

Two-Two-One Assocs. v Medina
2015 NY Slip Op 32236(U)
November 23, 2015
Civil Court, New York County
Docket Number: 69266/2015
Judge: Michael Weisberg
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART

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TWO-TWO-ONE ASSOCIATES,

Index No. 69266/2015

Petitioner,

DECISION/ORDER

-against-

RAMON MEDINA, ET AL.,

Respondents.

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Present: Hon. Michael Weisberg
Judge, Housing Court

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of this motion.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	
Order to Show Cause and Affidavits Annexed.....	1
Answering Affidavits.....	2

This is a holdover summary eviction proceeding based on an allegation that the occupants are mere licensees with no further right to reside in the apartment. Petitioner alleges that the tenant of record Leonida Medina died and that Ramon Medina, “John Doe,” and “Jane Doe” entered into or remain in possession without the permission of the landlord. The apartment is located on West 105th Street between Broadway and Amsterdam Avenue and appears to have last had a rent stabilized rent of \$644.79. An inquest was held after no one appeared as a respondent and Petitioner was awarded a default judgment against only Ramon Medina. Petitioner’s witness testified that as far as he knew no one else was living in the apartment, and so Petitioner discontinued the proceeding as against John Doe and Jane Doe.

After execution of the warrant of eviction, Movant Bienvenido Medina moved *pro se* to be restored to possession of the premises. He alleges in his affidavit that Ramon Medina is his

brother and that Ramon has not lived in the apartment since 1987. He further alleges that he has lived in the apartment for many years and that Petitioner was aware of that fact. In an affidavit annexed to a prior order to show cause (for which Movant never appeared in the court room after the motion was sent up from the clerk's office), Movant alleged that the deceased tenant of record was his mother and that he never appeared in the proceeding because the pleadings were in the name of his brother Ramon. Petitioner opposed the motion with an affirmation from its attorney but failed to avail itself of the opportunity to rebut any of Movant's allegations. By order dated October 26, 2015, the court scheduled this matter for a hearing on the issues raised by the motion.

Movant appeared *pro se* at the hearing and testified with the assistance of a court interpreter. He testified that he moved into the subject apartment with his mother Leonida Medina in 1984. After living in the apartment for ten consecutive years, his residence in the apartment became less consistent. He would leave and come back, staying at the apartment "whenever [he] wanted to." Movant further testified that Ramon Medina is his brother, but that Ramon moved out of the apartment in 1987 and has not been back since then. Leonida Medina died in August 2014 after a long illness. Movant was living in the apartment around the time his mother became ill and began to require the services of a home health aide. Because the apartment only has one bedroom and the home health aide was at the apartment, there as no room for Movant to live there, so he began to stay at his relatives' apartment in the building next door at 223 West 105th Street. This happened about two or three years before his mother died.

Luis Altamiranda testified for Petitioner. He is employed by SDG Management, the company that manages the subject building as well as 223 West 105th Street. He testified that some time after Leonida Medina died he began an investigation into who was living in the

subject apartment. He knocked on the door at the subject apartment and it was opened by Movant. But Movant would not give him his name or any other information. This statement appears to conflict with a statement made by Altamiranda at inquest. At that time Petitioner's attorney asked him, "As far as you know there's no one else in the apartment [other than Ramon Medina?]" Altamiranda responded, "Correct."

Altamiranda also testified at the hearing that as part of his investigation he spoke to an individual named "Ramon." Altamiranda lives at 223 West 105th Street, the same building as Movant's relatives. Altamiranda had observed Ramon at the subject premises, but also at an apartment at the 223 building. He could not determine where Ramon was living because he observed Ramon going back and forth between the two apartments. Altamiranda testified that Ramon never told him his last name, but that the superintendent of the building told him that it was "Medina." Altamiranda assumed this was correct because it was the same last name as Leonida Medina and because Ramon had told him that he was her relative. This is another example of Altamiranda's testimony conflicting with his earlier inquest testimony. At that time he testified that in the Spring of 2015 Ramon informed him that Leonida Medina was his mother.

On rebuttal, Movant asserted that the person with whom Altamiranda spoke, that Altamiranda identified as Ramon Media, had to have been Ramon Acosta, not Ramon Medina. Ramon Acosta is Movant's cousin, and he lives in an apartment at the 223 building.

In light of the conflicting testimony given by Altamiranda regarding the occupancy by anyone other than Ramon Medina/Acosta in the apartment, the court does not know why Petitioner opted to discontinue this proceeding against John and Jane Doe instead of seeking a default judgment against him. Notwithstanding that Movant was initially named and served with the notice of petition and petition (albeit as "John Doe"), discontinuing the proceeding against

him may have rendered his eviction improper. This is because due process requires that for a warrant to be effective against a subtenant, licensee, or occupant, he must be named and served with the notice of petition and petition (*170 W. 85th St. Tenants Assn. v. Cruz*, [173 AD2d 338] [1st Dept 1991]).¹ Although this may not be the case where the landlord is proceeding directly against the tenant (e.g. if this had been a proceeding commenced against Leonida Medina) (*see Loira v. Anagnostopolous*, 204 AD2d 608 [2d Dept 1994]; *but cf. Stanford Realty Assoc. v. Rollins*, 161 Misc 2d 754 [Civ Ct, NY County 1994] [individual who might have independent possessory rights to apartment is necessary party to holdover summary eviction proceeding]), it is certainly the case here where the tenant of record has died and the petition alleges that all respondents are licensees with no right to continued occupancy.

Whether or not Petitioner's eviction of Movant was proper, the fact remains that Movant's testimony that he did not live in the apartment for the two or three years prior to his mother's death would be fatal to a claim that he had the right to succeed to her tenancy. Though there might otherwise be some basis to restore Movant to occupancy of the apartment, Movant's admission that he was not living in the apartment during the requisite time period means that it would ultimately be futile to do so. In a situation such as this, even where an eviction was improper, the court has discretion to deny a tenant's motion to be restored to possession (*see Soukouna v. 365 Canal Corp.*, 48 AD3d 356 [1st Dept 2008]; *789 St. Marks Realty Corp. v. Waldron*, 46 Misc 3d 138[A] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]).

In light of all the circumstances herein, including that Movant acknowledges receipt of the notice of petition and petition and declined to appear in response to them and that he did not

¹ It is unlikely that the court in *Cruz* contemplated a situation in which an individual is named and served and then the case is discontinued against him. In this court's opinion, naming and serving a party but then discontinuing against him does not satisfy due process so as to meet the requirement described in *Cruz*.

live in the apartment for the two or three years prior to the death of the tenant of record, the motion is denied in its entirety. All stays are vacated.

This decision/order is of course without prejudice to any claims for damages that Movant may have against any individual or entity in connection with his eviction.

This constitutes the decision and order of this court.

Dated: November 23, 2015

Hon. Michael Weisberg
J.H.C.