2020-10-14

S.E. v. Doe

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2020 NY Slip Op 51203(U)
Decided on October 14, 2020
Civil Court Of The City Of New York, Queens County
Guthrie, J.
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Decided on October 14, 2020

Civil Court of the City of New York, Queens County

S.E., Petitioner,

against

Jennifer Doe, Respondent, and JOHN DOE and JANE DOE, Respondents.

L & T 63821/19

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Petitioner's motion for reargument pursuant to CPLR § 2221 of the court's January 22, 2020 Decision/Order granting Respondent Jennifer Colon's motion to dismiss and for other relief

Papers Numbered

Notice of Motion & Affirmation/Exhibits Annexed 1

Affirmation in Opposition & Exhibits Annexed 2

Reply Affirmation 3

Motion to Dismiss Record (Papers 1, 2, 3, and 4 cited in Recitation pursuant to CPLR § 2219(a) [*2]in January 22, 2020 Decision/Order) 4, 5, 6, 7

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

PROCEDURAL HISTORY

This holdover proceeding was commenced in July 2019. The proceeding is predicated on the termination of a month-to-month tenancy. After Respondent Jennifer Colon retained counsel through the Universal Access (UA) program, counsel for Ms. Colon made a motion to dismiss pursuant to CPLR §§ 3211(a)(2) and/or (a)(7) and CPLR § 1024. Following submission of opposition, amended opposition, and reply, the court heard argument on the motion to dismiss on January 22, 2020. Decision was reserved after argument. In a Decision/Order rendered on the same date, the court granted Respondent's motion to dismiss, holding that the Petition improperly pleaded that the subject premises is exempt from rent stabilization and failed to plead a ground for eviction under the Rent Stabilization Code. Petitioner now moves, by different counsel, to reargue the court's January 22, 2020 Decision/Order and for denial of Respondent' motion to dismiss upon reargument. After opposition and reply were submitted, the court heard argument on Petitioner's motion for reargument via Microsoft Teams on October 9, 2020 and reserved decision at the conclusion of the argument.

ANALYSIS

I. Timeliness of Petitioner's motion.

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." Additionally, a motion for leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." CPLR § 2221(d)(3). In first addressing the timeliness of Petitioner's motion, the court notes that Respondent's counsel served the January 22, 2020 Decision/Order with notice of entry upon Petitioner's former counsel by first-class mail on February 14, 2020. Petitioner's substituted counsel served and filed the instant motion for reargument on May 12, 2020. This is clearly in excess of thirty days from service of the notice of entry. However, since the notice of entry was served upon counsel by first-class mail, five days are added to the running of the period stated in CPLR § 2221(d)(3). *See* CPLR § 2103(b)(1). In calculating thirty-plus-five days from February 14, 2020, the final day for making the motion for reargument was March 20, 2020. On March 20, 2020, Governor Andrew M. Cuomo issued Executive Order (EO) 202.8 in response to the COVID-19 public health crisis.

Relevant here, EO 202.8 suspended "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the civil practice laws and rules until April 19, 2020." Subsequently, the suspension provisions of EO 202.8 have been continued without interruption (with exceptions not relevant here) through November 3, 2020 by EOs 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, and 202.67. Accordingly, since Petitioner's time for moving to reargue ran through March 20, 2020, the [*3]service and filing of the motion on May 12, 2020 (when the suspension provisions of EO 202.8, as extended by EOs 202.14 and 202.28, were in effect) was not untimely.[FN1] Moreover, even in the absence of the EO suspension provisions, the court would exercise its discretion to consider Petitioner's motion for reargument as a request for reconsideration of its prior order, as Petitioner has filed a notice of appeal in a timely fashion and, as the court will detail below, due process considerations require reconsideration. *See e.g. Itzkowitz v. King Kullen Grocery Co. Inc.*, 22 AD3d 636, 638 (2d Dept 2005).

II. Merits of Petitioner's motion.

Petitioner argues that the court erred in granting Respondent's motion to dismiss, asserting that the court misconstrued the the burden upon Petitioner on a CPLR § 3211(a)(7) motion and/or erred in treating the motion as a summary judgment motion without giving the

parties proper notice. Petitioner also argues that Petitioner demonstrated that she has a cause of action upon which she should be entitled to proceed. Respondent opposes the motion in its entirety [FN2]

Without reaching the substantive merits of Petitioner's motion, upon reviewing Petitioner's motion, the court holds that it erred in hearing and deciding upon Respondent's motion to dismiss without first addressing the potential need for a guardian *ad litem* (hereinafter "GAL") to be appointed for Petitioner in this proceeding. Under CPLR § 1201, a person "shall appear by his guardian ad litem if he is an adult incapable of adequately prosecuting or defending his rights." Under CPLR § 1202, [t]he court in which an action is triable may appoint a guardian ad litem at any stage in the action upon its *own initiative* " (emphasis added). While Petitioner's former attorney did not request that the court appoint a GAL at the time that Respondent's motion to dismiss was pending, the amended opposition papers that he submitted include a letter from Dr. Paul Rashid dated June 8, 2019, describing Petitioner's psychiatric condition, and a psychiatric evaluation by Dr. Henry McCurtis, dated December 4, 2019, which details Petitioner's psychiatric history and diagnoses. Faced with these submissions, which raised an issue of fact as to Petitioner's ability to adequately prosecute this proceeding, it was incumbent upon the court to address the need for a GAL before passing upon Respondent's motion to dismiss. *See Shad v. Shad*, 167 AD2d 532, 533 [2d Dept 1990]; *see also Piggott v. [*4]Lifespire, Inc.*, 149 AD3d 785, 786 [2d Dept 2017]; *Resmae Mtge. Corp. v. Jenkins*, 115 AD3d 926, 927-928 [2d Dept 2014]; *1234 Broadway LLC v. Feng Chai Lin*, 25 Misc 3d 476, 484 [Civ Ct, NY County 2009] [Inadequacy for Article 12 purposes "might be cultural, linguistic, physical, intellectual, or psychological, to name a few."]. Although Petitioner has been represented by counsel at all times in this proceeding, an Article 12 GAL would serve a discrete (albeit complementary) role. *See In re Aho*, 39 NY2d 241, 247 [1976] ["[A] guardian ad litem may of necessity be obliged to act contrary to the desires of the [ward] and to adopt a position adverse to that urged by his ward."]; *Matter of New York Found. Senior Citizens v. Hamilton*, 170 AD3d 543, 544 [1st Dept 2019] [Landlord was not entitled to rely on "GAL's acquiescence to the [s]tipulation" since the GAL is not a decision-making position, but an appointment of assistance].[FN3]

As the court has determined that a question of fact exists regarding the potential need for a GAL to appointed for Petitioner, a hearing is required. *See Shad*, 167 AD2d at 533; *Kushner v. Mollin*, 144 AD2d 649, 650 [2d Dept 1988]. In light of the administrative preference for all eviction proceedings to be conducted remotely whenever appropriate (*see* Administrative

Order 231/20, effective October 12, 2020), the court will first conference the case with counsel to determine when and by what means the hearing will be conducted, and to ensure that Petitioner will be given notice and provided with the opportunity to participate.

CONCLUSION

In accordance with the foregoing, the court grants Petitioner's motion to reargue to the extent that the court recalls and vacates its January 22, 2020 Decision/Order because it erred in not conducting a hearing to determine whether Petitioner should be appointed a GAL pursuant to CPLR §§ 1201 and 1202 before hearing and deciding Respondent's motion to dismiss. This determination is without prejudice to Respondent renewing her motion or otherwise interposing a responsive pleading once the GAL issue has been addressed. The court restores the proceeding for a virtual conference with counsel via Microsoft Teams on October 27, 2020 at 10:30 AM to discuss the scheduling and means by which a GAL hearing will be conducted.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: October 14, 2020

Queens, New York

HON. CLINTON J. GUTHRIE, J.H.C.

Footnotes

Footnote 1: The question of whether the EOs cited create a suspension or a toll of the time limits is not implicated here, as the relevant provisions have continuously run (via consecutive EOs) from March 20, 2020 through the present. *See* Thomas F. Whelan,

Executive Orders: A Suspension, Not a Toll of the SOL, NYLJ, Oct. 6, 2020, available at https://www.law.com/newyorklawjournal/2020/10/06/executive-orders-a-suspension-not-a-toll-of-the-sol/ [last accessed October 13, 2020].

Footnote 2: Respondent also argues that the motion should be denied before reaching the merits, as Petitioner has not included the underlying motion papers with its motion (citing *Plaza Equities, LLC v. Lamberti*, 118 AD3d 687 [2d Dept 2014] and *Cripps v. Dibisceglie*, 172 AD3d 1305 [2d Dept 2019]). In the circumstances of the COVID-19 public health crisis and the limitations on access to court files that has resulted, the court exercises its discretion to excuse Petitioner's omission. *See* CPLR 2001. The court has reviewed all of the underlying motion papers, which are contained in the court file, in deciding Petitioner's motion.

Footnote 3: The court stresses that its determination here does not connote an assessment of Petitioner's former counsel's representation.

Return to Decision List