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65 West 68th Street LLC v. Balangue

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART G
---X
65 WEST 68TH STREET LLC,

LT Index No.: 319050-23/NY

PETITIONER-LANDLORD

-against-

DECISION/ORDER

PHILLIP BALANGUE

RESPONDENTS-
UNDERTENANTS
---X

Hon. Alberto Gonzalez:

Recitation as required by CPLR Rule 2219(A), of the papers considered in the review of Respondent's motion pursuant to CPLR § 3211(a)(1) and (a)(7), dismissing the proceeding for failure to state a cause of action as the Notice of Termination does not describe a breach of substantial obligation of tenancy in violation of RSC § 2524.2 and 2524.3 with sufficient detail, and pursuant to CPLR § 3211(a)(1) and (a)(7), dismissing the proceeding for failure to state a cause of action by inadequately stating the lease provisions Respondent allegedly breached, or how they relate to the allegations of the predicate notices therein.

Papers	NYSCEF DOC #
[Respondent's] Notice of Motion;	8
[Respondent's] Affidavit or Affirmation in Support of Motion;	9

[Respondent's] Affidavit or Affirmation in Support of motion;	10
[Respondent's] Memorandum of Law;	11
Exhibit A-E;	12-17
[Petitioner's] Affidavit or Affirmation in Opposition to Motion	18
Exhibit 1	19
[Respondent's] Affidavit or Affirmation in Reply;	20

<u>Procedural History and Factual Background</u>

The instant holdover proceeding was initiated by service of a notice of petition and petition, dated September 26, 2023 requesting a final judgment awarding possession of the Premises to Petitioner and the issuance of a warrant to remove Respondent from possession. *See NYSCEF #1, 2, 3.*

The petition states, "Respondent's term expired for the reasons set forth in the Ten (10) Day Notice to Cure, dated July 18, 2023 and Fifteen (15) Day Notice of Termination, dated September 14, 2023 ("<u>Notice of Termination</u>"), which are annexed hereto with proof of service

upon Respondent, and made a part hereof, as if fully set forth below in this Petition. The Notice of Termination required that the Respondent vacate the Apartment on or before September 25, 2023." *See NYSCEF #1* ¶ 6.

The Ten (10) Day Notice Cure (hereafter referred to as "Notice To Cure"), states in part as follows:

"PLEASE TAKE NOTICE, that you have violated and continue to violate a substantial obligation of your tenancy, Rent Stabilization Code ("RSC") RSC § 2524.3(a), (b), (c), and/or (d), Real Property Law ("RPL") § 235-f, Multiple Dwelling Law ("MDL") § 301, and paragraphs 1, 10, 11 and 12 of your written initial lease, dated August 12, 1990 ("Lease") between 67 West 68th Street LLC's ("Owner") predecessor-in-interest, as landlord, and Phillip Balangue, as tenant. More specifically, you are in violation of: 1. RSC § 2524.3(a), (b), (c) and/or (d) RPL § 235-f, MDL § 301, and paragraphs 11 and 12 of your Lease since you are living or sleeping and/or permitting "John Doe", and "Jane Doe" ("Occupants") to live in or sleep in the recreation room of the Apartment, which is in contravention to the Certificate of Occupancy for the Apartment, which is annexed hereto as Exhibit 1 and have failed to advise Owner of the name of the Occupants as required by RPL § 235-F; and/or 2. RSC § 2524.3(a), (b), (c) and/or (d) and paragraphs 10, 11 and 12 of your Lease you have made illegal alterations to the Apartment without the prior written consent or authorization from the Owner and without obtaining permits as require by law, including, but not limited to constructing an illegal wall with sliding doors in the apartment located near the bedroom and living room areas. The illegal wall was constructed without permits, is floor to ceiling, and close off the windows to the apartment, which deprives the remainder of the Apartment of light and air." *See NYSCEF #1*, Pg. 12.

The Notice To Cure further states:

"PLEASE TAKE FURTHER NOTICE, that you are hereby required to cure the aforementioned breach on or before August 7, 2023 ("Cure Date"), that being more than ten (10) days after the service of this Notice upon you by: "(1) removing the Occupants from the Recreational Room; (2) removing all living and sleeping furniture, appliances, and personal property from the Recreational Room; (3) providing the name of the Occupants; (4) removing the illegal wall as required by law and restoring the apartment to its original condition; and (5) providing Owner access to the apartment before the Cure Date to confirm that you have cured same." *See NYSCEF #1*, Pg. 13.

The Seven (7) Day Notice of Termination (hereafter referred to as "Notice of Termination") states:

"PLEASE TAKE FURTHER NOTICE, that you have violated and continue to violate a substantial obligation of your tenancy, RSC § 2524.3(a), (b), (c) and/or (d), RPL § 235-f, MDL § 301, and paragraphs 1, 10, 11 and 12 of the Lease since you failed to: (1) remove the Occupants

from the recreational Room; (2) remove all living and sleeping furniture, appliances, and personal property from the Recreational Room; (3) provide Owner the name of the Occupants; (4) remove the illegal wall as required by law and restoring the Apartment to its original condition; and/or (5) provide Owner access to the Apartment and/or confirmation of before the Cure Date to confirm that you have cured same. Specifically, on September 7, 2023, the superintendent observed living and sleeping furniture, appliances, and personal property in the Recreational Room, but not limited to a bed. The superintendent also observed an unknown male Occupant resting on the couch in the Apartment. Additionally, by email, dated September 7, 2023, Landlord' attorney emailed your attorney and asked if items (1)-(4) were completed and requested access to confirm same. By email, dated September 12, 2023, your attorney only represented that no other Occupants resided in the Apartment, but failed to respond to the other items or provide access dates to confirm same. Your attorney's representation regarding other Occupants is contrary to the superintendent's September 7, 2023 observations of living and sleeping furniture, appliances, and personal property in the Recreational Room and of the Occupant in the Apartment." *See NYSCEF #1*, Pg. 3-4.

Thereafter, the petition was first made returnable on October 26, 2023 at 9:30am in Part G, Room 581. On October 26, 2023 the proceeding was adjourned to December 11, 2023 at 9:30am. On December 11, 2023, Manhattan Legal Services filed a Notice of Appearance on behalf of Respondent Phillip Balangue. On December 11, 2023, the proceeding was adjourned to February 28, 2024 at 9:30am, and the parties consent to a briefing schedule, wherein Respondent agreed to file a motion to dismiss.

On March 27, 2024, the Respondent filed a motion to dismiss. Respondent argues, "[t]he predicate notices issued to Mr. Balangue fail to outline any specific, actionable breaches of substantial obligation of the tenancy that would justify eviction under RSC §§ 2524.2 and 2524.3. *See Notice to Cure and Notice of Termination, annexed hereto as* Exhibit A and B. Moreover, the notice to cure and notice of termination failed to state the lease provisions that Mr. Balangue allegedly violated with specificity." *See NYSCEF #11*, Pg. 2.

Respondent further argues, "Here, New York law requires clear, specific allegations in predicate notices to inform the tenant of the claimed violations. In Mr. Balangue's case, the landlord's failure to specify which lease provisions were allegedly violated by Mr. Balangue's

action render the predicates notices legally insufficient. Despite stating various lease provisions, the notices fail to clarify how Mr. Balangue's conduct breached these specific provisions, mooring the defects identified in the *Lam* and *Lots* cases. This lack of clarity and specificity in the notices does not allow Mr. Balangue to adequately address or cure the alleged breaches, significantly undermining the legal foundation for the eviction proceeding. The absence of explicit reference to lease provisions and the vague nature of the allegations do not satisfy legal requirements for notice specificity." *See NYSCEF #11*, Pg. 5.

Respondent further argues that, "applying the legal standards and precedents to Mr. Balangue's situation, it becomes clear that the petition lacks the requisite factual specificity and legal basis to sustain a holdover proceeding based upon breach of substantial obligation of tenancy. The predicate notices issued to Mr. Balangue fail to outline any specific, actionable breaches that would justify eviction under the legal framework established by CPLR § 3211(a)(7) and relevant case law. Petitioner failed to prove the existence of building code violations or illegal use that would support a theory of breach of tenancy. Moreover, there is no evidence or assertion by Petitioner that it has incurred fines or violations from the City of New York, in connection to its allegations of illegal use. Without evidence of violations or penalties, Petitioner's claims are unsubstantiated."

In opposition, Petitioner argues that the Respondent's motion to dismiss is untimely as the motion was filed more than 3 months after Respondent's answer was served and filed, in violation of CPLR § 3211(e). *See NYSCEF #18* ¶ 11-15. Further, Petitioner argues that Respondent's motion must be dismissed because it fails to refer to any "documentary evidence," and as such fails under CPLR § 3211(a)(1), and as such the opposition is only limited CPLR § 3211(a)(7). *See Id* ¶ 16. Petitioner argues that its Notice to cure sets forth a cause of action for

breach of lease and/or breach of a substantial obligation, and that "assuming the factual allegations deemed to be true, and the Petitioner being granted the benefit of every possible favorable inference, the Notice to Cure clearly states how Respondent is in breach of not only paragraphs 10, 11 and 12 of the lease, but also RSC § 2524.3 (a), (b), (c) and/or (d), RPL § 235-f, MDL § 301." *See Id* ¶ 23. Petitioner further argues that Respondent failed to annex the lease or state how Respondent's conduct does not breach the citied lease provisions or the cited statutory provision. Specifically, Petitioner argues, "[f]rom a review of Respondent's motion, it seems Respondent is arguing that there are no issues of fact that Respondent's conduct does not breach the lease. This is not the standard for a motion to dismiss pursuant to CPLR § 3211(a)(7). Even assuming arguendo that Respondent's argument is true, which it is not, Respondent fails to allege how Respondent's conduct does not breach RSC § 2524.3(a),(b),(c), and/or (d), RPL § 235-f, and MDL § 301, which are clearly cited to in the Notice to Cure." *See Id* ¶ 26. Finally, Respondent argues that because the instant holdover is not solely predicated on RSC § 2524.3(c) but on other provision of the RSC, RPL, MDL and the lease, a violation or fine is not a condition precedent to commencing the action.

In Reply, Respondent argues Petitioner's argument of timeliness is misplaced as CPLR § 3211(e) in fact explicitly allows Respondent's motion to dismiss for failure to state a cause of action to be made at any time. Respondent further argues that the deficiencies in the predicate notice serve as documentary evidence, and that the notice fails to detail the alleged lease violations to allow Respondent to mount a defense, rendering the notice insufficient.

Discussion

On a motion to dismiss pursuant to CPLR § 3211, "the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts alleged in the complaint as true, accord

plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon vs. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994).

Pursuant to CPLR § 3211(a)(7), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 7. The pleading fails to state a cause of action…"

When deciding a motion to dismiss pursuant to CPLR § 3211(a)(7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." *Guggenheimer vs. Ginzburg*, 43 N.Y.2d 268, 401 N.Y.S.2d 182 (1997).

Pursuant to CPLR § 3211(a)(1), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded upon documentary."

Petitioner has annexed the notice to cure and notice of termination to the petition and made them a "part hereof;" "[a] copy of any writing which is attached to a pleading is a part thereof for all purposes." CPLR § 3014. As such, the notice to cure and the notice of termination are part of the pleadings.

"In evaluating the facial sufficiency of a predicate notice in a summary eviction proceeding, the appropriate test is one of reasonableness in view of the attendant circumstances." *Oxford Towers Co., LLC vs. Leites*, 41 A.D.3d 144, 837 N.Y.S.2d 131 (App. Div. 1st. 2007) (citing *Hughes vs. Lenox Hill Hosp.*, 226 A.D.2d 4, 18, 651 N.Y.S.2d 418 [1996]).

A predicate notice, such as a notice to terminate, must "provide the necessary additional information to enable the tenant respondent to frame a defense to meet the tests of

reasonableness and due process. *Jewish Theological Seminary of America v. Fitzer* (258 AD2d 337, 338, 685 NYS2d 215 [1st Dep't 1999]. While a predicate notice [']need not lay bare a landlord trial proof ['] and will be upheld, taken as a while it is sufficient to advise the tenant of the claim. *McGoldrick v. DeCruz* (195 Misc 2d 414, 758 NYS2d 756 [AT 1st Dep't 2003], broad and unparticularised allegations may be too vague, generic and conclusory to enable a tenant to prepare a defense. *128 Second Realty LLC vs. Dobrowolski (*51 Misc 3d 147[A], 41 NYS3d 450, 2016 NY Slip Op 50772 [U] [AT 1st Dep't 2016]); *69 EM LLC v Mejia* (49 Misc 3d. 152 [A], 29 NYS3d 84, 2015 NY Slip Op 51765 [U] [AT 1st Dep't 2015])." *Woodlawn 278-305, LLC vs. Barnett*, 72 Misc.3d 1208 (A), 148 N.Y.S.3d 683 (Civ. Ct. Bronx. Cty. 2021) (Hon. Judge Lutwak).

Concerning the notice to cure and notice of termination's first violation – that Respondent is living and sleeping and/or allowing John Doe and Jane Doe to live, sleep in the recreational room in contravention of the certificate of occupancy, [failing] to advise the owner of the name of the occupants – Petitioner cites to RSC § 2524.3(a), (b), (c). The RSC sections read as follows:

" Without the approval of the DHCR, an action or proceeding to recover possession of any housing accommodation may only be commenced after service of the notice required by section 2524.2 of this Part, upon one or more of the following grounds, wherein wrongful acts of the tenant are established as follows:

> (a) The tenant is violating a substantial obligation of his or her tenancy other than the obligation to surrender possession of such housing accommodation, and has failed to cure such violation after written notice by the owner that the violations cease within 10 days; or the tenant has willfully violated such an obligation inflicting serious and substantial injury upon the owner within the three-month period immediately prior to the commencement of the proceeding. If the written notice by the owner that the violations cease within 10 days is served by mail, then five additional days, because of service by mail, shall be added, for a total of 15 days, before an action or proceeding to recover possession may be commenced after service of the notice required by section 2524.2 of this Part.

(b) The tenant is committing or permitting a nuisance in such housing accommodation or the building containing such housing accommodation; or is maliciously, or by reason of gross negligence, substantially damaging the housing accommodation; or the tenant engages in a persistent and continuing course of conduct evidencing an unwarrantable, unreasonable or unlawful use of the property to the annoyance, inconvenience, discomfort or damage of others, the primary purpose of which is intended to harass the owner or other tenants or occupants of the same or an adjacent building or structure by interfering substantially with their comfort or safety. The lawful exercise by a tenant of any rights pursuant to any law or regulation relating to occupancy of a housing accommodation, including the RSL or this Code, shall not be deemed an act of harassment or other ground for eviction pursuant to this subdivision.
(c) Occupancy of the housing accommodation by the tenant is illegal because of the requirements of law and the owner is subject to civil or criminal penalties therefor, or such occupancy is in violation of contracts with governmental agencies.
(d) The tenant is using or permitting such housing accommodation to be used for immoral or illegal purpose."

Petitioner also cites to paragraphs 11 and 12 of the Respondent's lease, in support of its first violation, listed as "Your Duty To Obey and Comply With Laws, Regulations and Lease Rules," and "Objectionable Conduct," respectively. Though Petitioner is correct that Respondent fails to attach documentary evidence in support of its motion to dismiss under CPLR § 3211(a)(1) (and as such the court will decline to dismiss on those grounds) Respondent correctly raises the question of whether the Petitioner has properly asserted a provision under the lease in predicate notices, with facts to support Petitioner's claim.

Paragraph 11 states:

"Your Duty to Obey and Comply with Laws, Regulations and Lease Rules:

A. Government Laws and Orders. You will obey and comply (1) with all present and future city, state and federal laws and regulations, including the Rent Stabilization Code and Law, which affect the Building or the Apartment and (2) with all orders and regulations of Insurance Rating Organizations which affect the Apartment and the Building. You will not allow any windows in the Apartment to be cleaned

from the outside, unless the equipment and safety devices required by law are used.

B. Owner's Rules Affecting You. You will obey all Owner's rules listed in this Lease and all future reasonable rules and all future reasonable rules of Owner or Owner's agent. Notice of all additional rules shall be delivered to You in writing or posted in the lobby or other public place in the building, Owner shall not be responsible to You for not enforcing any rules, regulations or provisions of another tenant's lease except to the extent required by law.

C. Your Responsibility. You are responsible for the behavior of yourself, or your immediate family, your servants and people who are visiting You. You will reimburse Owner as additional rent upon demand for the cost of all losses, damages fines and reasonable legal expenses incurred by Owner because You, members of your immediate family, servants or people visiting You have not obeyed government laws and orders of the agreements or rules of this Lease." *See NYSCEF # 19.*

Paragraph 12 states:

"Objectionable Conduct [.] As a tenant in the Building, You will not engage in objectionable conduct. Objectionable conduct means behavior which makes or will make the Apartment or the Building less fit to live in for You or other occupants. It also means anything which interferes with the right of others to properly and peacefully enjoy their Apartments, or causes conditions that are dangerous, hazardous, unsanitary and detrimental to other tenants in the Building. Objectionable conduct by You gives Owner the right to end this Lease." *See NYSCEF # 19.*

The Petitioner fails however to state in its notice to cure and notice of termination, how the allegation violates paragraph 11 and 12. The Petitioner does not explain in its notice to cure or notice of termination, how the occupants or the furniture or the appliances or the personal property bring Respondent in noncompliance with city, state or federal law. Though the notices offer the certificate of occupancy in support, it is unclear how the allegation violates the certificate of occupancy or MDL § 301, which leaves Respondent to speculate how their conduct may be in contravention of the certificate of occupancy or MDL § 301. Respondent may not know whether Petitioner is alleging subletting or overcrowding or both or other allegations as violations of the certificate of occupancy. Similarly, Petitioner does not cite to a rule that Respondent is in violation of, or that Respondent's behavior or that of their family or servants rises to a violation of the lease. Moreover, the notices do not inform Respondent how the allegation is objectionable conduct, as defined in the lease, and therein make the apartment and building "less fit to live," or that Respondent's behavior affects other tenants. Further, the notice do not provide for an instance in which Petitioner requested the names of the alleged occupants to trigger a violation of RPL 235-f.

Concerning Petitioner's allegation of "illegal alterations," and the "illegal wall," Petitioner cites to paragraph 11 and 12. Petitioner also cites to paragraph 10, which states:

"Changes and Alterations To Apartment [.] You cannot build in, add to, change or alter, the Apartment in any way, including wallpapering, painting, repainting or other decorating, without getting Owner's written consent before You do anything. Without Owner's prior written consent, You cannot install or use in the Apartment any of the following: dishwasher machines, clothes washing or drying machines, electric stoves, garbage disposal units, hearing, ventilating or air conditioning units or any other electrical equipment which, in Owner's reasonable opinion,

will overload the existing wiring installation in the Building or interfere with the use of such electrical wiring facilities by other tenants of the Building. Also, You cannot place in the Apartment water-filled furniture." *See NYSCEF # 19.*

Absent from Petitioner's Notice of Termination are facts that would support Respondent's violation of paragraphs 11, 12 and specifically paragraph 10 of the lease. Petitioner's notice of termination relies in part on the superintendent's September 7, 2023 observations, which make no mention of the illegal wall or alterations. Petitioner's other basis for the notice of termination is an email, also dated September 7, 2023, where Petitioner's counsel contacted Respondent's counsel. However, the email is not attached, fails to state if it occurred before or after the superintendent's visit, and fails to definitely establish whether the wall and alteration was cured.

Petitioner however cites other provisions in support of its cause, including RSC § 2524.3(b), (c), (d).

Concerning, RSC § 2524.3(b) ('the tenant is committing or permitting a nuisance"), Petitioner alleges in its notice to cure that Respondent's illegal use and conduct of the apartment is a "nuisance in that you have engaged in a persistent and continuing course of conduct evidencing an unreasonable and unlawful use of the Apartment to the annoyance, inconvenience, discomfort or damage of others, which is intended to harass the Owner or other tenants or occupants in the Building and interfere with their comfort and safety, which makes the Apartment and/or Building less fit to live in for other residents, interferes with the right of other residents of the building to properly and peacefully enjoy their apartment, causes conditions which are detrimental to other residents in the Building, and/or interferes with the Owner's rights and/or its ability to manage or operate the Building or Apartment." *See NYSCEF #1*, Pg. 12.

"To constitute a nuisance the use of property must interfere with a person's interest in the use and enjoyment of land (*see* Restatement [Second] of Torts § 821D; *see also Copart Indus. v. Consolidated Edison Co. of N.Y.*, 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169, 362 N.E.2d 968 [1977]). The term "use and enjoyment" encompasses the pleasure and *124 comfort derived from the occupancy of land and the freedom from annoyance (*see* Restatement [Second] of Torts § 821D, Comment *b; see also Nussbaum v. Lacopo*, 27 N.Y.2d 311, 315, 317 N.Y.S.2d 347, 265 N.E.2d 762 [1970]). However, not every annoyance will constitute a nuisance (*see* 2 Dolan, Rasch's Landlord and Tenant—Summary Proceedings § 30:60, at 465 [4th ed.]). Nuisance imports a continuous invasion of rights—"a pattern of continuity or recurrence of objectionable conduct" (*Frank v. Park Summit Realty Corp.*, 175 A.D.2d 33, 34, 573 N.Y.S.2d 655 [1st Dept.1991], *mod. on other grounds* 79 N.Y.2d 789, 579 N.Y.S.2d 649, 587 N.E.2d 287 [1991])." *Domen Holding Co. vs. Aranovich*, 1 N.Y.3d 117, 769 N.Y.S.2d 785 (2003).

In the instant matter however, Petitioner fails to formulate facts or assertions that Respondent is engaging in a pattern affecting other tenants or harassing the owner, or otherwise performing a nuisance. Further, Petitioner fails to allege in its predicate notices how Respondent is violating RSC § 2524.3(d), by permitting the unit to be used for illegal or immoral purposes.

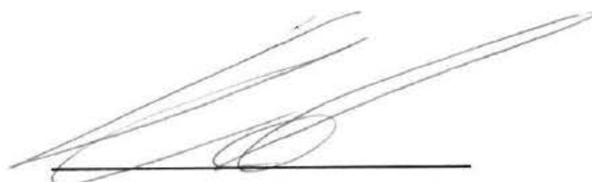
Further, the lack of violations and civil penalties are fatal to Petitioner's claim under RSC § 2524.3(c), as the Petitioner is not currently subject to civil or criminal penalties by any agency including the Department of Buildings or the Department of Housing Preservation and Development. *210 West 94 LLC vs. Lourdes Concepcion*, 2003 N.Y. Slip Op 50612(U) (App. Term. 1st. Dept. 2003).

Finally, Petitioner's argument that Respondent's motion is untimely pursuant to CPLR § 3211(e) is unavailing as the statute specifically provides that a motion to dismiss pursuant to

CPLR § 3211(a)(1) and (7), "may be made at any subsequent time or in a later pleading, if one is permitted." *See* CPLR § 3211(e). As such, the Respondent's motion is timely.

CONCLUSION

For the reasons stated above, it is hereby ORDERED that Respondent's motion to dismiss is GRANTED and the petition is DISMISSED as Petitioner has failed to state a cause of action as the predicate notices served are inadequate and lack the required specificity.



Hon. Alberto M. Gonzalez, HCJ
ALBERTO GONZALEZ
JUDGE, HOUSING COURT

Dated: New York, New York
April 29, 2024