2024-02-26

Ladan Realty Corp. v. Kercy

Civil Court of the City of New York
County of New York, Part A

Index # **LT-060752-19/NY**

Ladan Realty Corp.,
Petitioner(s) – Landlord(s)
-against-
Michelle Kercy
Respondent(s) – Tenant(s)

Seq. 02 & 03

Decision / Order

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

Papers	Numbered	NYSCEF Doc. No.
Notice of Motion (Seq. 02)	1	11
Affirmation in Support	2	12
Affidavit in Support	3	13
Exhibits in Support	4	14 – 17
Notice of Cross-Motion (Seq. 03)	5	29
Affirmation in Opposition to Cross-Motion	6	30
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Reply in Support of Cross-Motion	8	33
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Upon the foregoing cited papers, the Decision/Order on Petitioner's motion (Seq. 02) to vacate the ERAP stay, restoring the case to the court's calendar, granting Petitioner's outstanding motion previously returnable November 6, 2020, and Respondent's cross-motion (Seq. 03) to dismiss is as follows:

Ladan Realty Corp (Petitioner) commenced this summary holdover proceeding against Michelle Kercy (Respondent) upon filing of the Petition and Notice of Petition on May 7, 2019 seeking to recover possession of the rent stabilized premises located 23 Arden Street, Apt. 2-B, New York, NY 10040 ("Subject premises"). On December 14, 2018, Petitioner purportedly served Respondent with a Notice of Non-Renewal and Termination of Tenancy ("Non-Renewal Notice" or "Notice") which notified Respondent that the landlord does not intent to renew her lease based upon the fact that she is not occupying the premises as her principal place of residence. The Non-Renewal Notice terminated Respondent's tenancy effective March 31, 2019, and demanded that she surrender possession on or before such date or be subjected to a summary proceeding. Upon Respondent's failure to quit, Petitioner commenced the instant proceeding which was first scheduled to be heard on May 21, 2019. Respondent appeared through Northern Manhattan Improvement Corp Legal Services ("NMIC"), as counsel, by Notice of Appearance dated June 21, 2019. Due to the COVID-19 pandemic, the case was delayed. On or around February 2021, the proceeding was stayed due to Respondent's filing of a Hardship Declaration and further stayed upon Respondent's filing of an Emergency Rental Assistance Program ("ERAP") application.

By Notice of Motion dated January 23, 2024, Petitioner filed the instant motion (Seq. 02) to vacate the ERAP stay due to the application's denial, restoring the case to the calendar, and granting "Petitioner's outstanding motion previously returnable November 6, 2020." By Decision/Order dated February 8, 2023, this court granted the portion of Petitioner's motion seeking to vacate the ERAP stay due to the denial of the application and restored the case to the calendar. The matter was adjourned for

the remainder of the motion to be briefed and for Respondent to file a cross-motion. On March 15, 2023, Respondent filed opposition to Petitioner's motion and the instant cross-motion (Seq. 03) seeking summary judgment and dismissal of the petition for failure to state a cause of action in non-prime and an insufficient Golub Notice. The court heard argument on both motions and reserved decision.

Petitioner previously filed a cross-motion, initially returnable November 6, 2020, seeking payment of outstanding use and occupancy. By Decision/Order dated December 2, 2020, The Hon. Daniele Chinea allowed for a stay of the proceeding pursuant to CPLR 2201 on condition that Respondent pay ongoing use and occupancy at a rate of $714.23 per month starting November 2020 until such time as the case proceeds to trial. However, for the reasons stated in that Decision/Order, Petitioner's request for all arrears due through October 2020 was denied without prejudice to *renew at trial*. Petitioner's instant motion (Seq. 02) alleges that the "Petitioner's motion has never been decided" and currently Respondent owes $24,356.55 through January 31, 2023. However, as correctly pointed out by Respondent's counsel in their opposition, the motion was decided and denied. The December 2nd Decision/Order stands, and the court will not deem Petitioner's current motion to be a request to reargue or renew because Petitioner fails to ask for such relief in their papers. Additionally, such relief must be made before the Judge who rendered the initial Decision/Order. The court notes that this proceeding was already assigned to a trial part and was "trial ready" before Petitioner inexplicably filed the instant motion, serving only to further delay the trial which would have included Petitioner's claims for use and occupancy as previously ordered by the court. As such, the portion of Petitioner's motion (Seq. 02) seeking relief on a previously decided motion is denied..

Respondent's cross-motion (Seq. 03) seeks dismissal based on a defective predicate Golub Notice (Non-Renewal Notice). Respondent avers that the Non-Renewal Notice is speculative, vague, and contains conclusory allegations that demonstrate Petitioner failed to conduct any diligent investigation prior to filing the instant proceeding. Respondent cites to several cases that dismiss a cause of action for nonprimary residence where allegations contained in a predicate notice are generic and lack a "timeframe or chronology as to [a party's] absence." See, *PR 307 W. 93, LLC v. Constantin*, 51 Misc. 3d 992, 26 N.Y.S.3d 843 (Civ. Ct.) citing to *London Terrace Gardens, L.P. v. Heller*, 40 Misc. 3d 135(A) (Appellate Term, 1st Dep't 2009).

The Golub Notice in question states, in relevant part:

> The facts that support the foregoing conclusions are as follows:
> i. You have not maintained an ongoing, substantial, physical nexus with the premises for actual living purposes.
> ii. You have failed to spend more than 183 days a year out of the preceding two (2) years residing at the premises, as confirmed, and substantiated by the employees, agents, and/or superintendent of the landlord.
> iii. The condition of your apartment is such that it is impossible for anyone to live there, due to the extreme clutter. The entire floor, furniture, chairs, tables, countertops from wall to wall in all rooms in your apartment are covered from the floor to approximately several feet in height with piles of garbage, debris, bags and assorted personal property you collected. It is almost impossible to access portions of the apartment, nor does it look like anyone could sleep in the apartment and/or has slept in the apartment for some time.

iv. The landlord has spoken to you about whether you actually reside in the apartment, and you stated that you need the apartment for storage purposes and that you are staying with family members. The landlord has been unable to ascertain the address as to where you are actually primarily residing.

Respondent purports that sections "i" and "ii" "merely recite the legal ground for the eviction." *Berkeley Assocs. Co. v. Camlakides*, 173 A.D.2d 193 (Appellate Division, 1st Dep't 1991). Whereas the allegations contained in section "iii" are entirely speculative. Lastly, section "iv" captures a single moment in time, at best, and lacks specific facts as to who had the conversation and when. Petitioner defends the adequacy of the Non-Renewal Notice asserting it meets the standard of review of "reasonableness in light of the attendant circumstances." *Hughes v. Lenox Hill Hosp.*, 226 A.D.2d 4 (Appellate Division 1st Dep't 1996). Petitioner avers the allegations contained therein are more than "boilerplate" and advise Respondent of why her tenancy was terminated while their veracity and validity are issues for trial.

Any party may move for summary judgment after issue has been joined. Civil Practice Law and Rules § 3212 (b) provides "the motion shall be granted if, upon all the papers and the proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" and must do so by tender of evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557 (Court of Appeals 1980). The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. In opposition and as an initial matter, Petitioner points out that Respondent's moving papers are unsupported by an affidavit of personal knowledge from Respondent as required by CPLR § 3212 and therefore the motion must be denied as a matter of law. In reply, Respondent states that an affidavit of personal knowledge is not necessary where counsel has demonstrated personal knowledge of the facts of the case. An affidavit or affirmation of an attorney, "even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form', e.g., documents, transcripts." *Id.* Nonetheless, no factual showing is necessary to ascertain the legal sufficiency of the Golub Notice. See, *Raine v. Allied Artists Prods., Inc.*, 63 A.D.2d 914, 406 N.Y.S.2d 59 (Appellate Division 1st Dep't 1978).

It is well established that "compliance with statutory notice requirements represents a condition precedent to maintenance of a summary eviction proceeding." See, *W54-7 LLC v. Schick*, 2006 NY Slip Op 26499, 14 Misc. 3d 49, 829 N.Y.S.2d 399 (Appellate Term, 1st Dep't 2006). Under Rent Stabilization Code § 2524.2(b), "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 fact necessary to establish the existence of such ground, and the date when the tenant is required to surrender possession." A proper predicate notice of termination must adequately "apprise defendants as to the grounds, allowing them to prepare a legal defense." *Domen Holding Co. v. Aranovich,* 1 N.Y.3d 117 (Court of Appeals 2003).

The court finds Respondent's characterization of the facts and grounds for terminating Respondent's tenancy in the Non-Renewal Notice to be on point. Sections (i) and (ii), as written in the Non-Renewal Notice, are conclusory generic statements that mirror the statute upon which this proceeding is based. The first two sections of the Notice here are parallel to the one examined and deemed "studiously vague" by the Appellate Term First Department in *London Terrace Gardens, L.P. v.*

Heller, 40 Misc. 3d 135(A) (2009). The termination notice in *Heller* is nearly *verbatim* to the Notice in this case and stated "the tenant has not 'maintained an ongoing, substantial, physical nexus with the [rent controlled] premises for actual living purposes'; that tenant has 'failed to spend more than 183 days out of the preceding year residing at the premises, as confirmed and substantiated'." *Id*. See also, *Zevrone Realty Corp. v. Cedano*, 61 Misc. 3d 1213(A) (Civ. Ct. Bronx Co. 2018) ("Notices that parrot the grounds for non-renewal of the lease are inadequate.")

The remainder of the Notice, sections (iii) and (iv), contain nothing more than hearsay and circumstantial allegations surrounding Respondent's presence at the subject premises. Specifically, section (iii) which speaks to the "condition" of the subject premises lacks the foundation upon which it was determined that "it is impossible for anyone to live there." Assuming *arguendo* that it is "almost impossible to access portions of the apartment," that fact in and of itself does not prove that Respondent is not maintaining the subject premises as her primary residence. Section (iii) further alleges "nor does it look like anyone could sleep in the apartment and/or has slept in the apartment for *some time* [emphasis added]." Yet Section (iii) fails to include any semblance of length of time, which is a crucial element of Petitioner's cause of action and necessary to enable Respondent to prepare a legal defense.

Section (iv) references a conversation where Respondent allegedly stated he needs the apartment for storage purposes and is staying with family member but fails to state when said conversation was had. Petitioner is a corporation and so it is also unclear who the Notice is referring to as "Landlord." Lastly, section (iv) admits that the "landlord has been unable to ascertain the address as to where you are actually primarily residing." As such, the admitted lack of an alternate address along with generic and speculative allegations contained in the Notice do not pass the test of reasonableness under the attendant circumstances. See, *First Ave. Props. v. McLaughlin*, 48 N.Y.S.3d 265 (Appellate Term 1st Dep't 2016) (the court found the combined notice of lease nonrenewal, and termination set forth case-specific allegations in support of landlord's nonprimary residence claim where the notice included that the tenant relocated to the island nation of Jamaica). Here, the Notice, which is unamendable, fails to meaningfully apprise Respondent of Petitioner's nonprimary residence claim and as such dismissal is warranted.

Accordingly, for the foregoing reasons it is;

ORDERED that Respondent's motion (Seq. 03) is granted and the proceeding is dismissed as Petitioner has failed to state a cause of action; and it is further

ORDERED that Petitioner's motion (Seq. 02) is denied as moot.

This constitutes the Decision/Order of the court, a copy of which shall be uploaded to NYSCEF.

Date: February 26, 2024

So Ordered

Hon. Vijay M. Kitson, J.H.C.

HON. VIJAY M. KITSON
JUDGE, HOUSING COURT