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Henry v. Murphy

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[*1]

Henry v Murphy
2023 NY Slip Op 51053(U)
Decided on September 29, 2023
Civil Court Of The City Of New York, Kings County
Rumprecht-Behrens, 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This opinion is uncorrected and will not be published in the printed Official Reports.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 September 29, 2023

Civil Court of the City of New York, Kings County

Eluire Henry; Darcel J. Olivier, Petitioner(s),

against

**Jean Murphy; Giovanna Murphy; Tamia Wells;
John" "Doe; Jane Doe, Respondent(s).**

Index No. LT-050234-23/KI

For Petitioners: DC37 by John Bart, Esq.

For Respondents: Arthur E. Edwards PLLC by Arthur Edwards, Esq.

Agata E. Rumprecht-Behrens, J.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers/Numbered

Notice of Motion and Affidavits /Affirmations annexed NYSCEF 7-15

Answering Affidavits/ Affirmations NYSCEF 18-19

Reply Affidavits/ Affirmations NYSCEF 20-27

This is a holdover proceeding predicated on a 90 Day Notice of Termination. Petitioner

seeks to recover the premises known as 8410 Glenwood Road, Apt 3, 3rd Floor, Brooklyn, NY 11236.

Respondents Giovanna Murphy and Tamia Wells seek dismissal on 11 different grounds. [\[FN1\]](#)

The timeline of events in this case is undisputed. On or about May 30, 2022, petitioners received \$15,050 from the Emergency Rental Assistance Program (ERAP) on behalf of the respondents. On or about November 2022, petitioners served respondents with a 90 Day Notice advising them that if they don't vacate the premises by February 28, 2023, a holdover proceeding will commence. On March 8, 2023, petitioners filed a Notice of Petition/Petition with the court. The clerk's office assigned the first court date as May 16, 2023.

Respondents argue that by virtue of accepting the ERAP funds on or about May 30, 2022, petitioners have agreed not to evict "for reason or expired lease or holdover tenancy any household on behalf of whom rental assistance is received for 12 months after the first rental assistance payment is received, unless the dwelling unit is the subject of the lease or rental agreement is located in a building that contains 4 or fewer units, in which case the landlord may decline to extend the lease or tenancy if the landlord intends to immediately occupy the unit for the landlord's personal use or the use of an immediate family member as a primary residence." [\[*2\]](#)*L.2021, c.417, Part A, §5* Respondents argue that because the 90 Day Notice and the Notice of Petition/Petition were served less than 12 months after the ERAP payment, the proceeding must be dismissed. In addition, respondents argue that the predicate notice is defective and insufficient to support this petition and that the petition itself is defective on various grounds.

Petitioners oppose the motion because "nothing prohibited Petitioners from commencing and prosecuting this holdover action at this time. This is because the subject premises contains less than 4 units and petitioner/landlord has stated under oath that her adult son intends to occupy the subject apartment as his primary residence." *See NYSCEF Doc. 20* Petitioners hold that they are entitled to continue with the instant proceeding because the matter falls within the exception enumerated by the legislature. According to the affidavit of Elvire Henry (*Henry Affidavit*), the apartment will be used by her son as a primary residence. *See NYSCEF Doc. 21*. The *Henry Affidavit* goes on to explain that, as a pro-se petitioner, she was not aware "that it would have been preferable if I had included my intentions for the third floor in my court papers. Nevertheless, the tenants were served with court papers as far back as March of this year. While they did not know the reason, they certainly knew that it

was my intention to reclaim the apartment." In addition, petitioners argue that the verbose motion papers fail to identify the defects in the predicate notice and in the petition.

Respondents point out that the Affirmation in Opposition refers to this case as a "run-of-the-mill no defense holdover matter." (*NYSCEF Doc. 20*). Neither the 90 Day Notice, nor the Notice of Petition/Petition allege that petitioners seek to occupy the premises for personal use. There is no notice to the tenant that this is what is colloquially known as an owner's use holdover. If, in fact, petitioners seek to recover the apartment for personal use, then respondents argue that the petition does not comply with RPAPL 741 because it does not state the facts upon which the proceeding is based.

This case is plead as a "run-of-the-mill holdover matter" and the 90 Day Notice is a straight notice of termination. This Court does not have to address the issues of whether this is an owner's use holdover because it is not plead as such. Had the Petition been drafted as an owner's use petition, then the Court would have to address whether the 90 Day Notice is proper under those circumstances. Here, the first and only mention of the intent to recover the property for personal use is in Opposition to the instant motion.

A motion to dismiss pursuant to *CPLR § 3211(a)(1)* may be granted "only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law." [*Cavaliere v. 1515 Broadway Fee Owner, LLC*, 150 AD3d 1190](#), [2nd Dep't 2017]; *citing*, *Goshen v. Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]). Here, the facts and the timeline of events are undisputed. Respondents have shown that ERAP payments were accepted, and that the holdover case was commenced less than 12 months later in contravention of the ERAP statute.

Respondents challenge both the sufficiency of the 90 Day Notice and the timeline of the filing of this case.

[*Herzl Realty LLC v. Almodovar*, 79 Misc 3d 1223\(A\)](#) (Civ. Ct. Kings County 2023) is based on analogous facts: petitioner accepted ERAP payments and, shortly thereafter, served respondents with a Notice of Termination and a Notice of Petition and Petition. The Notice of Termination in the *Almodovar* case stated that respondents must vacate by November 30, 2022 when in fact, the 12 month stay pursuant to the acceptance of ERAP payments would not expire until August 28, 2023. The *Almodovar* decision states, in part,

The Notice of Termination, which instructed Respondent to vacate the premises on

or before November 30, 2022, made no mention of ERAP. The Notice of Termination was silent as to ERAP even though the statute is clear that acceptance of payment for rental arrears through ERAP shall constitute an agreement by the landlord not to evict for reason of expired lease or holdover tenancy for twelve (12) months after the landlord receives the first assistance payment.

(See, Part BB, Subpart A, § 9(2)(d)(iv), as amended by L. 2021, c. 417, Part A, § 5). Petitioner has not asserted any exception to the foregoing twelve (12) month rule.

A defective predicate notice cannot be cured by amendment. *Chinatown Apartments v. Chu Cho Lam*, 433 N.Y.S.2d 86 (1980). The sufficiency of a predicate notice in a summary proceeding must be evaluated by the "reasonableness in view of the attendant circumstances" test. [*Oxford Towers o. LLC v. Leites*, 41 AD3d 144](#) [1st Dept 2007).

Here, as in *Almodovar*, petitioners commenced a case less than 12 months after the ERAP payments were made. The 90 Day Notice states that the respondents must vacate by February 28, 2023. Nothing in the notice appraises the respondents of the fact that they cannot be evicted until after May 30, 2023. Without being appraised of the fact that due to the ERAP they cannot be evicted until after May 30, 2023, respondents might have been not aware of that defense and moved before the time contemplated by the legislature expired. After reviewing the 90 Day Notice and applying the "reasonableness in view of the attendant circumstances" test, the 90 Day Notice is insufficient and fails to appraise the respondents of their defenses. The 90 Day Notice cannot be amended and therefore the petition upon which it is based must be dismissed.

Accordingly, respondents' motion is granted, and the case is dismissed without prejudice.

The Court does not need to reach the various other claims and reasons to dismiss contained within the instant motion.

Date: September 29, 2023
Hon. Agata E. Rumprecht-Behrens
Housing Court Judge

Footnotes

Footnote 1: Respondents withdrew, on the record, their requests for dismissal enumerated in Para 5, Para 12 and Para 13 of the Notice of Motion.

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