

<b>BPP St Owner LLC v Carlotti</b>
2016 NY Slip Op 32066(U)
October 20, 2016
Civil Court of the City of New York, New York County
Docket Number: 60387/15
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: HOUSING PART F

\_\_\_\_\_  
BPP ST OWNER LLC,

X

Petitioner-Landlord

-against-

**DECISION & ORDER**  
**Index No.: L&T 60387/15**

**HON. SABRINA B. KRAUS**

PAULA CARLOTTI  
505 East 14<sup>TH</sup> Street  
Apartment 6H  
New York, New York 10009

Respondent-Tenant

ANDRES BORRERO, JOHN DOE  
JANE DOE

Respondents-Undertenants

\_\_\_\_\_  
X

**BACKGROUND**

This summary holdover proceeding was commenced by **BPP ST OWNER LLC** (Petitioner) against **PAULA CARLOTTI** (Respondent), the occupant of 505 East 14<sup>TH</sup> Street, Apartment 6H, New York, New York 10009 (Subject Premises), based on the allegation that Valentino Carlotti (Tenant) the last rent-stabilized tenant of record, permanently vacated the Subject Premises, and that Respondent was Tenant’s licensee, whose license expired when Tenant permanently vacated.

Petitioner issued a Notice of Termination dated March 5, 2015. The Petition is dated March 2015, and the proceeding was initially returnable on April 17, 2015. Respondent appeared *pro se* on April 14, 2015, and filed an answer, asserting:

I am the sister of Valentino Carlotti. I did contemporaneously and primarily reside with Valentine Carlotti at least two years immediately preceding his permanent vacatur from the subject apartment, so I have succession rights to the rent stabilized apartment. The landlord knew that I was residing with my brother as I was named as an occupant on the lease for more than two years with Valentine Carlotti as the named Resident and lease-holder. Keys and access to the subject apartment were provided to me by the Petitioner.

#### **ALLEGED FACTS**

Tenant has been the Tenant of record of the Subject Premises since the mid 1990s. Respondent asserts she has lived in the Subject Premises since 2007, and that Tenant lived there from 1993 until he permanently vacated in late October 2013. The last renewal lease executed by Tenant expired March 31, 2014. In December 2013, Respondent wrote to Petitioner and advised that Tenant had vacated and would not be renewing his lease. Respondent requested that the renewal be issued in her name. Respondent provided documentation substantiating her claim that Petitioner was aware that she was an occupant of the Subject Premises and had issued a photo ID and key card to her in or around 2011. Respondent also provided Petitioner with documents showing she was residing in the Subject Premises. Petitioner neither issued a renewal lease, nor served Tenant with a *Golub Notice*.

In February 2015, Respondent emailed Petitioner to inquire as to the status of her succession request. Petitioner responded with a written request that Tenant sign a statement acknowledging his surrender and the effective date of the surrender. Notably, Tenant never executed any such surrender. Petitioner's in house counsel made a decision to proceed with the

instant licensee proceeding absent a surrender, based on Respondent's written statement that Tenant had permanently vacated (*see exhibit "J" to Respondent's motion for summary judgment*).

Respondent tendered payment of rent in her name for February through May 2014. Petitioner held these payments until June 2014, when they were returned to Respondent with a written denial of her succession claim.

Tenant acknowledges that he moved out of the Subject Premises in October 2013, and that he has remained out since that date, but asserts that it is "temporary" and that he hopes to return at some unidentified point in the future. Tenant asserts he never abandoned the Subject Premises, that his employment involved extensive travel outside the country, and that he has continued to exercise dominion and control over the Subject Premises since he moved out in October 2013, by dealing with management regarding repairs, directing Petitioner to change the locks, continuing to park cars in the building and continuing to be listed as tenant and billed for rent by Petitioner.

Tenant asserts that in 2007, Respondent moved in with him and they lived together at the Subject Premises through October 2013. Tenant states that he temporarily moved out and told Respondent that she could stay and have her name added to the lease.

Petitioner also asserts Tenant owns several other apartments in New York City.

Petitioner alleges, and Tenant does not refute, rent has not been paid for the Subject Premises since 2013. Petitioner continues to send rent bills to the Subject Premises in Tenant's name, as recently as May 2016.

#### **PRIOR MOTION PRACTICE**

***Petitioner's motion for use and occupancy and Respondent's motion for discovery***

On June 2, 2015, Petitioner moved for discovery and order directing payment of use and occupancy. Petitioner sought leave to depose Respondent and document production, and Respondent cross-moved for discovery. On June 30, 2015, Respondent moved for a stay pending determination of the motions and related relief.

Respondent argued that Petitioner was obligated to either offer Tenant a renewal lease, which form has a provision for the Tenant to indicate he did not wish to renew, or issue a Notice of Nonrenewal pursuant to the Rent Stabilization Code. Respondent argued that the proceeding should be dismissed for these reasons, while she did not use the words “necessary party”, she argued that Petitioner’s failure to comply with its obligations under the Rent Stabilization Code mandated dismissal of the proceeding.

Pursuant to a decision and order dated August 7, 2015, the court granted Petitioner’s motion for discovery and denied Respondent’s motion for summary judgment. The court stated Respondent had failed to establish Tenant lived with her for the requisite two year period to be entitled to succession, denied summary judgment on this basis, and did not specifically address the other arguments raised by Respondent. The court directed Respondent to pay all outstanding use and occupancy for the period of March 2015 through the date of the decision, and to pay use and occupancy *pendente lite*. The court marked the proceeding off calendar pending discovery.

***Petitioner’s First Motion for Relief Pursuant to CPLR §3126***

On November 13, 2015, Petitioner moved for relief pursuant to CPLR §3126, based Respondent’s failure to comply with discovery. Respondent had failed to produce any documents and had failed to pay use and occupancy. The motion was granted by the court (Milin, J) pursuant to an order that provided Respondent should pay use and occupancy, setting a

payment schedule for same, directing Respondent to produce documents by December 31, 2015, and to appear for a deposition on January 13, 2016.

***Petitioner's Motions pursuant to RPAPL 745 and CPLR §3126***

On February 26, 2016, Petitioner moved for an order pursuant to RPAPL §745 and CPLR §3126 because again, Respondent had failed to make any payments and produce any documents. The court (Lau, J) issued a conditional order providing Respondent's answer would be stricken unless Respondent produced documents by May 2, 2016, and paid all amounts past due for use and occupancy by said date. The order provided that Petitioner could move for appropriate relief on default and adjourned the proceeding to April 8, 2016.

On May 23, 2016, Tenant purportedly appeared in this proceeding for the first time, by making an application to the court to sign an order to show cause stating that he was the leaseholder of the Subject Premises, had not been named or served in the proceeding, and that Petitioner was unlawfully attempting to regain possession of the Subject Premises without affording him due process. The court (Saxe, J) declined to sign the order to show cause noting “.. movant did not prepare the affidavit in support of osc. May renew upon proper papers.”

On May 27, 2016, Petitioner again moved for relief based on Respondent's failure to comply and requested a judgment and warrant of eviction be issued against Respondent. On June 7, the motion was granted by the court (Lau, J.), Petitioner was granted a final judgment of money and possession in the amount of \$22,857.30, and issuance of the warrant was stayed for ten days. The court's order noted that Respondent had the funds to pay, but did not wish to tender said funds if she could ultimately lose the case. The warrant of eviction issued on June 30, 2016.

### TENANT'S MOTION

On August 11, 2016, Tenant appeared by counsel, and moved for an order pursuant to CPLR §5015(a)(4) vacating the judgment entered against Respondent, and dismissing this proceeding. On August 25, 2016, the Court heard argument and reserved decision.

Pursuant to CPLR 5015(a)(4), the court which rendered a judgment may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, based on lack of jurisdiction.

Tenant does not deny that he has been aware of this proceeding, nor offer any explanation for his failure to attempt to intervene earlier. Tenant argues that as the last tenant of record, he is a necessary party to this action, and was not named or served with the papers in this proceeding.

It is well settled that absent a surrender of possession by the tenant, the landlord may not proceed directly against the tenant's licensee (*170 West 85<sup>th</sup> Street Tenants Association v. Cruz*, 173 A.D.2d 338).

Absent a surrender of possession by the tenant (*see, Matter of Eight Cooper Equities v Abrahms* 143 Misc2d 52, 54-55, 539 N.Y.S.2d 673[surrender is accomplished by vacating the premises and returning the keys to the landlord]), which is not established by the record before us, the lessor must obtain a judgment of possession against the lessee pursuant to RPAPL § 711 and may not proceed directly against the undertenant, whether licensee, subtenant or occupant, pursuant to RPAPL § 713 (*100 West 72<sup>nd</sup> St. Assoc. v Murphy*, 144 Misc.2d 1036,1039, 545 N.Y.S.2d 901) *Cruz* at 339.

Rent Stabilization Code. § 2523.5 (d) provides that:

... the failure to offer a renewal lease pursuant to this section shall not deprive the tenant of any protections or rights provided by the RSL and this Code and the tenant shall continue to have the same rights as if the expiring lease were still in effect.

CPLR §1001(a) defines a necessary party as a person "... who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants."

CPLR §1001(b) provides that if a person is a necessary party and jurisdiction over him cannot be obtained absent his consent “... the court, when justice requires may allow the action to proceed without his being made a party.” The statute further specifies certain criteria for the Court's consideration in determining whether to allow the action to proceed. The criteria include what available remedies exist for Petitioner in the event of dismissal, potential prejudice from non-joinder to Respondent or the person not joined, whether the prejudice may have been avoided, and whether an effective judgment may be rendered in the absence of the person who is not joined.

As the underlying proceeding seeks possession of the Subject Premises, Tenant who has never surrendered or otherwise had his tenancy legally terminated would be inequitably effected by a judgment in this proceeding.

Petitioner also argues that Tenant has delayed in raising the failure to name a necessary party as a defense in this action, and that this is a tactic due to Respondent's problems with her succession claim. Laches is not a defense to a motion to vacate pursuant to CPLR 5015(a)(4). “.... nonjoinder of necessary parties may be raised at any stage of the proceedings ... including for the first time on appeal (*Censi v. Cove Landings*, 65 AD3d 1066, 1068 2009; cf *1234 Broadway LLC v Huang* 44 Misc3d 1 *occupants failed to show reasonable excuse for four year delay in moving to interpose an answer*).”

Petitioner asserts that even absent a surrender or termination, it is entitled to commence this licensee holdover on the premise that Tenant had surrendered possession by operation of law. “A surrender by operation of law occurs when the parties to the lease both do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated (*Riverside Research Institute v KMGGA, Inc.* 68 NY2d 689).” This generally occurs

when a tenant abandons possession during the term indicating an intention to yield his interest, and the landlord re-takes possession in such a manner as to show he intends to reassume dominion and control (*Stahl Associates Co v Mapes* 111 AD2d 626,628 citing *Kottler v New York Bargain House* 242 NY28).

Surrender by operation of law is a fact specific inquiry and has been found: where landlord accepted keys and re-rented or put a new occupant in possession (*Brock Enterprises Ltd v Dunham's Bay Boat Company Inc.* 2929 AD2d 681); where the tenant informed the landlord that it would be vacating the premises, landlord demanded keys, changed the locks, and advertised the premises for rent (*Bay Plaza Estates, Inc. v New York University* 257 AD2d 472); or where tenant was relocated by landlord to a larger apartment, and landlord took back possession, changed the locks and began renovations [*Lewis v Cathedral Parkway Towers* 17 Misc3d 129(A)].

Petitioner relies primarily on the representation of Respondent for its allegation that Tenant surrendered as a matter of law, and further argues said surrender is established by Tenant's failure to pay rent since 2013, failed to inquire about a renewal lease after the expiration of the last lease on March 31, 2013, and the fact that Tenant has not been seen in the Subject Building.

This court has not found, nor does Petitioner cite any cases where surrender by operation of law was found based on a conduct or simple representation of a third party. Nor do the cases finding surrender by operation of law include situations where the tenant leaves an occupant in possession that the landlord does not accept (*see eg Valley Dream Housing Company Inc v Lupo* 11 Misc3d 130(A) *relocation of the tenant of record from the premises to a nursing home,*

*leaving daughter in possession, did not constitute a surrender of possession and proceeding pursuant to RPAPL §713 does not lie).*

Petitioner does not even assert any attempt to contact Tenant to verify Respondent's representation that Tenant intended to permanently vacate the Subject Premises. Petitioner has never disputed that it failed to offer Respondent as renewal lease in accordance with its obligation under the code . While Petitioner states Respondent never inquired about a lease renewal, it is Petitioner's affirmative obligation under 9 NYCRR 2522.5(b)(1) to offer Tenant a lease renewal, not Tenant's obligation to inquire about a renewal in the absence of same.

Petitioner relies on *Lewis v. Cathedral Parkway Towers*, 17 Misc 3d 129, where the Appellate Term found there had been a surrender by operation of law. However, that proceeding is clearly distinguishable from the present case in that in *Lewis*, the tenant of record was in communication with the landlord and negotiated a larger unit in the Subject Building and relocated to that larger unit, thereby abandoning the Subject Premises. In the instant case, there was no communication with Tenant in regard to his living in the Subject Premises and no clear surrender, as in *Lewis*, where Tenant actually moved into another unit.

### **CONCLUSION**

The court is very disturbed by the procedural history set forth above. It appears as though Tenant was aware of this proceeding and intentionally took no action to intervene until Respondent had lost on all accounts. Tenant has not lived in the Subject Premises since October 2013 and has no definite plan to resume occupancy and neither Tenant nor Respondent have paid any rent or use and occupancy for the Subject Premises since 2013. These factors make dismissal of the proceeding at this juncture for lack of jurisdiction based on failure to name a necessary party feel like an unjust result. While imposition of costs is contemplated in some,

situations by the statute, Petitioner did not seek said relief in the motion papers. Additionally, Respondent raised this issue in her very first submission to the court and can not be held responsible for the fact that it was not addressed at that time, and the court has no jurisdiction over movant who was never named or served.

Based on the foregoing, the court is constrained to grant the motion and dismiss the proceeding.

This constitutes the decision and order of this court.

Dated: October 20, 2016  
New York, NY

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Hon. Sabrina B. Kraus, J.H.C

TO: ROSE & ROSE  
*Attorney for Petitioner*  
By: Dean Dreiblatt, Esq.  
291 Broadway, 13<sup>th</sup> Floor  
New York, NY 10007  
(212) 349-3366

WILLIAM E. LEAVITT, ESQ  
*Attorneys for Carlotti*  
305 Broadway, Suite 900  
New York, N.Y. 10007  
(212) 897-5852