

Turin Hous. Dev. Fund Co. , Inc. v Kennedy

2022 NY Slip Op 34648(U)

February 4, 2022

Civil Court of the City of New York, New York County

Docket Number: L&T Index No. 051341/20

Judge: Eleanora Ofshtein

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This opinion is uncorrected and not selected for official publication.

Original

**CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART C**

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**TURIN HOUSING DEVELOPMENT
FUND COMPANY, INC.**

Petitioner (Landlord),

**L&T Index No. 051341/20
(Motion Seq. No.: 1)**

-against-

DECISION/ORDER

**MINER KENNEDY AND VALIENNE ROUSSEL,
AS ADMINISTRATORS OF THE ESTATE OF
MARY LEE MAYO,**

Respondents (Tenants),

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**Present: Hon. ELEANORA OFSHTEIN,
Judge, Housing Court**

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

<u>Papers</u>	<u>NYSEF Document</u>
Respondent's Motion/Affirmation/Affidavit/Exhibits.....	#3-10
Petitioner's Opposition/Affirmation/Affidavit/Exhibit.....	#12-27
Respondent's Affirmation in Reply/Affidavit.....	#28-33

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Upon the foregoing cited papers, the decision/order on this motion is as follows:

Petitioner brought this summary nonpayment proceeding against the Administrators of the Estate of a deceased shareholder, Mary Lee Mayo, seeking the monthly maintenance of \$699.49, for over a five-year period (September 2014 through January 2020). Although the shareholder died in September 2014, the Administrators of the Estate, Miner Kennedy (the grandson of Ms. Mayo), and Valienne Roussel (the granddaughter of Ms. Mayo), were appointed in July 2019. Respondents, by counsel, filed an answer with counterclaims, verified by Valienne Roussel, raising defenses including laches, failure to restore to actual possession and legal fees.

During the delays caused by the COVID-19 pandemic, and subsequent stays ordered by the resultant statutes, the proceeding was virtually conferenced, but the parties were unable to reach a settlement. Respondents move for summary judgment, pursuant to CPLR §3212, based on the laches defense, arguing that they were appointed as Administrators in July 2019, that prior to the formation of the estate, they became aware that Petitioner had taken possession of the

apartment, that after an illegal lockout proceeding was filed against Petitioner, possession was restored as a result of a stipulation entered into between the parties¹, and that Respondents commenced payment of maintenance once they were in possession. Petitioner opposes the motion, arguing that the history of the case raises triable issues of fact.

The documents submitted include an affidavit from Essie Smith, stating that she is the daughter of the late shareholder, and that Ms. Mayo was staying with her in South Carolina at the time of death, in September 2014. Although Ms. Smith's affidavit is unclear as to any time-periods, she states that after her mother's death, she contacted an attorney regarding the apartment, had some contact with Petitioner, and unsuccessfully attempted to form an estate. Ms. Smith states that she found out that Petitioner had gained possession of the unit after her daughter tried to enter the apartment (see NYSCEF #30). The affidavit of Respondent Roussel indicates her relationship as the granddaughter of Ms. Mayo and the daughter of Ms. Smith. Ms. Roussel states that she was aware that her mother wanted to sell the unit as early as 2016 but does not explain the five-year delay in forming an estate, states nothing about the payment of maintenance after the death of the shareholder, fail to explain who, if anyone, had possession of the unit after the shareholder's death, and does not explain the filing of the illegal lockout if she did not have prior possession (NYSEF #5, #39, and see reply papers).

Petitioner's view of events differs substantially. Petitioner claims that the family members were fully aware that Petitioner has been attempting to collect maintenance, that Petitioner had been in contact with the family attorney about selling the property, that Petitioner's were led to believe that the family members were forming an Estate, and that the delay in forming the Estate was a financial strategy to sell the apartment when it was lucrative. Additionally, Petitioner notes that since the family members filed an illegal lockout, there was an admission that they were in possession and are, therefore, liable for the maintenance.

According to the affidavit of Petitioner's managing agent, Petitioner first sued Ms. Mayo for arrears in 2015, not knowing that she had died, and had started a new case in 2017 against Ms. Mayo's next-of-kin, Ms. Smith, having received a letter from Ms. Smith asking about the procedures to sell her mother's apartment (see Affidavit, NYSEF #13&17). Having discussed the issues with Ms. Smith and her family attorney, Petitioner eventually gained possession of the

¹ The Court notes that the stipulation which settled the alleged illegal lockout is unclear as to who was restored to possession.

unit after the family defaulted and no one appeared or answered the 2017 Housing Court petition. Thereafter, the family member brought an alleged lockout case, and the parties agreed to settle the case by granting access once the Estate was formed and the Administrators were appointed.

Petitioner explains that the settlement in the lockout case was necessary since it became evident that the 2017 Housing Court case had a procedural defect: to wit, the Petitioner could not locate the affidavit of service for the mailing of the petition and notice of petition to Ms. Smith, at her alternate address. Petitioner was able to find the demand which had been mailed to Ms. Smith's alternative address, but not the petition and notice of petition. Therefore, the alleged lockout case was settled by stipulation in May 2019, possession was restored to the family members once the administrators were appointed, which occurred in July 2019, and Petitioner then started this nonpayment case a few months later, in January 2020 (see NYSCEF document #14). Petitioner argues that despite repeated communication through their family attorney, and awareness that maintenance was not being paid, the family members did not answer or respond to any of the notices, did nothing to ensure continued payment of maintenance, and did not establish an estate until five years after the death of Ms. Mayo.

Summary judgment pursuant to CPLR 3212, is a drastic remedy which deprives a litigant of its day in court and should not be granted where there is doubt as to the existence of a triable issue of fact. (See, Sillman v Twentieth Century-Fox Film Corp, 3 NY2d 395, 404 [1957]). It is well settled that the proponent of a summary judgment motion must make out a *prima facie* case and that "the motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (See, Winegrad v New York Univ Med Ctr, 64 NY2d 851, 853 [1985]). However, once the moving party proves its *prima facie* case, the opposing party is required to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action". Zuckerman v City of New York, 49 NY2d 557, 560 (1980). The function of summary judgment is issue finding, not issue determination. (See, Sillman v Twentieth Century Fox Film Corp, 3 NY2d 395, 404 [1957]). The court's function is not to determine credibility, but to determine if there is a triable issue, or if arguably there is a genuine issue of fact. (See, SJ Capelin Associates, Inc v Global Mfg Corp, 34 NY2d 338, 341 [Ct App, 1974] and Color by Pergament, Inc v Pergament, 241 AD2d 418 [1st Dept 1997]).

If proven, laches, an equitable doctrine based on fairness, bars the Petitioner from obtaining a possessory judgment for arrears found to be stale. (Continental Cas Co v Employers Ins Co of Wausau, 60 AD3d 128 [2008]; and 1560-80 Pelham Pkwy Assoc v Errico, 177 Misc 2d 947 [App Term, 1st Dept 1998] citing City of New York v Betancourt, 79 Misc 2d 907, 908 [App Term, 1st Dept 1974]). Where unreasonable and inexcusable delay results in prejudice to the opposing party, the enforcement of a right will be barred. (Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 816 [2003] citing Matter of Barabash, 31 NY2d 76, 81 [1972]; and Dante v 310 Associates, 121 AD2d 332, 334 [1st Dept 1986]). Furthermore, “(t)he mere lapse of time without a showing of prejudice will not sustain a defense of laches” (internal citation omitted). Skrodelis v Norbergs, 272 AD2d 316 (2d Dept 2000).

The burden of proof lays with the party relying on the affirmative defense of laches, and all four of the following elements are necessary when analyzing the facts presented: conduct giving rise to the situation; delay in asserting the claim despite the opportunity to do so; lack of knowledge or notice; and injury or prejudice if relief is granted. (See, Dwyer v Mazzola, 171 AD2d 726 [2d Dept 1991]; A&E Tiebout Realty, LLC v Johnson, 23 Misc 3d 1112[A] [Civ Ct, Bronx County 2009], *affd* 26 Misc 3d 131[A] [App Term, 1st Dept 2010]; and Stein v Doukas, 98 AD3d 1026, 1028 [2d Dept 2012] quoting Kraker v Roll, 100 AD2d 424 [1984]). Thus, the defense of laches is an equitable one, which requires consideration of the totality of the factual circumstances as they relate to the specific elements. (See also, Deutsche Bank Nat Trust Co v Joseph, 117 AD3d 982, 985 [2d Dept 2014]).

On the issue of laches, this limited record precludes the Court from granting a summary judgment without first having the factual issues decided at trial. On the one hand, Petitioner failed to petition an Estate and waited five years for the family members to do so. On the other hand, at least some of the family members were aware of the rising maintenance arrears during the five years before the Estate was formed and did nothing to ensure payment while also arguing, in the lockout case, that they were entitled to possession.

First, delay alone is insufficient to establish laches, especially where prior litigation and knowledge may negate such a defense. (See, Roxborough Apts Corp v Becker, 31 Misc 3d 138[A] [1st Dept 2011]). Second, even if a portion of the maintenance is proven to be stale, dismissal need not be the result. Petitioner could still be granted a money judgment as to any arrears deemed to be stale. (See, 1560-80 Pelham Pkwy Assoc v Errico, 177 Misc 2d 947, *supra*).

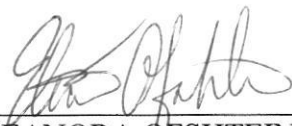
Additionally, the Court notes that Petitioner is suing the Respondents in their capacity as Administrators to the Estate, not individually, so Respondent's argument that they cannot afford the maintenance, is insufficient. Third, considering the lockout allegations brought by the family member, even the basic question of who was in possession of the apartment throughout these five years, is in dispute. This may become a threshold issue since, although not raised in this motion, the record is insufficient to decide whether under these circumstances, the HSTPA amendment to RPAPL 711(2) would allow Petitioner to seek these arrears in a summary proceeding.

As there are material facts in dispute, the motion for summary judgment must be denied.

Therefore, the case is adjourned to March 16, 2022 at 11:00AM, for a pre-trial conference via Microsoft Teams.

This constitutes the Decision/Order of this Court.

Dated: New York, New York
February 4, 2022



ELEANORA OFSHTEIN,
JHC

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