

EOM 106-15 217th Corp. v. Severine, 76840/16

April 5, 2017

- Civil Court, Queens County, Housing Part A
- 76840/16
- Judge Clifton Nembhard
- For Plaintiff: Petitioner: Daniel Padernacht, Padernacht Law, PC
- For Defendant: Respondent: Ernie Mui, Queens Legal Services

Cite as: EOM 106-15 217th Corp. v. Severine, 76840/16, NYLJ 1202782776491, at *1 (Civ., QU, Decided March 6, 2017)

CASENAME

EOM 106-15 217th Corp., Petitioner-Landlord v. Woodly Severine
106-15 217th Street., Apt. A5 Queens, New York 11429,
Respondent-Tenant
76840/16

Decided: March 6, 2017

Recitation, as required by CPLR §2219(a), of the papers considered in the review of Michaelle Severine's motion pursuant to CPLR 3211 (a)(2) and/or (7) to dismiss the petition or alternatively for leave pursuant to CPLR §3025(b) to file an amended answer.

Papers Numbered

Notice of Motion and Affidavits Annexed 1

Order to Show Cause and Affidavits Annexed

Answering Affidavits 2

Replying Affidavits 3

Exhibits

Other

DECISION/ORDER

*1

Upon the foregoing papers, the Decision/Order on the motion is as follows:

Prior to commencing this nonpayment proceeding, petitioner served a Five Day Notice dated September 19, 2016, alleging that respondent owed \$3,740.00 calculated as follows: \$1,248.00 for September and August, a \$2.00 credit for July, \$8.00 for June and \$1,238.00 for May.

Respondent's wife now moves for dismissal on the ground that the predicate notice fails to set forth a good faith approximation of the rent owed and is therefore defective.

A demand for rent is a statutory prerequisite for maintaining a nonpayment proceeding. RPAPL §711(2). A proper demand is not only a warning of an impending law suit, it is also an opportunity for a tenant to pay any rent arrears in order to avoid litigation. *J.D. Realty Assocs. v. Jorin*, 166 Misc2d 175 [Civ Ct NY 1995]. Therefore, the demand must inform the tenant of the period for which the rent is allegedly due as well as the amount claimed.

While it must be *2 specific, the amount demanded need not be the exact amount due. *100 Audubon Holdings L.P. v. Hernandez*, 28 Misc3d 140(A) [App Term 1st Dept 2010]. However, the demand must be a good faith assertion of the rent due at the time it was made. *Dendy v. McAlpine*, NYLJ, May 27, 2010 at 37 col 6 [App Term 2nd Dept]. A prejudicial error, both in the amount of rent and

time period for which it was sought, renders a demand defective even though made in good faith. *Jones St. Apts, Inc. v. Overture*, NYLJ,, April 24, 1996 at 28, col 1 [Civ Ct NY].

Here movant alleges that her husband no longer lives in this rent stabilized apartment and that in 2015 petitioner provided her with a letter enabling her to obtain a one shot deal. She also avers that she made a payment of \$1,240.00 for May's rent in or about May, earmarked a payment of \$1,250.00 for June's rent on or about July 4, 2016 and earmarked a payment of \$1,250.00 for September's rent on September 14, 2016.

Petitioner in opposition acknowledges receipt of these payments but argues that it applied the payments as they were received. It asserts that as a result, the rent demand reflects a good faith approximation of the rent due for the time listed. Petitioner includes respondent's rent history as an exhibit in its opposition papers. The breakdown indicates that the May payment was credited on June 6, 2016, the July payment on July 8, 2016 and the September payment on September 16, 2016.

It is a general principle that a payment of rent intended for a certain period must be applied to that period; a landlord is not entitled to apply tenant's earmarked checks as it sees fit. *Shimon Realty Inc. v. Stosko*, NYLJ June 24, 2002, at 24 col 6 [Civ Ct Kings] (citing *Kew Realty Co. v. Charles*, NYLJ June 3, 1998, at 27 col 2 [App Term 2nd Dept 1998]; *134-38 Maple Street Realty Corp. v. Medina*, 3 Misc3d 134(A) [App Term 2nd Dept 2004].

Here, petitioner's failure to apply the earmarked checks for the period they were intended renders the demand defective. Moreover, petitioner's contention that its practice is to credit payments as they are received is belied by the fact that the September's payment was not reflected in the rent demand even though it was received three days before the notice was prepared.

Since it is well settled that a predicate notice cannot be amended
J.D. Realty Assocs. v. Jorin, supra, the motion is granted and the
case dismissed.

This constitutes the decision and order of the Court.

Dated: March 6, 2017

Queens, New York