

<b>Mercedes v Metro Mgt. Dev. Corp.</b>
2017 NY Slip Op 30242(U)
January 31, 2017
Supreme Court, New York County
Docket Number: 450717/16
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
ROSSANNA MERCEDES,

Index no. 450717/16

Plaintiff,

**DECISION AND ORDER**

-against-

METRO MANAGEMENT DEVELOPMENT CORP.,  
NY HOLDING CO. ASSOCIATES, and  
FRANCISCO LEANDRO PENA OLIVO,

Defendants.

-----X  
BARBARA JAFFE, JSC:

**For plaintiff:**  
Courtney Libon, Esq.  
The Legal Aid Society  
Harlem Community Law Office  
230 East 106<sup>th</sup> St.  
New York, NY 10029  
212-426-3000

**For defendant Olivo, self-represented:**  
2969 Briggs Ave., Apt. 21  
Bronx, NY 10458

A hearing was held before me on plaintiff's application for an order requiring defendants to show cause why they should not be preliminarily enjoined from commencing or continuing eviction or ejectment proceedings against her, including a stay of all proceedings in an ejectment action commenced by defendant Olivo (defendant) against plaintiff under index No. 007706/16 in the housing part of the Civil Court, Bronx County, and awarding plaintiff costs and disbursements. Plaintiff claims that she is the sole rent-stabilized successor-tenant of apartment 22 at 125 Sherman Avenue, New York, New York 10034, and has filed an action for a judgment declaring same and that the rent-stabilized lease offered to defendant is void, and permanently enjoining the eviction and ejectment proceedings. Defendant opposed; co-defendants took no position.

I granted plaintiff a temporary restraining order staying the ejectment proceeding and held

the hearing. Co-defendants were excused from attending the hearing

By letter dated September 2, 2016, plaintiff advised that she needed time to review subpoenaed documents and asked that the record be kept open for that purpose. By letter dated September 14, 2016, plaintiff advised that there were no further documents for submission. A transcript of the hearing was provided on January 26, 2017.

The sole witnesses for plaintiff were plaintiff, her sister Julieta Mercedes, and on rebuttal, Jose Salazar. Defendant testified and called as witnesses Mercedes Lantigua, Pedro Vizcayno, and Edgar Varillas.

### I. EVIDENCE

It is undisputed that before July 15, 2015, Mariana Banks was the sole tenant of apartment 22 at 125 Sherman Avenue in the Bronx, that plaintiff is Banks's 27-year-old great-granddaughter, and that defendant is Banks's son. It is also undisputed that plaintiff presently resides in the apartment with her infant daughter and that the second bedroom in the apartment is sublet by defendant to a family of three, that defendant is prevented by an order of protection from having any contact with plaintiff, and that upon the death of his mother, the landlord issued defendant a lease dated December 17, 2015, listing him as the sole tenant.

#### A. Plaintiff

Plaintiff testified that in November 2011, following her graduation from college, she moved into apartment 22 at Banks's invitation, and remained there until she became pregnant at the end of 2012. On April 1, 2013, plaintiff moved in with the father of her daughter at 2766 Barnes Avenue in the Bronx. That same month, her grandparents, aunt, and cousins, who had previously lived with Banks, moved out of the apartment and into a NYCHA apartment.

Petitioner claims that on May 12, 2013, she moved back in with Banks, where she and her daughter have lived ever since, and that Banks paid the rent and for all of their food. According to plaintiff, the family in the second bedroom pays monthly rent of \$800 to defendant.

Plaintiff testified that she was very close with Banks, and visited her a few times each month while she was growing up. When plaintiff became pregnant, Banks was supportive, and was sad when plaintiff moved out. Plaintiff was ashamed of herself when she returned to Banks's apartment but Banks welcomed her warmly. They ate together every day and watched television together, and Banks played with plaintiff's daughter, whom she loved. As plaintiff did not start working until her daughter was ten months old, she stayed home with her and Banks every day. Despite her advanced age, Banks was always neat, orderly, clean, and sharp.

In early July 2015, plaintiff, Banks, and other members of Banks's family, including defendant, traveled to Banks's other home in the Dominican Republic for her 100<sup>th</sup> birthday party. Banks had already been diagnosed with cancer. Plaintiff and the family had decided that instead of radiation treatment, she should be kept comfortable and brought to the Dominican Republic where she wanted to be. Banks died of cancer later that month. Plaintiff played an active role in Banks's medical care decisions.

According to plaintiff, defendant, who is her granduncle and Banks's son, never lived in the apartment, but lives with his wife and some of her family in an apartment on Briggs Avenue in the Bronx, which plaintiff regularly visits, and before that, when she was in college, he lived in Inwood. Plaintiff explains that while defendant visited Banks every day, he never spent the night there, although he receives mail there. She also testified that when she last saw defendant at his apartment in the Bronx in October 2015, he explained to her that he wanted her to move out of

the apartment so that he could succeed to Banks's SCRIE benefits. When plaintiff responded that there was no need for the SCRIE benefits because she would be paying the rent, he got angry and upset, and insisted she move out. The following day, on October 12, 2015, the police came to the apartment on defendant's complaint that she had broken in. No arrest was made, and plaintiff denied having broken in to the apartment.

Plaintiff also testified that should defendant succeed with his ejection action, she will be homeless, and that although her daughter's father offered her shelter, it would be "a nightmare," and she would only send her daughter to live there while she tries to find alternatives. Presently, she works part time and is in school, and as she has no credit, she cannot rent an apartment. Her parents have no room for her and they live far from her work and school. She would be able to afford the monthly \$800 rent for Banks's apartment.

Plaintiff's sister, Julieta Mercedes, testified that plaintiff lived with Banks since December 2011, after moving from Florida, and until Banks's death, that plaintiff's daughter grew up in Banks's apartment, and that plaintiff was always at the hospital during Banks's illness. Mercedes visited them once a week and is very concerned for her niece's welfare. Mercedes also stated that defendant lives in the Bronx, and had never seen evidence of his having lived in Banks's apartment.

In support of her testimony, plaintiff offered several family photographs of her and Banks, all taken between July 2013 and July 2015, and the following documents addressed to her at apartment 22:

- 1) HRA's address history screen covering August 1, 2002 to May 21, 2012;
- 2) copies of pay stubs dated January 4, 11, 18, and 25, 2013;

- 3) her daughter's birth certificate dated September 3, 2013;
- 4) notices from the New York City Human Resources Administration (HRA) dated February 15, 2014 and August 15, 2014;
- 5) New York City Payroll Management System Record Selection screen covering July 6, 2014 to November 3, 2015 (Pl. Exh. 1);
- 6) Medicaid notices dated September 11, 24, 2014, and November 18, 2014; and
- 7) W-2 Wage and Tax Statements for tax years 2014 and 2015.

Plaintiff also submitted documentary evidence reflecting that she lived elsewhere:

- 1) a declaration of support dated August 26, 2012, indicating that since January 2012, she was supported by her godmother Josefina Rodriguez at apartment 42;
- 2) an application for Child Health Plus dated April 23, 2012, sent to her at apartment 42 and indicating that she lived with her godmother;
- 3) HRA's address history screen reflecting that from April 26, 2012 to October 2, 2013, she resided in apartment 42;
- 4) Medicaid notices dated May 22, and 23, 2012, and January 31, 2013, addressed to her at apartment 42;
- 5) an application dated January 14, 2013 for Medicaid benefits addressed to her at apartment 42;
- 6) her application for Medicaid dated February 23, 2013, addressed to her at apartment 42, and reflecting a change of address to 3057 Bailey Avenue in the Bronx;
- 7) an application for Child Health Plus dated August 25, 2013, and attached to the August 15, 2014, HRA notice, reflecting her address as apartment 42;
- 8) Medicaid notice dated October 4, 2013, addressed to her at a New Jersey address; and

9) a copy of an undated envelope sent from a family medical practice addressed to her at apartment 42.

B. Defendant

Defendant denied that plaintiff ever lived in the apartment, and testified that he is in the process of evicting her from it as he has been paying the rent the entire time.

Defendant testified that he has lived in the apartment for the last 35 years, although on cross-examination, he admitted that from 1979 or 1980, when he married his wife, they lived together at 10 Cooper Avenue in Manhattan until they separated in approximately 1995, only again to assert that he has lived at the subject apartment since 1983. He claims that he is ill and that the apartment is rightfully his because the landlord, once his mother died, put his name on the lease.

In October 2015, while defendant was with his wife at her apartment at 2969 Briggs Avenue in the Bronx, he received a telephone call from the tenants of the apartment's second bedroom informing him that plaintiff and her father had broken into the apartment from the fire escape. Thus, defendant called the police. When defendant arrived at the apartment, he saw that the door to Banks's room had been broken and that plaintiff had removed from it all of his clothes and personal effects. He offered in evidence a domestic incident report containing his statement to the police and his supporting deposition. (Def. Exh. A). In March 2016, plaintiff obtained a protective order against defendant, which keeps him from the apartment.

Lantigua testified that she used to visit Banks and do errands for her, and that her mother lives on the first floor of the subject premises. According to Lantigua, defendant lived with Banks in 2013, 2014, and 2015, due to her advanced age and need of his assistance. "It was only

the two of them, that's all." (Tr. at 17, line 15). She does not know plaintiff and had never seen her before.

Vizcayno testified that he has lived in the subject apartment with his wife since approximately 2011, and that defendant stayed there with his mother "almost always." (Tr. at 20, line 24). His wife pays defendant \$600 a month in rent. According to Vizcayno, plaintiff never lived in the subject apartment, and that the only reason she lives there is because she broke in, which his son told him.

Varillas testified that he lives in apartment 31 at the subject premises, and that Banks used to take care of his children who often stayed with her. He denied knowing plaintiff, and stated that from 2013 to 2015, defendant lived in the subject apartment, something he knew because he saw defendant living there with Banks, and that defendant slept there every weekday night. Because his children stayed with Varillas on weekends, he could not state that he saw defendant sleep there on weekends. On cross-examination, however, Varillas admitted that his children, the youngest of whom is now 22 or 23, were taken care of Banks when they were children during the 1980s. He also clarified that from 2013 to 2015, he did not go to Banks's apartment.

Defendant offered the following documentation addressed to him at apartment 22:

- 1) notice from the US Citizenship and Immigration Services dated December 19, 2005 and March 2, 2006;
- 2) a notice of assessment from the New York State Department of Motor Vehicles, dated January 24, 2013;
- 3) notices from SafeLink dated November 7, 2014, and February 6, 2015;

- 4) a notice from the Social Security Administration dated November 30, 2014;
- 5) advice of payment of personal injury settlement dated December 6, 2014;
- 6) statement from a medical group for services rendered, dated May 7 and 15, 2015;
- 7) a lawyer's letter seeking payment of a debt, dated May 28, 2015;
- 8) bills for child support dated May 29, 2015, August 28, 2015, November 27, 2015, February 26, 2016, March 24, 2016, May 27, 2016, and June 24, 2016;
- 9) notices from the New York State Workers' Compensation Board dated August 12, 2015 and February 5, 2016;
- 10) correspondence from the Social Security Administration, dated after September 28, 2015;
- 11) Chase Bank statements dated November 12, 2015, December 11, 2015, February 9 and 11, 2016, March 11, 2016, April 13, 2016, May 12, 2016, and June 11, 2016;
- 12) correspondence from Chase Bank dated November 20, 2015, December 2, 2015, January 14, 2016, and April 15, 2016;
- 13) correspondence from JPMorgan Chase Bank dated November 21, 2015, and June 24, 2016;
- 14) monthly bills from Metro Management dated from January 1, 2016, through August 1, 2016;
- 15) monthly prescription drug summaries from Express Scripts dated from February 2016 to July 2016;
- 16) renewal lease for apartment 22 dated February 22, 2016;
- 17) notice from the New York State Office of Temporary and Disability Assistance, dated February 29, 2016, and March 4, 2016;
- 18) DHCR docketing acknowledgment notice dated March 18, 2016;
- 19) a notice of rent owed on apartment 22, dated April 22, 2016;

- 20) attorney letter dated March 7, 2016 advising that the office was appointed by the Family Court to represent him in an action against him by plaintiff;
- 21) attorney letter relating to an unrelated matter, dated April 22, 2016,;
- 22) HRA's request for documentation dated May 3, 2016;
- 23) blank application for SCRIE benefits mailed to him on May 3, 2016;
- 24) HRA's receipts for documentation dated May 9, 2016, and May 17, 2016;
- 25) a notice of decision from HRA dated May 19, 2016; and
- 36) notice of collection for a debt owed dated June 22, 2016.

Defendant also submitted a litigation closing statement from his attorney in an unrelated matter, dated May 20, 2016, addressed to him at 2969 Briggs Avenue, apartment 21, Bronx, New York 10458.

#### C. Plaintiff's rebuttal

According to Salazar, plaintiff's rebuttal witness, also a resident of 125 Sherman Avenue, plaintiff has lived in the apartment since her child was born. He knows that she lives there because he sees her going to work each day and returning to the apartment at night. Salazar denied knowing where defendant lived between 2013 and 2015 but would see him at the apartment on a weekly basis when Banks was there. He testified that defendant did not live there because he never saw him going to work or coming back to the apartment after work, nor did he see him taking out the trash.

### II. ANALYSIS

#### A. Preliminary injunction

Pursuant to CPLR 6301, the court may grant a party a preliminary injunction "where it

appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights." To obtain a preliminary injunction, the moving party has the burden of demonstrating, by non-conclusory statements, the likelihood of success on the merits, a danger of irreparable injury, and that the balance of equities is in its favor.

(Vincent C. Alexander, Practice Commentaries, McKinneys Consol Laws of New York, CPLR 6312, Bk 7B, C6312:1 [2010]). Moreover, where a denial of injunctive relief will render a final judgment in the party's favor ineffectual, the degree of proof required to show a likelihood of success on the merits is reduced. (*See Republic of Lebanon v Sotheby's*, 167 AD2d 142, 145 [1<sup>st</sup> Dept 1990]).

#### B. Succession to the apartment

Pursuant to the Rent Stabilization Code, where a tenant has permanently vacated a housing accommodation,

any member of such tenant's family, as defined in section 2520.6(o) of this Title, who has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years . . . immediately prior to the permanent vacating of the housing accommodation by the tenant . . . shall be entitled to be named as a tenant on the renewal lease.

(9 NYCRR § 2523.5[b][1]).

Thus, a tenant's family member, as defined in 9 NYCRR § 2520.6(o), may succeed to the tenant's lease if the family member resided with the tenant in the apartment as a primary residence for no less than two years immediately before the tenant's permanent vacatur of the apartment. Family members, as defined in the Code and as pertinent here, do not include great-grandchildren, unless the great-grandchild, as any other person, has resided with the tenant in the apartment "as a primary or principal residence . . . if [such person] can prove emotional and

financial commitment, and interdependence between such person and the tenant.” (9 NYCRR

§ 2520.6[o] [1], [2]). Factors to be considered in making such a determination include:

- (I) longevity of the relationship;
- (ii) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life;
- (iii) intermingling of finances as evidenced by, among other things, joint ownership of bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget for purposes of receiving government benefits, etc.;
- (iv) engaging in family-type activities by jointly attending family functions, holidays and celebrations, social and recreational activities, etc.;
- (v) formalizing of legal obligations, intentions, and responsibilities to each other by such means as executing wills naming each other as executor and/or beneficiary, granting each other a power of attorney and/or conferring upon each other authority to make health care decisions each for the other, entering into a personal relationship contract, making a domestic partnership declaration, or serving as a representative payee for purposes of public benefits, etc.;
- (vi) holding themselves out as family members to other family members, friends, members of the community or religious institutions, or society in general, through their words or actions;
- (vii) regularly performing family functions, such as caring for each other or each other's extended family members, and/or relying upon each other for daily family services;
- (viii) engaging in any other pattern of behavior, agreement, or other action which evidences the intention of creating a long-term, emotionally committed relationship.

(9 NYCRR § 2520.6[o] [2]).

Given these rules and guidelines, in order to demonstrate a likelihood of success on the merits on her claim for a judgment declaring her to be in rightful possession of apartment 22, plaintiff must prove, by a preponderance of the evidence, that: 1) from July 2013 until Banks's death on July 15, 2015, apartment 22 was her primary residence, as defined in the governing regulations, and 2) she and Banks were emotionally and financially committed to one another and were interdependent.

#### 1. Primary residence

Plaintiff's 2014 and 2015 W-2 Wage and Tax Statements reflect that plaintiff resided at

apartment 22 in 2014 and 2015, and some HRA and Medicaid notices were sent to her at that address in 2014. The sole relevant evidence offered as to her residence in 2013 is her daughter's birth certificate, which proves only that she reported that address to the registry. Her application for Child Health Plus dated August 25, 2013, and a Medicaid notice dated October 4, 2013, however, were sent to her at other addresses, Salazar's credible testimony is offset by Lantigua's credible testimony, and her sister's testimony is colored by her interest in the case.

To the extent that defendant attempted to prove that plaintiff did not primarily reside in apartment 22 between July 16, 2013 and July 15, 2015, because he lived there then, his evidence is also insufficient. He not only gave confusing testimony about the duration of his residence there, but Vizcayno's testimony is colored by the favorable terms of his subtenancy with defendant, and Varillas's testimony was impeached. Lantigua's testimony, while credible, is offset by Salazar's. And although notices from various entities were sent to him at apartment 22, they commence in November 2014 and end at the end of May 2015. That they extend into 2016 is immaterial, as again, the period in question is July 16, 2013, to July 15, 2015. He offered no evidence relating to 2013 and most of 2014 and 2015.

Defendant also attempted to prove that because plaintiff broke into apartment 22 on October 12, 2015, she must not have lived in the apartment from July 16, 2013 to July 15, 2015. Not only did the alleged break-in occur outside the period in issue, but defendant's allegations are not supported by admissible, nonhearsay evidence, as neither he nor Vizcayno personally observed the alleged break-in. The domestic incident report is inadmissible, but even if it were admissible, it is not probative as it solely reports defendant's prior consistent statements which are also inadmissible. Moreover, defendant's specific testimony that plaintiff had broken the

lock of Banks's room and removed his clothing and personal possessions, although unchallenged, does not prove that apartment 22 was not plaintiff's primary residence even if it had occurred during the pertinent period.

## 2. Emotional and financial commitment and interdependence

It was essentially undisputed, and otherwise satisfactorily proven, that plaintiff's relationship with Banks extended for plaintiff's entire life up until Banks's death, that plaintiff relied on Banks for support, that they jointly attended family functions and celebrations, and that plaintiff assisted Banks with medical decisions during her final illness. She offered no evidence, however, that they shared household or family expenses, intermingled their finances or formalized any legal obligations.

## III. CONCLUSION

Based on these findings, and notwithstanding the paucity of defendant's evidence, plaintiff failed to prove, by a preponderance of the credible evidence, that from July 16, 2013 to July 15, 2015, she primarily resided in apartment 22, and thus, she does not demonstrate a likelihood that she will succeed on the merits here, even taking into account the irreparable harm she will suffer incident to an ejection. However, the balance of equities favors plaintiff, as the harm to her if ejected is greater than the harm to defendant, who has alternative accommodations and receives monthly income from the rent he receives from Vizcayno which amounts to 75 percent of the total monthly rent. Moreover, if plaintiff is denied injunctive relief, any eventual judgment in her favor will be ineffectual if she is ejected in the meantime.

Accordingly, it is hereby

ORDERED, that defendants are preliminarily enjoined from continuing eviction or

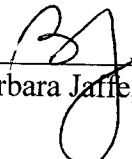
ejection proceedings against her, including a stay of all proceedings in the ejection action under index No. 007706/16; it is further

ORDERED, that defendant file and serve an answer on or before February 28, 2017; it is further

ORDERED, that the parties are to attend a preliminary conference on March 15, 2017 at 2:15 pm, at 80 Centre Street, room 279, New York, NY 10013; and it is further

ORDERED, that plaintiff provide defendant with copies of all of the subpoenaed documents submitted following the hearing on this motion on or before February 28, 2017, if she has not yet done so.

ENTERED:

  
\_\_\_\_\_  
Barbara Jaffe, JSC

DATED: January 31, 2017  
New York, New York