

United Upper Room Pentecostal Church, Inc. v Sklar
2015 NY Slip Op 30578(U)
March 3, 2015
Sup Ct, Bronx County
Docket Number: 303552/2008
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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THE UNITED UPPER ROOM PENTECOSTAL
CHURCH INC. and PASTOR BARRINGTON
SMITH,

DECISION AND ORDER

Index No. 303552/2008

Plaintiffs,

- against -

MIKE SKLAR,

Defendant.

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PRESENT: Hon. Lucindo Suarez

Upon defendant's notice of motion dated October 20, 2014 and the affirmation and exhibits submitted in support thereof; plaintiffs' undated affirmation in opposition; defendant's affirmation in reply dated February 19, 2015; and due deliberation; the court finds:

Defendant previously moved for summary judgment, which was denied for untimeliness. *See* CPLR 3212(a); *Brill v. City of New York*, 2 N.Y.3d 648, 814 N.E.2d 431, 781 N.Y.S.2d 261 (2004). Defendant now moves for reargument on the ground that the court overlooked the fact that the note of issue was not filed in accordance with the terms of an April 30, 2013 order vacating a prior note of issue, and was therefore a nullity. The April 30, 2013 order stated that the note of issue could be restored by stipulation of all parties or by court order. Plaintiffs do not deny that neither a stipulation nor an order preceded or accompanied the note of issue filed by plaintiffs on February 17, 2014.

The court sees no reason to treat the note of issue as a nullity. Defendant does not claim that discovery remains outstanding, that the case is not otherwise ready for trial or that there is any other circumstance rendering the note of issue a nullity. *See* 22 NYCRR § 202.21(e); *cf.*

Furrukh v. Forest Hills Hosp., 107 A.D.3d 668, 966 N.Y.S.2d 497 (2d Dep't 2013). He has not moved to vacate the note of issue upon learning of it. In fact, in November 5, 2013 correspondence to plaintiffs, defendant requested that plaintiffs forward a stipulation to restore the action to the trial calendar.

Defendant claims not to have been aware of the filing of the note of issue until receipt of the decision denying summary judgment. However, only the filing of a note of issue could have precipitated the transfer of the action from the Mandatory Appearance Part (for inactive cases) to the Pre-Trial Part (for post-note trial-ready cases), where the parties appeared on three occasions prior to the submission of the summary judgment motion. Nevertheless, plaintiffs do not assert that the note of issue was actually served upon defendant; they argue merely that "the note of issue was filed on February 7, 2014. The filing was a matter public record [*sic*]."

Plaintiffs' failure to serve the note of issue constitutes good cause permitting entertainment of the summary judgment motion, *see McFadden v. 530 Fifth Ave. RPS III Assoc., LP*, 28 A.D.3d 202, 812 N.Y.S.2d 88, *rearg denied*, 2006 NY Slip Op 70501(U) (1st Dep't June 20, 2006), and there is no indication that defendant was aware of its filing at any time prior to the first appearance in the Pre-Trial Part, *see Luciano v. H.R.H. Constr., LLC*, 89 A.D.3d 578, 933 N.Y.S.2d 17 (1st Dep't 2011). The court notes that the summary judgment motion was made on the one hundred twentieth day after the action first appeared in the Pre-Trial Part.

As to the merits of the summary judgment motion, the complaint seeks damages for defendant landlord's lease by locking plaintiff tenants out of the premises during the lease term and re-letting the premises. Defendant's answer asserted a counter-claim for unpaid rent. Defendant argued that summary judgment must be granted because plaintiffs cannot establish a

prima facie case, having been precluded by the April 30, 2013 order from offering evidence of payment of rent arrears and damages for lost personal property and replacement rental.

A cause of action for breach of contract requires an enforceable contract, plaintiff's performance of its contractual obligations, defendant's failure to perform under the contract and damages resulting from such failure. *See Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 913 N.Y.S.2d 161 (1st Dep't 2010). Having been precluded from offering proof of payment of rent, plaintiffs cannot demonstrate their performance under the contract. *See Singh v. Data Palette Info. Servs., LLC*, 103 A.D.3d 534, 959 N.Y.S.2d 438 (1st Dep't 2013). Because the preclusion order prevents plaintiffs from establishing a *prima facie* case, summary judgment is appropriate. *See King v. Compass Retail*, 226 A.D.2d 263, 641 N.Y.S.2d 269 (1st Dep't 1996).

Plaintiffs' argument that it is not known whether they were so precluded ignores the plain language of the order, and plaintiffs submitted no proof that they complied with or responded to the order. As plaintiffs' sole response to the discovery demand pre-dates the preclusion order, it may safely be assumed that it was deemed deficient. The April 30, 2013 order was a conditional order which became absolute on July 1, 2013 (sixty days later) upon plaintiffs' failure to comply with its terms. *See e.g. Wilson v. Galicia Contr. & Restoration Corp.*, 10 N.Y.3d 827, 890 N.E.2d 179, 860 N.Y.S.2d 417 (2008); *Callaghan v. Curtis*, 48 A.D.3d 501, 852 N.Y.S.2d 275 (2008); *Gilmore v. Garvey*, 31 A.D.3d 381, 818 N.Y.S.2d 534 (2006); *see also State Farm Mut. Auto Ins. Co. v. Hertz Corp.*, 43 A.D.3d 907, 841 N.Y.S.2d 617 (2007)). To the extent plaintiffs may seek to excuse the failure to exchange proof of payment of arrears by claiming that there were no arrears, plaintiffs' principal testified that they often paid rent in less than the contract amount. Plaintiffs otherwise submitted nothing admissible to raise an issue of fact.

Defendant also moves for summary judgment on his counter-claim for unpaid rent. Although premised on the erroneous assumption that plaintiffs failed to respond to the counter-claim, the motion is supported by defendant's affidavit that plaintiffs failed to pay rent and abandoned the premises. Absent from the motion, however, is any proof that defendant performed under the contract, *see Harris, supra*, particularly significant given plaintiffs' allegations and testimony of being locked out of the premises.

Accordingly, it is

ORDERED, that defendant's motion for leave to reargue the decision and order of the undersigned dated October 7, 2014 is granted; and it is further

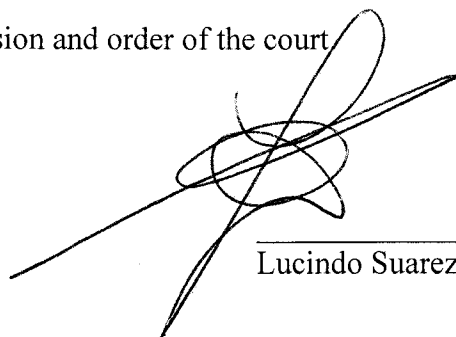
ORDERED, that upon such reargument, defendant's motion for summary judgment dismissing plaintiff's complaint is granted; and it is further

ORDERED, that the Clerk of the Court shall enter judgment in favor of defendant dismissing plaintiffs' complaint; and it is further

ORDERED, that upon such reargument, defendant's motion for summary judgment on its counter-claim for unpaid rent is denied.

This constitutes the decision and order of the court

Dated: March 3, 2015



Lucindo Suarez, J.S.C.