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Jonas Brock Hous. Co. v. Martinez

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: Housing Part K

JONAS BRONCK HOUSING COMPANY INC.,

L & T Index No. 14269/18

Petitioner,

Present:

Hon. Norma J. Jennings

RAFAEL MARTINEZ,

DECISION/ORDER

Respondent.

HON. NORMA J. JENNINGS:

Recitation, as required by CPLR 2219(A), of the papers considered in review of respondent for leave to amend his answer and discovery:

| PAPERS | NUMBERED |
|---|-----------------|
| Respondent's motion to amend and for Discover, memorandum of law, affidavits and exhibits annexed | 1 |
| Petitioner's affirmation in opposition and exhibits annexed | 2 |
| Affirmation in Reply | 3 |

After oral argument via Skype for Business and upon the foregoing cited papers, the decision and order on this motion is as follows:

BACKGROUND AND PROCEDURAL HISTORY:

This nonpayment proceeding was commenced in March 2018 seeking rental arrears totaling \$4,984.00 for the period, September 2017 through March 2018 at a monthly rental of \$709.00. Paragraph (7) of the petition provides that "The demised premise is not subject to the New York City Rent Control or the Rent Stabilization Law of 1969, and as amended, because the premises is located in a building owned by a limited profit housing company pursuant to Article II of the Private Housing Finance Law and the US Department of Housing and Urban Development Pursuant to Section 236 of the National Housing Act as administered by the Federal Housing Administration (FHA). The project was created for the purpose of providing housing for the elderly." The proceeding has had a long and protracted history and respondent has been represented by Mobilization or Justice, Inc., throughout this proceeding. On May 7, 2018, respondent filed a Demand for a Verified Bill of Particulars requesting information regarding the monthly rent and payments. The Bill of Particulars also requested that petitioner provide information on how the amount of rent was calculated and the income upon which the rent was based. In response to the question as to how respondent's rent was calculated, petitioner responded "based upon the income

and household composition respondent submitted to petitioner for his 2105 & 2106 annual recertification. However, respondent has failed to submit his income and household information to petitioner for his 2017 & 2018 recertification.”¹

The proceeding was adjourned several times for possible settlement and in April 2019, respondent moved, pursuant to CPLR 3211(a)(1), 3211(a)(5), and 3211(a)(7), or in the alternative, pursuant to CPLR section 3212 to dismiss the petition. Respondent also moved, pursuant to CPLR 3025(b,) for leave to file an amended answer. Respondent sought dismissal on the ground of judicial estoppel and petitioner simultaneously commenced a holdover and nonpayment proceeding against the respondent. Respondent argued that petitioner declined to collect use and occupancy in that proceeding “but reserved its right to collect same and it is now judicially estopped from seeking to evict Mr. Martinez for those same monies.”² Respondent also sought dismissal on the grounds that the rent demand was defective, and payments were made that satisfied the petition. In the alternative, respondent moved for leave to file an amended answer in which he raised a defense of general denial as well as a defective rent demand, judicial estoppel, tender and refusal, payment, laches and counterclaims for breach of the warranty of habitability, injunctive relief for breach of the warranty of habitability, and attorney’s fees. On March 17, 2020, the Honorable Krzysztof Lach denied respondent’s motion to dismiss the proceeding, pursuant to CPLR 3211(a)(1); CPLR 3211(a)(5); 3211(a)(7); and CPLR 3212. Respondent’s motion seeking leave to file an amended answer was granted, however, the court struck respondent’s first affirmative defense of defective rent demand and second affirmative defense of judicial estoppel.

Respondent now moves, pursuant to CPLR 3025(b), for leave to file a second amended answer, and pursuant to CPLR section 408 and 3101, for leave to conduct discovery. Respondent argues that leave to amend an answer shall be freely given absent prejudice or surprise resulting directly from the delay, is not palpably insufficient or patently devoid of merit. Here, respondent is seeking to amend his answer in order to raise an argument that came to light during settlement discussions, and if aware, would have been raised in his first amended answer. Respondent argues, petitioner cannot claim prejudice because the proposed answer includes the same defenses and counterclaims as in the first amended answer and an additional defense discovered during settlement negotiations.

The thrust of respondent’s argument is that the subject premises are subject to Department of Housing and Urban Development (“HUD”) regulations which must be strictly followed, petitioner has failed to adhere to the requirements of the HUD handbook to provide Three Reminder Notices to respondent, prior to recertification, which bars him from commencing a nonpayment proceeding and requires dismissal of the proceeding, pursuant to RPAPL Section 741. Chapter 7 of the HUD handbook outlines the requirements to recertify a tenant’s income which must be included in the Three Reminder Notices. The First Reminder Notice must be provided to the tenant 120 days before the recertification anniversary date and if the tenant fails to respond within 30 days of the First Reminder Notice, a Second Reminder Notice must be sent which includes all of the information in the First Reminder Notice. If the tenant fails to respond, a Third Reminder Notice, which has to include the information from the First Reminder Notice, must be sent no later than 60 days prior to the anniversary date. These notices, respondent argues, also must be provided in languages other than English if the tenant has limited

¹ Petitioner’s response to question 2 of the Bill of Particulars.

² Memorandum of Law in Support of respondent’s motion to dismiss, page 9.

proficiency. In this proceeding, respondent argues, the three notices fail to meet the HUD requirements because the Second Reminder Notices in 2018 and 2019 do not include the information from the First Reminder Notice, and since petitioner did not provide copies of the Third Reminder Notice for 2018 and 2019 it is not clear whether they were sent.

Respondent also moves, pursuant to CPLR 3101(a) for leave to conduct discovery, which provides that there shall be full disclosure of all matters “material and necessary” in the prosecution or defense of an action. Respondent argues, the Court of Appeals has interpreted “material and necessary” liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. Discovery is discretionary and must be evaluated on a case by case basis and is granted upon a showing of “ample need,” enumerated in *New York University v. Farkas* which respondent has met. In this proceeding, petitioner’s non-compliance with the HUD handbook entitles respondent to discovery, as reviewing the past income recertification reminders will show if petitioner complied with the HUD procedure and if not, petitioner cannot maintain this proceeding. Respondent has a meritorious defense that he did not receive income recertification reminders in 2017, 2018, and 2019 as required by the HUD handbook. The information requested is directly related to the cause of action, as the reminder notices provided are deficient, and the request is tailored to clarify the disputed facts, as respondent is requesting income recertification reminders for 2017, 2018, 2019, and 2020 along with respondent’s annual recertification date. Petitioner is not prejudiced as they are required to maintain copies of income recertification notices in tenants file, however, respondent will be prejudiced because he cannot prepare adequately for trial without the notices, and the court can alleviate prejudice by requiring discovery to be completed within the twenty days outlined in the Notice to Produce.

PETITIONER’S OPPOSITION:

Petitioner argues in opposition that respondent’s motion to amend his answer must be denied as respondent was already granted leave to amend his answer by Judge Lach and could have raised this defense in the first amended answer. This motion, petitioner argues, is a tactic to delay the proceeding which is prejudicial to petitioner, and respondent’s allegation that amendment is necessary because counsel only became aware during settlement negotiations that respondent failed to recertify in 2018 and 2019, is meritless. In response to respondent’s Verified Bill of Particulars petitioner stated that respondent failed to complete recertifications for 2017 and 2018, and counsel confirmed that she received 2017 recertification documents.

Petitioner argues that respondent’s motion for discovery must also be denied because respondent has not shown “ample need” and in a simple nonpayment proceeding there is generally no reason to permit discovery, as there are usually insufficient facts in dispute to justify the prejudice to petitioner by further delaying the landlord’s recovery of rent or possession. Petitioner further argues that respondent has not shown “ample need,” as the request is overly broad, burdensome, seeks irrelevant information and is not narrowly tailored to clarify the disputed fact as respondent is seeking income recertification reminder notices from 2017 through the present to establish its claim that petitioner failed to comply with the HUD Handbook notice requirements. Petitioner argues it is not required to comply with the HUD Handbook as respondent’s tenancy is not being terminated nor is respondent being charged

market rent, despite failing to recertify for 2018 and 2019. The tenants in the subject premises which are governed by Section 236 of the National Housing Act, must recertify on an annual basis to verify their income and ensure they do not exceed the limits for a low-income unit. Based upon the documentation provided by respondent, he was found to be a 60% eligible tenant and in 2015 NYSFHA and DHCR approved monthly rentals for a one bedroom apartment of \$693.00 with a marked rent of \$929.00 and respondent's rent remained \$693.00 until June 1, 2019 when NYSFHA and DHCR approved an increase in rent to \$748.00 for a one bedroom with a market rent of \$1,003.00. On May 24, 2019, petitioner sent respondent a notice that his monthly rent would increase to \$748.00 effective July 1, 2019 and this is respondent's current monthly rent.

Petitioner argues that respondent alleges he suffers from depression but has not provided medical documentation or proof that he informed petitioner that he spoke Spanish and requested all notices be sent in Spanish. Petitioner argues these allegations, fail to make a showing of "ample need" and the motion to amend the answer and discovery must be denied because respondent can establish his defense that he did not receive the Three Reminder Notices at trial. Petitioner further argues respondent has not disputed the monthly rent charged by petitioner in either amended answer, and the cases cited by respondent in support of its position are distinguishable and do not apply to the present case.

DECISION:

RESPONDENT'S MOTION FOR LEAVE TO AMEND HIS ANSWER:

CPLR Section 3025(b) provides "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." Leave shall be freely given absent prejudice or surprise resulting directly from the delay in moving to amend. *Fahey v. County of Ontario*, 44 NY2d 934 (1978), however, mere delay, is not sufficient to show prejudice.

This is respondent's second motion to amend his answer. In this amended answer respondent has raised an additional affirmative defense that petitioner cannot maintain this proceeding because it did not comply with the HUD Handbook by failing to send the three required Reminder Notices prior to respondent's recertification anniversary. Respondent's counsel states that her office only became aware of this defense during a conference in May 2020, however, the petition in this case clearly states that the premises are not rent-stabilized but are a section 236 building governed by HUD. In addition, in response to respondent's Bill of Particulars petitioner stated that respondent failed to recertify for 2017 and 2018. The court has the discretion to allow respondent to raise a defense that was not previously raised despite being represented by Mobilization for Justice, Inc., throughout this proceeding.

Respondent's motion for leave to file and serve an amended answer is granted. Respondent has raised a meritorious defense to this proceeding, specifically the failure of petitioner to comply with the HUD handbook. Chapter 7 of the HUD Handbook specifies the requirements for recertification, including the three notices that must be sent prior to the tenant's recertification anniversary and must be maintained in the tenant file documenting the date the notice was issued. Pursuant to the HUD Handbook,

4350.3(7)(B)(2) the owner must provide tenants with Three Reminder Notices, the first within 120 days prior to the recertification anniversary date. The First Reminder Notice must 1) refer to the requirement in the HUD model lease regarding the tenant's responsibility to recertify annually, 2) state the names of the staff person at the property to contact about scheduling a certification interview, the contact information for this person, and how the contact should be made. The owner may propose an interview date as long as the tenant has the option to reschedule the interview for a more convenient date and time, 3) give the location, days, and office hours that property staff will be available for recertification interview, 4) list the information that the tenant should bring to the interview, 5) State the cutoff date by which the tenant must contact the owner and provide the information and signatures necessary for the owner to process the recertification, 6) state that if the tenant responds to the owner after the specified date (10th day of the 11th month after the last annual recertification), the owner will process the annual recertification but will not provide the tenant 30 day notice of any resulting rent increase, 7) state that if the tenant fails to respond before the recertification anniversary date, the tenant will lose the assistance and will be responsible for paying the section 236 market rent.

If the tenant within 30 days fails to respond to the first reminder, the landlord must provide a Second Reminder Notice with all the information given in the First Reminder Notice, approximately 90 days prior to the tenant's recertification anniversary informing the tenant his/her certification is due. If the tenant does not respond to the Second Reminder Notice 60 days before the recertification anniversary date, the owner must provide a Third Reminder Notice no later than 60 days prior to the anniversary date, this notice serves as a 60 day notice to terminate assistance, and a 60 day rent increase notice. 7(B)(3) The Third Reminder Notice must provide the tenant with all of the information given in the First Reminder Notice, specify the amount of rent the tenant will be required to pay if the tenant fails to provide the required recertification information by the certification anniversary date and state that this rent increase will be made without additional notice. All three reminder notices must be maintained in the tenant file documenting the date the notice was issued. 7(B)(4).

Respondent relies on several cases in support of his argument that petitioner cannot maintain this proceeding because the Reminder Notices sent failed to comply with HUD handbook requirements. In *Starrett City Inc. v. Brownlee*, 22 Misc.3rd 38, (App. Term 2nd Dept. 2008), the Appellate Term affirmed the vacatur of a default judgment and dismissal of the proceeding on the ground that the first and third recertification notices were deficient in that they did not include the information required by HUD, specifically the name and contact information for the person employed at the property to recertify the tenant and the rent the tenant would be obligated to pay absent recertification of income eligibility. The court held that there was an improper termination of the section 8 subsidy and such an improper termination bars the maintenance of a nonpayment proceeding. In *SEBCO IV Associates LP v. Lytza Colon*, 63 Misc.2d 1227(A)(Civ. Ct. Bronx County 2019), respondent who resided in a project based Section 8 building federally subsidized by HUD, was sued for the market rate rent based upon her failure to timely recertify her income. In granting respondent's motion for discovery, the court noted "in order to charge market rent for failure to recertify, petitioner was required to provide the respondent with a series of written notices per the HUD handbook, failure to comply with these notice requirements invalidates any termination or suspension of a section 8 subsidy for failure to recertify, and bars collection of market rent from a tenant in a project-based subsidized apartment."

In *Henry Phipps Plaza S. Assoc. Lt., Partnership v. Quijano*, 137AD3d 602 (2016) *rev'g for reasons set forth within dissenting op of Schoenfeld, J*, 45 Misc.3d 12 (App. Term 1st Dept. 2014), despite the respondent intentionally mis-representing her income, the landlord failed to follow the proper HUD procedures before attempting to terminate respondent's tenancy. The petitioner did not provide the notice of the possibility of eviction based upon fraud, nor did it afford the unrepresented tenant the opportunity to respond prior to commencing a proceeding as required by HUD rules, depriving the tenant of due process. In *Green Park Associates v. Inman*, 121 Misc.3rd 204 (Civ. Ct. Kings County, 2019), the court dismissed the proceeding due to petitioner's failure to comply with HUD procedures. In this case, petitioner was the landlord of a substantially rehabilitated dwelling rented under United States Housing Act of 1937 who sued respondent for nonpayment as the tenant did not pay the market rent charged after the landlord refused to recertify him. The landlord believed the tenant was ineligible because another person moved in with respondent and his family. The HUD handbook required that when the landlord learned of a change in a tenant's household, it had to immediately notify the tenant in writing of the need to recertify and give the tenant 10 calendar days to respond. There was no recertification interview held prior to termination of benefits and there was no documentation of any specific demand for information required for recertification. The only document offered by petitioner in satisfaction of the requirements of section 5-13 was a letter notifying the tenant that his tenancy had already been terminated upon the expiration of his lease, there was no mention of an increase in rent.

Petitioner is correct that these cases can be distinguished from the present proceeding as respondent has not been charged market rent, fees or surcharges, but just the alleged maximum low income rent for a one-bedroom unit. However, petitioner's argument that the HUD rules are not required to be complied with in commencing a nonpayment proceeding is in contravention of the case law which states that the HUD Handbook requirements are to be strictly construed and a nonpayment proceeding cannot be commenced if not followed. Although respondent is not being charged market rent nor has his lease been terminated, if respondent does not pay the arrears due, he can lose his subsidy and be evicted from his apartment.

Petitioner provided to respondent's counsel, the First and Second Reminder Notices for 2018 and the First and Second Reminder Notices for 2019.¹ Petitioner failed to submit any Reminder Notices for 2017 or Third Reminder Notices for 2018 and 2019. The First Reminder Notice for 2018 dated January 10, 2018 and First Reminder Notice for 2019 dated January 4, 2019 are identical. The Court notes that the notices were not sent in Spanish and failed to provide the name of the staff person to contact regarding scheduling of a recertification interview. The notice also fails to provide the contact information for the individual person, and how the contact should be made. Respondent is given a date and time to recertify and told "you must meet with management office representative at the above date and time and supply the required information." Respondent is not given an option to reschedule for a more convenient date and time. The Notice also fails to give the location, days, and office hours that management staff will be available for recertification interviews or the cutoff date by which the tenant must contact the owner and provide the information and signatures necessary for the owner to process the recertification. The Notice fails to state that if the tenant responds to the owner after the specified cutoff date, the owner will process the annual recertification, but will not provide the tenant 30-day notice of any resulting rent increase. The Notice provided states that if respondent fails to certify his income, in a timely manner, it may result in loss of his subsidy and an increase in rent but does not say

the tenant would be responsible for paying the Section 236 market rent. The Second Reminder Notices which are also identical but are in English and Spanish, dated February 22, 2018 and February 4, 2019, respectively, do not include any of the information from the First Reminder Notice which is required by the HUD Handbook.

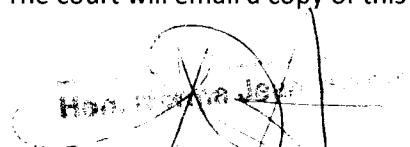
Respondent's motion for discovery is also granted. A summary proceeding is, by its very nature, an expedited adjudication process where discovery is not available as a matter of right. Instead, discovery is allowed only by leave of court and upon a showing of "ample need". *New York University v. Farkas*, 121 Misc.2d 643 (Civ. Ct. NY County 1983). Although routinely granted in holdover proceedings discovery may also be granted in nonpayment proceedings; *Pamela Equities Corp. v. Frey Co.*, 120 Misc.2d 281 (Civ. Ct. NY County 1983); and is not for the landlord's exclusive benefit. *Smilow v. Ulrich*, 11 Misc.3d 179 (Civ. Ct. NY County 2005). In showing "ample need" the six factors to be considered are 1) whether the respondent has asserted facts to establish a cause of action; (2) where there is a need to discover information directly related to the cause of action; 3) whether the information requested is carefully tailored and is likely to clarify the disputed facts; 4) whether prejudice will result from granting discovery; 5) whether the court can alleviate the prejudice; 6) whether the court can structure discovery.

Respondent has shown "ample need" for discovery. In this proceeding, both parties are represented by counsel, respondent has asserted facts to support his defense that petitioner has not complied with the HUD Handbook Notice requirements, and the requested documentation in the Notice to Produce directly deals with this defense. The information requested is carefully tailored and will clarify the facts as to whether the required notices were sent and complied with the HUD handbook. Petitioner will not be prejudiced as the requested documents are required by HUD to be kept in the tenant file and should be produced within twenty (20) days.

Accordingly, respondent's motion to amend her answer is granted. The annexed amended answer is deemed filed and served. Respondent's motion discovery is also granted. Petitioner is to respond to the Notice to Produce within twenty days of this decision with Notice of Entry. The proceeding is adjourned to October 19, 2020 at 10:00am for a conference via Skype. The court will send an invitation to both sides.

This constitutes the decision and order of this court. The court will email a copy of this decision to both sides.

Dated: September 2, 2020
Bronx, New York



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J.H.C.

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ⁱ Exhibit D Respondent's Notice of Motion