified the premises.

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