Gladstone v Russell
2020 NY Slip Op 34573(U)
August 19, 2020
Civil Court of the City of New York, New York County
Docket Number: 011591/20
Judge: Marc Finkelstein
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART HE

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KATE GLADSTONE,

Petitioner,

Index No.
L&T 011591/20

-against-

HEIDI RUSSELL,

Respondent.

DECISION AND ORDER

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MARC FINKELSTEIN, J.:

Petitioner commenced this proceeding by order to show cause in lieu of notice of petition seeking to be restored to possession of Apartment 2A at 129 Barrow Street, New York, NY 10014 ("the subject premises"). Due to the COVID-19 emergency, a hearing was held via Skype on August 11, 12 and 13. Both parties were represented by counsel. Both parties testified (with petitioner referring to herself as Katherine Gladstone Klein), along with a witness for petitioner.

Respondent Russell's domestic partner, Valentina Bajada, is the owner of the subject co-op apartment. Petitioner and respondent knew each other as petitioner had previously stayed in the second bedroom in the apartment under an Airbnb arrangement. Later, respondent contacted petitioner to see if she was interested in renting the bedroom on a longer term basis. In June 2019, by oral agreement between the parties, petitioner moved into subject premises with her twelve year old daughter and her dog and paid respondent rent for June. Petitioner and her daughter occupied one bedroom and respondent occupied the other. Respondent continued in occupancy after June. No rent payments were subsequently made. The parties were unable to formalize an agreement for petitioner to vacate and she remained in occupancy. After serving a thirty day notice of termination terminating the tenancy as of November 30, 2019, Ms Bajada

commenced a holdover proceeding against petitioner herein in December 2019, captioned Valentina Bajada v Katherine Klein a/k/a Kate Gladstone, Index No. 73763/19.

The holdover proceeding was settled by stipulation dated January 30, 2020. Petitioner Bajada was awarded a final judgment of possession, with issuance of the warrant forthwith. Execution of the warrant was stayed through March 31, 2020. All rent arrears and use and occupancy allegedly owed and disputed by respondent Gladstone Klein were waived from July 2019 through March 31, 2020 upon Ms. Gladstone Klein's timely vacatur by March 31, 2020.

A warrant of eviction was issued to the marshal. Petitioner and her daughter did not vacate by March 31, 2020. Given the family's continued occupancy, having not vacated or surrendered the premises, pursuant to the illegal eviction law (NYC Administrative Code §26-521) as well as the terms of the January 30, 2020 stipulation, respondent was prohibited after March 31 from utilizing self-help to lockout respondent. Petitioner could only be lawfully removed from the premises by way of a marshal execution of the issued warrant. In the interim, New York was faced with the Covid-19 crisis. As a result, Court Administration issued an Administrative Order and the Governor issued an Executive Order, on March 16, 2020 and March 20, 2020 respectively, which established a moratorium on evictions. All pending eviction orders were suspended and marshals were prohibited from executing warrants. Thus, as long as Ms. Gladstone Klein remained in occupancy, not having vacated or surrendered possession, she could not legally be evicted while the moratorium remained in place. The moratorium on evictions has subsequently been extended so that no outstanding residential warrants of eviction may be executed prior to October 1, 2020.

On July 11, 2020 petitioner and her daughter went to Pennsylvania. When they returned to the premises on July 28 they found that the top lock to the apartment had been changed and they could not gain entry. They found a note on the outside of the apartment door which said: "We had to change the upper lock due to security and safety issues. Contact 718-673-2548 to be let in" (petitioner's exhibit 7). Over the next two days, petitioner had various communications with respondent's counsel at the phone number provided, and with respondent herself, in the hope and anticipation of being given the keys so that she and her daughter could get back into the apartment. They were refused the keys. As a result, petitioner commenced the instant lockout proceeding on July 31, 2020. Respondent Russell filed an answer and counterclaim.

At the hearing, respondent's attorneys indicated the two-fold theory of their defense to the alleged illegal lockout and petitioner's request to be restored to possession. First, respondent asserts that she was entitled to conclude that petitioner and her daughter had vacated the apartment when they left on July 11, 2020 and did not return until July 28, and, therefore, rather than illegally locking out petitioner, she was entitled to change the lock and thereafter continue to deprive petitioner of possession and refuse to give her the new key. Second, respondent argues that if the court finds respondent was not warranted in assuming petitioner had vacated the apartment and petitioner was in fact locked out, the court should nevertheless deny petitioner's order to show cause to be restored to possession because, given petitioner's conduct towards respondent since she took occupancy, her restoration would be an imminent threat and danger to petitioner.

On respondent's first defense theory, after listening to the testimony of both parties and reviewing the exhibits in evidence, the court finds under the circumstances that petitioner's trip

to Pennsylvania with her daughter did not warrant respondent's conclusion that the family had abandoned or surrendered possession thereby permitting her to use self-help to change the lock and keep the family out of possession upon their return. The burden of proving a surrender rests upon respondent who is seeking to establish it or relying upon such surrender. Sam & Mary Housing Corp v Jo/Sal Market Corp, 100 AD2d 901 (2d Dept 1984), *affirmed*, 64 NY2d 1107 (1985). The burden of proving surrender is a heavy one; requiring a showing of an intention by the tenant to abandon the premises accompanied by conduct carrying the intent out. Gardner v Smith, NYLJ, December 21, 2005, p 22, col 3 (Civ Ct, Kings Co). The evidence does not sustain a conclusion by the court that when petitioner went to Pennsylvania she either expressly surrendered or vacated her occupancy of the premises or did so by her actions or operation of law.

Given the apparent tension between the parties, even though they had the means to communicate with each other, there was a total lack of communication. As a result, petitioner and her daughter left for Pennsylvania on July 11, 2020 without telling respondent. Nothing was said or put in writing as to whether petitioner was moving out or if and when she would be returning. After petitioner went to Pennsylvania, respondent did not try to communicate with her as to whether she had vacated or if she was returning and, if so, when. Nor did petitioner provide respondent with any information in this regard.

Besides the lack of any verbal or written communication indicating petitioner's intent to vacate when she went to Pennsylvania there are significant demonstrative factors that indicate her lack of intent to vacate. Petitioner did not turn over the keys to respondent nor did she leave the keys in the apartment when she left. Most importantly, the court finds petitioner's testimony

credible and supported by pictures of her bedroom (petitioner's exhibits 4, 5 and 6), that besides taking normal items for a temporary trip to Pennsylvania, all her other possessions remained in the apartment.

As respondent was renting a bedroom, the vast majority of her personal possessions were in the bedroom. Regardless of whether one or more of the three pictures of the bedroom may not have been taken immediately before petitioner left to Pennsylvania, the court credits her testimony that the picture are true and accurate depictions of the state of her bedroom when she left. The pictures demonstrate that the bedroom was left in a neat, lived-in condition, with considerable clothing neatly folded in shelves, a great deal of cosmetics and toiletries on the bureau top and a neatly made-up bed with wall hangings and her daughter's pictures on the walls. This scenario was unrebutted by respondent. Due to whatever perceptions she had about her difficulties with petitioner, she declined to open petitioner's bedroom door to see if petitioner's possessions were still there before she concluded that petitioner had vacated and she changed the lock. Lastly, despite respondent's note that petitioner found on the apartment door when she was locked out which stated the lock was changed for some unspecified security and safety issues and provided Ms. Gladstone Klein with a number to call to be let in, she was not let in and remains locked out to date. Thus, for the above reasons, regardless of what respondent may have subjectively surmised, the court finds that she has failed to prove that petitioner abandoned or surrendered as a defense to this illegal lockout proceeding. .

The court now turns to the second prong of respondent's argument. Having found that petitioner has been illegally locked out, respondent argues that the court should nevertheless deny her request to be restored to possession because restoration would represent a clear, imminent

and substantial threat and danger to respondent. Assuming *arguendo* that the court would have such discretion to deny restoration, the burden of proof in this regard falls upon respondent.

Petitioner and respondent have occupied the apartment together for over a year, from June 2019 until petitioner left for Pennsylvania on July 11, 2020. Although respondent made some six reports of purported harassment during this time (respondent's exhibits -1-6) there was no police confirmation or further action presented at the hearing. Although respondent testified that she intended to secure an order of protection, no court filing or order of protection was presented.

Respondent testified that petitioner was deliberately spraying an unknown toxic chemical or bleach directly at her and at the walls of the apartment and at her bedroom door. However, petitioner's testimony and the pictures admitted into evidence by respondent herself as part of exhibit O may be viewed as indicating petitioner was cleaning and disinfecting the apartment with such items as Lysol and Windex and some of the droplets of spray may have landed on the outside of respondent's clothing and on the walls and door.

Although respondent perceives that she is being harassed by petitioner, it is not clear as to how much of this perception may be driven and magnified as a result of respondent's stated OCD, her aversion to chemicals and the burning of incense, and her demonstrated heightened sense of anxiety. In any case, more than the parties not getting along and perhaps that petitioner could have treated respondent with greater kindness, sensitivity and cooperation, the court finds that none of respondent's testimony or exhibits properly admitted into evidence, rises to the level of demonstrating that if the court were to restore petitioner and her young daughter, who are locked out during this pandemic, to possession, respondent would be subjected to imminent and substantial threats and danger.

As the court had determined that petitioner and her daughter have been illegally locked out and respondent has failed to meet her burden of proof that restoration would subject her to imminent substantial danger and threats, petitioner's order to show cause to be restored to possession is granted. The court shall email a copy of this decision to respective counsel Respondent and her daughter shall be restored to possession as of Sunday, August 23, 2020, 9:00 AM. Petitioner shall seek NYPD assistance to implement this order restoring her to possession.

In the interim, this order shall be superseded upon any order of a court of competent jurisdiction prohibiting petitioner's occupancy of the subject premises. Once petitioner is restored to possession based upon this order, either party is free to take whatever lawful action they deem appropriate regarding the conduct of each to the other. However, pursuant to the extension of the eviction moratorium, the marshal may not execute the warrant of eviction prior to October 1, 2020.

This constitutes the decision and order of the court.[1]

Dated: August 19, 2020
New York, New York

APPROVED
MFINKELS , 8/19/2020 ,10:41:25 AM

MARC FINKELSTEIN
JHC

[1]The parties may be wise to take a Covid-19 test for the comfort of all concerned.