

1850 Second Ave. Servs. Corp. v Ackerman

2007 NY Slip Op 30627(U)

April 6, 2007

Supreme Court, New York County

Docket Number: 0110758/2006

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 52

1850 Second Ave

INDEX NO. 110758/06

MOTION DATE 1/16/07

MOTION SEQ. NO. 01

MOTION CAL. NO. Re-assigned

- v -

Belknap, N

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ *petition* ^{is dismissed} and counter claims are severed & continued for reasons set forth in annexed decision & order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).

Dated: 1/16/07

MBZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X
1850 SECOND AVENUE SERVICES CORPORATION,
1850 Second Avenue
New York, New York 10128
and
NEW YORK FOUNDATION FOR SENIOR
CITIZENS, INC.,

Index Number 110758/2006
Mot. Submit Date Jan. 16, 2007
Mot. Seq. No. 001

Petitioners,

- against -

NORMAN MACTAS ACKERMAN,
1850 Second Avenue, Apt. 5C
New York, New York 10128,
Respondent.

**DECISION, ORDER AND
JUDGMENT**

-----X
For the Petitioners:
Carol A. Dunning, Esq.
46 George Street
Manhasset NY 11030

For the Respondent:
Norman M. Ackerman, *pro se*
1850 Second Avenue, Apt. 5C
New York NY 10128

Papers considered in review of this petition for a declaration and award of possession:

Papers	Numbered
Notice of Petition, Petition, Affidavit of Service	1,2
Answer & Counterclaims	3
Supplement to Answer	4
Reply to Counterclaim	5
Affirmation in Opposition	6
Amended Answer in Opposition	7

PAUL G. FEINMAN, J.:

In this special proceeding brought pursuant to Social Services Law § 461-h and RPAPL 745, petitioners seek declaratory relief and a warrant of eviction, as well as damages for breach of contract. Respondent answers and counterclaims seeking treble damages for an alleged rent overcharge and punitive damages for alleged harassment. He also also seeks summary judgment and dismissal of the petition on the basis of res judicata, failure to join necessary parties,

incorrect forum, and other grounds. For the reasons which follow, the petition is dismissed for failure to obtain personal jurisdiction in accordance with the Social Services Law and the counterclaims are severed and continued.

Facts

Co-petitioner New York Foundation of Senior Citizens, Inc., ("Foundation") is a social service agency that conducts the Enriched Housing Project pursuant to a licence issued by the New York State Department of Health (Ver. Pet. ¶2). The program offers living arrangements, including assistance in meal preparation, shopping, housekeeping and personal care, for senior citizens who meet the eligibility requirements (Ver. Pet. ¶ 3). Petitioner 1850 Second Avenue Services Corp. ("1850 Second Ave.") is a participant in the Enriched Housing Program and the operator and owner of the rent stabilized premises located at that address (Ver. Pet. ¶ 4).

Respondent is a tenant in apartment 5C of the building pursuant to a lease dated December 1, 2000, and the recipient of Enriched Housing Program Services through the Enriched Housing Program Admission Agreement dated December 1, 2000 (EHP Agreement) (Ver. Pet. ¶ 5; Ex. A).

Under the EHP Agreement, respondent is to pay a monthly fee for the services provided to him under the program. In addition, respondent is obligated to pay monthly rent to 1850 Second Ave., the amount of which constitutes a portion of the Enriched Housing Fee (Ver. Pet. ¶ 8).¹ Residents are required to re-certify their eligibility for the Enriched Housing Program on an annual basis (Ver. Pet. ¶9). Respondent has refused to sign the re-certification documents for the year 2006, and refused to sign the 2005 and 2006 amendments to the EHP Agreement which set

¹Thus, for the initial year, the monthly "rent" was \$753.54, and the monthly fee for EHP services was \$832 (Ver. Ans. Ex. A).

* 4]
forth the annual increases in the fees for those years (Ver. Pet. ¶ 10, Ex. A). Petitioners state that respondent refuses all Enriched Housing services other than meals, has failed to pay the Enriched Housing Fee since June 2004, and owes \$23,558 (Ver. Pet. ¶¶ 13, 14). The portion of the amount that is owed to 1850 Second Avenue as unpaid rent is \$5,668 (Ver. Pet. ¶ 17).

Petitioners issued a notice of termination of the Admission Agreement, signed on February 14, 2006, to take effect on March 17, 2006, but which indicated that respondent could proffer objections (Ver. Pet. Ex. B). Respondent wrote letters setting forth various concerns regarding safety, health, maintenance, and management of the building (Ver. Pet. Ex. C). On May 5, 2006, a 10 Day Notice to Cure Default was signed indicating that respondent had failed to pay his rental fees pursuant to the Enriched Housing Agreement of the New York State Department of Health Regulations for Enriched Housing and his lease, and that he had ten days to cure the default by paying (Ver. Pet. Ex. D). On May 15, 2006, a 30 Day Notice to Terminate Lease was signed, requiring respondent to remove himself from the premises by June 15, 2006 or face a summary eviction proceeding (Ver. Pet. Ex. E). Petitioner remains in possession of the apartment.

Petitioners seek a declaration that the EHP Admission Agreement was terminated and respondent was discharged from the Enriched Housing Program as of March 17, 2006.² They also seek a judgment of \$5,668., plus interest, costs, and attorneys' fees, representing the use and occupancy owed, along with a warrant of eviction for the apartment. They also seek damages for respondent's breach of damages in the amount of \$17,890, plus interest and costs, that amount

²May 17, 2006 is two days after the date of the signing of the 30 Day Notice to Terminate.

* 5]
being the difference between the total unpaid Enriched Housing Fees and the rent due and owing to 1850 Second Avenue. They also seek damages in the amount of \$5,668 plus interest, costs, and attorneys' fees as to the rents due to 1850 Second Avenue.

Respondent, proceeding *pro se*, seeks by way of his answer to the petition not only to counterclaim but to dismiss the petition pursuant to CPLR 3212. He proffers seven affirmative defenses: res judicata; failure to join the Department of Housing & Urban Development and the New York City Housing Authority; petitioners have adverse interests and claims requiring different relief and therefore the claims should be severed; petitioners have violated the rent stabilization laws; and defective verifications.

Analysis

Social Services Law § 461-h governs special proceedings for terminating admission agreements of residents in enriched housing programs, among other special programs. Under the statute, a special proceeding is commenced by petition and notice of petition which are to be served by personal delivery on the resident, with proof of service filed with the court within three days after delivery to the resident (Soc. Serv. Law § 461-h[5][a-b]). In addition, a copy of the notice of petition and petition are to be mailed to the State Department of Social Services (Soc. Serv. Law § 461-h[5][a]). The only exception to service by personal delivery is where the resident has been removed pursuant to section 461-g of the Social Services Law; the statute then allows any method of service under CPLR 308.

Pursuant to the statute, the resident may answer and assert counterclaims and defenses, and if the relief includes a judgment for payment of charges and other assessment due, then any counterclaims against the operator may be heard in a special proceeding pursuant to the

provisions of the statute, or the court may sever the claims and counterclaims from the special proceeding (Soc. Serv. Law § 461-h[7-8]). If there are triable issues of fact, they are to be tried by the court, with any adjournment to be given of not more than 10 days (Soc. Serv. Law § 461-h[9]).

Service on respondent was deficient. According to the affidavit of service, respondent was served not by personal delivery (CPLR 308[1]), but by substituted service upon the concierge of the premises, a person of suitable age and discretion. According to the affidavit of the process server, the concierge would not let him into the building at 7:07 p.m. on August 7, 2006 to deliver the papers to respondent. A copy of the papers was then mailed to respondent the following day at his home address. There is no indication that the Department of Social Services was served with a copy of the ~~petition~~ and notice of petition, nor is there any indication of when the affidavit of service was filed with the court. Moreover, if upon repeated attempts the process server found, and so stated, that the concierge never allows a process server into the building, whether it be day or evening, then petitioners should seek an application to the court pursuant to CPLR 308(5) for an alternate means of service upon respondent.

Because service was improper, the court has no jurisdiction over this proceeding and the petition must be dismissed without prejudice to commencement of a new proceeding. While the assertion of unrelated counterclaims will result in the waiver of jurisdictional defenses, here the respondent's counterclaims are directly related to the issues raised in the complaint. Thus, jurisdictional defects are not waived.

Respondent's counterclaims for rent overcharge and harassment are severed and continued. The court has not analyzed the merits of the counterclaims because respondent's

summary judgment motion was not made on proper notice nor in conformance with CPLR 2214 nor the Uniform Court Rules for the Supreme Court of New York County. There is no motion for relief regarding the counterclaims from the petitioner.

It is


ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed without prejudice; and it is

ORDERED that the respondent's two counterclaims are severed and continued.

The foregoing shall constitute the decision, order and judgment of this court

ENTER :

Dated: April 6, 2007
New York, New York



J.S.C.