

Norfolk Dev. LLC v Kee
2013 NY Slip Op 31787(U)
August 6, 2013
HCIV, New York County
Docket Number: 76794/06
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK : HOUSING PART C

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NORFOLK DEVELOPMENT LLC,

Petitioner-Landlord,
-against-

DECISION/ORDER
Index No. L & T 76794/06

ELIZABETH KEE a/k/a RITA ELIZABETH KEE,
106 Norfolk Street,
Apartment No. 25
New York, New York 10002

Respondent-Tenant,
RENATO STABILE,
“JOHN DOE” AND/OR “JANE DOE”
Respondents-Undertenants

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BACKGROUND

NORFOLK DEVELOPMENT LLC (Petitioner) commenced this summary holdover proceeding to recover possession of 106 Norfolk Street, Apartment 25, New York, NY 10002 (Subject Premises) on the grounds that **ELIZABETH KEE** (Respondent) did not occupy the Subject Premises as her primary residence. After six years of litigation, including two interim appeals, This Court issued a decision dated June 12, 2013, awarding Petitioner a final judgment of possession after trial, and staying execution of the warrant through July 15, 2013. The warrant of eviction issued on July 1, 2013. On July 3, 2013, Respondent served and filed a notice of appeal. A Marshal’s notice of eviction was served on July 18, 2013. Respondent asserts that she did not received the notice as required. A Marshal executed on the warrant of eviction on July 26, 2013. Respondent now moves for an order restoring Respondent to the Subject Premises,

staying reletting of the Subject Premises and for related relief. On August 6, 2013, the court heard argument and reserved decision.¹

DISPUTED FACTS

Respondent alleges that on July 15, 2013, she traveled to upstate New York and that she did not return to New York City until Sunday July 21, 2013, when she went to a birthday dinner in Queens and spent the night there. Respondent asserts that on the morning of July 22, 2013, she went to the Subject Premises to check her mail and get a change of clothes, and that there was no Marshal's notice posted on her door, and no copy of a Marshal's notice had been delivered to her by mail as of said date. Respondent left and did not return to the Subject Premises again until July 29, 2013, when she discovered she had been evicted. At that time, Respondent acknowledges a copy of the Marshal's notice of legal possession was posted on the door to the Subject Premises. On the same date, when she checked her mail she saw a copy of the Marshal's notice which had been postmarked July 18, 2013. Respondent further asserts use and occupancy for August was tendered and received.

Petitioner provides the affidavit of service by Timothy Thompson, a licensed process server, who asserts that on July 18, 2013 at 6:51 am he posted the notice of eviction on Respondent's door, with a prior attempt having been made on July 17, 2013 at 2:16 pm . Attached to Petitioner's opposition papers is a photograph of the Marshal's notice posted on the

¹ The trial was done in Part R. The motion should have been made returnable before the Judge currently sitting in Part R, but was inadvertently directed by the clerk's office to Part C. At the request of both parties, the court is determining the motion rather than referring the motion back to Part R for determination. However, any further applications should be directed to Part R.

door to the Subject Premises, advising that Respondent could be subject to an eviction as early as July 26, 2013, and showing the date of the notice as July 18, 2013. Petitioner's agent alleged that said notice remained posted on the door to the Subject Premises through and including July 26, 2013, when the warrant was executed. A second photograph showing both notices on the door to the Subject Premises, and alleged to have been taken on July 26, 2013, is also attached to the opposition papers.

DISCUSSION

The parties papers primarily focus on whether the Marshal's notice was properly served and whether Respondent had received the notice prior to the execution of the warrant. However, while Respondent's allegation of improper service of the notice of eviction by the Marshal may give rise to liability against the Marshal if established, it does not effect the validity of the judgment, nor does it render invalid the execution of the warrant as to Petitioner in this proceeding (*Presidential Management Co. v Farley* 78 Misc.2d 610; *Graham v Moore* 10 Misc3d 133(A)). Therefore, the court finds that there is no need to conduct to a hearing to determine if the Marshal properly served the notice of eviction. The real issue remains what relief, if any, is Respondent pending appeal of this court's June 12, 2013 decision.

Petitioner argues that any appeal of this court's decision after trial has been rendered moot by the execution of the warrant. The court disagrees. The cases relied upon by Petitioner are not applicable to the case at bar. For example, in *Michalak v Fechtel* 27 Misc3d 140(A) the Respondent had consented to entry of a judgment and therefore had waived the right to appeal.

It is well settled that the Civil Court may, in appropriate circumstances, restore a tenant

to possession, after execution of the warrant (*Brusco v Braun* 84 NY2d 674,682). A determination as to whether good cause exists to restore a tenant to possession after execution of the warrant "... is entrusted to the sound discretion of the court upon review of the particular facts and circumstances presented (*Harvey 1390 LLC v Bodenheim* 96 AD3d 664; *see also 102-116 Eighth Ave. Assoc.* 229 AD2d 296)."

Both parties assert that they are certain to prevail on appeal.

CPLR § 5519(a)(6) provides that "Service upon the adverse party of a notice of appeal ... stays all proceedings to enforce the judgment or order appealed from pending the appeal..."

where :

the appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party will not commit or suffer to be committed any waste and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the value of the use and occupancy of such property ... from the taking of the appeal until delivery of possession of the property;

This court has previously held that this provision is applicable to a judgment of possession in a summary holdover proceeding [*Andrada Owners Corp. v DiGrazia* 38 Misc.3d 1219(A)]. "The purpose of the stay is to prevent the winner of a judgment from enforcing it while the loser prosecutes an appeal (David D Siegal Practice Commentaries C5519:1)." It has generally been held that service of the notice of appeal alone is insufficient to invoke the automatic stay, and that additionally the court must set and the appellant must pay an undertaking.

In this case, Respondent did not move the court to set an undertaking, because she wishes

to move for a discretionary stay before the Appellate Term, rather than to seek the automatic stay provided by CPLR 5519(a)(6). However, Respondent failed to seek the discretionary stay prior to the execution of the warrant, and does not now seek to invoke the automatic stay or ask this court to set an undertaking.

Respondent's counsel asserts Respondent always intended to move for a stay pending appeal. Yet even on July 29, three days after execution of the warrant, neither counsel nor Respondent were aware that an eviction had taken place, and counsel was playing "telephone tag" with her client "... to gauge the timing for our serving a motion for a stay pending appeal...(July 30, 2013 affirm of Zekaria)."

It is not clear why when the decision was issued on June 12, 2013, Respondent sought no stay to prevent execution of the warrant by the end of July. The decision provided for entry of a judgment, forthwith issuance of the warrant and only stayed execution of the warrant through July 15, 2013. The decision was sent by email to the attorneys, on the same date it was issued. Respondent's counsel was ill advised to wait past the expiration of the stay on execution of the warrant, for notification from Respondent that she received a Marshal's notice, before moving for a stay, particularly in light of Respondent's affidavit detailing that she was away from the Subject Premises for much of the month of July. However, the court does not find that Respondent should lose her right to a meaningful appeal, based on the failure to timely seek a stay.

Petitioner was aware that Respondent had filed a notice of appeal, and was aware of Respondent's intention to move for a stay. Petitioner never the less did not extend opposing counsel the courtesy of formal notification of its intent to execute the warrant of eviction, and

immediately after the expiration of the stay, directed the Marshal to serve the notice of eviction with no notice to counsel. While no such notice is required, it may have eliminated the present application and prevented any claim by Respondent that she was unaware of the impending eviction.

Notwithstanding the failure of Respondent's counsel to more timely move to seek a stay, the intent of CPLR § 5519 is clearly to afford Respondent an opportunity to either seek a discretionary stay pending appeal, or to move this court to set an undertaking to invoke the automatic stay. The prejudice to Respondent if she is not afforded an opportunity to return to the *status quo* and seek a stay pending appeal would be severe, and outweighs any prejudice to Petitioner by staying reletting to afford Respondent an opportunity to move for said stay.

Therefore, reletting is stayed through August 31, 2013, to afford Respondent an opportunity to move for a discretionary stay pending appeal, or to invoke the automatic appeal by moving for this court to set an undertaking. Petitioner shall also be stayed from renovating the Subject Premises during this period. If the discretionary stay is granted, or if Respondent moves to invoke the automatic stay by asking the court to set an undertaking which is then provided, then Respondent shall be restored to possession forthwith pending the appeal. The warrant of eviction shall remain valid, but execution shall be stayed pending the appeal. To the extent that Petitioner has incurred costs in the execution of the warrant, or asserts any other prejudice, Petitioner may seek to address these concerns in the form of any undertaking set or as a condition of any discretionary stay granted.

The court issues this order in an effort to place the parties in the position they would have been had a stay been sought prior to execution of the warrant, thereby enabling Respondent to

pursue her right to appeal, and giving Petitioner an opportunity to seek that any stay be conditioned as appropriate.

In the event Respondent fails to obtain a stay pending appeal on or before August 31, 2013, the stay on reletting is vacated and Respondent shall have no right to be restored to possession.

This constitutes the decision and order of this court.

Dated: New York, New York
August 6, 2013

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

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