2023-09-11

Riverdale Osborne Towers v Berrian

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

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RIVERDALE OSBORNE TOWERS HOUSING ASSOC. LLC,

Index No.309163/21

Petitioner,

DECISION/ORDER

-against-

Mot. seq. no. 2

COURTNEY BERRIAN,

Respondents.

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The following e-filed documents, listed by NYSCEF document numbers 17-23 (motion no. 2), were read on this motion to dismiss the petition.

In this nonpayment summary eviction proceeding, Petitioner does not dispute that the subject building is a "covered property" or that Respondent resides in a "covered dwelling" as defined by section 4024(a) of the Coronavirus Aid, Relief, and Economic Act (15 USC § 9058[a]). Nor does it dispute that the rent demand it served as a predicate to this proceeding is a "notice" as described by section 4024(c) of the Act (*id*. § 9058[c] [requiring a thirty-day notice, rather than the fourteen-day notice required by RPAPL § 711]). Instead, its sole argument is that Respondent did not object to the notice until this motion, filed twenty months after commencement of the proceeding, and any objection to the notice is therefore waived.

Petitioner is only entitled to judgment if it can make out all elements of its cause of action (*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]). Contrary to Petitioner's suggestion, the issue of the sufficiency of a predicate notice is not one that "would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of the prior pleading" and thus need not be pleaded as an affirmative defense (CPLR 3018[b]). Indeed, even an oral "general denial" places the sufficiency of a predicate notice into issue and requires Petitioner to prove that an effective predicate notice has been served (*Matter of Metro Plaza Apts., Inc. v Buchanan*, 204 AD3d 45, 48 [3d Dept 2022]). Respondent's written answer, filed in May 2023, admits two allegations but otherwise "general[ly] den[ies]" the remaining allegations of the petition,

including the allegation regarding service of a sufficient predicate rent demand, thus putting the sufficiency of Petitioner's notice into issue.[1]

Because Petitioner's predicate rent demand notice does not comply with the thirty-day requirement of the CARES ACT, it is ORDERED that the motion is granted; and it is further

ORDERED that the petition is dismissed, without prejudice.

This is the court's decision and order.

Dated: September 11, 2023

Michael L. Weisberg, JHC

[1] While a pro se litigant may be excused for answering with a "general denial," counsel should avoid its use. This form of answering "is almost always improper, for rarely does a complaint contain not a single statement that should be admitted or [denied knowledge or information sufficient to form a belief]. An improper general denial may well earn sanctions against the offender and may even result in the court granting summary judgment striking the answer" (1B West's McKinney's Forms Civil Practice Law and Rules § 4:229 [Apr. 2020 update]). That treatise recommends, "Do not generally deny a complaint" (*id.*; *see also Barbetta v Costa*, 15 AD2d 720 [4th Dept 1962] ["We condemn the growing practice of serving such an answer whether it is verified or not. It is apparent that defendant knew, at the time the answer was served, that certain of the allegations of the complaint were true. Her representatives or attorneys could have ascertained the true facts with a minimum of effort."]).