

Esposito v Larig

2017 NY Slip Op 33315(U)

August 2, 2017

Supreme Court, Kings County

Docket Number: 517226/2016

Judge: Carolyn E. Wade

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At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the *7th* day of August 2017

PRESENT:
HON. CAROLYN E. WADE,

Justice

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TINA ESPOSITO,

Plaintiff,

Index No.: 517226/2016

-against-

DECISION AND ORDER

SOPHRONIA LARIG a/k/a SOPHIA LARIG and EYAL DAN,

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of Defendants' Motion and Plaintiff's Cross-Motion:

Papers	Numbered
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1 _____
Cross-Motion and Affidavits/Affirmations.....	2 _____
Answering Affidavits/Affirmations.....	3, 4 _____
Reply Affidavits/Affirmations.....	5, 6 _____
Memorandum of Law.....	_____

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Upon the foregoing cited papers, and after oral argument, defendants SOPHRONIA LARIG a/k/a SOPHIA LARIG and EYAL DAN move by way a pre-answer motion to dismiss for an order 1) dismissing the complaint; or in the alternative, 2) referring Plaintiff's first cause of action to the New York State Division of Housing and Community Renewal ("DHCR") for a determination of Defendants' legal regulated rent; 3) dismissing the second, third and fourth causes of action; and 4) staying the balance of the complaint pending a final determination of Defendants' legal regulated rent by DHCR.

Plaintiff TINA ESPOSITO, by cross-motion, moves for 1) a default judgment against both defendants on the ground that they failed to timely appear or plead in this action, and referring this matter to a Judicial Hearing Officer for an inquest on damages, or in the alternative, 2) directing defendants to pay plaintiff retroactive and prospective rent/use and occupancy pending the conclusion of this action.

The underlying action was commenced by TINA ESPOSITO ("Plaintiff"), the landlord and owner of real property located at 11 First Place, Brooklyn, New York 11231 ("Subject Premises") against defendant tenants, SOPHRONIA LARIG a/k/a SOPHIA LARIG ("LARIG") and EYAL DAN ("DAN"), who reside in Apartment #1. The Verified Complaint asserts five causes of action: an order to determine the amount of rent for the subject premises (1st cause of action), a judgment for use and occupancy (2nd cause of action), a judgment of ejectment (third cause of action), a judgment for use and occupancy, and attorneys' fees (4th cause of action), and a judgment for reasonable legal fees and costs (5th cause of action).

This matter has an extensive related procedural history in Kings County Housing Court.

Notably, on July 25, 2011, Plaintiff commenced a summary holdover proceeding, *Esposito v. Larig*, #83322/11, which was premised on her claim that the subject premises was exempt from rent stabilization due to “high rent vacancy deregulation.” By a Decision/Order, dated June 9, 2014, the Hon. Maria Milin, JHC, granted the branch of Defendants’ motion for summary judgment, and dismissed the Petition (Exhibit “B” of Defendants’ motion). Plaintiff’s cross-motion for summary judgment, and her application for use and occupancy were both denied.

In her ruling, Judge Milin determined that the Defendants were entitled to a rent stabilized lease as the first tenant after a temporary exemption from rent stabilization (from 1995-2005); and that they were permitted to assert an overcharge counterclaim. The Judge noted that there was “insufficient evidence to determine the correct rental amount for the premises and to determine the overcharge claim.”

On July 13, 2016, the Appellate Term modified the Housing Court’s order by dismissing the rent overcharge counterclaim based upon the expiration of the statute of limitations, but otherwise affirmed the June 9, 2014 order in all other respects (Exhibit “C” of Defendants’ motion). The instant action, and pre-answer motion to dismiss ensued.

In support of the instant motion, Defendants argue that a determination of their legal regulated rent (1st cause of action) should be referred to the DHCR. They point out that there is no “base date” rent (as defined in the Rent Stabilization code) “from which one can extrapolate what the current legal regulated rent should be.” Defendants also aver that DHCR’s expertise and the doctrine of primary jurisdiction serve as further grounds for the agency to determine the rent.

With respect to Plaintiff's remaining causes of action, Defendants contend, *inter alia*, that the ejectment claim (3rd cause of action) should be dismissed, as they were not served with a predicate notice of termination. Moreover, they argue that the claims for use of occupancy, and attorney's fees (2nd & 4th cause of action) as well as legal fees and costs (5th cause of action), should be dismissed because they are ancillary to the ejectment claim.

Plaintiff, by cross-motion and in opposition, contends that a default judgment should be entered against the Defendants because they did not timely file their pre-answer motion to dismiss. In the alternative, she requests that Defendants be directed to pay retroactive and prospective rent/use and occupancy pending the conclusion of this action. Plaintiff further asserts that she is entitled to a judgment of ejectment because the Defendants have neither paid rent nor use and occupancy since August 2007.

In reply, Defendants maintain that they timely filed the pre-answer motion with respect to LARIG; however, they are silent as to the timeliness of DAN's application. They further assert that a finding by DHCR as to the legal regulated rent is a pre-requisite to a determination of Plaintiff's claims for ejectment, use and occupancy, damages and attorney's fees.

Plaintiff, in rebuttal, avers that the Defendants do not dispute that DAN is in default, as the Motion to Dismiss was untimely filed more than twenty days after the pleadings were personally served on him. She also maintains that a default judgment should be entered against LARIG, as she had until November 22, 2016 to file a pre-answer motion to dismiss.

CPLR §320(a) provides that a defendant has twenty days after personal service of the summons and complaint to respond. If a defendant is served by way of substituted service, he/she is to respond within thirty days after service is complete. Pursuant to CPLR §308(2),

substituted service is completed ten days after the filing of the proof of service with the clerk.

In the instant case, the affidavit of service for the Summons and Verified Complaint reflects that DAN was personally served on October 6, 2016 at the Subject Premises (Exhibit "2" of Defendants' cross-motion). Thus, DAN's time to respond to the pleadings expired October 26, 2016. Yet, the instant pre-answer dismissal motion was not filed until November 23, 2016. The court notes that Defendants do not dispute that DAN's motion is untimely.

Moreover, on October 6, 2016, DAN accepted service (substituted service) for his wife, LARIG (Exhibit "3" of Defendants' cross-motion). On October 11, 2016, a copy of the pleadings was sent to her by first class mail. The affidavit of service was then e-filed with the Kings County Clerk on October 13, 2016 (Exhibit "4" of Defendants' cross-motion). Therefore, service was completed on October 23, 2016. Since LARIG was delivered the pleadings by way of substituted service, she was required to file the pre-answer dismissal motion by November 22, 2016. LARIG filed the application a day late on November 23, 2016. Notably, neither DAN nor LARIG proffered a reasonable excuse for their untimeliness nor brought an application seeking an extension to serve their pre-answer motion. As a result, this Court determines that a default judgment be entered against both DAN and LARIG. Plaintiff requests that this matter be referred to a Judicial Hearing Officer to conduct an inquest on damages. Yet, an inquest must be stayed at this juncture, as it is undisputed that the current legal regulated rent must be determined.

In her June 9, 2014 Decision/Order, Judge Milin, JHC, found that there was insufficient

evidence to determine the correct rent amount for the Subject Premises. This court reaches the same finding, as it is undisputed that there is no "base date" rent to determine what the current legal regulated rent should be (1st cause of action). Thus, this court defers to the expertise of DHCR to make this determination (see *Massaro v. Jaina Network Sys., Inc.*, 106 AD3d 701 [2d Dept 2013]); *Contempo Acquisition LLC v. Dawson*, 2015 NY Slip Op 32312[U] [Sup Ct, N.Y. Cty. 2015]). As this significant issue remains undecided, this court hereby stays a determination on the balance of the Summons and Verified Complaint (2nd-5th causes of action) pending DHCR's ruling on Plaintiff's first cause of action.

Accordingly, based upon the above, Defendants' Motion to Dismiss is **granted solely to the extent that Plaintiff's first cause of action is referred to DHCR for a determination of Defendants' legal regulated rent.** A ruling on the balance of the Verified Complaint (2nd-5th causes of action) is hereby stayed pending DHCR's decision.

Plaintiff's Cross-Motion is granted solely to the extent that a default judgment be entered against Defendants LARIG and DAN. However, this court hereby stays the inquest on damages pending DHCR's determination of Plaintiff's first cause of action.

This constitutes the Decision/Order of the court.

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HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE