

JUAN FISHER

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

-----x
125 EAST 50TH STREET CO., LESSEE, LLC d/b/a
THE BENJAMIN,

Petitioner,

Index No. L&T 72194/2014

-against-

DECISION and ORDER

IVAN FISHER, "JOHN DOE" and "JANE DOE"

Respondents.

-----x
PETER M. WENDT, J.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of Respondent's motion for summary judgment, and Petitioner's cross-motion for summary judgment, money judgment for \$187,765.43 as past due rent from June 1, 2012 through July 22, 2014, and money judgment for use and occupancy from July 23, 2014 at the rate of \$250.00 per day:

Papers	Numbered
Notice of Motion and Affirmation and Affidavit Annexed	1
Memorandum of Law	2
Cross-Motion and Affirmation and Affidavit Annexed	3
Memorandum of Law	4
Affirmation in Opposition to Petitioner's Cross-Motion and Reply	5

Upon the foregoing cited papers, the Decision/Order in this motion is as follows:

Petitioner 125 East 50th Street Co., Lessee, LLC d/b/a The Benjamin ("Petitioner") commenced this non-payment proceeding against Respondents Ivan Fisher ("Respondent"), John Doe and Jane Doe, alleging that Respondent failed to pay rent in the amount of \$183,765.43 from July 1, 2012 through July 22, 2014. The predicate rent demand notice sought \$183,765.43 for rent from July 1, 2012 to July 6, 2014. Respondent is the occupant of 125 E. 50th Street, Room 1201, New York, NY 10022 ("subject premises"). Respondents

through counsel served an answer with various affirmative defenses and counterclaims

Respondent moves for summary judgment seeking to dismiss the proceeding based upon: 1) lack of personal jurisdiction; 2) the rent demand is defective as it lacks specificity; and 3) laches. Respondent's motion also sought the right to have a trial by jury, and a rent abatement for lack of services. Respondent asserts that he was not served with the rent demand, and notice of petition and petition in accordance with RPAPL 735. He states that he was not personally served with the rent demand, and notice of petition and petition, as stated in the affidavit of service, and moreover, the description in the asserted affidavit of service does not match him. Respondent argues that the rent demand is improper as it fails to specify the individual days/weeks./months when payments were not made, and the specific amounts due per rental billing period. Respondent further asserts that there is no clear understanding as to how much Respondent was billed per day/week/month as to permit him to determine whether the amount stated is a good faith assertion of the rent due at the time of the demand. Moreover, Respondent states that a delineation is especially necessary in this proceeding as the building is a hotel, and rates change on a daily/weekly basis due to time of year, week, weekends or holiday rates.

Petitioner cross moved for summary judgment seeking: 1) a judgment of possession for the subject premises; 2) a money judgment for past due rent from July 1, 2012 through July 22, 2014 in the amount of \$183,765.43; and 3) use and occupancy at the rate of \$250.00 per day from July 23, 2014 through either the date Petitioner obtains possession of the subject

premises or Respondent satisfied the money judgment. Petitioner also opposes Respondent's motion on the grounds that: 1) the 3 day demand for rent was properly signed by counsel pursuant to applicable case law; 2) the 3 day demand for rent specifies a good faith claim for the rent due and the period for which the rent is due; and 3) the Petition is proper. Petitioner asserts that it is the owner of the premises from which removal is sought, and: 1) Respondent is estopped in denying the title of his grantor; 2) Respondent is in occupancy of the subject premises; 3) Respondent has failed to pay rent as it became due; 4) a proper demand for rent has been made; and 5) Respondent's affirmative defenses are without merit. Petitioner also asserts that the affirmative defense of laches was not asserted in Respondent's answer, and thus, the Court should not consider this defense.

Pursuant to CPLR §3212, a grant of summary judgment is permissible in cases where there is clearly no material and triable issue of fact presented. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Di Menna & Sons, Inc. v City of New York*, 301 NY 118 (1950). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 (1978).

To obtain summary judgment, the moving party must make a prima facie showing to the court that as a matter of law it is entitled to judgment in its favor. *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 (1979); CPLR 3212 (b). To defeat a motion for summary judgment, the opposing party must then show sufficient facts to require a trial on

any issue. *Zuckerman v City of New York*, 49 NY2d 557 (1980); *DiSabato v Soffes*, 9 AD2d 297 (1st Dept 1959). Both parties must lay bare their evidentiary proof in admissible form. *Friends of Animals v Associated Fur Mfrs.*, *supra*; *Zuckerman v City of New York*, *supra*.

The role of the motion court is merely one of issue finding, not issue determination. *Rose v Da ECIB USA*, 259 AD2d 258 (1st Dept 1999); *Pirrelli v Long Island RR*, 226 AD2d 166 (1st Dept 1996). The court must view the evidence in light most favorable to the opposing party and draw all reasonable inferences in the opposing party's favor. *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989). However, mere conclusory allegations regarding the existence of questions of fact are insufficient to defeat a motion for summary judgment. *Dillenberger v. 74 Fifth Avenue Owners Corp.*, 155 AD2d 327 (1st Dept., 1989).

RPAPL § 711(2) requires a landlord to demand payment of outstanding rent from a tenant as a condition to the commencement of a nonpayment proceeding against the tenant. One purpose of the rent demand requirement is to afford a tenant an opportunity to avoid litigation by paying the amount due. *2229 Creston Partners LLC v. Ramos*, 31 Misc.3d 1221(A) (Civ.Ct. N.Y. Co. 2011); *545 W. Co. v. Schachter*, 16 Misc.3d 431, 432 (Civ.Ct. N.Y. Co. 2007). Accordingly, the predicate notice needs to specify when the sums demanded became due. *542 Holding Corp. v. Prince Fashions, Inc.*, 46 AD3d 309, 310 (1st Dept.2007). Failure to demand rent with reasonable specificity in the predicate notice renders such notice defective. Moreover, predicate notices cannot be amended and a defective predicate notice requires dismissal of a summary proceeding. *Chinatown Apts., Inc. v. Chu Cho Lam*, 51

N.Y.2d 786,788 (1980).

A review of the 3 day rent demand shows that Petitioner sought the amount of \$183,765.43 for the period of July 1, 2012 through July 6, 2014. However, there is no itemization or specificity as to how the amount of \$183,765.43 was determined to be the rent owed by Respondent. As argued by Respondent, he lives in a building which operates as a hotel. The rates of the hotel could change depending on the time of year, and/or whether it is a weekday, weekend or holiday. Petitioner failed to state whether Respondent was charged at a daily rate, weekly rate or monthly rate, and/or the amount Respondent was charged at a daily rate, weekly rate or monthly rate. Petitioner simply stated an enormous lump sum amount for a period of approximately two years. Moreover, it is unclear as to why the rent demand seeks rent from July 1, 2012 through July 6, 2014 without any explanation regarding why the demand seeks rent starting on the first of a month and ending on the sixth of the month.

It is well settled that “a proper demand for rent must fairly afford the tenant, at least, actual notice of the alleged amount due and of the period for 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.” *542 Holding Corp. v. Prince Fashions, Inc.*, 46 AD3d at 310 (citing *Schwartz v. Weiss-Newell*, 87 Misc.2d 558, 561 (1976)); *501 Seventh Ave. Assoc., LLC v 501 Seventh Ave. Bake Corp.* 7 Misc.3d 137(A) (App. Term 1st Dept.

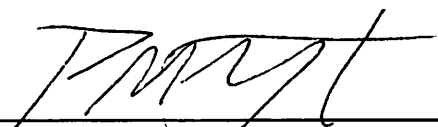
2005); see also, *J.D. Realty Assocs. v. Scoullar*, NYLJ, July 26, 1996 at 21, col. 1 (App Term 1st Dept) (demand without itemization held void); *Pinnacle Hamilton LLC v. Moumouni*, NYLJ, June 15, 2011 at 171, col. 1 (Civ.Ct. N.Y. Co.) (When landlord demands an exorbitant amount of rent, held it does not constitute a good faith sum of rent owed and petition must be dismissed); *Retail Property Trust v. SHNS Corp.*, 28 Misc.3d 1217(A) (Dist. Nas. 2010) (rent demand providing lump sum but failing to include a breakdown of monies is defective).

Petitioner cites *Zapco 1500 Investment, LP v. 1500 Broadway Chile Co., Inc*, 12 Misc.3d 127(A) (App. T. 2006) in support of its contention that a three day notice need only assert the amount total due and the period for which it is claimed due. After a review of the case, the court finds Petitioner's argument unpersuasive, as it is unclear in this matter how the amount claimed became due, and the precise periods for which the rental arrears are claimed.

Accordingly, Respondent's motion seeking to dismiss the petition based upon a defective rent demand is granted, and Petitioner's cross-motion is denied. Therefore, the court need not reach the remaining issues raised by both parties having dismissed the proceeding on the grounds set forth above. The petition is dismissed without prejudice to a new proceeding commenced after service of an adequate rent demand.

The foregoing constitutes the Decision and Order of this Court.

**Dated: New York, New York
July 21, 2015**



PETER M. WENDT, J.H.C.