

East 93rd Street Associates LP v. Cargill, L&T 63179/16

April 19, 2017

- Civil Court, Kings County, Housing Part G
- L&T 63179/16
- Judge Jeannine Baer Kuzniewski
- For Plaintiff: Attorney for the Petitioner: Cohen Hurkin Ehrenfeld Pomerantz & Tenenbaum LLP.
- For Defendant: Attorney for Lashannia Cargill: Ikenna Anyoku, The Legal Aid Society, Housing Help Program.

Cite as: East 93rd Street Associates LP v. Cargill, L&T 63179/16, NYLJ 1202783907431, at *1 (Civ., KI, Decided March 23, 2017)

Recitation, as required by CPLR 2219(A), of the papers considered in the review of this Notice of Motion:

PAPERS NUMBERED

NOTICE OF MOTION AND AFFIRMATION ANNEXED ORDER TO SHOW CAUSE AND

AFFIRMATION ANNEXED 1

ANSWER AFFIRMATION & AFFIDAVIT 2

REPLY AFFIRMATION 3

EXHIBITS

STIPULATIONS

OTHER

DECISION/ORDER

*1

Upon the foregoing cited papers, the Decision/Order in this Notice Of Motion pursuant to CPLR §3211(a)(7) dismissing the Petition is as follows:

This summary nonpayment proceeding was commenced seeking rental arrears for the premises known as 5 East 93rd Street, Apartment A-948, Brooklyn. Respondent, represented by counsel, moves to dismiss the Petition on the grounds that the predicate rent demand is defective. Petitioner opposes.

This proceeding is predicated on a written rent demand (the "Demand") dated February 2, 2016 claiming \$11,040.02 due as rent through February, 2016. The demand incorporates by reference an attached breakdown of the arrears. The Demand is issued by "Rutland Road Associates, L.P. Owner/Landlord".

The matter was first on this Court's calendar on April 29, 2016. At that time the respondent had secured counsel and the matter was adjourned twice to July 13, 2016.

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On July 13, 2016 counsel for both sides adjourned the matter yet again to August 29, 2016. This stipulation also provided for the amendment of the caption to reflect East 93rd Street Associates LP as the Petitioner. The matter was again adjourned by two attorney stipulation to November 14, 2016 when Respondent brought the instant motion. The matter was then adjourned by two attorney stipulation to February 3, 2017 for Petitioner's opposition. The matter was adjourned two more times until submission.

Respondent's basis for dismissal is that at the time the proceeding was commenced, and more importantly, at the time the demand for rent was made, Petitioner did not own the property. In support of this allegation respondent attaches copy of a Deed dated January 28, 2016 transferring the property from Rutland Road Houses Inc. To Rutland Road Houses Inc as nominee for East 93rd Street Associates LP. Counsel for the Respondent contends while respondent consented to the amendment of the caption to reflect the name of a new owner, the predicate rent demand is not capable of amendment and therefore may not serve as a proper predicate to this proceeding.

Petitioner does not dispute the transfer of ownership prior to issuance of the Rent Demand nor that Rutland Road Associates L.P. was at that time without authority to demand rent from the Respondent, Petitioner opposes arguing that while generally predicate notices cannot be amended, that here the two attorney stipulation should be construed to have done just that, amend the predicate rent demand.

The Court disagrees. RPAPL §711(2) requires that a Petitioner make a rent demand prior to commencing a summary non-payment proceeding. Said demand is a "predicate requirement" of a summary non-payment proceeding. *Sycamore Assoc. v. Dietz*, 8 Misc. 3d 132(A) (App. Term 2nd Dept. 2005).

"A proper predicate rent demand is a condition precedent to commencement of a non-payment proceeding and cannot be amended nunc pro tunc. *Chinatown Apts. v. Chu Cho Lam*, 51 NY2d at 787 (1980); *Cypress Ct. Assoc. v. McLauren*, 33 Misc 3d 1203[A] [Civ. Ct. Kings Co. 2011]; *Vartarian v. Brady*, 184 Misc 2d 333 (Civ. Ct. NY Co. 1999); *Parkchester Apts. Co. v. Walker*, 1995 NY Misc. LEXIS 738, 213 N.Y.L.J. 123 (Civ. Ct. Bx. Co. 1995)" *ELG 1275 LLC v. Reyes*, 53 Misc 3d 1209[A][Civ Ct, Bronx County 2016].)

As such the within rent demand was incapable of being amended by stipulation and is therefore defective and may not form the basis of this proceeding.

Accordingly, Respondent's motion is granted and the proceeding is dismissed without prejudice.

Dated: Brooklyn, New York

March 23, 2017