

**Thor 172 Fifth Ave. LLC v Francisco**

2016 NY Slip Op 30729(U)

April 20, 2016

Civil Court, New York County

Docket Number: 79840/2015

Judge: Sabrina B. Kraus

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This opinion is uncorrected and not selected for official publication.

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

\_\_\_\_\_  
THOR 172 FIFTH AVENUE LLC, X

Petitioner-Landlord

**HON. SABRINA B. KRAUS**

-against-

**DECISION & ORDER**  
**Index No.: L&T 79840/2015**

SAMANTHA FRANCISCO  
172 Fifth Avenue, Apt. 3C  
New York, NY 10010

Respondent-Tenant

“JOHN DOE” and “JANE DOE”

Respondents-Undertenants

\_\_\_\_\_  
X

**BACKGROUND**

This summary holdover proceeding was commenced **THOR 172 FIFTH AVENUE LLC** (Petitioner) against **SAMANTHA FRANCISCO** (Respondent), the alleged rent-stabilized tenant of record of 172 Fifth Avenue, Apt. 3C, New York, NY 10010 (Subject Premises), based on the allegation that Respondent failed to maintain the Subject Premises as her primary residence.

**PROCEDURAL HISTORY**

Petitioner issued a notice of non-renewal dated May 4, 2015. The notice asserts that Respondent is believed to be residing at an apartment in Long Island City, and that prior to living in Long Island City, from 2009 to 2014, Respondent lived in a Condo she owned on West 122<sup>nd</sup>

Street. The petition is dated October 6, 2015, and the proceeding was initially returnable October 22, 2015.

Respondent appeared *pro se* on the initial return date, and the proceeding was adjourned to December 2, 2015 for Respondent to obtain counsel. Counsel for Respondent and her sister Tiffani Francisco (TF) appeared on December 2, 2015, and filed an answer asserting defenses including that TF had previously succeeded to the tenancy of Respondent, that said succession had been acknowledged by Petitioner's predecessor in interest, and that TF was the tenant of record of the Subject Premises. An amended answer asserting substantially the same claims was filed on December 10, 2015.

On January 26, 2016, Petitioner moved to strike Respondent's affirmative defenses, to substitute Tiffani Francisco as Jane Doe, for discovery and related relief. On March 23, 2016, Respondent moved for summary judgment. On April 19, 2016, the court heard argument and reserved decision. The motions are consolidated herein for determination.

### **DISCUSSION**

Petitioner's motion to dismiss Respondent's first affirmative defense for failure to state a cause of action is denied. The pleading of such a defense is surplusage, as it may be asserted at any time even if not pleaded. The choice whether or when to move to assert the defense should remain with the pleader and therefore the assertion of the defense in an answer is not subject to a motion to strike (*Riland v Frederick S. Todman. & Co* 56 AD2d 350).

Petitioner's motion to dismiss the second affirmative defense of waiver and estoppel is denied, the defense when read in light of the entire pleading raises issues of fact and is not subject to summary determination.

Petitioner's motion to dismiss the defenses of laches and unclean hands is also denied as neither party, in the voluminous submissions on the motions, provided the court with any legal authority on whether said defenses can be asserted as a defense to a holdover proceeding.

Petitioner's motion to dismiss Respondent's fifth affirmative defense is granted. Petitioner asserts that Respondent is the tenant of record and TF is an occupant and not a party to any lease between the parties. An occupant need not be served with the prescribed notices for eviction even where that occupant is a family member and known to Petitioner (*1700 First Avenue LLC v Parsons-Novak* 46 Misc3d 30).

Petitioner's motion to dismiss the sixth affirmative defense and to substitute TF in place of Jane Doe is denied. Respondent has established by numerous documents including rent checks, HPD complaints, and as recently as July 2015, a complaint filed with DHCR, that Petitioner and its predecessor in interest had written notice of TF's name and occupancy of the Subject Premises. As such Petitioner was not entitled to name TF as Jane Doe pursuant to CPLR 1024 [*Triborough Bridge and Tunnel Authority v Wimpfheimer* 165 Misc2d 584; *1234 Broadway LLC v Ying* 50 Misc 3d 140(A)].

Petitioner's motion to dismiss the seventh affirmative defense is granted. The pleadings assert that Respondent vacated the Condo on West 122<sup>nd</sup> Street in 2014 prior to the service of the Golub Notice herein, as such there was no reason for Petitioner to serve Respondent at said address.

Petitioner's motion to dismiss the eighth affirmative defense is also granted. The eighth affirmative defense merely denies that Respondent received any predicate notice or petition at the

alternate address. This is insufficient to rebut the affidavits of service or require a traverse hearing (*In re de Sanchez* 57 AD3d 452).

Petitioner's motion to dismiss Respondent's ninth and tenth affirmative defenses is denied. If TF establishes an affirmative recognition of her tenancy by Petitioner's predecessor in interest this would be a valid defense in the proceeding [*Johny v Tolbert* 8 Misc3d 130(A); *Matter of Equity Props. Corp. v Joy* 49 AD2d 630; *Riverside Holdings LLC v Murray* 2002 WL 992085].

Petitioner's motion to dismiss the twelfth affirmative defense which asserts the proceeding is frivolous is granted. Where TF continued to sign leases in the name of Respondent it can not be said that the underlying claim is frivolous as a matter of law.

Respondent's cross-motion for summary judgment is denied. The defenses upon which Respondent seeks summary judgment all raise contested issues of fact which must be decided at trial, the primary issue being whether Petitioner's predecessor in interest recognized TF as a tenant upon Respondent's permanent vacature.

Petitioner's motion for use and occupancy is granted to the extent of directing TF to pay use and occupancy *pendente lite* by the tenth of each month from May 2016 forward without prejudice to the rights of either party.

Petitioner's motion for discovery is granted to the extent of directing Respondent and TF to appear for depositions within 60 days of the date of this order. To the extent Petitioner seeks documents from Respondent and TF that part of the motion is denied. Respondent acknowledges that she permanently vacated the Subject Premises in 2001, based on the foregoing Petitioner has

failed to establish ample need for the documents sought from Respondent pertaining to her primary residency.

Similarly most of the documents sought by Petitioner from TF also relate to the non-primary residency claim as against Respondent and therefore Petitioner has no ample need for same. Moreover, TF has already provided the documents pertaining to her central defense in this proceeding to Petitioner. As to TF, the denial is without prejudice to renewal, upon a carefully tailored request for specific relevant documents, after the depositions of Respondent and TF are completed, if ample need for same can be established.

The proceeding is marked off calendar pending the completion of discovery, and may be restored upon completion by stipulation.

This constitutes the decision and order of the Court.

Dated: New York, New York  
April 20, 2016

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Sabrina B. Kraus, JHC

TO: GARY WACHTEL, ESQ  
Of Counsel to Smyth Law PC  
Attorney for Petitioner  
450 Seventh Avenue, Suite 1905  
New York, NY 10123  
212.371.6500

GOODFARB & SANDERCOCK, LLP  
Attorneys for Respondent  
By: Margaret B. Sandercock, Esq.  
880 Third Avenue - 13<sup>th</sup> Floor  
New York, NY 10022  
212.509.0440



