

Bianci v Shanley

2023 NY Slip Op 31776(U)

May 25, 2023

City Court of Peekskill, Westchester County

Docket Number: Index No. LT-26-2023

Judge: Reginald J. Johnson

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PEEKSKILL CITY COURT
COUNTY OF WESTCHESTER: STATE OF NEW YORK

MICHAEL P. BIANCI, ADMINISTRATOR OF THE
ESTATE OF BABARA JEAN MILCH

Petitioner

Decision and Order
Index No.
LT-26-2023

-against-

JOHN J. SHANLEY,

Respondent.

Reginald J. Johnson, J.

The Respondent, by his attorney James G. Dibbini & Associates, P.C., moved to dismiss this summary proceeding based on the ground that he was a family member of the late Barbara Jean Milch (the “decedent”) and not a squatter. The Petitioner, by his attorney Keane & Beane, P.C., opposed the motion to dismiss and cross moved for summary judgment on the grounds that Respondent was not a family member of the decedent, that he was never given a license by the decedent to live at the premises, and that he is now a squatter. The Respondent opposed the Petitioner’s cross motion for summary judgment and submitted a reply affirmation in further support of Respondent’s motion to dismiss.

Procedural History

On January 18, 2023, the Petitioner commenced this summary proceeding against the Respondent on the ground that he was a squatter. On February 7, 2023, the parties were scheduled for a first appearance which was adjourned to March 21, 2023, by Respondent. On March 21, the parties appeared and Respondent requested a motion schedule. The Court set the motion schedule as follows: motion by April 11, 2023; opposition by April 18, 2023; reply, if any by April 25, 2023; and a decision by May 25, 2023. By stipulation dated April 17, 2023, the parties agreed to change and extend the motion schedule as follows: Petitioner’s opposition to Respondent’s motion to dismiss and to serve and file Petitioner’s cross motion for summary judgment was extended through and including May 2, 2023; Respondent to serve and file his written reply in further support of his motion to dismiss was

extended through and including May 9, 2023; Respondent to serve and file his opposition to Petitioner's cross motion for summary judgment was extended through and including May 23, 2023; and Petitioner to serve and file his reply in further support of his cross motion to dismiss was extended through and including May 31, 2023. The Court marked the motions fully submitted on May 22, 2023.

Factual History

Petitioner's decedent took title to 1259 Maple Ave, Peekskill, New York 10566 (the "premises") on May 12, 1999 (Petition at ¶ 4). On October 10, 2022, Barbara Jean Milch died and on November 25, 2022, Letters Testamentary, without limitations, were issued to Petitioner (Id. at ¶¶ 5-6). On December 3, 2022, the Petitioner served the Respondent with a Ten-Day Notice to Quit (Id. at ¶ 9). The Respondent resided at the premises full time for about 8 years in between college and the time he met his now ex-wife (Shanley Affid. at ¶ 10). Respondent moved out of the premises for a period of 3 years in or around 2002 while his home was being built a short distance down the street from the premises (Id. at ¶ 11). After the Respondent's home was built, he moved into it with his ex-wife until they divorced, and then he moved back into the premises in or around June of 2019 (Id. at ¶¶ 16-17). Respondent stated that the decedent permitted him to move back into the premises "[i]n the interest of ensuring stability for my children and to provide emotional support to me during my divorce" (Id. at ¶ 17).

Respondent claimed that he is a family member because he went on vacations and celebrated holidays with the Milch family, and that he continuously resided at the premises for periods of time (Id. at ¶ 15). Respondent referred to decedent as his mother and she referred to him as her son; she paid for his children's school fees; and his children have a room inside the premises and their artwork is displayed throughout the premises (Id. at ¶¶ 14, 18). Lastly, Respondent claimed that the decedent offered to subdivide the premises so that he could build a house for himself, but she died before that could happen (Id. at ¶ 19).

Petitioner stated that Respondent "currently occupies the Premises pursuant to an oral license previously given by Barbara Jean Milch [Decedent] prior to her death on October 10, 2022" (Petition at ¶ 2). Petitioner also stated that "As of the date hereof, Respondent continues to occupy the Premises, and continued to take advantage of Petitioner by squatting at the Premises" (Id. at ¶ 10). Then Petitioner claimed that Respondent was never given a license, oral or written, to occupy the premises (Id. at ¶ 7). And then Petitioner argued, Respondent "was allowed to visit with his children at the Premises by the Decedent, that was his license to occupy the

Premises” (Affid. of M. Corrao at ¶ 14, citing Affid. of Janet Bianchi [decedent’s daughter-in-law] annexed as Exh. 2 at ¶15). Petitioner demanded that Respondent surrender and vacate the premises, but he refused, so Petitioner served him with a Ten-Day Notice to Quit on December 3, 2022 (Petition at ¶¶ 8-9). Notwithstanding service of the Ten-Day Notice to Quit, Respondent continues to occupy the premises.

Legal Analysis

On a motion to dismiss, the Court must give the pleading a liberal construction, accept the facts as alleged in the petition to be true, and afford the plaintiff the benefit of every possible favorable inference (*Landon v. Kroll Laboratory Specialists, Inc.*, 22 N.Y.3d 1 [2013]; *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11 [2005]; *Goshen v. Mutual Life Ins. Co.*, 98 N.Y.2d 314 [2002]; *Cron v. Hargro Fabrics, Inc.*, 91 N.Y.2d 362 [1998]). To prevail on a motion to dismiss based on documentary evidence, the moving party must show that the documentary evidence conclusively refutes plaintiff’s allegations (*AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 5 N.Y.3d 582 [2005]; *Darby Group Companies, Inc. v. Wulforst Acquisition, LLC*, 130 A.D.3d 866 [2d Dept 2015]).

On a motion for summary judgment, it if clearly appears that no material and triable issue of fact is presented, the motion must be granted (*Sillman v. Twentieth Century-Fax Film Corp.*, 3 N.Y.2d 395 [1957]; *Andre v. Pomeroy*, 35 N.Y.2d 361 [1974]). Summary judgment is proper to eliminate unnecessary expense to named litigants where no issue of material fact is presented to justify a trial against them (*Donadio v. Crouse-Irving Memorial Hospital, Inc.*, 75 A.D.2d 715 [4th Dept 1980]). A party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact (*Ciccione v. Bedford Cent. School Dist.*, 21 A.D.3d 437 [2d Dept 2005]). It has been held that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (*Mason v. Dupont Direct Financial Holdings, Inc.*, 302 A.D.2d 260 [1st Dept 2003]; *Epstein v. Scally*, 99 A.D.2d 713 [1st Dept 1984]). Since the key to deciding a summary judgment motion is issue finding rather than issue determination, affidavit[s] should be scrutinized carefully in light most favorable to party opposing motion (*Victor Temporary Services, a Div. of Victor United, Inc., a Subsidiary of Walter Kidde, Inc. v. Slattery* [4th Dept 1984]; *Town*

Bd. Of Town of Ellicott v. Lee, 241 A.D.2d 958 [4th Dept 1977]). To successfully oppose a motion for summary judgment, a party must assemble and lay bare sufficient affirmative proof to demonstrate the existence of a genuine triable issue of fact (*Forray v. New York Hosp.*, 101 A.D.2d 740 [1st Dept 1984]). However, where a decision on a question of law is controlling, summary judgment is appropriate (*Marinas of the Future, Inc. v. City of New York*, 87 A.D.2d 270 [1st Dept 1982]).

Real Property Actions and Proceedings Law (RPAPL) §713 states, in pertinent part,

A special proceeding may be maintained under this article after a ten-day notice to quit has been served upon the respondent in the manner prescribed in section 735, upon the following grounds:

3. He or the person to whom he has succeeded has intruded into or squatted upon the property without the permission of the person entitled to possession and the occupancy has continued without permission or permission has been revoked and notice of the revocation given to the person to be removed

It is well settled law that to maintain a summary proceeding pursuant RPAPL 713(3), commonly known as “squatter proceedings,” it is essential that the occupant sought to be removed or the person to whom the occupant has succeeded intruded into or squatted upon the premises, in the first instance without the permission of the owner, his predecessor in title or one entitled to possession (*Robbins v. De Lee*, 34 A.d.2d 870 [3d Dept 1970]; *Walcer v. Sherman*, 205 N.Y.S. 427 [App Term 1924]); *Stuhr Gardens Assoc., LLC. v. Doe*, 2016 NY Slip Op 30796(U) [Peekskill City Court 2016] [Johnson, J.]; *Marrero v. Escoto*, 145 Misc.2d 974 [App. Term 2d Dept 1990]). “[A] squatter proceeding can be maintained only **if the occupant never had permission, from the landlord or other person entitled to possession, to be on the premises**” [*Goffe v. Goffe*, 14 Misc.3d 130(A) *10 (App. Term 9th & 10th Jud. Dist. 2007) (citations omitted) (emphasis added)]. Here, the Petitioner stated that the Respondent “currently occupies the Premises pursuant to an oral license previously given by Barbara Jean Milch (“Decedent”) prior to her death on October 10, 2022,” and that he continues in possession until this day (Petition at ¶¶ 2 and 10). Such factual concessions are fatal to the Petitioner’s squatter proceedings and mandates dismissal (*349 Dino Realty Corp. v Baker*, 1992 NYLJ LEXIS 8777 (Civ. Ct. Kings Co. 1992); *Sementilli v. Ferrento*, 89 NYS.2d 838 [N.Y. Sup Ct. 1949] (consent of landlord to tenant’s entry into possession of premises barred claim that tenant was a squatter); *Einhorn v. Eihorn*, 124 NYS2d 498 (N.Y. App. Term 1950) (where occupant’s original entry upon premises was with landlord’s permission, subsequent

withdrawal of permission did not have the effect of transforming their occupancy into an intrusion so as to authorize maintenance of a squatter proceeding).

A summary proceeding is a statutory remedy and the petition must be strictly construed. Consequently, if the petitioner cannot fit his situation into one of the categories in RPAPL §§711 or 713, he must seek relief by way of an action in ejectment (*North Shore Motor Lodge Corp. v. Land*, 68 Misc.2d 87 [N.Y. Dist. Ct. 1971]). Since the Petitioner conceded that the Respondent entered the premises lawfully pursuant to an oral license (he therefore could not have been a squatter as a matter of law), there is no triable issue of fact regarding his entry into the premises; therefore, the petition must be dismissed (*Kaufman v. Zash*, 7 A.D.2d 927, 928 [2d Dept 1959] citing *Williams v. Alt.*, 26 N.Y.283 [1919]; *Muraski v. Melkin*, 71 Misc.2d 575 [Civil Ct. Queens Co., 1972]). In light of the Court's decision, the Court need not address the other arguments raised by the parties.

After due consideration of the papers submitted herein and the applicable statutes and case law, this Court finds that the Respondent was not a squatter, but a licensee, and therefore the instant squatter proceedings is hereby dismissed.

Dated: Peekskill, New York
May 25, 2023

Reginald J. Johnson, JCC

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