CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART R
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RIVERSIDE PARK COMMUNITY, LLC &
RIVERSIDE PARK COMMUNITY II LLC,

Petitioner-Landlord

HON. SABRINA B. KRAUS

DECISION & ORDER
Index No.: L&T 53434/12

-against-

FREDDY VENTURA
FREDDY VENRURA JR
JULISSA VENTURA
3333 BROADWAY, BUILDING A
APARTMENT A10C
NEW YORK, NY 10031,

Respondents-Tenant

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BACKGROUND

This summary holdover proceeding was commenced by **RIVERSIDE PARK COMMUNITY, LLC & RIVERSIDE PARK COMMUNITY II LLC** (Petitioner) against **FREDDY VENTURA** (VENTURA) the tenant of record, and his adult child **FREDDY VENTURA JR** (VENTURA JR.), and adult grandchild **JULISSA VENTURA** (JULISSA) the undertenants alleged in occupancy, (collectively Respondents), seeking to recover possession of Apartment A10C, at 3333 BROADWAY, NEW YORK, NEW YORK 10031 (Subject Premises). The proceeding was brought pursuant RPAPL § 715(1) and at the request of the Manhattan District Attorney's office.

PROCEDURAL HISTORY

This proceeding was commenced by service of a Ten Day Notice of Termination dated January 5, 2012 (Notice), and Notice of Petition and Petition, dated January 27, 2012. The Notice asserted that Ventura's tenancy was being terminated pursuant to RPAPL 711(5) and pursuant to Paragraphs 28 and 33 of Ventura's lease, and Rules 12 and 13 relating thereto. Ventura receives a Section 8 subsidy from HPD pursuant to 24 CFR 882. The Notice asserted Ventura was permitting the use of the Subject Premises "for an immoral or illegal purpose and for an illegal trade or business, to wit: the sale, storage, packaging or manufacturing of a controlled substance."

The factual allegations underlying Notice include the execution of a search warrant in the Subject Premises on November 10, 2011, and items found pursuant to said search including cocaine, cash and zip lock bags. The Notice asserted that Ventura Jr had been sentenced for criminal possession of a controlled substance. Paragraph d) of the Notice provides:

> The landlord has received numerous complaints from other tenants and building employees that there has been drug related activity inside the subject premises from at least the summer of 2011 on. Other tenants and building employees have advised that they fear for their comfort, safety and well being due to the illegal activity emanating from inside the subject premises. There has been heavy pedestrian traffic into and out of the subject premises. The use of the premises for illegal drug activity has created an extreme danger to other residents and building employees.

At the commencement of the proceeding, Ventura Jr was incarcerated, but appeared by counsel on February 27, 2012. Ventura appeared *pro se.*

On March 21, 2012, Ventura Jr moved to dismiss the proceeding and for related relief. On April 25, 2012, Ventura Jr moved to compel Petitioner to comply with the Demand for Verified Bill of Particulars in a more specific way. On April 25, 2012, the court (Stoller, J.)

denied the motion to dismiss, but granted the motion to compel to the extent of "...precluding Petitioner from offering any evidence by a law enforcement witness of any dates (of) illegal activity other than November 10, 2011 and to the extent of precluding Petitioner from offering any evidence by any other residents of the building in which the subject premises is located concerning activity prior to June 21, 2011."

The proceeding was adjourned for trial to June 27, 2012.

On May 30, 2012, Ventura Jr filed an answer alleging lack of personal jurisdiction and failure to state a cause of action. Ventura Jr was released from prison on or about July 3, 2012. On August 2, 2012, the proceeding was assigned to Part R for trial. The trial took place on August 2, 2012 and on August 9, 2012. The parties submitted post trial memoranda on or about September 14, 2012, and the court reserved decision.

FINDINGS OF FACT

Ventura was born in the Dominican Republic and immigrated to the United States in 1965. Ventura worked in a factory and attended Bronx Community College. In 1967, Ventura was drafted into the United States Army, where he served for two years, until 1969 when he was discharged with honor. In 1970 Ventura married, and he and his wife had five children. In 1976, Ventura got a job as a maintenance worker for Sheraton Hotels, where he worked for 18 years. Towards the end of that period, Ventura was diagnosed with lung cancer, as a result of exposure to toxins at his workplace, and after a period of receiving workers compensation benefits, Ventura retired and began helping to raise his grandchildren.

Ventura has lived in the Subject Premises since 1988, with his family. Ventura and his wife have 17 grandchildren. Ventura's daughter passed away in 2002, and his wife divides her

time between the Subject Premises and her daughter's home, at 583 Riverside Drive, where she helps to care for her grandchildren.

From July through September 2011, Ventura was away from the Subject Premises, visiting his ill sister in the Dominican Republic. During this period, Julissa stayed at the Subject Premises to care for Ventura's other young grandchildren who lived at the Subject Premises.

On November 3, 2011, Criminal Court issued a search warrant for the Subject Premises based on the affidavit of Detective Nelson Pabon of the New York City Police Department (Ex 15). The warrant provided that there was reasonable cause to believe that items evidencing illegal drug dealing would be found in the Subject Premises. These items included "... crack/cocaine, vials, caps, small ziplock-style bags and other evidence of the possession and distribution of crack/cocaine including but not limited to paraphernalia used to process and distribute the drug including but not limited to dilutants and scales, records and documents reflecting drug transactions in any format ...".

On November 10, 2011, at approximately 6 am, Detective Pabon and his team of officers executed a search warrant at the Subject Premises pursuant to which they recovered 6.961 grams of cocaine, a box of plastic sandwich bags, and $1953.00 in cash. All three Respondents were arrested, however, only Ventura Jr was charged. Ventura Jr was convicted by plea of possession of a controlled substance, a Class A misdemeanor, and sentenced to one year in prison (Ex 8).

At the trial, Detective Pabon was qualified as an expert in the sale of illegal drugs. Detective Pabon testified that the drugs recovered had a street value of $300, and in his opinion drugs were being sold from the Subject Premises. Detective Pabon testified that when questioned on November 10, Ventura stated that he wanted his son to stop selling drugs.

Ventura testified that on November 10, he heard the police breaking down the entrance door of the Subject Premises, and unable to open the door, sat at the dining room table with Ventura Jr and Julissa, until the police broke in. Ventura testified that the sandwich bags confiscated by police were originally in the kitchen and not in the bedroom, where police allegedly found them. The money confiscated by police, according to Ventura, was a combination of rent money he asked Julissa to hold and her own funds, which she stored at the Subject Premises.

Ventura Jr has lived in the Subject Premises since 1988. Ventura Jr has a prior criminal record, including two prior convictions by plea for the sale of drugs, in 1995 and 2007. Ventura Jr served four years in prison for the 2007 offense (certificates of disposition in evidence as Exs 6 & 9)1. Ventura Jr came back to live at the Subject Premises in February 2011, after he was released on parole. Ventura Jr is a recovering addict, and while on parole he attended a weekly program and submitted to weekly drug tests. Ventura Jr testified that the cocaine found under his bed in the Subject Premises was for his own personal use. In October 2011, Ventura Jr tested positive for cocaine use (Ex C).

Julissa Ventura did not testify.

Carlton Cooper (Cooper) and Ramon Cornelio (Cornelio), both tenants who live on the same floor as Respondents in the subject building, testified they had never witnessed heavy pedestrian traffic in connection with the Subject Premises. Both were living in their

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1 Also in evidence is a certificate of disposition for conviction of possession of a weapon (Ex 7), however the defendant is not Ventura Jr and the conviction appears to be unrelated to this proceeding.

apartments and present for the period between June 2011 and November 2011, and have known Respondents for years.

Cooper is 75 years old and lives in Apartment 10D, which is about two feet away from the Subject Premises. Cornelio is 63 years old and retired. Cornelio has lived in the building for approximately thirty years. Cornelio lives in Apartment 10J which is on the other side of the floor from the Subject Premises. Cornelio observed no heavy pedestrian traffic at the Subject Premises, other then Ventura's grandchildren, and no drug related activity. The Court found both witnesses to be credible.

DISCUSSION

RPAPL § 711(5) provides that a special proceeding may be maintained where "(t)he premises, or any part thereof, are used or occupied as a bawdy-house ... or for any illegal trade or manufacture, or other illegal business."

In order to maintain a proceeding under RPAPL §711(5) a landlord has "the burden to prove by a preponderance of the credible evidence that the subject premises were used to facilitate trade in drugs and that the tenant knew or should have known of the activities (*855-79 LLC v. Salas* 40 A.D.3d 553)." "The term 'use' of premises for illegal purposes implies doing of something customarily or habitually upon the premises (*Grosfeld Realty Co. v. Lagares* 150 Misc.2d 22)." In the *Lagares* case the Appellate Term reversed the Housing Court's award of possession in a drug holdover proceeding, where the son of a section 8 tenant was responsible for the illegal activity holding that the "(l)andlord had failed to establish by prevailing evidence that the apartment premises was used or occupied for illegal purposes so as to warrant eviction of the Section 8 tenant pursuant to RPAPL 711(5)."

Petitioner's case relies almost entirely on circumstantial evidence. Although the evidence at trial establishes that drugs were found in the Subject Premises on a single date, Petitioner failed to prove that the Subject Premises was being habitually used in connection with the sale of drugs. Petitioner argues that the box of sandwich bags, and the cash recovered supports an inference of sales, however, no other physical evidence, ie. scales, weapons, or marked bills, demonstrating the sale of drugs was found.

Petitioner relies on this one single event. No other evidence or testimony was provided demonstrating that Petitioner ever had a problem with Ventura as a tenant before, or any prior incidences involving drugs. Although, Ventura Jr has had prior convictions for the sale and the use of drugs, no testimony was presented establishing that the sale of drugs involved in those convictions happen at or near the Subject Premises.

The Notice alleges there were many instances of heavy traffic, however, Petitioner failed to present any evidence as to heavy traffic in and out of the Subject Premises. Petitioner failed to prove any of the allegations in paragraph (d) of the Notice, in regards to complaints from other tenants and building employees about drug related activity or that any other tenants or occupants have been disturbed or put in danger.

Ventura is a senior citizen with a long term tenancy in the Subject Premises without incident. Ventura testified, although he had some knowledge of his son's criminal history with drugs, he did not know Ventura Jr. was using drugs. The court found Ventura to be a credible witness with limited exceptions. The Court found Ventura's explanation for the cash recovered from Julissa's room to lack credibility. This finding is underscored by the fact that Julissa was not called by Ventura to coorborate his testimony regarding the cash found even though he

described Julissa as the one he trusted most in his family. To the extent the court draws a negative inference from Julissa's failure to testify it is that the Court infer's her testimony would not support Ventura's explanation of the cash recovered.

Similarly, the Court found Ventura's testimony that he, Ventura Jr and Julissa calmly sat at the dining room table while the police battered down the entrance door to the Subject Premises to be improbable, particularly given that Ventura Jr. Knew that he had drugs hidden underneath his bed and that he was on parole. Finally, the court does not credit the testimony of either Respondents that the box of sandwich bags had been located in the Kitchen, nor their implication that the police lied when they testified they recovered the bags from under Venrtura Jr's bed.

Notwithstanding the foregoing, "(e)vidence that establishes only a single instance of illegal drugs in the apartment, even combined with a single criminal disposition, is insufficient to prove the apartment is habitually used for the illegal sale of drugs (*New York City Housing Authority v. Grillasca* 18 Misc.3d 524 *citing 554 West 148th Street Associates LLC v. Thomas,* 8 Misc.3d 132)."

Petitioner failed to offer the type of evidence which courts have traditionally found sufficient to determine that a residential premises was being used for the illegal ale of drugs [See eg *88-09 Realty LLC v Hill* 190 Misc2d 286 (*undercover buy operation on two different dates over a three month period plus recovery of 18 bags of crack cocaine, two scales one bag of marijuana and other drug paraphernalia*); *Arjs Realty v Perez* 2003 NY Slip Op 51220(U)(*firearm,51.3 grams of cocaine, two electronic scales, customer list and drug paraphernalia*); *New York City Housing Development v Arias* 11 Misc.3d 138(A)*(one kilo of*

cocaine, and ammunition); *Royal Charter Properties Inc. v. Vidal* 14 Misc3d 139(A)*(100 individually wrapped bags of marijuana, a safe, heat sealer and digital scale*); *New York County District Attorneys Office v Robinson* 27 Misc3d 137(A)(*209 ziplock bags of crack cocaine and a digital scale*); *MS Housing Associates v Greene* 28 Misc3d 131(A)(*a deck of heroin, 400 glassine envelopes, a stun gun a drug paraphernalia*).

Moreover, the court gives little weight to Detective Pabon's opinion that the amount of cocaine recovered is sufficient to support an inference of sales. In *People v Sanchez* 86 NY 27 the Court of Appeals held where the defendant was found in possession of 3 1/4 ounces of uncut and unpackaged cocaine there was insufficient evidence to infer an intent to sell. The Court held:

> While defendant's possession of a 'substantial quantity of drugs can be cited as circumstantial proof of an intent to sell, it cannot be said as a matter of law that the quantity of uncut and unpackaged drugs possessed in this case permitted an inference that defendant intended to sell them. More than mere possession of a modest quantity of drugs, not packaged for sale and unaccompanied by any other saleslike conduct, must be present for such an inference to arise.

(*Id* at 35 ; *see also People v Martinez* 228 AD2d 185). Similarly, while the Court found Detective Pabon to be a credible witness, the statement he testified to concerning Ventura's admission that he wanted his son to stop selling drugs, does not establish that the Subject Premises was being used for that purpose, and the court does not accord that testimony great weight.

In *137 Realty Associates v Samuel* 7 Misc3d 80, the Appellate Term reversed the decision after trial where landlord was awarded possession in a holdover proceeding. The tenant was arrested in connection with a single drug sale and found in possession of $20 in prerecorded

buy money. The Appellate Term held "no fair interpretation of the evidence can support a finding that tenant's apartment was utilized as a focal point for drug activity or that any such illegal use occurred 'customarily or habitually' upon the premises (*Id* at 82 *citations omitted*)."

Similarly, in *Second Farms Neighborhood HDFC v Lessington* 31 Misc3d 144(A) the Appellate Term in affirming the dismissal of the underlying drug holdover proceeding held "(o)n this record, neither the quantity of contraband recovered inside the apartment, nor the possession charges brought against tenant, warrants the conclusion that the apartment was utilized as a focal point for drug activity or that any such illegal use occurred 'customarily or habitually upon the premises.'"

The Court finds that Petitioner failed to establish by a preponderance of credible evidence that the Subject Premises were being used for illegal drug sales, and thus Petitioner has failed to establish a cause of action pursuant to RPAPL 711(5).

Petitioner alternatively argues a cause of action for breach of lease. Assuming arguenndo the pleadings supported such a cause of action, even under this theory Petitioner has failed to prove its case. The Notice asserts that Respondent breached his obligations under paragraphs 12 and 13 of the Rules and Regulations of Respondent's lease (Ex1). Paragraph 12 is the rule against disturbing other tenants. Not a single tenant testified that they were disturbed by conduct in the Subject Premises. In fact the only evidence in this regard is from the two tenants who live on Respondent's floor and who testified for Respondent that there were no such disturbances.

Paragraph 13 of the rules also primarily proscribes use of the premises for the sale or distribution of narcotics, and as noted Petitioner has failed to establish that. The final provision in Paragraph 13 however pertains only to possession and provides that no tenant or member of a

tenants family shall use or occupy the subject premises "... for possession of a controlled substance such as would constitute a violation of Section 220.16, Section 220.18 or Section 220.21 of the Penal Law of the State of New York."

Ventura Jr was not convicted pursuant to any of those three sections of the Penal Law which are all felonies, but only pled to conviction of Section 220.03, which is a misdemeanor not a felony and a much less serious crime.

As such the Court also finds that Petitioner failed to establish a cause of action for breach of lease. Given that Petitioner failed to establish either under the lease or statute that there was a breach, the court need not reach the issue of whether Ventura knew or should have known of Ventura Jr's conduct.

Based upon the forgoing, the Court finds that Petitioner has failed to prove by a preponderance of the credible evidence any cause of action entitling Petitioner to a judgment of possession as against Respondents and the proceeding is dismissed.

This constitutes the decision and order of the Court.

Dated: New York, New York
October 12, 2012

Sabrina B. Kraus, JHC

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