

Picken v Staley

2011 NY Slip Op 33237(U)

May 16, 2011

Supreme Court, New York County

Docket Number: 69669/2011

Judge: Sabrina B. Kraus

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART E

DAVID PICKEN X

Petitioner-Landlord

-against-

DECISION & ORDER
Index No.: L&T 69669/2011

HON. SABRINA B. KRAUS

NADIA STALEY
113 WEST 85TH STREET, APT. B
NEW YORK, NY 10024

Respondent-Tenant
_____ X

BACKGROUND

This summary holdover proceeding was commenced by **DAVID PICKEN** (Petitioner) against **NADIA STALEY**, the tenant of record (Respondent), seeking to recover possession of Apartment B, at 113 West 85th Street, New York, NY 10024 (Subject Premises) based on the allegation that Respondent’s lease has expired, and she is no longer entitled to remain in possession of the Subject Premises.

PROCEDURAL HISTORY

The petition is dated June 1, 2011, and was served by conspicuous place delivery on Friday June 10, 2011, with a prior attempt having been made on June 9, 2011. The proceeding was originally returnable on June 16, 2011, and was adjourned from June 16, 2011 to June 30th on Respondent’s application. Respondent appeared through counsel on June 16, 2011, and changed attorneys per consent form dated June 29, 2011.

On June 30, 2011, Respondent's newly substituted counsel sought a second adjournment. This application was granted per court order, which extended Respondent's time to serve and file an answer through July 7, 2011, directed Respondent to pay one month's use and occupancy without prejudice, adjourned the proceeding to July 14th and provided that any motions by either party should be filed prior to said date.

On July 7, 2011 Respondent filed an answer asserting eleven affirmative defense and two counterclaims.

PENDING MOTIONS

Respondent moves for dismissal of this holdover proceeding, and Petitioner cross moves for an order amending the petition, deeming the affidavit of service to have been filed on June 10, 2011, and for summary judgment.

The Court heard oral argument on September 22, 2011, and reserved decision on the motions.

Respondent's motion to dismiss the petition for failure to comply with RPAPL §741 is denied. Petitioner has standing to maintain this proceeding as the landlord and lessor of the Subject Premises [RPAPL §721(1)]. Annexed as Exhibit "B" to Petitioner's cross-motion is a copy of the lease agreement between Petitioner and Respondent for the Subject Premises.

Moreover, the fact that the Multiple Dwelling Registration lists Jan Pickens as the registered managing agent does not require dismissal. Petitioner is not even required to plead and prove compliance with the MDR requirements as part of its *prima facie* case in a holdover proceeding [*Nairne v. Perkins* 14Misc.3d 1237(a)].

The crux of Respondent's motion is that the petition should be dismissed because the

affidavit of service was filed on June 13th 2011, which was only three days before the petition was noticed to be heard. This Court has previously held that amendments to the Civil Court Act eliminate any time deadline for the filing of proof of service (NYCCA § 409) and that to the extent that there is a conflict between NYCCA §409(a) and RPAPL § 733(1), the provisions of the NYCCA prevail (*Zot v Watson* 20 Misc.3d 1113(a)). Recently the Appellate Term, Second Department, in *Siedlecki v. Doscher* __ NYS2d __, 2011 NY Slip Op 21268, July 28, 2011, held that pursuant to CPLR § 2001, at any stage of the proceeding, if a substantial right of a party is not prejudiced a mistake or irregularity, including late filing of an affidavit of service, should be disregarded.

Moreover, in this case, the petition was served and the mailing completed on June 10, 2011. The affidavit of service was filed on the next business day, which fell on June 13, 2011. Petitioner argues that pursuant to § 25 of the New York General Construction Law, his time to file should have be extended through June 13, 2011 which was the next business day.

Respondent argues unconvincingly that she was prejudiced by the filing of the affidavit of service on Monday June 13, 2011, rather than Friday June 10, 2011, because she only had three days to find a lawyer familiar with landlord tenant cases and was forced to pay an “exorbitant fee” for a lawyer to appear on June 16 and request the initial adjournment.

Respondent does not state in her affidavit whether she received the papers on June 10 or not, but she did obtain counsel prior to the first Court appearance. Additionally, the Court notes that this is the second summary proceeding litigated between the parties, in a previous non-payment proceeding under Index No 92127/10 the parties litigated and both were represented by counsel. That proceeding was commenced in December 2010 and was settled pursuant to a

stipulation January 20, 2011. The terms of the stipulation of settlement in that proceeding ran through March 28, 2011.

Finally, this Court notes that pursuant to RPAPL §743 the answer in a holdover proceeding is to be asserted or filed “at the time when the petition is to be heard.” This statute has routinely been interpreted by the Courts to mean that the time for Respondent to file an answer is extended by adjournment of the proceeding unless “arrangements to the contrary” have been made [*Gluck v. Wiroslaw* 113 Misc.2d 499; *see also City of New York v. Candelario* 156 Misc2d 330 *affd in part, revd in part on other grounds* 223 AD2d 617 (*tenant’s appearance did not constitute waiver of jurisdictional defense because adjournment for tenant to obtain counsel extended tenant’s time to answer*); *In-Towne Shopping Centers Co v. Demottie* 17 Misc3d 134(a) (*adjournment to obtain counsel implicitly extends tenant’s time to answer*)].

It would seem extremely unfair to hold that a landlord’s case must be dismissed for filing an affidavit a day or two late, but interpret a different provision in the same statutory scheme to allow the tenant’s time to answer to be liberally extended. Any possible prejudice as a result of the late filing of the affidavit of service is eliminated by extending respondent’s time to file an answer, as was done in this proceeding. Interpretation of RPAPL §733(1) to excuse a *de minimis* non prejudicial error and RPAPL §743 to afford the tenant any additional time to file a written answer, is to both parties, and serves the well established policy of resolution of cases on the merits (*Demottie supra*).

As such Petitioner’s cross-motion is granted to the extent of deeming the late filing of the affidavit of service a *de minimis* error which caused no prejudice to Respondent and is excused. Petitioner’s cross-motion to amend the allegation of the pleading regarding the

identity of the registered managing agent is also granted and the petition is deemed amended.

Based on the foregoing Respondent's motion to dismiss the proceeding is denied. Petitioner is entitled to partial summary judgment on Respondent's Seventh, Eighth and Tenth affirmative defenses for the reasons stated above and those defenses are dismissed. The balance of relief sought in Petitioner's cross-motion for summary judgment is denied as the Court finds that there are questions of fact regarding the substantial rehabilitation of the building and Respondent's defense that the building is subject to rent regulation which must be addressed at trial. Petitioner's attempt to address this issue in its reply papers is too little too late. Additionally, Respondent's verified answer sufficiently raises the issue of personal jurisdiction to require a traverse hearing, and raises questions of fact as to the fair value use and occupancy.

As such the proceeding is restored to the calendar for trial and traverse on October 27, 2011 at 9:30 am in Part E Room 526.

This constitutes the decision and order of this Court.

SABRINA B. KRAUS

Dated: New York, New York
May 16, 2011

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