

Zombeck v Segesta

2013 NY Slip Op 30733(U)

April 11, 2013

Civ Ct, NY County

Docket Number: 52569/2013

Judge: Sabrina B. Kraus

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

LAWRENCE ZOMBECK, X

Petitioner-Landlord

-against-

DECISION & ORDER
Index No.: L&T 52569/2013

HON. SABRINA B. KRAUS

ROBERT SEGESTA
342 WEST END AVENUE APT 1A
NEW YORK, NEW YORK 10023

Respondent-Tenant

X

BACKGROUND

This summary nonpayment proceeding was commenced by **LAWRENCE ZOMBECK** (Petitioner) and seeks to recover possession of 342 WEST END AVENUE APT 1A NEW YORK, NEW YORK 10023 (Subject Premises) based on allegations that **ROBERT SEGESTA** (Respondent) had failed to pay past due rent for the Subject Premises.

PROCEDURAL HISTORY

This proceeding was commenced by issuance of a three day notice dated December 20, 2012 seeking \$ 4,826.12 in rent arrears, at a rate of \$1425.26 per month plus fuel charges from September 2012 through December 2012. The petition is dated January 17, 2013.

The Respondent filed an answer on February 14, 2013, asserting improper service, that the rent sued for had been paid, and that repairs were necessary. The proceeding was initially returnable on February 25, 2013. On that date, the parties entered into a stipulation which provided the proceeding was discontinued. The stipulation read “ LL accepts \$1206.53 in ct,

Resp is current on all rent through 2/28/13 accordingly discontinued.”

On April 8, 2013, Petitioner moved for an order restoring the proceeding to the calendar and vacating the stipulation dated February 25, 2013. Respondent failed to appear on the return date, and the court reserved decision on the motion.

THE MOTION

Petitioner’s motion seeks an order vacating the stipulation dated February 25, 2013 based on an alleged mutual mistake of fact. Petitioner’s motion is supported by an affirmation of counsel and Petitioner’s affidavit. Neither document asserts the exact amount Petitioner alleges was actually due on February 25, 2013, just that it was more than was recited in the stipulation. Petitioner’s affidavit also asserts that \$4,826.12 is due through March 2013.

The affidavit refers to an annexed rent history, but the rental history is confusing and appears to be different parts of incomplete documents. The first page covers a period from April 2011 to April 2012. It states at the bottom that it is page 1 of 2, but no page 2 is annexed, instead the second page of exhibit B covers a period from June 2012 through December 2012 and states it is page 1 of 1, and is followed by a third page which also states it is page 1 of 1, and only covers January and February 2013. Moreover through out the breakdown the monthly SCRIE subsidy is listed as a charge rather than a credit.

The stipulation did not amend the petition to include rent due beyond December 2012.

It is well settled that Courts favor stipulations and they will not lightly be set aside (*Hallock v. State of NY* 64 NY2d 224). This is particularly true where party seeking to vacate the stipulation was represented by counsel at the time the stipulation was entered (*Town of Clarkstown v MRO Pump & Tank, Inc.* 287 AD2d 497). However, a stipulation will be vacated

on the basis of mutual mistake, if a party can show that the mutual mistake existed at the time of the stipulation, and that the mistake is so substantial that the stipulation does not represent a true meeting of the minds (*Litvinov v. Hodson* 74 AD2d 1884 *citing Carney v. Carozza* 16 AD3d 867; *Gro-Wit Capital Ltd v. Obigor LLC* 33 AD3d 859). The party seeking to vacate the stipulation bears the burden of proving the mutual mistake by clear and convincing evidence (*Vermilyea v. Vermilyea* 224 AD2d 759).

“Where a mistake of fact is attributable to the negligence or carelessness of the party seeking to vacate a stipulation, and there has been no fraud or deceit on the part of the other party thereto, such a mistake will not constitute a basis to set aside the agreement [*Waterside 1 LLC v. Christian*, 13 Misc3d 138 (A), 2006 NY Slip Op 52229(U) *citing Da Silva v. Musso* 53 NY2d 543 *and Lowe v. Steinman* 284 Ad2d 506].” Thus in *Waterside* the Appellate Term affirmed the lower court’s denial of a motion to vacate the stipulation in a nonpayment proceeding. The Appellate Term noted that the landlord had the opportunity to ascertain the correct amount of rent due, prior to the execution of the stipulation and “it cannot avoid the consequences of its own carelessness by seeking to have the stipulation vacated (*Id.*)”

In the case at bar, Petitioner had the information available to it prior to entering into the stipulation. Petitioner failed to clearly advise counsel of the accurate amount due. This does not create a basis to vacate a stipulation based on mutual mistake (*Gro-Wit Capital Ltd v. Obligor, LLC* 33 Ad3d 859 *where information forming basis of alleged mistake was available to the party prior to entry of the stipulation there is no basis to vacate the stipulation based on mutual mistake*). Moreover, there is absolutely no showing that the mistake was mutual, and that Respondent was unaware of additional charges sought by Petitioner at the time of the

stipulation.

This court has previously held that where a landlord represented by counsel through its own mistake agrees to an improper amount in a stipulation of settlement, there is no basis to vacate the stipulation based on mutual mistake (*Evergreen Estates HDFC INC v McGhee* 30 Misc3d 1205(A)).

However, in the case at bar the stipulation may be considered a stipulation of discontinuance rather than a stipulation of settlement. The primary agreement underlying the stipulation was that the amount sued for had been paid. Given the absence of an amendment of the petition to include rents subsequent to December 2012, the scope of the proceeding discontinued was limited.

In *Yonkers Fur Dressing Co. v. Royal Ins. Co.* 247 NY 435 the Court of Appeals held that where a lawsuit is unequivocally terminated by a stipulation of discontinuance, any further relief sought pursuant to said stipulation, including vacating the stipulation, must be sought in a new action or proceeding. This has become known as the Yonkers Rule and has been subject to criticism and limitations, but never overruled (*See eg Teitelbaum Holdings Ltd v Gold* 48 NY2d 51).

Based on the foregoing, Petitioner's motion to vacate the February 25, 2013 stipulation is granted only to the extent of finding that the discontinuance of this proceeding is without prejudice to claims for rent due after December 2012. That claim has been terminated with finality and there is no basis to revive it. However, notwithstanding the fact that the stipulation provided that all rent due through February 2013 had been paid, Petitioner may sue for arrears accrued after December 2012, and Respondent shall reserve any defenses to same.

This constitutes the decision and order of this Court.

Dated: April 11, 2013
New York, New York

Hon. Sabrina B. Kraus
J.H.C.

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