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Soufer Family LLC v. Sprague

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[*1]

Soufer Family LLC v Sprague
2023 NY Slip Op 50334(U) [78 Misc 3d 1223(A)]
Decided on April 14, 2023
Civil Court Of The City Of New York, New York County
Bacdayan, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on April 14, 2023

Civil Court of the City of New York, New York County

Soufer Family LLC, Petitioner,

against

Barbara Sprague ET AL, Respondent.

Index No. 64229/18

Butnick and Levenson, for the petitioner

Himmelstein McConnell Gribben & Joseph LLP, for the respondent

Karen May Bacdayan, J.

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by NYSCEF Doc No: 8-14, 19-25.

PROCEDURAL HISTORY AND BACKGROUND

On May 5, 2019, the Hon. Clifton Nembhard issued a decision and order in this holdover proceeding, "striking respondent's first through tenth objections in point of law and affirmative defenses," and adjourning the proceeding for a traverse hearing on May 24, 2019. (NYSCEF Doc No. 10, petitioner's attorney's affirmation in support, exhibit A.) Counsel for

petitioner served respondents with a notice of entry on May 13, 2019. The notice advised respondent's counsel that "the within is a true copy of the DECISION/ORDER in this matter dated May 5, 2019, duly entered in the office of the Clerk of the within named Court." (*Id.*) The UCMS "case summary" indicates "05/17/2019 — Notice of Entry — decision, Filed By: (P) Family Soufer LLC[,].") (NYSCEF Doc No. 11, petitioner's attorney's affirmation in support, exhibit B.) Respondent's then attorney rejected the notice of entry as the attached decision did not bear the stamp of the clerk of the court. (NYSCEF Doc No. 22, respondent's attorney's affirmation in opposition, exhibit C.) The letter of rejection, dated May 21, 2019, stated:

"[T]here is no indication from your transmission that what was sent was an 'entered' Decision/Order or the date such Decision/Order may have been entered; 2. although your 'Notice of Entry' cover sheet claims that the 'within' was 'filed' with the Office of the Clerk of the Civil Court, the document annexed bears no indication of any such 'filing' (sic). In other words, there is no indication from the papers sent that any document was ever actually 'entered' in the Office of the Clerk of the Civil Court, New York County." [*2](*Id.*)

On March 9, 2022, almost three years later, respondent Gronowicz served petitioner with a notice of appeal from the May 5, 2019 decision and order. (NYSCEF Doc No. 5, notice of appeal.) Petitioner previously moved to "strike" that notice as untimely. (NYSCEF Doc No. 8, notice of motion [sequence 3].) Respondent opposed and argued that the notice of entry was rejected by respondent's former counsel, as the annexed decision and order did not bear any indication that it was "entered" with the clerk. On August 1, 2022, the court issued a decision and order denying petitioner's motion to "strike" the notice of appeal, finding "that the notice of entry served by petitioner does not comply with CPLR 5016 and 5513, and further finds that respondent's time to file an appeal has not yet run." (NYSCEF Doc No. 27, decision and order dated August 1, 2022.) On September 19, 2019, the Hon. Clifton Nembhard issued a decision and order denying traverse and striking the eleventh affirmative defense. (NYSCEF Doc No. 43, decision and order dated September 19, 2022.) Petitioner filed notice of entry of the September 19, 2019 decision and order on December 20, 2022. (NYSCEF Doc No. 44, notice of entry.)

Petitioner has now moved for an order (i) deeming the May 5, 2019 decision and order duly entered as of May 5, 2019, (ii) deeming the notice of entry of the May 5, 2019 decision and order proper *nunc pro tunc* pursuant to CPLR 2001, and (iii) deeming the September 19, 2019 order duly entered as of September 19, 2019. (NYSCEF Doc No. 35, notice of motion [sequence 5].) [\[FN1\]](#) With regard to the court's August 1, 2022 decision and order — a

determination of *petitioner's own motion to "strike" the notice of appeal* — petitioner argues for the first time that the court "should have held that it did not have jurisdiction to 'strike' the Notice of Appeal[]" because "a motion to strike the Notice of Appeal can only be brought before the appellate court" (NYSCEF Doc No. 36, petitioner's attorney's affirmation ¶ 13.) Petitioner claims it "had no way of knowing whether the Order was ever entered, because the Housing Part was not an e-filed court, and the Housing Park clerks routinely *never* stamped decisions as entered, prior to issuing decisions by mail." (*Id.* ¶ 17.) Petitioner argues that "[t]he issue at hand, i.e. the mere neglect of the Clerk of the Court to mark as entered an indisputable order of this Court . . . is clearly exactly the type of issue that CPLR 2001 was enacted to resolve." (*Id.* ¶ 20.)

On December 30, 2022, pursuant to a so-ordered stipulation, the Appellate Term First department adjourned respondent's appeal to the May 2023 term. (*Soufer Family LLC v Barbara Sprague & Anthony Gronowicz*, 2022 NY Slip Op 76417 (U) [App Term 1st Dept 2022].)

In January 2023, Respondent cross-moved to stay this proceeding pending the Appellate Term's determination of his appeal of the May 5, 2019 decision and order. (NYSCEF Doc No. 54, notice of cross-motion [sequence 6].) Respondent states he "immediately perfected his appeal" soon after the court issued the May 5, 2019 decision and order. (NYSCEF Doc No. 55, [*3]respondent's attorney's affirmation in support of cross-motion ¶ 15.) Respondent further argues that the pending appeal "will directly affect the trial of this proceeding. It will determine what [] defenses respondent may raise, specifically whether respondent may raise a defense of co-tenancy and/or succession." (*Id.* ¶ 10.) Respondent contends "[i]t would be a waste of court resources to conduct a trial without respondent having an opportunity to raise his defenses only to then have the Appellate Term determine that he has a viable defense of co-tenancy." (*Id.* ¶ 11.) Respondent states he is willing to pay use and occupancy for the duration of any stay, thus petitioner would not suffer any prejudice were this court to stay the proceeding pending determination of the appeal. (*Id.* ¶ 14.)

In opposition, respondent frames petitioner's motion, dated December 19, 2022, as "an end-run around" the court's August 1, 2022 decision and order, and that respondent perfected his appeal on December 13, 2022. (NYSCEF Doc No. 64, respondent's attorney's affirmation in opposition ¶¶ 3-4.) Respondent argues he would be prejudiced were the court to deem the notice of entry proper *nunc pro tunc* because he "would lose his right to appeal the May 2019 decision and be left with no defenses" (*Id.* ¶ 9.) Respondent also contends petitioner is collaterally estopped from seeking the relief in the instant motion because the August 1, 2022

decision and order resolved the issue as to whether the notice of entry was properly served. (*Id.* ¶¶ 14-16.)

Petitioner filed opposition to the cross-motion in January 2023, arguing it would suffer prejudice from a stay of proceedings that even payment of use and occupancy cannot alleviate, because a stay would continue a denial of petitioner's right to recover possession of the subject premises despite respondent's "substantive defenses" having been stricken by the court in 2019. (NYSCEF Doc No. 58, petitioner's attorney's affirmation in opposition ¶ 23.)

Petitioner moved at the Appellate Term to dismiss the appeal on the basis of untimeliness. On February 28, 2023, the Appellate Term denied petitioner's motion and stated petitioner could "raise any issues concerning the propriety of the appeal in its brief in opposition to the appeal" (*Soufer Family LLC v Barbara Sprague & Anthony Gronowicz*, 2023 NY Slip Op 62638 (U) [App Term 1st Dept 2023].) On March 31, 2023, the Appellate Term adjourned the appeal, pursuant to a "so-ordered" stipulation, to the September 2023 term (*Soufer Family LLC v Barbara Sprague*, 2023 NY Slip Op 64193(U) [App Term 1st Dept 2023].)

On April 5, 2023, upon reviewing the Appellate Term's orders and stipulations from December 2022, February 2023, and March 2023, the court emailed the parties, advising that it believed the Appellate Term's denial of petitioner's motion to dismiss the appeal was dispositive of petitioner's motion and asked the parties if they would agree to mark the proceeding off-calendar until determination of respondent's appeal. While respondent agreed with the court's position, petitioner did not and represented that the parties stipulated to adjourn the appeal to the September 2023 term "to allow the Term to hear both appeals at the same time. Both appeals being the tenant's appeal of the May 5, 2019 and an anticipated appeal (by the losing side) on the Court's decision on Petitioner's motion to deem the order entered as of May 5, 2019 nunc pro tunc." The court then informed the parties that decision is reserved on submission.

DISCUSSION

Petitioner's Motion to Deem the May 5, 2019 Decision and Order Entered Nunc Pro Tunc, [*4] and to Deem Notice of Entry of the May 5, 2019 Decision and Order Proper Nunc Pro Tunc

"The function of orders nunc pro tunc is to correct irregularities in the entry of judicial mandates or like procedural errors. . . . When a ruling has in fact been made but is improperly evidenced by a defective mandate, or by no mandate at all, an appropriate and suitable order

or judgment which manifests the existence of a determination may subsequently be granted to take effect as of the date of such determination (internal citations and quotation marks omitted)." (*Cornell v Cornell*, 7 NY2d 164, 167 [1959]; [*Gletzer v Harris*, 12 NY3d 468 \[2009\]](#) [citing *Cornell*].) In the context of judgments, courts may direct entry of judgment *nunc pro tunc* when the failure to enter a judgment is due to an accident or oversight by a court clerk. (*Cornell*, 7 NY2d at 168-169 ["In theory of law it was the function of the clerk to prepare and enter a final judgment to carry out the decision if the interlocutory judgment did not become final by itself. It is within the power of the court at the present time to correct the failure by making the judgment final as of the time when it should have been done. The omission was a mere irregularity."])

Respondent has already perfected his appeal; petitioner does not dispute respondent perfected his appeal on December 13, 2022 — prior to filing of the instant motion — and the Appellate Term issued an order on December 30, 2022, so-ordering a stipulation to adjourn respondent's appeal to the May 2023 term. This court finds it appropriate to refrain from issuing a decision and order that would affect an issue interrelated to that of timeliness of the notice of appeal — an issue the Appellate Term itself directed petitioner to raise in opposition to the appeal. (*Cf. Adams v Fox*, 27 NY 640, 641 [1863] ["[W]hen a notice of appeal has been served, and the proper undertaking perfected, the case is so far removed from the subordinate court, that we can entertain any application, which the case, in its then condition, may render necessary."]; *see also Spindler v Gibson*, 72 AD 150 [1st Dept 1902] ["[T]he appeal itself, when properly taken, is removed from the Special Term into the Appellate Division, and the latter court alone has jurisdiction of the same; the Special Term, as to it, is without power to make an order affecting it."])

Indeed, petitioner is seeking to "in effect dismiss[] [respondents'] appeal" of the May 5, 2019 order, by having this court deem the May 5, 2019 decision and order entered *nunc pro tunc*, and deeming notice of entry of said decision and order proper *nunc pro tunc*. If the court were to do so, it would essentially decide the pending appeal by rendering the notice of appeal untimely. (*See Matter of Johnson*, 258 AD 750 [2d Dept 1939] [finding order of Surrogate's Court, permitting proposed amendments to appellant's case on appeal, to "in effect dismiss[] the contestants' appeal from the intermediate order denying in part a motion of the [appellants] for commissions to take the testimony of witnesses" and holding such order "was in excess of the jurisdiction of the [court]."]) This is petitioner's third attempt to dispose of respondent's appeal of the May 5, 2019 decision and order. Petitioner first sought to "strike" respondent's notice of appeal, which the court denied and which petitioner now belatedly concedes, contrary to its prior position, was an improper motion given that

appellate courts have sole authority to dismiss an appeal. Then, petitioner moved at the Appellate Term to deny respondent's appeal as untimely, an application which was denied. Instead, petitioner was instructed to advance the issue of timeliness in opposition to respondent's appeal. This dispositive issue is now before the Appellate Term, and this court would be remiss to "trespass on the jurisdiction of the appellate court while the appeal is pending before it." (*Matter of Cupo v McGoldrick*, 278 AD 108, 113 [*5][1st Dept 1951].)

Petitioner's motion to deem the May 5, 2019 decision and order duly entered as of May 5, 2019 and deem the notice of entry of the May 5, 2019 decision and order proper *nunc pro tunc* is denied. The court, however, grants petitioner's motion to deem the September 19, 2022 decision and order duly entered as of September 19, 2022 *nunc pro tunc* pursuant to CPLR 2001. [\[FN2\]](#)

Respondent's Cross-Motion to Stay the Proceeding

Under CPLR 2001, courts of original jurisdiction "may grant a stay of proceedings in a proper case, upon such terms as may be just." Courts have broad discretion to stay a proceeding "in order to avoid the risk of inconsistent adjudications, duplication of proof and potential waste of judicial resources" ([215 West 84th St Owner LLC v Ozsu](#), 209 AD3d 401, 401 [1st Dept 2022] [citing *Zonghetti v Jeromack*, 150 AD2d 561, 563 [2d Dept 1989].) The court is persuaded by respondent's position that this proceeding, in deference to the Appellate Term, should be stayed pending determination of respondent's appeal. In the absence of a stay, the respondent would be in the untenable position of proceeding without any defenses. Should the Appellate Term grant respondent's appeal and resuscitate some or all of respondent's stricken defenses, there is a high risk that inconsistent determinations would ensue. However, in order to balance the equities, and given the fact that the pending appeal will not be heard until the September 2023 term, and respondent's representation that it is willing to pay use and occupancy for the duration of any stay, the court dispenses with the requirement of a formal motion pursuant to RPAPL 745 (2) and grants respondent's cross-motion to stay the instant proceeding pending the Appellate Term's determination of respondent's appeal, conditioned upon respondent paying ongoing use and occupancy, beginning May 1, 2023, by the 5th of each month, until such time the Appellate Term determines the pending appeal.

CONCLUSION

Accordingly, for the foregoing reasons, it is

ORDERED that petitioner's motion is GRANTED solely to the extent of deeming the September 19, 2022 decision and order duly entered as of September 19, 2022 *nunc pro tunc* pursuant to CPLR 2001, and in all other respects is DENIED, and it is further

ORDERED that respondent's cross-motion is GRANTED to the extent that this proceeding is hereby stayed pending a determination from the Appellate Term First Department of respondent's appeal, currently scheduled for the September 2023 term; and it is further

ORDERED that the stay granted herein is conditioned upon respondent paying ongoing use and occupancy directly to petitioner, beginning May 1, 2023, by the 5th of each month.

Either side may move to restore this proceeding on eight days' written notice, subsequent to the determination of the Appellate Term First Department.

This constitutes the decision and order of this court.

Dated: April 14, 2023
New York, NY

HON. KAREN MAY BACDAYAN
Judge, Housing Part

Footnotes

Footnote 1: The court did not issue any decision and order on September 19, 2019. The court considers this a typographical error, as petitioner clearly indicates in its motion papers that it is referring to the September 19, 2022 decision and order of the Hon. Clifton Nembhard, which struck respondents' eleventh affirmative defense. CPLR 2001.

Footnote 2: The stamp of the clerk does not appear on the September 19, 2022 decision and order. While Housing Court clerks routinely do not stamp orders, the rules requiring such stamping apply to Housing Court. *See* 28 NYCRR 208.4-a(b)(1) (stating the rules regarding electronic filing in Supreme Court apply to all actions in which electronic filing is authorized in the Civil Court.) Under the Supreme Court electronic filing rules, a clerk may either affix a filing stamp on the original hard copy of an order and file it electronically or affix the filing stamp to an order after it has been filed electronically. Regardless of the method of affixing the stamp, the stamp "shall be proof of the fact of entry and the date and time thereof." 22 NYCRR 202.5-b(h)(1). The NYSCEF website will transmit a notification of receipt of the

entry to the e-mail addresses of the parties who have consented to NYSCEF, but such transmission does not constitute service of notice of entry. *Id.* at 202.5-b(h)(2). Instead, a party can serve a copy of the stamped order and written notice of its entry, either by filing through the NYSCEF website or by serving a hard copy by any method permitted under CPLR 2103 [b] [1] — [b] [6]. *Id.*

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