

Kroll v James

2013 NY Slip Op 31905(U)

June 20, 2013

Civ Ct, NY County

Docket Number: 53535/2013

Judge: Jack Stoller

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

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LOTHAR KROLL,

Petitioner/Landlord,

Index No. 53535/2013

- against -

DECISION/ORDER

TUANCHAI JAMES,

Respondents/Tenants.

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Present:

Hon. Jack Stoller
Judge, Housing Court

Lothar Kroll, the petitioner in this proceeding (“Petitioner”), commenced this holdover proceeding against Tuanchai James, the respondent in this proceeding (“Respondent”), seeking possession of 440 West 164th Street, Apt. 1, New York, New York (“the subject premises”) on the ground that Respondent is either a licensee whose license to occupy the subject premises has been terminated or a month-to-month tenant or a tenant by sufferance or a tenant at will whose tenancy Petitioner had terminated. Respondent’s answer, which the Court took orally pursuant to RPAPL §743, was that Petitioner is an improper party. The Court held a trial on this matter.

Petitioner took the position at trial that he is a shareholder in a housing development fund corporation established pursuant to Article XI of the Private Housing Finance Law, owning shares appurtenant to a proprietary lease for the subject premises. Petitioner also took the position at trial that Respondent, who is the invitee of the prior shareholder, remained in possession of the subject premises after Petitioner purchased the shares from the prior shareholder. In support of this position, Petitioner introduced into evidence a share certificate

purporting to be issued by 440 West 164th Street Housing Development Fund Corporation (“the HDFC”) dated September 28, 2012 and a proprietary lease between the HDFC and Petitioner, also dated September 28, 2012 (“Petitioner’s lease”).

Petitioner himself never appeared to testify on his behalf. Instead, he executed a power of attorney form dated September 26, 2012 authorizing, *inter alia*, a person named Inna Khiterer (“Petitioner’s agent”) to represent him with regard to, *inter alia*, real estate transactions and claims and litigation. The power of attorney form states that Petitioner’s address is in Germany and the form was apparently executed at a United States consulate in Germany. Petitioner’s agent appeared at the trial of this matter and characterized Petitioner as a distant relative of hers.

Petitioner’s agent also testified at trial that she is a shareholder in the HDFC although, like Petitioner, she does not reside at the building where the subject premises is located. Petitioner’s agent also testified that, as of November of 2011, Petitioner’s agent had been elected to the board of the HDFC and assumed the title of president. Petitioner’s agent was still president of the HDFC at the time that Petitioner purported to purchase shares of the HDFC, and in fact Petitioner’s agent testified at trial that she signed the stock certificate for Petitioner as president of the HDFC on the same transaction at which it appears that she acted as attorney-in-fact for Petitioner.

An attorney-in-fact must act in the utmost and undivided loyalty for her principal. Matter of Ferrara, 7 N.Y.3d 244, 254 (2006). Similarly, a member of a board of a residential cooperative corporation acts under a fiduciary duty to further the collective interests of the cooperative. 40 W. 67th St. Corp. v. Pullman, 100 N.Y.2d 147, 156 (2003). Petitioner’s agent’s dual role as signatory on the stock certificate in the same transaction according to which her

principal is purchasing those shares in her corporation raises a question to the Court with regard to the propriety of the transaction.

Furthermore, an objective of Article XI of the Private Housing Finance Law, which establishes HDFC's, is to provide housing to low income families. 546 W. 156th St. HDFC v. Smalls, 43 A.D.3d 7, 13 (1st Dept. 2007). Permitting shareholders to own stock in HDFCs without maintaining their appurtenant apartments as their primary residence undermines that goal. Accordingly, the typical proprietary lease in an HDFC requires a shareholder to maintain the appurtenant apartment as that shareholder's primary residence. See, e.g., 167-169 Allen St. HDFC v. Ebanks, 22 A.D.3d 374 (1st Dept. 2005), *leave to appeal denied*, 2006 N.Y. App. Div. LEXIS 1892 (1st Dept. 2006), 406 W. 47th St. HDFC v. Picot, 2003 N.Y. Misc. LEXIS 1532 (App. Term 1st Dept. 2003). If indeed Petitioner's lease would require him to maintain the subject premises as his primary residence, as is standard, then Petitioner's residence in Germany has implications for his standing to commence this proceeding. See Newell Funding LLC v. Tatum, 24 Misc.3d 597, 601 (Civ. Ct. N.Y. Co. 2009) (if the rules of a cooperative prohibit a party from owning the stock and from a right of occupancy, that party cannot demonstrate the requisite possessory interest to show that it has standing to commence a summary proceeding).

Petitioner's lease, as introduced in evidence at trial, only contains the first page of Petitioner's lease, which goes up to paragraph 1(b), and then skips to the last page of Petitioner's lease, which begins at paragraph 42. Petitioner did not introduce any evidence of any part of Petitioner's lease in between paragraphs 1(b) and 42. Accordingly, the evidence at trial does not show whether Petitioner's lease requires him to maintain the subject premises as his primary residence. However, the Court draws a negative inference from the omission of every page of

Petitioner's lease in evidence except the first and last page.

The circumstances of this proceeding, from shareholders in an HDFC who don't reside at apartments appurtenant to their shares, to officers of the HDFC also purchasing shares in the HDFC as agents for their distant relatives, underscore why proof of Petitioner's standing pursuant to RPAPL §721 is more than a rote exercise. Accordingly, it bears noting that Petitioner's signature on the power of attorney form executed on September 26, 2012 in Germany, which is accompanied by an acknowledgment, bears no resemblance to the signature on that part of Petitioner's lease reserved for the lessee/shareholder. There is no printed name beneath that signature, only the word "Lessee," with the initials "L.S." underneath it. The fact that Petitioner was executing acknowledged documents in Germany two days before the date of Petitioner's lease, combined with the fact that the signatures are not the same, compels the finding that Petitioner himself did not sign Petitioner's lease.

Of course, it is possible that Petitioner's agent signed Petitioner's lease on behalf of Petitioner. However, the approved manner of executing a contract by an agent is to do so in the name of the principal by his or her agent. Bussing v. Lowell Film Productions, Inc., 233 A.D. 493, 494 (3rd Dept. 1931) *aff'd*, 259 N.Y. 593 (1932). Petitioner's lease bears no such writing. Accordingly, the Court cannot make a finding on the evidence taken at trial that Petitioner met his burden of proving that he actually holds the proprietary lease for the subject premises. Compare Linroc Enterprises, Inc. v. 1359 Broadway Assoc., 186 A.D.2d 95 (1st Dept. 1992) (a notice to cure is defective when an agent for a party signed it without identifying himself as such).

The Housing Court does not have jurisdiction to entertain matters concerning title or

ownership of stock. This finding of the Court is limited to a finding that Petitioner did not meet his burden of proving his case at the trial held before this Court to the extent that he had to prove that he is a proper party pursuant to RPAPL §721. Accordingly, the Court dismisses this proceeding.

The parties are directed to pick up their exhibits within 30 days or they will either be sent to the parties or destroyed at the Court's discretion and in compliance with DRP-185.

This constitutes the decision and order of this Court.

Dated: New York, New York
June 20, 2013

HON. JACK STOLLER
J.H.C.