2022-05-13

Barker v. Cruz

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Barker v Cruz
2022 NY Slip Op 50397(U)
Decided on May 13, 2022
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
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Decided on May 13, 2022

Civil Court of the City of New York, Bronx County

Denzil Barker, Petitioner,

against

Irene Cruz, Respondent-Tenant, and John Doe 1, John Doe 2, Jane Doe 1, & Jane Doe 2, Respondents-Undertenant.

L & T Index No. 312920-2021

Attorneys for Respondent Irene Cruz: Bronx Legal Services, By Heather McLinn, Esq. [hmclinn@lsnyc.org]For Petitioner: Evan Rogers, Esq. [evan@evanrogerslaw.com]

Shorab Ibrahim, J.

RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION BY THE PETITIONER TO VACATE THE ERAP STAY AND FOR SUMMARY JUDGMENT AND CROSS-MOTION BY RESPONDENT FOR LEAVE TO FILE AN ANSWER AND TO DISMISS THE PROCEEDING: NYSCEF DOCS. No. 11-30

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

HISTORY AND PROCEDURAL POSTURE

For the purposes of the within motion and cross-motion the relevant history of this case is as follows: Petitioner commenced this proceeding, after expiration of a 90-day termination notice, to regain possession of the 1st floor apartment at 3303 Fenton Avenue, Bronx, NY 10469 (the subject premises). The respondent applied for the Emergency Rental Assistance Program (ERAP) on or about July 16, 2021. The application, according to the respondent, was provisionally approved on or about November 16, 2021. The petition herein does not seek arrears or use and occupancy and the petitioner will not participate in the ERAP program because, according to petitioner, rent is legally uncollectible and he does not wish to extend the [*2]tenancy as he needs the premises for family use.

Petitioner now moves to vacate the ERAP stay and for summary judgment in the absence of an answer. Respondent cross-moves seeking leave to file an answer and for dismissal on several grounds.

DISCUSSION

For obvious reasons, the court must render a decision on the respondent's cross-motion first.

Answer

The motion for leave to file an answer is granted. This portion of respondent's motion is unopposed. (*see Site 13 Apartment Owners, LLC v Miles*, 26 Misc 3d 132(A), 2010 NY Slip Op 50060(U) [App Term, 1st Dept 2010]). Answers in holdover proceedings are due, pursuant to RPAPL § 743, at the time the petition is to be heard. This provision has been interpreted to mean that the time to answer is extended by adjournment unless arrangements to the contrary have been made. (*see Crotona Parkway Apts. HDFC v Depass*, 68 Misc 3d 1226(A), 2, 2020 NY Slip Op 51074(U) [Civ Ct, Bronx County 2020]). In any event, the alleged "late" filing of the answer, which includes potentially meritorious defenses, does not prejudice petitioner at this stage of the litigation. (*see Jacobson v McNeil Consumer Specialty Pharmaceuticals*, 68 AD3d 652, 654-655, 891 NYS2d 387 [1st Dept 2009] (prejudice does not simply occur because a party is exposed to greater liability or must expend additional time preparing its case).[FN1]

As such, the proposed answer (NYSCEF Doc. 24) is deemed served and filed.

Improper Service of Process

The petition and notice of petition, according to the affidavit of service, were served by conspicuous place service (aka "nail and mail") after attempts on November 16, 2021 at 1:31 PM, November 17, 2021 at 6:08 PM and November 18, 2021 at 9:33 AM. (*see* NYSCEF Doc. 8).[FN2]

There is no dispute that under the law at the time (*see* Part C, Subpart A, Ch. 417 of the Laws of 2021), petitioner could only resort to nail-and-mail service after attempting personal service with "due diligence." "Due diligence" is not defined by statute and this state's courts have not established a definition. In other words, there is no rigid standard and whether due diligence has been exercised is determined on a case-by-case basis. (*see Barnes v City of New York*, 51 NY2d 906, 907, 415 NE2d 979 [1980] ("Indeed, in determining the question of whether due diligence has been exercised, no rigid rule could properly be prescribed."); *Brafman & Associates, P.C. v Balkany*, 190 AD3d 453, 139 NYS3d 199 [1st Dept 2021] (There are no rigid standards governing due diligence requirement for substituted service); *Mid-Island Mortgage Corp. v Drapal*, 175 AD3d 1289, 1290, 108 NYS3d 190 [2nd Dept 2019]; *Greene Major Holdings, LLC v Trailside at Hunter, LLC*, 148 AD3d 1317, 1320, 49 NYS3d 769 [3rd Dept 2017]).

Respondent argues that by failing to attempt service on a weekend or to ascertain respondent's whereabouts, due diligence was not exercised.

In the First Department, the courts have repeatedly found that three (3) attempts at service, made at different times and on different days, before resorting to nail-and-mail service, establishes *prima-facie* proof of proper service under the due-diligence standard. (*see Hochhauser v Bungeroth*, 179 AD2d 431, 578 NYS2d 170 [1st Dept 1992] (Three attempts to serve defendant at his home made during various hours of the day were sufficient to establish due diligence so as to permit substitute service.); *Brown v Teicher*, 188 AD2d 256, 590 NYS2d 452 [1st Dept 1991] (Three attempts at defendant's home at diverse times); *Ayala v Bassett*, 57 AD3d 387, 870 NYS2d 261 [1st Dept 2008]; *HSBC Bank USA, N.A. as Trustee for Registered Holders of Renaissance Equity Loan Asset-Backed Certificates, Series 2007-03 v Hanchard*, 170 AD3d 599, 97 NYS3d 67 [1st Dept 2019]; *compare Bel Air Leasing LP v Johnston*, 73 Misc 3d 809, 810, 157 NYS3d 346 [Civ Ct, Kings County 2021] (finding that the "Second Department has imposed a requirement that a process server make 'genuine inquiries about the defendant's whereabouts and place of employment'"), *quoting Estate of Waterman v Jones*, 46 AD3d 63, 66 [2nd Dept 2007]).

Furthermore, weekend attempts are *not* required. (*see Lara v 1010 E. Tremont Realty Corp.*, 205 AD2d 468, 614 NYS2d 6 [1st Dept 1994] (Three weekday attempts at home at diverse times); *Friedman v Telesco*, 253 AD2d 846, 678 NYS2d 364 [2nd Dept 1998] (Three consecutive weekday attempts at diverse times); *Finkelstein Newman Ferrara LP v Manning*, 35 Misc 3d 130(A), 1, 2012 NY Slip Op 50643(U) [App Term, 1st Dept 2012] (Three weekday attempts, including at 7:30 PM, when a working person might expect to be home constitutes due diligence prior to nail-and-mail service); *Brafman & Associates, P.C. v Balkany*, 190 AD3d at 453 (Attempts made at various times on a Monday, Wednesday and Friday).[FN3]

This is not to say that inquiry by the process server might not be required in certain circumstances. In *Board of Managers of 50 West 127th Street Condominiums v Kidd*, due diligence was rebutted when the defendant presented unopposed evidence that the plaintiff knew of her travel and work schedule. (169 AD3d 432, 94 NYS3d 27 [1st Dept 2019]). To properly challenge the facially sufficient affidavit of service present here, it was incumbent on the respondent to come forth with evidence that the petitioner was required to do something more. (*see Ayala v Bassett*, 57 AD3d 387 [Affidavit of service alleging three attempts at service at residence at various times "constituted prima facie evidence of proper service," shifting the burden to the respondent "to offer an affidavit or other documentary evidence challenging the validity of the attempted service."]).

Of course, there will also be times where a petitioner is expected to do more in order to meet the due diligence standard. In an illegal sublet holdover, for example, a petitioner might be required to further investigate a respondent's *actual* abode or business address. (*see e.g. 63 West LLC v Bicher*, 74 Misc 3d 282, 285-286, 160 NYS3d 557 [Sup Ct, New York County 2021]).

Here, respondent's affidavit says nothing about the service attempts and makes no claims that the petitioner had any information which would trigger additional inquiry. (*see Walkes v [*3]Benoit*, 257 AD2d 508, 684 NYS2d 533 [1st Dept 1999] ("In order to rebut an affidavit of service a defendant must personally contest the service on motion.").

For these reasons, the court finds that service of the notice of petition and petition was proper and the branch of the motion seeking dismissal based on failure to exercise due diligence is denied.

"Window-Period" Payment(s) & Vitiation

In this Department, the acceptance of rent during the "window period," defined as the time between termination of a tenancy and commencement of a proceeding, (*see Georgetown Unsold Shares, LLC v Ledet*, 130 AD3d 99, 100, 12 NYS3d 160 [2nd Dept 2015]), *may* require dismissal of the proceeding. (*see 205 East 78th St Assoc v Cassidy* 192 AD2d 479, 598 NYS2d 699 [1st Dept 1993]; *184 West 10th Corp v Westcott*, 8 Misc 3d 132[A], 2005 NY Slip Op 51150[U] [App Term, 1st Dept 2005]). Other cases denying dismissal on these grounds turn on whether the landlord "intended to relinquish a known right." (*Beacon 109 223-225 LLC v Mon Sheng Wu*, 32 Misc 3d 140[A], 2011 NY Slip Op 51570[U] [App Term, 1st Dept 2011]; *PCV/ST LLC v Finn*, 2003 WL 21203337, 2003 NY Slip Op 50897(U) [App Term, 1st Dept 2003]; *West Waverly Equities v Leiff*, 190 Misc 2d 281, 737 NYS2d 762 [App Term, 1st Dept 2001]).

Although these cases involve acceptance in the window period prior to commencement of non-primary residence holdovers, the reasoning has been extended to other types of holdovers. (*see Sebco Hous. Dev. Fund Co., Inc. v Acosta*, 66 Misc 3d 147(A), 2020 NY Slip Op 50236(U) [App Term, 1st Dept 2020] (Nuisance holdover); *170 East 77th 1 LLC v Berenson*, 12 Misc 3d 1017, 1020-1021, 820 NYS2d 693 [Civ Ct, New York County 2006] (lease expired in unregulated unit)).

Here, respondent's affidavit says almost nothing to support the vitiation argument. However, the motion includes a purported DSS printout, containing information for "shelter" checks from January 2021 through March 2022. In response, petitioner states "to the best of my recollection the affidavit of service of the Petition was filed on November 19, 2021 and I did go to the bank to deposit moneys AFTER that date not during the 'window period.' "**[FN4]**

The window-period here, relying on the termination notice expiring October 31, 2021, lasted until the notice of petition and petition were filed with the court, which occurred no later than November 12, 2021. (*see* NYSCEF Doc. 6; *ABN Assoc., LLC v Citizens Advice Bur., Inc.*, 27 Misc 3d 143(A), 1, 2010 NY Slip Op 51075(U) [App Term, 1st Dept 2010]; *Sebco Hous. Dev. Fund Co., Inc. v Acosta*, 66 Misc 3d 147(A)).

A review of the printout shows that the November 2021 cycle 'A' payments are uncashed. At most, even accepting the information in these uncertified records as true, the petitioner did not cash *any* window-period payments and only cashed the November 'B' payments made on the respondent's behalf long after the case had commenced. Nothing in the record suggests that the petitioner intended to relinquish the right to proceed with this

case. (*see Beacon 109 223-225 LLC v Mon Sheng Wu*, 32 Misc 3d 140[A]). In fact, petitioner's refusal to participate in the ERAP process (*see* respondent's affidavit [NYSCEF Doc. 23] at par. 9 & 10), should have suggested to the respondent that the petitioner intended to pursue eviction even before the [*4]petition was served.

Consequently, the court finds that petitioner's actions did not vitiate the termination notice [expiring October 31, 2021] and dismissal on this ground is denied.

Proceeding Commenced When ERAP Application Pending

Respondent next argues that the proceeding should be dismissed because there was an ERAP application pending at the time the case was commenced.

The plain language of the ERAP law bars the commencement of eviction proceedings until a determination has been made. (Part BB of Chapter 56, Laws of 2021). It similarly bars "any pending eviction proceeding pending a determination of eligibility." (*see Zheng v Guiseppone*, 74 Misc 3d 1231(A), 3, 2022 NY Slip Op 50271(U) [Civ Ct, Richmond County 2022]).

An analyzing the statute, numerous courts have allowed vacatur of the ERAP stay to avoid inequity or fraud or absurd or futile results.

In *Actie v Gregory*, (74 Misc 3d 1213(A), 2022 NY Slip Op 50117(U) [Civ Ct, Kings County 2022]), the court vacated the stay because it was an unregulated unit in a private house and the landlord would not renew the lease because he wanted it for family use. The court reasoned that even if ERAP funds were paid, the landlord-tenant relationship would not be reinstated and, as such, a stay was futile and prejudicial to the petitioner. Similarly, the court in *Ami v Ronen* vacated the stay where the landlord of an unregulated unit sought the unit for family use. (2022 NY Slip Op 22098, — NYS3d — [Civ Ct, Kings County 2022]); (*see also*, *Silverstein v Huebner*, 2022 NY Slip Op 31051(U) [Civ Ct, Kings County 2022] (unregulated unit sought for personal use)).

In another case with similar facts to those here, the court vacated the stay noting that the ERAP statute was not "designed to create a barrier preventing small property owners from advancing litigation involving residential properties, where the tenancy is not subject to statutory control, landlord expresses its intent not to seek use and occupancy, and desires to pursue litigation where the tenancy has been properly terminated." (*see Papandrea-Zavaglia v Arroyave*, — NYS3d —, 2022 NY Slip Op 22109 [Civ Ct, Kings County 2022]).

These cases are all distinguished, of course, because each was pending when the ERAP stay was invoked. Here, the ERAP application, and thus the stay, pre-dates the petition. This court finds this distinction without difference. To hold otherwise creates a situation where a landlord who did not commence a case *before* the ERAP application is barred from *any* relief. Such a scheme would run afoul of a landlord's due-process protections. (*see Actie v Gregory*, 74 Misc 3d 1213(A), 1). Reason dictates that in order to challenge the ERAP stay, a petitioner must be allowed to at least commence a proceeding where the stay can be challenged.

Based on the above, dismissal based on the ERAP stay is denied.

Petitioner's Motion to Vacate ERAP Stay and For Summary Judgment

For the reasons already stated, the ERAP stay is vacated.

Summary judgment is also denied. The motion partially relies on a purported February 2021 (90) day notice [as does the petition], expiring May 31, 2021. However, the notice on file expires on October 31, 2021. This issue awaits resolution.

CONCLUSION

Based on the foregoing, the petitioner's motion is granted solely to the extent of vacating the ERAP stay; summary judgment is denied. Respondent's motion is granted solely to the extent of deeming the answer served and filed; dismissal is denied in all respects.

This matter is adjourned to June 9, 2022 at 4PM for an in-person pre-trial conference. Any further motions must be served no later than May 27, 2022, with opposition due no later than June 7, 2022.

This constitutes the Decision of the court. It will be posted on NYSCEF and emailed to the parties.

SO ORDERED,

Dated: May 13, 2022
Bronx, NY
SHORAB IBRAHIM, JHC

Footnotes

Footnote 1: The court notes that the ERAP stay here was triggered upon respondent's application. (*see 2986 Briggs LLC v Evans*, 74 Misc 3d 1224(A) [Civ Ct, Bronx County 2022], quoting the ERAP law, "all proceeding shall be stayed pending a determination of eligibility."). As such, respondent was not under any obligation to file an answer earlier in this litigation.

Footnote 2:A reasonable reading of the affidavit of service shows the (3) noted attempts, rather than (2) as respondent suggests.

Footnote 3:*Spath v Zack*, (36 AD3d 410, 829 NYS2d 19 [1st Dept 2007]), cited to by respondent, is distinguishable from the above cited cases. In *Spath*, the respondent did not reside at the premises served at the time of service.

Footnote 4: Though the petition refers to a termination notice expiring May 31, 2021, the notice petitioner relies upon expires on November 30, 2021. To the extent amendment is sought or needed, the court advised petitioner to await the instant Decision.

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