2020-09-28

Department of Hous. Preserv. & Dev. v. Rieder

[*1]

Department of Hous. Preserv. & Dev. v Rieder
2020 NY Slip Op 51095(U)
Decided on September 28, 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This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on September 28, 2020

Civil Court of the City of New York, Bronx County

Department of Housing Preservation And Development ("DHPD"), Petitioner(s),

against

Ben Rieder, 2085, LLC, and JONATHAN WIENER, Respondent(s)-Landlord.

1767/2020

David L. Moss & Associates

Attorneys for Respondents

Via email: Jordan@mossnylaw.com [Jordan J. Tapis, Esq.]

&

DHPD

Via email: apriglia@hpd.nyc.gov [Adam Aprigliano, Esq.]

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 With Affirmation And Exhibits A-C 1

Affirmation in Opposition With Exhibits 1-5 2

After oral argument on September 24, 2020, and upon the foregoing cited papers, the decision and order on this motion is as follows:

FACTUAL AND PROCEDURAL HISTORY

This proceeding, commonly referred to a "heat and hot water" case, was commenced by the Department of Housing Preservation and Development ("DHPD") after placement of violations for inadequate heat and/or hot water In this type of case, DHPD seeks, in addition to an order directing a landlord to provide adequate heat and hot water, civil penalties for time such services were not provided

DHPD's original petition is dated January 13, 2020, with service on Ben Rieder and Jonathan Wiener complete on February 3, 2020 upon the filing of the affidavits of service

with the court.[FN1] (*see Rodriguez v Rodriguez*, 103 AD3d 117, 123, 957 NYS2d 699 [2nd Dept 2012]). The January 13, 2020 petition alleges violations issued on December 17, 2019 and December 24, 2019 and seeks fines ranging from $250 to $500 per day for the first violation and $500 to $1000 per day for subsequent violations [from the date the violation is placed until the violation is corrected]. On the first court date, March 5, 2020, respondents appeared by counsel and the matter was adjourned to March 26, 2020 for respondents to submit an answer.[FN2] Respondents [*2]have not answered the original petition.

On March 10, 2020, petitioner served an amended petition by mail to respondents' counsel. The amended petition adds a violation placed on January 31, 2020 and eliminates the language about the "first violation" and its attendant fines. Rather, the amended petition seeks between $500 and $1000 per day for each violation issued [from the date the violation issued to the date the violation is corrected]. Respondents did not answer the amended petition.

Respondents now move for dismissal of the amended petition. They argue that under CPLR § 3025 leave of court was required for petitioner to serve the amended pleading. They also argue that service of the amended petition on counsel, rather than the respondents directly, is improper.

Thus, the court is required to answer two distinct procedural questions: was leave of court required for petitioner to serve the amended petition and is service of an amended pleading upon counsel, rather than the respondent directly, proper?

DISCUSSION

CPLR § 3025(a) states,

> Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.

Amended pleadings served within these parameters, are served as "of right." When an amended pleading is not "as of right" and is done without leave of court, (*see* CPLR § 3025(b)), it is considered a nullity. (*Walden v Nowinski*, 63 AD2d 586, 404 NYS2d 635 [1st Dept 1978]; *Nikolic v Federation Employment and Guidance Service, Inc.*, 18 AD3d 522,

524, 795 NYS2d 303 [2nd Dept, 2005]. Here, however, in the absence of an answer, the court agrees with petitioner that the twenty (20) day limitations encapsulated in CPLR § 3025(a) never began to run, much less expire. (*Gowen v Helly Nahmad Gallery, Inc.*, 60 Misc 3d 963, 979, 77 NYS3d 605 [Sup Ct, New York County, 2018] ("Despite the age of the instant matter, the Defendants have not yet filed an Answer. Therefore, pursuant to CPLR § 3025(a), the amendment of the complaint is proper as of right."); *Empire Blue Cross and Blue Shield v Various Underwriters of Lloyds, London, England*, 5 Misc 3d 1024[A] at *2, 2004 NY Slip Op 51528[U] [Sup Ct, New York County, 2004]; *Jones v State of New York*, 67 Misc 3d 1201[A] at *3, 2020 NY Slip Op 50351[U] [Court of Claims 2020] ("Moreover, the Court notes that Claimant's time to amend the Claim as of right under CPLR 3025 (a) has not yet expired as Defendant has not served an answer to the Claim."); *Hedgepeth v Wing*, 5 Misc 3d 1009[A] at *4, 2004 NY Slip Op 51300[U] [Sup Ct, Westchester County 2004]).

Any other outcome would be absurd. Even if the amended petition were a nullity, as respondents claim, after respondents serve an answer to the original petition, petitioner could timely serve the amended petition without leave of court. The CPLR ought not be read to give appearing respondents a procedural advantage *by not filing an answer*. Alternatively, even if the amended petition were *deemed* a nullity, petitioner could move to serve the amended petition pursuant to CPLR § 3025(b).

As the amended pleading was properly served without leave of court, the court turns to respondents' second argument—that service of the amended pleading must be in in the same manner of the original petition. Respondents fail to recognize the clear distinction between the original petition, which must be served on respondents directly for the court to obtain jurisdiction over them, and the amended petition, which does not require such service.

To state it bluntly, there is simply no authority supporting respondents' argument. Numerous courts, on the other hand, have held the there is no need for personal service anew of an amended pleading. (*Pinto v House*, 79 AD2d 361, 365, 436 NYS2d 733 [1st Dept 1981] ("There is no need to serve a supplemental summons upon a party that has already been properly joined in the action."), *citing Patrician Plastic Corp. v Bernadel Realty Corp.*, (25 NY2d 599, 607, 307 NYS2d 868 [1970] ("Extensive research fails to yield either statute or decisional precedent which would require in all cases that a defendant already in an action be served with original process if a new claim is to be made against it "); *Doyle v Happy Tumbler Wash-O-Mat, Inc.*, 113 Add 818, 820, 493 NYS2d 578 [2nd Dept 1985] ("It is well

settled that a defendant who is already properly in an action need not be served with original process when a new claim is to be made against it."); *Rohany v State*, 144 Misc 2d 940, 942, 545 NYS2d 513 [Ct of Claims 1989]; *Park Ave. Bank v Cong. & Yeshiva Ohel Yehoshea*, 29 Misc 3d 446, 449, 907 NYS2d 571 [Sup Ct, Kings County 2010]).

Consequently, service of the amended petition to respondents' attorney was entirely proper. (see CPLR § 2103(b); *Yeshiva Ohel Yenoshea, supra*; *Rohany v State, supra*).

The court now turns to respondents' request to file a late answer. The parties stipulated on March 5, 2020 than an answer was due on or about March 26, 2020. The world and this state's court system, as we knew it on March 5, 2020 quickly changed. In fact, on March 7, 2020, Governor Andrew Cuomo issued Executive Order 202 declaring a statewide emergency due to the Covid-19 pandemic. Then, on March 20, Governor Cuomo issued Executive Order 202.8 ("EO 202.8"). Although EO 202.8 stayed "[a]ny specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state ", it did not appear to stay the requirement to file an answer. Petitioner argues that the amended petition likely made its way to respondents' counsel's office "no later than March 15, 2020" and that an answer should have already been served. However, respondent then did not have to answer the original petition and EO 202.8 further states, "[e]ach employer shall reduce the in-person workforce at any work locations by 100% no later than March 22 at 8 p.m." Based on these unique circumstances and this state's strong public policy to resolve disputes on their merits, (*see Pichardo v 969 Amsterdam Holdings, LLC*, 176 AD3d 571, 572, 108 NYS3d 845 [1st Dept 2019]), the request to file a late answer to the amended petition is granted.

CONCLUSION

Based on the foregoing, it is Ordered, that respondents' motion to dismiss the amended petition is denied in all respects. Respondent shall file an answer within ten (10) days of receipt of this Decision and Order. The matter is adjourned to October 21, 2020 at 10:40 A.M., for a teleconference via Microsoft Teams.

This constitutes the Decision and Order of the court.

Copies of this Decision/Order will be emailed to the parties by the court.

SO ORDERED,

Dated September 28, 2020

Bronx, NY

/S/

SHORAB IBRAHIM, JHC

Footnotes

Footnote 1: Service on 2085, LLC was complete on February 18, 2020.

Footnote 2: Though the notice of appearance lists only 2085, LLC, respondents' counsel clearly represents all named respondents.

Return to Decision List