

Lexington NY Realty, LLC v Saldana Yanez
2015 NY Slip Op 30250(U)
February 25, 2015
Civil Court, New York County
Docket Number: 70995/12
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART R

LEXINGTON NY REALTY, LLC

Petitioner

HON. SABRINA B. KRAUS

-against-

DECISION & ORDER
Index No.: L&T 70995/12

SANTIAGO J. SALDANA YANEZ
"JOHN DOE" and "JANE DOE"
1636 Lexington Avenue, Apt. # 14
New York, NY 10029

Respondents

X

BACKGROUND

This summary holdover proceeding was commenced by **LEXINGTON NY REALTY, LLC** (Petitioner) against **SANTIAGO J. SALDANA YANEZ** (Respondent) and **JERUSHA J. SALDANA** (Jersusha) seeking to recover possession of 1636 Lexington Avenue, Apt. # 14 New York, NY 10029 (Subject Premises) based on the allegation that Ida Yanez (Ida) the last rent control tenant of record died in April 2012, and the remaining family members are no longer entitled to remain in possession of the Subject Premises. Respondent is the grandson of Ida, and has asserted a succession claim to Ida's tenancy. The primary issue for the court to determine is whether Respondent resided with Ida at the Subject Premises for at least two years prior to her death, the relevant period being April 2010 to April 2012.

PROCEDURAL HISTORY

Petitioner issued a Notice to Quit dated June 4, 2012, the petition is dated June 28, 2012,

and the proceeding was initially returnable July 16, 2012. Both Respondent and Jerusha appeared on July 16, 2012, and the parties executed a stipulation discontinuing the proceeding as to Jerusha, based on her representation that she had resided at 4301 Park Avenue, Union City, New Jersey (NJ Apt) since 2008 and was not asserting any rights regarding the Subject Premises.

On August 14, 2012, Respondent appeared by counsel and filed a verified answer asserting succession and various procedural defenses, and Petitioner moved for discovery. The motion was granted per the parties stipulation on October 26, 2012, and the proceeding was marked off calendar for discovery.

Respondent sat for a deposition on May 20, 2013.

On February 6, 2014, Petitioner moved for summary judgment. On March 10, 2014, Respondent cross-moved for summary judgment. The motion was denied by the court (Spears, J) on August 11, 2014.

On December 11, 2014, the proceeding was assigned to Part L for trial and the trial commenced. The trial continued and concluded on February 11, 2015, in Part R. The proceeding was adjourned to February 19, 2015 for submission of post trial memoranda, and the court reserved decision.

FINDINGS OF FACT

Respondent stipulated to Petitioner's *prima facie* case. Petitioner is the deed owner of the Subject Premises pursuant to a deed dated February 21, 2006 (Ex 1). Petitioner also submitted the deposition transcript of Respondent in evidence (Ex 4).

The Subject Premises is a small apartment. At the entrance, there is a door to the bathroom at the left, if you walk straight into the Subject Premises you pass through the kitchen,

followed by the Living Room/ Dining Room area. Past that to the left is a small bedroom and all the way at the end is the master bedroom, off the master bedroom is another space described as a large closet or storage area, but also used as a bedroom.

Ida died on April 23, 2012 (Ex B). It is undisputed that at the time of her death the Subject Premises was her primary residence. Ida died at Mount Sinai Hospital and the death certificate lists the informant as Tammy Raiford (Raiford), Ida's daughter who resides in the Bronx.

From October 2010 through April 2011, and from October 2011 through April 2012, Respondent was not living in the Subject Premises, but lived and worked in Puerto Rico with his family. While in Puerto Rico, Respondent made frequent business trips to the Dominican Republic with his father.

A portion of Respondent's most recent passport was admitted into evidence (Ex Q). The passport was issued in October 2006. The passport shows that Respondent;

Entered the Dominican Republic February 19, 2009 and left February 28, 2009; and

Entered the Dominican Republic December 12, 2010 and left February 2, 2011; and

Entered the Dominican Republic January 11, 2012 and left January 31, 2012; and

Entered the Dominican Republic February 13, 2012 and left March 10, 2012; and

Entered the Dominican Republic March 21, 2012 and left April 10, 2012.

A portion of Respondent's previous passport was also admitted into evidence (Ex H). This passport shows that Respondent obtained a tourist visa for Brazil valid as of January 30, 2004, and seems to indicate that Respondent was in Brazil from May 19, 2004 through August 20, 2004. The visa required a first entry within 90 days of issuance and was valid for five years.

The passport also shows that Respondent entered the Dominican Republic February 25, 2005 and left March 7, 2005.

The first witness called by Respondent was Ida Collier (Collier). Collier is Respondent's aunt and the sister of his mother. In the two years prior to Ida's death, Collier was at the Subject Premises every weekend, and occasionally during the week. Collier did not know when Respondent started living in the Subject Premises. Collier testified that Respondent was at the Subject Premises every weekend during the two years before Ida's death, and any time she visited during the week. This testimony was incorrect as acknowledged by Respondent, given that Respondent was out of New York for one year during the two year period. Based on this substantial inaccuracy, the court can not credit Collier's testimony regarding Respondent's primary residence.

The next witness to testify was Jerusha. Jerusha lived in her parents home in San Juan from 1992-1998 and from September 2003 through August 2005. The home is located at 1922 Rufino Tamayao, San Juan, Puerto Rico (PR Home). When Respondent was in Puerto Rico this is where he lived as well. They each have their own bedroom in the PR Home.

Jerusha lived in the Subject Premises from December 2005 through June 2008.

Since 2008, Jerusha has lived in the NJ Apt. From June 2011 through April 2012, Jerusha was at the Subject Premises approximately once a month, and from April 2010 to June 2011, she was there between 5 and 10 times, Jerusha did not see Respondent in the Subject Premises on any of these occasions.

From September 2010 to May 2011, Jerusha was in Cambridge Massachusetts pursuing a graduate degree. During this period, Jerusha only went to the Subject Premises during her

winter break. Jerusha had no first hand knowledge of Respondent's occupancy of the Subject Premises after October 2011 through the time of Ida's death. The court found Jerusha to be a credible witness.

The next witness to testify for Respondent was Mayra Yanez Saldadana (Mayra). Mayra is Respondent's mother and has resided at the PR Home for over 30 years. Between 2004 and 2010, Mayra visited Ida at the Subject Premises on approximately 10 occasions, only two of those visits were between 2010 and 2012. Mayra is married to Santiago Raphael Saladana Santana (Dad). In the fall of 2010, Mayra noticed that Dad became forgetful. Mayra no longer trusted Dad to operate the family business, so she asked Respondent to come back to Puerto Rico and help oversee Dad's activities in regards to the family business.

Respondent closed his bank account, and went back to live in the PR home. Respondent lived in the PR home for one year out of the relevant period. During this year, Respondent worked in the family business and traveled on multiple trips with Dad to the Dominican Republic to oversee family interests in property and investments there. Respondent and his family have a farm /country house in the Dominican Republic, in addition to their PR Home.

Although Respondent testified that he was not formally paid any salary by his family during these periods, Respondent admits he was regularly given cash as needed. Respondent testified that his family would not pay him a 'formal salary' because the whole family lived together and worked together and shared the "big pot." Respondent testified at his deposition that his parents regularly supplement his income and pay for all charges on one of his credit cards. The court views this as a form of salary. Respondent stated "I don't pay for my credit

card at all. It's like free money. You know, we work for our family all our lives. We figure, you know, all our money is, you know - it's from the same pot (Ex 4 p. 55, l. 15-19)."

When Ida died, Mayra and Respondent came back to New York. Mayra testified they came back to New York together after Ida's death, Respondent testified he came back earlier.

For more than two years before her death, Ida had a home attendant at the Subject Premises twenty-four hours a day seven days a week. Mayra's sister was in charge of coordinating the home attendants for Ida. Mayra bought a bed for the home attendant and set up a bedroom for them.

The next witness to testify for Respondent was Vicenta Irene Rodriguez (Vicenta). Vicenta was a home attendant for Ida and cared for Ida at the Subject Premises from approximately February 2010 through April 2012. Vicenta worked for a company known as Special Touch during that period. Vicenta worked with Ida from Sunday to Friday. The court can not credit the testimony of Vicenta, nor does the court find such testimony reliable, as she testified that Respondent was present in the Subject Premises for the several month's leading up to Ida's death, and it is uncontested that Respondent was out of the country during that period.

Respondent testified on his own behalf. Respondent is thirty-eight years old. Respondent grew up in the PR home and lived there until he attended college in Boston University. After Respondent graduated from BU he returned to live in the PR home and work in the family business.

Respondent testified that he moved into the Subject Premises in 2004 . Respondent has a New York State Driver's License that was issued in October 2009 that lists the Subject Premises as his address (Ex O).

Respondent kept some belongings in the Subject Premises in a locked room. Jerusha had a key to the door.

At his deposition, Respondent testified that he had two law suits pending relating to workman's compensation. No documents were offered by Respondent at trial from these cases showing what address of record Respondent listed in these cases or where they are pending. Respondent testified at his deposition that he was injured for a year and a half around 2008. Respondent testified that his other primary source of income, apart from freelance gigs, was from his parents. His parents also pay for charges on his credit card and the statements for said charges are sent to the PR Home.

Respondent is estranged from Dad. At his deposition he testified " I had no relations with my father. We had silent treatment. He hated the fact that I wanted to do music. That's why I lived with my grandmother. (Ex 4 p. 25 l. 7-10)."

While in the Dominican Republic served as the eyes and ears of his mother as far as what was going on with the family business and investments. At his deposition, Respondent testified that he was needed to travel to the Dominican Republic with Dad on business trips because "... my mother hates the Dominican Republic. She hates Dominican people, so she can't stand it out there. So I would have to go for her and be her spy and like 'what's your father doing over there' and I told her, said what he's doing, you know. 'He's throwing away all your money (Ex 4, p.27, l. 14-22)."

Respondent further testified that he was pleased that Dad was suffering from dementia stating "Me and my dad have a horrible relationship still to this day, you know. Like now it's - **it's awesome** because he has Alzheimer's and dementia so he can't scream at me. **It's**

beautiful. He could just smile and just be like, oh, treat me nice. Yeah (Ex 4 pp. 29- 30, l. 21-25, 1-2).”

Respondent also testified at the deposition that he has a 201 cell phone that he obtained in New Jersey, from the NJ Apt., prior to Ida’s death, that he regularly shops at Pathmark by the NJ Apt for groceries to be used at that residence, and that he stayed at the NJ Apt twice a week during the relevant period, because Jerusha was suffering from depression. At trial, Respondent testified he stayed there a total of 10 times during the same period.

Respondent had a bank account with HSBC. Statements on this account for April 2010 through December 2010 were offered into evidence. The account statements are addressed to Respondent at the Subject Premises. Respondent closed the account on December 29, 2010. While, the account shows many transactions in Manhattan, it also shows regular cash withdrawals from 4200 Park Avenue, Weehawken, New Jersey. The court notes that this location is a few hundred feet from the NJ Apt.

Respondent had a Mastercard account. Statements for the account were admitted into evidence for the period of February 2010 through 2012 (Ex K). The statements are sent to a post office box in San Juan Puerto Rico. The statements are in Spanish.

The statements show that in April 2010 Respondent was in Atlanta Georgia.

The statement show charges for Pathmark in Weehawken NJ in May and September 2010, and a purchase at a liquor store in Union City NJ in August 2010. The Statements show charges for services of the law firm of Chasan Leyner & Lamparello, PC, in Secaucus, NJ, in May and July 2010.

The MasterCard statements also show charges in Philadelphia in August 2010. , where Respondent testified his girlfriend lived. The statements show that Respondent flew from Philadelphia to San Juan on September 30, 2010. Respondent testified that he traveled to one Philadelphia once a month during the relevant period.

From September 2010 through April 2011, the statements are consistent with Respondent being out of the country. The only regular charge is an automatic payment for a t-mobile account. The statements show Respondent back in Philadelphia on April 16, 2011.

The statements show Respondent grocery shopping at Pathmark in Weehawken, NJ in 2011 on: April 26; May 5,15, 16, and 20; June 5, 14, 18, and 25; July 7 and 27; August 13, and September 3. The statements show additional charges in New Jersey on: July 30; August 4,6, and 27; and September 9 and are consistent with Respondent being out of the country from September 10, 2011 forward.

Respondent submitted some tax related documentation in evidence. The 2009 and 2010 tax documents list the same San Juan PO Box as the credit card statements as Respondent's address, but they also reference the address of the Subject Premises as Respondent's address. The 2009 and 2010 documents are not actual copies of Respondent's returns but are a "transcript" of the return. The cover sheet states that the transcript includes any changes or amendments made subsequent to the filing of the return. For Respondent's 2009 return it lists the date received as June 2, 2011.

The 2011 returns were filed on April 15, 2012 and list only the PO Box address as Respondent's address. They do not list the Subject Premises as Respondent's address, but list

Respondent's home address as being in San Juan, Puerto Rico. The returns for 2009-2011 were all prepared by the same accountant located in San Juan, Puerto Rico.

A 2012 W2 form for Respondent lists the NJ Apt as Respondent's home address (Ex N). Respondent also acknowledged at his deposition that in 2007 he filed a business tax return from California.

Respondent's testimony regarding his tax returns and explanations for different addresses used lacked credibility. Respondent testified that he received no mail at the Subject Premises when he was not there, other than junk mail.

The next witness to testify for Respondent was Raiford. Raiford was raised in the Subject Premises, it was her mother's apartment. Raiford is Respondent's aunt. In the two years prior to Ida's death, Raiford was in the Subject Premises to make sure everything was properly done and to check on Ida. Raiford was in charge of Ida's care, Raiford had a power of attorney for Ida and was also designated as Ida's health care proxy. Raiford was listed as the informant on Ida's death certificate.

Raiford testified that in order to qualify for 24 hour health care for Ida one family member had to be designated as residing in the Subject Premises. The family made Respondent this designee.

The court does not give great weight to Raiford's testimony regarding Respondent's residence in the Subject Premises because Raiford testified Respondent was always there, which he clearly wasn't. Raiford testified Respondent was "there when he was there" but she considered him as living there because he kept some belongings in the Subject Premises. It was

clear to the court that Raiford had no specific first hand knowledge about where Respondent was during the relevant two year period.

The next witness to testify for Respondent was Loira Yanez (Loira). Loira lived in the Subject Premises from the time she was three years old until she got married. Loira is Ida's daughter and Respondent's aunt. Loira testified that the family considers the Subject Premises as the family home. Loira testified that in the two years prior to Ida's death she went to the Subject Premises two to three times per week, and Respondent was always there. Again this testimony is inaccurate and so the court can not give much weight to Loira's testimony.

The next witness to testify was Jose Preval (Preval). Preval is the tenant of record of apartment 18 in the subject building, and has lived there since 1980. Preval's apartment is right above the Subject Premises. Preval knows Respondent and his entire family. Preval testified that he went to Ida's funeral about 8 years ago. Again this testimony is inaccurate and Preval's time frame is off by years. Preval was unaware that Respondent was away for six months at a time in the last two years of Ida's life. The court does not give great weight to Preval's testimony as it was not reliable or accurate.

After Preval's testimony, Respondent rested.

Mirsad Radoncic (Super) was called as a rebuttal witness by Petitioner. Super lives in the building in an apartment on the first floor. Super has been the Super since May 2006. On April 24, 2012 the Super saw members of Ida's family at the building, they were crying, they told Super Ida had died. On May 1, 2012, Super observed Ida's daughter's moving items out of the Subject Premises.

In the two years prior to Ida's death Super often went to the Subject Premises to make repairs, change light bulbs or assist the home attendants. Super met Respondent in September 2012 after Ida died. From 2006 to Ida's death Super saw Respondent only four times. Since Ida's death Super sees Respondent daily.

DISCUSSION

§ 2204.6 (d)(1) provides in pertinent part:

... the city rent agency shall not issue an order granting a certificate of eviction, and any member of the tenant's family, as defined in paragraph (3) of this subdivision, shall not be evicted under this section where the tenant has permanently vacated the housing accommodation and such family member has resided with the tenant in this housing accommodation as a primary residence for a period of no less than two (2) years immediately prior to the permanent vacating of the housing accommodation by the tenant ...

The statute further provides that the minimum periods of required residency shall not be deemed to be interrupted by any period during which the family member temporarily relocates for reasonable grounds [9 NYCRR § 2204.6 (d)(1)(f)].

To establish the right to succeed to Ida's tenancy, Respondent has the burden of establishing by a preponderance of credible evidence that he lived in the Subject Premises with Ida as his primary residence for two years prior to her death (*Gottlieb v Licursi* 191 AD2d 256).

The Court finds that Respondent failed to meet his affirmative obligation to establish that he lived in the Subject Premises as his primary residence with Ida for the two years prior to her death. For at least one year of the two year period, Respondent lived and worked in his family homes and businesses in Puerto Rico and the Dominican Republic. The Court does not find that this absence constituted a period of temporary relocation as defined by 9 NYCRR § 2204.6 (d)(1)(f) [*SP 10 Downing LLC v Gazzoli* 31 Misc.3d 138(A)].

The court finds that the documentation submitted by Respondent to support his claim of primary residency was not substantial and that Respondent failed to otherwise establish primary residency by a preponderance of credible testimony [*138th Street Properties, LLC v Patrick* 26 Misc3d 140(A)]. All of the witnesses called by Respondent, except Jerusha, gave inaccurate or false testimony regarding Respondent's presence in the Subject Premises. Either the witnesses were lying, or they just did not have knowledge of the actual facts.

The court finds the facts in this case to be similar to those in *315 E 72 St. Owners, Inc. v Siegel* (22 Misc.3d 10). In *Siegel* a grandson moved into his grandmother's apartment just before starting college. He was away from the apartment for most of the time he was in college and did not resume full time occupancy until after his grandmother died. In *Siegel*, the Appellate Division held that the grandson's occupancy was occasional and incidental during the relevant time period, and the initial connection to his grandmother's apartment was "too fleeting and ephemeral" to constitute the type of residency intended to be afforded protection during periods of temporary relocation.

The court finds the same to be true in the case at bar. While Respondent claims he came to live in the Subject Premises in 2004, there is no documentary evidence supporting this alleged period of occupancy.

Respondent additionally failed to show that his absence of one year out of the two year relevant period was a temporary period of relocation as defined by the statute. Respondent admitted that he had no relationship with his father, and that he was happy that his father was allegedly suffering from dementia. The court did not find the testimony that he went to care for his father during his illness as credible. The evidence suggests Respondent went because his

mother didn't like traveling to the Dominican Republic and wanted Respondent to report back to her on her husband's activities in business and regarding investments. This does not constitute a reasonable ground for temporary relocation as defined by the statute.

For the 12 months that Respondent was not living in Puerto Rico during the relevant period, he regularly spent time in New Jersey, admitting he slept there twice a week, did grocery shopping there, banking there and listed that address on some documentation during the relevant period as his residence.

Overall the court finds that Respondent failed to establish that his occupancy of the Subject Premises prior to Ida's death bore indica of permanence and continuity, instead the occupancy was more of a transient nature (*829 Seventh Avenue Company v Reider* 67 NY2d 930; *Gottlieb v Licursi* 191 AD2d 256), with Respondent only moving in to live there full time after Ida died.

CONCLUSION

Based on the foregoing, the court finds that Petitioner is entitled to a final judgment of possession as against Respondent and "Jane Doe" identified only as Respondent's girlfriend. The proceeding is dismissed as to "John Doe" as there was no evidence of any such occupant. The warrant of eviction shall issue forthwith. Execution of the warrant is stayed through May 31, 2015, conditioned on payment of use and occupancy by the 5th of each month from March through May.

This constitutes the decision and order of the Court.¹

Dated: New York, New York
February 25, 2015

Sabrina B. Kraus, JHC

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¹ Parties may pick up Trial Exhibits within thirty days of the date of this decision from Part R. After thirty days, the exhibits may be shredded in accordance with administrative directives.

