2023-06-02

276-W71 LLC v. G.S.

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276-W71 LLC v G.S.
2023 NY Slip Op 23171
Decided on June 2, 2023
Civil Court Of The City Of New York, New York County
Stoller, J.
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Decided on June 2, 2023

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

276-W71 LLC, Petitioner,

against

G.S., Respondent.

Index No. 71059/2019

For Petitioner: Edward Alper
For Respondent: Judith Killen

Jack Stoller, J.

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

Pages numbered
Notice of Motion and Supplemental Affidavit and Affirmation Annexed 1, 2, 3
Order To Show Cause and Supplemental Affidavit and Affirmation Annexed 4, 5, 6
Affidavit and Affirmation In Opposition To Order To Show Cause 7, 8
Affirmation In Opposition to Notice of Motion 9
Reply Affirmation In Support of the Notice of Motion 10
Reply Affirmation In Support of the Order To Show Cause 11

Upon the foregoing papers, the Decision and Order on this motion are as follows:

276-W71, LLC, the petitioner in this proceeding ("Petitioner"), commenced this summary proceeding against, G.S., the respondent in this proceeding ("Respondent"), seeking a money judgment and possession of 276 West 71st Street, Room 17, New York, New York ("the subject premises") on an allegation of nonpayment of rent. The parties settled this proceeding. Petitioner now moves for a judgment against Respondent and for attorneys' fees. Respondent cross-moves to vacate a stipulation, to be restored to possession of the subject premises, for a finding that Petitioner and Petitioner's counsel violated RPAPL §768, for civil penalties for a violation of RPAPL §768, and for costs and sanctions against Petitioner and Petitioner's counsel. The court resolves both motions by this order.

Undisputed facts

The Court appointed a guardian *ad litem* ("GAL") for Respondent by an order dated August 17, 2022. Respondent also appeared by counsel. With counsel representing both parties, the parties settled this matter according to a stipulation dated January 19, 2023 ("the Stipulation"). The Stipulation obligated Respondent to pay Petitioner $18,150 on or before February 21, 2023 ("the Deadline"). On default in payment, Petitioner could move for the entry of a judgment and for attorneys' fees. The Stipulation provided that in the event of a motion for a judgment, the only defense would be a delay by the Human Resources Administration [*2]("HRA") in processing checks after an approval.

Sometime in early February, before the Deadline, counsel for the parties communicated with one another, to the effect that HRA denied Respondent's application for assistance with payment of arrears.

Sometime thereafter, someone who works for Petitioner spoke with Respondent directly without the presence of Respondent's GAL or attorney. As a result of this communication, Respondent signed a statement dated February 10, 2023 purporting to surrender possession of the subject premises, which is rent-stabilized, in return for $7,500, without prejudice to Petitioner's claims, and Petitioner regained possession of the subject premises from Respondent at that point in time.

Petitioner subsequently moved for a judgment against Respondent for the rent arrears. Petitioner's managing member averred on February 27, 2023 in support of the motion for a judgment that he was entitled to a money judgment for the full amount, with no mention that Petitioner had possession of the subject premises.

After Respondent made his motion, Petitioner made an application to adjourn Respondent's motion to interpose responsive papers. The Court conditioned such an adjournment on Petitioner's restoration of Respondent to possession of the subject premises, without prejudice to Petitioner's claims. Respondent has since been restored to possession of the subject premises.

Discussion

Conduct is frivolous and therefore sanctionable if, *inter alia*, it is completely without merit in law. 22 N.Y.C.R.R. §130-1.1(c)(1). In determining whether the conduct undertaken was frivolous, the Court shall consider, *inter alia*, the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party. 22 N.Y.C.R.R. §130-1.1(c)(3).

The Court shall appoint a guardian *ad litem* for a litigant if the Court finds that the litigant is incapable of protecting their interests. CPLR §1201. Accordingly, the Court's appointment of the GAL for Respondent compels the conclusion that the Court made a finding that Respondent is incapable of protecting his interests. After the appointment of the GAL, and with notice that the Court had made this finding and appointed a GAL, Petitioner still negotiated about the subject of this litigation with Respondent directly, without the presence of the GAL or Respondent's attorney and, indeed, without notice to the GAL or Respondent's attorney or the Court, causing Respondent to surrender possession of a rent-stabilized apartment. Petitioner even avoided putting the Court on notice of this conduct when Petitioner subsequently moved for a judgment against Respondent. Such conduct undermines the Court's findings that Respondent requires the services of a guardian *ad litem*.

The Court has a policy of rigorous protection of the rights of the infirm. *Matter of Jesten F. (Ruth S.)*, 167 AD3d 1527, 1528 (4th Dept. 2018), *Vinokor v. Balzaretti*, 62 AD2d 990 (2nd Dept. 1978), *Kalimian v. Driscoll*, 1991 NY Misc. LEXIS 854 (App. Term 1st Dept.). To put it less prosaically, the Court must ensure that the litigation will not "run roughshod" over the rights of the disabled. *Countrywide Home Funding Co. v. Henry J.K.*, 16 Misc 3d 1132(A)(S. Ct. Nassau Co. 2007). Accordingly, a party cannot take a default judgment against an adversary who may need a guardian without notifying the Court of such a need. *Sarfaty v. Sarfaty*, 83 AD2d 748, 749 (4th Dept. 1981), *Oneida Nat'l Bank & Trust Co. v.*

Unczur, 37 AD2d 480, 484 [*3](4th Dept. 1971), *N.Y.C. Hous. Auth. (Amsterdam Houses) v. Richardson*, 27 Misc 3d 1204(A)(Civ. Ct. NY Co. 2010), *NY City Hous. Auth. v. Beverly B.*, 2005 NY Misc. LEXIS 3324 (Civ. Ct. NY Co. 2005), *In re Linden-Rath*, 188 Misc 2d 537, 540 n.2 (S. Ct. NY Co. 2001), *Jackson Gardens LLC v. Osorio*, N.Y.L.J., July 11, 2001 at 25:6 (Civ. Ct. Queens Co.), *Parras v. Ricciardi*, 185 Misc 2d 209, 213-14 (Civ. Ct. NY Co. 2000), *New York Life Ins. Co. v. V.K.*, 184 Misc 2d 727, 737 (Civ. Ct. NY Co. 1999).

If a litigant cannot obtain a default determination against an adversary who needs a guardian without disclosing that need to the Court, it stands to reason that the same litigant cannot negotiate a settlement with such an adversary in the absence of the guardian and without notice as such. Correspondingly, actions taken in litigation against litigants who require guardians *ad litem* without their guardians involved are unenforceable and ineffective, *Cowell v. Dickoff*, 60 AD3d 716, 717 (2nd Dept. 2009), *Jamsol Realty, LLC v. German*, 46 Misc 3d 11, 15 (App. Term 2nd Dept. 2014), *SG 455 LLC v. Green*, N.Y.L.J. October 27, 2015 at 1202740678954 at *1 (Civ. Ct. Kings Co.), *Countrywide Home Funding Co.*, *supra*, 16 Misc 3d at 1132(A), *Parras*, *supra*, 185 Misc 2d at 213-14, even when, for example, those proceedings entailed a stipulation executed by an attorney before the litigant obtained a guardian. *Genesis Holding, LLC v. Watson*, 5 Misc 3d 127(A) (App. Term 1st Dept. 2004). *Cf.* Matter of Thomas J., 130 AD3d 1030, 1031 (2nd Dept. 2015), Wright v. Rickards, 94 AD3d 874, 875 (2nd Dept. 2012) (once a guardian is appointed for an incapacitated person, litigation against the incapacitated person and against the guardian as representative of the incapacitated person should not proceed without the permission of the court which appointed the guardian).

Petitioner defends its actions by quarreling with the merits of the Court's appointment of the GAL for Respondent. If a party takes issue with an order of the Court, the party's remedy is to appeal or to make a motion pursuant to CPLR §2221. The party's remedy is decidedly *not* to take it upon itself to flout the authority of the Court, *NYC Hous. Auth. v. Porter*, 40 Misc 3d 41, 42-43 (App. Term 2nd Dept. 2012), and fashion its own remedy. *NYC Coal. to End Lead Poisoning v. Giuliani*, 248 AD2d 120, 121 (1st Dept. 1998).

Petitioner also argues that *1234 Broadway LLC v. Lin*, 25 Misc 3d 476 (Civ. Ct. NY Co. 2009) stands for the proposition that the appointment of a guardian *ad litem* does not take away the autonomy of the ward, such that Petitioner was free to negotiate an agreement with Respondent in the absence of the GAL. However, *1234 Broadway LLC*, *supra*, 25 Misc 3d at 476, essentially stands for the proposition that a guardian *ad litem* cannot defy the wishes of their ward.[FN1] An attempt to leverage a ward's autonomy as such to support a proposition

that an adversary may effectively ignore a finding of a Court that a litigant is incapable of protecting their interest is a bad-faith perversion of the holding. For the same reason, Petitioner's assertion that Respondent is the party who initiated negotiations to settle the matter with a surrender is irrelevant. The appropriate response to a settlement overture from an adversary represented by a guardian *ad litem* in the litigation is to politely decline and notify the guardian of the exchange.

Petitioner also cites *1234 Broadway LLC*, *supra*, 25 Misc 3d at 476 for the proposition that the GAL's mandate did not extend to the subject matter of Petitioner's negotiation with Respondent. Petitioner argues that the GAL's involvement with that negotiation would have constituted an impermissible management of Respondent's personal affairs. However, a [*4]guardianship *ad litem* applies to the proceeding in which the Court appointed the guardian. *Id*. at 482. If Petitioner could bypass the GAL to negotiate for possession of the subject premises during the pendency of litigation commenced by a petition seeking, *inter alia*, possession of the subject premises, then the application of the guardianship to this proceeding has no meaning.

The extent of Petitioner's negotiation with Respondent underscores Petitioner's audacity in disregarding the Court finding that Respondent is not capable of protecting his rights. Petitioner did not just negotiate with Respondent and leave it at that. Petitioner did not negotiate just any old agreement with Respondent without his attorney or GAL present, like an agreement to pay by a date certain. Petitioner negotiated *a surrender of a rent-stabilized tenancy* with Respondent without his attorney or GAL present—in the context of a nonpayment proceeding no less—a concession so impactful that the Legislature requires the Court to engage in extra allocution with pro se tenants who stipulate as such. RPAPL §746(2)(c)(iv).

Petitioner's flagrant defiance of the Court's finding that Respondent requires a GAL, the maximal impact of the agreement Petitioner negotiated with Respondent, and Petitioner's failure to notify counsel or the Court, most glaringly in Petitioner's subsequent motion for a money judgment against Respondent are indeed completely without merit in law and, therefore, sanctionable.

A purpose of sanctions is to advance the public interest, *Tag 380, LLC v. Estate of Howard P. Ronson*, 69 AD3d 471, 475 (1st Dept. 2010), in part to prevent malicious litigation tactics. *Levy v. Carol Mgmt. Corp.*, 260 AD2d 27, 34 (1st Dept. 1999), *Kernisan v. Taylor*, 171 AD2d 869, 870 (2nd Dept. 1991). A sanction substantial enough to disincentivize

future litigants from bypassing guardians *ad litem* would comport with this rule.

Be that as it may, the Court must also weigh the amount sought in the lawsuit, the culpability of the party's conduct, and prejudice to the adversary, *Vicom, Inc. v. Silverwood*, 188 AD2d 1057 (4th Dept. 1992), *Bedford Gardens Co. LP v. Berkowitz*, 15 Misc 3d 1132(A) (Civ. Ct. Kings Co. 2007), considerations that bring into play both Petitioner's payment of $7,500 to Respondent and Petitioner's subsequent restoration of Respondent to possession of the subject premises. The record before the Court does not show how much of the $7,500 Respondent has left, although it appears that Respondent used at least some of the money for hotel stays. The extent to which Respondent retains the buyout sum comprises a potential equitable factor weighing in favor of Petitioner in setting a sanctions amount. *See Pawar v. The Stumble Inn*, 2012 NY Misc. LEXIS 5056 (S. Ct. NY Co. 2012) (inequitable conduct of an adversary of a party who would be sanctioned figures into the determination of sanctions).

Not only is this equitable factor relevant to a final determination of an amount appropriate for sanctions, it has potential relevance to Petitioner's motion for a final judgment as well. As the record on these questions is not sufficient at the moment for the Court to properly fix a sanctions amount, the Court will calendar both the sanctions motion and the motion for a judgment for a conference and, if necessary, a hearing.

The sanctionable conduct found above only applies to Petitioner. The record is insufficient to demonstrate as a prima facie matter that Petitioner's counsel engaged in like conduct.

As mentioned above, Respondent moves to be restored to possession. For the reasons stated above, the Court already granted this relief as a condition of granting a prior application of Petitioner to adjourn Respondent's motion for that relief. Respondent also moves to vacate what he characterizes as "the stipulation." However, the ostensible agreement to move was not a "stipulation," and there is nothing to vacate.

Respondent also moves for a finding that Petitioner violated RPAPL §768. However, Civil Court does not have the jurisdiction to render declaratory relief. *Caffrey v. N. Arrow Abstract & Settlement Servs., Inc.*, 160 AD3d 121, 129 (2nd Dept, 2018), *Zuckerman v. Spector*, 287 AD2d 402 (1st Dept. 2002). Respondent also moves for an award of civil penalties pursuant to RPAPL §768, a request for relief that warrants an interpretation of the statute.

Prior to the enactment of RPAPL §768, a party claiming an illegal lockout could seek

possession by a summary proceeding brought pursuant to RPAPL §713(10) and could seek damages on a private cause of action pursuant to RPAPL §853. Both RPAPL §713(10) and RPAPL §853 remains in effect through and after the enactment of RPAPL §768. As the Court must avoid a construction rendering statutory language to be superfluous, *Matter of NY Cty. Lawyers' Ass'n v. Bloomberg*, 95 AD3d 92, 101 (1st Dept. 2012), the Court does not construe the enactment of RPAPL §768 to create either a duplicative summary proceeding for recovery of possession on an allegation of a lockout or a duplicative private right of action for damages. Rather, the Court construes the enactment of RPAPL §768 to give rise to the same kind of criminal liability statewide as N.Y.C. Admin. Code §26-521(a)(3) had already imposed on anyone found guilty of an illegal lockout within New York City.

In addition to criminal liability, RPAPL §768 also provides for civil penalties. However, a provision for civil penalties, which are normally collected by a government agency, does not necessarily give rise to a private right of action. *Bd. Of Mgrs. Of 150 E. 72nd St. Condominium v. Vitruvious Estates, LLC*, 2018 NY Misc. LEXIS 2364 (S. Ct. NY Co. 2018), *aff'd on other grounds*, 173 AD3d 589 (1st Dept. 2019), *Paul v. 370 Lex., LLC*, 7 Misc 3d 747, 751 (S. Ct. NY Co. 2005), *Clancy v. State*, 126 Misc 2d 292, 293 n.1 (Ct. Cl. 1984). Where affected parties have a derivative cause of action for civil penalties, the statutory scheme spells it out, as is the case with the New York City Housing Maintenance Code. N.Y.C. Admin. Code §27-2115(h)(1), Dominguez v. Zinnar, 2009 NY Slip Op. 33266(U), ¶ 6 (S. Ct. NY Co.), Shapiro v. Townan Realty Co., 162 Misc 2d 630, 634 (Civ. Ct. NY Co. 1994), Amsterdam v. Goldstick, 136 Misc 3d 831 (Civ. Ct. NY Co. 1987). RPAPL §768 does not contain similar provisions. Accordingly, Housing Court is not the forum to adjudicate civil penalties pursuant to RPAPL §768, Cordova v. 1217 Bedford Realty LLC, 67 Misc 3d 1206(A) (Civ. Ct. Kings Co. 2020), a proposition underscored when Courts have distinguished the relief litigants may obtain in Housing Court pursuant to RPAPL §713(10) from relief pursuant to RPAPL §768. Vazquez v. Suljovic, 74 Misc 3d 1226(A) (Civ. Ct. Queens Co. 2022), Gonzalez v. Nycha - Borinquen Plaza Houses, 71 Misc 3d 1213(A) (Civ. Ct. Kings Co. 2020).

Accordingly, it is

ORDERED that the Court denies the motion for restoration to possession as moot, as the Court has already granted that relief and Respondent is now in possession of the subject premises, and it is further

ORDERED that the Court denies the motion for an order finding that Petitioner is in

violation of RPAPL §768, and it is further

ORDERED that the Court denies the motion for civil penalties, and it is further

ORDERED that the Court denies the motion to vacate a stipulation, and it is further

ORDERED that the Court denies the motion to sanction Petitioner's counsel, and it is further

ORDERED that the Court grants the motion to sanction Petitioner, and it is further

ORDERED that the Court shall restore this matter for a conference at a date to be set in consultation with counsel and the GAL and possibly for a hearing regarding the appropriate [*5]amount of the sanction, and it is further

ORDERED that the Court shall restore the motion for a judgment for a similar evaluation of the appropriate amount.

This constitutes the decision and order of this Court.

Dated: June 2, 2023
New York, New York
HON. JACK STOLLER
J.H.C.

Footnotes

Footnote 1: The opening paragraph of decision states that, "[t]he issue in this case is whether a housing court GAL may consent on the ward's behalf when the ward herself opposes the settlement." *Id.* at 477.