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West 8th Street Associates, LLC v. Ortiz

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**CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART P**

West 8th Street Associates, LLC

Petitioner

Against

Atanacio Ortiz, Javier Ortiz, Romeo Ortiz, Mercedes
Chuquiralao, Gladys Chuquiralao, Magdalena M. Ortiz
Gomez, "John Doe", "Jane Doe"

Respondents

Decision/Order

Index No. 63952/16

Petitioner commenced this non-primary residence holdover proceeding on May 12, 2016, and after protracted motion practice, the trial in this matter began in December 2018. After several trial dates, respondents moved for an order declaring a mistrial based on petitioner's conversation with a witness who was scheduled to testify at the trial. The court conducted a hearing on the motion.

Respondent's witness, Estella Gonzalez, testified that approximately one week prior to the trial date, she called the landlord regarding a repair, and the landlord questioned her about the instant matter. The landlord asked Ms. Gonzalez if she was coming to court, and the landlord then informed her that it was a difficult case. The landlord also questioned how long Ms. Gonzalez has known respondent, Atanacio Ortiz, and how she would prove that respondent lived in the building between 2014 and 2016. The landlord also informed Ms. Gonzalez that they had video cameras. Ms. Gonzalez testified that she felt intimidated by the conversation with the landlord. In addition, Ms. Gonzalez reported that the landlord informed her that she did not want to continue with the case because it was costing a lot of money, and the landlord thought it was a waste of time.

On cross-examination, Ms. Gonzalez testified she came to court to support her neighbor, Mr. Ortiz. Ms. Gonzalez stated that the landlord never raised her voice and remained professional throughout their conversation. However, Ms. Gonzalez became intimidated when the landlord mentioned the video cameras. Ms. Gonzalez testified that the landlord did say "I will see you in court", but did not make any threats during their conversation nor did she make any promises to her if she did not appear in court.

Petitioner's witness, Soon Bin Kim, testified that approximately one week prior to the court date she had a conversation with Ms. Gonzalez when Ms. Gonzalez called about the repair of her floor. During the conversation, Ms. Kim asked Ms. Gonzalez if she would be coming to court, although most of their conversation centered around Ms. Gonzalez's floor. Ms. Kim testified that she took over management of the building this year and inherited the case. However, Ms. Kim stated that she did not know any of the tenants, and she wanted to know if Mr. Ortiz lived in the building and if it was a worthwhile case. Ms. Gonzalez informed Ms. Kim that she has known Mr. Ortiz for thirty years and Ms. Kim informed Ms. Gonzalez that only the time period between 2014 and 2016 was relevant. Ms. Kim added that she informed Ms. Gonzalez that she did not want to continue with the case, and it was not going to be a case with results.

On cross-examination, Ms. Kim admitted that she asked Ms. Gonzalez if she was coming to court, if she knew Mr. Ortiz, and how long she has known him. In addition, Ms. Kim acknowledged that during the conversation with Ms. Gonzalez, she stated that it was a costly case, but she denied saying that it was a waste of time. However, Ms. Kim commented that there were a lot of people testifying and she did not think that the testimony would prove that respondent lived there. Further, Ms. Kim thought that this was a waste of her time and the court's time, and noted that she was paying for every minute of court time. Ms. Kim also denied asking Ms. Gonzalez if she had evidence. Further, Ms. Kim stated that she talked to Ms. Gonzalez to determine if it was a worthwhile case and Ms. Gonzalez informed her that she has known respondent for thirty years.

On re-direct, Ms. Kim stated that she discussed the video surveillance with Ms. Gonzalez, but denied telling Ms. Gonzalez that she would defeat Ms. Gonzalez's proof.

After assessing the accuracy of Ms. Gonzalez's recollection of the conversation, her motive, and truthfulness, the court finds Ms. Gonzalez to be a reliable and credible witness. Ms. Kim largely corroborated Ms. Gonzalez's version of their conversation which included a discussion of Ms. Gonzalez's knowledge of respondent, how long she has known him, whether she planned to come to court, and the fact that petitioner had video surveillance evidence. Petitioner's discussion of the evidence and comments regarding the number of witnesses and the cost of the trial appear to be an attempt to dissuade Ms. Gonzalez from testifying. There is no dispute that Ms. Gonzalez was scheduled to testify, as petitioner's counsel had requested and received a witness list from respondents' counsel.

The fact that Ms. Gonzalez was not dissuaded from coming to court is not relevant to a determination that Ms. Kim tampered with the witness and attempted to obstruct the trial process. Upon learning that Ms. Gonzalez planned to come to court, Ms. Kim engaged in a discussion of details of the case and the evidence which was improper. The court finds that petitioner's misconduct is prejudicial to respondent because of its impact on the witness who reported that she was intimidated.

Under CPLR § 4402, a party may move at anytime during a trial for a mistrial. A motion for a mistrial is directed to the sound discretion of the trial court (see *Harris v Village of East Hills*, 41 NY 2d 446 [1977]). The right to a trial in a court of record is an absolute right, and any attempt

to influence the outcome of a trial is wrongful and must not be viewed as “de minimus”, *Bartnofsky v Max Factor*, 122 Misc2d 827 [Civ. Ct. NY Cty 1983]. The judge presiding over the trial “may mistry the case before its conclusion where it is apparent that misconduct by either an adversary or a third party makes it impossible to get a fair determination”, *12-16 Arden Assoc. v Vasquez*, 168 Misc2d 475 [Civ. Ct. NY Cty 1995]. Ms. Kim’s discussion of the case with respondent’s witness is clear misconduct which intrudes on respondent’s right to a fair trial.

Based on the foregoing, respondent’s motion for a mistrial is granted.

A new trial in this matter will commence on March 9, 2020 at 9:30am.

This constitutes the decision and order of this court.

Dated: January 6, 2020

CHERYL J. GONZALES
JUDGE, HOUSING COURT

Cheryl J. Gonzales, JHC