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

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NEIGHBORHOOD RESTORE, H.D.F.C.,

Petitioner-Landlord,

Index No.: L&T 72947/03

- against-

Motion Sequence No. 001

SADIE HAYNES,

Respondent-Occupant,

DECISION & ORDER

- and -

"JOHN DOE" and/or "JANE DOE,"

Respondent(s)-Undertenant(s).

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HON. SHLOMO S. HAGLER, J.H.C.:

In this residential holdover proceeding, petitioner Neighborhood Restore H.D.F.C.[1] ("Neighborhood" or "petitioner") moves for an order as follows:

(a) striking all the affirmative defenses and counterclaims of respondent Sadie Haynes ("Haynes" or "respondent");

(b) granting summary judgment pursuant to CPLR § 3212; and

(c) setting this matter down for a hearing to determine the fair market use and occupancy for the subject premises.

Respondent opposes the motion.

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[1] After this motion was submitted, petitioner filed an Order to Show Cause to amend the caption and petition to reflect the correct name of petitioner as Neighborhood Restore H.D.F.C. and its status as a New York corporation and to stay this motion pending the determination of its Order to Show Cause. Petitioner's Order to Show Cause to amend was granted on consent by order of the Hon. Inez Hoyos, J.H.C. on August 8, 2003.

BACKGROUND

In or about September, 1999, the City of New York commenced a foreclosure action on the building located at 66 West 120th Street, New York, New York 10027 ("subject building"). On August 9, 2000, the City of New York was granted a foreclosure judgment and an award of possession. In May, 2001, the City of New York transferred the subject building to the petitioner by foreclosure deed. The transfer was subsequently upheld by the U.S. Bankruptcy Court. See, Decision Granting Relief from the Automatic Stay and Denying Motion for Reconsideration, In re: Sadie Haynes, Debtor, Chapter 13, Case No. 01-12631 (CB), issued by United States Bankruptcy Court, Southern District of New York ("Bankruptcy Court Decision"), p. 3.

In or about April, 2003, petitioner served respondent with a Notice to Quit for apartment #1 at the subject building ("subject premises"), terminating the license respondent had been granted by the previous owners of the subject building. Thereafter, petitioner commenced this licensee holdover proceeding in or about May, 2003. In or about June 2003, respondent interposed a Notice of Appearance, Verified Answer and Counterclaims, which set forth four (4) affirmative defenses and two (2) counterclaims.

DISCUSSION

First Affirmative Defense

In her first affirmative defense, respondent acknowledges receipt of the Notice of Petition and Petition and does not challenge that the service was effectuated in accordance with Real Property Actions and Proceedings Law ("RPAPL") § 735. However, respondent alleges

that she neither received a verification page with the Petition nor a copy of the affidavit of servic of the Notice to Quit. Significantly, respondent does not allege that she did not receive the Notice to Quit.[2]

This Court initially notes that the copy of the Petition filed with the Court and stamped as received by the Clerk of the Court on May 15, 2003, contains both the verification and the affidavits of service for the Notice to Quit. Furthermore, respondent has not proffered a copy of the Petition she alleges was served upon her. Assuming, *arguendo*, that respondent neither received the verification of the Petition nor the affidavits of service for the Notice to Qui it would not require dismissal.

Regarding the verification of the Petition, Civil Practice Law and Rules ("CPLR" § 3022 states, in pertinent part, that:

> . . . Where a pleading is served without a sufficient verification in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity, provided he gives notice with due diligence to the attorney of the adverse party that he elects so to do.

In this case, verification of the Petition is required under RPAPL § 741. However, respondent did not reject the Petition as a nullity but instead raised her objection in her answer, dated June 10, 2003 -- approximately twenty (20) days after service of the Petition, and approximately ten (10) days after respondent's attorney had appeared at the first court date on May 30, 2003. "Due diligence" under CPLR § 3022 has been held to mean immediately or withi twenty-four (24) hours. Lentile v. Egan, 94 AD2d 839, 463 NYS2d 542 (3d Dept 1983) *aff'd*

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[2] Although respondent's Affidavit in Opposition to petitioner's motion ("Aff. In Opp."), ¶ 13, claims that the predicate notices were not annexed to the papers with which she was served, her answer only alleges that the verification page and the copy of the affidavit of service of the Notice to Quit were missing.

61 NY2d 874, 474 NYS2d 467 (1983); (Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3022:2). Respondent's failure to raise an objection to the allegedly missing verification to the Petition served upon her for at least ten (10) days after being represented by counsel waives that objection. Id.; Rosenshein v. Ernstoff, 176 AD2d 686, 576 NYS2d 2 (1st Dept 1991). Finally, even if respondent's objection to the allegedly missing verification of the Petition served upon her was timely raised, such a defect is *de minimus* and amendable. CPLR § 3026; Hablin Realty Corp. v. McCain, 123 Misc 2d 777, 478 NYS2d 224 (App Term, 1st Dept 1984).

Regarding respondent's allegation that the affidavit of service for the Notice to Quit was not included in the Petition served upon her, such a defect, even if true, would not be grounds to dismiss the Petition. The New York Civil Court Act ("NYCCA") § 409, CPLR 306 and CPLR 306-b all require the **filing** of an affidavit of service under certain circumstances. While providing copies of the affidavit(s) of service of the predicate notices is commonplace and no doubt a good practice, there is no requirement that the affidavit of service also be served upon the other side, in addition to filing with the court.

Furthermore, the facts regarding the service of the Notice to Quit were sufficiently provided in the Petition in compliance with the requirement of RPAPL § 741 for a statement of the facts upon which the Petition is based. *Cf* Century Paramount Hotel v. Rock Land Corp., 68 Misc 2d 603, 327 NYS2d 695, (NY Civ Ct 1971). Finally, the respondent has not shown how the alleged failure to include the affidavit of service of the Notice to Quit prejudiced her in any way, making such a defect amendable as well. CPLR § 3026; Hablin v. McCain, *supra*.

Respondent's first affirmative defense is, therefore, stricken.

Second Affirmative Defense

Respondent has withdrawn or consented to the striking of her second affirmative defense, claiming ownership rights to the subject building and premises under adverse possession. Thus, respondent's second affirmative defense is stricken.

Third Affirmative Defense

Respondent's third affirmative defense alleges that she is a month-to-month tenant and not a licensee. Respondent argues that, under the doctrine of *res judicata*, the Bankruptcy Court Decision held that she was a tenant rather than a licensee and she was, therefore, entitled to a thirty (30) day notice of termination instead of the ten (10) day Notice to Quit.

There are two legal doctrines that deal with effect of prior decisions upon a pending litigation – *res judicata* and collateral estoppel. *Res judicata* (also referred to as claims preclusion) precludes a party from relitigating an entire claim or cause of action actually litigated and decided in a prior litigation. Parker v. Blauvelt Volunteer Fire Company, 93 NY2d 343, 690 NYS2d 478 (1999).

Collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity [to the parties]. . . . The policies underlying its application are avoiding relitigation of a decide issue and the possibility of an inconsistent result." Buechel v Bain, 97 NY2d 295, 303, 740 NYS2d 252, 257 (2001) (cites omitted). Collateral estoppel has two requirements that must be met before it can be invoked: first, there must be an identity of issue which has already been decided in the prior action and is decisive of the issue presented in the present action, and second,

the parties (or those in privity to them) must have had a full and fair opportunity to contest the decision now said to be controlling. *Id.*, 97 NY2d at 303-04, 740 NYS2d at 257.[3]

The claims and issues decided by the Judge Blackshear in the Bankruptcy Court Decision were that the respondent did not have an **ownership** interest in the property and the tax foreclosure by the City of New York was valid and would not be stayed. The Bankruptcy Court found that the subject building was acquired by the City of New York through a tax foreclosure, the deed was transferred to petitioner, and the time of redemption by the former owner or occupant expired. The Bankruptcy Court, however, did **not** rule on whether respondent was currently a tenant of the subject premises. At various points, the Bankruptcy Court referred to the respondent as an "at-will tenant" of the former owner (Bankruptcy Court Decision, p.1); cited respondent's own claim as a tenant to the prior owner (Bankruptcy Court Decision, p. 6, "[s]he continued to acknowledge her status as a tenant"); or implied that she was a licensee of the prior owner (Bankruptcy Court Decision, p. 6, ". . . the Debtor entered onto the premises with the permission of the lawful owners as a tenant and she never refuted, disclaimed or acted in contradiction to this license.").[4] Therefore, the Bankruptcy Court's decision can not be considered either *res judicata* or collateral estoppel on the issue of respondent's status as a tenant or licensee. The only claims or issues common to both this proceeding and the Bankruptcy Court

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[3] In addition, claims or issues which properly could and should have been litigated in the prior litigation are also precluded under both *res judicata* and collateral estoppel. Parker v. Blauvelt Volunteer Fire Company, 93 NY2d 343, 690 NYS2d 478 (1999).

[4] Significantly, respondent's repeated claims in both the bankruptcy action and at the commencement of this proceeding that she is the owner of the subject premises undercuts her argument that she should be considered a tenant of the same premises.

action were respondent's claim of ownership through adverse possession and the validity of the City of New York's tax foreclosure and subsequent transfer of ownership rights to petitioner.

Assuming, *arguendo*, that respondent was a tenant of the prior owner, her alleged month-to-month tenancy was extinguished upon the tax foreclosure by the City of New York. Pursuant to RPAPL § 713(4), no landlord-tenant relationship exists once there has been such a tax foreclosure. Furthermore, respondent has not provided any indicia of a landlord-tenant relationship with the petitioner (or any other alleged prior owner), who is the current legal owner and acquired its ownership rights as a result of the tax foreclosure. Therefore, petitioner was only required under RPAPL § 713 to serve a ten (10) day Notice to Quit rather than the thirty (30) day notice argued by respondent.

Accordingly, respondent's third affirmative defense is stricken.

Fourth Affirmative Defense

Respondent alleged in her fourth affirmative defense that the Petition is jurisdictionally defective because the information contained in ¶ 8 of the Petition regarding the Multiple Dwelling Registration ("MDR") was inaccurate.

While a current MDR is required for non-payment proceedings (Multiple Dwelling Law § 325) and for holdover proceedings brought under RPAPL § 711 (22 NYCRR § 208.42(g) and 27 NYCRR § 2107(b)), there is no such requirement for a proceeding brought under RPAPL § 713, when no landlord-tenant relationship exists. Citibank, N.A. v. Garcia, N.Y.L.J., November 6, 1998, p. 23, col. 2 (App Term 2d & 11th Dist); Green Point Savings Bank v. Fusco, 163 Misc 2d 648, 621 NYS2d 796 (Civ Ct, Kings County 1994).

Assuming, *arguendo*, that an MDR is required, petitioner has attached a current MDR as Exhibit "G" to the Notice of Motion. Beacway Operating Corp. V. Hult, N.Y.L.J., March 13, 1992, p. 21, col. 2 (App Term 1st Dept). Respondent's fourth affirmative defense is, therefore, also stricken.

Petitioner's Motion for Summary Judgment

The movant has the initial burden of proving entitlement to summary judgment. As the Court of Appeals in Winegrad v. N.Y.U. Medical Center, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985) held:

> The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (see, Zuckerman v. City of New York, 49 N.Y.2d 557, 562; Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Matter of Redemption Church of Christ v. Williams, 84 A.D.2d 648, 649; Greenberg v Manlon Realty, 43 A.D.2d 968, 969).

Once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR § 3212(b); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); Friends of Animals v. Associated Fur Mfrs., 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979); Freedman v. Chemical Construction Corp., 43 N.Y.2d 260, 401 N.Y.S.2d 176 (1977); Spearmon v. Times Square Stores Corp., 96 A.D.2d 552, 465 N.Y.S.2d 230 (2d Dept 1983). "It is incumbent upon a [respondent] who opposes a motion for summary judgment to assemble, lay bare and reveal [her] proof, in order to show that the matters set up in [her] answer are real and are capable of being established upon a trial." Spearmon, 96 A.D.2d at 553 (quoting Di Sabato v.

Soffes, 9 A.D.2d 297, 301, 193 N.Y.S.2d 184 [1st Dept 1959]). If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant's papers, the movant's facts may be deemed admitted and summary judgment granted since no triable issue of fact exists. Kuehne & Nagel, Inc. v. F.W. Baiden, 36 NY2d 539, 369 NYS2d 667 (1975).

Inasmuch as petitioner has proven its *prima facie* case and respondent has no cognizable defense to this proceeding, this Court grants petitioner summary judgment. Accordingly, this Court grants petitioner a final judgment of possession against respondent. Issuance of the warrant of eviction shall be forthwith with execution thereof stayed through October 31, 2003, on condition that respondent pays use and occupancy as determined by the Court at the hearing.

Respondent's Counterclaims

Respondent's first counterclaim for reimbursement of various payments respondent alleges she made on behalf of the subject building for the period of time that petitioner was the owner is hereby severed for a plenary action or may be claimed as a setoff, if appropriate, against any use or occupancy which petitioner is seeking.

Respondent's second counterclaim for attorney's fees is denied as respondent is not the prevailing party in this proceeding.

CONCLUSION

This matter is restored to the court's calendar on September 30, 2003 at 9:30 a.m. for a hearing to determine the fair market use and occupancy for the subject premises.

The foregoing constitutes the decision and order of this Court. Courtesy copies of this decision and order have been mailed to counsel for the parties.

Dated: New York, New York
September 19, 2003

J.H. C.