

Steiner v Klein
2024 NY Slip Op 35537(U)
March 8, 2024
Civil Court of the City of New York, Kings County
Docket Number: Index No. LT-320285-23/KI
Judge: Karen May Bacdayan
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART G

ANDREAS STEINER

Index No. LT-320285-23/KI

Petitioner,

DECISION/ORDER

-against-

Motion Sequence Nos. 1-2

ISRAEL KLEIN, JOHN DOE, JANE DOE

Respondents.

ENTERED
3/8/2024, 9:38:15 AM

HON KAREN MAY BACDAYAN, JHC

Law Offices of Scott D. Gross (Scott David Gross, Esq.), for the petitioner
The Beltas Law Firm (Brandy Andrea Beltas, Esq.), for the respondent

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by
NYSCEF Doc Nos.: 6-26.

PROCEDURAL POSTURE AND BACKGROUND

Petitioner commenced this holdover proceeding against Israel Klein (“respondent”) on the basis that his lease has expired. Prior to the commencement of this proceeding, in March 2022, the parties submitted their dispute to arbitration before a rabbinical court. (NYSCEF Doc No. 11, petitioner’s exhibit C, agreement to submit to arbitration.) The rabbinical court determined that respondent must vacate the subject apartment by February 28, 2023. (NYSCEF Doc No. 12, petitioner’s exhibit D, judgment of rabbinical court, dated March 23, 2022. [“Party B [respondent] is required to vacate the apartment at 578 Bedford Ave #2D on or before February 28, 2023.”])¹ Respondent failed to timely vacate and, in late March 2023, petitioner served upon respondent a 90-day notice of termination pursuant to Real Property Law §§ 232-a and 226-c. Respondent submitted an answer to the petition claiming, without further explanation, “retaliatory reasons.” (NYSCEF Doc No. 5, *pro se* answer, dated December 5, 2023. Now before the court is petitioner’s motion for summary judgment based on the March 23, 2022 award of the rabbinical court; and for use and occupancy should respondent be granted a stay of the execution of the warrant. (NYSCEF Doc No. 6, notice of motion [sequence 1].)

¹ The court notes that the arbitration agreement provides that “The parties submit themselves to the personal jurisdiction of the courts of the State of New York and/or New Jersey for any action or proceeding to confirm or enforce the award of the Arbitrators.” *Id.*

The day before petitioner's motion was noticed to be heard, respondent retained counsel who filed a cross-motion to dismiss the proceeding on the basis that the arbitration agreement and award provided that the rabbinical court "shall have continuous jurisdiction over the implementation, enforcement or over any matter arising out of or relating to a . . . final award[.]) In the alternative, respondent moved for a stay of the proceeding to enable him to return to the rabbinical court to seek modification of the arbitration agreement. (NYSCEF Doc No. 22, respondent's exhibit C, agreement to submit to arbitration; NYSCEF Doc No 17, notice of motion [sequence 2].)² Neither party provided to the court the underlying decision or any record of deliberations, and, indeed, none may exist.

Petitioner's attorney submitted opposition to respondent's cross-motion and opposition that same evening. (NYSCEF Doc No. 26, petitioner's attorney's affirmation in opposition.) Petitioner argues that no motion to dismiss will lie based on an agreement to arbitrate. Petitioner further argues that no stay should be granted as respondent has not actually sought a hearing with the rabbinical court, and, as the facts and circumstances have not changed, the rabbinical court is unlikely to arbitrate the controversy again. Additionally, petitioner argues that respondent has waived his remedy in arbitration.

Despite respondent's attorney's mistaken belief that the court would take the motion on submission, the court heard oral argument on March 7, 2024. Respondent's attorney was not prepared for argument. The court will first discuss respondent's cross motion.

DISCUSSION

Petitioner is correct that an agreement to arbitrate disputes is not grounds for dismissal of this proceeding. As stated in *Allied Bldg. Inspectors Int'l Union of Operating Eng'rs v Office of Labor Relations*, 45 NY2d 735 (1978), "neither the dismissal of the petition nor the direction to proceed to arbitration [] can stand. An agreement to arbitrate is not a defense to an action. Thus, it may not be the basis for a motion to dismiss[.]" (*Id.* at 738 [internal citation omitted].) Moreover, respondent has not properly moved to compel arbitration; however,

² Respondent's attorney cursorily addresses an argument made in respondent's papers that petitioner has been cashing earmarked rent checks from respondent, rent which it is prohibited to accept without a court order. Aside from not understanding this argument as petitioner is specifically allowed to accept rent without prejudice at this juncture pursuant to RPAPL 711 (1), respondent did not state this as a basis for dismissal in the notice of motion. If any discrepancy arises between the relief sought in the notice of motion and the relief sought in the supporting papers, the notice of motion will control. See Part G rules (VII) available at <https://www.nycourts.gov/COURTS/nyc/housing/Judge/partrules/KBacdaya.pdf>.

because it is not a certainty that a second arbitration would be entertained based as it would be on the same circumstances that existed in March 2022, there is also no certainty that such a motion, if filed, would be granted. As stated in *Fid. Brokerage Servs., Inc. v. Epstein*, 239 AD2d 342 (2d Dept 1997), “Supreme Court properly concluded that the doctrine of *res judicata* precluded the appellants from bringing a second arbitration based on the same transaction, despite the fact that the arbitration award was [as in the instant case] never confirmed[.]” (*Id.* at 342 [internal citation omitted].)

Neither is a stay warranted given that the court finds respondent has waived his option to arbitrate the underlying issues in this dispute. As stated in *Lew v Johnson*, 31 Misc 2d 867 (Westchester County Ct 1961):

“We believe the rule to be well established that a party to an arbitration agreement may by his actions or lack of action waive his rights to arbitration of a dispute; so also the rule that undue delay or action inconsistent with an intention to enforce such a right will result in a waiver of that party's right to arbitration. *Boening v Hoe & Co.*, 156 N.Y.S. 2d 13 [1956 Supreme Ct., Westchester County, Gallagher, J.] citing *Haupt v Rose*, 265 N.Y. 108.” (*Lew*, 31 Misc 2d at 869.)

Indeed, “[t]here is . . . nothing irrevocable about an agreement to arbitrate. Both of the parties may abandon this method of settling their differences, and under a variety of circumstances one party may waive or destroy by his conduct his right to insist upon arbitration.” (*Zuber v Commodore Pharmacy, Inc.*, 24 AD2d 649, 650 [2d Dept 1965] [internal citations and quotation marks omitted].) Here, by sitting on his rights for over a year since the date the rabbinical court required respondent's vacatur, and by advancing that he wishes to arbitrate this dispute six months after this proceeding was filed against him, respondent has abandoned his intent to arbitrate his ability to remain in the subject apartment.³

³ Incidentally, the Supreme Court of the United States recently decided in *Morgan v Sundance*, 596 US 411 (2022), that prejudice is not a consideration in the context of waiving a right to arbitrate: “Nine circuits, including the Eighth, have invoked the strong federal policy favoring arbitration in support of an arbitration-specific waiver rule demanding a showing of prejudice. Two circuits have rejected that rule. We do too.” (*Sundance, Inc.*, 596 US at 416 [internal quotation marks and footnotes omitted].) While neither party has argued prejudice, respondent has enjoyed over one year of occupancy after the vacate date ordered by the rabbinical court.

Petitioner's Motion for Summary Judgment

A court may employ the drastic remedy of summary judgment only where there is no doubt as to the absence of triable issues. (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974].) On such a motion, a court's function is to find, rather than to decide, issues of fact. (*Southbridge Towers, Inc. v Renda*, 21 Misc 3d 1138 [A], 2008 NY Slip Op 52418 [U] [Civ Ct, NY County 2008], citing *Epstein v Scally*, 99 AD2d 713 [1st Dept 1984].) The facts must be considered "in the light most favorable to the non-moving party." (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011].) Only upon a *prima facie* showing of entitlement to summary judgment, does the burden shift to the non-moving party to establish material issues of fact requiring a trial. (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted].) "An unfounded reluctance to employ the remedy of summary judgment only serves to swell the trial calendar and to deny other litigants the right to have their claims properly adjudicated." (*Andre v Pomeroy* at 364.)

Petitioner has sustained its burden. There is no material issue of fact. In fact, petitioner's motion is unopposed as the affirmation and affidavit submitted are only in support of respondent's cross-motion. Moreover, nothing has changed since The Rabbinical Court of Givas Hamorah handed down its decree. Respondent fairly had his case heard over two years ago by a rabbinical court of his choosing. There can be no question that respondent had a full and fair opportunity to be heard in that forum. Through his failure to act, respondent has abandoned his option to arbitrate whatever rights he may have to remain in the apartment.

CONCLUSION

Accordingly, it is

ORDERED that respondent's motion is DENIED; and it is further

ORDERED that petitioner's motion is hereby GRANTED; and it is further

ORDERED that a judgment of possession shall enter immediately as to ISRAEL KLEIN; and it is further

ORDERED that the motion is denied as to John Doe and Jane Doe, as Petitioner has failed to establish that they are an individuals who resides in the apartment, or to demonstrate diligent efforts to ascertain their identities and has not adequately described them. (*Wilmington Trust, N.A. v Shasho*, 197 AD3d 534, 536 [2d Dept 2021]; *Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 29-30 [2d Dept 2009]; *Lebowitz v Fieldston Travel Bureau, Inc.*, 181 AD 2d 481 [1st

Dept 1992]; *Michaelangelo Preservation LLC v Clark*, 2022 NY Slip Op 50424 [U] [Civ Ct, Bronx County 2022]); and it is further

ORDERED that the warrant of eviction shall issue forthwith only as to ISRAEL KLEIN and may be executed *without a stay*; and it is further

ORDERED that petitioner's request for a hearing to determine the fair value of use and occupancy in the event execution of the warrant is stayed is DENIED without prejudice to renewal should respondent seek a stay on the execution of the warrant; and it is further

ORDERED that petitioner shall serve and file a copy of this decision and order, with notice of entry by regular mail upon respondent and upload proof of service to NYSCEF within five (5) business days; and it is further

ORDERED that the earliest execution date ("EED") is March 9, 2024. This means that the petitioner shall not cause service of a marshal's notice until on or after the EED date; and it is further

ORDERED that, because of respondent's undisputed age, Adult Protective Services shall be notified prior to execution of the warrant.

This constitutes the decision and order of this court.

Dated: March 8, 2024
New York, NY

So Ordered: 
HON. KAREN MARY BACDAYAN
Judge, Housing Part