

26 Bond St. Mgt. LLC v Baumann

2015 NY Slip Op 31238(U)

July 20, 2015

Civil Court of the City of New York, New York County

Docket Number: 65389/2012

Judge: Jack Stoller

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

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26 BOND STREET MANAGEMENT LLC,

Petitioner/Landlord,

Index No. 65389/2012

- against -

DECISION/ORDER

RUTH BAUMANN, JOSHUA EICHENBAUM, et al.,

Respondents/Tenants.

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Present: Hon. Jack Stoller
Judge, Housing Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of these motions.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Supplemental Affirmation and Affidavit Annexed	1, 2, 3
Notice of Cross-Motion and Supplemental Affirmation and Affidavit Annexed	4, 5, 6
Affirmation and Affidavit In Opposition to the Cross-Motion and in Further Support	7, 8
Reply Affirmation	9

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

26 Bond Street Management LLC, the petitioner in this proceeding (“Petitioner”), commenced this holdover proceeding against Ruth Baumann (“Respondent”), a respondent in this proceeding, and Joshua Eichenbaum (“Co-Respondent”), another respondent in this proceeding (collectively, “Respondents”)¹ seeking possession of 26 Bond Street, Apt. 1F, New York, New York (“the subject premises”) on the basis that Respondent is a tenant of the subject premises pursuant to the Loft Law and that Respondent does not maintain the subject premises as

¹ Another respondent, Naomi Eichenbaum (“Respondent’s daughter”), has withdrawn her answer and vacated the subject premises.

her primary residence. Respondents interposed an answer which, *inter alia*, denied the allegation that Respondent has not been maintaining the subject premises as her primary residence.

Discovery ensued. Petitioner now moves for summary judgment in its favor. Respondents cross-move for summary judgment in their favor. The Court consolidates both motions for resolution herein.

Despite the fact that summary resolution of issues of primary residence are ordinarily not favored, Extell Belnord LLC v. Uppman, 113 A.D.3d 1, 12 (1st Dept. 2013), both parties insisted at oral argument of this motion that there were no disputes of fact and, indeed, the record on the motion practice does not reveal any material disputes of fact. In sum, the record shows that Respondent spends approximately twelve hours a day, five days a week, and fifty weeks a year at the subject premises; that Co-Respondent, who is Respondent's son, lives in the subject premises; that over the past five years, Respondent has rarely slept in the subject premises, but rather at her boyfriend's apartment elsewhere in Manhattan ("the boyfriend's apartment"), and that Respondent operates her business out of the subject premises.

Respondent has lived at the subject premises since 1978. Co-Respondent was born in 1984 and continues to live in the subject premises. There is no dispute that documentation of the sort associated with a tenant's primary residence – Respondent's driver's license, tax returns, voter registration, mailings from a house of worship Respondent sometimes has attended, utility bills, cell phone bills, credit card statements, various insurance mailings – places Respondent at

the subject premises.²

Respondent is self-employed in graphic design, particularly having to do with the branding of products. Respondent's business is located at the subject premises. Respondent works at the subject premises ten to twelve hours a day during the workweek, although she frequently has to meet clients throughout the Tri-State area during daytime hours.

Respondent started a relationship with her boyfriend in 2008. The boyfriend's apartment is located in a residential cooperative and he owns the shares appurtenant to the proprietary lease for the boyfriend's apartment. Respondent's name is not connected with any documents pertaining to the boyfriend's apartment.

Respondent sleeps at the boyfriend's apartment on a near-exclusive basis. At a deposition in July of 2014, Respondent identified only fourteen days out of four-and-half years from January of 2010 through the date of a deposition that Respondent slept in the subject premises, although it is possible that there were more.³ Respondent averred in an affidavit in support of her motion that a reason that she and her boyfriend spent so many of their nights in New York City at the boyfriend's apartment as opposed to the subject premises was because Co-Respondent, her son, lives at the subject premises and they have more privacy at the boyfriend's apartment, as no one else lives at the boyfriend's apartment.

² Respondent testified to this effect at a deposition and, in a reply affirmation, Petitioner's attorney averred that Respondent "carefully constructed a paper trail" in an effort to link her with the subject premises.

³ Respondent testified that for one six-month period, she slept at the boyfriend's apartment a "majority" of the time, although without providing as specific a number as she did for other six-month periods.

Respondent has drawers in one dresser and a half of a closet at the boyfriend's apartment, as well as a toothbrush, shampoo, a bicycle, and some clothing items there. Respondent's routine during the workweek is to wake up at the boyfriend's apartment, sometimes shower and exercise at the boyfriend's apartment, but sometimes shower and exercise at the subject premises, head to the subject premises by about 7 a.m., sometimes prepare and eat breakfast at the subject premises, feed and tend to her cats, work, prepare and eat lunch at the subject premises, and head back to the boyfriend's apartment in the evening with an overnight bag by about 8 to 10 p.m., coordinating to meet him there by phone or email.

Respondent keeps the bulk of her clothes, jewelry, possessions, furniture, and toiletries in the subject premises, including cameras, as photography is a hobby of hers. Respondent does not co-mingle funds with her boyfriend. He is not in her will. Respondent's daughter, who lives in elsewhere in Manhattan, is Respondent's health care proxy. While Respondent has a key to the boyfriend's apartment and the doorman at his building knows her, Respondent's boyfriend does not have a key to the subject premises.

About three weekends a month, Respondent and her boyfriend go to Connecticut where he owns a condominium, where they engage in various sporting activities and hobbies. Respondent also has occasion visits her parents in New Paltz, New York on weekends.

Respondent averred in an affidavit in support of her motion that she socializes with other residents of the building in which the subject premises is located ("the Building") including one ninety-two-year-old neighbor for whom she is an attorney-in-fact.

Petitioner bears the burden of establishing that Respondent maintains a primary residence

in a place other than the subject premises. Sharp v. Melendez, 139 A.D.2d 262, 264 (1st Dept. 1988), *leave to appeal denied*, 73 N.Y.2d 707 (1989). Obviously, the only prospect for any other primary residence of Respondent is the boyfriend's apartment. However, not a single document links Respondent to the boyfriend's apartment. Respondent has no discernible rights of possession of the boyfriend's apartment. Petitioner does not dispute that Respondent spends twelve hours a day and two hundred fifty days a year at the subject premises.

Rent-stabilized tenants who spend less time in their rent-stabilized apartments with much stronger ties to alternate addresses further away from New York City nevertheless maintain their New York City rent-stabilized apartments as their primary residences. See, e.g., Glenbriar Co. v. Lipsman, 11 A.D.3d 352, 353-354 (1st Dept. 2004), *aff'd*, 5 N.Y.3d 388 (2005) (a New York apartment was still a tenant's primary residence when she spent six months out of the year in Florida); 310 E. 23rd LLC v. Colvin, 41 A.D.3d 149, 149-150 (1st Dept. 2007) (a house a tenant owns in Upstate New York used as a home address in certain tax-related documents is merely the tenant's second residence that the tenant only used on weekends, holidays and vacations, not her primary residence); Four Winds Assocs. v. Rachlin, 248 A.D.2d 352, 353 (2nd Dept. 1998) (a tenant who owns a condominium in Florida, registered her automobile there, and had a restricted Florida driver's license still maintained her primary residence at her rent-stabilized apartment in New York City when she voted in New York, paid New York income taxes, possessed a New York State driver's license, received ongoing care from medical professionals in New York, and kept her clothing in the New York apartment); RSP 86 Prop. LLC v. Sylvester, 47 Misc.3d 137(A) (App. Term 1st Dept. 2015) (a rent-stabilized tenant who maintains seasonal homes in the

Hamptons and in Florida does not vitiate a substantial physical nexus to his rent-stabilized apartment where the tenant's most important documents, such as his tax returns, driver's license, voter registration, and bank and credit card statements place the tenant at the rent-stabilized apartment); Ninth Ave. Realty LLC v. McKay, 29 Misc.3d 136(A) (App. Term 1st Dept. 2010) (the ownership of and weekend use of and vacation use of a house in Orange County, New York does not mean that rent-stabilized tenants are not using their rent-stabilized apartment as their primary residence when their rent-stabilized apartment is fully-furnished, they spend well in excess of one hundred eighty-three days at the rent-stabilized apartment, and where they maintain full-time jobs in Manhattan); ST Owner LP v. Ward, 21 Misc.3d 133(A) (App. Term 1st Dept. 2008) (even when a rent-stabilized tenant owned a house in New Jersey and registered her car there, the rent-stabilized premises in New York was still her primary residence when she only used the New Jersey house on the weekends).

The Court struggles to harmonize this authority with the proposition Petitioner asks this Court to endorse, that Respondent does not maintain the subject premises her primary residence when she sleeps at an apartment an intra-borough subway ride away from the subject premises as an incidence of a romantic relationship, continues to connect all of her documentation to the subject premises, and spends more days at the subject premises than tenants who own vacation homes in Florida and the Hamptons. The stray possessions Respondent has at the boyfriend's apartment cannot come close to the kind of furnishing that a second home logically requires.

Petitioner argues that the subject premises is not Respondent's primary residence because she uses the subject premises solely for business purposes, which is not permitted.

Ter-Arutunian v. Stahl Associates Company, N.Y.L.J. Jan. 23, 1987 at 13:1 (S. Ct. N.Y. Co.).

However, Respondent maintains and feeds her cats at the subject premises, socializes with neighbors in the Building, including one to the point of being his attorney-in-fact, maintains and prepares food at the subject premises, and maintains the great bulk of her personal property at the subject premises, conduct which has nothing to do with Respondent's business.

Moreover, as the subject premises is subject to the Loft Law, at least some use of the subject premises for commercial purposes is permissible. See Anthony v. New York City Loft Bd., 122 A.D.2d 725, 727 (1st Dept. 1986) (a dwelling covered by the Loft Law must be converted "at least in part" into a residential unit). Had Respondent operated her business in the subject premises and also slept in the subject premises with any regularity, Petitioner's cause of action would be wholly devoid of merit. Accordingly, the outcome of this proceeding turns on the extent to which Respondent's failure to sleep in the subject premises for a protracted period of time implicates it as her primary residence.

That Petitioner's case boils down to this issue inures to Respondent's benefit, as no single factor shall be solely determinative of a primary residence controversy. Katz Park Ave. Corp. v. Jagger, 11 N.Y.3d 314, 317 (2008), Glenbriar Co., supra, 5 N.Y.3d at 392-393. Be that as it may, a tenant who prefers to sleep at a friend's apartment during a refurbishment of the tenant's rent-stabilized apartment maintained the apartment as his primary residence even when the tenant himself prolonged the refurbishment. Ascot Realty, LLC v. Richstone, 10 A.D.3d 513, 513-514 (1st Dept. 2004), *leave to appeal dismissed*, 4 N.Y.3d 842, 843 (2005). A tenant with two rent-stabilized apartments that are used as one does not relinquish the one she does not sleep in

her primary residence when she takes meals in that apartment, spends a substantial amount of time in that apartment, works on a novel in that apartment, and engages in craft and hobby projects in that apartment. 138-140 Vil. Owners Corp. v. Dillard, 18 Misc.3d 1111(A) (Civ. Ct. N.Y. Co. 2007).

More significantly, even a married rent-stabilized tenant does not relinquish her apartment as her primary residence when she sleeps every night with her spouse in his (separate) apartment, as she otherwise uses her apartment as a home, 224 East 18th Street Assoc. v. Sijacki, 138 Misc.2d 494, 499-500 (Civ. Ct. N.Y. Co. 1987), *aff'd*, 143 Misc.2d 565 (App. Term 1st Dept. 1989), a proposition consistent with the law that two spouses may have two separate primary residences. Glenbriar Co., *supra*, 11 A.D.3d at 353-354, Rose Associates v. State Div. of Housing & Community Renewal, Office of Rent Admin., 121 A.D.2d 185, 187 (1st Dept. 1986), 60 W. 57 Realty, Inc. v. Durante, 17 Misc.3d 71, 72 (App. Term 1st Dept. 2007). If even a married couple can maintain two separate primary residences, surely Respondent and her boyfriend, who are not married and therefore may break up without having to litigate against one another, may have two separate primary residences. Consenting adults are allowed to have romantic relationships with each other at a speed of their choosing. They may be close enough to spend every night together but independent enough from one another to maintain separate residences. And they are free to choose to spend their nights together in the residence where they have more privacy than the residence where an adult child of one of them lives.

Accordingly, the Court finds that Petitioner has not met its burden of proving that Respondent does not maintain the subject premises as her primary residence. The Court denies

Petitioner's motion for summary judgment and grants Respondent's motion for summary judgment and dismisses the petition.

This constitutes the decision and order of this Court.

Dated: New York, New York
July 20, 2015



HON. JACK STOLLER
J.H.C.