2022-02-10

Torres v. Sedgwick Ave. Dignity Devs. LLC

[*1]

Torres v Sedgwick Ave. Dignity Devs. LLC
2022 NY Slip Op 50085(U)
Decided on February 10, 2022
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This opinion is uncorrected and will not be published in the printed Official Reports.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 February 10, 2022

Civil Court of the City of New York, Bronx County

Jason Torres, Petitioner,

against

Sedgwick Avenue Dignity Developers LLC, JOHN WARREN & MHR MANAGEMENT INC., Respondents-Owners, and DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, Co-Respondent.

Index No. 307644/2020

For Petitioner: TAKEROOT Justice by Rajiv Jaswa, Staff Attorney & Allen S. Joslyn, Of Counsel

For Respondents: Rosenblum & Bianco, LLP by Tracy William Boshart.

Shorab Ibrahim, J.

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of this motion:

NYSCEF Doc. Nos. 42, 43, 44, 45, 46, 47, 48 & 49.

By petition dated November 20, 2020, petitioner sought an order from the court directing that respondents correct outstanding conditions and violations in the subject apartment and that the court find that respondents have harassed him, as the term is defined in NYC Administrative Code § 27-2004(a)(48).

On April 22, 2021, pursuant to CPLR § 409(b), the court issued an Order to Correct the outstanding open violations (Order) and adjourned the case for trial on petitioner's harassment cause of action and other claims. Notably, the Order takes notice of open violations pursuant to Multiple Dwelling Law (MDL) §328(3).

After several days of trial, petitioner concluded his *prima facie* case and rested without introducing into the trial record the Order, or any other DHPD records related to violations, whether open or closed, at the subject apartment. As such, respondents moved, pursuant to CPLR § 4401, for an order granting judgment in their favor dismissing petitioner's harassment claim.[FN1]

As the harassment claim is premised on the respondents' failure to correct conditions in the subject apartment,[FN2] such allegations must be based at least in part on one or more violations [*2]of record issued by the department or any other agency." (NYC Admin Code § 27-2115[h][2][i]); *see also* NYC Admin Code § 27-2004(a)(48)(b-2) defining harassment as "repeated failures to correct hazardous or immediately hazardous *violations of this code* or major or immediately hazardous violations of the New York city construction codes, relating to the dwelling unit or the common areas of the building containing such dwelling unit, within the time required for such corrections." [emphasis added]; *Coleson v Sarker*, __ NYS3d __, 2021 NY Slip Op 21314 [Civ Ct, Bronx County 2021]; *Jeffers v River Park Residences LP*, 70 Misc 3d 1225[A], 3, 2021 NY Slip OP 50218[U] [Civ Ct, Bronx County 2021]).

Respondents contend that petitioner's failure to introduce into evidence, during trial, proof that qualifying violations of record exist, or existed, is fatal. Respondents also argue that petitioner's failure, at trial, to establish ownership of the subject building requires dismissal.

In opposition, petitioner relies entirely on the fact that the court had already found that respondents are owners and had already taken judicial notice of what petitioner terms *relevant* violation summary reports in issuing its April 22, 2021 Order to Correct. In sum,

petitioner argues that the prior Order establishes those parts of the *prima facie* case that they did not address at trial and is law of the case that respondents cannot relitigate.

In reply, respondents argue that simply referring to the prior Order would be a violation of their right to due process.

As to ownership, the court need not rely on petitioner's law of the case argument. Rather, the Answer admits paragraphs 6, 7, and 8 of the Petition.[FN3] Those paragraphs allege that the named respondents are "owners." (see CPLR § 3018(a) (providing that all statements in a pleading that are not sufficiently addressed with a denial are deemed admitted); *DeSouza v Khan*, 128 AD3d 756, 758, 11 NYS3d 168 [2nd Dept 2015] (facts admitted in a party's pleading constitute a formal judicial admission)). Because "admissions ... in pleadings are always in evidence for all the purposes of the trial of [an] action," ((*id.*) [internal citations omitted]), respondents' argument that petitioner has failed to establish that the respondents are "owners" is without merit. (*see also Holmes v Jones*, 121 NY 461, 466, 24 NE 701 [1890]).

As to the failure to introduce DHPD records into evidence during the trial, petitioner argues that the violations are part of the record since they are referenced in the April Order. Although the Order is part of the court record, it was not made part of the *trial* record.

The court looks again to respondents' answer in assessing this argument. The petition (par. 9) alleges "numerous hazardous conditions persistent leaks and other violations of the Housing Maintenance Code exist" in the apartment. Paragraph 12 refers to specific violations placed by DHPD on August 5, 2020, July 16, 2020, and October 28, 2019. In response, respondents "[d]enies knowledge and information to form an opinion as to the allegations set forth in" those paragraphs, among others.

DHPD open violations are public records, easily accessible to any "owner," particularly to owners of a thirty (30) unit building who are represented by seasoned counsel. As such, these "owners" may not plead ignorance to the existence of violations of record. (*Rochkind v Perlman*, [*3]123 AD 808, 810-811, 108 NYS 224 [2nd Dept 1908] ("Nor may this form of denial be used in a case of intentional ignorance of the defendant when it is his duty, as here, to know or learn the facts, and they are at hand and accessible 'A party cannot plead ignorance of a public record to which he has access, and which affords him all the means of information necessary to obtain positive knowledge of the facts.'") [internal citations omitted]).

This sort of improper denial may be deemed an admission. (*see Gilberg v Lennon*, 193 AD2d 646, 547 NYS2d 462 [2nd Dept 1993]; *Majerski v City of New York*, 193 AD3d 715, 718, 146 NYS3d 641 [2nd Dept 2021] ("denials of 'knowledge or information sufficient to form a belief' was improper as the truth or falsity of the information alleged within those paragraphs of the complaint is wholly within the possession of the defendants"). Indeed, for over one hundred years, this sort of denial has been condemned as frivolous and insufficient to raise an issue of fact. (*see Allen v National Surety Co.*, 144 AD 509, 510, 129 NYS 228 [1st Dept 1911]).

Thus, the existence of violations of record is not a triable issue. (*see also* CPLR §409(b); *Bldg Management Co. Inc. v Etienne*, 69 Misc 3d 1218[A], 2, 2020 NY Slip Op 51440[U] [Civ Ct, Queens County 2020] (The statute itself requires that a summary determination be made whenever "no triable issues of fact are raised," *regardless of the posture of the proceeding*.) [emphasis added]); *see also, Triangle Pac. Bldg. Products Corp. v National Bank of North America*, 62 AD2d 1017, 404 NYS2d 121 [2nd Dept 1978] (CPLR § 409(b) and § 410 mandate a trial only of "issues of fact which cannot be disposed of by summary determination upon the pleadings")).

In other words, respondents are deemed to have admitted both points they allege petitioner failed to prove at trial.[FN4]

The court next addresses petitioner's argument that the Order is part of the trial record, even though he never asked the court to take notice of it.

Certainly, if petitioner had requested the court take notice of the Order and include it in the trial record, the court would have granted the request and respondents' motion perhaps never made. (*see Strook & Stroock & Lavan v Beltramini*, 157 AD2d 590, 591, 550 NYS2d 337 [1st Dept 1990] ("prior ruling is law of the case and may not be relitigated")).

Ordinarily, a document does not become part of the record where it is not actually offered into evidence. (*see Siegel v Dubinsky*, 56 Misc. 681, 683, 107 NYS 678 [App Term, 1907]; *In re Kaimie's Will*, 116 NYS2d 179, 181 [Sur Ct, Bronx County 1952]). Here, petitioner did not move the Order into evidence at trial and he has not previously requested that the court take notice of it or of the DHPD records.

There is no mandatory rule that the court take notice of orders in the court file. (*see Allen v Strough*, 301 AD2d 11, 18, 752, NYS2d 339 [2nd Dept 2002] (holding that while courts "may take judicial notice of a record in the same court of either the pending matter or

some other action the taking of such notice is not mandatory."); *Walker v City of New York*, 46 AD3d 278, 282, 847 NYS2d 173 [1st Dept 2007] (a court *may* take judicial notice of its uncontroverted records and files); *Casson v Casson*, 107 AD2d 342, 344, 486 NYS2d 191 [1st Dept 1985] (court *may* take notice of its own records); *Weinberg v Hillbrae Bldrs*, 58 AD2d 546, 396 NYS2d 9 [1st Dept 1977]; *Ptasznik v Schultz*, 247 AD2d 197, 199, 679 NYS2d 665 [2nd Dept 1998] (In some [*4]instances, and under certain circumstances, undisputed portions of court files or official records, such as *prior orders* or kindred documents, *may* be judicially noticed.) [emphasis added]); *Khatibi v Weill*, 8 AD3d 485, 486, 778 NYS2d 511 [2nd Dept 2004]; *New York Teachers Housing Corporation v Perez*, 2018 NY Slip Op 50667(U), FN2, 59 Misc 3d 1223(A) [Civ Ct, Bronx County 2018] (court *can* take judicial notice of its undisputed court records) [emphasis added]; *Hamilton v Miller*, 23 NY3d 592, 603, 992 NYS2d 190 [2014]).

In truth, however, the Order itself has no bearing on the harassment cause of action. It is the attached and referenced DHPD records that do. As such, the court addresses whether it may admit those records *sua sponte*.

Judicial notice, taken *sua sponte*, is frowned upon in our courts.[FN5] (*Billets v Bush*, 63 AD3d 1203, 1204, 881 NYS2d 195 [3rd Dept 2009] (error to take *sua sponte* judicial notice of prior orders after conclusion of fact-finding hearing); *In re Dakota CC*, 78 AD3d 1430, 1431, 912, NYS2 151 [3rd Dept 2010] (error to take judicial notice without affording party opportunity to challenge accuracy or relevancy "nor should the court have included allegations in the fact-finding decision that were not established during the hearing"); *Matter of Justin EE.*, 153 AD2d 772, 774, 544 NYS2d 892 [3rd Dept 1989], *lv. denied* 75 NY2d 704, 552 NYS2d 109 (*sua sponte* judicial notice, taken after the conclusion of fact-finding hearing, "was inappropriate in that respondents had no opportunity to challenge either the accuracy or relevance of the judicially noticed facts.")).

Consequently, the party seeking the benefit of the doctrine of judicial notice must generally bring the fact to the court's attention and request that the court take judicial notice. (*see Walton v Stafford*, 14 AD 310, 314, 43 NYS 1049 [1st Dept 1897], aff'd 162 NY 558 [1900]; *JP Morgan Chase Bank, N.A. v Malarkey*, 65 AD3d 718, 720, 884 NYS2d 787 [3rd Dept 2009]; *Donohue v State*, 54 Misc 2d 608, 610, 283 NYS2d 158 [Ct Cl 1967], rev'd on other grounds 31 AD2d 67, 296 NYS2d 607 [4th Dept 1968] ("To enable and authorize a court to take judicial notice of *any* fact, it is the *duty* of claimants to bring such fact to the attention of the court and claim it for judicial notice." [emphasis added]).

These holdings rightly emphasize a fundamental problem with *sua sponte* notice—that notice to a party has not been given so that they may mount a challenge to the proposed evidence.

Here, this fundamental right will not be affected by admitting the Order and DHPD records attached thereto into the trial record. As stated above, respondents have notice of the records [even if they were not already attached to the prior Order], and their answer does not create an issue of fact as to their existence.

Furthermore, MDL § 328(3) provides: "In any action or proceeding before the housing [*5]part of the New York city civil court ... the visually displayed ... computerized violation files of the department responsible for maintaining such files and all other computerized data as shall be relevant to the enforcement of state and local laws for the establishment and maintenance of housing standards ... shall be prima facie evidence of any matter stated therein and the courts *shall* take judicial notice thereof...." [emphasis added]). The DHPD records are certainly relevant to the "enforcement of state and local laws for the establishment and maintenance of housing standards." (*see Prometheus Realty Corp. v City of New York*, 80 AD3d 206. 210-211, 911 NYS2d 299 [1st Dept 2010] (holding that "whether a particular landlord's conduct constitutes harassment must similarly be recognized as an issue of 'housing standards' within the previously-established jurisdiction of the Housing Part.")[FN6]

The court thus deems petitioner's opposition as a request to accept into evidence the DHPD records already part of the court file. (*see e.g., Henning v State*, 213 NYS2d 912, 914 [Ct Claims 1961] (In interest of justice, on court's own motion, case reopened for further trial)). The court does not have the authority to deny such a request under the MDL especially where, as here, respondents' due process rights are protected. This is especially true as the court has the right to reopen the case even after a party rested, although that discretion should be used sparingly. (*Mulligan v Wetchler*, 39 AD2d 102, 105, 332 NYS2d 69 [1st Dept 1972]; *Lagana v French*, 145 AD2d 541, 536 NYS2d 95 [2nd Dept 1988] ("A Trial Judge has the right to permit the introduction of evidence after the close of the offerer's case.")).

In *MRI Enterprises, Inc. v Comprehensive Medical Care of New York, P.C.*, the Appellate Division held that a court, under certain circumstances, may *sua sponte* "allow a party to reopen his or her case, and supplement the evidence to cure any defects in the evidence that have inadvertently occurred." (122 AD3d 595, 596, 996 NYS2d 119 [2nd Dept

2014]; *In re Dior*, 139 AD3d 1065, 1066, 30 NYS3d 851 [2nd Dept 2016] (proper exercise of discretion to *sua sponte* permit petitioner to reopen its case)).

In reopening a case, "the trial court should consider whether the movant has provided a sufficient offer of proof, whether the opposing party is prejudiced, and whether significant delay in the trial will result if the motion is granted." (*Sweet v Rios*, 113 AD3d 750, 752, 979 NYS2d 130 [2nd Dept 2014]; *Frazier v Campbell*, 246 AD2d 509, 510, 667 NYS2d 394 [2nd Dept 1998]).).

Petitioner's initial failure to offer the records into evidence was clearly inadvertent as he believed they would be considered part of the trial record. There is no significant delay in the trial. In fact, respondents will pick up exactly where the court left off, by commencing their defense. (*see Fischer v RWSP Realty LLC*, 63 AD3d 878, 882 NYS2d 192 [2nd Dept 2009] (reopening favored prior to adversary commencing their case); *see also, Morgan v Pascal*, 274 [*6]AD2d 561, 712 NYS2d 48 [2nd Dept 2000] (Reopening allowed even after *both* sides rested). Respondents are not prejudiced in any way. (*see Kay Foundation v S & F Towing Service of Staten Island, Inc.*, 31 AD3d 499, 501, 819 NYS2d 765 [2nd Dept 2006] ("The fact that the defendants will have to adjudicate the action on the merits does not warrant a finding of prejudice sufficient to deprive the plaintiff of his day in court") [internal citation omitted]; *Benjamin v Desai*, 228 AD2d 764, 643 NYS2d 717 [3rd Dept 1996]).

Under the circumstances present, respondents, in fact, do not face *any* prejudice in admitting the document into the trial record at this stage. The court notes that only open violations of record as of April 19, 2021 are attached to the Order. Only those records were required to be attached to the Order as the court directs correction of "open" violations. Only those are the records now admitted into the trial record.

Petitioner, on the other hand, having rested, may be limited in directing the court *how* to view the records. (*see Hoya v Saxa*, 149 Misc 2d 191, 192, 571 NYS2d 179 [App Term, 1st Dept 1991] ("Once admitted, however, it is incumbent on counsel, acting as an officer of the court and in the interests of judicial economy, to assist the court in determining which of the listed violations impacts particularly on the tenancy and premises in question so as to be accorded commensurate weight on the issue of habitability.")).

In considering a § 4401 motion, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant. (*Sczerbiak v Pilat*, 90 NY2d 553, 556, 664 NYS2d 252 [1997]. The motion may be granted only if, "upon the evidence

presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party." (*id*.) With the open violations report in evidence, the motion must be denied. (*see* Boshart Affirmation at 5-7 [NYSCEF Doc. 42] ("This means that the Petitioner's entire prima facie case can be proven by introducing into evidence two document, the multiple dwelling registration (ownership) and the Building Summary Violation Report.").

The court will contact the parties to arrange a mutually convenient date for continued trial.

This constitutes the Decision and Order of the court.

Dated: February 10, 2022
SO ORDERED,
Bronx, NY
/S/
SHORAB IBRAHIM, JHC

Footnotes

Footnote 1: Rather than rule on respondents' oral motion, the court set a briefing schedule.

Footnote 2: See Petition at par. 20-27.

Footnote 3: While the Reply states that respondents "have not admitted ownership" (par. 15), the court disagrees. Indeed par. 2 of the Answer states that respondents "admit the allegations set forth in paragraph six (6), seven (7), eight (8)". Alternatively, the Answer affirmatively denies par. 1, 10, 13, 19, 20, 25, 26 and 27 of the petition. (Answer at par. 3).

Footnote 4:A better practice for this court would be to issue an order before trial that limits the issues in controversy.

Footnote 5:*See* CPLR 4511(a); *Hartman v WVH HDFC*, 71 Misc 3d 1204[A], FN5, 2021 NY Slip OP 50276[U] [Civ Ct, New York County 2021] (The Courts can take judicial notice of *law* without any request from the parties); *Rothstein v City University of New York*, 194 AD2d 533, 534-535, 599 NYS2d 39, [2nd Dept 1993] (the court's *sua sponte* decision to take judicial notice of New York City Building Code is authorized by CPLR 4511(b), as it may be considered an "ordinance * * * [or] regulation * * * [of a] governmental subdivision * * * of the state." In such a case, the statute declares that judicial notice may be taken without request (*i.e.,* without notice), at the court's discretion.)).

Footnote 6: Given that the court's mandate is to enforce "state and local laws for the

establishment and maintenance of housing standards," an open Violation Summary Report is accessed by the court on every proceeding, sometimes *sua sponte*. Open violations records maintained by DHPD are easily accessible online and are needed to, among other things, assess whether a matter has merit or whether a matter should end. (see CCA 110(a); CCA 110(c) [The court may retain continuing jurisdiction of any action or proceeding relating to a building until all violations of law have been removed]).

Return to Decision List