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605 West 42nd Owner LLC v. Rodriguez

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Civil Court of the City of New York
County of New York
Part: Part C, Room: 823



Index #: LT-302061-22/NY
Motion Seq #: 3

Decision/Order

605 West 42nd Owner LLC
Petitioner(s)

Present: Vanessa Fang
Judge

-against-

Hector Pena; Benjamin Rodriguez; "John" "Doe"; "Jane" "Doe"
Respondent(s)

Recitation, as required by CPLR 2219(A), of the papers considered in the review of this Motion by petitioner to restore.

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

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

Petitioner and respondent-occupant Benjamin Rodriguez settled this holdover proceeding on October 28, 2022 pursuant to a two-attorney, so ordered stipulation ("stipulation"). The stipulation provides that the probationary agreement commences October 28, 2022 and continues through October 28, 2023 ("probationary period") during which time respondent-occupant, his guests, invitees and/or licensees and petitioner and/or its agents shall comply with the terms set forth in the stipulation.

During the probationary period respondent-occupant agrees not to engage in or permit any course of conduct or acts as alleged in the Notice of Termination and petitioner agrees not to harass respondent, disclose respondent's private information, and not allow admission of any guests to respondent's apartment without his explicit permission.

In the event of an alleged material breach of this stipulation during the probationary period, paragraph 12 of the stipulation provides that the opposing counsel shall first be advised by e-mail "of the breach and provide a ten-day period within which the breaching party may cure such breach within the 10-day period."

Paragraph 13 of the stipulation provides that if

either party believes the breach has not been timely cured, or if there is a subsequent breach, the party may restore this proceeding to the Court's calendar on 8 days' notice of motion for a hearing to determine whether there has been a material breach of the agreement. The motion shall be supported by an affidavit of someone with actual knowledge of the breach setting forth the specific and particularized nature of the alleged violation of the stipulation, including the dates and times of the alleged breaches.

Paragraph 14 provides that upon restoration, the sole issue shall be whether the alleged conduct occurred in violation of the stipulation and was a material breach of the agreement.

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Paragraph 15 provides that if there is a determination of a material breach, the court may issue relief it deems appropriate including but not limited to a judgment of possession or an extension of the probationary period.

Paragraph 16 provides that if no breach is found, but there is an alleged subsequent material breach of this agreement, either party may restore this proceeding following the procedures set forth in paragraphs 13-15.

Lastly, paragraph 17 provides that if this proceeding is not restored to the court's calendar by October 28, 2023 the proceeding shall be deemed discontinued.

Petitioner now moves for an order restoring this proceeding based on respondent-occupant's alleged breach of the stipulation, scheduling this matter for a hearing to determine whether there was a breach, issuing a judgment of possession against respondent-occupant, granting petitioner a money judgment for legal fees due to respondent-occupant's breach, and allowing petitioner to proceed to an inquest against respondent-tenant.

In support of its motion, petitioner submits an affidavit from Nadjie Sterikchani who states that she is an employee for petitioner; respondent-occupant has continued to harass, threaten and demean her on a daily basis; she is the building concierge from 3:00 PM to 11:00 PM from Monday through Thursday and 7:00 AM to 3:00 PM on Sundays; respondent-occupant constantly barks at her in a threatening and menacing manner on a daily basis; she observes respondent-occupant regularly causing fights with other building staff members and residents; on her first day at work respondent-occupant said to her "welcome to the worst job of your life" and has since made her feel scared and threatened; on December 12, 2022 and December 13, 2022, respondent-occupant said to her "come visit [him] sometime" as he gets lonely; that respondent-occupant's conduct in threatening and harassing her is daily; on December 13, 2022 respondent-occupant sang to her and asked her to allow him access to the 40th floor and when she refused him access to the 40th floor he began to berate and curse at her and another resident who was in the lobby; and on the evening of December 15, 2022, respondent-occupant shouted in her direction "slut, you're such a slut."

Respondent-occupant disputes the allegations and opposes the motion on the grounds that the motion is insufficient to restore this matter to the court's calendar. Respondent-occupant argues that petitioner failed to provide sufficient notice to his counsel of the alleged breach per the terms of paragraph 12 of the stipulation. Respondent-occupant maintains that the notice to cure contemplated by paragraph 12 is akin to a notice to cure that is to be served as a predicate notice in a holdover proceeding which requires allegations containing factual specificity. Respondent-occupant also argues that the motion itself is insufficient to warrant restoration as the supporting affidavit does not allege a material breach, is ambiguous, and fails to comply with paragraph 13 of the stipulation in alleging the particularized nature of the breach including the dates and times of the objectionable conduct.

Respondent-occupant's counsel states that petitioner's counsel notified him of an alleged breach in an e-mail correspondence on December 14, 2022 titled "Notice to Cure" that read "Please be aware that your client, Benjamin Rodriguez, is in breach of the stipulation. Mr. Rodriguez has been observed harassing Building personnel and menacing female employees in the Building. We are prepared to proceed with restoration upon the expiration of the 10-day cure on December 26, 2022." When asked if petitioner's counsel could provide further context concerning the alleged breach the reply was "[a] major aspect of his breach, is that he has harassed a female staff member on multiple occasions."

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Paragraph 12 of the parties' stipulation appears to simply require notice to the opposing party's attorney of an alleged breach and afford a ten-day period to cure the breach. The notice via e-mail of the breach was vague and ambiguous lacking in any specific facts. However, factual details were not explicitly required per paragraph 12 of the parties' stipulation nor is there any indication that a Notice to Cure with similar standards to a predicate notice was contemplated by the parties' agreement. If the parties intended to require the aggrieved party to give notice to opposing counsel of the breach with factual particularity, the parties should have provided for such prerequisites in the stipulation. Therefore, the e-mail notice to respondent-occupant's counsel complied with the terms of paragraph 12 of the stipulation.

In contrast, paragraph 13 of the stipulation is explicit in requiring "an affidavit of someone with actual knowledge of the breach setting forth the specific and particularized nature of the alleged violation of the stipulation, including the dates and times of the alleged breaches" in order to restore this proceeding to the court's calendar. Petitioner's affidavit lists three dates on which alleged objectionable conduct occurred two of which consisted of respondent-occupant making statements to the deponent or in her direction. The majority of the remaining allegations contained in the affidavit are generalizations of menacing, threatening or harassing behavior that occurred on a regular basis. None of the allegations state a specific time of the occurrences despite the petitioner's accessibility to this information since building employees are tasked with logging confrontations with tenants and immediately notifying their supervisors of the exact words and actions pertaining to the incident. As stated above, if the parties contemplated prerequisites in order to permit a party to restore this proceeding based on an alleged breach, the stipulation should state those requirements. By the same token, paragraph 13 of the stipulation does list prerequisites with which petitioner has failed to comply to permit restoration of this matter to the court's calendar.

Accordingly, petitioner's motion is denied without prejudice to renew upon proper papers.

This constitutes the decision and order of the court.

Dated: April 28, 2023
New York, New York

HON. VANESSA FANG, J.H.C