

10-12 W. 107th St. HDFC v Vilma

2013 NY Slip Op 33011(U)

December 3, 2013

Sup Ct, New York County

Docket Number: 85668/2011

Judge: Sabrina B. Kraus

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART C

10-12 WEST 107TH STREET HDFC, X

Petitioner-Landlord

-against-

DECISION & ORDER
Index No.: L&T 85668/2011

HON. SABRINA B. KRAUS

MIREYA VILMA
12 WEST 107TH STREET - APT 2C
NEW YORK, NEW YORK 10025

Respondent-Tenant

JOHN DOE#1, "JANE DOE #1"
AND "JANE DOE #2"

Respondents-Occupants

X

BACKGROUND

The underlying summary holdover proceeding was commenced by **10-12 WEST 107TH STREET HDFC** (Petitioner) against **MIREYA VILMA** (Respondent), based on the allegation that Respondent was a month to month tenant who had chronically failed to pay her rent timely, and that Respondent had failed to accept a renewal offer at a higher rent.

PROCEDURAL HISTORY

Petitioner issued a thirty day notice of termination dated August 24, 2011(Notice).

The Notice asserted that throughout Respondent’s tenancy Respondent had chronically failed to pay her rent on time. The Notice further asserts that from 1996 to 2011 at least twelve nonpayment proceedings were commenced, and index numbers for those proceedings are specified therein. The Notice further asserts that the proceeding started in 2006 was pending for

a period of two years through and including November 2008. This was followed by a proceeding commenced in February 2009, which was pending through mid-2011. The Notice further asserts that the costs of this prolonged litigation end up being absorbed by the shareholders of the HDFC.

The petition is dated October 7, 2011, and the proceeding was initially returnable on October 19, 2011.

In December 2011, Counsel appeared for Respondent. On February 8, 2012, Respondent filed a written answer asserting an affirmative defense based on breach of warranty of habitability.

THE JULY 20, 2012 STIPULATION

On July 20, 2012, counsel for both parties entered into a stipulation of settlement. The stipulation provides “(t)he parties acknowledge that the Petitioner is a ‘low income’ residential cooperative housing corporation. Respondent Mireya Vilma’s tenancy, prior to termination, was month to month and not subject to any type of rent regulation.”

The stipulation provided that Respondent would be on probation for a period of 12 months, during which time she agreed to pay her rent by the 10th day of each month. The stipulation provided that “TIME BEING OF THE ESSENCE” in two different paragraphs, but also afforded Respondent an opportunity to cure any defaults within 5 days of a notice to cure being faxed to Respondent’s attorneys. The agreed upon use and occupancy was \$1250 per month. The stipulation provided that Respondent would make all payments by money order or DSS checks.

The stipulation provided that if Respondent failed to cure the breach within the five day period, Petitioner would be entitled to restore for a judgment and a warrant, and that said relief would be granted without a hearing, unless the breach was disputed.

Respondent also acknowledged past due arrears at the time of the stipulation of \$4087.00, this included \$1500 in legal fees, which Respondent agreed to pay by August 31, 2012. Respondent did not have the funds to pay said arrears, but obtained a one shot deal by the end of August to satisfy said amount.

On April 29, 2013, Petitioner moved for a judgment of possession based on its allegation that Respondent had breached the stipulation of settlement. The motion asserted that as of said date Respondent had breached the terms of the stipulation on three separate occasions.

The first breach was that Respondent failed to timely pay rent for October 2012. On October 19, 2012, Petitioner issued a notice to cure, Respondent cured within the applicable period. Petitioner's breakdown also indicates a check submitted by Respondent that month was dishonored for insufficient funds.

Respondent breached the stipulation a second time when she failed to pay rent timely for December 2012. Petitioner issued a notice to cure December 11, 2012, and Respondent cured within the applicable period.

The third breach occurred when Respondent failed to pay rent on time for March 2013. Petitioner issued a notice to cure dated March 28, 2013, giving Respondent until April 2, 2013 to cure. Respondent tendered two payments on April 4, 2013, one was a check for \$800, check number 416, this check was again returned by the bank for insufficient funds. Respondent failed to cure within said period, and Petitioner brought the motion for a judgment.

Respondent submitted written opposition to the motion. Respondent acknowledged in the opposition that as of April 29, 2013, the return date of the motion she was in default on the terms of the stipulation and unable to satisfy the arrears. However, she argued to would be able to come current shortly after the return date of the motion.

THE MAY 30, 2013 STIPULATION

The motion was resolved by stipulation dated May 30, 2013. The stipulation extended the probationary period through October 31, 2013, provided that Respondent would pay additional fees, and that Respondent would pay arrears of \$1530 due through May by June 15, 2013. The stipulation provided that all other terms of the July 20, 2012 stipulation remained in full force and effect, and further provided “Petitioner indicates no additional reinstatements will be voluntarily granted.”

Respondent paid \$1530 by June 13, 2013, but Respondent failed to pay use and occupancy for June by June 10, 2013. Respondent failed to pay use and occupancy for July by July 10, 2013. Petitioner issued a notice to cure dated July 23, 2013. Respondent failed to cure within the time frame provided.

On August 13, 2013, Petitioner again moved for entry of a judgment based on its allegation that Respondent had defaulted on the terms of the probationary stipulation. Respondent submitted opposition to the motion. Respondent again acknowledged she had defaulted on the terms of the stipulation, and that as of August 12, 2013 she was in default in the amount of \$2405. Respondent asserted that she had not been able to comply with the stipulation because her husband was ill. Respondent asserted that as of August 2013 her husband had been fighting cancer for two years, and had been hospitalized for 15 days. Respondent asserted her husband had not been able to work since June 2013, and that Respondent was also working less

during that period, to be able to care for her husband for the two weeks he was in the hospital. Respondent asked the court to extend her time to make the payments, but did not specify in the opposition papers when or how she would be able to come current.

THE AUGUST 13, 2013 STIPULATION

The motion was resolved by the parties stipulation dated August 13, 2013, which provided for the entry of a judgment of possession and the forthwith issuance of the warrant of eviction. The stipulation provided “Respondent acknowledges her default under the terms of the stipulations of settlement dated July 20, 2012 and May 30, 2012.” The parties agreed that as of said date \$2980 remained outstanding, including \$500 in legal fees. The stipulation further provided that Respondent would pay \$2500 by September 10, 2013, in addition to September rent by said date, and that Respondent would pay \$480 plus October rent by October 10, 2013. The stipulation provided that on default the warrant could execute, and provided no cure for any further defaults.

The warrant of eviction issued on October 18, 2013.

On November 8, 2013, Respondent sought a stay of execution of the warrant by OSC. Respondent acknowledged that she had defaulted in making the payments under the parties’ third stipulation of settlement. Respondent acknowledged that as of November 8, 2013, there was \$5480 unpaid through October 2013, in addition to November’s rent. Respondent asserted she had only \$2525 immediately available, and had applied to various charities to seek the balance. The application was denied by the court (Elsner, J) without prejudice to renewal on proof of arrears.

THE PENDING MOTION

On November 22, 2013, Respondent again moved by order to show cause to stay the eviction. Respondent asserted she had \$3000.00, which was all arrears due through November 2013. Petitioner opposed the motion and asked the court to allow Petitioner to execute on the warrant. The court heard argument and reserved decision. Both sides agreed, after inquiry by the Court at oral argument, that no hearing was required to resolve the issues raised by the motion.

DISCUSSION

It is well settled that an agreement to pay rent in a timely manner is an essential obligation of a tenancy and repeated breaches of the agreement to pay timely are not *de minimus*, but constitute a breach of a material term of a contract (*Fifty States Mgt v Pioneer Auto Parks* 46 NY2d 573; *Cyber Land Inc., v Chon Property Corp.* 36 Ad3d 748).

Appellate courts have consistently held that a stipulation of settlement resolving a chronic nonpayment proceeding is to be strictly enforced, particularly where there have been multiple stipulations and multiple defaults within one proceeding [See *eg Lassrick Associates LP v Wheeler* 2002 NY Slip Op 50462(U)(App Term, 1st Dept); *225 East 10th Street LLC v Durante* 13 Misc3d 132(A)(App Term, 1st Dept); *1277 Shakespeare Realty Corp. v Espinal* 19 Misc3d 132(A) (App Term, 1st Dept.); *59-61 East 3rd Street LLC v Campbell* 23 Misc3d 134(A)(App Term, 1st Dept); *Grady Inc. v Johnson* 23 Misc3d 137(A)(App Term, 1st Dept); *705 W 179th Street Realty Inc v Rodriguez* 18 Misc3d 134(A)(App Term, 1st Dept); *150th St Holding Co LLC v Liverpool* 36 Misc3d 128(A)(App Term, 1st Dept); *NKP Realty LLC v Jennings* 16 Misc3d 119 (App Term, 1st Dept)].

Moreover, it has been held to be reversible error, where under such circumstances, the trial court granted a stay rather than enforcing the terms of the stipulation agreed to by the parties

[See eg *Third Lenox Terrace Associates v Johnson* 34 Misc3d 148(A)(where tenant breached three so-ordered stipulations in chronic rent delinquency holdover proceeding strict enforcement of the terms of the stipulation was warranted and the granting of a stay was reversible error); *77 St Realty Associates v Cazzorla* 19 Misc3d 131(A)(further stay on execution of warrant in chronic rent delinquency found to be reversible error where tenant had breached multiple stipulations); *830 Sheva Associates LLC v Vasquez* 41 Misc3d 127(A)].

There is some appellate authority that weighs in favor of granting a stay under certain circumstances. In *2246 Holding Corp v Nolasco* 52 AD3d 377, the Appellate Division, First Department issued an order holding that a stay on execution of the warrant was appropriate where a long term indigent tenant defaulted because HRA was late in issuing a check for assistance towards the arrears. *Nolasco* has been cited by the Appellate Term, Second Department in a number of cases where that court found defaults related to delays in obtaining the funds from DSS were excusable (See eg *Homewood Gardens Estates LLC v Deen* 40 Misc3d 134(A); *Bushwick Properties, LLC v Wright* 34 Misc3d 135(A)(Justice Weston dissented); *Ramou Home Corp . LLC v Marksman* 39 Misc3d 142(A)].

But *Nolasco* was distinguished in *377 Broome Street Corp v McManamon* (20 Misc3d 134(A)) by the Appellate Term, First Department, which held that the denial of a further stay by Housing Court was appropriate and strict enforcement of the parties' stipulation warranted "... particularly where, as here, the rent delinquencies underlying the landlord's holdover petition continued unabated into the probationary period agreed to by tenant ..." and implying that *Nolasco* was inapplicable because the default there was occasioned by a delay in payment by HRA.

Respondent has been a tenant for 21 years and lives in the Subject Premises with her mother who is 82 and disabled, her sister who is also disabled, her husband who is ill with cancer and her adult son. Respondent asserts that in October 2013, she got a second job to supplement her income and that around the same period her son also got a job. Respondent asserts that these new jobs will enable the family to be able to afford to pay ongoing rent. Respondent acknowledges that the prior defaults were based on inability to pay and have no connection to delays by HRA or DSS.

Petitioner argues that Respondent has repeatedly breached every stipulation entered in this proceeding pending since 2011, and that Petitioner should be entitled to execute on the warrant of eviction. It is indeed undisputed that Respondent breached each and every stipulation entered into in this proceeding. Moreover, each time a stipulation was entered Respondent was in arrears and the stipulation allowed time for Respondent to become current and stay current which Respondent failed to do.

Petitioner is a low income cooperative, and while they must establish cause to evict Respondent, Respondent is a non-regulated tenant.

In light of the prolonged and repeated defaults under the stipulations of settlement the court finds that Petitioner is entitled to execute on the warrant of eviction. While the court has empathy for Respondent and her family, the court finds that the record clearly establishes an ongoing pattern of failure to pay rent timely throughout the two year period this proceeding has been pending. “A temporary financial embarrassment may excuse isolated instances of late payment, but inability to pay cannot excuse chronic and continuing delinquency (*Adam’s Tower Limited Partnership v Richter* 186 Misc2d 620, 621).”

However, Respondent is a long term tenant and relocating may be prove difficult. Based on the foregoing, execution of the warrant is stayed through February 28, 2014 conditioned upon the payment of \$3000 and December use and occupancy by December 16, 2013, and payment of January and February use and occupancy by the 5th of each month. On default or after February 28, 2014, the warrant may execute on Marshal's notice and APS notification.¹

This constitutes the decision and order of this court.

Dated: December 3, 2013
New York, New York

Hon. Sabrina Kraus
JHC

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¹ The notice of appearance filed by Respondent's counsel is only behalf of Respondent. As indicated several other adults are living in the Subject Premises. They appear to have been named and served herein as "Does" however, there is no judgment or warrant against any party other then Respondent.