2020-08-17

Shan Xiang Zheng v. Sanchez

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Shan Xiang Zheng v Sanchez
2020 NY Slip Op 50963(U)
Decided on August 17, 2020
Civil Court Of The City Of New York, Queens County
Guthrie, J.
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Decided on August 17, 2020

Civil Court of the City of New York, Queens County

Shan Xiang Zheng and LIANG JIN ZHENG, Petitioners-Landlords,

against

Juliana Euse Sanchez, Respondent-Tenant, MANUELA AGUDELO, JOHN DOE, and JANE DOE, Respondents-Undertenants.

L & T 50093/20

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Clinton J. Guthrie, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Respondent's *pro se* order to show cause to vacate the default judgment *and* Respondent's motion (by counsel) to vacate the default judgment pursuant to CPLR § 5015(a)(1), for leave to file an amended answer pursuant to CPLR § 3025(b), and for summary judgment pursuant to CPLR § 3212:

Papers/Numbered

Order to Show Cause & Affidavit Annexed *1*

Notice of Motion & Affirmation/Affidavit/Exhibits Annexed. *2*

Affirmation in Opposition & Affidavits/Exhibits Annexed *3*

Affirmation in Reply *4*

Upon the foregoing cited papers, the decision and order on respondent's order to show cause and motion to vacate the default judgment, for leave to file an amended answer, and for summary judgment (consolidated for determination herein) is as follows.

PROCEDURAL HISTORY

This nonpayment proceeding was commenced in early January 2020. The Petition seeks rent from November 2019 through January 2020. Respondent Juliana Euse Sanchez filed a *pro se* answer on January 14, 2020. After an initial court date on January 22, 2020, the proceeding was adjourned to February 18, 2020. On February 18th, Respondent failed to appear and the court (Sergio Jimenez, J.) granted a default judgment in Petitioners' favor in the amount of $8,400.00. On the same date, Respondent filed a *pro se* order to show cause, seeking vacatur of the default judgment. Respondent stated in her affidavit annexed to the order to show cause that she "came to court late because [her] son's babysitter didn't appear and [she] had to find someone to take care of him." On the adjourned return date of the order to show cause, March 3, 2020, The Legal Aid Society appeared as counsel for Respondent and the proceeding was adjourned to April 7, 2020 for repairs to be done and for motion practice and briefing. Following the shutdown of normal court operations due to the COVID-19 public health emergency, Respondent, through counsel, filed a motion seeking vacatur of the default judgment, leave to file an amended answer, and summary judgment through the Electronic Document Delivery System (EDDS). Following further briefing via EDDS, court heard argument on Respondent's order to show cause and motion via Skype on August 10, 2020 and reserved decision.

ANALYSIS

Vacatur of Default Judgment

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CPLR § 5015(a)(1) provides that a court may relieve a party from a judgment upon the ground of "excusable default." A party seeking relief "must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action." Deutsche Bank Nat. Trust Co. v. Luden, 91 AD3d 701 [2d Dept 2012]; see also Pursoo v. Ngala-El, 89 AD3d 712 [2d Dept 2011]; Parker v. City of New York, 272 AD2d 310 [2d Dept 2000]. The determination of whether there is a reasonable excuse is "based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits." Harcztark v. Drive Variety, Inc., 21 AD3d 876, 876-877 [2d Dept 2005].

*Respondent states in both her affidavits (for the order to show cause and motion) that she was late for court on February 18, 2020 because she did not have childcare for her son due to her babysitter's absence. She came to court on the same date and filed an order to show cause after defaulting as a result of arriving late. Respondent then retained counsel and has fully participated in the proceeding since the original return date of her pro se order to show cause. Petitioner has not demonstrated that Respondent's default was prejudicial or willful. Accordingly, the court finds that Respondent has established a reasonable excuse for failing to appear. See Crevecoeur v. Mattam, 172 AD3d 813, 814-815 [2d Dept 2019]; De Vito v. Marine Midland Bank, N.A., 100 AD2d 530, 531 [2d Dept 1984] [The determination of what constitutes [*2]a reasonable excuse "lies within the sound discretion of the trial court."]; see also Donahue v. Buisch, 265 AD2d 601, 603 [3d Dept 1999] [Reasonable excuse found where lack of childcare prevented appellant from attending child custody hearing].*

*With regard to Respondent's alleged defenses, the affidavit annexed to the order to show cause denies that $8,400.00 is owed and references a lack of heat. Respondent's motion sets forth eight (8) separate defenses (which are also pled as affirmative defenses in Respondent's proposed amended answer). The first proposed defense alleges that the rent demand is defective because it does not credit a purported payment in cash for November 2019 rent. Similarly, the third proposed defense alleges that the Petition fails to accurately state the facts upon which the proceeding is based because it does not credit the alleged payment in November 2019. However, there is no sworn statement from Respondent regarding the cash payment, and no proof of any kind is presented. Therefore, the first and third proposed defenses are merely conclusory and not "potentially meritorious."**[FN1]***

Respondent's second proposed defense disputes that Petitioner mailed notices pursuant to Real Property Law (RPL) § 235-e(d) to Respondent for each of the months of rent that it seeks in the Petition. The Petition includes a copy of a notice made pursuant to RPL § 235-e(d), which is dated November 6, 2019 (and accompanied by proof of mailing by certified mail). Petitioners argue that notices pursuant to RPL § 235-e(d) do not need to be sent for rent that comes due in the course of a summary eviction proceeding. There is not yet appellate authority on this issue, as RPL 235-e(d) was promulgated last year as part of the Housing Stability and Tenant Protection Act (HSTPA). See Laws 2019, ch 36, §§ 9, 29 (Part M) (effective June 14, 2019). However, the court does not need not resolve the issue at this time. As with Respondent's first and third proposed defenses, the allegation of noncompliance with RPL § 235-e(d) is wholly conclusory. There is no sworn statement from Respondent denying that the required notices were sent, nor is any tangible proof supporting the defense presented with the motion. See e.g. Matter of Shirley C., 145 AD2d 631, 632 [2d Dept 1988] ["[C]onclusory assertions contained in [the] moving papers, without more, are insufficient to justify vacating the default."].

Respondent's fourth and fifth proposed defenses assert that the lease upon which Petitioners bring this nonpayment proceeding is invalid and, as a result, Petitioners cannot maintain this proceeding under RPAPL § 711(2) because there is no privity between the lessors and Petitioners. In her affidavit annexed to the motion, Respondent explains the circumstances of signing her lease, with landlords believed to be Xiao Zheng and Lin Qiu Zhu, on April 26, 2019. A copy of the lease is annexed to the motion. Petitioners acknowledge that Xiao Zheng and Lin Qiu Zhu entered into the lease with Respondent. Petitioners claim that Xiao Zheng and Lin Qiu Zhu were acting as managing agents, and then assigned the lease to Petitioners on the same day as its execution (and annex the Assignment of Lease to the Petition and opposition papers).

It is axiomatic that a summary nonpayment proceeding must be predicated on an express or implied rental agreement in effect at the time that the proceeding is commenced See e g 265 Realty, LLC v Trec, 39 Misc 3d 150[A], 2013 NY Slip Op 50974[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2013] [citing Matter of Jaroslow v Lehigh Val R R Co , 23 NY2d 991 [1969]] Here, it is undisputed that Petitioners did not make a rental agreement with Respondent; rather, they are proceeding via the Assignment In determining whether a new landlord may enforce rights against a tenant, there must be "both privity of contract, based on the agreement between the parties, and privity of estate, based on the transfer of interest in

the real property." Robles v. Margaritis, 52 Misc 3d 523, 527 [Dist Ct, Nassau County 2016] [citing New Amsterdam Casualty Co. v. National Union Fire Ins. Co., 266 NY 254 [1935]]. In assessing privity of estate, "[o]ne cannot transfer what he/she doesn't possess." Redhead v. Henry, 160 Misc 2d 546, 548 [Civ Ct, Kings County 1994]; see also Abera Corp. v. Smith, 67 Misc 3d 1241[A], 2020 NY Slip Op 50809[U] [Civ Ct, Kings County 2020]. As Petitioners have not presented irrefutable evidence that Xiao Zheng and Lin Qiu Zhu had either the authority [FN2] or a requisite interest in the subject premises to enter into a lease with Respondent, Respondent's fourth and fifth proposed defenses are potentially meritorious.

Respondent's sixth and seventh proposed defenses assert, collectively, that the subject building is a de facto multiple dwelling that is unregistered with the New York City Department of Housing Preservation and Development (HPD) and lacking a certificate of occupancy, and that consequently Petitioners may not recover rent pursuant to Multiple Dwelling Law (MDL) §§ 301(1) and 302(1). The eighth proposed defense seeks dismissal on the basis that the Petition describes the subject premises as a "legal two (2) family dwelling," rather than a multiple dwelling. In support of these defenses, Respondent's affidavit (annexed to the motion) describes the layout of the subject building: she lives on the second floor with her son, Petitioner Shan Xiang Zheng and his family (including an individual believed to be Xiao Zheng) reside in the ground-floor apartment, and Petitioner Liang Jin Zheng and her family (including an individual believed to be Lin Qiu Zhu) reside in a basement apartment. Respondent states that the basement apartment is fully furnished, with a kitchen, bathroom, and at least one bedroom. Respondent also annexes an HPD document listing only 2 "A" units and a New York City Department of Buildings (DOB) Property Profile Overview classifying the subject building as a "Family Dwelling." In opposition, Petitioners annex an affidavit from Qiu Zhu Lin [FN3] , who denies ever living in the basement and denies that the basement has ever been used for residential living. Petitioners also annex photographs alleged to be of the basement, taken by Petitioners' attorney. The photographs show what appear to be a couch, television, dresser, refrigerator, deep freezer, washing machine, trash, meters, and a heating system. There are also at least two doors within the basement that are discernible.

*Based on the evidence presented, there are at minimum issues of fact in dispute as to whether the basement has been used for residential purposes (and thus whether the building is a [*3]de facto multiple dwelling). See e.g. Cashew Holdings, LLC v. Thorpe-Poyser, 66 Misc 3d 127[A], 2019 NY Slip Op 52032[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists*

2019]. Therefore, Respondent's sixth, seventh, and eighth proposed defenses are potentially meritorious. As Respondent has demonstrated a reasonable excuse for failing to appear and potentially meritorious defenses, the default judgment is vacated pursuant to CPLR § 5015(a)(1). See e.g. Deutsche Bank Nat. Trust Co. v. Luden, supra. Respondent's order to show cause and the portion of her motion seeking vacatur of the default judgment are hereby granted.

Motion to Amend Answer

Respondent's motion also seeks amendment of her pro se answer pursuant to CPLR § 3025(b). Pursuant to CPLR § 3025(b), "[a] party may amend his or her pleading . . . at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including granting of costs and continuances." See e.g. Faiella v. Tysens Park Apts., LLC, 110 AD3d 1028, 1029 [2d Dept 2013] ["Leave to amend a pleading should be freely given absent prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or patently devoid of merit."]; Nationstar Mtge., LLC v. Jean-Baptiste, 178 AD3d 883, 886 [2d Dept 2019]. Respondent states in her affidavit annexed to the motion that she was unaware of several defenses available to her when she filed her pro se answer, and (as stated previously) annexes a proposed amended answer setting out those defenses.

The court has already determined that there is potential merit to Respondent's proposed fourth, fifth, sixth, seventh, and eighth affirmative defenses (while also finding that her first, second, and third proposed defenses lack merit). The proposed amended answer also includes a counterclaim alleging breach of the warranty of habitability resulting from conditions, including lack of heat. Since Respondent raised conditions in need of repair in her pro se answer and order to show cause (and Petitioner agreed to repair the heating system in a subsequent stipulation), there is potential merit to Respondent's counterclaim. See Park West Management Corp. v. Mitchell, 47 NY2d 316, 328 [1979] [[N]o one will dispute that health and safety are adversely affected by insect or rodent infestation, insufficient heat and plumbing facilities, significantly dangerous electrical outlets or wiring, inadequate sanitation facilities or similar services which constitute the essence of the modern dwelling unit."]. Petitioner Shan Xiang Zheng alleges economic prejudice in an affidavit annexed to the opposition papers, insofar as Respondent has failed to pay rent. However, as the court has determined that Respondent has potentially meritorious defenses to this proceeding and as no

trial has commenced or even been scheduled at this time, the potential prejudice to Petitioners is not sufficient to prevent Respondent from amending her answer. Nationstar Mtge., LLC, 178 AD3d 883 at 886 ["'Mere lateness is not a barrier to amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine.'"] [Internal citations omitted]. Accordingly, Respondent's motion to amend her answer is granted; however, Respondent's first, second, and third affirmative defenses are stricken from the amended answer for the reasons stated on Pages 3 and 4, supra. The amended answer, as modified, is deemed served and filed.

Motion for Summary Judgment

*Respondent moves for summary judgment on her fourth and fifth affirmative defenses, arguing that the Petition should be dismissed because the lease is invalid and/or because there is a lack of contractual privity between the lessors (Xiao Zheng and Lin Qiu Zhu) and Petitioners. A party moving for summary judgment pursuant to CPLR § 3212 must "establish [its] cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his [*4]favor and he must do so by tender of evidentiary proof in admissible form." Friends of Animals, Inc. v. Associated Fur Mfrs., 46 NY2d 1065, 1067 [1980] [Quoting CPLR § 3212(b)]. Contrariwise, "to defeat a motion for summary judgment, the opposing party must 'show facts sufficient to require a trial of any issue of fact.'" Id. [Quoting CPLR § 3212(b)].*

The court has previously determined that Respondent's fourth and fifth affirmative defenses are potentially meritorious. However, summary judgment is not warranted. Petitioners, through the affidavits of Shan Xiang Zheng and Qiu Zhu Lin, have raised an issue of fact regarding the lessors having requisite authority to enter into leases on Petitioners' behalf (though, as noted above, Petitioners have not conclusively established such authority through admissible evidence). Moreover, an issue of fact exists regarding potential ratification of the lease by Petitioners, even if the lessors lacked the requisite authority to execute it. See e.g. Matter of 148 S. Emerson Partners, LLC v. 148 S. Emerson Assoc., LLC, 157 AD3d 887, 888-889 [2d Dept 2018]; Lipman v. Vebeliunas, 39 AD3d 488, 490 [2d Dept 2007] ["'An unauthorized execution of an instrument affecting title to land or an interest therein may be ratified by the owner of the land or interest so as to be binding on him.'"]

[Internal citations omitted].[FN4] *As a result, Respondent's motion for summary judgment is denied.*

CONCLUSION

In accordance with the determinations made herein, Respondent's order to show cause and motion to vacate the default judgment are granted and the default judgment is vacated; Respondent's motion to amend the answer is granted to the extent permitted herein; and Respondent's motion for summary judgment is denied. This proceeding will be restored to the Part E calendar for a Skype conference on September 16, 2020 at 10:00 AM in accordance with Administrative Order 160/20 (effective August 13, 2020). A Skype invitation will be sent to the parties' attorneys. In the event that either attorney is unavailable, he or she shall promptly notify the court.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: Queens, New York

August 17, 2020

HON. CLINTON J. GUTHRIE

J.H.C.

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Footnotes

Footnote 1:*Nonetheless, the court notes that a proper rent demand and compliance with RPAPL § 741(4) (requiring the statement of facts upon which the proceeding is based) remain statutory prerequisites and must be established by a petitioner in a summary proceeding as part of its prima facie case. See 125 Ct. St., LLC v. Sher, 58 Misc 3d 150[A], 2018 NY Slip Op 50092[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2018]; Migliaccio v. Childs, 65 Misc 3d 131[A], 2019 NY Slip Op 51575[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019].*

Footnote 2:*Although the opposition papers state that a Management Agreement between Petitioners and Xiao Zheng and Lin Qiu Zhu is annexed as an exhibit, no such document is annexed.*

Footnote 3:*Since the affidavit references executing the lease, it is assumed that Qiu Zhu Lin is the same individual as Lin Qiu Zhu.*

Footnote 4:*Nonetheless, ratification, "whether express or implied, must be performed with full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language." Holm v. C.M.P. Sheet Metal, 89 AD2d 229, 233 [4th Dept 1982].*

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