2022-06-15

Powell v. Jones

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2022 NY Slip Op 50537(U)
Decided on June 15, 2022
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
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Decided on June 15, 2022

Civil Court of the City of New York, Bronx County

Vicknell Powell, Petitioner,

against

Cherylin Jones A/K/A SISTER E. JONES-BEY, Respondent-Tenant.

L&T Index No. 311520-2021

For Petitioner: Jessica Scheiber, Esq.

For Respondent: The Bronx Defenders, by Jaden Powell, Esq.

Shorab Ibrahim, J.

RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION BY THE RESPONDENT TO DISMISS THE PROCEEDING, OR TO STAY THE PROCEEDING, OR FOR LEAVE TO FILE AN ANSWER: NYSCEF Documents No. 8 through 33.

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

RELEVANT FACTS & PROCEDURAL POSTURE

This is a holdover proceeding commenced by Vicknell Powell (petitioner) to reclaim possession of the unregulated second-floor apartment at 1028 Elder Avenue, Bronx, NY 10472 (the subject premises) from Cherylin Jones a/k/a Sister E. Jones-Bey (respondent) after termination of the tenancy.

The May 12, 2021 dated 60-day Termination Notice (notice) was purportedly served at the premises by conspicuous place service after attempts on May 24, 2021 and May 25, 2021.

Respondent now moves to dismiss pursuant to CPLR 3211(a)(1) and (a)(7) arguing, essentially, that service of the notice was doomed to failure since respondent was not residing at the premises at the time of service due to being illegally locked out by petitioner. If dismissal is not granted, respondent asks this court to stay the proceeding pursuant to CPLR 2201, pending a trial and determination of a HP proceeding between these same parties. Respondent also seeks leave to file an answer.

Petitioner does not oppose the answer. However, she strongly opposes dismissal or the imposition of any stay.

DISCUSSION

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, an answer at this stage of the proceeding, which includes potentially meritorious defenses, does not prejudice petitioner at this [*2]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). The court also notes that to have the full benefit of representation, respondent must be allowed to file an answer. (*see Harlem Restoration Project v Alexander*, 1995 NY Misc. LEXIS 783 [Civ Ct, New York County 1995]).

Service of the Termination Notice

To decide the motion, the court must refer to two (2) prior lock-out proceedings filed by respondent-tenant against petitioner-landlord. Index No. 301075-21 (lockout 1) was settled by stipulation dated March 29, 2021. That two-attorney stipulation requires that the landlord repair the apartment door within ten (10) days. Notably, the petition was "withdrawn as to Petitioner's demand that she be restored to possession." (*see* NYSCEF Doc. 22). Index No. 306206-21 (lockout 2) was settled by stipulation dated July 13, 2021.[FN1] That two-attorney stipulation required the landlord install and provide a working key to the building front door by July 14, 2021. (*see* NYSCEF Doc. 24).

For her part, the respondent-tenant alleges she was "kept out of my apartment from the end of January 2021 until June 2021 due to harassment and illegal lockouts by Petitioner." (*see* NYSCEF Doc. 15 at 8).

Notably, however, there was never a finding [by a court] that the tenant had been locked out illegally and the parties never stipulated that the tenant had, in fact, been illegally locked out.

In fact, respondent-tenant states, "near the end of January 2021 it was clear that *I needed to remove myself* from the premises for a while." [emphasis added] (*see* NYSCEF Doc. 15 at 5).

A reasonable inference that can be drawn from the plain language of the lockout 1 stipulation is that possession was no longer an issue. After all, if the door was not repaired, the stipulation requires the tenant to commence an HP action, rather than restoring the lockout case.

Indeed, petitioner states that she never changed any locks. Rather, she changed the door to the unit after the Fire Department broke it to access the subject apartment. (*see* NYSCEF Doc. 33 at 4). This, according to petitioner, occurred in February 2021. (*id*).

The above timeline does not establish, for the purposes of a CPLR 3211 motion, that the landlord knew the tenant was not residing at the premises. Nor is there any allegation that the landlord was put on notice that respondent was residing elsewhere. Neither respondent nor her attorneys in the lockout proceedings allege they informed the landlord of any other address where the tenant could be found and/or served with process.

The lockout 1 petition only alleges that in February 2021, the respondent stayed elsewhere. However, she did not surrender possession, even constructively [as she kept her

cats at the apartment].

Petitioner, on the other hand, offers in her affidavit that she had "no notice of any *other* location where the Respondent was residing, nor place of employment, nor any way to get in touch with her." [emphasis added] (*see* NYSCEF Doc. 33 at 7). Petitioner concludes that to the extent respondent-tenant was out of the apartment, it was a *voluntary* departure.

As to the allegation that after the lockout 1 petition the door lock was changed, the court notes that respondent-tenant's counsel acknowledges that keys were provided on or about May 6, 2021. The tenant, however, did not attempt to access the apartment with those keys until June 2, 2021. (*see* NYSCEF Doc. 23 at 17-18).

Thus, presuming that everything respondent-tenant states is accurate, under any scenario, working key or no working key, respondent-tenant would not have been present at the subject premises when service of the termination notice was attempted because she did not attempt to access the premises during that time.

When considering a motion under CPLR § 3211(a)(7), one must afford the pleadings a liberal construction. The court must deem the facts alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). In assessing a motion under CPLR § 3211(a)(7), "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]). Thus, "a motion to dismiss made pursuant to CPLR § 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law." (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker*, *LLP*, 38 AD3d 34, 38, 827 NYS2d 231 [2nd Dept 2006]; *see Leon v Martinez*, 84 NY2d at 87-88).

In sum, respondent alleges that petitioner was "well-aware that Respondent could not receive service, since Respondent was in shelter, actively litigating several illegal lockout proceedings." (see NYSCEF Doc. 17). However, respondent has not established through documentary evidence or otherwise that petitioner was ever informed respondent was in a shelter [even though respondent-tenant was represented in lockout 1 by March 2021]. It is also untrue that the illegal lockouts were being actively litigated at the time of service of the termination notice in May 2021. Lockout 1 ended by stipulation dated March 29, 2021. Lockout 2 commenced by petition dated June 11, 2021.

Denis v Fisher, (66 Misc 3d 433 [Civ Ct, Queens County 2019]), cited to by respondent, is distinguishable. In *Denis*, the Hon. Sergio Jimenez found service inadequate because the attempts were "predestined to fail." (66 Misc 3d at 434). This determination was made because the petitioner had actual knowledge that the respondent had been removed from the premises [by Adult Protective Services]. No such knowledge has been adequately alleged, much less established here.[FN2]

Based on the above, the motion to dismiss under CPLR § 3211(a)(1) and (a)(7) is denied.

A Stay Pursuant to CPLR § 2201

Absent dismissal, respondent requests that this case be stayed so that respondent may have "a meaningful opportunity to adjudicate her harassment and breach of warranty of habitability claims that are already pending and ready for trial in the Housing Part." (*see* [*3]NYSCEF Doc. 17). Respondent argues that if she were evicted as a result of this proceeding, she would lose standing in the Housing Part (HP) proceeding.

CPLR § 2201 states, "except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." Granting such a stay is within the sound discretion of the court. (*see Concord Associates, L.P. v EPT Concord, LLC*, 101 AD3d 1574, 1575, 957 NYS2d 509 [3rd Dept 2012]). There is, however, a strong rule against staying a summary proceeding. (*see Scheff v 230 E. 73rd Owners Corp.*, 203 AD2d 151, 152, 610 NYS2d 252 [1st Dept 1994]; *Hillside Park 168, LLC v Hossain*, 61 Misc 3d 132(A), 2018 NY Slip Op 51451(u) [App Term 2nd Dept 2018]). The question before this court is whether the facts and circumstances of this matter *require* an exercise of the court's discretion in granting a stay of this matter.

The court answers this query in the negative. The gravamen of the July 19, 2021 HP petition is respondent-tenant's harassment claim. (*see* NYSCEF Doc. 25). Harassment "shall mean any act or omission by or on behalf of an owner that (i) *causes* or is intended to cause any person lawfully entitled to occupancy of a dwelling unit " [emphasis added] (*see* NYC Admin Code § 27-2004(a)(48)). In other words, the harassment statute contemplates that an occupant who has been harassed may well surrender possession. An "owner's" successful harassment campaign, however, would not divest the court's jurisdiction. This court has not identified, and respondent has not pointed to, any case holding that continued possession is required for the Housing Court to hear the harassment claim.[FN3]

The court need not delve into the prejudice a stay would cause petitioner but notes that the subject premises are a three-family home, petitioner has not received rent for many months, and the parties' lease long expired.

CONCLUSION

Based on the above, respondent's motion is denied in part and granted in part. Dismissal is denied and the application for a stay is denied. The proposed verified answer (NYSCEF Doc. 29) is deemed served and filed.

This case is adjourned to June 28, 2022 at 11 AM for an in-person pre-trial conference.

This constitutes the Decision and Order of the court. A copy will be posted on NYSCEF.

SO ORDERED,
Dated: June 15, 2022
Bronx, New York
/S/

_____
Shorab Ibrahim, JHC

Footnotes

Footnote 1: Respondent's counsel's affirmation in support of the motion apparently misstates the date of the lockout 1 stipulation.

Footnote 2: In another case respondent cites to the court determined that service was "predestined to fail" because of knowledge held by the landlord. (*see 91 Fifth Ave. Corp. v Brookhill Prop. Holdings LLC*, 51 Misc 3d 811, 815 [Civ Ct, New York County 2016] (Landlord knew tenant was not yet in occupancy at the premises served)).

Footnote 3: The court notes that the HP case is in a trial posture (see NYSCEF Doc, 26), while this matter is still in the pre-answer motion stage. In all likelihood, the HP case will go to trial first.