

Park Terrace Gardens, Inc. v Penkovsky

2011 NY Slip Op 30294(U)

February 9, 2011

Sup Ct, NY County

Docket Number: 121647/02

Judge: Eileen A. Rakower

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PRESENT: **HON. EILEEN A. RAKOWER**
Justice

PART 15

Part Terrace Gardens, Inc

INDEX NO. 121647/02

- v -

MOTION DATE _____

Perkowsky et al

MOTION SEQ. NO. 8

MOTION CAL. NO. _____

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

1

2,3

4

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

FEB 10 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/9/11


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
PARK TERRACE GARDENS, INC.,

Plaintiff,

- against -

NICHOLAS PENKOVSKY, ROBIN SCHWARTZ,
"JOHN DOE" AND "JANE DOE,"

Defendants,
-----X

HON. EILEEN A. RAKOWER, J.S.C.

Index No.
121647/02

**DECISION
and ORDER**

Mot. Seq.

008

FILED

FEB 10 2011

NEW YORK

Plaintiff Park Terrace Gardens, Inc. ("Park Terrace of ~~COUNTY OF NEW YORK~~ County") commenced this action in 2002 against Nicholas Penkovsky and Robin Schwartz ("defendants") for ejectment, use and occupancy, and three causes of action sounding in breach of contract. Defendants occupy Apartment D-55 in the premises known as 77 Park Terrace East in New York County ("the building"). The issue presented upon the application and cross-motion presently before the court is whether defendants defaulted on a stipulation entered into between the parties on January 4, 2008, and so ordered by the Hon. Walter B. Tolub ("the stipulation").

In the stipulation, the parties agreed that during the pendency of this matter, defendants would "pay use and occupancy ... in the full amount of maintenance and any assessments attributed to the apartment's proportional share for the period commencing January 1, 2008 and continuing through the culmination of this litigation" The stipulation further provides that "[i]n the event of any alleged default in payment, after five business day's [sic] written notice received by fax to defendants' attorney with a copy of regular mail to said attorneys, the amount payable for use and occupancy shall be \$1,800.00 plus any assessments attributed to the apartment along with any other relief that the Court orders."

Defendants now move for an order compelling the coop to accept use and occupancy payments for the months of July 2009 and September 2009 (each in the

amount of \$946.83) *nunc pro tunc*. Defendants state that in July 2009 they timely delivered a check to the coop for their monthly maintenance as per the stipulation. They further state that “[a] check image was returned to [them] by [their] bank with [their] statement, in the normal course of business.” Plaintiffs submit a one-page document which they claim is part of their bank statement. The document contains the images of the two separate checks dated July 10, 2009, which were intended for payment of use and occupancy for the months of June 2009 and July 2009 respectively. The only information provided for each check is brief description which states: “Check [number], \$946.83 Date Presented 07/20/2009.” The document does not indicate that said amounts were deducted from defendants’ account.

Defendants state that they were subsequently advised by the coop that use and occupancy for July 2009 was not paid when they received the coop’s five-day written notice of default, pursuant to the stipulation. Defendants “thought that this was a mistake,” and advised their prior attorney accordingly.

Defendants state that they subsequently inquired with their bank, and discovered that the use and occupancy check for July 2009 had in fact bounced. Defendants claim that they had no reason to be aware of the bounced July 2009 check because their bank is supposed to inform them in writing if a check bounces, and failed to do so in this instance due to what defendants surmise to be a “glitch” with the bank. Defendants claim that, had they been aware of the “glitch,” they “would certainly have replaced the payment during the five days’ notice period”

Defendants state that although they attempted to tender payment of maintenance for the months of July 2009 and August 2009, the coop rejected said payments. Defendants argue that they should not be held in breach of the stipulation because “[m]issing the July 2009 payment was entirely inadvertent”

Park Terrace cross-moves for an order finding defendants in default of the stipulation based upon their failure to timely (or ever) cure their defaults on payment of use and occupancy for July 2009 and August 2009, and/or holding defendants in contempt for their alleged violations. The coop first notes that defendants admit in their affidavit that they failed to cure their nonpayment of use and occupancy for July 2009 within the five-day cure period set forth in the stipulation. In addition, the coop alleges that defendants have a history of “repeated non-compliance with the stipulation.” The coop states that defendants’ checks first started bouncing in June

2009, when the payment of use and occupancy for that month bounced due to a lack of sufficient funds. On July 10, 2009, defendants tendered two checks: one was a second check for June 2009 use and occupancy, while the other was for July 2009 use and occupancy. The second check for June 2009 use and occupancy cleared; however, the check that was drafted to pay July 2009 use and occupancy bounced due to insufficient funds.

Although defendants claim that it was not until the coop's September 1, 2009 notice of default that they became aware of any issue with their payment of July 2009 use and occupancy, the coop submits a letter July 30, 2009 that it sent to defendants. In that letter the coop advised defendants that two of their checks (including the check for use and occupancy for July 2009) bounced for lack of sufficient funds. The following month, defendants delivered a check for August 2009 use and occupancy, which also bounced.

On September 1, 2009, the coop sent via facsimile and regular mail a notice to defendants' counsel advising defendants of their default under the stipulation based upon their failure to timely pay use and occupancy for the months of June, July and August of 2009, and demanding that defendants cure within five business days.

On September 4, 2009, defendants tendered a check to the coop for "August 2009" use and occupancy, plus a \$10.00 bounced check charge. This check cleared. On September 8, 2009 defendants, through counsel, submitted a letter to the coop which stated as follows:

We acknowledge receipt of your letter dated September 1, 2009. Enclosed are copies of cancelled checks for June and July dated July 10, 2009 each in the amount of \$946.83, as well as our client's August, 2009 payment in the amount of \$956.83 which includes the \$10 charge bank charge [sic] and which is also stamped received. Our understanding is that September's rent will be paid today.

The enclosures are not annexed to the exhibit.

Stipulations are favored by the courts as they serve the dual purpose of

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providing litigants with predictability and promoting judicial economy by limiting the issues to be litigated in court (*see McCoy v. Feinman*, 99 N.Y.2d 295, 303 [2002]). Accordingly, stipulations are accorded the status of independent contracts, and are not to be disturbed by a court absent a showing of good cause, such as fraud, collusion, mistake or duress (*id.*).

Here, the court finds that defendants defaulted on the stipulation by failing to timely cure their nonpayment of use and occupancy for July 2009 within five business days of the coop's September 1, 2009 notice of default. It is undisputed that defendants failed to pay July 2009 use and occupancy within the five-day cure period. Defendants' purported excuse for its failure to timely cure its breach - a "glitch" with their bank - is unavailing. Even if their bank was supposed to advise them of a bounced check and failed to do so, defendants were free, and indeed would have been wise to inquire with their bank upon receipt of the September 1, 2009 notice of default. The coop's position regarding July 2009 use and occupancy could not have come as a surprise to defendants by this time, as the coop had informed them a month earlier by letter dated July 30, 2009 that their July 2009 check was returned due to insufficient funds. While defendants claim that they did not investigate the matter further because there was "a certain amount of mistrust" between themselves and the coop, they chose this course of inaction at the peril of being in breach of the stipulation.

Wherefore it is hereby

ORDERED that the coop's motion is granted to the extent that the court finds and declares defendants to be in default of the stipulation; and it is further

ORDERED that, pursuant to the stipulation, the amount payable for use and occupancy shall be \$1,800.00 per month from the month of October 2009 until the conclusion of this action.

This constitutes the decision and order of the court. All other relief requested is denied.

FILED

FEB 10 2011

DATED: February 9, 2011

NEW YORK
COUNTY CLERK'S OFFICE



EILEEN A. RAKOWER, J.S.C.