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AD NASH & CO. L.P. v. PHILLIPS

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART F

-----X
AD NASH & CO. L.P.,

Petitioner

Index No. LT # 71563/19

- against -

DECISION/ORDER

PARIS PHILLIPS
262 Van Buren Street
Apt. 3-C
Brooklyn, New York 11221

Respondent

“JOHN DOE” and “JANE DOE”
-----X

HON. HANNAH COHEN:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of respondent’s motion to dismiss pursuant to CPLR 3211(a)(7) and petitioner’s opposition and ensuing reply.

Papers

Notice of Motion
Cross Motion
Opposition
Reply

Numbered

1
2
3
4

Upon the foregoing cited papers, the Decision and Order on these Motions are as follows:

Petitioner commenced this holdover proceedings alleging that respondent is subletting or assigning her right to occupy the premises without the landlord’s permission and compliance with Rent Stabilization Code section 2525.6 and Real Property Law section 226(b). The premises are subject to rent stabilization and both parties appear with counsel.

Petitioner moves by motion for discovery pursuant to CPLR 408 and an examination before trial. Respondent cross moves for dismissal pursuant to CPLR 3211(a)(7) based upon a failure to state a cause of action due to lack of specificity in petitioner's predicate notice and to amend its answer pursuant to CPLR 3025(b) and in opposition to discovery as the information requested is overly broad and beyond the scope of this proceeding.

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accord the plaintiff every possible favorable inference and accept as true all alleged facts. The only determination for the court is whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83 [1994]; *Breytman v Olinville Realty LLC*, 54 AD3d 703 [2nd Dept 2008]). On a motion to dismiss pursuant to CPLR 3211(a)(7) a court must determine whether accepting as true the factual allegations in the petition and according the plaintiffs the benefits of any favorable inferences, the plaintiff can succeed upon any reasonable views of the facts and whether the pleadings have a cause of action (See *Rochdale Village Inc., v Zimmerman*, 2 AD3d 827 [AD 2nd Dept 2003]). Additionally, the allegations in the pleadings cannot be vague or conclusory (see *Stolanoff v Gahona*, 248 AD2d 525 [AD 2nd Dept 1998]). A deficient predicate notice is unamendable and requires dismissal (*Chinatown Apts v Chu Cho Lam*, 51 NY2d 786 [1980]).

With respect to the sufficiency of the predicate notice, the test is whether the notice "is one of reasonableness in view of the attendant circumstances." (*Hughes v Lenox Hill Hosp.*, 226 AD2d 4 [1st Dept 1996]; *Oxford Towers Co. LLC v Leites*, 41 AD3d 144 [1st Dept 2007]). Courts must make a fact specific analysis of each case considering the totality of the circumstances surrounding a particular case. Rent Stabilization Code 2524.2(b) requires that the predicate notice state the facts necessary to establish the existence of the ground upon which the owner relied for the removal of

the tenant (*Barrett v Silva*, 18 Misc3d 126[A] [App Term 2d & 11th Jud Dist 2007] citing *Berkeley Assoc. Co. v Camlakides*, 173 AD2d 193 [1st Dept 1991]). In this instance, petitioner in its notice to cure states the following “ that, without permission of the Landlord, and in violation of the terms of the aforesaid Lease Agreement, you have permitted and/or are permitting “John Doe” and/or “Jane Doe” to use and occupy the Subject Premises in your absence and/or you have assigned or sublet whatever rights you have to occupy the Subject Premises, or a part thereof, to “John Doe” you have sublet or assigned whatever right you have to occupy the Subject Premises or a part thereof to “John Doe and “Jane Doe”, without compliance with the requirements of Section 2525.6 of the Rent Stabilization Code, Section 226(b) of the Real Property Law” and in violation of your lease. “The Landlord never consented to your sublet/assignment of the Subject Premises to “John Doe” and “Jane Doe”.

Accepting as true petitioner’s allegation and according them the benefit of every favorable inference, the petition states a cause of action for possession based upon the rent stabilized tenant’s subletting or assignment of the premises pursuant to Section 226-b of the Real Property Law. However, with respect to the sufficiency of the predicate notice, “the appropriate test is one of reasonableness in view of the attendant circumstances.” (*Hughes v Lennox Hill Hosp.*, 226 AD2d 4 [1st dept 1996]); See also *Oxford Towers Co. LLC v Leites*, 41 Ad3d 144 [1st Dept 2007]). Thus courts are required to make a fact-specific analysis considering the totality of circumstances surrounding a particular case. Rent Stabilization Code section 2524.2(b) requires that the predicate notice state the facts necessary to establish the existence of the ground upon which the owner relies for the removal of the tenant (*Barrett v Silva*, 18 Misc3d 126[A] [App Term 2d & 11th Jud Dist 2007]).

Here, the predicate notice states no facts establishing the petitioner’s grounds alleging the

sublet or assignment. Petitioner merely recites generic language in violation of the Rent Stabilization Code. Petitioner could have easily stated facts such as how long the respondent was not seen at the premises, the number of people residing at the premises, alternate addresses for the respondent or the names or description of the individual(s) observed at the premises. Petitioner's failure to state any specific facts, renders the notice defective (C.F. *Amin Mgt LLC v Martinez*, 55 Misc3d 144[A] [App Term 1st Dept 2017] [notices are sufficient in illegal sublet proceeding where the section of the RSC, lease provision and number of individuals occupying the apartment are cited]; *East Vil. RE Holdings v McGowan*, 57 Misc3d 155[A][App Term 1st Dept 2017] [notice in illegal sublet proceeding meets standard for specificity where notice alleges tenant living at another specified address and give's subtenant's name]; *Pere v Ross*, 150 Misc2d 20 [App Term 1st Dept 1991] [notice sufficient in illegal sublet that alleges tenant was "subletting and/or assigning the premises without permission"... to third persons, to wit: Vernau Edwards a/k/a 'Jane Doe' and "John Doe"; *Bronx 1071 Franklin Ave., L.P. v Nana*, 61 Misc3d 1207(A) [Civ Ct. Bronx Co 2018] [notice sufficient where it alleges respondent has not been seen for several months and names various individual have been seen going in and out of the premises].

As the notice is bereft of any particular facts, respondent's motion to dismiss pursuant to CPLR 3211(a)(7) is granted without prejudice to petitioner's claims in another proceeding. In light of the above, the court need not address the parties other claims for relief.

This constitutes the decision and order of this court.

Dated: January 27, 2020
Brooklyn, New York



Hannah Cohen, J.H.C.

HANNAH COHEN
JUDGE, NYC CIVIL COURT