2019-12-27

ROCHDALE VILLAGE, INC v. RICHARD

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

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ROCHDALE VILLAGE, INC.,

Index No. L&T 62768/19

Petitioner-Landlord,

-against-

DECISION/ORDER

MICHAEL STONE,

Respondent-Shareholder,

GREGORY ROLAND WILLIAMS,
"JOHN DOE," and "JANE DOE",

Respondents-Occupants.

----------X

Present:

Hon. CLINTON J. GUTHRIE
Judge, Housing Court

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):

Papers	**Numbered**
Notice of Appearance and Notice of Motion & Affirmation/Affidavit/Exhibits Annexed	1
Affirmation in Opposition & Exhibits Annexed.....	2
Affirmation in Reply & Exhibits Annexed	3

Upon the foregoing cited papers, the decision and order on Respondent's motion to dismiss is as follows:

PROCEDURAL HISTORY

The immediate holdover proceeding was commenced by Notice of Petition and Petition dated June 10, 2019. Annexed to the Petition are a "Ten (10) Day Notice to Cure" (hereinafter "Notice to Cure") and "Ten (10) Day Notice to Terminate" (hereinafter "Notice of

Termination"), which allege that Respondents Michael Stone (cooperator of the subject premises, a Mitchell-Lama cooperative apartment) and occupants Gregory Roland Williams, John Doe, and Jane Doe committed a nuisance in the subject premises, violated a substantial obligation of the Occupancy Agreement, and used the premises for illegal or immoral purposes. The notices contain identical allegations, except the Notice of Termination adds an additional allegation based on an incident that purportedly occurred after the service of the Notice to Cure.

After the initial court date on July 3, 2019, the proceeding was adjourned for Respondent Michael Stone to seek counsel through the Universal Access program. Prior to the next court date (August 13, 2019), the Legal Aid Society appeared for Respondent and filed a motion to dismiss, or in the alternative, leave to interpose an answer. After an adjournment for submission of opposition and reply papers, the Court heard argument on Respondent's motion on September 18, 2019 and reserved decision.

ANALYSIS

The crux of Respondent's motion is that the Notice of Termination is defective insofar as it does not allege any facts demonstrating that Respondent failed to cure the allegations set out in the Notice to Cure. In *31-67 Astoria Corp. v. Landraira*, 54 Misc.3d 131(A), 52 N.Y.S.3d 249 (App. Term 2d Dep't 2017), the Appellate Term, Second Department held that a 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." (Citing *Hew-Burg Realty v. Mocerino*, 163 Misc.2d 639, 622 N.Y.S.2d 187 (Civ. Ct. Kings County 1994)). Moreover, "a violation removed during the cure period will not support the termination of a lease based on the tenant's alleged default." *Id. See also Sudimac v. Beck*, 63 Misc.3d 1208(A), 2019 NY Slip Op 50442(U) (Civ. Ct. Queens County 2019); *2704 Univ. Ave. Realty Corp. v. Thompson*, 63

Misc.3d 1222(A), 2019 NY Slip Op 50652(U) (Civ. Ct. Bronx County 2019); *cf. 1123 Realty LLC v. Treanor*, 62 Misc.3d 326, 86 N.Y.S.3d 381 (Civ. Ct. Kings County 2018).

Here, the Notice of Termination, dated May 20, 2019, states that Petitioner is terminating Respondent's tenancy "for the reasons that you fail to comply with the notice to cure dated February 8, 2019, a copy which is a next hereto [sic] and made a party [sic] hereof and incorporated herein, as if fully set forth below." What follows is a word-for-word reiteration of the four alleged incidents in the Notice to Cure, along with a fifth alleged incident occurring after the date of the Notice to Cure (on February 16, 2019). Both notices reference 9 NYCRR §§ 1727-5.3(a)(1) (concerning nuisance), (a)(2)[1] (concerning violation of a "substantial agreement, covenant or obligation of the lease, or fail[ure] to comply with any substantial provision of the by-laws, subscription agreement, or other governing document"), and (a)(14) (use of the dwelling for "illegal or immoral purposes"), which are regulatory grounds for eviction in state-assisted Mitchell-Lama cooperatives, in addition to various provisions of the Occupancy Agreement.

In the opposition papers, Petitioner's attorney first argues that Respondent "failed to deny or try to contact petitioner Rochdale Village Inc, to dispute or correct such allegations." (Pena Affirmation, ¶ 4). However, no reference to this failure to deny or try to contact is made in the actual Notice of Termination. The second argument in opposition is that the additional allegation in the Notice of Termination, involving Respondent Gregory Roland Williams being threatened by a guest with a firearm (gun) on February 16, 2019 (hereinafter "February 16, 2019 incident"), falls under 9 NYCRR § 1727-5.3(a)(14), which does not require a cure notice before termination can occur. The full text of 9 NYCRR § 1727-5.3(a)(14) is as follows: "The dwelling

[1] Errantly cited as 1727-5.3(1)(2) in the notices.

unit is used for illegal or immoral purposes, including but not limited to the unlawful trade, manufacture, distribution, storage, and/or sale of marijuana or any controlled substance as defined in Public Health Law Section 3306, and Penal Law Section 220.00." The description of the February 16, 2019 incident in the Notice of Termination does not include any reference to the trade, manufacture, distribution, storage and/or sale of marijuana or any other controlled substance. Consequently, the remaining question is whether the incident, as described, states facts manifesting the usage of the premises for illegal or immoral purposes. Unfortunately, neither "illegal" nor "immoral" is defined in the relevant regulations, except insofar as trade manufacture, distribution, storage, and/or sale of marijuana or any other controlled substance is specified to be one *nonexclusive* example of illegal/immoral usage.

Although the Court has found no specific authority on the interpretation of 9 NYCRR § 1727-5.3(a)(14), a relevant analogue is Real Property Actions and Proceedings Law (RPAPL) § 711(5), which permits a summary proceeding to be maintained where "[t]he premises, or any part thereof, are used or occupied as a bawdy-house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business." Appellate cases interpreting the statute have specifically held that "use" for the immoral/illegal acts enumerated therein "'implies doing of something customarily or habitually upon the premises.'" *855-79 LLC v. Salas*, 40 A.D.3d 553, 555 (1st Dep't 2007) (citing *1021-27 Ave. St. John Hous. Dev. Fund Corp. v. Hernandez*, 154 Misc.2d 141, 145, 584 N.Y.S.2d 990 (Civ. Ct. Bronx County 1992); *see also Second Farms Neighborhood HDFC v. Lessington*, 31 Misc.3d 144(A), 932 N.Y.S.2d 763 (App. Term 1st Dep't 2011); *88-09 Realty, LLC v. Hill*, 305 A.D.2d 409, 410 (2d Dep't 2003); *554 W. 148th St. Assoc. LLC v. Thomas*, 8 Misc.3d 132(A), 803 N.Y.S.2d 18 (App. Term 1st Dep't 2005); *Grosfeld Realty Co. v. Lagares*, 150 Misc.2d 22,

575 N.Y.S.2d 220 (App. Term 1st Dep't 1989). The inference of a "customary or habitual" requirement for allegations made pursuant to 9 NYCRR § 1727-5.3(a)(14) finds support in the language of the regulation itself, which uses the plural "purposes" (rather than the singular "purpose") and enumerates examples (unlawful trade, manufacture, distribution, storage, and/or sale of marijuana or any controlled substance) that are uniformly *ongoing* in nature. Consequently, the Court interprets 9 NYCRR § 1727-5.3(a)(14) as requiring more than a single incident of "illegal" or "immoral" acts or behavior.

As pled, the February 16, 2019 incident, taken alone, does not state a cause of action under 9 NYCRR § 1727-5.3(a)(14). It involved a single occurrence where a guest used a firearm to threaten an occupant. The Notice of Termination acknowledges that it was the occupant, Mr. Williams, who called the police after the incident and reported it to security at Rochdale Village and a police officer. The Notice of Termination does not state that either Mr. Stone nor Mr. Williams were charged with any crime in relation to the incident, and the Notice's statement that the incident "presented a clear danger to the safety and total disregard of other residents and employees of the building" is not supported by specific facts. Moreover, although 9 NYCRR § 1727-5.3(a)(14) is also cited in the Notice to Cure, there is no mention as to what portion of the allegations therein correspond with that provision vis-à-vis the other provisions (9 NYCRR §§ 1727-5.3(a)(1) and (a)(2)). Consequently, no cause of action has been stated under 9 NYCRR § 1727-5.3(a)(14).

Since both 9 NYCRR §§ 1727-5.3(a)(1) and (a)(2) require notices to cure to be served before termination may be sought (*see* 9 NYCRR §§ 1727-5.3(b)(1)), Petitioner was obligated to state specific facts in the Notice of Termination that addressed whether or not any of the allegations in the Notice to Cure had been cured. *See 31-67 Astoria Corp., supra*; *see also*

Sudimac, supra ("A notice to cure is not a mere formality to a termination of a tenancy."). Here, the Notice of Termination merely reiterated the prior allegations and the allegation of the additional incident on February 16, 2019, which occurred within the cure period, did not relieve Petitioner of its obligation to state facts in the Notice of Termination addressing whether or not cure of any of the allegations had occurred. Since the Notice of Termination was served over two months after the expiration of the cure period, Petitioner had ample time to discover those facts. However, the Notice of Termination merely states that "you fail to comply with the notice to cure." This conclusory statement is devoid of specificity. No other facts stated in the Notice of Termination address the issue of cure. Consequently, the Court holds that the Notice of Termination is defective as a matter of law and may not be amended. *See Chinatown Apts. v. Chu Cho Lam*, 51 N.Y.2d 786 (1980). Respondent's motion to dismiss pursuant to CPLR § 3211(a)(7) is granted and the proceeding is dismissed, without prejudice. The alternative request to interpose an answer is denied as moot.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: Queens, New York
December 27, 2019

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

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Attorneys for Petitioner

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Attorneys for Respondent

SO ORDERED - HON. CLINTON J. GUTHRIE

Civil Court of the City of New York
County of Queens
Part: Part A, Room: 401
Date: August 13, 2019

Index #: **LT-062768-19/QU**
Motion Seq #: 1

Decision/Order

ROCHDALE VILLAGE INC
Petitioner(s)
-against-
MICHAEL STONE; GREGORY ROLAND WILLIAMS; "John" "Doe"; "Jane" "Doe"
Respondent(s)

Present: Clinton J. Guthrie
Judge

Recitation, as required by CPLR 2219(A), of the papers considered in the review of this OSC for:
Dismiss

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed (Affirmation)	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits (Affirmation)	2
Replying Affidavits (Affirmation)	3
Exhibits	
Stipulations	
Other	

Upon the foregoing cited papers, the Decision/Order in this Motion is as follows:

As per separate Decision/Order, Respondent's motion to dismiss is granted and the proceeding is dismissed, without prejudice.

Date: 12/27/19

Judge, Civil/Housing Court

Generated: July 22, 2019

SO ORDERED - HON. CLINTON J. GUTHRIE