

379 East 10th St., LLC v Miller
2012 NY Slip Op 32824(U)
December 3, 2012
HCIV, New York County
Docket Number: 60596/2011
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART R

379 EAST 10TH STREET, LLC, X

Petitioner-Landlord

-against-

DECISION & ORDER
Index No.: L&T 60596/2011

HON. SABRINA B. KRAUS

EDDIE MILLER
379 EAST 10TH STREET,
Cellar Apartment, APARTMENT C
NEW YORK, NY 10009

Respondent-Tenant

X

BACKGROUND

The underling summary non-payment proceeding was commenced by 379 EAST 10TH STREET, LLC (Petitioner) against Eddie Miller, the rent-stabilized tenant of record (Respondent) of the cellar apartment, a/k/a Apartment C at 379 East 10th Street, New York, NY 10009 (Subject Premises) based on the allegation that Respondent had failed to pay \$46,450.00 in arrears at a rate of \$1400.00 per month for the period of May 2008 through March 2011.

PROCEDURAL HISTORY

The Notice of Petition and Petition issued on March 17, 2011. Respondent appeared by counsel and filed a Notice of Appearance, answer and counterclaims on March 24, 2011. The proceeding was initially returnable on March 31, 2011.

Respondent’s answer asserts that the there was no valid certificate of occupancy for the Subject Premises, and that the proceeding was barred by MDL §301 and §302. Respondent also asserted that Petitioner had breached the warranty of habitability, and that the rent sued for was

not a legal rent, as well as laches. Respondent asserted counterclaims for a rent abatement, demanding that the court set the rent and direct Petitioner to issue leases to Respondent, and that Petitioner be directed to take any necessary steps to legalize the use of the Subject Premises.

On June 30, 2011, Respondent moved to dismiss the proceeding or alternatively for summary judgment. On January 12, 2012, the motion was granted by the court (Schneider, J) only to the extent of dismissing claims for rent for any period prior to February 16, 2011, the date when Petitioner first obtained a certificate of occupancy for the Subject Premises. The Court denied the balance of the motion finding that the Subject Premises had been legalized, and was subject to Rent Stabilization, and that HPD had no further "rent-setting jurisdiction." The proceeding was restored to the calendar on January 31, 2012 for trial.

On January 31, 2012, Respondent's application for an adjournment was granted pursuant to a written decision and order, which adjourned the trial to March 7, 2012 on condition that Respondent deposit \$14,000.00 with the Court by February 7, 2012, and continue to deposit \$1400 per month by the 7th of each month pending final resolution of the proceeding.

On March 7, 2012, Petitioner moved to quash trial subpoenas served by Respondent. The motion was granted in part by the court, and the proceeding was transferred to the expediter for trial. The proceeding was assigned to Part N for trial on March 7, 2012 and was adjourned to March 21, 2012 and then again to July 19, 2012.

On July 19, 2012, the parties through counsel entered into a stipulation of settlement (Stipulation) that was so ordered by the court. The Stipulation provided that Respondent would be entitled to a payment or credit from petitioner totaling \$25,000.00, in full satisfaction of all Respondents' claims including attorneys fees. The \$25,000 was to be distributed to Respondent by release of \$16,800.00 in rent being held on deposit with the Court, in addition to a rent credit

for the months April through July 2012 at a rate of \$1600.00 per month. Finally, Petitioner was to tender a check payable to Respondent in the amount of \$1800.00 and deliver said check to Respondent's counsel within ten days of the Stipulation being so-ordered. An additional \$2800 beind held by the court was also to be released to Respondent.

The Stipulation further provided that the parties would execute a Rent Stabilized lease for the Subject Premises at a rent of \$1600 per month and that \$1600 per month would be the legal registered rent from April 2012 forward and that Respondent would not seek to challenge that rent.

On August 23, 2012, Respondent moved for an order to be allowed to proceed *pro se* in the litigation. The motion was granted by the court (Lau, J) pursuant to written decision and order, which provided in part: "All parties have a copy of NYC Finance check no. 132022 dated 8/7/12 in the amount of \$19,210.18. Resp has the original check as it is made payable to him. Resp motion granted. Renewal leases were tendered to Resp by Resp atty in open court today." There is no indication from the moving papers, or the decision, that Respondent sought to vacate the Stipulation at that time.

On that same date, Petitioner cross-moved for an order holding Respondent in contempt for failure to comply with the Stipulation, by failing to sign and return the lease. The cross-motion was granted to the extent of extending the parties' time to fully execute the lease tendered in court to Respondent, the order also provided that the Stipulation remained in full force and effect.

On September 14, 2012, Respondent moved *pro se* and by order to show cause for an order vacating the Stipulation on the basis that his prior counsel had "misrepresented what I wanted to do in the court room and in terms of the settlement. The opposing attorney, the judge,

and my attorney altered the agreement without my consent and then presented it as legitimate document. I wished to have the stipulation of settlement vacated.” In paragraph five of his affidavit in support Respondent added “I did not approve of the final settlement and there was fraud done in the case.”

Petitioner again cross-moved for an order seeking to hold Respondent in contempt for failure to sign and return the lease tendered in court, and for related relief. Both parties appeared in Part R on that date on the motion.¹ Petitioner’s counsel made an application for the matter to be referred to Part N, which was denied by the court for the reasons stated on the record. Respondent sought additional time to submit written opposition to Petitioner’s cross-motion. The court granted Respondent’s request to the extent of holding the record open on the cross-motion through September 18th for Respondent to submit written opposition.

On September 14, 2012, the court issued a decision and order denying Respondent’s motion to vacate the stipulation finding no support for Respondent’s contentions that the terms of the executed stipulation were altered without his knowledge, and finding that Respondent had not expressed lack of consent to the terms of the executed stipulation.

Respondent made no further submission by September 18th, and the court issued a decision, dated September 19, 2012, denying Petitioner’s cross-motion for contempt, per decision and order which held that Respondent’s obligations under the Stipulation had been stayed as of September 5, 2012, when the order to show cause was signed, and therefore extending Respondent’s time to sign and return the lease.

¹ Judge Lau was on vacation on the return date and through October 1, 2012. The proceeding was assigned to Judge Kraus who was the Part Y Judge on that date.

On September 17, 2012, in the late afternoon, Respondent made an *ex parte* application before Judge Gonzalez for a new order to show cause to be signed. Respondent's affidavit in support provided:

I was told by Judge Kraus that she would allow me to enter defensive and exculpatory documents in response to Petitioner's cross-motion. Unfortunately, I suffered a terrible accident reacquiring a hospital visit. The judge breathlessly denied my osc and failed to extend the "day or two" to respond to the cross-motion. Even in my infirmed state, I contacted Judge Kraus' court attorney to report the accident and still the judge ruled unfavorably.

The affidavit further asserted:

I have the documents detailing my defenses in requesting a vacating of the stipulation. I'd plan on delivering them to Judge Kraus but never was given the chance.

Respondent's *ex parte* application was denied by Judge Gonzalez per written order which made reference to this Court's September 14, 2012 order denying the motion to vacate.

On September 24, 2012, Respondent made an *ex parte* application heard by Judge Kraus, wherein Respondent asserted that he had misunderstood that the Court was allowing submissions on the cross-motion through September 18, 2012, noted in particular that both Judge Kraus and the court attorney for Part R were not in court on September 17, which was a Jewish holiday, and sought an opportunity to make the submission of the attached documents in opposition to the cross-motion, that he wished the Court to also consider in further support of his original motion to vacate the Stipulation. 2

The Court (Kraus, J) declined to sign the order to show cause per written order which provided in part:

2 Respondent also submitted an affidavit of unavailability on the date of the application seeking to adjourn the proposed return for the OSC from October 3, 2012 to November 6, 2012 based on his assertion that he would be taking a business related trip to Europe and would be out of the country from September 30, 2012 through November 6, 2012.

Resp was given a chance to submit additional papers only on x-motion, not as reply. As the cross-motion was denied, the absence of additional papers which primarily address R's motion does not prejudice Resp. Even considering those papers, there is no basis to vacate the underlying Stipulation.

On October 1, 2012, the Appellate Term denied *ex parte* motions made relating to this proceeding (*Slip Op No 2012 NY Slip Op 87434(U)*).

On October 15, 2012³ Petitioner filed its third motion for contempt which was originally returnable October 30, 2012. The motion was adjourned to November 16, 2012. On November 15, 2012, Daniel M O'Hara appeared as newly retained counsel for Respondent, and on November 26, 2012, Respondent cross-moved for seeking renewal and re-argument of this court's September 14, 2012 decision denying Respondent's motion to vacate the Stipulation.

The cross-motion was referred by Judge Lau to Judge Kraus in accordance with the joint application of parties' counsel and pursuant to CPLR 2221. The Court accepted the referral, heard oral argument on the cross-motion in Part R and reserved decision on the motion³.

DISCUSSION

Motion for Reargument

A motion for reargument must be based on matters of fact or law misapprehended by the court in determining the prior motion (CPLR 2221(d)(2)). Respondent argues that the fact misconstrued by the court in determining the prior motion is that because Respondent participated in the negotiations of the stipulation in open court on the date the stipulation was executed, and because Respondent failed to voice any objection to the execution and submission of the

³ Petitioner's motion for contempt is being held in abeyance by Part N pending this court's ruling on the pending motion for re-argument.

stipulation in court, “(T)he court misapprehended Respondent’s behavior on the record as consent (*par 37 of 11/26/12 O’Hara aff in support*).

Respondent’s motion for reargument is denied. The court did not misunderstand that Respondent participated in the negotiations or that Respondent failed to raise any objection. Those facts are accurate and acknowledged by the Respondent in its moving papers, rather what Respondent argues is that he did participate and consent because he felt he had no choice, because he didn’t want to proceed to trial without his attorney and he didn’t want to or couldn’t pay his attorney to proceed with a full trial (*par 38 of 11/26/12 O’Hara aff in support & par 14 of 11/26/12 aff of Respondent*).

As the moving papers fail to raise any factual or legal issue misapprehended by the court in its original determination, Respondent’s motion for reargument is denied.

Motion for Renewal

A motion for renewal must be based on new facts not offered on the prior motion in combination with a reasonable explanation for the failure to present such facts (CPLR 2221(e)). Respondent argues that the new facts that serve as the basis for the motion is that Respondent felt he was under duress on the date the stipulation was executed, based on the fact that his attorney had told him they would not continue to represent him absent payment of a large sum, and because the court indicated he would not be granted an adjournment of the scheduled trial. Respondent asserts “I refrained from objecting (sic) the stipulation while I was in front of the judge because I felt overwhelmed, and certainly did not want to face \$15,000.00 in legal fees to try the matter (*par 14 of 11/26/12 aff of Respondent*).” Respondent further argues the “... court also would not allow me what I felt to be the necessary time to find alternative representation (*par 6 of 11/26/12 aff of Respondent*).”

Respondent acknowledges that he was aware of these facts when the motion was originally made, but argues that because the court has discretion to grant renewal anyway absent prejudice to Petitioner.

The court grants Respondent's motion for renewal, because Respondent was *pro se* at the time of the original motion, and because of the issues set forth above regarding Respondent's attempts to submit additional papers. Respondent originally argued that the Stipulation should be vacated, because the Stipulation was changed without his knowledge constituting a fraud and because he never consented to the terms of the Stipulation. In its September 14, 2012, order this Court found no basis either for the allegation that the terms of the Stipulation were changed without his knowledge, nor for the allegation that he did not consent to the Stipulation.

On renewal, Respondent argues that the Stipulation should be vacated on the basis of duress, and that said duress prevented him from expressing his lack of consent when the Stipulation was submitted.

The Court finds this new theory of duress no more persuasive than the prior theory of fraud. In *Cantamessa v Cantamessa* 170 AD2d 792, the Appellate Division, found that a party had not been improperly pressured into entering a stipulation by the trial court. In that case as in the case at bar, where the parties were represented by counsel and engaged in settlement negotiation for several hours prior to the time a stipulation was submitted. The Court held:

Based upon our review of the record, we conclude that defendant's assertions constitute an insufficient basis on which to vacate the stipulation of settlement. While the parties were encouraged to accept the stipulation, the record does not demonstrate that the Trial Judge exerted undue pressure or engaged in coercive measures.

Id at 793.

In order to establish duress as a basis to vacate a stipulation of settlement entered in open court and under the advise of counsel, the movant must establish that his adversary or some other participant committed or threatened to commit an unlawful act which induced the party to execute the stipulation (*Helwig v Wilkens* 51 AD2d 694; *Feuer v Darkanot* 36 AD3d 753 *a party seeking to vacate stipulation by asserting duress must demonstrate that threats of an unlawful act compelled his performance of an act he had the legal right to abstain from performing*)

A claim that a party felt pressured by counsel to consent to the terms of a stipulation is insufficient to establish duress (*Swanson v Bryant* 160 AD2d 999 *tenant not entitled to relief from stipulation of settlement on the grounds that her attorney pressured her to sign or that she misunderstood the implications of the agreement*).

Respondent's claim that he felt pressured by the court to agree to the stipulation is similarly not a basis to vacate the Stipulation (*Ross v Clyde Beatty-Cole Brothers Circus* 26 AD3d 321 *general contentions that a party felt pressured by the court are insufficient to establish basis to vacate stipulation entered in open court*; *Shuler v Dupree* 14 AD3d 548; *Willig v Rapaport* 81 AD2d 862 *court's statement that failure to execute stipulation will result in lifting of a stay subjecting party to incarceration was not a basis for vacating a stipulation on grounds of duress*).

Moreover, counsel for Respondent argues that there was an atmosphere of coercion on the date Respondent entered into the Stipulation but this claim is unsupported. Notably Respondent never submitted a copy of the official transcript of the proceedings on the date the Stipulation was entered in open court, and now submits instead Respondent's complaint letters to various administrative judges regarding statements or conduct of the court and his counsel on that date. This is insufficient to establish duress (*see SD v ND* 27 Misc3d 1215(A)).

Finally, the court notes that Respondent makes no argument that the underlying Stipulation is unconscionable, contrary to public policy, or that Respondent improvidently waived defenses in the Stipulation.

Based on the forgoing, upon renewal the motion to vacate the Stipulation is denied.

The proceeding is referred back to Judge Lau for determination on Petitioner's motion for contempt. This constitutes the decision and order of the Court.

Dated: December 3, 2012
New York, New York

Hon. Sabrina Kraus

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