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| 420 W. 42nd St., LLC v Mercado |
| 2021 NY Slip Op 32084(U) |
| October 19, 2021 |
| Civil Court of the City of New York, New York County |
| Docket Number: 80711/17 |
| Judge: Vanessa Fang |
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART D

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420 WEST 42ND STREET, LLC,

Index No. L&T 80711/17

Petitioner,

Motion Seq. No.: 002

-against-

DECISION/ORDER

LUIS MERCADO,

Respondent-Tenant,

ROSA VARGAS, "JOHN DOE," and/or "JANE DOE,"

Respondent-Undertenants.
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Recitation, as required by CPLR § 2219(a), of the papers considered in review of this motion by petitioner to restore this proceeding for a hearing based on respondent's breach of the parties' stipulation of settlement dated November 18, 2019.

| PAPERS | NUMBERED |
|--|--------------------|
| Notice of Motion & Affidavits Annexed | 1 (NYSCEF # 3-17) |
| Order to Show Cause and Affidavits Annexed | |
| Answering Affidavits | 2 (NYSCEF # 18-19) |
| Replying Affidavits | |
| Exhibits | |
| Stipulations | |
| Other | |

VANESSA FANG, J.:

Petitioner commenced this summary holdover proceeding against Luis Mercado ("respondent"), Rosa Vargas, "John Doe," and "Jane Doe" seeking to recover possession of the subject premises, located at 420 West 42nd Street, Apartment #18D, New York, New York on the grounds that respondent was committing or permitting a nuisance by maintaining the apartment in a deplorable condition that substantially interfered with the comfort and safety of petitioner and other tenants and occupants in the subject building.

On March 21, 2018, respondent filed an answer raising various defenses. Both petitioner and respondent were represented by counsel. No other respondents appeared or answered.

On March 22, 2018, the parties entered into a two-attorney so ordered court stipulation (hereinafter “2018 stipulation”) containing the following terms:

1. Respondent consents to the jurisdiction of the court.
2. Respondent explicitly denies any and all allegations in the Notice to Terminate and/or Petition and neither the fact of entering this agreement nor any language used herein shall explicitly or implicitly constitute such an admission.
3. Respondent agrees to cease and desist from any claims outlined in the Notice to Terminate and/or Petition in so far as they constitute a nuisance.
4. This matter shall be marked “off calendar” for a period of eighteen (18) months commencing forthwith and ending September 22, 2019.
5. To ensure compliance, respondent to provide access to petitioner to inspect the condition of the apartment on four occasions: 7/2/2018, 11/5/2018, 3/4/2019, and 7/2/2019.
6. In the event that petitioner alleges in good-faith that paragraph 3 of this agreement has been breached, petitioner may move to restore the matter for all appropriate relief including a judgment by notice of motion on eight (8) days notice to Respondent’s counsel for a hearing on the issue of whether paragraph 3 of this agreement has been breached. The allegations forming the good faith basis for Petitioner’s motion shall be set forth in an affidavit, attached to such motion, of someone with personal knowledge of the alleged breach. In the event that Petitioner files a motion to restore the within matter for a hearing but fails to attach an affidavit of someone with personal knowledge demonstrating a good faith basis for belief that this agreement has been breached, Petitioner shall not be entitled to a hearing.
7. Specifically, in order to prove that paragraph 3 of this agreement has been breached, petitioner must prove, at such hearing, that Respondent’s behavior since entering into this agreement constitutes a nuisance. During such hearing, if Petitioner is able to prove that paragraph 3 of this agreement has been breached, Respondent shall be allowed to introduce evidence of a cure, to the extent curable, of the alleged breach of the stipulation. Petitioner reserves the right to claim that the breach is not curable. In the event that Petitioner proves to the satisfaction of this Court that Respondent has breached paragraph 3 of this agreement and Respondent cannot prove that the alleged breach has been cured, Petitioner may seek all appropriate relief, without prejudice to Respondent’s rights pursuant to RPAPL 753.
8. In the event that the period described in paragraph 3 above has elapsed without any party seeking to restore this matter, this matter shall be deemed discontinued with prejudice effective September 22, 2019.
9. This stipulation may not be modified except in writing by both parties.

10. To avoid any negative inferences this stipulation shall be deemed to have been written jointly by both parties.

On or about August, 2019, petitioner filed a motion to restore alleging that respondent breached the 2018 stipulation. On November 18, 2019, the parties entered into another two-attorney so ordered court stipulation (hereinafter “2019 stipulation”). Essentially, the underlying provisions of the 2018 stipulation were reiterated with the following modifications:

1. Respondent acknowledges that on August 22, 2019 there was a presence of bed bugs in the subject premises.
2. On or about October 29, 2019, Petitioner was granted access, and an extermination treatment was successfully conducted in the subject premises.
3. Respondent explicitly denies any and all allegations pertaining to nuisance in the subject premises made by Petitioner in its August 22, 2019 Motion to Restore.
5. Respondent agrees to extend the probationary period outlined in the “Stipulation of Settlement”, dated March 22, 2018. As such, this matter shall be marked “off calendar” for a period of [twelve] (12) months commencing forthwith and ending November 18, 2020.
6. To ensure compliance, respondent to provide access to petitioner to inspect the condition of the apartment and/or to continue extermination treatment on five occasions: January 10, 2020; April 10, 2020; July 10, 2020; October 10, 2020; November 17, 2020. Access on these dates from 9am to 11am.
7. In the event that Petitioner fails to gain access to the Subject Premises on the dates set forth in paragraph 5 of this agreement, Petitioner shall provide Respondent’s counsel notice of such within 48 business hours notice by phone at (212) 541-5996 so that the access date may be rescheduled.
10. In the event that the period described in paragraph 3 above has elapsed without any party seeking to restore this matter, this matter shall be deemed discontinued with prejudice effective November 18, 2020.

On May 24, 2021, petitioner filed the instant motion to restore alleging that respondent breached the 2019 stipulation. This matter was then calendared in the HMP Part to connect unrepresented litigants with counsel through the Office of Civil Justice of the New York City Human Resources Administration right-to-counsel (Universal Access) program. Subsequently, respondent-undertenant, Rosa Vargas, retained counsel and petitioner discontinued against John Doe and Jane Doe.

Petitioner seeks to restore this matter for a hearing due to respondent’s alleged breach of the parties’ 2019 stipulation as evidenced by an inspection that petitioner conducted on July 7, 2020 after receiving a neighbor’s letter dated July 6, 2020 complaining about a bedbug infestation emanating from respondent’s apartment. Petitioner states it performed two other inspections of the subject premises on November 17, 2020 and April 16, 2021 and again found respondent in violation of the parties’ 2019 stipulation.

Petitioner argues that the Covid-19 pandemic hampered its ability to timely file the instant motion. Petitioner maintains that a letter application to convert this proceeding to the court’s NYSCEF (New York State Courts Electronic Filing) system was filed with the court in August, 2020. However, that application was only approved by the court on May 5, 2021. Petitioner asserts therefore that it was prevented from seeking relief prior to the November 18, 2020 deadline as set forth in the 2019 stipulation.

Respondent opposes petitioner’s motion and asserts that petitioner is bound by the terms of the parties’ 2019 stipulation which required petitioner to restore the matter by November 18, 2020 or the matter would be deemed discontinued. Respondent argues that petitioner’s failure to timely restore this proceeding per those terms renders this instant motion as untimely and that this matter be deemed discontinued with prejudice.

Respondent-undertenant Rosa Vargas joins in respondent’s opposition and, at oral argument, further asserts that she was not a party to either the 2018 or 2019 stipulations. Therefore, the relief sought in this motion cannot be obtained against Ms. Vargas and petitioner would be required to serve and file a separate motion for appropriate relief against her.

In March, 2020, the global Covid-19 public health pandemic ensued upending billions of lives and changing the landscape of nearly every facet of daily life overnight. Despite this, the

New York City Housing Court continued to hear housing matters and made adjustments to convert to a virtual setting and maintain health safety protocols during the ongoing pandemic. Throughout these unprecedented, challenging times, several Administrative Orders of the Chief Administrative Judge of the Courts and Directives and Procedures of the Administrative Judge of the Civil Court of the City of New York were issued to ensure the public’s continued access to the Housing Court by aligning the court’s increasing technological capabilities and infrastructure with the evolving public health emergency. *See* Administrative Orders of the Chief Administrative Judge of the Courts 87/20 (May 1, 2020), 115/20 (May 28, 2020), 121/20 (June 9, 2020), 267/20 (November 6, 2020), 268/20 (November 17, 2020); Directives and Procedures of the Administrative Judge of the Civil Court of the City of New York DRP-208A (June 15, 2020), 213 (August 12, 2020); *see also* Coronavirus and the New York State Courts: Latest Statewide Administrative Orders, <https://www.nycourts.gov/latest-AO.shtml> (last accessed October 19, 2021).

Petitioner acknowledges that, pursuant to the terms of the 2019 stipulation, unless a motion to restore was filed by November 18, 2020, the proceeding would be deemed discontinued with prejudice. Yet, petitioner seeks to be relieved from its agreed upon obligation to seek restoration in a timely manner based on a reasonable excuse, the pandemic. Unfortunately, petitioner offers nothing to support this request and instead highlights what petitioner failed to do. For instance, petitioner did not reach out to the court to inquire about the status of its pending application to convert the proceeding to NYSCEF or to seek assistance with its efforts to convert to electronic filing. Petitioner also did not provide explanations regarding why a motion was not filed via the court’s Electronic Document Delivery Systems (EDDS) which was available for electronic filing prior to the authorization to use NYSCEF or why a

motion was not at least served on respondent’s counsel in a timely manner despite challenges with the court’s filing system. Petitioner also did not notify or communicate with respondent’s counsel either by phone, letter, or email from the date of the alleged breach on July 7, 2020 to the filing of this motion on May 24, 2021 although counsel’s contact information (phone number, mailing address, and email) was provided in the stipulation. Rather, the motion and alleged breach by respondent only came to light on May 24, 2021 when the motion was filed on NYSCEF. Despite petitioner’s allegation that respondent breached the 2019 stipulation’s probationary period, in the absence of any lawful exception to enforcement of the two-attorney agreement, petitioner has not established a reasonable excuse for its delay in filing this motion. Petitioner is bound by the terms of its stipulation. Accordingly, petitioner’s motion to restore is denied and this proceeding is dismissed as against respondent Luis Mercado.

Lastly, petitioner is not without relief as the parties were informed that a Supreme Court action was recently filed seeking an order granting petitioner access to the subject premises. In addition, at the close of oral arguments, respondent Luis Mercado indicated that he is willing to provide access to petitioner for bedbug remediation of the subject premises. The parties were encouraged to quickly arrange access so as to effectively remediate any hazardous or unsafe conditions in the apartment to protect the health and safety of respondents and other tenants in the building.

This constitutes the decision and order of the court.

Dated: October 19, 2021
New York, New York



HON. VANESSA FANG, J.H.C.