2022-07-28

Hill v. Cubilete

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART E

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LAMONT HILL,

L&T Index No 300344/20
Mot. Seq. No. 1,3

Petitioner-Owner,

DECISION AND ORDER

-against-

CARMEN CUBILETE,

Respondent-Tenant

VICTORIA WILTSHIRE, "JOHN DOE" and/or "JANE DOE,"

First and last names of latter two Respondents-Undertenants being fictitious and unknown to Petitioners Person(s) intended being in possession of the Premises described

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HONORABLE DAVID A. HARRIS, J.H.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of respondent's motion to dismiss, listed by NYSCEF number:

10,12,13,14,15,16,17,18,19,21,22,23,24

Upon the foregoing cited papers, the Decision and Order on these Motions is as follows:

After the service of a Notice of Termination dated February 11, 2020, terminating a month to month tenancy (Notice), petitioner commenced this summary proceeding seeking to recover possession of apartment #204 (Apartment) in the building located at 224 Highland Boulevard, in Brooklyn (Building). The notice of petition and petition were served by conspicuous posting, with attempts at in-hand delivery made on September 2, 2020 and September 3, 2020, and mailings on September 3, 2020. The affidavit of service was filed on September 5, 2020 (NYSCEF No. 5). The notice

of petition (NYSCEF No. 2) filed with the court did not include a return date and time. On August 25, 2020, the court endorsed on the notice of petition "Date to be determined. The court will notify all parties of the court date." (NYSCEF No. 3).

On January 25, 2021, and again on February 9, 2021, respondent Carmen Cubilete filed hardship declarations (NYSCEF Nos. 6 & 8). On February 9, 2021, respondent Victoria Wiltshire filed a hardship declaration (NYSCEF No. 7). The hardship declarations resulted in the proceeding being stayed through January 15, 2022. On January 3, 2022, respondent Carmen Cubilete appeared by counsel (NYSCEF No.9). At an unstated time, respondent applied for assistance through the Emergency Rental Assistance Program (ERAP), receiving approval in the sum of $19,500 (NYSCEF No. 15).

Petitioner now moves to restore the proceeding to the court's calendar, alleging that it did not accept and returned the ERAP payment. Petitioner provides both an original and an amended 1099 form, the original reflecting the payment and the amended reflecting no payment (NYSCEF No. 22). Respondent opposes, arguing that petitioner's actions constitute acceptance of the ERAP funds, precluding petitioner from maintaining this proceeding.

Respondent cross-moves to dismiss, alleging pursuant to CPLR 3211(a)(2) that documentary evidence establishes that petitioner accepted the ERAP payment, mandating dismissal of this proceeding. Alternatively, respondent seeks dismissal alleging that the petition was not served ten to seventeen days prior to its return date pursuant to Real Property Actions and Proceedings Law (RPAPL) § 733[1]. The court turns first to the potentially dispositive cross-motion to dismiss.

Dismissal is appropriate when "a defense is founded upon documentary evidence" (CPLR 3211[a][1]). The standard has been construed as imposing a significant burden. It has been held that:

> "'A motion pursuant to CPLR 3211(a)(1) to dismiss based on documentary evidence may be appropriately granted 'only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law'' (*YDRA, LLC v.*

> *Mitchell,* 123 A.D.3d 1113, 1113, 1 N.Y.S.3d 206, quoting *Goshen v. Mutual Life Ins. Co. of N.Y.,* 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190; *see Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.,* 20 N.Y.3d 59, 63, 956 N.Y.S.2d 439, 980 N.E.2d 487; *Tooma v. Grossbarth,* 121 A.D.3d 1093, 1094–1095, 995 N.Y.S.2d 593; *Biro v. Roth,* 121 A.D.3d 733, 734, 994 N.Y.S.2d 168). "In order for evidence submitted under a CPLR 3211(a)(1) motion to qualify as 'documentary evidence,' it must be 'unambiguous, authentic, and undeniable' " (*Cives Corp. v. George A. Fuller Co., Inc.,* 97 A.D.3d 713, 714, 948 N.Y.S.2d 658, quoting *Granada Condominium III Assn. v. Palomino,* 78 A.D.3d 996, 996–997, 913 N.Y.S.2d 668; *see Treeline 1 OCR, LLC v. Nassau County Indus. Dev. Agency,* 82 A.D.3d 748, 752, 918 N.Y.S.2d 128). "It is clear that judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' would qualify as 'documentary evidence' in the proper case" (*Fontanetta v. John Doe 1,* 73 A.D.3d 78, 84–85, 898 N.Y.S.2d 569, quoting David D. Siegel, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 7B, CPLR C3211:10 at 21–22). Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence (*see Attias v. Costiera,* 120 A.D.3d 1281, 1283, 993 N.Y.S.2d 59; *Cives Corp. v. George A. Fuller Co., Inc.,* 97 A.D.3d at 714, 948 N.Y.S.2d 658; *Fontanetta v. John Doe 1,* 73 A.D.3d at 87, 898 N.Y.S.2d 569)."

(25-01 Newkirk Ave., LLC v Everest Nat. Ins. Co., 127 AD3d 850, 851 [2d Dept 2015]). The evidence offered here by respondent that purports to establish the acceptance of rent does not meet the stringent standards mandated for it to qualify as documentary evidence. Respondent offers email communications, and the court further notes that the document entitled New York State Owner Certification provides that "I agree, and it is my intent, to sign this application by typing my name below" but the document offered bears neither an autograph signature nor a typed name. As such, respondent does not meet the burden of establishing a defense based upon documentary evidence, and the branch of respondent's motion seeking dismissal on that ground is denied.

Alternatively, respondent seeks dismissal alleging that service of the notice of petition and petition did not comply with the requirements of RPAPL § 733[1], which requires that "the notice of petition and petition shall be served at least ten and not more than seventeen days before the time at which the petition is noticed to be heard." Here, service was complete when petitioner filed the affidavit of

service on September 4, 2021 (RPAPL §735[2][b]). Petitioner's motion, returnable on March 9, 2022, was served on February 17, 2022 (NYSCEF No. 10). Respondent argues that petitioner could have and should have complied with RPAPL § 733[1] by awaiting the assignment of a return date before effecting service.

In opposition, petitioner argues that "the court procedures in place at the height of the COVID-19 pandemic, when the Notice of Petition and Petition were served, dictated that a Petition that was served was "assigned" without a court date on it." The procedures implemented by the court to which petitioner refers were embodied in Chief Clerk's Memorandum (CCM) 210, dated July 30, 2020, which provided that:

> "Landlord & Tenant Holdover cases are generally submitted with a return date selected by the filer/petitioner. Due to the current crisis related to the COVID-19 Pandemic, we are unable to schedule these cases and are uncertain when future court dates will become available.
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> ...
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> **This procedure is to be employed for scheduling Holdover proceedings received in person or via mail:**
> - Schedule case to the appropriate administrative part. At a future date these cases will be rescheduled for an actual appearance.
> - A notation should be made on the notice of petition stating "DATE TO BE DETERMINED. THE COURT WILL NOTIFY ALL PARTIES OF THE COURT DATE"

> **This procedure is to be employed for scheduling Holdover proceedings filed in NYSCEF:**
> - Schedule case to the appropriate administrative part. At a future date these cases will be rescheduled for an actual appearance and parties will be notified.
> - A notation should be made on the Notice of Petition – Assigned stating "DATE TO BE DETERMINED. THE COURT WILL NOTIFY ALL PARTIES OF THE COURT DATE"
> - Notice of Petition – Assigned should be filed in NYSCEF Application."

(CCM 210, July 30, 2020, available at

https://nycourts.gov/COURTS/nyc/SSI/directives/CCM/CCM210.pdf [last accessed July 16, 2022]).

Contrary to petitioner's assertions, there is no mention in the memorandum whatsoever of

petitions that have been served; what is referenced is petitions that have been submitted. Nor does petitioner point to any executive order, judicial directive, or legislative enactment modifying the requirements of RPAPL § 733. At the time service was completed in September 2020, in conformity with the requirements of CCM 210, the clerk's office had already filed on NYSCEF a document entitled "notice of petition – assigned," which included the endorsement "date to be determined. The court will notify all parties of the court date." Thus petitioner was informed that no date had been assigned before a process server ever attempted to serve the petition. At the time petitioner attempted service, petitioner was obligated to comply with the requirement that the notice of petition be served 10 to 17 days prior to the return date. A chief clerk's memorandum regarding the process of assignment of such a date does nothing to alter that requirement. If the court were to conclude otherwise, the statutory requirement of timely service would be meaningless; any service attempts that otherwise were sufficient would confer jurisdiction without regard to when they were made.

A clerk's memorandum does not supersede a statutory enactment. Petitioner could have complied with the memorandum by filing the petition and then, when the matter was assigned a return date and time, serving the papers timely. Petitioner did not do so. As a consequence, this court lacks jurisdiction, and the branch of respondent's motion seeking dismissal for untimely service is granted. Petitioner's motion to restore is denied as moot.

This is the decision and order of the court.

Dated: Brooklyn, New York
July 28, 2022

DAVID A. HARRIS, J.H.C.

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