2021-07-27

Silverstein v. Huebner

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Silverstein v Huebner
2021 NY Slip Op 50702(U)
Decided on July 27, 2021
Civil Court Of The City Of New York, Kings County
Stoller, J.
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Decided on July 27, 2021

Civil Court of the City of New York, Kings County

Yehuda Silverstein, Petitioner,

against

Levi Huebner and ELIE POLTORAK, Respondents.

Index No. 94101/2018

For Petitioner: Nissan Shapiro

For Respondent: Dana M. Christensen

Jack Stoller, J.

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Pages numbered

Notice of Motion and Supplemental Affidavit and Affirmation Annexed 1, 2, 3

Addendum to Notice to Restore and Supplemental Affirmation and Affidavit Annexed 4, 5, 6

Notice of Cross-Motion and Supplemental Affirmation and Affidavits Annexed 7, 8, 9

Affirmation and Affidavit In Opposition and Reply 10, 11

Reply Affirmation 12

Upon the foregoing papers, the Decision and Order on this motion are as follows:

Yehuda Silverstein, the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Levi Huebner ("Respondent"), a respondent in this proceeding, and Elie Poltorak ("Co Respondent"), another respondent in this proceeding, seeking possession of the subject premises Petitioner obtained a judgment against Co Respondent on inquest and a warrant issued Petitioner now moves for leave to execute on the warrant Co Respondent cross moves to remove the judgment obtained against him, to vacate a stipulation that Respondent entered into with Petitioner, and for leave to interpose an answer The Court consolidates these motions for resolution herein

This proceeding was first noticed to be heard on December 19, 2018 Respondent, who is an attorney, initially represented Co Respondent in this matter and moved for relief, including but not limited to dismissal on the basis of lack of personal jurisdiction, supported by an affirmation of Co Respondent (who is also an admitted attorney), dated January 24, 2019 By an order dated April 5, 2019, the Court denied so much of the motion as sought dismissal and [*2]directed service of an answer within thirty days Petitioner effectuated

service of this order on Co-Respondent with notice of entry by regular mail on April 11, 2019. Co-Respondent never served an answer. The Court also granted Respondent's separate motion to be relieved as Co-Respondent's attorney and, finding that Co-Respondent was not a necessary party, transferred this case to the trial part by an order dated May 16, 2019. After a substantial amount of motion practice and adjournments, Respondent entered into a stipulation with Petitioner on March 4, 2020 ("the Stipulation"). Co-Respondent did not appear in Court that day and, of course, did not sign the Stipulation. The Stipulation conferred a judgment of possession upon Petitioner as against Respondent, provided for a forthwith issuance of a warrant of eviction, and stayed execution thereof through March 31, 2020. The Stipulation stated that Co-Respondent remained in possession of the subject premises. The Court held an inquest on March 4, 2020 and then entered a judgment of possession against Co-Respondent ("the Judgment"), with the same timeframe regarding the issuance and execution of the warrant. The warrant issued on March 16, 2020.

The global COVID-19 pandemic ensued, with its attendant stays of eviction. In 2020, the Court promulgated a directive, DRP-213, that required landlords seeking an eviction to move for relief to do so.[FN1] Petitioner served his motion for this relief on September 30, 2020, which was subsequently adjourned. On December 28, 2020, the Governor signed into law the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, L. 2020, c. 381 ("CEEFPA").[FN2] Co-Respondent filed with the Court a hardship declaration, defined in §4 of CEEFPA, which had the effect of staying execution of the warrant of eviction through August 31, 2021 ("the expiration of the statutory stay"). CEEFPA, Part A, §8. Co-Respondent then moved to remove the Judgment pursuant to Part A, §7 of CEEFPA by a motion e-filed on June 3, 2021. If the Judgment was removed, the warrant would by necessity have to be vacated as well,[FN3] and the hardship declaration would have the effect of staying all further proceedings through the expiration of the statutory stay. CEEFPA, Part A §6.

CEEFPA Part A, §7, entitled "Default Judgments," requires a landlord seeking an "enforcement of an eviction pursuant to a default judgment" to first move for such relief after December 28, 2020, upon which motion the Court shall hold a hearing. If, as in this matter, a default judgment had been awarded prior to December 28, 2020, "the default judgment shall be removed upon the respondent's written ... request to the court either before or during such hearing and an order to show cause to vacate the default judgment shall not be required."

The statute's language raises the question of whether a landlord must specifically move for relief pursuant to CEEFPA Part A, §7 in order to entitle a tenant to a removal of a judgment. The word "such" when used in a statute generally refers to the last antecedent in the context. *American Smelting & Refining Co. v. Stettenheim*, 177 A.D. 392, 396 (1st Dept. 1917), *In re Estate of Johnson*, 18 Misc 3d 898, 900 (Sur. Ct. Kings Co. 2008), *Kruger v. Page Management [*3]Co.*, 105 Misc 2d 14, 31 (S. Ct. NY Co.1980), *appeal dismissed*, 80 AD2d 525 (1st Dept. 1981). Accordingly, the language providing that a default judgment shall be removed upon a respondent's request made before or during "such" a hearing refers to the hearing on a landlord's motion, militating in favor of the proposition that a statutory removal of a default judgment requires a landlord's motion pursuant to CEEFPA, Part A, §7. *Stuyvesant Manor, Inc. v. Zayas*, 2021 NY Slip Op. 50607(U), ¶ 3 (Civ. Ct. Kings Co.)(a landlord's DRP-213 motion filed prior to December 28, 2020, as in this matter, does not render a respondent in a summary proceeding eligible for a removal of a judgment). *See Also 2115 Wash. Realty v. Braxton*, 2021 NY Slip Op. 21183, ¶¶ 3-4 (Civ. Ct. Bronx Co.)(denying a motion to remove a judgment as per CEEFPA Part A, §7 when a prior motion to vacate a default judgment had been settled by counsel without a vacatur of the default judgment).

However, CEEFPA also states that the Court shall remove a default judgment made on a request, *inter alia*, "before" such a hearing. A request to remove a default judgment without a landlord's motion could be "before" a hearing just as readily as such a request made upon a landlord's motion for relief. Arguably, then, no motion of a landlord would be needed to effectuate a removal of a default judgment. *Cf. Jenkins Portfolio Cos. LLC v. Grant*, 2021 N.Y.L.J. LEXIS 418, *2 (Civ. Ct. NY Co.), *J.J.L. Realty Corp. v. Alvira*, 71 Misc 3d 1226(A) (Civ. Ct. Bronx Co. 2021), *Ketcham Assocs. LLC v. Gil*, 2021 NY Slip Op. 30780(U), ¶ 5 (Civ. Ct. Queens Co.)(construing the language of CEEFPA Part A, §7 broadly regarding requests to remove default judgments).

Applying these competing interpretations of CEEFPA Part A, §7 to the particular facts of this matter clarifies its uses. In this case, Co-Respondent never answered the petition although served with notice of entry of the Court's order directing him to do so within thirty days.[FN4] While Co-Respondent averred that he thought Petitioner and Respondent were litigating disputes over use and occupancy and that a pending referral to Adult Protective Services ("APS") stayed a dispute over his possession, the Court's transfer order of May 19, 2019 specifically states that APS had no record of Co-Respondent and, more importantly, Co-Respondent's averment has no support in the clear order of the Court directing that he serve

an answer. Even if Co-Respondent had a good reason for failing to serve an answer in the two years after the Court ordered him to, Co-Respondent does not attach a proposed answer to his cross-motion or give any indication of what defenses Co-Respondent may have. The Court already denied Co-Respondent's prior motion to dismiss this case on personal jurisdiction grounds. *See RPG Consulting, Inc. v. Zormati*, 82 AD3d 739, 740 (2nd Dept. 2011)(the law of the case doctrine is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as judges and courts of co-ordinate jurisdiction are concerned). Co-[*4]Respondent's occupancy of the subject premises is derivative of Respondent's tenancy, Respondent has surrendered possession of the subject premises, and the subject premises is unregulated. While the Court should not have to speculate about what possible defense Co-Respondent may have to this case, even if the Court did so speculate, no possible defense is apparent. Accordingly, even assuming *arguendo* that the Court would have granted Co-Respondent's cross-motion to remove the judgment, the Court would deny Co-Respondent's cross-motion to interpose an answer, which CEEFPA does not otherwise mandate.

Without an answer, a removal of the default judgment would mean that Petitioner would — once again in this matter — have to prove its case on inquest in order to obtain a warrant of eviction, although the removal of the judgment combined with Co-Respondent's filing of a hardship declaration would forestall that inquest to a date following the expiration of the statutory stay. CEEFPA, Part A §6. The actual practical effect of the removal of the judgment, then, would be the difference between how much time after the expiration of the Legislature's determination of a public health emergency would elapse before Petitioner could evict Co-Respondent.

CEEFPA §3, entitled "Legislative intent," states that the pandemic currently raging throughout New York and the world poses a unique and historic threat to public health and that the Legislature intends to "avoid as many evictions as possible" for people experiencing pandemic-related hardships or who have difficulty moving. However, the Legislature's intent to avoid the public health consequences of evictions during a pandemic would not apply upon the expiration of such exigent conditions. Under the facts presented herein, then, construing CEEFPA to mandate a removal of a judgment in the absence of a landlord's motion would not advance the Legislature's stated goals as it would only incur delay of an eviction after the expiration of the emergency.

However, holding a potential no-fault removal of a default judgment over a landlord's head as the price for a landlord's motion to enforce, with an eviction, that default judgment would disincentivize landlords from making such motions during a public health crisis and thus advance the legislature's goals.

Accordingly, particularly given the peculiar facts of this matter, the Court construes CEEFPA as applied to this case to require a motion of Petitioner pursuant to CEEFPA, Part A, §7 — not a DRP-213 motion — in order to trigger Co-Respondent's entitlement to a statutory no-fault removal of the judgment. Without such a motion from the landlord, the Court denies Co-Respondent's motion to remove the Judgment, without prejudice to renewal if Petitioner makes a motion pursuant to CEEFPA, Part A, §7. By the same token, the Court denies Petitioner's motion pursuant to DRP-213 as insufficient to obtain the relief Petitioner seeks in the light of the subsequent passage of CEEFPA and Co-Respondent's filing of a hardship declaration, without prejudice to renewal if made in conjunction with a motion pursuant to CEEFPA, Part A, §7. Pursuant to that filing, execution of the warrant remains stayed by statute through August 31, 2021.

The Court also denies Co Respondent's motion to vacate the Stipulation because Co Respondent wrongly asserts that the Stipulation awards a judgment against Co Respondent Petitioner obtained the Judgment on inquest, not by the Stipulation

Accordingly, it is

ORDERED that the Court denies both motions in their entirety, subject to the qualifications outlined herein.

This constitutes the decision and order of this Court.

Dated: New York, New York

July 27, 2021

HON. JACK STOLLER

J.H.C.

Footnotes

Footnote 1: The directive can be found here: https://nycourts.gov/COURTS/nyc/SSI/directives/DRP/DRP213.pdf

Footnote 2: The statute can be found here: http://nycourts.gov/whatsnew/pdf/AO-340-20.pdf

Footnote 3: It is a judgment that authorizes the issuance of a warrant. RPAPL §749(1).

Footnote 4: Although Co-Respondent avers in support of his cross-motion that he did not receive notice of unspecified calendar dates of this matter, Co-Respondent did not rebut the affidavit of mail service of the order denying his motion to dismiss and directing service of an answer. Service by mail is complete regardless of delivery where the mailing itself complies with all requisites, *Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co.*, 114 AD3d 33, 46 (2nd Dept. 2013), 14 Second Ave. Realty Corp. v. Szalay, 16 AD2d 919 (1st Dept. 1962), and even a denial of receipt of service is insufficient to rebut the resulting presumption of service. *Lenchner v. Chasin*, 57 AD3d 623 (2nd Dept. 2008).

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