

1427 York Ave. LLC v Schiller
2010 NY Slip Op 30060(U)
January 13, 2010
Civil Court of the City of New York, New York County
Docket Number: 50724/08
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART S

1427 YORK AVENUE LLC X

Petitioner-Landlord

-against-

DECISION & ORDER
Index No.: L&T 50724/08

HON. SABRINA B. KRAUS

PATRICIA SCHILLER
1427 York Avenue, Apt. 1B
New York, New York 10021
Respondent-Tenant

“JOHN and/or JANE DOE”

X

BACKGROUND

This summary holdover proceeding was commenced by **1427 YORK AVENUE LLC** (Petitioner), and seeks to recover possession of **1B**, at **1427 York Avenue, New York, New York, 10003** (Subject Premises), based on the allegation that **PATRICIA SCHILLER**, the rent-controlled tenant of record, does not maintain the Subject Premises as her primary residence.

PROCEDURAL HISTORY

The proceeding was commenced by service of a thirty day notice on March 12, 2008. The Notice of Petition and Petition issued on or about May 2, 2008, and the proceeding initially appeared on the Court’s calendar on May 16, 2008. On or about June 17, 2008, Respondent appeared by counsel and served a written answer which denied certain allegations in the petition, but asserted no affirmative defenses. On June 18, 2008, pursuant to stipulation, Respondent consented to the jurisdiction of the Court, acknowledged service of the predicate notice and

pleadings, consented to discovery, and agreed to pay use and occupancy *pendente lite*. The proceeding was marked off calendar pending completion of discovery.

On August 14, 2009, the parties stipulated to restore the proceeding to the calendar for trial. On September 10, 2009, the proceeding was transferred to Part S, and the trial commenced. The trial continued on September 30, and concluded on October 1, 2009, at which time the Court reserved decision.

FINDINGS OF FACT

At the commencement of trial, the parties stipulated to the admission of certain documents. The parties also submitted a pre-trial stipulation dated September 9, 2009 (Exhibit 20) which acknowledged many of the basic elements of Petitioner's *prima facie* case. The parties stipulated to the admission of Exhibits 1-24 in evidence. These documents primarily establish that Respondent owns several properties, and has a real estate business. The documents include some cable and utility bills for the other properties. Additionally, Respondent's deposition transcript was stipulated into evidence (Exhibit 22). Respondent's credit card statements from February through September 2008 were also submitted (Exhibit 20).

Petitioner is the owner of the Subject Premises pursuant to a certified copy of a deed dated July 25, 2002 (Exhibit 1). The building in which the Subject Premises is located is a multiple dwelling and Petitioner has a current registration on file with HPD (Exhibit 2). The Subject Premises is a rent controlled apartment. In 1984, the tenant of record was Helen Reich with a legal rent of \$131.02 per month (Exhibit 3).

Respondent is the owner of 200 shares of Adams Corners Owners Corp., pursuant to a stock certificate dated May 5, 2008, said shares are issued to Respondent, as proprietary lessee,

for a cottage located in Putnam Valley, New York (Exhibit 4). The address of the premises is 5 Berry Hill Road, #1B, Putnam Valley, New York 10579 (*see UCC Financing Statement* in evidence as Exhibit 7).

Respondent is the owner in fee of a condominium number 417 of Old Port Cove Condominium Two located in Palm Beach County Florida, pursuant to a Warranty Deed dated June 10, 2005 (Exhibit 5). The condominium has one bedroom apartment, in an elevator building located in North Palm Beach, Florida. Respondent generally spends three months a year there from January through March (Exhibit 22).

Respondent is the owner pursuant to a Deed dated May 4, 2006, of a single family dwelling located at 873 Peekskill Hollow Road, Putnam Valley, New York, which deed lists Respondent's residence as 299 Peekskill Road, Putnam Valley, New York, 10579 (Exhibit 6).

Respondent is the owner pursuant to a Deed dated September 30, 1996, of 1826 Edwards Avenue, Riverhead, New York, 11933 (Exhibit 9), and has a mortgage for said property dated January 22, 1999 (Exhibit 8). Respondent owns a boat which is registered to her and maintained in Aquebogue, New York (Exhibit 10).

Petitioner's first witness was Michael Gordon. Mr. Gordon is a private investigator licensed by the State of New York (Exhibit 29), whom Petitioner hired to install a video surveillance camera to monitor Respondent's presence at the Subject Premises. Mr. Gordon installed a video camera in the hallway of the first floor of the subject building. Installation was complete and recording began on June 5, 2007. The recording is triggered by motion, and the camera is wired to a DVR in the basement of the subject building. After the installation, Mr. Gordon testified that he would check the recordings approximately once a week. Mr. Gordon

made tapes from the hard drive, which he brought to court and which were submitted into evidence (Exhibits 30[A]-30[O]).

Mr. Gordon also viewed the tapes and created a log (Exhibit 26), which was admitted into evidence on consent, of any instances where Respondent was observed entering or exiting the Subject Premises. According to the log, from June 15, 2007 through May 10, 2008, Respondent spent a total of 17 nights in the Subject Premises. Portions of the various tapes were also played during the trial.

However, there were significant issues regarding the reliability of the videos established at trial. Mr. Gordon acknowledged that there were periods where no recordings were made, during to what he described as “power loss” in the basement of the building. Apparently the DVR was connected to a power switch, which other people had access to, and which was turned off, on more than one occasion, by unknown or unidentified individuals. Thus no recordings were made for the period of March 18, 2008 through April 3, 2008. Additionally, the originally camera installed was allegedly vandalized in July 2007 and no recordings were registered for the period of July 4th through July 12, 2007. A second vandalization occurred later the same month.

Through Mr. Gordon’s testimony, Petitioner also put into evidence pictures of the common areas of the building to describe the camera installation in further detail (Exhibits 27[A]-27[Z]).

At the conclusion of Mr. Gordon’s testimony, Petitioner rested on its *prima facie* case.

Respondent testified on her own behalf. Respondent testified that the Subject Premises is her primary residence, and that she occupies the premises over 183 days per year. Respondent testified that the premises she owns at 299 Peekskill Road, Putnam Valley, New York is her

office, and that she owns a coop at 5 Berry Hill Road, Putnam Valley, New York, that is located a few miles away from the office.

Michael Gordon was the next witness called by Respondent, and answered a few brief questions regarding the installation of the camera.

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.

In considering the first category, whether Respondent has specified another address as a residence, there are some documents in the record. For example Exhibit 6, a deed dated May 2006 specifies Respondent resides at 299 Peekskill Hollow Road, Putnam Valley, New York. Similarly, Exhibit 10, a certificate of Documentation for Respondent’s boat, used recreationally,

lists the same address for Respondent. This address is also listed a biennial statement filed for Respondent, on August 2003, with the New York Department of State (Exhibit 24), and on tax documents for other properties owned by Respondent in or around Putnam Valley, New York (Exhibit 21).

However, not offered into evidence by either party are the more traditional indicia of primary residence such as a drivers license or tax returns. The Court notes that Petitioner conducted discovery, requested such documents in discovery and has not offered the documents at trial.

If the videotape evidence is discounted or given little weight, then all Petitioner has really established on its *prima facie* case is that Respondent, an individual admittedly in the Real Estate Business owns several properties, some of which are used for business related purposes, and some of which are used for recreational purposes. Even the credit card statements in evidence, while establishing transactions outside of New York, are for a limited period and do not show the daily transactions over a sustained period that would support a finding of nonprimary residence.

Equally unimpressive was the defense put on to Petitioner's *prima facie* case. Other than to generally deny the validity and accuracy of the videotapes, and to assert that she does actually occupy the premises over 183 days per year, Respondent did not make a strong showing of primary residence by offering her own documents into evidence, or the testimony of witnesses as to the nature and use of the Subject Premises.

However, in order to prevail upon a claim of non-primary residence, the burden lies with Petitioner, who 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]).

The Court finds that Petitioner has failed to sustain its burden in this regard. As noted above the reliability of the video tapes in evidence is dubious given the reliability issues raised at trial. Neither the camera nor the taping device were located in secure spots. Both were tampered with by unknown individuals on numerous occasions. The original recordings were not preserved. The combination of the lack of reliability, and the fact that the videotape was not authenticated by the testimony of any witness to the recorded events, result in the Court being able to give said evidence little to no weight (*See eg People v. Patterson*, 93 NY2d 80 [Ct of Appeals, 1999]). Respondent offered credible explanations as to her periods of absence from the Subject Premises, and her use of other properties she owns. Evaluated as a whole, Petitioner has thus failed to establish by a preponderance of the credible evidence that Respondent fails to maintain the Subject Premises as her primary residence.

CONCLUSION

Based on the forgoing, the petition is dismissed. This constitutes the decision and order of this Court.

Dated: New York, New York
January 13, 2010

Sabrina B. Kraus, JHC

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