CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART R

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GOLD STREET PROPERTIES, L.P.,

Petitioner/Landlord,

Index No. 90185/2013

- against -

DECISION/ORDER

KIMBERLY FREEMAN,

Respondents/Tenants.

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Present: Hon. Jack Stoller
Judge, Housing Court

Gold Street Properties, L.P., the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Kimberly Freeman, the respondent in this proceeding ("Respondent"), seeking possession of 33 Gold Street. Apt. 125, New York, New York ("the subject premises") on the ground that Respondent breached a substantial obligation of her tenancy insofar as she subleased the subject premises multiple times on a short-term basis without Petitioner's permission.

Respondent served and filed a pre-answer motion to dismiss, which was denied by an order that did not specify a deadline according to which Respondent was required to answer. Under such circumstances, as this is a special proceeding, Respondent was required to answer within five days of service of the order denying the motion to dismiss together with notice of entry. CPLR §404(a). Petitioner served Respondent with a copy of the decision denying the order together with notice of entry. Respondent did not answer within five days of service of the notice of entry. Respondent then attempted to file an answer without moving for an extension on the first day of trial of this matter. The Court exercised the discretion afforded it by CPLR

§404(a) to deny the filing of the answer under those circumstances and deemed the answer to be a general denial. The Court held a trial of this matter on April 1, 2014, April 3, 2014, May 7, 2014, and May 22, 2014.

While there were some sharp factual disputes at trial, there was no controversy between the parties with regard to many significant fact issues: that the subject premises is not subject to rent regulation; that there is a lease between the parties that prohibits sublets without Petitioner's consent; that the lease also requires that Respondent use the subject premises solely for residential purposes; and that the lease commenced on August 1, 2013.

There was also no controversy at trial that Respondent advertised the subject premises on Airbnb. Airbnb is a company that provides an internet platform connecting individuals who offer accommodations to individuals who wish to book accommodations and, if the parties agree on the price and terms, they can complete the transaction, including payment, via such platform. Airbnb, Inc. v. Schneiderman, 2014 N.Y. Misc. LEXIS 2270 (S. Ct. Albany Co. 2014). There is no controversy at trial that Respondent collected money from a series of travelers to New York City to sleep at the subject premises on a short-term basis, ranging from $129.00 per night to $200.00 per night; that the monthly rent for the subject premises is $2,350.00, which amounts to a daily rate of $77.26;[1] and that the property manager for Petitioner called Respondent on October 15, 2013 to verbally tell her to stop this activity.

There was no controversy at trial that Petitioner served Respondent with a notice to cure on October 28, 2013, informing Respondent that she was in default of various provisions of the lease between the parties, and in order to cure the default, Respondent must "[i]mmediately and

[1] The Court arrives at this figure by dividing the annual rent by 365.

permanently remove all illegal occupants from the subject [premises]; and ... [c]ease and desist from advertising the subject [premises] for short-term rentals; and ... [c]ease and desist from illegally subletting [the subject premises] without the prior written consent of [Petitioner]," and that Petitioner would terminate her tenancy if Respondent failed to cure the default on or before November 15, 2013.

There was a dispute at trial as to whether Respondent timely cured. Respondent testified that, upon her conversation with Petitioner's property manager on October 15, 2013, she removed her advertisement from Airbnb, canceled plans with all of her guests that she had previously arranged with to stay at the subject premises, and refrained from any further such conduct. Petitioner called its super as a witness, who testified that he witnessed people who appeared to be Airbnb guests engaged in a dispute with Respondent over amounts of money to be paid. When the super testified on Petitioner's *prima facie* case, he testified that he witnessed this exchange in early November of 2013. When the super testified on Petitioner's rebuttal case, he testified that he witnessed this exchange on November 15, 2013. When questioned on cross-examination about the different dates the super testified about, he testified that he regards November 15, 2013 as "early November."

As an employee of Petitioner, the super is not a disinterested witness, and the super's testimony that he regards November 15, 2013 as "early November" defies common sense. Be that as it may, even assuming *arguendo* that the Court fully credits the super's testimony, Petitioner has not introduced any evidence that Respondent continued to engage in objectionable conduct after November 15, 2013. There are no Airbnb advertisements in evidence that post-date November 15, 2013, and the super, who had offered testimony about Airbnb guests prior to

November 15, 2013 as well, testified that he did not observe any other guests after November 15, 2013. The preponderance of evidence demonstrates that Respondent did not engage in proscribed activity after November 15, 2013.

The nature of the occupancy of Respondent's guests was not as roommates, but subtenants. Peck v. Lodge, 2003 N.Y. Misc. LEXIS 2044 (S. Ct. N.Y. Co. 2003). Even in an unregulated context, an allegation of illegal subletting is normally curable. Thompson v. 490 West End Apts. Corp., 252 A.D.2d 430, 436-37 (1st Dept.), *appeal denied*, 92 N.Y.2d 814 (1998) (cure of an illegal sublet is available to a shareholder of a residential cooperative corporation). Petitioner argues that such a cure is not available to Respondent in this proceeding, as she has profiteered and as she has been operating the subject premises essentially for commercial purposes.

"Profiteering" does not necessarily preclude a cure, although there is authority that stands for the proposition that cure of a subtenancy where there has been profiteering requires a refund to the subtenants of overcharged amounts. Cambridge Dev., LLC v. Staysna, 68 A.D.3d 614, 615 (1st Dept. 2009), Ariel Assocs., LLC v. Brown, 271 A.D.2d 369, 369-370 (1st Dept.), *leave to appeal dismissed*, 95 N.Y.2d 844 (2000), 672 Ninth Ave. LLC v. Burbach, 14 Misc.3d 1236A (Civ. Ct. N.Y. Co. 2007), Husda Realty Corp. v. Padien, 136 Misc.2d 92, 94 (Civ. Ct. N.Y. Co. 1987) (Tom, J.). However, for these purposes, limitations on a tenant's ability to cure a sublease only apply to the extent that such a sublease undermines various rent regulatory schemes. Cambridge Dev., LLC, supra, 68 A.D.3d at 615, 151-155 Atl. Ave., Inc. v. Pendry, 308 A.D.2d 543, 543-544 (2nd Dept. 2003), 51 W. 86th St. Assoc. LLC v. Fontana, 28 Misc.3d 140A (App. Term 1st Dept. 2010), 643 Realty LLC v. Thadal, 15 Misc.3d 131A (App. Term 2nd Dept.

2007), West 148 LLC v. Yonke, 11 Misc.3d 40, 41 (App. Term 1st Dept. 2006), Central Park W. Realty v. Stocker, 1 Misc.3d 137A (App. Term 1st Dept. 2004), 145 Ave. C LLC v. Kelly, 2006 N.Y. Misc. LEXIS 3980 (Civ. Ct. N.Y. Co. 2006), Husda Realty Corp., supra, 136 Misc.2d at 94. Instructively, a landlord does not have a cause of action against a rent-stabilized tenant who profiteers at the expense of a roommate. First Hudson Capital, LLC v. Seaborn, 54 A.D.3d 251, 252 (1st Dept.), *appeal dismissed*, 11 N.Y.3d 894 (2008). The subject premises is not subject to regulation. Without a rationale such as the integrity of the Rent Stabilization Law and Code at stake, there is no discernible obstacle to a cure by ceasing the conduct objected to. The Court further notes that the predicate notice in this matter was highly specific about the meaning of a cure, to wit, ceasing advertisements, removal of illegal occupants, and ceasing subletting, and the evidence shows that this was all effectuated by the deadline in the notice itself, November 15, 2013.

Petitioner also argues that conduct as Respondent engaged in violated public policy, as evinced by MDL §4(8)(a) and N.Y.C. Admin. Code §27-2004(a)(8)(a), which were amended by Laws 2010, Chapter 225 on July 16, 2010 to proscribe the kind of conduct Respondent had engaged in. However, the Legislature is presumed to know what statutes are in effect when enacting new laws. In re Adoption of Gerald T., 211 A.D.2d 17, 21 (1st Dept. 1995). RPAPL §753(4), which presumes the opportunity to cure breaches of leases, existed as of 2010. Yet, the Legislature did not amend RPAPL §753(4) to carve out an exception for the kind of conduct Respondent engaged in. Moreover, the Multiple Dwelling Law and the New York City Housing Maintenance Code are generally aimed at the conduct of owners of property, not tenants. Accordingly, the Court does not find that the enactment of statutes designed to prevent rental

property from being used for hotel purposes prevents Respondent from being able to cure such activity.

As Respondent ceased engaging in the conduct Petitioner objected to and specifically outlined in the notice to cure within the time frame provided by the notice to cure and prior to the commencement of this proceeding, the Court dismisses this proceeding after trial.

The parties are directed to pick up their exhibits withing 30 days or they will either be sent to the parties or destroyed at the court's discretion and in compliance with DRP-185.

This constitutes the decision and order of this Court.

Dated: New York, New York
June 16, 2014

HON. JACK STOLLER
J.H.C.