2020-03-25

Boston Tremont Hous. Dev. Fund Corp. v. Torres

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Boston Tremont Hous. Dev. Fund Corp. v Torres
2020 NY Slip Op 50367(U)
Decided on March 25, 2020
Civil Court, Bronx County
Lutwak, J.
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Decided on March 25, 2020

Civil Court, Bronx County

Boston Tremont Housing Development Fund Corporation, Petitioner-Landlord,

against

Ely Torres, , Respondent-Tenant.

L & T Index No. 23102/2019

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Diane E. Lutwak, J.

Recitation, as required by CPLR 2219(A), of the papers considered in the review of Respondent's Order to Show Cause to Vacate Default Judgment, Restore Case to Calendar and for such other relief as may be just:

PapersNumbered

Order to Show Cause with Supporting Affidavit Dated 5/29/2019 1

Supplemental Affirmation in Support Dated 11/8/2019 and Exhibits A-O 2

Affirmation in Opposition Dated 2/7/2020 and Exhibits A-P 3

Upon the foregoing papers, and for the reasons stated below, Respondent's Order to Show Cause is decided as follows.

PROCEDURAL HISTORY & FACTUAL BACKGROUND

This is a nonpayment eviction proceeding commenced by Boston Tremont Housing Development Fund (Petitioner) seeking to recover possession of Apartment #6F at 1016 Bronx Park South, Bronx, NY 10460 (the subject premises) based on the allegation that Ely Torres

(Respondent), a tenant living in a project-based Section 8 building administered by HUD (United States Department of Housing and Urban Development), has failed to pay past due rent.

PROCEDURAL HISTORY

Petitioner issued a "Ten (10) Day Notice" on March 22, 2019 seeking $2294.00, comprised of rent arrears of $349.00 for October 2018 and for the five months of November 2018 through March 2019 at the monthly rate of $389.00. This notice was followed by a nonpayment petition dated April 27, 2019 seeking rent arrears of $2683, comprised of the monies listed in the rent demand plus $389.00 for April 2019. Respondent *pro se* filed an answer on May 20, 2019 using the court's "Answer in Person" form (CIV-LT-91 rev'd Oct 2014), on which she checked off a "General denial" and asserted "financial hardship". The case was calendared for an initial court appearance on May 23, 2019.

Respondent failed to appear on May 23, 2019 and the court issued a final judgment of possession and a money judgment for $2683 to Petitioner. On May 29, 2019, prior to any warrant requisition by a City Marshal, Respondent *pro se* filed an Order to Show Cause seeking to vacate the default judgment, which was signed and made returnable June 13, 2019. In her affidavit in support of that Order to Show Cause Respondent asserted as her excuse for defaulting on the initial court date: "My daughter was sick with fever and bad asthma." As a defense to the proceeding Respondent asserted: "They charging me as if I was working still gave them the paperwork they have not dropping my rent I cant not pay this amount."

On the return date of her Order to Show Cause, Respondent was referred for legal assistance and the case was adjourned to July 11, 2019. Respondent retained counsel and the Order to Show Cause was adjourned to August 20 by written Stipulation in which Respondent agreed to provide Petitioner with (1) proof that she was not receiving unemployment insurance benefits and (2) verification from her former employer that she was no longer working. On August 20 the Order to Show Cause was adjourned to August 30 by a Stipulation in which Petitioner acknowledged receipt in court that day from Respondent of the documentation listed in the July 11 Stipulation. On August 30 the Order to Show Cause was adjourned by Stipulation to October 7 "for Petitioner to review the unemployment letter and former employer letter". The Order to Show Cause was then adjourned on consent four more times — to November 22, to January 7, to February 19 and then to March 16 — during which time Respondent's counsel filed

a Supplemental Affirmation in Support of Respondent's Order to Show Cause on November 8, 2019 and Petitioner's counsel filed an Affirmation in Opposition on February 11. The motion was marked submitted, decision reserved, on March 16, 2020.

Respondent seeks vacatur of the default judgment pursuant to CPLR R 5015(a)(1) based upon excusable default (having to care for a sick child at home) and a meritorious defense (improper rent amount) Petitioner opposes, arguing that Respondent failed to submit any medical documentation to support her claim that the default is excusable, failed to submit any documentation to substantiate her defense that she was being charged an incorrect rental amount and has made no rent payments whatsoever since October 2018

DISCUSSION

Under CPLR § 5015(a)(1), a default judgment may be vacated where the moving party [*2]demonstrates a reasonable excuse for their default and a meritorious defense to the proceeding. *Eugene Di Lorenzo, Inc v A C Dutton Lumber Co* (67 NY2d 138, 501 NYS2d 8 [1986]); *Goldman v Cotter* (10 AD3d 289, 781 NYS2d 28 [1st Dep't 2004]). What constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court. *Chevalier v 368 E 148th St Associates, LLC* (80 AD3d 411, 914 NYS2d 130 [1st Dep't 2011]). The determination of whether a reasonable excuse has been offered is *sui generis* and should be based on all relevant factors, among which are the length of the delay chargeable to the movant, whether the opposing party has been prejudiced, whether the default was willful or deliberate, and the strong public policy favoring the resolution of cases on the merits rather than on default. *Li Xian v Tat Lee Supplies Co, Inc* (126 AD3d 424, 2 NYS3d 344 [1st Dep't 2015]); *Chevalier v 368 E 148th St Associates, LLC, supra*, *citing* *Harcztark v Drive Variety, Inc* (21 AD3d 876, 876-877, 800 NYS2d 613 [1st Dep't 2005]); *Guzetti v City of New York* (32 AD3d 234, 820 NYS2d 29 [1st Dep't 2006]); *Silverio v City of New York* (698 NYS2d 669, 266 AD2d 129 [1st Dep't 1999]); *Fromartz v Bodner* (266 AD2d 122, 698 NYS2d 142 [1st Dep't 1999]).

Litigants may be relieved of their defaults even when represented by counsel and the default is due to "law office failure", *Mejia v Ramos* (113 AD3d 429, 979 NYS2d 281 [1st Dep't 2014]) ("the belief of plaintiffs' counsel that he thought an adjournment had been granted, although not the strongest argument, amounts to a law office failure 'which is a recognized excuse for vacatur of a default'"), and a motion court's failure to vacate a default in such circumstances may

constitute reversible error, *see, e.g., Chelli v Kelly Group, PC* (63 AD3d 632, 883 NYS2d 26 [1st Dep't 2009])(reversing lower court's order denying defendants' motion to vacate a default order entered five weeks earlier where defendants "demonstrated their failure to appear was neither willful nor part of a pattern of dilatory behavior, but was purely the result of inadvertent law office failure on the part of the attorneys to whom they had entrusted their defense"); *FEB Realty LLC v Public Adm'r for NY County* (45 Misc 3d 131[A], 3 NYS2d 284 [AT 1st Dep't 2014])(reversing Housing Court Judge's order and granting motion to vacate default judgment in eviction proceeding where the default "was not willful or deliberate but rather the result of her (now former) counsel's misguided expectation that his request to adjourn the return date of petitioner's motion would be granted").

Respondent has made a sufficient showing on both prongs of the 5015(a)(1) test to warrant vacatur of the default judgment and warrant of eviction. Respondent promptly moved to vacate her default on May 29, 2019, just three business days after the initial calendar date on May 23, 2019 and before a City Marshal even requisitioned a warrant of eviction. There were no prior undue delays, as the petition itself was dated April 27, 2019 and Respondent filed her answer on May 20, 2019. Respondent's sworn statement in her affidavit supporting her Order to Show Cause that her daughter "was sick with fever and bad asthma" was unrefuted, and the fact that Respondent came to court within a few days after missing the first court appearance reflects that the default was unintentional. Further, the default was an isolated event; while the case was adjourned on consent many times after Respondent filed her Order to Show Cause, the record reflects no other defaults. Medical documentation was not required, *compare 219 E 7th St Hous [*3]Dev Fund Corp v 324 E 8th St Hous Dev Fund Corp* (40 AD3d 293, 836 NYS2d 81 [1st Dep't 2007]); *Norowitz v Ponconco, Inc* (96 AD2d 581, 582, 465 NYS2d 276, 277 [2nd Dep't 1983]), especially where, as here, Respondent did not claim that she took her daughter to a doctor.

As for a meritorious defense, aside from asserting a "general denial" in her answer to the petition, Respondent in her affidavit in support of her Order to Show Cause raised a defense of demonstrable merit. While the petition states and it is undisputed that Respondent's tenancy is subject to one of HUD's Section 8 housing programs, Respondent disagreed that Petitioner had correctly set her share of the monthly rent at $389 as stated in the petition. She conveyed this in her sworn affidavit of May 29, 2019, asserting that she was being charged as if she were still working, even after providing paperwork. For purposes of this motion, the court accepts the accuracy of Respondent's affidavit and construes it liberally as she was not represented by

counsel at the time she prepared and filed it. *Pezhman v City of New York* (29 AD3d 164, 168, 812 NYS2d 14, 18 [1st Dep't 2006]). Respondent further elaborated on this defense in the supplemental sworn affidavit prepared by her subsequently-retained attorney which she signed on October 23, 2019.

Regarding the numerous documents attached as exhibits to Respondent's supplemental and Petitioner's opposition papers, it is evident that there are factual issues regarding the correctness of the $389 per month tenant share stated not just in the rent demand and petition but also in the two-page HUD-50059 form and ten-page Model Lease for Subsidized Programs, both of which documents appear on their face to have been signed by Respondent on July 23, 2018. A review of Petitioner's rent ledger, copies of which were attached as exhibits to both sides' papers, shows that the monthly tenant share of $389 which Petitioner began billing in August 2018 is significantly higher than the $88 rate Respondent had been paying for much of the prior two years, even though she claims to have lost her job in May 2018 and been left with no income other than monthly child support payments of $562.30. However, that issue, as well as Petitioner's further increase of Respondent's rent during the course of this litigation to a market level of $1571 per month effective September 2019, will have to await resolution at trial, unless the parties can reach a mutually acceptable settlement.

CONCLUSION

For the reasons stated above, Respondent's Order to Show Cause is granted. The default judgment is vacated and this proceeding is hereby restored to the Court's calendar for settlement or trial on a future date that will be scheduled upon resolution of the current COVID-19 emergency and/or full resumption of court operations. This constitutes the Decision and Order of this Court, copies of which will be emailed to the parties' respective attorneys.

Diane E Lutwak, HCJ

Dated: Bronx, New York

March 25, 2020

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