

Livian v Soblesohn
2021 NY Slip Op 32554(U)
October 22, 2021
Civil Court of the City of New York, Queens County
Docket Number: Index No. 068713/19
Judge: Maria Ressos
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART B

-----X Index No.:068713/19

MICHAEL M. LIVIAN,

Motion Cal. # _____ Motion Seq. # _____

Petitioner,

DECISION/ORDER

-against-

Recitation, as required by CPLR §2219(a), of the
Papers considered in the review, Motion:

STEVE SOBLESOHN,

Papers Numbered

Respondents-Tenant,

Motion & Affirm 1
Cross- Motion & Affirm in Opp.....2
Reply.....3

"JOHN DOE" & " JANE DOE"

Respondents-Occupants,

-----X

HON. MARIA RESSOS, J.H.C.

Petitioner moves herein for an order restoring this matter to the calendar and allowing Petitioner to execute on the warrant of eviction based upon respondent’s default on a stipulation dated December 5, 2019. Respondent cross-moves pursuant to CPLR§ 5015(a)(3) to vacate the previously executed stipulation, judgement and warrant. Respondent additionally cross-moves pursuant to CPLR§§ 3211 (a)(1) and/or (a)(2) and /or (a)(7) and /or (a)(8) to dismiss the proceeding. Respondent additionally cross-moves in the alternative pursuant to CPLR§§ 2004 and/or 3012(d) for leave to interpose the annexed proposed answer. Petitioner opposes the cross-motion in all respects.

This holdover proceeding first appeared on the court’s calendar on October 28, 2019 and was adjourned to December 5, 2019 for Respondent to seek counsel. On that day, the respondent who was still unrepresented entered into a stipulation with Petitioner, who had an attorney, in which the respondent consented to the entry of a final judgment of possession in favor of Petitioner with a warrant to issue forthwith and execution stayed to April 30, 2020 for Respondent to vacate the premises. The stipulation additionally provided that Petitioner severed claims for rent arrears/ use and occupancy thru April 30, 2020 in consideration for compliance with the agreement. A warrant of eviction was issued on January 6, 2020. The earliest execution date was May 1, 2020. Respondent failed to vacate the premises and continues to reside there. Due to the COVID-19 pandemic, evictions were stayed due to various legislation and administrative orders. Pursuant to DRP-213, Petitioner was required to make the instant motion in order to execute on the warrant of eviction. The case first appeared in the HMP on May 25, 2021 and was adjourned to June 29, 2021 in Part B for the respondent to complete the intake process with the assigned legal service provider. It was then adjourned several times for the intake process to be completed and motion practice. This Court reserved decision on the motion on September 13, 2021.

In support of the cross-motion, Respondent argues that the Court should vacate the stipulation, judgment and warrant for good cause because he appeared un-represented and entered into the stipulation without advice of counsel, without knowledge of the applicable defenses and counterclaims and consented to terms that are highly prejudicial including the severance of

claims for use and occupancy and a possessory judgment. In his affidavit in support of the motion Respondent alleges that he agreed to sign the stipulation because he believed Petitioner “agreed to cancel the rent arrears.” Sobelsohn affidavit ¶10,12. However the stipulation states that the rent was severed rather than waived and Respondent alleges that had he known that the arrears were not being waived, he would not have signed the stipulation. Respondent additionally contends that the stipulation does not reserve his defenses and counterclaims should Petitioner sue him in a plenary action. Respondent additionally argues that he was not aware that the Petitioner was required to serve him a ninety day notice to terminate his tenancy as he occupied the premises for more than two years and since Petitioner only served him with a thirty day notice, he had a meritorious defense which he was not aware of and failed to raise. Therefore, not only should the stipulation be vacated but the case should be dismissed pursuant to CPLR§§ 3211 (a)(1) and/or (a)(2) and /or (a)(7) and /or (a)(8) or in the alternative he should be granted leave to interpose the annexed proposed answer.

Petitioner in opposition argues that the Court should not vacate the stipulation as it would be inequitable and unjust to do so. Petitioner avers that Respondent has had the benefit of an additional fifteen months to vacate the premises due to the COVID-19 pandemic, the shutdown of court operations for some time and the resulting delays. Petitioner contends that Respondent has not paid any use and occupancy during this time and therefore has had the full benefit of the stipulation. Petitioner argues that the stipulation was reviewed meticulously by the court staff prior to being allocated by Judge Lai who “so-ordered” the stipulation. Therefore, Respondent was aware of the terms of the stipulation prior to signing it. Furthermore, courts favor the enforcement of stipulations as it serves the interest of resolving disputes efficiently which is essential to the management of court calendars. Petitioner additionally argues that in the absence of fraud, collusion, mistake or accident courts have upheld stipulations. Moreover, there is no good cause to vacate the stipulation in this case, the fact that Respondent was unrepresented by itself, is insufficient to vacate the stipulation. Petitioner further argues that the stipulation in this case is patently fair, clear and concise and it would be highly prejudicial and unjust for this Court to vacate a “so-ordered” stipulation that was entered into well before the COVID-19 pandemic based upon the reasons set forth by Respondent.

Petitioner argues that the predicate notice was proper and Respondent was given sufficient notice as required under RPL§ 232-a as amended by the HSTPA. In support of this position, Petitioner argues that the amendment of the HSTPA was effective on October 12, 2019. However, since October 12, 2019 was a Saturday and October 14, 2019 was a holiday, the actual effective date was October 15, 2019. However, although the notice of petition and petition were served on the respondent on October 15, 2019, they were filed in court on October 4, 2019 and that is the date when the proceeding was commenced, not October 15, 2019 when the papers were served on respondent. Therefore, Petitioner was not required to serve a ninety day notice as the amendment to the HSTPA was not effective when the proceeding was commenced.

As the cross-motion is dispositive, the Court will address Respondent’s cross-motion first. The HSTPA amended RPL§ 226-c and RPL§ 232 -a to lengthen the time of the termination notice a landlord must give a tenant based upon the length of the tenancy. Prior to these amendments in order to terminate a month -to-month tenancy a landlord was only required to serve a thirty day notice. However, with the amendments, if the tenant occupied the premises for a year or less

then only a thirty day notice is required. One year to less than two years requires a sixty day notice and two or more years requires a ninety day notice. These provisions apply to proceedings commenced on or after the statute’s effective date, October 12, 2019. However, since October 12, 2019 was a Saturday and October 14, 2019 was a holiday, the first “actual effective date was October 15, 2019. *Denis v. Fisher*, 66 Misc. 3d 433 (Civ. Ct. Qn Cty, 2019) The issue here is when was this proceeding commenced. Respondent advances the position that this proceeding was commenced when the notice of petition and petition was served upon him on October 15, 2021 by nail and mail service. In support of this position, Respondent cites *92 Bergenbrooklyn, LLC v. Cisarano*, 50 Misc. 3d 21 (AT 2nd, 11th & 13th Jud. Dists, 2015). In that case, the Appellate Term affirmed the lower court’s dismissal of the summary holdover proceeding on the basis that the proceeding was commenced upon service of the papers on the tenant, “albeit based on a somewhat narrower rationale.” *Id* at 23. After analyzing the history of the commencement by filing system and the case law, the Appellate Term stated as follows: “Based on this clearly expressed intention in the legislative history to make summary proceedings subject to the commencement –by-filing system in courts in which that system applies (it does not apply in the Justice Courts), we hold that a summary proceeding is commenced by filing in the Civil Court.” *Id* at 24. However, later in its decision, the Appellate Term refined its position by stating, “it is our view that the question of when a summary proceeding is “commenced” must now be answered differently, in this context and others, depending on the context in which the question arises.” *Id* at 24. For the purpose of obtaining jurisdiction, commencement must be determined by service of the petition and notice of petition. The court held that in the context of whether the acceptance of rent vitiated the termination notice “commencement must continue to be defined by service of the petition and notice of petition, not when they are filed.” *Id* at 25.

In *64 Van St. LLC v. Cuevas*, NYLJ March 25, 2020 at p. 21, col. 2. (Civ. Ct. Qns Cty) the Hon. Clinton Guthrie followed the Appellate Term in *92 Bergenbrooklyn LLC* finding that, in the case before him, there is a similar basis for tying commencement to service of the notice of petition and petition and only when a respondent has been served with the notice of petition and petition are they put on notice that the landlord is proceeding with an eviction and only then are both parties apprised of the nature of the notice served. In that case, at issue was when the proceeding was commenced to determine the applicability of the HSTPA and the propriety of the predicate notice served on the tenant. The index number was purchased and the petition filed on October 8, 2019, yet the notice of petition and petition were not served until after October 15, 2019 and proof of service and the notice of petition and petition were filed with the clerk on October 18, 2019. Judge Guthrie, held that since the service of the notice of petition and petition were completed after October 17, 2019, the amended RPL§232 -a and its notice requirements were applicable. He dismissed the case as the landlord had only served a thirty day notice on the tenant who resided in the premises for more than two years. Similarly, in *Sukaj Group LLC v. Mallia*, 66 Misc. 3d 1223(A) (Civ. Ct. NY Cty 2020) the Hon. Shorab Ibrahim, dismissed a summary proceeding where the petition was dated October 21, 2019 and served on November 4, 2019. In that case however, both the filing and the service of the notice of petition and petition were completed after the October 15, 2021 effective date of the statute.

In *Denis v. Fisher*, the Hon. Sergio Jimenez opined that [t]he point where a proceeding is commenced is either: (1) The date the notice of petition and petition were filed; or (2) The date

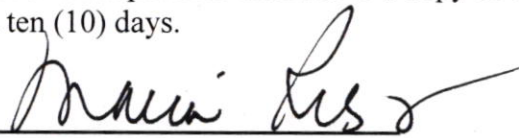
that service was effectuated upon the respondent or; (3) The date that the petitioner filed proof of service with the court. In that case, the notice of petition and petition were filed on October 17, 2019, the notice of petition and petition were served on the respondent on October 25, 2019 and the petitioner filed proof of service with the court on October 28, 2019. Judge Jimenez did not determine the exact date the proceeding was commenced as all three dates were after the effective date of the amendment to the statute.

In the instant proceeding, it is undisputed that Petitioner obtained an index number and filled the notice of petition and petition on October 4, 2019. Petitioner completed the service of the notice of petition and petition on Respondent on October 15, 2019 when he mailed the papers to Respondent. Petitioner then filed the notice of petition, petition and proof of service in the Civil Court on October 16, 2019. Following the analysis of the Appellate Term in *92 Bergenbrooklyn, LLC* and in the context of determining the applicability of the amended RPL§§ 232-a and 226-c, this Court finds that this proceeding was commenced by service of the notice of petition and petition on the respondent on October 15, 2019. It is only at that time that the respondent would have been put on notice that the landlord is proceeding with the case. Since the notice of petition and petition were served on October 15, 2019, the effective date of the amendment, the notice requirements of RPL§ 232-a apply to this case. As it is undisputed that Respondent occupied the premises for more than two years and Petitioner only served a thirty day notice of termination, the case is subject to dismissal. See *64 Van Street, LLC v. Cuevas*; *Sukaj Group LLC v. Mallia*. This was a viable defense that Respondent could have raised prior to entering into the stipulation, if he had the benefit of counsel. There is no indication in the stipulation that Respondent knowingly waived this defense. Petitioner could not maintain this proceeding with a defective predicate notice unless Respondent waived that defense.

Accordingly, Petitioner’s motion is denied in all respects and the branches of the cross-motion seeking vacatur of the stipulation, judgement and warrant and dismissal of the proceeding is granted. The branch of respondent’s motion seeking leave to file an answer is denied as moot. The stipulation entered on December 5, 2019, the judgement and warrant are all vacated and the proceeding is dismissed without prejudice.

This constitutes the decision and order of the Court. Respondent shall serve a copy of this order with notice of entry upon the petitioner within ten (10) days.

Dated: October 22, 2021
Queens, NY



Hon. Maria Ressos, J.H.C.

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**MARIA RESSOS
JUDGE, HOUSING COURT**