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

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WEST 97TH STREET REALTY CORP.,

Index No. 78484/2015

Petitioner,

DECISION/ORDER

-against-

JULIA APTAKER, ET AL.,

Motion seq. no. 1

Respondents.

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Cullen & Assocs., P.C., New York City, for Petitioner.
Neighborhood Defender Service of Harlem, New York City, for Respondent Julia Aptaker.

WEISBERG, J.:

This holdover summary eviction proceeding is predicated on allegations that Respondent, her daughter, or their guests have engaged in nuisance conduct, including altercations with and threats against fellow tenants. Respondent has moved pre-answer to dismiss the petition on the grounds that the court lacks personal jurisdiction, that the petition fails to state a cause of action, and that the proceeding was commenced in retaliation for Respondent's complaints about conditions in her apartment.

Respondent's apartment is located in a "luxury doorman building" containing "brand new gut renovated apartments with condo style finishes," according to the website of the building's management company (Stellar Management, http://www.stellarmanagement.com/no-fee-NYC-rentals/new-york-city-neighborhoods/Upper-West-Side-rental-apartment-listings-50-WEST-97TH-STREET [accessed Jan. 22, 2016]). According to the property website StreetEasy, there are currently six apartments available for rent at rates ranging from $3,150.00 to $6,250.00 per month. The building is located on West 97th Street between Central Park West and Columbus Avenue.

Respondent alleges that she is 79 years old and has lived in the building since 1969, which is the same year the building was built. She receives a Senior Citizen Rent Increase Exemption and pays $477.00 per month in rent. The tenancy is subject to rent stabilization. Respondent's daughter and two young grandchildren live in the apartment with her. She describes her apartment as having recently suffered a rat infestation, ongoing water leaks, and mold.

Petitioner alleges the following in its notice to cure (which is incorporated into the notice of termination), [1] claiming that the conduct has disturbed other tenants and interfered with their ability to enjoy their homes:

> Respondent, and/or her daughter Lisa, and/or Respondent's guests or other occupants have engaged in loud and disruptive behavior, including excessive yelling and fighting, both in the apartment and in the common areas of the building. This began in March 2014 and has been "continuing to date," resulting in visits to the apartment by officers of the New York Police Department.
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> Lisa has "engaged in multiple altercations with fellow residents and employees" of the building. These altercations include "verbal threats" by Lisa.
>
> Lisa has banged on the apartment doors of other tenants in the building and has followed them inside and outside the building. This conduct has resulted in the NYPD being called on multiple occasions, including on February 5, 2015.
>
> Respondent and/or Lisa made threats to another tenant in the building, and that Respondent threatened to slit the throat of another tenant. This occurred on July 10, 2015. The NYPD were called to the building on that occasion.

Other than the dates listed above, the notice does not contain any other dates of occurrence of the alleged conduct. Nor does the notice provide any more details.

Respondent's claim that that the petition fails to state a cause of action seems based on two separate arguments: 1) that the notice does not describe the allegations on which Petitioner's

[1] Petitioner served a notice to cure notwithstanding that it terminated Respondent's tenancy pursuant to Rent Stabilization Code (9 NYCRR) § 2524.3(b) ("nuisance") and not section 2524.3(a) (breach of substantial obligation of tenancy).

claim is based with sufficient specificity, in that it lacks dates, times, and other details, and 2) that even if taken as true, the conduct alleged does not constitute nuisance as a matter of law.

Cause of Action for Nuisance: Specificity in the Predicate Notice

A predicate notice served pursuant to the Rent Stabilization Code must state the facts necessary to establish the ground for eviction (*see 69 E.M. LLC v. Mejia*, 49 Misc 3d 152[A], 2015 NY Slip Op 51765[U] [App Term, 1st Dept 2015]; Rent Stabilization Code [9 NYCRR] § 2524.2[b]). The facts must be pleaded with sufficient specificity: a notice containing allegations that are broad and unparticularized may be found too generic and conclusory to satisfy the level of specificity required by section 2524.2(b) and to enable the tenant to prepare a defense (*see 69 E.M. LLC*, 49 Misc 3d 152[A], citing *Berkeley Assoc. Co. v. Camlakides*, 173 AD2d 193 [1st Dept 1991]). In evaluating whether a predicate notice has met the standard above, the test is one of "reasonableness in view of the attendant circumstances" (*Oxford Towers Co., LLC v. Leites*, 41 AD3d 144 [1st Dept 2007]).

The Appellate Division has upheld the sufficiency of a predicate notice alleging nuisance where the notice lacked details such as names, dates, or specific instances of misconduct (*see Pinehurst Constr. Corp. v. Schlesinger*, 38 AD3d 474 [1st Dept 2007]. In that case the court was evaluating the sufficiency of the notice after trial and the court specifically noted that the landlord had provided more information about its claims, including copies of complaints from other tenants, in a bill of particulars. So *Pinehurst* does not establish a bright line rule that names, dates, and specific instances of misconduct are never required. These details might be required if the failure to include them would be unreasonable in view of the attendant circumstances (*see 297 Lenox Realty Co. v. Babel*, 19 Misc 3d 1145[A], 2008 NY Slip Op 51168[U] [notice insufficient for failure to include specifics such as dates of occurrence and names of individuals

involved for at least some of the alleged incidents, where conduct was alleged to have occurred over a three year period and was of the type that would be "readily susceptible to identification by date and time"]).

Petitioner's notice is not completely bereft of dates of the alleged incidents. Petitioner specifies two dates on which incidents of nuisance conduct allegedly occurred and provides the month and year in which other conduct, which it claims has continued, first commenced. It does not provide any date range for the fourth type of nuisance conduct alleged (multiple altercations with neighborhoods). Nor does it state the names of any of the other tenants who have borne the brunt of nuisance behavior. And is it not especially particular when it comes to the specific details about the repeated altercations and verbal threats. In its lack of detail, as Respondent points out, the notice does not compare favorably with the notice at issue in *Domen Holding Co. v. Aranovich* (1 NY3d 117 [2003]).

But the question in *Domen* was not whether the predicate notice met the specificity requirements of section 2524.2(b), the fact that the Court commented on the detail-laden nature of the notice notwithstanding. Instead, the question was whether, as a matter of law, the three incidents alleged by the landlord, which took place over the course of five years, could constitute nuisance (*see Domen Holding Co. v. Aranovich*, 302 AD2d 132, 136 [1st Dept 2003], *revd on other grounds* 1 NY3d 117 [2003] ["The necessary question before us is whether the three instances, to the extent they are documented in the Notice of Termination, either quantitatively or qualitatively constitute nuisance warranting eviction of the tenant"]). In other words, contrary to Respondent's claim, *Domen* did not create a standard for specificity in a predicate notice (though cautious drafters may decide that the lesson of *Domen* is to err on the side of more specificity in pleading). Nor does *Domen* stand for the proposition that a notice is insufficiently specific if it

does not measure up to the notice in that case (a conclusion supported by the fact that the Appellate Division decided *Pinehurst* after *Domen*).

To be sure, Petitioner chose to err on the side of less specificity in drafting its notice. Respondent is only given a relatively general picture of the claims that Petitioner intends to prove. But the court declines to conclude that the notice is insufficiently specific, or too generic and conclusory, to meet the standard of section 2524.2(b) or to allow Respondent to prepare her defense.

However, Respondent is not left without a remedy if she desires more details regarding Petitioner's claims: she may demand a bill of particulars (*see Pinehurst Constr. Corp.*, 38 AD3d 474; *City of New York v. Valera*, 216 AD2d 237, 238 [1st Dept 1995]). The purpose of a bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial (*see Miccarelli v. Fleiss*, 219 AD2d 469, 470 [1st Dept 1995]). To that end, a landlord's response to a tenant's demand for a bill must clearly detail the specific acts comprising nuisance that the landlord intends to prove at trial (*see id.*). That would necessarily include the dates of each incident that Petitioner intends to prove at trial, the names of the individuals who were disturbed or whose enjoyment of their apartments were interfered with as the result of each incident (*cf. Roxborough Apts. Corp. v. Kalish*, 22 Misc 3d 130[A], 2009 NY Slip Op 50127[U] [App Term, 1st Dept 2009] ["in the absence of any claim or showing that [tenant's conduct] in any way affected other building residents, landlord failed to state an actionable claim for nuisance"], and what specifically occurred during each incident.

Cause of Action for Nuisance: Number/Nature of Allegations

Nuisance in the landlord-tenant context is a pattern of continuity or recurrence of objectionable conduct that interferes with a person's use and enjoyment of their apartment (*see*

Domen, 1 NY3d at 123-124). Isolated incidents may not be sufficient to allege the continuity required to prove nuisance. But the Court in *Domen* held that allegations of three incidents in five years was sufficient to state a cause of action for nuisance where the nature of the conduct alleged suggested that the tenant's continued residency in the apartment put health and comfort other tenants at constant risk (*see id.*).

It cannot reasonably be said that Petitioner has alleged isolated incidents. Rather, Petitioner has alleged a continuing course of conduct that has occurred over a period of sixteen months. The allegations are all of type to suggest, as in *Domen*, that Respondent's continued occupancy of the apartment could put the health and comfort of the building's other residents at risk. The court cannot conclude at this juncture that, if proven, the conduct alleged by Petitioner would not constitute nuisance.

Retaliatory Eviction

Respondent seeks dismissal of the petition based on her claims that Petitioner commenced this proceeding in retaliation for her good faith complaints about conditions in her apartment, relying on the "documentary evidence" provision of the CPLR (3211[a][1]). She has annexed to the motion her affidavit and a copy of her written complaint to the landlord. Dismissal based on the provision of documentary evidence requires Respondent to submit evidence that "conclusively establishe[s] a defense to the asserted claims as a matter of law" (*IMO Industries Inc. v. Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11 [1st Dept 1999]; *see generally Fontanetta v. Doe*, 73 AD3d 78 [2d Dept 2010]). To be considered "documentary" for the purposes of the statute, the evidence must be "unambiguous and of undisputed authenticity" (*Fontanetta*, 73 AD3d at 86). Affidavits are not documentary evidence (*id.*). At this point in the

proceeding, Respondent is not entitled to dismissal of the petition based on her claim of retaliatory eviction.

What Respondent really seeks is summary judgment. Putting aside the question whether summary judgment on a retaliatory eviction defense would be available, Respondent has not asked the court to treat this pre-answer motion as one for summary judgment pursuant to CPLR 3211(c), and the court declines to do so now.

Personal Jurisdiction

Respondent alleges that Petitioner failed to properly serve her with the notice of petition and petition as required by law. The affidavit of Petitioner's process service alleges two unsuccessful attempts at personal service and then service by affixing the papers to Respondent's apartment door and by mailing copies by regular and certified mail. Respondent alleges in a sworn statement that she was home all day on the date of the process server's second attempt at personal service. She alleges that nobody knocked on her door or otherwise attempted to serve her personally on that date.

Because Respondent has made a specific, non-conclusory denial of service, a traverse hearing must be held (*see Finkelstein Newman Ferrara LLP v. Manning*, 67 AD3d 538 [1st Dept 2009]).

Respondent's motion is denied insofar as it seeks dismissal of the petition for failure to state a cause of action or based on a defense of retaliatory eviction. Respondent's motion is granted to the extent of restoring the proceeding to the calendar on March 1, 2016, at 9:30, Room 823, for a traverse hearing.

Dated: January 25, 2016

Hon. Michael L. Weisberg