

1820 First Ave. Inc. v Mendoza
2015 NY Slip Op 31776(U)
September 22, 2015
Civil Court of the City of New York, New York County
Docket Number: 92291/2013
Judge: Jack Stoller
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

----- X
1820 FIRST AVENUE INC.,

Petitioner/Landlord,

Index No. 92291/2013

- against -

DECISION/ORDER

GILBERTO MENDOZA,

Respondents/Tenants.

----- X

Present: Hon. Jack Stoller
Judge, Housing Court

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

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Supplemental Affirmation Annexed	1, 2
Affirmation and Affidavit In Opposition	3, 4
Reply Affirmation	5

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

18-20 First Avenue Inc., the petitioner in this proceeding (“Petitioner”), commenced this holdover proceeding against Gilberto Mendoza, the respondent in this proceeding (“Respondent”), seeking possession of 18 First Avenue, Apt. 12, New York, New York (“the subject premises”) on the ground that Respondent was a licensee of the prior tenant of record of the subject premises (“the prior tenant”) and that Respondent’s license terminated. Respondent interposed an answer with a general denial. Respondent now moves to dismiss the petition or, in the alternative, to amend his answer.

Respondent, by an affirmation of his attorney, alleges that Respondent is the son of the

prior rent-stabilized¹ tenant of the subject premises, that Respondent lived at the subject premises with the prior tenant from 2008 to the present, that the prior tenant executed a lease renewal on August 27, 2013 that was to commence in December of 2013, that the prior tenant died on September 2, 2013, and that Respondent requested a lease in his name by letters to Petitioner dated September 18, 2013 and October 4, 2013, and October 31, 2013, the latter two of which also included tenders for the rent for the subject premises.

Respondent argues that Petitioner retained the payments Respondent sent him, and thus created a landlord/tenant relationship with Respondent. Respondent does not identify his motion as a summary judgment motion, so the Court analyzes Respondent's motion to dismiss as a motion to dismiss pursuant to CPLR §3211. Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007), Sokol v. Leader, 74 A.D.3d 1180, 1183 (2nd Dept. 2010). However, Respondent does not identify which section of CPLR §3211 applies to Respondent's motion. Seeking dismissal on a defense like creation of a tenancy by waiver, i.e., acceptance of checks, is a defense not otherwise identified in CPLR §3211. Accordingly, the Court applies the standard set forth for evaluating motions brought pursuant to CPLR §3211(a)(1), as CPLR §3211(a)(1) covers any defenses other than those listed in CPLR §3211(a)(5). Fontanetta v. John Doe 1, 73 A.D.3d 78, 84 (2nd Dept. 2010).

Dismissal pursuant to CPLR §3211(a)(1) is only warranted if the documentary evidence submitted "utterly refutes [Petitioner's] factual allegations." Mill Fin., LLC v. Gillett, 122 A.D.3d 98, 103 (1st Dept. 2014). Respondent does not attach to his motion any receipts from

¹ The petition pleads that the subject premises are subject to the Rent Stabilization Law.

Petitioner for payments, nor even a sworn statement from anyone with any personal knowledge of Respondent's tender of checks. Respondent submits evidence of a tender by an affirmation of an attorney, which is without probative value, as the attorney has no personal knowledge. Thelen LLP v. Omni Contr. Co., Inc., 79 A.D.3d 605, 606 (1st Dept. 2010), *leave to appeal denied*, 17 N.Y.3d 718 (2011). Respondent does attach to his motion a money order stub, but it does not even have Respondent's name – or the name of any other payor – on it. In addition to that, Petitioner's registered managing agent avers in opposition that Petitioner did not receive any tenders of rent after September 2013. Moreover, acceptance of such rent payments, by itself, is ordinarily insufficient to create a tenancy by waiver. Brooks v. Kenton Assoc., Ltd., 169 A.D.2d 466, 467 (1st Dept. 1991), Plon Realty Corp. v. D'Abbracci, 1997 N.Y. Misc. LEXIS 757 (App. Term 1st Dept. 1997). To the extent that Respondent's argument would have any merit, the purported establishment of a tenancy by waiver raises an issue that is not susceptible to resolution by motion practice. 23 Manhattan Val. N. LLC v. Bass, 28 Misc.3d 139(A) (App. Term 1st Dept. 2010). Respondent has not refuted Petitioner's allegations, utterly or otherwise, and the Court denies so much of Respondent's motion as seeks dismissal on the grounds of creation of a tenancy by waiver.

Respondent also moves to dismiss the petition on the basis that the predicate notice herein (“the notice to quit”) is a ten-day notice to quit for a licensee pursuant to RPAPL §713, not a thirty-day notice of termination for a month-to-month tenant pursuant to RPAPL §232-a. To the extent that Respondent bases his argument upon the proposition that Petitioner and he created a month-to-month landlord/tenant relationship by the tender and acceptance of rent,

Respondent has failed to refute Petitioner's allegations for purposes of a motion to dismiss, as noted above. Accordingly, the Court denies so much of Respondent's motion as seeks dismissal because the proceeding is predicated on a notice to quit pursuant to RPAPL §713.

Respondent also moves to dismiss the petition because the notice to quit does not inform Respondent that Petitioner was overcharging the prior tenant of record. Even assuming *arguendo* that Petitioner was overcharging Respondent, which Respondent does not prove on its motion, RPAPL §713 does not specify any requirement as to the contents of a notice to quit. Washington Mut. Bank, F.A. v. Hanspal, 18 Misc.3d 127(A) (App. Term 2nd Dept. 2007), Helping Out People Everywhere v. Deich, 160 Misc.2d 1052, 1054 (App. Term 2nd Dept. 1994). Compare Park Summit Realty Corp. v. Frank, 107 Misc.2d 318, 321 (App. Term 1st Dept. 1980), *aff'd*, 84 A.D.2d 700 (1st Dept. 1981), *aff'd*, 56 N.Y.2d 1025 (1982) (a termination notice pursuant to RPL §232-a must only inform a tenant that a landlord elects to terminate the tenancy and that refusal to vacate will lead to summary proceedings). The function of a predicate notice is twofold: to end an occupant's estate and inform the occupant of the consequence associated with a failure to vacate. Raffone v. Schreiber, 18 Misc.3d 925, 927 (Civ. Ct. N.Y. Co. 2008), Katz v. Grifa, 156 Misc.2d 203, 206 (Civ. Ct. N.Y. Co. 1992). Accordingly, Petitioner need not have pled an overcharge in the notice to quit and the Court denies so much of Respondent's motion as seeks dismissal on this ground.

Respondent also moves to dismiss on the ground that the notice to quit alleged that Respondent's license terminated prior to the expiration of the last lease of the prior tenant and,

relatedly, that Petitioner did not name the estate of the prior tenant (“the estate”)² as a party to this proceeding. The last lease for the prior tenant expired on November 30, 2013. The notice to quit alleged that Respondent’s license to occupy the subject premises expired almost three months before that, on September 2, 2013 upon the death of the prior tenant. Service of the notice to quit was completed as of November 15, 2013, before the expiration of the prior tenant’s lease. The notice to quit demanded that Respondent quit the subject premises on or before December 8, 2013, after the expiration of the prior tenant’s lease. This proceeding was commenced by filing the petition with the Court on December 24, 2013, New York City Civil Court Act §400(1), after the expiration of the prior tenant’s lease.

An owner has a cause of action in a licensee holdover proceeding against an occupant of a premises when the occupant remained in possession after a vacatur of a tenant of record therein. 85 Fourth Partners, L.P. v. Puckey, 16 Misc.3d 136A (App. Term 1st Dept. 2007), Starrett City, Inc. v. Smith, 25 Misc.3d 42, 46 (App. Term 2nd Dept. 2009). However, when the termination is the result of the death of the tenant of record, if the lease that was entered into between the landlord and the deceased tenant is still in effect, the landlord must sue the estate in order to gain possession. Westway Plaza Assoc. v. Doe, 179 A.D.2d 408, 409-410 (1st Dept. 1992), Visutton

² While Respondent asserts that the estate is a necessary party, an estate is not a legal entity, and so any action against an estate must be brought against the executor or administrator in his or her representative capacity. Haladan Mgt. Co. v. Estate of Elizabeth Ann Davies, 2015 N.Y. Misc. LEXIS 3138 (Civ. Ct. Kings Co. 2015), *citing* Grosso v. Estate of Gershenson, 33 A.D.3d 587 (2nd Dept. 2006). Be that as it may, Petitioner has not named a representative of the estate either, so Respondent’s argument is the same whether Respondent asserts that the estate should have been named or a representative of the estate should have been named. For the purposes of convenience, the Court refers to both the estate and a representative of the estate as, simply, “the estate.”

Assocs. v. Fastman, 44 Misc.3d 56, 58 (App. Term 2nd Dept. 2014), 135 PPW Owners LLC v. Schwartz, 5 Misc.3d 1028(A) (Civ. Ct. Kings Co. 2004). However, after the prior lease expires, a landlord has no obligation to join an estate of a deceased tenant as a party to a licensee holdover proceeding against remaining occupants since any possessory claim of the estate lapses upon the expiration of the lease, Ellis v. Disch, 17 Misc.3d 126(A)(App. Term 1st Dept. 2007), Jane St. Co. v. Suttoni, N.Y.L.J. July 26, 1996 at 21:3 (App. Term 1st Dept.), 135 PPW Owners LLC, supra, 5 Misc.3d at 1028(A),³ even where the deceased tenant renewed a lease but then died before the new lease commenced. Carnegie Mgmt. Co. v. Oppenheimer, 2001 N.Y. Misc. LEXIS 1022 (App. Term 1st Dept. 2001).

Neither party disputes that Petitioner waited until the expiration of the prior tenant's lease to commence this proceeding. Nevertheless, Respondent argues that the notice to quit is defective insofar as it purports that the prior tenant's death terminated Respondent's license to occupy the subject premises before the prior tenant's last lease expired. Respondent argues that Petitioner must not only wait until the expiration of the prior tenant's lease to commence this proceeding against Respondent without the estate, but also that Petitioner may not predicate such a proceeding on a purported termination of Respondent's license during the pendency of the prior tenant's lease.

The death of a tenant terminates or revokes a license due to the personal nature of the license, and the right of the licensee to occupy the real property pursuant to the license ceases

³ Where the tenancy of the deceased is rent-controlled, and therefore statutory, with no lease to expire as with a rent-stabilized tenancy, the representative of the deceased tenant's estate is a necessary party. Extell Belnord LLC v. Uppman, 113 A.D.3d 1, 12 (1st Dept. 2013).

upon the death of the licensor. 100 W. 72nd St. Assoc. v. Murphy, 144 Misc.2d 1036, 1039-1040 (Civ. Ct. N.Y. Co. 1989)(Tom, J.), Giannetti v. Goben, 36 Misc.3d 1221(A) (Dist. Ct. Nassau Co. 2012), New York City Housing Authority v. Shepherd, 114 Misc.2d 873 (Civ. Ct. Kings Co. 1982). While the estate of a deceased tenant may occupy the leased premises from the date of the tenant's death through the expiration of the lease, such occupancy is for winding-up purposes only with no right of occupancy after the end of the lease term. Rubinstein v. 160 West End Owners Corp., 74 N.Y.2d 443, 446 (1989), Carnegie Mgmt. Co., *supra*, 2001 N.Y. Misc. LEXIS at 1022.⁴ Accordingly, the pendency of a lease of a deceased tenant does not forestall the termination of a license granted by that deceased tenant. Petitioner therefore need not await the expiration of the prior tenant's lease in order to memorialize the purported termination of Respondent's license by a notice to quit. The Court therefore denies Respondent's motion to dismiss.

Respondent moves in the alternative to amend his answer. Respondent's second affirmative defense in the proposed amended answer in essence alleges that Petitioner created a month-to-month tenancy with Respondent, and therefore a thirty-day notice of termination pursuant to RPL §232-a was the appropriate notice, not a ten-day notice to quit pursuant to RPAPL §713. Petitioner argues that this defense is meritless. On a motion to amend a pleading, the movant does not need to establish the merit of the proposed new allegations, but rather to

⁴ Instructively, an estate of a deceased tenant with an extant lease is not "a tenant in occupancy" within the meaning of General Business Law § 352-eeee and is not, therefore, vested with the right to take advantage of the option to purchase the cooperative shares allocated to the apartment. Russell v. Raynes Assoc. P'ship, 166 A.D.2d 6, 11 (1st Dept. 1991).

simply show that the proffered amendment does not plainly lack merit, Nussberg v. Tatintsian, 90 A.D.3d 563 (1st Dept. 2011), a liberal standard given the proposition that amendments to pleadings should be “freely given.” McGhee v. Odell, 96 A.D.3d 449, 450 (1st Dept. 2012). Respondent’s attachment of money order stubs and communications to Petitioner to his motion demonstrate that this defense does not “plainly lack merit.”

Petitioner argues that the third⁵ and fourth affirmative defenses are meritless. Both defenses argue that the notice to quit in this matter fails to advise Respondent that Petitioner was overcharging the prior tenant. For reasons stated above, this argument does not implicate the validity of the notice to quit. Washington Mut. Bank, F.A., supra, 18 Misc.3d at 127(A), Helping Out People Everywhere, supra, 160 Misc.2d at 1054, Park Summit Realty Corp., supra, 107 Misc.2d at 321, Raffone, supra, 18 Misc.3d at 927, Katz, supra, 156 Misc.2d at 206. Accordingly, the Court does not find that these defenses have merit.

Petitioner argues that the fifth affirmative defense in the proposed amended answer is meritless. The fifth affirmative defense is a defense based upon failure to name a necessary party, to wit, the estate. For the reasons noted above, the Court finds that this defense is without merit. Petitioner waited until the expiration of the prior tenant’s lease to commence this proceeding and therefore was not required to join the estate to this proceeding.

Accordingly, the Court grants Respondent’s motion to amend his answer, except that the

⁵ The proposed amended answer lists two “second” affirmative defenses. The second “second” affirmative defense immediately precedes the fourth affirmative defense. It appears to be a typographical error. The Court refers to the second “second” affirmative defense as the third affirmative defense for clarity’s sake.

Court denies Respondent's motion to amend his answer so as to add the third, fourth, and fifth affirmative defenses of the proposed amended answer. With these exceptions, the Court deems the proposed amended answer annexed as Exhibit F to Respondent's motion to now be Respondent's answer.

The Court restores the matter to the Court's calendar for trial on October 28, 2015 at 9:30 a.m. in part H in 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 22, 2015



HON. JACK STOLLER
J.H.C.