5th & 106th Street Assocs. LP v Montanez
2015 NY Slip Op 31876(U)
October 15, 2015
Civil Court, New York County
Docket Number: L&T 71875/13
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART R

5TH & 106TH STREET ASSOCIATES LP

Petitioner-Landlord

-against-

OSVALDO MONTANEZ
LAURA PETRACHE
"JOHN DOE" and "JANE DOE"
1590 Madison Avenue, Apt. 3A
New York, New York 10029

Respondents

HON. SABRINA B. KRAUS

DECISION & ORDER
Index No.: L&T 71875/13

BACKGROUND

This summary holdover proceeding was commenced by **5TH & 106TH STREET ASSOCIATES LP** against **OSVALDO MONTANEZ** (Respondent), the tenant of record, seeking to recover possession of 1590 Madison Avenue, Apt. 3A, New York, New York 10029 (Subject Premises) based on several allegations including that Respondent has vacated the Subject Premises, and assigned and/or sublet the Subject Premises to **LAURA PETRACHE** (Petrache). Petrache has appeared herein and asserted succession on her own behalf and on behalf of Tenoch Montanez-Petrache (TMP), who is a minor and the son she has with Respondent.

PROCEDURAL HISTORY

Petitioner issued a fifteen day notice to cure dated May 11, 2015, asserting that in late 2014, Respondent advised Petitioner that he would be vacating the Subject Premises, that he did vacate without surrendering his rights, that an unauthorized occupant remains in the Subject

Premises, that Respondent is not primarily residing at the Subject Premises and that he receives mail at an address in Elmhurst, New York.

Petitioner issued a notice of termination dated June 8, 2015, which further asserted that Petrache was in occupancy and had acknowledged that she was living in the Subject Premises without Respondent and was not listed on the household composition. The notice asserted that Respondent's conduct violated his lease and constituted fraud. The petition issued on July 15, 2015, and the proceeding was initially returnable on July 27, 2015.

On October 6, 2015, the proceeding was assigned to Part R for trial, and the trial commenced. The trial continued and concluded on October 7, 2015 and the court reserved decision.

FINDINGS OF FACT

Petitioner is the landlord of the Subject Premises, and Respondent became the tenant of record pursuant to an original lease dated July 16, 2010 for a one year term at a monthly rent of $750.00 (Ex 1). The Subject Premises is located in a project known as Lakeview Apartments, and is a project based Section 8 unit. Pursuant to said lease, Respondent's rent is subsidized by HUD. The lease provides that the rent may be changed during the term of the lease in several situations, including due to a change in the number of persons in Tenant's household, and failure to provide information pertaining to income and family composition. The lease provides that only Respondent and persons listed and approved on his application may live in the Subject Premises.

Respondent moved into the Subject Premises alone in June 2010. Petrache and TMP came to live with him in the Subject Premises in September 2011, and have remained in occupancy since that date. Respondent moved out of the Subject Premises in May 2014.

Respondent renewed the lease on April 26, 2011 (Ex 2), April 26, 2012 (Ex 3), and on June 4, 2013 (Ex 4). Respondent's last executed lease renewal expired June 30, 2014.

On July 10, 2014, Respondent submitted a written request to add his minor son, TMP to the current lease (Ex aa), and Respondent completed and submitted documents for the annual recertification (Ex bb). On October 24, 2014, Petitioner submitted a letter to Respondent advising him that his recertification had been reviewed and completed, that his new rent would be $926.00 per month effective November 1, 2014, and that he needed to make an appointment to go in and sign his lease (Ex cc). Respondent never executed said lease or tendered any rent for any period after the expiration of his lease.

Respondent filled out an application to be a tenant of the Subject Premises and submitted said application in January 2009 (Ex 6). Respondent listed himself as the sole household member on the application, with an income of $30,000 per year. In or about June 2010, pending the approval of his application, Respondent advised Petitioner that he had moved temporarily moved out of state, and provided other mailing addresses where he could be reached in New York (Ex 7).

There is a valid MDR on file for the subject building (Ex 8).

In connection with the execution of the leases, Respondent also signed off on a Certification of Compliance with HUD's Eligibility and Rent Procedures each year. Each form listed Respondent as the only household member (Exs 5(a)-(d)).

TMB was born on September 28, 2002 in Brooklyn, New York (Ex M). Respondent and Petrache never married, but they lived together for substantial periods of time, including the three years they lived together in the Subject Premises. Their relationship was plagued by some instances of domestic violence. Petrache lived in North Carolina from 2005 through 2007, without Respondent (Ex K-3). From April 2007 through December 2008, Petrache lived with Respondent in Corona, and Petrache and Respondent lived together in North Carolina from December 2008 through June 2010. A temporary order of protection was issued in favor of Petrache against Respondent in June 2010 by a District Court in Wake County, North Carolina (Ex K-3).

TMP was enrolled in school in North Carolina through the Spring of 2011(Ex F). From the fall of 2011 through the date of the trial, TMP was enrolled in public school in New York City (Ex J(1)-(4)). PMT required special education services both in North Carolina and in New York (Exs A-F).

Petrache filed a Family Offense Petition against Respondent in August 2012, in Family Court in New York County (Ex K-4). A temporary order of protection was issued on October 9, 2012, but did not reference any obligation for Respondent to stay away from the Subject Premises (Ex K-1). Petrache never pursued a permanent order of protection, because her issues with Respondent were resolved.

Petrache submitted a 2013 tax return (Ex P). The information filled out on the return appears to be false in some respects and contradicts the information provided by Respondent and Petrache both to Petitioner and at trial. For example, the tax return states that Respondent and Petrache are married and filing jointly, and lists an annual income of $87,567.00.

New York County Family Court also issued an order directing payment of child support on December 18, 2014 (Ex K-2). Respondent was listed as the non-custodial parent, and provided documentation supporting a finding that he had an annual salary of $99,845.16.

Linda Dennison (LD) testified for Petitioner. LD has been employed as a property manger for the subject building since April 2014. LD had no knowledge of communications between Respondent and Petitioner's agents prior to said date. In 2014, Respondent advised LD that he was moving and that he wished his son and Petrache to remain in the Subject Premises. LD advised Respondent that a transfer could not be accomplished in said manner, because Petrache was not on the lease or household composition. LD testified that Respondent had permanently moved from the Subject Premises but she did not know when Respondent had moved.

LD testified that she did not provide Respondent with information about how to properly effect such a transfer because Respondent did not ask. Petrache did come to the office to speak with LD and ask what rights she may have to remain in possession, but LD stated she extended Petrache a "courtesy" by speaking to her at all, and was not obligated to provide Petrache with the requested information.

LD testified she took no action regarding Respondent's request to add TMP to the lease because to add TMP Respondent would have had to show he had full custody of the child. LD's attitude towards Respondent and his family was fairly hostile, and her understanding of her obligations in assisting Respondent and his family in complying with necessary procedures to either be added to the lease or in regards to the remaining family member request does not seem to comport with the spirit of the applicable regulations.

Respondent also testified at trial. After becoming a tenant, Respondent inquired from management regarding his interest in bringing his family to live with him from North Carolina and transferring to a two bedroom apartment. Respondent was advised by management to wait until his family had arrived and then add them to the lease and make the request for the transfer to a larger unit. When Petrache and TMP moved in with him in September 2011, Respondent and Petrache went to the management office to start the paperwork to add Petrache to the lease, but during said process it was discovered that Petrache's Green Card had mistakenly listed her as a male, and management declined to continue to process Respondent's request.

Later, in 2014, Respondent informed LD that he wished to move out, and have the lease transferred to Petrache and his son. LD by her own admission did not provide Respondent with much information or direction in this regard, and simply told Respondent that they would have to leave. Once he had moved, Respondent advised management that he was no longer living in the Subject Premises, and Respondent was told to send a letter confirming this, but was still not advised of the proper procedures necessary to transfer the Subject Premises to Petrache and his son. Respondent submitted a letter requesting that the lease be put in his son's name after he had moved out of the Subject Premises, because LD had advised him that a request to transfer to Petrache would be denied because she was not on the lease.

Petrache also testified at the trial. Petrache started living in the Subject Premises in September 2011, and within a month of her arrival she went with Respondent to the management office to have her name added to the lease, and the error on her Green Card was discovered. Petrache felt that Petitioner had just used the error in the Green Card as an excuse to reject her and PMT, and did not pursue having her name added to the lease until her relationship with Respondent deteriorated and he moved out. Petrache testified that she had recently obtained a

new Green Card, but the new Green Card was not offered into evidence. However, proof of her application to replace the card was submitted (Ex L-3).

Documents establishing Petrache's residency during the relevant period were scant (se eg L-11, L-3, as well as education documents and 2013 tax return) but the court believes that this is because Petrache was *pro se*. Petrache's residency during the relevant period was not contested by Petitioner by any contradictory evidence at trial.

DISCUSSION

It is undisputed that Respondent has permanently vacated the Subject Premises well before the commencement of this proceeding, that he advised Petitioner in advance that he was doing so, that Petitioner knew he had permanently vacated prior to the commencement of the proceeding and that he advised Petitioner as to the identity of the remaining family members in occupancy.

It is also undisputed that Petrache and PMT lived with Respondent in the Subject Premises from September 2011 through May 2014, as a family unit, and that Respondent advised Petitioner of this in advance of Petrache's arrival, and then sought to have her added to the lease upon her arrival.

9 NYCRR 1727-8.2 provides that where a tenant has permanently vacated a dwelling unit, any family member as defined in section 1700.2(a)(7) who meets all requirements shall be entitled to be named as a tenant on the lease. As applicable herein, the requirements include residency with the tenant for the two years prior to tenant's leaving, and established proof of primary residency, which must include listing of such person on all income affidavits, certifications or recertifications required during the relevant period (9 NYCRR 1727-8.2(a)).

The definition of family member in 9 NYCRR 1700.2(a)(7) includes blood relations, relations by marriage and "... any other person residing with the tenant or cooperator. Although no single factor shall be solely determinative, evidence which is to be considered in determining whether such emotional and financial commitment and interdependence existed shall be the income affidavit filed by the tenant for the dwelling unit and other evidence ...".

Similarly, the HUD Handbook 4350.3 Chapter 3-16 provides that a remaining family member must be a party to the lease when the tenant leaves the unit.

24 CFR § 5.403 provides that family includes, regardless of marital status, a group of persons residing together with or without children, and the remaining member of a tenant family.

The court finds that Respondent and Petrache did constitute family to each other during the relevant period, as most obviously demonstrated by the special needs child they share and raise together.

Notwithstanding the requirements for a remaining family member to be listed on the required documentation to qualify for succession, courts have found that the failure to list an occupant is not fatal to a succession claim of a remaining family member.

The door to this line of cases was opened in the 2004 holding of the Appellate Division, First Department in *Manhattan Plaza Associates, LP v DHPD* (8 AD3d 111) where the court held that the failure to be so listed should not be fatal to a succession claim. The Court noted that it was permissible for a hearing to be held to rebut the presumption of nonresidency established by failure to be listed on the form. While the regulation at issue in *Manhattan Plaza* has since been amended to be more forceful regarding the requirement to be listed on annual forms, the language from the Appellate Division decision that continues to be cited by courts includes:

> We note that the applicable federal regulations do not mandate any procedure with respect to eviction of tenants in Section 8 housing (*see* 24 CFR Part 983). The challenged regulation, which permits an applicant to establish that he or she is a bona fide family member entitled to succession rights does not frustrate the purpose of Section 8 law, which, by recognizing the entire family as the tenant (*see* 42 USC § 1437(a), seeks to encourage family cohesion.

Id at 112.

Where the required residency and family relationship has been established by a preponderance of credible evidence at trial, courts have continued to find that a remaining family member is entitled to succession, even in the absence of compliance with the requirement to be listed on annual forms [*2013 Amsterdam Avenue Housing Associates v Wells* 10 Misc3d 152(A); *Bronx 361 Realty, LLC v Quinones* 26 Misc3d 1231(A); *Los Tres Unidos Associates, LP v Colon* 45 Misc3d 129(A); *Marine Terrace Associates v Kesoglides* 44 Misc.3d 141(A)]. The inquiry remains fact specific and includes consideration as to the bona fide family relationship, whether the owner knew of the occupancy, whether the owner frustrated earlier attempts to have the occupants added to the lease, and other relevant factors.

In this case, the court finds that given the totality of the circumstances, Petrache has established the right to succeed to Respondent's tenancy, based on the preponderance of credible evidence provided at trial. Based on the foregoing, the petition is dismissed.

This constitutes the decision and order of the Court.1

Dated: New York, New York
October 14, 2015

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Sabrina B. Kraus, JHC

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1 Parties may pick up Trial Exhibits within thirty days of the date of this decision from the second floor clerk's office, window 9. After thirty days, the exhibits may be shredded in accordance with administrative directives.