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BEC Continuum Owner LLC v Foster
2023 NY Slip Op 51154(U) [80 Misc 3d 1233(A)]
Decided on October 31, 2023
Civil Court Of The City Of New York, Kings County
Weisberg, 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This opinion is uncorrected and will not be published in the printed Official Reports.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 October 31, 2023

Civil Court of the City of New York, Kings County

<p>BEC Continuum Owner LLC, Petitioner,</p> <p>against</p> <p>Fabian Foster, et al., Respondents.</p>
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Index No. 310995/22

Michael L. Weisberg, J.

The petition in this holdover summary eviction proceeding alleges termination of the rent-stabilized tenancy on the ground that Respondents have caused or permitted a nuisance. After a bench trial, the court finds that Respondent Fabian Foster engaged in multiple incidents of threatening and harassing conduct towards the building superintendent. However, because the parties' lease does not contain a conditional limitation permitting early termination of the lease, Petitioner may not maintain a summary eviction proceeding pursuant to Article 7 of the Real Property Actions and Proceedings Law and instead must seek Respondents' eviction in an ejectment action.

FINDINGS OF FACT

A preponderance of the credible evidence establishes the following facts:

Petitioner BEC Continuum Owner LLC is the landlord of the subject premises. Respondents Fabian Foster and Nicole Ebanks are the rent-stabilized tenants of the subject premises, initially pursuant to a lease commencing September 1, 2019 and renewed thereafter. The premises are registered as a multiple dwelling with the Department of Housing Preservation and Development and registered with the Division of Housing and Community Renewal. Petitioner served a "30 day notice to terminate" alleging various objectionable conduct.

Beginning in February 2022, Foster has engaged in serial harassment of and threats to King Morris, the building superintendent. On multiple occasions threatened to kill Morris and publicly accused him of raping his (Foster's) wife. Foster also threatened to hurt Morris's [*2] daughters and to invade his apartment. As a result, Morris's children no longer visit him at the building. Foster has also left threatening and harassing voicemails on Morris's telephone. Morris feels terrorized by Foster's conduct.

Foster is a military veteran and receives a Section 8 subsidy. He testified that he has been diagnosed with depression and post-traumatic stress disorder. Although there was not enough evidence in the record for the court to credit Foster's testimony about his own diagnoses, based on other testimony the court has little trouble finding that Foster is mentally ill. He testified that there are incidents of necromancy and voodoo occurring in the building, and that Morris and other people in the building are stealing his dog's DNA.

DISCUSSION

"A summary proceeding is a special proceeding governed entirely by statute and it is well established that there must be strict compliance with the statutory requirements to give the court jurisdiction" (*Clarke v Wallace Oil Co.*, 284 AD2d 492, 493 [2d Dept 2001]). A landlord seeking eviction based on early termination of a fixed lease term cannot take advantage of the summary remedy offered by RPAPL Article 7 unless the lease contains a conditional limitation providing for its early termination (*Perrotta v Western Regional Off-Track Betting Corp.*, 98 AD2d 1 [4th Dept 1983]; [Fourth Hous. Co., Inc. v Bowers](#), 53 Misc 3d 43 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2016]; [Hatim Group, LLC v Johnson](#), 36 Misc 3d 147[A], 2012 NY Slip Op 51631[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2012]). While the absence of a conditional limitation precludes a summary eviction remedy, the tenant may be subject to an ejectment action ([JCF Associates, LLC v Sign Up USA, Inc.](#), 59 Misc 3d 135[A], 2018 NY Slip Op 50501[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2018]).

"The expiration of a lease by the occurrence of a conditional limitation is an expiration by lapse of time" rather than breach of a condition (13A Carmody-Wait 2d § 90:19; *Perrotta*, 98 AD2d at 5) In *Perrotta*, the following lease term was found to create a conditional limitation:

It is expressly understood and agreed that in case the demised premises shall be deserted or vacated, or if default be made in the payment of the rent or any part thereof as herein specified,...or if the Tenant shall fail to comply with any of the statutes, ordinances, rules, orders, regulations and requirements of the Federal, State and Local Governments or of any and all their Departments and Bureaus, applicable to said premises, the Landlord may, if the Landlord so elects, at any time thereafter terminate this lease and the term hereof, on giving to the Tenant five days' notice in writing of the Landlord's intention so to do, *and this lease and the term hereof shall expire and come to an end on the date fixed in such notice as if the said date were the date originally fixed in this lease for the expiration hereof*. Such notice may be given by mail to the Tenant addressed to the demised premises. (*Perrotta*, 98 AD2d at 3-4 [emphasis in the original]).

As explained by the court, this paragraph "creates a conditional limitation, for the lease, once the five-day notice is served, expires automatically on the happening of a specified contingency, the arrival of the termination date fixed in the notice" (*id.* at 5 [citations omitted]).

Here, Petitioner did not direct the court's attention to any provision of the lease (admitted into evidence) creating a conditional limitation. In reviewing the lease, the court located paragraph 17, the only possible paragraph that Petitioner could rely on for termination, which reads, in pertinent part:

Renter Default: In the event Renter does not comply with any obligation of this lease, [*3]creates a nuisance, engages in conduct detrimental to the safety of the other renters, intentionally damages the property or is disturbing to other renters, then owner may terminate the tenancy and lease upon ten days' written notice to Renter.

As demonstrated by the decision in *Fourth Hous. Co., Inc.*, this paragraph does not create a conditional limitation. In that case, which involved a Mitchell-Lama tenancy, the lease permitted the landlord to terminate the tenancy based on chronic non-payment after a vote by the board and service of a thirty-day notice (*Fourth Hous. Co., Inc. v Bowers*, 53 Misc 3d at 45). However, the lease did "not provide that the term of the lease shall automatically expire

upon the lapse of a time fixed in that notice. Thus, a termination made pursuant to this 'chronic non-payment rule' would be based upon a breach of a condition and not upon a lapse of time, making it a condition, and not a conditional limitation" (*id.* at 45).[\[FN1\]](#)

CONCLUSION

The lease between the parties does not contain a conditional limitation providing for its early termination. Absent a conditional limitation, Petitioner cannot maintain a holdover summary eviction proceeding premised on early termination of the lease.

Accordingly, it is ORDERED that judgment shall enter in favor of Respondents dismissing the petition.

This is the court's decision and order.

Dated: October 31, 2023
Michael L. Weisberg, JHC

Footnotes

Footnote 1: Though the case was before the Appellate Term on an appeal from the landlord, whose motion for summary judgment was denied, the court searched the record and, pursuant to CPLR 409(b), granted judgment to the tenant and dismissed the petition.

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