

3648 White Plains LLC v Mensah
2017 NY Slip Op 31459(U)
July 12, 2017
Civil Court of the City of New York, Bronx County
Docket Number: LT-900509/2017
Judge: Sabrina B. Kraus
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 52

3648 WHITE PLAINS LLC,
& EFUYEMI OGUNYINKA

X

Petitioner

-against-

DECISION & ORDER

Index No.: LT - 900509/17

HON. SABRINA B. KRAUS

OWUSU MENSAH
OWUSU MENSAH CORPORATION
JOHN DOE / JANE DOE
3648 White Plains Road
Ground Floor Store
Bronx, New York 10467

Respondents

X

BACKGROUND

This summary holdover proceeding was commenced by **3648 WHITE PLAINS LLC**, and **EFUYEMI OGUNYINKA** (Petitioners) and seeks to recover possession of the ground floor store located at 3648 White Plains Road, Bronx, NY 10467 (Subject Premises), based on the allegation that the tenants of record, **OWUSU MENSAH** and **OWUSU MENSAH CORPORATION** (collectively “Respondents”) lease has expired, and that Respondents’ subsequent monthly tenancy was terminated.

PROCEDURAL HISTORY

Petitioners issued a Thirty Day Notice of Termination, terminating Respondents’ tenancy effective, February 28, 2017. The Petition is dated March 1, 2017, and proof of service was filed March 28, 2017.

Petitioners filed a consent to change attorney on March 23, 2017.

The proceeding originally appeared on the Part 52 calendar on April 3, 2017, at which time Respondents failed to appear and the proceeding was adjourned to April 12, 2017, and the court sent Respondents a postcard.¹

On April 25, 2017, Petitioners' counsel filed an affirmation of actual engagement, asking that the proceeding be adjourned to another day. The court adjourned the proceeding to May 16, 2017, and sent Respondents a post card.

On May 16, 2017, Respondents failed to appear and the proceeding was adjourned to June 1, 2017, for inquest.

On June 1, 2017, the proceeding was adjourned to June 8, 2017. Again the file indicates Respondents had not appeared and a post card was sent notifying them of the date.

On June 8, 2017, the Respondents appeared by counsel, the court (Dominguez,J) denied Petitioners' oral application for use and occupancy, and the proceeding was adjourned to July 11, 2017, for motion practice.

On July 11, 2017, Respondents moved to dismiss the proceeding alleging lack of standing and lack of subject matter jurisdiction. Petitioner submitted opposition papers, the court heard oral argument and reserved decision.

¹ On April 12, 2017, the proceeding was marked dismissed no appearance either side by the court (Rivera, J). However, further court appearances were made, and Judge Rivera later set an inquest date. Therefor, as discussed with counsel, on the record, at the time the pending motion was submitted, the court is construing said dismissal to have been vacated based on the further court proceedings and the conduct of the parties.

**PETITIONERS RETAIN STANDING TO MAINTAIN THE PROCEEDING
NOTWITHSTANDING THE JUDGMENT OF FORECLOSURE**

Respondents move to dismiss the proceeding under CPLR § 3211 (a)(3), which provides for dismissal where the party asserting the cause of action lacks capacity to sue. Respondents rely on a judgment of foreclosure and sale, issued May 17, 2017, for the property in which the Subject Premises are located.

Although a judgment of foreclosure and sale has been issued, it is conceded that the actual sale of the property has not yet occurred. It is well settled that the rights and interest of the owner of the property only “... becomes barred and foreclosed upon the actual sale and conveyance made thereunder and not on the date of entry of the judgment of foreclosure (*Banque Arable Et International, et al v. One Times Square Limited Partnership*, 223 AD 2d 384 [1st Dept] citing, *Dulberg v Ebenhart*, 68 AD2d 323, 327).” The entry of a judgment of foreclosure does not divest the owner of his interest in the property until there is an actual sale (*Carnavalla v Ferraro* 281 AD2d 443).

The provision barring others of their interest in, or their rights of equity of redemption in, the mortgaged premises, of necessity relates to the final concluding act- that of a sale of the premises. Until that time the mortgagee or the owner of the equity of redemption may redeem... but, as soon as the sale is made, confirmed, and conveyance delivered, that provision of judgment becomes operative and of full force, and the parties to the action are forever thereafter barred and foreclosed of all their right, title, interest and equity of redemption.
(*Nuts v Cuming* 155 NY 309).

Petitioners’ right to maintain this proceeding was not terminated on May 17, 2017, upon the signing of the judgement of foreclosure. Since the property has yet to be sold, Petitioners are still considered to be the landlord and owner, and as defined by RPAPL §721(1) retain standing to maintain this holdover proceeding.

Based on the forgoing, Respondents' motion to dismiss for lack of standing is denied.

**CIVIL COURT HAS SUBJECT MATTER JURISDICTION
OVER THIS HOLDOVER PROCEEDING**

Jurisdiction over summary proceedings is conferred upon the Civil Court by the State Constitution (N.Y. Const, art VI, § 15[b]) and by the State Legislature, acting pursuant to the mandate of this constitutional provision (CCA 204; RPAPL 701; see *Wilson Han Assn. v. Arthur*, NYLJ, July 6, 1999 [App Term, 2d & 11th Jud Dists]; cf. *Lacks v. Lacks*, 41 N.Y.2d 71, 74–76, 390 N.Y.S.2d 875, 359 N.E.2d 384).

[*Chan v. Adossa*, 195 Misc. 2d 590, 594 (App. Term 2003)].

“Pleading irregularities in a petition do not render a summary proceeding jurisdictionally defective where, as here, Civil Court has subject matter jurisdiction under RRAPL article 7 and personal jurisdiction over the tenant has been obtained (see *Birchwood Towers # 2 Assoc. v. Schwartz*, 98 A.D.2d 699, 700 [1983]; *Jackson v. New York City Hous. Auth.*, 88 Misc.2d 121, 122 [1976]). [*E. Midtown Plaza Hous. Co. v. Cannings*, 14 Misc. 3d 127(A) (App. Term 2006)].”

Respondents' argue the predicate notice is defective on its face, in that it fails to provide a breakdown of rental arrears alleged owed. However, failure to include a recitation of arrears is not a defect in a predicate notice terminating a month to month tenancy.

Based on the forgoing, Respondents' motion to dismiss for lack of subject matter jurisdiction is denied.

Respondents have neither served and filed an answer, nor sought leave to do so, as such a general denial is deemed interposed on behalf of Respondents.

Trial is set for August 3, 2017 at 9:30 am in room 529(A).

This constitutes the decision and order of this court.²

Dated: July 12, 2017
Bronx, NY

Hon. Sabrina B. Kraus
JCC

TO: MALDONADO & CRUZ PLLC
Attorneys for Respondents
By: VICTOR E. NEGRON, ESQ
181 East 161st Street
Bronx, NY 10451
718.828.6050

MADU, EDOZIE & MADU, PC
Attorneys for Petitioners
By: UCHE EMELUMADU, ESQ.
1599 East Gunhill Road
Bronx, NY 10469
718.379.3500

² In its opposition papers, Petitioner makes a request for use and occupancy, however no cross-motion was served and filed for said relief and Petitioners' oral application for use and occupancy was denied by the court (Dominguez, J) on June 8, 2017, as such the court does not address that issue in this decision.

