

SMJ v Goodwin

2012 NY Slip Op 30001(U)

January 4, 2012

Civil Court of the City of New County, New York County

Docket Number: 64946/2011

Judge: Sabrina B. Kraus

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

SMJ ASSOCIATES LLC

X

Petitioner

-against-

DECISION & ORDER
Index No.: L&T 64946/2011

HON. SABRINA B. KRAUS

BRUCE GOODWIN
500 A EAST 87TH STREET, APT 12BB
NEW YORK, NY 10128

Respondent

X

BACKGROUND

This summary nonpayment proceeding was commenced by **SMJ ASSOCIATES LLC** (Petitioner) against **BRUCE GOODWIN** (Respondent), seeking to recover possession of **500 A EAST 87TH STREET, APT 12BB, NEW YORK, NY 10128** (Subject Premises) based on the allegation that Respondent had failed to pay rent due for the Subject Premises.

PROCEDURAL HISTORY

The three day demand is dated March 8, 2011, and seeks \$67,702.02 in arrears through March 2011, at a monthly rent of \$5806.16. The Notice of Petition and Petition are dated April 20, 2011. On May 20, 2011, Respondent appeared by counsel and filed a written answer. The proceeding was originally returnable on May 31, 2011. On May 31, 2011 Respondent’s counsel submitted an affirmation of engagement, and the proceeding was adjourned by the court to June 15, 2011 for traverse and trial. On June 15, 2011, the proceeding was adjourned to July

25, 2011, and the file notes indicate Petitioner's application for access to do repairs was opposed by Respondent, and denied by the court. On July 25, 2011, the proceeding was adjourned again, pursuant to a stipulation, to September 21, 2011, for traverse and trial, as there were no trial judges available in Part X. On September 21, 2011, the proceeding was adjourned to November 14, 2011, there is no indication on the file jacket of the basis for the adjournment. On November 14, 2011, Respondent's counsel submitted a second affirmation of engagement and the proceeding was adjourned by the court to December 9, 2011, for trial and marked final versus Respondent. On December 9, 2011, Respondent's application for a further adjournment was denied and the proceeding was transferred to Part X for traverse and trial. On December 9, 2011, sometime after 3pm the proceeding was transferred to Part R and the traverse hearing commenced. The traverse hearing continued on December 13,14, 15 and concluded on January 3, 2012. At the conclusion of the hearing the Court heard closing arguments and reserved decision.

PLEADINGS

The affidavit of service for the three day demand indicates that the demand was served by conspicuous place delivery on March 11, 2011 at 7:49 am, after an initial attempt on March 10, 2011 at 4:56 pm, with a mailing on March 11, 2011 by certified and first class mail (affidavit and proof of mailing are annexed as Exhibit 4). The affidavit of service for the Notice of Petition and Petition indicate that they were served by conspicuous place delivery, on April 27, 2011 at 6:46 pm, with an initial attempt being made on April 26, 2011 at 9:07 am ,and a mailing by certified and first class mail on April 28, 2011.

Respondent's answer is dated May 19, 2011 and was filed on May 20, 2011. The

answer is not verified .The answer was rejected by Petitioner’s counsel pursuant to a Notice of Rejection dated May 24, 2011 as untimely, but no application was made regarding the rejection in the Resolution Part and the transfer order had sent the matter out for traverse and trial, thereby implicitly acknowledging the claims in the answer and the answer’s validity.¹

The answer as pertains to service essentially asserts that Petitioner failed to make valid attempts at service prior to resorting to conspicuous place delivery, and that there is no apartment at the building known as apartment 12BB, which is how the Subject Premises is identified in the pleadings.

HEARING

Petitioner’s first witness at the hearing was Andre Meisel. Mr. Meisel is the Process Server who served the Three Day Demand in the proceeding. Mr. Meisel testified that he had been employed as a Process server “on and off” for 12 years, and that he worked as an independent contractor for a number of different agencies. Petitioner offered into evidence a license for Mr. Meisel, issued September 1, 2011, and valid for a period through February 28, 2012 (Exhibit 1).

Mr. Meisel also produced his log book at the hearing, however the log book was not admitted into evidence, as the Court sustained Respondent’s objection to the admission of the

¹ Generally, this Court holds that an unverified answer is insufficient to rebut the facially valid affidavit of the process server and trigger the need for a traverse hearing (*see eg* CPLR 3120), but as counsel for Petitioner had stipulated that there was to be a traverse hearing pursuant to the July 25, 2011 stipulation, and the transfer order from the Resolution Part had sent the matter out for both a traverse hearing and a trial, this Court considered that to be the law of the case.

log book. The log book was not maintained in the manner required by law.² For example, the entries were not made in a pre-bound paginated book, but on various forms issued by the agencies for whom Mr. Meisel does service. The documents are then bound, at a later date, when Mr. Meisel collects a sufficient number of them. Many of the documents which later formed the log book were photocopies, and Mr. Meisel acknowledged he was not in possession of the originals of the log sheets maintained for service of the demand herein.

The Court found Mr. Meisel to be a credible witness. The Court notes that Mr. Meisel was very precise in his testimony, and that he maintained a calm composure and testified consistently through several days of questioning. Mr. Meisel testified that he fills out the information on the sheets for the log book contemporaneously with the service. Mr. Meisel did not file the affidavits of service with the Court or prepare the affidavits, but he provided the information regarding service to the individual who did prepare the affidavits.

Mr. Meisel was also called as a rebuttal witness and put into evidence a letter dated December 6, 2010, establishing that he was licensed at the time service was made in this proceeding (Exhibit 19).

Mr. Meisel testified that on March 10, 2011, he went to the Subject Building at 4:56 pm, and identified himself to the doorman. The doorman gave him permission to go up, and he went to the elevator and went to the 12th Floor. Mr. Meisel testified that the Subject Premises is listed as Apartment 12B on the entrance door to the apartment, but identified as 12BB in the documents served. Mr. Meisel testified that when he went to the Subject Premises and checked

² Pursuant to § 89-cc (1) of McKinney's General Business Law the records are to be kept in chronological order in a bound paginated volume.

the entire 12th floor of the building saw that there was no Apartment labeled 12BB, only an apartment 12B, he went back down to the lobby to confirm the apartment number with the doorman, before returning to the Subject Premises. When he went back up to the 12th floor, he knocked on the door loudly, and when there was no response he noted the date and time and left.

Mr. Meisel testified that he returned the next morning on March 11, 2011, before 8 am, and again knocked loudly on the door, but received no response. Mr. Meisel taped the papers to be served to the door, noted the details of service and left.

The fact that Mr. Meisel was actually at the Subject Premises is confirmed by his testimony that the Apartment was labeled 12B and that there was no Apartment labeled 12BB on the floor. This is something Mr. Meisel could not have known without looking at the door of the Subject Apartment and having actually checked the other apartments on the 12th floor of the Subject Premises.

The next witness to testify for Petitioner was Joyce Bonhag. Ms. Bonhag is employed by Petitioner, and has been so employed for seven years. Ms. Bonhag testified that the lobby for the Subject Building has a double set of doors, and a directory of tenants which lists Respondent as the tenant of apartment 12BB. Ms. Bonhag was recalled by Petitioner later in the hearing and confirmed that the directory in the lobby lists B. Goodwin as the tenant of apartment 12BB.

The next witness for Petitioner was Juan Delgado. Mr. Delgado is a licensed Process Server (Exhibit 8) and served the petition in this proceeding. Mr. Delgado's log book was produced but not admitted into evidence. The court sustained Respondent's objection to the admission of the log book, as it was not maintained in a manner required by law. However, Mr. Delgado's testimony as to the date and time of service was confirmed by Respondent's own

testimony. Respondent in his testimony acknowledged receipt of the notice of petition and petition, and confirmed that he observed Mr. Delgado enter the Subject Building on the date and time alleged in the affidavit of service. Respondent further testified. that when he went up to his apartment ten minutes later the papers were taped to the door.

The next witness for Petitioner was Wendy Resnick. Ms. Resnick owns Savon Process company and has been the proprietor for four years. Ms. Resnick is a licensed process server and has an agency license as well (Exhibit 11). Ms. Resnick did the mailings for the Notice of Petition and Petition, prepared affidavits of service and testified regarding the details of same (Proof of mailings and affidavits are in evidence as Exhibit 10).

Hernando Romero also testified for Petitioner. Mr. Romero testified that he had been employed by Petitioner for 11 years as a Superintendent, and he lives in the Subject Building. Mr. Romero testified that Respondent's mailbox is clearly labeled as Goodwin- 12 BB and Petitioner offered photographs depicting that and also corroborating the testimony of Mr. Meisel that the Subject Building was clearly listed as 500A East 87th Street on the awning and elsewhere (Exhibits 12B, 12C, & 12E).

Respondent testified on his own behalf. Respondent testified that during the time service of the predicate notice and petition was made he was generally at home in the mornings until 10 am and back at home early by approximately 4 pm. Respondent confirmed as noted above that the Process Server served the notice of petition and petition on the date and time alleged. Respondent even took photographs of the petition taped to his door and offered them into evidence (Exhibits B1-B3). Respondent never specifically denied receiving the mailing for either the petition or the rent demand. His attorney, though asking him to specifically deny

other aspects of service, never asked about the mailings.

As to the rent demand, Respondent testified that he was at home on March 10 and March 11 2011 and that no one knocked on the door on either occasion. Respondent said he had never seen the demand other than as annexed to the petition.

The Court did not find Respondent to be a credible witness. The Court found Respondent to be evasive in his testimony. Respondent became evasive on cross-examination when asked as to how he could recall with specificity being home on those dates and times. Respondent testified that he came to this conclusion after the commencement of the litigation by reviewing his “agenda”. Respondent later acknowledged that there was no actual “agenda”, but that what he meant was that he reviewed a host of other documents, including emails to determine he was home on those dates and times. Respondent testified that the documents existed to confirm this, but that he had not brought them to court.

No witness confirmed Respondent’s presence at the Subject Premises on those dates and no phone records or other corroborating evidence was offered. The Court finds it not credible that Respondent had such documents, but chose not to produce them, given the extensive five day hearing conducted on the issue of service.

During cross-examination Respondent also was unable to identify what purported to be his own signature on a series of rent checks, some of which referenced stipulations or agreements. Respondent offered no plausible explanation for his inability to recognize his signature on a series of checks drawn from his own account and submitted to the landlord for the payment of rent for the Subject Premises.

Also during cross-examination Respondent looked at lease agreement and falsely

testified that it did not identify the apartment as 12BB, even in the face of the admitted exhibit that clearly stated otherwise (Exhibit 7).³ Additionally, at a prior point in the hearing Respondent, falsely accused Petitioner's counsel of attempting to coach a witness during his testimony, an accusation the Court observed to be completely unfounded.

Respondent further claimed on cross-examination that he did not know how much rent was owed to Petitioner, or when the last time was that he paid rent. The pleadings in this case assert arrears of over \$60,000 through April 2011. This is the second non-payment proceeding pending between the parties, the case immediately prior to this proceeding was dismissed on a procedural technicality. Given that Respondent's testimony was that he can not recall the last time that he paid rent, and that his monthly rent is \$5806.16 there is likely over \$100,000.00 in arrears through January 2012 asserted due by Petitioner in this case.

Respondent also refused to answer whether he had filed tax returns for the past five years, choosing instead to invoke his 5th amendment privilege against self incrimination. The permissible negative inference from this is that Respondent may not be paying rent in part due to financial duress.

Based on the lack of credible testimony offered by Respondent and his failure to corroborate that testimony by any other evidence, and the other factors cited above, the Court concludes that Respondent sought to raise the issue of traverse only to further delay an adjudication on the merits in this proceeding.

CONCLUSION

³ In fact Respondent's counsel stipulated during the hearing that the lease and renewals identify the Subject Premises as Exhibit 12BB.

Based on the forgoing, the Court finds that Petitioner has established by a preponderance of the credible evidence that both the predicate rent demand and the notice of petition and petition were properly served in this proceeding, and this Court has jurisdiction over Respondent. Respondent's emphasis on the fact that the Subject Premises is known both as 12B and 12BB is unavailing. Mail is clearly directed to 12BB as indicated by the label on the mail box, and both process server's served the correct apartment, even if it is labeled 12B rather than 12BB.

The Court has considered Respondent's remaining arguments and finds them to be without merit.

Based on the forgoing, the Court dismisses any portion of any defense that asserts lack of personal jurisdiction. Additionally, the Court dismisses in its entirety Respondent's First, Second, Third, Fifth, Sixth and Eighth Objections in Point of Law, and Respondent's First, Second, and Sixth Affirmative defenses.

The proceeding is restored to the calendar for trial in Part R on January 13, 2012 at 9:30 am. At that time, the Court will entertain any remaining applications for recusal on the trial portion of the proceeding. Regardless of the determination of said application, the parties should be prepared to proceed with trial on January 13, 2012.⁴

⁴ Respondent made several applications for this Court to recuse itself, as well as several applications for a "mistrial" during the hearing. These applications were only made well after the hearing was commenced, and generally in response to adverse rulings by the Court. At one point, the Court granted the application for recusal to the extent of ruling that if traverse was not sustained, the proceeding would be reassigned for trial. However, Petitioner later objected that it was not given an opportunity to oppose such application. The Court agreed and held that the application for recusal could be renewed by Respondent, and that Petitioner would be given a chance to state any opposition before a final ruling was made in this regard.

This constitutes the decision and order of this Court.⁵

SABRINA B. KRAUS

Dated: New York, New York
January 4, 2012

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⁵ The exhibits will be available to be picked up within the next thirty days from Part R or after January 13, 2012, from the Record Room on the Second Floor. Any exhibits not picked up by said date will be shredded in accordance with administrative directives.