

601 W. 135 St. HDFC v Tsiropoulos
2015 NY Slip Op 31972(U)
October 27, 2015
Civil Court of the City of New York, New York County
Docket Number: 58784/2015
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART R

601 WEST 135 STREET HDFC,

X

Petitioner

HON. SABRINA B. KRAUS

-against-

DECISION & ORDER
Index No.: L&T 58784/2015

YVETTE M. TSIROPOULOS, YVETTE M.
TSIROPOULOS, as Voluntary Administrator of the
Estate of LUZ MORALES PIETRI a/k/a/LUZ
MORALES
601 West 136 Street, Apt. 26
New York, New York 10031

Respondents

X

BACKGROUND

This summary holdover proceeding was commenced by **601 WEST 135 STREET HDFC** (Petitioner) against **YVETTE M. TSIROPOULOS** (Respondent) in her individual capacity and as Voluntary Administrator of the Estate of Luz Morales Pietri a /k/a/ Luz Morales (The Estate). Respondent is the daughter of Luz Morales (Morales), who is now deceased, and was the last proprietary lessee of record of 601 West 136 Street, Apt. 26, New York, New York 10031 (Subject Premises). The petition is based on the allegation that The Estate has breached its obligations under the proprietary lease by failing to assign said lease within 60 days of the death of Morales.

PROCEDURAL HISTORY

Petitioner issued a Notice of Termination (Notice) dated March 3, 2015, asserting that the

Estate had breached a substantial obligation of its tenancy pursuant to paragraph 7.01(b)(v) of the proprietary lease. The Notice further asserted that Morales and William Morales were the original proprietary lessees and that Respondent was the voluntary administrator of both estates. The Notice asserted that by operation of law the shares and proprietary lease passed to Respondent as voluntary administrator, and that over 60 days had elapsed since the death of the proprietary lessees, without a transfer to an assignee as required by Paragraph 5.05(b) of the proprietary lease. The Notice required respondents to vacate by March 14, 2015.

The notice of petition and petition issued March 19, 201, and the proceeding was initially returnable on April 2, 2015. The proceeding was adjourned to May 26, 2015, on Respondent's application to obtain counsel. Counsel appeared for Respondent on May 26, and made a further application for an adjournment, which was granted. The court directed Respondent to pay three months' use and occupancy, at a rate of \$275 per month by June 8, 2015, and to file an answer on before said date. The proceeding was adjourned to June 19, 2015, and marked final as against Respondent.

Respondent, through counsel, filed an answer dated June 19, 2015. The answer asserted defenses including, that Petitioner had failed to serve a notice to cure, estoppel and a claim for attorneys' fees.

On said date, Respondent moved to dismiss pursuant to CPLR 3211(a)(1) based on the failure of Petitioner to serve a notice to cure. However, said motion was withdrawn, pursuant to a stipulation which provided that all defenses raised in the motion were preserved, that Respondent's time to answer was extended through July 17, 2015. The proceeding was adjourned to August 3, 2015.

On August 3, 2015, the proceeding was further adjourned to September 21, 2015 on Respondent's application, and marked final as against Respondent.

On September 14, 2015, Respondent filed notice of consent to change attorney.

On September 21, 2015, Respondent's further application for an adjournment was denied, and the proceeding was transferred to the Expediter's Part. On that date, the proceeding was assigned to Part R for trial. The trial commenced and concluded. The proceeding was adjourned to October 21, 2015, for post trial submissions, and on October 21, 2015, the court reserved decision.

FINDINGS OF FACT

Petitioner is the owner of the subject building, pursuant to a deed dated May 7, 1993 (Ex 1). Petitioner is incorporated under Section 402 of the Business Corporation law and Article XI of the Private Housing Finance Law (Ex 3).

William and Luz Morales were husband and wife and the proprietary lessees of the Subject Premises, pursuant to a proprietary lease dated June 7, 1993 (Ex 6). William Morales died on February 10, 2008 (Ex 4). Luz Morales a/k/a Luz Maria Pietri Morales died on October 21, 2012 (Ex 5). Respondent was appointed voluntary administrator of both estates, pursuant to certificates issued by Surrogate's Court, New York County on December 1, 2014 (Exs 4 & 5).

There is a valid MDR for the building effective through 2016 (Ex 2).

Respondent moved into the Subject Premises in April 2010. As of this date Morales was recovering from a hospital stay in a nursing home, and Respondent expected her to return to the Subject Premises shortly.

In the Spring of 2010, Morales made an application to Petitioner to add names to the proprietary lease. Petitioner acknowledged receipt of said request in writing as of April 30, 2010 (Ex I). On the same date, Petitioner requested proof of relationship between Morales and the proposed individuals to be added as well as proof of residency. The Board indicated there was a \$650 fee to process the amendment to the proprietary lease and provided Morales with the contact information for their attorney (Ex J).

On May 5, 2010, Respondent made a written request on behalf of Morales to be added as a proprietary lessee for the Subject Premises. Respondent stated she had a power of attorney for Morales which had been submitted to Petitioner at a January 2008 board meeting (Ex K).

In July 2014, Petitioner sent a written request to Respondent to attend a meeting to discuss the status of the Subject Premises. The letter noted that no payments had been made to Petitioner for the Subject Premises since August 2013, that Respondent had previously declined an offer by the Board to be added as a proprietary lessee, and that the current request to add Respondent was subject to a different standard now that both of Respondent's parents were deceased. The Board requested Respondent attend a meeting on August 4, 2014 (Ex H).

A letter from Petitioner's counsel was sent to Respondent on August 25, 2014, advising Respondent that prior to proceeding she needed to obtain authority to act on behalf of her parents' estates from Surrogates Court (Ex G). A follow up letter in this regard was sent to Respondent on October 16, 2014 (Ex F).

By January 7, 2015, Petitioner acknowledged receipt of the appropriate certificates from Surrogate's Court and requested that Respondent complete an application and submit two years of tax records so that Petitioner could process her request to become a shareholder (Ex E).

A new board was elected in June 2015 and requested to meet with Respondent in July 2015 (Ex C). Respondent met with the Board on July 6, 2015, and expressed a desire to become a shareholder. The Board discussed her request but made no decision. At this meeting, Respondent was asked why she had failed to pay the maintenance and Respondent stated she had stopped paying to get the Board's attention. The Board was not happy with the extent of the default on payment of maintenance.

Respondent through counsel submitted the required application to Petitioner's counsel on July 16, 2015, along with representations that Respondent had not filed taxes since 2008 and that Respondent earned approximately \$500 per month as a tutor/translator. The letter also provided "Let me know if you need her to file a tax return for 2014 (Ex B)." The application lists an additional source of income for Respondent in the amount of \$867 per month for social security retirement benefits. Respondent's application provided a date of birth, but did not provide a social security number. Many significant parts of the application were not completed. Respondent failed to provide any information about any bank accounts, credit cards, proof of citizenship or legal US Resident status

William Palma (WP) is the President of the Board and has been President since 1988. WP became a shareholder in the building in 1993 and lives in Apartment 39. WP testified that after her parents died, the Board tried to learn Respondent's intentions regarding the Subject Premises, but that Respondent did not answer the letter they sent her in that regard.

When Respondent's parents were still alive the Board offered Respondent the opportunity to be added as a co-tenant on her parents' proprietary lease and Respondent declined.

WP testified that after her father died, in 2008, the Board advised Respondent that she should become a co-tenant while Morales was still alive, and Respondent declined. WP testified that the Board never discussed whether they would accept Respondent as a shareholder after Morales' death.

WP testified that Respondent never followed up on the application and other requirements that the Board forwarded her regarding Morales' request to have Respondent added as a co-tenant in 2010. WP testified that while a shareholder is still alive, if the shareholder wishes to add a sibling or a child as a co-tenant no formal application is required, but that after the death of the shareholder the procedures differ and a formal application is required. WP noted this was primarily due to the applicable income restrictions.

WP testified that no notice to cure was served prior to the commencement of this proceeding because such a notice is not required by the proprietary lease. WP's understanding of the terms of the proprietary lease is that an executor has 60 days to effect a transfer.

WP testified that given the default in paying maintenance arrears, the Board's view of Respondent's application had become less favorable, and that the Board has never had to sue a shareholder for nonpayment of rent. WP testified that to date Respondent had not submitted all the documents required for the Board to process her request for a transfer. WP testified that Respondent's application was not complete because she had not submitted tax returns. WP testified that Respondent was still in default on her obligation to pay maintenance and that there was over \$6000 in arrears.

After WP's testimony, Petitioner rested and Respondent moved to dismiss based on the failure of Petitioner to submit a stock certificate into evidence and based on Petitioner's failure

to serve a notice to cure. The court denied the motion based on the stock certificate, and reserved decision on that part of the motion based on the failure to serve a notice to cure.

Respondent also testified at the trial. Respondent testified that she had grown up in the Subject Premises, and that she lived there from 1952 to 1972, and again from 1975 to 1976. Respondent had most recently commenced living on the Subject Premises in April 2010, because her Morales was in hospice, but wished to return to living in the Subject Premises.

Shortly after she moved in, Respondent requested to be added to the proprietary lease as a shareholder. There were no further discussions after her initial inquiry and correspondence until she received correspondence from Petitioner's counsel directing her to obtain certificates as voluntary administrator for her parents' estate.

Respondent had a dispute with the Board regarding the payment of maintenance because she was asserting a claim for \$19,000 on behalf of her father's estate for repairs that had been made to the Subject Premises.

Respondent's testimony was a bit inconsistent and not entirely credible. Respondent testified that she was told at the July 2015 meeting that she did not qualify to become a shareholder, but also testified that she was certain her application would be approved by the Board.

Respondent testified that she was not "clear" on the requirement to submit tax returns and Respondent did not submit an application when it was sent to her in January 2015, because she did not believe it pertained to her request to become a shareholder. This portion of Respondent's testimony lacked credibility.

Respondent testified that she had not filed tax returns since 2005.

Petitioner did not submit the by laws for the corporation in evidence

WP was recalled on rebuttal by Petitioner, primarily to rebut Respondent's testimony that she was advised at the July 2015 meeting that she did not qualify to become a shareholder. WP testified that the Board has not made a determination on Respondent's application, and that any such determinations would be both in writing and in person. WP testified that Respondent's application is in "limbo" and that the Board will not make a determination on the application until Respondent has completed it by submitting the required tax returns. WP testified that no other documentation would be found sufficient by the Board to determine whether Respondent's income made her eligible for the assignment.

DISCUSSION

Article Seven of the proprietary lease addresses termination of leases and provides:

If at any time during or after the happening of any of the events mentioned in subdivision (a) to (I) of this section 7.01, the corporations shall give to the Shareholder a notice stating that the term hereof will expire on a date at least five days thereafter, then (1) the term of this lease shall expire on the date so fixed in such notice as fully and completely as if it were the date herein fixed for the expiration of the lease, (2) all right, title and interest of the shareholder hereunder shall thereupon wholly cease and expire, and (3) the shareholder shall thereupon quit and surrender the Apartment to the Corporation. If such events and notice occur, the Corporation and the Shareholder intend by this provision to create hereby a conditional limitation, which grants the corporation the right to re-enter the Apartment and to remove all persons and personal property therefrom, either by summary dispossession proceedings, or by any suitable action or proceeding at law or in equity, or otherwise, and to repossess the Apartment as if this lease had not been made, and no liability whatsoever shall attach to the Corporation by reason of the exercise of the right of re-entry, re-possession and removal herein granted and reserved.

Petitioner bases this proceeding on Article 7.01(b)(v) of the proprietary lease which provides:

If at any time during the term of this lease ... this lease or any of the shares to which it pertains shall pass by operation of law or otherwise to anyone other than the shareholder named

in this lease or a person to whom such Shareholder has assigned this lease in the manner herein permitted, but this subsection (v) shall not apply if this lease shall pass to the executors or administrators of the shareholder and provided that within (60) days (which period may be extended by the Directors) after the death of the Shareholder said lease and shares shall have been transferred to any assignee in accordance with paragraph 5.05(b);

Article 5.05 (b) of the proprietary lease governs assignments. It sets forth the procedure for assignments including the requirements including that they be in writing, that the shareholder not be in arrears. 5.05(b)(ii) (B) provides that Petitioner "... may not unreasonably withhold consent to assignment of the lease and a transfer of the shares to a financially responsible member of the Shareholder's family ... who shall have accepted all the terms and conditions of this lease."

§ 576(1)(b) of Article XI of the Private Housing Finance Law which is referenced both in Petitioner's Certificate of Incorporation (Ex 3) and the proprietary lease provides that:

Dwellings in any such project shall be available for persons or families whose probable aggregate annual income does not exceed six times the rental (including the value or cost to them of heat, light, water and cooking fuel) of the dwellings to be furnished

The court finds that Petitioner has failed to meet its burden in establishing a right to possession as against Respondent. This finding is not based on Respondent's argument that Petitioner was required to serve a notice to cure. The provision relied upon by Petitioner automatically terminates the lease and provides for no applicable cure period¹.

Nor is the court persuaded by Respondent's arguments that Petitioner has no right to proceed against Respondent in her individual capacity, or that this court lacks subject matter jurisdiction over this proceeding. While it is true that Respondent in her individual capacity

¹ Respondent's motion to dismiss at the close of Petitioner's case for failure to serve a notice to cure is thus denied.

would have been more appropriately named as an undertenant occupant, this irregularity, raised for the first time in Respondent's post trial memo is not a fatal defect. Additionally, it is clear that Civil Court has subject matter jurisdiction over this summary holdover proceeding, and Respondent's arguments that the proceeding must be maintained in Surrogate's Court is unavailing.

However, pursuant to the terms of the proprietary lease, the 60 day period for the transfer may be extended by The Board. It is undisputed that Respondent has submitted an application for the transfer, that the Board was still actively considering that application as of July 2015, well after the commencement of this proceeding. The Board President testified that as of the date of the trial, the Board had not yet made a decision on Respondent's application, and that any decision would be in writing. The President testified that the Board had not yet made a decision because they viewed the application as incomplete, based on Respondent's failure to submit tax documents, that she has already advised Petitioner do not exist.

The court finds that Petitioner's on going consideration of the application including the request that Respondent meet with the Board in July 2015, where the application was discussed and acknowledged as pending, must be deemed to be an extension of the 60 day period referenced in the proprietary lease.

Petitioner's arguments in its post trial submission that the Board's decision not to approve the application for the transfer of the proprietary lease and shares is protected by the business judgment rule is premature. The Board must first make such a decision before it can be protected by the business judgment rule, but the Board has yet to make a decision on the pending application.

Nor is the Board's position that the application be held indefinitely in abeyance because of Respondent's failure to submit tax returns reasonable. At the outset there is no specific requirement in the proprietary lease, articles of incorporation or governing statute that require the submission of tax returns. While such a request as part of the application process is not unreasonable, it is possible that other documentation could be submitted to insure that Respondent's income qualifies her to become a shareholder, and the failure to submit a document which does not exist can not be used as a basis by Petitioner to indefinitely postpone making a decision on the pending application. Indeed the provision of the proprietary lease in Article 5.05(b)(i)(G) providing that if the Board fails to act on an application within 30 days of submission, then the decision can be made by a majority of the shareholders rather than the Board, suggests that the Board has a duty to act on an application within a reasonable period after it is submitted.

The court must conclude, based on a preponderance of credible evidence that Respondent's time to transfer the shares in her capacity as voluntary administrator is deemed extended until the Board makes a determination on the pending application, in accordance with the proprietary lease. If the Board grants the application, the underlying claim is moot, and if the Board denies the application the issue would be the reasonableness of said denial pursuant to Article 5.05(b)(ii) (B) of the proprietary lease [see eg 352-54 *West 48 Street HDFC v Rodriguez* 41 Misc3d 138(A)].

CONCLUSION

Based on the foregoing, the petition is dismissed without prejudice.

This constitutes the decision and order of the Court.²

Dated: New York, New York
October 27, 2015

Sabrina B. Kraus, JHC

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2 Parties may pick up exhibits, within thirty days of the date of this decision, from Window 9 in the clerk's office on the second floor of the courthouse. After thirty days, the exhibits may be shredded, in accordance with administrative directives.