

6914 Ridge Blvd LLC v Delao

2020 NY Slip Op 35574(U)

June 30, 2020

Civil Court of the City of New York, Kings County

Docket Number: Index No. 86571/2018

Judge: Jeannine Baer Kuzniewski

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART O
6914 RIDGE BLVD LLC.,

Petitioner,

Index No. 86571/2018

DECISION/ORDER

-against-

ELINORA DELAO,
JOHN DOE & JANE DOE,
Respondent-Tenants.

Hon. Jeannine Baer Kuzniewski

Recitation, as required by CPLR 2219(A), of the papers considered in the review of this Notice of Motion:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIRMATION & AFFIDAVIT ANNEXED	<u>1</u>
ORDER TO SHOW CAUSE AND AFFIRMATION ANNEXED	<u> </u>
ANSWER AFFIRMATION	<u>2</u>
REPLYING AFFIRMATION	<u>3</u>
EXHIBITS	<u> </u>
STIPULATIONS	<u> </u>
OTHER Decision dated 1/6/2020	<u>4</u>

Upon the foregoing cited papers, the Decision/Order on this Notice of Motion pursuant to CPLR §§2004, 4404, 5015(a) and 5019(a) or in the alternative for the Court to settle the transcript is as follows:

This is a holdover proceeding in which the respondent asserted succession rights as her defense. This Court held a trial on four dates, June 13, 2019, June 25, 2019, September 9, 2019 and November 7, 2019. On January 6, 2020 this Court issued a decision which awarded the respondent succession rights and dismissed the proceeding with prejudice. A Notice of Entry was filed on January 16, 2020 and a Notice of Appeal was filed on February 13, 2020. Thereafter, on May 20, 2020, the petitioner filed this Motion which was heard on June 15, 2020.

Counsel for the petitioner, who was substituted in as counsel after the decision after trial was issued, is arguing that a new trial is required as the transcript from the third day of the trial is not available. The Court notes that an investigation was done concerning the recording and this Court was informed that although the case was logged

into the FTR on two occasions on September 9, 2019¹ there was no volume to the recording. It is noted that all cases logged in on that day did not have volume and there is no explanation available for how this occurred.

Movant argues that they are entitled to a new trial based upon their inability to perfect an appeal due to the loss of one day of trial transcript. CPLR §4404(b) provides:

“(b) Motion after trial where jury not required. After a trial not triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside its decision or any judgment entered thereon. It may make new findings of fact or conclusions of law, with or without taking additional testimony, render a new decision and direct entry of judgment, or it may order a new trial of a cause of action or separable issue.”

The respondent opposes this part of the Motion based upon CPLR §4405 which provides:

“A motion under this article shall be made before the judge who presided at the trial within fifteen days after decision, verdict or discharge of the jury. The court shall have no power to grant relief after argument or submission of an appeal from the final judgment.”

It is undisputed that the motion was not timely made. The petitioner argues that the delay should be excused pursuant to CPLR §2004 which provides:

“Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.”

In support of this argument the petitioner claims that upon being retained they promptly submitted a request for the audio recording of the trial. The Court notes that the Notice of Appeal filed on February 13, 2020 was done by current counsel’s office and Exhibit G of this motion contains an email request for the transcript that is dated January 30, 2020. That request was for three of the trial dates. On February 5, 2020 a second request was submitted seeking the transcript for all four days of the trial.² A review of the email attached to the Exhibit supports a finding that there was notice of a problem with

¹FTR 12:00:46 and 2:36:31, room 505.

²See Exhibit H.

the audio on or before February 10, 2020. On March 13, 2020 it was confirmed that the transcript for September 9, 2019 was not available.³ On March 7, 2020 Governor Cuomo declared a disaster emergency in New York under Executive Order 202. On March 22, 2020, the New York State on PAUSE became effective.

Under the facts before the Court, the Court will grant an extension to CPLR §4405 pursuant to CPLR §2004. It is undisputed that the Motion is untimely and was untimely even prior to tolling of statutes due to the global pandemic.⁴ The petitioner's counsel offered "good cause" for the delay in attempting to obtain the transcript. The Court recognizes that the movant was not trial counsel and therefore did not have personal knowledge of the days of the trial or the courtrooms in which the trial took place.

"[A] litigant, within 15 days of the date of the verdict, may make a written motion for such relief (CPLR 4405, 4406). A litigant's failure to timely move is not necessarily fatal if the litigant can establish 'good cause' for the delay ...".⁵

Under the facts presented in the Affirmation and Affidavit In Support the Court will consider the Motion. Upon a review of the arguments presented, the Court denies that part of the Motion pursuant to CPLR §4404(b). The Court recognizes that the lack of a transcript for one of the days of trial would be prejudicial to the petitioner. However, this does not support setting aside the decision of the Court and ordering a new trial. The petitioner has remedies that they have not pursued.

"A party to an appeal is entitled to have the record show the facts as they really occurred at the trial and should not be prejudiced by an error or omission of the stenographer. A defendant's remedy for a claim that the trial transcripts are incorrect is to move before the trial court to resettle the transcript. Pursuant to the CPLR, any errors or deficiencies in the transcript which are not remedied by the consent of the parties may be settled by the trial court, which is the final arbiter of the record."⁶

"Thus, an appeal may be held in abeyance and remitted to the trial judge for

³Exhibit J attached to Motion.

⁴NYS Executive Order 202, 202.28, 202.31.

⁵Casey v. Slattery, 213 A.D.2d 890, 891, 623 N.Y.S.2d 942, 943 (1995)

⁶36A Carmody-Wait 2d § 207:109

a hearing to settle the transcript where its accuracy is in question, so that the transcript accurately reflects what transpired. The appellate court may also remit the matter for a new trial if it finds that the transcript is so replete with inaccuracies or omissions as to preclude adequate review of the issues being raised on appeal. Remittitur is not required, however, to correct inconsequential errors in transcription.”⁷

The Court recognizes that the loss of one day of trial testimony is not inconsequential, however, the loss of a transcript has been similarly and previously encountered by other courts.

“Where no stenographic record was made of the trial court proceeding (or where a record was made but no transcript is available, for example, because the stenographer's minutes have been lost), a statement in lieu of transcript must be prepared and settled by the parties.”⁸

“It is the duty of the Trial Judge to settle the transcript, or, if the stenographer's minutes are lost, a statement in lieu of a transcript pursuant to CPLR 5525(d) in accordance with her recollection of what transpired at the trial. The Trial Judge's recollection may be supplemented or aided by affidavits offered by the parties after notice of settlement is given, but it is her recollection that must ultimately control (*Cassella v. Manikas*, 8 A.D.2d 587, 183 N.Y.S.2d 618).”⁹

The petitioner does not claim to have approached the respondent's counsel for a statement of the missing day's testimony. Nor do they claim to have contacted the petitioner's trial counsel. Paragraph 25 of the Affirmation In Support of the Motion quotes prior counsel from the transcript when he stated that he was working off an outline. This leads this Court to believe that new counsel has been on notice that trial counsel may have some notes. Additionally, the petitioner has not attempted to settle the transcript, had the procedure been followed, the Court would have been obligated to review it's own contemporaneous notes to see if the transcript could be settled.

“The fact that the stenographer's minutes of the trial are lost and cannot be

⁷Supra.

⁸§ 12:7. Statement in lieu of transcript where a record of the proceeding was not made or has been lost, 8 N.Y.Prac., Civil Appellate Practice § 12:7 (3d ed.)

⁹Brandenburg v. Brandenburg, 188 A.D.2d 368, 369, 591 N.Y.S.2d 38, 38 (1992)

obtained or the stenographer is dead does not relieve the trial justice from the duty of settling the case on appeal. Under such circumstances, the case must be settled in accordance with his recollection of what transpired at the trial. This recollection may be supplemented or aided by affidavits offered by the respective parties after notice of settlement is given, but the recollection of the trial justice must control.”¹⁰

The denial of that part of the Motion seeking a new trial is consistent with the case law relied upon by the petitioner. The movant argues that this situation is unique as the cross-examination of the respondent and the testimony of two out of three of the collaborating witnesses is missing. However, the applicable case law contemplated situations where the entire trial record was not available due to the loss of the stenographer’s notes or upon the death of the stenographer. The court in Monaco v. New York City Transit Authority¹¹ ruled:

“A stenographic transcript is an aid to the judge, who is tasked with the final responsibility to certify the record (*see* *707 CPLR 5525 [c], [d]). The parties may agree on a statement in lieu of a transcript and the court may adopt, according to its own recollection, a statement in lieu of transcript submitted by one of the parties (*see Brandenburg v Brandenburg*, 188 AD2d 368 [1992]). However, **when no agreement and no reconstruction is possible**, a new trial is required. Indeed, in civil cases, where a stenographer dies or is no longer in possession of minutes and the minutes cannot be obtained, meaningful appellate review is impaired and a new trial should be ordered if reconstruction is not possible.”

At this juncture it cannot be determined that “no reconstruction is possible” when the petitioner has not taken any steps to reconstruct the transcript. The petitioner has offered no proof that the loss of the transcript for one of the four days of trial makes it infeasible to settle the transcript. Further, there has been no case law asserted that the voluntary substitution of counsel warrants a new trial. Accordingly, the Court grants that part of the Motion seeking an extension of time to file the motion, and upon doing so denies that part of the Motion seeking a new trial. It is for the petitioner to proceed pursuant to CPLR §5525.

Dated: June 30, 2020


Hon. Jeannine Baer Kuzniewski, J.H.C.



Hon. Jeannine Baer Kuzniewski, J.H.C.

¹⁰ Cassella v. Manikas, 8 A.D.2d 587, 587, 183 N.Y.S.2d 618, 619 (1959)

¹¹ 153 A.D.3d 705, 706–07, 59 N.Y.S.3d 774 (2017). Emphasis added.