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BROWN v. MITCHELL

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART O

-----X
ANETTE BROWN,

Index No. L&T 307740/22

Petitioner,

-against-

**DECISION/ORDER UPON
MOTION TO DISMISS AT
TRIAL**

JUNIOR T. MITCHELL a/k/a JAY MITCHELL,

Respondent.

-----X

Present:

Hon. CLINTON J. GUTHRIE
Judge, Housing Court

The following is the Decision/Order of the court upon an oral motion made by respondent's attorney at the close of petitioner's prima facie case pursuant to CPLR § 4401.

PROCEDURAL HISTORY

This residential holdover proceeding predicated upon termination of tenancy by a Sixty Day Notice was filed in May 2022. After counsel appeared for respondent, an answer was interposed and the case was transferred to this trial Part. The parties appeared for trial on July 31, 2023. Petitioner put on her prima facie case. At the close of the prima facie case, respondent's attorney moved to dismiss the proceeding, on the dual bases that the predicate notice and the petition misdescribed the subject premises and that the service of a predicate notice prior to the termination period accruing under a prior predicate notice was inconsistent and ambiguous. The court reserved decision upon the oral motion after hearing from the attorneys for both parties.

TRIAL

The court admitted petitioner's certified deed at petitioner's Exhibit 1. Petitioner Anette Brown was the sole witness for petitioner. Ms. Brown testified that she is the owner of the subject premises. She stated that respondent Junior Mitchell was a tenant in a room on the 2nd Floor of the subject building. She stated that Mr. Mitchell was also known as "Jay Mitchell." She testified that she lives on the entire 1st Floor and basement of the subject building, and that the basement is used as a home office.

In describing the 2nd Floor, Ms. Brown testified that it consisted of an apartment with three (3) bedrooms. She stated that only one of the rooms was occupied and that was Mr. Mitchell's. She stated that the other rooms were locked. Ms. Brown also testified that Mr. Brown was rarely at the subject premises and hadn't slept there in a year.

Ms. Brown testified that Mr. Mitchell moved into his room, which was furnished, in September 2020. She stated that he made an agreement to pay \$250.00 per week for his room. She also stated that he had not paid rent since November 7, 2021.

Ms. Brown next testified about the Sixty Day Notice relevant to this proceeding (NYSCEF #3 and admitted as petitioner's Exhibit 3). She confirmed that her signature was on the notice and that it was served on Mr. Mitchell. Ms. Brown also testified about a "60 Day Notice" dated December 16, 2021, which was later admitted as petitioner's Exhibit 2. She testified that she had it served on Mitchell by hand, also on December 16, 2021. Ms. Brown testified that after she gave the December 2021 notice to Mr. Mitchell, he "went wild" and made complaints to "every city agency" about heat, lights, gas, and water. Ms. Brown denied that Mr. Mitchell would have lacked heat, since the building had central heating and she would have lacked heat if he lacked heat. When asked why she served the 60 Day Notice admitted as

Exhibit 3, Ms. Brown stated that she needed her space back. She also denied retaliating against Mr. Mitchell.

On cross-examination, Ms. Brown confirmed that she had never filed a multiple dwelling registration with the Department of Housing Preservation and Development (DHPD) “because [she] lived there.” When asked if there were any other tenants living on the 2nd Floor in September 2020, when Mr. Mitchell moved in, Ms. Brown replied that family members would stay in other rooms for a night “here and there.” When asked where Mr. Mitchell’s room was, Ms. Brown replied that it was in the rear of the 2nd Floor. When asked where the other rooms on the 2nd Floor were, Ms. Brown replied that they were in the rear and that they are locked.

Ms. Brown was next asked if any other tenants were living on the 2nd Floor, other than Mr. Mitchell, when the December 2021 60 Day Notice was served. She replied that family members were there, who would “come and go.” Asked whether Mr. Mitchell had access to any space other than his own room, Mr. Brown replied that he had access to the kitchen and bathroom. However, she denied that he had any access to the other bedrooms.

When asked about complaints made by Mr. Mitchell, Ms. Brown did not recall him making complaints before the notice was served in December 2021.

On redirect, Ms. Brown testified that Mr. Mitchell lived in the “most rear” room.

DISCUSSION

Pursuant to CPLR § 4401, “[a]ny party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions.” Additionally, pursuant to CPLR §

409(b), the court “shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised.”

Upon the admissions made by petitioner at trial, respondent’s motion to dismiss at trial must be granted and the petition dismissed because of a misdescription of the subject premises in the predicate notice and petition and because the predicate notice improperly describes the tenancy.

RPAPL § 741(3) requires that every petition shall “describe the premises from which removal is sought.” Failure to properly describe the premises will result in dismissal of the petition. *See e.g. Clarke v. Wallace Oil Co.*, 284 AD2d 492 [2d Dept 2001]; *US Airways, Inc. v. Everything Yogurt Brands, Inc.*, 18 Misc 3d 136[A], 2008 NY Slip Op 50279[U] [App Term, 2d Dept, 2d & 11th Jud Dists 2008]; *City of New York v. Mortel*, 161 Misc 2d 681 [App Term, 2d Dept, 2d & 11th Jud Dists 1994]. To satisfy the description requirement, “the petition must accurately describe the exact location of the premises in sufficient detail to allow a marshal executing a warrant to locate the premises in issue and effect an eviction without additional information.” *Sixth Street Community Center, Inc. v. Episcopal Social Services*, 19 Misc 3d 1143[A], 2008 NY Slip Op 51151[U] [Civ Ct, NY County 2008].

Here, the Sixty Day Notice and petition describe the subject premises as “All rooms, 2nd floor, rear, 182-11 144th Avenue, Springfield Gardens, NY 11413.” At trial, however, petitioner admitted that there are *three (3)* rooms located at the rear of the 2nd Floor apartment and that respondent does not have any access to the other two (2) rooms that he does not occupy. Petitioner also admitted that respondent’s living space includes the bathroom and kitchen of the subject apartment, however this information is omitted from the description in the predicate notice and petition. Therefore, the predicate notice, which cannot be amended (*see Chinatown*

Apts., Inc. v. Chu Cho Lam, 51 NY2d 786, 788 [1980]), and the petition do not describe the subject premises in a manner that would permit a marshal to find the actual space occupied by respondent and carry out an eviction without recourse to additional information. Petitioner’s testimony that respondent lived in the “most rear” room does not cure the misdescription; instead, it compounds it, insofar as this descriptor is absent from both the predicate notice and the petition. It is precisely the type of “additional information” that a marshal would lack in attempting to locate the premises.

Therefore, petitioner has failed to sustain its cause of action under Article 7 of the RPAPL insofar as the petition and predicate notice misdescribe the subject premises. *See* RPAPL § 741(3); *1646 Union, LLC v. Simpson*, 62 Misc 3d 142[A], 2019 NY Slip Op 50089[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019] [“[R]elief 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[.]’”].

Additionally, although not raised by respondent, the court finds pursuant to CPLR § 409(b) that the predicate notice is defective insofar as petitioner describes the tenancy as being “held under monthly hiring.” Petitioner’s testimony at trial was she had an agreement with respondent on a weekly basis. Nothing was offered to demonstrate that the weekly tenancy became a monthly tenancy at any point. Consequently, the notice, which was annexed to the petition and made a part thereof, fails to “state the respondent’s interest in the premises and his relationship with petitioner with regard thereto.” RPAPL § 741(2); *Lilley v. Molina*, 63 Misc 3d 155[A], 2019 NY Slip Op 50815[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019].¹

¹ While RPL 232-a references termination of monthly tenancies, petitioner was required to properly state the nature of the tenancy, even if RPL 232-a may serve as a means to terminate the tenancy.

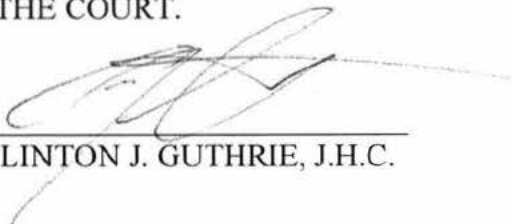
Although respondent's motion is granted for the reasons set out above, the court finds that the service of a prior predicate notice is not a sufficient basis for dismissal. While the prior notice dated December 16, 2021 was effectively vitiated by the Sixty Day Notice at issue herein, the court finds that the later notice merely extended the tenancy and time for vacatur through the termination date in the second notice. *See* RPL §§ 226-c and 232-a.

CONCLUSION

For each of these reasons, respondent's motion pursuant to CPLR § 4401 is granted and the petition is dismissed after petitioner's prima facie case at trial, without prejudice. The clerk shall issue a judgment dismissing the petition. *See* CPLR § 411. Respondent's counterclaims are deemed severed without prejudice. *See* CPLR § 407; *City of New York v. Candelario*, 223 AD2d 617, 618 [2d Dept 1996]. The parties are directed to pick up their exhibits within 35 days or they will be sent to the parties or destroyed at the court's discretion in accordance with DRP-185. This Decision/Order will be filed to NYSCEF.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: Queens, New York
August 1, 2023


HON. CLINTON J. GUTHRIE, J.H.C.