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Rhodes v New Bedford Mgt. Corp.

2024 NY Slip Op 32067(U)

June 12, 2024

Supreme Court, Kings County

Docket Number: Index No. 536444/2022

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 12th day of June 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

-----X
ASSATA RHODES,
Plaintiff(s)

Index No: 536444/2022
Motion Seq. 1-2

-against-
NEW BEDFORD MANAGEMENT CORP., PETER VON
SIMSON,
Defendant(s)
-----X

ORDER

The following e-filed papers read herein:
Notice of Motion/Petition/Affidavits Annexed
Exhibits Annexed.....

NYSCEF Nos.:
1-17; 21-28

In this matter, Assata Rhodes (“Plaintiff”) moves (Motion Seq. 1) for summary judgment in lieu of complaint against New Bedford Management Corp., (“New Bedford”) and Peter Von Simson (“Von Simson”) (Collectively “Defendants”) to recover money damages in the amount of \$4,375.40. Additionally, Plaintiff moves (Motion Seq. 2) for default judgment against Defendants. Defendants have not opposed the motions.

This action arises out of an alleged billing dispute between the parties. What the court determines from the pro se Plaintiff’s motion, is that she alleges that she was wrongfully assessed surcharges and additional fees regarding an income affidavit that was submitted to Defendants in April of 2022. On July 6, 2022, Plaintiff sent an email to Defendants, which was forwarded to their billing department requesting clarification and removal of the surcharge and administrative fees issued. On July 8, 2022, Defendants responded to Plaintiff and stated that the surcharge and administrative fee placed on her account were due to Plaintiff submitting an Income Affidavit reporting \$0 income, which by New York City Department of Housing Preservation and Development (“HPD”) standards is not acceptable. On July 11, 2022, Defendants issued a letter to Plaintiff stating that they received her 2021 Income Affidavit, which failed to disclose her income. Defendants attached a Questions and Answers Flyer from HPD which states in part that residents cannot report \$0 income, and that the failure to disclose income would subject residents to the maximum non-submission surcharge, here, 50% or \$379.55 and an additional ongoing charge of \$150 per month. Subsequently on September 13, 2022, HPD emailed Plaintiff provisions of their policy which states in part that “reporting \$0 income is not acceptable,” and that “managing agents will require an explanation as to how you are able to pay your rent/maintenance charges, utilities, and the cost of food without income.” Additionally, Plaintiff was informed that if she fails to provide an explanation, the 50%

surcharge will remain on the account until such proof is submitted. On September 15, 2022, Defendants issued a letter to Plaintiff stating that her account has a balance of \$1541.65, and that if it was not brought current by September 30, 2022, that the account would be moved to the legal department and parking privileges, if any, would be revoked.

On or about October 5, 2022, Plaintiff filed a Payment Demand, an Affidavit of Fact, and an Affidavit of Non-Response with the Clerk of Kings County on the ground that Defendants are responsible for any damages to Plaintiff including, but not limited to, assessing surcharges and/or fees absent lawful/contractual authority to do so.

To prevail on a motion for summary judgment in lieu of complaint, “even if the instrument sued on is for payment of money only, the standard for summary judgment must be separately satisfied (see CPLR 3213; *Allied Irish Banks, PLC*, 36 Misc.3d 216 2012 Slip Op. 22114 [[Sup Ct 2012]]). Additionally, the plaintiff must provide proof of an agreement for money only and the defendant's failure to pay (*Id.*). It is well established that “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Ayotte v. Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Admissible evidence may include “affidavits by persons having knowledge of the facts [and] reciting the material facts (see CPLR3212[b]; *Bank of New York Mellon v Gordon*, 171 AD3d 197 [2d Dept. 2019]; citing *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965 [1985]).

As a general matter, a court should not examine the admissibility of evidence submitted in support of a motion for summary judgment unless the nonmoving party has specifically raised that issue in its opposition to the motion (*Gordon* at 202; *Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d [2d Dept. 2014]). Additionally, a motion for summary judgment will not be granted if it depends on proof that would be inadmissible at the trial under some exclusionary rule of evidence (*Id.*). “Out-of-court statements offered for the truth of the matters they assert are hearsay and may be received in evidence only if they fall within one of the recognized exceptions to the hearsay rule, and then only if the proponent demonstrates that the evidence is reliable” (*Id.*; *Nucci v Proper*, 95 NY2d 597 [2001]).

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v. Nassau County*, 111 A.D.2d 212, [2d Dept. 1985]; *Steven v. Parker*, 99 AD2d 649, [2d Dept. 1984]; *Galetta v. New York News, Inc.*, 95 AD2d 325, [1st Dept. 1983]). When deciding a summary judgment motion, the Court must construe facts

in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v. Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept. 1990]; *Rebecchi v. Whitmore*, 172 AD2d 600 [2d Dept. 1991]).

28 RCNY 3-03, HPD's rules and regulations state that:

(c)(1): Surcharges shall be payable monthly on a current basis by tenant/cooperators in occupancy based upon income realized during the prior calendar year and such income shall be reported on income affidavits to be furnished by tenant/cooperators.

(c)(5): A housing company or its designee is required to collect all surcharges computed on the basis of income received by all individuals in occupancy.

(d)(1): In the event that a tenant/cooperator fails to return a fully completed affidavit by April 30th of each year, the income of such tenant/cooperator will be presumed to have exceeded the maximum allowable income by 150 percent or more. Written notice will be given informing such tenant/cooperator that the 16 maximum surcharge will be imposed effective July 1st... a non-refundable administrative charge, payable to the housing company, will be applied. This charge cannot exceed \$150.00 for each month after June 30th in which the tenant/cooperator has not submitted a fully completed income affidavit. This charge must be made payable to the housing company. The housing company may remit half of any such charge collected to the managing agent, in accordance with the terms of the applicable contract, to compensate for the additional administrative work. In extenuating circumstances, HPD may permit reimbursement of excess surcharge to the tenant/cooperator.

For purposes of this paragraph, an income affidavit in which the tenant/cooperator's household income is not disclosed is not a fully completed income affidavit.

(f)(1): Interim changes in income. Where a tenant/cooperator anticipates a long-term reduction in income, resulting from death of a wage earner, retirement, or other such circumstances, said tenant/cooperator must submit documentation of such interim change in income to the managing agent. The managing agent shall verify the documentation submitted, and if a change in income is so determined, shall remove the surcharge and inform HPD of such action. HPD reserves the right to disapprove the action of the housing company.

(f)(2) Where a tenant/cooperator anticipates a temporary reduction in income, such as job loss, temporary illness, or other such circumstances, said tenant/cooperator must submit documentation of such temporary reduction in income to the managing agent. The managing agent shall verify the documentation submitted, and if the interim change in income is so determined, shall reduce, eliminate or defer collection of surcharges for a reasonable period of time or shall arrange for an extended payment plan.

(f)(3) The managing agent must maintain supporting documentation for all agreements which shall be available for review by HPD. Any

tenant/cooperator shall have the right to appeal any determination under this subdivision (f) to HPD.

Here, the court finds that Plaintiff has not established her prima facie burden for entitlement to summary judgment. As an initial matter, Plaintiff does not allege that she availed herself of HPD's appeal procedure providing for a hearing. Thus, Plaintiff has failed to exhaust her administrative remedies, and such challenge is not properly before the court. Moreover, assuming arguendo, that Plaintiff had properly exhausted her administrative remedies before commencing this action, Plaintiff has failed to establish that Defendants' actions were arbitrary and capricious, made in violation of lawful procedure, or was affected by an error of law.

CPLR 3215(a) provides in pertinent part as follows: "[w]hen a defendant has failed to appear, plead, or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him." On a motion for leave to enter a default judgment pursuant to CPLR 3215, a plaintiff is required to file proof of: (1) service of a copy or copies of the summons and the complaint, (2) the facts constituting the claim, and (3) the defendant's default (*see* CPLR 3215[f]; *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 59 [2d Dept 2013]). To demonstrate "the facts constituting the claim" the movant need only submit sufficient proof to enable a court to determine that a viable cause of action exists (*Id.*; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62 [2003]). CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action (*Feffer v. Malpeso*, 210 AD2d 60 [1st Dept. 1994]; *Beaton v Transit Facility Corp.*, 14 AD3d 637 [2d Dept 2005]).

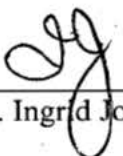
Here, Plaintiff's supporting papers fail to set forth the facts constituting entitlement to recover damages based on an instrument of money only. Thus, Plaintiff's conclusory allegations are insufficient to support a default judgment pursuant to CPLR 3215.

Accordingly, it is hereby,

ORDERED, that Plaintiff's motion (Motion Seq. 1) for summary judgment in lieu of complaint is denied, and it is further,

ORDERED, that Plaintiff's motion (Motion Seq. 2) for default judgment against Defendants is denied.

This constitutes the decision and order of the court.



Hon. Ingrid Joseph J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**