

25-70 Realty LLC v Bahana

2024 NY Slip Op 33356(U)

June 18, 2024

Civil Court of the City of New York, Queens County

Docket Number: Index No. L&T 313710/23

Judge: Clinton J. Guthrie

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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

-----X
25-70 REALTY LLC,

Petitioner,

Index No. L&T 313710/23

-against-

DECISION/ORDER

JONATHAN BAHANA, JOHN DOE, JANE DOE,

Respondents,

-----X

Present:

Hon. CLINTON J. GUTHRIE
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of petitioner’s motion for discovery sanctions pursuant to CPLR § 3126, to compel discovery pursuant to CPLR § 3124, and for use and occupancy:

Papers	Numbered
Notice of Motion & All Documents Annexed.....	<u>1 (NYSCEF #27-33)</u>
Answer/Affirmation in Opposition & All Documents Annexed.....	<u>2 (NYSCEF #34)</u>
Affirmation in Reply & All Documents Annexed.....	<u>3 (NYSCEF #49-58)</u>

Upon the foregoing cited papers, the decision and order on petitioner’s motion is as follows.

PROCEDURAL HISTORY

This summary holdover (licensee) proceeding was filed in August 2023. Respondent Jonathan Bajana (hereinafter “respondent”) appeared, pro se, after commencement and has asserted a defense of succession to the tenancy of the subject rent-stabilized apartment. After petitioner served discovery demands, the court (Schiff, J.) rendered a Decision/Order dated January 17, 2024 acknowledging that respondent consented to production of discovery documents and set a deadline of March 5, 2024 for production. Subsequently, this court rendered a Decision/Order dated March 13, 2024, which extended the discovery production date

to April 12, 2024.¹

On April 29, 2024, petitioner filed the instant motion, which seeks discovery sanctions, including the striking of respondent's answer, pursuant to CPLR § 3126, or, in the alternative, an order compelling discovery compliance pursuant to CPLR § 3124. The motion also seeks use and occupancy. Respondent submitted an Answer/Affirmation in Opposition, along with certain documents, and petitioner submitted reply papers. The court heard argument on petitioner's motion on June 14, 2024 and reserved decision.

DISCUSSION & CONCLUSION

The court first addresses petitioner's request for discovery sanctions. CPLR § 3126 permits a court to impose sanctions, including deeming issues resolved, precluding certain evidence, or striking a pleading. Appellate courts have limited the discretion to impose discovery sanctions to circumstances where a party has engaged in willful and contumacious conduct in failing to comply with discovery obligations (*see Cannon v. 111 Fulton St. Condominium, Inc.*, 162 AD3d 838, 840 [2d Dept 2018]; *Yong Soon Oh v. Hua Jin*, 124 AD3d 639, 641 [2d Dept 2015]; *Vaccaro v. Weinstein*, 117 AD3d 1033, 1034 [2d Dept 2014]). Moreover, "[t]he court has broad discretion to determine the nature and degree of any sanction imposed under CPLR 3126 for failure to comply with discovery demands or orders." *Pfeiffer v. Shouela*, 206 AD3d 941, 942 [2d Dept 2022]).

Here, the court recognizes that respondent is unrepresented and has produced some documents to petitioner, namely expired driver's licenses, renewal leases, DHPD (Department of Housing Preservation and Development) notices, letters from the prior owner, a death certificate

¹ In a Decision/Order dated March 14, 2024, this court also denied a motion for use and occupancy by petitioner.

for Luis Bajana, and a CityFHEPS approval. Nonetheless, respondent has not produced documents responsive to several of the categories requested by petitioner, nor has he submitted a *Jackson*-style affidavit for any categories of documents that he does not possess.

Upon due deliberation, the court grants petitioner's motion to the extent of conditionally precluding respondent's reliance on any documents, at trial or otherwise, covered by petitioner's discovery demands that are not produced to petitioner's attorneys by July 10, 2024 (*see Robert v. Azoulay Realty Corp.*, 209 AD3d 781, 784 [2d Dept 2022]).² The court deems this to be the relief warranted under both CPLR §§ 3124 and 3126 and deems both prongs of petitioner's motion to be granted to this extent. The court does not find that the "drastic remedy" of striking respondent's answer (*see Pfeiffer*, 206 AD3d at 943) is warranted, particularly in consideration of the substantial interests that are implicated by a claim of succession rights (*see Matter of Murphy v. New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 653 [2013]; *Matter of Jourdain v. New York State Div. of Hous. & Community Renewal*, 159 AD3d 41, 45 [2d Dept 2018]; *Thanasoulis v. Shapiro*, 81 Misc 3d 132[A], 2023 NY Slip Op 51304[U], *1 [App Term, 1st Dept 2023] [Waiver of succession defense deemed an "excessively severe result."]) [internal citations omitted].

The court will next address petitioner's "renewed" request for use and occupancy. The court previously denied a motion by petitioner for use and occupancy, finding that petitioner had not established that the requisite adjournments solely attributable to respondent had occurred to trigger the provisions of RPAPL § 745. Petitioner again moves for use and occupancy and alleges that there is now a sufficient basis for the court to grant discovery pursuant to RPAPL §

² Respondent shall not be precluded from relying on any documents previously produced, including those annexed to the opposition papers.

745.

However, the court finds that the requisite two (2) adjournments or 60 days “made solely at the request of the respondent” (excluding an initial adjournment to obtain counsel) have not occurred (*see* RPAPL § 745(2)). While petitioner states that the case was adjourned on March 13, 2024 at respondent’s request, to comply with discovery, the court actually reserved decision on petitioner’s prior motion for use and occupancy on the same date and restored the case on May 7, 2024 in rendering its decision. Therefore, the court does not find this time to be countable against respondent. While there is no dispute that respondent requested additional time to oppose petitioner’s motion for discovery sanctions on May 7, 2024, the following adjournment, on May 30, 2024, was effectively for petitioner to submit reply papers. Therefore, at this juncture, one adjournment and 23 days are deemed to be solely attributable to respondent. Accordingly, petitioner’s motion for use and occupancy under RPAPL § 745 is denied.

Finally, while petitioner submitted opposition and evidence in its reply papers to address a reference made by respondent to the existence of an ERAP application, there was no proper cross-motion made under CPLR § 2215. To the extent that petitioner has demonstrated that an approval has been made on Isabel Bajana’s application, a determination has occurred and there is no basis for a stay of this proceeding (*see Ben Ami v. Ronen*, 79 Misc 3d 14, 16 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2023]). For the court to opine further on the effect, if any, of the ERAP approval and/or the receipt and return of any ERAP funds would be an impermissible advisory opinion in the absence of a motion made on notice (*see Matter of B.Z Chiropractic, P.C. v. Allstate Ins. Co.*, 197 AD3d 144, 154 [2d Dept 2021] [“Courts of New York do not issue advisory opinions...our courts instead resolve controverted questions of fact and law affecting parties’ present interests”]).

Accordingly, petitioner's motion is disposed according to the foregoing determinations.

The proceeding will be restored to Part B, Room 403, on July 17, 2024 at 9:30 AM for trial transfer.

This Decision/Order will be filed to NYSCEF and emailed and mailed to respondent.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: Queens, New York
June 18, 2024



HON. CLINTON J. GUTHRIE
J.H.C.

SO ORDERED - HON. CLINTON J. GUTHRIE