CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART T
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FAZEENA JAGROOP,

Petitioner,

Index No.
L & T 4281/08

–against–

DECISION/ORDER

MERCEDES RUIZ,

Respondent.
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JAYA K. MADHAVAN, J.

In this summary nonpayment proceeding, petitioner is the purchaser in foreclosure of respondent's former home. The petition seeks over $32,000.00 in alleged rental arrears from December 2007 to the present. The court held a trial in which the sole issue was whether there is a valid lease agreement between the parties to support this proceeding.

Background

The underlying facts are both illuminating and disturbing. The premises are a one family house which has been respondent's home for the past nine years. Beginning in 2004, respondent was no longer able to make her monthly mortgage payments in full and unable to renegotiate her loan with her lender. A foreclosure action ensued resulting in a judgment against respondent on April 15, 2005. Nearly a year later, on March 14, 2006, the premises were sold to Louis Zazzarino in a foreclosure sale for $286,000.00. However, this sale left a surplus of $112,007.73 which was eventually deposited with the Bronx County Clerk's Office on July 26, 2006.

In the meantime, on or about March 24, 2006, respondent retained Peter Torres, Esq. as her attorney to help her repurchase her home. Mr. Torres then structured a transaction by which

the premises would be conveyed first from Mr. Zazzarino to respondent and then immediately reconveyed to Mr. Torres' secretary who is the petitioner in this proceeding. Petitioner was to then sell the premises to respondent one year later for $350,000.00. However, the parties never drafted an actual contract of sale conveying the premises from petitioner to respondent.

Mr. Torres and a Mr. Raymond Perez then helped petitioner secure a $350,000.00 mortgage to finance the conveyance from Mr. Zazzarino to respondent for $305,000.00. Mr. Zazzarino also received the sum of $35,000.00 plus statutory interest to permit the reconveyance from respondent to petitioner.

On June 27, 2006, the premises were conveyed and reconveyed as outlined above. Mr. Torres represented both petitioner and respondent during these transactions. The parties then entered into an agreement (Agreement) which detailed how $111,000.00 of the anticipated surplus would be distributed. (Pet. Exh. 2.) Significantly, the Agreement reflects a disbursement of $3,500.00 by Peter Torres, Esq. to Raymond Perez, *Esq*. (*Id*., emphasis added.) However, Mr. Perez was disbarred by Order of the Appellate Division, Second Department, dated July 29, 1996. A complaint against Peter Torres, Esq. in connection with this matter is now pending before the Appellate Division, First Department.

In any event, paragraph three of the Agreement provides:

> [a]s a tenant at 1502 Hawthorne Street, Bronx, New York, Mercedes Ruiz agrees to pay upon being billed for water, electric, gas and any and all related expenses while living at the premises.

Petitioner maintains that this document establishes a landlord–tenant relationship between the parties. Respondent strongly disagrees and maintains that the only agreement between the parties was for her to repurchase the premises after a year. Neither side submitted post–trial memoranda

on this or any other disputed legal issue.

Discussion

Preliminarily, the court notes that once a landlord and a tenant enter into a contract of sale, their relationship is merged into the contract and becomes one of vendor and vendee. (*Barbarita v. Shilling*, 111 AD2d 200, 201 [2d Dept 1985]. *See also14 Second Ave Realty Corp. v. Steven Corp*., 16 AD2d 751 [1st Dept 1962], *affirmed*, 12 NY2d 919 [1963]. *Walker v. Espinal*, 2004 NY Slip Op 50832[U], * 1 [App Term 1st Dept]; *Neuhaus v. McGovern*, 195 Misc2d 613, 614 [App Term 9th and 10th Jud Dists 2002].) However, the landlord–tenant relationship may continue if the parties so specify in their contract or if it can be implied from their conduct, e.g. by the continued payment of rent. (*Barbarita v. Shilling*, 111 AD2d at 202 *citing Rae v. Courtney*, 250 NY 271, 274 [1929]; *Hadlick v. DiGiantomasso*, 154 AD2d 338, 340 [2d Dept 1989]; *Osborne v. Moutafis*, 7 Misc3d 32, 33 [App Term 9th & 10th Jud Dists 2005]; *Secretary of HUD v. Lemaire*, 2004 NY Slip Op 50837[U], * 1 [App Term 9th and 10th Jud Dists].) Thus, a contract vendor may not recover rent or use and occupancy from his/her vendee unless the landlord–tenant relationship has been preserved or the parties are proceeding under RPAPL § 713[9] (holdover proceeding against defaulting contract vendee in possession) (*Fulgenzi v. Rink*, 253 AD2d 846, 848 [2d Dept 1998]; *Jacobs v. Andolina*, 123 AD2d 835, 836 [2d Dept 1986].) As the parties did not enter into an actual contract of sale, their relationship is not one of vendor and vendee as implied by respondent. At most, the parties aspired to a vendor–vendee relationship which was never realized. (*Walker v. Espinal*, 2004 NY Slip Op 50832[U] at * 1.)

Next, petitioner argues that the Agreement establishes a landlord–tenant lease between

the parties. An oral or written agreement is enforceable as a lease only where the essential terms are agreed upon. (*Bernstein v. 1995 Associates*, 185 AD2d 160, 162 [1st Dept 1992]; *Matter of Davis v. Dinkins*, 206 AD2d 365, 366 - 367 [2d Dept 1994]; *Mur-Mil Caterers, Inc. v. Werner*,166 AD2d 565, 566 [2d Dept 1990].) Those terms include the area to be leased, the duration of the lease, and the price to be paid. (*Bernstein v. 1995 Associates*, 185 AD2d at 162 [1st Dept 1992].) Where the amount of rent to be paid is omitted or not otherwise ascertainable by objective means, no enforceable agreement lies. (*Martin Delicatessen v. Schumacher*, 52 NY2d 105, 110 [1981]; *Gotham Food Group Enterprises v. Principal Mutual Life Insurance Co.*, 267 AD2d 48 [1st Dept 1999]. *See also Matter of Dodgertown Homeowners Ass'n, Inc. v. City of New York*, 235 AD2d 538, 539 [2d Dept 1997], holding that "the central distinguishing characteristic of a lease is the surrender of absolute possession and control of property to another party for an agreed–upon rental" (*citations omitted*.) *Cf. Bernstein v. 1995 Associates*, 185 AD2d 160, 162 [1st Dept 1992], *citing 166 Mamaroneck Ave Corp. v. 151 East Post Road Corp*., 78 NY2d 88, 91 [1988]), price term "fair market value" held sufficiently precise in agreement to lease property since amount of rent to be paid could be determined objectively.)

The Agreement is hopelessly deficient to constitute an enforceable lease agreement between the parties. Absent from this "agreement" is any reference to respondent paying rent. Instead, respondent is "to pay upon being billed for water, electric, gas and any and all related expenses while living at the premises." (Pet. Exh. 2, ¶ 3.) Rent is not a related or incidental expense to living at a premises–it is the primary expense of occupancy. This glaring omission from the parties' Agreement is fatal to petitioner's claim. (*Martin Delicatessen v. Schumacher*, 52 NY2d at 110; *Gotham Food Group Enterprises v. Principal Mutual Life Insurance Co.*, 267

AD2d at 48].)

Even if the court were to accept petitioner's sweeping proposition that this agreement obligates respondent to pay rent, her claim still fails. Paragraph three of the Agreement conditions respondent's obligation to make payment "upon being billed." Petitioner however failed to introduce any evidence that she ever billed respondent for the rent that is purportedly due under the Agreement.

Alternatively, petitioner argues that respondent's rental obligation is set forth both in the Agreement as well as in a confession of judgment (Confession) executed on June 27, 2006. The court is guided by the "familiar and eminently sensible proposition of law [] that, when parties set down their agreement in a clear, complete document, their writing should. . . be enforced according to its terms." (*Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] quoting *W.W.W. Assoc. v. Giancontieri*, 77 NY2d 157, 162 [1990]; *TAG 380, LLC v. ComMet 380, Inc.*, 10 NY3d 507, 512 - 513 [2008].) Indeed, "the best evidence of what parties to a written agreement intend is what they say in their writing." (*Slamlow v. Del Col*, 79 NY2d 1016, 1018 [1992].) Thus, extrinsic evidence of the parties intent may be considered only if the court finds the agreement to be ambiguous. (*Greenfield v. Philles Records, Inc.*, 98 NY2d 562, 569 [2002].) "Courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." (*Reiss v. Financial Performance Corp.*, 97 NY2d 195, 199 [2001] [internal quotation marks and citations omitted].)

The plain meaning of the Agreement is clear and unambiguous: Respondent was to pay water, electric, gas and related expenses to petitioner upon being billed for the same. If the

parties truly wished for respondent to be obligated to pay rent "while living at the premises," then they could have easily reduced that vital term into a single sentence. Whatever the reason for this omission, it does not render the Agreement ambiguous such that extrinsic evidence may now be used to clarify the parties' intentions. (*See Van Kipnis v. Van Kipnis*, 43 AD3d 71, 77 citing *Reiss v. Financial Performance Corp.*, 97 NY2d at 199.) Nor may the Confession be used to create ambiguities that do not otherwise exist. (*Id.*) Instead, the court must construe the unambiguous Agreement as written and enforce it as the negotiated result of two represented parties to an arms–length transaction. (*Greenfield v. Philles Records, Inc.*, 98 NY2d at 569 [2002].) Thus, there is no basis for the court to consider the Confession. (*Id.*)

However, even if the Agreement was ambiguous, the Confession adds no clarity to petitioner's claims. The Confession states that respondent shall pay $3,277.54 per month consisting of the mortgage, property tax and insurance "from August 1, 2006 until [her] money from the [] sale of the property in the amount of $111,000.00 is released from the Supreme Court of the State of New York, County of the Bronx, Index No. 16001/04." Respondent's surplus moneys were deposited with the Bronx County Clerk on July 26, 2006 and then released to and disbursed by Mr. Torres in June 2007. Thus, at the very latest, any obligation that respondent had to pay the monthly mortgage for the premises ended in June 2007 by the plain terms of the Confession–six months prior to the onset of the alleged rental arrears herein.

Accordingly, the Court finds that there is no landlord–tenant relationship between the parties. The Clerk of the Court shall enter judgment in favor of respondent dismissing the petition with prejudice. The parties shall recover their exhibits from the Part T Clerk in Room 470. This constitutes the Decision/Order of the Court, copies of which are being mailed to the

parties today as set forth below.

Dated: November 19, 2008
Bronx, NY

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Hon. Jaya K. Madhavan

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Clerk of the Court