

**45 Pinehurst Ave Realty Co LLC v De La Cruz**

2009 NY Slip Op 32777(U)

November 16, 2009

Civil Court of the City of New York, New County

Docket Number: L&T76915/07

Judge: Sabrina B. Kraus

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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: HOUSING PART S  
\_\_\_\_\_  
45 PINEHURST AVE REALTY CO LLC, X

Petitioner-Landlord

-against-

**DECISION & ORDER**  
**Index No.: L&T 76915/07**

**HON. SABRINA B. KRAUS**

JOSE DE LA CRUZ  
45 PINEHURST AVENUE, APT 25  
NEW YORK, NY 10033

Respondent-Tenant

ELIANA GUZMAN

Respondent-Undertenant  
\_\_\_\_\_  
X

**BACKGROUND**

This summary holdover proceeding was commenced by **45 PINEHURST AVE REALTY CO LLC** (Petitioner) and seeks to recover possession of **Apartment 25, at 45 PINEHURST AVENUE, NEW YORK, NEW YORK, 10033** (Subject Premises) based on the allegation that, **JOSE DE LA CRUZ** (Respondent), the rent stabilized tenant of record, has breached a substantial obligation of his tenancy in that he is chronically in default of the payment of rent. **ELIANA GUZMAN** (Undertenant) is the spouse of Respondent and, an occupant of the Subject Premises. Undertenant was not sued by petitioner at the commencement of the proceeding, but was added as a party on or about July 3, 2008.

## PROCEDURAL HISTORY

This proceeding was commenced by the service of a notice of default, issued on or about May 16, 2007, alleging that in the years 2005 and 2006 Petitioner was forced to commence seven nonpayment proceedings against Respondent to collect rent.

The Notice of Petition and Petition issued on or about June 29, 2007, and the proceeding first appeared on the Court's calendar on July 16, 2007. Respondent appeared and the proceeding was adjourned for Respondent's counsel to appear. Respondent appeared by counsel on July 30, 2007, and following a number of adjournments, the proceeding was assigned to Part S for trial on December 18, 2007, at which time the Petitioner and Respondent entered into a stipulation of settlement. Pursuant to said stipulation: Respondent consented to a final judgment of possession; and execution of the warrant was stayed for a probationary period starting January 2008 and continuing through March 2009; and Respondent was required to pay arrears of \$10,280.49, by January 30, 2008; and Respondent was required to pay the monthly rent no later than the tenth of each month.

On July 3, 2008, Northern Manhattan Improvement Corporation moved by Order to Show Cause, on behalf of Undertenant, who appeared through counsel for the first time at this point in the proceeding. Undertenant asserted she is the mother of Respondent's child, an occupant living in the Subject Premises, and sought a stay of eviction.<sup>1</sup> That motion was granted pursuant to a stipulation wherein Petitioner agreed to accept payments from Undertenant, the

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<sup>1</sup> At the time of the motion it was asserted that Respondent and Undertenant had separated, and that Respondent was not living in the Subject Premises. Prior to the October 1, 2009 hearing, Respondent represented to the Court that he and the Undertenant had reconciled, and that both parties were living in the Subject Premises.

December 2007 stipulation was “restored to force and effect” and Undertenant was added as a Respondent. The stipulation further provided that Petitioner would fax a notice of default to attorneys for both Respondent and Undertenant, simultaneously with service of notice of eviction.

On or about April 7, 2009, Respondent moved for a stay of the proceeding. Respondent alleged he had timely delivered all payments to his attorney, and that his attorney had forwarded the payments late due to the attorney’s illness and hospitalization. The motion was granted pursuant to decision and order dated April 29, 2009<sup>2</sup> (4/29/09 Stipulation), to the extent of excusing the default under the stipulation, on condition that arrears due through April 2009 be paid by April 30, 2009 and that the probationary period be extended through September 2009.

On June 4, 2009, counsel for Respondent moved for an order to be relieved as Respondent’s attorney in this proceeding. The motion was granted on June 22, 2009 by the Court. Respondent did not appear in opposition.

On August 26, 2009, Respondent acting *pro se*, brought an Order to Show Cause returnable on September 4, 2009, seeking another stay of eviction. On September 4, 2009, Benjamin Kaplan, Esq., who had previously withdrawn as counsel for Respondent, filed a new notice of appearance, and appeared once again on behalf of Respondent. Respondent asserted in his motion that he had made all required payments, implying he was not in default, but still

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<sup>2</sup> Although the motion was resolved by a document labeled decision and order and signed by the Court instead of the parties, Respondent’s counsel stipulated that the probationary term be extended, and the order was entered into on consent of Respondent and his attorney. During the course of the hearing, counsel stipulated on the record that the 4/29/09 order was in fact a stipulation between the parties.

received a marshal's notice. The motion was granted to the extent of setting the matter down for a hearing on September 15, 2009, to determine if a default occurred.

On September 15, 2009 the hearing was adjourned to October 1, 2009<sup>3</sup>. On October 1, 2009, the Court held a hearing on Respondent's motion and reserved decision.

### **FINDINGS OF FACT**

The first witness to testify at the hearing was Marvin Hellman. Through Mr. Hellman's testimony, Petitioner offered into evidence a document labeled "Tenant Statement" which contained a history of charges and payments for Respondent from January 2007 through August 31, 2009 (Exhibit 3). Mr. Hellman testified that subsequent to the 4/29/09 Stipulation, extending the term of the probationary stipulation, Petitioner received three payments from Respondent, two were received on May 7, 2009 and one on May 12<sup>th</sup> 2009.

The first payment due pursuant to the 4/29/09 Stipulation was \$2145.68 representing use and occupancy for April and May 2009. This payment was made late and not received in full by Petitioner until May 12, 2009.

Respondent also defaulted in timely making the July 2009 payment, which was not received until July 13, 2009. No further payments were tendered by Respondent prior to August 31, 2009.

In evidence, as Exhibit 4, is an overnight mail envelope from the United States Post Office that was still sealed at the time it was offered into evidence. The envelope was opened

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<sup>3</sup> On October 1, 2009, counsel for Undertenant moved to be relieved as counsel. The motion was granted by the Court on default but no stay was issued for reasons set forth in the order.

by the Court, and inside contained a cashier's check dated August 28, 2009 in the amount of \$1,061.00 payable to Petitioner.

Respondent was the next witness at the hearing. Respondent did not provide credible testimony at the hearing. Respondent testified that he did not recall when he made the payments due for May 2009. He testified that for payments due from June 2009 through August 2009 he timely submitted payments to his attorney, who was to forward them to Petitioner. However, the documentary evidence directly contradicts this claim, as the August payment was mailed directly by Respondent to Petitioner, who did not receive it prior to August 31, 2009. The bank check was not even purchased until August 28, 2009.

Respondent provided no credible evidence to rebut the evidence provided by Petitioner that he defaulted in timely making payments due for July and August 2009. Respondent contradicted himself in his testimony.

Petitioner established that Respondent failed to make timely payments due under the 4/29/09 stipulation on April 30, 2009, July 10, 2009, and August 10, 2009.

No other witnesses were presented by either party.

### **DISCUSSION**

The December 2007 stipulation originally settling the proceeding, provided for the entry of a judgment of possession and forthwith issuance of a warrant of eviction. The stipulation provided that time was of the essence and any default would allow for the execution of the warrant after service of a marshals notice. Respondent defaulted repeatedly during the course of the probation on his obligation to make timely payments.

Even after the initial defaults were excused, and once the probationary period was

extended, the defaults by Respondent continued. It is clear, based upon the facts established at the hearing, that Respondent has defaulted on the 4/29/09 Stipulation.

Stipulations of settlement are contracts and are subject to the principles of contract construction *Aivaliotis v. Continental Broker-Dealer Corp.*, 35 AD3d 153 (1st Dept., 2006). The underlying proceeding was predicated on the allegation that Respondent had failed to timely pay rent. The proceeding was settled by agreeing that the failure to pay Petitioner by the 10th of any month was a default. Because the essential obligation of Respondent was to pay on time, a late payment not a *de minimus* default, but rather a default that goes to the heart of Respondent's obligation of under the Stipulation.

“A covenant to pay rent at a specified time ... is an essential part of the bargain as it represents the consideration to be received for permitting the tenant to remain in possession of the property of the landlord.” *Fifty States Mgt.v. Pioneer Auto Parks*, 46 N.Y.2d 573, 575 (1979). Repeated breaches of the covenant to timely pay are not *de minimus*, but are breaches of a material term of the contract. *Cyber Land Inc. v. Chon Property Corporation*, 36 AD3d 748 (2nd Dept., 2007).

The Stipulation was entered under advice of counsel, and so-ordered by the Court. The Stipulation expressly provided that if Respondent breached the terms, Petitioner would be entitled to execute on the warrant of eviction. Such language has been held to be unambiguous, and subject to enforcement without extrinsic evidence of the parties' intent. *64th Street-3rd Ave. Ass. v. Wall*, 257 A.D.2d 487 (1st Dept.,1999).

Appellate Courts have held that it is an abuse of discretion, when trial courts excused

late payments in a chronic non-payment holdover proceeding, if the stipulation clearly provided that a breach would entitle the landlord to an eviction. For example, in *Kalimian v. Cutarella*, **NYLJ May 23, 2003 (App. Term, 1st Dept.)**, the Appellate Term held that where the stipulation provided that two late payments during a twelve month period would entitle landlord to execute on the warrant of eviction, the language was unambiguous and required that the stipulation be enforced according to its terms. The Appellate Term reversed the lower court's finding that the breach was *de minimis*, and noted that the tenant's excuse of the late payment was "insufficient cause to warrant relief from the stipulations provisions". *Kalimian v. Cutarella, Supra*, citing *Hallock v. State of New York*, 64 N.Y.2d 224; *see also M & B Lincoln Realty Corp. v. Lubrun*, 4 Misc 3d 129(A) (App Term, 2nd Dept, 2004); *M.F. Realty v. Santini*, **NYLJ, July 15, 2003 (App Term, 1st Dept.)** ( *Affirming lower court's denial of tenant's motion for a further stay on the execution of the warrant as tenant had breached two stipulations and late payments continued in the probationary period* ).

### **CONCLUSION**

Based on the forgoing, Respondent's order to show cause is denied. Petitioner is entitled to execute on the warrant of eviction, after service of a marshal's notice on Respondent and Undertenant.

This constitutes the decision and order of this Court.

Dated: New York, New York  
November 16, 2009

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Sabrina B. Kraus, JHC

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