83-40 Britton Ave. LLC v Sultana

2023 NY Slip Op 34746(U)

December 13, 2023

Civil Court of the City of New York, Queens County

Docket Number: Index No. LT-304454-23/QU

Judge: Clifton A. Nembhard

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Civil Court of the City of New York
County of Queens, Part D

Index # **LT-304454-23/QU**

Seq. 01
Decision / Order

83-40 Britton Avenue LLC
Petitioner(s)
-against-
Farida Sultana
John Doe, Jane Doe
Respondent(s)

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	**Numbered**	**NYSCEF Doc. No.**
Notice of Motion	1	8
Affirmation in Support of Motion	2	9
Exhibits in Support of Motion	3	10, 11, 12
Affidavit in Opposition to Motion	4	13
Affirmation in Opposition to Motion	5	14
Exhibits in Support of Opposition	6	15, 16, 17, 18
NYSCEF Court File		1 - 18

Upon the foregoing cited papers, the Decision/Order on Respondent's motion (Seq. 01) to dismiss the instant proceeding is as follows:

This summary nonpayment proceeding was commenced by Notice of Petition and Petition dated March 10, 2023, where 83-40 Britton Avenue LLC ("Petitioner") sought to recover rental arrears and possession of the rent stabilized premises located at 83-40 Britton Avenue, Apt. 7A, Flushing, New York 11373 ("Subject premises"). The pleadings incorporate a fourteen-day rent demand ("Demand") which informed Farida Sultana ("Respondent") that the sum of $38,801.85 is owed representing arrears from April 2021 through and including January 2023 at a rate of $2,031.51 per month. Based upon Respondent's failure to comply with the Demand, Petitioner commenced the instant proceeding.

Respondent filed an "Answer" in person on April 3, 2023, and the initial return date was set for April 19, 2023. That day, the case was adjourned for Respondent to go through intake with free legal counsel. The Legal Aid Society filed a notice of appearance on behalf of Respondent on June 8, 2023. On June 9, 2023, Respondent's counsel filed the instant motion (Seq. 01) to dismiss. Petitioner filed opposition. Respondent did not file papers in reply. The court reserved decision on the motion on August 24, 2023. Respondent seeks dismissal pursuant to CPLR 3211(a)(10) for failure to name a necessary party, and CPLR 3211 (a)(7) and CPLR 1024 for improper use of a pseudonym. Alternatively, Respondent seeks leave of court to file an amended answer (Attached as Exhibit C – NYSCEF Doc No. 12).

In deciding a motion to dismiss pursuant to CPLR 3211(a)(7), the pleadings are afforded a liberal construction. *CPLR § 3206.* The facts alleged on the complaint or petition must be accepted as true and Petitioner must be afforded the benefit of every possible inference. The court determines only whether the facts alleged fit within *any* cognizable legal theory. *Leon v. Martinez, 84 N.Y.2d 83* (1994)*; Fishberger v. Voss, 51 A.D.3d 627* (Appellate Division, 2nd Dep't 2008*)*. A dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law.

CPLR § 1001)(a) refers to a necessary party as one who "ought to be a party if complete relief is to be accorded between the persons who are parties to the action or a person who might be inequitably affected by a judgment in the action." *New York v. Long Island Airports Limousine Service Corp.*, 48 N.Y.2d 469, 472 (Court of Appeals 1979*); Notre Dame Leasing Ltd. Partnership v. Division of Housing and Community Renewal*, 22 A.D.3d 667 (Appellate Division, 2nd Dep't 2005). There is a difference between a *proper* party and a *necessary* party. Subtenants, while "proper" parties to a holdover proceeding, are not "necessary" parties whose presence is crucial to the court's ability to award complete relief as between landlord and tenant. *Triborough Bridge and Tunnel Authority v. Wimpfheimer*, 165 Misc.2d 584 (Appellate Term, 1st Dep't).

Respondent argues the case must be dismissed pursuant to CPLR 3211(a)(10) based on Petitioner's failure to name and individually serve a necessary party (CPLR § 1001), specifically, MD Basiruddin Ahmed ("Occupant"). The occupant allegedly moved into the subject premises with Respondent, his spouse, in 2018 (Affidavit in Support ¶ 3). Respondent alleges Petitioner had actual knowledge of the occupant's presence "having likely" met him when he visited management to pay rent (Affirmation in support ¶ 9). The court notes that the occupant has not appeared in this matter either informally or formally through counsel. There is no affidavit from the occupant himself attached to any of the motion papers. Respondent has not submitted any documentary evidence in support of their position.

Respondent cites to several cases in support of their position. In *Deutsche Bank Natl. Trust Co. v. Turner*, 2011 N.Y. Slip Op. 51153(U) (Civ. Ct. Bronx Co. 2011), the court found that an occupant's continuous residence at a premises made them a necessary party to a holdover proceeding. In *ATM One v. Garcia*, NYLJ, page 22, col 4 (Civ. Ct. Kings Co. 2002), the court found the landlord had adequate notice of the tenant's sister's possessory interest in the property, such as participation in prior court proceedings, payment of rent and interactions with management, and should have named her in a holdover proceeding.

In opposition to Respondent's motion, Petitioner argues that Respondent does not have standing to file a motion raising an affirmative defense on behalf of a party that has not appeared. Any occupant(s) at the premises would have been served with the pleadings as John and Jane Doe and yet no occupants have appeared in this case. Petitioner reiterates that the subject of this nonpayment proceeding is Respondent's default on her rental obligation as per the most recent renewal lease. Privity of contract exists only with Respondent, not her supposed spouse. Petitioner attaches a copy of the initial lease dated August 2, 2019 (NYSCEF Doc. No. 15) and renewal lease dated July 28, 2021 (NYSCEF Doc. No. 16), both signed only by the Respondent. Petitioner's managing agent disputes having knowledge of the occupant attesting that Respondent never listed the names of any occupants on her application for the apartment or occupancy rider with the original lease, and her tax return is silent as to other individuals in the household. See, NYSCEF Doc. No. 18 – rental application and redacted tax return. Petitioner's agent utterly disputes that management ever had contact with the occupant directly and characterizes Respondent's affidavit as "bare bones allegations."

Another case Respondent cites to is *Stanford Realty Assoc. v. Rollins,* 161 Misc.2d 754 (Civ. Ct. New York Co. 1994). However, as correctly pointed out by Petitioner, Respondent's reliance on that case is misplaced as the Appellate Term in *Randazzo v. Galietti*, 55 Misc.3d 131(A) (Appellate Term, 2nd Dep't 2017) rejected the holding in *Rollins* as inconsistent with the law of the Second Department. *Galietti* held that once the landlord established the tenant's husband did not sign the most renewal lease, he was *not* a necessary party to the substantial violation of

lease holdover proceeding. *Id.* Here, Respondent fails to articulate, to the court's satisfaction, how the occupant is a *necessary* party in the context of this nonpayment dispute between the landlord and tenant. The court finds the occupant would be a proper but not necessary party whose presence is "indispensable to providing complete relief" between the parties appearing herein, this portion of Respondent's motion is denied. See, *98-48 Queens Blvd. LLC v. Parkside Mem'l. Chapels Inc.*, 70 Misc.3d 1211(A) (Civ. Ct. Queens Co. 2021), citing, *Triborough Bridge and Tunnel Authority v. Wimpfheimer*, 165 Misc.2d 584 (Appellate Term, 1st Dep't 1995).

The latter part of Respondent's motion alleges Petitioner misused CPLR § 1024 when resorting to the use of "John Doe" instead of naming the occupant as MD Basiruddin Ahmed. Pursuant to CPLR § 1024, "[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." The Appellate Division, Second Department has held that "parties are not to resort to the 'Jane Doe' procedure unless they exercise due diligence . . . to identify the defendant by name and, despite such efforts, are unable to do so. Any failure to exercise due diligence to ascertain the [Doe's] name subjects the complaint to dismissal as *to that party* [emphasis added]." *Bumpus v. New York City Tr. Auth.*, 66 AD3d 26, 29-30 (Appellate Division 2nd Dep't 2009) (internal citations omitted). The purpose of CPLR § 1024 is to ensure a party is identified and given notice and opportunity to appear in the proceeding.

Aside from alleging that the occupant's identity was known to the Petitioner from the outset of Respondent's tenancy, Respondent argues Petitioner did not demonstrate diligent efforts to ascertain the name of the occupant before resorting to the use of "John Doe." To do so, Petitioner's counsel "should present an affidavit stating that a diligent inquiry has been made to determine the names of such parties..." *Capital Resources Corp v. Doe,* 586 N.Y.S.2d 706, 707 (Civ. Ct. Kings Co. 1992). Additionally, when Petitioner encountered "Ahmed Doe" while attempting service of the rent demand, Petitioner should have further investigated the occupant's name. Petitioner counters by repeating that the occupant has not appeared in this case and that Respondent does not have standing to seek dismissal on his behalf. Additionally, had the occupant appeared, Petitioner cites to several cases where the court simply amended the pleadings and added the party to the case.

The court agrees with Petitioner that Respondent does not have standing to raise this defense on behalf of the occupant. Assuming arguendo that the court found Petitioner misused CPLR § 1024, the proceeding would only be dismissed as to the party that was misnamed. See, *RR Reo II, LLC v. Omeje*, 33 Misc.3d 128(A) (Appellate Term, 2nd Dep't 2011). Respondent would still be left to deal with the landlord's underlying nonpayment claim. At this juncture, the court is not inclined to dismiss the proceeding in its entirety or in part, on the merits, given that the occupant has not appeared.

The court will grant the part of Respondent's motion seeking to interpose an amended answer pursuant to CPLR 3025(b) over Petitioner's objection. This relief is freely granted absent surprise or prejudice to the opposing party and so long as the proposed amendment is not "palpably insufficient or patently devoid of merit." *Geater Bright Light Home Care Servs., Inc. v. Jeffries-El*, 199 A.D.3d 777 (Appellate Division 2nd Dep't 2021). Respondent filed a *pro se* answer on April 3, 2023, at the start of the proceeding, and only checked off a general denial. The instant motion for leave to amend was filed three months later, shortly after Respondent retained counsel. The amended answer includes the same two defenses discussed in the instant motion, warranty of

habitability, partial constructive eviction due to habitability and a related counterclaim. The court strikes Respondent's first and second affirmative defenses *sua sponte* for the same reasons as those stated in the denial of this motion and as devoid of merit. *Bank of New York Mellon v. Shurko*, 209 A.D.3d 949 (Appellate Division, 2nd Dep't 2022). Although Petitioner disputes the warranty of habitability issues, the burden will remain on Respondent to prove the existence of the conditions and as such, there is no prejudice in permitting Respondent to interpose affirmative defenses three and four or the counterclaim.

Accordingly, it is ORDERED that Respondent's motion (Seq. 01) is denied in part and granted in part. The portions of Respondent's motion seeking dismissal is denied, without prejudice. The portion of Respondent's motion seeking to interpose an amended answer is granted as described above. Respondent's amended answer, Exhibit C, NYSCEF Doc. No. 12, is deemed timely served and filed *nunc pro tunc*. The matter is adjourned with the marking of settlement or trial to January 22, 2024 at 9:30am in Part D, Room 406.

Petitioner is directed to serve and file a notice of entry along with a copy of this Decision/Order within 3 days from the date of this Decision/Order and upload proof thereof.

This constitutes the Decision/Order of the court, a copy of which shall be accessible through NYSCEF.

SO ORDERED
HON. CLIFTON A. NEMBHARD

Date: December 13, 2023

So Ordered

Clifton A. Nembhard, J.H.C.