

**731 Realty Co. v Rivera**

2012 NY Slip Op 30043(U)

January 12, 2012

Supreme Court, New York County

Docket Number: 72248/11

Judge: Sabrina B. Kraus

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CIVIL COURT OF THE CITY OF NEW YORK  
 COUNTY OF NEW YORK: HOUSING PART R

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 731 REALTY CO, X

Petitioner-Landlord

**HON. SABRINA B. KRAUS**

-against-

**DECISION & ORDER**  
**Index No.: L&T 72248/11**

EVELYN RIVERA  
 733 WEST 183<sup>RD</sup> STREET, APT 1H  
 NEW YORK, NY 10033,  
 Respondent-Undertenant

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 X

### **BACKGROUND**

This summary nonpayment proceeding was commenced by **731 REALTY CO** (Petitioner) against **JULIA RIVERA**, the rent stabilized tenant of record, seeking to recover possession of **Apartment 1H, at 733 WEST 183<sup>RD</sup> STREET, NEW YORK, NY 10033**, (Subject Premises) based on the allegation that Julia Rivera failed to pay rent due for the Subject Premises. **EVELYN RIVERA** (Respondent) was added as a Respondent Tenant and the proceeding discontinued against Julia Rivera, pursuant to the stipulation of settlement.

### **PRIOR LITIGATION**

There was a prior nonpayment proceeding under Index No 78479/2009 (2009 proceeding) against Julia Rivera, Respondent's mother. The Court has taken judicial notice of the contents of the file in that proceeding. Respondent, though not sued in that case, filed an answer that repairs were necessary, and requesting an inspection. The proceeding was returnable on August 12, 2009, and adjourned to September 8, 2009, pursuant to a stipulation. The

stipulation provided that Respondent was the daughter of Julia Rivera and lived in the Subject Premises. The proceeding was adjourned for the Julia Rivera to appear, or for “a letter of authorization.”

On September 8, 2009, Julia Rivera did not appear, the proceeding was settled pursuant to a so-ordered stipulation providing Respondent was appearing on behalf of Julia Rivera, pursuant to a notarized letter 1. The stipulation provided for the entry of a judgment against Julia Rivera in the amount of \$3497.23, forthwith issuance of the warrant, and a stay of execution of the warrant through October 8, 2009 for payment. Petitioner agreed to repair the bedroom ceiling. Respondent was not added as a party to that proceeding, and the stipulation provided that “No tenancy rights conferred upon Evelyn Rivera Gomez by signing the herein stipulation.” The warrant of eviction issued on September 25, 2009.

On October 7, 2009, Respondent moved to stay the eviction. Respondent stated that Julia Rivera was hospitalized in Puerto Rico, and was extremely ill. Respondent stated she was awaiting checks from the IRS in order to satisfy the arrears. The motion was returnable on October 19, 2009 and was denied by the Court (Spears, J.) pursuant to an order which provided “... movant Evelyn Rivera appears, but shows no ability to pay rent due through October 31, 2009 in the amount of \$4371.51. All stays are vacated. No further notice of eviction required unless required by law.”

On October 20, 2009, Respondent again moved for a stay of the eviction. Respondent stated that her pay check had been delayed a few weeks, that she could prove income, and sought additional time to pay the arrears. Respondent annexed a document indicating that since July

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1 There is no copy of said letter in the Court file.

2009 she had been employed full time as a child care provider earning between \$700 and \$900 per month. The motion was denied by the Court (Spears,J) pursuant to an order which provided:

...movant has shown no ability to pay rent due through \$4371.51, respondents is denied (sic). Respondent indicated that she would go get a money order for \$1000.00. But, she failed to return as of 2:40pm. No further notice of eviction required, unless required by law.

Julia Rivera appeared, for the first time in the proceeding, on November 5, 2009, after the warrant of eviction had been executed, and an eviction had already taken place. Julia Rivera moved for an order restoring her to the Subject Premises. Ms. Rivera asserted she had been ill with vertigo, since May, and had been unable to travel by herself. Ms. Rivera stated that once she felt better she returned to New York. Ms. Rivera stated Respondent had not been working, and that is why they had been unable to pay the rent arrears. Ms. Rivera stated she had a pending application for a one shot deal with welfare.. Ms. Rivera submitted documents showing she had arrived from Puerto Rico on October 30, 2009, and that she had applied for assistance with DSS on November 4, 2009. On November 6, 2009, the Court (Spears, J) issued an order granting the motion to the extent of staying re-letting through November 16, 2009, for payment of \$6,495.77, which included \$5245.79 in rent arrears plus \$1250 in legal and Marshall fees.

On November 9, 2009, Ms. Rivera applied for a second post-eviction order to show cause stating she had a bank check for the full \$6495.77, but did not know where to take the check. The motion was denied on the return date November 10, 2009, because neither party appeared in court. However, presumably the sum was tendered and accepted and Respondent and Ms. Rivera were restored to possession.

### **PROCEDURAL HISTORY**

This proceeding was commenced in June 2011. Although Respondent was a known occupant, she was neither named nor served with the pleadings. The petition asserts that the rent was personally demanded from Julia Rivera prior to the petition. The petition sought rent from March 2011 through June 2011, at a monthly rent of \$944.97. Julia Rivera never answered or appeared in this proceeding.

On July 7, 2011, Respondent filed an answer indicating that repairs were necessary. The proceeding was returnable July 15, 2011. Respondent appeared and requested an inspection. The proceeding was adjourned for the results of the inspection and to give Respondent an opportunity to obtain counsel. The inspection resulted in two Class "A" violations and 18 Class "B" violations being placed on the Subject Premises. The conditions found included defective sink faucets in the kitchen, plastering and painting throughout the Subject Premises, concealed water leaks in the ceiling of three rooms in the Subject Premises, broken tiles in the walls of the bathroom, defective wooden floors throughout the Subject Premises, mold on the bathroom ceiling, and defective kitchen cabinets.

On September 12, 2011, Respondent failed to appear for the scheduled trial and a judgment was entered on default against Julia Rivera . The same day Respondent moved to vacate the default, asserting a severe leak from the ceiling in the Subject Premises had caused her to be late in appearing for court. Respondent represented that she had all of the rent, but had not paid, because she was seeking a rent abatement and compensation for property damage. Respondent asserted there were many outstanding violations, including mold in the bathroom.

On September 21, 2011, the default was vacated and the proceeding was assigned to Part R for trial.

The parties entered into a stipulation of settlement providing that Julia Rivera does not reside in the Subject Premises, discontinuing as to Julia Rivera, and adding Respondent as a party. The stipulation recognized Respondent's right to succeed to her mother's regulated tenancy and provided Respondent would be issued a renewal lease in her name, after she had paid the arrears. Respondent agreed arrears through September 2011 totaled \$6074.10. Petitioner agreed to an abatement of \$1500, in full satisfaction of all warranty of habitability claims through that date. Respondent consented to a judgment for \$4574.10 and the forthwith issuance of the warrant of eviction. Petitioner agreed to correct outstanding violations. The warrant of eviction issued on October 17, 2011.

On November 2, 2011, Respondent moved for a stay on the execution of the warrant. Respondent indicated she had applied for assistance with HRA and was waiting for an approval. Respondent annexed a document showing an application to HRA had been made on October 26, 2011.

This Court denied the order to show cause on November 15, 2011. The parties agreed there remained \$6464.04 due through November 2011. The Court noted that the proceeding had been settled at trial, that Respondent had been granted an abatement, that Respondent had tendered no payment, and that Respondent showed a pending application for assistance with DSS, but no proof of ability to pay. The order provided the warrant could execute on re-service of a Marshall's notice, and that the denial was without prejudice to renewal on proof of ability to pay.

On November 28, 2011, Respondent moved again for a stay on the execution of the warrant. Respondent asserted her mother was ill and in intensive care for cancer, that she was still awaiting an HRA approval, and that she needed more time to pay the arrears. The Court declined to sign Respondent's *ex parte* order, and provided Respondent could renew on proof of ability to pay the arrears.

Respondent was evicted on December 2, 2011. On December 5, 2011, Respondent moved for an order restoring her to possession of the Subject Premises. Respondent asserted that she had half the amount of arrears due, and that she needed the breakdown of rent and Marshall fees for HRA to pay the balance. Respondent asserted that she was homeless, had no family and that she had been sleeping in the park.

On December 7, 2011, this Court denied Respondent's application. The Court noted Respondent made no claim that the eviction was unlawful, and that there was no factual dispute requiring a hearing. The Court noted that the parties agreed that \$7409.01 was due in arrears through December 2011. Petitioner sought an additional \$1575 for moving expenses, and \$2240 for legal fees, which the Court found reasonable. Factors upon which the denial was based were that Respondent had been evicted in the 2009 Proceeding, showed no proof of ability to pay at the time of the motion, and had already been granted an abatement. However, the Court stayed re-letting through December 17, 2011 to afford Respondent an opportunity to appeal.

On December 21<sup>st</sup>, 2011, Respondent moved again for an order restoring her to possession. Respondent showed an approval for \$7,409.00, the amount of arrears due through December 2011. The approval was for rental arrears from September 2011 through December

2011, totaling \$3594, in addition to \$2240 for Marshall and Legal Fees and \$1575 for moving fees. Respondent asserted she had no ability to pay any sum beyond the approval amount of \$7409.00. The Court passed the motion to the afternoon to afford Respondent an opportunity to produce evidence from the DSS Liaison office in the Courthouse, that Respondent was eligible for an additional approval for the entire \$11,224.00 due per the December 7, 2011 order. Respondent was not able to obtain such evidence, and the DSS liaison office indicated it was unlikely Respondent would be approved for any additional amounts. Petitioner's counsel asserted that renovations had begun at the Subject Premises, after the expiration of the stay on December 17, 2011. Based on these facts the Court denied Respondent's motion.

Later that same day, Respondent renewed her application to be restored to possession based on a second DSS approval for an additional \$3215.01 in arrears. Respondent also showed a blank money order purchased on December 23, 2011, in the amount of \$600.00. The total of the two approvals plus the money order comprised the \$11,224.01 due per the December 7, 2011 order. The motion was adjourned to January 5, 2012. Petitioner submitted opposition asserting that demolition of the Subject Premises had begun, that the Subject Premises was not currently habitable and that Respondent lacked the ability to pay ongoing rent.

The Court granted the motion to the extent of setting the matter down for a hearing to determine whether the equities weighed in favor of restoration. The hearing commenced on January 10, 2012 and concluded on January 11, 2012. At the conclusion of the hearing, the Court heard closing arguments. In the middle of Petitioner's closing argument, Respondent got up and left the court room and courthouse and did not return. She indicated she did not care what the Court ruled.

The Court reserved decision, and had indicated to the parties, prior to Respondent's departure, that a decision would be available for the parties on Friday January 13, 2012 at 9:30 am in Part R.

### HEARING

Respondent testified first at the hearing. Respondent has lived in the Subject Premises all her life and is 43 years old. Respondent stated she was employed and would be able to pay the rent going forward. Respondent stated she could not pay any amount above the DSS approval, for January 2012 or additional fees, until later in the month. Respondent testified that she worked for ACS from 9am to 3pm, caring for children, and that she earned \$417.00 per month in this capacity. Respondent testified that she earned an additional \$1160.00 per month walking dogs. Respondent submitted some pay stubs from ACS to establish employment (Exhibit A).

On cross-examination, Respondent stated she had been employed by ACS since August 2011, (2) and that she had been employed as a Dog Walker from September 2011 forward. Respondent stated that she tendered no rent prior to the eviction because "no one asked me to pay." Respondent offered no explanation as to why she was earning \$1500.00 per month from September 2011 forward, yet had failed to make any payment towards the arrears prior to the eviction.

Respondent testified that she had a fiancée who would move into the Subject Premises with her if she were restored to possession, and would pay \$600.00 per month towards the rent. The December 23, 2011 approval references a third party contribution of \$650 per month for future rent payments. Respondent testified that her fiancée lived with his mother, and that

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2 The claim that she had just become employed by ACS in August 2011 is contradicted by papers in the 2009 proceeding asserting she was employed by ACS as early as July 2009.

notwithstanding the fact that she had a fiancée, she had been sleeping on the street and in the park after being evicted.

Respondent's second witness was Ernestina Pedraza. Ms. Pedraza testified that she has known Respondent all her life, and that their mothers were friends for 27 years. Ms. Pedraza testified she found Respondent sleeping on the street and took her in. Since that time, Respondent has been sleeping on Ms. Pedraza's couch. Ms. Pedraza testified that her mother had purchased food, clothing and shoes for Respondent, because Respondent's belongings were in storage. After Ms. Pedraza's testimony, Respondent rested.

Petitioner's first witness was Joseph Podolski. Mr. Podolski is an officer of Petitioner and a manager for the building. Mr. Podolski has managed the building for 13 years and is at the building 5 days a week. Mr. Podolski testified that Respondent's belongings were being held in storage, that a gut renovation was underway at the Subject Premises, and the Subject Premises was not in a habitable condition. Materials for the renovation were ordered on December 5, 2011, and the renovation began on December 19, 2011. There was currently no power, water or gas in the Subject Premises, and that the Subject Premises were filled with debris. Photographs of the current condition of the Subject Premises were admitted into evidence (Exhibits 1a-v).

Mr. Podolski testified that extensive electrical work was required in the Subject Premises, and that he had been unaware of this prior to the eviction because he had not observed the wiring in the Subject Premises for the past 30 years. Mr. Podolski estimated the total cost of the renovation to be approximately \$18,000.00. Mr. Podolski testified the renovation of the three bedroom apartment would be complete by the end of March 2012.

Mr. Podolski was evasive in response to questions as to whether the outstanding violations had been corrected prior to Respondent's eviction, and if so why such extensive renovations were necessary. Mr. Podolski testified that he had no personal knowledge that the violations were corrected, and that the Super had done the work to correct the violations. Mr. Podolski's testimony regarding the correction of the violations and the renovations was not credible.

The next witness called by Petitioner was Manuel Cabon, the Super for the building. Mr. Cabon has been the Super for eight years, and lives in a basement apartment at the Subject Building. Mr. Cabon did repairs in the Subject Premises about two months prior to the hearing. Mr. Cabon replaced the floor tiles in one bedroom, replaced a part of the wood floor in the living room, installed a new CO2 detector and fixed the entrance door. Mr. Cabon testified that he had done no other repairs.

Mr. Cabon testified that Respondent was an undesirable tenant. He implied that Respondent had intentionally damaged doors inside the Subject Premises, and asserted that she had often refused to allow him access for repairs. Mr. Cabon testified that he often received complaints from other tenants in the building regarding Respondent's behavior and her guests. Mr. Cabon testified that Respondent's visitors who were badly behaved and intimidating.

Mr. Cabon is not comfortable dealing with Respondent, noting that she uses harsh language towards him, his wife and other tenants. Mr. Cabon referred to an incident where he observed Respondent called another tenant a "faggot". Mr. Cabon testified that on January 10, 2011, after the hearing Respondent approached him in the hallway of the courthouse and told

him that she intended to falsely accuse him of sexually assaulting her. The Court found Mr. Cabon to be a credible witness.

### DISCUSSION

RPAPL §749(3) permits a court to vacate a warrant of eviction for good cause shown. In appropriate circumstances, Civil Court has the authority to vacate a warrant after execution and restore the tenant to possession (*Brusco v. Braun* 84 NY2d 674, 682). Every application made pursuant to RPAPL §749(3) must be determined on the particular facts and circumstances of that case, and depends on factors such as the extent and nature of the defaults as well as a balancing of the equities between the parties (*Parkchester Apartments Co. v Heim* 158 Misc2d 982).

In this case it is difficult for the Court to determine whether the equities weigh in favor of restoration. The strongest factor weighing in favor of Respondent is that she has lived in the Subject Premises her entire life, and that she has obtained the funds due through December 2011.

However, Respondent offered no credible explanation for her default in payment. Respondent repeatedly represented she had funds available yet to date has never tendered any sum to the Petitioner for payment of rent. Respondent asserts she was earning \$1500 per month from September 2011 forward and did not pay any money to Petitioner because no one asked for the money. Respondent's explanations defy credibility. Additionally Respondent was evicted previously for nonpayment of rent in 2009, and has not paid rent for most of 2011. Respondent failed to establish to this Court's satisfaction that she will have the ability to pay ongoing rent in the future although, presumably she has satisfied DSS in this regard as indicated in the approvals issued.

Respondent is a volatile individual prone to outbursts. The behavior the Respondent has exhibited in Court confirms Mr. Cabon's testimony in this regard. More than once in this proceeding, Respondent stormed out of the Courtroom prior to the conclusion of the proceeding, and on at least two occasions Respondent referred to this Court using obscene and offensive language. If this is how Respondent behaves when seeking relief before this Court, it is easy to believe that Respondent would be intimidating to other residents and the Super and engage in worse behavior outside of court.

However, Petitioner's failure to provide evidence to this Court that the outstanding violations of record have been cured is disturbing. The HPD printout of open violations for the building (Exhibit CT) indicate that there are 216 open violations as of January 10, 2012, 46 Class "A" violations, 146 Class "B" violations and 24 Class "C" violations. The Court does not find that the violations were in fact cured given the HPD records. The record before the Court indicates chronic and severe conditions existed in the Subject Premises and in the Subject Building for years. Mr. Cabon acknowledged Respondent's ceiling collapsed in 2010. Many of the violations issued in this proceeding in July 2011, are identical to the violations issued in 2009 Proceeding, and are still outstanding for the Subject Premises. There appear to be violations regarding leaks, mold, and water damage throughout the building.

As to thi issue of renovations, in *Winthrop v. Menal* 24 Misc3d 141(A), The Appellate Term, Second Department, affirmed an order restoring a tenant to possession after eviction, even though the landlord had commenced renovations to the apartment immediately after the eviction. The Court held that but for the DSS delay the tenant would not have been evicted. The Court noted that restoration did not need to be conditioned upon payment of the renovation costs. This

Court notes that the legal standard for restoration to possession after eviction in the First Department is more liberal than in the Second Department.

Additionally, there is some authority that suggests that Court cannot give significant weight to Petitioner's allegations of undesirable conduct in making such a determination (see eg *New York City Housing Authority Butler Houses v. Williams* 7 Misc3d 1028(A) *although authority relied upon therein pertains to NYCHA tenants*).

Given the totality of the circumstances discussed above, this Court finds that the most significant facts in determining the underlying application is that the Subject Premises has been Respondent's home for over forty years, Respondent is indigent and had DSS checks or approvals been issued earlier Respondent would not have been evicted . Based on the foregoin respondent's motion is granted . Reletting is stayed through Wednesday January 18<sup>th</sup>, 2012 for Respondent to tender to Petitioner \$11,224.01 due through December 2011. Upon such tender, the warrant is vacated and the tenancy reinstated.

Given that the Subject Premises is not habitable and will not be until March 2012, the Court reduces the rent for the Subject Premises to \$1.00 per month from January 2012 until such time as the Subject Premises is rendered habitable and Respondent is restored to possession. Respondent is to tender \$1.00 for the month of January 2012 on or before January 18<sup>th</sup> 2012, in addition to the \$11,224.01, and thereafter \$1.00 per month, by the 5<sup>th</sup> of each month, until the Subject Premises is restored to a habitable condition and Respondent is restored to possession.

This constitutes the decision and order of this Court.

Dated: New York, New York  
January 12, 2012

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Sabrina B. Kraus, JHC

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