

236 W 16th St LLC v Freijomil

2012 NY Slip Op 32620(U)

October 17, 2012

Civil Court, New York County

Docket Number: 66680/2011

Judge: Sabrina B. Kraus

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

236 W 16th St LLC

HON. SABRINA B. KRAUS

Petitioner-Landlord

DECISION & ORDER
Index No.: L&T 66680/2011

-against-

CARMEN FREIJOMIL,
236 WEST 16TH STREET Apt 1C
New York, New York 10011

Respondent-Tenant

STEPHANIE DOE, STACEY DOE,
CHRISTINA DOE

Respondent-undertenants

X

BACKGROUND

This summary holdover proceeding was commenced by 236 W 16th St LLC (Petitioner) against **CARMEN FREIJOMIL** the last rent control tenant of record (Tenant) of 236 West 16th Street Apt 1C, New York, New York 10011 (Subject Premises) based on the allegation that Tenant was causing a nuisance. Tenant has never appeared herein. **STEPHANIE SACKS, STACY SACKS** and **KRISTINA SACKS** (Collectively Respondents) are the granddaughters of the Tenant and are the only ones currently residing at the Subject Premises. Respondents appeared by counsel on or about July 2011 and filed a written answer, asserting several affirmative defenses including a joint claim of succession.

PROCEDURAL HISTORY

Petitioner issued a thirty day notice of termination in March 2011. The proceeding was originally returnable May 16, 2011. Respondents appeared through counsel. On July 13, 2011, Respondents filed an answer asserting *inter alia* lack of subject matter jurisdiction based on a failure to serve a notice to cure, failure to state a cause of action, and failure to properly name

and serve Respondents, and succession. The affirmative defense of succession asserts that Tenant has permanently vacated the Subject Premises and that Respondents lived with Tenant at the Subject Premises for most of their lives and “successively for a period of more than two (2) years.”

In July the Court sent a post card addressed to Tenant at the Subject Premises, which was returned by the post office, with a stamp that indicated that Tenant had filed a forwarding order directing all mail to be forwarded to 1712 Madison Street, Apt. 1L, Ridgewood, NY 11385-3639. The label indicated the card was being returned to sender because the forwarding time had expired.

On August 23, 2011, Respondents counsel moved to withdraw. The motion was granted by the court (Stanley, J.) and the proceeding was adjourned to October 5, 2011, for the Court to make an APS referral on behalf of the 76 year old Tenant who had yet to appear.

On October 5, 2011, the proceeding was adjourned to November 9, 2011, for APS to investigate whether the Tenant had permanently vacated the Subject Premises. On November 9, 2011 the file is marked that APS closed the case and the proceeding was adjourned to December 7, 2011.

On December 7, 2011, Respondents newly retained counsel filed a notice of appearance and the parties entered into a stipulation marking the case off calendar and agreeing to discovery on Respondents’ succession claim.

On February 9, 2012, Petitioner filed a motion to strike based on the Respondents failure to comply with discovery. The motion was adjourned over several dates to May 2, 2012.

On May 2, 2012, Tenant’s daughter, Ms. Chavez appeared and represented to the Court that Tenant was living with her, was bedridden, and had stopped living in the Subject Premises at least one and a half years earlier.

On August 15, 2012, the court (Kraus, J) heard oral argument on Petitioner's motion to strike. At oral argument, Petitioner's counsel stipulated that the underlying cause of action based on nuisance was moot, and that the only remaining issue to be determined in this proceeding was succession. The court incorporated these stipulations into the decision issued which denied the motion to strike, directed Petitioner to complete deposition of Respondents within 30 days, permitted Petitioner to issue discovery subpoenas for certain documents and directed Respondents to execute releases so the Petitioner could obtain their tax records for the past six years directly from the IRS.

THE PENDING MOTION

Petitioner now moves for renewal or re-argument of the August 15 decision. The relief sought by Petitioner is not to reinstate the cause of action for nuisance or rescind counsel's stipulations on the record, but only to strike Respondent's answer. The body of the motion states no basis to renew or reargue the denial of the motion to strike. Instead, Petitioner asserts that the court misapprehended the facts and law in finding that there had been a surrender by operation of law and in holding that the nuisance had been cured. Petitioner seeks renewal based on new evidence which it asserts establishes that Respondent never legally "surrendered" the Subject Premises to Petitioner. Respondents oppose the motion asserting that Petitioner acted to enforce the court's decision by scheduling depositions, and then once again failed to follow through. Respondents point out that hundreds of pages of documents have been produced, and that they agreed to allow Petitioner to subpoena directly anything that was not produced.

DISCUSSION

The basis for Petitioner's motion is fiction. This court never issued any order finding a surrender as an operation of law, nor did this court issue any order dismissing nuisance as a cause of action. Rather counsel stipulated on the record to limit the scope of the litigation

pending before the court, based on the undisputed facts that Tenant has not lived in the Subject premises for years, is bedridden and lives with her daughter in Queens. Tenant has also submitted a written statement through her daughter, as Power of attorney that she no longer lives in the Subject Premises, and will never return to live in the Subject Premises.

At the oral argument on August 15, 2012, Counsel for Petitioner, Warren Dank appeared in support of the motion. In response to the Court's question as to the underlying basis of the holdover proceeding Mr. Dank stated:

“ It's based on nuisance and they have an allegation – they have an affirmative defense of succession rights. We provided a discovery request, we have a pending motion right now to strike the pleadings because the discovery responses were inadequate. Since the succession rights would've began two years prior to the vacature, which was 2010, we have a letter that states that Carmen is no longer residing as of Nov 22nd 2010.”

When the Court asked why Petitioner wanted to pursue a nuisance claim against Tenant who had vacated, Mr. Dank responded “No, the nuisance is against the three occupants.” The Court pointed out that Petitioner could not maintain a nuisance proceeding against Respondents because they had not been recognized as tenants. Mr. Dank agreed.

The Court then asked Mr. Dank if he would stipulate that the nuisance claim was moot based on Tenant's surrender and Mr. Dank stated: “No, you're right. The nuisance at this point is moot ...”. Mr. Dank further stipulated on the record that the only issue remaining was the claim of succession. The Court's decision provides:

The parties agreed on the record on oral argument that the tenant of record has surrendered her tenancy pursuant to the 10/26/11 letter sent by Dorothy Chavez her daughter and POA. Based on said letter both parties agreed that petitioner's underlying cause of action for nuisance is moot and the only remaining issue for this Court to determine is whether the Undertenants are entitled to succession rights. The parties therefore conceded that Petitioner need prove no prima facie case and that the sole issue for trial shall be Respondents' entitlement to succession.

The decision neither finds a surrender by operation of law nor dismisses any cause of action, but merely recites what was agreed to by counsel at argument.

Instead of immediately returning to court and seeking to withdraw his consent to limit the scope of the litigation, Mr. Dank sent a letter to counsel on September 19, 2012, seeking to enforce the order and advising that Petitioner would like to conduct Respondents' depositions the next day. The attorneys agreed on a deposition date of September 28, 2012.

Two days later, on September 21, Mr. Dank filed the instant motion seeking re-argument, and seeking a stay on going forward with the depositions.

Petitioner alternatively argues that new evidence in the form of electronic rent payments submitted in the name of Tenant from May 2011 forward warrants renewal. However, the parties executed a stipulation that payments for this period were for use and occupancy and without prejudice to either parties rights or claims, and Tenant's banking is being controlled by her daughter Dorothy Chavez, pursuant to the POA [*see also Herzog v Joy* 74 AD2d 372 (*payments by a rent control tenant no longer in possession are not determinative of status and did not preclude a finding that remaining family members were tenants under Rent Control*)]. Moreover, the "newly discovered evidence" does not vitiate the stipulation by counsel made in open court.

CPLR 2104 provides that "(a)n agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered." In this case Petitioner's counsel did stipulate on the record in open court to limit the scope of the litigation to succession and deem the cause of action for nuisance moot. This was then incorporated in the order issued by the court, which has subsequently been entered.

What Petitioner is really seeking is to rescind the stipulation limiting the scope of the litigation, but the motion neither seeks that relief, nor asserts a legal or factual basis for vacating the stipulation.

Based on the foregoing, Petitioner's motion is denied in its entirety.

This constitutes the decision and order of the court.

Dated: October 17, 2012
New York, New York

Hon. Sabrina B. Kraus

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