

Bella & Sons Realty LLC v Polanco
2024 NY Slip Op 35538(U)
August 19, 2024
Civil Court of the City of New York, Bronx County
Docket Number: Index No. LT-331365-23/BX
Judge: Bryant F. Tovar
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Civil Court of the City of New York
County of Bronx

Index # **LT-331365-23/BX**



Bella & Sons Realty LLC

Petitioner(s)

Decision / Order

-against-

Ashley Polanco; "John" "Doe"; "Jane" "Doe"

Respondent(s)

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Order to show Cause/ Notice of Motion and Affidavits /Affirmations annexed	1
Answering Affidavits/ Affirmations	2
Reply Affidavits/ Affirmations	3
Memoranda of Law	
Other	4

Upon the foregoing cited papers, the Decision/ Order on the motion is granted for the following

reason(s):

BACKGROUND AND PROCEDURAL HISTORY

Bella & Sons Realty LLC (Petitioner) commenced this non-payment proceeding against Ashley Polanco (Respondent), "John Doe" and "Jane Doe" seeking rental arrears of \$20,443.00 through July 2023, pursuant to a lease agreement between the parties, wherein the respondent would pay \$1370.25 to reside in Apartment 1A ("subject premises") within 801 East 226 Street, Bronx, New York 10466. Prior to the commencement of this proceeding the petitioner served upon the respondent a fourteen (14) day rent demand. After the expiration of the fourteen-day rent demand, the petitioner commenced this non-payment proceeding. On or around August 15, 2023, the respondent filed a pro se answer with this court. The parties first appeared in the intake part on October 24, 2023, at 3:00 p.m. The proceeding was assigned to resolution Part K, with a return date of December 12, 2023, at 2:00 p.m. In the interim, the respondent retained Mobilization for Justice, Inc. as her counsel. The proceeding was adjourned from December 12, 2023, to February 13, 2024, at 9:30 a.m. The respondent's counsel filed a motion with this court via the New York State Courts Electronic Filing system (NY St Cts Elec Filing [NYSCEF])

Doc No. 7, notice of motion). The petitioner filed opposition. On February 13, 2024, the proceeding was adjourned to April 8, 2024, for the respondent to file a reply. The respondent filed a reply. On April 6, 2024, the petitioner filed a second opposition. On April 8, 2024, the parties appeared before the court, the motion was taken upon submission and was marked as decision reserved.

The respondent seeks dismissal pursuant to Civil Practice Law and Rules (CPLR) § 3211(a)(7), and Real Property Actions and Proceedings Law (RPAPL) § (714)(4), § 702(1), and § 711(2) on the grounds the rent demand is defective. Respondent further seeks a finding of laches and summary judgment pursuant to CPLR § 3212. In the alternative respondent seeks leave to amend the pro-se answer filed by the respondent.

The petitioner opposes alleging the respondent violated CPLR § 2214(b) by short-serving the motion and providing seven days' notice instead of eight days' notice ([NYSCEF] Doc No. 8, affirmation in opposition to motion). Additionally, the petitioner's counsel does not believe laches apply as the "petition was filed in July of 2023 only 2 months after the CDC declared the Covid-19 pandemic over in May 2023. Petitioner argue respondent should not be permitted to raise a laches defense under these circumstances" (NYSCEF Doc No. 8, affirmation in opposition to motion). Notably, the petitioner fails to provide an affidavit in support from anyone with personal knowledge or provide documentary evidence.

In reply, respondent asserts the motion is timely pursuant to CPLR § 406(b) The respondent also highlights the petitioner's opposition fails to refute the defects in the rent demand. Interestingly, the respondent argues the petitioner could have commenced this proceeding at any time after August 2020 as the court continued to function ([NYSCEF] Doc No. 9, affirmation in reply).

The court notes and rejects the late affidavit in opposition filed by petitioner on April 6, 2024, from a Martin Vuksanaj ("Vuksanaj")([NYSCEF] Doc No. 10, affidavit in opposition).

LAW AND ITS APPLICATION

Service Requirements CPLR § 2214(b)

The relevant portion of CPLR § 2214(b) states “A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard...”. Here, the respondent's counsel filed this motion on February 6, 2024, on the New York State Courts Electronic Filing system, which was seven days prior to the return date, February 13, 2024.

CPLR § 2001 states:

“At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.”

The New York Court of Appeals in *Ruffin v Lion Corp.*, 15 NY3d 578, 582-83 [2010] clearly articulated:

“CPLR 2001 may be used to cure only a “technical infirmity” (*Matter of Miller v. Board of Assessors*, 91 N.Y.2d 82, 87, 666 N.Y.S.2d 1012, 689 N.E.2d 906 [1997]; *see also e.g. Matter of Tagliaferri v. Weiler*, 1 N.Y.3d 605, 606, 775 N.Y.S.2d 753, 807 N.E.2d 864 [2004]; *Matter of Great E. Mall v. Condon*, 36 N.Y.2d 544, 548, 369 N.Y.S.2d 672, 330 N.E.2d 628 [1975]; *Matter of Board of Trustees of Common School Dist. No. 2 of Town of Dickinson v. Commissioner of Educ. of State of N.Y.*, 33 N.Y.2d 601, 603, 347 N.Y.S.2d 569, 301 N.E.2d 541 [1973]). In deciding whether a defect in service is merely technical, courts must be guided by the principle of notice to the defendant—notice that must be “reasonably calculated, under all the circumstances, to apprise interested parties of the

pendency of the action and afford them an opportunity to present their objections” (*Raschel v. Rish*, 69 N.Y.2d 694, 696, 512 N.Y.S.2d 22, 504 N.E.2d 389 [1986], quoting *583 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 339 U.S. 306, 94 L.Ed. 865 [1950]).”

In *Nardeo v Diaz*, 82 Misc 3d 1092, 1104 [Civ Ct 2024] the court examined and discussed the impact of Ruffin upon CPLR § 2001 as follows:

Finally, the court notes that cases in Housing Court, like all other courts in this state, should be resolved on their merits whenever possible. (*see Horseshoe Realty, LLC v. Meah*, 47 Misc.3d 127(A), 2015 WL 1400554 [App. Term, 1st Dept. 2015]; *Genuine Realty Corp. v. Mitchell*, 61 Misc.3d 132(A), 2018 WL 5046890 [App. Term, 1st Dept. 2018]). Defaults are routinely vacated because it is preferable for the parties to get their day in court. (*see Cappel v. RKO Stanley Warner Theaters, Inc.*, 61 A.D.2d 936, 936, 403 N.Y.S.2d 31 [1st Dept. 1978]; *38 Holding Corp. v. City of New York*, 179 A.D.2d 486, 487, 578 N.Y.S.2d 174 [1st Dept. 1992]). For this same reason, courts should overlook “mistakes, defects, and irregularities” at any stage of litigation if “a substantial right of a party is not prejudiced.” (*see Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 2001*) [“[a] statute like CPLR 2001 is essential in an enlightened system of civil procedure that eschews the elevation of form over substance.”)]. This **653 is what the Legislature and the Court of Appeals directs us to do.)

In this proceeding, the respondent's motion was served a single day late. This mistake should be classified under CPLR § 2001 as a technical infirmity akin to a “mistake, defect, and irregularities” that should be overlooked “if a substantial right of a party is not prejudiced.” The petitioner in its opposition has not enunciated a substantial right, which is being prejudiced. As such this court overlooks the defect in the respondent’s service of the motion and proceeds to the merits.

Affidavit in opposition

The court notes petitioner filed an affidavit in opposition to the respondent’s reply. The petitioner provides no explanation or basis for the filing of the affidavit in opposition. The court shall treat the affidavit in opposition as a sur-reply. “The practice of filing a sur-reply was repudiated by this

Court in *Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 562, 582 N.Y.S.2d 712 [1992]; *see also Lumbermens Mut. Cas. Co. v. Morse Shoe Co.*, 218 A.D.2d 624, 626, 630 N.Y.S.2d 1003 [1995], which has been applied to bar consideration of such submissions (*see e.g. Pinkow v. Herfield*, 264 A.D.2d 356, 695 N.Y.S.2d 20 [1999]; *cf. Sanford v. 27–29 W. 181st St. Assn.*, 300 A.D.2d 250, 251, 753 N.Y.S.2d 49 [2002])” (*see Garced v Clinton Arms Assoc.*, 58 AD3d 506, 509 [1st Dept 2009]). Accordingly, the court shall not consider this sur-reply.

Rent Demand

The respondent avers there are two defects in the rent demand rendering it subject to dismissal. The respondent alleges the petitioner’s rent demand conflicts with the petitioner's rent ledger. The rent demand alleges rental arrears begin to accrue in May of 2022 while the rent ledger shows the rent arrears began to accrue in August of 2020 (NYSCEF Doc No. 7, notice of motion). The next defect in the rent demand according to the respondent is based upon the petitioner's failure to properly credit the respondent (NYSCEF Doc No. 7, notice of motion). The respondent alleges the petitioner’s rent demand seeks \$1370.25 for July 2023, however, the rent ledger shows a payment of \$1400.00 in July 2023 (id).

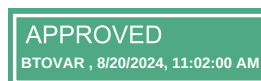
The petitioner did not dispute the respondent’s allegations regarding defects in the rent demand in its opposition (NYSCEF Doc No. 8, affirmation in opposition to motion). “When a respondent fails to oppose matters advanced on a motion, the facts alleged in the moving papers may be deemed admitted by the Court (*Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539, 369 N.Y.S.2d 667, 369 N.Y.S.2d 667, 330 N.E.2d 624 [1975]; *Madeline D'Anthony Enter., Inc. V. Sokolowsky*, 101 A.D.3d 606, 957 N.Y.S.2d 88 [1st Dept.2012]; *Argent Mtge. Co., LLC v. Montesana*, 79 A.D.3d 1079, 915 N.Y.S.2d 591 [2nd Dept.2010])” (*see Commissioners of State Ins. Fund v Garcia*, 49 Misc 3d 875, 877 [Sup Ct 2015]). The respondent’s unopposed allegations compels this court to deem the alleged defects

in the rent demand as factual¹. A proper demand for rent must fairly afford the tenant, at least, actual notice of the alleged amount due and of the period for which such claim is made. At a minimum, the landlord or his agent should clearly inform the tenant of the particular period for which a rent payment is allegedly in default and of the approximate good faith sum of rent assertedly due for each such period. (see *542 Holding Corp v Prince Fashions, Inc.*, 46 AD3d 309, 311 [1st Dept 2007], citing *Schwartz v. Weiss-Newell*, 87 Misc 2d 558, 561, 386 NYS2d 191 [Civ Ct, NY County 1976].) The petitioner does not explain why the rent ledger shows a balance starting in August of 2020 nor why the petitioner demanded rent that was already tendered. The unexplained defects in the rent demand render it defective.

The court need not consider the balance of the respondent's motion based on the above.

CONCLUSION

This proceeding is dismissed due to unexplained defects in the rent demand. This constitutes the decision and order of this court.



Date: August 19, 2024

Hon. Bryant F. Tovar
Housing Court Judge

¹ The court notes, however, that the rent ledger shows two payments totaling \$1400.00 in July of 2022 and the rent demand seeks \$1350.00 for July 2022 (NYSCEF) Doc No. 7, notice of motion, at exhibit A; NY St Cts Elec Filing [NYSCEF] Doc No. 1, petition).