

Riverside Park Community LLC v Springs
2015 NY Slip Op 32526(U)
February 5, 2015
Civil Court of the City of New York, New York County
Docket Number: 60514/2014
Judge: Anne Katz
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART E

L&T Index No. 60514/2014

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RIVERSIDE PARK COMMUNITY LLC &
RIVERSIDE PARK COMMUNITY II LLC

DECISION/ORDER

Petitioner-Landlord

-against-

GORDON SPRINGS,

Respondent-Tenant

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RECITATION AS REQUIRED BY CPLR §2219(A): OF PAPERS CONSIDERED IN THE REVIEW OF RESPONDENT’S MOTION FOR SUMMARY JUDGMENT AND ATTORNEY’S FEES AND PETITIONER’S MOTION TO RESTORE THE CASE TO THE CALENDAR; AMENDING THE CAPTION; SUMMARY JUDGMENT; WARRANT OF EVICTION; AND USE AND OCCUPANCY:

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HON. ANNE KATZ

The within proceeding is a licensee holdover proceeding where petitioner seeks to gain possession of the premises located at 3333 Broadway, Apartment #A6F, New York, New York 10031 (“subject premises”). Petitioner alleges that the subject premises are not subject to rent regulation as the petitioner duly “opted out” of a Mitchell-Lama program in 2005. Petitioner claims that upon opting out of the Mitchell-Lama program in 2005, the subject premises became subject to fair market rents. In October 2013, the tenant of record, Marion Jones (“Jones”) passed away and petitioner commenced the within proceeding against respondent, Gordon Springs (“respondent”), the great grandson of Jones. Petitioner alleges that any license granted to respondent by Jones terminated by operation of law and respondent has no right to remain at the subject premises. On or about February 10, 2014, petitioner served respondent with a Thirty (30) Day Notice which required respondent to quit the subject premises by March 31, 2014. Respondent failed to vacate and

petitioner commenced the within proceeding by Notice of Petition and Petition dated April 1, 2014. Respondent, by counsel, submitted an Answer and Notice of Appearance dated July 15, 2014. Subsequently, respondent moved this Court by Notice of Motion dated July 15, 2014 for summary judgment on respondent's fourth affirmative defense. Respondent also moved this Court for attorney's fees. On September 15, 2014, the within proceeding was marked off calendar pending the determination of an Article 78 proceeding brought by petitioner against HPD. Petitioner alleged that HPD improperly gave respondent tenancy rights to the subject premises. On December 19, 2014, the Supreme Court of the State of New York, County of New York, issued a Decision/Order which dismissed petitioner's Article 78 petition. Petitioner, by counsel, now moves this Court for an Order restoring the within proceeding to the calendar; amending the caption, *nunc pro tunc*, to reflect petitioner as "BSREP UA 3333 Broadway LLC"; and upon granting such relief, granting summary judgment in favor of petitioner with issuance of a warrant of eviction forthwith and no stay of execution thereof; granting petitioner a possessory judgment for all past and ongoing use and occupancy; and denying respondent's pending motion for summary judgment on his fourth affirmative defense.

Restoration of Proceeding

Petitioner's motion to restore the within proceeding to the calendar is granted. On September 14, 2014, the within proceeding was marked off calendar pending a determination in the Article 78 proceeding brought by petitioner against HPD. On December 19, 2014, the Honorable Cynthia S. Kern issued a Decision/Order ("Decision") which dismissed petitioner's Article 78 petition. A Decision was issued in the Article 78 proceeding and it is now appropriate for the within proceeding to be restored to the calendar for final disposition. It is also noted that respondent has not opposed petitioner's motion to restore the within proceeding.

Amending Caption

Petitioner's motion to amend the caption, *nunc pro tunc*, to reflect petitioner as BSREP UA 3333 BROADWAY LLC is granted. Pursuant to C.P.L.R. § 3025, leave to amend a pleading should be freely given unless the pleading is devoid of merit or will result in undue prejudice or surprise to the other party. Both C.P.L.R. § 1018 and R.P.L. § 223 allow a new owner or grantee the same remedies as a prior owner to a proceeding and allow the new owner to continue a suit commenced by the prior owner against an original party. Petitioner alleges that title to the subject building was transferred from Riverside Park Community I LLC & Riverside Park Community II LLC to BSREP UA 3333 Broadway LLC on October 22, 2014. Petitioner provides an Assignment and Assumption Agreement in support of its claim. Petitioner also provides an Assignment and Assumption of Leases and Contracts including "Schedule A" which assigns BSREP UA 3333 BROADWAY LLC interest in the subject premises. Accordingly, petitioner has made a prima facie showing that BSREP UA 3333 BROADWAY LLC is entitled to maintain the instant proceeding against respondent. Respondent will suffer no prejudice or surprise. Petitioner's motion is granted.

Factual History

The tenant of record, Marion Jones, moved into the subject premises under a Mitchell-Lama program. During Jones' tenancy, in 2005, petitioner "opted out" of the Mitchell-Lama program. At the time that petitioner opted out of the Mitchell-Lama program Jones was the sole occupant of the subject premises and was issued an enhanced section 8 voucher ("enhanced voucher") from HPD. In or about the middle of 2011, Jones's great grandson, respondent, moved into the subject premises with Jones. HPD added respondent to Jones' family composition and respondent continued to appear as part of the family composition until Jones passed away on October 3, 2013. Subsequent to Jones' death, HPD processed an interim recertification effective November 1, 2013 which removed Jones from the enhanced voucher and named respondent as the remaining household member.¹ Subsequently, on April 15, 2014, HPD also issued respondent a "Notice of Recalculation of Subsidy After a 15% Decrease in Income" which named the respondent as recipient of the enhanced voucher. Based upon HPD's determination that respondent was entitled to the enhanced voucher, petitioner brought an Article 78 petition in the Supreme Court of the State of New York, County of New York. In its Article 78 proceeding, petitioner sought to reverse and annul the determination made by HPD dated April 15, 2014 to the extent that it granted tenancy rights to respondent. HPD cross-moved to dismiss the petition on the ground that, *inter alia*, the petition failed to state a cause of action. The Honorable Cynthia S. Kern granted HPD's cross-motion and dismissed the petition. Judge Kern held that the petition failed to state a cause of action since, as a matter of law, HPD does not have the authority to grant respondent tenancy rights. After petitioner's Article 78 petition was dismissed, petitioner brought the within motion seeking, *inter alia*, summary judgment based upon its allegation that respondent does not have tenancy rights to the subject premises since he is not "family" and therefore not entitled to the enhanced voucher which would allow him to remain at the subject premises. Petitioner bases its claims that respondent is not family upon the fact that respondent did not reside with Jones at the time petitioner opted out of the Mitchell-Lama program and HPD issued Jones the enhanced voucher. As respondent did not reside with Jones when the enhanced voucher was issued, petitioner alleges respondent is not "family" and not entitled to the enhanced voucher and the protections afforded the holder of an enhanced voucher.

Mitchell-Lama Program

The Mitchell-Lama program that petitioner originally participated in was a project based assistance program designed to provide affordable housing to low income tenants like Jones. Most project based assistance contracts were typically 20-year contracts first available around 1975. *Estevez v. Cosmopolitan Associates LLC*, 2005 WL 3164146. Thus, in the mid-1990's, a large number of project based programs were set to expire and upon expiration, landlords were able to "opt out" as long as they gave adequate notice of their intent to do so. *See Estevez, supra*. Concerned that as the project based contracts ended, landlords would "opt out" and charge market rents, displacing a large number of low income families, Congress amended the Housing Act in 1999 to

¹ After the death of Jones, petitioner refused subsidy payments from HPD and served respondent with the 30 Days Notice to Vacate.

provide that, upon termination of or failure to renew project based assistance contracts, the tenant who had benefitted from those contracts would receive “enhanced voucher” assistance. 42 U.S.C. §1437f(t); see *Estevez, supra*. Enhanced vouchers were a hybrid of project based and tenant based assistance and paid the difference between the reasonable market price of the rental and the greater of 30-percent of the tenant’s household income or the rental amount that the household was paying when the tenants first became eligible for enhanced vouchers. 42 U.S.C. §1437f(t)(1)(D). Enhanced vouchers typically had a higher value than pure tenant-based vouchers. Enhanced voucher assistance under 42 U.S.C. §1437f(t) was available so long as the assisted family elected to remain in the same project in which the family was residing on the date of the eligibility event for the project and the family made an election to so reside. 42 U.S.C. §1437f(t)(1)(B). The enhanced voucher added extra protection based upon the increased monetary value and the tenant’s unfettered right to remain. *Barrientos v. 1801-1825 Morton LLC*, 2007 WL 721394. A family was no longer entitled to the benefits of the enhanced voucher if the assisted family moved at any time from such project; 42 U.S.C. §1437f(t)(1)(C)(i); or the voucher was made available for use by any family other than the original family on behalf of whom the voucher was provided. 42 U.S.C. §1437f(t)(1)(C)(ii). Therefore, the voucher continued only as long as the assisted family resided in the same project in which the project based assistance was received. If the “family” moved at any time, from that project, or if the voucher was made available for use by any family other than the original family on behalf of whom the voucher was provided,” the enhanced voucher was lost and the section 8 assistance reverted to a standard tenant-based voucher. The enhanced voucher’s higher monetary value enabled particularly vulnerable tenants the ability to remain in their homes even though the landlord opted out of the project based program and was free to charge market rent. Tenants who held an enhanced voucher had the right to remain in the premises absent a serious or repeated lease violation or other good cause. *HPD Administrative Code, §19.4*.

Respondents Fourth Affirmative Defense

Respondent moves for summary judgment dismissing the petition on his fourth affirmative defense which alleges that when Jones passed away respondent became the holder of the enhanced voucher. Respondent alleges that he fits the definition of “family” as defined by the federal regulations, the Department of Housing Preservation’s Administrative Plan and 24 C.F.R. §5.403. 24 C.F.R. §5.403 in relevant part, defines family as (1) A single person....and (vi) the **remaining family member of a tenant family** [emphasis added]. 24 C.F.R. §982.4 further defines “family” as a person or group of persons, as determined by the PHA consistent with 24 C.F.R. 5.403, who are approved to reside in a unit with assistance under the program. As respondent is a single person who is the remaining family member of a tenant family and was approved by to reside in the unit with assistance under the enhanced voucher program, he clearly fits the definition of “family”. As “family”, respondent is not a licensee as claimed by petitioner. Rather respondent as “family” is the recipient of the enhanced voucher and has the “right to remain” in the subject premises absent a serious or repeated lease violation or other good cause. *HPD Administrative Code §19.4*. Under *HPD Administrative Code §19.4*, “a family that receives an enhanced voucher has the right to remain in the project as long as the units are used for rental housing and are otherwise eligible for housing choice voucher assistance. The owner may not terminate the tenancy of a family that exercises its right to remain except for a serious and repeated lease violation or other good cause. If an owner refuses to honor the family’s right to remain, the family may exercise any judicial remedy that is available under State and/or local law.”

It is undisputed that upon opting out of the Mitchell-Lana program, Jones, as “the assisted family”, elected to remain at the subject premises, which was the project where Jones was residing on the date of the eligibility event. It is also undisputed that respondent was added to the family composition by HPD and upon Jones’ death, respondent became the holder of the enhanced voucher. Respondent as “family” was entitled to remain at the premises and receive the greater monetary benefits from the enhanced voucher until such time as the respondent moved from such project or the voucher was made available for use by any family other than the original family (respondent’s family”) on behalf of whom the voucher was provided. 42 U.S.C.1437f(t)(1)(B) and (C)(i)(ii). This Court rejects petitioner’s position that respondent is a licensee and not entitled to protection under 42 U.S.C. 1437f(t) because he was not residing in the apartment at the time the enhanced voucher was made available to Jones. As stated above, *24 C.F.R. §5.403* considers a single and remaining member of a tenant family as “family”. Accordingly, as petitioner has failed to assert a serious or repeated lease violation or other good cause to terminate respondent’s tenancy the petition has failed to state a cause of action. Respondent’s motion for summary judgment on his fourth affirmative defense is granted and the petition is dismissed with prejudice.

Holding in Article 78 proceeding

Petitioner brought a petition pursuant to Article 78 of the Civil Practice Law and Rules (“CPLR”) which sought to reverse and annul the determination made by HPD dated April 15, 2014 to the extent that it granted tenancy rights to respondent. HPD cross-moved to dismiss the petition on the ground that, inter alia, petitioner failed to state a cause of action. The Supreme Court of the State of New York, County of New York issued a Decision which denied the petition and granted HPD’s cross-motion. The Honorable Cynthia S. Kern found that as a matter of law HPD does not have the authority to grant tenancy rights when it approves tenant-based Section 8 housing subsidies. It is undisputed by all parties that HPD does not have the right to grant respondent tenancy rights to the subject premises. However, respondent’s tenancy rights do not stem from HPD rather his tenancy rights are derived under federal statute U.S.C. 1437f and his protected class as “family” under the remedial statute. Judge Kern’s Decision relied on *HPD Administrative Code §11.3.3*, however, HPD Administrative Code 11.3.3 is inapplicable herein. While under HPD Administrative Code 11.3.3 a tenant-based subsidy may be terminated by the owner if the lease terminates on its own terms; the lease is not renewed; the HAP contract terminates; or HPD terminates assistance for the family, none of these circumstances were present herein. Respondent was entitled to the HAP contract and petitioner was not entitled to terminate the lease absent a serious or repeated lease violation or other good cause. *HPD Administrative Code, §19.4*. Accordingly, respondent as family is protected by *42 U.S.C. §1437f(t)* and is entitled to the enhanced voucher and to remain at the subject premises absent serious or repeated violations of the lease or other good cause. Administrative Code §19.4 .and has the right to remain at the subject premises.

Failure to Renew Lease

Petitioner also alleged that respondent is not entitled to remain at the subject premises as Jones did not request a lease renewal in accordance with the terms of the lease and that only Jones is entitled to a renewal lease. Petitioner's argument with regard to the lease is not properly before this Court. Petitioner failed to allege any facts with respect to the lease in the predicate notice or Petition. RPAPL section 741(4) requires a petition to state the facts upon which it is based. As petitioner did not allege any facts regarding the renewal lease or respondent's right to a lease, such arguments are not appropriate herein.

Summary Judgment

CPLR §3212(b) states that a motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Summary judgment shall be granted if there are no material issues of fact that exist. The moving party has the initial burden of demonstrating, by admissible evidence, its right to judgment however, once the moving party meets its initial burden, the burden shifts to the opposing party who must proffer evidence in admissible form, establishing that an issue of fact exists warranting a trial. *Bendik v. Dybowski*, 227 AD2d 228, 642 NYS2d 284 (AD 1st Dept, 1996). On a motion to dismiss, all allegations in the pleading are deemed true and afforded the benefit of every favorable inference. *Schlemme v. Planning Board of City of Poughkeepsie*, 118 A.D.3d 893, 988 N.Y.S.2d 640 (2014). As fully discussed herein, there are no material issues of fact. Respondent is family under federal statute, 24 C.F.R. 5.403 and 24 C.F.R. §982.4, and protected by 42 U.S.C.1437f(t) and HPD Administrative Code §19.4. Absent respondent's voluntary election to vacate the premises or respondent's serious or repeated violation of the lease or other good cause, respondent as holder of the enhanced voucher is entitled to remain at the subject premises. Petitioner has not set forth any facts which show respondent has seriously or repeatedly violated any provision(s) of the lease or other good cause to terminate the lease. Respondent's motion for summary judgment on his fourth affirmative defense is granted. The within petition is dismissed with prejudice. Petitioner's motion for summary judgment and a warrant of eviction are denied.

Use and Occupancy and Attorneys Fees

All parties shall appear in Part E, Room 526 on March 10, 2016 at 9:30 a.m. for a hearing on the issue of any past use and occupancy and attorneys fees.

This constitutes the Decision and Order of this Court.

Dated: New York, New York
February 5, 2015

Anne Katz J.H.C.

