2023-03-14

Fans Assoc. LLC v. Yoontaek Im

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Fans Assoc. LLC v Yoontaek Im
2023 NY Slip Op 50189(U)
Decided on March 14, 2023
Civil Court Of The City Of New York, Queens County
Ressos, J.
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Decided on March 14, 2023

Civil Court of the City of New York, Queens County

Fans Associates LLC, Petitioner (Landlord),

against

Yoontaek Im, Respondent (Sub-Tenant), Sung Ju Moor, Misun Kim, "John Doe" & "Jane Doe" Respondent(s) (Occupants).

Index No. 304590/2022

Maria Ressos, J.

Recitation as required by CPLR 2219(a), of the papers considered in review of petitioner's motion (Seq. 01) for a default judgment and warrant, and respondent's cross-motion (Seq, 03) seeking permission to file an answer and dismissal pursuant to CPLR 3211(a)(2) for lack of subject matter jurisdiction, (a)(8) for failure to serve the Notice of Petition and Petition and (a)(7) for failure to state a cause of action.

Papers Numbered

Notice of Motion, NYSCEF Doc. # 4. 1
Affirmation and Affidavit in Support, NYSCEF Doc. # 5, 6 2
Notice of Cross-Motion, NYSCEF Doc. # 16 3
Affidavit in Opposition to Motion and in Support of Cross-Motion, NYSCEF Doc. # 17 4
Affirmation in Opposition to Motion and in Support of Cross-Motion, NYSCEF Doc. # 18 5
Memorandum of Law, NYSCEF Doc. # 19 6

Affirmation in Opposition to Cross-Motion, NYSCEF Doc. # 28 7
Court File, NYSCEF Doc. # 1-33

Upon the foregoing papers, the Decision/Order on the instant motions is as follows:

This nonpayment proceeding was commenced by Notice of Petition and Petition dated April 1, 2022 seeking possession and unpaid rental arrears for the subject premises, a cooperative, located at 149-43 35th Avenue, Apt. # 1C, Flushing, New York 11354. The claim is predicated on a Fourteen (14) Day Rent Demand, incorporated in the Petition, where the sum of $25,350.00 was sought for the following months: 12/1/19 rent, 1/1/20 — 2/28/20 rent, 3/1/21 — [*2]7/31/21, 11/1/21 — 3/31/22 at $1,950.00 per month. The petition alleges that respondent Yoontaek Im is the subtenant of the premises who came into possession pursuant to a now *expired* written lease with petitioner or its predecessor. See, NYSCEF Doc. # 1. Respondents Sung Ju Moor and Misun Kim are alleged to be occupants of the premises. On April 26, 2022, petitioner filed the instant DRP 222 motion (Seq. 01) seeking a default judgment for failure to answer and a judgment and warrant of eviction. The motion was calendared in the HMP (Housing Motion Part) on July 7, 2022 where Communities Resist appeared before the court and indicated their office would represent Yoontaek Im. That same day, respondent Misun Kim was referred to Queens Legal Services (QLS) for intake. The case was adjourned to September 15, 2022 for all purposes. It is unclear from the record what transpired between respondent Kim and QLS but Legal Services never formally appeared on the case. Communities Resist filed a cross-motion to dismiss (Seq. 02) which was withdrawn with leave to renew and the case was adjourned once again on consent to October 31, 2022. See, NYSCEF Doc. # 15. Respondent re-filed their motion (Seq. 03) and after oral argument on January 13, 2023, the court reserved decision on the papers.

By motion (Seq. 01), petitioner sought a default judgment based on respondents' failure to interpose an answer and failure to satisfy the petition. Respondent Im opposes petitioner's motion for a default judgment. Petitioner did not file reply. Since respondent Im has appeared in the case and presented allegations to support finding of an excusable default and meritorious defenses, which would serve as a basis for this court to vacate any default entered, the Court denies petitioner's motion for a default judgment at this time. *See, Nationstar Mtge., LLC v McLean*, 140 AD3d 1131, 1132 (2016); *Santiago v New York City Health & Hosps. Corp.*, 10 AD3d 393, 394 (2004); *136-76 39th Ave., LLC v Ai Ping Wu*, 55 Misc 3d 128[A], 2017 NY Slip Op 50363[U] (App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2017).

The Court now turns to respondent's motion (Seq. 03), the first part of which is seeking

leave to file an answer. Absent from petitioner's opposition papers is any specific opposition to this portion of respondent's motion. See, NYSCE Doc. # 28. Pursuant to CPLR 2004, the court may extend the time fixed by any statute upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed. *CPLR 2004*. CPLR 3012(d) grants the court discretion to extend the time to appear or plead, or compel the acceptance of an untimely pleading, upon such terms as may be just, provided there is a showing of reasonable excuse for the delay. *CPLR 3012*. "In determining whether a party should be granted leave to file a late answer, several factors are considered by the court, including the length of the delay, the excuse offered for the delay, the absence of willfulness, the possibility of prejudice, the potential merits of the defenses, and the public policy favoring the resolution of disputes on their merits" See, *NYSANDY3 NBP11 LLC v. Thompson,* 149 N.Y.S.3d 883 (NY Civ. Ct. 2021), citing, *ArtCorp Inc. v Citirich Realty Corp.*, 140 AD3d 417 (1st Dept 2016); *Emigrant Bank v Rosabianca*, 156 AD3d 468 (1st Dept 2017), see also *In Town Shopping Ctrs. Co. v. DeMottie*, 17 Misc 3d 134(A) (App Term, 2d Dept 2007). Considering the lack of objection, lack of demonstratable prejudice by petitioner, the potentially meritorious defenses raised in the attached proposed answer, and public policy favoring resolution of matters on the merits, the Court grants respondent's motion and accepts respondent's verified late answer, attached as respondent's Exhibit G, and deems it served and filed *nunc pro tunc*. See, NYSCEF Doc. # 26.

It is important to note that there is a pending holdover proceeding filed under Index [*3]Number 55256/2020 between the parties. The holdover proceeding was commenced by Notice of Petition and Petition sometime in July 2020. Respondent appeared in the matter by counsel, Communities Resist, with a notice of appearance filed on August 31, 2021. A review of the court's internal system shows that proceeding has been stayed, with no future court date, since the filing of notice of a pending Emergency Rental Assistance Program ("ERAP") application (No. AA9EJ) on October 5, 2021. See, NYSCEF Doc. # 6 on Index Number 55256/2020. The existence of this holdover adds context to arguments made by respondent in their motion papers.

The latter part of respondent's motion is seeking dismissal on several grounds. The first is pursuant to CPLR 3211(a)(2) for lack of subject matter jurisdiction. As recounted by the Appellate Division Second Department, in New York, the authority of the courts to decide classes of cases stems from article VI of the New York Constitution. Subject matter jurisdiction describes the judicial power to enforce a judgment and to bind a party over whom it has a legal hold, akin to the concept of personal jurisdiction. See, *Morrison v. Budget Rent A Car Sys.*, Inc., 230 AD2d 253, 657 N.Y.S.2d 721 (Appellate Division 2nd

Dep't 1997) citing *Thrasher v. United States Liab. Ins. Co.,* 19 NY2d 159, 166, 278 N.Y.S.2d 793, 225 N.E.2d 503. Even though a challenge to subject matter and personal jurisdiction both lie within CPLR 3211, personal jurisdiction can be waived or stipulated to but the same is not true for subject matter. If a court lacks subject matter jurisdiction, parties may not confer it on the court. See, *Graham v. New York City Hous. Auth.,* 224 AD2d 248 (Appellate Division 1st Dep't) and *Financial Indus. Regulatory Auth., Inc. v Fiero*, 2008 NY Slip Op. 01030 (Court of Appeals 2008).

Housing court was created to give a landlord a "simple, expeditious and inexpensive means of regaining possession of his premises in cases where the tenant refused upon demand to pay rent, or where he wrongfully held over without permission after the expiration of his term." *Reich v Cochran,* 201 NY 450, 454 (1911). Summary proceedings are "purely possessory [in] character" that even within the context of a nonpayment proceeding, the "power to fix the rent due is an incidental matter." See, *Patchogue Assoc. v Sears, Roebuck & Co.*, 37 Misc 3d 1, 951 N.Y.S.2d 314 (Appellate Term, Second Dep't 2012). The Second Department has repeatedly concluded that in a summary proceeding, a monetary award in favor of a landlord can only be made concomitant with an award of possession. See, *Felsenfeld v Rogers*, 2022 NY Slip Op. 51143(U) (Appellate Term, Second Dep't 2022) citing *615 Nostrand Ave. Corp. v Roach*, 15 Misc 3d 1, 832 N.Y.S.2d 379 (Appellate Term, Second Dep't 2006), *Javaherforoush v Sherrard*, 74 Misc 3d 137(A) (Appellate Term, Second Dep't 2022).

The above language was described as dictum by the Appellate Term First Department in *Four Forty—One Holding Corp. v. Bloom,* 148 Misc. 565 (Appellate Term, First Dep't 1933) and stems from an earlier Court of Appeals decision, *Brown v. City of New York*, 66 NY 385, 1876 WL 12243 (1876). In *Brown v. City of New York*, the Court of Appeals stated "it is said that these proceedings can only be instituted against a party in possession or claiming possession of the demised premises." *Id*. The *Bloom* court's disagreement with *Brown v. City of New York* is best captured by their contention that once subject matter jurisdiction vests, it is not divested by succeeding events, "although of such character as would have prevented jurisdiction from attaching in the first instance" and that the Court in *Brown v. City of New York* was not presented with the question of whether "removal of a tenant before the return of the precept operates to deprive the court of jurisdiction which has concededly attached or whether it constitutes any defense in a summary proceeding." Id. In *Bloom*, the court had subject matter jurisdiction [*4]because respondent was in possession when the case was commenced, and the "removal of the tenant did not operate to arrest the proceedings properly begun." *Four Forty—One Holding Corp. v. Bloom,* 148 Misc. 565 (Appellate Term, First

Dep't 1933). This court is bound by and will follow the rule reiterated in the Second Department which appears to be that once a party surrenders possession, regardless of when they do so, this court loses its ability to decide a monetary claim for unpaid rent because possession is no longer part of the relief sought.

While respondent concedes to not returning a copy of the key to the premises, he proffers that his attorney "unambiguously" informed the landlord of his surrender of the apartment before the instant nonpayment case was commenced. *First Nat. City Bank v. Wall St. Leasing Corp.*, 80 Misc 2d 707, 709, 363 NYS2d 699 (NY City Civ Ct 1974). Citing to *Merrbill Holdings, LLC v. Toscano*, 2018 NY Slip Op 50410[U] (App. Term, 2d Dep't. 2018), respondent alleges this summary proceeding cannot be maintained because he was not in possession or claiming to be in possession at the time the case was commenced. In his affidavit in support, respondent Im attests that he has been residing at a low-income building for seniors located in the town of Hempstead from the time he moved out around February 1, 2021. See, NYSCEF Doc. # 17. Respondent claims that since his last written lease expired in November 2019, he has not paid any rent to petitioner and the only time he goes to the premises is to visit co-respondent Misun Kim as her guest.

Respondent attaches a letter dated June 14, 2021, drafted by his attorney addressed to the landlord that states: "This letter is to inform your office that *Im has moved out of the premises on February 3, 2021* [emphasis added]. After February 3, 2021, Misun Kim is the only remaining tenant in apartment #1C." See, NYSCEF Doc. # 13. Respondent's counsel also attaches an email chain between their office and petitioner's counsel that starts on August 31, 2021, where Communities Resist sends over a copy of their notice of appearance on the holdover proceeding (Index Number 55256/2020). See, NYSCEF Doc. # 14. Petitioner's attorney responds back stating that his client will participate with the ERAP program and, for purposes of settlement, would sign a renewal lease with Im. Respondent's counsel replies on September 13, 2021, asking that his client's name not be included in any renewal lease because *he already vacated the apartment* [emphasis added] and was only "helping Misun Kim with [the] ERAP application." It is unclear if petitioner's counsel responded to that September email but the record shows that in October 2021, petitioner's counsel filed a notice of a pending ERAP in the holdover proceeding and no action was taken on that case since then.

In opposition, petitioner argues they never obtained possession because the property was never vacant. Respondent Im's own affidavit states that co-respondent Misun Kim remains in the apartment. See, NYSCEF Doc. # 17. Petitioner also points out that respondent Im

submitted an ERAP application, which was approved for $29,250.00 on March 3, 2022, almost a year after he allegedly vacated the premises. The approval email reads: "this notification confirms that the [ERAP] Application AA9Vj for YoonTaek Im residing at 149-43 35th Avenue Apt 1C Flushing, NY 11354 is approved." See, NYSCEF Doc. # 30. The payment covered rent for March 2020 through February 2021 and prospectively for August 2021 through October 2021. This would mean ERAP paid for three (3) prospective months where respondent, by his own admission, was residing elsewhere.

The question of whether this court has subject matter jurisdiction stands on whether respondent surrendered possession of the subject premises. Possession is a moot issue where petitioner could have taken complete ownership of the premises without need of a summary [*5]proceeding and where respondent Im did not exert control over the property. See, *488 Arcade, L.L.C. v. 90 N. Pearl, Inc.*, 28 Misc 3d 1239(A), 958 N.Y.S.2d 307 (City Ct. 2010). To start, there are questions surrounding the impact the filing of the ERAP application has on respondent Im's relationship to the property, despite having moved out. At a minimum, it places a cloud of uncertainty over his relationship with the premises. However, the record does establish that petitioner could not have regained complete possession of the premises without the need of a summary proceeding because respondent Im left at *least* one occupant at the premises, Misun Kim. The holdover proceeding commenced back in 2020 names respondent Im as the subtenant of Fan Associates LLC, petitioner. Sung Ju Moor, Misun Kim, and Soon Yo Lee, were named as occupants. Respondent Im attested that he periodically visits co-respondent, occupant, Misun Kim. Respondent never alleges that Misun Kim was placed at the premises by petitioner or some other means. As such, the documentary evidence submitted fails to show how petitioner could have taken complete possession of the premises without the need of a summary proceeding. *First Nat. City Bank v. Wall St. Leasing Corp.*, 80 Misc 2d 707, 709, 363 NYS2d 699 (NY City Civ Ct 1974) and *488 Arcade, L.L.C. v 90 N. Pearl Inc.*, 2010 NY Slip Op 51649[U] (City Ct., City of Albany, 2010). Respondent Im might have physically removed himself and his belongings from the premises, but he failed to surrender legal and physical possession back to petitioner by leaving an occupant at the premises. As such, subject matter jurisdiction is not at issue.

Respondent seeks dismissal pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction. The affidavit of service of Notice of Petition and Petition alleges substituted service at the subject premises. See, NYSCEF Doc. # 3. Service was complete after mailing of the pleadings to the subject premises on April 8, 2022. Respondent argues this was not proper service of process because petitioner had actual knowledge that respondent Im physically vacated the subject premises months prior. Petitioner did not file proof that an

additional copy of the pleadings was mailed to Im's new residence. *RPAPL 735*. In opposition, petitioner raises two main points. The first is that Im never notified petitioner of an alternate address. The second is that respondent applied for ERAP by which he seemingly represented to New York State and the landlord that he resided at the subject premises. The Court finds that viewed in the light most favorable to the non-moving party, respondent has not submitted sufficient documentary evidence that support a finding of invalid process. The documents submitted allude that petitioner *might* have known respondent Im physically vacated, but that does not mean petitioner served the pleadings incorrectly. Respondent has not submitted any proof that petitioner knew Im's new address. This branch of the motion is denied without prejudice.

Finally, respondent seeks dismissal pursuant to CPLR 3211(a)(7) for failure to state a cause of action of nonpayment because there has been no landlord-tenant relationship between the parties since respondent Im's lease expired in 2019. Several facts appear to be undisputed. It is undisputed that Im's ERAP application was approved and petitioner accepted the money in February 2022. Respondent's affidavit and petitioner's own rent ledger show that no money was tendered since the ERAP payment. Lastly, it is undisputed that Im did not sign a written renewal lease and as plead in paragraph two of the petition, the last written agreement expired. Respondent argues that since the ERAP payment was received during the pendency of a holdover proceeding, predicated on a 90-day notice of non-renewal and termination, a new tenancy could not have been created. See, NYSCEF Doc. # 24. See, *92 Bergenbrooklyn, LLC v. Cisarano*, 50 Misc 3d. 21 (App. Term, 2d Dep't. 2015) and *Feuerman v. Hugo*, 176 N.Y.S.3d 897 (Civ. Court, New York County 2022) (*acceptance of ERAP money in an expiration of lease [*6]holdover does not re-instate tenancy or vitiate a notice of termination and is permissible receipt of rent under RPAPL 711(1)*). In addition, having repeatedly communicated to petitioner that respondent vacated the apartment, and declined to sign a renewal lease, it was not reasonable for petitioner to assume respondent is consenting to renew or revive their landlord-tenant relationship.

On the other hand, petitioner relies on the language of Real Property Law ("RPL") § 232-c for the proposition that respondent is a month-to-month tenant who defaulted on their monthly rental obligation subjecting him to a nonpayment summary proceeding. Specifically, by accepting ERAP payment *after* the lease expired, Im became a month-to-month tenant within the definition RPL § 232-c which states that "the landlord shall accept rent for any period subsequent to the expiration of such term, then, unless an agreement either express or implied is made providing otherwise, the tenancy created by the acceptance of such rent shall be a tenancy from month to month commencing on the first day after the expiration of such

term." (See also, *Priegue v Paulus*, 43 Misc 3d 135[A] [App Term, 2d Dept, 9th & 10th Jud Dists 2014], *payment of rent after an expiration of a lease shows an intention to continue a landlord-tenant relationship at the same monthly rent.)* However, for forthcoming reasons, the court is not convinced by petitioner's analysis of the facts at hand.

Section 741 of the Real Property Actions and Proceedings Law (RPAPL) requires the petition in a summary eviction proceeding to "state the respondent's interest in the premises and relationship to petitioner with regard thereto," "describe the premises from which removal is sought," and "state the facts upon which the proceeding is based." The pleadings in a motion to dismiss pursuant to CPLR 3211 are afforded a liberal construction. *CPLR 3206.* The facts alleged on the complaint or petition must be accepted as true and must afford the petitioner the benefit of every possible inference and determine only whether the facts alleged fit within any cognizable legal theory. *Leon v. Martinez, 84 NY2d 83 (1994); Fishberger v. Voss, 51 AD3d 627 (2nd Dep't 2008)*. A dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law.

Ever since the enactment of the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 ("CEEFPA") (L 2021 ch 56, part BB as amended L 2021 ch 417, part A), the Housing Court has faced many challenges interpreting and analyzing questions involving ERAP. The issue presented to the court now is explicitly whether respondent's submission of an ERAP application, done with the assistance of counsel, knowing that he had vacated the premises, followed by petitioner's acceptance of the payment upon its approval, after the commencement of a holdover proceeding, created a new tenancy giving petitioner a new cause of action in nonpayment upon failure to pay. This court's reading of the ERAP statute and review of the facts at hand do not support that conclusion.

Variations of this question were examined by courts of concurrent jurisdiction and help provide guidance. After trial in *JSB Props. LLC v Yershov*, 2022 NY Slip Op. 22294 (Civ Co., New York County 2022), the Hon. Stoller found where ERAP paid four months after the lease expiration at the rate of the prior monthly rent, "that [ERAP] application constitut[ed] an effort to bind a landlord to treat the applicant as a tenant for one year, an act consistent with an intention to continue a landlord-tenant relationship." The *Yershov* court found that the landlord had a cause of action for nonpayment of rent. Otherwise, "tenants who obtain an ERAP benefit that a landlord accepts can live in their apartments for free for a year without the landlord having a remedy." *Id*. The court in *BOP MW Residential Mkt. LLC v. Fanyu Lin*, 2023 NY Slip Op. [*7]23043 (Civ Co., New York County 2023) declined to follow *Yershov*.

BOP MW Residential Mkt. LLC v. Fanyu Lin, 2023 NY Slip Op. 23043 (Civ Co., New York County 2023) is a holdover proceeding where respondent moved to dismiss arguing landlord's acceptance of ERAP payments vitiated the notice of termination and showed an intent to reinstate respondent's tenancy. The court distinguished the facts of its case from *Yershov* because in *Yershov* landlord accepted ERAP funds prior to terminating respondent's tenancy. Instead, acceptance of the ERAP payments was petitioner's way of collecting "use and occupancy owed which it is entitled to under RPAPL 711(1) once a proceeding is commenced." *Id*. This Court finds the facts of the instant case to be more analogous to *Fanyu Lin* than to *Yershov* and favors the narrower interpretation of the ERAP statute.

Paragraph (d) of subdivision 2 of section 9 of subpart A of part BB of chapter 56 of the laws of 2021, establishing the ERAP program, reads that "acceptance of payment for rent or rental arrears for this program... shall constitute agreement by the recipient landlord or property owner: [ ] *not to evict* [emphasis added] for reason of expired lease or holdover tenancy any household on behalf of whom rental assistance is received for 12 months after the first renal assistance payment is received..." (L 2021, ch 56, § 1, part BB, § 1, subpart A, sec 1, § 9 [2] [d] [iv].) The September 1, 2021 amendment of the statute alludes that the legislative intent is to "*extend the prohibition on the eviction* of residential tenants who have suffered financial hardship during the COVID-19 covered period." Courts have applied the "agree not to evict" language to mean a respondent is entitled to a *stay of execution* of a warrant of eviction for the 12 month period after petitioner's acceptance of ERAP funds in the context of a holdover proceeding. See, *Homewell Realty Corp. v. Rojas*, 2022 NY Slip Op. 51159(U) (Civ Ct, Queens County 2022). Extending prohibition on evictions does not necessarily equate to the formation of a contract or lease where, as is the case here, the applicant made it abundantly clear that they no longer wish to revive their tenancy and physically left the premises.

The Office of Temporary and Disability Assistance (OTDA) is tasked with administrating the ERAP program. Their website states that tenants may be eligible for ERAP if the following apply, and lists the criteria used for finding eligibility, including "household income; the receipt of unemployment benefits, reduction of income, or financial hardship due to the pandemic; the applicant's obligation to pay rent *at their primary residence* for rent owed on or after March 13, 2020; and the *risk of homelessness or housing instability* demonstrated by having rental arrears." [emphasis added]. Respondent cannot be said to have been at risk of homelessness at his primary residence at the time he submitted the ERAP application because he informed the landlord as early as June 14, 2021, that he vacated. The Court cannot ignore the fact that petitioner was on notice that respondent Im

vacated and another occupant remained. The September 13, 2021 email submitted by respondent's counsel was never challenged or addressed by petitioner in their opposition. See, NYSCEF Doc. # 14. Said email communicated respondent's refusal to sign a renewal lease, and no one is disputing that a renewal lease was never signed. The record shows that despite knowing that respondent no longer wished to renew their agreement to pay rent at the subject premises since they vacated, petitioner *chose* to participate with the ERAP program.

Most glaringly, petitioner commenced a holdover proceeding and never moved to restore the case knowing that respondent Im vacated but an occupant remained. Petitioner's acceptance of the ERAP payment under these conditions did not create a new tenancy. Instead, because respondent Im did not surrender vacant possession, he "received the full benefit of a diminution [*8]of use and occupancy that petitioner may seek in another forum, and a stay of ( ) eviction for one year which has now expired." See, *BOP MW Residential Mkt. LLC v. Fanyu Lin*, 2023 NY Slip Op. 23043 (Civ Co., New York County 2023). The ERAP payment was made in February 2022 which means the 12 month bar on eviction expired sometime in February 2023. Petitioner's remedy is to restore their still pending holdover proceeding and seek the appropriate relief therein.

The Court finds petitioner failed to state a cause of action in nonpayment and the proceeding is dismissed. This constitutes the Decision/Order of the Court. A copy of this Decision/Order to be uploaded to NYSCEF.

Dated: March 14, 2023
Queens, NY

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Maria Ressos, J.H.C.