Online Reference: FLWSUPP 2305ASBU

Landlord-tenant -- Eviction -- Public housing -- Supportive housing for elderly -- Notice of termination -- Sufficiency -- Notice to tenant of her alleged breach of lease based on criticism of community employees and verbal harassment of other tenants and their relatives was too vague and conclusory to comply with federal notice requirements -- Court declines to adopt "harm" analysis, which would allow landlords to forego compliance with contractual and regulatory pre-suit obligations if tenant is not harmed -- Harm approach would nullify contractual requirements of lease and federal regulations and is incompatible with Florida's policy to strictly construe contractual and statutory forfeiture rights -- Claims for eviction dismissed

ASBURY ARMS, INC., Plaintiff, vs. RITA LYNAR, Defendant. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2013-CA-039015. May 28, 2015. Lisa Davidson, Judge. Counsel: Stephanie L. Schafer and Michele D. Morales, Quintairos, Prieto, Wood & Boyer, P.A., Orlando, for Plaintiff. Nicholas A. Vidoni, Watson, Soileau, Deleo, Burgett, and Pickles, P.A., Cocoa, for Defendant.

ORDER ON DEFENDANT'S

MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court on Defendant's Motion for Summary Judgment filed February 24, 2015. The Motion was heard by the Court on April 15, 2015. The Court considered the arguments of Counsel and has carefully reviewed the Motion, together with the parties' memoranda and the Court file. Being otherwise fully advised in the premises, the Court makes the following findings of fact and conclusions of law:

1. Plaintiff, ASBURY ARMS NORTH, INC. ("AANI"), filed a Complaint to evict Defendant, RITA LYNAR ("LYNAR"), on November 13, 2013. AANI receives federal subsidies, and the title of its lease explains that it provides "Supportive Housing For The Elderly." AANI's subsidized rental business is governed by regulations promulgated by the United States Department of Housing and Urban Development ("HUD"), and AANI's lease form mirrors many of these regulations.

2. On October 28, 2013, sixteen days prior to the initiation of this action, AANI provided LYNAR with a notice of termination. This notice told LYNAR that she breached the lease because she "criticized community employees," and "verbally harassed" other tenants and their relatives. The following are the specific allegations of LYNAR'S breach:

· On June 20, 2013 you openly criticized a community employee (Employee 1).

· On June 23, 2013, you openly criticized a community employee (Employee 2)

· On July 10, 2013 you openly criticized multiple, additional community employees to the extent another tenant complained of your actions and comments

· On July 15, 2013, you continued to criticize multiple community employees.

· On July 31, 2013, you verbally harassed another tenant (Tenant 1).

· On August 2, 2013, you again verbally harassed Tenant 1.

· On August 19, 2013, you again verbally harassed Tenant 1.

· On August 29, 2013, you were provided a Ten Day Notice of Non-Compliance (With Opportunity to Cure).

· On September 13, 2013, you interrogated and verbally harassed the daughter of a tenant (Tenant 2). Due to your actions, Tenant 2 is considering leaving the community.

· On September 16, 2013, you were issued a Notice of Termination of Lease.

· On October 16, 2013, Asbury Arms North, Inc. agreed to negotiate a move out date in lieu of formal eviction.

· Despite Ashbury Arms North, Inc. attempts to avoid a formal eviction, you continued to harass Tenant 1. The harassment escalated and Tenant 1 contacted the local police regarding said harassment.

3. LYNAR moved for summary judgment, arguing that AANI's notice failed to comply with the pre-suit notice requirements under the lease and federal regulations because it was framed in vague and conclusory language that failed to inform her of the factual nature of her alleged breaches. AANI also argued that even if the notice was insufficient, a dismissal should not occur where LYNAR could not show that she was "harmed" by an insufficient notice.

4. The standard for summary judgment is well-established:

> A motion for summary judgment may be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fla.R.Civ.P. 1.510(c). The burden is on the movant to demonstrate conclusively that the nonmoving party cannot prevail. *Pennco, Inc. v. American General Home Equity, Inc.,* 629 So.2d 307, 308 (Fla 2d DCA 1993).

5. Neither party disputes the fact that LYNAR received the notice of termination that AANI attached to its complaint. AANI filed no sworn evidence in opposition to LYNAR's motion for summary judgment. Without a factual dispute, there remains a pure question of law as to whether AANI's notice complies with the contractual and regulatory pre-suit requirements for this action.

6. Prior to bringing an eviction action, both the lease and federal regulations require AANI to provide a notice which "shall" explain the reasons for the termination "with enough specificity so as to enable the TENANT to prepare a defense." Lease ¶8(f)and 24 CFR 247.4(a). There are no cases interpreting this requirement from Florida's District Courts of Appeals, nor any cases from Florida's Federal District Courts. Therefore, the Court reviewed and considered decisions from other federal and state courts that have confronted the same issue raised in LYNAR's motion for summary judgment.

7. The Court in *Pheasant Hill Estates Associates v. Milovich,* 33 Pa. D. & C. 4th 74, 78 (Pa. C.P. 1996) noted, "whenever the federal government provides monies to an organization, the organization must expect some strings to be attached. Strict compliance with HUD regulations is one of those strings." In *Edgecomb v. Housing Authority of Town of Vernon,* 824 F. Supp. 312, 315 (D. Conn. 1993), the Court noted that the court must resolve the issue as to whether the termination procedures complied with applicable regulations in light of the due process requirements of *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Among those due process procedures required by *Goldberg* is that a recipient have timely and adequate notice detailing the reasons for a proposed termination. "The requirement of notice is to inform the tenant of the allegations so that he can prepare a defense." In *Edgecomb,* the notice of termination stated that the tenant had "engaged in drug-related criminal activity

or violent criminal activity, including criminal activity by any family member. . . .”The Court found that this notice was insufficient to adequately inform the tenants of the allegations against them. The Court reinstated the tenants' subsidized housing payments because the notice of termination did not state the particular felony, the person who allegedly committed it, nor did it give a brief factual statement concerning the incident(s) alleged in the notice. As stated in *Moon v. Spring Hill Apartments,* 11 S.W. 3d 427, 433 (Tex. Ct. App. 2000), “due process requires a timely and adequate notice to vacate detailing the reasons for a proposed termination because a denial of federal housing benefits, like denial of other forms of public assistance, is a denial of an interest protected by the Fourteenth Amendment.” (citations omitted).

8. Other courts have reached a similar result to *Edgecomb.* In *Swords to Plowshares v. Smith,* 294 F. Supp. 2d 1067, 1073 (N.D. Cal. 2002), a federal district court dismissed an eviction action where the notice failed to identify “the persons involved in each of the events, and the person who brought the event to Plaintiff's attention.” The notice had vague allegations as to the tenant's conduct: pushing another tenant against a kitchen table and threatening another tenant with hammer or knife. The Court found that the notice was deficient for failure to identify the alleged victim, time or date. The tenant therefore was not put on adequate notice of the complained conduct so that he could prepare a defense. *See Cuyahoga Metropolitan Housing Authority v. Younger,* 639 N.E.2d 1253, 1257 (Ohio App. 1994) (affirming the lower court's dismissal of an eviction action where the notice contained allegations that unauthorized persons were in tenant's unit and that her neighbors were disturbed by activities therein. However, the notice failed to notify the tenant of dates of the alleged incidents and it also failed to identify individuals involved in the alleged incidents.).

9. Other cases where courts have found a notice to be deficient, similar to *Moon v. Spring Hill Apartments,* when it is “framed in vague and conclusory language” or “fails to set forth a factual statement to justify termination” or “merely parrots the broad language of the regulations” include:

- “Record of anti-social activities and arrests of your son, Fred, Jr., constituting a threat to the peace and safety of the community.” *Escalera,* 425 F2d. at 858 n. 2.

- “Illegal acts of Mr. Humphrey, having an adverse effect on the project and its tenants.” *Id.*

- “You are in violation of your lease in section 6j: The Tenant shall not commit or maintain a nuisance on or about the premises.” *Housing Auth. v. Saylors,* 19 Wash. App. 871, 578 P. 2d 76 (1978).

- “Serious, repeated damage to unit, repeated disturbance.” *Associated Estates Corp. v. Bartell,* 24 Ohio App.3d 6, 492 N.E.2d 841 (1985).

- “[E]ndangering [the] welfare of other tenants.” *Moon,* 11 S.W.3d at 433.

- “[C]reated and permitted ‘loud and disturbing noises in and about [their] apartment at all hours of the day and night.' ” *Pheasant Hill Estates Assoc. v. Milovich,* 33 Pa. D. & C. 4th 74 (1996).

10. AANI's notice bears the same type of vague and conclusory language as these examples of noncompliant language. The notice fails to identify the people involved in the events, and its broad and unexplained incidents of “harassment” and “criticism” do not meet the requirements under AANI's own contract or the applicable federal regulations. It is difficult to imagine what type of “criticism” could be legitimate grounds for an eviction. “Harassment” has multiple definitions. The notice using the words “criticism” and “harassment” without detailing who LYNAR spoke to, the dates of the “criticism” and

"harassment", and the actual words or conduct complained of in no way allows LYNAR to prepare a defense. The fact that the notice of termination states that the police were contacted has no relevance. There is no allegation that LYNAR made any actual threats or that the law enforcement even investigated once they were contacted. When a tenant is being evicted due to what he or she is alleged to have said, the requirement of specificity is particularly acute.

11. AANI requests that this Court excuse its contractual and regulatory noncompliance since LYNAR has not been "harmed" by AANI's insufficient notice. In making this argument, it relies in part upon a Texas appellate court's decision in *Nealy v. Southlawn Palms Apartments,* 196 S.W. 3d 386, 391 (Tex. Ct. App. 2006). There, the Court decided that the pre-suit notice did not comply with the specificity requirements, but decided to waive the landlord's obligations where landlord met with tenant to discuss undesirable behavior, neither tenant or counsel alleged they could not prepare a proper defense, the tenant filed an answer and engaged in discovery. *Id.* at 393. The *Nealy* court adopted this approach from the Georgia Court of Appeals, articulated in *Hill v. Paradise Apartments, Inc.,* 182 Ga.App. 834, 357 S.E.2d 288 (1987). There, the Georgia Court held that the tenant could not show harm caused by a noncompliant letter where the tenant had ten days to discuss the termination, had 30 days to vacate, hired a lawyer to represent her in the eviction action, filed an answer, and engaged in discovery. *Id.*

12. The "harm" analysis has not garnered support outside of Georgia and Texas state courts. Neither of the two federal cases with published opinions addressing the sufficiency of the notice purporting to terminate a tenant receiving rental subsidies adopted the "harm" analysis. In *Edgecomb,* the Court declared a noncompliant notice "unlawful and void." Another federal decision, *Swords to Plowshares v. Smith,* 294 F. Supp. 2d 1067, 1072-1073 (N.D. Cal. 2002), specifically rejected the "harm" analysis.

13. The majority of relevant state court decisions follow the federal approach and similarly dismiss eviction actions based upon a non-compliant termination notice. This majority includes New Jersey, New York, Pennsylvania, Rhode Island, Connecticut, Ohio, Washington, and also one Texas appellate Court. See, *Riverview Towers Assocs. v. Jones, 358 N.J.Super.* 85, 88, 90, 817 A.2d 324, 327 (2003); *Hedco, Ltd. v. Blanchette,* 763 A.2d 639, 643 (2000); *Jackson Terrace Ass'n. v. Paterson,* 155 Misc.2d 556, 557, 589 N.Y.S.2d 141, 142 (1992); *Cent. Brooklyn Urban Dev. Corp. v. Copeland,* 122 Misc. 2d 726, 729, 471 N.Y.S. 2d 989, 992 (1984); *Cuyahoga Metropolitan Housing Authority v. Younger,* 639 N.E.2d 1253, 1257 (Ohio App. 1994); *Moon v. Spring Creek Apartments,* 11 S.W. 3d 427, 433 (Tex. Ct. App. 2000); *Pheasant Hill Estates Associates v. Milovich,* 33 Pa. D. & C. 4th 74, 78 (Pa. C.P. 1996); *Glastonbury Hous. Auth. v. Martinez,* No. 82600, 1995 WL 621849, at *2 (Conn.Super.Ct. Oct. 16, 1995); *Stratford Hous. Auth. v. Reese,* No. SPBR-9411 28443, 1995 WL 264020, at *2 (Conn.Super.Ct. April 7, 1995); *Tacoma Rescue Mission v. Stewart,* 155 Wash.App. 250, 254 n. 9, 228 P.3d 1289 (2010).

14. Adoption of a "harm" analysis allows landlords to forego compliance with their contractual and regulatory pre-suit obligations simply because a tenant can raise defenses in the judicial eviction proceeding. Since any tenant can raise a defense to eviction in Florida, the "harm" analysis would permit landlords to evict tenants absent any compliance with the express provisions of the lease and federal regulations. This would be an exception that nullifies the contractual requirements of LYNAR's lease and HUD's regulations.

15. Further, the "harm" approach is incompatible with Florida's policy to strictly construe contractual and statutory forfeiture rights. The Florida Supreme Court explained: "The statute providing for summary proceeding by landlord to evict tenant must be strictly construed and substantially followed." *Wiesen v. Schatzberg,* 26 So.2d 62 (Fla. 1946).

16. Under Florida's strict construction of a landlord's termination rights, the Fifth District Court held that "a statutory cause of action cannot be commenced until the claimant has complied with all the conditions

precedent. Since the landlord failed to comply with the notice requirements, this action was properly dismissed." *Investment and Income Realty, Inc. v. Bentley,* 480 So. 2d 219 (Fla. 5th DCA 1985). *See also, Baker v. Clifford-Mathew Inv. Co.,* 128 So. 827 (Fla. 1930).

17. The requirement to dismiss an action where the party failed to comply with contractual or statutory conditions precedent has long been a feature of Florida jurisprudence, even outside of the landlord-tenant context.[1]

18. Accordingly, this Court declines to adopt a "harm" analysis and dismisses Plaintiff's action for possession without leave to amend.

WHEREFORE, it is Ordered and Adjudged:

A. Defendant's Motion for Summary Judgment is GRANTED.

B. Plaintiff's claims for eviction are DISMISSED without prejudice and without leave to amend.

C. The Court reserves jurisdiction to enter any orders as are necessary and proper, including orders awarding attorney's fees.

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[1] *Seaside Community Development Corp. v. Edwards,* 573 So.2d 142, 144 (Fla. 1st DCA 1991) ("When the happening of a condition precedent is an element of a contract, no recovery can be had with regard to performance of the contract absent substantial compliance with the condition precedent."); *Coquina, Ltd. v. Nicholson Cabinet Co.,* 509 So. 2d 1344 (Fla. 1st DCA 1987) (affirming a dismissal of a lien foreclosure action where the plaintiff failed to comply with conditions precedent.); *Nguyen v. Roth Realty, Inc.,* 550 So. 2d 490 (Fla. 5th DCA 1989) (reversing judgment where "it was established at trial that appellee did not comply with the condition precedent"); *Babe, Inc. v. Baby's Formula Service, Inc.,* 165 So.2d 795, 797 (Fla. 3d DCA 1964) ("(I)n order for the plaintiff to maintain its contract action, it must first establish performance on its part of the contractual obligations thereby imposed."); *Wright v. Fidelity & Cas. Co. of New York,* 139 So.2d 913, 915 (Fla. 1st DCA 1962) ("In the absence of such proof [of compliance with conditions precedent] it cannot be held as a matter of law that any liability was imposed on the [Defendant])." *Slaughter v. Barnett,* 154 So. 134 (Fla. 1934) ("One cannot maintain an action against the other without showing performance or a tender of performance on his part unless such performance has been excused."); *Holt v. Calchas,* 2015 WL 340554 (Fla. 4th DCA January 28, 2015) [40 Fla. L. Weekly D296a] (reversing a foreclosure judgment where the plaintiff did not demonstrate its compliance with contractual conditions precedent at trial.).

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