2020-04-20

Hilda Townsend Revocable Trust v. Johnson

[*1]

Hilda Townsend Revocable Trust v Johnson
2020 NY Slip Op 50444(U)
Decided on April 20, 2020
Civil Court, 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This opinion is uncorrected and will not be published in the printed Official Reports.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 April 20, 2020

Civil Court, Queens County

HILDA TOWNSEND REVOCABLE TRUST, Petitioner-Landlord,

against

JAY JOHNSON, a/k/a JAY JACKSON, DIANE CONRAD and "JOHN DOE,", Respondents-Tenants.

Index No. L & T 66646/19

Fred L. Pollack, Esq.

114 Old Country Road, Suite 248

Mineola, NY 11501

Attorney for Petitioner

Andreas Spiker, Esq.

DC 37 Health and Security Plan

Municipal Employees Legal Services

55 Water Street, 22nd Floor

New York, NY 10041

Attorneys for Respondents

Clinton J. Guthrie, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the motion to dismiss by Respondents Lloyd Jackson and Diane Conrad:

Papers	**Numbered**
Notice of Motion & Affirmation/Affidavit/Exhibits Annexed	*1*
Affirmation in Opposition & Affidavit/Exhibits Annexed	*2*
Notice of Petition and Petition	*3*

Upon the foregoing cited papers, the decision and order on Respondents' motion to dismiss

PROCEDURAL HISTORY

This holdover proceeding is predicated on a "Notice of Termination of Month to Month Tenancy." On the initial court date, Respondent Diane Conrad and unnamed Respondent Lloyd Jackson appeared by counsel and answered. The proceeding was adjourned twice and Respondents then moved to dismiss based on Petitioner's alleged failure to name necessary parties and improper use of CPLR § 1024. The proceeding was adjourned once more for Petitioner to oppose Respondents' motion. On February 5, 2020, the Court heard argument on the motion and reserved decision.

ANALYSIS

Failure to Name Necessary Party

Respondents' first basis for dismissal is Petitioner's alleged failure to name necessary parties, specifically Lloyd Jackson and Isaiah Burke. Mr. Jackson states in an affidavit annexed to the motion that he entered into possession of the subject premises in 2013 via a lease bearing his name and signature. The lease is annexed as an exhibit to the motion and is also purportedly signed by Diane Conrad (Mr. Jackson's domestic partner), Isaiah Burke (Mr. Jackson's son), and Dalton Townsend, acting as trustee. The crux of Respondents' argument is that the identification of Mr. Jackson and Mr. Burke in the lease (and the appearance of their signatures thereon) renders them necessary parties in this proceeding, in which Petitioner seeks possession of the premises stated on the lease (175-29 138th Avenue, 2nd Floor, Springfield Gardens, New York 11434).[FN1]

Petitioner, in its opposition papers, denies that Mr. Jackson and Mr. Burke are necessary parties. The opposition papers include an affidavit by Lucille Townsend, who is a trustee of the Hilda Townsend Revocable Trust. Ms. Townsend disputes the validity of the lease proffered by Respondents, which she claims that she had not seen until her attorney forwarded Respondents' motion to her. She states that Dalton Townsend was removed as trustee in 2017 "due to a variety of inappropriate actions taken by him." She also claims that the signature on the lease does not match Mr. Townsend's signature on other documents, some of which are annexed as exhibits to the opposition papers.

Pursuant to CPLR § 1001, "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." CPLR § 1003 permits dismissal without prejudice if a necessary party is not joined (subject to CPLR § 1001(b), which permits an action to proceed in certain circumstances). In a summary proceeding, a necessary party is "a party without whom the court cannot proceed to issue an order or judgment if there is an objection to that party's absence." *Crossroads Associates, LLC v. Amenya*, 47 Misc 3d 1216(A), 16 N.Y.S.3d 791 (City Ct. Peekskill 2015) (citing 89 NY Jur. 2d Real Property — Possessory Actions § 136). Meanwhile, a "proper" party is one whose "absence will not prevent the entry of

a binding judgment, but whose presence would make an order or judgment more complete." *Crossroads Associates, LLC*, 47 Misc 3d at 1216(A), 16 N.Y.S.3d at 791. A signatory to a lease is generally held to be a necessary party. *See e.g. Randazzo v. Galietti*, 55 Misc 3d 131(A), 55 N.Y.S.3d 694 (App. Term 2d, 11th & 13th Jud. Dists. 2017); *Friedman v. Yosef*, 50 Misc 3d 138(A), 31 N.Y.S.3d 921 (App. Term 2d, 11th & 13th Jud. Dists. 2016).

Here, however, there is a genuine dispute about the authenticity of the lease at issue. In order to prevail upon a motion to dismiss founded upon documentary evidence, the evidence must "utterly refute[] [petitioner's] factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mut. Life Ins. Co.*, 98 NY2d 314, 326 (2002). *See also Jesmer v. Retail Magic, Inc.*, 55 AD3d 171, 180-181 (2d Dep't 2009); *Berardino v. Ochlan*, 2 AD3d 556, 557 (2d Dep't 2008). Although the Court does not make any ultimate assessment regarding the alleged handwriting variances or the authority under which Dalton Townsend was acting when the least was executed, Petitioner's affiant's sworn statement and exhibits are sufficient to raise an issue of fact as to the lease's authenticity. Accordingly, Respondents have not "conclusively [*2]established" that they are necessary parties on the basis of the lease alone.

Beyond the lease, the only evidence offered to establish Mr. Burke's necessary party status is a printout (allegedly) from whitepages.com containing the subject premises address and Mr. Burke's name. No information is provided as to when the website was accessed, nor any explanation about how the third party obtained the information. As a result, the printout is hearsay and of no evidentiary value. Additionally, no affidavit from Mr. Burke is annexed to the motion; indeed, Mr. Jackson's affidavit does not even state that Mr. Burke currently lives in the subject premises. Consequently, Respondents have failed to demonstrate (for the purposes of this CPLR § 3211 motion) that Mr. Burke is a necessary party under CPLR § 1001.

As for Mr. Jackson, he states that he currently occupies the subject premises and has lived there since 2013. Ms. Townsend acknowledges in her affidavit that she had a telephone conversation with Mr. Jackson and Ms. Conrad about a rent increase in September 2018, but claims that Mr. Jackson did not state his first name during the conversation. Otherwise, since she lives in Tennessee, she had a managing agent communicate with the tenants and collect rent (cash payments) from them. Accordingly, although he was not correctly named in the Notice of Petition and Petition, Mr. Jackson is a necessary party insofar as the affidavits establish his tenancy. However, the Court does not find that dismissal is the appropriate remedy. Mr. Jackson has previously interposed an answer, thus appearing and intervening in this proceeding. *See FS 45*

Tiemann Place LLC v. Gomez, 38 Misc 3d 135(A), 967 N.Y.S.2d 866 (App. Term 1st Dep't 2013) (citing RPAPL § 743) [FN2] Accordingly, since CPLR § 1001(b) empowers a court to "order [a person] summoned" when he or she is a necessary party and subject to the court's jurisdiction, Mr. Jackson is hereby summoned and joined as a party herein. *See e.g. Windy Ridge Farm v. Assessor of Town of Shandaken*, 11 NY3d 725, 727 (2008).

CPLR § 1024 and Use of Fictitious Names

Respondents also move for dismissal on the basis that Petitioner failed to exercise due diligence prior to using wholly or partially fictitious names for parties pursuant to CPLR § 1024. In support, Respondents again point to the 2013 lease and the appearance of their names thereon.

Pursuant to CPLR § 1024, "[a] party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known." The Appellate Division, Second Department has held that "parties are not to resort to the 'Jane Doe' procedure unless they exercise due diligence . . . to identify the defendant by name and, despite such efforts, are unable to do so. Any failure to exercise due diligence to ascertain the 'Jane Doe's' name subjects the complaint to dismissal as to that party." *Bumpus v. New York City Tr. Auth.*, 66 AD3d 26, 29-30 (2d Dep't 2009) (internal citations omitted). *See also Scoma v. Doe*, 2 AD3d 432, 433 (2d Dep't 2003); *Porter v. Kingsbrook OB/GYN Assocs. P.C.*, 209 AD2d 497 (2d Dep't 1994). In *Capital Resources Corp. v. Doe*, 154 Misc 2d 864, 865 (Civ. Ct. Kings County 1992), the court noted that "[i]t is implicit in section 1024 that the unusual authority it sanctions should not be availed of in the absence of a genuine effort to learn the true name of the party." (Citing, *inter alia*, McLaughlin, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, CPLR [*3]C1024:1, at 234).

As the Court has already determined that there is an issue of fact as to the authenticity of the lease, its existence alone is insufficient to have given Petitioner notice of Mr. Jackson's and Mr. Burke's names. Ms. Townsend's affidavit is frank about her absentee status at the premises and engagement of a managing agent but nonetheless provides details about her contacts with Ms. Conrad and Mr. Jackson by telephone and the information used to determine who was residing in the subject premises. Respondents have not disputed any of the particulars of Ms. Townsend's affidavit. As a result, Respondents have not demonstrated that Petitioner failed to exercise due

diligence under CPLR § 1024 prior to commencing this proceeding [FN3] For each of these reasons, Respondents' motion to dismiss is denied.

Summary Determination Pursuant to CPLR § 409(b)

Pursuant to CPLR § 409(b), "[t]he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised. The court may make any orders permitted on a motion for summary judgment." In two recent cases, *1646 Union, LLC v. Simpson*, 62 Misc 3d 142(A), 2019 NY Slip Op 50089(U) (App. Term 2d, 11th & 13th Jud. Dists. 2019) and *901 Bklyn Realty, LLC v. Woods-Najac*, 65 Misc 3d 158(A), 2019 NY Slip Op 51976(U) (App. Term 2d, 11th & 13th Jud. Dists.), the Appellate Term, Second Department, dismissed proceedings pursuant to CPLR § 409(b) notwithstanding the fact that the bases for dismissal had not been raised by the parties in either case.

Upon reviewing the Notice of Petition and Petition, as well as the affidavits and exhibits annexed to the parties' pleadings, the Court invokes CPLR § 409(b) and dismisses the proceeding since Petitioner, a trust, lacked capacity to commence it. The Appellate Term, Second Department, has held that an express trust may not commence and maintain a summary proceeding since "the statute [EPTL § 7.21(a)] vests the legal estate of an express trust in the trustees[.]" *Ronald Henry Land Trust v. Sasmor*, 44 Misc 3d 51, 52, 990 N.Y.S.2d 767, 768 (App. Term 2d, 11th, 13th Jud. Dists. 2014); *see also Salanitro Family Trust v. Gorina*, 49 Misc 3d 153(A), 29 N.Y.S.3d 849 (App. Term 2d, 11th & 13th Jud. Dists. 2015). Although the full trust document is not annexed to Petitioner's opposition papers, the amendment (signed in 2017 and which removed Dalton Townsend as trustee) is included and specifically states that "GRANTOR [Hilda Townsend] has herewith delivered and does hereby grant, convey, and assign and set over the TRUSTEES [Lucille Townsend and Kenneth Townsend] the property described in Schedule 'A' annexed to the TRUST." Therefore, only the trustees had capacity to commence this proceeding. Neither the Petition nor the Notice of Termination names the trustees; instead, both are signed by counsel on behalf of the Hilda Townsend Revocable Trust. No authorization by the trustees is indicated or alleged. Accordingly, Petitioner lacks capacity to proceed herein and dismissal of the Petition pursuant to CPLR § 409(b) is required.

CONCLUSION

In accordance with the determinations made herein, Respondents' motion to dismiss is denied. Upon the Court's summary determination pursuant to CPLR § 409(b), however, the proceeding is dismissed.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: Queens, New York

April 20, 2020

HON. CLINTON J. GUTHRIE

J.H.C.

Footnotes

Footnote 1: The Court notes that the lease uses "Springfield Gardens," while the Petition uses "Jamaica " However, the zip codes are the same

Footnote 2: Since Mr. Jackson raised an objection to personal jurisdiction in his answer but failed to specifically move on that basis in his motion to dismiss, that objection is waived and Mr. Jackson has submitted to the jurisdiction of the Court. *See* CPLR § 3211(e).

Footnote 3: Likewise, Petitioner's failure to specifically name Mr. Jackson and Mr. Burke on the Notice of Termination is not fatal to maintenance of the proceeding at this juncture

Return to Decision List