CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART R

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129th STREET CLUSTER ASSOC LP,

Petitioner-Landlord

-against-

DECISION & ORDER
Index No.: L&T 67445/11

HON. SABRINA B. KRAUS

TERESA LEVY
47-49 West 129th Street, Apt 4D
NEW YORK, NY 10009

Respondent-Tenant

_____X

BACKGROUND

The underlying holdover proceeding was commenced by Petitioner against Respondent the Rent Stabilized tenant of record based on allegations that Respondent has created a nuisance in the Subject Premises by creating noise, acting in a harassing manner towards other tenants and other related behavior. Respondent has appeared by counsel and served a demand for a bill of particulars and answer and counterclaims.

Petitioner now moves to dismiss certain defenses in the answer and vacate the demand for a bill of particulars.

MOTION TO DISMISS DEFENSES

The first affirmative defense asserts a failure to state a cause of action. This defense is not subject to a motion to strike as it may be asserted at any time (CPLR 3211(e); *Riland v Todman* 56 AD2d 350). The motion to dismiss the first affirmative defense is denied.

The second affirmative defense asserts lack of subject matter jurisdiction. Housing Court always has subject matter jurisdiction over a holdover proceeding.

> We call the attention of the bar to the loose usage of the terms 'jurisdictional defect' or 'jurisdictionally defective' in summary proceedings. Where, as here, the Civil Court has jurisdiction of the subject of the proceedings under article 7 of the Real Property Actions and Proceedings Law and jurisdiction of the person of the respondent has been obtained as provided by law, the proceeding is not 'jurisdictionally defective'

Birchwood Towers # 2 Ass v Schwartz 98 AD2d 699, 700.

To the extent that the second affirmative defense asserts that the termination notice is insufficient to serve as a predicate for the proceeding, the court also finds that the defense must be dismissed. The notice is sufficiently detailed to advise the tenant of the allegations underlying the proceeding and permit the tenant to frame a defense (RSC § 2524.2(b); *McGoldrick v DeCruz* 195 Misc2d 414). The motion to dismiss the second affirmative defense is granted.

The third affirmative defense which similarly asserts that the notice of termination is defective is dismissed for the reasons stated above.

The fourth affirmative defense essentially asserts a failure to state a cause of action and for the reasons noted above is not subject to dismissal.

The fifth affirmative defense asserts failure to serve a notice to cure. A notice to cure is not required when it is alleged that the tenant is committing a nuisance. As to the nuisance grounds asserted in the petition no such notice is required. Both parties concur in their motion papers that the pleadings do not assert a cause of action for breach of lease. Based on the foregoing the fifth affirmative defense is dismissed.

The sixth affirmative defense asserts that noise can not form the basis of nuisance conduct as a matter of law. This defense is dismissed. Noise can form the basis of cause of

action for nuisance and the allegations in the pleadings are not limited to nosie alone [*Roaj Realty Inc. v Ortega* 2002 NY Slip Op 50214(u)(*blasting music, associated with recurring parties late into the night, can form the basis of nuisance conduct*); *Carnegie Park Ass v Graff* 2003 N.Y. Slip Op. 51198(U)].

The seventh affirmative defense asserts that Respondent is entitled to a thirty day notice of termination, pursuant to certain regulatory agreements governing the Subject Premises. The agreement does appear to cover the Subject Premises. The amended regulatory agreement between Petitioner and the City of New York defines Home Units as those units designated as part of the Home Project in the Home Agreement. Those are further defined in Schedule A-1 of the Home Agreement as "Project 6, 47-49 West 129th Street." This is the address of the Subject Building. Based on the foregoing, the motion to dismiss the seventh affirmative defense is denied.

The eighth and ninth affirmative defense seeks a reasonable accommodation under the Fair Housing Act and New York State Human Rights Law, which prohibit landlords from refusing to make reasonable accommodations in rules policies and practices if necessary for a disabled individual to use housing. Whether some of the conduct asserted is a result of Respondents' children's disabilities and whether they require such reasonable accommodation are questions of fact for trial. Therefore the motion to dismiss the eighth and ninth affirmative defenses is denied.

Paragraphs 39 and 40 of Respondent's tenth affirmative defense assert that pursuant to RPAPL 745(2)(a)(iv) Petitioner is precluded from seeking use and occupancy in this proceeding because Respondent has asserted 'jurisdictional claims.' Respondent's defense regarding lack of

subject matter jurisdiction has been dismissed. Moreover, the jurisdictional defense referred to in RPAPL pertains to defenses of personal jurisdiction, which have not been asserted by Respondent. Additionally, breach of warranty of habitability is not a defense to the underlying holdover proceeding, as such the tenth affirmative defense is dismissed.

In the event Petitioner obtains a judgment of possession in this proceeding and seeks an award of fair market use and occupancy, the court may consider the condition in the Subject Premises in determining fair market use and occupancy.

DEMAND FOR A BILL OF PARTICULARS

CPLR §3042 requires a party to provide a bill and state any objections in the bill provided. It would then be Respondent's obligation to move for relief if Respondent felt the bill provided was insufficient to move for an order pursuant to CPLR §3042 (c). However, as the parties have set forth their dispute concerning the demand in the underlying papers the court will address the parties' claims.

Petitioner shall respond to paragraphs a and d of the demand in their entirety, as well as providing the response to c, but only to the extent of stating whether complaints were oral and in writing. Petitioner need not respond to any other portion of the demand.

The proceeding is restored to the calendar for all purposes on January 30, 2013 at 9:30 am.

This constitutes the decision and order of this court.

Dated: December 19, 2013
New York, New York

Hon. Sabrina Kraus

BORAH GOLDSTEIN ALTSCHULER
NAHINS & GOIDEL, PC
Attorneys for Petitioner
BY: Gregory G. Vail Esq
377 Broadway
New York, New York 10013
(212) 431-1300

NORTHERN MANHATTAN IMPROVEMENT CORP
Attorneys for Respondent
By: Alan G. Morley, Esq
76 Wadsworth Avenue, 3rd Floor
New York, New York 10033
(212) 822-9300