2023-08-09

# 35-45 81st St. Owners Corp. v. Carraso

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| 35-45 81st St. Owners Corp. v Carraso |
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| 2023 NY Slip Op 50836(U) |
| Decided on August 9, 2023 |
| Civil Court Of The City Of New York, Queens County |
| Schiff, J. |
| Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. |
| This opinion is uncorrected and will not be published in the printed Official Reports. |

Decided on August 9, 2023

Civil Court of the City of New York, Queens County

**35-45 81st Street Owners Corporation, Petitioner,**

**against**

**Lupe Carraso, "John Doe" and "Jane Doe", Respondents.**

Index No. L&T 318632/22

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Attorney for Respondent

Logan J. Schiff, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Respondent's motion to dismiss pursuant to CPLR 3211:

**Papers** **NYSCEF Doc.**
Notice of Motion/Affirmation/Affidavits/Exhibits 6-20
Affirmation in Opposition/Exhibits 23-27

Reply Affirmation 28-29

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

**RELEVANT BACKGROUND AND PROCEDURAL HISTORY**

Petitioner 35-45 81st Street Owners Corporation ("Petitioner"), a cooperative corporation, commenced this holdover proceeding against the lessee and shareholder Lupe a/k/a Lupita Carraso ("Respondent") upon filing a Notice of Petition and Petition on December 2, 2022. The basis of the holdover is Respondent's alleged breach of her proprietary lease due to objectionable conduct. Prior to commencement, Petitioner served a 30-day Notice to Cure dated January 15, 2022, alleging the following:

> a) Over the past several months you have continually harassed several Board Members of Cooperative including but not limited to Jose Gonzalez.
>
> b) You have without the permission of the Board posted and slipped under the doors of [*2]other apartments notices which contain inaccurate and libelous information pertaining to the Cooperative and several Board Members.
>
> c) Please be advised you must cure said violation by March 1, 2022 or the cooperative corporation shall terminate your Proprietary Lease Agreement.

Thereafter, by Notice of Termination dated October 25, 2022, the managing agent for Petitioner purported to terminate Respondent's tenancy effective November 30, 2022. The notice states:

> PLEASE TAKE NOTICE THAT DUE TO YOUR FAILURE TO CURE THE CONDITIONS CITED IN THE JANUARY 15, 2022 NOTICE TO CURE SENT TO YOU you are hereby notice that the undersigned, the Landlord elects to terminate your tenancy ....

Respondent through counsel now moves to dismiss pursuant to CPLR 3211 on several grounds, including lack of personal jurisdiction and failure to state a cause of action based on the facial insufficiency of the Notice of Termination.

**DISCUSSION**

*A. Personal Jurisdiction*

RPAPL 735 provides that a petitioner in a summary eviction proceeding must exercise reasonable application in attempting to personally serve a respondent or another household

member of suitable age and discretion. While less rigorous than the due diligence standard for service in plenary proceedings (*see* CPLR 308), reasonable application still requires a reasonable expectation of success (*see 159 W. 23rd LLC v Spa Ciel De NY Corp.*, 66 Misc 3d 139(A) [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2019]). As an added safeguard in ensuring respondents have actual notice where substitute or affix and mail service is utilized, RPAPL 735(1)(a) mandates that the petitioner mail within one day of service two copies of the papers by registered or certified and first class mail to the premises. An additional mailing is required "if such property is not the place of residence of [the respondent] and if the petitioner shall have written information of the residence address of such person, at the last residence address as to which the petitioner has such information " (*id.*). Failure to strictly comply with the mailing requirements of RPAPL 735(1)(a) will deprive the court of personal jurisdiction and result in dismissal (*see Besdine Management Co. v Sheldon*, 1990 NY Misc. LEXIS 819 [App Term, 1st Dept 1990]).

The affidavit of service in this case states that service was effectuated upon leaving a copy of the papers with Camila Robalino, a person of suitable age and discretion, on January 24, 2023, and by mailing two copies by certified and first class mail to Respondent at the subject premises 35-45 81st Street, Apt. D-3, Jackson Heights, NY 11372. The process server did not mail additional copies to an alternate address.

In seeking dismissal, Respondent states in her affidavit that Petitioner had knowledge that she has for decades resided in Apartment D-10 in the building rather than the subject unit D-3, including at the time it effectuated service solely at D-3 in January 2023. In support of this proposition, Respondent avers that she has sublet D-3 since at least 2001 with the cooperative Board's knowledge, and regularly corresponds with the Board via D-10, which she also owns. Respondent attaches several documents in support of her position, most notably the stock certificates for both units in her name, a cease-and-desist letter from Petitioner's counsel dated January 5, 2022, addressed to unit D-10, and a letter dated January 3, 2023, from the managing [*3]agent to her relating to subletting charges, also addressed to D-10.

Respondent argues that the correspondence with Petitioner and its counsel is sufficiently reliable documentary evidence to warrant consideration on a pre-answer motion to dismiss. While the use of evidentiary material, including an affidavit, in support of a motion to dismiss is generally disfavored, such evidence may be considered where it "conclusively establish[es] that the [petitioner] has no cause of action" (*Phillips v Taco Bell Corp.* 152 AD3d 806, 808 [2d Dept 2017], citing *Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682

[2d Dept 2012]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]).

Petitioner does not dispute the authenticity of Respondent's evidence, including the letter sent by Petitioner's own counsel to Respondent at unit D-10 in January 2022 before this case was commenced, effectively waiving any challenge to admissibility (*see Tomeo v Beccia*, 127 AD3d 1071, 1072 [2d Dept 2015]; *Hartford Acci. & Indem. Co. v Transamerica Ins. Co.*, 141 AD2d 423, 425 (1st Dept 1998]). In fact, Petitioner's opposition papers do not even address this branch of Respondent's motion or explain why Petitioner did not mail Respondent copies of the Petition at her known residence at unit D-10, as required by RPAPL 735(1)(a). Under these circumstances, Petitioner has not rebutted Respondent's showing of a failure to comply with the requirements of RPAPL 735 for obtaining personal jurisdiction (*see Besdine Management Co. v Sheldon*, 1990 NY Misc. LEXIS 819 [App Term, 1st Dept 1990]; *40-42 94th St Realty LLC v Priego*, 2023 NY Slip Op 50660(U) [Civ Ct, Queens Co 2023]; *Denis v Fisher*, 66 Misc 3d 433 [Civ Ct, Queens Co 2019].

Although typically an evidentiary "traverse" hearing is required to determine if personal jurisdiction has been obtained where service is challenged, it is not needed where the affidavit of service is patently defective from the face of the papers and admissions (*see Doi Bak, LLC v Alta Plastics*, 41 N.Y.S.3d 449 [App Term, 2d Dept. 2016]. Such is the case here. Accordingly, Respondent's motion is granted, and the Petition is dismissed without prejudice for lack of personal jurisdiction.

*B. Sufficiency of Termination Notice*

Respondent separately moves to dismiss the Petition based on the inadequacy of the Notice of Termination, which Respondent alleges is lacking in the detailed allegations needed to constitute a valid predicate notice. Petitioner's Notice to Cure makes two generalized allegations, namely that Respondent: (1) is harassing Board members including Jose Gonzalez and (2) is placing notices under the doors of tenants containing "inaccurate and libelous information pertaining to the Cooperative and several Board Members." The Notice of Termination incorporates the allegations in the Notice to Cure and, apart from the boilerplate statement that Respondent has not cured, contains no new factual statements.

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]). A proper

termination notice based on objectionable conduct should "adequately apprise[] [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]).

Generally, where a landlord treats conduct as curable it must recite in the notice of termination new post-cure incidents that warrant termination of the tenancy (*see Landaira*, 54 [*4]Misc 3d 131 [A] at *2 [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2017]; *Hew-Burg Realty v. Mocerino* (163 Misc 2d 639, 641 [Civ Ct, Kings Co 1994]); *Columbia Leasing L.P. v Williams*, 2023 NY Slip Op 23206 [Civ Ct, Queens Co 2023]; *2186 Realty NY LLC v Martinez*, 2022 NY Slip Op 31054 [U] [Civ Ct, NY Co 2022]). While most of the case law in this area relates to rent-stabilized tenancies, the Appellate Division has recently adopted a similar standard in the context of a cooperative board seeking to terminate a proprietary lessee for ongoing objectionable conduct where respondent is first afforded a cure period (*see Tomfol Owners Corp. v Hernandez*, 201 AD3d 453 [1st Dept 2022] [affirming dismissal of ejectment action in cooperative 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]"]).[FN1]

Petitioner's Notice of Termination contains no new factual assertions after the end of the cure period beyond a conclusory statement that Respondent did not cure and is therefore inadequate under the standard articulated by the Appellate Division in *Tomfol Owners Corp*. As a defective predicate notice in a summary proceeding is non-amendable, this matter must 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.

Dated: August 9, 2023
Queens, New York

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HON. LOGAN J. SCHIFF, J.H.C.

**Footnotes**

**Footnote 1:**The Appellate Division dismissed the proceeding in *Tomfol Owners Corp.* notwithstanding the fact that the board had terminated the tenancy following a shareholder vote pursuant to the procedures required in the proprietary lease and cooperative by-laws and was therefore subject to the deferential business judgment rule (*see 40 W. 67th St. Corp. v. Pullman*, 100 NY2d 147 [2003]). Here, while neither side produced the proprietary lease, there is no allegation of a shareholder or board vote, meaning that the business judgment rule likely does not apply to any assessment of the pleadings and predicate notices (*see Barrett Japaning Inc. v. Bialobroda*, 2017 NY Misc. LEXIS 662 [App. Term 1st Dept. 2017]).

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