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| Otero v Hope Founders HDFC |
| 2021 NY Slip Op 32001(U) |
| March 29, 2021 |
| Civil Court of the City of New York, New York County |
| Docket Number: 300468/2021 |
| Judge: Evon M. Asforis |
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**CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART HE**

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ALVIN OTERO,

Petitioner,

L&T Index # 300468/2021

- against-

**DECISION/ORDER
AFTER HEARING**

HOPE FOUNDERS HDFC,

Respondent-Owner.

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HON. EVON M. ASFORIS

Background

Petitioner, Alvin Otero, commenced this proceeding by order to show cause in lieu of a notice of petition dated February 17, 2021, seeking to be restored to possession to 171 East 109th Street, Apartment 2D, New York, New York (“subject premises”). Petitioner retained counsel with Manhattan Legal Services and asserts respondent unlawfully evicted him from the subject premises.

Petitioner asserts that he resided with the tenant of record of the subject premises, Maria Ramos, for approximately 12 years before she passed away in November 2020. Petitioner is a 55 year-old man who suffers from numerous illnesses, has limited mobility, and on January 25, 2021, was hospitalized. Prior to his discharge from the hospital in February 2021, petitioner learned that his apartment keys no longer worked in the apartment door lock. Petitioner alleges that respondent changed one of the locks on the apartment entrance door which has prevented him from returning to possession of the subject premises.

Respondent appears in this proceeding by counsel and filed a Verified Answer asserting among other things, that respondent did not change the locks to the apartment entrance door and has not unlawfully locked petitioner out. Additionally, respondent argues that petitioner is a mere licensee and cannot maintain this illegal lockout proceeding, and even if petitioner was in possession of the premises, which respondent denies, petitioner does not have a valid succession claim. Petitioner alleges he is the nephew of the tenant of record and nephew is not a protected person (not an "immediate family" member) entitled to succession rights under the Rent Stabilization Law and Code §§ 2520.6(n) & (o).

The matter was initially scheduled to be heard on February 22, 2021, and the hearing was held on March 8, 2021. The parties submitted post-hearing memoranda of law on March 12, 2021. Petitioner testified on his own behalf along with Reginald Thompson. Two other witnesses, Luis Rivera and Fonda Porter, testified for respondent.

The Hearing

Petitioner, Alvin Otero, testified he lived with Maria Ramos (his "aunt") for at least ten to twelve years. They lived in her two-bedroom apartment that had a living room and kitchen. The lease for the apartment was in Maria Ramos' name, and petitioner believed the rent was \$800.00. Petitioner initially applied for public assistance to assist with his portion of the rent, however, when he became eligible for HASA benefits, HASA paid \$400.00 per month for the rent on his behalf to Ms. Ramos. Petitioner testified the entrance door to the apartment has two locks and years ago the building's entrance door required a key and a key code and now you have to swipe a green fob over the lock to enter.

Petitioner testified that he met Maria Ramos approximately eleven years ago through his mother. Initially they all met and had breakfast together and after this meeting he began

spending time together with Ms. Ramos in the apartment. When he first moved into the apartment Ms. Ramos' health was okay, but then she began to lose her sight, she was unable to walk and ultimately, she was confined to the bed 24 hours a day. Petitioner further testified when Ms. Ramos lost her eyesight, he helped care for her like she was his aunt. He testified that although she was not his blood aunt, he considered her his aunt because they lived together as a family. "I took care of her because I loved her," he testified. "On holidays we cooked food and celebrated together with visitors. I'm the only family she had." Petitioner further testified that he visited Ms. Ramos when she was taken to the hospital by her GAL but thereafter, she was moved to a nursing home and her GAL did not tell him where she was located. Ms. Ramos died on November 16, 2020.

Petitioner credibly testified that he was hospitalized in January 2021 and prior to his discharge his HASA caseworker, Mr. Reginald Thompson, took his keys to check the apartment door. It was then that petitioner learned he was unable to enter back into the subject premises. Petitioner testified that he is currently living in an SRO unit which is extremely difficult for him because of the heavy doors, the close proximity of people in the building, and many people do not wear masks. He states he is afraid of getting COVID-19 because his health is not good.

Petitioner testified that Mr. Thompson would visit him at the apartment every two months until the outbreak of COVID-19. While living in the building he knew and interacted with the superintendent of the building, Mr. Prieto, who lived on his floor plus he knew the superintendent's son and the porter of the building. Petitioner credibly testified on cross-examination that Ms. Ramos and he were not blood relatives and that he was her caretaker in the apartment.

Reginald Thompson testified on behalf of petitioner. Mr. Thompson credibly testified that he is an HRA caseworker with a case load of 45 clients and he assists in helping his clients navigate life issues. Mr. Thompson testified petitioner has been his client since May 2018. Initially in May 2018 petitioner was in Puerto Rico; however, he first met petitioner in person in September 2018 at the subject premises. Since September 2018 he visits petitioner every other month at the apartment for his home visits. Mr. Thompson testified Ms. Ramos, petitioner's aunt, was in the apartment a few times when he came to visit. He states that their relationship was good. He believed petitioner's aunt was a movie-buff because whenever he came to visit, they were always watching movies together.

Mr. Thompson testified there was a lease for the apartment because petitioner submitted documents from the prime tenant to secure rental assistance from the Department of Social Services ("DSS"). Mr. Thompson asserts that the last time he saw petitioner in the subject premises was in February 2020, prior to the outbreak of COVID19, and last time he saw him recently was February 13, 2021, the Saturday before he was discharged. Mr. Thompson testified he went to petitioner's apartment because the social worker at the hospital was concerned about the door to the apartment and whether petitioner's belongings were secure because the paramedics ("EMS") damaged the door in getting into the apartment. Mr. Thompson testified the key fob worked for the entrance door to the building but one key to the door did not work.

On cross-examination Mr. Thompson testified credibly that he did not know why petitioner was in Puerto Rico in May 2018 or when he returned from that trip; only that he first met petitioner in September 2018. Mr. Thompson testified that documents were submitted to DSS including a lease, the W147Q form which was signed by the prime tenant for petitioner to

obtain DSS benefits. Mr. Thompson testified he was unaware that Ms. Ramos could not read or write; however, it is DSS policy to accept the paperwork as presented. Mr. Thompson also testified that when he went to the apartment with petitioner's keys the bottom lock did not work and although he did not witness the landlord changing the lock, from what he saw, the lock did not look damaged but it looked like the cylinder was changed.

Luis Rivera was called by petitioner and he testified on behalf of both parties. Mr. Rivera credibly testified he works for Hope Community since August 2018 and at the building since October 2019. Mr. Rivera testified he does not live at the building and his janitorial duties include sweeping, cleaning, and taking out the garbage among other things. He testified there are approximately 46 apartments in the building, and he knows some tenants by face. He has seen petitioner in the building and his only contact with petitioner has been to say hello and goodbye to him. Mr. Rivera testified he does not know how many times he has seen petitioner and he does not remember the first time he saw him. His normal working hours are 7:00 a.m. to 3:00 p.m. from Monday through Friday. Mr. Rivera testified he last saw petitioner at the building on February 26, 2021, when he spoke with him because he was working in the lobby. He further testified he did not know if petitioner was a tenant, and that he has just seen him around the building. Petitioner's counsel did not cross-examine this witness.

Lastly, Fonda Porter was called by petitioner and she testified on behalf of both parties. Ms. Porter testified she is the Executive Director of Asset Management for the building and her day-to-day operations include making sure the buildings are in good condition and in compliance with rules and regulation. Ms. Porter testified the subject building receives a tax credit pursuant to IRS Section 42 and the building is subject to the Rent Stabilization Laws of New York. Ms. Porter asserts that the residents of the building have income qualifications and every year the

tenants come to the office to sign off on their household composition and household income.

Ms. Porter testified that Maria Ramos was the tenant of record for the subject premises and her income certifications for 2016, 2018, and 2019 did not include petitioner as an occupant or provide his income information (*see, Petitioner's Exhibit G*).

Ms. Porter further testified that she was unaware of why the signatures on the 2016, and 2018 income certifications did not match. She believed the 2018 form was signed by Ms. Ramos' guardian, but she did not know as she was not there when the form was signed. Ms. Porter also testified that she visits the building whenever its needed and probably at least once a month, but she did not recognize petitioner. Ms. Porter also states that she found out Ms. Ramos died in February 2021, after speaking with Mr. Thompson. This conversation caused her to contact Ms. Ramos' guardian who forwarded her a copy of Ms. Ramos' death certificate. In addition, Ms. Porter testified that respondent never changed the lock on Ms. Ramos' apartment door maintenance just secured the door with a metal latch. There is no padlock on the latch.

Discussion

Based on the testimony at the hearing, the documentary evidence presented in this proceeding, and the applicable case law presented in the parties post-hearing memorandums of law, the court finds that petitioner has established his claim for unlawful eviction. Real Property Actions and Proceeding Law ("RPAPL") § 768 and Administrative Code § 26-521 provide that it shall be unlawful to evict an occupant of an apartment without proper legal process or notice.

More specifically, Administrative Code § 26-521 states in pertinent part:

It shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer or who has entered into a lease with respect to such dwelling except to the extent permitted by law pursuant to a warrant of eviction or other order of a court of competent jurisdiction or a governmental vacate order by:

(iii) engaging or threatening to engage in any other conduct which prevents or is intended to prevent such occupant from the lawful occupancy of such dwelling unit or to induce the occupant to vacate the dwelling unit including, but not limited to, removing the occupant's possessions from the dwelling unit, removing the door at the entrance to the dwelling unit; removing, plugging or otherwise rendering the lock on such entrance door inoperable, or changing the lock on such entrance door without supplying the occupant with a key. (Emphasis added).

Herein, petitioner has shown he resided in the subject premises as his home for more than thirty consecutive days as a lawful occupant of the subject premises. Petitioner credibly testified he has resided in the subject premises for over ten years. Petitioner's HRA caseworker credibly testified petitioner was receiving social services benefits (for the rent) at the subject premises since 2018, and his caseworker visited him at least six or seven times at the subject premises since September 2018. Petitioner provided the court with his bank statements and letters addressed to him at the subject premises to attest to his residency in the premises for more than thirty days (*see, Petitioner's Exhibit B, C and D*). Therefore, it is clear to the court that petitioner has resided in the subject premises for more than thirty consecutive days.

Respondent alleges it did not change the lock to the apartment door and that the apartment door was only secured with a latch. Respondent's agent, Fonda Porter, credibly testified maintenance secured the door with a latch and the locks to the apartment door were not changed. However, pursuant to the statute (NYC Admin. Code § 26-521(iii)) an owner may not remove, plug, or otherwise render the lock of the entrance door inoperable. The latch installed by respondent in this instance prevents respondent from reentering the subject premises.

It is well settled that it is illegal to evict a lawful occupant of a dwelling who has resided in the premises for thirty consecutive days or longer without a warrant of eviction obtained in a

court proceeding or by court order. In Romanello v Hirshfeld, 63 NY2d 613 [1984], the Court of Appeals states, “a landlord may not oust an occupant of an apartment from those premises without resorting to proper legal process and providing legal notice.” In this case, respondent has not commenced a summary proceeding against petitioner to regain possession of the subject premises. In fact, respondent was unaware of the tenant of record’s death in November 2020, until February 2021 and was unaware of petitioner’s occupancy in the subject premises. However, this does not excuse respondent’s use of self-help in regaining possession of the subject premises nor does it relieve respondent of its obligation to commence a summary proceeding against petitioner.

Notwithstanding these facts, respondent argues petitioner should not be restored to possession because he is a “mere” licensee who lacks standing, and the court lacks the power to restore a mere licensee to possession of the premises. Respondent cites numerous cases to support its argument; however, the court finds that the cases cited are distinguishable from this case and respondent’s argument unpersuasive.

Respondent relies on Andrews v Acacia Network, 59 Misc3d 10 [2nd Dept, App Term 2018]. In Andrews, the Appellate Term reversed the lower court’s decision to restore petitioner to possession. Petitioner lived in a dormitory-style room of a supportive housing facility and commenced an unlawful entry and detainer proceeding pursuant to RPAPL § 713(10) seeking to be restored to possession to his room. The Court found petitioner was not entitled to be restored to possession because 1) he lacked exclusive dominion and control of a specified portion of the premises and 2) petitioner signed a “Resident Attestation” in which he agreed he had no tenancy rights to the premises.

Similarly, in Tantaro v Common Ground Cmty. Hous. Dev. Fund, Inc., 147 AD3d 684

[1st Dept, App Div 2017], the Court found petitioner was a mere licensee and was not protected from eviction without legal process. Petitioner was not listed as a member of the tenant of record's household composition and she was required to sign a visitor's log each time she sought access to the subject premises. The premises were a room in an SRO, and it was clear to the court that petitioner was on notice she was considered to be a visitor with no occupancy or tenancy rights. The Appellate Term First Department also held in Korelis v Fass, 26 Misc3d 133(A) [1st Dept, App Term 2010], a petitioner with no independent right to possession of the apartment is only a licensee without rights to be restored to possession. The Court affirmed the lower court's decision to dismiss petitioner's lockout proceeding. Moreover, an illegal lockout proceeding was properly dismissed after trial, when petitioner presented no evidence, she had a possessory interest in the subject premises. Petitioner was a Section 8 tenant of another apartment and thus a mere licensee of the tenant of record (see, Padilla v Rodriguez, 61 Misc3d 133(A) [1st Dept, App Term 2018]).

Lastly, respondent cites and relies on Jimenez v 1171 Wash. Ave, LLC, 67 Misc3d 1222(A) [Civ Ct, Bronx Cty 2020], Qian "Lily" Zhu v Xiao "Joy" Hong Li, 70 Misc3d 139(A) [2nd Dept, App Term 2021], and Brown v 165 Conover Assoc., 5 Misc3d 128(A) [2nd Dept App Term] among others, to support its position that petitioner is a mere licensee and should not be restored to possession of the subject premises. In Jimenez, the court provided a detailed analysis of the facts in its case and its similarities to the facts and circumstances of Andrews. The petitioner in Jimenez lived in one of three bedrooms in a shared apartment, in a supportive housing facility. The occupants of this facility signed a set of "Client Rules and Regulations" advising them of various limitations on their use of the premises. Petitioner signed three separate forms that advised him he would face "immediate discharge" including a "Waiver of

Tenant Rights” rider which stated that there were no tenancy rights to the apartment. In denying petitioner’s request for restoration, the court found that the explicit and extensive occupancy conditions prohibited petitioner from any possible claim to possession as in Andrews, supra.

In Qian “Lily” Zhu, supra, the lower court properly dismissed an illegal lockout proceeding brought by petitioner against her mother. The court determined petitioner was not given exclusive possession of designated space in her mother’s home and that petitioner surrendered possession of the premises in exchange for valuable consideration of \$6,000.00. Lastly, in Brown, supra, the sister of the deceased tenant of record, did not claim tenancy right to the premises. Therefore, the court held the sister was a mere licensee whose license expired upon the death of the tenant of record and restoration should not have been granted.

Herein, the facts and circumstances of this case are distinguishable from the cases cited by respondent for several reasons. First, the premises is not a supportive housing facility wherein petitioner has signed a residency attestation or waiver of tenant’s rights as in the supportive housing cases (see, Andrews, Jimenez). Second, petitioner had exclusive control and possession of the entire rent stabilized apartment; and lastly, petitioner has asserted an independent possessory right to the subject premises. Petitioner has not surrendered his possessory rights, and he asserts in his papers that he has a succession rights claim to the subject premises. Unlike in Korelis where petitioner had no independent right to possession of the apartment and in Brown, where petitioner did not claim any tenancy rights to the apartment, petitioner herein has an independent right to possession of the subject premises and has sought to enforce his succession rights claim. All of these factors taken together establish petitioner’s right to be restored to possession of the subject premises.

Lastly, respondent argues that petitioner failed to sufficiently prove his non-traditional

family relationship with the tenant of record. Respondent argues that petitioner failed to show an emotional and financial interdependence with the tenant of record, Maria Ramos, that petitioner's testimony was self-serving and not corroborated. The court finds respondent's argument unpersuasive.

Although petitioner's independent possession claim is based upon his succession rights to the apartment, it is the court's position that petitioner need not prove his succession case in this proceeding. This is a lockout proceeding. The court herein must determine if petitioner was in fact in lawful possession of the subject premises for thirty consecutive days or more and whether respondent through its actions has unlawfully locked petitioner out of the premises without the benefit of proper legal process and notice. Notwithstanding respondent's argument, the court finds that petitioner has sufficiently shown his independent possessory right to the apartment and has shown a colorable succession claim.

In Braschi v Stahl Associates Co, 74 NY2d 201 [1989], the Court of Appeals forever changed the landscape for non-traditional family members and their right to succeed to a rent regulated apartment pursuant to Sec. 2204.6(d) of the New York City Rent and Eviction Regulations. The Court of Appeals held "[t]he determination as to whether an individual is entitled to noneviction protection should be based upon an objective examination of the relationship of the parties....including the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance place upon one another for daily family services." Additionally, the Court states "[t]hese factors are most helpful, although it should be emphasized that the presence or absence of one or more of them is not dispositive since it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice

of the parties which should in the final analysis, control.”

In this case, petitioner credibly testified that he lived with his “aunt” in the subject premises for over ten years. He paid a portion of the household expenses by contributing to half the rent, and he further testified that he and his aunt engaged in family-type activities such as celebrating the holidays together with friends. Petitioner cared for Ms. Ramos when her health declined and he states, “he was the only family she had” and he cared for her because he loved her. The court finds that this is more than a colorable claim for succession and petitioner’s testimony is in fact corroborated. Petitioner’s HASA caseworker corroborated the fact that petitioner paid half of the rent as far back as 2018 and he also corroborated the fact that petitioner and his aunt’s relationship was familial.

Whether petitioner will prevail on his non-traditional succession claim is not for this court to decide but it is this court’s position that petitioner should have had the opportunity to fully present his claim in a court proceeding, which did not happen. Respondent is required to commence a proceeding against petitioner to regain possession of the subject premises. But for EMS damaging the apartment door and Mr. Thompson notifying them, respondent would still be unaware of Ms. Ramos’ death and petitioner’s occupancy in the premises.

Even though there may be no landlord-tenant relationship between petitioner and respondent, RPAPL § 713(10) provides that a petitioner peaceably in actual possession or constructive possession at the time of the forcible or unlawful detainer may maintain an illegal lockout proceeding. Petitioner was peaceably in actual possession of the premises so he has standing and can maintain this illegal lockout proceeding. Additionally, the Housing Stability and Tenant Protection Act (“HSTPA”) enacted on June 14, 2019, amended RPAPL § 711(2) to read “a tenant shall include an occupant of one or more rooms in a rooming house or a resident,

not including a transient occupant, of one or more rooms in a hotel who has been in possession for thirty consecutive days or longer. No tenant or lawful occupant of a dwelling or housing accommodation shall be removed from possession except in a special proceeding...” (see Saacheri v Cathedral Props. Corp, 184 Misc2d 304 [2nd Dept, App Term 2000]). In Saccheri, the lower court improperly dismissed an illegal lockout proceeding commenced by petitioner proprietary lessee who was locked out of his cooperative apartment after his shares were sold. The Court found this was an error because petitioner was “peaceably in actual possession at the time of the forcible or unlawful entry.” Id. (See also, Dixon v Fanny Grunberg & Associates, LLC, 4 Misc3d 139(A) [1st Dept, App Term 2004]; Banks v 508 Columbus Props., 8 Misc3d 135(A) [1st Dept, App Term 2005]; and Goris v Salce, 41 Misc3d 128(A) [1st Dept, App Term 2013]).

Therefore, petitioner has established his right to be restored to the subject premises for the following reasons: 1) Petitioner was peaceably in actual possession of the premises when he was locked out; 2) Petitioner was in possession of the subject premises for thirty consecutive days or longer; 3) Petitioner has asserted an independent possessory right to the subject premises; and 4) there has been no legal action brought against petitioner. Based on the facts and circumstances of this case, the credible testimonial and documentary evidence presented at the hearing and current case law, the court finds that petitioner has been unlawfully locked out and is entitled to be restored to possession of the subject premises forthwith.

Conclusion

Based on the foregoing, Alvin Otero’s order to show cause in lieu of a notice of petition is granted. Petitioner shall be restored to possession of the subject premises, 171 East 109th Street, Apartment 2D, New York, New York forthwith. Petitioner is awarded a final judgment

of possession against respondent; respondent shall remove all clasps, latches, or other impediments for respondent to gain access to the subject premises forthwith. If respondent changed any of the cylinder door locks, respondent shall provide petitioner with keys to the subject premises forthwith. Petitioner may also use the assistance of a locksmith and NYPD to regain entry to the premises.

This constitutes the decision and order of the court.

Dated: New York, New York
March 29, 2021


EVON M. ASFORIS
JUDGE HOUSING COURT

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