

STB Owners LLC v Martis

2023 NY Slip Op 30722(U)

February 16, 2023

Supreme Court, Bronx County

Docket Number: Index No. 318864/22

Judge: Kisha L. Miller

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This opinion is uncorrected and not selected for official publication.

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

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STB OWNERS LLC,
Petitioner,

Index No. L&T 318864/22

-against-

DECISION/ORDER

EMERLY MARTIS, JOHN DOE,
JANE DOE,

Motion seq no. 1

Respondents.

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HON. KISHA L. MILLER:

Cullen & Associates, P.C., for Petitioner.
Mobilization for Justice, Inc., for Respondent.

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of this motion to dismiss.

Papers

Numbered

Notice of Motion and Affidavits Annexed.....	NYSCEF Doc. Nos. 7-11
Answering and Affidavits Annexed.....	NYSCEF Doc Nos. 12-16
Reply Affidavit.....	NYSCEF Doc. No. 17

Upon the foregoing cited papers, the decision and order on this motion is as follows:

Petitioner, a not-for-profit corporation, commenced this summary eviction proceeding to recover possession of the premises located at 4439 3rd Ave, Apartment 4C, Bronx, New York, on the basis that Respondent violated a substantial obligation of the tenancy. The “Ten (10) Day Notice of Termination” alleges:

- 1) On or about March 1, 2020 in an unprovoked attack you assaulted an agent/employee of Petitioner;
- 2) Said assault occurred on/in the subject building;
- 3) Said conduct constitutes “violent criminal activity” as defined in the lease and riders thereto and violates Articles 1, 2 and 3 of the Lease Addendum for Drug Free Housing.

Respondent filed a pre-answer motion to dismiss pursuant to CPLR §3211(a)(7) and Rent Stabilization Code §2524.3 based upon Petitioner’s failure to serve a required predicate notice, specifically a notice to cure prior to commencing the proceeding. Respondent argues that the Regulatory Agreement between Petitioner and The City of New York specifically states that

Petitioner is not exempt or excluded from any requirements of the Rent Stabilization Code, and that Petitioner's failure to serve the requisite notice warrants dismissal of the proceeding.

Petitioner opposes the motion, arguing that the Lease Addendum allows Petitioner to terminate the tenancy if Respondent engages in criminal activity; therefore, service of a notice to cure is not required. Petitioner further argues that Respondent's conduct -- assaulting one of Petitioner's agents at the premises -- is not curable so service of a notice of termination was proper.

Discussion

On a motion to dismiss for failure to state a cause of action 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 to dismiss will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). The court must afford the pleading a liberal construction, accept its allegations as true, and accord Petitioner the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83 [1994]).

Rent Stabilization Code §2524.3(a) provides, in relevant part, that an action or proceeding to recover possession of any housing accommodation may be commenced where a tenant is violating a substantial obligation of their tenancy and had failed to cure such violation. Prior to commencing an action, written notice must be provided that the violations cease within 10 days (Rent Stabilization Code §2524.3[a]; Rent Stabilization Code §2524.2).

In support of its claim that it was not required to serve a notice to cure in accordance with Rent Stabilization Code §2524.3(a), Petitioner points to the Lease Addendum which provides, in relevant part:

1. The Resident, invitees, subleasees, assignees or other person under the Resident's

- control shall not engage in or facilitate criminal activity on or near the property, including, but not limited to, violent criminal activity or drug-related criminal activity.
2. The Resident, invitees, subleases or assignees shall not use or permit the dwelling Unit to be used for, or to facilitate, criminal activity, including, but not limited to, violent criminal activity or drug-related criminal activity.
 3. “Violent criminal activity” means any felonious criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force against the person or property of another.

Paragraph 5 provides:

One of more violations of section 1 or section 2 of this Lease Addendum constitutes a violation of the Lease and noncompliance with the Lease. Any such violation is grounds for termination of tenancy and eviction from the Unit.

The Notice of Termination alleges that Respondent has breached the lease and demands that Respondent surrender possession by April 26, 2022. The petition alleges that Respondent’s term expired on April 26, 2022, as per the Notice of Termination. Petitioner specifically highlights Paragraph 5 to justify termination of Respondent’s lease term.

“To maintain a summary holdover proceeding, a landlord must allege and prove that, as of the time the proceeding is commenced, the tenant remains in possession beyond the expiration of his term” and [t]he tenancy must have ended automatically by lapse of time and not by election of the landlord to forfeit the lease for breach of a condition” (*Perrotta v Western Regional Off-Track Betting Corp.*, 98 AD2d 1 [4th Dept 1983][internal citations omitted]). “If a clause in a lease provides that the lease cannot endure beyond the time when a contingency happens, it creates a conditional limitation upon the occurrence of which the lease automatically expires, a summary proceeding will lie to evict a tenant who remains thereafter” (*Perrotta*, id [internal citations omitted]).

Petitioner treats Paragraph 5 as a conditional limitation, but the language does not support Petitioner’s position. The provision establishes “violent criminal activity” as a *ground* for “termination of tenancy and eviction from the [u]nit,” but the express terms do not provide for automatic expiration of the lease on the happening of a specified contingency (*Perrotta*, id).

Paragraph 16 of the lease, on the other hand, contains language permitting automatic termination of the lease. Entitled “Tenant’s Default,” this provision requires Petitioner to provide written notice of default with specific cure dates for the following: failure to pay rent on time (5 days); failure to move into the apartment within 15 days after the beginning date of the term (10 days); issuance of a court order (10 days); improper conduct by tenant annoying other tenants (10 days); and failure to comply with any other term of rule in the lease (10 days).

Paragraph 16 further provides, in relevant part:

“If Tenant fails to cure the default in the time stated, or violates Section 16B, Landlord may cancel the Lease by giving Tenant a cancellation notice. The cancellation will state the date the Term will end which may be no less than 10 days after the date of the notice. On the cancellation date in the notice the Term of the Lease shall end.”

This language creates a conditional limitation since the lease would expire “automatically on the happening of a specified contingency, the arrival of the termination date in the notice”

(*Montgomery Trading Co. v Cho*, 3 Misc 3d 133[A], 2004 NY Slip Op 50436[U] [App Term, 1st Dept 2004]). It is “not the tenant’s conduct which, at the option of the lessor, operates on the lease to effect its termination...Rather, it is by the passage of time – the period of time specified in the termination notice – that the lease automatically comes to an end...” (*TSS-Seedman’s, Inc. v Elota Realty Co.*, 72 NY2d 1024 [1988]). As per Paragraph 16, Respondent’s conduct, which falls within the default labeled “[f]ailure to comply with any other term of [r]ule in the lease,” requires service of a 10-day notice to cure.

Petitioner argues that Respondent’s conduct is not curable, relying primarily upon *Adams Tower Ltd. Partnership v Richter*, 16 Misc 2d 620, 2000 NY Slip Op 20539 [App Term, 1st Dept 2000]). In that holdover proceeding, premised upon Respondent’s violation of a substantial obligation of the tenancy due to chronic rent delinquency, the Appellate Term concluded that the cumulative pattern of Respondent’s conduct was incapable of cure. The Court

stated the fact that the lease or statute provides for a cure “does not necessarily imply that a means or method to cure must exist in every case.”

The ruling in *Adams Tower Ltd Partnership* does not alter the conclusion in this proceeding. Nothing in the Appellate Term’s decision suggests “that service of a notice to cure is useless or futile when it is a required component of a conditional limitation” (quoting *72-15 Realty Co. LLC v Marmol*, 70 Misc 3d 199, 2020 NY Slip Op 20251 [Civ Ct, Queens County 2020]). In *72-15 Realty Co, LLC*, where the landlord alleged the tenant was creating a nuisance by allowing noxious liquid to leak down radiator pipes, among other things, the court found that the lease did not contain a conditional limitation and that service of a notice to cure was required. Regarding the landlord’s claims that the conduct was incapable of cure, the court declined to make a “fact-intensive inquiry” on the issue, concluding that the lease term required service of a notice to cure before the conditional limitation could be met (*72-15 Realty Co. LLC*, id). This court applies the same conclusion reached in *72-15 Realty Co. LLC* to this proceeding.

Since Petitioner failed to serve a notice to cure as per the lease term prior to terminating Respondent’s tenancy, the proceeding must be dismissed.

Accordingly, it is

ORDERED that Respondent’s motion to dismiss the proceeding is granted.

This constitutes the decision and order of the court.

Dated: February 16, 2023

JM



KISHA L. MILLER, J.H.C.