

104-110 Grove Street HDFC v. Fulton, 092758/2016

May 17, 2017

- Civil Court, Kings County, Housing Part F
- 092758/2016
- Judge Marcia Sikowitz
- For Plaintiff: Petitioner was represented by Samantha Sumilang of Lazarus, Karp & Kalamotousakis, LLP.
- For Defendant: Respondent was represented by Barbara Michalska, Esq. of CAMBA Legal Services.

Cite as: 104-110 Grove Street HDFC v. Fulton, 092758/2016, NYLJ 1202786328746, at *1 (Civ., KI, Decided May 3, 2017)

CASENAME

[Read Summary of Decision](#)

Decided: May 3, 2017

RECITATION, AS REQUIRED BY CPLR SECTION 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:.

PAPERS NUMBERED

NOTICE OF MOTION AND AFFIRMATION AND EXHIBITS ANNEXED 1

ANSWERING AFFIRMATION AND AFFIDAVIT AND EXHIBITS ANNEXED 2

REPLYING AFFIRMATION 3

DECISION/ORDER

*1

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

Petitioner commenced this nonpayment proceeding seeking \$32,739.82 in rent in paragraph (4) of the petition. Paragraph (4) states: see rider attached.

The predicate three day rent demand also seeks \$32,739.82 as a lump sum and states, see rider attached. The rider attached to the predicate notice is a five page rent history commencing December 1, 2010 with an opening charge of \$962.00 for rent, and \$962.00 for security deposit.

Respondent moves by notice of motion for an order dismissing the proceeding pursuant to CPLR 3211 (a)(7) for failure to state a cause of action based on a defective rent demand. Petitioner opposes the motion, and both sides are represented by counsel.

Respondent states that the rent demand and the petition seek a lump sum of \$32,739.82 from December 1, 2010, without specifying when the arrears began to accrue, or how the arrears were calculated. Respondent attaches a stipulation of settlement from a prior nonpayment proceeding, L&T 72023/14, wherein petitioner waived \$10,891.16 due through November 2014. These previously waived arrears are included in the predicate notice and the petition. The predicate notice seeks rent arrears that are not owed. Respondent seeks partial summary judgment on a defense of laches and argues she has met the four elements required to prove the defense. Respondent fails to attach an affidavit from someone with personal knowledge.

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Petitioner opposes the motion and states the rent demand contains a good faith approximation of the arrears due. Petitioner admits that \$10,891.16 that accrued prior to November 2014 was waived in a prior proceeding, and inadvertently included in the predicate notice herein. Petitioner opposes granting summary judgment in respondent's favor on the defense of laches based on its claim that there is no prejudice in petitioner delaying seeking the arrears from 2010. Petitioner attaches an updated rent history allegedly reflecting the waiver of \$10,891.16 as exhibit D. This rent history also ends October 1, 2016 and seeks arrears of \$32,739.82, the same sum demanded in the predicate notice including late fees.

Discussion

A rent demand is the statutory predicate for a summary nonpayment proceeding. RPAPL Section 711(2). A predicate rent notice must set forth "...the approximate good faith amount of rent owed..." *Dendy v. Mcalpine*,

NYLJ May 10, 2010, p 37 c 6 (AT, 2nd Dept.) See also 402 Nostrand Ave. Corp v. Smith, 19 Misc3d 44 (AT, 2nd Dept, 2008). "...A proper demand for rent must fairly afford the tenant, at least, actual notice of the alleged amount due and of the period of which such claim is made. At a minimum, the landlord or his agent should clearly inform the tenant of the particular period for which a rent payment is allegedly in default and of the approximate good faith sum of rent assertedly due for each such period..." Schwartz v. Weiss-Newell, 87 Misc 2d 558 at 560 and 561 (Civ Ct, NY Co., 1976) See also ShopRite Supermarkets, Inc., v. Yonkers Plaza Shopping, 29 AD3d 564 (AD, 2nd Dept., 2006), Parkview Gardens LP v. Lamont, NYLJ 8/23/2008, p 28, c 3 (Civ Ct, Kings Co.); and 622 West 141st LLC v. Garcia, NYLJ 4/30/1997 p 27 c 2 (Civ Ct, NY Co.)

The demand must inform the tenant of the claim against him to afford the tenant a chance to pay the arrears to avoid litigation. Prime Residential Brooklyn II LLC v. Chrispin, NYLJ 5/28/2003, p 21 c 3 (Civ Ct, Kings Co); Shore Terrace Cooperative v. Schwartz, NYLJ, 7/31/1996, p 23, c 6 (Civ Ct, Kings Co.)

A defect in a predicate notice is not subject to cure by amendment and require dismissal of the proceeding. Chinatown Apartments, Inc. v. Chu Cho Lam, 51 NY2d 786 (1980)

This proceeding commenced in November 2016, and the predicate rent demand seeks arrears from December 2010. The predicate notice seeks arrears that were resolved in a prior litigation. Petitioner offers no explanation for seeking arrears that accrued prior to 2014 which were resolved in L&T 72023/14, 104-110 Grove Street HDFC v. Fulton. The predicate notice fails to contain a clear, unambiguous, good faith approximation of what rent arrears are owned. Therefore, the respondent's motion is granted and the petition is dismissed for failure to state a cause of action based on a defective rent demand. This constitutes the decision and order of the court.

DATED: May 3, 2017

