2019-05-10

472-476 Columbus Ave, LLC v. Kretzu

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART C

Motion Seq. # 2

472-476 COLUMBUS AVE., LLC
Petitioner-Landlord

-against-

ORFELINA KRETZU
472 Columbus Avenue, Apt. 2B
New York, New York 10024
Respondent-Tenant

GEORGE KRETZU, "JOHN DOE" and/or "JANE DOE"
Respondents-Occupants

L&T Index # 75250/17

DECISION/ORDER

Hon. Clifton A. Nembhard

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondent's motion for an order pursuant to CPLR 408 and CPLR 3101 granting her leave to conduct discovery.

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	
Other	

Upon the foregoing papers, the Decision / Order on this motion is as follows:

Background

Petitioner commenced the instant nuisance holdover proceeding to recover possession of apartment 2B located at 472 Columbus Avenue, New York based on complaints it received from respondents' neighbor. Prior to commencement petitioner served a notice terminating respondent's tenancy effective September 18, 2017. Respondents joined issue by answer dated December 3, 2017. They then moved to dismiss the proceeding based on petitioner's failure to serve a notice to cure as required by the lease. The court (J. Marin) denied the motion finding that the lease merely gave petitioner the right to proceed either under a breach of lease theory

with a notice to cure or on a nuisance theory without one. Respondents now seek documents and notices in petitioner's possession related to the alleged nuisance, leave to depose an agent of petitioner who is familiar with the claims in the predicate notice and leave to subpoena the complaining neighbor.

Discussion

Discovery is not inherently hostile to the nature of a summary proceeding and may assist in the speedy disposition of a case by clarifying the issues for trial. *42 West 15th St. Corp. v Friedman,* 208 Misc 123, 125 [App Term 1st Dept]. While there is no presumption in favor of discovery in a nuisance holdover proceeding, the court will grant this relief in the appropriate circumstances. *See, e.g., 86 West Corp. v. Singh*, 2007 NY Misc LEXIS 8544[Civ Ct NY]. The court must look at the attendant circumstances of each case and determine whether ample need has been shown. *New York University v. Farkas*, 121 Misc2d 643 [Civ Ct NY 1983].

When it comes to obtaining disclosure from a non-party witness, the same standard applies. *Schroder v. Consolidated Edison Co.*, 249 AD2d 69 [1st Dept 1998]. CPLR § 3101 (a) (4) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: . . . any other person, upon notice stating the circumstances or reasons such disclosure is sought or required". The words "material and necessary" are to "be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity". *Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403 [Ct App 1968]. The statute does not require that the party seeking disclosure demonstrate that it cannot obtain the information from any other source. *Kapon v. Koch*, 23 NY3d 32 [Ct App 2014]. Therefore, if the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty.

There is ample need for discovery here. In the notice of termination petitioner alleges that the tenant of apartment 3B has reported that respondents have continuously harassed him for at least three years. The notice goes on to allege specific behavior over the course of the years upon which harassment claim is based. The opportunity to review the records petitioner has made or collected pertaining to the alleged harassment and to depose petitioner's agent and the complaining neighbor are narrowly tailored discovery requests which target the disputed facts, are likely to clarify same and would not be prejudicial to petitioner.

Petitioner's contention that the motion should be denied because respondent failed to offer an affidavit in support is unpersuasive. CPLR § 105 (u) provides that a verified pleading may be substituted for an affidavit whenever the latter is required. *A & J Concrete Corp. v Arker*, 54 NY2d 870 [Ct App1981]. Here respondents' verified answer contains a sworn denial of petitioner's factual claims against them and thus supports the merits of their defense for purposes of the instant motion.

Conclusion

Based on the foregoing the motion is granted. Petitioner shall respond to respondents' Notice of Discovery and Inspection and make its agent available for oral examination. Respondent may serve Peter Zak with a subpoena ad testificandum. The matter is hereby marked off calendar pending completion of discovery. Respondent shall continue to pay ongoing use and occupancy pendente lite as previously stipulated.

This constitutes the decision and order of the Court.

SO ORDERED

HON. CLIFTON A. NEMBHARD

Date: May 10, 2019
New York, New York

Hon. Clifton A. Nembhard, JHC