2023-05-09

U.S. Bank Trust v. Emdin

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U.S. Bank Trust v Emdin
2023 NY Slip Op 50423(U)
Decided on May 9, 2023
Civil Court Of The City Of New York, Queens County
Schiff, J.
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Decided on May 9, 2023

Civil Court of the City of New York, Queens County

U.S. Bank Trust, as Trustee for LSF9 Master Participation Trust, Petitioner,

against

Lilith Emdin, Mr. Moore (First Name Refused), John Doe, and Jane Doe, Respondents.

Index No. L&T 052469/20

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Logan J. Schiff, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Respondents' motion for summary judgment:

Papers/NYSCEF DOC.
Notice of Motion/Affirmation/Affidavits/Exhibits 31-45
Affirmation in Opposition/Affidavits 46-48
Reply Affirmations 50-51

Upon the foregoing cited papers, the court's decision and order on motion sequence 3 is as follows:

RELEVANT BACKGROUND AND PROCEDURAL HISTORY

Petitioner U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust ("Petitioner") commenced this post-foreclosure holdover proceeding pursuant to RPAPL § 713[5] against Lilith Emdin, Mr. Moore (First Name Refused), John Doe, and Jane Doe by Notice of Petition and Petition dated February 4, 2020. Only John Doe and Jane Doe ("Respondents") have appeared, each through separate counsel.

This proceeding was initially stayed by statute upon Jane Doe's filing of a hardship declaration pursuant to the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 on or around May 24, 2021, and subsequently upon John Doe's application in May 2022 for rental assistance pursuant to the COVID-19 Emergency Rental Assistance Program of 2021 ("ERAP"). On March 15, 2023, the parties stipulated to lift the ERAP stay and set a briefing schedule for the instant motion. Respondents thereafter filed a joint answer with counterclaims on April 12, 2023. The answer asserts several defenses, including the existence of a one-year lease, which Respondents allege they executed with the prior owner on September 1, 2019, five days before the property was sold at auction on September 6, 2019, following the entry of a judgment of foreclosure and sale on January 25, 2017.

Respondents now jointly move for summary judgment pursuant to CPLR 3212, or in the alternative for dismissal pursuant to CPLR 3211, on several grounds, including (1) improper use of a John/Jane Doe designation, (2) failure to personally exhibit the referee's deed, (3) failure to serve a 10-day notice to quit, and (4) service of a defective 90-day notice. Respondents also ask for an order joining the Department of Housing Preservation and

Development as a party.

DISCUSSION

Petitioner's Use of John/Jane Doe

Respondents move for dismissal on the basis of improper use of a pseudonym pursuant to CPLR 1024, arguing Petitioner could have reasonably discovered their identifies prior to commencement with adequate diligence. CPLR 1024, the procedural mechanism authorizing use of a Doe designation, states in relevant part:

> A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name an identity as is known.

While on its face CPLR 1024 only requires ignorance of a party's identity, decisional authority has established that it is a mechanism that may only be used after exercising adequate "due diligence" to identify the unknown party before commencement (*Bumpus v. New York City Tr. Auth.*, 66 AD3d 26, 29-30 [2d Dept 2009]). Improper use of a pseudonym is treated as a jurisdictional defect, resulting in dismissal as to the unnamed party (*id.* at 30; *Wilmington Trust, N.A.* v *Shasho*, 197 AD3d 534, 536 [2d Dept 2021]).[FN1]

The courts have not articulated a precise definition of what constitutes due diligence and typically interpret matters on a "case by case basis" (*Wilmington Trust Co. v. Gewirtz*, 193 AD3d 1110 [2d Dept. 2021]). In the analogous context of diligent service of process under CPLR 308, there is generally a required showing of "genuine inquiries about the defendant's whereabouts and place of employment," with a preference for quality over quantity (*Estate of Waterman v Jones*, 46 AD3d 63, 66 [2d Dept 2007]).

If due diligence is not readily defined, its absence is more easily identified. For instance, if a petitioner "knows, or reasonably should know, the [respondent's] true name, an unknown party designation in the [petition] will generally be treated as a jurisdictional defect" (*Redstone Garage Corp. v New Breed Automotive, Inc.*, 2016 NY Slip Op 51776[U] at *2 [App Term, 2d 11th & 13th Dists, 2d Dept 2016]). In *Redstone Garage Corp.*, the Appellate Term vacated a default judgment where the record revealed the landlord had actual knowledge of the respondent's identity and should have known it in any event by virtue of a sign on the building (*id.* at *4). Similarly, in *Capital Resources Corp. v John Doe*, 154 Misc 2d 864, 865 [Civ Ct, Kings Co 1992], cited by Respondents, the landlord acquired the

premises in foreclosure and commenced a holdover against the tenant of the former owners. Even though it was "undisputed, that petitioner knew [the tenant's] and identity prior to the initiation of this proceeding" by virtue of a prior proceeding, the landlord improperly used CPLR 1024 (*id.* at 866).

Courts have also found improper use of CPLR 1024 where the petitioner failed to proffer any evidence of diligent efforts when confronted with a dispositive motion by the respondent (*see, e.g., RR Reo II, LLC v Omeje*, 2011 NY Slip Op 51848[U] at *2 [App Term, 2d, 11th & 13th Jud Dists 2011, 2d Dept 2011]; *105 Realty 2018 LLC v East Harlem Council for Cmty. Improvement Inc.*, 2023 NYLJ LEXIS 1171 at *7 [Civ Ct, NY Co 2023]; *Clearview Gardens Fourth Corp. v Mula*, 2023 NY Slip Op 50262[U] at *2-*3 [Civ Ct, Queens Co 2023]; *see also Michaelangelo Pres., LLC v. Burgos*, 2022 NY Slip Op 50424[U] [Civ Ct, NY Co 2022] [denying default judgment application as to J. Doe where no evidence was offered of investigation into the party's identity]).

In support of their motion, Respondents offer the affidavit of Elias Fernandez, named as John Doe in this proceeding (NYSCEF 34). Mr. Hernandez alleges that while he received stacks of paper in his mailbox and on his stoop following the foreclosure auction, no person ever came [*2]to the property to inquire about his or his partner Jane Doe's identity. He further states that he was home on at least two of the alleged dates the process server visited the premises to serve the notice to quit. Lastly, he attaches a letter dated January 28, 2020, that he and Jane Doe sent to Petitioner advising them of their names shortly before commencement. The letter does not include any tracking information or a recipient address.

The court notes that the affidavit of service of the Petition (NYSCEF 41), although generally attesting to "due diligence," is bereft of any details regarding efforts made to identify Respondents' identities. Moreover, while the process server states that he confirmed through a discussion with an unnamed neighbor that nobody in the residence was on active military duty, he does not state if he inquired whether the neighbor had any information regarding Respondents' names or identifying information.

Respondents' submissions are sufficient to make a prima face showing of improper use of a pseudonym (*see RR Reo II, LLC v Omeje* at *4), and had Petitioner failed to offer meaningful opposition, the court would have dismissed the proceeding as to John and Jane Doe. However, unlike in the cases cited by Respondents, Petitioner offers in opposition an affidavit from its property manager, who affirms that she visited the property on six specific occasions before commencement of the proceeding to ascertain the occupants' identities, and

states that she was denied access (NYSCEF 48). Petitioner also submits an affidavit of a document custodian, who states that after a diligent search she has not located any record of receipt of the letter Respondents allege they mailed to Petitioner notifying them of their identities (NYSCEF 47).

The affidavits submitted by Petitioner are sufficient to create an issue of fact for trial in lieu of the drastic remedy of summary judgment. Petitioner's evidence is far more substantial than that of the post-foreclosure petitioner in *Deutsche Bank Natl. Trust Co. v. Turner*, 2011 NY Misc. LEXIS 3037 at *7-*8 [Civ Ct, Bronx Co 2010], cited by Respondents, who in opposition to a motion to dismiss did not present any evidence that it even once "knocked on [respondent's] door, asked the prior owners if anyone else resided in the building, or checked the names on the mailboxes."

Finally, as to Respondents' argument in reply that even if Petitioner's affidavits are taken as true the matter should be dismissed because Petitioner did not attempt to contact the former property manager listed on the building's multiple dwelling registration, the court is not prepared to endorse such a required showing as a minimum standard, while noting that due diligence must be ascertained on a case-by-case basis. Accordingly, Respondent's motion to dismiss for improper use of a John and Jane Doe designation is denied without prejudice to raising the defense at trial.

Exhibition of Referee's Deed

Respondents argue that Petitioner's failure to personally serve them with a certified or original referee's deed requires dismissal. RPAPL § 713[5] authorizes a post-foreclosure holdover proceeding upon service of a ten-day notice to quit, provided the petitioner has "exhibited" the original or certified referee's deed to the respondent. Whereas service of the notice to quit, like the petition, may be effectuated by affix and mail service upon reasonable application (*see* RPAPL § 735), the courts previously held that the legislature's use of the word "exhibit" in the statute required in-hand service of the referee's deed (*see Home Loan Servs., Inc. v Moskowitz*, 920 N.Y.S.2d 569 [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2011]).

As Petitioner notes in its opposition, the in-hand service requirement for a referee's deed was abrogated by the Appellate Term in *Plotch v. Dellis*, 75 N.Y.S.3d 779 [App Term, 2d, 11th [*3]& 13th Jud Dists, 2d Dept 2018], and now a petitioner may utilize affix and mail service for both the referee's deed and the notice to quit upon reasonable application (*id.* at

781; *see also Citibank, N.A. v Colucci*, 110 N.Y.S.3d 202 [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2018]). Accordingly, Respondents' motion to dismiss for failure to personally exhibit the deed is denied.

Service of Notice to Quit

Respondents argue that Petitioner failed to exercise reasonable application in resorting to affix and mail service of the 10-day notice to quit as required by RPAPL §§ 713[5] and 735. Respondents' detailed answer, along with Respondent John Doe's affidavit in support of the motion, are sufficient to overcome the presumption of service created by Petitioner's process server's affidavit (*see NYCTL 2009-A Trust v Tsafatinos*, 101 AD3d 1092, 1093-94, [2d Dept 2012]; *Countrywide Home Loans Serv., LP v Albert*, 78 AD3d, 983, 984-85 [2d Dept 2010]). Yet such a showing is a basis for a trial or hearing on a disputed issue of fact, not dismissal on the papers (*see Rox Riv 83 Partners v. Ettinger*, 276 AD2d 782, 783 [2d Dept 2000]).

Whereas personal jurisdiction is a threshold issue that will generally warrant a limited issue "traverse" hearing before trial (*see Elm Mgt. Corp. v. Sprung*, 33 AD3d 753, 754-755 [2d Dept 2006]), service of a predicate notice implicates a petitioner's compliance with a statutory condition precedent to maintenance of the proceeding (*see Mautner-Glick Corp. v. Glazer*, 148 AD3d 515, 516 [2d Dept 2017]; *W54-7 LLC v. Schick*, 14 Misc 3d 49, 50 [App Term 1st Dept 2006]), and is therefore an issue that may be reserved for trial, which the court chooses to do here. The court notes that it will remain Petitioner's burden to prove service of the notice to quit, and Petitioner should be prepared to offer the testimony of the process server in light of Respondents' detailed denial of service (*see Mautner-Glick Corp.* at 516).

Facial Sufficiency of the 90-Day Notice

In addition to serving a 10-day notice to quit, a petitioner in a post-foreclosure holdover proceeding must comply with the predicate notice provisions of RPAPL § 1305, a New York state law that mirrors the protections afforded to tenants in foreclosed properties under the federal Protecting Tenants at Foreclosure Act ("PTFA") [123 US Stat 1660, 111th Cong, 1st Sess., May 20, 2009]).

RPAPL § 1305[1][c)] defines a tenant as any person who was obligated by written or oral agreement to pay rent to the former homeowner or their representative. Tenants are entitled remain in the premises for the greater of ninety days from service of an RPAPL §

1305 90-day notice, or the duration of their lease (RPAPL § 1305[2]). For a lease to qualify for protection, the rental amount must not be for "substantially less than the fair market rent for the unit" (*id.*), language which tracks the "bona fide lease" requirements of the PTFA (*see Wilmington Trust, N.A. v Holmes*, 130 N.Y.S.3d 630 [Civ Ct, Queens Co 2020]).

Respondents argue that Petitioner's RPAPL § 1305 notice, dated October 4, 2019, is defective because it states that Respondents are entitled to remain in the premises for the greater of ninety days from receipt of the notice or for the duration of their lease, if a bona fide lease, while simultaneously advising Respondents that a summary proceeding would nonetheless be commenced within ninety days of receipt. Respondents argue that the notice was confusing and contradictory because they had executed a one-year lease with the prior owner on September 1, 2019, five days before the property was sold at auction, and which remained in effect for nearly a year after service of the 90-day notice, and well after this proceeding was commenced in [*4]February 2020. In opposition, Petitioner disputes the validity of the lease, arguing it is substantially below market rent and was executed on the eve of a referee's auction years after a judgment of foreclosure and sale.

In assessing the adequacy of a predicate notice, "the appropriate test is one of reasonableness in view of the attendant circumstances" (Hughes v. Lenox Hill Hosp., 226 AD2d 4, 18 [1st Dept 1996], *lv denied* 90 NY2d 829 [1997]; *see also Tzifil Realty Corp. v. Rodriguez*, 155 N.Y.S.3d 525 [App Term, 2d 11th & 13th Dists, 2d Dept 2021]). Of particular relevance to this proceeding, the Appellate Term in the Second Department has made it clear that a landlord need not be omniscient in crafting a predicate notice and may, in limited circumstances, plead facts in the alternative as to an unknown occupant (*see Kew Gardens Portfolio Holdings LLC v Bucheli*, 130 N.Y.S.3d 878 [App Term, 2d 11th & 13th Dists, 2d Dept 2020] [10-day notice to quit that alleged respondents-occupants were either squatters or licensees was reasonable where petitioner was uncertain as to how respondents entered into occupancy]).

Turning to the 90-day notice at issue here, the court finds that it directly comports with the literal requirements of RPAPL § 1305, which state that the written notice shall advise tenants:

> (a) that they are entitled to remain in occupancy of such property for the remainder of the lease term, or a period of ninety days from the date of mailing of such notice, whichever is greater, on the same terms and conditions as were in effect at the time of entry of the judgment of foreclosure and sale, or if no such judgment was entered, upon the terms and conditions as were in effect at the time of transfer of ownership of such property; and (b) [provides] the name and address of the new

owner.

RPAPL § 1305[3]. The statute does not obligate a successor-in-interest of a foreclosed property to make a predetermination as to the validity of any preexisting lease prior to serving the 90-day notice. It only requires the petitioner to advise the tenants of their rights in the event they have a bona fide lease, which Petitioner did here. Accordingly, the court holds that Petitioner's 90-day notice is reasonable under the attendant circumstances, as it "adequately apprised [respondents] as to the grounds upon which [the notice is] based, allowing them to prepare a legal defense" (*Domen Holding Co. v Aranovich*, 1 NY3d 117, 125 [2003]); *see also see Wilmington Trust, N.A. v Holmes*, 130 N.Y.S.3d 630 [Civ Ct, Queens Co. 2020]).

Joinder of the Department of Housing Preservation and Development ("HPD")

Respondents' motion to join HPD pursuant to Civil Court Act § 110[d] for purposes of effectuating proper housing maintenance standards is denied. HPD is not a necessary party in order for Respondents to assert counterclaims for harassment (*see Akter v Zara Realty Holding Corp.* 160 N.Y.S.3d 887, 888 [2d Dept 2022]; *Berg v Chelsea Hotel Owner, LLC*, 164 N.Y.S.3d 131, 134 [1st Dept 2022]), nor is HPD needed to obtain an order to correct housing quality conditions pursuant to Civil Court Act § 110[c], including under the Housing Maintenance Code (*see, e.g., Lu v. Betancourt*, 116 AD2d 492 [1st Dept 1986]). To the extent that Respondents argue HPD has failed to issue violations, the Housing Maintenance Code § 27-2115[h][1] allows this court to issue an order to correct upon a showing of good cause without HPD's consent or appearance.

CONCLUSION

The court has considered the remaining arguments for dismissal in Respondents' motion and finds them unavailing. Accordingly, Respondents' motion for summary judgment is denied [*5]in its entirety on the basis of triable issues of fact. The parties are directed to appear on July 6, 2023, at 9:30 a.m. in Part B for purposes of a pre-trial conference, at which time the matter will be referred to a Trial Part.

Dated: Queens, New York
May 9, 2023

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HON. LOGAN J. SCHIFF, J.H.C.

Footnotes

Footnote 1: It is worth noting that the due diligence requirement originated out of case law involving the interplay of CPLR 1024 with the statute of limitations. Following the enactment of CPLR 306-a in 1992, the supreme and country courts shifted from a commencement by service to a commencement by filing system (*Bumpus* at 30). As a result, a plaintiff hoping to avoid the expiration of the statute of limitations against an unknown party could simply commence an action using a John Doe designation and would receive the benefit of CPLR 306-b's 120-day period for effectuating service (*id.* at 31). Requiring a plaintiff to undertake a diligent search to identify the defendant is a small price to a pay to avoid the expiration of the statute of limitations and is consistent with the requirement in plenary actions to use due diligence prior to resorting to affix and mail service (see CPLR 308[4]). Such considerations may have less relevance in the context of summary eviction proceedings for possession, which rarely implicate the statute of limitations, and only require "reasonable application" to effectuate nail and mail service (*see* RPAPL § 735). Nonetheless, CPLR 1024's due diligence standard has been adopted by the appellate courts in summary proceedings against unknown parties (*see Redstone Garage Corp. v New Breed Automotive, Inc.*, 2016 NY Slip Op 51776[U] at *2 [App Term, 2d 11th & 13th Dists, 2d Dept 2016]; *RR Reo II, LLC v Omeje*, 2011 NY Slip Op 51848[U] at *2 [App Term, 2d, 11th & 13th Jud Dists 2011, 2d Dept 2011]).

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