

2 Hamilton Ave. Co, Inc. v Operation Prom
2019 NY Slip Op 32498(U)
July 8, 2019
City Court of New Rochelle, Westchester County
Docket Number: LT 253-19
Judge: Susan I. Kettner
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CITY COURT OF THE CITY OF NEW ROCHELLE
COUNTY OF WESTCHESTER

.....X
2 Hamilton Avenue Co, Inc., c/o Sedgefield
Management Ltd.

INDEX NO. LT 253-19

Petitioner-Landlord,

-against-

**Amended
DECISION AND ORDER**

Operation Prom and John Doe and/or Jane Doe,

Respondents-Tenants,

.....X

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Kettner, J.:

In this commercial summary proceeding for non-payment¹ and possession, a trial was held on June 3, 2019, at which time the Court reserved decision and afforded both parties the opportunity to submit post trial memoranda.

Background

Petitioner originally commenced a previous summary proceeding (“The First Proceeding”), seeking the same relief as in the present case, on or about January 2, 2019. The Court (Carbone, J.) dismissed the action without prejudice, by decision and order dated April 1,

¹The amount set forth in the petition, dated February demanded the amount of \$6,695.00 in past-due rent. The amount now allegedly owed is \$12,051.00, representing past-due rent through the month of June, 2019.

2019. Petitioner subsequently commenced the instant proceeding.

At the trial, the following was received into evidence

Petitioner's Exhibit 1,	Lease between the Parties, dated 7/31/17 for a two-year, one month term
Petitioner's Exhibit 2	Rent Ledger for the months of 10/1/18 through 6/1/19
Respondent's Exhibit A	Notice of Petition and Petition, dated 2/8/19 and Three Day Notice to Pay ("The Second Proceeding" or "Instant Proceeding")
Respondent's Exhibit B-1	Photo of mice droppings on window sill
Exhibit B-2	Photo of water leak stains
Exhibit B-3	Photo of cockroach in premises
Respondent's Exhibit C	Notice of Petition and Petition, dated 1/2/19 ("The First Proceeding")
Respondent's Exhibit D-1	Letter dated 7/31/18 from respondent to petitioner requesting modification of lease
Exhibit D-2	Letter dated 10/13/18, regarding) 12/31/18 vacature of the premises.
Respondent's Exhibit E	Copy of text message, dated 1/7/19 between respondent and "Judy" the super, advising of 1/6/19 vacatur of premises

FACTS

The credible facts adduced at the non-jury trial, established the following facts, which are largely undisputed:

Petitioner leased commercial premises to respondent, non-profit 501-c organization for a term beginning July 1, 2017 and ending on July 31, 2019 with an initial monthly rent of

\$1,300.00 per month. The lease called for a monthly rental of \$1,339.00 for the second year and \$1,378.00 for the third year. Respondent testified that petitioner had originally promised them a particular office suite which petitioner was unable to deliver. Due to the substitution, respondent tried to "break" the lease, but was unsuccessful in doing so.

Respondent testified that she communicated directly with the superintendent, "Joe" by text regarding the problems they were experiencing at the premises, such as roof leaks, and bug infestation. Photos of the conditions were received into evidence detailing the conditions during the Spring and Summer of 2018. When the superintendent passed away, his widow, "Judy" took over his responsibilities and respondent communicated with her regarding matters involving the premises.

Due to loss of a significant grant and donor funding, the respondent requested a modification of the lease, (Exhibit C), which was denied. Subsequently, respondent sent petitioner a letter (Exhibit D), announcing their decision to vacate by the end of December, 2018.

On January 6, 2019, the respondents vacated the premises, one day after the superintendent, "Judy" informed them that the petitioner had filed a non-payment proceeding against them. ("The First Proceeding"). This text exchange was memorialized in a copy of the text message set forth in Respondent's Exhibit E.

After the first petition was dismissed without prejudice *and* respondent vacated the premises, the petitioner filed the instant non-payment proceeding seeking the same relief.

CONCLUSIONS OF LAW

Petitioner claims that respondent never properly terminated the lease, citing the fact that t

the keys were never turned over and that the superintendent, "Judy" lacked any authority to accept a surrender of the premises.

The un-rebutted testimony demonstrated that the respondent vacated the premises after the first non-payment petition was filed on January 2, 2019 and that the first non-payment petition was dismissed without prejudice.

"[A] summary proceeding, being a possessory remedy, lies only against the tenant in possession and those in possession under the tenant", *Park Prop. Dev. v Santos*, 1 Misc3d 16, 767 NYS2d 558, citing *Euclid Holding Co. v Schulte*, 153 Misc 455, 461, *revd on other grounds*, 153 Misc 455, 461 (1934). To maintain a summary non-payment proceeding, an essential jurisdictional element requires that the respondent be in possession of the premises when the proceeding is commenced. *First National City Bank v Wall Street Leasing Corp.*, 80 Misc2d 707, 363 NYS2d 699 (1974). The overwhelming evidence in the instant case established that the respondent vacated the premises prior to the filing of this action, thus divesting this Court of jurisdiction.


Petitioner's argument that there was no proper relinquishment by tenant and acceptance by the landlord constituting a valid surrender goes to the parties' substantive rights under the lease and misses the point. The issue here is purely jurisdictional and this Court cannot address the merits of the case. Simply put, a summary proceeding cannot lie where respondent did not physically possess the premises when the proceeding was commenced. The Court does note that petitioner is not without further remedy as it may seek relief in another forum under the terms of

the lease.²

Accordingly, the matter is dismissed

The foregoing constitutes the Decision and Order of the Court.

Dated: July 8, 2019
New Rochelle, New York



Hon. Susan I. Kettner
City Court Judge

²Should the evidence support such a claim.