Min Tjia v Schwartz
2011 NY Slip Op 31148(U)
May 3, 2011
Civ Ct, New York County
Docket Number: 62466/10
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART E

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MIN TJIA and CHIH SHIEN KANG

Petitioners-Landlord

-against-

DECISION & ORDER
Index No.: L&T 62466/10

HON. SABRINA B. KRAUS

DEBRA SCHWARTZ
78 FRANKLIN STREET, 4TH FLOOR
NEW YORK, NY 10013

Respondent-Tenant

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BACKGROUND

This summary holdover proceeding was commenced by **MIN TJIA** and **CHIH SHIEN KANG** (Petitioner) against **DEBRA SCHWARTZ**, the rent-stabilized tenant of record (Respondent), seeking to recover possession of the 4th floor at 78 Franklin Street, New York, NY 10013 (Subject Premises) based on the allegation that Petitioners wished use and occupancy of the Subject Premises by Min Tjia's daughter, as her primary residence in New York City.

PROCEDURAL HISTORY

The notice of non-renewal was issued on or about November 20, 2009, and advised that Respondent's lease , which was to expire on March 31, 2010, would not be renewed as Petitioner's intended to seek use of the premises for a family member. The petition is dated April 6, 2010 , and the proceeding was originally returnable in Court on April 22, 2010.

On April 22, 2010, Respondent appeared through counsel, pursuant to a notice of

appearance and answer. Respondent asserted lack of personal jurisdiction based on improper service of the notice of petition and petition, lack of good faith by Petitioners, and a counterclaim for the fair value of the improvements made to the Subject Premises pursuant to NYC Loft Board Regulations.

On May 10, 2010, the parties entered into an interim stipulation wherein Respondent consented to the jurisdiction of the court, waived traverse defenses, agreed to pay use and occupancy during the litigation, and was permitted to serve discovery demands. On June 14, 2010, the proceeding was marked off calendar, for the deposition of Petitioner and his daughter and related discovery.

On or about November 2, 2010, Petitioner moved to restore the case to the calendar because Respondent had fired her attorney and failed to complete discovery. The motion was resolved by stipulation dated November 19, 2010, wherein Respondent was represented by newly retained counsel. The stipulation scheduled the deposition of Petitioner's daughter for December 16, 2010, and adjourned the proceeding to January 13, 2011.

The proceeding was further adjourned to February 24, 2011 for motion practice. Respondent moved for additional discovery, and Petitioner cross-moved to restore the case to the calendar for trial. The Court denied Respondent's motion and restored the proceeding to the calendar for trial on March 28, 2011.

The proceeding was set for trial on May 5, 2011.

Respondent now moves for an order for leave to file an amended answer and to compel discovery. The motion was submitted on April 21, 2011 and the Court reserved decision.

RESPONDENT'S MOTION TO AMEND

Respondent moves to amend her answer to include as defense that she is disabled, as that term is defined in the Rent Stabilization Code, and thus entitled to an offer to be relocated by Petitioner. Respondent's counsel asserts they only recently discovered the alleged disability and that it has only become severe enough to prevent her from working, after the commencement of this proceeding. Respondent has been diagnosed with Major Depressive Disorder and Borderline Personality Disorder.

Petitioner opposes the amendment both because it is sought on the eve of trial, and because the allegations of a disability are contested, and Petitioner asserts the allegations are not supported by sufficient evidence.

CPLR §3025(b) provides in pertinent part: "A party may amend his pleading ... at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." This statute has been liberally construed to support New York's policy that all parties be afforded a full and fair determination of their claims on the merits (*Martin v. Katz* 15 AD2d 767).

In the case at bar, Petitioner asserts two types of prejudice, one is that the proceeding will be delayed, and the second is that the cost of the proceeding will be increased. Neither one of these claims is sufficient to establish prejudice sufficient to deny Respondent amendment of the pleadings. "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine *(Edenwald Contracting Co. v. City of New York* 60 NY2d 957, at 959, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 3025:5,p.477)."

In this case, Respondent's claim of an alleged disability is not overwhelmingly supported by documentary evidence. However, the standard does not require it to be so supported at this stage. Even though Respondent has a long history of gainful employment and there is no allegation in the moving papers or pleadings that her alleged disability is expected to be permanent, it can not be said that the proposed amended pleading is palpably insufficient (*cf Davis & Davis PC v Morson* 286 AD2d 584 *where a proposed pleading is palpably insufficient as a matter of law leave to amend should be denied*).

Therefore, Respondent's motion to amend the pleading is granted on conditions set forth below, and only to the extent of permitting her to assert the additional defense of a disability in the proposed answer. No other portions of the proposed amended pleading are accepted, and as Petitioner correctly notes, Respondent has already waived traverse defenses.

In order to minimize the delay and prejudice to Petitioner as a result of this late assertion of an affirmative defense, the amendment is granted on condition that Respondent comply with the following :

Respondent by putting her medical and psychological condition at issue in this proceeding has waived any doctor patient privilege.

Respondent is to provide Petitioner's counsel with HIPPAA authorizations for all records and for *ex parte* interviews with Dr. Mary Fitzpatrick and Dr. Edwin Robbins within ten days of the date of this order.

Respondent is to appear at Petitioner's counsel's office for a deposition within thirty days of the date of this order.

Upon failure to comply timely and fully with either of these directives, Respondent's

motion to amend her pleading shall be deemed denied. Upon compliance the motion shall be granted and the pleading deemed amended and served in accordance with this Court's order.

The proceeding is adjourned to June 6, 2011 at 2pm for a compliance conference concerning the above directed discovery. The foregoing is without prejudice to Petitioner's right to move for additional discovery if so advised.

Finally, given the lateness of the assertion of the affirmative defense, Petitioner need not offer any alternative accommodations to Respondent until the completion of trial. Petitioner's obligation under the statute does not ripen until it is established that Respondent is disabled as defined by the Rent Stabilization Code. Given that Respondent has not been classified as disabled by the Social Security Administration, and that the alleged disability is contested by Petitioner, the right to relocation will not be established until Respondent proves her affirmative defense at trial. If Petitioner proves its case at trial, and Respondent establishes she is indeed disabled and entitled to such an offer, the trial court if so advised may stay issuance of the warrant until the required offer has been made (*Gogu v. Ely* 152 Misc2d 169).

The balance of Respondent's motion seeking to compel production of documents is denied as without merit.

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This constitutes the decision and order of this Court.

SABRINA B. KRAUS

Dated: New York, New York
May 3, 2011

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