ST-DIL LLC v Kowalski
2015 NY Slip Op 31713(U)
September 11, 2015
Civil Court of the City of New York, New York County
Docket Number: 56773/2014
Judge: Jack Stoller
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART H
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ST-DIL LLC,

Petitioner,

Index No. 56773/2014

- against -

DECISION/ORDER

JOHN KOWALSKI, et al.,

Respondents.
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Present:
Hon. Jack Stoller
Judge, Housing Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion.

Papers	Numbered
Notice Of Motion and Supplemental Affirmation and Affidavit Annexed.....	1, 2, 3
Affirmation In Opposition	4
Reply Affirmation	5

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

ST-DIL LLC, the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against John Kowalski, the respondent in this proceeding ("Respondent"), seeking possession of 274 First Avenue, Apt. OM-B, New York, New York ("the subject premises"), on the ground that Respondent is a licensee of the prior tenant of record, his sister ("the prior tenant"), and that his license terminated by operation of the prior tenant's surrender of the subject premises. Respondent answered, interposing a defense that he is entitled to succeed to the rent-stabilized tenancy of the prior tenant. Discovery ensued. Petitioner now moves for summary judgment in its favor.

There is no material dispute of fact on the record on the motion practice that Petitioner is

the proper party to commence this proceeding pursuant to RPAPL §721; that Petitioner has complied with the registration requirements of MDL §325; that the subject premises has been subject to the Rent Stabilization Law and that Petitioner has complied with the registration requirements of 9 N.Y.C.R.R. §2528.3; that the prior tenant was the last rent-stabilized tenant of the subject premises; that the prior tenant is no longer in possession of the subject premises; that Respondent gained possession of the subject premises through the prior tenant; and that Petitioner properly served Respondent with a notice to quit pursuant to RPAPL §713 prior to the commencement of this proceeding. In short, there is no dispute that Petitioner has proven its *prima facie* case. The ultimate outcome of this proceeding turns on whether Respondent has succession rights to the prior tenant's tenancy.

With qualifications, a member of a rent-stabilized tenant's family who has resided with the tenant for two years immediately prior to the tenant's permanent vacatur is entitled to succeed to that tenancy. 9 N.Y.C.R.R. §2523.5(b)(1). If a tenant who does not live in the rent-stabilized apartment continues to execute leases for it anyway, that tenant does not "permanently vacate" for succession purposes until the expiration of the most recent lease that tenant executed, the effect of which is that a remaining family member cannot show that he or she resided with the tenant immediately prior to the permanent vacatur. Third Lenox Terrace Assoc. v. Edwards, 91 A.D.3d 532, 533-534 (1st Dept. 2012), 206 W. 104th St. LLC v. Zapata, 45 Misc.3d 135(A) (App. Term 1st Dept. 2014), 525 W. End Corp. v. Ringelheim, 43 Misc.3d 14, 15-16 (App. Term 1st Dept. 2014), BCD Delancey LLC v. Jian Gou Lin, 42 Misc.3d 132(A) (App. Term 1st Dept. 2013). Based upon this proposition, Petitioner argues that Respondent cannot succeed to the

prior tenant's tenancy because the prior tenant did not reside in the subject premises with Respondent for two years prior to her permanent vacatur from the subject premises. In order to prevail on its motion for summary judgment, then, Petitioner bears the burden of eliminating issues of material fact as to whether Respondent and the prior tenant resided with one another for two years prior to the prior tenant's permanent vacatur. Kebbeh v. City of New York, 113 A.D.3d 512, 513 (1st Dept. 2014).

In opposition to Petitioner's summary judgment motion, Respondent submits that the prior tenant was in an abusive relationship that ended in December of 2009, that the abuser was arrested, and that the prior tenant has a lifelong restraining order against him.[1] The prior tenant testified in a deposition, the transcript of which Petitioner annexes to its motion, that she wanted to get away from her abuser, so starting in April of 2010 she lived in Pennsylvania. The prior tenant also testified that another reason that she moved to Pennsylvania was because her employer offered her a position there; that she has lived in Pennsylvania since April of 2010; and that she spent approximately twenty-four days in New York in 2012 and ten days in New York in 2013.

There is no dispute on the record that the prior tenant executed a two-year lease for the subject premises commencing on March 1, 2012 and expiring February 28, 2014.

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[1] Petitioner argues in reply that the Court should not consider this evidence because of defects in the prior tenant's verification of this averment. However, evidence that would not be admissible at trial may be considered in opposition to a summary judgment motion as long as it does not become the sole basis for the Court's determination. Klopsis v. A.O. Smith Water Prods. Co. (In re N.Y. City Asbestos Litig.), 21 A.D.3d 320 (1st Dept. 2005). The Court also considers the prior tenant's deposition testimony in determining the outcome of this motion, which is consistent with this averment.

Petitioner annexes to its motion the prior tenant's lease for a home in Pennsylvania commencing on April 25, 2012; the prior tenant's driver's license issued in Pennsylvania on May 30, 2012; documents showing that the prior tenant obtained automobile insurance in Pennsylvania starting in June of 2012; the prior tenant's bank statements using an address in Pennsylvania from June of 2012 through June of 2014; federal and Pennsylvania tax returns filed from an address in Pennsylvania for 2012 and 2013; non-resident tax returns filed in New York using an address in Pennsylvania; and utility bills for the prior tenant in Pennsylvania from March of 2013 through August of 2013.

The prior tenant testified at the deposition that, until August of 2013, she intended to return to New York City. The prior tenant testified at the deposition that she paid rent to Petitioner until this time. Petitioner annexes to its motion sworn statements from the prior tenant, one dated August 13, 2013 that states that she would vacate the subject premises as of September 3, 2013 and that Respondent was living in the subject premises, and another dated October 18, 2013 confirming the prior tenant's vacatur from the subject premises. The prior tenant surrendered her key to the subject premises.

Respondent testified at a deposition that he lived at the subject premises from 2006 through 2013.

While Petitioner assembles a substantial body of evidence showing that the prior tenant was not present in the subject premises from April of 2010 through the date she finally surrendered in September of 2013, the prior tenant alleges that at least part of the reason that she was not in New York was because she was a victim of domestic violence. The Rent Stabilization

Code deems excusable some reasons for a rent-stabilized tenant's absence from his or her apartment, such as service in the military, full-time enrollment in an educational institution, or incarceration.[2] The Rent Stabilization Code does not specifically excuse a tenant's absence from a rent-stabilized apartment because the tenant is a victim of domestic violence. However, a reasonable ground otherwise not enumerated in the Rent Stabilization Code can potentially excuse a tenant's absence from his or her rent-stabilized apartment. 9 N.Y.C.R.R. §2520.6(u)(3), 9 N.Y.C.R.R. §2523.5(b)(2)(vi).

A failure to construe domestic violence victimhood as a "reasonable ground" to be absent from a rent-stabilized apartment would have the undesirable result of potentially forcing domestic violence victims to choose between their safety and their home. Federal law offers an instructive resolution of this dilemma as it relates to federally-funded subsidized housing vouchers. While a federally-subsidized tenant can only receive assistance for a dwelling so long as the tenant lives at that dwelling, 42 U.S.C. §1437f(o)(9), such a tenant may still receive assistance if the tenant has moved out of the assisted dwelling unit in violation of a lease in order to protect the safety of a victim of domestic violence who reasonably believed he or she was imminently threatened by harm if he or she remained. 42 U.S.C. §1437f(r)(5). Following this logic, a family member's absence from a rent-stabilized apartment to be safe from domestic violence does not interrupt the family member's chain of residency for purposes of obtaining succession rights. 390 West End Assocs. LP v. A P, N.Y.L.J. April 6, 1999 at 26:1 (App. Term

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[2] The definition of "primary residence" in the Rent Stabilization Code provides that a failure to be present for more than 183 days a year can be excusable according to the reasons stated in 9 N.Y.C.R.R. §2523.5(b)(2). 9 N.Y.C.R.R. §2520.6(u)(3).

1st Dept.).

Petitioner argues that excusable absences from rent-stabilized apartments only apply to claimants to succession rights, 9 N.Y.C.R.R. §2523.5(b)(2), not to the tenants to whose tenancies the claimants seek to succeed. Certainly, there are circumstances according to which an absence of a tenant from a rent-stabilized apartment operates to deprives a family member of succession rights. See Matter of Glass v. Glass, 29 A.D.3d 347, 348-349 (1st Dept. 2006) (a rent-stabilized tenant's family members' possession of the tenant's apartment is insufficient to demonstrate succession rights to that tenancy as the family member's possession commenced after the tenant had already been confined to nursing home), 315 East 72nd St. Owners, Inc. v. Siegel, 22 Misc.3d 10 (App. Term 1st Dept. 2008) (a remaining family member could not show succession rights when he only stayed in his grandmother's apartment for a brief period of time when she was housed at a medical facility, after which time he moved out to attend a university). However, a rent-stabilized tenant's excusable absence from an apartment during a family member's occupancy of the apartment does not preclude the family member's succession claim as a matter of law. See, e.g., Sutton Place Mgt. Co. v. Rainey, 19 Misc.3d 133(A) (App. Term 1st Dept. 2008) (a family member of a rent-stabilized tenant established the right to succeed to the tenancy even when the tenant was absent from the apartment for excusable health reasons).

Moreover, the excusable absence asserted herein is that the prior tenant was a victim of domestic violence, a ground which presents specialized concerns. Assuming *arguendo* that a tenant would have otherwise resided with a family member for the requisite time period prior to a tenant's permanent vacatur but for a tenant's domestic violence victimhood, adoption of

Petitioner's position would have the undesirable effect of causing a domestic violence victim to hesitate when seeking safety.

Accordingly, the Court finds, on the record herein, that Petitioner may only prevail on summary judgment if Petitioner establishes that there is no fact dispute that the prior tenant was not present in the subject premises for a reason other than avoidance of domestic violence.

As noted above, Petitioner marshals an impressive body of evidence that the prior tenant may have left the subject premises anyway. Be that as it may, the deposition transcript of the prior tenant indicates that when asked about her abusive relationship, it was difficult for her to answer, and Petitioner's counsel, exhibiting humanity and respect to her, offered her time to collect herself. Moments like this illustrate the difficulty the Court has in determining on papers as opposed to a trial whether the prior tenant was absent from the subject premises because of domestic violence or because of another reason. Compare Ferrente v. American Lung Ass'n, 90 N.Y.2d 623, 631 (1997), Curcio v. Samson Constr. Co., Inc., 82 A.D.3d 664, 665 (1st Dept. 2011) (the Court is not to make an assessment of credibility on a motion for summary judgment).

Summary judgment is a drastic remedy, Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012), and on a motion for summary judgment, all of the evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party's favor. Gronsky v. County Of Monroe, 18 N.Y.3d 374, 381 (2011), Branham v. Loews Orpheum Cinemas, Inc., 8 N.Y.3d 931 (2007), People v. Greenberg, 95 A.D.3d 474, 484 (1st Dept. 2012), Udoh v. Inwood Gardens, Inc., 70 A.D.3d 563, 565 (1st Dept. 2010). As the record on this motion shows indicia that the prior tenant intended to return to the

subject premises – she continued to pay non-resident New York taxes, for example – and would have done so but for her abusive relationship, the Court cannot rule that Petitioner has eliminated material issues of fact as to the circumstances of the prior tenant's absence from the subject premises.

As noted above, Petitioner has proven that there is no issue of material fact as to its *prima facie* case. Accordingly, the Court grants Petitioner partial summary judgment, to the extent that Petitioner has proven its *prima facie* case, with the only remaining issue being whether Respondent has succession rights to the prior tenant's tenancy. The Court restores this matter for a trial limited to this issue on October 2, 2015 at 9:30 a.m. in part H, Room 523 of the Courthouse located at 111 Centre Street, New York, New York.

This constitutes the decision and order of this Court.

Dated: New York, New York
September 11, 2015

HON. JACK STOLLER
J.H.C.