CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART R

RICHARD EVANS,

Petitioner-Landlord

-against-

DECISION & ORDER
Index No.: L&T 55690/09

HON. SABRINA B. KRAUS

ALAN MICKENS,
427 West 162nd Street
Ground Floor Apt.
New York NY 10032

Respondent-Tenant

VIOLET DELISSER,

Respondent-Occupant

BACKGROUND

This summary holdover proceeding was commenced by **RICHARD EVANS** (Petitioner) and seeks to recover possession of the **Ground floor Apartment** at **427 West 162nd Street** (Subject Premises) from **ALAN MICKENS** (Respondent) and Violet Delisser, an alleged undertenant, based on the allegation that Respondent's lease had expired and he is not entitled to a renewal because Petitioner and his immediate family members intend to occupy the Subject Premises, as part of their primary residence. Violet Delisser has never appeared herein and is not asserted to be in occupancy. Ms. Delisser was named by Petitioner because the 2001 Stipulation asserted she was an occupant of the Subject Premises at that time.

PRIOR LITIGATION

A prior holdover proceeding was commenced against Respondent in regards to the Subject Premises in 2011. That proceeding *Rev. Winston Clarke v Alan Mickens* Index Number

51566/2001 was settled pursuant to a stipulation of settlement on or about August 21, 2001 (2001 Stipulation), wherein Respondent was represented by counsel. The 2001 Stipulation was so-ordered by the court, and recorded with the City clerk's office. The 2001 Stipulation provides that Respondent is the tenant of the Subject Premises, and would be treated as if his tenancy were governed by Rent Stabilization. The 2001 Stipulation further provided that Respondent would be entitled to lease renewals on the same terms as if his tenancy were governed by Rent Stabilization, and that his tenancy could only be terminated on a basis permitted by Rent Stabilization, including but not limited to a determination by the owner not to renew his lease based a need to use the premises as the owner's primary residence.

PROCEDURAL HISTORY

Petitioner issued a combined notice of termination and notice of non-renewal on or about September 29, 2008. The notice asserts that Petitioner and his family currently reside on the second, third and fourth floors of the subject building, and that Petitioner wishes to enlarge his family residence and have access to the backyard. The subject building is a two family dwelling. The notice of petition and petition issued on or about February 6, 2009.

On or about March 18, 2009, Respondent appeared by counsel, Kenneth Rosenfeld, Esq. of Northern Manhattan Improvement Corporation, and filed an answer and counterclaim. Respondent's answer included an affirmative defense that he suffered from a permanent impairment as defined by § 2520.6 (q) of the Rent Stabilization Code, and that Petitioner was required to offer Respondent an alternative housing accommodation in accordance with §2524.4(a) of the Rent Stabilization Code.

On or about June 2, 2009, Respondent's counsel moved for an order appointing a *Guardian Ad Litem* (GAL) for Respondent in the underlying proceeding . Counsel asserted that

Respondent has a long history of psychiatric and physical disabilities, including that Respondent suffers from Bipolar Disorder. Counsel asserted that Respondent received SSI disability benefits as well as pension payments for permanent disability. Counsel stated Respondent's condition had substantially deteriorated from the inception of the litigation, and that Respondent was no longer capable of assisting in his own defense. The motion was supported by documentation from APS showing Respondent was eligible for protective services as of January 2009. The motion was opposed by Petitioner, who asserted Respondent was capable of defending his rights and was intentionally attempting to delay the proceeding. On June 4, 2009, the Court (Fitzpatrick, J) granted the motion and appointed Francine Thompson as GAL for Respondent. The Court adjourned the proceeding to July 7, 2009 for all purposes.

Prior to the GAL motion, on May 5, 2009, Petitioner had moved for an order dismissing certain of Respondent's defenses and seeking discovery on the affirmative defense asserting Respondent was disabled and entitled to be provided with alternative housing. On June 4, 2009, the Court (Fitzpatrick, J) granted that portion of the motion that sought discovery, limited the warrant of habitability defenses to a set off against use and occupancy, directed Respondent to pay ongoing use and occupancy, and denied the balance of relief sought by Petitioner.

On July 7, 2009, Petitioner moved for re-argument of that portion of the June 4, 2009 order that had denied Petitioner's motion to dismiss Respondent's first affirmative defense. On September 15, 2009, Petitioner's motion for re-argument was denied and the proceeding was marked off calendar by the Court pending completion of discovery.

On November 13, 2009, Petitioner moved for an order (November 2009 Motion to Strike) restoring the proceeding to the calendar, for an order granting access to do repairs, directing Respondent to provide Petitioner with a set of keys for the Subject Premises, and for an

order striking Respondent's answer. That motion was adjourned a number of times by the parties, through and including February 3, 2010.

On February 3, 2010, Respondent's counsel moved for permission to withdraw. Neither Respondent, nor his GAL, appeared in opposition to the motion. Counsel asserted in the moving papers that Respondent had engaged in frivolous motion practice independent of his attorney and GAL, and that Respondent would no longer cooperate with counsel in defending the underlying proceeding. The motion was granted on default by the Court (Hahn, J) pursuant to a written order providing Respondent's counsel was relieved immediately. The order further adjourned and the proceeding to March 9, 2010 for Respondent and/or the GAL to retain new counsel and serve opposition papers to the November 2009 Motion to Strike, which was still pending.

On March 9, 2010, the GAL again failed to appear for the proceeding. The proceeding was adjourned to April 14, 2010. On March 16, 2010 the Court (Hahn, J) issued an order *sua sponte* relieving Francine Thompson as Respondent's GAL and indicating a new GAL would be appointed. The order issued references that Ms. Thompson had indicated to Respondent's prior counsel that she no longer wished to serve as Respondent's GAL. On March 19, 2010, the Court (Hahn, J) issued an order appointing Thomas Giles as Respondent's new GAL. Mr. Giles filed a written statement accepting said appointment on April 20, 2010.

On May 13, 2010, Respondent moved to have his GAL relieved. The motion was denied by the Court (Hahn, J) pursuant to a written order dated May 13, 2010. On that same date, the Court issued an order providing that Petitioner's November 2009 Motion to Strike was "continued" to June 30, 2010. The Court extended Respondent's time to comply with outstanding discovery to June 30, 2010. The Court ordered Respondent to provide access for repairs on May 19, 2010, and directed Respondent to submit to examinations by a psychologist for a total of three hours on two occasions. The order concluded by stating "This motion was

originally returnable on November 2009, and this opportunity for compliance is being deemed marked 'final' against Respondent."

On June 15, 2010, Thomas Giles made an oral application to be relieved as Respondent's GAL. The Court (Hahn,J) granted the application pursuant to a written order for the reasons set forth on the record, and the proceeding remained adjourned to June 30, 2010. On June 17, 2010, the Court (Hahn, J) appointed a third GAL for Respondent in this proceeding, Betty Ware Hayes.

On June 30, 2010, the proceeding was transferred from Part H to Part I in connection with an Article 81 proceeding regarding Respondent that was pending before Judge Hagler in Supreme Court, and pursuant to a stay issued in the Article 81 proceeding. On August 12, 2010, the proceeding was transferred back to Part H, by Judge Hagler, pursuant to a written order which provided that the Article 81 proceeding was discontinued, and the pending stay had been vacated. The proceeding was adjourned in Part H to September 7, 2010.

On September 14, 2010, the Court (Hahn, J) issued a decision determining Petitioner's November 2009 Motion to Strike. The Court held:

> Respondent has brought (22) motions and order to show cause since petitioner brought the instant motion, and despite the court's strenuous and repeated attempts to have respondent mickens comply with the disclosure/discovery ordered by the court, respondent has engaged in a course of conduct, through delays and disregard of court orders, designed to obstruct the underlying proceeding. In addition, contradicting respondent's claim to being disabled, resp. introduced a document from his physician (d. 7/2/10) asserting his mental capacity as fit. Accordingly, Petitioner's motion is granted in its entirety and the proceeding is set for trial October 5, 2010 at 9:30 Part H Room 1164B. This constitutes the decision and order of the Court.

The relief sought in Petitioner's 3126 motion included a request to strike Respondent's answer and was incorporated in the Court order granting Petitioner's motion in its entirety.

On October 5, 2010, the proceeding was transferred from Part H to Part X for trial.

The file contains an email from Spiredoula Viglis, Esq dated October 5, 2010 which states that HRA's Office of Legal Affairs (OLA) was accepting an Article 81 referral for Respondent, who had contacted Mr. Viglis, that morning and threatened to commit suicide. The email further stated "After review of his psychiatric evaluation it became clear that he is not able to appreciate and understand risk and suffers from a functional limitation." That email was sent to the Court attorney for Part H and placed in the court file.

On October 5, 2010, the GAL made an application for an adjournment based on a second Article 81 proceeding, which was anticipated to have been commenced in regards to Respondent. The application which was referred back to Part H, and denied by the Court (Hahn,J). After the denial of the application, the proceeding continued in Part R. The Court started the trial, and Mr. Richard Evans was called as Petitioner's first witness. The Court indicated that it would not hear any testimony related to the case on that date, but only take into evidence any documents produced by Petitioner showing Petitioner had the right to proceed with the case. At least one exhibit, a certified deed was marked into evidence.

Later on the same date, Respondent's GAL Betty Ware-Hayes moved by Order to Show Cause to be relieved. Ms. Ware-Hayes asserted that Respondent no longer wished her to act as his GAL, that she had a long term illness, and this proceeding was causing the GAL too much stress. The motion was granted by the Court (Elsner J) pursuant to a written order relieving Ms. Ware Hayes as GAL, and appointing Betty Marshall as Respondent's fourth GAL in this proceeding. The Court set a continued trial date for October 21, 2010.

On October 21, 2010, the proceeding was marked off calendar, pursuant to a stay issued in connection with a second Article 81 proceeding commenced before Judge Hagler under Index No 402814/10. On June 23, 2011, Judge Hagler transferred the proceeding back to Housing Court, to Part H, the original resolution part. The transfer order provided "This court dismissed

the article 81 proceeding with prejudice as petitioner failed to prove its prima facie case." Judge Hagler issued an order on June 23, 2011 which provided:

> Article 81 proceeding is dismissed with prejudice for the reasons stated on the record. All stays are vacated. The prior orders of appointment of Self-Help Community Services, Inc. is vacated and the Guardian is discharged. The Guardian to file a final account forthwith. The Landlord/Tenant matter is transferred back to the Housing Court forthwith.

On September 6, 2011, Petitioner moved for an order restoring the case to the calendar and transferring the matter back to Part for what it labeled as a continue "inquest." The motion was returnable in Part H. The Court (Stanley,J) granted the motion to the extent of restoring it to the calendar, and referred the balance of the motion to Part R for determination. The proceeding was transferred to part R. The proceeding was adjourned in Part R by the Court (Halperin, J) to October 13, 2011. On October 13, 2011, the Court granted Petitioner's motion to the extent of setting the matter down for an immediate trial on that date.

Apparently, the Court (Halperin,J) attempted to commence a second and new trial in this proceeding on October 13, 2011, but Respondent acted in a disruptive matter and prevented the proceeding from moving along. The October 27, 2011 affirmation of Eileen O'Toole asserts:

> ... the Respondent refused to proceed and engaged in a filibuster, continuing to argue against restoration of the proceeding for trial. In response, noting that the Respondent's Answer had been stricken, the Court recommended that Petitioner move for summary judgment in lieu of trial. As it appeared that the issues raised in this proceeding could at this juncture be resolved in this manner, Petitioner accepted the Court's recommendation. This resulted in a second decision and order dated October 13, 2011 directing a schedule for papers on the motion.

The second order issued by the Court on October 13, 2011 provides:

> Petitioner's application for adjournment to make a motion for summary judgment is granted for the reasons stated on the record. The proceeding is adjourned to 11/29/11 Part R 9:30 for said motion. Petitioner's motion to be served and filed by November 29,

2011. Petitioner's application was made in lieu of trial. Respondent's GAL may also file opposition to the motion.

On November 29, 2011, the proceeding appeared before this Court for the first time. On that date, Betty Marshall made an oral application to be relieved as GAL, and Respondent made an application to have Ms. Marshall removed as his GAL. The Court denied both applications, pursuant to a written order, which also adjourned the proceeding, to afford Respondent additional time to submit opposition papers to the Court. The additional papers were to be submitted by December 5, 2011. Respondent did submit papers in opposition by December 5, 2011, Petitioner submitted a reply on December 8, 2011, and the Court reserved decision.[1]

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v. New York Univ. Med. Ctr*., 64 NY2d 851, 853)."

In this proceeding, Respondent's answer has been stricken in its entirety, and no affirmative defense remains to the claims in the petition. In *Wilson v. Galicia Contracting & Restoration Corp*. 10 N.Y.3d 827, 830, the Court of Appeals held that where an answer has been stricken, based on a failure to comply with discovery, the defaulting party is precluded from presenting evidence to defeat the cause of action, and said party is deemed to have admitted all traversable allegations in the opposing party's pleading. Courts have consistently held that once a pleading has been stricken pursuant to CPLR 3126, the path for a summary judgment motion has been laid [*Smith v. Imagery Media LLC* 23 Misc3d 1119(A), 2009 NY Slip Op 50837(U)(*granting motion for summary judgment after answer had been stricken for discovery*

[1] Per administrative directive, this Court retains jurisdiction over the pending motion, rather than referring the motion back to the resolution part.

defaults); *Ziskin Law Firm LLP v. Bi-County Electric Corp.,* 43 AD3d 1158 (*summary judgment properly awarded after answer had been stricken pursuant to CPLR 3126 and upon showing of prima facie case*); *AWL Industries Inc. v. QBE Insurance Corp*., 65 AD3d 904 (*court need not determine whether there was a triable issue of fact after defendant's answer had been stricken petitioner was entitled to judgment*).

Petitioner has made a *prime facie* showing of entitlement to summary judgment with respect to the underlying owners' use holdover proceeding. Petitioner purchased the subject building in 2005, and is the owner pursuant to a recorded deed (Exhibit I to moving papers). Respondent is in possession and the terms of his tenancy are governed by a written lease dated August 21, 2011 for a period through and including March 31, 2003. Respondent's lease was most recently renewed in writing on December 6, 2006 for a period of two years, through and including January 6, 2009.

The subject building is a two family home. Mr. Mickens asserts his occupancy of the Subject Premises commenced on or about 1984. The building is not a multiple dwelling, and the Subject premises are not subject to rent regulation, although the 2001 Stipulation provides that Respondent's tenancy is to be governed by the terms applicable to a rent regulated tenant.

On or about October 3, 2008, Petitioner served Respondent with a combined termination notice and notice of intention not to renew his lease. The notice indicated Petitioner sought to recover possession of the Subject Premises for personal use and occupancy by himself and his family members as their primary residence. Respondent did not vacate the Subject Premises and remains in possession.

Petitioner resides in the building with his family and they occupy all portions of the building other than the Subject Premises. Petitioner seeks to expand the living space for himself and his family is entitled to maintain this proceeding in accordance with the 2001 Stipulation

(Exhibit D to moving papers).

Petitioner submits an affidavit in support of the motion. Petitioner currently resides on the top three floors of the subject building with his wife, Melissa Dribble, his son, Ben Evans and his wife's two minor children, who are ten and twelve years of age (Marriage certificate for Petitioner and his wife annexed as Exhibit Q to moving papers). Petitioner states that he wishes to enlarge his family residence, and in particular he wishes to provide his wife's minor children with their own bedroom. Petitioner has no access to the garden, and only limited access to the basement, due to Respondent's occupancy. Petitioner has lived in the Subject Building since 2006 with his family and has no other residence. Petitioner owns a vacation home and an investment property overseas. Petitioner is a permanent resident of the United States pursuant to a Green Card issued in 2010 (Exhibit P to moving papers).

The motion is also supported by the affidavit of Petitioner's wife, Melissa Dribble. Ms. Dribble confirms that she and her husband have lived at the subject building with their family, are both employed in New York and pay taxes from the Subject Premises (Exhibit R to moving papers). Petitioner's established occupancy of the building as a family residence since 2006 evinces the necessary requirement of good faith.

Respondent cross-moves for summary judgment. Much of the focus of Respondent's cross-motion discusses concern prior determinations he feels were wrongly made, but which. are now law of the case, and binding on this Court. This includes but is not limited to Judge Hahn's September 14, 2010 order striking Respondent's answer. This Court has no jurisdiction to vacate or modify the order of Judge Hahn and is bound by same. Respondent suggests that Petitioner's motion for summary judgment is not timely, but Petitioner's motion was brought in accordance with Judge Halperin's October 13, 2011 order providing for same. Respondent's GAL has been present at all Court dates, and has taken the position that there remains no

meritorious defense to assert on behalf of Respondent, given the procedural history of the proceeding as outline above. The Court has considered all submissions by Respondent and finds that nothing contained therein presents a defense to the underlying proceeding in light of the prior court order striking Respondent's answer.

Petitioner has established a *prima facie* entitlement to possession as a matter of law, given that Respondent's answer has been stricken. With respect to Petitioner's motion for a default judgment against Violet Delisser, the motion is denied and the Court dismisses the action against her. It is uncontested that Violet Delisser has not been in occupancy since at least 2005 when Petitioner purchased the subject building, and was only named because she is referenced as an occupant in the 2001 Stipulation. As Ms. Delisser was not in possession at the time the proceeding was commenced, the court lacks jurisdiction over her. Accordingly the Court dismisses the action against Violet Delisser.

The Court awards Petitioner a final judgment of possession as against Alan Mickens. The warrant of eviction may issue forthwith. Execution of the warrant is stayed through May 31, 2012 provided, Respondent pays $563.06 per month by certified funds or money order on or before the fifth of each month, from March 2012 through May 2012. Upon default in payment or after May 31, 2012, the warrant may execute on service of a Marshall's notice, notice to GAL and additional APS notice of eviction date.

This constitutes the decision and order of this Court.

Dated: New York, New York
February 7, 2012

Sabrina B. Kraus, JHC

TO: EILEEN O'TOOLE
Attorney for Petitioner
270 Madison Avenue, Suite 1500
New York NY 10016
(212) 838-1153

BETTY MARSHAL, ESQ.
Guardian Ad Litem for Respondent
55 West End Avenue, Suite 8H
New York NY 10023
(212) 265-1103

ALAN MICKENS
427 West 162nd Street, Ground Floor Apt.
New York, NY 10032