



--- N.Y.S.3d ----, 70 Misc.3d 591, 2020 WL 6879003 (N.Y.City Civ.Ct.), 2020 N.Y. Slip Op. 20309

**\*\*1** Wyona Apartments LLC, Petitioner,

v

Norberto Ramirez et al., Respondents.

Civil Court of the City of New York, Kings County

L & T 90147/17-KI

November 22, 2020

CITE TITLE AS: Wyona Apts. LLC v Ramirez

### HEADNOTE

#### [Landlord and Tenant Summary Proceedings](#)

Virtual Trial of Nonpayment Proceeding during Pandemic—Request for Stay—Ability to Meaningfully Participate

Respondents, the tenant of record and other allegedly rightful tenants or occupants of the subject premises, were not entitled to an indefinite stay (CPLR 2201) of the nonpayment summary proceeding on due process grounds based on the claim that one respondent lacked the technology to meaningfully participate in the virtual trial scheduled during the COVID-19 pandemic. While virtual testimony is not equivalent to in-person testimony, virtual trials had become preferred during the pandemic due to court closures, long delays and uncertainty about when in-person operations could resume. Judiciary Law § 2-b (3) empowers courts to employ innovative and necessary procedures to further ensure litigants' meaningful participation in virtual trials. Here, the assertion that the respondent could not meaningfully participate was belied by her virtual appearance at a prior conference using her smartphone, notwithstanding that the conference lasted three times longer than planned due to the difficulty when listening to the interpreter translate while others were talking. That a trial takes longer does not mean that it should not be had. The parties could consent to have the interpreter translate through a phone directly to the respondent or to sequential interpretation on the record. The virtual meeting software allows participants to share exhibits and does not obstruct the court or others from viewing the witness during the process, regardless of the size of her screen. Concerns about the respondent's ability to read an exhibit were speculative and it was not unreasonable to expect her to zoom into a document on her smartphone. Moreover, the equities militated against a stay where the proceeding was commenced three years earlier, discovery was completed and the case sent to trial before the pandemic lockdown, and respondents had violated their agreement to pay ongoing use and occupancy.

### RESEARCH REFERENCES

[Am Jur 2d Landlord and Tenant § 826](#); [Am Jur 2d Trial §§ 117, 127](#).

[Carmody-Wait 2d Trial in General § 45:2](#); [Carmody-Wait 2d Summary Proceedings to Recover Possession of Real Property §§ 90:186, 90:215, 90:225](#).

[Dolan, Rasch's New York Landlord and Tenant including Summary Proceedings \(5th ed\) §§ 32:1, 44:4, 47:1](#).

[NY Jur 2d Real Property—Possessory and Related Actions §§ 242, 295](#).

### \*592 ANNOTATION REFERENCE

See ALR Index under Landlord and Tenant; Trials.

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### APPEARANCES OF COUNSEL

*Make the Road New York*, Jackson Heights, for respondents.

*Goldberg Lustig & Steckler PLLC*, Brooklyn, for petitioner.

### OPINION OF THE COURT

Zhuo Wang, J.

This is a nonpayment proceeding commenced in 2017 against respondent Norberto Ramirez (Norberto), the only alleged tenant of record, who moved into the subject premises five years ago. The petition alleges that the monthly legal regulated rent is \$2,100.

Make the Road New York (MRNY) represents Norberto as well as Consuelo Leon (Leon) and Jesus Ramirez (Jesus), who live with Norberto. It is unclear whether Leon and Jesus were ever joined as respondents; however, MRNY submitted a notice of appearance on behalf of “Respondents” and served an amended answer claiming that Leon and Jesus are the “rightful tenants and/or occupants entitled to possession of the subject premises.” In their amended answer, verified by Leon, respondents \*\*2 counterclaim for rent overcharge claiming that the monthly rent should be \$1,450.

Following eight adjournments—including a six-month period to complete discovery—this case was sent to a trial part in early March 2020. This court scheduled a pretrial conference pursuant to its Part Rules, for March 28, 2020. But that conference was canceled due to the lockdown on March 17th as a result of the coronavirus pandemic. This proceeding was effectively stayed until the Chief Administrative Judge issued Administrative Order 160A/20 on August 13, 2020, that lifted the stay on residential eviction matters commenced prior to March 17, 2020 (AO/160A/20).

At a virtual pretrial conference on September 28, 2020, petitioner's counsel and a staff attorney from MRNY, Aura Zuniga, Esq., appeared virtually. Leon also appeared through \*593 her smartphone. Because Leon required a Spanish interpreter but none was immediately available, the conference was delayed for about an hour. Due to the challenge of hearing one another over the interpreter, as well as technical difficulties and off-the-record attorney/client discussions regarding settlement, the conference lasted approximately three hours. The parties were unable to settle, and a virtual trial was scheduled to proceed on October 13, 2020. On the October 13th trial date, Zuniga made an application to adjourn the virtual trial date for her own health-related issues, which this court granted. The virtual trial is now scheduled for November 24, 2020, and December 2, 2020.

Respondents now move for, ostensibly, an indefinite stay of the proceedings pursuant to [CPLR 2201](#). Petitioner opposes.

### Arguments

On their motion, respondents seek a stay of the proceeding pursuant to [CPLR 2201](#). They argue that holding a virtual trial violates their due process rights for three reasons. First, respondents assert that Leon lacks the technology to meaningfully participate at a virtual trial because, while she has a smartphone, she does not have a computer or Internet connection at home. Although she appeared at the September 28th virtual conference through her smartphone, respondents contend that Leon's lack

of a larger monitor will render her unable to fully see an exhibit during the trial. Moreover, respondents assert that, when viewing these exhibits, Leon may not be visible—thereby depriving this court of the ability to adjudge her credibility. Incidentally, MRNY also rejects alternatives that have been proposed including having Leon testify at MRNY's office or equipping her with an Internet accessible computer so she can testify from her home.<sup>1</sup>

The second reason asserted by respondents is based on language access. **\*\*3** Zuniga recounts the difficulty Leon experienced when listening to the Spanish interpreter translate simultaneously while others were talking. This method of interpretation purportedly left Leon unable to comprehend much of what was said during the conference in either Spanish or English. When this court proposed an alternative at oral argument by having the court-approved interpreter stay muted but **\*594** simultaneously translate to Leon by phone, Zuniga expressed concerns about the quality of the interpretation off-the-record.

Third, respondents by way of Zuniga's affirmation assert that a stay is warranted because existing social distancing protocols coupled with Zuniga and Leon's health conditions have prevented them from meaningfully preparing for trial. Zuniga also affirms that respondents do not have an unlimited data plan, so she primarily consults with her clients through phone calls and text messages. These limitations were so severe that Zuniga claims that Leon was unable to notarize an affidavit in support of this motion, although at oral argument it did not appear that MRNY had explored every reasonable avenue to obtain such notarization. Zuniga adds that requests for government records remain outstanding because agencies have been slower to respond since the pandemic.

Finally, respondents point out that, because of the aforementioned technical and linguistic challenges, the September 28th conference took three times longer than originally planned. Additionally, Zuniga annexes a screenshot<sup>2</sup> of the virtual conference and recalls a comment by this court that other judges had reported frustrations with simultaneous interpretation during virtual court proceedings. In essence, respondents contend that the virtual trial will be riddled with so many complications and delays so as to endanger their right to a fair trial.

In opposition, petitioner contends that an indefinite stay of this proceeding is unwarranted given that virtual trials have been held throughout the state and federal courts. In point of fact, Leon already made a virtual appearance, namely, at the September 28th conference. Petitioner further asserts that this is a nonpayment proceeding while cases of greater complexity are being heard virtually every day. Lastly, petitioner argues that the equities support denying a stay because Leon is not the tenant of record and respondents have undisputedly breached the parties' stipulation by failing to pay ongoing use and occupancy—a breach that occurred long before the mid-March shutdown because of the pandemic.

### **Discussion**

**CPLR 2201** provides that “[e]xcept where otherwise prescribed by law, the court **\*\*4** in which an action is pending may **\*595** grant a stay of proceedings in a proper case, upon such terms as may be just.” “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner’ ” (see  *Mathews v Eldridge*, 424 US 319, 333 [1976]).

There can be little dispute that the state of the current COVID-19 pandemic sweeping the nation justifies conducting the instant trial by virtual means. Indeed, presented at the September 28th conference with choosing an in-person or virtual trial, respondents chose the latter. That a virtual trial is preferable to an in-person trial is not in dispute. What is in dispute is whether holding a virtual trial in this particular instance deprives respondents of being heard at a meaningful time and in a meaningful manner.

**Judiciary Law § 2-b (3)** permits this court to “devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it.” “By enacting **Judiciary Law § 2-b (3)**, the Legislature has explicitly authorized the courts' use of innovative procedures . . . [and] courts may fashion necessary procedures consistent with constitutional, statutory, and decisional law” (see  *People v Wrotten*, 14 NY3d 33, 37 [2009]).

Because virtual testimony is certainly not the equivalent of in-person testimony, its application requires a “case-specific finding of necessity” (compare *Matter of State of New York v Robert F.*, 25 NY3d 448, 454 [2015]). Additionally, this court may fashion procedures during the virtual trial to preserve the traditional elements of a fair trial, including testimony under oath, the opportunity for contemporaneous cross-examination, and the opportunity for this court and the parties to view the witness' demeanor as he or she testifies (compare *Wrotten*, 14 NY3d at 39; see e.g. *Sawant v Ramsey*, 2012 WL 1605450, \*4, 2012 US Dist LEXIS 64384, \*10 [D Conn, May 8, 2012, Civil Action No. 3:07-cv-980 (VLB)]).

“[G]iven the court closures required by the pandemic, the months' long delay that has resulted, and the continuing lack of clarity about when it will be safe to resume normal in-person operations, the courts have concluded that it is absolutely preferable to conduct [a virtual trial] . . . rather than to delay [a] trial indefinitely” (see *Ciccone v One W. 64th St., Inc.*, 69 Misc 3d 585, 593 [Sup Ct, NY County, Sept. 4, 2020] [internal quotation \*596 marks omitted]).

In *Ciccone*, the Supreme Court (Gerald Lebovits, J.) rejected contentions that a virtual trial deprives the parties of due process and that the costs for obtaining the technology to appear virtually are prohibitively expensive for an attorney. Namely, the *Ciccone* court found that “technology used for video-conferencing is straightforward and easy to use; and all that is required to participate in a trial by video-conference is a computer and Internet access, which should be readily available to counsel” (*id.* at 595 [internal quotation marks and brackets omitted]).

At the outset, *Ciccone*'s rationale based on technology that is “easily accessible to counsel” is less compelling when applied to low-income tenants brought to Housing Court on residential eviction cases. An attorney's purported inability to afford \*\*5 videoconferencing technology should be distinguished from that of an indigent tenant's. In other words, the presumption that the modern practice of law should readily include a computer and Internet access does not hold for litigants, especially those of limited financial means.

But applying a case-specific analysis to the principal litigant in this proceeding does not yield a significantly different outcome than that of the attorney in *Ciccone*. Namely, the record of Leon's virtual appearance at the September 28th conference belies her assertion that she cannot meaningfully participate in a virtual trial. And while there were challenges in using simultaneous translation during that appearance, *Judiciary Law § 2-b (3)* empowers this court to employ procedures to further ensure Leon's meaningful participation.

Namely, if listening to an interpreter simultaneously translate is infeasible, both parties may consent to have the interpreter translate through a phone directly to Leon. If MRNY is concerned about the integrity of the translation by a court-approved interpreter, as they stated at oral argument, the court may address this by having sequential interpretation on the record instead. This method of interpretation undoubtedly lengthens trial time, but simply because a trial takes longer does not mean that a trial should not be had.

This court is also unpersuaded that the occasional technical snafu experienced by users of videoconferencing software renders virtual trials fundamentally unfair. This court has conducted numerous virtual trials via Microsoft Teams with both lawyers and self-represented litigants and finds that the \*597 traditional elements of a fair trial have all been preserved. Namely, witnesses appearing virtually are sworn and cross-examination occurs in real time. Exhibits are shown to a witness through the share screen function of the Teams application. The examiner is even able to request and obtain control of the document during this process. As for the ability to view the witness' demeanor while an exhibit is being shown, this court notes that the share screen function on Microsoft Teams does not obstruct this court or others from viewing the witness during the process. Nor does the size of Leon's screen affect the size of the window by which she appears to others. Additionally, MRNY's concerns that Leon may not be able to read an exhibit appear to be entirely speculative, and expecting her to zoom into a document if displayed on her smartphone is not unreasonable in light of her prior virtual appearance. In any event, the ability to view a witness' demeanor at all times during their testimony is but one factor in analyzing that witness' credibility. Lastly, at virtual trials, this court customarily gives an initial instruction to every virtual witness regarding the gravity of and consequences for violating the oath

and advises that the court or any party—at any time—may direct the witness to exhibit the room from where the witness is testifying. These instructions and safeguards are but one of many steps that can be taken to \*\*6 ensure a fair trial.

Finally, the equities in this particular proceeding militate against a stay. First, this is a three-year-old nonpayment proceeding with discovery completed nearly one year ago. Second, this is not only a summary proceeding commenced prior to March 17, 2020, but is also one that was sent out to trial prior to the mid-March lockdown. Third, even assuming they are “rightful tenants entitled to possession,” respondents are not long-term, rent-stabilized tenants. Lastly, and perhaps most importantly, it is undisputed that respondents violated the terms of their own stipulation to pay ongoing use and occupancy and that, to date, respondents have made only four use and occupancy payments in 2019 and three this year. Indeed, long before the emergence of the current pandemic, respondents repeatedly failed to pay any monies—even at the monthly amount that they themselves claim to be the correct legal rent.

Although respondents' request for an indefinite stay must be denied, MRNY's difficulty in adequately preparing their clients for a virtual trial occurring less than two days away persuades \*598 this court that respondents should be afforded more time to prepare for that trial, conditioned upon respondents' payment of ongoing use and occupancy. Indeed, Zuniga states that Leon's cell phone plan limits her ability to virtually prepare for a virtual trial and extensive preparation is necessary since—contrary to petitioner's characterization—this proceeding is not a “run-of-the-mill” nonpayment case. Rather, and more akin to a plenary action than a summary proceeding, the parties consented to discovery, much of which relates to improvements allegedly made to the subject premises in order to justify increases of nearly one third of the legal regulated rent. Incidentally, an adjournment of the virtual trial also addresses respondents' need to obtain relevant records from government agencies.

After granting MRNY added trial preparation time, this court does not find that a virtual trial in January 2021 deprives respondents of due process. Said another way, a virtual trial, while an imperfect mode to administer a trial, is not an unconstitutional one in this instance.

This court has considered the remainder of respondents' arguments and finds them to be without merit. Accordingly, it is ordered that the motion for a stay of the proceedings is denied; and it is further ordered that the November 24, 2020 and December 2, 2020 trial dates are hereby vacated and the trial is adjourned to allow time for MRNY to prepare their client for a virtual trial in January 2021 or as soon as practicable thereafter; and it is further ordered that the above adjournment is conditioned upon respondents' timely payment of ongoing use and occupancy at \$1,450 by the first of each month commencing December 1, 2020; and it is further ordered that this matter is transferred to Part X for reassignment to another trial \*\*7 judge; and it is further ordered that the parties shall receive notification in due course from the assigned judge as to a future trial date.

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### Footnotes

- 1 In support, MRNY submits affidavits from its operations director, Antonia Genoa, and its legal director, Sienna Fontaine, who both aver that these options are infeasible.
- 2 This court in no way condones MRNY's photographing the virtual proceedings without notification or leave of court in violation of Uniform Rules for Trial Courts (22 NYCRR) § 29.1 (b).