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| <b>Fort 709 Assoc. LP v Ramirez</b>  |
| 2013 NY Slip Op 33119(U)   |
| December 13, 2013  |
| Supreme Court, New York County   |
| Docket Number: L&T 79624/2013  |
| Judge: Sabrina B. Kraus  |
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CIVIL COURT OF THE CITY OF NEW YORK  
 COUNTY OF NEW YORK: HOUSING PART C

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 FORT 709 ASSOCIATES LP

Petitioners-Landlord

-against-

FERNANDO RAMIREZ  
 709 West 176<sup>th</sup> Street, Apt 3C  
 NEW YORK, NY 10033

Respondent-Tenant

YULINA RAMIREZ, ALBA RAMIREZ  
 “JOHN DOE” and “JANE DOE”

Respondents -Undertenants

**HON. SABRINA B. KRAUS**

**DECISION & ORDER**

**Index No.: L&T 79624/2013**

**BACKGROUND**

This summary holdover proceeding was commenced by **FORT 709 ASSOCIATES LP** (Petitioner) and seeks to recover possession of 709 West 176<sup>th</sup> Street, Apt 3C, NEW YORK, NY 10033 (Subject Premises) based on allegations that **FERNANDO RAMIREZ** (Respondent) the rent-stabilized tenant of record has unlawfully sublet the Subject Premises and is residing in Maryland. **YULINA RAMIREZ** (Undertenant) is the alleged undertenant and occupant of the Subject Premises. **ALBA RAMIREZ** is Respondent’s wife.

**PROCEDURAL HISTORY**

Petitioner issued a Notice to Cure dated July 10, 2013, stating that Respondent is no longer residing in the Subject Premises, but is living in Maryland in a home he owns with his wife. The Notice further asserts that Undertenant is residing in the Subject Premises, and that the Con Edison account for the Subject Premises has been in her name since January 2011.

The Notice of Termination is dated August 1, 2013, the petition is dated August 27, 2013, and the proceeding was originally returnable on September 18, 2013. On said date, Respondent and Undertenant appeared by counsel, and the proceeding was adjourned to October 18, 2013. Respondent and Undertenant filed a written answer asserting affirmative defenses and counterclaims.

The answer asserts that Respondent serves in the military, which requires periods of time when he is away from the Subject Premises. Respondent asserts that he is temporarily serving the military in a civilian capacity for the army's Casual Operations Unit, and that he is needed in this capacity for approximately one year, at which time he will return to residing in the Subject Premises.

Respondent denies any sublet of the Subject Premises and states that Undertenant is his daughter, and has resided in the Subject Premises for over five years.

On October 18, 2013, Petitioner moved for discovery and to strike Respondent's affirmative defenses. On December 9, 2013, Respondent and Undertenant cross-moved for an order dismissing the proceeding or alternatively for summary judgment. On December 9, 2013, the court heard limited argument and reserved decision on the motions. The motions are consolidated herein for disposition.

### **DISCUSSION**

It is undisputed that Undertenant is the daughter of Respondent. Respondent has provided a birth certificate establishing same. Respondent shows that the United States Army wrote to Petitioner's counsel on January 28, 2011, confirming that Respondent's absence from

the Subject Premises was due to his military service, that Respondent had never sublet the Subject Premises and that the only occupants were immediate family members.

### **MOTION TO STRIKE DEFENSES**

Petitioner moves to strike Respondent's first affirmative defense, which asserts improper service. The motion is denied. The answer is verified by Respondents and specifically disputes that sufficient number of papers were annexed to the Subject Premises and or mailed. The defense is preserved for trial.

Petitioner moves to strike Respondent's third affirmative defense for failure to state a cause of action. This is denied. A motion to dismiss an affirmative defense of failure to state a cause of action does not lie (*Mazzei v Kyriacou* 98 AD3d 1088).

Respondent's fourth affirmative defense is labeled lack of subject matter jurisdiction, but really seeks to challenge service of the predicate notices. Respondents assert service of said notices was improper as it did not comply with RPAPL 735. Petitioner's moving papers focus solely on the label lack of subject matter jurisdiction, but fail to allege the allegations actually made in paragraphs 7 through 9 of the answer. As such the motion to dismiss the defense of lack of subject matter is granted, as Housing Court always has subject matter jurisdiction over holdover proceedings, but the defenses in paragraph 7 - 9 remain for trial.

The motion to dismiss the seventh affirmative defense is granted as the defense as pled asserts no legal or factual defenses to Petitioner's claim.

### **RESPONDENT'S MOTION TO DISMISS**

Respondent moves to dismiss based on his allegations that the predicate notices are defective. The predicate notice asserts that the Respondent has breached his lease agreement. Yet

neither party provides the court with a copy of the governing lease in the motion papers. Thus the court can not make a determination as to whether the notices are adequate based on the foregoing Respondent's motion to dismiss based on the inadequacy of the notices is denied.

Respondent also moves for summary judgment. Petitioner comes forward with no admissible evidence to dispute the allegations made by Respondent. Petitioner does not appear to have much of a case. Petitioner has failed to show or even allege that anyone other than Respondent's daughter has occupied the Subject Premises in his absence or that Respondent's absence for work is not excusable under the Rent Stabilization Law. Petitioner has been aware since at least 2011 that Respondent has been away for said reason, and that Respondent's daughter was in occupancy of the Subject Premises.

Respondent also provides a letter from the United States Army confirming that he was asked to stay on after his retirement in November 2011 to serve injured United States Soldiers who were injured in combat and are returning from service. Respondent serves in this regard in Fort Knox, Kentucky and has committed to the United States Army to remain in service in such capacity until October 2014, when combat operations in Afghanistan are slated to end.

Petitioner argues that the law presumes a sublet in the absence of the tenant. This is not true where the allegation is that the tenant is subletting to a child or immediate family member (*see eg PLWJ realty Inc v Gonzalez* 285 AD2d 370 *where Petitioner proved tenant did not live in premises, but failed to prove subletting to the son, proceeding was dismissed for failure to establish sublet*). If Undertenant establishes long term contact with the Subject Premises, the proceeding should be dismissed, and Petitioner will be relegated to commencement of a non-primary residence proceeding, regardless of whether Respondent's absence from the Subject

premises is excusable (*235 West 71 Street LLC v Checchak* 782 NYS2d 498). The court may also consider whether as alleged Respondent and Undertenant ever contemporaneously occupied the Subject Premises [*See Morris Asset Mgmt LLC v Hammel* 34 Misc3d 148(A); *706 Realty Corp v Mohammed* 34 Misc3d 129(A)]

The papers are insufficient to determine whether Undertenant has such ties. Undertenant fails to provide documentation supporting her otherwise uncontested claim that she has lived in the Subject Premises for most of her life.

Based on the foregoing, Respondent's motion for summary judgment is denied.

#### **PETITIONER'S MOTION FOR DISCOVERY**

Petitioner fails to establish ample need for discovery from Respondent. This is not a nonprimary residence proceeding and as noted above the main issue for trial is whether Undertenant has longstanding ties to the Subject Premises. Based on the foregoing, Petitioner's motion for discovery as to Respondent is denied.

Petitioner did not move for any discovery from Undertenant.

Finally, Petitioner moves for an order directing the payment of use and occupancy.

However, given that discovery has been denied, and pretrial motions resolved the court is setting a final trial date and there is no need for an order regarding the payment of interim use and occupancy. Denial of use and occupancy is without prejudice to renewal if Respondent seeks to adjourn the trial date.

Trial and traverse are set for January 15, 2014 at 9:30 am.

This constitutes the decision and order of this court.

Dated: December 13, 2013  
New York, NY

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Hon. Sabrina B. Kraus, J.H.C.

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