2020-11-30

Bldg Mgt. Co. Inc. v. Etienne

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Bldg Mgt. Co. Inc. v Etienne
2020 NY Slip Op 51440(U)
Decided on November 30, 2020
Civil Court Of The City Of New York, Queens County
Guthrie, 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This opinion is uncorrected and will not be published in the printed Official Reports.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 November 30, 2020

Civil Court of the City of New York, Queens County

Bldg Management Co. Inc., Petitioner-Landlord,

against

Clarens Etienne a/k/a CLARENS ETTIENE, , Respondent-Tenant, MARIE ETIENNE, LINDA ETIENNE, JOHN DOE, and JANE DOE, Under-Respondents-Undertenants.

L & T 51263/20

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Clinton J Guthrie, J

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Petitioner's motion pursuant to CPLR § 2221(d) for reargument of the court's September 16, 2020 Decision/Order

Papers Numbered

Notice of Motion & Affirmation/Exhibits Annexed 1

Affirmation in Opposition & Exhibit Annexed 2

Affirmation in Further Support (Reply) 3

Upon the foregoing cited papers, the decision and order on Petitioner's motion for reargument is as follows.

PROCEDURAL HISTORY

This is a holdover proceeding brought on the basis that the rent-stabilized tenant of record, Clarens Etienne a/k/a Clarens Ettiene (hereinafter "Mr. Etienne"), failed to renew his [*2]lease for the subject premises, 245-10 Grand Central Parkway, Apartment LM, Bellerose, NY 11426. Mr. Etienne has not appeared in this proceeding. Respondent Marie Etienne appeared through counsel and made a motion to dismiss, or, in the alternative for leave to interpose a late answer, and Petitioner made a cross-motion to strike Respondent's defenses and for other relief. The court rendered a Decision/Order on the motions on September 16, 2020. Respondent's motion to dismiss was denied on the merits. However, pursuant to CPLR § 409(b), the court dismissed the proceeding upon the holding that the predicate notice of termination was defective and not subject to amendment. As a result, Respondent's alternative motion for leave to interpose a late answer and Petitioner's cross-motion were denied as moot. Petitioner now moves to reargue the court's September 16, 2020 Decision/Order pursuant to CPLR § 2221(d). Following submission of opposition and reply papers, the court heard argument on the motion to reargue via Microsoft Teams on November 24, 2020 and reserved decision.

ANALYSIS

Pursuant to CPLR § 2221(d)(2), a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." Although Petitioner seeks reargument of the court's *sua sponte* determination pursuant to CPLR § 409(b), a motion to vacate is the proper means for challenging a *sua sponte* order. *See Kennedy Plaza, LLC v. Powell*, 11 Misc 3d 132[A], 2006 NY Slip Op 50355[U] [App Term, 2d Dept, 2d & 11th Jud Dists 2006]. Nonetheless, since Petitioner sets forth its arguments as to why the court should set aside its order made pursuant to CPLR § 409(b) in its motion for reargument, the court deems Petitioner's motion to be one for vacatur of the

court's *sua sponte* order and for reargument of its cross-motion to strike Respondent's defenses and for other relief. *See* CPLR § 2001.

The central argument of Petitioner's motion to vacate the portion of the court's September 16, 2020 Decision/Order made pursuant to CPLR § 409(b) is that none of the appellate authority cited by the court supports the making of a summary determination where the tenant of record has failed to appear and the undertenant lacks the requisite status to challenge statutory prerequisites. However, in several opinions, the Appellate Term, Second Department has explicitly held that a default judgment cannot be granted on facially insufficient pleadings. *See Gristmill Realty, LLC v. Roa*, 2020 NY Slip Op 51358[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2020]; *Lakeview Affordable Hous., LLC v. Turner*, 66 Misc 3d 142[A], 2020 NY Slip Op 50163[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2020]; *Merrbill Holdings, LLC v. Toscano*, 59 Misc 3d 129[A], 2018 NY Slip Op 50410[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2018]; *Kentpark Realty Corp. v. Lasertone Corp.*, 3 Misc 3d 28, 31 [App Term, 2d Dept, 2d & 11th Jud Dists 2004].

In light of these holdings, it is notable that Petitioner does not challenge the court's determination that its notice of termination is defective in the motion at bar. Assuming, *arguendo*, that the court had refrained from making a summary determination at the juncture that it did, the same result nonetheless would have eventuated at the time that Petitioner sought a default judgment against the tenant of record. Since the language of the first sentence of CPLR § 409(b) is mandatory ("[t]he court shall make a summary determination"), the statute itself requires that a summary determination be made whenever "no triable issues of fact are raised," regardless of the posture of the proceeding. *See Bahar v. Schwartzreich*, 204 AD2d 441, 443 [2d Dept 1994] ["In a special proceeding, where no triable issues of fact are raised, the court *must* [*3]make a summary determination on the pleadings and papers as if a motion for summary judgment were before it"] [emphasis added]; *Fourth Hous. Co., Inc. v. Bowers*, 53 Misc 3d 43 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2016])[FN1] . Accordingly, since a valid notice of termination is a required condition precedent for maintaining a summary holdover proceeding to terminate a rent-stabilized tenancy, the court did not err in dismissing the proceeding pursuant to CPLR § 409(b) upon its holding that Petitioner's notice of termination was facially insufficient and unamendable. *See Mautner-Glick Corp. v. Glazer*, 148 AD3d 515, 515-516 [1st Dept 2017]; *1646 Union, LLC v. Simpson*, 62 Misc 3d 142[A], 2019 NY Slip Op 50089[U] [App Term, 2d Dept, 2d, 11th & 13th Jud

Dists 2019]. For these reasons, Petitioner's motion to, in effect, vacate the court's *sua sponte* summary disposition and dismissal of the proceeding is denied.

As for Petitioner's motion to reargue the portion of the court's September 16, 2020 Decision/Order denying its cross-motion, the motion is granted to the sole extent of restoring the proceeding for reargument pursuant to CPLR § 2221(d). However, upon reargument, the court holds that it did not overlook or misapprehend any matters of fact or law in denying Petitioner's cross-motion as moot upon dismissal of the Petition. *See e.g. Jacob Marion, LLC v. "Doe"*, 58 Misc 3d 155[A], 2018 NY Slip Op 50191[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2018]; *Esposito v. Larig*, 52 Misc 3d 67, 70 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2016]. The court therefore adheres to its prior determination denying Petitioner's cross-motion.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: November 30, 2020

Queens, New York

HON. CLINTON J. GUTHRIE

J.H.C.

Footnotes

Footnote 1: It is worth noting that in *Bowers*, over a dissent, the majority specifically held that it is the lower court's obligation to make a summary determination when the papers and pleadings establish that the proceeding is "fatally defective," regardless of whether the issue is raised by the parties. *Bowers*, 55 Misc 3d at 45.

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