2023-09-01

1113 Holding Ltd v. Christian

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART O

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1113 HOLDING LTD, Index No. L&T 307194/22
Petitioner,

-against- DECISION/ORDER

FITZROY CHRISTIAN, JOHN DOE, JANE DOE, Motion seq. nos. 2, 3
Respondents.

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HON. KISHA L. MILLER:

Ita R. Flug, Esq., for Petitioner.
Brooklyn Legal Services, for Respondents Christian and John Doe.

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of the order to show cause to strike the traverse claim and cross-motion to amend.

Papers	**Numbered**
Order to Show Cause, Cross-Motion and Affidavits Annexed….	NYSCEF Doc. Nos. 13, 15-35
Answering and Affidavits Annexed……	NYSCEF Doc. No. 36
Reply Affidavit……	NYSCEF Doc. Nos. 37-39

In this nonpayment summary eviction proceeding, Respondent Fitzroy Christian ("Fitzroy") appeared by counsel and filed an answer interposing several defenses, including improper service, and counterclaims. Following a motion by Petitioner to vacate the stay based on Fitzroy's application with the COVID-19 Emergency Rental Assistance Program, which the court granted, the proceeding was transferred to Part X for trial.

The proceeding appeared on the Resolution Part O calendar for a pre-trial conference on May 2. On that date, the court adjourned the proceeding for another pre-trial conference on June 14 and scheduled a traverse hearing for July 25. After unsuccessful attempts to settle the proceeding on June 14, the court confirmed the traverse hearing scheduled on July 25.

Four days prior to the hearing, Petitioner filed the instant order to show cause to strike Fitzroy's traverse claim based upon his failure to file a verified answer. Counsel for Fitzroy then filed a notice of appearance on behalf of John Doe or Akeem Christian ("Akeem"). Both

Respondents now cross-move for an order staying the trial, denying Petitioner's order to show cause, dismissing the petition as against John Doe, and granting summary judgment in favor of Fitzroy. Alternatively, Respondents seek leave to interpose a verified amended answer.[1]

Petitioner is correct that Fitzroy's answer is unverified. He alleges improper service of the notice of petition of petition but failed to verify the answer filed by his attorney as per CPLR §3020. To obtain a traverse hearing, a respondent must submit a sworn, non-conclusory claim disputing the affidavit of a process server, which constitutes prima facie evidence of proper service (*NYCTL 1998-1 Trust & Bank of NY v Rabinowitz*, 7 AD3d 459 [1st Dept 2004]). An attorney's affirmation has no probative value and is insufficient as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Respondents seek to correct the omission by seeking leave to interpose an amended answer. Annexed to the cross-motion is a proposed amended verified answer and an affidavit by Fitzroy providing detailed facts contesting service of process. A party may move at any time to amend or supplement a pleading and leave shall be freely given (CPLR §3025[b]; *Edenwald Contr. Co. v. City of New York*, 60 NY2d 957 [1983]). Absent prejudice or surprise to the nonmoving party, it is an abuse of the court's discretion to deny leave to amend an answer (*Lanpont v. Savvas Cab Corp*., 244 AD2d 208 [1st Dept 1997]).

Petitioner failed to allege prejudice or surprise if the amendment is allowed, and this court finds none (see *Barbour v Hospital for Special Surgery*, 169 AD2d 385 [1st Dept 1991] [prejudice means "some special right lost in interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add"]). Petitioner has been aware of the allegations of improper service since Fitzroy appeared by counsel shortly after commencement of this proceeding. Petitioner

[1] In the reply papers, Respondents withdraw the portion of the cross-motion requesting summary judgment in favor of Fitzroy due to improper service.

never moved to strike Fitzroy's claim before or after the proceeding was transferred for trial or objected to the unverified answer during the pre-trial conferences. Petitioner waited until eve of the scheduled traverse hearing to seek relief and offered no explanation for the late motion. The proposed amended answer, which contains similar defenses and counterclaims raised in the initial answer, includes a signed, notarized verification by Fitzroy. Given the potentially meritorious defenses raised, this court will allow the amended answer and declines to strike the traverse claim (*46 East 91st Street Associates, LLC v Bogoch,* 23 Misc 3d 36, 2009 NY Slip Op 29173 [App Term, 1st Dept 2009]).

Part of Respondents' cross-motion seeks dismissal of the petition against John Doe based upon improper use of a fictitious name pursuant to CPLR §1024. In a supporting affidavit, Akeem, who identifies as co-Respondent John Doe, alleges that he has lived in the apartment with Fitzroy, his father, since 2003; that everyone, including Tito, the superintendent, knows him as Akeem or Fitzroy's son; that he receives mail and packages at the building; and that when the bedroom ceiling collapsed in 2021, he provided his name and phone number to the superintendent and the workers to facilitate access to the apartment to perform the repairs. Respondents argue that Petitioner should have named Akeem or made a diligent effort to identify his name instead of relying on a pseudonym.

Petitioner submitted no opposition to this portion of the cross-motion.

CPLR §1024 permits use of a fictitious name only where the adversary is ignorant of the name and identity of proper parties (*Triborough Bridge and Tunnel Authority v Wimpfheim*er, 165 Misc 2d 584 [App Term, 1st Dept 1995]). Based upon Akeem's unopposed and uncontested claims that Petitioner knew his name and was aware of his occupancy, Petitioner should have named him in the petition or described what efforts were made to ascertain his name (CPLR §1024; *George Tut & Co. v Doe,* 20 Misc 3d 815, 2008 NY Slip Op 28264 [Civ Ct, Kings County 2008]). Failure to do so warrants dismissal as against John Doe.

Lastly, this court declines Respondents' request to issue an order directing a deposit with the Clerk of the Court and setting a briefing schedule for motion practice. All motions seeking dispositive relief, including summary judgment, should have been filed *prior to* being transferred to Part X for trial. The parties must be prepared to move forward with the traverse hearing and, if necessary, trial.

Accordingly, it is

ORDERED that Petitioner's order to show cause to strike the traverse claim is denied in its entirety; it is further

ORDERED that Respondent's cross-motion is granted, in part, as follows: the portion seeking leave to file an amended answer is granted. The proposed amended answer (NYSCEF Doc. No. 20, Respondents' Exhibit A) is deemed served and filed *nunc pro tunc*. The portion seeking dismissal of the petition as against John Doe is granted; it is further

ORDERED that the portion of the cross-motion requesting an order staying the trial and returning the proceeding to the Resolution Part is denied; it is further

ORDERED that the proceeding is scheduled for a IN-PERSON traverse hearing on October 10, 2023 at 10:30am at 851 Grand Concourse, Bronx, New York, room 405.

All parties are directed to appear promptly.

This constitutes the decision and order of the court.

Dated: September 1, 2023

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KISHA L. MILLER, J.H.C.