

**Sulecki v Spodek**

2008 NY Slip Op 32225(U)

August 8, 2008

Supreme Court, Kings County

Docket Number: 0106148/2007

Judge: Sabrina B. Kraus

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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS: HOUSING PART H

\_\_\_\_\_  
ROBERT SULECKI and MAUREEN SULECKI, X

Petitioners-Landlords

-against-

**DECISION & ORDER**  
**Index No.: L&T 106148/07**

**HON. SABRINA B. KRAUS**

JULIE SPODEK  
232 KINGSLAND AVENUE, Apt.2R  
BROOKLYN, NY 11222

Respondent-Tenant

“JOHN DOE” & “JANE DOE”

Respondents-Undertenants

\_\_\_\_\_  
X

**BACKGROUND**

This summary holdover proceeding was commenced by **ROBERT SULECKI** and **MAUREEN SULECKI**, ("Petitioners") and seeks to recover possession of Apartment 2R, at 232 Kingsland Avenue, Brooklyn, New York, 11222 ("Subject Premises") from the rent-stabilized tenant of record, **JULIE SPODEK** ("Respondent"), based on the allegation that Petitioners wish to recover the premises for the use of their son, Robert Suleccki, Jr., as his primary residence in New York City.

### **PROCEDURAL HISTORY**

Petitioners issued a Notice of Non-Renewal dated June 13, 2007 indicating their intention to commence this proceeding. On or about December 12, 2007, the Notice of Petition and Petition were served. The proceeding was initially returnable on December 17, 2007. On or about January 8, 2008, Respondent appeared, through counsel, and the proceeding was adjourned for motion practice. On or about June 24, 2008, the motions were argued and decision reserved by the Court.

### **THE MOTIONS**

Respondent moves for an order dismissing the proceeding. Respondent's motion is based on the fact that she is classified as disabled for the purpose of receiving Supplemental Security Income ("SSI") benefits from the government, and that Petitioner failed to offer her alternate housing in accordance with §2524.4(a)(2) of the Rent Stabilization Code ("RSC"). Petitioner opposes Respondent's motion arguing that the definition of a disabled person differs materially under the Federal Regulations and the RSC, and that the issue is an affirmative defense which Respondent bears the burden of establishing at trial. Petitioner further cross-moves for discovery on Respondent's medical condition in order to prepare for trial.

### **FACTS**

Respondent is the rent-stabilized tenant of record of the subject premises, and has lived in the premises since 1999. Respondent states that she has lived in

the Williamsburg section of Brooklyn since 1989, and that she has been receiving SSI benefits, for psychiatric disabilities, for approximately two years. Respondent states that she suffers from Major Depression and Anxiety Disorder. The effects of these disabilities include shortness of breath, feelings of terror and paralysis, low self esteem and an inability to concentrate. Respondent further alleges that, at times, her depression prevents her from engaging in basic daily activities such as showering and laundry.

As a whole, Respondent alleges that these disabilities prevent her from engaging in full time employment, limiting her to part time baby sitting, which on occasion is disrupted due to her disabilities.

Petitioners allege that they wish to recover possession of the subject premises so that their son, Robert Sulecki, Jr. (“Robert”), can move in. They state that Robert and their other son James Sulecki currently live with them.

Robert is thirty years old , and wants to live independently of his parents for privacy reasons. Robert has a permanent disability, due to a knee injury and therefore seeks an apartment on the second floor. Petitioners intend for their other son , James, to move into a vacant apartment on the third floor of the subject building. Petitioners want their son, Robert, in the subject building, to assist in management of the building.

Finally, Petitioners allege that Respondent has been babysitting children at the subject premises for several years, and that in 2006 Respondent requested their

permission to open a child care center in the subject premises. Petitioners further provide a 2005 New York Times Article wherein Respondent was cited as being a Nanny for two families, as part of a growing trend for shared nannies, to establish Respondents on going employment.

### **MOTION TO DISMISS**

Respondent moves for dismissal pursuant to CPLR § 3211(a)(1), (2), and (7). Respondent argues that the petition fails to state a cause of action because it contains no allegation that Petitioners offered Respondent alternative housing, although Petitioners were advised of Respondent's disability, prior to the service of said pleading. Respondent argues that the obligation to make such an offer ripened, at the point Petitioner learned of the disability.

However, in the case at bar, Petitioners challenge Respondent's allegation that she is a disabled person, as defined by the RSC. The RSC defines a person with a disability as:

a person who has an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which prevent such person from engaging in any substantial gainful employment.

RSC § 2520.6(q).

Essentially, Respondent argues that if a tenant qualifies, under Federal Regulations, to receive SSI benefits, as a disabled person, then said person is disabled, within the meaning of the RSC, as a matter of law.

This Court disagrees and holds that factual scenarios can exist where a tenant may be disabled for the purposes of receiving SSI benefits, but still not come within the definition of disabled under the RSC.

Under the Social Security Act, a person is disabled for the purposes of receiving SSI:

if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted for a continuous period of not less than twelve months.

42 U.S.C. § 1382c(3)(a).

The Court finds that there are significant differences between the two definitions, which depending on the facts of the case, may present situations where a tenant can be disabled for the purposes of receiving SSI benefits, but not necessarily disabled within the meaning of the RSC. Other courts have recognized this same possibility. *See e.g. D'Angelo v. Kisswani*, N.Y.L.J., June 7, 1989, p.27, col.1 (Civ. Ct., Queens Co., Haber, J.)(*Court found after trial that while Respondent qualified for SSI benefits due to psychiatric disability she failed to establish she was a disabled person within the meaning of the RSC*); *Borg v. Santos*, 17 Misc.3d 472 (Civ. Ct., Kings Co., Heymann, J.)(*whether respondents disability falls within the definition of the RSC is a question of fact to be determined at trial*).

One significant difference is that the definition under the RSC requires that there be an expectation that the tenant will be **permanently** disabled.

Moreover, even if the Court found that Respondent were disabled within the meaning of the RSC that would not warrant dismissal of this proceeding. It is not part of Petitioner's *prima facie* case to prove that Respondent is not disabled.

Nearly all of the cases relied upon by Respondent involve tenants who were senior citizens. *See e.g.*, **Schreier v. Albrecht**, 126 Misc.2d 336 (1986); **Lio v. Gorbea**, N.Y.L.J., Jan. 7, 1998, p.25, col.1 (Civ. Ct., Kings Co.); **Tsororos v. Lauriello**, N.Y.L.J., April 8, 1998, p.32, col.5 (Civ. Ct., Kings Co.); **Croman v. Leighton**, N.Y.L.J., July 21, 2004, p.18, col.3 (Civ. Ct., N.Y. Co.); **Miller v. Jones**, N.Y.L.J., Jan. 28, 2004, p.19, col.1 (Civ. Ct., N.Y. Co.)

These cases are readily distinguishable from the case at bar. A tenant's age is an objective fact which can be determined with certainty by the offer of a certified birth certificate. Whether a tenant's depression and anxiety constitute a permanent disability, preventing the tenant from being gainfully employed is a more subjective determination.

The disability is an affirmative defense to be alleged and established by Respondent. The statute does not indicate at what point in the proceeding the offer of relocation must be made. As the statute does not require that the relocation offer be made at any particular point in the proceeding, and as Petitioner is entitled to contest the defense at trial, the Court finds that under these circumstances the offer could even be made after trial, with issuance of the warrant being stayed until an offer has been made. *See e.g.* **Gogu v. Ely**, 152 Misc.2d 169 (Civ. Ct., Queens Co., 1991, Rios, J.).

In this case whether Respondent is disabled within the meaning of the RSC is a question of fact to be determined at trial.

Based on the foregoing Respondent's motion to dismiss the proceeding is denied. Respondent shall serve and file an answer on or before August 25<sup>th</sup>, 2008.

#### **PETITIONER'S CROSS-MOTION FOR DISCOVERY**

Petitioner cross-moves this Court for an order allowing Petitioner to conduct discovery on the issue of Respondent's disability. Respondent opposes the motion arguing that the discovery sought by Petitioner is not sufficiently tailored. Petitioner seeks to depose Respondent, copies of her medical records, and the names and addresses of any health care professionals who have reached a conclusion regarding Respondent's disability.

Normally, a motion for discovery can not be made prior to the joinder of issue. However, in this case given the nature of the discovery sought, and Respondent's clear intention to assert her disability as an affirmative defense, the Court finds that the motion is properly made at this time despite the lack of joinder of issue.

Petitioner has met the applicable standard for disclosure in a summary proceeding. The information sought by Petitioner is directly relevant to Respondent's affirmative defense, and Respondent has put her medical condition at issue by the assertion of such a defense. **New York University v. Farkas**, 121 Misc.2d 643 (1983).

Petitioner shall be entitled to take Respondent's deposition, at a date to be agreed upon by the parties, and no later than September 30, 2008. Ten days prior to said deposition, Respondent shall provide Petitioner with the names and addresses of all health care professionals, who have examined Respondent and reached a conclusion as to whether or not she is disabled, as well as copies of the medical records relied upon by said health care professionals.

The matter shall be restored to the calendar on October 6, 2008 at 9:30 am, Part H Room 507, for a compliance conference.

#### **CONCLUSION**

In conclusion Respondent's motion to dismiss the proceeding is denied and Respondent is directed to serve and file an answer on or before August 25, 2008.

Petitioner's motion for discovery is granted to the extent provided above, with discovery to be completed on or before September 30, 2008.

The matter is restored to the Court's calendar for a compliance conference on October 6, 2008 at 9:30 a.m..

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York  
August 8, 2008

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**Sabrina B. Kraus, JHC**

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