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88-35 162ND STREET LLC. v. RODRIGUEZ

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART D
88-35 162ND STREET LLC.,

Petitioner,

-against-

Index No.: L&T 69089/19
DECISION/ORDER

CARMEN RODRIGUEZ
FELIX MOREL
"JOHN DOE" & "JANE DOE"

Respondents.

Hon. Sergio Jimenez

Recitation, as required by CPLR §2219(a), of the papers considered in the review of Respondent's motion to dismiss pursuant to CPLR §3211 or leave to interpose an answer and for any other relief as the court may deem just and proper;

Papers	Numbered
Notice of Motion, Affirmation & Attached Exhibits	<u>1</u>
Affirmation in Opposition & Attached Exhibits	<u>2</u>
Reply Affirmation & Attached Exhibits	<u>3</u>

Upon the foregoing cited papers, the Decision and Order on respondent's motion is as follows;

PROCEDURAL HISTORY

Petitioner commenced the underlying holdover proceeding in October 2019 after allegedly terminating respondent's tenancy by service of a ten day notice which alleged illegal occupancy pursuant to an alleged illegal alteration. Specifically, petitioner alleges that an illegal partition was erected subdividing the living room. Petitioner bases this claim on RSC §2524.3(c) claiming the partition resulted in the issuance of an ECB violation from the New York City Department of Buildings against petitioner subjecting them to civil and/or criminal penalties.

Respondent is a rent stabilized tenant whose tenancy commenced in 2000. She denies erecting the partition and alleges the partition existed in the apartment at the time she took possession. Through counsel, she now seeks dismissal of the proceeding or, in the alternative, leave to file an answer. After the motion was fully briefed by both sides, the Court heard argument on October 16, 2020 and reserved decision.

RESPONDENT'S MOTION

Respondent argues that the petition should be dismissed because the Notice of Termination is fatally defective and thus fails to satisfy the notice requirements of RSC §2524.3(c), on which petitioner justifies this proceeding. Specifically, they argue that the statute requires service of a notice that contains a specific ground upon which the landlord relies to evict the tenant and the facts necessary to establish the existence of such ground. These facts must be sufficiently clear, unequivocal, and specific within the notice. Respondent's attorney argues that in the current notice served, petitioner determines the illegality based on the receipt of violations, which 9 NYCRR §2204.2(a)(3) explicitly states is insufficient alone to justify an eviction without a vacate order from the agency that issued the violation or causation by respondent. In essence, they argue (citing *Granada Terrace Const. Corp. V. Roberts*, 173 NYS2d 769), that the existence of a violation alone does not necessarily make the tenant's occupancy illegal. Further, they allege, that in an eviction proceeding premised on illegal occupancy, "the landlord has an obligation to cure the illegal condition or show that it would be unduly burdensome or economically infeasible [sic] to cure the violation and legalize the occupancy." *Kaurv. Sobhey*, 5 Misc3d 1012(A). Respondent contends the partition already existed when they moved into the apartment.

PETITIONER'S OPPOSITION

Petitioner opposes the motion and counters by asserting that their pleadings should be liberally construed and that they are not required to bare their proof in them but merely allege sufficient facts to support their cause of action. They cite the undisputable facts that the wall exists and that they did indeed receive a violation for the existence of the wall which remains outstanding.

ANALYSIS

RSC §2524.3(c) allows a landlord to commence an action to recover possession where the "Occupancy of the housing accommodation by the tenant is illegal because of the requirements of law and the owner is subject to civil or criminal penalties therefor, or such occupancy is in violation of contracts with governmental agencies." Case law has further developed when the occupancy by a tenant has been deemed 'illegal'. It is widely held that the mere existence of a violation, in and of itself, does not entitle the landlord to an order of dispossession. *Casabianca, Inc. v. Connobbio*, 205 Misc 380 (1952). Instead, the facts and circumstances in each case must be considered to determine whether the Court should grant a final order. *H.L.M. Properties Corp. v. Gross*, 6 Misc2d 666 (1957). "It is well settled that a landlord may not remove a tenant on the ground of illegal occupancy where: (1) the landlord created the illegality, or (2) where the landlord took title with notice of an illegality created by a predecessor in title, and (3) the illegality is susceptible of cure without undue expense or difficulty." *2610 Cropsey Dev. Corp. v. Castro*, 11 Misc3d 1085(A) [Sup Ct, 2nd Dept 2006]. Plaintiff has not alleged nor demonstrated they were unaware of the illegality upon purchase of the premises, nor that respondents created the illegality. They cannot now use it as a basis for a claim of illegal occupancy of the apartment by respondent. *Connobbio*, supra; *81 Bowery Realty*

Corp. v. Qui Hui Chen, 20 Misc3d 1103(A) [Sup Ct, 1st Dept 2008]. The termination notice before the court tracks the statutory language of RSC §2524.3(c) and cites the basis for the illegality of the occupancy solely to the violation received by petitioner. The notice does not ascribe responsibility to respondent or any other party nor does it provide any other relevant circumstances, such as petitioner's inability to legalize the condition or the infeasibility to do so. In addition, petitioner has not addressed that respondents' removal is necessary to certify or correct it. It also cannot be asserted the actual occupancy of respondent is the basis for the violation, as in when, for example, the apartment is in an illegal space such as a basement. A landlord may be entitled to such relief where a violation exists and compliance therewith cannot be effected without the removal of the tenant but the notice should inform respondent of this basis. It should also be afforded where the evidence establishes that the tenant created the conditions from which the violation arose. *Connobbio*, supra. The condition here appears to be one created by either the petitioner's or the respondent's predecessor and thus is insufficient to establish illegality of this tenant's occupancy. *Grier v. Fenty*, 13 Misc2d 542 (1957). Further, petitioner has failed to establish that compliance with correcting the violation by legalizing the condition is impossible or economically improvident. The nature of the violation is the construction of a partition without a permit. In fact, the violation report (Resp. Exh. E) prescribes the remedy as "obtain permit or restore to original condition." While petitioner has offered to 'restore' the apartment to its apparent original condition, they have not established why they cannot obtain a permit, a significantly less intrusive option if it is possible.

As such, the Court agrees with respondent that the Termination Notice is fatally defective. It is axiomatic that predicate notices cannot be amended. *Chinatown Apts. v. Chu Cho Lam*, 51 NY2d 786 (1980).

CONCLUSION

Respondent's motion to dismiss the petition due to a defective predicate notice is granted. The Court does not reach any other segments of the motion as they are moot. The clerk will enter a judgment of dismissal in favor of respondents.

This constitutes the Decision and Order of the Court.

October 20, 2020

Hon. Sergio Jimenez


Sergio Jimenez
Judge, Housing Court

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