2022-11-09

Hamilton v. Carter

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Hamilton v Carter
2022 NY Slip Op 22345
Decided on November 9, 2022
Civil Court Of The City Of New York, Bronx County
Shahid, J.
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Decided on November 9, 2022

Civil Court of the City of New York, Bronx County

Ena Sophia Hamilton, Petitioner,

against

Jacqueline Carter,
"JOHN" "DOE," "JANE" "DOE", Respondents.

L&T Index No. 301262/20

Attorney for Petitioner: Matthew Stuart Livits, Esq. of Lazarus Karp Ehrlich McCourt, LLP

Attorney for Respondent: Madeline Halimi, Esq. of Mobilization for Justice, Inc.

Omer Shahid, J.

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in the review of Respondent's motion to dismiss or, in the alternative, leave to serve and file an answer:

Papers Numbered
Notice of Motion (Motion No.2 on N.Y.S.C.E.F.) 1
Affirmation in Opposition (Entries 28-29 on N.Y.S.C.E.F.) 2
Reply Affirmation in Support (Entries 39-43 on N.Y.S.C.E.F.) 3

Petitioner commenced this holdover proceeding seeking possession of 1041 College

Avenue, Apartment #3, Bronx, NY 10456 (the "subject premises") from Respondents on the ground that Petitioner elects to terminate Respondents' month-to-month tenancy pursuant to a 60-day termination notice, dated January 14, 2020. The subject premises is not subject to the Rent Stabilization Law because the subject building is a three-unit dwelling.

The Notice of Petition and Petition were filed on N.Y.S.C.E.F. on September 27, 2020. The Notice of Petition does not state a specific date, time, room, and part. Besides stating the courthouse address, the notice asserts that the date is to be determined and that "[t]he court will set a date and notify the parties when we are able to do so." Entry 2 on N.Y.S.C.E.F. The clerk's office then uploaded an assigned Notice of Petition on October 9, 2020 which states "Date to be determined. The court will notify all parties of the court date." Entry 3 on N.Y.S.C.E.F. On that same date, the court uploaded and mailed a copy of a court notice which states that "[d]ue to the ongoing COVID-19 public health crisis, your upcoming court appearance at Bronx County Housing Court has been postponed until further notice from the court. Once the matter has been scheduled by the court, you will be notified of your court date and you will be required to follow the Court's instructions. If you have an attorney, you should consult with him or her if you have any questions regarding this matter." Entry 4 on N.Y.S.C.E.F.

On April 21, 2021, Respondent Jacqueline Carter filed a hardship declaration with the court and the matter was stayed as a result. Due to the expiration of the hardship declaration on January 15, 2022, Petitioner filed a motion to restore (Motion #1) on N.Y.S.C.E.F. on February 14, 2022. The motion was calendared in Part B (Room 360) on March 15, 2022. On that date, Respondent appeared and the matter was adjourned to April 4, 2022 for Mobilization for Justice, Inc. ("M.F.J.") to screen Respondent for representation. The matter was then adjourned from April 4, 2022 to April 19, 2022 for M.F.J. to complete intake with Respondent. M.F.J. was retained as counsel for Respondent on April 5, 2022 and a notice of appearance was filed the same date on N.Y.S.C.E.F. On the April 19, 2022 appearance, the matter was adjourned to May 26, 2022 for an in-person, pre-trial conference. The court directed Respondent to file an answer by May 13, 2022. On May 12, 2022, Respondent filed the instant motion (as cross-motion) on N.Y.S.C.E.F. The next day, Respondent filed a notice on N.Y.S.C.E.F. that she has filed an E.R.A.P. application (#J4H94). On the May 26, 2022 appearance, the matter was placed on the E.R.A.P. administrative calendar pending a determination on Respondent's application. On August 26, 2022, Petitioner filed a motion to vacate the E.R.A.P. stay (Motion #3) on N.Y.S.C.E.F. The motion was scheduled on October 11, 2022. After conference on that date, Motions #1 and #3 were granted on consent on the record and the fully-briefed Motion #2, the instant motion, was marked submitted for

determination.

Respondent moves this court to dismiss this proceeding pursuant to C.P.L.R. §§ 3211(a)(1), (7), and (8) based upon documentary evidence for lack of personal jurisdiction and for failure to state a cause of action because the Notice of Petition served upon Respondent does not comply with C.P.L.R. § 403(a), R.P.A.P.L. § 731(2), and/or 22 N.Y.C.R.R. § 208.42(b). In the alternative, Respondent seeks leave to serve and file the verified answer, attached as Exhibit "A" to the motion, pursuant to R.P.A.P.L. § 743 and/or C.P.L.R. § 3012(d). Respondent states that the Notice of Petition fails to set forth the date and time of the hearing and in what part it will take place. Since summary eviction proceedings are creatures of statute, Respondent argues that the omissions in the Notice of Petition are incurable defects which warrant a dismissal of the instant proceeding due to the strict compliance requirement in the First Department as espoused in decisions such as *M.S.G. Pomp Corp. v. Doe*, 185 AD2d 798 (1st Dep't 1992).

Petitioner opposes the motion. Petitioner argues that Respondent's motion is baseless as it ignores the administrative orders and directives that were in place at the time and which dictated the procedural rules to follow in order to allow the court system to adjust to the administrative and procedural issues posed by the COVID-19 pandemic. Setting forth a date, time, and part in the Notice of Petition would violate these administrative codes and directives.

While Petitioner does not cite to any of these administrative codes and directives, the court assumes that Petitioner is referring to the Chief Clerk's Memorandum ("C.C.M.-210"), dated July 30, 2020. This memo states 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." The memo goes on to provide, in pertinent part, the following:

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 [*2]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.

A party may move for judgment dismissing a proceeding commenced against them based upon documentary evidence. *See* C.P.L.R. § 3211(a)(1). A motion pursuant to C.P.L.R. § 3211(a)(1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 (2002), *citing Leon v. Martinez*, 84 NY2d 83, 88 (1994).

C.P.L.R. § 403(a) provides that "[a] notice of petition shall specify the time and place of the hearing on the petition and the supporting affidavits, if any, accompanying the petition." C.P.L.R. § 403(a). Similarly, R.P.A.P.L. § 731(2) states that "[e]xcept as provided in section 732, relating to a proceeding for non-payment of rent, the notice of petition and petition shall specify the time and place of the hearing on the petition and state that if respondent shall fail at such time to interpose and establish any defense that he may have, he may be precluded from asserting such defense or claim on which it is based in any other proceeding or action." R.P.A.P.L. § 731(2). Based upon these provisions of the law, a notice of petition must set forth the time and place the matter is to be heard. The Notice of Petition herein does not state such.

Respondent argues that it is the established law in New York that a failure to set forth a return date in a notice of petition pursuant to C.P.L.R. § 403(a) constitutes a jurisdictional defect which requires a dismissal. Respondent cites to *Matter of Figaro v. New York State & Local Retirement Sys.*, 203 AD2d 678 (3d Dep't 1994) for this proposition. Respondent goes on to argue that this appellate rule enunciated in the Third Department binds this court in the absence of a contrary appellate rule declared in either the First Department or by the Court of Appeals. However, the court disagrees with Respondent because the Third Department has now disavowed such a rule.

The Third Department no longer holds that an omission of a return date on a notice of petition is an incurable jurisdictional defect. *See Oneida Public Library Dist. v. Town of Verona*, 153 AD3d 127 (3d Dep't 2017). The Appellate Division in *Oneida Public Library Dist.* stated that due to the 2007 amendment of C.P.L.R. § 2001, an "omission of a return date in a notice of petition does not constitute a jurisdictional defect so as to deprive the court from assessing whether such omission may be excused under CPLR 2001, and our prior decisions stating to the contrary should no longer be followed for such proposition." *Oneida Public Library Dist.*, 153 AD3d at 130. The Fourth Department has also followed suit. *See*

Bender v. Lancaster Cent. School Dist., 155 AD3d 1590 (4th Dep't 2017).

Respondent also cites to *Matter of Lincoln Plaza Tenants Corp. v. Dinkins*, 171 AD2d 577 (1st Dep't 1991). The Appellate Division found "that the petitioner's order to show cause was jurisdictionally defective in that it did not specify the time and place of the hearing on the petition nor request any relief as against the Borough President, the proper party respondent to the underlying article 78 proceeding, thereby requiring dismissal of the petition as against the Borough President." *Dinkins*, 171 AD2d at 577. Respondent's reliance upon *Dinkins* is unavailing. The *Dinkins* court relied upon the Third Department decisions which the Appellate Division of that Department has now disavowed, as discussed above. Moreover, *Dinkins* was [*3]decided prior to the 2007 amendment of C.P.L.R. § 2001. The Appellate Division in the First Department has subsequently held that a procedural mistake in the commencement of a proceeding may be permitted pursuant to C.P.L.R. § 2001 if it does not prejudice a substantial right of a party. *See United Services Auto. Ass'n v. Kungel*, 72 AD3d 517 (1st Dep't 2010).

Hence, this court is constrained to hold that the failure to set a return date on the notice of petition is not a jurisdictional defect subject to a dismissal if it passes the muster of C.P.L.R. § 2001, as supported by the appellate authority recited above.

C.P.L.R. § 2001 provides that "[a]t any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid." C.P.L.R. § 2001.

The Appellate Division in the Second Department clarified on how to do an analysis pursuant to C.P.L.R. § 2001 in *Grskovic v. Holmes*, 111 AD3d 234 (2d Dep't 2013). The court stated that "a close reading of the statute reveals that CPLR 2001 recognizes two separate forms of potential relief to address mistakes, omissions, defects, or irregularities in the filing of papers. The statute distinguishes between the 'correction' of mistakes and the 'disregarding' of mistakes, and each invokes a different test. Courts may correct[] mistakes upon such terms as may be just. The statute then says, set off by an 'or,' that mistakes may be disregarded if a substantial right of a party is not prejudiced." *Grskovic*, 111 AD3d at 242-43 (internal quotations and citations omitted).

C.C.M.-210, which was issued at the height of the pandemic, acknowledges that ordinarily a petitioner selects the date and time on the notice of petition. Due to the pandemic, the court was unable to schedule cases filed by petitioners, including the instant proceeding. The court did not accept notices of petition with times and places as these were marked "to be determined" by the clerk's office. C.C.M.-210, however, corrects these omissions by stating that a notice will be sent to the parties informing them of the time and place the matter is to be heard once the court can schedule an actual appearance at a future date. Thus, in correcting these omissions, the court need not factor in whether such a correction prejudices a substantial right of Respondent. The court only needs to determine whether such a correction would be just. The court determines that it would lead to a just result.

As noted by Judge Christel F. Garland in *911 L.L.C. v. Rivera*, 70 Misc 3d 599 (Civ. Ct., Bronx Co. 2020), "that although ordinarily an improperly noticed motion may be subject to denial, these are not ordinary times." *911 L.L.C.*, 70 Misc 3d at 600. Although the issue before the *911 L.L.C.* court was a motion without a return date and the issue here is that of a notice of petition without a return date, the *911 L.L.C.* court's analysis is informative. That court noted how Executive Order 202.8, in effect at that time, "recognized the need for a change in the way the court handles its business during the pandemic." *Id.* at 601. Similarly, here, C.C.M.-210 was devised to lessen foot traffic into the courthouse and to protect not only the judges and court staff, but also attorneys and litigants from appearing in the courthouse when the City was in the throes of a public health crisis. The parties would be informed by the court of a time and place once the court system is able to address and grapple the issues confronting it due to the pandemic and schedule actual appearances once it was safe to do so. C.C.M.-210 was issued to protect litigants like Respondent herself from traveling to the courthouse and answering at the height of [*4]the pandemic and instead informing them with a notation from the court that a notice will subsequently be sent to the parties informing them of a return date when the parties can appear.

To require dismissals of proceedings where the notice of petition was assigned by the clerk's office as "to be determined" would certainly lead to an unjust result. Per C.C.M.-210, the clerk's office would accept unrepresented petitioners' filings at the window but designate the time and place "to be determined." These petitioners had no say in when their proceedings would be returned for a hearing. To dismiss proceedings based upon petitioners' reliance upon how the court was accepting notice of petitions at the time would be unduly harsh and unjust. Some of these petitioners, small landlords such as the Petitioner in the instant case, have awaited over two years to have their claims heard. To dismiss this

proceeding, and countless others, because the clerk's office, at the time, would only accept notices of petition without time and place and mark them as "to be determined" would be unjust. This is especially so when the notice of petition is issued by the court. *See* N.Y.C.C.A. § 401(c). Petitioner, acting in accordance with and relying upon C.C.M.-210, should not be punished for how the court was handling the filing of notices of petition at that time.

Even if the court was to determine whether Respondent was prejudiced by the omission, the court finds that she was not. Respondent states in her affidavit that the notice caused her confusion. However, the record establishes that Respondent had notice of the proceeding the entire time. Respondent was not subjected to various notices but was informed by a single notice that Respondent would be notified of a return date when the court is able to schedule an appearance at a safer time. Furthermore, Respondent availed herself of the stay of this proceeding pursuant to the hardship declaration and has also received the benefit of the stay associated with her E.R.A.P. application. Respondent appeared, either by herself or through counsel, on each of the calendared appearances. Hence, Respondent has not demonstrated any prejudice that would result in disregarding that omission which was subsequently corrected by the clerk's office by notifying the parties of the return date and place the matter is to be heard.

For the reasons stated above, Respondent's motion to dismiss is denied.

The branch of Respondent's motion which seeks leave to serve and file the verified answer, attached as Exhibit "A," is granted. The annexed verified answer is hereby deemed as served and filed. However, the second affirmative defense is hereby stricken as a determination on that point of law has been made pursuant to this decision.

Based upon the foregoing, Respondent's motion to dismiss is denied. The branch of Respondent's motion which seeks leave to serve and file the verified answer, attached as Exhibit "A," is granted. The verified answer is hereby deemed as served and filed. However, the second affirmative defense in the answer is stricken in accordance with the order above. The matter is hereby restored to the court's calendar and shall appear on December 1, 2022 at 10 A.M. in Part B (Room 360) for an in-person, pre-trial conference.

The foregoing constitutes the decision and order of the court.

Dated: November 9, 2022

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Bronx, NY

Omer Shahid, J.H.C.

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