2020-12-07

1020-45 Realty Corp. v. Melendez

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART R

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1020-45 Realty Corp.,

Petitioner-Landlord,

L&T Index No. 51216/20

-against-

DECISION/ORDER

Luis Melendez;
Olga Albino, et al.

Respondent-Tenant.

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Zhuo Wang, J.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of respondent's motion for summary judgment and petitioner's cross-motion.

Papers	**Numbered**
Notice of Motion and Affidavits Annexed.....	1
Affirmation in Opposition, and Affidavits Annexed	2

In this nonpayment proceeding, Petitioner sought to recover alleged rental arrears for the premises located at 1020 45th Street, Apt 4G, Brooklyn, NY pursuant to a rent-stabilized lease. Respondents filed a *pro se* answer asserting general denial.

The proceeding first appeared on the court's calendar on January 27, 2020. Respondents subsequently retained Mobilization for Justice as counsel and, on March 13, 2020, prior to the COVID-19 emergency shutdown, Respondents moved the court for leave to amend their *pro se* answer to include, among others, defenses of improper service, breach of warranty of habitability, and several counterclaims. Respondents'

motion was granted on July 22, 2020, and their proposed Amended Answer attached to their motion was deemed served and filed.

On August 11, 2020, Respondents filed a motion to dismiss based on improper service of the rent demand and lack of personal jurisdiction. The motion to dismiss was granted on October 9, 2020 only to the extent of setting this matter down for a traverse hearing on service of the rent demand and the notice of petition and petition. This proceeding was set down for a traverse hearing in this trial part on December 9, 2020.

Respondents' filed the instant motion on November 9, 2020, seeking leave, for the second time, to serve and file an amended answer pursuant to CPLR §3025(b). The proposed amended answer contains a defense under Tenant Safe Harbor Act ("THSA"), which was signed into law on June 30, 2020, asserting that Respondent suffered financial hardship resulting from the COVID-19 pandemic. Respondents argue that leave to amend pleadings should be freely given absent significant prejudice to the other side. Respondents also assert that since there was a recent change in the law enacted to ameliorate instance of financial hardship such as instant case. Respondents argue that there is no unfair surprise to Petitioner since Petitioner was aware of the proposed defense, which was discussed at a conference on October 21, 2020, but that in any case, unfair surprise is only found in extreme situations, such as when a movant delayed for years. Respondents also assert that during the pendency of the motion to dismiss, they informed Petitioner of their intent to move to amend their answer to include a defense

under TSHA. In any event, Respondents argue that on this type of motion to amend, the court need not test the validity of the proposed defense, and that it should only be denied where the proposed amendment is insufficient as a matter of law and is totally devoid of merit.

Petitioner argues that it would be unduly prejudicial for Respondents to submit an amended answer at this juncture in the litigation in a trial ready case, where Respondents were aware of the defense for several months and filed the instant motion to amend shortly prior to the commencement of the trial. Petitioner argues that this appears to be a "conscious and strategic decision to delay this matter as long as possible." Petitioner also argues that no corroborating evidence has been offered in support of Respondents' proposed defense and casts doubts on Respondents' claims that they suffered financial hardship as the result of loss of income (Respondent Melendez allegedly formerly drove for Uber to support his family, which he contends was no longer profitable after the emergency shutdown) and directly due to Respondents and their children contracting the COVID-19 virus.

CPLR § 3025 provides that leave to amend pleadings shall be freely granted. The Court of Appeals has held that "[l]eave to amend the pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay," [Fahey v County of Ontario, 44 NY2d 934, 935 (1978)]. Additionally, "[p]rejudice . . . is not found in the mere exposure of the defendant to greater liability. Instead, there must be some indication that the

defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position," [Loomis v Civetta Corinno Constr. Corp., 54 NY2d 18, 23 (1981) (citations omitted)]. Moreover, mere delay is not enough to constitute prejudice [see, e.g. Godell v Greyhound Rent A Car, Inc., 24 AD2d 568 (2d Dept 1965)].

Petitioner cites to Boyd v Trent, 297 AD2d 301, 303 [2d Dept 2002] for the proposition that "[c]ourts should determine 'how long the amending party was aware of the facts upon which the motion' is based . . . [and] when a party's delay is at issue, the movant must demonstrate a reasonable excuse for the delay and provide an affidavit of merit."

Boyd is factually distinguishable from the case at bar. First, in Boyd, plaintiffs waited 10 years to serve an amended complaint rather than the four mere months it took Respondents in the instant case to move to interpose a defense based on the recently passed TSHA. Moreover, assuming Boyd applies to the case at bar because this is a trial-ready matter, Respondents have asserted a reasonable excuse despite their possible awareness of the facts surrounding this defense since March; namely, the defense was not available to them until the law was passed in late June. Lastly, under Boyd, Respondents have established that the proposed amendment is meritorious. Namely, Respondents have provided affidavits describing the effects the COVID-19 emergency has had on their finances and their health, as well as the health of their children. Respondent Melendez

detailed his difficulties, as the sole provider for the family of five, to continue to earn a living as an Uber driver during the pandemic, which ultimately resulted in him having to find work in construction, where work opportunities are inconsistent and pay significantly less than he was earning previously. Respondents also stated that the entire family contracted COVID-19 and that it took several weeks to recover from the virus.

Furthermore, Petitioner does not dispute Respondents assertion that Respondents informed Petitioner of their intent to amend the answer while the prior motion to dismiss was *sub judice* or that the amendment was discussed at a prior conference with the court. Thus, Petitioner cannot claim to have been surprised by the amendment. Petitioner will not be hindered in the preparation of his case or prevented from taking some measure in support of his position since the defense Respondent seeks to interpose places no additional burden on Petitioner to prove its case. Under the TSHA, it is Respondents burden to prove the defense. Furthermore, the TSHA does not relieve Respondents from paying the alleged rental arrears that accrued during the covered period. Petitioner can still obtain a money judgment for the amount owed during that period, if it can prove its entitlement to such. Petitioner can also still maintain a claim for a possessory judgment for any amount that accrued prior to the covered period.

Accordingly, Respondents' motion is granted to the extent that Respondents' Second Amended Answer, attached as "Exhibit A" to the motion, is deemed served and

filed. This proceeding will appear on the Part R calendar on December 8, 2020 at 9:30AM for a virtual traverse hearing.

This constitutes the decision and order of the court.

Dated: December 7, 2020

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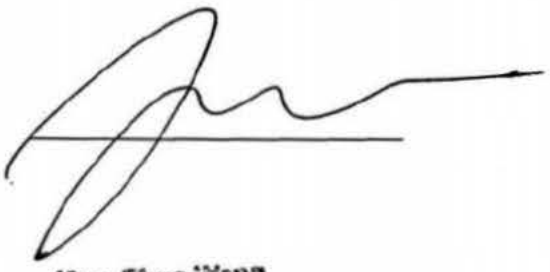

Hon. Zhuo Wang
Judge, Housing Court