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Broadway Bretton, Inc. v Doe

2023 NY Slip Op 31979(U)

June 5, 2023

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

Docket Number: Index No. 312512-22

Judge: Karen May Bacdayan

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART F

BROADWAY BRETTON, INC.

INDEX NO. 312512-22

Petitioner,

DECISION/ORDER

-against-

“JANE DOE”

Respondent.

CIVIL COURT OF THE
CITY OF NEW YORK
JUN 05 2023
ENTERED
NEW YORK COUNTY

HON KAREN MAY BACDAYAN, JHC

Novick Edelstein Pomerantz, PC, for the respondent
Northern Manhattan Improvement Company, for the respondent

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by
NYSCEF Doc Nos: 4, 5, 14-18.

PROCEDURAL POSTURE AND BACKGROUND

This is a nonpayment proceeding commenced by Broadway Bretton, Inc. (“petitioner”) in August 2022 against respondent, a rent stabilized tenant.¹ Respondent appeared by counsel on December 16, 2023. (NYSCEF Doc No. 5, notice of appearance.) Pursuant to a briefing schedule ordered by the court on December 21, 2022, respondent timely filed an amended answer on January 13, 2023. (NYSCEF Doc No. 13, briefing order; NYSCEF Doc No. 14, amended answer.) Respondent’s intended motion for leave to conduct discovery was due to be filed and served by February 5, 2023. Six days prior to the deadline, on January 30, 2023, respondent provided notice that an appeal had been filed pending the denial of her Emergency Rental Arrears Program (“ERAP”) application. (NYSCEF Doc No. 15.) This had the effect of staying the proceeding until such time as the Office of Temporary and Disability Assistance (“OTDA”) rendered a decision on her appeal. (*See* Admin Order of Chief Admin Judge of Cts AO 34/22 ¶ 5; L 2021, ch 56, part BB, subpart A, § 8, as amended by L 2021, ch 417, part A, § 4.) No motion was ever filed. The appeal was denied on April 25, 2023.

¹ Respondent’s true identity has been changed, and her file sealed, to protect her identity.

On May 17, 2023, petitioner moved to restore the proceeding to the trial calendar and to vacate the ERAP stay. (NYSCEF Doc No. 16, notice of motion [sequence 1].) The motion was served via NYSCEF and made returnable the next day. Respondent did not oppose the vacatur of the stay, but sought to have the court order another briefing schedule regarding an objection to personal jurisdiction (regarding her defense that the affidavit of service was not timely filed pursuant to RPAPL 735 [2] [b]), and discovery (regarding her affirmative defenses and counterclaims related to fraudulent overcharge). (NYSCEF Doc No. 14, amended answer ¶¶ 19-31.) Petitioner objected to respondent's request given that a briefing order had been issued five months prior to the court appearance and any motion had been due three and a half months before the appearance. The court took respondent's oral application on submission.

DISCUSSION

At the outset, in order to narrow the issues before the court, respondent's request to move for dismissal of the petition based on this court's lack of personal jurisdiction is declined. Respondent has waived her personal jurisdiction defenses. By not asserting an objection to personal jurisdiction in her initial answer dated September 9, 2022, respondent waived her right to contest personal jurisdiction. (NYSCEF Doc No. 4, *pro se* answer.) Even if the court were to overlook the respondent's failure to raise a personal jurisdiction defense while unrepresented, respondent's attorney filed a notice of appearance five months ago on December 22, 2023, and did not raise a personal objection defense until January 13, 2023 when she filed an amended answer which petitioner accepted in order to expedite motion practice. Pursuant to CPLR 320 (a), "[t]he defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer. . . ." (*Chao Jiang v Ping An Ins.*, 179 AD3d 517, 517 [1st Dept 2020] ["by appearing by notice of pro hac vice admission in this dispute, failing, twice, to file timely pre-answer motions to dismiss, and defending on the merits (internal citations omitted)"]; (*Am. Home Mortg. Servicing, Inc. v Arklis*, 150 AD3d 1180, 1181 (2d Dept 2.) Pursuant to CPLR 320 (b) "an appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction under (CPLR 3211 (a) (8) is asserted by motion or in the answer as provided in (CPLR 3211)." (*Id.*; see also *McGowan v Hoffmeister*, 15 AD3d 297 [1st Dept 2005] ("While permission to amend an answer is to be freely given pursuant to CPLR 3025 (b), the waiver of a jurisdictional defense cannot be nullified by a subsequent amendment to a pleading adding the missing affirmative defense."))

Respondent’s justification for breaching the briefing order --- that an ERAP stay was in effect --- is weak. The purpose of the ERAP statute is to prevent as many *evictions* as possible as a result of the COVID-19 pandemic. It is not intended to excuse litigants from statutory requirements, or court orders. There is nothing in the ERAP statute explicating a toll or suspension of an attorney’s procedural obligations or obligations under a court order. (*See* NY Stat § 363 [“Generally, omissions in a statute cannot be supplied by construction”].) Having amended the statute once, certainly the legislature could have included that the filing of an ERAP application suspended pending litigation, statutory deadlines, and court orders if that was the intention. There is precedent for this which was invoked during the height of the pandemic. (*See e.g.* Executive Law § 29-a.) However, the legislature did not so specify; and canons of statutory construction require the court to conclude that this was not the legislature’s intent. “[F]ailure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended. . . .” (*People v Finnegan*, 85 NY2d 53, 58 [1995].) Moreover, as the Court of Appeal instructed in *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 (2004), “court-ordered time frames are not options, they are requirements, to be taken seriously by the parties. Too many . . . hours of the courts, are taken up with deadlines that are simply ignored.” (*Id.* at 726–27.)

That said, initially the court intended to bar further motion practice based on respondent’s disregard of the briefing order. However, the court finds that it would be unduly harsh in this instance, *without notice, which respondent now has*,² for the court to hold respondent in default of its briefing order and prohibit the filing of a motion for leave to conduct discovery, something that ensues as of right in other forums. While motions may be decided on default for failure to follow a court’s briefing order,³ there is no motion except for petitioner’s motion before the court; and that motion is formally granted below. It would be an error for the court to, in effect, issue a decision on the merits of a motion --- *i.e.*, whether or not respondent is entitled to discovery based on her interposed defenses --- that is not properly before it. Thus, in the interests of justice and substantive fairness, the court orders a *final* briefing schedule.⁴

² The court has amended its Part Rules to reflect this interpretation of the statute.

³ *Liberty Cmty. Assocs., LP v DeClemente*, 139 AD3d 532 (1st Dept 2016); *Matter of 144 Stuyvesant, LLC v Goncalves*, 119 AD3d 695 (2d Dept 2014).

⁴ See Part F Rules at VI, Motions – Filing, Briefing, and Argument – available at <https://www.nycourts.gov/COURTS/nyc/housing/Judge/partrules/KBacdaya.pdf>.

CONCLUSION

Accordingly, it is

ORDERED that petitioner’s motion to vacate the ERAP stay is GRANTED; and it is further

ORDERED that respondent shall file her motion for leave to conduct discovery pursuant to CPLR 408 by June 26, 2023; and it is further

ORDERED that petitioner’s opposition and any cross-motion shall be filed by July 15, 2023; and it is further

ORDERED that respondent’s opposition to the cross-motion and reply to petitioner’s opposition shall be filed by July 25, 2023; and it is further

ORDERED that petitioner’s reply shall be filed by August 2, 2023.

The parties shall appear in Part F, Room 523, of the New York City Civil Courthouse on August 4, 2023 at 9:15 a.m. in person for oral argument.⁵

This constitutes the decision and order of this court.

Dated: June 5, 2023
New York, NY

So Ordered.

HON. KAREN MAY BACDAYAN
Judge, Housing Part

⁵ The court has fashioned a robust yet manageable briefing schedule in order allow respondent to file her motion and, at the same time, ameliorate any perceived unfairness to petitioner. If the parties seek to alter this schedule, *they must agree* and alert the court by letter correspondence filed on NYSCEF concomitant with an email to kbacdaya@nycourts.gov. If the parties cannot agree, they must adhere to the schedule. The court will not involve itself in the parties’ negotiations in this regard.