

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

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BPP ST OWNER LP,
Petitioner,

L&T Index No. 75333/13

Motion Seq. No. 008

-against-

DECISION/ORDER

DAVID HENSLEY,
Respondent,

NAOMI ZANG,
Respondent-Undertenant.

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Present: Hon. Heela D. Capell
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the Respondent’s motion to depose a non-party witness.

Papers	Numbered
Notice of Motion & Affidavits Annexed.....	1
Notice of Cross-Motion and Affidavits Annexed	
Answering Affidavits	2
Replying Affidavits.....	3
Exhibits	
Memorandum of law.....	

After submission of the foregoing cited papers, Respondent’s motion is decided as follows:

BPP ST Owner LLC (“Petitioner”) commenced this non-payment proceeding against David Hensley (“Respondent”) and Naomi Zang (collectively, “Respondents”) after service of a Notice of Petition and Petition dated July 25, 2013, with respect to the rent stabilized premises located at 525 East 14th Street, Apartment 4-G, New York, New York 10009 (“Premises”).

Respondent appeared through counsel and filed an answer dated August 6, 2013 in which he asserted *inter alia* the affirmative defense and counterclaim of rent overcharge. Naomi Zang has not appeared.

On September 19, 2013, Respondent moved for discovery with respect to his overcharge defense and counterclaim, seeking documents dated on or after July 1, 2009 connected to purported improvements performed at the Premises which increased the rent from \$909.79 per month to \$3,088.33 per month. In the motion, Respondent also sought to depose Petitioner's employee with knowledge of the improvements. The parties partially resolved the motion by stipulation dated September 19, 2013. In the stipulation Petitioner agreed to forward documents responsive to Respondent's document demand by November 3, 2013. However, Petitioner did not consent to an EBT. The proceeding was adjourned to November 7, 2013.

On November 7, 2013 the parties stipulated that Petitioner had produced some relevant documents in accordance with Respondent's document demand. Petitioner also agreed to produce its agent John Kennedy ("Kennedy") for a deposition at Respondent's attorneys' office. Respondent agreed and to pay use and occupancy in the amount sought in the petition, \$3140.47 per month, from April 2013 through November 2013 without prejudice. The proceeding was marked "off calendar" for the parties to complete discovery.

Petitioner moved to restore the proceeding to the court's calendar on December 2, 2016. In the motion Petitioner also sought to amend the caption to substitute Petitioner, the new owner of the building, as the petitioner, and to dismiss Respondent's defenses and counterclaims. On or about December 9, 2016, Respondent served a Notice of EBT on Petitioner with respect to "JOHN KENNEDY non-party person with knowledge of the improvements and/or repair work

performed in the premises located at 525 East 14th Street, Apartment 3-G, New York, New York 10009.” (Resp. EBT Notice).

The motion was adjourned to January 26, 2017 and granted in part by stipulation entered into by counsel on that date. In the January 26, 2017 stipulation, Petitioner agreed to produce Michael Prince (“Prince”), who was currently employed as Petitioner’s managing agent, in place of Kennedy. Respondent agreed to tender past due use and occupancy (a total of \$56,280.24) and ongoing use and occupancy in the amount of \$3140.47 per month without prejudice. Prince was deposed on April 20, 2017, and admitted at his deposition that he did not have knowledge of the improvements and/or work performed at the Premises during the pertinent time period.

On June 28, 2017, Petitioner moved to restore the proceeding to the calendar for trial. The parties stipulated to restore the case and the proceeding was adjourned to September 12, 2017 for trial. As Petitioner was not ready to proceed to trial on September 12, 2017, the Honorable Timmie Elsner marked the case off of the court’s calendar, and indicated on the court file that the case “may be restored when Petitioner ready to proceed.”

On April 23, 2018, Petitioner moved to restore the case to the calendar, to amend the petition to include all monies due through April 2018, to dismiss Respondent’s affirmative defenses and counterclaims and for summary judgment in favor of Petitioner. The motion was withdrawn on the record on April 23, 2018. Respondent filed a motion for sanctions on that date, which was returnable on May 3, 2018. The motion was withdrawn by stipulation dated May 3, 2018. Petitioner moved again to restore the proceeding to the calendar for trial in a motion made returnable on May 22, 2018.

The proceeding was restored to the calendar on May 22, 2018 and was adjourned to June 14, 2018 for trial. On June 14, 2018, the proceeding was referred to Part R for trial. The Trial Court conducted a pre-trial conference on September 6, 2018 where the parties executed a Pre-Trial Order. In the Pre-Trial Order, Petitioner listed Kennedy as one of its witnesses. Respondent filed a motion *in limine* before the trial court returnable on September 18, 2018. In the motion, Respondent sought to preclude Kennedy from testifying at trial. Respondent argued in support that Petitioner should not be permitted to call this key witness at trial whom it failed to produce for a deposition.

In a decision and order dated November 30, 2018, the Honorable Anne Katz denied Respondent's motion ("Decision"). In the Decision, Judge Katz found that the drastic remedy of preclusion was not appropriate as Respondent had failed to establish that Petitioner's failure to produce Kennedy was "wilful, deliberate and contumacious." The Trial Court restored the case to the trial calendar and adjourned it to March 15, 2019 for trial.

Respondent filed this motion on February 19, 2019, which was returnable in Part R on February 25, 2019. The Trial Court transferred the case back to this Resolution Part on February 25, 2019 so that the parties could engage in motion practice. The motion was adjourned in this Part to April 4, 2019 to enable the parties to fully brief the motion and for oral argument. This court heard oral argument on the motion on April 4, 2019. In the motion Respondent seeks the court to compel Petitioner to produce Kennedy's contact information and to permit Respondent to obtain documents from and depose Kennedy prior to trial.

In support of the motion, Respondent maintains he was unaware that Kennedy would be available to be deposed until Petitioner submitted his name in a witness list on September 6,

2018. Respondent argues that he had previously tried to obtain Mr. Kennedy's contact information prior to that time but that it was unable to get it from Petitioner. Moreover, Respondent was not aware that Petitioner would be calling the witness at trial on its *prima facie* case. Accordingly, he will be prejudiced if he is not permitted to depose and obtain documents from Kennedy prior to the trial, particularly where he was initially entitled to depose him.

The court recognizes that, in theory, summary proceedings in Housing Court are intended to be a quick procedure allowing the landlord to recover possession of residential premises. However, in practice, summary proceedings can take a considerable amount of time, particularly where the tenant raises a substantial defense. Here, it is safe to say that this proceeding falls into the latter category. It is also fair to say that Respondent was not responsible for a large portion of the delay in this proceeding. Respondent timely filed an answer, moved for discovery and attempted to complete discovery so that he could proceed to trial and avail himself of his defenses. Respondent also moved immediately to preclude Kennedy from testifying once Petitioner submitted Kennedy's name on its witness list. Respondent then filed the instant motion *prior* to the trial date that Judge Katz allotted in the Decision.

Petitioner correctly argues that applications for leave to conduct discovery in a case which is calendared and scheduled for trial are not routinely granted, absent extraordinary circumstances. (See *Blondell v Malone*, 91 AD2d 1201 [4th Dept 1983]; *Wahrhaftig v Space Design Group*, 33 AD2d 953 [3rd Dept 1970]). However, in contrast to Petitioner's position, the court finds that "special, unusual [and] extraordinary circumstances" exist which warrant an award of discovery despite the trial ready posture of the proceeding. (*Goldsmith v Howmedica, Inc.*, 158 AD2d 335, 336 [1st Dept 1990]).

Respondent repeatedly sought to depose an individual with knowledge of improvements made to the Premises on or about July 1, 2009. The parties entered into two stipulations which entitled Respondent to depose such an individual. One individual was Kennedy, who for unstated reasons was not produced from the date of the November 7, 2013 stipulation until his purported termination from the buildings owner's employ in 2015.¹ Certainly, the delay in deposing Kennedy during that period has not been attributed to Respondent. Once Petitioner actually produced an agent for a deposition, which did not occur until April 2017, the individual did not have any knowledge of the pertinent facts sought by Respondent. Here, extraordinary circumstances exist as Kennedy, the individual with personal knowledge of the facts necessary for Respondent to prepare its defense, not only has resurfaced, but is being called by Petitioner as a witness on its *prima facie* case four years later. It would be unduly prejudicial to preclude Respondent from deposing this individual, particularly where Respondent did not cause a delay in this proceeding and is paying use and occupancy to Petitioner in the amount demanded in the petition.²

Moreover, pursuant to the parties' multiple stipulations granting discovery to Respondent, it was Petitioner's obligation to produce its agent for a deposition, and not, as Petitioner argues, Respondent's obligation to locate him. Now that a witness with personal

¹ In the Decision, the court notes that Petitioner had informed Respondent's counsel in or about 2015 that it no longer had control over Kennedy and could not produce him for a deposition because he was no longer employed by Petitioner. It is unclear what occurred during the period of November 2013, when Petitioner agreed to produce Kennedy, and 2015 when Petitioner recognized that Kennedy was no longer an employee, however, Petitioner does not attribute any delay in deposing Kennedy to Respondent. Furthermore, in the affirmation annexed to the motion, Respondent's counsel asserts that upon realizing that Kennedy was no longer in Petitioner's employ, Respondent attempted to ascertain from Petitioner whether it intended to call Kennedy as a witness, and if so, to obtain his contact information.

² It is undisputed that in this non-payment proceeding, Respondent is current in his rent payments.

knowledge of both Petitioner's claims and Respondent's defense is actually available to be deposed, Respondent is entitled to finally complete discovery.

The court is also not persuaded by Petitioner's argument that Respondent's motion for preclusion bars him from seeking discovery. Respondent argues that it sought preclusion rather than a deposition since it would have caused less delay. In his prior motion Respondent explained that he did not want to "turn back the clock" on the case. Respondent's tactical decision to move for preclusion prior to seeking discovery of Kennedy does not have a judicial estoppel effect, as Petitioner maintains, because one position is not contrary to the other. (*See e.g. Sheener v De La Beaudiere*, 127 AD3d 442 [1st Dept 2015] [Plaintiff cannot maintain that defendant is both the owner and not the owner of the same painting in the same proceeding]; *Nestor v Britt*, 270 AD2d 192 [1st Dept 2000] [Landlord cannot rely on one lease to the exclusion of a second lease to obtain one remedy and then seek an additional remedy based on the second lease]). Furthermore, preclusion is a far more drastic remedy than discovery, which courts have broad discretion to grant. (*See 148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486 [1st Dept 2009]). Here, Kennedy's testimony is clearly essential to both parties in this proceeding and Respondent will be severely prejudiced if he is not permitted to depose him.

Accordingly, Respondent's motion is granted. Petitioner is ordered to provide Respondent's counsel with Kennedy's contact information within one week of service of a copy of this decision and order upon Petitioner's counsel, along with notice of entry. Respondent shall obtain the court's signature on the subpoena annexed to its motion within one week thereafter, and notice the deposition and request for production of documents within thirty days of the court's signature. Respondent shall continue to tender use and occupancy as agreed without

prejudice. The proceeding is adjourned to May 30, 2019 in Part G, Room 581 at 11:30 A.M. for control purposes and possible referral to the court expediter for trial.

This constitutes the decision and order of the court.

Dated: New York, New York
April 5, 2019



HON. HEELA D. CAPELL
J.H.C.

Copies of this decision and order are being mailed to:

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