Afikoman LLC, Petitioner-Landlord v. Fitzgerald House, Inc., Respondent-Tenant, L&T251751/2011
L&T 251751/2011

Civil Court, New York County, Housing Part U
NYLJ Publication Date: Mar 04, 2015

Cite as: Afikoman LLC v. Fitzgerald House, Inc., L&T 251751/2011, NYLJ 1202719413937, at *1 (Civ., NY, Decided January 20, 2015)

L&T 251751/2011

Judge Kelly O'Neill Levy
Read Summary of Decision
Decided: January 20, 2015

ATTORNEYS

Attorney for Petitioner: Gregg R. Kurlander, Esq., Kucker & Bruh, LLP, New York, NY.
Attorney for Respondent: Fitzgerald House Inc., Angelyn D. Johnson, Esq., Brooklyn, NY.

Recitation, as required by CPLR §2219(a), of the papers considered in the review of Petitioner's Order to Show Cause seeking vacatur of the money judgment in the amount of $180,000.00; staying the enforcement of the money judgment; vacating the stipulation of settlement; and dismissing the proceeding based upon Petitioner's failure to plead Section 8 status.

Papers Numbered
Respondent's Order to Show Cause, Affirmation, Affidavit, Exhibits 1
Petitioner's Affirmation in Opposition and Exhibits 2
Respondent's Reply Affirmation, Affidavits, Exhibits 3

DECISION/ORDER

*1
Petitioner commenced this residential holdover proceeding against Respondent Fitzgerald Houses, Inc. ("Fitzgerald Houses") as well as numerous unnamed undertenants to recover possession of a number of apartments in the subject premises, 62 East 125th Street; judgment for rent arrears; judgment for the fair

value of use and occupancy, plus interest, costs and disbursements along with legal fees in the amount of $3,000.

By so-ordered Stipulation of Settlement on October 26, 2011 (Martino, J.) negotiated and executed by attorneys for Petitioner and Respondent Fitzgerald House concerning Apartments #1B, 2B, 2C, 2D, 2F, 2G, 3D, 3F, 3G, 4A, 4C, 4D, 4E, 4F, and 4G, the parties settled this proceeding. The Stipulation is detailed and among its 17 provisions, states that Respondent consents to the entry of a final judgment of possession and forthwith issuance of the warrant of eviction, execution stayed through and including 5:00 p.m. on January 31, 2012, subject to terms and conditions enumerated within the stipulation. By Decision/Order dated March 8, 2012, the *2 court (J. Martino) granted Petitioner's motions for summary judgment against several occupants and cross-motions for summary judgment against several others.

On April 23, 2012, the court conducted an inquest concerning several other apartments, amending the petition to add several individuals as named occupants, and granting final judgment of possession in favor of Petitioner as to those enumerated apartments.

By so-ordered Stipulation on May 31, 2012, the occupant of another apartment consented to a Final Judgment of Possession with the warrant to be issued forthwith and execution of the warrant stayed through June 7, 2012, among other terms. The case concerning another apartment was marked off calendar by same stipulation.

Petitioner subsequently filed a motion for an Order: (i) granting it a money judgment for $83,950 for use and occupancy through August 31, 2012 pursuant to the parties' October 26, 2011 stipulation; and (ii) granting Petitioner a separate money judgment for Petitioner's legal fees in an amount to be determined by the court after a hearing.

By Decision and Order dated July 16, 2013, the court found that it retained jurisdiction over the issue of use and occupancy but that because Respondent raised in its answer and opposition details of various violations and allegations that Petitioner attempted to frustrate payment of use and occupancy, granted Petitioner's motion only to the extent of setting the matter down for a hearing on what, if anything, Petitioner did to frustrate Respondent's obligations under the October 26, 2011 Stipulation. The court stated that it would consider at the hearing only what alleged breaches of the warranty of habitability, if any, post-dated the

October 26, 2011 Stipulation as well as any attempts made by Petitioner to interfere with Respondent's subtenants after October 26, 2011. The court indicated that a decision on legal fees would be rendered after a hearing.

After numerous adjournments granted on consent, Counsel for the parties subsequently settled the motion by stipulation dated February 4, 2014, so-ordered by the court, obviating the need for a hearing.

*3

The Instant Motion

Respondent filed the instant Order to Show Cause, seeking to challenge the February 4, 2014 Stipulation of Settlement, executed by counsel for both parties and Petitioner's agent wherein in consideration for Respondent's full and complete compliance with the terms and conditions of the stipulation, Petitioner agreed to waive $115,000 of the $180,000 in outstanding use and occupancy and legal fees. The stipulation provided for a specific payment plan which was over a six-year period for the $65,000 balance and expressly stated that in the event Respondent failed to timely make a payment, Petitioner's counsel shall serve Respondent's counsel with a ten (10) day notice to cure and that in the event the default was not timely cured, Petitioner would be entitled to enter a money judgment against Respondent in the amount of $180,000.00, minus any payments received. The stipulation provided that upon submission of an affirmation of default, Petitioner would be entitled to a money judgment against Respondent for its reasonable attorneys' fees incurred in enforcing the Stipulation.

Respondent, through its new attorney, now argues that its former counsel, Steven Stutman, Esq., lacked the authority to bind it to the February 4, 2014 stipulation. Respondent argues that Executive Director of Fitzgerald House, Carol Gardner, did not give Mr. Stutman authority to enter into the settlement, which it characterizes as an "unauthorized and unconscionable agreement," and states that Ms. Gardner was unable to appear in court for the hearing on February 4 due to her grand jury service and that Petitioner and the court had unjustly rejected Respondent's request for an adjournment.

The court notes that it had previously granted Respondent's two requests for adjournments of the hearing on consent. On November 19, 2013, Respondent made a third request for an adjournment, this one seeking to adjourn the December 10, 2013 hearing due to Ms. Gardner's unavailability due to grand jury service. The court granted the request to the extent that the purpose of the appearance was

changed from a hearing date to an attorney status conference. However, on the adjourn date, Respondent's counsel requested that the conference be further adjourned due to inclement weather which the court granted and the hearing was adjourned to February 4, 2014.

*4
When Respondent's counsel requested, on the morning of the hearing, to further adjourn the hearing again due to Ms. Gardner's grand jury service, the court indicated that if Petitioner would not agree to the adjournment, it would deny Respondent's counsel's request. Petitioner's counsel did not consent to the adjournment and subsequently delivered to the court a stipulation of settlement signed by both attorneys and Petitioner's agent, which the court reviewed and so-ordered. Respondent's agent's signature is not on the agreement nor was it on their prior stipulation of settlement.

Over four months later, Respondent filed the instant motion, arguing that the court lacked the authority to deny the adjournment request and that the February 4 stipulation should be vacated as a matter of law or a hearing should be held to determine whether Mr. Stutman had authority to enter into the agreement. Respondent states that Petitioner had attached its bank account which contained funds primarily derived from the Veterans' Administration.

Petitioner opposed the motion, arguing that no substitution of counsel had occurred; that Respondent had the choice to go forward with the hearing on February 4 appearance date; and that Mr. Stutman was not only Respondent's attorney but additionally served as an Officer Secretary of Fitzgerald House. Petitioner further states that Ms. Gardner failed to demonstrate that she rejected the settlement before it was so-ordered by the court or that she was unaware that her attorney had entered into the February 4 stipulation. Petitioner indicates that Respondent waited a number of months after the stipulation was so-ordered to return to court to challenge the stipulation, and only after one of its bank accounts was restrained. Finally, Petitioner argues that Respondent waived its ability to challenge the sufficiency of the petition almost three years prior.

Respondent filed reply, again arguing that its prior counsel lacked apparent and actual authority to enter into the February 4 stipulation of settlement.

Discussion

"Stipulations of settlement are favored by the courts and are not lightly cast aside, particularly when the parties are represented by attorneys." Hallock v. State of N.Y., 64 N.Y.2d 224, 230 (1984). See also Hotel Cameron Inc. v. Purcell, 35 A.D.3d 153, 155 (1st Dep't 2006).

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The enforcement of stipulations "serve[s] the interest of efficient dispute resolution and is essential to the management of court calenders and the integrity of the litigation process." Hallock at 230. "Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation." Id. See also Matter of Frutiger, 29 N.Y.2d 143, 150 (1971).

Respondent submits affidavits from Ms. Gardner, who states that Mr. Stutman entered into the February 4 stipulation "without her knowledge or consent," and Mr. Stutman, who contends that he did not have an opportunity to go over the stipulation with his client and that "although legally required to do same, the court refused to adjourn the matter. I did not and could not commence a trial without a witness since my client was doing her legally [sic] obligation of jury service." The court finds this argument unavailing as the hearing date had been known to the parties since December 17, 2013 yet he waited until the day of the hearing to request an adjournment and counsel had more than sufficient time to consult with his client.

As Petitioner properly points out here, Respondent had the option of going forward with the hearing after his eleventh hour adjournment request was denied and instead chose to sign the stipulation settling the proceeding. Moreover, former counsel served as Secretary of Fitzgerald House, a fact that had been concealed from the court and gives further support for Petitioner's contention that Respondent's former counsel did indeed have authority to settle the case. Respondent's former counsel had negotiated and signed the extensive settlement agreement of October 26, 2011 and multiple adjournments with Petitioner's counsel, appeared on behalf of Respondent on numerous occasions, engaged in considerable motion practice over several years, and was cloaked with apparent authority to settle the matter. See 1420 Concourse Corp. v. Cruz, 175 A.D.2d 747, 749-50 (1st Dep't 1991), Health-Loom Corp. v. Soho Plaza Corp., 272 A.D.2d 179, 182 (1st Dep't 2000). See also 208 Ave. A Assocs. v. Calanni, 46 Misc.3d 126(A) at *1 (App. Term, 1st Dep't 2014).

There is no evidence before the court that Ms. Gardner was an essential witness. Moreover, her appearance was neither required nor necessary for the hearing to go forward. In any event, Ms. Gardner had ample notice of the hearing date and had sufficient time to notify the *6 grand jury warden of her conflict and make a request to miss a session where only a quorum of 16 out of 23 is required. See New York State Unified Court System Grand Juror's Handbook, available through the Suffolk County Jury website at

https://portal.nycourts.gov/app/NyJuror/SitePages/Suffolkpercent20County percent20Jury.aspx at p. 12.

Neither at the time of the adjournment request nor as part of this motion did the Respondent present proof that the grand jury service continued 10 weeks after it began or that a request was made upon learning of the hearing date to be excused from service for the hearing.

The court finds unavailing Respondent's placing of blame on the court given the numerous adjournments provided by the court and the Respondent's same day request to adjourn the matter once again. That Respondent waited over four months before moving to vacate the stipulation further renders dubious its claim that it was unaware of what had transpired on February 4, 2014.

Finally, the February 4, 2014 stipulation contained a considerable reduction $115,000 in arrears owed and legal fees agreed upon leaving Respondent with a balance of $65,000. This amount was to be paid over a six-year period. The court finds this settlement, which included a default clause, reasonable and notes that Respondent stood to derive a considerable benefit from the bargain and did nothing to undo the agreement for several months after the stipulation was entered indicating Respondent's ratification of the terms of the stipulation. See 1420 Concourse, 175 A.D.2d at 750, citing Continental Cas. Co. v. Chrysler Constr. Co., 80 Misc.2d 552, 554 (N.Y. Co. Ct. 1975). Significantly, the settlement agreement was signed by Respondent's counsel, who was an officer of Respondent (a fact that was concealed in the motion by Respondent). When there are legal bases for upholding the validity of a stipulation, including apparent authority, waiver, and ratification, no hearing is required. See 1420 Concourse Corp. v. Cruz, 175 A.D.2d 747 (1st Dep't 1991). Finding no good cause justifying vacatur of the stipulation or vacatur or stay of the money judgment, the court denies that portion of Respondent's motion.

The remainder of the motion is denied. Respondent cannot claim now, several years after settling the proceeding by so-ordered stipulation of October 26, 2011 (J. Martino) wherein Respondent expressly waived its defenses, several dozen court appearances, and extensive *7 motion practice, that the proceeding should now be dismissed based upon Petitioner's failure to plead Section 8 status.

This constitutes the Decision and Order of the court. The Clerk is directed to mail a copy to both sides.
Dated: January 20, 2015
New York, New York