3750 Broadway Realty Group, LLC v Garcia
2015 NY Slip Op 31239(U)
July 21, 2015
Civil Court of the City of New York, New York County
Docket Number: L&T 71875/13
Judge: Sabrina B. Kraus
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

3750 BROADWAY REALTY GROUP, LLC

HON. SABRINA B. KRAUS

Petitioner-Landlord

DECISION & ORDER
Index No.: L&T 71875/13

-against-

ANA GARCIA
3750 Broadway, Apt. 21
New York, New York 10032

Respondent-Tenant

GARY GARCIA, MICHELE LUM
"JOHN DOE" and "JANE DOE"

Respondents-Undertenants

BACKGROUND

This summary holdover proceeding was commenced by MM 3750 REALTY LLC against **ANA GARCIA (**Tenant), the rent controlled tenant of record, seeking to recover possession of 3750 Broadway, Apt. 21, New York, New York 10032 (Subject Premises) based on the allegation that Tenant does not primarily reside in the Subject Premises. **GARY GARCIA** (Respondent) is Tenant's son and has asserted succession rights herein, and **MICHELE LUM** (Lum) is Respondent's wife and also resides in the Subject Premises.

PROCEDURAL HISTORY

Petitioner issued a termination notice dated May 6, 2013, terminating Respondent's tenancy as of June 30, 2013. The petition is dated July 1, 2013, and the proceeding was initially returnable July 12, 2013.

On July 9, 2013, the building was sold to **3750 Broadway Realty Group LLC** (Petitioner), and on August 2, 2013, the court (Lau, J) granted a motion to substitute in the owner as Petitioner in this proceeding. Respondents were directed to serve a written answer by August 16, 2013, and the proceeding was adjourned to August 23, 2013.

Respondents, *pro se*, filed a written answer dated August 13, 2013. The answer asserted that the Subject Premises is the primary residence of Tenant, as well as Respondent and Lum and Tenant's granddaughters. The answer further asserted harassment by the landlord and constructive eviction in March 2012. Annexed to the answer were various documents intended to substantiate that the Subject Premises is the primary residence of respondents.

These documents included:

- A form submitted to Petitioner at their request re emergency contact information, dated 4/20/11 identifying Tenant as the tenant of record, and listing other occupants of the Subject Premises as Garcia, Lum, and their minor daughters Adrianna and Natalie Garcia. At Petitioner's request, Tenant also provided the date of birth and social security number for each listed occupant.1

-A notice to owner on DHCR prescribed form dated October 29, 2006, of family members residing with Tenant who may be entitled to succession. The tenant of record is listed as "Marta Bello /Ana Garcia". Bello's family members listed were Americo Garcia and Mercedes Garcia, her son and cousin respectively, both residing in the Subject Premises since 1961; Respondent, her daughter in law, residing in the Subject Premises since 1980; and her grandsons Garcia and Salvador Garcia, both listed as residing in the Subject Premises since 1980 or 1981 respectively.

- Tax transcripts for Tenant for the years 2010-2013.

- Documents from a prior holdover proceeding against respondents under Index Number 92273/2012.

-Respondent's birth certificate.

---

1 In accordance with administrative directives, the court has redacted the social security numbers on documents annexed to the answer filed with the court.

-Respondent's tax returns and W-2s for 2006 thorough 2008.
-Tax documents from Lum from 2007.

Petitioner filed a notice of rejection of respondents' answer on August 21, 2013, asserting that the pleading failed to comply with RPAPL §743. Respondents' *pro se* answer was withdrawn, on consent, on August 22, 2013, and they agreed to file a new answer through counsel, who had appeared on their behalf as of that date.

On September 2, 2013, Tenant, Respondent and Lum through counsel, filed an answer and jury demand. The amended answer asserted *inter alia* that Tenant had vacated the Subject Premises in 2009, and asserted succession on behalf of Respondent and Lum.

Both parties moved for summary judgment. Petitioner asserted entitlement to summary judgment, based on the claim that Tenant stopped living in the Subject Premises in 2009, but did not permanently vacate any time prior to commencement of the proceeding, thereby precluding Respondent and Lum from establishing that they lived with Tenant in the Subject Premises as their primary residence for two years prior to Tenant's permanent vacteur.

Respondents cross-moved for summary judgment, asserting defects in the predicate notice, and on Respondent's succession claim.

The court (Lau, J) issued a decision and order dated March 14, 2014, denying both motions. The court held Tenant was the rent control tenant of record, pursuant to a DHCR order issued April 24, 2008, which acknowledged her right to succeed to her mother's tenancy. Tenant acknowledged having purchased a coop in Woodside, Queens, and that she started living there as of October 2008. Tenant did not advise the landlord that she had moved.

The court found that the sole issue for trial was whether Respondent was entitled to succession. The court denied the summary judgment motion finding there were triable issues of

fact, including when, if ever, Tenant permanently vacated the Subject Premises, whether Respondent is "disabled" within the meaning of the statute, and the date and duration of Tenant and Respondent's co-occupancy of the Subject Premises.2

The court found respondents' defense regarding the defective predicate notice lacked merit, and the proceeding was restored to the calendar on April 8, 2014.

On May 28, 2014, Petitioner moved for re-argument on its summary judgment motion. That motion was denied by the court (Lau, J) on July 14, 2014, and the proceeding was restored to the calendar on July 29, 2014.

On October 27, 2014, the parties entered into a so-ordered stipulation, wherein respondents consented to Petitioner's *prima facie* case.

The proceeding was assigned to Part R for trial, the trial commenced on January 22, 2015, and certain documents were marked into evidence. On March 6th, 2015, Petitioner filed a consent to change attorney, having obtained new counsel.

The trial continued on April 24, and concluded on April 29, 2015. The proceeding was adjourned through June 5, 2015, for the submission of post trial memoranda, and on June 5, 2015, the court reserved decision.

---

2 Respondents' counsel stipulated on the record, on April 24, 2015, that Respondent is not seeking to establish he is disabled, within the meaning of the succession statute or to shorten the required length of co-residency, but that issues related to Respondent's limitations were raised to show Tenant's state of mind in continuing to act as a tenant of the Subject Premises, even after she had moved out.

PRIOR RELATED PROCEEDINGS

As requested by the parties and noted on the record, the court takes judicial notice of the following prior related summary proceedings and the contents of the court files for same. Certain documents from these three proceedings were also admitted into evidence at trial [Exs. 6(a)-(p)].

HP Proceeding - Index Number 6060/2012

This proceeding was commenced by Tenant, under her name and the name of Marta Bello (Bello) on March 29, 2012. An inspection was ordered to take place on April 5, 2012, however the HPD inspector was unable to gain access to the Subject Premises, because a vacate order had been issued pertaining to the Subject Premises as of March 9, 2012.

HPD records for 2012 indicate that the subject building was in the AEP program 3.

On May 31, 2012, the parties entered into a consent order resolving the proceeding. The order was based on a partial vacate order and stop work order that had been issued regarding the Subject Premises, and an outstanding ECB violation for defects in maintaining the structural stability of the subject building. The order provided the landlord would correct the violations within nine weeks.

On August 10, 2012, Tenant's motion to restore the proceeding for a compliance hearing, and the landlord's cross-motion for an order extending their time to comply were granted, pursuant to a stipulation wherein the landlord agreed to pay fines, and further agreed to temporarily relocate Tenant to Apartment 34 B at 4060 Broadway. Tenant signed a "Temporary Relocation and License Agreement" on the same date. Tenant agreed to pay rent for the

---

3 The AEP is an enforcement program which identifies the 200 most distressed multiple dwellings citywide each year.

relocation unit at the same rate as the rent for the Subject Premises, and the landlord was given an additional 60 days to correct the violations and lift the vacate order.

On October 18, 2012, landlord moved for an order vacating the August 10, 2012 stipulation, on the grounds of fraud or misrepresentation, prohibiting Tenant and her licensees from entering or occupying the Relocation Unit and for related relief. Landlord asserted Tenant was not occupying the Relocation Unit and had allowed others to occupy, that one of the named Petitioners in the proceeding Bello had been dead since 1993, and that Tenant actually resided elsewhere. The motion was granted on default of Tenant appearing, and without opposition from HPD, by the court (Wendt, J) and the proceeding was dismissed.

Tenant sought to vacate her default and restore the proceeding by Order to Show Cause on November 7, 2012, but the court (Wendt, J) declined to grant the *ex parte* application to sign the order to show cause in light of the 10/18/12 order dismissing the proceeding. Tenant made an application pursuant to CPLR §5704(b) before the Appellate Term, which was denied on November 23, 2012 [2012 NY Slip Op 90867(U)].

HP Proceeding Index Number 6235/2012

Tenant commenced this proceeding by order to show cause on December 7, 2012, based on the partial vacate order. On January 8, 2013, the initial return date, the proceeding was discontinued pursuant to a stipulation wherein Tenant acknowledged that the vacate order had been lifted on December 24, 2012, and that she had been restored to possession of the Subject Premises.

Holdover Proceeding - Index Number 92273/2012

This holdover proceeding was commenced by the landlord of the Relocation Unit in December 2012. The proceeding was discontinued on the initial return date, pursuant to a

stipulation confirming that possession of the Relocation Unit had been surrendered by Tenant on January 2, 2013.

FINDINGS OF FACT

Pursuant to the October 27, 2014 stipulation the parties agreed that:

Respondent hereby consents to Petitioner's *prima facie* case, without the introduction of live witness testimony, including but not limited to the representations set forth in Paragraph "9" of the Petition, dated July 1, 2013, that respondent Ana Garcia did not utilize the subject premises as her primary residence during the relevant period as alleged in the Golub Notice, dated May 6, 2013, but was instead residing at 59-15 47th Avenue, Woodside, NY 11377 (Woodside Coop).

.....

.... And the primary issue for trial is whether Gary Garcia qualifies for succession rights, in particular in light of the fact that Ana Garcia, the tenant of record, acknowledges that : a) she neither surrendered her rights and interests to the subject premises nor notified Petitioner that she permanently vacated prior to 2013 but instead asserted continuously that she was the tenant of record, and b) she did not primarily reside at the subject premises during the relevant period of time as referenced in the May 6, 2013 Notice.

Petitioner acknowledges receipt of a copy of a notarized document, dated September 11, 2013, titled "CONFIRMATION OF SURRENDER" in which Ana Garcia states that she is surrendering any rights and/or interests to the subject premises (Ex B). Petitioner stipulates as part of this agreement that any of Ms. Garcia's rights have been thereby surrendered.

At the commencement of the trial, respondents' counsel acknowledged on the record that Lum's succession claim was no longer before the court. Additionally, Petitioner's counsel discontinued the proceeding as against Tenant, as it was acknowledged that Tenant had executed a surrender agreement and was no longer residing in the Subject Premises. The proceeding was also discontinued as against "JOHN DOE" and "JANE DOE" based on Respondent's representation that the only occupants of the Subject Premises are Respondent, Lum and their daughters.

Petitioner is the owner of the Subject Building pursuant to a deed dated July 9, 2013 (Ex 1). There is a valid MDR filed for a period through and including 9/1/15 (Ex 2). Bello was the rent control tenant of record of the Subject Premises pursuant to a lease dated July 1, 1965, for a one year term, at a rent of $130.47 per month (Ex 4).

Bello's death certificate was issued by the State of Florida and indicates that she was never married and that her residence was the Subject Premises at the time of her death (Ex BB-2).

Tenant paid the rent for the Subject Premises after Bello died by personal check. In 2006, the landlord started rejecting payments submitted by Tenant asserting she was not the Tenant of record. In response, Tenant file a complaint at DHCR to recognize her as the Tenant of record for the Subject Premises.

Tenant was recognized as the successor rent control tenant of record for the Subject Premises pursuant to an order issued by DHCR on April 24, 2008, based on a finding that she resided with Bello in the Subject Premises for at least two years prior to Bello's death in March 1993 (Ex BB-1). Petitioner never the less continued to issue rent bills in Bello's name through 2013.

Tenant was the President of the Tenants' Association for the Subject Building from 1994 through 2008, and participated in litigation against the landlord regarding numerous apartments in the Subject Building under Index Number 6391-06 (Ex GG). Tenant also obtained rent reduction orders for multiple tenants in the building, in her capacity as President of the Tenants Association (Ex BB-2).

Tenant became the owner of the Woodside Coop in February 2008 (Ex A). Tenant testified that it took her six months to transition and that she did not really move into the

Woodside Coop until September or October of 2008. The Woodside Coop is an HPD regulated development for mid income families.

Respondent is Tenant's son, and was born on May 31, 1981, in the City of New York (Ex E). Tenant testified that Respondent has lived in the Subject Premises from birth.

Documents from the NYC Department of Education indicate that Tenant and Respondent listed their residence as as 541 west 156th Street, New York, New York Apartment 3, as of 1985 (Ex FF). The records indicate that Respondent was developmentally delayed, had a low IQ and was not talking intelligibly at the age of 4. The BOE records indicate that Respondent was learning disabled. By 1988, the Board of Education documents reflect the Subject Premises as Respondent's address (Ex FF-2).

Tenant obtained a rent reduction order from DHCR based on the vacate order , reducing the legal rent for the Subject Premises to $1 per month as of March 9, 2012 (Ex BB). An order restoring the rent was granted on December 11, 2013, effective January 8, 2013. As of August 21, 2013 there were 23 outstanding violations of record for the Subject Premises for Class "A", "B" and "C" violations issued primarily in March 2013 (Ex M).

Tenant was the first witness to testify. Tenant emigrated to the United States in 1980 and is employed by NYCHA in a clerical capacity. Tenant resides in the Woodside Coop. Tenant moved into the Subject Premises on August 3, 1980. Tenant testified she lived there until 2008, except for a six month period in 1995, when she vacated the Subject Premises temporarily, because she was a victim of domestic violence. Tenant lived in the Subject Premises with Bello, Salvador Garcia, the father of her children, Marcella Garcia and her oldest son Sal Garcia. Bello died in 1993. Salvador Garcia moved out in 2000, and Sal Garcia moved out in 2008.

Tenant testified that in 2012, after the vacate order was issued and her family was displaced, and her children and her granddaughters were homeless and living in a shelter in Brooklyn.

Tenant testified that Lum and her children moved into the Subject Premises in August 2008.

Through 2013, Tenant continued to pay the rent for the Subject Premises, by personal check (Ex 5). Tenant continued to correspond with the landlord as the tenant of record, and listed her address as the Subject Premises, for years after she had moved to the Woodside Coop. Tenant went so far as to feign outrage at the claim that she was not living in the Subject Premises in her letter to the landlord dated November 23, 2012 (Ex 5). In response to the commencement of a holdover proceeding by the landlord Tenant stated:

> Please be informed that the reason why you do not see me in the building as often; it's because I always requested shelter for my family. I told the Red Cross and Ms. Beron at PHD (sic) to help them; not me because I will be staying here and there with family or friends.

This letter is a complete lie and seeks to hide from the landlord the fact that Tenant had been living in middle income housing in the Woodside Coop for years.

Tenant continued to act as the tenant of record after she moved out, and prior to that she continued to include Bello's name on tenant related documents, because she believed she was required to do so and because the landlord had a history of acting in bad faith towards herself and her family, refusing to recognize their rights as regulated tenants. Tenant also emphasized that even after landlord received a DHCR order recognizing her as the tenant of record, and was on written of Bello's death, landlord continued, through 2013, to address all bills and tenant related correspondence to Bello (*see eg* Ex. G).

Tenant submitted W-2 forms for 2005 through 2008 (Ex C) all of which show the Subject Premises as her address. Tax documents for 2009 also list the Subject Premises as her address (Ex 5).

Tenant also submitted statements from her Citibank account for the years 2005 through 2008 (Ex DD). The statements were sent to her at the Subject Premises through November 2008.

Respondent testified after Tenant. Respondent met Lum in 2004 on the internet. They began dating and Respondent testified that he traveled upstate by bus to see her. Respondent was arrested in Sullivan County in late 2004, and on October 31, 2005, Respondent was convicted in Criminal Court in Sullivan County, New York, of endangering the welfare of a child (Ex EE). Respondent was sentenced to three years probation, and ordered to attend certain classes Upstate. The records indicate that, at the time of the incident, Respondent was living with Lum in Sullivan County in Monticello NY at 5452 Main Street, Apt 2, with a phone number of 845 693 4290 (Ex EE). Lum has two other children with a different father, that were the subject of the endangering conviction. Respondent also had an ACS case with Lum related to her daughters

An order of protection was issued as against Respondent, which was valid through January 12, 2007. As a result of the order, Respondent moved from Sullivan County to the Subject Premises to live with Tenant (Ex EE, Chrono Notes 4/16/08, p. 22 of 67). When Respondent started his probation, he was assigned to a probation officer upstate, but later was re-assigned a probation officer in New York City.

Respondent was not permitted by the terms of his probation to leave New York City. Respondent acknowledged that he routinely violated this condition, and often spent time upstate

with Lum. Respondent repeatedly requested to be transferred out of New York City to Sullivan County for purposes of ongoing parole, and so he could change his residence, but this request was denied by Sullivan County Supreme Court.

During Respondent's probation, Tenant advised police that Respondent had a history of physical abuse against previous girlfriends and that Tenant had previously obtained orders of protection against Respondent. Tenant advised against approving Respondent's request to have his probation case transferred to Sullivan County and suggested it should be transferred to Florida where Respondent's father resided. (Ex EE, Chrono Notes p. 57 of 67). Tenant did not want Respondent to stay in the Subject Premises during his probation.

Tenant had contacted Respondent's former parole officer, because she feared for the safety of herself and her family, based on Respondent's involvement with a ganag known as the Latin Kings. Respondent has a tattoo consistent with membership in the Latin Kings, and showed other indicia of gang affiliation.

Respondent was re-arrested on June 11, 2006, for a non-violent misdemeanor. The arrest was at the Puerto Rican Day Parade for an incident related to Respondent's involvement with the Latin Kings.

Parole Officers visited the Subject Premises on July 5, 2006, and noted that Tenant lived in the Subject Premises with her son Salvatore, and an elderly gentleman named Mongo. Tenant changed the locks on the door to the Subject Premises to keep Respondent out, because of Respondent's growing involvement with the gang. Tenant advised police that Respondent had been fired and again sought permission to transfer his ongoing case to Florida, where Respondent's father resides (Ex EE, chrono Notes, p. 60 of 67), and so he would not have to remain in the Subject Premises.

Respondent acknowledged his association with the gang during his probation, but testified he ended the association shortly after his probation officer learned of his gang related activities.

Respondent and Lum have two daughters together who were born in June 2006 and June 2007, both were born in Sullivan County.

Respondent requested permission to leave the jurisdiction for three days in May 2008 to assist Lum with moving to New York City.

By September 4, 2008, Respondent confirmed to his parole officer that Tenant had moved out of the Subject Premises, was living in the Woodside Coop, and that Lum, and their two daughters were living in the Subject Premises. Lum's two other children were living with different people outside New York City (Ex EE, Chrono Notes 9/4/08, p. 4 of 87). There was tension between Tenant and Lum, and Respondent stated the two could not reside together (Ex EE, chrono notes 4/22/08, p. 21 of 67).

Initially, Respondent testified he was unemployed from 2005 through 2008.

Then, in response to prompting by counsel, he changed his testimony. In April 2006, Respondent was employed at Rand Engineering, at 159 West 25th Street, as a handy man on a full time basis (Ex EE, Chrono Notes 4/5/06, p. 55 of 67). Respondent stated he worked for Rand from late 2005 through 2006, and that he worked for the Raleigh Hotel, in upstate New York, for six months in 2007. Respondent later testified that he worked at the Raleigh Hotel in 2008.

Respondent testified that his probation officer, Carl Gonzalez allowed him to work upstate, event though it violated the terms of his probation, because Lum was pregnant. During

this period, Respondent often slept upstate, either at the hotel or at Lum's home. When asked if he ever slept at the Subject Premises during this period, Respondent answered:

> Yeah, when I went , you know, when I came back home and when I'd be visiting ma, the girls, or I'd come back home and I didn't have to work or when I lost my job. That's it. I had no reason to be upstate anymore. The probation officer added on to when I had lost my job at the Raleigh that there was no reason to be upstate anymore. So after that, I was stuck at 3750. No reason to take a bus back up.

During this period Respondent got a cell phone upstate with an 845 area code. No records from this phone were submitted into evidence. Respondent testified that during this period, he was not required to return to New York City for probation appointments, but was often permitted to just phone in. Respondent missed a number of home visits made by his parole officer to the Subject Premises. As of June 2008, Respondent provided his cell number as 845-798-2695. Statements from the various phone accounts associated with respiondent were not submitted into evidence.

Respondent's testimony regarding permission from probation to leave New York City is not supported by the documents from probation (Ex EE). Respondent's probation officer during the Summer of 2007 was David Bethel, and it is specifically during this period that Respondent requested to be transferred to Upstate, but was denied permission and directed to remain in New York City. The documents show that Respondent was often not at the Subject Premises for visits from the probation officer, and that from March through the Summer of 2007, Respondent continued to attempt to move "back" to Sullivan County, but was repeatedly denied permission to do so by the court (Ex EE, chrono notes, pp 26-33).

Respondent registered to vote from the Subject Premises in August 2001(Ex L).

Respondent submitted certain tax documents in evidence. For the year 2006, Respondent submitted a 1040A form, reporting wages of $12, 301, and unemployment benefits of $5418.00. Respondent took exemptions for Lum and his daughter and falsely asserted that they lived with him at the Subject Premises, for the full twelve months of 2006. There is no indication on this document that the return was filed. Respondent also took a $2000 child care credit for having his daughter cared for by a relative Altagarcia Hidalgo, at an address of 3340-44 Fort Independence, Bronx NY 10453. Similar information is entered on Respondent's resident income tax return (Ex T). Respondent clearly lied and put false information on these documents, as such the court can not give them much weight as proof of Respondent's actual residence.

For 2007, Respondent submitted a Wage and Income Transcript (Ex O). This document shows Respondent was employed by the Fallsburg Ranch in upstate New York. Respondent did not acknowledge this employment during his testimony at trial. Wages earned were reported as $3,936.00. The document also references employment by the Raleigh Hotel with total wages earned being $7,080.00, and unemployment compensation in the amount of $1,290.00. The document lists the Subject Premises as Respondent's address. Respondent's 1040A form for 2007 once again claims deductions for Lum and his two daughters and falsely asserts that they lived with Respondent for 12 months in the Subject Premises (Ex R-1). In 2007 , Respondent took a $4000 child care deduction, asserting both daughters were cared for by Hidalgo at the Bronx Address (Ex R-2). Again this information is admittedly false and the court can not give these documents much weight.

For 2008, Respondent again reported income from employment at the Raleigh Hotel , but this time only $8883.00, and Respondent otherwise received unemployment (Ex N). Respondent

took the same deductions for his daughters and made the same false representation regarding childcare and their residence (Ex S).

Respondent's Citibank records were submitted into evidence for 2008 through 2010 (Ex II). The statements show regular activity through September 2008, with consistent transactions both in New York City and Upstate. However the statements show no activity after that period and only a negligible balance in the account.

Respondent and Lum were married on February 14, 2014 (Ex K).

The next witness to testify Respondent was Lum. Lum testified she has resided at the Subject Premises since August 31, 2008. Lum primarily testified about the amount of time she and Respondent spent upstate and in New York City from 2004 forward. Lum's testimony and Respondent's testimony were contradictory in this regard.

Time Warner bills for the Subject Premises for the period of September 2008 through September 2010 were submitted into evidence (Ex HH). The statements were addressed to Lum at her upstate home until December 2008, when they were addressed to Lum at the Subject Premises.

DISCUSSION

Housing accommodations not occupied by the tenant as a primary residence, as determined by a court of competent jurisdiction, are not subject to rent control (9 NYCRR § 2200.2).

9 NYCRR § 2204.6(d)(1) provides in pertinent part that "... any member of the tenant's family ... 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 the housing

accommodation as a primary residence for a period of no less than two years ... immediately prior to the permanent vacating of the housing accommodation by the tenant ....".

Given the stipulated facts, the primary question for the court, after trial, is whether Respondent and Tenant primarily resided together at the Subject Premises for the two years prior to Tenant's permanent vacateur. It is clear that they did not.

The court finds that Tenant stopped living in the Subject Premises and moved to her Woodside Coop no later then May of 2008. Given that the Coop is housing for middle income individuals, the court assumes Tenant was legally required to reside there from February 2008 forward. However, Tenant did not submit a copy of her proprietary lease in evidence. Lum and Tenant did not get along and Lum first tried living in the Subject Premises in May of 2008, so the court assumes Tenant had moved by then.

However, while Tenant stopped living in the Subject Premises in the Spring of 2008, she continued to act as the tenant of record for the Subject Premises, in every respect through September 2013, the date when she signed a surrender and permanently vacated the Subject Premises.

As such Tenant and Respondent did not primarily reside in the Subject Premises for the two years prior to Tenant's permanent vacatur, and Respondent has thus failed to prove his entitlement to succession.

While the parties cite to a number of cases in support of their positions, the court finds that the case most directly on point is [*Ludlow 65 Realty, LLC v Chin* 42 Misc3d 126(A)]. In *Ludlow* the rent control tenant of record moved out of the premises in 1979, but the court found he did not permanently vacate until 2011. The landlord moved for summary judgment, and the trial court denied the motion. The Appellate Term modified, to the extent of granting the motion

and awarding the landlord a judgement of possession. The Appellate Term noted that the tenant continued to participate in litigation, pay rent, and "most significantly" completed forms with DHCR asserting he was the tenant of record after he moved out.

These factors are all also present in the case at bar.

Additionally, the evidence in the record suggests that Respondent and Lum were really residing in upstate New York, and that Respondent only listed the Subject Premises as his residence, because he was not legally allowed to continue to live with Lum after the order of protection was issued, and was not permitted to leave New York City as a term of his probation. It is clear that he never the less continued to sleep at Lum's upstate home, and worked for a significant period upstate, even during his probation.

The case law which addresses the rights of family members to succeed to rent regulated tenancies where the date that the tenant stopped living in the apartment, is different from the date that the tenant permanently vacated, is somewhat varied.

In the First Department, the appellate cases hold that where the tenant moves out before the permanent vacate date, succession claims fail because the family member will not be able to establish that the two primarily resided in the apartment prior to said date.

For example, in *Third Lenox Terrace Assoc v Edwards* (91 AD 3d 532, 2012), the rent-stabilized tenant and her sister both began living in the apartment in 1995. The tenant moved out in 1998, but continued to sign leases and pay rent through 2005. The Appellate Division held that the tenant can not be deemed to have permanently vacated the apartment at any time prior to the expiration of the last renewal, and therefore the sister could not establish co-occupancy for the two years prior to the permanent vacate date. *Third Lenox* has been consistently followed by the Appellate Term, First Department, and often has served as the basis for an award of

summary judgment on ths issue of succession [*see eg 206 West 104th Street LLC v Zapata* 45 Misc3d 135(A); *Extell Belnord LLC v Eldridge* 42 Misc3d 143(A); *525 West End Corp v Ringelheim* 43 Misc3d 14; *PS 157 Lofts LLC v Austin* 42 Misc3d 132(A); *BCD Delancey LLC v Jian Gou Lin* 42 Misc.3d 132(A); *360 West 55th Street, LP v De George* 36 Misc.3d 126(A)].

The Appellate Term, Second Department has also followed this holding in *Jols Realty Corp v Nunez* [43 Misc3d 129(A)]. In *Nunez* the proceeding was dismissed after trial, based on the court's finding that the nephew of the tenant had established the right to succeed as a nontraditional family member. The Appellate Term reversed holding that because the tenant moved out in 2005, but continued to execute renewals through 2011, and the rent continued to be paid in the name of the tenant, the nephew could not establish they resided together for the two years prior to tenant's permanent vacate date.

However, in *Mexico Leasing LLC v Jones* [2015 NY Slip Op 51456(U)], the Appellate Term, Second Department held that where the tenant moved to Pennsylvania in 1999, but returned to the apartment regularly, and continued to pay rent and sign leases through June 2011, her daughter who had lived in the apartment since 1984 "... satisfied the Code's requirement's for succession." The Appellate Term held that succession was established not because the daughter had lived with the tenant for the two years prior to moving in 1999, but based on their finding that the succession claim could not be denied

> .... solely on the ground that the tenant of record has not maintained her primary residency in the stabilized apartment during the two-year period prior to her permanent vacating of the apartment ... on July 1, 2011. Notably, RSC § 2523.5 (b)(1) focuses on the remaining family member's having resided in the apartment 'as a primary residence' within the two year period prior to the tenant's permanent vacating of the apartment, and does not insist upon the tenant of record's having so resided during that period. It is thus our view that the eviction of the remaining family member in the circumstances of this case would not be consistent with the purpose of RSC § 2523.5 (b)(1) to avoid the

> 'grievous harm' (*Lesser*, 140 AD2d at 173) of uprooting family members, and is not warranted.

The Court cited *Murphy v New York State Div. Of Hous & Community Renewal* (21 NY3d 6490 as authority for its decision. In *Murphy,* the Court of Appeals allowed succession of a son under Mitchell Lama Succession regulations, where the tenant had failed to include the son on an income affidavit for one out of the two years prior to the tenant vacating. The court held that in the context of succession, the principal purpose of the income affidavit was to provide proof of the applicant's primary residence, that it was undisputed that the son had resided in the premises for the two year period, and the failure had no impact on the amount of rent assessed or due. In *Mexico Leasing*, *Murphy* appears to have been cited for the proposition that even where the technical rule of law would lead to a denial of succession, succession should still be granted where the eviction of a family member of the tenant, who both resided with the tenant for a long period and has lived in the premises for a long period would otherwise be the result.

The ruling in *Mexico Leasing* appears to have been viewed with approval by the Appellate Division, Second Department, who denied a motion for leave to appeal [2015 NY Slip Op 71089(U)].

This holding was also relied on by a lower court in *Matter of Underhill-Washington Equities LLC v DHCR* [47 Misc3d 1215(A)], where the court held that DHCR's decision to award the brother of a rent control tenant to succession where the tenant moved to Florida in 2005, but continued to pay rent through 2009, and submitted an answer in a 2011 holdover proceeding asserting she maintained the premises as her primary residence through 2011, was not arbitrary and capricious. The court adopted DHCR's position that in succession cases only the primary residency of the family member claiming succession for the two year period must be

established and not that the premises remained the primary residence of the tenant for said period (*see also* DHCR Fact Sheet # 30 *providing family member has the right to a renewal lease or protection from eviction if he or she resided with the tenant as a primary resident in the apartment for two (2) years immediately prior to the death of, or permanent departure from the apartment by the tenant. The family member may also have the right to a renewal lease or protection from eviction if he/she resided with the tenant from the inception of the tenancy or from the commencement of the relationship*). The court found *Third Lenox* distinguishable, because the tenant had not executed any lease renewal continuing her tenancy after she moved in 2005.

As such there appears to be developing a split in authority between the First and Second Departments, regarding succession requirements under a scenario where rent stabilized tenants move out, but continue to execute lease renewals. For this court, the First Department authority is controlling.

However, even in the First Department, some courts have declined to apply the principal of *Third Lenox* in the context of rent control tenancies [*Patmund Realty Corp v Mui* 32 Misc.3d 1232(A)]. In rent control tenancies, there are often no executed lease renewals, and therefore, no bright line that establishes the continuation of the tenancy after a tenant moves out. "There is no provision in the Rent and Eviction Regulations setting forth any guidelines or mandates involving a successor tenant as to what action an owner, or for that matter a tenant, must take with respect to changing the identification pertaining to the tenancy. A family member who qualifies merely succeeds to the... tenant's rights if that is his or her choice [*Golden Mountain v Severino* 2015 NY Slip Op 50623(U)].

However, even absent execution of lease renewals, if there are sufficient acts by the tenant to affirmatively continue to assert rights as a tenant of record after moving out, the *Third Lenox* rationale will be applied. Thus in the case at bar, where Tenant continued to actively assert her claim as the tenant of record for years after she moved, by actively participating in litigation as the tenant of record in multiple forums, obtaining relief in those forums based on her continued claim to be the tenant of record, such as being provided with alternative housing in the context of the HP proceeding, the court must conclude that tenant failed to permanently vacate the Subject Premises. Had the Tenant's activities been limited to the continued payment of rent, that would not have led to the conclusion that the Tenant had failed to permanently vacate, particularly given the landlord's refusal to accept rent from other sources and continued intentional billing to Bello, but Tenant went far beyond that in this case.

Here, Tenant, like the respondent in *Ludlow 65 Realty, LLC v Chin* in addition to continued payment of rent, participated in litigation in court, and at pursued her claim of tenancy at DHCR.

Neither is this a case where Respondent clearly lived in the Subject Premises without interruption . As noted, the record is far from clear that Respondent lived in the Subject Premises from 2004 through 2008, a period where he was employed upstate, arrested upstate, involved in a relationship with Lum resulting in the birth of two daughters Upstate in 2006 and 2007, excluded from the Subject Premises at times by Tenant, and during which Respondent continually attempted to obtain authority to legally move back upstate.

CONCLUSION

Based on the foregoing, the court finds that Respondent failed to establish by a preponderance of credible evidence that he primarily resided in the Subject Premises with Tenant for the two year prior to her permanent vacateur. Petitioner is awarded a final judgment of possession as against Respondent and Lum. The warrant of eviction shall issue forthwith, execution is stayed through October 31, 2015, conditioned on payment of ongoing use and occupancy at the last lease rate to afford respondents an opportunity to vacate.

This constitutes the decision and order of the Court.4

Dated: New York, New York
July 21, 2015

_____

Sabrina B. Kraus, JHC

TO: ADAM LEITMAN BAILEY, PC
Attorneys for Petitioner
By: Christopher Halligan, Esq.
120 Broadway, 17th Floor
New York, New York 10271
212.825.0365

WILLIAM E. LEAVITT, ESQ
Attorneys for Respondents
305 Broadway, Suite 900
New York, New York 10007
212.897.5852

4
Parties may pick up Trial Exhibits within thirty days of the date of this decision from the second floor clerk's office, window 9. After thirty days, the exhibits may be shredded in accordance with administrative directives.

[* 24]