

<b>119 Grand Realty LLC. v Imbert</b>
2021 NY Slip Op 32039(U)
April 23, 2021
Civil Court of the City of New York, New York County
Docket Number: 51773/2019
Judge: Eleanor Ofshtein
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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: HOUSING PART C

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119 GRAND REALTY LLC. ,

L&T Index No. 51773/2019  
(Motion Seq. 2)

Petitioner-Landlord,

-against-

DECISION/ORDER

CLAUDIA IMBERT,

Respondent-Tenant,

MERCEDES DELGADO, REINA HERNANDEZ,  
"JOHN DOE" and "JANE DOE",

Respondents-Undertenants.

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Hon. ELEANORA OFSHTEIN  
Judge, Housing Court

Recitation, required by CPLR § 2219(a), of the papers considered in the review of the motion:

<u>Papers</u>	<u>Numbered</u>
Respondent's Motion with Affirmation and Affidavit.....	1
Petitioner's Opposition with Affirmation and Affidavit.....	2
Respondent's Reply.....	3

Upon the foregoing cited papers, the Decision/Order in this Motion is as follows:

This summary holdover proceeding commenced upon Notice of Petition and Petition after service of a Notice to Cure, and a subsequent Notice of Termination, alleging that Respondent Claudia Imbert ("Imbert"), illegally sublet/assigned her rent stabilized unit to the occupants, Mercedes Delgado, Reina Hernandez and John Doe and Jane Doe ("Delgado", "Hernandez" and/or "Occupants"), without the permission of the Landlord, and that Imbert does not reside at the premises, and instead, lives at 4901 Henry Hudson Parkway, Bronx, New York. Respondent filed an answer denying the allegations, interposed affirmative defenses and a counterclaim, and filed a demand for a verified Bill of Particulars.

Respondent's motion seeks summary dismissal pursuant to CPLR 3212 on the basis of two main arguments: first, that the occupants, Delgado and Hernandez, are close family members with extensive occupancy ties to the subject premises, and second, that neither occupant is capable of contracting to sublet, or receive assignment, since both are incapacitated adults, and

that Imbert is their Article 81 guardian. Respondent states that either of these argument show, as a matter of law, that she has not sublet/assigned the premises.

Due to the COVID-19 pandemic and the subsequent Court delays after March 2020, the motion was not fully submitted until November 2020. Furthermore, in December 2020, the Legislature passed, and the Governor signed, the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (“EEFPA”) which further stayed proceedings for sixty days and allowed tenants to file a Hardship Declaration, providing an additional stay to May 1, 2021. The Court has not received a Hardship Declaration from Respondent on this case.

Additionally, Respondent’s reply states that one of the occupants, Respondent’s 103-year old grandmother, Mercedes Delgado, passed away on October 27, 2020.

With regard to Hernandez, Imbert’s affidavit in support of the motion asserts that she lives with her 67-year-old aunt, Hernandez, who is severely mentally disabled, has the mental capacity of a child, lacks the capacity to live on her own, and that Imbert is her primary caretaker and Article 81 guardian. Imbert further avers that her aunt is physically and emotionally dependent on her for every aspect of her life and that her relationship with her aunt is more akin to a mother/daughter relationship, with Imbert in the maternal role. According to Imbert’s affidavit, this relationship goes back years since Ms. Hernandez’ was born with developmental disabilities rendering her with the emotional and intellectual capacity of a five-year-old, unable to read or write, and completely dependent on Imbert and a home-care attendant for her care. In support of the motion, Imbert submits the order appointing her the Temporary Article 81 Guardian for both occupants.<sup>1</sup> (Respondent’ Motion, Exhibit F and G.)

It is well settled that the proponent of a summary judgment motion must make a *prima facie* case establishing entitlement to judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of any material issues of fact. (Alvarez v Prospect Hospital, 68 NY2d 320 [1986]). The failure to make such a presentation requires denial of the motion, regardless of the sufficiency of the opposing papers. (Winegrad v New York University Medical Center, 64

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<sup>1</sup> Regarding Delgado: Supreme Court Index# 50138/19, TRO dated June 26, 2019 and Regarding Hernandez: Supreme Court Index# 500137/19, TRO dated June 26, 2019. (Respondent’s Motion, Exhibit F).  
Orders appointing Imbert Temporary Guardian for Delgado and Hernandez: same Index numbers as above, dated July 25, 2019. (Respondent’s Motion, Exhibit G).

NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment, to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial. (Zuckerman v City of New York, 49 NY2d 557 [1980]). The evidence must be considered in the light most favorable to the party in opposition to the motion. (Henderson v City of NY, 178 AD2d 129, 130 [1st Dept 1991]). Since summary judgment is a drastic remedy, the motion for summary judgment must establish that there is no defense to the cause of action and the mere color of a triable issue forecloses the remedy. (Rodriguez v City of New York, 31 NY3d 312, 317 [2018]; and see, Rudnitsky v Robbins, 191 AD2d 48 [2d Dept 1993]). Therefore, when deciding a motion for summary judgment the court’s function is issue finding rather than issue determination. (Kershaw v Hospital for Special Surgery, 114 AD3d 75 [1st Dept 2013]).

In response to the motion, Petitioner does not put forward any facts to refute Imbert’s position, and merely re-states the allegations noted in the predicate notice, to wit: that Imbert does not reside at the premises, that Delgado and Hernandez occupy the premises and are unknown to Petitioner, and that Imbert owns and resides at 4901 Henry Hudson Parkway, Bronx, New York. Such allegations may support a summary nonprimary residence holdover proceeding, but do not otherwise refute the *prima facie* evidence presented by Imbert, that the occupants have been found to be incapacitated adults and that Imbert is their Temporary Article 81 Guardian.

“Only when litigants are so incapacitated that trial court deems them judicially incompetent may the state take away their liberty and place it in the hands of a Mental Hygiene Law guardian appointed to handle the litigant’s affairs comprehensively...In reaching these determinations, Supreme Court must consider prospective wards’ functional levels, taking into account ‘preferences, wishes, and values with regard to managing the activities of daily living’ (Mental Hygiene Law 81.02 § [c] [3]) and ‘understanding and appreciation of the nature and consequences of [their] functional limitations’. (Mental Hygiene Law § 81.02 [d] [2].) This judgment of incompetence is the prerequisite to transplanting the right to property from an individual to a guardian. Short of this drastic declaration by Supreme Court, the state may not establish an article 81 guardianship.” 1234 Broadway LLC v Lin, 25 Misc 3d 476 (Civ Ct, NY County, 2009); see also, Mental Hygiene Law §81.

As per the Supreme Court decision, the various powers and responsibilities granted to Imbert by her appointment include entering into contracts for the ward, making decisions

regarding her social environment and other social aspects of life, choosing the ward's place of abode, and managing all income and assets. Under these circumstances, the ward is deemed incapacitated and therefore unable to contract for herself, and the guardian is provided with the power to contract for her. The ward's inability to sublet, or to have the capacity to be assigned the unit, falls under this umbrella of incapacity, as a matter of law.

On its burden to refute this *prima facie* showing, Petitioner has provided no evidence to the contrary and appears to seek to boot-strap a nonprimary residence case in the guise of an illegal sublet/assignment case. Therefore, a review of the record in this case indicates no material issues of fact which require a trial on this sublet/assignment holdover proceeding.

Therefore, the motion is granted and the petition is dismissed.

This constitutes the decision and order of this Court.

Dated: New York, New York  
April 23, 2021

*Eleanora Ofshtein*



HON. ELEANORA OFSHEIN  
JHC

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