

4960 Broadway LLC v Molina
2019 NY Slip Op 33892(U)
December 4, 2019
Civil Court of the City of New York, New York County
Docket Number: 82220/15
Judge: Anne Katz
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CCIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART R

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4960 BROADWAY LLC
C/O SOL GOLDMAN INVESTMENTS LLC,

Petitioner-
Landlord,

-against-

WASHINGTON MOLINA A/K/A
WASHINGTON A. MOLINA

Respondent-
Tenant

and

DIEGO MOLINA, NANCY REYES,
"JOHN DOE" AND "JANE DOE"

Respondents-
Undertenants.

Index No.: L&T 82220/15
DECISION/ORDER

-----X
HON. ANNE KATZ:

In this holdover proceeding petitioner seeks possession of 4960 Broadway, Apartment 4H, New York, New York 10034 ("premises"). The premises are subject to the Rent Stabilization Law of 1969, as amended. Petitioner alleges that respondent Washington Molina a/k/a Washington A. Molina ("respondent") has held over and continues in possession of the premises without the permission of petitioner. Petitioner demanded that respondent vacate the premises by September 30, 2015 pursuant to a "Notice To Tenant Pursuant to Rent Stabilization Code ("RSC") Section 2524 © of Owner's Intention Not to Renew a Lease Due to the Grounds Set Forth in RSC 2524.4(c) Regarding the Requirement that the Tenant Occupy the Housing Accommodation as the Tenant's Primary Residence and Notice of Termination and Intention to Commence Summary Proceeding" ("Notice"). Respondent failed to vacate and petitioner commenced this proceeding by Notice of Petition and Petition dated October 7, 2015. Respondent appeared, by counsel, and submitted a Verified Answer with Counterclaims dated March 22, 2016 ("Answer"). The Answer alleged that respondent resides at the premises with his brother, Diego Molina ("Diego") and mother, Nancy Reyes ("Reyes"). Respondent also asserted a counterclaim for legal fees. On August 18, 2018, the parties stipulated to Exhibits (P1)-(P5) and (RA)-(RJ). Additional exhibits were submitted into evidence at trial.

Petitioner's Case

On its *prima facie* case petitioner submitted a certified deed (P1), Multiple Dwelling Registration (P2), DHCR registration (P3), original lease which commenced September 16, 2003 (P4) and last renewal lease which commenced June 26, 2013 (P5).

Petitioner called respondent as its first witness. Through respondent, petitioner submitted a letter dated August 2, 2015, from respondent to petitioner (P6). The letter requested petitioner issue respondent a renewal lease. The letter alleged that petitioner was aware respondent resided at the premises with Reyes. The letter also stated that Diego Molina resided at the premises and respondent denied that he sublet the premises. The letter stated the superintendent's claim that he only sees Reyes and Diego at the building was "impossible" because Diego works from 5am to 9pm six days a week and Reyes does not leave the premises without respondent. The letter further stated that superintendent is often absent from the building and it is not easy to obtain repairs or get paper work done. Through respondent, petitioner submitted respondent's E-Z pass statements from September, 2013 through November 2013 (P7). Initially the E-Z pass statements were addressed to respondent at 19 Spring Avenue, Bergenfield, New Jersey 07621 ("New Jersey address") but in September, 2015 after service of the Notice, the E-Z pass statements were addressed to the premises. On cross examination, respondent stated the premises are his only residence, he never sublet the premises and he takes care of Reyes who is disabled. Respondent testified that from October 1, 2013 through September 30, 2015, the relevant time period, he shared a car with his sister who lives in Yonkers. According to respondent, his sister drove the car three or four times a week to New Jersey and that the E-Z pass charges do not reflect where he slept.

Petitioner's next witness was Lorik Fejza ("Fejza"), the superintendent who has been employed since April 1, 2013. Fejza testified he resides in the basement apartment of the building which is six stories high, contains 47 apartments, stairs and an elevator. Fejza testified that during the relevant time frame he did not observe respondent at the premises "very often" but did observed another male, Reyes and her attendant. Fejza could not recall if he made repairs at the premises. Fejza testified he works from 6am to 5pm sweeping the lobby then from 6am to 7am, checking each floor (for 15 to 20 minutes) and at about 8am he tends to tenants' complaints. On cross examination, Fejza testified he cannot see the lobby from his basement apartment, he works from his basement apartment, eats lunch and drinks in his basement apartment and does not pay rent for the apartment. Fejza also admitted he leaves the building after 5pm. According to Fejza, he only saw Reyes a few times during the relevant time and when he went to the premises Reyes was always present with an attendant. On re-direct, Fejza testified he sees approximately 15 to 20 tenants each day.

Petitioner rested.

Respondent's Case

Respondent's first witness was Glorja Cabrera ("Cabrera"), a 20 year resident of the building and respondent's next door neighbor. Cabrera testified she is disabled, does not work, is home every day, she is friendly with respondent and sees him once or twice a week. Cabrera testified she notices respondent because she opens her door when she hears the door to the subject premises open. According to Cabrera, she met respondent and Reyes when they moved into the premises. Cabrera could not recall when Fejza became the super but alleged she only sees him once a week in the early morning or evening. Cabrera testified Reyes was wheelchair bound but did not know how often she had an attendant. Cabrera also admitted that petitioner has sued her numerous times and has sent two different notices not to renew her lease. On cross

examination, Cabrera testified she was injured in 2006, had surgery in 2016 for which she took painkillers, medications, antidepressants and the injury hindered her ability to focus. Cabrera was unable to testify as to whether respondent slept at the premises.

Respondent's next witness was Maria Carbajal-Sanchez ("Sanchez"). Sanchez was Reyes' home health aid from June, 2014 through February, 2017. Sanchez testified she worked almost everyday, 24 hours per day but changed her testimony to reflect she worked five days per week from 8am to 10pm and slept at the premises from Sunday through Thursday even though she was not working. Sanchez testified she and Reyes slept in the bedroom and respondent and Diego slept in the living room. She testified that she saw respondent four to five nights per week at the premises that he ate at the premises and helped to take care of Reyes. Sanchez testified that respondent stayed in New Jersey with his girlfriend one or two days per week. Sanchez also testified that another attendant worked with Reyes on Friday and Saturday. On cross examination, Sanchez testified that Reyes died in March, 2018 and she stopped working in February, 2018 then corrected her testimony to reflect she worked until February, 2017.

Diego Molina ("Diego"), respondent's brother, also testified. Diego testified that he moved into the premises with respondent in 2003 and that he and respondent slept in the living room while Reyes and the attendant slept in the bedroom. Diego testified that he saw respondent in the mornings and evenings and respondent slept at the premises except two times a month when he would "leave and not return". Diego did not know where respondent worked or where he went when he left the premises. Diego testified that respondent had a "friend", Juana Gaby Laras, who lived in New Jersey but did not know much about her. Diego testified he worked in New Jersey and left the premises at 5:30am and returned between 6pm and 7pm. At first Diego stated that he was not home and ate dinner out but changed his testimony to state he, respondent and Reyes ate dinner together. Diego testified he saw Fejza one or two times a month but did not speak to him. On cross examination, Diego testified that he and Reyes moved into the premises in 2004, he did not know the name of the prior superintendent and that Reyes had many attendants but did not know who paid them.

Evelyn Molina ("Molina"), respondent's sister, also testified. Molina testified that she lives in Yonkers and visited respondent at the premises where he lives. Molina testified that family gatherings were at the premises since Reyes was disabled but stated she did not know where respondent slept because that was "personal". According to Molina, she and respondent shared a car for which she paid the insurance and respondent paid the E-Z pass. Respondent testified that she drove the car three to four times per week which included visits to her brothers in New Jersey and her shopping in New Jersey. Molina testified that during the relevant time frame she was self employed as a cleaning woman in Scarsdale and when she needed help respondent helped her with her cleaning jobs. On cross examination, Molina testified that she knew Juana but could not recall when she last saw her although she approximated it was one year ago.

Respondent was the last witness to testify. Respondent testified that he moved into the premises in 2003 and has resided there since. Respondent testified that he resided at the premises with Reyes, Diego and an attendant. Respondent testified that he and Diego slept in the living room and Ryes slept in the bedroom with her attendant and that he and Diego each had a closet in the dining room and Reyes kept her clothes in the bedroom. Respondent testified that he was involved with Juana and sometimes slept at the New Jersey address. However, he testified he did not keep clothes there nor was his name on the lease. Respondent also testified that he took Reyes to shop in New Jersey since there were parking spots; New Jersey is tax free for clothes and he visited siblings who resided in New Jersey. According to respondent, he drove the shared car to New Jersey four or five days a week and his sister used the car two or three times per week. Respondent alleged that his E-Z pass statements were initially sent to the New Jersey address because Juana helped him pay his bills in 2013 and beginning of 2014 but in the beginning of 2014, Juana stopped helping him financially which he stated explained why Exhibit (RC) and Exhibit (RF) were initially addressed to the New Jersey address. Respondent alleged that in the beginning of 2014, respondent and Juana had a fight and she refused to continue to pay his bills so he had his bills redirected to the premises. Respondent testified he was the person who communicated with Fejza about repairs, stated he saw Fejza in the lobby, on the street and once or twice in the basement, where Fejza lived.

Respondent submitted numerous documents to support his alleged primary residence at the premises. The documents included:

1. Chase Statement xxxx2617 from November, 2013 through May, 2015 which listed respondent's name and reflected the subject premises as his address (RA). A review of the statements reveal that respondent did not use this account frequently with the transactions taking place evenly in New York and New Jersey with the purchases in New Jersey primarily at retail stores.
2. Chase Statement xxxx1305 from May, 2016 which listed respondent's name and reflected the subject premises as his address (RB). These statements are not relevant as they are after the Notice was issued.
3. Chase Statement xxxx8938 from December 4, 2013 through February, 2014 which reflected respondents's name and the New Jersey address. The statements from March, 2014 through January, 2016 reflected respondent's name and address at the premises (RC). A review of the statements reveal that during the relevant time frame, the card was not used frequently and all purchases were made in New York or Ecuador when he visited his home country.
4. Chase Statement xxxx7816 from June, 2014 through January, 2018 which listed respondent's name and reflected the premises as his address (RD). A review of the statements reveal that during the relevant time frame, the card was not used frequently and more purchases were made in New York than New Jersey which the New Jersey purchases for E-Z pass or retail stores.

5. Chase Statement xxxx9714 from November, 2013 through May, 2014 (RE). A review of the statements reveal that during the relevant time frame the statements contained the respondent's name and the premises as the mailing address. A review of the statements reveal that the card was not used frequently, that purchases were made in New York, New Jersey and Ecuador and the New Jersey purchases were primarily E-Z pass charges or retail stores.
6. Chase Statement xxxx9301 from October, 2013 through October, 2015 (RF). A review of the statements reveal that from October 1, 2013 through November 1, 2013 the bills were addressed to respondent at the New Jersey address. The statements after November, 2013 were addressed to respondent at the premises. A review of the statements reveal that all cash withdrawals were made in New York or Ecuador, when he visited his home country, and were not frequent.
7. Apple Bank Savings Statement, in Trust for Nancy Reyes in the name of respondent, Account xxxx0863, from September, 2013 through December, 2017 (RG). A review of the statements reveal very few transactions but all took place in New York.
8. Apple Bank Savings Statement in Trust for Nancy Reyes in the name of respondent, xxxx5896 from November, 2016 through December, 2017 (RH). These statements are not relevant as they are after the Notice was issued.
9. Department of Motor Vehicles e-Notification submitted September 1, 2015 which reflected the name of respondent at the premises and Board of Elections statement in the City of New York, which reflected the name of respondent at the premises as an active voter as of October 5, 2015. Respondent last registered to vote in 1996 (RI). These are not relevant as they are after the Notice was served.
10. ConEdison Billing summary from November, 2013 through February, 2016 which reflects respondent's name at the premises (RJ).
11. Department of Motor Vehicles Compass System which reflects respondents's name at the premises with a license as of November 2, 2015 (RK). This is not relevant as they are after the Notice was issued.
12. T-Mobile Bill from July, 2015 through October, 2015 which list respondent's name at the premises (RL). These statements are not relevant as they are after the Notice was served.
13. Respondent's social security statement dated September 28, 2015 which lists respondent as recipient and the premises as his mailing address (RM). This is not relevant as it was issued after the Notice was issued.
14. ConEdison Account for July, 2012, April, 2014, December, 2014, January, 2015, April, 2015 through August 2015 and through August, 2015 and February 2016 which list the respondent on the account and the premises as the mailing address (RN).
15. Statements from Ashley Home Furnishings from January, 2014 through May, 2014 which reflect respondent and the premises as the mailing address (RO).

On cross-examination, petitioner submitted a Google Maps picture which reflected the New Jersey residence (P8); and the deposition of respondent dated November 3, 2017 (P9). Petitioner pointed out that although respondent testified his E-Z pass statements went to the New Jersey address because his girlfriend paid them because he did not work, Diego and Molina both testified that respondent did work, with Molina saying she employed him. Respondent also previously testified that he used the car four to five days a week but Molina testified that she also used the car four to five times per week.

Rebuttal Case

On petitioner's rebuttal case Joanne Kunda ("Kunda") testified. Kunda is the principal of Rebus International, a private investigation company and is a licensed private investigator. Kunda's New York State Private Investigator license was entered into evidence (P12). Kunda testified petitioner hired her on June 12, 2015 to conduct an investigation as to the residence of respondent. In response to the investigation, a report was issued on June 16, 2015 (P13). Kunda testified, and the report reflected, that on June 15, 2015 at 11:20 am an investigator called respondent on his cell phone and stated the caller needed to deliver a package to respondent. Kunda testified that during the call respondent identified himself as Washington Molina, stated he was home at the time of the call and the package could be delivered to the New Jersey address. The report also reflected that respondent stated his wife Juana would be at the New Jersey address if the package were delivered later in the evening. Kunda testified, and the report reflected, that when respondent was asked about the premises, respondent stated Reyes lived there. On re-direct examination, Kunda testified that during a phone call with Reyes, Reyes stated that respondent resided at the New Jersey address.

Amy Christianson ("Christianson"), a resident of the building also testified on petitioner's rebuttal case. Christianson testified she moved into apartment 3H, below the premises, in 2006. Christianson testified she walks to her apartment through the lobby. She stated that she used to sit outside the building to give cans to an elderly gentleman but never saw respondent during the relevant time period and only one time after. On cross examination, Christianson admitted: she rarely goes to the fourth floor where the premises are located; she worked from home during the relevant time frame; and she took Phenobarbital to treat epilepsy and Claritan for allergies.

Fejza also testified on petitioner's rebuttal case. Fejza testified he took pictures of Juana's house in New Jersey on April 26, 2018 (P14A); the respondent's car at the New Jersey address on April 26, 2018 (P14B); and respondent and Juana's cars (P14C) at the house in New Jersey on April 26, 2018.

Discussion of the Evidence as it applies to the Law

After consideration of the testimonial and documentary evidence, this Court finds that petitioner did not meet its burden and establish by a preponderance of evidence that respondent did not maintain his primary residence at the premises. More specifically, petitioner did not prove that respondent did not reside at the premises for an aggregate of less than 183 days each year during the relevant time frame. The Rent Stabilization Code §2524.4(c) requires that a premises be used by a tenant as a primary residence and authorizes a landlord to recover possession of premises when such premises are not occupied by the tenant, as his primary

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residence, as determined by a court of competent jurisdiction. The landlord has the burden of showing, by a preponderance of the evidence that the tenant did not use the premises as a primary residence and no single factor must be shown for the landlord to prevail. *Glenbriar v. Lipson*, 5 NY3d 388, 838 NE2d 635, 804 NYS2d 719 (Ct. App. 2005). The tenant may rebut the landlord's evidence and demonstrate that there was a substantial physical nexus to the premises. See *Rose Associates*, *supra*.

Respondent's E-Z pass records are not probative as to where respondent resided since it was uncontradicted that he shared the car with Molina and both individuals drove the car to New Jersey to visit relatives and shop at retail stores. The E-Z pass records were also unreliable as they were not authenticated, and there was nor was there any testimonial evidence to explain the records.

It was undisputed that respondent had a girlfriend in New Jersey who he visited and sometimes stayed with. The documentary evidence supports respondent's testimony that he resided at the premises and did retail shopping in New Jersey where there is no tax. A review of Chase Statements from November, 2013 through May, 2015 (RA) contain respondent's name at the premises and demonstrate the transactions made in New Jersey were for retail purchases; Chase Statements from June, 2014 through January, 2018¹ (RD) contain respondent's name at the premises and demonstrate the transactions in New Jersey were for E-Z pass or for retail purchases; Chase Statements from November, 2013 through May, 2014 (RE) contain respondent's name at the premises and demonstrate the transactions in New Jersey were for E-Z pass or retail purchases. Although some of respondent's earlier E-Z pass statements and credit card bills were addressed to a respondent at the New Jersey address, respondent credibly testified Juana helped him pay bills until they got into a fight at the end of 2013/beginning of 2014.

Petitioner's witnesses were unable to credibly establish that respondent did not reside at the premises as his primary residence. Fejza's testimony was vague and did not prove where respondent resided. The basis of Fejza's testimony was that during the relevant time frame he did not observe respondent at the premises "very often", observed another male at the premises and only saw Reyes a "few times". Fejza could not recall if he performed repairs at the premises and testified although he works from 6am to 5pm he eats lunch, takes coffee breaks and does some work from his basement apartment which has no view of the lobby. Additionally, Fejza is not always present at the building since he testified he sometimes leaves after 5pm. Such vague testimony is not dispositive on the issue of where respondent resided as his primary residence. *Rose Associates v. State Div. Of Housing and Community Renewal, Office of Rent Admin.*, 121 AD2d 185 (App. Div 1st Dept 1986). Fejza's pictures of respondent's car at the New Jersey address in 2018 (P14A-P14C) are not relevant; they were taken three years outside the relevant time frame. Kunda's testimony also failed to prove respondent did not reside at premises. Kunda lacked personal knowledge of respondent's residence and the document submitted by Kunda was based upon an investigator's report, who did not testify and only pertained to an isolated date (June 15, 2015) when the investigator called respondent. Respondent's conversation with the investigator actually suggested respondent did not reside in New Jersey since he said he may not be present at the New Jersey address in the evening but the investigator could leave the package with Juana. Respondent's statement that Reyes lived at the premises is also consistent with the

¹Only October, 2013 through September, 2015 fall within the relevant time frame

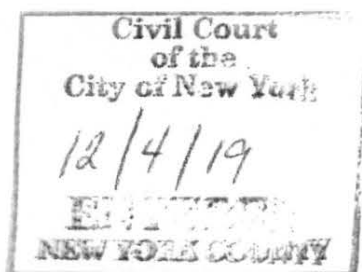
testimony given. While the report established respondent had connections to the New Jersey address, the report also established that respondent had connections to the premises in New York. Christianson's testimony added no value although she never saw respondent, she lived on the third floor, one floor below respondent, and testified she never walked up to the fourth floor.

This Court also found respondent's witnesses credibly rebutted petitioner's evidence. Cabrera, who was a next door neighbor, credibly testified that she saw respondent at the premises once or twice a week. Sanchez, Reyes' attendant, who lived at the premises from June, 2014 through February, 2017, credibly testified that she consistently saw respondent at the premises and respondent helped take care of Reyes. Molina's testimony established she used the car to go to New Jersey, clearly the E-Z pass charges did not prove where respondent resided. Moreover, respondent testimony was credible and supported by the documentary evidence. The documents included: ConEdison Billing summaries from November, 2013 through February, 2016 which listed respondent's name in connection with the account for the premises (RJ); ConEdison Accounts from July, 2012 through February 2016 which listed respondent's name in connection with the account for the premises (RN); Ashley Home Furnishings from January, 2014 through May, 2014 which listed respondent's name and mailing address as the premises (RO); Chase Statement from November, 2013 through May, 2015 (RA) which listed respondent's name and mailing address as the premises and transactions evenly split between New York and New Jersey with New Jersey purchases at retail stores; Chase Statements from March, 2014 through January which 2016 (RC) which lists respondent's name and address at the premises and all purchases were in New York or Ecuador; Chase Statements from June, 2014 through January, 2018 (RD) which list respondent's name and mailing address at the premises with more purchases in New York and the New Jersey purchases for E-Z pass or retail; Chase Statement from November, 2013 through May, 2014 (RE) with the respondent's name and the mailing address at the premises with purchases in New York, New Jersey and Ecuador and the New Jersey purchases primarily E-Z or retail purchases; Chase Statements from November, 2013 through October, 2015 (RF) with respondent's name and mailing address at the premises with all transactions in New York or Ecuador; Apple Bank Savings Statement, in Trust for Nancy Reyes in the name of respondent, Account xxxx0863, from September, 2013 through December, 2017 (RG).

Conclusion

Based upon the facts presented herein, the evidence fairly interpreted supports a finding that petitioner failed to meet its burden to prove that respondent did not live at the premises as his primary residence and the petition is dismissed. The parties may pick up their Exhibits in Room 225, Window 9 within 30 days. This constitutes the Decision/Order of this Court.

Dated: New York, New York
December 4, 2019



Anne Katz
Hon. Anne Katz