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Village Housing Development Fund Corp. v. Gadson

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

-----X

Village Housing Development Fund
Corporation, d/b/a VillageCare at 46 & Ten,
L & T INDEX NO. 56839/19

Petitioner

Amended

-against-

DECISION/ORDER

Howard Gadson

Respondent

-----X

J. SIKOWITZ:

RECITATION, AS REQUIRED BY CPLR SECTION 2219(A), OF THE PAPERS
CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIRMATION AND AFFIDAVITS ANNEXED.....	-----1-2-----
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	-----
ANSWERING AFFIRMATION	-----3-4-----
REPLYING AFFIRMATION.....	-----5-----
EXHIBITS.....	
OTHER	

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS
MOTION IS AS FOLLOWS:

Petitioner commenced this holdover proceeding seeking possession of the “premises” without stating a room or apartment number based on its claims that respondent engaged in nuisance behavior and violated the rules of Village Care as set forth in the handbook. Petitioner is a not-for-profit corporation organized and existing under the laws of the State of New York, and is the licensed operator of the adult care facility known as VillageCare at 46 & Ten (VillageCare). This holdover proceeding is commenced in accordance with the provisions of Section 461-h of the Social Services Law. The parties settled the case in a stipulation dated, November 1, 2019, providing for a six month probationary period in paragraph (3). Specifically, paragraphs 3 and 4 of the two attorney stipulation state:

3. Without admitting the allegations in the Petition, Respondent agrees to refrain from smoking in his Room or in the public areas of the Subject Building except for the designated smoking areas, for a period of six (6) months, from November 1, 2019 to April 30, 2020.

4. The parties hereby agree to mark the present proceeding off the Court’s calendar without prejudice to Petitioner restoring the proceeding to the Court’s calendar for trial in the event that Respondent violates Paragraph “3” of this Stipulation. Any motion to restore the proceeding must be made on at least eight (8) days’ notice to Respondent’s counsel and must include an affidavit of an individual with personal knowledge and good faith basis to restore the instant Proceeding. In the event the case is not restored by the end of the six (6) month period set forth in Paragraph “3”, the Proceeding will be deemed discontinued with prejudice, each side to bear its own costs and fees.

Petitioner moves by notice of motion, dated December 14, 2020, for an order restoring the proceeding to the calendar for trial. Respondent opposes the motion in all respects.

In support of the motion petitioner attaches affidavits from two employees of petitioner, and neither person has personal knowledge of respondent engaging in acts violating the paragraph (3) of the stipulation. Specifically Sharon Rosenzweig, a licensed master social worker, states that upon information and belief that on January 16, 2020, another VillageCare employee smelled a strong odor of cigarette smoke emanating from respondent’s room, and upon entering the room this other employee observed it was filled with smoke. Ms. Rosenzweig states she spoke to respondent and he admitted he smoked in his room.

The second affidavit is from Sandy Freeland, senior vice president of program operations for petitioner. This employee also has no personal knowledge of respondent breaching the parties’ stipulation. Ms. Freeland attaches incident reports reflecting respondent smoking cigarettes on dates in 2018 and 2019 all of which predate the petition herein, and were presumably the basis for the predicate notice and petition. Ms. Freeland repeats the alleged hearsay statement from an unknown employee of petitioner that Ms. Rosenzweig refers to in her affidavit.

In opposition to the motion, respondent states the instant motion is dated, December 14, 2020, seven and a half months after the April 30, 2020 deadline to restore the case. As per the two attorney stipulation, if there is no motion to restore the proceeding for trial based on breach of the stipulation on or before April 30, 2020, the proceeding is deemed discontinued with prejudice. It is undisputed that the hearsay allegations that respondent was smoking in his room reference an alleged occurrence on January 16, 2020, and petitioner states it was barred by the Governor’s executive orders from timely moving to restore the case for twelve months. Respondent argues that based on the untimeliness of the motion, it should be denied. In addition, the report of respondent smoking in his room on January 16,

2020, is based on hearsay allegations and there is no affidavit in support from anyone with personal knowledge as required by the stipulation. Respondent argues that the governor's executive orders do not toll the time limit in so ordered two attorney stipulations of settlement particularly when petitioner had the opportunity from January 16, 2020, the date of the alleged incident, to April 30, 2020, the deadline for restoring the case, a four and a half month time period. In addition, petitioner offers no explanation for waiting nearly one year to make this motion, dated December 14, 2020.

Respondent states in his affidavit that he was advised by his counsel that this case was closed in counsel's office in May 2020 based on petitioner failing to restore the case for trial as per the two attorney stipulation. Respondent states that any conversations he had with Ms. Rosenzweig, a social worker, were confidential and he believed any statement he shared with her was privileged. He never waived his right to confidentiality, and he never gave her permission to disclose his confidential communications with her.

In reply, petitioner argues it was stayed by the Governor's executive orders tolling "any specific time limit" set forth in any court order. Petitioner argues that its claim of alleged breach of the stipulation prohibiting smoking, which petitioner describes as endangering the health of the residents and staff, is not an "essential proceeding," and it would not have been permitted to submit an order to show cause for emergency relief. Petitioner argues that respondent's right to confidentiality in speaking with a social worker is outweighed by respondent's "repeated violation of VillageCare's smoking rules," without stating dates of repeated violations from someone with personal knowledge of these acts.

Discussion

This motion, dated December 14, 2020, to restore the proceeding for trial, based on respondent's alleged default by smoking a cigarette in January 2020, a date within the six month probationary period, is denied for the following reasons.


The two affidavits submitted by petitioner's social workers to the effect that in January 2020, respondent smoked a cigarette in his room, are not supported by an affidavit from the employee who has personal knowledge of the incident. One of the social workers relies on a conversation she had with respondent. Respondent states the conversation was privileged, and he never waived confidentiality, or his right to privacy with a social worker. It is undisputed that paragraph (4) of the two attorney stipulation requires that a motion to restore the case for trial be supported by an affidavit from someone with personal knowledge of the respondent's behavior.

Petitioner argues the fine points of "hearsay," but fails to address the requirement of the stipulation that the case be restored based on an affidavit from someone with personal knowledge. Personal knowledge is not repeating a statement made by an unknown person without even an offer of proof as to why there is no affidavit from the individual who has personal knowledge. It has been nearly sixteen months since the alleged smoking incident in January 2020, and petitioner offers no supplemental affidavits to support an allegation that respondent is smoking cigarettes with its January 25, 2021 reply papers.

The two attorney, so ordered, stipulation requires that a motion to restore the proceeding for a trial based on respondent's alleged breach of the agreement within six months shall be supported by an affidavit from someone with personal knowledge of the breach. The motion fails to contain such an

affidavit. The proceeding was deemed discontinued with prejudice if not restored by April 30, 2020, and the instant motion is dated December 14, 2020. There is no indication petitioner notified respondent's counsel of its intention to restore the case prior to April 30, 2020, but was waiting based on petitioner's belief it was barred by the governor's executive orders. Petitioner sent respondent's counsel a letter referencing an incident on May 17, 2020, which is outside the six month deadline of April 30, 2020. Petitioner did not notify respondent it was not filing a motion to restore because it did not believe this was an essential matter. Petitioner believed that respondent's alleged smoking in his bedroom in violation of the rules, a danger to other tenants and staff, was not an essential matter. Assuming arguendo, the motion was timely filed, it would be denied as it is not supported by an affidavit from someone with personal knowledge. Petitioner's motion to restore the proceeding for trial is denied. This constitutes the decision and order of the court.

DATED: April 15, 2021



Marcia J. Sikowitz, JHC