

Mutual Redevelopment Houses, Inc . v Kennedy

2009 NY Slip Op 33029(U)

November 16, 2009

Supreme Court, New York County

Docket Number: 101517/09

Judge: Michael D. Stallman

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

PRESENT: STALLMAN
Justice

PART 7

MUTUAL REDEVELOPMENT HOUSES, INC.

INDEX NO.

101517/09

MOTION DATE

MORGAN KENNEDY, ET AL

MOTION SEQ. NO.

02

MOTION OF

FILED
NOV 25 2009
NEW YORK COUNTY CLERKS OFFICE

The following papers, numbered 1 to 4 were read in motion for

see also interim order of 10/26/09

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

PAPERS NUMBERED

1-3

Answering Affidavits - Exhibits A-B

4

Replying Affidavits

+ papers on reg 03 + 04 (end 01) + 11 supp Affirm (11/5/09) 5

Cross-Motion: Yes No

Affirm (11/12/09) 6

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the memorandum decision and order filed with reg 02.

Copies by mail to plaintiff's counsel, defendant Yo Dr. Denis Kennedy and Dr. Denis Kennedy.

Note: The affidavit of Dr. Kennedy, signed by her and Kennedy, dated 11/12/09 (papers 6, enumerated above) is not notarized. Dr. Kennedy, and Mr. Kennedy are again warned and cautioned that all papers they submit must be notarized. Only attorneys who are non-parties may submit affidavits.

MICHAEL D. STALLMAN

J.S.C.

Dated: 11/16/09

[Signature]

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

* 2]
SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 7

-----x
MUTUAL REDEVELOPMENT HOUSES, INC.,

Plaintiff,

Index No.: 101517/09

-against-

DECISION AND ORDER

MORGAN KENNEDY and NEW YORK CITY
HUMAN RESOURCES ADMINISTRATION/
DEPARTMENT OF SOCIAL SERVICES-ADULT
PROTECTIVE SERVICE,

Defendants.
-----x

HON. MICHAEL D. STALLMAN, J.:

FILED
NOV 25 2009
NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence numbers 002, 003, and 004 are consolidated for disposition.

In motion sequence number 002, defendant Morgan Kennedy (Kennedy) seeks to vacate the default judgment entered against him (seq. 01), which granted plaintiff Mutual Redevelopment Houses, Inc. (Mutual) a preliminary injunction granting it the right to enter Kennedy's apartment in order to exterminate a bedbug infestation. In motion sequence number 004, Kennedy seeks the same vacatur, with the additional request that he not be held responsible for the cost of remediating the bedbug infestation.

In motion sequence number 003, Mutual seeks an order directing Kennedy "to post a bond and/or an undertaking in the amount of fifty thousand dollars (\$50,000.00)," and to enter judgment against Kennedy for the costs of the extermination and repair of the apartment, as well as attorneys' fees.

BACKGROUND

Mutual is the corporate owner of the cooperative residence in which Kennedy is a proprietary-lessee. There appears to be no factual dispute that, as of the beginning of this litigation, Kennedy's apartment, as well as other units on the floor of Kennedy's apartment, were infested with bedbugs, creating a condition hazardous to the health of the residents. Mutual alleges that Kennedy refused access to his apartment in order to allow it to decontaminate his unit, except for one occasion for a period of four hours, and that refusal of access and/or inadequate access precipitated worsening of the infestation and the instant action.

On February 4, 2009, this Court signed an emergency order to show cause with a temporary restraining order, pursuant to which Mutual sought and obtained entry to Kennedy's apartment to remediate the bedbug infestation. (Motion Seq. 01). On the return date, defendant New York City Human Resources Administration/Department of Social Services-Adult Protective

Service indicated that Kennedy did not qualify for intervention by Adult Protective Services, and Mutual discontinued this proceeding as against the City. On March 12, 2009, the Court granted the preliminary injunction on default, Kennedy having failed to appear.

On May 6, 2009, Kennedy, then represented by counsel, sought vacatur of the preliminary injunction, asserting that he had never been served with process, and claiming that he was forcibly evicted from his apartment on January 30, 2009, and that his possessions were illegally seized. Since January 30, 2009, Kennedy has apparently been residing with his mother, Dr. Doris Kennedy (Dr. Kennedy). Both Kennedy and Dr. Kennedy assert that the value of Kennedy's seized possessions exceeds \$1,000,000.00.

The thrust of the underlying action concerns the cause of the bedbug infestation, and who must bear the financial obligation for remediating the problem. According to Paragraph Fourth of the cooperative's Occupancy Agreement:

"The member covenants and agrees:

1. To take good care of the demised premises and appurtenances, and suffer no waste or injury and to repay and reimburse the Cooperative the actual cost of all repairs in and about the demised premises as and when the said repairs are needed and made by the Cooperative, except repairs to pipes, heating apparatus, partitions, plumbing and drains not occasioned by the misuse or neglect of the Member; the expense of the latter repairs shall be borne by the Cooperative."

Paragraph Fifth (12) states:

"(a) If Member shall default in the performance of any covenant on Member's part to be performed by virtue of the provisions in any article in this Agreement contained, Cooperative may immediately, or at any time thereafter, without notice, perform the same for the account of Member. If Cooperative at any time is compelled to pay or elects to pay any sum of money, or do any act which will require the payment of any sum of money, by reason of the failure of Member to comply with any provision hereof, the sum or sums so paid by Cooperative with all interest, costs and damages, shall be deemed to be additional carrying charges hereunder and shall be due from Member to Cooperative on the first day of the month following the incurring of such respective expenses.

(b) In the event of any action or proceeding instituted by Cooperative against Member with respect to this Agreement or any matter herein or Member's occupancy, tenancy or use of the demised premises, the prevailing party shall recover from the other party the costs and expenses, including reasonable attorneys' fees and disbursements, incurred by the prevailing party in the institution, prosecution or defense of the action or proceeding. Such sums shall be paid to the prevailing party within fifteen (15) days after written demand, and any sums due from Member to Cooperative shall be deemed to be additional carry charges hereunder."

Kennedy asserts that he did not cause the bedbug infestation, and that the building had been having problems with bedbugs in earlier years on other floors. Kennedy further insists that he was evicted from his premises under the guise of the cooperative needing to exterminate in the apartment, even though he had granted access to management on several occasions. Kennedy also maintains that all of his possessions were taken from him, and that he has been unable to have them returned.

In opposition to Kennedy's motion to be restored to the

apartment, Mutual asserts that, although remediation has been progressing throughout these proceedings, the infestation was so severe in Kennedy's apartment that it is still not habitable, more work being necessary. Brendan Keany, the General Manager for Mutual, submitted an affidavit, in which he affirms that Kennedy caused and allowed his apartment to become infested with bedbugs; that Kennedy denied Mutual regular and unfettered access to the apartment to exterminate the bedbugs; that Kennedy's actions caused 33 other apartments to become infested with bedbugs; that Kennedy's possessions were infested with bedbugs and have been removed to storage; and that Mutual has spent in excess of \$30,000.00 in remediating the infestation, including the removal of the flooring in Kennedy's unit. The affidavit is supported by numerous photographs of Kennedy's apartment and belongings, which substantiate the extent of the problem.

Matthew Pilato, the Restoration Manager at Mutual, also submitted an affidavit, in which he states that he attempted to gain access to Kennedy's apartment in order to exterminate the premises, after receiving numerous complaints from tenants that bedbugs were crawling outside Kennedy's door, but Kennedy refused access to the apartment. Stuart Bogard, the principal of Pro-Tech Pest Control, Inc., the company hired by Mutual to treat the building for bedbugs, submitted an affidavit in which

he states that all the tenants, except for Kennedy, cooperated with his efforts, and that when he was finally able to enter Kennedy's apartment, it was crawling with thousands of bedbugs. Plaintiff's papers include photographs that appear to corroborate the claims of a gross infestation.

According to Mutual, it would cost approximately \$350.00 to disinfect Kennedy's possessions, which plaintiff represents are currently sealed and stored in a storage facility owned by plaintiff.

Since Kennedy's initial motion (motion sequence number 002), the Court attempted to settle the dispute in several conferences. After discharging his attorney, Kennedy has become self-represented, but never appeared in court. Rather, Dr. Kennedy repeatedly appeared to submit papers, frequently not in a form capable of being submitted. The ensuing flurry of motion practice and short service of papers on Kennedy's behalf, including unbound papers, necessitated adjournments. On September 10, 2009, this Court appointed Dr. Kennedy as guardian ad litem for Kennedy, on her consent, on Kennedy's request and plaintiff's consent, and based on Dr. Kennedy's representations that Kennedy has recently suffered a nervous breakdown, and that he is also suffering from influenza. However, pursuant to that order, Dr. Kennedy's appointment is not effective until she submits an affidavit showing her ability to answer for any

damage sustained by her negligence or misconduct, as required by CPLR 1202(c).

DISCUSSION

"When a defendant seeking to vacate a default judgment raises a jurisdictional objection ... the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default ... [internal quotation marks and citations omitted]." *Caba v Rai*, 63 AD3d 578, 581, n 1 (1st Dept 2009).

"The burden of proving jurisdiction is upon the party asserting it and when challenged that party must sustain that burden by a preponderance of the credible evidence. An affidavit of service is not conclusive once there is a sworn denial of receipt [internal citations omitted]." *OCI Mortgage Corp. v Omar*, 232 AD2d 462, 463 (2d Dept 1996).

The papers submitted with the motions include affidavits of licensed process servers, indicating that, on February 5, 2009, Kennedy was served by leaving a copy of the summons with notice with a woman identified as Kennedy's mother at Dr. Kennedy's address, indicated as Kennedy's last known address, as well as by mailing a copy of the documents by first class mail to that address. According to other affidavits of service, a copy of the summons with notice was affixed to the door of Kennedy's

apartment on February 5, 2009, i.e., the apartment that is the subject of this lawsuit, with a follow-up mailing, after unspecified "due diligence"; the verified complaint was purportedly served on Kennedy by "nail and mail" service at his apartment on March 10, 2009, and by "deliver and mail" service, upon the concierge of his mother's building with a mailing to Kennedy there, also on March 10, 2009. In affidavits and affirmations, both Kennedy and Dr. Kennedy deny that they were ever served.

As to the service of the order to show cause, according to an affidavit of service sworn to February 6, 2009, a process server delivered the order to show cause with supporting documents to "'Jane' Kennedy- Mother who refused first name" on February 5, 2009 at her apartment, 300 East 71st Street, Apt. 4A. This affidavit does not mention any mailing. According to another February 6, 2009 affidavit of service, another process server attempted to make personal service of the order to show cause with supporting documentation on Kennedy at the subject apartment on February 5, 2009 and then affixed a copy to the door of Kennedy's apartment; the pre-printed lines pertaining to mailing are crossed out. Both Kennedy and his mother denied service in their papers.

Given the apparent lack of any other affidavit of mailing of the order to show cause in the papers submitted or in the

County Clerk's file, the Court gave the parties a further opportunity to serve and submit additional papers on this issue. See Interim Order of October 26, 2009. The supplemental papers submitted on November 12, 2009 clarify that no factual question exists. There is no additional evidence of the required mailing; thus, the Court concludes that the order to show cause was not mailed.

The order to show cause itself required personal service. Personal service on an individual (CPLR 308) permits alternatives to personal delivery to the named party. However, substituted service (e.g., on Dr. Kennedy, Kennedy's mother) or "nail and mail" service, each require a mailing as statutorily directed. Because no mailing was effectuated, the order to show cause for the preliminary injunction (Motion sequence 01) was not properly served. Accordingly, this Court's order of March 12, 2009, which granted the preliminary injunction, must be vacated; the order to show cause (seq. 01) is accordingly denied for lack of personal service according to its terms.

In contrast, as to service of the summons with notice and the complaint, the papers present a triable factual question as to whether service was effectuated, a precondition for the Court to exercise personal jurisdiction over defendant Kennedy. Because he (and his mother) have disputed the alleged acts of service, neither Kennedy or his mother have waived objection to

jurisdiction by asking for affirmative relief. Accordingly, a traverse hearing is ordered before a Special Referee.

Motion sequence number 003 seeks to have Kennedy post a bond or undertaking, and to enter a judgment against him for the costs of the extermination and attorneys' fees. This motion must be held in abeyance pending the traverse hearing and any adjudication of the issues concerning responsibility for payment. Plaintiff may re-notice the motion thereafter, along with any motion to confirm or disaffirm the referee's report. Kennedy's papers in opposition to it are styled as his own order to show cause. Because the payment issues ultimately will turn on factual questions of responsibility for infestation, and because both sides would benefit if the factual determination could be expedited, the Court will address this issue to enable the parties, if they choose, to resolve this question before the referee, should the referee sustain service of the summons.

"Generally, a shareholder of a cooperative is responsible for maintaining the apartment in good repair and would be responsible for extermination within the apartment." *Zayas v Franklin Plaza*, 23 Misc 3d 1104(A), 2009 NY Slip Op 50579(U), *2 (Civ Ct, NY County 2009). This general proposition is found within the provisions of the cooperative's Occupancy Agreement quoted above. However, if it can be evidenced "that there was building-wide bedbug infestation[,] Section 78 (1) of the

Multiple Dwelling Law imposes a non-delegable duty upon the cooperative corporation, as landlord, to maintain the building in good repair." *Id.* However, this would be true only if the cause of the infestation is not due to the shareholder's acts or omissions.

Based on the documents presented, it cannot be determined, at this point, whether Kennedy was the initial cause of the bedbug infestation, whether the building was infested prior to bedbugs appearing in Kennedy's apartment, or whether Kennedy's alleged failure to provide access for complete extermination aggravated the situation and increased the scope of work and cost of remediation. Under these circumstances, a triable factual question is presented, one appropriate to be heard by a referee, if the Court has jurisdiction over defendant.

In the interests of the efficient administration of justice and expediting a determination, but only with the consent of all parties, the Court will permit the referee to hear evidence on both service of the summons and complaint and thereafter, on the causation/aggravation of the bedbug infestation, should the referee find that jurisdiction was acquired.

Although Kennedy seeks the immediate return to his apartment and return of his property, he has not met his burden of demonstrating that his possessions are bed bug free. Neither does it appear that the apartment is in "move-in" condition yet.

Indeed, the papers before the Court indicate that the property has been stored but not disinfected, and that the apartment needs rehabilitation after disinfection. The Court cannot permit a tenant to return to an uninhabitable and hazardous premises. Therefore, Mutual must complete the extermination/restoration of Kennedy's apartment in the most expeditious manner possible, initially at its expense, without prejudice to a later determination of responsibility.

Furthermore, because Kennedy's possessions have merely been maintained in storage, and not disinfected, the Court cannot allow the items to be released until such time as they have been completely rid of bedbugs. However, because of the denial of the preliminary injunction, plaintiff may not hold them indefinitely. Therefore, if Kennedy requests, plaintiff must promptly arrange for the disinfection of the property (which it estimates to cost approximately \$350), initially at its expense, without prejudice to a determination of responsibility, and thereafter, must promptly offer to return it to Kennedy. Should Kennedy refuse or neglect to retrieve upon reasonable notice after disinfection, plaintiff may arrange for storage at Kennedy's expense, and/or by motion, may seek to have such property deemed abandoned.

Finally, Dr. Kennedy is reminded to comply with CPLR 1202(c) and this Court's order of September 10, 2009 which

appointed her as guardian ad litem, viz.: Dr. Kennedy must submit an affidavit to the Court showing that she is able to answer for any damage sustained by negligence or misconduct.

CONCLUSION AND ORDER

Based on the foregoing, it is hereby

ORDERED that the issue of whether service was properly effectuated on Morgan Kennedy of plaintiff's summons and complaint is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information

Sheet,¹ upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee Part (Part 50) for the earliest convenient date; and it is further

ORDERED that, upon the consent of all parties, in writing or on the record, at the same time that the Special Referee, or the referee designated by the parties, hears and reports on the above issue, the Special Referee, or the referee designated by the parties, shall hear and report on the issue of who is responsible for the bedbug infestation at the subject premises, should jurisdiction be found, subject to the same conditions and procedures specified above including the right of the parties to consent to having the referee determine the issues or any of them; and it is further

ORDERED that plaintiff shall restore the subject apartment to a habitable condition as soon as possible; and it is further

ORDERED that Morgan Kennedy agree, prior to having his property that is currently being stored by plaintiff returned to him, that there be a decontamination of said property, to be paid for plaintiff, with the understanding that the actual cost of such decontamination may or may not eventually be determined to an obligation of defendant Morgan Kennedy; and it is further

ORDERED that Morgan Kennedy agree to a decontamination at

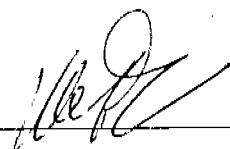
¹Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.

his expense, and to submit proof thereof to plaintiff, of anything else to be brought into the apartment, including his clothing.

Copies by mail to counsel for plaintiff, defendant c/o Dr. Doris Kennedy and to Dr. Doris Kennedy as guardian ad litem.

Dated: November 16, 2009
New York, NY

ENTER:



Hon. Michael D. Stallman, J.S.C.

MICHAEL D. STALLMAN
J.S.C.

FILED
NOV 25 2009
NEW YORK
COUNTY CLERK'S OFFICE

**NEW YORK COUNTY SUPREME COURT - SPECIAL REFEREE
CALENDAR**

INFORMATION SHEET

Title of Action: Mutual Redevelopment Houses, Inc. v Kennedy

Index No.: 101517/2009

Issues Referred to HEAR AND REPORT: (1) Whether service of the pleadings was properly effectuated on Morgan Kennedy; (2) whether Kennedy was the initial cause of the bedbug infestation, whether the building was infested prior to bedbugs appearing in Kennedy's apartment, or whether Kennedy's alleged failure to provide access for complete extermination aggravated the situation (if the parties consent in writing that the same Referee hear and report on this issue). Parties may stipulate for the referee to determine all or any issues.

Estimated Time Needed for Hearing: 1-4 DAYS

Attorney for Plaintiff: Michael Schwartz, Esq.
Barry Mallin & Associates, PC
132 Nassau St, Suite 522
New York, NY 10038
(212) 285-1200

Defendant: Dr. Doris Kennedy
(by Guardian Ad Litem) 300 E 71st St Apt 4-A
New York, NY 10021
(212) 861-4722

Please attach this form to a copy of the order of reference or transcript and file, as soon as possible after issuance and in any event within 60 days thereof, with:

Special Referee Clerk - Motion Support Office
60 Centre Street - Room 119, New York, New York 10007

- You will be notified by mail of the date and time of the hearing.
- Please direct all inquiries to the Special Referee Clerk (646-386-3028)
- Usually, cases are assigned to a Referee and the hearing commences on the original hearing date. Counsel therefore should be prepared with witnesses and evidence on the original date. Counsel are required to consult with all adversaries in regard to requests or applications for an adjournment.