

Renaissance Assoc. LP v Brown

2012 NY Slip Op 32790(U)

November 21, 2012

Civil Court of the City of New York, New York County

Docket Number: L & T 79806/11

Judge: Sabrina B. Kraus

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

 RENAISSANCE ASSOC. LP X

HON. SABRINA B. KRAUS

Petitioners-Landlord

-against-

ANNA BROWN
 49-55 WADSWORTH TERRACE, APT. 1A
 NEW YORK, NY 10040

Respondent-Tenant

 X

DECISION & ORDER
Index No.: L&T 79806/11

BACKGROUND

RENAISSANCE ASSOC. LP (Petitioner) commenced this summary nonpayment proceeding in July 2011 by issuance of a ten day rent demand to Anna Brown (Respondent), the tenant of record of Apt 1A at 49-55 Wadsworth Terrace, New York, NY 10040 (Subject Premises). The Subject Premises are part of HUD subsidized housing, and Respondent has lived in the Subject Premises for 19 years. The demand sought \$5,734.00 in arrears, for a period of August 2008 through July 2011 at a rate consistently under \$200 per month. The petition issued on August 24, 2011. On September 8, 2011, Respondent answered and asserted defenses including improper service, that the monthly amount sought was incorrect, and laches. The proceeding was originally returnable on September 15, 2011.

The proceeding was adjourned by stipulation to October 19, 2011. On October 19, 2011, Respondent failed to appear and a default judgment in the amount of \$5879.00 was entered against her. The warrant of eviction issued on December 6, 2011. On January 9, 2012, Respondent returned to court and moved to vacate her default judgment. The motion was

resolved on January 19, 2012, pursuant to a stipulation which vacated the default, and adjourned the proceeding to March 8, 2012, at Respondent's request, for her to have time to retain counsel.

The proceeding was adjourned over several more court dates to August 6, 2012, when it was transferred to the expediter. On that date, the proceeding was assigned to Part R for trial, and after a conference with the parties, it was adjourned to September 10, 2012 for trial. On September 10, 2012, Respondent failed to appear for the trial, and Petitioner made an oral application for a default judgment against Respondent. In support of its application Petitioner submitted a rent/payment history (Ex 1), rent break down, (Ex 2) and certifications from US Department of Housing and Urban Development ("HUD")(Ex 3).¹

Petitioner included in its application a request to amend the petition to include all arrears due through September 2012. The court held said relief could only be sought on notice to Respondent, whereupon Petitioner withdrew its application for a default, and the proceeding was adjourned to October 2, 2012, for Petitioner to move for appropriate relief. Petitioner moved for summary judgment on October 2, 2012. Respondent appeared and requested an opportunity to submit written opposition to Petitioner's motion. The Court granted the request and adjourned the proceeding to October 12, 2012 for submission of Respondent's written opposition. On October 12, 2012, Respondent submitted her opposition and the Court reserved decision.

DISCUSSION

Petitioner's moving papers establish a *prima facie* case for a judgment. Petitioner establishes it is the owner of the subject building pursuant to a deed , the building has a valid MDR, and the Respondent is a tenant of record pursuant to a written lease between the parties.

¹ These documents are also annexed to Petitioner's moving papers.

Petitioner issued a ten day rent demand and subsequent petition and provided valid affidavits of service for the pleadings.

Petitioner showed that the HUD subsidy had been paid through September 2012, but Respondent's share, which the moving papers assert totals \$7,278.00 through September 2012 remains outstanding. The arrears sought by Petitioner were further detailed as follows:

\$152 per month for the period of August 2008 through July 2010; and

\$145 per month from August 2010 to July 2011; and

\$135 per month for the period of August 2011 through September 2012.

Petitioner argues that the affirmative defense of laches asserted by Respondent is inapplicable based on the prior litigation between the parties. The court notes that the parties have been involved in two prior prolonged summary proceedings prior to the instant proceeding, and both parties reference the prior proceedings in their motion papers. The court takes judicial notice of those proceedings and the contents of said files.

In April 2009, Petitioner commenced a non-payment proceeding against Respondent under Index No. 67128/2009, seeking arrears from July 2007 forward. That proceeding continued through January 26, 2010, when it was dismissed by the court. There is no order regarding the dismissal, and it is not possible from looking at the file to determine what the basis of the dismissal was. It appears that Petitioner sued for the full contract rent in the 2009 proceeding, based on Respondent's failure to re-certify, and after the dismissal in January 2010, Petitioner commenced a holdover proceeding based on Respondent's failure to re-certify.

In May 2010, Petitioner issued a thirty day notice to cure asserting that Respondent had been terminated from the Section 8 Program through her own fault and giving her until July 2, 2010 to have the subsidy reinstated and arrears paid. A notice of termination issued on July 7,

2010 and the petition issued in September 2010. That proceeding under Index Number 82146/2010 continued through May 9, 2011, when it was discontinued by Petitioner based on Respondent's having completed her re-certification and having her subsidy reinstated.

This proceeding was commenced shortly after.

In her opposition papers, Respondent does not dispute the amount asserted due by Petitioner. Respondent asserts a warranty of habitability claim, however, she raises this claim for the first time in her opposition to summary judgment and has asserted no defense based on conditions in her answer or any prior point in this proceeding. Respondent asserts improper service of the petition, stating she never received it on her door, but the proceeding was not assigned to Part R for a traverse hearing only for trial, and Respondent only denies receipt of the petition on her door which is insufficient to trigger the necessity for a traverse hearing, particularly at this point in the proceeding.

Respondent asserts that the deed and MDR relied upon by Petitioner are defective but the court finds they are not.

Respondent's main defense is laches. Respondent does not assert that she ever believed that Petitioner was not going to seek the rent, rather she asserts that the delay occasioned by the other proceedings has prejudiced her, because she is unable to pay the arrears and may be denied assistance from DSS because the arrears go so far back. Respondent asserts that the Judge in the holdover proceeding advised her not to make any rent payments. Assuming this was true this is not laches that can be attributed to Petitioner. Respondent asks that the court limit any possessory judgment awarded to Petitioner to rent arrears from August 2011 forward.

The Court finds no material issue of fact on Respondent's laches defense which requires a trial. First the court notes that it is undisputed that Respondent has not paid her portion of the

monthly rent since 2008. From August 2008 through September 2011 the only payments received by Petitioner have been from Section 8.

Section 8 made three lump sum payments towards arrears during this time, \$14,900.00 in January 2010, \$30,840.00 in November 2010 and \$2354.00 in September 2011. Additionally, from December 2010 through July 2011, and then again from October 2011 forward Section 8 has timely paid the subsidy amount. Respondent was well aware that she was required to pay her portion during this period, but continuously disputed the amount that HUD had determined was her appropriate share. Respondent's failure to timely comply with re-certification requirements was responsible for the delay occasioned by the last holdover proceeding.

In determining whether rent claims are stale, proof of prior litigation between the parties may negate a defense based on laches (*Roxborough Apts. Corp. Becker*, 31 Misc3d 138[A]; *Baumrind v Valentine* 2002 NY Slip Op 50137[U]). In this case the undisputed facts combined with the prior litigation between the parties negate Respondent's defense of laches.

In order to prevail on a motion for summary judgment Petitioner must show there exist no material issues of fact requiring a trial (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Petitioner has established a *prima facie* entitlement to a judgment for arrears and Respondent has failed to assert any defense which requires a trial as noted above. Based on the foregoing, the Court grants Petitioner's motion to amend the petition for all arrears due through September 2012, and grants Petitioner's motion for summary judgment.

However, Petitioner has failed to establish an entitlement to the full amount of \$7,278.00 sought through September 2012. Initially, the court notes that the rent demand in this proceeding seeks one lump sum of \$2070.00 for a period of August 2008 through October 2009. The demand also lists August 2009 through October 2009 separately which makes the amounts

sought for this period further confusing. The demand for this period of time is insufficient to serve as a predicate for a judgment because it is not further detailed, is not subject to amendment, and cannot be said to be a good faith approximation of the sums due for this period (*JD Realty Assocs v Jorrin* 169 Misc2d 292). Thus Petitioner's claim for arrears prior to October 2009 is severed from this proceeding and dismissed without prejudice to Petitioner's right to seek said sums in a plenary action.

Similarly, for October 2009 through March 2010 the demand seeks \$135 per month, but Petitioner in its motion and pleading asserts a right to \$152 per month for the same period. The predicate notice is non-amendable, the petition seeks the same sums for the same periods as the demand, and Petitioner has not made any application to conform the pleadings to the proofs. Therefore, Petitioner is limited to recovering \$ 135 per month for the period of October 2009 through March 2010. For April and May 2010, Petitioner is entitled to \$152 per month. For the period of June 2010 through July 2011 Petitioner is entitled to \$145 per month and for August 2011 through September 2012, Petitioner is entitled to \$135 per month.

Petitioner is awarded a final judgment in the amount of \$5034, as all arrears due from October 2009 through September 2012, the warrant of eviction shall issue forthwith, execution of the warrant is stayed through January 15, 2013 for payment of same, to afford Respondent an opportunity to seek assistance in the payment of arrears from DSS. The court exercises its discretion in extending the stay on execution of the warrant, because Respondent has expressed a need to seek assistance from DSS in the payment of arrears, is a long term tenant, and also in recognition of the length of time it has taken the parties to have this dispute resolved with finality. Upon default the warrant may execute upon Marshall's notice.

This constitutes the decision and order of this Court.

Dated: New York, New York
November 21, 2012

Sabrina B. Kraus, JHC

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