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| <b>Westfront Assoc., LLC v Concepcion</b>                                                                                                                                                                                  |
| 2011 NY Slip Op 33360(U)                                                                                                                                                                                                   |
| December 19, 2011                                                                                                                                                                                                          |
| Civil Court of the City of New York, New York County                                                                                                                                                                       |
| Docket Number: 50860/10                                                                                                                                                                                                    |
| Judge: Sabrina B. Kraus                                                                                                                                                                                                    |
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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: HOUSING PART R

\_\_\_\_\_X

WESTFRONT ASSOCIATES LLC,

Petitioner-Landlord

-against-

ANA CONCEPCION  
452 NINTH AVENUE  
APARTMENT 8  
NEW YORK, NY 10018,

Respondent-Tenant

ODALIS CONCEPCION, RAFAEL RAUL,  
ORLANDO CONCEPCION, "JOHN DOE" AND  
"JANE DOE"

Respondents-Undertenants

\_\_\_\_\_X

**HON. SABRINA B. KRAUS**

**DECISION & ORDER**  
**Index No.: L&T 50860/10**

**BACKGROUND**

This summary holdover proceeding was commenced by **WESTFRONT ASSOCIATES LLC** (Petitioner) against **ANA CONCEPCION**, the last rent stabilized tenant of record, seeking to recover possession of Apartment 8, at 452 Ninth Avenue, New York, NY 10018 (Subject Premises) based on the allegation that Ana Concepcion is not occupying the Subject Premises as her primary residence. The tenant of record never appeared. **ODALIS CONCEPCION** (Respondent) has appeared, and asserted that he is the son of Ana Concepcion, and entitled to succeed to her tenancy.

## PROCEDURAL HISTORY

This proceeding was commenced by service of a Notice of Non-Renewal of Lease on or about September 29, 2009, and Notice of Petition and Petition on or about January 14, 2010. On January 25, 2010, Respondent appeared and represented that his mother was in the Dominican Republic, and asserted his claim to succession of his mother's Rent Stabilized lease. Although there was no formal written answer, the assertion of the succession claim was noted on the file, and acknowledged by counsel for Petitioner, at the commencement of trial. The proceeding was adjourned to February 9, 2010, for Petitioner to make a motion for discovery. On February 9, 2010, the Court granted Petitioner's motion for discovery, ordering Respondent to turn over documents requested, and to appear for a deposition. The proceeding was marked off the Court's calendar, pending the completion of discovery.

The proceeding was restored to the calendar for trial in April 2011. On May 26, 2011, Respondent was granted an adjournment to July 14, 2011 to obtain counsel. The proceeding was adjourned several other times through December 15, 2011, at which point the proceeding was sent to Part R for trial. The trial commenced on December 15, 2011 and concluded on December 16, 2011. At the conclusion of the trial, the Court reserved decision.

### Trial

Petitioner relied primarily on the testimony of Respondent in establishing its *prima facie* case. Other than Respondent, Petitioner offered the testimony of Saul Moskowitz, a managing agent, and the Super. Mr. Moskowitz had no personal knowledge of any material facts relevant to the proceeding. The Super had only been to the Subject Premises on one occasion prior to the commencement of the proceeding.

Respondent testified that he moved into the Subject Premises in 1986, and has lived there ever since. Respondent testified that he lived there with various members of his family, including his mother, Ana Concepcion. Respondent testified that, in or about 2005, his mother went to the Dominican Republic and has not returned since. His mother resides there with her family. Respondent testified that initially it was not clear that his mother had permanently vacated in 2005, and thought it was possible his mother would return to New York. However, approximately three years ago, Respondent visited his mother whose advanced Alzheimer's had progressed to the point where she could no longer recognize Respondent. Respondent testified that his mother had become so weak that she was not able to walk. Based on the foregoing Respondent testified it was unlikely his mother would ever return to the Subject Premises.

Petitioner offered no lease in evidence which was signed by Ana Concepcion. Exhibit 6 in evidence is a lease renewal that was signed by Respondent and his brother. It was for a two year period from January 1, 2008 through December 31, 2009. The prior renewal in evidence is Exhibit 5, which runs from January 2006 through December 31, 2007. Both Respondent and Mr. Moskowitz agreed that the renewal does not appear to be signed by Ana Concepcion, but neither witness could state who signed the renewal.

No other lease agreement was offered into evidence by either party. Both Respondent and Petitioner agree that Exhibit 7, which is a copy of Ms. Concepcion's passport evidences a true copy of Ana Concepcion's signature.

Respondent offered into evidence a series of tax documents (exhibits A-G) showing that the Subject Premises has been his primary residence for at least the last ten years.

The Court finds based on all credible evidence that Ana Concepcion permanently vacated the Subject Premises in 2005, prior to the execution of the lease agreement in November of 2005 ( Exhibit 5). The Court finds further that it is undisputed that prior to that date, Respondent, who is the son of the tenant of record, resided in the Subject Premises, with his mother from 1986 through 2005.

§ 2523.5 of the Rent Stabilization Code provides in pertinent part that at the time a renewal lease is offered if the tenant of record has permanently vacated, a member of the Tenants family, including the tenant's son, "... who has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two (2) years ... immediately prior to the permanent vacating of the housing accommodation by the tenant ... shall be entitled to be named as a tenant on the renewal lease."

While the record at trial is scant, the preponderance of the credible evidence offered at trial establishes that Respondent meets the criteria for succession rights as defined by the Code. While there is some authority suggesting that the execution of additional renewal leases may change the date a tenant has permanently vacated ( *Metropolitan Life Insurance v. Butler* 2002 NY Slip Op 50014[U] [App Term, 1<sup>st</sup> Dept, 2002]; *360 West 55<sup>th</sup> Street LP v. Anvar* 13 Misc.3d 7 [App Term, 1<sup>st</sup> Dept, 2006]), those cases are inapplicable to this proceeding given the undisputed testimony that the tenant did not execute either of the last two renewal leases executed.

Moreover, the Court notes the undisputed testimony by Respondent at trial that he can not read or write in English, and the fact that he attempted, in his own way, to assert his succession claim to the Subject Premises by printing his name and signing the renewal lease on

December 14, 2007. While a tenancy can not be created by waiver, the record reflects that Petitioner was aware that Respondent was the sole occupant in the Subject Premises for many years, Petitioner received and signed the Renewal Lease with such notice, and Petitioner countersigned the renewal Respondent had signed.

Mr. Moskowitz testified that at the time Renewal Leases are due the landlord verifies with the Super the identity of the actual occupants of the Subject Premises. The Super testified that for the seven years he has worked at the Subject Building he has only known Respondent to be the tenant of the Subject Premises.

Based on the foregoing, the Court finds Respondent is entitled to succeed to his mother's tenancy as the Rent Stabilized tenant of record. Given the foregoing, the petition is dismissed.

This constitutes the decision and order of this Court.

Dated: New York, New York  
December 19, 2011

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Sabrina B. Kraus, JHC

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