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

-----X
25/35 HILLSIDE ASSOCIATES LLC,

L&T Index No.: 317933-22/NY

PETITIONER

**DECISION/
ORDER**

-against-

CHRISTIAN QUINONES
35 HILLSIDE AVENUE
APARTMENT 5D
NEW YORK, NEW YORK 10040

RESPONDENT

“JOHN DOE” and “JANE DOE”

RESPONDENT-UNDERTENANTS
-----X

Hon. Alberto Gonzalez:

Recitation as required by CPLR Rule 2219(A), of the papers considered in the review of Respondent’s motion to dismiss, pursuant to CPLR § 3211(a)(7) and/or CPLR § 3212 because the Notice To Cure Is fatally defective; pursuant to CPLR § 3211(a)(7) and/or CPLR § 3212 because the “remaining alleged nuisance conduct does not in fact raise to the level of nuisance;” and pursuant to CPLR § 3211(a)(7) because the predicate Notice Of Termination “does not allege any conduct that happened before the expiration of the cure period, rendering the Notice Of Termination fatally defective, and the petition fatally defective.”

<u>Papers</u>	<u>NYSCEF Doc #</u>
[Respondent’s] Notice of Motion;	13
[Respondent’s] Affidavit or Affirmation in Support;	14
[Respondent’s] Memorandum of Law;	15
[Respondent’s] Affidavit or Affirmation in Support;	16
Exhibits A-E;	17-21
[Respondent’s] Affidavit or Affirmation in Opposition To Motion;	23
[Respondent’s] Affidavit or Affirmation in Reply.	24

Procedural History and Factual Background

Petitioner, 25/35 Hillside Associates LLC initiated this proceeding by way of a Petition Holdover, and Notice of Petition, that were both filed with the court on November 21, 2022. *See* NYSCEF #1, 2. The Petition in section 7 states that the, “[g]rounds for the eviction are the same as those stated in the Notice to Cure dated July 18, 2022 and the Notice Of Termination dated October 31, 2022. A copy of both notices together with proof of service is annexed hereto and made a part hereof.” *See* NYSCEF # 1 ¶ 7.

Petitioner’s July 18, 2022 Notice To Cure states as follows: “PLEASE TAKE FURTHER NOTICE THAT, the facts upon which the above grounds are based are as follows:

1. The landlord has received complaints from other residents of the building of excessive noise emanating from your apartment.
1. On or about January 31, 2022, you caused excessive noise to emanate from your apartment. Upon information and belief, said excessive noise was due to your use of power tools to improperly, and without the landlords consent, alter the subject apartment.
2. On or about June 2, 2022, you were observed using power tools and making, without the landlords consent, improper alterations to the public halls of the subject building.
3. On or about June 3, 2022, an agent of the landlord observed improper and unauthorized alterations to the electrical wiring in the subject apartment.
4. On or about June 11, 2022, at approximately 1:30am, an unknown individual, who is not a resident of the subject building, was observed loitering in the lobby. Said individual stated to building personnel he was waiting for the tenant apartment 5D.
5. On or about June 12, 2022, an unknown individual, who is not a resident of the subject building, at approximately 2:00am, was observed loitering on the 6th floor stairs to the rooftop. Said individual stated he was waiting for the tenant of apartment 5D.” *See* NYSCEF # 17.

The Notice To Cure went on to say that, “in order to cure the aforesaid violations, you must forthwith return the subject building and apartment to its original condition, refrain from further improper and/or nuisance behavior and grant the landlord access to your apartment to verify all alteration have been corrected. PLEASE TAKE FURTHER NOTICE should you fail to

cure the above stated violations on or before August 15, 2022, which is at least fifteen (15) days from the date hereof, the landlord shall terminate your tenancy...” See NYSCEF # 17.

Thereafter, Petitioner served a Notice Of Termination, dated October 31, 2022, which terminated Respondent’s tenancy. See NYSCEF # 18. The Notice Of Termination further stated, “that termination is based upon the fact that you have failed to comply with a Notice To Cure dated July 18, 2022, in that you continue to engage in objectionable conduct making the building less fit to live in for the building’s other residents, interfering with the rights of other residents to quietly and peacefully enjoy their apartments, causing conditions that are dangerous and/or detrimental to the building’s other residents, and repeatedly harassing other residents of the building.” See NYSCEF # 18.

The specific acts alleged in the Notice Of Termination, were as follows: “PLEASE TAKE FURTHER NOTICE...

- a) The landlord continues to receive complaints from other residents of the building of excessive noise emanating from your apartment.
- b) You continue to use power tools to make unauthorized alternations in the public hall of the building and in your apartment.
- c) On an almost daily basis, your guests and/or invitees have been observed loitering in the public areas of the subject building.
- d) You have not obtained the necessary permits for the improper and unauthorized alternations.
- e) You have failed to grant the landlord access to your apartment to verify the apartment has been restored to its original condition and/or confirm the improper and unauthorized alternations do not pose a fire and safety hazard.”

The petition was then first heard on December 14, 2022, and then adjourned. On March 17, 2023, Respondent appeared by counsel¹ and the matter was adjourned to May 4, 2023 and then June 6, 2023. On May 9, 2023, Respondent’s counsel filed the instant motion seeking dismissal, because Petitioner’s Notice To Cure is “fatally defective”; “the remaining alleged nuisance conduct does not in fact raise to the level of nuisance”; and that the predicate Notice of Termination, “does not allege any conduct that happened before the expiration of the cure period, rendering the Notice of Termination fatally defective, and the petition fatally defective.” *See* NYSCEF #13. Petitioner then filed an affirmation in opposition on July 2, 2022. *See* NYSCEF #23. A reply was then filed by Respondent’s counsel on July 21, 2022, and oral argument was heard by the court on August 16, 2023. *See* NYSCEF #24.

DISCUSSION

On a motion to dismiss pursuant to CPLR § 3211, “the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” Leon vs. Martinez, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994).

Pursuant to CPLR § 3211(a)(7), “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 7. The pleading fails to state a cause of action...”

When deciding a motion to dismiss pursuant to CPLR § 3211(a)(7), “the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are

¹ Respondent’s counsel filed a Notice of Appearance and a Verified Answer with the court on March 16, 2023.

discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail.” Guggenheimer vs. Ginzburg, 43 N.Y.2d 268, 401 N.Y.S.2d 182 (1997).

Petitioner has annexed the Notice To Cure and Notice Of Termination to the petition and made them a “part hereof;” “[a] copy of any writing which is attached to a pleading is a part thereof for all purposes.” CPLR § 3014. As such, the Notice to Cure and the Notice of Termination are part of the pleadings.

“In evaluating the facial sufficiency of a predicate notice in a summary eviction proceeding, the appropriate test is one of reasonableness in view of the attendant circumstances.” Oxford Towers Co., LLC vs. Leites, 41 A.D.3d 144, 837 N.Y.S.2d 131 (App. Div. 1st. 2007) (citing Hughes vs. Lenox Hill Hosp., 226 A.D.2d 4, 18, 651 N.Y.S.2d 418 [1996]).

Moreover, “Every notice to a tenant to vacate or surrender possession of a housing accommodation shall state the ground under section 2524.3 or 2524.4 of this Part, upon which the owner relies for removal or eviction of the tenant, the facts necessary to establish the existence of such ground, and the date when the tenant is required to surrender possession” 9 NYCRR 2524.2(b); See also RPAPL§ 741 (4).

Further, when a landlord elects to serve a notice to cure pursuant to NYCRR 2524.3(a), it can then move to terminate only after the tenant, “has failed to cure such violation after written notice by the owner that the violations cease within 10 days...” NYCRR 2524.3 (a).

Generally, “where a landlord treats conduct as curable, it must recite specific post-cure evidence that the conduct remains uncured in the termination notice.” Columbia Leasing L.P. vs. Williams, NY Slip Op 23206 (Civ. Ct. Queens. Cty. 2023); see also Hew-Burg Realty vs. Mocerino, 163 Misc.2d.639, 622 N.Y.S.2d 187 (Civ. Ct. Kings. Cty. 1994); 31-67 Astoria Corp vs. Landaira, 54 Misc.3d 131(A), 52 N.Y.S.3d 248 (Table) (App. Term. 2nd Dep’t. 2017);

Tomfol Owners Corp vs. Hernandez, 201 A.D.3d 453, 156 N.Y.S.3d 732 (Mem) (App. Div. 1st. Dep't. 2022); 2186 Realty NY LLC vs. Martinez, NY Slip Op 31054 (U) (Civ. Ct. NY. Cty. 2022) (“[t]he Notice to Terminate must allege the tenant failed to cure the alleged default specified in the Notice to Cure after expiration of the cure period, and additional affirmative acts by the tenant, separate from those already alleged in the Notice to Cure, are necessary for the tenant to have failed to cure.”)

Respondent argues that, “[t]he Notice of Termination here is fatally defective because it is vague and conclusory and lack factual specificity.... [t]here is no explanation as to what Respondent’s objectional conduct is, how are other residents affected by it, what the dangerous conditions are and how they are determinantal to others. There are no facts to support the claim that Respondent failed to comply with the Notice to Cure.” *See* NYSCEF #15, Pg. 6 (Memorandum of Law).

As to the five allegations in the Notice of Termination (a-e), Respondent’s counsel writes in its memorandum of law, “[a]llegation “a”... [t]his statement lacks specificity in that it fails to explain when such complaints were made and describe the noises...[a]llegation “b”... it is unclear what these allegations are, whether they are in addition to the previously alleged ones, and when they were observed... [a]llegation “c”... fails to specify when precisely individuals were observed and what about waiting for Respondent objectionable or nuisance conduct... [a]llegation “d”... it is not clear what these alterations are. Moreover, Respondent was not informed what permits he must obtain and how... [a]llegation “e”... it does not state when an inspection was scheduled and/or attempted. *See* NYSCEF #15, Pg. 7 (Memorandum of Law).

In opposition, Petitioner’s counsel writes, “[a] notice of termination must set forth sufficient facts to establish grounds for the landlord to recover possession. *Chinatown*

Apartments, Inc. v. Chu Cho Lam, 51 NY 2d 786, 433 NYS 2d 86, 12 NE 2d 1312 (1980). Further, the notice must set forth the “who, what, when and where” of the grounds for the eviction. *510 East 5th St. Assocs. v. Gatchell*, 22, col.2 9/20/89 NYLJ (Civ. Ct. NY. Co). It is respectfully submitted, the predicate notices herein fully comply with the foregoing as same contain specific factual allegations of improper conduct together with the date and place said improper conduct was observed.” See NYSCEF # 23 ¶ 7 (Affirmation).

The court however finds that Petitioner’s Notice Of Termination does not set forth post-cure acts sufficient to make out its breach of lease claim. In addition, the Notice Of Termination is vague and does not state whether the complaints therein are new allegations in addition to those in the Notice To Cure. The Notice Of Termination does not state when the complaints were observed, when they were made, who observed them, and what the specific alterations are – including or in addition to electrical wiring, mentioned in the Notice To Cure. Given the almost three-month gap between the serving of the Notice To Cure and the Notice Of Termination, more specificity is not a unreasonable for Respondent to properly defend against the allegations.

As such, the court grants Respondent’s motion to dismiss, pursuant to CPLR § 3211(a)(7) because the Notice Of Termination does not allege any conduct that happened after the expiration of the cure period.

Moving then to Petitioner’s Nuisance claim.

Petitioner’s Notice of Termination terminates Respondent’s tenancy pursuant to Section 2524.3(b). Section 2524.3(b) authorizes the bringing of a nuisance holdover proceeding, provided the service of a predicate notice under 2524.2, (though not a notice to cure). See NYCRR 2524.3(B).

A nuisance, “for purposes of the Rent Stabilization Code, is a condition that threatens the comfort and safety of others in the building and key to the definition is a pattern of continuity or recurrence of objectionable conduct” 1123 Realty LLC vs. Treanor, 62 Misc.3d 326, 86 N.Y.S.3d 381(Civ. Ct. N.Y. Cty. 2018); See also Frank v. Park Summit Realty Corp (175 AD2d 33, 573 NYS2d 655 (App. Div. 1st. Dep’t. 1991).

Ordinarily one instance of objectional conduct, will not satisfy the nuisance standard. See 40 W.75th St. LLC vs. Horowitz 25 Misc.3d 1230 (A), 906 N.Y.S.2d 772 (Table) (Civ. Ct. N.Y. Cty. 2009).

However, there is no “quantitative test,” when determining whether claims are a nuisance, “the court must weigh the quantitative and qualitative aspects under a specific set of facts to determine whether a nuisance occurred.” 160 West 118th Street Corp vs. Gray, 7 Misc.3d 1016 (A), 801 N.Y.S.2d 238 (Table) (Civ. Ct. N.Y. Cty. 2004); 772 East 168th Street LLC vs. Holmes, 61 Misc.3d 1206(A), 110 N.Y.S.3d 798 (Table) (Civil. Ct. N.Y. Cty. 2018). Moreover, “not every annoyance will constitute a nuisance” (see 2 Dolan, Rasch’s Landlord and Tenant – Summary Proceedings § 30:60, at 465 [4th Ed]). Bainbridge Avenue Properties, Inc. vs. Sow, 66 Misc.3d 1207(A), 120 N.Y.S.3d 583 (Table) (Civil. Ct. Bronx. Cty. 2019).

And, “[w]hile there is no bright line rule mandating the inclusion of names, dates and specific instances of misconduct in the predicate termination notice, Pinehurst Construction Corp v. Schlesinger, 38 AD3d 474, 833 N.Y.S.2d 428 (1st Dep’t 2007), they may be required if the failure to include them would be unreasonable in light of all the attendant circumstances.” Concourse Green Associates. LP vs. Patterson, 53 Misc.3d 1206(A), 46 N.Y.S.3d 474 (Table) (Civ. Ct. Bronx. Cty. 2016) (citing to 297 Lenox Realty Co. v. Babel, 19 Misc.3d 1145 [A] (Civ. Ct. Kings. Co. 2008). See also, Hughes vs. Lenox Hill Hospital, 226 (“the appropriate standard

for assessment of the adequacy of notice is one of reasonableness in view of all attendant circumstances.”)

As with Petitioner’s objectionable conduct claims, Petitioner’s nuisance claims are devoid of factual allegations, specific enough for Respondent to not make out a defense.

Petitioner alleges that the landlord is committing a nuisance by making “excessive noise.” Though petitioner fails to note who made these complaints; “[g]enerally, where noise has been found to establish nuisance, the noise disturbed multiple residents in the building [see eg Brodcom West Dev. Co. v. Best 23 Misc 3d 1140 [A], 889 N.Y.S.2d 881, 2009 NY Slip Op 51208 [U]; Roaj Realty Inc. v. Ortega 2002 NY Slip Op 50214 [U]; Carnegie Park Associates v. Graff 2003 NY Slip Op 51198 [U].” Bainbridge Avenue Properties Inc. v. Sow, 66 Misc.3d 1207 (A), 120 N.Y.S.3d 583 (Table) (Civ. Ct. Bronx. Cty. 2019); see also Prince George Associates L.P. vs. Cislyn Mais 14 East 28th Street, 44 Misc.3d 1202(A), 997 N.Y.S.2d 100 (Table) (Civ. Ct. N.Y. Cty. 2014). Petitioner also fails to note when the noise was made. At most, Petitioner has made two *noise* allegations in its Notice To Cure (with specific dates), but fails to make out any specific occurrences – dates and times – in the Notice To Terminate.

The Notice To Terminate similarly fails to state dates concerning the use of the power tools or the loitering, and moreover fails to state what the alteration made in the public hall is, and how it affects the other tenants.

Further, Respondent’s affidavit states that he is “confused about what steps I was required tot take to cure my alleged breach of lease and nuisance conduct[;]” “I did use power tools to build a low-frame bed for an art project at one point, but I am unsure if that is the noise the owner claims to have received complaints about[;]” “I am not aware of any permits I was supposed to get[;]” “I have not made any unauthorized alternations to my apartment or any other

part of the building[;] “When I first move in my apartment back in April 2021, I had no gas and electricity in the kitchen area. I reached out to HPD to help with these issues[;] Subsequently the landlord and/or HPD fixed the faulty wiring in my apartment.” *See* NYSCEF #16

By contrast, Petitioner fails to attach an affidavit of someone with personal knowledge, in addition to its attorney affirmation, to rebut or clarify Respondent’s claims.

As such, Respondent’s motion pursuant to CPLR § 3211(a)(7) that, “the remaining alleged nuisance conduct does not in fact raise to the level of nuisance,” is granted.

CONCLUSION

For the reason stated above, it is hereby ORDERED that Respondent’s motion to dismiss is granted and the petition is dismissed. This constitutes the Decision and Order of the court, copies of which will be uploaded to NYSCEF.


Hon. Alberto M. Gonzalez, HCJ
ALBERTO GONZALEZ
JUDGE, HOUSING COURT

Dated: New York, New York
August 23, 2023