

Dixon Holdings LLC v Fenton
2009 NY Slip Op 32686(U)
November 17, 2009
Civil Court of the City of New York, New York County
Docket Number: 95836/07
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART S

DIXON HOLDINGS LLC, X

HON. SABRINA B. KRAUS

Petitioner-Landlord

-against-

DECISION & ORDER
Index No.: L&T 95836/07

MARY ANN FENTON
77-79 Seaman Avenue
APT 4B
New York, New York 10034

Respondent-Tenant

“JOHN DOE” AND/OR “JANE DOE”

Respondents- Undertenants
_____ X

BACKGROUND

This summary holdover proceeding was commenced by **DIXON HOLDINGS LLC** (Petitioner), and seeks to recover possession of Apartment 4B at 77-79 Seaman Avenue (Subject Premises), based on the allegation that **MARY ANN FENTON** (Respondent), the rent-control tenant of record, does not live in the Subject Premises as her primary residence. Respondent appears by counsel, denies the allegations of the petition, and asserts that the petition should be dismissed.

PROCEDURAL HISTORY

Petitioner served a predicate notice on or about September 18, 2007, advising Respondent that his tenancy was terminated effective October 31, 2007. The Notice of Petition and Petition issued on or about November 21, 2007. The original return date was November 27,

2007. Both parties appeared by counsel and entered into a stipulation marking the proceeding off calendar pending discovery.

Respondent served and filed a written answer on or about December 6, 2007. Petitioner took Respondent's deposition on March 27, 2008. There was some motion practice regarding discovery disputes. On or about December 23, 2008 Respondent hired new counsel.

On July 15, 2009 the proceeding was assigned to Part S for trial. The trial took place on July 15, 2009, September 1, 2009 and concluded on September 2, 2009. Closing arguments were heard, and post trial memoranda submitted, on September 29, 2009. The Court reserved decision.

FINDINGS OF FACT

Petitioner is the owner of the premises known as 77-79 Seaman Avenue, New York, New York , 10034 pursuant to a deed dated June 20, 2002 (Exhibit 1). The premises is a multiple dwelling, and HPD has on file a MDR for the period commencing March 31, 2009 (Exhibit 2). Respondent is the rent control tenant of record for the Subject Premises.

Witnesses Presented at Trial

Renata Angioli, the managing agent for the Subject Building was the first witness for Petitioner. Ms. Angioli maintains an office at the Subject Building in apartment 2B, and resides in Staten Island. The Subject Building is owned by Ms. Angioli and her parents, who are members of Petitioner. Ms. Angioli uses apartment 2B as a *pied a terre* between one to four times a month, on average.

The Subject Premises is a two bedroom apartment. In or about 2004 or 2005, Ms. Angioli began to suspect that Respondent did not live in the Subject Premises. Ms. Angioli's

suspicion was based on the fact that no one could ever reach the Respondent, the Super rarely saw her, and her mailbox always appeared full.

In the Spring of 2005, there was a plumbing emergency resulting in a leak into Apartment 1B at the Subject Building, and Ms. Angioli was not able to contact the Respondent until the day following the leak. After that incident, Respondent agreed to provide Ms. Angioli with a set of keys for access to the Subject Premises in the event of an emergency.

Ms. Angioli also believed that Respondent did not live in the Subject Premises because she would pay rent in the incorrect amount, and mail payments to Ms. Angioli's home in Staten Island, rather than slipping it under the door of the office at the Subject Building as requested.

Ms. Angioli stated that she rarely observed Respondent in the Subject Building, and that even late at night her lights did not appear to be on when observed from the street. On more than one occasion, Ms. Angioli received mail from the post man, for Respondent, and held onto it, because she could not find the Respondent to deliver it. Some of these mail items were placed in Respondent's tenant folder by Ms. Angioli, and introduced as evidence at trial (Exhibits 14(a)-(d)).

On cross-examination, Ms. Angioli contradicted her direct testimony in several aspects regarding the time of night she goes to sleep, and what she was able to observe of the Subject Premises from the street. Overall, the Court found Ms. Angioli to be a witness who lacked objectivity and of limited credibility.

The next witness presented by Petitioner was **Jamie Brown**, a representative from Con Edison. Through, Ms. Brown's testimony Petitioner entered into evidence Con Edison record for the Subject Premises (Exhibit 15) for a period covering March 2005 through December 2008.

Ms. Brown testified that all gas usage and charges on the exhibit were estimated and not based on any actual reading. From January 2005 through October 2006, there are no electrical readings on the printout in evidence. However, Ms. Brown stated that this appeared to be based on an abnormality in the record produced, and did not indicate that there was no electrical usage during this period. Ms. Brown also testified that there was nothing in Con Edison's records that would lead her to conclude that the Subject Premises was unoccupied.

Given Ms. Brown's testimony that the records produced were not accurate, the Court does not accord them any great weight in determining the issue of non-primary residence.

Leslie Warren also testified for Petitioner. Ms. Warren has lived in Apartment 4D at the Subject Building, for approximately eleven years. Ms. Warren stated she knows some neighbors, but does not know who lives in the Subject Premises. Ms. Warren could not say whether she had ever seen Respondent, prior to her testimony in court, but would not have recognized Respondent as a person residing in the Subject Building. Ms. Warren also stated that she may have confused the occupants from 3B with the occupants from the Subject Premises. Ms. Warren did not believe that the Subject Premises was unoccupied because she recalls seeing holiday decorations on the door each year. Ms. Warren was a credible witness.

Maria Lopez the super for the Subject Building testified. Ms. Lopez has worked at the building for approximately seven years, and knows that Respondent is a tenant in the Subject Building. Ms. Lopez first met Respondent in 2002. From 2002 through 2007, Ms. Lopez stated she would see Respondent in the Subject Building between three to four times per year. However, on cross-examination Ms. Lopez stated that she sees Respondent on weekday mornings, at about 7:30 am leaving for work. Ms. Lopez stated that she and the Respondent

have a good relationship, and that they have discussed Christmas decorations for the building. Ms. Lopez also stated that she has seen Respondent coming and going from the building, and that she believes that Respondent lives in the Subject Premises.

Respondent also testified at trial. She was called both as a witness for Petitioner and on her own behalf. Respondent has lived in the Subject Premises since 1956, although she moved out for a period, and did not resume occupancy until the 1990s, when she returned to reside with her parents. Respondent has lived in the Subject Premises, without interruption, since approximately 1991 or 1992. Respondent is fifty-five years old, is single, and has no children.

Respondent has lived alone in the Subject Premises since 1996. Respondent works in a hospital and describes her schedule as consisting of irregular hours. Respondent has a large family and often spends weekends with one of her siblings. Respondent also often works on weekends. Respondent has had the same job for the past twenty-six years, and typically works about fifty-two hours per week.

Respondent does not sleep in the Subject Premises every night after work. Approximately once a month, Respondent will stay with Yolanda Andrews, a close friend, who lives on the Upper Westside of Manhattan. Respondent will also house sit for Ms. Andrews, when Ms. Andrews travels.

Respondent acknowledged that she often does not pick up her mail, and that at times her mail has been returned to the sender due to her failure to do so.

Yolanda Andrews testified for Respondent. Ms. Andrews has known Respondent for thirty years, and lives on West 86th Street in Manhattan in a cooperative apartment that she owns. Ms. Andrews lives alone in a two bedroom apartment, in a doorman building. Ms. Andrews

stated that Respondent may stay over once or twice a month when she works a late shift, and that Respondent housesits at after Ms. Andrews' apartment, when Ms. Andrews travels. Ms. Andrews testified that Respondent does not live in her apartment, nor does she receive mail there, but that Respondent does keep a change of clothes and a few personal items in her apartment. Ms. Andrews was an extremely credible witness.

DISCUSSION

9 NYCRR § 2200.2(f)(18) provides that "Housing accommodations not occupied by the tenant, not including subtenants or occupants, as his primary residence, as determined by a court of competent jurisdiction" are not subject to rent control. 9 NYCRR § 2200.3(j) in defining primary residence provides:

Although no single factor shall be solely determinative, evidence which may be considered in determining whether a housing accommodation subject to this Subchapter is occupied as a primary residence shall include, without limitation, such factors as listed below:

- (1) specification by an occupant of an address other than such housing accommodation as a place of residence on any tax return, motor vehicle registration, driver's license or other document filed with a public agency;
- (2) use by an occupant of an address other than such housing accommodation as a voting address;
- (3) occupancy of the housing accommodation for an aggregate of less than 183 days in the most recent calendar year ... ;
- (4) subletting of the housing accommodation.

Petitioner has failed to establish any one of the above listed criteria by a preponderance of the credible evidence. No documentary evidence was introduced showing Respondent listed any other address on tax returns, drivers license, voting registration or any document filed with any public agency. Respondent has not sublet the Subject Premises, and Petitioner has not

established by a preponderance of credible evidence that she occupied the Subject Premises for less than 183 days in the preceding calendar year.

Petitioner's case is primarily based on three claims: that Respondent rarely picks up her mail; that the managing agent rarely sees her at the Subject Premises; and that she spends a lot of time on the Upper West Side of Manhattan doing shopping and visiting a close friend.

In order to prevail upon a claim of non-primary residence, Petitioner must establish, by a preponderance of the credible evidence, that Respondent has failed to use the Subject Premises for actual living purposes, and that Respondent lacks a strong, continuing physical connection with the premises (*Toa Construction Co. Inc v. Tsitsires* 54 AD3d 109 [1st Dept 2008]). Petitioner has failed to sustain its burden in this regard.

CONCLUSION

Based on the foregoing, the Petition is dismissed. This constitutes the decision and order of this Court.

Dated: New York, New York
November 17, 2009

Sabrina B. Kraus, JHC

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