

229 West 109 St. Realty Corp. v Avila

2013 NY Slip Op 30498(U)

March 14, 2013

Civil Court, New York County

Docket Number: 70490/2012

Judge: Sabrina B. Kraus

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

229 WEST 109 STREET REALTY CORP, X

Petitioner-Landlord

HON. SABRINA B. KRAUS

-against-

DECISION & ORDER
Index Nos.: L&T 70490/2012
& 70491/2012

GUSTAVO AVILA
229 West 109th Street
Basement East & Basement West
NEW YORK, NY 10025,
Respondent-Tenant

X

BACKGROUND

These summary holdover proceedings were commenced by **229 WEST 109 STREET REALTY CORP** (Petitioner) against **GUSTAVO AVILA** (Respondent) and other occupants, seeking to recover possession of two apartments in the basement at 229 West 109th Street, New York, NY 10025 (Subject Premises) based on the allegation that Respondent was provided with the apartments as incident of his employment and his employment has since been terminated. Respondent is represented by counsel and has filed no written answer therefore a deemed general denial is asserted on his behalf. The proceedings were tried together and both are determined in accordance with this decision and order.

PROCEDURAL HISTORY

Petitioner’s counsel sent a letter to Respondent dated June 7, 2012, confirming that on or

about April 2012, Respondent's services as Superintendent for the subject building had been terminated, and requiring that Respondent vacate and surrender possession of the Subject Premises.

This Notice of Petition and Petition issued June 26, 2012, and the proceedings were originally returnable July 9, 2012. The proceedings were transferred to Part X for assignment to a trial judge on August 17, 2012. On November 19, 2012, the proceedings were assigned to Part R for joint trial. The trial commenced on November 19, 2012, and continued on January 7 and 25, 2013, and on February 23 and 28, 2013 and concluded with closing arguments on March 6, 2013, after which the court reserved decision.

FINDINGS OF FACT

Petitioner is the owner of the subject building pursuant to a deed dated July 8, 1980 (Ex 1). There is a valid multiple dwelling registration on file for the subject building (Ex 3). The building was a family run building. However the father, George Hersh, died and after his death there developed a family dispute between Mark Hersh, his son, and Esther Hirsch, his wife and her daughter (see eg Ex 11). Mark Hersh seems intent on making his mother and sister suffer as a result of their decision to remove him from management of the property and other issues. As will be addressed further below, this litigation is essentially another attempt by Mr. Hersh to hurt his mother and family.

Respondent was hired to work as a Super for the subject building approximately seven years ago. The Subject Premises were provided to Respondent as incident of his employment as a super. In April 2012, management of the Subject Building changed and Respondent was terminated as super.

Respondent alleges that he has independent tenancy in the Subject Premises. The I cards for the building do not indicate that there are any apartments in the basement of the subject building (Ex 4), nor were the basement apartments ever registered with DHCR (Exs 5 & 6).

Respondent put in one lease agreement purportedly dated June 1, 2007 for a rental of \$300 per month (Ex A). Respondent testified that Mark Hersh gave him the lease in June 2007 and that he paid rent for June and July 2007 at a rate of \$300 per month. Respondent testified he needed the lease to register his children in school. Respondent testified he has three children who are currently 15, 11 and one infant. In 2007 his children would have been approximately 7 and 5. Respondent testified that those are the only months for which he paid rent for the Subject Premises.

Respondent then testified that he didn't have the receipts or the lease in his possession until recently, because he had given them to his mother in law, to store in her home, and she went to the Dominican Republic, so he could not have access to the documents.

Both Respondent and Mr. Hersh clearly and intentionally perjured themselves at trial. Respondent's testimony about the payment of rent and the circumstances surrounding the execution of the lease lacked any credibility. Mr. Hersh's testimony was entirely lacking in credibility. Petitioner established by a preponderance of evidence that the receipts allegedly issued by Mark Hersh in 2007 were on forms not manufactured as of said date. This was established by the detailed and credible testimony of Scott Hamilton, an employee of the maker of the receipt forms, offered into evidence by Respondent. The receipt forms were not manufactured until March 2011.

Therefore not only did Mark Hersh and Respondent perjure themselves at trial, but they also colluded to manufacture false evidence to support their lies.

Respondent asserted no formal affirmative defenses and has established no defense to Petitioner's claim of possession.

DISCUSSION

RPAPL 711(13) permits an owner to maintain a summary proceeding against a person who "entered into possession as an incident to employment by petitioner, and ... the employment has been terminated."

A superintendent who occupies an apartment as an incident of employment must vacate the living quarters upon termination of the employment (*Williams v Casiano* NYLJ June 15, 1993 [App Term, 1st Dept]). In this proceeding it is clear that no landlord tenant relationship ever existed between Petitioner and Respondent.

Petitioner established by a preponderance of the credible evidence that Respondent was provided with the spaces as an incident to his employment. On or about mid April 2012 his employment was terminated by a message left for him by the managing agent, who he had been intentionally avoiding after his initial meeting with her at the building on April 3, 2012. Respondent has not worked or received compensation since that time. The termination was confirmed by the aforementioned letter from Petitioner's counsel which is annexed to the petition.

Based on the foregoing Petitioner is awarded a final judgment of possession in both proceedings against Gustavo Avila, "John Doe", "Jane Doe", and Michelle Felpeto. In both proceedings the warrant of eviction shall issue forthwith and shall execute on service of a

marshal's notice. The proceedings are dismissed against the other named undertenant-occupants.

This constitutes the decision and order of this Court.¹

Dated: March 13, 2013
New York, New York

Sabrina B. Kraus, JHC

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¹ Exhibits may be picked up within thirty days of the date of this decision from the second floor record room at 111 Centre Street. After thirty days, the exhibits may be shredded in accordance with administrative directives.