EVBD LLC v Doe
2019 NY Slip Op 35266(U)
July 12, 2019
Civil Court of the City of New York, Queens County
Docket Number: Index No. L&T 51426/19
Judge: Clinton J. Guthrie
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART A

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EVBD LLC,

Index No. L&T 51426/19

Petitioner-Landlord,

-against-

DECISION/ORDER

JOHN DOE, JANE DOE,

Respondents-Tenants,

JOHN DOE, JANE DOE,

Respondents-Undertenants.

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Present:

Hon. CLINTON J. GUTHRIE
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of unnamed Respondent Ira Sternburg's Order to Show Cause to, *inter alia*, vacate the default judgment:

Papers	**Numbered**
Order to Show Cause & Affidavit Annexed.....	1
Supplemental Affirmation & Exhibits Annexed	2
Affirmation & Affidavit in Opposition.....	3
Notice of Petition and Petition.....	4

Upon the foregoing cited papers, the decision and order on Ira Sternburg's Order to Show Cause is as follows:

PROCEDURAL HISTORY

The immediate holdover proceeding was commenced by Notice of Petition and Petition dated January 10, 2019. After no Respondent appeared on the initial court date, January 30, 2019,

the proceeding was adjourned to March 6, 2019 for inquest. On March 6, 2019, after inquest, the Court (Judge Maria Ressos) granted Petitioner a final judgment of possession against all John Doe and Jane Doe Respondents. On May 6, 2019, unnamed Respondent Ira Sternburg filed a *pro se* Order to Show Cause seeking to vacate the default judgment.[1] On the return date of the Order to Show Cause, May 22, 2019, Queens Legal Services appeared for Mr. Sternburg and the Order to Show Cause was adjourned to June 19, 2019 for submission of supplemental papers and opposition. On June 19, 2019, the Court heard argument on the Order to Show Cause and reserved decision.

ANALYSIS

CPLR § 5015(a)(1) provides that a court may relieve a party from a judgment upon the ground of "excusable default." A party seeking relief under this statutory provision "must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action." *Deutsche Bank Nat. Trust Co. v. Luden*, 91 A.D.3d 701 (2d Dep't 2012). *See also Pursoo v. Ngala-El*, 89 A.D.3d 712 (2d Dep't 2011); *Parker v. City of New York*, 272 A.D.2d 310 (2d Dep't 2000). Where a reasonable excuse and a meritorious defense are evidenced, a default judgment should be vacated since "public policy favors the resolution of cases on their merits." *Li Gang Ma v. Hong Guang Hu*, 54 A.D.3d 312, 313 (2d Dep't 2008).

First, as to Mr. Sternburg's alleged reasonable excuse, he states in his *pro se* Affidavit that "I have not received any paperwork regarding this Index number at all. . . I have no idea about court papers filed. I have been at my home." In his supplemental Affidavit, Mr. Sternburg further states that "I didn't receive any documents until I received the marshal's notice. In addition, no one at my

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[1] Although the *pro se* Answer form only refers to staying the execution of the warrant, the allegations in Mr. Sternburg's affidavit (and the language of the form itself) address defenses and an excuse, which are only relevant in the context of vacatur of a default judgment.

household has ever matched the description provided in the affidavit of service for the Notice of Petition and Petition." In opposition, Petitioner argues that Mr. Sternburg has not denied service of the Notice of Petition and Petition with sufficient specificity, citing to *Matter of Romero v. Ramirez*, 100 A.D.3d 909 (2d Dep't 2012) and *Scarano v. Scarano*, 63 A.D.3d 716 (2d Dep't 2009). Those cases require a sworn denial of service including specific facts to raise a jurisdictional defense and necessitate a traverse hearing. It is true that Respondent does not set forth a specific denial of service that would meet the burden of raising a personal jurisdiction defense that would warrant a traverse hearing. However, the standard for demonstrating a reasonable excuse for failing to appear under CPLR § 5015(a)(1) is not as exacting as lack of personal jurisdiction, and includes circumstances where a party simply did not receive notice and law office failure. *See, e.g.*, *Crevecoeur v. Mattam*, 2019 NY Slip Op 03566 (2d Dep't 2019); Donnelly *v. Treeline Companies*, 66 A.D.3d 563, 564 (1st Dep't 2009); *Latha Restaurant Corp. v. Tower Ins. Co.*, 285 A.D.2d 437 (1st Dep't 2001); *Amaral v. Smithtown News, Inc.*, 2019 NY Slip Op 04122 (2d Dep't 2019).

In consideration of the "strong public policy in favor of resolving cases on the merits" (*Moore v. Day*, 55 A.D.3d 803, 804 (2d Dep't 2008)), the lack of any discernible willfulness on Mr. Sternburg's part (particularly when he was not named in this proceeding), and Mr. Sternburg's sworn statements that he did not receive any court papers under the immediate index number until he received a marshal's notice, the Court finds that Mr. Sternburg has established a reasonable excuse for failing to appear. *See, e.g.*, *De Vito v. Marine Midland Bank, N.A.*, 100 A.D.2d 530, 531 (2d Dep't 1984) (The determination of what constitutes a reasonable excuse "lies within the sound discretion of the trial court.").

As for a meritorious defense, Mr. Sternburg first alleges that Petitioner improperly resorted to naming him as "John Doe" under CPLR § 1024 because it did not attempt to ascertain his identity prior thereto. He states in his supplemental Affidavit that he has lived in the subject premises for four and a half years, that he believed that his mother was the owner, and that no one from EVBD LLC ever approached him. Respondent opposes these allegations through an Affidavit in Opposition from Daniel Pinkhasov, property manager for Petitioner, who states that he went to the premises multiple times in August and September 2018, and again on October 26, 2018, to try to ascertain who resided in the premises but that no one answered the door. The Court finds that Mr. Sternburg has articulated a meritorious defense based on improper use of "John Doe" under CPLR § 1024 but refrains from dismissing the proceeding on that basis at this juncture, as Petitioner has come forth with an adequate explanation of an investigation in its opposition papers to defeat dismissal on the papers. *See, e.g.*, *Bumpus v. New York City Tr. Auth.*, 66 A.D.3d 26, 29-30 (2d Dep't 2009).

In regards Mr. Sternburg's defense based on lack of personal jurisdiction, the Court reiterates its above finding that the Order to Show Cause does not contain a sworn denial with sufficient specificity to refute the process server's affidavit of service, so there is no merit to the personal jurisdiction defense. *See Matter of Romero v. Ramirez* and *Scarano v. Scarano*, *supra*. The defense based on the predicate notice being defective because Petitioner has no authority to maintain the proceeding is without merit because it is based on Mr. Sternburg's knowledge of Petitioner's authority, rather than the objective authority possessed by Petitioner. Finally, the defense based on estoppel is sufficiently pled as a meritorious defense. *See* RPAPL § 743 ("Any" equitable defense may be pled in an answer in a summary proceeding).

Consequently, as Mr. Sternburg has demonstrated a reasonable excuse and meritorious defenses, the Court grants his motion and vacates the default judgment and warrant pursuant to CPLR § 5015(a)(1). Rather than restore the proceeding for trial, however, the Court, pursuant to CPLR § 409(b), finds that it is appropriate to make a summary determination upon the pleadings. *See 1646 Union, LLC v. Simpson*, 62 Misc.3d 142(A), 2019 NY Slip Op 50089(U) (App. Term 2d, 11th & 13th Jud. Dists. 2019) ("[I]n a special proceeding, such as a summary proceeding (*see* RPAPL 701), the court is required to 'make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised' and 'may make any orders permitted on a motion for summary judgment.' (CPLR 409(b)")). Here, the Petition should be dismissed because the Notice to Quit attached to the Petition alleges that Respondents are licensees, but the Petition itself alleges that they are, variously, tenants, undertenants, and squatters.

In *City of New York v. Bullock*, 164 Misc.2d 1052 (App. Term 2d Dep't 1995), the Appellate Term, Second Department affirmed the lower Civil Court decision (*City of New York v. Bullock*, 159 Misc.2d 716 (Civ. Ct. Kings County 1993)), which had granted a motion to dismiss based on improper alternative pleading of licensee and squatter. As Judge Diana Johnson held in the lower court decision in *Bullock*, "even if petitioner is entitled to plead in the alternative, this does not excuse the petitioner from the particularization requirements necessitated in an eviction proceeding." 159 Misc.2d at 719. Here, Petitioner has not even pled in the alternative; instead, the allegations in the Notice to Quit are incompatible with the allegations in the Petition. The Notice to Quit addresses all John Does and Jane Does and states that "you are in possession of the premises as a licensee of EVBD LLC. [sic] or his predecessor-in-interest, the person entitled to the possession of the premises at the time the license was granted to you, who granted the license to

you, and that your right to occupancy is terminated effective December 13, 2018." The Petition, however, makes no reference to licensees whatsoever, and confusingly alleges that "[t]he Respondent, JOHN DOE, JANE DOE [sic] are the tenants who have entered into possession of the Premises without the permission of the Landlord. The Respondents JOHN DOE, JANE DOE are the undertenants of the aforesaid Respondents tenants whose names are unknown to petitioner. Respondents entered into possession of the premises as squatters."

The patent inconsistency between the allegations in the Notice to Quit and the Petition render both defective, as they "fail to property set forth the facts upon which the proceeding is based." *Lilley v. Molina*, 63 Misc.3d 155(A), 2019 NY Slip Op 50815(U) (App. Term 2d, 11th & 13th Jud. Dists. 2019) (citing RPAPL § 741).[2] *See also Hecsomar Realty Corp. v. Camerena*, 62 Misc.3d 143(A), 2019 NY Slip Op 50115(U) (App. Term 1st Dep't 2019) (affirming dismissal of licensee holdover proceeding where only evidence of squatter status was offered); *Bathija v. Chaudhry*, NYLJ, May 6, 1998, at 31, col 5 (App. Term 2d & 11th Jud. Dists. 1998) (affirming dismissal of "trespasser-squatter" proceeding where respondent entered into possession with permission). Since Petitioner is "'bound by the notice served,'" the Petition is devoid of a predicate notice that supports the allegations therein. *Singh v. Ramirez*, 20 Misc.3d 142(A), 2008 NY Slip Op 51680(U) (App. Term 2d & 11th Jud. Dists. 2008) (citing *One East 8th St. Corp. v. Third Brevoort Corp.*, 38 A.D.2d 524 (1st Dep't 1971)). Furthermore, as a defective predicate notice may not be amended, the proceeding must be dismissed, without prejudice. *See, e.g., Chinatown Apts. v. Chu Cho Lam*, 51 N.Y.2d 786 (1980); *125 Court St., LLC*, 2018 NY Slip Op 50092(U).

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[2] In *Lilley*, the Appellate Term affirmed the denial of a motion to restore where the petition and predicate notice alternatively pled that the respondent was a licensee, sublessee or assignee, but an affidavit by petitioner only alleged that the respondent was a squatter.

CONCLUSION

In accordance with the findings made herein, in it hereby ORDERED that Ira Sternburg's motion to vacate the default judgment and warrant is granted, the judgment and warrant are vacated, and the proceeding is dismissed, without prejudice, upon the Court's summary determination.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: Queens, New York
July 12, 2019

HON. CLINTON J. GUTHRIE
J.H.C.

To: Matthew J. Routh, Esq.
Shiryak, Bowman, Anderson, Gill & Kadochnikov LLP
80-02 Kew Gardens Road, Suite 600
Kew Gardens, NY 11415
Attorneys for Petitioner

SO ORDERED - HON. CLINTON J. GUTHRIE

Lino Diaz, Esq.
Queens Legal Services
89-00 Sutphin Boulevard, 5th Floor
Jamaica, NY 11435
Attorneys for Respondents