

Colon v Nugarese Inc.
2022 NY Slip Op 30446(U)
January 28, 2022
Civil Court of the City of New York, Bronx County
Docket Number: Index No. L&T 800451/21
Judge: Bernadette G. Black
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART O

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LINDA COLON,

Index No. L&T 800451/21

Petitioner,

DECISION/ORDER

-against-

NUGARESE INC.,

Respondent.

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BERNADETTE G. BLACK, J.:

BACKGROUND AND PROCEDURAL HISTORY

Petitioner Linda Colon commenced this illegal lockout proceeding by order to show cause in lieu of notice of petition, on November 18, 2021, pursuant to Real Property Actions and Proceedings Law (hereinafter “RPAPL”) section 713(10), seeking restoration to possession of the subject premises, 532 East 184th Street, Apartment D-1, Bronx, New York and an award of treble damages under RPAPL § 853. Petitioner alleges that on or about October 1, 2021 she discovered that respondent Nugarese, Inc. had caused the locks to the apartment entrance door to be changed, and that respondent continues to refuse to provide keys to the premises. Petitioner asserts that she had resided at the subject premises since 2013, pursuant to a rent-stabilized lease.

On December 1, 2021, the initial court appearance date, both petitioner and respondent appeared by counsel. The proceeding was adjourned on consent, as the parties contemplated settlement. As the parties were unable to reach settlement, the matter proceeded to trial.

EVIDENCE

Petitioner Linda Colon testified that since 2013 or 2014 the subject premises had been home to herself and her three minor children, one of whom is autistic. On or about September 1, 2021 petitioner and her children went to Pennsylvania because of a family emergency. Petitioner testified that her elderly grandfather, who suffers from dementia, had gone missing. By mid-September 2021 petitioner was still in Pennsylvania and was unsure when she would be returning home. Petitioner contacted her children's school to inform them that the family's return to New York had been delayed. On or about September 15, 2021 petitioner contacted Con Edison to shut off her utility service, as she had been very distracted when she left her apartment and was concerned that she may have left appliances or lights running.

After petitioner's grandfather was located, petitioner assisted with arrangements to place him in a nursing care facility. Petitioner and her children returned home on or about October 1, 2021. When she attempted to open the apartment entrance door, petitioner discovered her keys no longer worked. Petitioner located the building superintendent who informed her that the management office had directed him to change the locks to the apartment. Petitioner testified that prior to this exchange she did not have any communication with the management regarding vacating the apartment, and that she never surrendered her keys or otherwise informed the management she wished to surrender possession of the subject premises. Further, petitioner testified that she received no communication from the landlord prior to finding her locks had been changed.

Petitioner testified that shortly thereafter, she went to Housing Court in response to a nonpayment proceeding the landlord had brought against her. On November 18, 2021, petitioner

filed this illegal eviction proceeding. Petitioner testified that since the landlord changed the locks, she and her children have been moving around, without a permanent place to stay.

Calvin Merritt, a Consolidated Edison employee of twenty years, testified pursuant to respondent's subpoena. Mr. Merritt confirmed that Ms. Colon's account for the subject premises had been closed and that Con Edison had no procedure for suspending accounts at the account holder's request, but that an account could be re-activated at the customer's request. Mr. Merritt testified that Ms. Colon's account closed with a remaining balance which was subsequently referred to the company's collections department.

Franco Milio testified that his family owns and manages the subject building. Respondent landlord is enrolled in a program with Con Edison in which the utility provider will continue service under the landlord's account and notify the landlord whenever a tenant of the building closes their account with Con Edison, so that the utility service to the unit is not interrupted. As a result, by notice dated September 18, 2021, the management office learned that petitioner had closed her Con Edison account for the subject apartment. See Respondent's Exhibits I and J. Around that time, the building superintendent reported that the door to the subject apartment had been left ajar.

Mr. Milio testified that by September 2021, respondent had not received any rent for the apartment in fourteen months, and that the landlord had commenced a nonpayment proceeding against Ms. Colon. After receiving the Con Edison notice regarding petitioner's account and learning that the apartment door had been left ajar and the unit vacant, Mr. Milio instructed the superintendent to change the locks to the apartment. Respondent assumed that petitioner had abandoned the apartment. Mr. Milio testified that he did not have contact information for

petitioner and that respondent did not attempt to locate contact information for petitioner to confirm that she had surrendered her tenancy.

Sergelio Grijalva, the building superintendent, testified that he has been employed by respondent for nine or ten years, that he works at the subject building daily from 6:30 AM to 4:00 PM, and lives in an adjacent building within the same housing complex. The witness testified that he was familiar with petitioner Linda Colon, and believed she moved into the subject premises approximately five or six years ago. Mr. Grijalva recalled that petitioner moved out of her apartment during the year 2020 and that she had left several family members still occupying the apartment. On September 25, 2021 the witness found the apartment door ajar and the premises apparently unoccupied. Mr. Grijalva noticed the apartment door ajar again on September 28, 2021 and notified the management office. At respondent's direction the superintendent changed the locks to the apartment on September 30, 2021. Respondent submitted in evidence photographs of the subject premises taken by Mr. Grijalva on that date, depicting the rooms of the unit with sparse furnishings, a bare mattress, and empty clothes hangers strewn about. Respondent Exhibits A-H. Mr. Grijalva acknowledged petitioner never informed him that she planned on moving out of the apartment and that he never attempted to contact respondent. On cross-examination, Mr. Grijalva explained that over the years he had occasionally received telephone calls from petitioner requesting repairs for her apartment, but he did not keep a record of Ms. Colon's phone number, and he had never telephoned her. Mr. Grijalva testified that petitioner thereafter appeared at the subject building in mid-October.

Petitioner denied making any arrangement to permanently vacate her apartment and submitted in evidence, the following documents addressed to her at the subject premises: a Supplemental Nutrition Assistance Program letter regarding her food stamps benefits dated March

27, 2021, a letter from the Social Security Administration dated June 3, 2021 and her New York State Driver License, listing the subject premises. Petitioner seeks a judgment of possession for the subject premises.

APPLICABLE LAW AND ANALYSIS

Pursuant to RPAPL § 713(10), a special proceeding may be maintained on the ground that, “The person in possession has entered the property by force or unlawful means and he or his predecessor in interest was not in quiet possession for three years before the forcible or unlawful entry or detainer and the petitioner was peaceably in actual possession at the time of the forcible or unlawful entry or in constructive possession at the time of the forcible or unlawful detainer; no notice to quit shall be required in order to maintain a proceeding under this subdivision.”

Under RPAPL § 768 1. (a)(iii) and New York City Administrative Code § 26-521(a)(3) “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... changing the lock on such entrance door without supplying the occupant with a key.” Further, is unlawful for an owner to fail to take all reasonable and necessary steps to restore to occupancy any occupant whose vacatur resulted from the landlord’s actions or omissions, after such occupant requests restoration within seven days of the owner’s unlawful acts or omissions. See NYC Admin. Code §26-521(b).

Respondent asserts that petitioner abandoned the apartment and is no longer entitled to possession. In order to prove abandonment respondent must establish the following conditions (1) the tenant’s intention to abandon or relinquish possession of the unit, and (2) some overt act or

failure to act which clearly indicates that the tenant or occupant neither claims nor retains any interest in the subject premises. The burden of proving an abandonment is on the party seeking to establish or relying upon such a claim. *Sam & Mary Housing Corp. v. Jo/Sal Market Corp.*, 100 AD2d 901 (2d Dept., 1984); *Hui Zhen Wei v. 259 East Broadway Associates, LLC*, 57 Misc. 3d 136(A) (App Term, 1st Dept 2017); *Ahmed v. Chelsea Highline Hotel*, 49 Misc. 3d 139(A) (App Term, 1st Dept 2015); *Hip Hop Fries Inc. v. Gibbins Realty Corp.*, 13 Misc. 3d 128(A) (App Term, 1st Dept 2006); *Johnson v. Manning*, NYLJ, November 16, 1988, at 21, col 2, (App Term, 1st Dept).

Petitioner credibly testified that she took possession of the subject premises lawfully, pursuant to a rental agreement with the landlord. Though petitioner did not present her lease at trial, the court takes judicial notice of the non-payment proceeding currently pending in Bronx Housing Court, *Nugarese, Inc v. Linda Colon*, L&T Index No. 300160-21 commenced on or about January 14, 2021. The petition states that Ms. Colon is the tenant of record and that the apartment is subject to rent-stabilization. Ms. Colon appeared on the nonpayment case on November 5, 2021 and represented to the court that she had been locked out of her apartment by respondent. The court provided petitioner with a referral for legal counsel. See Hon. Scott-McLaughlin's decision dated November 5, 2021. Petitioner commenced this illegal eviction proceeding shortly thereafter. The nonpayment proceeding remains pending and is currently adjourned to March 3, 2022.

Respondent acknowledged that the landlord changed the locks to the subject premises at the end of September 2021 on the assumption that petitioner had abandoned the premises. Respondent made no attempt to contact petitioner, the tenant of this rent-stabilized unit, and respondent presented no unequivocal proof that petitioner abandoned her tenancy. When petitioner returned to premises no more than two weeks later, respondent refused to provide

petitioner with keys to the premises. Petitioner credibly testified that she hurriedly left the apartment to help her elderly, ailing grandfather in Pennsylvania, and that she returned to the premises approximately one month later.


CONCLUSION

Based on the foregoing, this court finds that petitioner has sustained her burden of proof and awards petitioner a judgment of possession for the subject premises. The warrant may issue forthwith. The earliest execution date is the date of this order. Respondent is directed to restore petitioner to possession of the premises forthwith. Petitioner may pursue her claim for damages in the appropriate forum.

This constitutes the decision and order of the court.

So Ordered

Dated: Bronx, New York
January 28, ~~2021~~ 2022



Bernadette G. Black, Judge
Civil Court, Trial Part