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| 74-76 Charles Realty LLC v Schmidt |
| 2011 NY Slip Op 33403(U) |
| December 19, 2011 |
| Civil Court of the City of New York, New York County |
| Docket Number: 62796/10 |
| Judge: Sabrina B. Kraus |
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CIVIL COURT OF THE CITY OF NEW YORK
 COUNTY OF NEW YORK: HOUSING PART R

 74-76 CHARLES REALTY LLC,

Petitioner-Landlord

HON. SABRINA B. KRAUS

-against-

DECISION & ORDER
Index No.: L&T 62796/10

CHARLES SCHMIDT
 76 CHARLES STREET APT F
 NEW YORK, NY 10014,
 Respondent-Tenant

LYDIA WHITCOMB , “JOHN DOE” AND
 “JANE DOE”

Respondents-Undertenants

 X

BACKGROUND

This summary holdover proceeding was commenced by **74-76 CHARLES REALTY LLC** (Petitioner) against **CHARLES SCHMIDT** (Respondent), the rent stabilized tenant of record, seeking to recover possession of Apartment F, at 76 CHARLES STREET, NEW YORK, NY 10014 (Subject Premises) based on the allegation that Respondent is not occupying the Subject Premises as his primary residence.

PROCEDURAL HISTORY

This proceeding was commenced by service of a Notice of Non-Renewal of Lease dated December 21, 2009. The notice asserted that Respondent does not maintain the Subject premises as his primary residence, and that he resides at 2666 Seminole Avenue, Apt.2, Seaford, New York 11783 (Seaford Residence). The notice further asserts Respondent receives mail at the Seaford Residence, has voted from that address, has his cars registered to that address, and

maintains a wireless account from that address. The notice further asserts that Respondent sublet the Subject Premises to Lydia Whitcomb who was asserted to be in occupancy at the time the notice was issued. The petition is dated April 7, 2010 and the proceeding was originally returnable April 28, 2010.

On April 23, 2010, Respondent appeared *pro se* and filed a written answer. Respondent's answer asserts that the Subject Premises has been his primary residence since June 1976, and that the Seaford Residence has been his families home since 1962. Respondent asserts the Seaford Residence was his mother's apartment through January 31, 2010. Respondent further asserted that Lydia Whitcomb was his friend and roommate.

Respondent initially obtained an adjournment to June 2, 2010 to consult with consul. On June 2, 2010, petitioner moved for discovery. The motion was granted on consent pursuant to a stipulation. The proceeding was marked off calendar pending discovery.

On August 19, 2010, Petitioner moved for an order for a judgment and a warrant based on respondent's failure to pay use and occupancy stipulated to in the June 2, 2010 stipulation. The Court (Capella, J) issued an order entering a money judgment against respondent in the amount of \$1484.01 and providing Respondent was to satisfy said judgment by August 24, 2010 or his answer would be deemed stricken.

On September 3, 2010, Respondent moved to restore the proceeding seeking an extension of time to pay use and occupancy ordered. The Court (Spears, J) issued an order vacating the prior money judgment, which has been satisfied, and entering instead a final judgment of possession with issuance of the warrant stayed five days. The Court also entered a new money judgment against Respondent, for "rent due" in the amount of \$2193.68 and directed Respondent

was to pay said sum by September 30, 2010, or provided Petitioner could execute on the warrant. The warrant of eviction issued on October 14, 2010, and the proceeding remained off calendar.

On April 29, 2011, Petitioner moved for an order pursuant to CPLR §3126 based on allegations that Respondent had not fully complied with outstanding discovery. The motion was settled per stipulation on June 8, 2011, and the proceeding was adjourned to July 20, 2011 for trial. On July 27, 2011, Petitioner moved a second time for relief pursuant to CPLR §3126. On August 19, 2011, the motion was withdrawn by Petitioner and the matter was adjourned for trial to October 12, 2011. On October 12, 2011, the proceeding was transferred to Part X for trial.

On November 23, 2011, the proceeding was assigned to Part R for trial. The trial commenced on November 23, 2011, and concluded on November 30, 2011. At the conclusion of trial the court reserved decision.

THE TRIAL

Petitioner's first witness at trial was Howard Benjamin Dublin. Mr. Dublin is employed by Petitioner's managing agent. Mr. Dublin as worked as a managing agent for the Subject Building for approximately eight years. Mr. Dublin knows Respondent through the litigation, between 2007 and 2009, Mr. Dublin visited the subject building one or two times per week. Mr. Dublin stated that in March of 2007 and October of 2009 he had observed an female in the Subject Premises. Mr. Dublin testified that he made this observation from outside the building on the ground floor from the back of the building.

The next witness for Petitioner was Stacey Chametznik. Ms. Chametznik has been a real estate broker for over twenty years, she specializes in rentals in Manhattan, primarily in the

Village. Ms. Chametznik is the agent for Petitioner for rentals in the subject building. The subject building consists of primarily studio apartments.

Ms. Chametznik met Lydia Whitcomb in or around September 2009. Ms. Chametznik was retained by Ms. Whitcomb to help her find a new apartment, and met with her at the Subject Premises, which Ms. Whitcomb asserted she was renting from Respondent. Ms. Chametznik has seen Respondent on two prior occasions, once on the street, and once in the backyard of the building in November 2009.

In November 2009, Ms. Chametznik witnessed a confrontation between Respondent and Ms. Whitcomb on the street. Ms. Chametznik has never spoken to Respondent, but she did advise Lydia Whitcomb to have Respondent arrested, when Ms. Whitcomb alleged Respondent was harassing her. This incident occurred in 2009 or 2010. Ms. Chametznik did not know when Lydia Whitcomb moved out of the Subject Premises, but she did know that Ms. Whitcomb was no longer living there. Ms. Chametznik received a text from Respondent in 2010 warning her to “stay out of this”.

Petitioner’s next witness was Ahron Freidus, who works for the managing agent for Petitioner. Since 2006, Mr. Freidus has managed the Subject Building with Mr. Dublin. Mr. Freidus testified that he has often been in the Subject Premises for repairs. The first time Mr. Freidus was at the Subject Premises was in the summer of 2006. Between that time and the end of 2007 Mr. Freidus was in the Subject Premises about ten times.

Mr. Freidus testified regarding the personal belongings of Respondent that he had observed when he was at the Subject Premises. Mr. Freidus testified that in 2007 he observed what were clearly Respondent’s belongings, and that on another occasion in 2009 the furniture in

the Subject Premises had changed and he observed women's belonging. The Court does not credit Mr. Freidus' testimony in this regard, the testimony appeared rehearsed and the level of detail that Mr. Freidus recalled regarding the personal belongings in the apartment from 2007 did not seem credible. Mr. Freidus did acknowledged that Respondent was with him at the Subject premises on both occasions.

Respondent next testified on his own behalf. Respondent testified that he moved into the Subject Premises in September 1976. Respondent testified that the Seaford Residence has been his mother's apartment for fifty years, and that is where Respondent and his sister grew up. Respondent testified that throughout his life he has consistently spent time at the Seaford Residence. Respondent testified that in 2008 and 2009 he spent more time at the Seaford Residence because his mother was ill, but that he still regularly spent time at the Subject Premises during that period as well.

Respondent testified that in 2006 he lost his business and when he sought public assistance he was advised he should get a roommate. Respondent testified that he would sporadically get roommates for various periods of time.

Respondent testified that at the end of September 2009 he had the police remove Lydia Whitfield from the Subject Premises. Respondent testified a few days later Ms. Whitfield called him and pick her up which he did. Respondent testified that Ms. Whitfield remained with him for a few days and then left, but that she left her belongings behind in the Subject Premises after she was gone.

Respondent testified that on October 6, 2009 he received a call from NYPD the 6th precinct asking him to come in for questioning. Respondent testified that he went in to the 6th

precinct, and that day or a day later he was locked out of the Subject Premises. Respondent testified that a few weeks later he went back to the Sixth Precinct to speak with the same detective. Respondent testified that Lydia Whitcomb was no longer in occupancy of the Subject Premises as of that point, but that her belongings remained in the Subject Premises.

Respondent testified that around Thanksgiving 2009, Ms. Whitcomb called and asked him to pick her up, which he did. Ms. Whitcomb slept at the Subject Premises on that occasion and she also stayed over a few times in December during snow storms. Respondent testified that he asked Respondent to remove her belongings, so that he could get another roommate. Respondent testified that ms. Whitcomb “disappeared” after Christmas 2009 and that he boxed up her belongings and put them in storage.

Respondent testified that his mother went into a nursing home in January 2010 and lost her apartment, the Seaford Residence, as a result. Respondent testified that from that point forward he was at the Subject premises full time, but that he would drive out to long island a few times per week to stay at the nursing home. Respondent testified that the Seaford Residence was on the water.

Respondent testified that in 2007 his mother stayed at the Subject premises because she was receiving treatment from an eye doctor, and that she stayed at the Subject Premises one night in November 2010.

Respondent testified that since Petitioner has taken over the building, he has constantly been in court with Petitioner. Respondent asserted Petitioner tried to evict him previously for nonpayment of rent, and that between the years 2006 and 2009 there was at least one summary nonpayment proceeding or HP action pending between the parties. Respondent also asserted that

there was litigation between the parties in 2007 at DHCR and in Housing Court related to a claim of rent overcharge.

On cross-examination Respondent testified that he had several roommates over the two year period prior to the service of the predicate notice. Ms. Quian Wong lived in the Subject Premises from January 2006 through April 2007 pursuant to a written agreement dated January 3, 2006 (Exhibit Q4). Ms. Saskia Van Leeuwen lived in the Subject premises from November 2007 through June 2008 (Exhibit Q3). Ms. Elizabeth Bess Wyrlic lived in the Subject Premises from August or September 2008 through May 2009 (Exhibit Q2). Ms. Lydia Whitcomb appears to have been living in the Subject Premises from August 2009 through December 2009 (Exhibit Q1).

While the agreements referenced above provide for no rental payment, Respondent was advertising the apartment on Craig's List for \$900 per month in August 2009 (Exhibit 16). The legal rent for the Subject Premises at this time was \$709.67 per month (*Exhibit 4 is lease renewal for Subject Premises dated November 20, 2008, and Exhibit 5 is certified DHCR registration for the same period*). Respondent was receiving \$215.00 per month towards the rent from the Department of social services. Respondent sought a "Nice Single Woman to stay on a Full Time Guest basis" and described the arrangement as "having your own place with the economic advantage similar to a roommate situation." The ad continues to state "From previous experiences, Women seem the best suited for this kind of arrangement, whereas girls do not. There are Rules, but there are no hidden, strange or odd prerequisites and there are no strings attached. However, There is an image that we must Project to Protect the Tenancy (Exhibit 16 *typos from original*)." The advertisement concludes by providing two different 516 numbers

where Respondent can be reached. The “women” Respondent rented to were all between the ages of 24 and 29. Respondent is 65 years old.

Respondent and Ms. Whitcomb were involved in litigation. Ms. Whitcomb filed criminal charges against Respondent including Petit Larceny, Harassment and Aggravated Harassment. Respondent testified on cross-examination that he refused to return Ms. Whitcomb’s property to her because she owed him money. In evidence as Exhibit 18 is a letter from Respondent to Ms. Whitcomb which references some of their dispute. In the letter Respondent advises Ms. Whitcomb that she is not permitted to have male guests visit her at the Subject Premises nor “lovers of any kind” and that is “a low profile apartment” which is “to be kept private,” but he concedes that Ms. Whitcomb is permitted to have her sister or some girlfriends visit her at the Subject Premises.

Respondent acknowledges that his cars were registered in Long Island at the Seaford Residence (Exhibit 8 is the registration for the vehicles from 2008 through 2010 listing respondent’s address at the Seaford Residence and Exhibit 10 shows insurance for the vehicles listed Respondent’s address at the Seaford Residence from 2006 through 2010) and that he voted from that residence from 2007 through 2010 (Exhibit 7 is Respondent’s request to change his voter registration to the Subject Premises filed January 19, 2011). Respondent’s driver’s license issued in 2007 and valid through 2012 lists the Seaford Residence as his address. From 2004 through 2007 Respondent’s license listed the Subject Premises as his address but he changed that in 2007 (Exhibit 11 are copies of the two licenses).

The Seaford Residence was the subject of a summary holdover proceeding commenced in Nassau County under index No. 4706/2009 (Exhibits 9a- 9d). Respondent was personally

served with the pleadings in said proceeding at the Seaford Residence on August 17, 2009 (Exhibit 9B). A predicate notice had been served in June 2009. Respondent answered by letter dated July 22, 2009. In the letter Respondent references an incident where he returns to the Seaford Residence after work and found the landlord in the residence going through his belongings. Respondent advises the landlord that he and his mother “will not be voluntarily vacating the said premises ... anytime soon (Exhibit 9D). Respondent and his mother entered into a stipulation in August 2009 agreeing to surrender possession of the Seaford Residence effective November 30, 2009 (Exhibit 9C). On or about December 2009, Respondent moved for a stay in the Nassau County proceeding through counsel (Exhibit 9D). The Seaford Residence is a two family home. The Owners occupied the ground floor.

Respondent’s motion for a stay was granted by the Court to the extent of staying execution of the warrant through January 31, 2010 (Exhibit 9A).

Respondent received several subscriptions to magazines which were sent to his Seaford Residence such as Car and Driver magazine and Motor Trend Magazine (*checks paying for subscriptions as part of exhibit 15*). Respondent was also a member of the Seaford Republican Club as evidenced by his 2009 dues payment (Exhibit 15). Respondent received home delivery of Newsday at the Seaford Residence (Id).

Respondent had a cell phone number of 516 236 5208. The bills were sent to Respondent at the Seaford Residence from 2007 through 2010 (Exhibits 12A-12C). Respondent filed extensions on his taxes for 2006 through 2008. Respondent testified that he never filed tax returns for those years.

DISCUSSION

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]). RSC § 2520.6(u) provides that while no single factor is controlling, the determination may be based on consideration of : 1) whether the tenant lists another address on tax returns, motor vehicle registrations, drivers license or any other documents filed with public agencies; and 2) whether the tenant uses another address for voting purposes; and 3) whether the tenant has spent over 183 days in the premises in the preceding calendar year; and 4) whether the premises have been sublet.

The Court finds that the preponderance of credible evidence establishes that Respondent did not live in the Subject Premises from January 2006 through January 2010. The Court finds that the evidence shows that Respondent unlawfully sublet the Subject Premises during said period as means of profiting from the apartment. Respondent was receiving \$215.00 from Social services for rent payments while collecting as much as 900 per months as “gifts” from the subtenants. The Court finds Respondent’s testimony that he lived with the young women in the small studio apartment to be entirely lacking in credibility. It is clear that he was subletting the Subject Premises to make money, and that the claim of being a roommate and the payments being an optional gift was a thinly veil attempt to disguise what he knew to be unlawful subletting of the Subject Premises.

Petitioner is not obligated to prove where Respondent did live, only that his connection to the Subject Premises was insufficient to constitute it continuing as his primary residence (*Toa Construction Co. Inc. v. Tsitsires* 54 AD3d 109 [2008][*proof of nonprimary residence does not require proof that tenant maintains alternative primary residence*]; *Rocky 116 LLC v. Weston* 195 Misc2d 363 [App Term, 1st Dept, 2003]; *Oakridge Center LLC v. Anthopoulos* 21 Misc3d 132[A][App Term, 1st Dept, 2008]).

Based on the foregoing, the Court awards Petitioner a final judgment of possession and forthwith issuance of the warrant of eviction. Execution of the warrant is stayed through and including June 30, 201 in light of Respondent's long term tenancy. The stay of execution of the warrant is conditioned on payment of ongoing use and occupancy at the last lease rate by the 5th of each calendar month from January 2012 through June 2012.

In the event of a default in vacating or payment, APS must be notified prior to any eviction as Respondent is 65 years of age.

This constitutes the decision and order of this Court.

Dated: New York, New York
December 19, 2011

Sabrina B. Kraus, JHC

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