

**141 AVENUE A ASSOCIATES LLC, pet-land-app v. JAY KLEIN, res-tent-res**

First Judicial Department

15-316

Oct 22 2015 (Date Decided)

: Lowe, III, P.J., Schoenfeld, Hunter, Jr., JJ.

15-316. 141 AVENUE A ASSOCIATES LLC, pet-land-app v. JAY KLEIN, res-tent-res — Ordered that the motion is granted to the extent of granting appellant leave to appeal as a poor person. Seymour W. James, Jr., Esq., of the Legal Aid Society, Criminal Appeals Bureau (199 Water Street, 3rd Floor, NY, NY 10038, tel# 212 577-3688) is assigned as counsel for the appellant to prosecute the appeal and to serve without compensation. So Order — Order (Phyllis K. Saxe, J.), dated June 22, 2015, reversed, without costs, tenant's motion to stay execution of the warrant of eviction denied, landlord's cross motion granted, the portion of the order which sua sponte changed the payment due dates is vacated, and the matter remanded to Civil Court for a hearing to determine the amount of rent/use and occupancy and the reasonable value of attorneys' fees due landlord. Execution of the warrant shall be stayed for 30 days from service of a copy of this order with notice of entry.

Pursuant to the terms of the January 2015 so-ordered stipulation settling this chronic rent delinquency holdover proceeding, tenant agreed, inter alia, to a two-year probationary period, during which rent had to be paid on the fifth of each month, and that "time is of the essence as to all payment dates." Upon tenant's failure to timely tender the June 2015 rent, he moved by order to show cause dated June 11, 2015, to stay execution of the warrant, claiming that he sent money orders for the June 2015 rent by regular mail on May 17, 2015. No proof of any money orders or mailing was attached to tenant's motion papers. The motion court granted tenant's application, referencing certain money orders not contained in the record, and further directed that future rent payments be made by the "tenth of the month until the probationary stipulation is satisfied." Landlord appeals and we now reverse.

The record now before us establishes that tenant failed to timely tender June 2015 rent by the fifth of the month in accordance with the unambiguous "time is of the essence" provision of the parties' probationary stipulation. "Strict enforcement of the parties' stipulation...is warranted based upon the principle that parties to a civil dispute are free to chart their own litigation course" (Mill Rock Plaza Assoc. v. Lively, 224 AD2d 301 [1996]). Given tenant's extensive history of rent defaults, which continued unabated into the probationary term agreed to by the parties with his most recent payment default, a further stay of execution of the warrant of eviction was unwarranted (see Henry Hudson Gardens LLC v. Bareda, 25 AD3d 466 [2006]).

Since landlord is the prevailing party in this litigation, it is entitled to recover reasonable attorneys' fees pursuant to paragraph 20 of the parties' lease and the express terms of the parties' June 2015 stipulation. We remand for an assessment on that issue and on the issue of the amount of rent arrears/use and occupancy due landlord.

**THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.**

October 22, 2015