2020-02-11

60 W. 190th St. LLC v. Rodriguez

[*1]

60 W. 190th St. LLC v Rodriguez
2020 NY Slip Op 20039
Decided on February 11, 2020
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the printed Official Reports.

Decided on February 11, 2020

Civil Court of the City of New York, Bronx County

60 West 190th Street LLC, Petitioner,

against

Jaqueline Tupette Rodriguez, Respondent-Tenant.

48560/19

Mobilization for Justice

By: Andrew Jones, Esq.

424 East 147th Street, 3rd Fl.

Bronx, NY 10455

&

Novick Edelstein Pomerantz P C

By: Gregory S. Bougopoulos, Esq.

733 Yonkers Ave.

Yonkers, NY 10704

Shorab Ibrahim, J.

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of this motion.

Papers Numbered

Notice of Motion 1

Cross Motion and Affirmation in Opposition 2

Reply Affirmation in Support of Notice of Motion 3

After oral argument held on January 28, 2020, and upon the foregoing cited papers, the decision and order on this motion is as follows:

FACTUAL AND PROCEDURAL HISTORY

/i>

*This is a nonpayment proceeding commenced by 60 West 190th Realty LLC, ("petitioner"), seeking possession of 60 West 190th Street, Apt. 3C, Bronx, NY 10468, ("the subject premises" or "apartment"), naming Jacqueline Tupette Rodriguez, ("respondent"), as the tenant of record. Petitioner commenced this action by written fourteen-day rent demand dated September 23, 2019 seeking $4,012.37 in rent arrears from June through September 2019 at a monthly rent of $1,146.42. A petition and notice of petition were thereafter served and filed, [*2]dated October 28, 2019. Paragraph seven of the petition states "the premises are not subject to rent control, rent stabilization or the Emergency Tenant Protection Act of 1974 because said premises are rented for business purposes."*

Respondent filed a pro-se answer and the proceeding was first scheduled to the court's calendar on December 2, 2019. On that day, Respondent retained counsel with Mobilization for Justice through the "Universal Access" program, and now moves for the relief requested herein.

Respondent moves to dismiss pursuant to CPLR 3211(a)(7), or in the alternative, for leave to amend the pro-se answer. Respondent seeks dismissal on the grounds that the petition incorrectly states the apartment is an unregulated commercial premises when, in fact, it is rent stabilized. Petitioner cross-moves to amend the petition to reflect the proper regulatory status, conceding the premises are rent-stabilized. Petitioner opposes respondent's motion to the extent it seeks dismissal. For the reasons stated below, respondent's motion to dismiss is denied, the cross-motion is granted solely to the extent that the petition is deemed amended to reflect the apartment is subject to rent-stabilization and respondent's request to serve and file the amended answer is granted.

DISCUSSION

In relevant part, Section 741 of the Real Property Actions and Proceedings Law requires the petition in a summary eviction proceeding "state the respondent's interest in the premises and [their] relationship to petitioner with regard thereto," "describe the premises from which removal is sought," and "state the facts upon which the proceeding is based."

While this court recognized some continued viability of MSG Pomp Corp. v Doe, (185 AD2d 798, 586 NYS2d 965 [1st Dept 1992] [interpreting RPAPL 741 as requiring petitioner to plead the proper regulatory status of the subject premises]), the better rule is the one espoused by the Appellate Term, Second Department in 17th Holding LLC v Rivera, "[i]n the absence of any demonstrable prejudice to tenant, we deem the petition amended to state that the premises is subject to rent stabilization." (195 Misc 2d 531, 758 NYS2d 758 [2002]; citing Birchwood Towers No. 2 Associates v Schwartz, 98 AD2d 699, 700, 469 NYS2d 94 [2nd Dept 1983] ["A petition in a summary proceeding is no different than a pleading in any other type of civil case. A petition which may fail to state facts sufficient to constitute a cause of action or contains other pleading infirmities is capable of correction by amendment."]; Paikoff v Harris, 185 Misc 2d 372, 376, 713 NYS2d 109 [2nd Dept 1999] ["in the absence of prejudice to a party, it is permissible to amend the pleadings in summary proceedings even with respect to misstatements of the rent-regulated status of the tenancy"]; see Shahid v Ansari, 2 Misc 3d 1, 3, 770 NYS2d 566 [App Term, 2nd & 11th Jud Dists 2003]).

Courts in this Department have similarly held. (see Coalition Houses L.P. v Bonano, 12 Misc 3d 146[A], 2006 NY Slip Op 51516[U] [App Term, 1st Dept 2006] [absent prejudice, no abuse in allowing amendment of misstatement in petition]; OLR ECW LP v Meyers, 59 Misc 3d 650, 72 NYS3d 780 [Civ Ct, Bronx County 2018] ["respondents have not pointed to any aspect of the regulatory agreement which affects their substantive rights or why the absence of a reference to it in the petition is prejudicial to them and warrants dismissal of the proceeding"]). Here, respondent alleges no prejudice and this court cannot discern any under the known facts.

*To be sure, there remains instances where the failure to plead a specific form of regulation or regulatory status may require dismissal. (see Westchester Gardens LP v Lanclos, 43 Misc 3d 681, 685-687, 982 NYS2d 302, [Civ Ct, Bronx County 2014]). Indeed, respondent cites to several cases where the proceeding was dismissed for such reasons. In Jasper L.P. v [*3]Davis, this court dismissed a petition which alleged the premises was subject to rent-stabilization, but which did not alert respondent or the court to additional regulatory schemes, namely a regulatory agreement with the New York City Department of Housing Preservation and Development ("HPD"), the Shelter Plus Care program ("S+C"), project-based Section 8, and Low-Income Housing Tax Credits ("LIHTC"). (63 Misc 3d 1209[A], 2019 NY Slip Op 50448[U] [Civ Ct, Bronx County 2019]).[FN1] These agreements*

should have been known to the court to properly adjudicate the matter, regardless of whether respondent could demonstrate prejudice.

In East 168th Street Assoc. v Castillo, the petition was dismissed as it failed to plead which particular Section 8 program the tenancy was subject to. (60 Misc 3d 774, 79 NYS3d 486 [Civ Ct, Bronx County 2018]). The court opined,

> *"the petitioner's conclusory statement that the premises are a HUD building that receives assistance under the Section 8 program is inadequate. The petitioner ignores that there are numerous Section 8 programs, each subject to different rules and requirements. The petition is silent as to by which Section 8 program the respondent's tenancy is governed Pleading the particular Section 8 program would enable respondent and/or her attorney to discern exactly which requirements apply to her, and to determine the scope of her rights and defenses."*

(id at 783-784; see Volunteers of Am-Greater NY, Inc. v Almonte, 65 AD3d 1155, 1157, 886 NYS2d 46 [2d Dept 2009]).

*In Mauro v Choi, the Hon. Gerald Lebovitz dismissed a petition which "intentionally tried to deceive respondents, DHCR, and this court." (11 Misc 3d 1070[A] at *6, 816 NYS2d 697 [Civ Ct, New York County 2006]). Such an equitable consideration, it appears, must be taken, even in this Department. In Hughes v Lenox Hill Hosp., the Appellate Division states,*

> *Plaintiff has stated no basis why the notice served by defendant should be regarded as unreasonable or, alternatively, should be subject to strict construction as a matter of equity (see, e.g., MSG Pomp Corp. v Doe, 185 AD2d 798, 586 NYS2d 965 [landlord's misrepresentation of ownership and rent-regulated status of apartment]).*

(226 AD2d 4, 18, 651 NYS2d 418 [1st Dept 1996]). Thus, not all errors or misstatements in pleading are the same. Sometimes, equity favors dismissal, particularly if the tenant can demonstrate real prejudice or the court is unable to fully assess the matter before it when it is not provided the proper regulatory frameworks. Here, there has been no allegation of intentional misrepresentation or an intent to deceive the court or respondent. Consequently, equity favors amendment and for the proceeding to move forward on the merits.

Amendment is favored, absent "surprise or prejudice resulting directly from the delay." (Lindo v Brett 149 AD3d 459, 52 NYS3d 308 [1st Dept 2017] citing McCaskey Davies &

Assoc. v New York City Health & Hosps Corp, 59 NY2d 755, 757, 463 NYS2d 434 [1983]). As such, the court grants petitioner's motion to amend the pleading to reflect the proper regulatory status. The court notes that respondent was able to obtain counsel and counsel quickly identified the defect in the petition. Additionally, as the subject apartment is denoted as "3-C" in a Bronx apartment building, it is likely the court would have identified the regulatory status of the apartment without difficulty. (compare, Lanclos, supra and Davis, supra, wherein the additional regulatory schemes could not be known by the court); see PCMH Crotona, LP v Taylor, 57 Misc 3d 1212[A], 2017 NY Slip Op 51401[U] [dismissal for failure to plead the existence of an OMH contract at the subject premises, which would have alerted the court to respondent's possible mental health concerns]). **[FN2]**

In this same vein, respondent's motion for leave to amend her answer is granted. Petitioner has not opposed this branch of respondent's motion and, in any case, given that the Court is permitting petitioner to amend its petition, respondent is entitled to an opportunity under CPLR § 3025(d) to serve and file an amended answer to that amended petition. (see Pri Villa Avenue L.P. v Santiago, 62 Misc 3d 1206[A], 2019 NY Slip Op 50012[U] [Civ Ct, Bronx County 2019]).

CONCLUSION

Based on the foregoing, it is So Ordered, respondent's motion seeking dismissal under CPLR 3211(a)(7) is denied. Petitioner's motion seeking leave to amend the pleadings is granted. Respondent's amended answer is deemed served and filed. The proceeding is adjourned to March 9, 2020, Part F, Room 320, 9:30 A.M., for all purposes, including settlement or trial. This constitutes the decision and order of the court.

SO ORDERED,

Dated: February 11, 2020

HON. SHORAB IBRAHIM

Judge, Housing Part

Footnotes

Footnote 1: *To the extent that this court's decision in Jasper L.P. v Davis referenced Almonte in discussing whether prejudice is a consideration, (see, e.g., 1691 Fulton Avenue Associates LP v. Stacy Lynn Johnson, Index No. 53393/2018 at 5, unpublished opinion [Civ Ct, Bronx County, Nov. 22, 2019]), we note that the petition in Almonte was dismissed for its failure to allege petitioner's contract with DHS which "provided the tenant with certain potential defenses, and the Civil Court could not have properly adjudicated this proceeding without that contract." Similarly, the petition in 1691 Fulton Avenue Associates LP v Johnson did not state, as required, that the premises received federal low-income housing tax credits, as supervised by HFA and HPD, and was therefore subject to regulatory agreements with HFA and HPD.*

Footnote 2: *In absence of a formal motion by petitioner, this court could, and would, deem the pleadings amended. (see 17th Holding LLC v Rivera, 195 Misc 2d at 532).*

Return to Decision List