

Franklin Plaza Apts., Inc. v Cueba

2013 NY Slip Op 33087(U)

December 11, 2013

Civil Court, New York County

Docket Number: 84290/2013

Judge: Sabrina B. Kraus

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

FRANKLIN PLAZA APARTMENTS, INC.

X

HON. SABRINA B. KRAUS

Petitioners-Landlord

-against-

COSME CUEBA
1941 Third Avenue - Apt 7B
NEW YORK, NY 10029

Respondent-Tenant

X

DECISION & ORDER
Index No.: L&T 84290/2013

BACKGROUND

This summary nonpayment proceeding was commenced by **FRANKLIN PLAZA APARTMENTS, INC** (Petitioner) and seeks to recover possession of 1941 Third Avenue - Apt 7B, NEW YORK, NY 10029 (Subject Premises) based on allegations that **COSME CUEBA** (Respondent) the proprietary lessee has failed to pay maintenance due for the Subject Premises.

PROCEDURAL HISTORY

Petitioner issued a rent demand dated September 17, 2013, seeking \$10,355.35 in arrears for a period covering January 2013 August 2013. The petition is dated October 9, 2013, and the proceeding was originally returnable on November 6, 2013.

Alice Cueba (Occupant) filed an answer on October 28, 2013, asserting a general denial. Respondent has never answered or appeared. On the initial return date, Occupant appeared and asserted she was the daughter of Respondent, and that she lives in the Subject Premises. Occupant further asserted that Respondent is 85 years old, and that her parents have another

home that they live in, in Long Island and that her parents go back and forth from the Subject Premises.

The proceeding was adjourned by the Judge presiding on said date to December 10, 2013 for Respondent to bring a notarized letter from her father and for Petitioner to determine whether they wished to add Occupant as a party to this proceeding and enter into an agreement with her. On December 10, 2013, Respondent did not appear. Occupant appeared and Petitioner's counsel asserted on the record that Petitioner did not wish to add Occupant as a party, and did not seek any relief in this proceeding as against Occupant. Counsel referenced relief obtained in a prior proceeding as against Occupant.

Occupant represented to the court on the record that Respondent does not live in the Subject premises on a full time basis, and that he travels back and forth from Long island where he has another home, and that he is physically able to appear in the proceeding but has elected not to do so.

Petitioner requested a default judgment be entered against Respondent. The court reserved decision on said application.

PRIOR PROCEEDINGS

There were two prior nonpayment proceedings between the parties that immediately preceded this case.

Index Number 58718/2012

This proceeding was commenced in March 2012. The petition asserted that Respondent and Honoria Cueba were the proprietary lessees for the Subject Premises, and sought \$3802.43 in arrears for November 2011 through February 2012.

Neither Respondent nor Honoria Cueba ever answered or appeared. Occupant filed an answer asserting a general denial. The proceeding was adjourned from March 30, 2012 to May 4, 2012 pursuant to a stipulation, so-ordered by the judge then presiding, which provided that the adjournment was either for respondents to appear or for Occupant to obtain a notarized letter with authority to act on their behalf.

On the adjourn date, Occupant appeared and asserted that respondents were her parents lived in a retirement community in Long Island, and the proceeding was adjourned to May 14, 2012.

On May 14, 2012, Petitioner discontinued the proceeding as against the respondents and added Occupant as a respondent. The stipulation provided for a judgment against Occupant in the amount of \$6291.77, forthwith issuance of the warrant, and a long payout schedule which ran through May 2013. The stipulation acknowledged that Occupant was respondents' daughter and listed on the income affidavits submitted to Petitioner. No warrant of eviction ever issued in the 2012 proceeding.

Index Number 55111/2013

Before the time ran on the stipulation entered in the 2012 proceeding, Petitioner commenced a new proceeding against Respondent and Occupant. This petition did not name Honoria Cueba, but instead asserted that both Respondent and Occupant were proprietary lessees of the Subject Premises.

In this petition, no predicate notice was served, but Petitioner asserted the rent had been demanded personally from Respondent and Occupant, and the petition which was dated January 30, 2013, sought rent for October 2012 through January 2013 totaling \$4421.55.

Occupant appeared on March 5, 2013 and asserted that Respondent was 81 and at the Subject Premises at the time of the court date, but implied that Respondent was physically unable to appear in court. Occupant entered a stipulation with Petitioner consenting to a judgment in the amount of \$6190.10, and forthwith issuance of the warrant along with an agreement to pay. No judgment was entered against occupant. The warrant of eviction issued as to Occupant on April 11, 2013.

On April 29, 2013, Occupant moved for an extension, and the parties entered a second stipulation staying execution of the warrant through May 21, 2013, for payment of \$7,073.45. At this point there was no judgment and warrant as against Respondent.

In June 2013, Occupant was evicted from the Subject Premises, and on June 21, 2013, Occupant and Petitioner entered into a stipulation resolving Respondent's post eviction Order to Show Cause. The stipulation allowed Occupant to pay and be restored. Occupant defaulted on the terms of the stipulation and her second *ex parte* application for post eviction relief was denied by the court.

In July 2013, Petitioner sought the entry of a default judgment against Respondent.

The application was denied pursuant to a written order issued by this court dated July 29, 2013. The denial provided that both Petitioner and Occupant had asserted that Respondent was in the Subject Premises, elderly and in poor health and that Petitioner needed to move for a GAL prior to seeking a default.

This proceeding followed.

DISCUSSION

Petitioner's application for a default as against Cosme Cueba is denied for the following reasons. First Petitioner in each case has made three different claims about the identity of the alleged proprietary lessees. In this proceeding, Petitioner alleges Respondent is the only proprietary lessee, in the 2013 Proceeding, Petitioner alleged the proprietary lessees were both Respondent and Occupant, and in the 2012 Proceeding, Petitioner alleged the proprietary lessees were Respondent and Honoria Cosme. Given the conflicting verified pleadings filed, the court can not determine if all necessary parties have been named.

Additionally, it now appears to the court that Respondent and his wife may not be residing in the Subject Premises and are alleged to be residing in a retirement community in Long Island. Presumably the Petitioner, which requires annual re-certifications must have some information in this regard, but there never appears to have been any attempt to serve Respondent at any such location.

Petitioner is a limited profit housing company organized under article II of the Private Housing Finance Law, also known, as the Mitchell-Lama Law, and primary residence is a requirement of being a tenant.

Additionally, the court does not understand why, Petitioner knowing that the only individual that has appeared in response to the commencement of a summary proceeding, and the person who is living in the Subject Premises is Occupant, has not named and served Occupant with papers where Petitioner seeks to take back possession of the Subject Premises, and refuses to enter into a stipulation with Occupant or allow her to be added as a party to this proceeding.

Petitioner's application for a default is denied without prejudice to renewal by motion on notice to Respondent and Occupant, supported by documentation and affidavits which establish the identity of the proprietary lessees and address the other issues raised by the court herein.

CONCLUSION

This constitutes the decision and order of this court.

Dated: December 11, 2013
New York, NY

Hon. Sabrina B. Kraus, J.H.C.

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