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Clearview Gardens Fourth Corp. v. Mula

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[*1]

Clearview Gardens Fourth Corp. v Mula
2023 NY Slip Op 50262(U) [78 Misc 3d 1219(A)]
Decided on April 4, 2023
Civil Court Of The City Of New York, Queens County
Schiff, 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This opinion is uncorrected and will not be published in the printed Official Reports.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 4, 2023

Civil Court of the City of New York, Queens County

Clearview Gardens Fourth Corporation, Petitioner-Landlord,

against

**Salvatore Mula, Respondent-Tenant, and
JOHN DOE AND JANE DOE, Respondents-Undertenants**

Index No. L&T 310227/22

Logan J. Schiff, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Respondent-Undertenant's motion to dismiss, and Petitioner's cross-motion to amend the caption:

Papers NYSCEF DOC.

Notice of Motion & Affirmation/Affidavits/Exhibits Annexed 8-11

Affirmation in Opposition 12

Notice of Cross-Motion & Supporting Affirmation 13-14

Reply Affirmation 15

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

Petitioner Clearview Gardens Fourth Corporation ("Petitioner"), a cooperative corporation, commenced the instant nonpayment against Respondent Salvatore Mula

("Respondent") in July 2022 for failure to pay monthly maintenance charges accrued pursuant to a proprietary lease. Petitioner named John Doe ("Co-Respondent") as an undertenant. Both Respondent and Co-Respondent have appeared by counsel. Co-Respondent now moves to dismiss this proceeding pursuant to CPLR(a)(7) and (a)(10) based on improper use of a fictitious name under CPLR 1024, arguing that Petitioner knew his identity before commencing this proceeding. Petitioner opposes the motion and cross-moves to join Co-Respondent and to amend the caption *nunc pro tunc*, in effect asking the court to substitute Co-Respondent's legal name, Jorge Ceballos, in lieu of John Doe.

In support of his motion, Co-Respondent offers an affidavit, in which he states that he has resided in the subject premises since 2013. He further avers that Petitioner knew of his [*2] identity since at least 2020, when Co-Respondent's counsel emailed Petitioner's counsel a copy of a complaint filed by Co-Respondent under Supreme Court Index No. 717395/2020-QU against Respondent for fraud, breach of contract, and other claims relating to Respondent's ownership of shares in the subject premises. Co-Respondent annexes to his affidavit an email dated October 10, 2020, which attaches the underlying Supreme Court complaint and is addressed to Hankin & Mazel PLLC, the law firm representing Petitioner in this proceeding.

While the use of evidentiary materials, including affidavits, in support of a motion to dismiss pursuant to CPLR(a)(7) is generally disfavored, they may be considered where such submissions "conclusively establish that the [petitioner] has no cause of action" ([*Phillips v Taco Bell Corp.* 152 AD3d 806](#), 808 [2d Dept 2017], citing [*Bokhour v GTI Retail Holdings, Inc.* 94 AD3d 682](#) [2d Dept 2012]; [*Rovello v. Orofino Realty Co.*](#), 40 NY2d 633, 635-36 [1976]). In such circumstances, the court must ascertain "whether the proponent of the pleading has a cause of action, not whether he has stated one" ([*Sokol v Leader*](#), 74 AD3d 1180, 1181—1182 [2d Dept 2010]).

In its opposition, Petitioner does not dispute the authenticity of Co-Respondent's October 10, 2020 email, or that it had knowledge of Co-Respondent's identity before filing the Petition. Instead, it argues that given the early posture of this proceeding, and the fact that Co-Respondent has appeared by counsel and availed himself of this court's jurisdiction, the court should permit Petitioner to amend the caption to substitute Co-Respondent Jorge Ceballos for John Doe.

While use of the pseudonymous John Doe is permitted pursuant to CPLR 1024 for an unknown party, it is a mechanism of last resort, to be used only after attempting to ascertain

the party's legal name ([Bumpus v. New York City Tr. Auth., 66 AD3d 26](#), 29 [2d Dept 2009]). Where a party has failed to exercise due diligence in utilizing CPLR 1024, personal jurisdiction has not been obtained and the proceeding must be dismissed as to the improperly named party (*Bumpus* at 30; *Redstone Garage Corp. v New Breed Automotive, Inc.*, 54 Misc 3d 126[A] [App Term, 2d, 11th & 13th Jud Dists 2016]; [RR Reo II, LLC v Omeje, 33 Misc 3d 128](#)[A] [App Term, 2d, 11th & 13th Jud Dists 2011]).

Here, the undisputed evidence submitted in support of Co-Respondent's motion conclusively establishes not only that Petitioner could have discerned Co-Respondent's identity, but rather that it *knew his name* nearly two years before commencement of the Petition. Under these circumstances, the court will not permit substitution, as to do so would render the jurisdictional requirements of CPLR 1024 meaningless (*see Wilmington Trust, N.A. v Shasho*, 197 AD3d 534 [2d Dept 2021]).

Accordingly, the proceeding is dismissed as to Co-Respondent. Furthermore, any warrant of eviction ultimately issued in this proceeding may not be enforced against Co-Respondent in light of the Housing Stability and Tenant Protection Act's amendment to RPAPL 749 (L. 2019, c. 36, part M, § 19), which now provides that the warrant of eviction is effective only against "persons named in the proceeding."[\[EN1\]](#)

While Petitioner may no longer proceed against Co-Respondent, the court will not dismiss this proceeding as against Respondent. A nonpayment proceeding sounds in contract (*see Solow v. Wellner*, 86 NY2d 582, 589-90 [1995]), and as such only the parties in contractual privity, in this case Petitioner and Respondent, are necessary parties ([see JLNT Realty, LLC v Liautaud, 49 Misc 3d 139](#)[A] [App Term, 2d, 11th & 13th Jud Dists 2015]; *Randazzo v Galietti*, 55 Misc 3d 131[A] [App Term, 2d, 11th & 13th Jud Dists 2017]).

Accordingly, it is hereby

ORDERED that the Petition is dismissed as to Respondent John Doe; and it is further

ORDEERED that any warrant issued in this proceeding may not be enforced against Jorge Ceballos, improperly named as John Doe; and it is further

ORDERED that this matter is restored to the court's calendar for conference on May 26, 2023 at 10:30am.

This constitutes the decision and order of the court.

Dated: April 4, 2023
Queens, New York
Hon. Logan J. Schiff, J.H.C.

Footnotes

Footnote 1: While it remains an open question whether the amended RPAPL 749 applies to occupants who move in after the filing of an eviction petition, the court does not need to reach that legal issue here, as it is undisputed that Co-Respondent was residing in the premises before commencement (*see Cuomo v Long Island Lighting Co.*, 71 NY2d 340 [1988] ["The courts of New York do not issue advisory opinions for the fundamental reason that in this State '[the] giving of such opinions is not the exercise of the judicial function.'" [internal citation omitted]).

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