2022-05-23

Islam v. Rodriguez

Islam v Rodriguez
2022 NY Slip Op 31621(U)
May 23, 2022
Civil Court of the City of New York, Bronx County
Docket Number: L&T Index No. 004800/20
Judge: Diane E. Lutwak
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK
BRONX COUNTY: HOUSING PART C/Room 590

----------X L&T Index # 004800/20

JWELLI A ISLAM,
Petitioner/Landlord

-against-

DECISION & ORDER

MARISOL RODRIGUEZ; MICHAEL WIGLEY;
VICTOR MOLINA; "JOHN DOE"; "JANE DOE",
Respondents/Occupants

760 Van Nest Avenue, Apt 1st Fl, Bronx NY 10462
Address

----------X

Hon. Diane E. Lutwak, HCJ:

Recitation, as required by CPLR 2219(A), of the papers considered in the review of Respondent Marisol Rodriguez's Order to Show Cause to Vacate Default Judgment and Warrant, Dismiss the Proceeding and/or Other Relief:

Papers	NYSCEF Doc #
Order to Show Cause	10, 23
Attorney's Affirmation in Support	11
Respondent's Affidavit in Support With Affidavit of Translation	12, 13
Memorandum of Law	14
Supporting Exhibits A-H	15-22
Petitioner's Affidavit in Opposition	25
Attorney's Affirmation in Opposition	26
Opposing Exhibits A-F	27-32
Attorney's Reply Affirmation	34

Upon the foregoing papers, and for the reasons stated below, Respondent Marisol Rodriguez's Order to Show Cause is decided as follows.

PROCEDURAL HISTORY & FACTUAL BACKGROUND

This licensee holdover eviction proceeding was commenced by Notice of Petition and Petition dated January 22, 2020, predicated upon a "Notice to Quit, Vacate and Surrender" dated December 19, 2019 advising Respondents that they "occupy the subject premises without a written lease", that Petitioner "is unaware of how you came to occupy the subject premises", that, "upon information and belief, you occupy the subject premises as a licensee purportedly granted by the prior owner of the subject premises, whom upon information and

belief you have a personal relationship with" and that if Respondents did not move out by January 13, 2020 Petitioner would commence a summary eviction proceeding against them. The Petition alleges that the apartment is not subject to rent regulation as it is in a 3-unit building and became vacant after June 30, 1971.

The Petition was filed with the Court on January 28, 2020 and given a return date of February 19, 2020. The affidavit of service of the Petition and Notice of Petition asserts "conspicuous" service on Respondents by posting copies on the door to the premises on February 6, 2020 after two attempts at personal service – first on February 5, 2020 at 3:07 p.m. and second on February 6, 2020 at 6:41 a.m. - followed by additional copies sent on February 7, 2020 by first-class and certified mail. Proof of service was filed with the Court on February 10, 2020.

After Respondents failed to appear, on March 12, 2020 the Court held an inquest and issued a judgment of possession to Petitioner, warrant to issue forthwith. Before Petitioner submitted a warrant requisition, all evictions were stayed and in-person courthouse operations other than essential matters were postponed due to the COVID-19 pandemic, Governor Cuomo's "New York on Pause" Executive Order and orders of Chief Administrative Judge Lawrence Marks of the New York State Unified Court System. Thereafter, upon default, by Decision and Order dated February 8, 2022 the Court granted Petitioner's motion pursuant to current Court Administrative Orders and Directives and Procedures for issuance of a warrant of eviction with leave to execute forthwith.

Respondent Rodriguez thereafter retained counsel who, on March 10, 2022, filed a Notice of Appearance and Order to Show Cause (OSC) seeking vacatur of the default judgment and, upon such vacatur, dismissal of the Petition on the following grounds:

(1) pursuant to CPLR Rules 5015(a)(4) and 3211(a)(8), for lack of personal jurisdiction because service of the Petition was not completed between ten and seventeen days prior to the date the Petition was noticed to be heard as required by Sections 733 and 735(2)(b) of the Real Property Actions and Proceedings Law (RPAPL), citing, *inter alia*, *Riverside Syndicate, Inc v Saltzman* (49 AD3d 402, 852 NYS2d 840 [1st Dep't 2008]), and *Berkeley Assocs Co v Di Nolfi* (122 AD2d 703, 505 NYS2d 630 [1st Dep't 1986]); and/or

(2) pursuant to CPLR Rules 5015(a)(3) and 3211(a)(7) and RPAPL § 741 because she is not a licensee but, based on her prior ownership of the premises and other circumstances, is a tenant at sufferance, requiring a 30-day predicate notice under Real Property Law § 228, not a 10-day notice to quit.

Alternatively, if the Court vacates the default judgment but does not dismiss the proceeding, Respondent seeks leave to file a late Answer pursuant to CPLR § 3012(d). Alternatively, if the Court does not vacate the default judgment, Respondent seeks a stay of execution of the warrant for a reasonable period of time to allow her to "vacate with dignity", pursuant to CPLR

§ 2201 and RPAPL § 749(3). Respondent explains that she provides full-time care for her son who has schizophrenia and bipolar disorder.

The Court signed Respondent's OSC and made it returnable March 24, 2022. On the return date Respondent's OSC was adjourned on consent to April 27, 2022 with a briefing schedule.

In opposition, Petitioner argues that Respondent has failed to assert either an excusable default or meritorious defense warranting vacatur of the judgment under CPLR § 5015. As to Respondent's claim of lack of personal jurisdiction, Petitioner argues that jurisdiction attached upon delivery and mailing of the Notice of Petition and Petition, and the landlord's failure to file proof of service with the Court according to the time frame set forth in RPAPL § 733 "did not preclude jurisdiction but instead should have been disregarded, since no prejudice was shown to have resulted from the belated filing of proof of service," citing, *inter alia*, *Siedlecki v Doscher* (33 Misc3d 18, 931 NYS2d 203 [App Term 2nd Dep't 2011]) and *Friedlander v Ramos* (3 Misc3d 33, 779 NYS2d 327 [App Term 2nd Dep't 2004]). Petitioner also argues that Respondent suffered no prejudice and the error should be disregarded as *de minimus* as the filing on Monday, February 10, 2020 was just one day short and "the final day for filing fell on Sunday".

As to Respondent's claim that she is a "tenant at sufferance" and not a "licensee" based on her prior ownership of the premises, resulting in a Petition that fails to properly state the facts, Petitioner counters with his own factual allegations regarding the ownership history of the building. Petitioner further argues that he should be permitted to move forward with execution of the warrant as it already has been over two years since the Court entered a judgment and Respondent has not shown any "exceptional or extraordinary circumstances" warranting a further stay.

On reply, Respondent points out that her arguments for vacating her default lie under CPLR §§ 5015(a)(4) and/or (a)(3) and that Petitioner relies on an incorrect subsection of CPLR § 5015(a) in arguing that she has failed to show an excusable default and meritorious defense. As to the RPAPL § 733 issue, Respondent notes the split in authority between the First and Second Departments and argues that this Court must follow the strict statutory interpretation of the First Department, not the Second Department case law cited by Petitioner.

Regarding the proper characterization of her occupancy of the premises, Respondent argues that regardless of who held title when, her "continued residence in the subject premises for nearly a decade prior to Petitioner's purchase coupled with persistent upkeep implicates a tenancy at sufferance", not a licensee status.

After argument on April 27, 2022, the OSC was marked submitted, decision reserved.

DISCUSSION

Only one of the various grounds for relief raised in Respondent's OSC need be considered as it is determinative of the outcome. The RPAPL contains unique service requirements, including the permissibility of "conspicuous" service after "reasonable application" under RPAPL § 735(1), rather than the "due diligence" required under CPLR § 308(4), followed by first-class and certified mailings within one day. The RPAPL requires that proof of service of a notice of petition and petition be filed with the court within three days - of either personal delivery to the respondent, when service has been made by that means, or of the required mailings to the respondent, when service is made by another method, RPAPL § 735(2). A further service requirement in holdover proceedings is that the notice of petition and petition be served at least ten (10) days and not more than seventeen (17) days before the return date. RPAPL § 733.[1]

The RPAPL also provides specific rules defining when service is complete:

(a) Where the papers are personally delivered to the respondent, "such service shall be complete immediately upon such personal delivery". RPAPL § 735(2)(a).
(b) Where the papers are served by substituted or conspicuous service, "such service shall be complete upon the filing of proof of service." RPAPL § 735(2)(b).

Here, it is undisputed that the Notice of Petition and Petition were served by "conspicuous" service with the following key dates:

- 2/5/20 – first attempt at personal delivery
- 2/6/20 – second attempt at personal delivery
- 2/6/20 – posting on entrance door to premises
- 2/7/20 – mailings to Respondents at the premises
- 2/10/20 – filing with the Court of proof of service
- 2/19/20 – return date

Applying the rules described above, while Petitioner properly met the one-day rule for the mailings, and met the three-day rule for filing proof of service (thereby completing service), Petitioner did not meet the rule for completing service at least ten days before the return date. That is, the completion of service by filing on February 10, 2020 was only nine days before the return date of February 19, 2020.

[1] Effective June 14, 2019, under the Housing Stability and Tenant Protection Act of 2019, L. 2019, ch 36, § 15 (Part M), what used to be "at least five and not more than twelve days" under RPAPL § 733(1) was changed to "at least ten and not more than seventeen days".

The leading case analyzing the interplay between RPAPL §§ 733 and 735(2) in the First Department is *Berkeley Assocs Co v Di Nolfi, supra*, in which the Appellate Division reversed the Appellate Term's affirmance of the Civil Court, granted the tenant's motion to vacate a default judgment and dismissed a holdover petition for lack of personal and subject matter jurisdiction due to noncompliance with the requirement under RPAPL § 733 that service be completed by filing proof of service at least five (now ten) days and not more than twelve (now seventeen) days before the return date. The Appellate Division, First Department came to the same result twenty-two years after *Berkeley Assocs* in *Riverside Syndicate, Inc v Saltzman, supra,* reversing the Appellate Term and reinstating Housing Court Judge Schreiber's order dismissing certain holdover petitions where the landlord had "failed to 'complete' service of the notice of petitions and petitions by filing proof of service (RPAPL § 735 [2] [b]) at least five days prior to the date the petitions were noticed to be heard (see RPAPL § 733 [1])."

Housing Court Judge Ibrahim, recently faced with a similar RPAPL § 733 issue, granted the respondent's motion to dismiss and explained:

> While the Appellate Term, Second Department may now take a different view on this exact issue, this court sits in the First Department and must follow binding authority. *Saltzman* is such binding authority. Indeed, it appears to still be binding authority statewide. *See Abakporo v Gardner* (22 Misc 3d 1101[A], 875 NYS2d 818 [Civ Ct Kings Co 2008]) ("this court is bound by the precedent set forth by the First Department in *Riverside Syndicate* which is the only decision on this issue which was made by any court of statewide jurisdiction"), *citing Mountain View Coach Lines v Storms* (102 AD2d 663, 664, 476 NYS2d 918 [2nd Dep't 1984]) ("The doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department" until the Court of Appeals or the same Division announces a contrary rule); *see also, D'Alessandro v Carro* (123 AD3d 1, 992 NYS2d 520 [1st Dep't 2014]).

Bronx 2120 Crotona Ave LP v Gonzalez (2022 NY Slip Op 22148, ¶¶ 2-3, 2022 NY Misc. LEXIS 2029, 2022 WL 1549195 [Civ Ct Bx Co May 17, 2022]); *see also Valane v Cruz* (2018 NYLJ LEXIS 2629 [Civ Ct Bx Co July 24, 2018])(stipulation vacated and proceeding dismissed where substituted service was completed by filing thirteen days before the return date under the pre-HSTPA version of RPAPL § 733[2]).

Accordingly, Respondent is entitled to vacatur of the default judgment under CPLR § 5015(a)(4) for lack of personal jurisdiction and, upon such vacatur, dismissal of the Petition

[2] *See fn 1, supra.*

without prejudice. Given this ground for dismissal, there is no need to reach Respondent's other arguments.

CONCLUSION

For the reasons stated above, it is hereby ORDERED that Respondent's Order to Show Cause is granted, the default judgment is vacated and the Petition is dismissed without prejudice. This constitutes the Decision and Order of the Court, which the Court is uploading on NYSCEF.

DEJ

_____
Diane E. Lutwak, H.C.J.

Dated: Bronx, New York
May 23, 2022

Attorney for Petitioner:

Jayson Blau, Esq.
5600A Broadway, 2nd Floor
Bronx, New York 10463
(347) 329-1146 j@jblau.com

Attorneys for Respondent Marisol Rodriguez:

Alana Murphy, Esq.
Mobilization for Justice, Inc.
424 East 147th Street, 3rd Floor
Bronx, New York 10455
(212) 417-3800 ext 3909 amurphy@mfjlegal.org