

Boriquen Rlty LLC v Cruz
2023 NY Slip Op 30315(U)
January 30, 2023
Civil Court of the City of New York, Bronx County
Docket Number: Index No. L&T 518/20
Judge: Christel F. Garland
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART T

X

BORIQUEN RLTY LLC,

Index No.
L&T 518/20

Petitioner,

Present:
Hon. Christel F. Garland

-against-

ANNETTE CRUZ, MELANIE CRUZ,

DECISION/ORDER

Respondents – Tenants,

JENNIFER CRUZ, JOHN DOE and JANE DOE,

Respondents - Occupants.

X

Petitioner commenced this summary holdover proceeding on or about January 6, 2020, seeking to recover possession of the subject rent stabilized apartment pursuant to Real Property Actions and Proceedings Law (“RPAPL”) § 713 [7]) on the ground that both Annette Cruz and Melanie Febus were the tenants of record who have permanently vacated the apartment and that they gave Jennifer Cruz a license to occupy the apartment.

After motion practice, the proceeding was ultimately transferred to the Expediter and referred to this part for trial. Respondent Jennifer Cruz (“Respondent”) who had interposed an answer asserting succession rights, sought leave to amend her answer and withdraw her succession claim. By decision and order dated September 16, 2022, the motion was granted and the proposed amended answer was deemed served and filed.

The proceeding was ultimately adjourned for trial. At trial, Petitioner called David Martinez as its first witness who testified that he is the owner and manager of the petitioner LLC¹. Mr. Martinez testified to the elements of Petitioner’s prima facie case². In addition, he testified that Annette Cruz is no longer in the apartment as she moved out of the apartment on November 22, 2019 and had paid rent for the apartment through November 2019. He testified that she called and wrote Petitioner a letter indicating that she was leaving and left the keys to the apartment

¹ Petitioner’s Exhibit 1 – certified deed.

² Petitioner’s Exhibit 2 - 5 – certified MDR; DHCR rent roll, original lease with TORs and renewal lease.

with Wendy Martinez, who is the tenant of apartment # 7 in the building. He testified that Melanie Febus, Annette Cruz's daughter, also moved out of the apartment. He testified that he then spoke to Jennifer Cruz and signed the notice of termination. He testified that he goes to the building 1 to 2 times a week and that the building is equipped with 32 security cameras that he is able to view from his office. According to Mr. Martinez, he first noticed that Jennifer Cruz was in the apartment sometime between the end of November and December 2019 when he went to the building to change the locks in December 2019. That is when he met Ms. Cruz and she asked him who he was. He informed her that he was the owner of the building and she then said to him that if he let her stay she would move out. He testified that she occupies the apartment with another individual named Joseph Isarro.

On cross-examination, Mr. Martinez testified that he believed the apartment was vacant following his conversation with Annette Cruz who informed him that she had paid rent through November of 2019 and that he could regain possession after that time.

Next, Judy Douglas, the tenant of apartment #17 in the building testified that she has resided in the building for approximately 12 years and that her apartment is located on the 3rd floor. Ms. Douglas testified that she was not familiar with the subject apartment nor who resides in that unit. However, she testified that she was familiar with Annette Cruz and was unaware that she had vacated the apartment. Ms. Douglas testified that she was not familiar with Jennifer Cruz but saw her around in late 2019 around 2020. She identified Respondent as the person she had seen in the building.

Diona Tejada, the tenant of apartment # 11 testified that she has been a building resident since 2015 and that her apartment is located next to apartment #10 in the building which is located in the "middle". Ms. Tejada testified that she was not familiar with Annette Cruz but knew "Sandra" who vacated the apartment in 2019. Ms. Tejada identified Jennifer Cruz as the person who lives next door to her and that she began seeing her around 2019 after Annette Cruz moved out. Ms. Tejada testified that she did not see Jennifer Cruz around before then.

Wendy Martinez testified that she is the tenant of apartment #7 in the building where she has resided for approximately 10 years. She testified that her apartment is located "in front of" apartment #10 and that she knew Melanie Febus who lived in the apartment. According to Ms. Martinez, the tenants of the subject apartment vacated sometime in 2019 and gave her the key for the superintendent. She testified that Annette gave her the keys to the apartment and that she started to see Respondent in the apartment when Annette moved out.

Next, Elvis Gomez testified in support of Petitioner's claims. Mr. Gomez testified that he moved into the subject building in January 2020 and that his apartment is located on the first floor and that the subject apartment is located on the second floor above his apartment. He testified that he was not familiar with Annette Cruz and that the first time he saw Respondent in the building was in January 2020 but that he had never been in the subject apartment.

Then, Angel Pena testified that he is the tenant of Apartment #9 which is located next door to apartment #10. He testified that he knew the tenants of apartment #10 who were Annette and Melanie. He testified that he had seen them sometimes. But he testified that he did not know

them and did not know when they moved because he had not seen anyone. He testified that he has seen Respondent leave the apartment sometime in 2020 but that he does not know her.

Petitioner then called Santiago Ojeda who testified that he has been the building superintendent since Petitioner purchased the building. He testified that he was familiar with the subject apartment and that he had been in the apartment sometime in 2019. He testified that the lady who had been living there had broken the window. He testified that the mother who is the “owner” of the apartment was not in the apartment because she had vacated and left for Florida. He testified that she, Annette Cruz, left the keys to the subject apartment with the tenant of apartment #7. He testified that when he went to change the locks to the apartment, someone was in the apartment. He testified that Respondent was living with the tenant of record and that when he went there the locks were changed because the door would not open. He testified that the tenant of record called to say she was leaving the keys with the tenant of apartment #7. He testified that he is always in the building because he is always working and that he became aware that Respondent was occupying the apartment sometime between 2019 and 2020 when he went to change the locks. He testified that he had been in the apartment approximately three times when Annette Cruz was in the apartment but that he had never seen Respondent in the apartment.

At the close of Petitioner’s case, Respondent moved for an order dismissing the petition based on her claim that Petitioner failed to establish its prima facie case. The parties were given an opportunity to reduce their arguments in writing and a short briefing schedule was set.

Respondent moved pursuant to CPLR § 4401 which permits any party to move for judgment with respect to a cause of action on the ground that the moving party is entitled to judgment as a matter of law, at the close of the evidence presented by an opposing party. It has been held that “a motion for a directed verdict pursuant to CPLR 4401 should not be granted unless there is no rational process by which the fact-finder could base a finding in favor of the nonmoving party” (*145 East 16th Street, LLC v Spencer et al*, 49 Misc3d 128(A) [App Term 2015]). And, “in assessing the motion, the court must afford the party opposing the motion every inference that may be properly drawn from the evidence presented, and the evidence must be viewed in the light most favorable to the nonmoving party” (*id*).

Section 713 (7) of the RPAPL, the ground relied upon by Petitioner in commencing this proceeding, provides that a special proceeding may be maintained under this article after a ten-day notice to quit has been served upon the respondent on the ground that they are a licensee of the person entitled to possession of the property at the time of the license, and that their license has expired or has been revoked by the licensor or that the licensor is no longer entitled to possession of the property. As stated by the Appellate Division, First Department in *Rosenstiel v Rosenstiel*, 20 AD2d 71 (1963), “as generally understood in the law of real property, a licensee is one who enters upon or occupies lands by permission, express or implied, of the owner, or under a personal, revocable, non-assignable privilege from the owner, without possessing any interest in the property, and who becomes a trespasser thereon upon revocation of the permission or privilege”.

The evidence at trial established that the tenant of record vacated the premises sometime in November 2019, that she turned over the keys to her neighbor, informed Petitioner that she had

done so and informed Petitioner that it could regain possession at the end of that month which had already been paid for. Although all of Petitioners' witnesses credibly testified at the trial, what was missing from the evidence was that the tenant of record gave Respondent a license to occupy the subject apartment. Instead, what the evidence showed and what the witnesses testified established is that they noticed Respondent around *after* the tenants of record had vacated, which does not, without more lend itself to the conclusion that Respondent had permission, either express or implied, from the tenants of record to occupy the apartment (emphasis added). Mr. Martinez who attempted to explain what he knew of the circumstances surrounding Annette Cruz's surrender was unable to show that Annette Cruz gave Respondent a license to occupy the apartment, whether express or implied. After all, a license requires some form of permission from the person entitled to possession. This was not established by the record which this court carefully reviewed several times in light of the arguments made. Although counsel argues that a license may be implied from the testimony of David Martinez regarding a request for a lease by Annette Cruz for the benefit of Respondent, the court was not able to identify any such evidence in the record, either documentary or testimonial, to support this claim.

Based on the foregoing, Respondent's motion which is made pursuant to CPLR § 4401 is granted to the extent that the petition is hereby dismissed as Petitioner failed to establish its claims.

This constitutes the decision and order of this Court.

A copy of this decision/order will be uploaded to NYSCEF.

All trial exhibits may be picked up in Part T, Room 410 within 30 days after receipt of this decision/order.

Dated: January 30, 2023



Christel F. Garland, JHC

Appearances by the Parties

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