2023-04-28

969 Carroll Assoc., LLC v. Mendes

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2023 NY Slip Op 23132
Decided on April 28, 2023
Civil Court Of The City Of New York, Kings County
Basu, J.
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Decided on April 28, 2023

Civil Court of the City of New York, Kings County

969 Carroll Associates, LLC, Petitioner,

against

Evons Mendes, YVENS MENDES, JOHN DOE and JANE DOE, Respondents.

Index No. LT-307047-22/KI

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Shantonu Basu, J.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion sequence No. 3:

Papers Numbered

Notice of Motion and Affirmation in Support 1, NYSCEF # 20, 21
Notice of Cross-Motion and Affirmation in Support 2, NYSCEF # 23 to 26
Answering Affidavits/ Affirmations 3, NYSCEF # 27

Upon the foregoing cited papers, the Decision/ Order on Petitioner's motion and Respondent's cross-motion is as follows:

For the reasons stated below, Petitioner's motion is granted to the extent of restoring the proceeding to the calendar for trial. Respondent's motion seeking discovery is denied.

PROCEDURAL HISTORY AND BACKGROUND

This is a licensee holdover proceeding brought by way of a petition dated April 8, 2022. NYSCEF # 1.

On August 25, 2022, CAMBA Legal Services appeared for Respondent-Yvens Mendes. [FN1]

To date, Respondent-Yvens Mendez has not filed a written answer. Nevertheless, the parties have moved forward as if an answer asserting succession had been filed. Thus, Respondent was to provide Petitioner with informal discovery, and the proceeding was marked off calendar by way of Decision/Order dated October 12, 2022. NYSCEF # 19.

Petitioner now moves this court to restore the matter to the calendar for trial following completion of discovery. NYSCEF # 20 and 21.

Respondent opposes Petitioner's motion on the grounds that discovery is not complete because, by way of cross-motion, Respondent seeks discovery from Petitioner. NYSCEF # 22 to 26. Respondent does not otherwise oppose Petitioner's motion to restore the proceeding to the calendar for trial.

Respondent's cross-motion seeks production of all rent stabilized leases for the apartment for the last 20 years and copies of correspondence between Petitioner and Respondent and other occupants of the subject premises. Respondent also seeks leave to depose the building's superintendent on the grounds that the superintendent might have information relevant to Respondent's succession claim.

Petitioner opposes Respondent's cross-motion on the basis that the requests are overbroad, that Respondent's requests are not limited to a relevant time period, that Respondent does not show ample need for the disclosure, and that the information sought

would not be probative or relevant to Respondent's succession claim.

DISCUSSION

Discovery in a summary proceeding is available only with leave of court (CPLR 408). Courts have long employed the "ample need" test to determine whether to grant such leave. This test was first formulated in *New York Univ. v. Farkas*, which set forth several factors. The *Farkas* test considers: (1) whether the party seeking discovery has asserted facts to establish a cause of action; (2) whether there is a need to determine information directly related to the cause of action; (3) whether the requested disclosure is narrowly tailored and is likely to clarify the disputed facts; (4) whether granting an application for disclosure will prejudice a party; (5) whether the court can alleviate such prejudice by an appropriate order; and (6) whether the court, in its supervisory role, can structure discovery so that parties will not be adversely affected by discovery requests (*New York Univ. v. Farkas*, 121 Misc 2d 643, 647 [Civ. Ct. NY Co. 1983]).

The proponent of discovery does not need to demonstrate every one of these factors (*Mautner-Glick Corp. v. Higgins*, 64 Misc 3d 16, 18 [App. Term 1st Dept. 2019]). Since only some of the factors need be shown, in its simplest form the *Farkas* test requires a court to determine whether the proponent of discovery genuinely needs the information requested and [*2]whether the proponent cannot obtain the information other than by obtaining the information from one of the parties in the case or from a third party.

However, the *Farkas* test does require that the cause of action or defense be properly pleaded. (*3612 Broadway Partners LLC v. Mejia*, NY Slip Op 23078 [Civ Ct, NY Co. 2023]; *Groschlaude v. Lawlor*, 2023 NY Slip Op. 23009, 183 N.Y.S.3d 266, 273 [Civ. Ct. NY Co. 2023]). Without a proper pleading, the court cannot determine whether there is a genuine need for the requested disclosure.

While the record reflects that Respondent-Yvens Mendez is claiming succession to the subject premises, Respondent has not interposed an answer asserting a succession defense or set forth facts that would clarify that the parameters of that defense. One of the documents submitted to the court file states that Respondent-Yvens Mendez is the son of the tenant-of-record. However, that statement is not a substitute for a pleading. Without a pleading, the court cannot determine Respondent-Yvens Mendez's alleged relationship to the tenant-of-record or the relevant time period for co-residency, *i.e.*, 1 or 2 years prior to the death of the tenant-of-record. As such, Respondent has not pleaded facts to establish a defense upon

which discovery can be granted.

Even if a succession defense had been pleaded, Respondent still has not demonstrated ample need to discover information related to his succession claim. Counsel for Respondent argues that discovery would clarify important information related to Respondent's succession claim. However, counsel for Respondent does not explain how twenty years of lease renewals are directly relevant to Respondent's succession claim.

Although at oral argument Respondent's counsel was willing to limit the request to two years of lease renewals, this does not cure the defects in the request. At best, even if Petitioner disclosed the requested renewal leases, and Respondent had signed those leases along with the tenant-of-record, that would only prove was that Respondent signed the renewal leases. It would not prove that Respondent co-resided with the tenant-of-record, which is an essential element of a succession claim.

Counsel for Respondent also does not explain what information the building superintendent has that Respondent does not also have. Nor does Respondent's counsel explain why that information must be obtained before trial rather than, for example, through a trial subpoena.

Similarly, Respondent's proposed document demand for "[a]ll correspondence between the management for Petitioner and the Tenants or Occupants" of the subject premises from 2017 to 2022 falls outside the relevant time period for a succession claim, and no reason is offered why these documents need to be produced in advance of trial.

Petitioner urges that Respondent's motion must be denied because the motion does not annex an affidavit regarding why disclosure is necessary. For the proposition that an affidavit is required in a motion for discovery, Petitioner cites to *Midtown Realty Co. v. General Instrument Corp.*, NYLJ 2/5/91, 1991 NY Misc. LEXIS 891 [App. Term. 2nd Dept.] ("Tenant failed to adequately demonstrate the necessity for the requested disclosure in order to properly defend . . . this commercial nonpayment proceeding. In seeking such relief, tenant relied exclusively on a conclusory affirmation of its counsel, who was without personal knowledge of the facts . . . .").

More recent cases have ruled that an affidavit may not always be required, particularly where there is a verified answer raising defenses that cry out for discovery (*Clinton-178 Towers LLC v. Chapple*, 58 Misc 3d 198, 206 [Civ. Ct. Bx. Co. 2017] (granting discovery despite the [*3]absence of an affidavit because "a verified pleading may be substituted for an

affidavit in many circumstances where the latter is required.")).

This court need not resolve the tension between these two principles. It is enough to rule that, in the instant case, the absence of an affidavit coupled with the absence of an answer make it impossible for the court to determine how the items requested fall outside Respondent's knowledge, custody and control, or why Respondent cannot present a full defense at trial without Petitioner producing these items prior to trial.

For these reasons, Respondent has not met the requirements of the *Farkas* test.

However, the analysis does not end there. The *Farkas* test is now forty years old. While the *Farkas* test remains the best expression of the standard for granting discovery, much has changed over the past four decades. In particular, the number of proceedings heard by the New York City Housing Courts has exploded. For example, according to research conducted by the NYC Rent Guidelines Board, the number of nonpayment cases that were calendared in 1983 (coincidentally the year *Farkas* was decided) was approximately 93,000. Ten years later in 1993 the number of nonpayment cases calendared had risen to approximately 124,000. Ten years after that in 2003, the number was approximately 133,000. Ten years later in 2013, the number was 122,463.

Since 1983, except for the years where Housing Court was functionally closed due to the coronavirus pandemic, there have been only five years where the number of nonpayment calendared calendared was fewer than the 93,000 reached in 1983. On average, the number of nonpayment cases calendared has risen about 30% since *Farkas* was decided.[FN2]

In addition to this increase in the number of proceedings calendared, New York City has experienced a drastic shortage of affordable housing and a steep increase in housing costs across the board.[FN3] When viewed as whole, this situation has been aptly named a housing crisis.

As a result of this crisis, there has been a concomitant increase in the value of the rights to regulated units, as is evidenced by the large sums that landlords have historically spent to purchase those rights from rent-regulated tenants and the refusal of tenants to accept such sums.[FN4] Essential services and amenities such as safe streets and parks, good schools, and quality healthcare are not evenly distributed across New York City. A family's access to these resources is determined in large measure by where the family lives. Similarly, landlords are often faced [*4]with many challenges in maintaining good housing in areas where the rent

rolls are modest.

Thus, both landlords and tenants are risking extraordinarily valuable property rights by litigating in Housing Court. This has led to an asymmetry in the law: a slip-and-fall case that is worth slightly over $50,000 is heard in Supreme Court, which has the resources to manage intensive discovery practice; a dispute over the rights to a highly prized rent-stabilized unit in a desirable neighborhood is heard in Housing Court, which lacks those resources.

In view of this imbalance, and in recognition of the purposes of CPLR 408, both courts and practitioners have begun to simplify the *Farkas* test. It is now commonplace for parties to consent to discovery in certain classes of summary proceedings, including challenges to the rent-regulatory status of an apartment, nonprimary residence cases, owner-use cases, and succession claims.

Thus, the modern approach to discovery in special proceedings is to view the *Farkas* test alongside a simpler question: would discovery speed a case towards a fair resolution, whether by settlement or after a trial? Where the answer is yes, leave to conduct discovery should be granted. Where the answer is no, leave to conduct discovery should be denied.

An example of this modern approach is the decision in *50th St. HDFC v. Abdur-Rahim*, 72 Misc 3d 1210(A), 150 N.Y.S.3d 231 [Civ. Ct. Kings Co. 2021]. The court in *Abdur-Rahim* noted that the rationale for CPLR 408 was that the Legislature envisioned special proceedings to be a speedy alternative to plenary actions, and the Legislature recognized that discovery could be an obstacle to the realization of this vision.

This does not mean that fairness should be sacrificed for speed or that discovery should never be granted in a special proceeding. In fact, the opposite is often true. Discovery can facilitate the purpose of speeding the proceeding towards a fair and orderly disposition. "Hiding the ball" not only renders litigation unfair but, almost as importantly, retaining evidence rather than disclosing it can impede the efficient resolution of disputes (*see Eagle-Picher Lead Co. v Mansfield Paint Co., Inc.*, 203 A.D. 9, 12 [3d Dept 1922] ["the court has no interest in assisting the party to conceal the grounds of his prosecution or his defense, in the hope that surprise at the trial may give him advantage"]; *see also 717 Sterling Corp. v. Cook*, 2023 NY Slip Op 50345(U) [Civ. Ct. Kings Co. 2023] (noting that "disclosure of certain documents/information would serve the purpose of speeding up the litigation, to the benefit of all parties").

The upshot of these cases is that, as much as is possible, a special proceeding should be

a chess match, not a poker game. While there is always a potential for discovery to delay a summary proceeding, the principle of *Abdur-Rahim*, when read in harmony with the older *Farkas* test, leads to a simple question: is the proposed disclosure genuinely needed prior to trial, and will the proposed disclosure speed up a fair deposition of the matter? Understood in this light, Respondent's motion must be denied because the answer to the question is no.

In an ideal world, Respondent's otherwise persuasive motion might be granted. In an ideal world information would flow freely for both landlords and tenants. But such is not the world of a special proceeding that is governed by the strictures of CPLR 408.

Since Respondent's cross-motion for discovery must be denied, Petitioner's motion must be granted because discovery is now complete.

CONCLUSION

Accordingly, it is

ORDERED that Petitioner's motion seeking to restore the matter to the court's calendar to [*5]be referred to a trial part is granted; and it is further

ORDERED that Respondent's cross-motion seeking leave of court to conduct discovery is denied; and it is further

ORDERED that this proceeding is restored to the court's calendar on May 22, 2023, at 9:30 am to be referred to a trial part.

This constitutes the decision and order of this court.

Dated: April 28, 2023
New York, NY

_____
Hon. Shantonu J. Basu,
Judge, Housing Court

Footnotes

Footnote 1: There was some confusion regarding the spelling of Respondent's name. The deceased tenant-of-record was named Yves Mendez. Petitioner's affirmation dated July 6, 2022 notes that the correct spelling of Respondent's name is Yvens Mendez. The caption was

never amended. However, by way of this order, the caption is amended to reflect the correct spelling of Respondent's name.

Footnote 2: NYC Rent Guidelines Board, Housing NYC: Rents, Markets & Trends 2022, p. 159 https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2022/11/2022-Housing-NYC-Book.pdf [last accessed April 28, 2023].

Footnote 3: For example, from 1994 to 2014, New York City suffered a net loss of 105,242 regulated housing units (Scott M. Stringer, Office of the Comptroller, The Growing Gap: New York City's Affordable Housing Challenge, p. 19-20 https://comptroller.nyc.gov/wp-content/uploads/documents/Growing_Gap.pdf [last accessed April 28, 2023]).

Footnote 4: *See* Mireya Navarro, *New York Builders Paying Huge Buyouts to Tenants in Their Way*, NY Times [December 24, 2015] (reporting that under the right circumstance buyout offers can be upwards of a million dollars).

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