2022-08-15

# 1163 Wash. LLC v. Cruz

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| 2022 NY Slip Op 50751(U) |
| Decided on August 15, 2022 |
| Civil Court Of The City Of New York, Bronx County |
| Lutwak, J. |
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Decided on August 15, 2022

Civil Court of the City of New York, Bronx County

**1163 Washington LLC, Petitioner (Landlord),**

**against**

**Dilenia Cruz, Respondent (Tenant).**

L & T Index No. 304445/2022

Attorneys for Petitioner:
Jayson Blau, Esq.
5600A Broadway, 2nd Floor
Bronx, New York 10463
(347) 329-1146

Attorneys for Respondent:
Bridget Mullaly, Esq.
Mobilization for Justice, Inc.
424 East 147th Street, 3rd Floor
Bronx, New York 10455
(212) 417-3784

Diane E. Lutwak, J.

Recitation, as required by CPLR R 2219(A), of the papers considered in the review of Respondent's Motion to Dismiss Pursuant to CPLR R 3211(8) or to Amend Answer Pursuant

to CPLR R 3025(b) and Other Relief:

Papers NYSCEF Doc #
Notice of Motion With Supporting Affirmation & Affidavit 8
Memorandum of Law in Support 9
Exhibits A-E in Support 10-14
Affirmation in Opposition 15
Affirmation in Reply 16
Exhibits AA-BB 17-18

After oral argument, upon the foregoing papers and for the reasons stated below, Respondent's motion is decided as follows.

**PROCEDURAL HISTORY & FACTUAL BACKGROUND**

This is a nonpayment eviction proceeding brought against a Rent Stabilized tenant who initially appeared *pro se* and is now represented by counsel. The petition, dated February 22, 2022, seeks rent arrears of $5382.82, comprised of $1345.83 per month for the months of November 2021 through and including February 2022. The petition was e-filed by Petitioner's counsel on February 23, 2022, followed by the e-filing of a process server's affidavit on March 1, 2022, alleging "substitute" service of the notice of petition and petition on February 26, 2022 on "Jane Doe, a person of suitable age and discretion, who was willing to receive [the papers] and who ***resided*** at said property" [emphasis in original]. The affidavit includes a description of "Jane Doe."

On March 10, 2022 Respondent *pro se* answered the petition by speaking with a court clerk who used the Court's "Answer in Person" form, "CIV-LT-91 (Revised Oct 2014)", to record her answer. The form states that Respondent "has appeared and orally answered the Petition as follows:". Two items on the answer form were checked off with "XXX": line 10, a defense of conditions in the apartment needing repair, and line 19, entitled "Other counterclaim(s)", where the sentence "I am applying for help with the HRA" was typed in. Also relevant, as discussed below, is the first section of that answer form, entitled "SERVICE". This section lists two options, enumerated as lines "1" and "2", neither of which were checked off:

1. I did not receive the Notice of Petition and Petition.

2. I received the Notice of Petition and Petition, but service was not correct as required by law.

The Court calendared the case initially for a virtual appearance in Intake Part 1 on March 15, 2022. Both sides appeared, Petitioner by counsel and Respondent *pro se*. Respondent was introduced to an attorney from Mobilization for Justice, Inc. (MFJ), that day's legal services provider under New York City's Universal Access to Legal Services Law, and the case was adjourned to April 5, 2022 for an in-person appearance in Resolution Part C. On April 5, 2022 Respondent requested an adjournment for MFJ to complete intake and assign her an attorney. The Court granted that request and adjourned the case to May 17, 2022.

Respondent retained MFJ and an attorney from that office filed a notice of appearance on May 12, 2022. On May 16, 2022, Respondent's counsel filed the motion that is now pending before the Court, seeking dismissal under CPLR R 3211(a)(8) for lack of personal jurisdiction due to allegedly improper service of the notice of petition and petition under Real Property Actions and Proceedings Law (RPAPL) § 735 or, alternatively, leave to file an amended answer under CPLR R 3205(b). The Proposed Amended Verified Answer, in addition to including admissions/ denials of the statements in the petition, includes one Objection in Point of Law (lack of personal jurisdiction for the same reason Respondent seeks dismissal) and one Affirmative Defense (breach of the warranty of habitability due to five listed conditions).

In her affidavit in support of the motion Respondent states that she is a "monolingual Spanish speaker", lives with her 16-year-old daughter and received only one copy of the notice of petition and petition by regular mail. Respondent further asserts that neither she nor anyone visiting, residing in or working at the apartment on the alleged date of "substitute" service meets the description of the "Jane Doe" to whom the process server claims to have given the papers and that, based on her work schedule that day, she would have been home at the time the process server claims to have served "Jane Doe". Respondent also asserts in her affidavit that when she came to court to answer the petition the clerk did not explain to her what correct service of the notice of petition and petition "as required by law" means.

In her attorney's memorandum of law, Respondent first argues that the proceeding should be dismissed pursuant to CPLR R 3211(a)(8) due to lack of personal jurisdiction, or set down for a hearing on this issue, based on the assertions in her affidavit. Alternatively, Respondent argues that because leave to amend pleadings must be "freely given," CPLR R 3025(b), she should be permitted to amend her answer to include a defense of lack of personal jurisdiction [FN1] . Respondent argues she did not waive this defense by either failing to include it in her original answer, made without the benefit of counsel and without

any knowledge of the meaning of correct service "as required by law", the language on the Court's pre-printed answer form, or by appearing for the first two court conferences.

In opposition, Petitioner argues that the motion should be denied as an objection to personal jurisdiction is waived unless it is made at the time a respondent first appears, or before the time to amend the answer without leave of court expires. Here, Petitioner argues, Respondent did not raise this defense in her answer and is attempting to do so after two adjournments and seventy-four days, "well beyond the time permitted to amend an answer as of right." Petitioner argues that it would be prejudicial to allow Respondent to challenge service now; if it had been raised timely Petitioner could have investigated and determined whether to withdraw this proceeding and start a new one. Regarding Respondent's claim that the clerk did not explain to her what correct service "as required by law" is, Petitioner argues that "the Court is not required to give Respondent legal advice and it would be highly inappropriate for the Court to do so."

**DISCUSSION**

The key question raised by Respondent's motion is whether she is permitted, now that she has retained counsel, to amend her answer by leave of court to include a defense of lack of personal jurisdiction.[FN2] A challenge to personal jurisdiction may be raised either in a pre-answer motion, CPLR R 3211(a)(8), or in an answer; generally, the defense is deemed waived if not raised in one or the other, CPLR R 3211(e). However, the waiver rule is subject to CPLR R 3025, under which pleadings may be amended as of right, 3025(a), or by leave of court, CPLR R 3025(b), and when court intervention is sought, "[l]eave shall be freely given". The Court of Appeals has determined that it is permissible when amending an answer as of right under CPLR R 3025(a) to add a challenge to personal jurisdiction, and that this "is consistent with CPLR R [*2]3211(e) and advances the purpose of CPLR R 3025(a) ... [which] gives a party 20 days [FN3] after serving a pleading to correct or improve upon it, and the addition of a jurisdictional defense is no less proper a correction or improvement than any other." *Iacovangelo v Shepherd* (5 NY3d 184, 187, 800 NYS2d 116, 118, 833 NE2d 259, 261 [2005]). The Court of Appeals in *Iacovangelo* distinguished its earlier decision in *Addesso v Shemtob* (70 NY2d 689, 690, 518, NYS2d 793, 794, 512 NE2s 314, 315 [1987]), noting that case involved "waiver by omission of a defense from a motion, not from an answer, and the two are not the same [t]here is no statutory right to amend a motion that is comparable to the right to amend an answer afforded by CPLR R 3025(a)." *Iacovangelo, supra* (5 NY3d at 187, 800 NYS2d at 117-18, 833 NE2d at 260-261).

Similarly, if the time has passed for amending as of right and leave to amend is sought under CPLR R 3025(b), a court may permit an amendment to include defenses deemed waived under CPLR R 3211(e).[FN4] As explained by the Court of Appeals, "Permission to amend pleadings should be 'freely given' (CPLR R 3025, subd [b]). The decision to allow or disallow the amendment is committed to the court's discretion. 'Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine.'" *Edenwald Contracting Co v New York* (60 NY2d 957, 959, 471 NYS2d 55, 56, 459 NE2d 164, 165 [1983])(quoting *Siegel, New York Practice,* reversing the Appellate Division and, 6½ years after the original answer was filed, reinstating the trial court's order permitting defendant to amend its answer to include "release", a defense under CPLR R 3211(a)(5) that is deemed waived under CPLR R 3211(e) if not raised in a pre-answer motion or in the original answer). The kind of prejudice that must be shown is described as, "some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to [*3]add." *A J Pegno Constr Corp v New York* (95 AD2d 655, 656, 463 NYS2d 214, 215 [1st Dep't 1983])(quoting *Siegel, New York Practice*). *See also Matter of Part 60 RMBS Put-Back Litig* (2018 NY Slip Op 32679[U]), ¶¶ 3-5 [Sup Ct NY Co 10/18/2018, Hon. Marcy S. Friedman]) (granting defendants' motions to amend their answers to include a statute of limitations defense, with an in-depth analysis of the issue of amending answers under CPLR R 3025(b) to include dispositive defenses deemed waived under CPLR R 3211(e)).

The unique characteristics of summary eviction proceedings under the RPAPL are well-recognized, such as the "highly contracted" time frame, *Smith v Maya* (No 98-770-KC, 1999 WL 1037917 [AT 2nd Dep't 7/23/1999]), *see fn 3, supra*, potentially dire consequences, *Braschi v Stahl Assocs Co* (74 NY2d 201, 215, 544 NYS2d 784, 790, 543 NE2d 49, 56 [1989])(noting that eviction from one's home is "one of the harshest decrees known to the law"), and limited availability of counsel for low-income tenants in New York City: While now mandated by the Universal Access to Legal Services Law, Local Law 136 of 2017, the supply still falls far short of what the demand calls for. *See generally 2247 Webster Ave HDFC v Galarce* (62 Misc 3d 1036, 1041, 90 NYS3d 872, 875 [Civ Ct Bx Co 2019]). In deference to these concerns, courts have held that to permit the full benefit of legal representation, once counsel has been retained a respondent should be permitted to file an amended answer. *See, e.g., 3225 Holdings LLC v Imeraj* (65 Misc 3d 1219[A] at fn 5, 119 NYS3d 392 [Civ Ct Bx Co 2019]); *W 152 Assocs LP v Gassama* (65 Misc 3d 1218[A], 119 NYS3d 392 [Civ Ct NY Co 2019]); *699 Venture Corp v Zuniga* (64 Misc 3d 847, 851, 105

NYS3d 806, 809 [Civ Ct Bx Co 2019]); *Morris I LLC v Baez* (62 Misc 3d 1227[A], 113 NYS3d 833 [Civ Ct Bx Co 2019]); *La Casa Nuestra HDFC v Harris* (2018 NYLJ LEXIS 2442 [Civ Ct NY Co 2018]); *Harlem Restoration Project v Alexander* (NYLJ, July 5, 1995, at 30, col 5, 1995 NY Misc LEXIS 783 [Civ Ct NY Co 1995]).

Here, before retaining counsel, Respondent - a Spanish-speaking-only litigant - answered orally in a timely manner by coming to the Bronx County Housing Court Clerk's office, speaking with a window clerk—presumably one of the Court's Spanish-speaking clerks, at least one of whom is stationed at a public window when the Court is open—who prepared Respondent's answer using the Court's pre-printed form. Respondent explains she did not challenge personal jurisdiction in her original answer because she did not know the rules for proper service of the notice of petition and petition. The answer form used in this case sheds no light on those rules and offers only two options for challenging "Service"—either (1) nonreceipt or (2) receipt, but "service was not correct as required by law", with no blank lines provided to insert any information as to how service was effectuated.[FN5] What exactly transpired during Respondent's encounter with the clerk is not spelled out in her motion papers, which do not explain whether the clerk even read these two options to her. Regardless, it is fair to assume the clerk did not provide Respondent with a primer on service of process under RPAPL § 735 (Petitioner is correct to point out that it would have been inappropriate for the clerk to give Respondent legal advice) or offer her an opportunity to review the process server's e-filed affidavit of service or go to the Court's Help Center or internet website for further information before proceeding with her [*4]answer.

At the first court appearance Respondent was introduced to one of the City's nonprofit legal services providers, MFJ, which was not able to complete intake by the second court appearance due to excessive demand for their services. Respondent thereafter retained MFJ, who, prior to the third court appearance, filed a Notice of Appearance and the motion for leave to file an amended answer now pending before this Court. The defense of lack of personal jurisdiction due to defective service of process as articulated in the Proposed Verified Amended Answer—which refutes the factual allegations of Petitioner's process server, who describes "substitute" service by personal delivery to a "Jane Doe"—is sufficient, *Haberman v Simon* (303 AD2d 181, 755 NYS2d 596 [1st Dep't 2003]), and complies with the rule on a motion for leave to amend a pleading that the movant "need not establish the merit of its proposed new allegations, but [must] simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit," *MBIA Ins Corp v Greystone & Co. Inc* (74 AD3d 499, 500, 901 NYS2d 522 [1st Dep't 2010])(internal citation omitted); *accord, e.g., Miller v Cohen* (93 AD3d 424, 425, 939 NYS2d 424 [1st Dep't 2012]).

Petitioner asserts that it is prejudiced because if the defense had been raised in the original answer it could have "investigated the claim and decided whether or not to commence a new action so as to not lose valuable time." There is no need to speculate as to whether Petitioner in fact would have chosen to withdraw this proceeding and file a new one had Respondent adequately articulated her "*Haberman*" challenge to personal jurisdiction in her original answer. The time that elapsed between when Respondent filed her original answer and when she retained counsel who filed this motion does not implicate the applicable definition of prejudice, as Petitioner lost no "special right" in the interim, nor suffered any "significant trouble or expense". The nine-week delay here falls far short of the 6½-year delay in *Edenwald*, which, in that case, did not prevent the Court of Appeals from permitting the requested amendment; Petitioner now has chosen to extend that minimal delay by opposing Respondent's motion and submitting it for decision by the court.

As pointed out by Respondent, other courts have granted motions to amend answers filed by unrepresented respondents in nonpayment proceedings, allowing them to add personal jurisdiction defenses. For example, in the unreported decision in *633 West 152 BCR LLC v Miguel Anaya* (L & T # 74595-19 [Civ Ct NY Co 11/16/20])(copy provided by Respondent's counsel), the court allowed a personal jurisdiction claim to be interposed for the first time in an amended answer, noting that "the respondent's original answer here was made orally before the court, before respondent had an opportunity to consult with and appear by counsel", the respondent "was unaware of this legal claim when he answered orally" and the respondent's supporting affidavit "clearly states detailed facts to support the claim." In *2401 Davidson Assocs v Rice* (2018 NYLJ LEXIS 3839 [Civ Ct Bx Co 2018]), one respondent had answered the petition orally at the Clerk's Office and did not challenge personal jurisdiction. At the first court appearance respondents "met an attorney from a legal services organization who immediately appeared that day on their behalf" and the case was adjourned for just over a month. Prior to the adjourned date respondents' newly-retained counsel moved for leave to interpose an amended answer which the Court granted, holding that respondents "should not be barred from amending an answer to include a personal jurisdiction defense when such amendment is sought by motion within a reasonable amount of time in relation to the proceeding's history, does not cause prejudice or surprise to the petitioner and is not devoid of merit."

Also instructive is the older case of *Lipman v Salsberg* (107 Misc 2d 276, 277, 433 NYS2d 970, 971 [Civ Ct NY Co 1980]), in which the respondent-tenant answered without counsel, raising only a defense of breach of the warranty of habitability. After filing the

answer, the tenant was fortunate enough to retain counsel immediately who was able to act quickly: "By the close of the following day, the tenant consulted an attorney and the attorney prepared and served a motion to dismiss based upon a claim of improper service of the petition and notice of petition. The motion was personally delivered to the petitioner's counsel on that same day." The court rejected petitioner's argument that the motion should be denied under CPLR R 3211(e), "which generally precludes raising a jurisdictional defense after failing to raise the issue in a responsive pleading." Instead, the court held that the jurisdictional issue had been properly raised, noting that (1) in terms of actual notice, petitioner's counsel presumptively received the motion prior to receipt of the answer; (2) the jurisdictional question was raised without delay; (3) "the same result could have been achieved by moving to amend the *pro se* answer to correct an omission, mistake or defect under CPLR § 2001, as applicable to any civil proceeding, or under CPLR § 405, as applicable to a special proceeding"; and (4) it did not serve the interests of the administration of justice to deny the motion to dismiss where the supporting affidavit "goes beyond mere conclusionary allegations of lack of proper service."[FN6]

**CONCLUSION**

For the reasons stated above, it is hereby ORDERED that Respondent's motion is granted to the extent that her Proposed Verified Amended Answer (Exhibit E/NYSCEF Doc #14) is deemed duly served and filed. The case is restored to the Court's calendar for an in-person, pre-trial conference on September 13, 2022 at 2:15 p.m. This constitutes the Decision and Order of this Court, which is being uploaded on NYSCEF.

Dated: August 15, 2022
Bronx, New York
Diane E. Lutwak, HCJ

**Footnotes**

**Footnote 1:**To the extent the motion seeks leave to ***add*** an affirmative defense of breach of the warranty of habitability, in fact Respondent's original answer included this defense and the proposed amended answer merely provides additional factual detail and a legal framework. Under the CPLR R 3025(b) mandate that leave to amend pleadings "shall be freely given", it is appropriate to grant this aspect of Respondent's motion without further discussion as it not only will cause no "significant prejudice" to Petitioner, *Edenwald Contracting Co v New York* (60 NY2d 957, 471 NYS2d 55, 459 NE2d 164 [1983]), but also will enable Petitioner to be more prepared to address this defense in settlement negotiations and/or at trial.

**Footnote 2:**Respondent's first argument is that the case should be dismissed either on the papers or after a traverse hearing for lack of personal jurisdiction. However, given that this motion was filed after Respondent filed an answer to the petition, and this defense was not raised in Respondent's original answer, the Court cannot simply address the merits but must first determine whether the defense has been waived or whether it can be heard.

**Footnote 3:**Under the New York City Civil Court Act, amended and supplemental pleadings generally are governed by the CPLR, NYCCCA § 909(b), except that the window for amending pleadings as of right is reduced from 20 to 10 days, NYCCCA § 909(a). The Appellate Term, Second Department, in an unreported decision, has held that neither the CPLR nor the NYCCCA applies in summary nonpayment proceedings, "which are more specifically governed by the RPAPL", *Smith v Maya* (No 98-770-KC, 1999 WL 1037917 [AT 2nd Dep't 7/23/1999]), which provides a "highly contracted" time frame, including the RPAPL § 732 requirement that the court clerk set a date for trial "not less than three nor more than eight days after joinder of issue". The *Smith v Maya* Court held that, "Inasmuch it could not have been intended that an answer should be amendable as of right after a trial has been held, the period of 20 days or even 10 days to amend the answer as of right cannot apply to nonpayment proceedings."

**Footnote 4:**In a decision dated February 22, 2005, the Appellate Division, First Department, citing to *Adesso v Shemtob, supra*, held that, "While permission to amend an answer is to be freely given pursuant to CPLR R 3025(b), the waiver of a jurisdictional defense cannot be nullified by a subsequent amendment to a pleading adding the missing affirmative defense." *McGowan v Hoffmeister* (15 AD3d 297, 792 NYS2d 381 [1st Dep't 2005]). While this decision continues to be cited, *see, e.g., Wells Fargo Bank, NA v Sewer* (186 AD3d 1182, 129 NYS3d 329 [1st Dep't 2020]), it should be noted that it was issued prior to the Court of Appeals' decision in *Iacovangelo*, which was issued on June 30, 2005. Accordingly, this Court does not find it to be controlling of the outcome herein.

**Footnote 5:**Even if one of these options had been checked off, arguably that would be insufficient to comply with long-standing decisional law that "the mere conclusory denial of receipt of service is insufficient to rebut the presumption that service was proper," *see, e.g.*, *Grinshpun v Borokhovich* (100 AD3d 551, 552, 954 NYS2d 520, 521 [1st Dep't 2012]).

**Footnote 6:**Another case cited and provided by Respondent, *3849 Associates v Utley* (NYLJ, 9/26/1986, p. 12, col. 4 [AT 1st Dep't]), is not on point. In that case, the issue on appeal was the trial judge's ruling that the tenant had waived personal jurisdiction by failing to raise this defense "in his answer or in a previous court appearance." The tenant had originally appeared *pro se* and failed to raise a personal jurisdiction defense in his answer. However, he subsequently retained counsel who moved for leave to include this defense in an amended answer which motion the Appellate Term noted "had been granted by another judge ***on consent***." [Emphasis added.] Accordingly, the Appellate Term remanded the case to the trial court for traverse.

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