

<b>3630 Holland LLC v Davis</b>
2021 NY Slip Op 32860(U)
March 17, 2021
Civil Court of the City of New York, Bronx County
Docket Number: L&T Index No. 6820/19
Judge: Howard J. Baum
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inquest was held. Thereafter, on April 2, 2019, Respondent, as a self-represented litigant, filed an order to show cause seeking to vacate the default judgment. Prior to the determination of the order to show cause, the proceeding was adjourned several times to give Respondent the opportunity to retain an attorney, for the attorney to submit supplemental papers in support of the order to show cause and for further motion practice. Petitioner submitted papers in opposition and Respondent submitted papers in reply.

By a Decision/Order, dated September 9, 2019, the court (Shorab Ibrahim, J.) granted the motion, vacated the default, ordered the late answer annexed to the supplemental papers in support of the motion was “deemed served and filed on consent” and adjourned the proceeding “for settlement or trial.” After the proceeding was transferred to the trial part, Respondent moved the court, pursuant to CPLR 408, for leave to conduct discovery. The motion was granted by a Decision/Order, (Shorab Ibrahim, J.) dated November 25, 2019.

Thereafter, at a subsequent pre-trial conference, this Court ruled the Decision/Order of September 9, 2019 requires a traverse hearing prior to holding a trial. This ruling was based on the language within the Decision/Order that “Respondent adequately and specifically rebuts facts in the process server’s affidavit (*Grinshpun v. Borokhovich*, 100 AD3d 551, 552 [1st Dept 2012]),” and Respondent stating a lack of personal jurisdiction defense in the answer she interposed.<sup>1</sup>

In the current motion before the court, Petitioner seeks to strike the defense seeking the dismissal of this proceeding based on the court’s asserted lack of personal jurisdiction over

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<sup>1</sup> Among the other defenses Respondent raised in her answer, she asserts Petitioner has failed to state a cause of action because the apartment is subject to the rent stabilization law and code and Petitioner has not alleged a basis under the code for evicting her.

Respondent. Petitioner argues the defense was waived because Respondent did not raise it as a basis to vacate the default judgment within the order to show cause she filed on April 2, 2019.<sup>2</sup> Additionally, Petitioner argues Respondent waived her lack of personal jurisdiction defense by moving the court seeking leave to conduct discovery after the answer was interposed.

Respondent has opposed the motion arguing the defense was properly interposed and that a party defending a lawsuit is permitted to seek discovery without waiving a personal jurisdiction defense. In reply, Petitioner draws a distinction between conducting discovery in a plenary action, where discovery is as of right, as opposed to a summary eviction proceeding where leave of court is required to conduct discovery. CPLR 408.

### Discussion

Preliminarily, Petitioner's motion is denied to the extent it seeks an order striking Respondent's lack of personal jurisdiction defense because her original motion seeking to vacate the default judgment, filed by order to show cause on April 2, 2019 when she was a self-represented litigant, did not include a personal jurisdiction defense.

As stated above, the September 9, 2019 Decision/Order granting Respondent's motion allowed the lack of personal jurisdiction defense to go forward. Under the law of the case doctrine, "a court should not ordinarily reconsider, disturb or overrule an order in the same action of another court of coordinate jurisdiction." *Dondi v. Jones*, 40 NY2d 8, 15 (1976) citing *Mount Sinai Hospital Inc. v. Davis*, 8 AD2d 361 (1st Dept 1959). Such a rule is critical to the

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<sup>2</sup> Respondent's affidavit in support of the order to show cause does not directly raise a lack of personal jurisdiction defense although, as a reasonable excuse for her default, she stated she was unaware of the proceeding and that Petitioner had been made aware her mailbox key had broken.

orderly administration of justice in a court composed of several judges. *Mount Sinai Hospital Inc. v. Davis*, 8 AD2d 361 (1st Dept 1959); *Post v. Post*, 141 AD2d 518 (2d Dept 1988).

Petitioner has not provided a rationale as to why the law of the case doctrine should not be applied here.

Moreover, as noted in the Decision/Order of September 9, 2019, Petitioner consented to the service and filing of the late answer interposed by Respondent. Therefore, Petitioner cannot now seek to strike defenses within the answer. *3849 Assocs. v. Utley*, NYLJ Sept. 26, 1986 at 12, c 4 (App Term 1st Dept).

As relevant to the alternative basis argued for striking Respondent's lack of personal jurisdiction defense, Petitioner cites to *Tratado De Libre Comercio, LLC v. Splitcast Technology LLC*, 2018 WL 233797 (Sup Ct NY County 2018) and *Flaks, Zaslow & Co. v. Bank Computer Network Corp.*, 66 AD2d 363 (1st Dept 1979) in arguing that by taking affirmative advantage of the court's powers, by seeking leave to conduct discovery, Respondent ratified the court's jurisdiction and waived any challenge she may have to the court's personal jurisdiction over her.<sup>3</sup> However, Petitioner's reliance on *Tratado De Libre Comercio, LLC* and *Flaks, Zaslow & Co.* is misplaced in relation to the factual circumstances here.

*Flaks, Zaslow & Co.*, which the court in *Tratado De Libre Comercio, LLC* cites as authority in ruling that a party that moved for an order compelling arbitration of the claims

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<sup>3</sup> Petitioner also cites to *Prezioso v. Demchuk*, 127 AD2d 576 (2d Dept 1987) and *Liebling v. Yankwitt*, 109 AD2d 780 (2d Dept 1985) which hold that a party who interposes a counterclaim that is unrelated to the subject matter of a claim raised against her waives a lack of personal jurisdiction defense. Petitioner acknowledges in its reply papers in support of the motion that it is not arguing the counterclaims raised in Respondent's answer are unrelated to the claims in the petition.

against them waived its lack of personal jurisdiction defense, does not hold that every motion seeking relief from a court, by a respondent who has raised a personal jurisdiction defense, results in the waiver of the defense. Rather, as is stated in *Carpet v. Walter Arnold, Inc.*, 94 AD2d 643 (1st Dept 1983), which distinguishes the ruling in *Flaks, Zaslów & Co.*, the determination as to whether a lack of personal jurisdiction defense has been waived depends on whether the respondent, in seeking other relief from the court, has made the court their own forum.

Under the circumstances presented here, in which a motion was made for leave to conduct discovery, Respondent has not made this court “her own forum” in a manner that would waive her lack of personal jurisdiction defense, particularly considering the discovery she sought related to her defense to the merits of the petition, that she is a rent stabilized tenant. Actively defending a proceeding, including moving for summary judgment to dismiss a proceeding on the merits (*Gliklad v. Cherney*, 97 AD3d 401 [1st Dept 2012]) and participating in discovery (*Calloway v. National Servs. Indus.*, 93 AD2d 734 [1st Dept 1983], *aff’d* 60 NY2d 906 [1983]; *Edwards, Angell, Palmer & Dodge, LLP v. Gerschman*, 116 AD3d 824 [2d Dept 2014]; *Williams v. Uptown Collision, Inc.*, 243 AD2d 467 [2d Dept 1997]; *Dinicu v. Groff Studios Corp.*, 215 AD2d 323 [1st Dept 1995]), does not result in the waiver of her lack of personal jurisdiction defense.

Moreover, the efforts by Petitioner to distinguish the above cited caselaw, in which a defendant in a plenary action, where a party may conduct discovery as of right, did not waive a lack of personal jurisdiction defense by conducting discovery, from the circumstances here, in which Respondent was required to move for leave, pursuant to CPLR 408, to conduct discovery,

are not persuasive. The procedural requirement that a party seeking to conduct discovery in a summary proceeding must obtain leave of court is in the interest of keeping the proceeding summary in nature. *Smilow v. Ulrich*, 11 Misc 3d 179 (Civ Ct NY County 2005), quoting *42 W. 15<sup>th</sup> St. Corp. v. Friedman*, 208 Misc 123, 125 (App Term 1st Dept 1955); *Plaza Operating Partners Ltd. v. IRM (U.S.A.) Inc.*, 143 Misc 2d 22 (Civ Ct NY County 1989). It is not intended to prevent a party, who has shown ample need to conduct discovery in defending a proceeding, from pursuing all her defenses including lack of personal jurisdiction.

Further, just as a defendant in a plenary action does not waive a lack of personal jurisdiction defense where they have sought relief from the court to compel discovery (*Calloway v. National Servs. Indus.*, 93 AD2d 734 [1st Dept 1983], *aff'd* 60 NY2d 906 [1983]) or to impose sanctions for an adversary's failure to comply with discovery (*Beris v. Miller*, 128 AD2d 822 [2d Dept 1987]) there is no reason Respondent should be found to have waived her jurisdictional defense for seeking relief from the court, pursuant to CPLR 408, to engage in discovery.

For these reasons, Petitioner's motion is denied.

Accordingly, this proceeding is placed back on the court's calendar on April 16, 2021 at 12:00 p.m. for conference. The parties are required to appear before the court by video/telephone conference. If needed, call 718-618-3566 or e-mail [civbxhs-virtual@nycourts.gov](mailto:civbxhs-virtual@nycourts.gov), prior to the court date, for information on how to appear by video/telephone conference. If appearing by video/telephone conference is not possible the parties must notify the court at 718-618-3566 at least 3 business days before April 16, 2021.

This constitutes the decision and order of the court.

Dated: Bronx, New York  
March 17, 2021



HON. HOWARD BAUM,  
J.H.C.

HOWARD J. BAUM  
JUDGE, HOUSING COURT