

Thomas Jefferson Owners Corp. v Lokshin

2024 NY Slip Op 33120(U)

March 18, 2024

Civil Court of the City of New York, Queens County

Docket Number: Index No. 303841/21

Judge: Clifton A. Nembhard

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This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART B

THOMAS JEFFERSON OWNERS CORP.
Petitioner

L&T Index # 303841/21

-against-

IGOR LOKSHIN
69-11 Yellowstone Boulevard, Apt. A56
Forest Hills, New York 11375
Respondents-Tenants

DECISION/ORDER

“JOHN DOE” & “JANE DOE”
Respondents-Possible Occupants

Hon. Clifton A. Nembhard

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondent’s motion.

| Papers | Numbered |
|--|-----------------|
| Notice of Motion and Affidavits Annexed | 1 |
| Order to Show Cause and Affidavits Annexed | |
| Answering Affidavits | 2 |
| Replying Affidavits | 3 |
| Exhibits | |
| Other | |

Upon the foregoing cited papers, the decision/order on this motion is as follows:

Background

Petitioner commenced this nonpayment proceeding to recover maintenance arrears from November 2017 to November 2018 totaling \$6,137.34. Prior to commencement petitioner served a demand seeking \$6,877.17 in maintenance from November 2017 to May 2021 at \$458.13 a month. Respondent filed a pro se answer on or about July 1, 2021. Thereafter, respondent filed a hardship declaration effectively staying the proceeding through January 15, 2022. Respondent moves by counsel for an order: 1) granting him leave to file and serve an amended answer; 2) awarding him summary judgment or 3) in the alternative, granting him leave to conduct discovery. The instant motion was filed electronically. Petitioner does not oppose

the branch of the motion that seeks leave to interpose an amended answer and respondent withdrew his first affirmative defense that the premises are not properly registered with the Department of Housing Preservation and Development. Accordingly, the proposed amended answer annexed to the motion is deemed served and filed timely and respondent's first defense is stricken.

Discussion

Respondent moves for summary judgment on the grounds that the predicate notice is defective and that petitioner accepted rent for months accruing after the months sought in the demand notice. Respondent first argues that the rent demand is fatally defective because it is not a good faith approximation of the sums owed. Specifically, respondent asserts that for the months demanded his monthly base maintenance was \$660.23 and he received a tax abatement credit of \$202.10 therefore he should have been charged \$458.13 each month. However, for the year 2017 he overpaid by \$806.36 therefore he should have received a credit in 2018. Moreover, he attempted to pay the balance owed through December 2018 but petitioner refused to accept it. Petitioner argues that this branch of the motion should be denied because respondent failed to attach a copy of the rent demand to the motion. The Court finds this contention unavailing. While CPLR 3212(b) requires the submission of the pleadings and other available proof to support a motion for summary judgment, CPLR 2221 provides that in an e-filed action such as this one the proponent of a motion need not include copies of papers that were previously filed with the court.

As to the demand, respondent relies on communications between his former attorney and petitioner's counsel after a previous nonpayment case was dismissed.¹ In a letter dated December 28, 2018, respondent's attorney calculates the arrears his client owes from January 2017 through December 2018 to be \$2,858.64. Counsel also enclosed a check for this sum as payment in full. On January 14, 2019, counsel follows up with an e-mail to petitioner's attorney stating that he's now made two unsuccessful attempts to tender his client's maintenance after the dismissal of the nonpayment case. Petitioner, in opposition to the motion, notes that respondent failed to include his attorney's response to the emails. On January 3, 2019, petitioner's attorney wrote a letter to respondent's lawyer informing him that he was not authorized to communicate directly with petitioner. The letter also indicated that petitioner disagreed with the dismissal of the case and the conclusion drawn by respondent as to the sum outstanding. On January 9, 2021, petitioner's attorney again wrote to respondent's counsel informing him that the tender did not bring respondent's account current despite respondent's contention.

It is axiomatic that a proper rent demand is a condition precedent to a nonpayment case. RPAPL 711(2), 741(4); *Chinatown Apts. v. Chu Cho Lam*, 51 NY2d [Ct App 1980]. The demand must set forth an approximate good faith amount of the arrears allegedly owed as well as the period for which the arrears are demanded. *Dendy v. McAlpine*, 27 Misc3d 138(A) [2nd Dept 2010]. A demand which fails to meet these criteria is defective and cannot be amended. *Chinatown Apts. v. Chu Cho Lam*, *supra*. The demand notice here alleges that respondent's maintenance for 2018, after a tax abatement credit of \$202.13, was \$458.13 a month as respondent asserts.

¹ Thomas Jefferson Owners Corp. v. Lokshin, L&T Index No. 56273/18.

Significantly, respondent offered no proof that he had overpaid by \$806.36 at the end of 2017 and the prior nonpayment case was dismissed solely on the grounds that the demand included fees which did not fall within the coverage of items permitted as additional rent. Finally, the petitioner did not concede that the \$2,858.64 tender was the total due. Accordingly, there are questions of fact which preclude the Court from finding that, as a matter of law, the rent demand is not a good faith approximation of the arrears owed by respondent.

Respondent's second ground for summary judgment is equally unavailing. Respondent, citing to *Morris v. Local 804 Delivery & Warehouse Employees Health & Welfare Fund*, 116 Misc2d 234 [Civ Ct Qns 1982], argues that petitioner waived its right to a summary proceeding by accepting current maintenance after the alleged original default. Respondent notes that the rent demand seeks two months of maintenance from 2017, eleven months of maintenance from 2018 and one month from 2021. However, the rent for the intervening months of 2019, 2020 and January 2022 through April 2021 were paid and accepted between the time the rent demand was served and the filing of the petition. *Morris v. Local 804 Delivery & Warehouse Employees Health & Welfare Fund*, *supra* stands for the proposition that a landlord cannot maintain a summary proceeding where money and not possession was at issue. The case at bar is distinguishable from *Morris* in that petitioner, in addition to a money judgment, petitioner is also seeking a judgment of possession. Respondent's contention that the money sought is not due under his current lease does not change this conclusion since petitioner commenced this case shortly after its appeal of the prior nonpayment case was denied.

Respondent seeks discovery to ascertain how much petitioner charged and how much he paid since January 2017. Discovery is generally not granted in nonpayment cases as there are usually no complex issues in dispute. Here respondent seeks discovery, in large part, due to his prior attorney's letter and email asserting that he only owed \$2,858.64 through December 2018. The amount of his actual maintenance and the amount he tendered to petitioner from January 2017 is not information in petitioner's exclusive possession. In fact, respondent's attorney included a breakdown of this information in his December 28, 2018 letter. Accordingly, the Court does not find that there is ample need for discovery in this case. *New York Univ. v. Farkas*, 121 Misc2d 643 [Civ Ct NY 1983].

Conclusion

Based on the foregoing, the motion is denied. The matter is adjourned to April 10, 2023 at 9:30 am for settlement or trial.

This constitutes the decision and order of the Court.

Date: March 18, 2024
Queens, New York



Hon. Clifton A. Nembhard, JHC