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

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436-438 WEST 47th APARTMENT OWNERS INC.,

Petitioner,

Index No. 61941/2015

- against -

DECISION/ORDER

DAVID R. DAWES, SUZANNE DAWES, WILLIAM M. DAWES,

Respondent.

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Present: Hon. Jack Stoller
Judge, Housing Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion.

Papers	Numbered
Notice of Motion and Supplemental Affidavit and Affirmation Annexed....	1, 2, 3
Notice of Cross-Motion and Supplemental Affidavits and Affirmation Annexed	4, 5, 6, 7
Respondent's Notice of Motion and Supplemental Affidavits and Affirmation Annexed	8, 9, 10
Affidavit and Affirmation In Opposition to Respondent's Motion	11, 12
Affidavits and Affirmation In Opposition to the Cross-Motion	13, 14, 15, 16, 17, 18, 19
Reply Affirmation and Affidavits on the Motion-In-Chief	20, 21, 22
Reply Affirmation and Affidavit on the Cross-Motion	23, 24

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

436-438 West 47th Apartment Owners Corp., the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against, *inter alia*, William M. Dawes, the respondent in this proceeding ("Respondent"),[1] seeking possession of 438 West 47th Street, Apt.

[1] Other respondents are named in the caption, but William M. Dawes is the only respondent to submit sworn statements on this motion practice. The Court only refers to William M. Dawes as "Respondent" in this decision solely for the purposes of convenience and without prejudice to the rights of any party.

3B, New York, New York ("the subject premises"), on the ground that Petitioner terminated Respondent's tenancy. Petitioner now moves for summary judgment. Respondent cross-moves for summary judgment in his favor. Respondent also moves to interpose an answer. The Court consolidates these motions for resolution herein.

Respondent previously made a pre-answer motion to the dismiss that the Court denied by an order dated September 3, 2015. The order provided that Respondent may serve an answer on or before October 1, 2015. Respondent did not answer by this date.

Upon the application of a party, the court may extend the time to plead upon such terms as may be just and upon a showing of reasonable excuse for delay. CPLR §3012(d). The file indicates that Respondent since discharged the attorney that he had at that point and retained new counsel. Respondent avers that he did not know about the Court's deadline to interpose an answer because he discharged his attorney. Respondent served the motion on Petitioner on February 8, 2016.

Petitioner opposes the motion on the ground that Respondent's delay prejudices Petitioner. For Petitioner to demonstrate prejudice, it would need to show that a late answer would hinder the preparation of its case or prevent it from taking some measure in support of its position. Whalen v. Kawaski Motors Corp., U.S.A., 92 N.Y.2d 288, 293 (1998), Loomis v. Civetta Corinno Constr. Corp., 54 N.Y.2d 18, 23 (1981), Anoun v. City of New York, 85 A.D.3d 694 (1st Dept. 2011), Valdes v. Marbrose Realty Inc., 289 A.D.2d 28, 29 (1st Dept. 2001). Petitioner argues that the Court should otherwise deem Respondent's answer to be general denial. Assuming that Respondent interposed a general denial, Petitioner bears the burden of proving all of the elements of its *prima facie* case anyway. Klar v. Associated Hospital Service,

24 Misc.2d 559, 560-561 (Mun. Ct. N.Y. Co. 1959), Scherman v. Empire Mut. Ins. Co., 11 Misc.2d 980, 981 (City Ct. N.Y. Co. 1957). All the proposed answer, annexed to Respondent's motion, contains are admissions of some of Petitioner's allegations, denial of others, and a counterclaim for attorneys' fees. Far from hindering the preparation of Petitioner's case, the proposed answer actually relieves Petitioner from proving certain elements of its *prima facie* case. The only addition to the answer that could conceivably surprise Petitioner is Respondent's counterclaim for attorneys' fees. However, Petitioner does not explain how such a counterclaim prevents it from taking a measure to support its position. Petitioner's allegation of prejudice is conclusory. Accordingly, the Court grants Respondent's motion and deems the answer annexed to Respondent's motion for leave to interpose an answer to be the answer in this proceeding.

On the record on the motions of Petitioner and Respondent for summary judgment, there is no material dispute of facts that Petitioner is a residential cooperative corporation and a proprietary lessor of Respondent pursuant to a proprietary lease between the parties ("the proprietary lease"); that the subject premises is therefore not subject to rent regulation; that Respondent is a shareholder and proprietary lessee of the subject premises; that Petitioner is a proper party to commence this proceeding pursuant to RPAPL §721; and that Petitioner has complied with the registration requirements of MDL §325.

The record on the motion practice also shows that there is no dispute that Respondent rented at least a portion of the subject premises to a series of short-term guests during 2014 and into 2015. Respondent himself averred to that in his affidavit in support of the cross-motion, acknowledging at least twenty-one such guests in 2014 and 2015. There is no dispute of material fact that an attorney purporting to be Petitioner's attorney sent Respondent a letter dated August

21, 2014 ("the August 2014 letter") alleging that Respondent was renting rooms in the subject premises as such, that such conduct opens up issues of overcrowding and safety, informing Respondent that he must stop, and warning that Petitioner would commence legal action if the conduct continued. Petitioner attaches to its motion an email Respondent sent to a member of the board of directors for Petitioner ("the Board") responding to the August 2014 letter by stating that he has had friends and family staying in the subject premises with him. Petitioner also attaches to its motion an ad Respondent placed on the internet to rent a room in the subject premises after the August 2014 letter. The ad stated, *inter alia*, "[d]ue to ... nosy neighbors ... please just say you're friend of mine ... or family friends ... if anyone asks."[2]

There is no dispute on the record that Petitioner caused a notice to be served on Respondent dated January 26, 2015 ("the notice to cure") stating that Respondent violated paragraphs of the proprietary lease requiring, *inter alia*, use of the subject premises for residential purposes in compliance with rules and regulations of government authorities and paragraphs of the proprietary lease prohibiting unauthorized sublets and assignments. The notice to cure demands that Respondent cease this conduct by January 28, 2015 or Petitioner would terminate Respondent's tenancy (although Petitioner effectuated service of the notice to cure by regular mail two days prior to January 28, 2015). The notice to cure also states that Respondent's conduct was objectionable and that the notice to cure was without prejudice to Petitioner's

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[2] As Respondent does not dispute in his opposition that he sent that email or placed the ad with that language, the Court deems that Respondent admits such acts. Kuehne & Nagel, Inc. v. Baiden, 36 N.Y.2d 539, 543-44 (1975), Madeline D'Anthony Enters., Inc. v. Sokolowsky, 101 A.D.3d 606, 609 (1st Dept. 2012). Insofar as Respondent placed the ad with that language, the language in the ad is admissible as an admission of a party. 42nd & 10th Associates LLC v. Ikezi, 46 Misc.3d 1219(A) n.2 (Civ Ct. N.Y. Co.), *aff'd*, 50 Misc.3d 130(A) (App. Term 1st Dept. 2015), *citing* Satra Ltd. v. Coca-Cola Co., 252 A.D.2d 389, 390 (1st Dept. 1998).

remedies pursuant to paragraph 31(f) of the proprietary lease providing for termination of Respondent's tenancy as such ("the termination clause").

The termination clause allows for termination of Respondent's tenancy upon an affirmative vote of two-thirds of the Board at a meeting called for the purpose of terminating Respondent's tenancy on the ground of objectionable conduct, repeated after written notice from Petitioner. There is no dispute on the record that the Board called such a meeting on January 30, 2015, the Board called a meeting on February 17, 2015, that Respondent was invited to attend the meeting and spoke at the meeting, and that the Board subsequently voted to terminate Respondent's tenancy by a vote of six in favor of termination, none opposed, and one abstention.

Paragraph 31 of the proprietary lease states that "upon the happening of any of the events mentioned in", *inter alia*, the termination clause, Petitioner shall give Respondent a notice terminating Respondent's tenancy within five days. There is no dispute on the record that, after the vote at the meeting on February 17, 2015, Petitioner caused such a notice ("the termination notice") to be served on Respondent on March 13, 2015 by regular mail and certified mail, purporting to terminate Respondent's tenancy as of March 30, 2015. The termination notice states that Respondent's conduct not only constituted illegal subletting but also commercializing the use of the subject premises and creating an unsafe environment for other shareholders in the building in which the subject premises is located ("the Building"). This proceeding ensued after March 30, 2015.

As there is no dispute of fact that Petitioner is a residential cooperative corporation and that Petitioner found Respondent's conduct objectionable, Petitioner has made a *prima facie* showing for summary judgment purposes that Respondent was objectionable. 40 W. 67th St.

Corp. v. Pullman, 100 N.Y.2d 147, 153 (2003). As there is no dispute that Petitioner is a proper party to have brought this proceeding, that the subject premises is not subject to rent regulation, and that Petitioner served the termination notice in compliance with the proprietary lease after sending a writing to Respondent in compliance with the termination clause, i.e., the August 2014 letter, Petitioner has shown an entitlement to summary judgment on its cause of action for possession against Respondent. Accordingly, the burden shifts to Respondent to prove that Petitioner is not entitled to summary judgment or that he is entitled to summary judgment. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 129 (2000), Ceron v. Yeshiva Univ., 126 A.D.3d 630, 632 (1st Dept. 2015).

Respondent argues that Petitioner is not entitled to the deference Courts accord the determinations of residential cooperative corporations because Petitioner has not followed the proprietary lease. Compare 16 Maujer St. HDFC v. Titus, 2007 N.Y. Misc. LEXIS 477 (Civ. Ct. N.Y. Co. 2007) (the business judgment rule does not apply where a cooperative violates the express terms of the proprietary lease). Paragraph 31(c) of the proprietary lease ("the sublet clause") provides Petitioner with a remedy for a cause of action sounding in unauthorized subletting. Respondent argues that the sublet clause provides the only remedy Petitioner has, as it addresses subletting in a more specific manner than the termination clause, which uses more general language about objectionable conduct. The sublet clause also contemplates that Respondent may cure.

A lease is a contract, D'Alto v. 22-24 129th St., LLC, 76 A.D.3d 503, 506 (2nd Dept. 2010), and the Court therefore applies canons of contractual construction to the proprietary lease. While a special provision of a contract prevails over a general provision of a contract, it does so

when the two provisions are inconsistent with one another. Bank of Tokyo-Mitsubishi v. Kvaerner a.s., 243 A.D.2d 1, 8 (1st Dept. 1998), Goldberger v. Sonn, 179 A.D.2d 573, 574 (1st Dept. 1992), Waldman v. New Phone Dimensions, Inc., 109 A.D.2d 702, 704 (1st Dept. 1985), *appeal dismissed*, 65 N.Y.2d 784 (1985). However, the Court should construe a contract so as to avoid a finding of inconsistency. National Conversion Corp. v. Cedar Bldg. Corp., 23 N.Y.2d 621, 625 (1969), In re Estate of Sherez, 212 A.D.2d 536, 537 (2nd Dept. 1995). Rather, the Court must reconcile seemingly inconsistent provisions if possible. 112 W. 34th St. Assoc., LLC v. 112-1400 Trade Props. LLC, 95 A.D.3d 529, 531 (1st Dept.), *leave to appeal denied*, 20 N.Y.3d 854 (2012), HSBC Bank USA v. National Equity Corp., 279 A.D.2d 251, 253 (1st Dept. 2001).

The Court reconciles the sublet clause and the termination clause against the background provided by Paragraph 31 of the proprietary lease, which authorizes Petitioner to serve Respondent with a termination notice upon the happening of "any of the events" set forth in the sub-paragraphs therein, including the Board's termination of the proprietary lease on the ground of objectionable conduct or a failure to cure an unauthorized sublet. If "any" of such grounds constitute a basis to terminate Respondent's lease, then such grounds are non-exclusive, and the same conduct can implicate both the sublet clause and the termination clause. As noted above, the termination notice stated, *inter alia*, that Respondent's conduct commercialized the subject premises and created an unsafe environment for other shareholders in the Building. Thus the sublet clause does not preclude Petitioner's exercise of the termination clause as it did in this proceeding, as Petitioner's cause of action did not solely consist of subletting activity, but other factors as well.

Respondent avers in support of his cross-motion and in opposition to Petitioner's

summary judgment motion that he cured the conduct complained of by ceasing short-term rentals after January 2, 2015. However, a termination on the basis of objectionable conduct by a cooperative precludes a cure, even when the conduct may be curable in other contexts. For example, a tenant's failure to provide access to an apartment is curable. Wonforo Associates v. Maloof, 2002 N.Y. Slip Op. 50316(U) (Civ. Ct. N.Y. Co. 2002), *citing* J. T. Tai & Co. Inc. v. Barnes, N.Y.L.J., September 16, 1988, at 17:1 (App. Term 1st Dept.). However, a shareholder in a cooperative could not cure a cooperative board's finding of objectionable conduct to the extent that Respondent had denied access to the cooperative. Gordon & Gordon v. 476 Broadway Realty Corp., 2014 N.Y. Misc. LEXIS 2281, 20-21 (S. Ct. N.Y. Co. 2014), *aff'd sub nom.*, Gordon v. 476 Broadway Realty Corp., 129 A.D.3d 547, 548 (1st Dept. 2015), 205 E. 77th St. Tenants Corp. v. Meadow, 41 Misc.3d 134(A) (App. Term 1st Dept. 2013).[3] Similarly, a hoarding condition can be curable. 4G Realty LLC v. Vitulli, 2 Misc.3d 29, 30-31 (App. Term 2nd Dept. 2003); 169 Realty LLC v. Wolcott, 2003 NY Slip Op 51371(U), 2 (App. Term 2nd Dept. 2003); 508 Columbus Properties v. Beasley, N.Y.L.J. March 24, 2010 at 26:3 (Civ Ct. N.Y. Co.), *citing* Lincoln Terrace Assoc. v. Snow, N.Y.L.J., Nov. 28, 1983, at 5:3 (App Term 1st Dept). However, a shareholder in a cooperative could not cure a cooperative board's finding of objectionable conduct on the basis of hoarding. 205 E. 77th St. Tenants Corp., supra, 41 Misc.3d at 134(A). Thus, even if subletting is otherwise curable, Respondent may not have the opportunity to cure even if subletting constituted a part of the basis upon which Petitioner terminated Respondent's lease.

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[3] See Meadow v. 205 E. 77th St. Tenants Corp., 2010 N.Y. Misc. LEXIS 3386, 1-2 (S. Ct. N.Y. Co. 2010).

The Court notes factors aggravating a mere sublet. The termination notice speaks of a commercialization of the Building, which is residential, and the safety concerns intuitively inherent in a revolving series of short-term guests into the common areas of the Building. Whether the Court finds such conduct to be objectionable or not, the application of the business judgment rule demands that the Court exercise restraint and defer to the Board's good faith decisions made for the purposes of the cooperative, within the scope of its authority. 40 W. 67th St. Corp., supra, 100 N.Y.2d at 147.[4] The Court also notes that Respondent's dissembling in his response to the August 2014 letter, denying that he was renting the subject premises to short-term guests when he actually was, and Respondent's admonition to his guests to pretend they were not, essentially, hotel guests, reveal a casual disregard for the interests of other shareholders necessary for the feasibility of cooperative living and undermine the Board's ability to discharge its duty to operate and maintain the Building. Application of a deferential standard to the Board's determination thus compels the result that the Board could find Respondent's conduct objectionable.

Respondent argues that the petition is defective because it does not reference the notice to cure. However, the petition makes no allegation that it is predicated on the notice to cure. The notice to cure specifically provided that it was without prejudice to Petitioner's remedies pursuant to the termination clause. The notice to cure, or any defects thereof, therefore bear no relation to Petitioner's cause of action herein.

Respondent argues that the Board did not act in good faith. Respondent states that the

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[4] The Court accords the same level of deference to a Board vote as a shareholder vote. London Terrace Towers, Inc. v. Davis, 6 Misc.3d 600, 603 (Civ. Ct. N.Y. Co. 2004).

current president of the Board ("the Board president") unsuccessfully attempted to evict Respondent in 2010; that this unsuccessful attempt precipitated the temporary removal of the Board president from his office; and that resumption of the Board president to his office led to vengeful, retaliatory action like the instant case. Respondent also takes issue with the manner in which he Board president looks at his girlfriend.

Be that as it may, the vote to terminate Respondent's tenancy was six to zero. Respondent does not offer proof with regard to the votes of Board members other than the Board president, rendering Respondent's argument as it applies to the other Board members speculation. Conclusory and speculative allegations of bad faith, self-dealing, and other wrongdoing will not suffice to raise a triable issue of fact, Molander v. Pepperidge Lake Homeowners Assn., 82 A.D.3d 1180, 1183 (2nd Dept. 2011), Bay Crest Assn., Inc. v. Paar, 72 A.D.3d 713, 714 (2nd Dept. 2010), 40-50 Brighton First Rd. Apts. Corp. v. Kosolapov, 39 Misc.3d 27, 29 (App. Term 2nd Dept. 2013), including, specifically, speculation about the influence of one cooperative officer upon others. Lincoln Guild Hous. Corp. v. Ovadiah, 49 Misc.3d 147(A) (App. Term 1st Dept. 2015).

Moreover, Respondent's conceded rental of a portion of the subject premises to a series of short-term guests formed the basis for a finding of objectionable conduct, as provided above. A bona fide ground upon which a cooperative renders a determination against a shareholder prevails over an allegation of the shareholder that personal animosity was the real reason for the adverse determination. Del Puerto v. Port Royal Owner's Corp., 14 Misc.3d 1214(A) (S. Ct. Kings Co. 2007), *aff'd*, 54 A.D.3d 977, 977-978 (2nd Dept. 2008), Matter of Schwarz v. Dorchester Apt. Corp., 9 Misc.3d 1118(A) (S. Ct. Kings Co. 2005)(even a reasonable perception

that a cooperative peculiarly directs an adverse action against one shareholder does not support a finding of bad faith when the cooperative is acting in its interest).

Accordingly, Respondent does not raise an issue of material fact as to whether Petitioner has acted in good faith and so the Court awards Petitioner summary judgment to the extent of awarding Petitioner a final judgment against Respondent for possession. Issuance of the warrant of eviction is permitted forthwith, execution thereof is stayed through May 31, 2016 for Respondent to vacate the subject premises. On default, the warrant may execute on service of a marshal's notice.

Petitioner moves for a judgment sounding in unpaid use and occupancy. As the Court awards Petitioner a final judgment on its holdover cause of action, Petitioner's cause of action for use and occupancy is ripe. 40 W. 55 LLC v. Kurland, 2003 N.Y. Misc. LEXIS 153 (App. Term 1st 2003). Petitioner's managing agent avers that Respondent owes $11,650.73 through February of 2016 and annexes a rent history to its motion that documents the arrears. Respondent does not rebut that he owes these arrears. As this is a motion for summary judgment, the Court construes Respondent's failure to rebut as an admission that he owes the arrears. Kuehne & Nagel, Inc., supra, 36 N.Y.2d at 543-44, Madeline D'Anthony Enters., Inc., supra, 101 A.D.3d at 609. Accordingly, the Court awards Petitioner a money judgment in the amount of $11, 650.73.

Petitioner also moves for a judgment sounding in attorneys' fees. Neither party disputes that the proprietary lease contains a clause, the effect of which is to entitle the prevailing party in litigation between the parties to a judgment sounding in attorneys' fees. As the Court awards Petitioner a final judgment, Petitioner is the prevailing party. Accordingly, the Court grants Petitioner's motion to the extent of determining that Petitioner is entitled to a judgment in

attorneys' fees. Petitioner does not annex to its motion proof documenting Petitioner's counsel's hourly rate or billing records. Accordingly, the Court calendars this motion for a hearing on a reasonable amount of attorneys' fees to award for May 20, 2016 at 9:30 a.m. in part C, Room 844 of the Courthouse located at 111 Centre Street, New York, New York.

This constitutes the decision and order of this Court.

Dated: New York, New York
April 18, 2016

HON. JACK STOLLER
J.H.C.