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Daly 180 Hous. Dev. Fund Corp. v. Williamson

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Daly 180 Hous. Dev. Fund Corp. v Williamson
2020 NY Slip Op 20185 [68 Misc 3d 1031]
July 30, 2020
Lutwak, J.
Civil Court of the City of New York, Bronx County
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As corrected through Wednesday, October 21, 2020

[*1]

Daly 180 Housing Development Fund Corporation, Petitioner, v Pamela Williamson, Respondent.
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Civil Court of the City of New York, Bronx County, July 30, 2020

APPEARANCES OF COUNSEL

The Legal Aid Society, Bronx (*Maureen A. Slack* of counsel), for respondent.

Jason D. Boroff & Associates, Bronx (*David Lee* of counsel), for petitioner.

Terry Wainsai, nonparty pro se.

Zkiyahu Ben Levy, nonparty pro se.

{**68 Misc 3d at 1032} OPINION OF THE COURT

Diane E. Lutwak, J.

This is a nonpayment proceeding commenced by notice of petition and petition dated April 23, 2019, and served, according to the affidavit of service, by "conspicuous place"/"nail-and-mail" service on May 6, 2019. The petition alleges that the premises are subject to federal Section 8 regulations governing the "Substantial Rehabilitation" program and seeks rent arrears of \$2,361. An accompanying rider breaks down the alleged arrears and shows they are comprised of the tenant's share of the rent at various monthly rates ranging from \$51 to {**68 Misc 3d at 1033} \$65 due for each month from April 2016 through April 2019. Respondent failed to answer the petition and the court issued a default judgment of possession on June 25, 2019, and a warrant of eviction on July 3, 2019.

On July 22, 2019, an order to show cause to vacate the default judgment, to permit the filing of an answer, to place the case on the court's calendar and to grant "such other and further relief as may be just" was filed with the court, supported by the affidavit of Zkiyahu Ben Levy who indicated he was "the person claiming possession of these premises and am the fiancé of the tenant named above." As an excuse for failing to answer Mr. Ben Levy indicated that he had not received a copy of the notice of petition and petition and first learned of this proceeding by receiving a city marshal's notice of eviction. As defenses, Mr. Ben Levy indicated that the amount being claimed was incorrect, that the rent had been fully paid by Section 8 and "we have rent receipts to prove otherwise." The court signed the order to show cause, and on the August 1, 2019 return date adjourned it to August 29 with the notation on the court file jacket that the adjournment was "for Resp. to seek counsel + Resp. to meet w/mgmt." Court file notations indicate that respondent was referred to The Legal Aid Society, and that on the next adjourned date respondent was re-referred and the matter was adjourned again, to October 7. Respondent then appeared by counsel and the case was adjourned again, to November 15, by two-attorney stipulation which included the statement, "Resp. counsel to email authorization to review tenant file." On November 15 the case was adjourned to January 6, 2020, by stipulation which noted, inter alia, "Pet to provide Resp's counsel with access to Resp's tenant file," and included access dates for repairs. On January 6 the case was adjourned to February 4 by stipulation stating, "Parties have agreed Resp's counsel to review tenant file on 1/16/20 at 2:00 p.m." On February 4 the case was adjourned to February 21 by stipulation stating, "Pet provided relevant tenant file documentation in court today. Resp's counsel to review." Notations on the court file jacket for February 21 reflect that a conference was held at the bench during which a briefing schedule on an unspecified motion to be filed by respondent was agreed to: March 6 for respondent to serve the motion in hand; March 27 for opposition; April 7 for reply and argument.

Rather than filing a new motion, respondent's counsel prepared and served a "Supplemental Affirmation" in further support {**68 Misc 3d at 1034} of the original order to show cause dated March 5, 2020, accompanied by respondent's affidavit sworn to on March 4, 2020, and various documents including a proposed answer raising affirmative defenses of laches, estoppel, improper calculation of the tenant's share of the rent and defective rent demand. In addition to [*2] amplifying the facts and arguments in support of the relief stated in the original order to show cause the supplemental papers seek discovery.

In her affidavit, respondent states that she moved into the premises in 2014 and resides there with her minor son. She attaches copies of petitioner's income/rent calculation forms (entitled "Owner's Certification of Compliance with HUD's Tenant Eligibility and Rent

Procedures" and identified as the "HUD 50059" form) for the years 2016, 2017 and 2018 which list her son Terry Wainsai as the sole other member of her household.^[EN*] Respondent states that she received neither the rent demand nor the notice of petition and petition and only learned about this proceeding when she received a notice of eviction in July 2019. She does not mention Zkiyahu Ben Levy, who identified himself as her fiancé in his affidavit of July 22, 2019, in support of the order to show cause, other than to say that after receiving the notice of eviction she "asked someone to go on my behalf and file an order to show cause."

Due to the COVID-19 pandemic and the consequent shutdown of in-court operations, petitioner did not serve its opposition by March 27 and the April 7 argument did not take place. However, pursuant to Administrative Order AO/115/20 of Chief Administrative Judge Marks dated May 28, 2020, petitioner's attorney prepared, served and filed an affirmation in opposition dated June 3, 2020, through the new temporary "EDDS" (Electronic Document Delivery System) in which he argues that respondent's supplemental papers in support of the order to show cause are untimely, are improper in form and should not be considered by the court. Petitioner also argues that respondent has failed to demonstrate the requisite excusable default and a meritorious defense required under CPLR 5015 (a) (1) for vacatur of a default judgment. Further, petitioner argues that respondent should not be permitted to file a late answer and that she is not entitled to discovery. **{**68 Misc 3d at 1035}**

In addition to a rent ledger and respondent's most recent lease, petitioner attaches to its opposition papers a copy of respondent's 2019 "HUD 50059" form, which, similar to the ones respondent provided for the years 2016, 2017 and 2018, lists her son Terry Wainsai as the sole other member of her household.

The court calendared the case for a Skype videoconference on July 23, 2020, and, just prior to that date, respondent's counsel informed the court and petitioner's counsel by email that she learned from "Ms. Williamson's partner" that respondent had passed away. At the videoconference respondent's counsel provided a copy of respondent's death certificate, confirming May 6, 2020, as her date of death. The death certificate lists respondent's son Terry Wainsai as the informant, with the same address as his mother at the subject premises.

Due to respondent's death, her attorney orally requested permission to be relieved from further representation and from attending any further appearances in this case. Petitioner's **[*3]** counsel argued that the order to show cause should be denied in its entirety and that it should be allowed to proceed with execution of the warrant of eviction as soon as that is permitted by the relevant administrative and other orders issued at various levels of

government in response to the COVID-19 pandemic.

Discussion

[1] The court is presented with the novel question in this nonpayment eviction proceeding of how to determine a pending order to show cause of a now-deceased tenant of record seeking vacatur of a judgment of possession and warrant of eviction entered on default, and other relief, in the absence of a motion to substitute the tenant's estate as required by CPLR 1021. It is well settled that the death of a party divests a court of jurisdiction to conduct proceedings in an action until a proper substitution has been made pursuant to CPLR 1015 (a). ([Griffin v Manning](#), 36 AD3d 530, 532 [1st Dept 2007].) An order issued after the death of a party without proper substitution is a nullity. ([Leroy v Morningside House Nursing Home Co., Inc.](#), 126 AD3d 652, 653 [1st Dept 2015]; [Cueller v Betanes Food Corp.](#), 24 AD3d 201 [1st Dept 2005], *lv denied* 6 NY3d 708 [2006].) Where a party to an action dies, any surviving interest in the action passes from the decedent to his or her representative, who may well have unique interests. ([Wisdom v Wisdom](#), 111 AD2d 13, 15 [1st Dept 1985], citing [Matter of Einstoss](#), 26 NY2d 181 [1970].) **{**68 Misc 3d at 1036}**

Had respondent's family surrendered the premises to petitioner upon her death this question would be academic; however, such a surrender apparently has not occurred, and unrefuted information before the court indicates that respondent's son and/or her fiancé may reside in the premises and have independent possessory rights. While the evidence of the purported fiancé's presence in the apartment is limited to his sworn statement in his affidavit, respondent does state in her affidavit that she lives with her son, and this is corroborated by the fact that her son, who turned 18 years of age in mid-March of this year, was listed as a member of respondent's household on each of her annual HUD 50059 forms for the four years immediately prior to the commencement of this proceeding. Accordingly, he appears to have a viable successor tenancy claim due to his mother's permanent vacatur of the premises (*see e.g. Los Tres Unidos Assoc., LP v Colon*, 45 Misc 3d 129[A], 2014 NY Slip Op 51566[U] [App Term, 1st Dept 2014]), which he has the right to raise in this proceeding ([Acquisition Am. v Diaz](#), 20 Misc 3d 1127[A], 2008 NY Slip Op 51647[U] [Civ Ct, NY County 2008]).

True, at the time the judgment was issued the rights of Mr. Wainsai may have been subordinate to and "extinguished by a judgment of possession in favor of the lessor." (*170 W. 85th St. Tenants Assn. v Cruz*, 173 AD2d 338, 339-340 [1st Dept 1991]; *see also New York Rys. Corp. v Savoy Assoc., Inc.*, 239 App Div 504 [1st Dept 1933].) However, this court

retains continuing jurisdiction over this matter even after entry of the judgment (*see generally Matter of Brusco v Braun*, 84 NY2d 674 [1994]; [Matter of Lafayette Boynton Hsg. Corp. v Pickett](#), 135 AD3d 518 [1st Dept 2016]; *Solack Estates v Goodman*, 78 AD2d 512 [1st Dept 1980]), and for the warrant of eviction to be effective against a subtenant, licensee or occupant, due process requires that they properly be made a party to the proceeding (*170 W. 85th St. Tenants Assn. v Cruz*). The failure to do so, or to commence an appropriate new [*4]proceeding against such subtenant, licensee or occupant, would render unlawful the eviction of such a person pursuant to a warrant issued in this proceeding. ([Parkash 2125 LLC v Galan](#), 61 Misc 3d 502 [Civ Ct, Bronx County 2018]; [115 Mulberry LLC v Giacobbe](#), 46 Misc 3d 1229[A], 2015 NY Slip Op 50343[U] [Civ Ct, NY County 2015].)

In light of the unusual circumstances presented here—respondent's recent death, the likely presence in the premises of one or more of her family members and the COVID-19 {**68 Misc 3d at 1037} pandemic—and the legal principles set forth above, the order to show cause is granted to the extent of staying execution of the warrant of eviction until a proper motion or other proceeding is presented and decided or otherwise resolved. While neither Mr. Wainsai nor Mr. Ben Levy are presently before this court, due to the COVID-19 pandemic and the consequent limitations on court operations imposed by various administrative directives it must be noted that the only reason the court calendared this proceeding for a videoconference in the first place was because the only two parties named in the papers were represented by counsel. (*See e.g.* Admin Orders of Chief Admin Judge of Cts [Marks] AO/85/20 [dated Apr. 8, 2020], AO/127/20 [dated June 18, 2020].)

[2] The final issue to address is The Legal Aid Society's oral request on the record to be discharged from this proceeding due to respondent Pamela Williamson's death, under the well-settled principle that such death severed the attorney-client relationship. ([Davis v Cohen & Gresser, LLP](#), 160 AD3d 484, 485 [1st Dept 2018].) Generally, a motion by counsel of record to withdraw from representation must be made on notice and "a showing of good and sufficient cause." ([Mason v MTA N.Y. City Tr.](#), 38 AD3d 258, 258 [1st Dept 2007]; CPLR 321 [b] [2].) While the requisite good cause has been shown, no motion on notice was served and filed. However, the primary concern under CPLR 321 (b) (2) is "reasonable notice to the client" (*Mason v MTA N.Y. City Tr.* at 258) which is not a relevant consideration here due to the client's death. Further, to the extent that respondent's son or fiancé may have any rights to the premises, given the court's determination to stay execution of the warrant of eviction they will have an opportunity to raise them at a future juncture. On these facts, no prejudice to a substantial right of any party due to the absence of a written motion to withdraw is evident. Accordingly, under CPLR 2001 the court exercises its discretion to disregard the omission

([see generally Grskovic v Holmes, 111 AD3d 234](#) [2d Dept 2013]), and grants the oral request of The Legal Aid Society to be relieved from any further appearances in this proceeding on behalf of respondent Pamela Williamson.

Conclusion

For the foregoing reasons, respondent's order to show cause is granted to the extent of staying execution of the warrant of eviction until a motion seeking proper substitution or joinder of necessary parties is made, or another proceeding is filed, **{**68 Misc 3d at 1038}** and resolved. This constitutes the decision and order of this court, copies of which will be emailed to petitioner's attorney and respondent's former attorney and sent by first-class mail to Zkiyahu Ben Levy and Terry Wainsai at the premises.

Footnotes

Footnote *:As he is listed with a birth date in March 2002, it is evident that while he was a minor at the time respondent signed the affidavit, he turned 18 years of age later that month.