

**25 W. 68th St. LLC v Sable**

2017 NY Slip Op 31118(U)

May 11, 2017

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

Docket Number: 60898/2016

Judge: Jack Stoller

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

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25 WEST 68<sup>th</sup> STREET LLC c/o SOL GOLDMAN  
INVESTMENTS LLC,

Petitioner,

Index No. 60898/2016

- against -

**DECISION/ORDER**

JEFFREY SABLE and JOHANNA BENNETT,

Respondents.

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Present: Hon. Jack Stoller  
Judge, Housing Court

25 West 68<sup>th</sup> Street LLC c/o Sol Goldman Investments LLC, the petitioner in this proceeding (“Petitioner”), commenced this holdover proceeding against Jeffery Sable (“Respondent”) and Johanna Bennett (“Co-Respondent”), the respondents in this proceeding (collectively, “Respondents”), seeking possession of 25 West 68<sup>th</sup> Street, Apt. 7C, New York, New York on the ground that Respondent sublet the subject premises to Co-Respondent without authorization. Respondents interposed an answer stating that Respondent could not stay in the subject premises because of conditions therein and that Respondent is permitted to have a roommate. The Court held a trial of this matter over the course of two days.

Predicate notices served on December 30, 2015 and February 5, 2016 annexed to the petition alleged that Respondent violated a substantial obligation of his tenancy by subletting the subject premises in violation of RPL §226-b and in violation of paragraph 3 of a lease dated June 21, 1968. The predicate notices were served with regularity.

Petitioner proved on its *prima facie* case that it is the proper party to commence this

proceeding pursuant to RPAPL §721; that Petitioner has complied with the registration requirements of MDL §325; and that the subject premises is subject to the Rent Control Law.<sup>1</sup>

Petitioner's property manager ("the property manager") testified that he never received any request from Respondent to sublet the subject premises, that he has been to the subject premises twenty-five times in the last eleven months, that Co-Respondent has been there, and that Respondent has not been there.

On the property manager's cross-examination, Respondents introduced into evidence an agreement signed by Respondent and Petitioner's managing director dated August 21, 2015 ("the Agreement") which provided that Respondent "agrees to vacate the [subject p]remises" as of August 28, 2015 for a lead paint abatement; that Petitioner would give Respondent a credit for rent for the time Respondent was not living in the subject premises; and that, "in the event that lead paint abatement cannot be completed by September 14, 2015, Petitioner shall notify [Respondent] of same by e-mail ... and that [Respondent] shall be credited an additional [amount of rent] per day that [Respondent] remains out of possession beyond September 14, 2015." The agreement further states that it was the result of "extensive negotiations" between the parties.

The property manager testified on cross-examination that the subject premises had lead paint violations; that he was engaged in lead paint remediation of the subject premises; that the remediation started in about January of 2016 and was complete by mid-summer of 2016; and that he did not know that a prior remediation was not properly done. On the cross-examination of the property manager, Respondents introduced into evidence a letter from Petitioner's attorney dated

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<sup>1</sup> Among other things, the petition alleges that the subject premises is subject to the Rent Control Law and the answer admits this allegation.

September 12, 2016 documenting that Petitioner abated the lead paint in the subject premises.

The property manager testified on redirect examination that Co-Respondent lived in the subject premises during the time that lead paint violations persisted in the subject premises.

The property manager's predecessor ("the prior property manager") testified on Petitioner's case that he last saw Respondent in the subject premises in October of 2015; that he did not see Respondent after that; that Co-Respondent lived there; that no one ever requested permission to sublet the subject premises; that he knew of a lead issue in the subject premises; and that Co-Respondent was the person he dealt with to gain access to the subject premises for lead abatement.

The prior property manager testified on cross-examination that Respondent told him that Co-Respondent was going to live in the subject premises; that he knew about violations placed on the subject premises for lead paint; and that he stopped managing the subject premises in June of 2016. On cross-examination of the prior property manager, Respondents introduced into evidence lead paint violations that the Department of Housing Preservation and Development of the City of New York ("HPD") placed on the subject premises.

Petitioner's rent collector testified as to arrears that Respondent owes, although Petitioner's rent collector testified on cross-examination that she was unaware of a rent abatement for lead paint.

Co-Respondent testified on Petitioner's *prima facie* case that she moved into the subject premises around October of 2015 and that the last night that Respondent slept in the subject premises was the night that she moved in. Petitioner introduced into evidence an email from Respondent to Co-Respondent dated April 4, 2016 referring to a backlog in payment of rent.

Co-Respondent testified on Petitioner's *prima facie* case that she paid \$750.00 to Respondent in November of 2015;<sup>2</sup> that she did not pay Respondent anything after that; that she has allergies; that lead is probably not good for her allergies; that Respondent told her there was lead paint in the subject premises; that the lead was a "nightmare" for Respondent's daughter; and that Respondent has been living in Prague because he cannot afford alternate accommodations in New York.

Petitioner introduced into evidence an email Co-Respondent sent Respondent on October 26, 2015 asking what furniture left behind that she can "toss". Co-Respondent testified that the subject premises was partially furnished when she moved in; that they were going to get new furniture and that she may have been moving out of state after six to eight months, in which case she would have left furniture that she did not care about.

Co-Respondent testified on cross-examination on Petitioner's *prima facie* case that she moved into the subject premises as a favor to Respondent; that she and Respondent had met in church; that she was friends with Respondent and Respondent's wife; that she moved into the subject premises because Respondent was concerned about the effect of lead paint in the subject premises on his daughter; that Respondent's family lives in Manhattan and that Respondent's in-laws live in Prague; that the Con Edison and cable account for the subject premises are in Respondent's name; that Respondent has three closets worth of personal property in the subject premises, as well as dressers, a trunk, and a bed; that Respondent was free to come and go from the subject premises as he pleased; and that she provided Petitioner with access more than ten

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<sup>2</sup> An affidavit of Respondent that Petitioner introduced into evidence corroborated this figure.

times for lead paint abatement.

Co-Respondent testified on redirect examination on Petitioner's case that she opened rent bills Petitioner sent to Respondent and left them in a pile on a table for Respondent to see; that she and Respondent never stayed in the subject premises on the same night; that she stayed in the subject premises because she was not sure how long she was going to live in New York and she needed little more than what she characterized as a crash pad; and that Respondent did not move back into the subject premises after September of 2016.

Respondent testified on Petitioner's *prima facie* case that the subject premises has been his home for his entire life; that he has been in the Czech Republic since November of 2015; that his monthly rent in November of 2015 was \$1,262.00; that Co-Respondent had paid him \$750.00 in November of 2015; that Co-Respondent paid more than half of the rent because he included bills in what she had to pay; that the November 2015 tender was the only money Co-Respondent paid him; that he did not know of a lead paint abatement in the subject premises in September of 2016; and that he had not taken any steps to move back into the subject premises since he received notice that the lead paint was abated.

Respondent testified on cross-examination on Petitioner's *prima facie* case that he left the subject premises in November of 2015 with his wife and his one-year-old daughter because of a lead paint condition in the subject premises; that he found out about the lead paint in August of 2014 because he had an independent company test the subject premises; and that he notified Petitioner in February of 2015 about the lead paint that was found. Respondent introduced into evidence on his cross-examination a letter that he sent Petitioner on February 24, 2015 saying that he wanted to move his wife and daughter into the subject premises and that he wanted

Petitioner to abate the lead paint.

Respondent testified on cross-examination on Petitioner's *prima facie* case that Petitioner began the lead paint abatement in September of 2015; that Petitioner agreed to compensate him for the time that he was out of the subject premises, referencing the letter that was already in evidence; that Respondent stayed at his father's apartment on West 58<sup>th</sup> Street in Manhattan with his daughter and wife while the remediation was ongoing; that he called HPD when Petitioner did not abate the lead condition; that he slept on a couch in his father's living room when he stayed there while his wife and daughter slept in a guest bedroom; that his father's apartment was thus very crowded; and that he didn't feel comfortable in his father's apartment after two months and could not move back into the subject premises with his daughter.

Respondent testified on cross-examination on Petitioner's *prima facie* case that the subject premises was covered with dust when he looked at it in September of 2015; that he threw away a broken bed that had been in the subject premises; and that he threw away other personal property that he thought was contaminated with lead dust.

Respondent testified on cross-examination on Petitioner's *prima facie* case that his wife's visa to remain in the United States was about to expire and, without a proper home, he didn't feel that he could start a process to legalize her continued occupancy in the United States; and that he took a couple of bags of clothes to the Czech Republic.

Respondent testified on cross-examination on Petitioner's *prima facie* case that Co-Respondent is an old and dear friend; that he felt that the subject premises would be vulnerable if it was just vacant for the time when Respondent could not live there; that he thought Co-Respondent could be his eyes and ears in the subject premises while he was not there; that he

needed to support himself while he was living in the Czech Republic, so he got a job teaching English; and that he has a teaching contract that goes through June of 2017.

Respondent testified on redirect examination on Petitioner's *prima facie* case that his personal possessions were contaminated with lead dust; that he salvaged the things that he cared about, including a black chair that he washed thoroughly; that he had communicated with Co-Respondent about paying rent after November of 2015 because he was not sure about his rent liability after November of 2015; that Co-Respondent could live in the subject premises even with the lead paint condition because she is not a minor child; that, in the summer of 2014, he lived both in the subject premises and in the Czech Republic for a month; that he was in New York for the last two weeks of August of 2014; and that he flew back for his wedding in September of 2014.

After Petitioner rested, Respondent moved for a directed verdict. The Court reserved decision on Respondent's motion.

Respondent testified on his own case that he met his wife at a teacher training for yoga in Tenerife in November of 2012; that, from 2012, he lived in the subject premises with a roommate; that he freelanced as a graphic web designer; that he started teaching yoga; that jobs he got were in Europe, Tenerife, and Prague; that he would be in Europe for one to two months at a time; that he was away from the subject premises for no more than two months at a time; that he and his wife found out that she was pregnant in November of 2013; and that Respondent's wife wanted to have their baby in Prague because Respondent's wife's mother, who lives there, is a pediatrician.

Respondent testified on cross-examination that his daughter will be three years old on



June 16, 2017; that he and his wife take turns taking care of their daughter in Prague; that his mother-in-law helps them with their daughter; that his father, stepmother, and half-sister are active in his life and would help with caring for his daughter; that his father is seventy-eight years old; that his stepmother is sixty-two years old; and that he can afford to live in New York City at the rent he pays for the subject premises.

Respondent testified on redirect examination that he could not afford a market-rate apartment in New York City and that immigration is an uncertain and complicated process.

The property manager testified on Petitioner's rebuttal case that Petitioner actually abated the lead in the subject premises between April 26, 2016 and April 29, 2016. Petitioner introduced into evidence documentation that HPD removed the lead-paint related violations. The property manager testified on cross-examination that Petitioner did not notify Respondent in April of 2016 that the subject premises was free of lead and has no proof of notification to Respondent of the lead paint abatement before September of 2016.

Petitioner's super testified on Petitioner's rebuttal case that Respondent took all of his belongings out of the subject premises on October 21, 2015 and moved out and that Co-Respondent moved into the subject premises on November 11, 2015 and that Respondent told the super that Respondent was moving out. Petitioner's super testified on cross-examination that Respondent did not say that he was permanently relocating; that Respondent said that he was moving because of the lead paint; and that there was lead paint in the subject premises. The super testified on redirect examination that he never met Respondent's wife.

A sublease is a transfer by a tenant of part of his or her estate or interest in the whole, or in a part, of the leased premises. BLF Realty Holding Corp. v. Kasher, 299 A.D.2d 87, 94 n.4 (1<sup>st</sup>

Dept. 2002), *appeal dismissed*, 100 N.Y.2d 535 (2003), 520 East 81<sup>st</sup> Street Assoc. v. Roughton-Hester, 157 A.D.2d 199, 201 (1<sup>st</sup> Dept. 1990). The presence of an unrelated individual in an apartment, coupled with the absence of the tenant of record from that apartment can lead to the conclusion that a sublet has occurred. 27 W. 84<sup>th</sup> St. Tenants Ass'n v. Knight, 11 Misc.3d 129(A)(App. Term 1<sup>st</sup> Dept. 2006), Kimmel v. Estate of Ling Kai K'Ung, N.Y.L.J. August 6, 1993 at 21:5 (App. Term 1<sup>st</sup> Dept. 1993).

Petitioner failed to maintain the subject premises free of lead paint, as memorialized in the Agreement, by which Petitioner itself conceded not only that Respondent could not live in the subject premises until Petitioner notified Respondent that it had abated the lead condition but also that Respondent was relieved from the duty to pay rent until he was able to live in the subject premises with his child. Petitioner's acknowledged default as such occasioned Respondent's absence from the subject premises. To the extent that the distinction between a subtenant and a roommate turns on whether another occupant of an apartment contemporaneously occupies it with a tenant, Fairmont Manor v. Verdicchio, August 18, 1995 at 21:3 (App. Term 1<sup>st</sup> Dept.), Kimmel, supra, N.Y.L.J. August 6, 1993 at 21:5, Glick v. Tafaghodi, N.Y.L.J. March 8, 1993 at 28:2 (App. Term 1<sup>st</sup> Dept.), 305 East 72<sup>nd</sup> Street Assocs. v. Menocal, N.Y.L.J. December 29, 1986, at 5:1 (App. Term 1<sup>st</sup> Dept.), penalizing a tenant for a failure to contemporaneously occupy an apartment with another person when the landlord is the party at fault for the tenant's non-occupancy would perversely incentivize landlords of rent-regulated properties to neglect the habitability of their units. Legal authority does not support such a remarkable proposition. See, e.g., 157 E. 57<sup>th</sup> St. LLC v. Birrenbach, 16 Misc.3d 81, 83 (App. Term 1<sup>st</sup> Dept. 2007)(a rent-regulated tenant does not fail to maintain an apartment as a primary

residence upon a constructive eviction therefrom).<sup>3</sup>

Be that as it may, Petitioner did not prove an indispensable element of its case. Even though the petition alleged that Respondent breached a specific provision of a lease, Petitioner did not introduce a lease into evidence. In the absence of an express restriction in a lease, a tenant has the unrestricted right to assign or sublet, Mann Theatres Corp. v. Mid-Island Shopping Plaza Co., 94 A.D.2d 466, 470 (2<sup>nd</sup> Dept. 1983), *aff'd for the reasons stated*, 62 N.Y.2d 930, 933 (1984), Ilfin Co. v. Shattan, N.Y.L.J. Nov. 22, 1982 at 13:6 (App. Term 1<sup>st</sup> Dept.), unless an apartment is subject to the Rent Stabilization Law, in which case the lease need not contain a clause barring subleases for a landlord to have a cause of action. McDermott v. Pinto, 101 A.D.2d 224, 226 (1<sup>st</sup> Dept. 1984), Sherry House Assocs. v. Kaye, 167 Misc. 2d 729 (App. Term 1<sup>st</sup> Dept. 1996). This exception to the requirement that a lease prohibit subletting, however, does not apply to apartments subject to the Rent Control Law. RPL §226-b(4), 46 Downing St. LLC v. Thompson, 2013 N.Y. Misc. LEXIS 4470, 26-27 (Civ. Ct. N.Y. Co. 2013), *aff'd*, 44 Misc.3d 143(A)(App. Term 1<sup>st</sup> Dept. 2014). The absence of a lease prohibiting sublets and the inapplicability of RPL §226-b to the subject premises, as a rent-controlled unit, thus mandates

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<sup>3</sup> Co-Respondent's presence in the subject premises raised a question about whether Respondent could have – or should have – also lived in the subject premises. However, lead paint presents hazards specific to children as opposed to adults. “The dangers of exposure to lead-based paint, especially to young children, are well documented ... young children are at a higher risk for lead exposure and its deleterious effects because of their normal hand-to-mouth activity and their developing neurological systems ....” N.Y. City Coalition to End Lead Poisoning, Inc. v. Vallone, 100 N.Y.2d 337, 342-343 (2003). See N.Y.C. Admin. Code §27-2056.5(a)(rendering a lead paint condition a violation of the housing maintenance code depending in part on whether a child under the age of seven resides in an apartment with such a condition). Accordingly, the presence of Co-Respondent, an adult, in the subject premises does not affect the proposition that the lead condition in the subject premises rendered it uninhabitable for a household with a child the age of Respondent's daughter, who as of this writing is still younger than seven years old.

dismissal of Petitioner's illegal sublet holdover proceeding.

Accordingly, the Court dismisses this proceeding after trial and denies Respondent's motion for a directed verdict as moot and subsumed into this order.

The parties are directed to pick up their exhibits within thirty days or they will either be sent to the parties or destroyed at the Court's discretion in compliance with DRP-185.

This constitutes the decision and order of this Court.

Dated: New York, New York  
May 11, 2017

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HON. JACK STOLLER  
J.H.C.