2023-09-29

STERLING QUEENSBORO LLC v. KAPLAN

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART B

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STERLING QUEENSBORO LLC,

Petitioner,

- against -

ROBERT KAPLAN
JANE DOE AKA MS. JULLIO

Respondent,

----------X

Index No. LT-301653-21/QU

NOTICE OF ENTRY

PLEASE TAKE NOTICE, that the within is a true copy of the Decision/Order duly entered in the office of the clerk of the within named court on October 3, 2023.

DATE: October 3, 2022
Jamaica, New York

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART B

STERLING QUEENSBORO LLC

Petitioner-Landlord

-against-

ROBERT KAPLAN
JANE DOE AKA MS. JULLIO
175-06 Devonshire Road, Apt. 2-O
Jamaica, New York 11432

Respondents-Tenants

L&T Index # 301653/21

DECISION/ORDER

Hon. Clifton A. Nembhard

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of petitioner's motions and respondent's cross-motion.

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	1, 3
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	
Replying Affidavits	4
Exhibits	
Other (Cross-Motion)	2

Upon the foregoing cited papers, the decision/order on this motion is as follows:

Background

Petitioner commenced the instant nonpayment proceeding to recover rent arrears from May 2020 to April 2021 totaling $23,100.00. Petitioner moved for a default judgment and warrant based on respondent's failure to answer r the petition. Julia Rendziuk ("respondent") subsequently filed an Emergency Rental Assistance Program ("ERAP") application effectively staying the proceeding. The application was approved and ERAP paid the rent for November 2020 through January 2022. Petitioner then moved for default judgment for the rent remaining due under the petition from May 2020 to October 29020. In addition, petitioner sought arrears from February 2022 through May 2022. Rendziuk cross-moved to dismiss pursuant to CPLR 3211(a)(7) for

failure to name her as a party and pursuant to CPLR 3211(a)(8) for failure to serve the petition and notice of petition with due diligence. In the alternative respondent sought leave to file an answer. Petitioner, in response, moved to amend the petition and notice of petition to add Rendzuik as a co-respondent.[i]

Discussion

The Court will first address the cross-motion. Rendziuk moves for dismissal on the grounds that petitioner improperly resorted to the use of a pseudonym in lieu of naming her. She also asserts that the petition and notice of petition was not served with due diligence. CPLR § 1024 provides that "[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." However, the ignorant party may not avail itself to the latitude offered by the statute unless it has exercised due diligence in attempting to assert the true identity of the defendant. *Bumpus v. New York City Trans. Auth.*, 66 AD3d 26 [2nd Dept 2009]. If the petitioner knows the party's name or fails to demonstrate that diligent efforts were made to learn the name, the use of a pseudonym renders the petition fatally as to that party. *Pinnacle Bronx East v. Bowery Residents Committee Inc.*, NYLJ, March 29, 2006, at 22 col 3 [Civ Ct Bx].

The petition identifies Rendziuk as Jane Doe aka Ms. Jullio. Rendziuk averred that she moved into the apartment in or about 2005 to live with Robert Kaplan. Kaplan subsequently moved out but she still gets mail there, comes and goes with her own key and has arranged for repairs to be made in the apartment. In 2013 she gave the management agent her full name when she arranged for the refrigerator to be replaced. Respondent submits the receipt and invoice for the fridge to support her claim. Respondent also alleged that she's spoken with the landlord's agent about purchasing a new oven. Rendziuk further asserted that she's had a good relationship with the building's superintendents and her neighbors since moving into the apartment. She's friends with a former employee of the management company and the current Co-op Board president. In addition, she worked for the Board as a landscaper.

Petitioner counters with an affidavit from its agent Michael Rokowsky who stated that Rendziuk never signed a lease with petitioner and never made rent payments in her own name. The agent asserted that Kaplan told him that he had moved out of the apartment and that "Ms. Jullio" was living there. Moreover, petitioner is the proprietary lessee of the apartment. It does not own or manage the building therefore, the superintendents are not its employees. The agent further stated that petitioner is not associated with the Co-op Board. He also denied that Rendziuk contacted him or the management office regarding repairs or conditions in the apartment. Finally, Rokowsky alleged that no one from his office assisted respondent with her ERAP application.

In deciding a motion to dismiss pursuant to CPLR 3211(a)(7), the allegations in a complaint are accepted as true and the plaintiff is accorded the benefit of every possible favorable inference. *Leon v. Martinez*, 84 NY2d 83 [Ct App 1994]. The motion must be denied if the factual allegations in the pleadings manifest any cognizable cause of action. *511 W. 232nd Owners*

Corp. v. Jennifer Realty Co, 98NY2d 144 [Ct App 2002]. Here the allegations contained in the petition set forth a cause of action for nonpayment of rent. Accordingly, this branch of the motion is denied. The Court notes that the result would be the same if the motion was made pursuant to CPLR 3211 (a)(1) based on documentary evidence. The receipt for the refrigerator lists Rendziuk as the purchaser and therefore is not dispositive proof that petitioner knew her name.

The Court however finds that dismissal is warranted because petitioner did not serve the petition and notice of petition with due diligence. In response to the global pandemic, the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 ("CEEFPA") imposed stricter requirements for the service of pleadings in summary proceedings which are not made personally. Chapter 381, § 83, part A, §5(2) of the Act provides that alternative methods of service can only be used if personal delivery cannot be made with due diligence. Due diligence is not defined by statute and must be determined on a case-by-case basis. *Estate of Waterman v. Jones*, 46 AD3d 63 [2nd Dept 2001]. While the quality and not the quantity of attempts to serve personally must be examined, typically three attempts made at different times of the day including both weekdays and a weekend will establish due diligence. *See, e.g., Brafman & Assoc., P.C. v. Balkany*, 190 AD3d 453 [1st Dept 2021]. Additionally, "it must be shown that the process server made genuine inquiries about the defendant's whereabouts" prior attempting service. *Faruk v. Dawn*, 162 AD3d 744 [2nd Dept 2018].

Here petitioner's process server went to premises on Friday, May 7, 2021, at 6:21 pm. He returned on Monday, May 10, 2021, and affixed copies on the door when he was unable to serve respondent personally. There is no affidavit from the process server indicating that he made any other attempts at service or why he had reason to believe that respondent would be home on either occasion. Accordingly, the Court finds that the two attempts do not satisfy CEEFPA's due diligence standard.

Conclusion

Based on the foregoing, the respondent's cross-motion is granted and the case is dismissed without prejudice.

SO ORDERED

This constitutes the decision and order of the Court.

HON. CLIFTON A. NEMBHARD

Date: September 29, 2023
Queens, New York

Hon. Clifton A. Nembhard, JHC

[i] The motion was designated as a "cross motion".