

Aimco 240 W. 73rd St., LLC v Benoff

2013 NY Slip Op 30228(U)

February 5, 2013

HCIV, New York County

Docket Number: 54657/2010

Judge: Sabrina B. Kraus

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

AIMCO 240 WEST 73RD STREET, LLC

X

Petitioner-Landlord

-against-

DECISION & ORDER

Index No.: L& T 54657/2010

HON. SABRINA B. KRAUS

GREGORY BENOFF
240 West 73RD Street, Apt 503
New York, New York 10023

Respondent-Tenant

“JOHN DOE” and/or “JANE DOE”

Respondents-Occupants

X

BACKGROUND

This summary holdover proceeding was commenced by **AIMCO 240 WEST 73RD STREET, LLC** (Petitioner) against **GREGORY BENOFF** (Respondent), seeking to recover possession of **240 West 73RD Street, Apt 503 , New York, New York 10023** (Subject Premises) based on the allegation that Respondent is a rent control tenant and has not maintained the Subject Premises as his primary residence.

Respondent appeared by counsel and filed a written answer on or about May 17, 2010 which asserted certain defects in the petition and a general denial. On September 7, 2010, the proceeding was marked off calendar while the parties engaged in discovery. On March 27,

2012, Respondent's counsel moved to be relieved. The motion was granted on consent and the proceeding adjourned to May 1, 2012 for the appearance of new counsel.

On May 1 2012, William J. Robb, Esq. filed a notice of appearance on behalf of Respondent and the proceeding was adjourned to June 12, 2012. On June 12, 2012, the court (Stanley, J.) Granted Petitioner's motion for relief pursuant to CPLR § 3126 pursuant to an order which extended Respondent's time to comply with outstanding discovery and adjourned the proceeding to July 24, 2012. The court issued a further order directing Respondent to produce documents on August 15, 2012 and adjourned the proceeding to September 19, 2012. Trial was scheduled for December 11, 2012.

On December 11, 2012, Petitioner moved again for relief pursuant to CPLR 3126. Respondent submitted a cross-motion for dismissal, which was never entered through the clerk's office, but which was submitted to the court along with the underlying motion for determination. On that date, the court (Stanley, J.) issued a decision which awarded Petitioner certain relief pursuant to CPLR 3126, gave Respondent an opportunity to submit additional documentation by January 31, 2013, and denied Respondent's cross-motion for dismissal. Trial was scheduled for February 5, 2012.

On February 5, 2012, Respondent moved to reargue that portion of Judge Stanley's December 11, 2012 order which denied Respondent's cross-motion to dismiss. Petitioner submitted opposition and the court reserved decision.

DISCUSSION

CPLR 2221(a) provides that a motion to reargue shall be made on notice to the judge who signed the order "... unless he or she is for any reason unable to hear it ...". One of the

circumstances that has been held to render a judge “unable to hear” a motion for re-argument is when a new judge is assigned to the case under the Individual Assignment System, in which case an administrative judge may provide that upon reassignment applications affecting prior order should be made to the newly assigned judge (*See practice commentaries by Harold A. Kurland and general Editor David L Ferstendig*).

Housing Court Judges in New York City are assigned to a particular part in a particular county generally for a period of one year. On January 15, 2013, Judge Stanley was reassigned to Bronx County Housing Court and Judge Kraus was assigned to Part C. Based on the foregoing, this reassignment renders Judge Stanley “unable to hear” the motion, and the motion is properly addressed to the new judge assigned to the Part C.

In its December 11, 2012 order the court held:

On the trial date, respondent now cross-moves for dismissal raising traverse issues alleging that they are never waivable in this 2010 case. However, the answer of 5/2010 does not raise the issue of traverse with sufficient specificity to deem this cross motion has merit. Accordingly, respondent’s cross-motion is denied.

Pursuant to CPLR § 2221(d)(2) a motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion...”. Respondent’s cross-motion sought dismissal for “lack of subject matter and personal jurisdiction based on Petitioner’s failure to properly serve the predicate notice and the Notice of Petition and Petition ...”. Petitioner submitted no opposition to the cross-motion, because it did not believe that the court was going to consider the request for relief, because the cross-motion had not been filed with the clerk’s office or entered into the court’s computer as a request for formal relief.

Respondent's original cross-motion did seek dismissal based on failure to serve the petition and the predicate notice on the alternate address and other service issues. These claims do address personal jurisdiction of the court and were waived when they were not included in the written answer filed by Respondent's counsel in May 2010. The court clearly has personal jurisdiction over Respondent. The answer did assert a lack of personal jurisdiction, but the answer acknowledges that the petition was served on Respondent and raises the defense based on the fact that the Notice of Petition failed to "identify the date, time part, and room number in which the petition is noticed to be heard." No part of Respondent's answer denies receipt of the predicate notice, nor asserts that Petitioner should have served the notice or any pleading on any alternate address.

In Respondent's motion to reargue, the primary emphasis is on the failure of Petitioner to have served the predicate notice on the Oakdale Address. This is a traverse claim and was waived by the failure to assert it in Respondent's answer. Based on the foregoing the motion to reargue is denied.

However, there are two issues raised by the cross-motion which were not addressed by the Court and which remain to be determined at trial.

The first issue is that there is no affidavit of service in the court file, nor annexed to any of the motion papers indicating that the predicate notice was ever served. In order to prove a cause of action at trial, Petitioner will need to prove that the notice was served, and that Petitioner complied with 9 NYCRR § 2204.3.

Respondent is not entitled to challenge service by raising lack of receipt, or disputing any facts alleged in an affidavit of service, but to date no affidavit of service appears to have

been filed with the court. The notice was delivered to DHCR as indicated by the stamp on the original notice in the court's file indicating it was received by DHCR on November 24, 2010 at 2:34 pm, but absent an affidavit of service being attached delivery of the notice alone would be insufficient to comply with the statute.

The notice relied upon by Petitioner asserts that it is issued pursuant to 9 NYCRR-2204.6. That provision of the rent control law applies to proceedings based on a certificate of eviction issues by DHCR. To proceed on a non primary residence proceeding without a certificate of eviction, Petitioner must allege and prove compliance with 9 NYCRR 2204.3 (*Kaycee West 113th Street Corp v Diakoff* 160 AD2d 573). This requires that "within 48 hours after the notice is served upon the tenant, an exact copy thereof, together with an affidavit of service, shall be filed with the district rent office ... (9 NYCRR § 2204.3 (c))." These provisions are not subject to waiver (*Shahid v Carillo* 8 Misc3d 134(A); *Garvin v Cole* 53 Misc2d 647).¹

In conclusion the motion to reargue is denied. The cross-motion was primarily aimed at contesting proper service of the petition and predicate notice, and additional mailings that respondent asserts were necessary. These claims are traverse claims which were waived by Respondent based on the failure to preserve them in his answer. However, notwithstanding said denial, Petitioner must still establish a cause of action for non-primary residence under rent control at trial.

¹ The court notes Respondent's original cross-motion asserts that Respondent's tenancy is governed by rent stabilization and not rent control. This issue was not addressed by the court, nor was it addressed by either of the parties in the re-argument motion. However, Petitioner will need to prove at trial that the tenancy is governed by rent control, and should the trial court determine that the tenancy is governed by rent-stabilization, Petitioner will be unable to establish a *prima facie* case.

Trial is set for February 13, 2013 at 9:30 am and marked final against both parties.

This constitutes the decision and order of this Court.

SABRINA B. KRAUS

Dated: New York, New York
February 5, 2013

TO: ROSMAN & ASSOCIATES
Attorneys for Petitioner
305 Madison Avenue, 46th Floor
New York, New York 10165
(212) 752-1330

WILLIAM J ROBB, ESQ ,
151 Broadway
Hawthorne, New York 10532
(914) 741-4301