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| Waterside Plaza Ground Lessee, LLC v Rwambuya |
| 2014 NY Slip Op 31762(U) |
| July 8, 2014 |
| Supreme Court, New York County |
| Docket Number: 105487/11 |
| Judge: Doris Ling-Cohan |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE DORIS LING-COHAN
Justice

PART 36

Waterside Plaza Ground Lessee
John G. Rwambuya et al.

INDEX NO. 105487/2011

MOTION DATE _____

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1, 2, 3

Notice of Cross-Motion etc. (+memo) _____ No(s). 4, 5, 6

Repeating Affidavits _____ No(s). 7, 8

Upon the foregoing papers, it is ordered that this motion ~~is~~ and cross-motion for

summary judgment are decided in accordance with the attached memorandum decision.

FILED

JUL 10 2014

NEW YORK
COUNTY CLERK'S OFFICE

The issue of attorney's fees is respectfully referred to a Special Referee to hear and determine, as provided in the attached decision.

Dated: 7/8/14

[Signature], J.S.C.

JUSTICE DORIS LING-COHAN

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
WATERSIDE PLAZA GROUND LESSEE, LLC, a
Delaware limited liability company,

Plaintiff,

Index No.: 105487/11
DECISION/ORDER

-against-

JOHN G. RWAMBUYA, YUNIA C. RWAMBUYA,
JOSEPH RWAMBUYA, "JOHN DOE" AND "JANE
DOE,"

Motion Sequence No.:
001

Defendants.

FILED

-----X
HON. DORIS LING-COHAN, J.S.C.:

JUL 10 2014

NEW YORK
COUNTY CLERKS OFFICE

In this residential landlord/tenant action, plaintiff moves for summary judgment on the complaint, and defendants have cross-moved for summary judgment to dismiss the complaint (motion sequence number 001). For the following reasons, the motion is denied and the cross motion is granted.

BACKGROUND

Plaintiff Waterside Plaza Ground Lessee, LLC (Waterside), a Delaware limited liability company licensed to do business in New York, is the net lessee and landlord of a residential apartment building (the building) located at 10 Waterside Plaza in the County, City and State of New York. See notice of motion, exhibit A (complaint), ¶¶ 1-2. Defendants John G. Rwambuya and Yunia C. Rwambuya are the tenants of record of apartment 20-F in the building. *Id.*, ¶ 3. Defendant Joseph Rwambuya is the son of John and Yunia Rwambuya, and is the current occupant of apartment 20-F. *Id.*, ¶ 4; Rwambuya aff in opposition, ¶¶ 1-31. The "John Doe"/"Jane Doe" named defendants are unknown persons unknown that plaintiff alleges also reside in apartment 20-F. See notice of motion, Exhibit A, (complaint), ¶ 4.

Joseph Rwambuya alleges that his family has resided in apartment 20-F since 1978 when he was five (5) years old. *See* Rwambuya aff in opposition, ¶ 3. Joseph Rwambuya states that his parents are Ugandan citizens, and that his father was a former employee of the United Nations. *Id.*, ¶¶ 8-9. Joseph Rwambuya also asserts that his parents returned to Uganda in 1992 and 2000, respectively, after they retired from their jobs here. *Id.*, ¶¶ 12-14. Joseph Rwambuya further maintains that he assumed full responsibility for paying rent for apartment 20-F in 2000, and that he has resided in the subject apartment continuously as his primary residence, since 1978, when he was five (5) years old. *Id.*, ¶¶ 15-31.

Plaintiff states that apartment 20-F is not subject to the Rent Stabilization Law. *See* notice of motion, exhibit A (complaint), ¶ 6. Plaintiff has presented a copy of a settlement agreement, dated July 26, 2001 (the settlement agreement), under which the building - which had evidently formerly been subject to the Mitchell-Lama Law - was removed from rent regulated status. *Id.*; exhibit D. The settlement agreement gave all of the tenants of the building the opportunity to either accept or reject its terms, and - in the event that a tenant should choose to accept those terms - to execute a new lease with plaintiff. *Id.* Plaintiff has also presented copies of the settlement acceptance that John and Yuni Rwambuya executed on September 5, 2001 (the settlement acceptance) and of the lease that they subsequently executed for the period of November 1, 2001 through October 30, 2002 (the lease). *Id.*; exhibits E, F. Plaintiff notes that the settlement acceptance incorporates by reference the terms of the settlement agreement, and that the relevant portion of the settlement agreement provides as follows:

19. In order to retain the benefits of this Agreement, the Settling Tenant must maintain his/her/their apartment as a primary residence and the failure to so maintain the apartment in said manner shall be a breach of this Agreement, such

that the Owner may seek, at such time as owner deems appropriate, a legal remedy in a court of competent jurisdiction, including, but not limited to, rescission of the future benefits under the Agreement to said Tenant, and/or recovery of possession of said Tenant's apartment. The criteria and evidentiary burdens normally used in rent stabilized contests as of the date of this Agreement pertaining to primary residence shall apply.

Id.; exhibit D. In its motion, plaintiff notes that John and Yuni Rwambuya do not contest that apartment 20-F is not their primary residence, which is currently in Uganda. *See* notice of motion, Epstein aff, ¶ 5. Plaintiff has presented copies of John and Yuni Rwambuya's deposition transcript, in which they both testified that they currently reside in Uganda, although they maintain some clothing and possessions in apartment 20-F for when they visit. *Id.*; exhibits M, N. Nonetheless, plaintiff argues that "there is no evidence whatsoever of John and Yuni Rwambuya's permanent vacatur" of apartment 20-F, thus, their son, Joseph Rwambuya, cannot legally exercise succession rights to the apartment. *Id.*, ¶ 10. Joseph Rwambuya denies this, and seeks to assert succession rights in his cross motion. *See* notice of cross motion, Rwambuya aff, ¶¶ 1-31.

Waterside commenced this action by filing a summons and complaint that sets forth causes of action for: 1) a declaratory judgment that John and Yunia Rwambuya do not occupy apartment 20-F as their primary residence; 2) rescission of the lease; 3) a judgment of possession for apartment 20-F; 4) an order of eviction; 5) attorney's fees and 6) use and occupancy. *See* notice of motion, exhibit A. The Rwambuyas filed a joint answer asserting the affirmative defense that Joseph Rwambuya is entitled to assert succession rights to apartment 20-F, and also asserting a claim for attorneys' . *Id.*; exhibit K. Now before the court are plaintiff's motion for summary judgment on the complaint and Joseph Rwambuya's cross motion for summary

judgment to dismiss the complaint.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003). Here, plaintiff's motion for summary judgment is denied and the cross-motion is granted, as explained below.

In its motion, plaintiff first notes that defendants' counsel submitted an affirmation in opposition to an earlier motion (that was made when this matter was being litigated in the Civil Court of the City of New York) that states that "I have been advised that...John and Yuni Rwambuya, who presently reside in Uganda, do not wish to contest [the landlord's] claim that the premises are not their primary residence." *See* notice of motion, exhibit J, ¶ 23. Plaintiff then notes that this admission entitles it to summary judgment on its declaratory judgment claim, and leaves the court "to entertain the sole remaining defense of succession raised by Joseph" Rwambuya. *Id.*; Epstein aff, ¶ 29. Plaintiff next asserts that "without permanent vacatur, no succession rights are triggered." *Id.*, ¶ 30. Plaintiff cites a quantity of case law by the Appellate Division, First Department, to support this proposition. *See e.g. Third Lenox Terrace Assoc. v Edwards*, 91 AD3d 532 (1st Dept 2012); *Cox v J.D. Realty Assoc.*, 217 AD2d 179 (1st Dept

1995); *Claridge Gardens v Menotti*, 160 AD2d 544 (1st Dept 1990). Plaintiff then argues that Joseph Rwambuya is not entitled to exercise succession rights because his parents never permanently vacated apartment 20-F. *See* notice of motion, Epstein aff, ¶¶ 30-58. Plaintiff particularly refers to the deposition testimony of John and Yunia Rwambuya that, since leaving the apartment to return to Uganda, they: 1) have returned to New York for approximately six weeks each year and stayed with Joseph Rwambuya at the apartment; 2) have kept their key cards; 3) maintain some clothing and personal effects in the apartment; 4) receive some mail at the apartment (including credit card statements) which Joseph Rwambuya either allows to accumulate there or forwards to Uganda, at his discretion; 5) visit doctors in New York when they come each summer; and 6) have never given plaintiff written notice of vacatur. *Id.*, ¶¶ 59-91. Plaintiff also notes Joseph Rwambuya's deposition testimony that, during a period when he was unemployed, his father sent him money from Uganda to use to pay the rent on the apartment, and, on one occasion, sent a check directly to plaintiff. *Id.*, ¶¶ 79-91. Plaintiff concludes by arguing that "primary residence and permanent vacatur are not one and the same," and that, in light of the foregoing testimony, John and Yunia Rwambuya cannot be found to have permanently vacated apartment 20-F. *Id.*, ¶¶ 92-103. In his opposition papers, Joseph Rwambuya argues that plaintiff has taken his parents' statement that they "regard the apartment as their home" out of context, and has attempted to attach too much weight to it. *See* Defendant's memorandum of law in support of cross motion at 2-3. Joseph Rwambuya also notes that, apart from the brief period when his father sent him money to help with the rent, he has been responsible for paying it since 2000, has paid it in his own name and also pays for all of the utilities in the apartment (which are in his name too). *Id.* at 4-6. He argues that this, together

with his parents' unequivocal statement that they now live in Uganda, establish that they have permanently vacated the apartment. *Id.* He also notes that the terms of the settlement agreement do not require that his parents or himself serve plaintiff with an official notice of vacatur. *Id.* Finally, Joseph Rwambuya argues that the policies that govern the law of succession rights cannot be overcome by the mere fact that he invites his parents to visit him at their former family home each summer so that they may spend time together, which permits his parents to take advantage of the superior medical care that is available in New York, and that he merely maintains some of their personal effects in the apartment for their convenience. *Id.* After reviewing the governing law, the court agrees with defendant Joseph Rwambuya.

In *68-74 Thompson Realty, LLC v McNally* (71 AD3d 411 [1st Dept 2010]), the Appellate Division, First Department, noted that:

“The burden of presenting legally sufficient proof to establish primary residency rests with the party claiming succession rights. ‘Primary residence’ is judicially construed as ‘an ongoing, substantial, physical nexus with the ... premises for actual living purposes’ [internal citations omitted].”

Id. at 412. Here, since Joseph Rwambuya has raised the affirmative defense that he is entitled to succeed to his parents' tenancy in the apartment, he bears the burden of proof. With respect to “an ongoing, substantial, physical nexus with the ... premises for actual living purposes,” Joseph Rwambuya has presented sufficient proof, as it is undisputed that he has resided in the subject apartment as his primary residence since 1977 when he was five (5) years old, and has paid rent and utility charges for the apartment - in his own name - since 2000. *See Katz Park Ave. Corp. v Jagger*, 11 NY3d 314, 317 (2008). In contrast, the evidence relied upon by plaintiff does not constitute proof that John and Yunia Rwambuya have a physical nexus to the subject premises

“for actual living purposes”, but, rather, merely discloses their intent to annually visit with their son and their doctors in New York. Moreover, while plaintiff places heavy weight on the statement by Mr. and Mrs. Rwambuya at their depositions that they “regard the apartment as their home”, there is no legal justification for treating such a sentimental statement, given that the parents raised their child in such apartment, as a bar to Joseph Rwambuya’s succession claim, in light of all of the other undisputed evidence which supports his claim. Accordingly, the court rejects plaintiff’s argument as semantic and unsupported by any facts, and denies plaintiff’s motion for summary judgment and grants defendant Joseph Rwambuya’s cross motion for summary judgment.

DECISION

Accordingly, for the foregoing reasons, it is

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Waterside Plaza Ground Lessee, LLC is denied; and it is further

ORDERED that defendants’ cross motion, pursuant to CPLR 3212 is granted and the complaint is dismissed as against the defendants, with costs and disbursements and attorneys’ fees awarded to defendants; and it is further

ORDERED that, as to the amount of attorneys’ fees, within 45 days of entry of this order, defendants shall supply to plaintiff an accounting of the fees/costs incurred, and plaintiff is directed to review such accounting and, within 45 days of receipt of the accounting, should plaintiff agree as to such fees, plaintiff shall pay to defendants such amount and supply this court with a stipulation of settlement with respect to attorneys’ fees. Alternatively, if plaintiff does not agree as to the amount of attorneys’ fees claimed by defendants, within 45 days of receipt of the accounting,

plaintiff shall supply to defendants, a detailed response, listing specific reasons for its disagreement within such amount/s (such objections shall be specifically directed to each item billed, with detailed reasons for the objection). Within 20 days thereof, counsel are directed to confer with each other by telephone, to resolve such dispute, if any, in a call initiated by defendants' counsel. If the parties are unable to agree on the amount of the defense fees/costs owed to defendants after conferring with each other, within 120 days from entry of this order, either side may file the within order with the Clerk of the Judicial Support Office (Room 119M), to arrange a calendar date for a reference to a Special Referee, and such issue is referred to a Special Referee, to hear and determine, in accordance with CPLR 4317(b); the failure to comply shall be deemed a waiver or default on this claim, as appropriate; and it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy of this order upon all parties, with notice of entry; and it is further

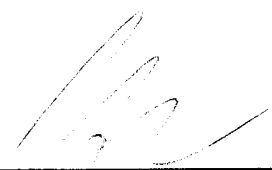
ORDERED that the Clerk is directed to enter judgment accordingly.

FILED

JUL 10 2014

Dated: New York, New York
 July 3, 2014

**NEW YORK
 COUNTY CLERK'S OFFICE**



Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\watersidevrwambuya.lane.wpd