

Tracey Towers Assoc. v Lucien
2018 NY Slip Op 32167(U)
September 7, 2018
Civil Court of the City of New York, Bronx County
Docket Number: LT-46837/16
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 34H

TRACEY TOWERS ASSOCIATES

X

Petitioner

-against-

DECISION & ORDER

Index No.: LT - 46837/16

HON. SABRINA B. KRAUS

GARRETT LUCIEN
20 East Mosholu Parkway S, Apt. 9B
Bronx, New York 10468

Respondent

X

BACKGROUND

This summary nonpayment proceeding was commenced by **TRACEY TOWERS ASSOCIATES** (Petitioner) and sought to recover possession of 387 East Mosholu Parkway N, #4B Bronx, New York 10467 (Subject Premises), based on the allegation that the tenant of record, **GARRETT LUCIEN** (Respondent) had failed to pay rent due for the Subject Premises.

PROCEDURAL HISTORY

Petitioner issued a rent demand dated July 18, 2016, seeking \$4,099.15 in arrears for April through July 2016 at a rate of \$1084.30 per month. The petition was filed on August 11, 2016, and proof of service was filed on August 17, 2016. The affidavit of service asserts that service was made by personal delivery to Respondent at the Subject Premises on August 13, 2016, with an additional mailing done on August 15, 2016.

Respondent did not answer or appear and, on October 7, 2016, Petitioner applied for a default judgment. On October 13, 2016, the application for a default was denied because the affidavit of service was not timely filed.

On November 23, 2016, Petitioner moved for an order deeming the affidavit of service filed timely *nunc pro tunc*. The file jacket indicates the motion was adjourned to January 10, 2017 for “the tenant of record to appear.”

On January 10, 2017, Respondent did not appear but Whitney Goodlett (WG) appeared as did Joan D. Lucien (JL). WG & JL were not made parties to the proceeding, but Petitioner entered into a stipulation with them. The stipulation did not in anyway address the merits of the underlying motion, or the issue of the late filing of the affidavit of service. Rather the stipulation acknowledged that WG & JL had made payments, by money order, totaling \$5421.50 and accepted same subject to collection. The stipulation provided that the default judgment was vacated (although no judgment had in fact been entered) and amended the petition to include a new sums which came due through January 2017 for a total of \$6505.80. WG & JL agreed to pay the balance due (6505.80 - 5421.50) by the end of the month, and Petitioner agreed to make repairs. The stipulation was so-ordered by the court (Black, J).

On April 18, 2017, Petitioner moved for an order restoring the proceeding to the calendar and entering judgment against Respondent, based on the failure of WG & JL to pay the remaining \$1084.30 due pursuant to the January 10, 2017 stipulation. JL appeared on the return date and Petitioner entered into a stipulation with her adjourning the motion to May 8, 2017 for Respondent to appear, and agreeing to have management meet with JL regarding a “non-compliance charge.” On May 8, 2017, WG appeared and again the motion was adjourned to June 5, 2017 for Respondent to appear pursuant to a stipulation which specified that the disputed charge totaled \$5,591.58 and dated back to 2014.

On June 5, 2017, WG appeared and entered into a stipulation consenting to entry of a judgment in the amount of \$6,505.80 against herself, with the warrant to issue forthwith and staying execution through July 20, 2017. The stipulation further provided that a default judgment would be entered against Respondent, and that Respondent was not in the military. The stipulation was so-ordered by the court (Liu, J). Once again the stipulation did not add WG, the only signatory besides Petitioner, as a party to the underlying proceeding. Despite the language in the stipulation, the court issued a judgment against Respondent in the amount of \$6505.80, and no judgment was issued against WG. The warrant of eviction issued on June 20, 2017.

In August 2017, WG was evicted from the Subject Premises, although she had never been made a party explicitly and no judgment or warrant had ever issued as to her or any individual other than Respondent. WG moved to be restored to possession on August 25, 2017, but she arrived to court late that morning and her order to show cause was denied. The same day WG again moved to be restored to possession by order to show cause returnable on August 29, 2017. WG stated that she was the cousin of Respondent, the basis of her failure to appear on time for the previous application and that she was attempting to secure funds to pay the arrears.

The motion was granted by the court (Marin, J) only to the extent of staying re-letting and removal through September 12, 2017, for payment of \$8,601.42 plus September use and occupancy.

THE PENDING MOTION

On July 30, 2018, Respondent appeared for the first time in this proceeding, and moved for an order vacating the money judgment that was improperly entered against him. Petitioner

appeared and submitted opposition. The court heard oral argument on the record and reserved decision.

For the reasons stated below, the motion is granted.

***FAILURE TO TIMELY FILE THE AFFIDAVIT OF SERVICE WAS
A FATAL DEFECT REQUIRING DISMISSAL OF THIS PROCEEDING***

RPAPL § 735(2) provides that proof of service of the notice of petition and petition must be filed within three days of personal delivery to respondent. Here, Petitioner alleged personal delivery on August 13, but did not file proof of service until four days later, August 17. In the First Department this has been held to be a fatal defect (*Riverside Syndicate Inc v Saltzman* 49 AD3d 402).

***UPON PAYMENT OF THE \$5421.50 IN JANUARY 2017, WHICH MORE THAN
SATISFIED THE PETITION AMOUNT, THE COURT LACKED ANY BASIS TO
AWARD PETITIONER FURTHER RELIEF AGAINST THE DEFAULTING
RESPONDENT FOR RENTS DUE FROM JANUARY 2017 FORWARD***

Moreover, even if this defect were overlooked, it is undisputed by Petitioner that the original amount sued for was paid. The fact that Petitioner elected to continue the case with WG and JL, who were never made parties, can not be a basis for the entry of a judgment against Respondent of a money judgment for sums which came due after the petition.

Even JL and WG never agreed to have a money judgment entered against Respondent. Rather the stipulation provided only a default judgment of possession was to have been entered against Respondent, but the court, contrary to the terms of the stipulation, entered a money judgment against the non-appearing Respondent for sums accruing after the initial petition had been satisfied.

***THE STIPULATIONS SIGNED BY JL AND WG
HAVE NO VALIDITY AGAINST RESPONDENT***

As this court has repeatedly held, even if WG had come to court and alleged that she had authority to act on behalf of Respondent and enter a stipulation on his behalf (which representation was in fact never made in this case) the stipulation would still be void as a matter of law, as to Respondent, because a lay person may not represent a litigant in court [*see eg Parkchester Pres. Co., LP v. Feldeine*, 31 Misc. 3d 859 (Civ. Ct. 2011)].

Based on the foregoing there was no basis in law or fact for the entry of the money judgment and warrant of eviction in this proceeding against Respondent. As such Respondent's motion is granted to the extent of vacating the judgment entered against Respondent. All liens and executions on said judgment are also vacated and any sums collected are to be returned to Respondent forthwith.

This constitutes the decision and order of this court.

Dated: September 7, 2018
Bronx, New York

Hon. Sabrina B. Kraus
JCC

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