2020-04-23

2015 MONTEREY AVENUE LLC v. Stewart

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART K

2015 MONTEREY AVENUE LLC

Petitioner,

-against-

BRIDGE STEWART

Respondent.

L&T Index No.: 016878/2019

DECISION/ORDER

Recitation, as required by CPLR § 2219 [a], of the papers considered in review of Respondent's Motions.

PAPERS	NUMBERED
Respondent's Notice of Motion (Seq #1); Affirmation; Affidavit and Exhibits ("A" – "I")	1, 2, 3, 4
Petitioner's Affirmation in Opposition (Seq #1); Affidavit; and Exhibits ("A" – "H")	5, 6, 7
Respondent's Notice of Cross-Motion (sic) (Seq. #2); Affirmation; Memorandum of Law; Affidavit & Exhibits ("AA"- "GG")	8, 9, 10, 11, 12
Petitioner's Affirmation in Opposition (Seq #2) & Exhibits ("A" – "C")	13, 14
Respondent's Affirmation in Reply and Exhibits ("A" – "B")	15, 16

Upon the foregoing cited papers, the Decision and Order is as follows:

BACKGROUND

This nonpayment proceeding was commenced by 2015 Monterey Avenue LLC ("Petitioner") against Bridge Stewart ("Respondent") seeking $972.90 in outstanding rent for a period encompassing four months from December of 2018 through March of 2019. Respondent, now represented by counsel, has moved for leave to amend the answer that the Respondent filed as an unrepresented litigant. Before this motion was submitted to the Court for a decision on its merits, Respondent filed a "cross-motion for partial summary judgment". This motion seeks partial summary judgment on the claim that a portion of Petitioner's rent is barred by the doctrine of laches. This defense has not been properly interposed as it is the subject of Respondent's undecided motion for leave to amend. Petitioner has

submitted written opposition to both of Respondent's motions. Respondent's respective motions are consolidated for disposition herein.

DISCUSSION

I. Respondent's Motion Seeking Leave to Amend Her Answer

As a self-represented litigant, the Respondent interposed an answer on April 15, 2019 which raised the following four defenses:

- *My name appears improperly;*
- *The rent, or a part of the rent, has already been paid to the Petitioner;*
- *There are or were conditions in the apartment and/or the building/house which the Petitioner did not repair and/or services which the Petitioner did not provide. "Mildew In Bathroom; Stove Not Working"; AND*
- *General Denial. "The rent has been paid".*

In her proposed verified amended answer annexed to Respondent's motion (Seq.# 1) as Exhibit G, she seeks leave to interpose the following defenses a) service related defenses concerning the rent demand and notice of petition and petition; b) a defense predicated upon the doctrine of laches; c) a defense which expounds upon the reason that the rent or a part thereof has already been paid; d) a defense grounded upon RPAPL § 741; and e) a habitability related defense.

Leave to amend pleadings is governed by CPLR 3025 [b] which provides that:

> "[a] party may amend his or her pleading . . . at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

It should be noted that a motion to amend a pleading is a matter "committed almost entirely to the court's discretion [and is] to be determined on a *sui generis* basis, with the widest possible latitude being extended to the court" (*Murray v City of New York*, 43 NY2d 400, 404–405 [1977]). Leave to amend should be freely given absent prejudice or surprise resulting directly from the delay in moving to amend. (*See Fahey v County of Ontario*, 44 NY2d 934 [1978]; *McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 91 AD2d 516 [1st Dept 1982], mod. on other grounds, 59 NY2d 755 [1983]). A party opposing leave to amend "must overcome a heavy presumption of validity in favor of [permitting amendment]" (*Otis El. Co. v. 1166 Ave. of Ams. Condominium*, 166 AD2d 307, 307 [1st Dept 1990]).

In the matter at bar, the Court grants leave to interpose the First, Second, Third, and Fourth Affirmative Defenses. These defenses either expound upon those defenses already plead by the Respondent in her *pro-se* answer or, in the case of Respondent's defense based on laches (which is raised for the very first time), do not cause prejudice or surprise to the Petitioner. Such defense was raised in the early stages of the litigation providing Petitioner ample opportunity to respond to such claims. Nor does the Court find that this defense is entirely devoid of merit.

The Court, however, strikes Respondent's service related defenses concerning service of the Notice of Petition and Petition. The Respondent, through counsel, executed a stipulation on April 22, 2019 which not only adjourned the proceeding but amended the Petition to date. If this stipulation had simply adjourned the proceeding or provided the Respondent additional time to answer or to submit a motion against the Petition, the agreement would not constitute a personal appearance such that it would waive the Respondent's right to contest personal jurisdiction (*see e.g. Rothlein v W.W. Norton & Co., Inc.*, 185 Misc 2d 66 [Sup Ct, New York County 2000]). But, in amending the Petition to date, the Respondent participated in the nonpayment proceeding on its merits by amending Petitioner's own pleadings: conduct which this Court finds is indicative of an intention to make this court her own forum. Respondent's service related defense concerning the rent demand, however, shall be interposed. A defense challenging the service of a predicate does not implicate personal jurisdiction (*see 156 Nassau Ave. HDFC v Tchernitsky*, 62 Misc 3d 140[A], [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019]).

II. Respondent's Motion for Partial Summary Judgment

Standard for Summary Judgment

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 N.Y.2d 361, 364 [1974]). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law/tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 231 [1978]).

Summary Judgment and Respondent's Laches Defense

Respondent moves this court for partial summary judgment based upon the doctrine of laches. Respondent argues that a portion of the money sought in the Petition is for a time period that renders it stale. All of the rent sought in the Petition purports to be for sums which accrued within the year immediately preceding the date of the Petition. Respondent argues, however, that Petitioner's accounting methods in applying rental payments has concealed the fact that Petitioner's claims truly date back to either 2014 or 2015. Petitioner opposes and states that Respondent essentially had a zero balance in August of 2017.

Courts may employ summary judgment on a laches defense wherein the moving party has successfully plead all of the requisite elements (*1515 Macombs, LLC v Jackson*, 50 Misc 3d 795 [Civ Ct, Bronx County 2015, Vargas, J.]; *Bldg. Mgt. Co. Inc. v Bonifacio*, 25 Misc 3d 1233[A][Civ Ct, New York County 2009, Lebovits, J.]). To establish laches, a party must show: (a) conduct by an offending party giving rise to the situation complained of; (b) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so; (c) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief; and (d) injury or prejudice to the offending party in the event that relief is accorded the complainant (*Bldg. Mgt. Co. Inc. v Bonifacio*, 25 Misc 3d 1233[A][Civ Ct, New York County 2009, Lebovits, J.]). All four elements are necessary for the proper invocation of this equitable doctrine based upon fairness (*Meding v Receptopharm, Inc.*, 84 AD3d 896, 897 [2nd Dept. 2011]; *Dwyer v Mazzola*, 171 AD2d 726 [2nd Dept. 1991]; A & E Tiebout Realty v Johnson, 23 Misc 3d 1112A [Civ Ct, Bronx County 2009], affd 26 Misc 3d 131[A] [App Term, 1st Dept 2010]).

Applying the laches doctrine to the instant matter, Respondent is awarded partial summary judgment on her affirmative defense as there are no genuine issues of material fact. The parties are in agreement that Respondent's rent from August of 2017 through and including May of 2018 was $252 per month. The parties further agree that Respondent was charged $256 each month in June and July of 2018

based on an annual certification of Respondent's income and thereafter this rent upwardly adjusted to $260 for the months of August 2018 through March 2019 (the last month sought in the Petition). The parties further concede that there was $215 paid each month during this time period except for March of 2019 when a total of $367.50 was paid. As such, there was a shortfall each and every month except for March of 2019. Based on these calculations, the Respondent underpaid a total of $659.50 in rent for the time period of August of 2017 through March of 2019. Furthermore, contrary to Petitioner's claims that Respondent essentially had a zero balance in August of 2017, the Court's own calculations show that $313.40 of the total sought in the Petition pre-dates August of 2017. Respondent concedes for the purposes of the motions that there were sums owed before August of 2017. Accordingly, the first element of laches is satisfied. The second element has also been satisfied as Petitioner delayed approximately twenty (20) months to collect the $313.40 it now seeks in this proceeding. The third element, lack of notice, is satisfied by the fact that no rent was demanded prior to the demand that predicated the instant nonpayment proceeding (*15 W. 24th St. Corp v Stallman,* 2001 NY Slip Op 40504 [U] [App Term, 1st Dept 2001] (A jurisdictional prerequisite to the bringing of a nonpayment petition is a demand for rent). Although Respondent may have received monthly rent bills, it has long been the law that an ordinary rent bill, delivered in the normal course of business, does not satisfy the requirements of a rent demand (*RCPI Landmark v Chasm Lake Management Services, LLC,* 32 Misc 3d 405 [Civ Ct, New York County, 2011]). Lastly, the fourth element of prejudice has been satisfied as the Respondent is not only a recipient of public assistance benefits which might make it difficult to pay the rental arrears but more importantly, given the length of time that has transpired, Respondent would find it difficult to present rent payments to ascertain the true amount of arrears that have accrued in the time period before August of 2017.

Where, as here, a tenant establishes all of the requisite elements of laches, the landlord must establish a reasonable excuse for the delay or be barred from recovering a possessory judgment for arrears found to be stale (*1560-80 Pelham Pkwy. Assoc. v Errico,* 177 Misc 2d 947, 948 [App Term, 1st Dept 1998], citing *City of New York v Betancourt,* 79 Misc 2d 907, 908 [App Term, 1st Dept 1974]). Here, Petitioner has failed to provide a reasonable excuse but instead has tried to cloud the issues before this Court by arguing that the Respondent essentially had a zero balance in August of 2017. This argument is predicated on a line item which appears on Petitioner's rent ledger on August 1, 2017 and seemingly indicates that the Respondent had a balance of $22.40 through such date. This, however, is a product of accounting fiction as there were several line items made on that very same day representing adjustments (both credits and charges) based on a recertification of Respondent's annual income in 2017. Furthermore, a portion of the

credit that allowed Petitioner to reduce Respondent's debt to $22.40 represented a credit for rent that had not yet accrued and should not be attributable to debt owed pre-dating that date.

Therefore, based on the above, $313.40 in rental arrears representing sums which pre-date August of 2017 is severed for a plenary action (*Abart Holdings, LLC v. Hall,* 2004 NY Slip Op 50823U, *1 [App Term 1st Dept]). Petitioner may pursue all claims for outstanding rent that has accrued from August 2017 to date in the instant proceeding and seek a final judgment for the same.

CONCLUSION

Accordingly, it is hereby:

ORDERED, that Respondents' motion seeking leave to interpose an amended answer is GRANTED. Respondent's amended answer annexed to her motion (sequence #1) as exhibit G shall be deemed served and filed, *nunc pro tunc.* The Court, however, strikes the personal jurisdiction defense concerning the notice of petition and petition as the Respondent has waived such defense; and it is further

ORDERED, that Respondent is granted partial summary judgment on her second motion (sequence # 2). The Court finds that of the $972.90 sought in the Petition, $313.40 represents sums that pre-date August of 2017 and are stale. The aforementioned sum is severed from this proceeding for a plenary action.

ORDERED, that this matter is restored to the Court's calendar in Part K, Room 350 on June 25, 2020 @ 9:30a.m. for trial. This date is subject to change in the event that the Court continues to hear only essential matters due to the COVID-19 pandemic.

This constitutes the Decision/Order of this Court.

Dated: April 23, 2020
Bronx, New York

HON. KRZYSZTOF LACH
Judge, Housing Court