SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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ANNE WEISENTHAL,

Plaintiff,

-against-

GOTHAM REALTY HOLDINGS, LLC,

Defendant.

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DECISION AND ORDER

Index No. 105613/2009

O. PETER SHERWOOD, J.:

This is an action by plaintiff tenant Anne Weisenthat ("plaintiff" or "tenant"): (1) to recover damages for rent overcharge on a stabilized apartment and breach of warranty of habitability; (2) for injunctive relief compelling defendant landlord Gotham Realty Holdings, LLC ("defendant" or "landlord") to provide tenant with a rent-stabilized renewal lease; and (3) an award of attorney's fees. Plaintiff moves pursuant to CPLR § 3215 (a) for a default judgment against defendant for the relief sought in the complaint. Defendant cross moves for an order excusing its default and granting leave for it to serve and file the verified answer annexed as Exhibit "A" to the cross motion papers.

On April 22, 2009, plaintiff commenced this action against defendant by filing the summons and verified complaint by which it seeks to recover for rent overcharge and breach of the warranty of habitability, to compel defendant to provide her with a rent-stabilized renewal lease and an award of attorneys' fees. The complaint, as verified by plaintiff, alleges that on or about February 16, 1989, plaintiff entered into possession of apartment #4D, located in a building at 220 East 65th Street, New York, New York 10021 (the "Apartment"), pursuant to a rent-stabilized lease with landlord's predecessor-in-interest, which was thereafter periodically renewed for various terms the latest of which expired on March 31, 2005. The monthly rent as of the last lease was $2,555.99. Due to landlord's failure to provide her with a fully executed renewal lease, plaintiff filed a complaint with the Division of Housing and Community Renewal ("DHCR") seeking an order compelling landlord to furnish her with a fully executed renewal lease. The DHCR issued a decision and order directing landlord to issue a renewal lease to commence on May 1, 2007 and expire on April 30, 2009 and to refund to tenant any excess rent collected. DHCR also made a finding that the Apartment remained subject to the Rent Stabilization Code until tenant vacated the Apartment.

Thereafter, landlord commenced a summary holdover proceeding in Housing Part of the Civil Court, New York County, alleging that plaintiff was a month-to-month non-regulated tenant whose tenancy had been terminated. Civil Court severed tenant's counterclaim for rent overcharge for a plenary action and dismissed the summary holdover proceeding. Plaintiff contends that landlord never furnished the renewal lease as directed by the DHCR.

The affidavit of service annexed to the moving papers as Exhibit "U" indicate that service of the summons and verified complaint was made on defendant on May 6, 2009, at 3:15 p.m., by delivering two copies of the summons and verified complaint to an agent of the Secretary of State at the Albany Office and paying the requisite fee of $40.00 pursuant to section 303 of the Limited Liability Company Law. Service was complete on that date and defendant's answer was due 30 days later (CPLR § 3012 [c]), *i.e.*, on June 6, 2009 (*see, Jones v 414 Equities LLC,* 57 AD3d 65 [1st Dept 2008]; *Shah v Wilco Systems,* 27 AD3d 169 [1st Dept 2005]). On July 10, 2009, plaintiff mailed a notice, along with an additional copy of the initiatory papers, to defendant at its last known address advising them that plaintiff had served them through the Secretary of State on May 6, 2009. Such notice was sent to comply with CPLR § 3215 (g) (4) (i) and (ii), which requires such notice to be sent 20 days prior to entry of a default judgment. Defendants did not appear or answer the verified complaint within the prescribed time period or seek an extension of the time in which to do so.

Plaintiff now seeks a default judgment for the relief sought in the complaint based upon defendant's failure to timely appear or answer. In support of its motion for a default judgment, plaintiff submits an affirmation of its attorney, Thomas C. Lambert, Esq. of the law firm Lambert & Schackman PLLC, establishing the default and plaintiff's affidavit of merit, together with exhibits "A" through "V" consisting, *inter alia,* of the Lease and renewal leases, the previous decisions of DHCR, the Civil Court and the Appellate Term, the summons and verified complaint, the affidavits of service and correspondence between plaintiff's attorney and the landlord.

Defendant cross moves for an order excusing its default in answering and granting leave for it to serve a late answer. In support thereof, defendant submits an affidavit of Charles Ishay, a member of defendant company. Mr. Ishay denies that defendant ever received the summons and verified complaint by mail or otherwise until in the summer of 2009 defendant received the summons and complaint from its landlord/tenant attorneys where they had apparently been mailed. Mr. Ishay acknowledges that defendant had not updated its address with the Secretary of State, but states that the address to which it had moved, namely 30 Broad Street, New York, New York, was

listed in the Yellow Pages directory. The failure to update its address was compounded by a mis-communication between Mr. Ishay and his then associate Avy Azeroual as to who was going to retain an attorney to represent the landlord.[1] As a result, no answer was served. Mr. Ishay immediately upon receiving the motion papers realized the mis-communication and retained an attorney to represent the landlord. He claims that at no time did defendant intend to abandon the action and that plaintiff, who has not paid rent since March 2009, would not be prejudiced if the court excuses defendant's default and permits it to interpose an answer. Mr. Ishay also contends that defendant has a meritorious defense as defendant purchased the building in 2004 and believed that upon the expiration of J-51 tax benefits the Apartment was to be decontrolled. Although DHCR decided otherwise, it found that a renewal lease existed which expired on March 31, 2007 at a rental of $2,722.13 and ruled that the landlord should issue an amended renewal lease to commence on May 1, 2007 at a rent of $2,905.87. Mr. Ishay acknowledges that the amended renewal lease was not sent, but contends, at most, plaintiff was required to continue paying monthly rent of $2,722.13. In any event, because plaintiff has not paid rent since March 2009 there can be no overcharge.

It is axiomatic that public policy favors the resolution of cases on the merits whenever possible (*see, Santora & McKay v Mazzella,* 211 AD2d 460 [1st Dept 1995]; *38 Holding Corp. v City of New York,* 179 AD2d 486 [1st Dept. 1992]). The courts may exercise discretion to excuse a default in answering where the defendant can establish that his default was excusable and that he has a meritorious defense to the action (*see, generally, Eugene Di Lorenzo, Inc. v Dutton Lbr. Co.,* 67 NY2d 138, 141 [1986]; *Barasch v Micucci,* 49 NY2d 594, 599 [1980]). Here, the reason for the defendant's default is essentially that it did not keep their address current with the Secretary of State and, therefore, did not receive notice of the action in time to defend. "'[T]here is no per se rule that a corporation served through the Secretary of State, and which failed to update its address on file there, cannot demonstrate an 'excusable default'" (*Cantarelli S.P.A. v L. Della Cella Co.,* 40 AD3d 445, 445-446 [1st Dept 2007], quoting *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.,* 67 NY2d 138, 143 [1986]). Here, defendant contends defendant inadvertently failed to update its address with the Secretary of State. There is no indication in the record that defendant was deliberately attempting to avoid notice of the action through its failure to update its address with the Secretary of State. Moreover, the mis-communication between Mr. Ishay and Mr. Azeroual as to retaining defense

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[1]Defendant submits an affidavit of Avy Azeroual which confirms Mr. Ishay's contention as to the mis-communication stating that he believed Mr. Ishay would engage counsel.

counsel which compounded the delay may properly be excused. Therefore, the Court finds the default in answering to be excusable since the delay was not prolonged (approximately eight months) and plaintiff has not demonstrated any prejudice as a result of the delay (*see, Jones v 414 Equities LLC*, 57 AD3d 65, 81 [1st Dept. 2008]; *Pagan v Four Thirty Realty LLC*, 50 AD3d 265 [1st Dept. 2008]). In reaching this determination the Court takes no position on whether the landlord has demonstrated a meritorious defense. Where, as here, no default order or judgment has been entered, a showing of a potential meritorious defense is not an essential element of an application to serve a late answer (*see, Jones v 414 Equities LLC, supra; Guzetti v City of New York*, 32 AD3d 234, 238 [1st Dept. 2006]). In any event, even if such showing was required, it is not necessary for the opposing defendants to establish the validity of their defenses as a matter of law (*see, Marinoff v Natty Realty Corp.*, 17 AD3d 412, 413 [2d Dept 2004]). Rather, demonstration of a potentially meritorious defense would be enough (*id.*).

Based upon the foregoing discussion, it is hereby

ORDERED, that plaintiff's motion for a default judgment is denied; and it is further

ORDERED, that defendant's cross motion for an order excusing its default in answering and for an extension of time within which to answer is granted and defendant shall serve and file a properly verified answer in the same form as Exhibit "A" annexed to the cross motion papers within 10 days of the date of entry of this order; and it is further

ORDERED that plaintiff shall serve her reply within 20 days of the service of defendant's answer; and it is further

ORDERED, that the attorneys for the parties are directed to appear for a preliminary conference on July 14, 2010, at 9:30 a.m., in Part 60, Room 341, at 60 Centre Street.

This constitutes the decision and order of the court.

DATED: 5/27/10

ENTER,

O. P. Sherwood

O. PETER SHERWOOD
J.S.C.