2023-06-16

Lavin v. Weinberg

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Lavin v Weinberg
2023 NY Slip Op 50590(U)
Decided on June 16, 2023
Civil Court Of The City Of New York, Queens County
Ressos, J.
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Decided on June 16, 2023

Civil Court of the City of New York, Queens County

Joseph C Lavin AS TRUSTEE OF THE ROSALIE ARCOS IRREVOCABLE TRUST, Petitioner(s),

against

Jason Weinberg AKA JASON STONE; "John" "Doe"; "Jane" "Doe"; "Jane" "Doe", Respondent(s).

Index No. LT-302188-21/QU

Maria Ressos, J.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered — NYSCEF Doc. No
Notice of Motion (Seq. 01) 1 No. 8
Affidavits / Affirmation annexed 2 No. 9, 11
Notice of Motion (Seq. 02) 3 No. 13
Affidavits / Affirmations annexed 4 No. 14, 15, 17
Notice of Cross-Motion (Seq. 03) 5 No. 19
Affidavits / Affirmations annexed 6 No. 20
Exhibit(s) annexed 7 No. 21 through 33
Affidavit / Affirmation in Opposition 8 No. 34, 35, 36
NYSCEF Court File No. 1 through 37

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

This holdover proceeding was commenced, amidst the COVID-19 pandemic, seeking to recover possession of the subject 1st floor premises in a purported two-family dwelling located at 144-63 25th Drive, Flushing, New York 11354. This summary proceeding was predicated on a 90-Day Notice of Termination, incorporated in the Notice of Petition and Petition whereby respondents' tenancy was extinguished effective April 30, 2021. When respondents failed to surrender possession by said date, petitioner commenced the instant matter by electronically filing a Notice of Petition and Petition on May 4, 2021. On November 8, 2021, an official court notice was generated that assigned the initial return date of November 19, 2021. A copy of this notice was mailed out to both petitioner and respondent. That day, respondent Jason Stone appeared *pro se*, was referred to Queens Legal Services ("QLS") and later retained QLS as counsel. QLS electronically filed a notice of appearance on behalf of Jason Stone, on December 2, 2021. Shortly after on December 21, 2021, respondent filed a COVID-19 Hardship Declaration, which had the effect of administratively staying the case until the expiration of the statutory stay in January 2022.

On February 20, 2022, petitioner filed motion Seq. 01, as was required pursuant to [*2]Directive and Procedure 213 ("DRP 213"), to restore the matter to the calendar. See, NYSCEF Doc. No. 8. Sometime in April 2022, QLS notified the court that respondent applied for the Emergency Rental Assistance Program ("ERAP") (Application No. J9KBB). The case was administratively stayed as required by law, once again, pending a determination of the ERAP application. Petitioner filed a second motion now seeking to vacate the ERAP stay, and restore the case to the calendar, among other things. See, NYSCEF Doc. No. 13. Through counsel, respondent filed a cross-motion (Seq. 03) seeking dismissal on several grounds, and if not, then an opportunity to file an answer. See, NYSCEF Doc. No. 19. Alternatively, respondent seeks a stay of the proceeding pending the outcome of a case at the Appellate Division. The Court heard argument on the papers on March 8, 2023 and reserved decision. For the sake of efficiency, the Court will consolidate petitioner's motions sequence 01 and 02 since at least part of the relief sought is the same. The portion of petitioner's motion seeking to restore the proceeding to the court calendar and vacate the ERAP stay are granted for the reasons below.

Absent from respondent's lengthy affirmation in opposition to petitioner's motion to vacate the ERAP stay and in support of the cross-motion to dismiss is any specific opposition to lifting the stay. In addition to the lack of opposition, here, it is undisputed that the ERAP

application was provisionally approved. Since a determination was made, the stay is extinguished. This is keeping in line with cases that deduced a "provisional approval" equates to a "determination" under the ERAP statute and "just as the stay is triggered by an application, it is dissolved by a determination." See, *653 LLC v. Rosa-Blano*, 2023 NY Slip Op. 50033(U) (Civ. Ct. Bronx Co. 2023), citing, *Park Tower South Company LLC v. Simons*, 75 Misc 3d 1067, 1071, 171 NYS3d 342 (Civ. Ct., New York Co. 2022); *Rutledge Apts. LLC v. Rodriguez*, 2023 NY Slip Op 23118, (Civ. Ct., Queens Co. 2023). Petitioner's affirmation and affidavit in support of their motion concede that any approved ERAP funds are "refused and rejected." See, NYSCEF Doc. No. 15. Furthermore, with the provisional approval, respondent receives the benefit of an affirmative defense in "any proceeding seeking a monetary judgment or eviction brought by a landlord for the non-payment of rent accrued during the same time period covered by the provisional payment for a period of twelve months from the determination of provisional eligibility."(L 2021, ch 56, § 1, part BB, § 1, subpart A, sec 1, § 9 [2] [c].) The statute is clear in outlining that if a landlord does not "accept a provisional payment within twelve months of the determination the *landlord shall be deemed to have waived the amount of rent covered by such provisional payment and shall be prevented from initiating a monetary action or proceeding, or collecting a judgment premised on the nonpayment of the amount of rent covered by such provisional payment* [emphasis added]." *Id*. See also, See, *Park Tower S. Co. LLC v Simons*, 2022 NY Slip Op 22192 [75 Misc 3d 1067] (Civ. Ct. New York Co. 2022).

Further absent from respondent's affirmation is any objection to the portion of petitioner's motion seeking to substitute "Joseph C. Lavin And Keith Calabrese As Trustees of the Jasmine Arcos Trust" for "Joseph C. Lavin As Trustee of The Rosalie Arcos Irrevocable Trust," as petitioner. In support of this request, petitioner attached a copy of the deed. As such, the underlying pleadings and caption are amended to reflect as such. The portion of petitioner's motion seeking a default judgment of possession is being held in abeyance pending this court's upcoming determination of respondent's cross-motion.

Respondent is challenging service of the Notice of Petition and Petition, specifically, that it was not served in accordance with RPAPL § 733. As outlined in memorandum CCM-210 issued by the Chief Clerk of the Civil Court of the City of New York, due to uncertainty over [*3]future court dates caused by the COVID-19 crises, courts no longer allowed filers to insert a return date.[FN1] Instead, Chief Clerk's Memorandum 210 ("CCM-210") dated July 30, 2020, instructed that a notation of "DATE TO BE DETERMINED. THE COURT WILL NOTIFY ALL PARTIES OF THE COURT DATE" be made on any notice of petition filed electronically on NYSCEF. After an unspecified amount of time, the court would then notify

the filer and respondent of the future date, time and part the case is assigned to. A lot of filers, relying on the court's notification of the date, time and part, did not attempt to re-serve the pleadings. Post-pandemic, this has created mass confusion for some and led to the dismissal of many cases where courts determined a letter from the court does not replace the requirements under RPAPL §733. See, *Fesz v. Zietz* (LT Index No. 315776-2022/QU, decided on April 25, 2023, Hon. Schiff); see *also*, *Hill v. Cubilete*, 2023 NY Slip Op 34493(U) (Civ Ct, Kings Co 2023).

In the instant case, petitioner's affidavit of service alleges the Notice of Petition and Petition were served on May 21, 2021. See, NYSCEF Doc. No. 5. The initial court date was not until November 19, 2021, which is almost *6 months* after the papers were served and filed. Under RPAPL §733, the Notice of Petition and Petition of a holdover proceeding "shall be served at least ten (10) and not more than seventeen (17) days before the time at which the petition is noticed to be heard." *RPAPL § 733(1).* Respondent urges dismissal based on petitioner's failure to comply with RPAPL § 733. In opposition, petitioner points out that respondent's motion is not supported by an affidavit by the respondent. Petitioner argues the court to not consider any allegations in the motion made without personal knowledge and to deny it in its entirety. The Court prefers to resolve cases on the merits and as such, with the lack of an affidavit in support, the Court will give respondent's motion and the allegations contained therein the proper weight. Petitioner opposes this portion of respondent's motion arguing prejudice and that the "court *expressly directed* petitioners to serve the papers with the [...] notation and without a listed court date [emphasis added]" and points to Exhibit "1". See, NYSCEF Doc. No. 34. However, there is no Exhibit 1 attached.

The Court is convinced by petitioner's last argument of *extreme prejudice* in dismissing the proceeding almost two years after its filing for non-compliance with RPAPL §733 (1). Petitioner points out that complying with the statute was an *impossibility* given the facts in this case. Here, a review of the court's internal system of "UCMSLC" indicates that court notice by letter with the pertinent information of date, time and place was generated on November 8, 2021 with the court date of November 19, 2021. The letter did not appear on NYSCEF, so it was not accessible online. Instead, the court notice or "Part Z Notice" was mailed out to both sides. Despite the great efforts of the United States Postal Service, it is safe to assume the mail would take more than one day to reach its intended recipients. As such, petitioner would not have been able to comply with the requirements of RPAPL § 733 because the *minimum* days for service prior to an appearance is *ten* days, making compliance under these facts a true impossibility. It would be prejudicial for petitioner, after waiting

almost 6 months for an initial return date, to recommence their case upon receipt of a delayed court notice.

Furthermore, this Court agrees with the reasoning that here, like the facts in *Services for the Underserved, Inc. v Mohammed*, 2023 NY Slip Op 50536(U) (Civ. Ct. Bronx Co. 2023), [*4]despite filing a notice of appearance on December 21, 2021, the fact that no answer was ever filed almost *two years after* filing of said notice and this motion, which raises personal jurisdiction for the first time based on noncompliance with RPAPL § 733(1), amounts to a waiver of a personal jurisdiction defense. In, *JP Morgan Chase Bank v. Jacobowitz*, 176 AD3d 1191 (2019), the Appellate Division Second Department, found that respondent's failure to move to dismiss more than 10 months after the filing of the notice of appearance waived any claim that the court lacked personal jurisdiction over them in the action. The delay in this case is even more egregious. It is important to note, just as the court did in *Mohammed*, not all types of involvements in an action constitute waiver of personal jurisdiction. However, "a person who participates in the merits of an action appears informally and confers jurisdiction on the court." *Matter of Roslyn B. v. Alfred G.,* 222 AD2d 581, 582, 635 N.Y.S.2d 283 (Appellate Division, 2nd Dept' 2014). Here, respondent filed a COVID-19 Hardship Declaration on December 19, 2021, indicating it would be difficult to obtain alternative suitable housing and that by submitting the declaration, respondent "understand[s] that my landlord may request a hearing to challenge the certification of hardship made herein, and that [respondent] will have the opportunity to participate in any proceedings regarding [their] tenancy " See, NYSCEF Doc. No. 7. Clearly, by filing the Hardship, respondent knowingly participated in the proceeding, accepted the benefit of a stay that endured through January 15, 2022 (almost *one year*), and signed off that should their landlord challenge this filing, they will participate in a hearing on the issue. Respondent also received the benefit of a stay pending their ERAP application which afforded respondent the opportunity to obtain an approval of arrears owed to petitioner. This Court is of the opinion that by doing so, respondent further participated in this action *on the merits* since a portion of the petition initially sought unpaid rent arrears. Respondent cannot have their proverbial cake and eat it too.

As to respondent's second and third bases for dismissal pursuant to CPLR 3211(a)(1) and (7), respondent argues petitioner relied on a defective, incurable predicate notice and failed to state a cause of action under RPAPL § 741. 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 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.

Here, respondent was served with a predicate 90-Day Notice of Termination. Respondent urges that the predicate is premature and runs afoul of respondent's lease agreement which does not expire until October 30, 2023. It is well settled that defects in predicate notices are not subject to cure and warrant dismissal. See, *Chinatown Apartments, Inc v. Chu Cho Lam*, 51 NY2d 786 (1980). As mentioned at the start of this Decision, respondent does not submit an affidavit in support of his motion. Respondent's counsel does attach a copy of an alleged lease with "Rosalie Arcos." See, NYSCEF Doc. No. 31. While the papers were amended to reflect a different owner, the Court notes that the predicate termination notice was signed by Joseph C. Lavin, the *trustee* of the Rosalie Arcos Irrevocable Trust. It is unknown to this Court whether that irrevocable trust was an *inter vivos* (living) or testamentary trust or the whereabouts of Rosalie Arcos, the person who supposedly executed the lease in question. Nonetheless, Joseph C. Lavin, in his affidavit in opposition to this motion, wholly rejects the lease and swears that it [*5]was forged and never executed between the parties. See, NYSCEF Doc. No. 36. In the same breath, respondent argues the petition fails to state a cause of action for failure to state respondent's interests in the premises. *RPAPL § 741(2) and (4).* Specifically, that respondent did not enter into an agreement with the current petitioner, but with the "former owner of the subject premises, Rosalie Arcos" subject to a written rental agreement, not an oral one as alleged in the petition. Evidently, questions of fact exist with respect to, *inter alia,* whether the written lease attached is valid and whether any subsequent owners would be bound by it. At this juncture, petitioner did state a legally cognizable cause of action and respondent did not prove their entitlement to dismissal based on *undisputed* documentary evidence. These portions of respondent's motion is denied.

Moreover, respondent's request to stay this proceeding pending the outcome of *Jason Stone v. Arcadio Arcos Jr. Irrevocable Trust et al*., index number 00737/2023, in the Second Department, is denied. CPLR 2201 grants courts in a civil action inherent power to control their own proceedings and stay cases *in their discretion*. Respondent alleges that the Appellate Division case involves a potential possessory interest in the property. Respondent's counsel attached a copy of the filing and from what the Court can surmise, it appears to be an appeal (e-filed on 2/1/2023) of the Supreme Court's vacatur of a *lis pendens* on the property. Again, there is no affidavit in support to proffer an explanation or provide context as to the relationship between the parties, how reinstating the *lis pendens*, if the appeal is successfully,

would impact this case. Given that there is no evidence of a stay *imposed* on this court, the Court is exercising its discretion in not staying this matter to prevent further delay.

Lastly, respondent alternatively sought leave to interpose the attached proposed answer. Petitioner opposes the request arguing respondent should not be allowed to file a late answer over a year since filing their notice of appearance. The Court acknowledges that extent of respondent's delay in filing this answer and does not find it credible that an ERAP stay somehow prohibited respondent from filing an answer at any point *prior* to making this motion. Be that as it may, there is no prejudice to petitioner given that the first two defenses in the proposed answer have already been decided in this decision. As to respondent's third defense, given the possible existence of a lease, respondent demonstrates a meritorious defense to this holdover proceeding and the Court, in its discretion will allow respondent to file their answer. The Court deems respondent's Exhibit A, NYSCEF Doc. No. 21, proposed answer, served and filed *nunc pro tunc*. As such, the portions of petitioner's motions (Seq. 01 and 02) seeking a default judgment is denied. This matter is restored to the Part D, Room 406, calendar for trial or settlement on August 7, 2023 at 9:30am.

This constitutes the Decision/Order of the Court, a copy of which will be uploaded to NYSCEF.

Date: June 16, 2023

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Judge of the Housing Court

Footnotes

Footnote 1: See, *CCM-210*. Dated 7/30/2020. Accessed on 6/12/23: https://nycourts.gov/courts/nyc/SSI/directives/CCM/CCM210.pdf.

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