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2085 LLC v Balde

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART L

X

2085 LLC,

Petitioner - Landlord,

-against-

AMADOU BALDE,

Respondent -Tenant.

X

Index No.

L&T 47225/19

Present:

Hon. Christel F. Garland

DECISION/ORDER

RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED IN THE
REVIEW OF THIS MOTION BY RESPONDENT TO AMEND AND DISMISS

PAPERS

NUMBERED

Notice of Motion, Affidavits & Affirmation Annexed	1
Notice of Cross-Motion, Affidavits & Affirmation Annexed	2
Replying Affidavits & Affirmation Annexed	3

Petitioner commenced this residential nonpayment proceeding on or about October 29, 2019, seeking rent it alleged became due for Apartment [REDACTED], a rent stabilized apartment located at 20 [REDACTED]-20 [REDACTED] Morris Avenue, Bronx, New York.

[REDACTED] Toure, an individual alleging to be the cousin of the tenant of record answered the petition asserting a general denial and financial hardship due to loss of employment.

The proceeding was then scheduled to appear on the court's calendar for the first time on November 12, 2019. On that date it was adjourned for an interpreter to appear. On the adjourned date, by stipulation dated December 3, 2019, the proceeding was then again adjourned. By the next court appearance, Mr. Toure appeared by counsel and by stipulation dated January 28, 2020 between Petitioner and Mr. Toure the proceeding was adjourned for possible settlement. In the meantime, Mr. Toure moved by notice of motion for an order, *inter alia*, granting him leave to amend his answer and dismissing the petition.

Due to the pandemic, the motion was not heard on the return date and instead was administratively adjourned until the court was able to schedule the proceeding for a virtual conference. After failed attempts to settle the proceeding, the court set a motion schedule for the court to determine Mr. Toure's motion as well as Petitioner's subsequently filed cross-motion which opposes the relief sought and seeks an order amending the petition to date and granting Petitioner summary judgment.

Both motions are consolidated and resolved as discussed below.

In support of his motion, Mr. Toure asserts that is he is the occupant of the subject apartment which he has occupied with his two minor children since 2014, that he has made rent payments to petitioner since then, and that the tenant of record now resides outside of the State of New York. Based on these facts, Mr. Toure argues that Petitioner failed to state a cause of action because there is no privity between himself and Petitioner, and that following recent amendments to the law Petitioner cannot evict him and his family as he was not named in this proceeding.

In opposition, Petitioner contends that Mr. Toure's motion must be denied because it was unaware that he occupied the apartment and did not know his identity until he appeared in court in defense to this proceeding. In addition, Petitioner asserts that all rent payments it received were in the name of the departed tenant of record who never surrendered possession of the apartment and in fact executed a lease renewal which expires in December of 2020. Petitioner further asserts that it seeks summary judgment for the rent arrears which total \$7,656.25 through August 2020 and only seeks a money judgment and not a judgment of possession against the tenant of record as a result of which summary judgment should be granted in its favor.

After review of the facts of this case, the parties' arguments and the evidence presented in support of the parties' respective claims, there is no dispute that Mr. Toure is not in privity with Petitioner as the tenant of record alone entered into a contract with petitioner to rent the subject premises. Mr. Toure is not a party to this proceeding and petitioner did not seek to join him as a party to this proceeding. The sole named Respondent is the tenant of record who has not appeared in defense to this proceeding. That being the case, pursuant to the amended provisions of § 749 of the Real Property Actions and Proceedings Law ("RPAPL") petitioner cannot seek to remove an unnamed occupant and cannot seek to remove Mr. Toure within the context of this proceeding as it stands in this procedural posture.

Notwithstanding the above, Mr. Toure is not a party to this proceeding and because he lacks the authority to act on behalf of the tenant of record, he may not seek to dismiss the petition and for the reasons set forth below the portion of his motion seeking leave to amend his answer is DENIED as moot (*see D'Angelo v Watner*, 2018 NY Slip Op 32324 [U] [Sup Ct, NY County 2018]). As to Petitioner's cross-motion, Petitioner may not seek the relief it seeks herein since the tenant of record has not appeared in defense to the proceeding, and Petitioner has not established that that it employed due diligence in serving him with the pleadings which would permit the relief sought provided petitioner complied with court directives and administrative orders currently in place (*see Borg v Feeley*, 56 Misc 3d 128 (A) [App Term, 1st Dept 2017]).

Based on the foregoing, since the relief Petitioner seeks herein cannot be granted, Petitioner's cross-motion is DENIED and the proceeding is discontinued without prejudice to the parties' claims and defenses in the pending holdover proceeding between the parties (*see* CPLR § 409).

A copy of this order will be emailed to all.

This constitutes the decision and order of the Court.

DATED: September 10, 2020



Christel F. Garland, JHC

Appearances of Counsel

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