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

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20 FIFTH AVENUE LLC,

Petitioner-Landlord

-against-

DECISION & ORDER
Index No.: L&T 76946/2010

HON. SABRINA B. KRAUS

HOLLY WERTHEIMER
20 FIFTH AVENUE, APT 6B
NEW YORK, NEW YORK 10011

Respondent-Tenant

"John Doe" and "Jane Doe"

Respondent-Occupants

_____X

BACKGROUND

The underlying summary holdover proceeding was commenced by **20 FIFTH AVENUE LLC** (Petitioner) against **HOLLY WERTHEIMER,** (Respondent), the rent-stabilized tenant of record based on the allegation that Respondent has failed to maintain the Subject Premises as her primary residence. Both parties are represented by counsel and a *guardian ad litem* (GAL) has been appointed for Respondent.

Petitioner asserts that Respondent has been living in the same building as the subject premises, but that she lives in Apartment 8G with her boyfriend. Respondent has filed an answer wherein she asserts that any absence from the Subject Premises is a result of her suffering from severe agoraphobia.

Petitioner now moves for an order requiring Respondent to submit to an independent medical examination by Petitioner's psychiatrist, and Respondent cross-moves for an order of protection and for an order directing Petitioner to produce documents. The motions are consolidated herein for determination.

PETITIONER'S MOTION TO COMPEL RESPONDENT TO SUBMIT TO A PSYCHIATRIC EXAMINATION

In this proceeding, Respondent does not dispute that she did not live in the Subject Premises for over two years prior to the service of the golub notice. Respondent asserts however that the reason she failed to live in the Subject Premises is because of her mental illness. It is unclear to what extent if any this claim is a defense to non-primary residence.

In the leading case on point, *Toa Construction Co v .Tsitsires* 54 AD3d 109, the Appellate Division held that the tenant's failure to occupy his rent-stabilized apartment as his primary residence warranted his eviction under the rent stabilization code, regardless of the fact that the reason for his failure to occupy was his mental illness (*cf Katz v Gelman* 177 Misc2d 83). However, there is dicta in the decision that suggests that proof of ability to occupy going forward may have resulted in a different outcome.

The court held:

> The laws of rent stabilization do not allow for the indefinite retention of the right to rent stabilized premises by a tenant who does not actually reside in the premises and has no intent to return to reside there at any point in the future. This is no less true where, as here, the tenant's inability to ever reside there is caused by his mental illness. ... Unless there is evidence at trial supporting a conclusion that the tenant will at some point be able to actually reside in the apartment, his absence should not be deemed excusable, and his abandonment of the premises as his residence should be acknowledged.
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> .....
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> Although his exact diagnosis was disputed, it is established that respondent

> suffers from a mental illness, which includes a panic disorder, that has resulted in his feeling compelled to spend virtually all his time away from the subject apartment. The credible evidence established that respondent lived the lifestyle of a homeless person in a psychologically "safe" area within a 20-block radius of the building (*Id* at 110 -112).

It is undisputed that Respondent has placed her mental illness in controversy in this proceeding by assenting it as an affirmative defense, this entitles Petitioner to the right to an independent psychiatric examination (*Koump v Smith* 25 NY2d 287). Respondent has already produced documentation regarding her illness in discovery.

In *TOA* the landlord moved for leave to conduct an independent psychiatric examination of the tenant prior to trial. The lower court denied the motion and the Appellate Term (*TOA Const. Co. v Tsitsires* 2003 NY Slip Op 50651(U)) affirmed the denial with Justice McCooe dissenting.

The Appellate Term held:

> It is true, as landlord argues, that tenant has put into controversy his claimed psychiatric disorders in an attempt to explain his admittedly fluctuating and erratic presence in the apartment premises. It needs to be emphasized, however, that the predominant issue to be determined in this nonprimary residence holdover proceeding remains the nature and extent of tenant's actual use of the apartment for living purposes; the psychological underpinnings of tenant's occupancy status is of little, if any, relevance to the outcome of this proceeding.

(Id). Thus the Appellate Term majority suggests that the fact that the tenant didn't live in the apartment because of his mental illness was all but irrelevant to a determination on primary residence.

In his dissent Justice McCooe wrote:

> The landlord claims a reciprocal right to conduct a psychiatric examination to meet this defense. CPLR Sec. 3121(a) grants this right when any party places his mental condition in controversy. The finding of a psychiatric illness establishes the need for an examination by the landlord's psychiatrist *Dominguez v Mabstoa* 168 AD2d 376(1st Dept., 1990). While I agree with the

> majority that the predominant issue is tenant's use of the apartment, this is a defense raised by the tenant and it would be premature to rule on its relevancy.

The Appellate Division reversed both the Appellate Term and the lower court's order and held:

> Respondent did, however, place his mental condition in controversy (CPLR 3121[a]) by asserting it as an affirmative defense in his pleadings and by submitting himself to an examination by a physician of his choice, the results of which he may seek in aid of his defense. Petitioner adequately demonstrated ample need for an independent psychiatric examination ((4 AD3d 141, 142).

Similarly, in this proceeding Respondent has place her mental illness in controversy by the assertion as an affirmative defense. Indeed, it appears as if this will be a central issue at trial as Respondent acknowledges that she did not use the Subject Premises for living purposes for years prior to the service of the golub notice, and excusable absence based on mental illness is her primary defense.

Respondent argues that the examination will be harmful to her, but the case law that Respondent relies on in this regard is not applicable to a psychiatric examination. For example Respondent relies on *D'Adamo v Saint Dominic's Home* (87 AD3d 966) for the proposition that where harmful an examination should not be permitted, but that holding in that case pertained to an invasive physical procedure called a "rigid sigmoidoscopy" which, like all surgical procedures, could be classified as dangerous and consisted of "..placing a rigid instrument in a person's rectum up to the sigmoid colon." That holding does not apply to a psychiatric examination. Respondent asserts only that such an examination "might" have an adverse effect on her progress (Exhibit V to cross motion).

To deny Petitioner's request would unfairly prejudice Petitioner by preventing Petitioner from having an opportunity to address the defense at trial with an expert of their own choosing.

Respondent requests that if the examination is ordered that she be able to have her own physician present. A party's attorney or representative, including a physician or registered nurse, may be present during an examination of the party conducted pursuant to CPLR 3121(a)[*Parsons v Hytech Tool & Die, Inc*. 241 AD2d 936; *Ramsey v NYU Hospital Center* 14 AD3d 349). However, Respondent may only choose one such representative, and said representative may not interfere with the actual examination. Respondent also requests that the examination be in her neighborhood, this request seems reasonable and should be accommodated by Petitioner.

Respondent is to submit to an examination within thirty days of the date of this order. Petitioner is furnish any report prepared by its expert to Respondent within 45 days of the examination. Petitioner's expert shall be furnished with documents pursuant to 22 NYCRR 208.13(b) to the extent same has not already been provided.

Respondent's motion for discovery is denied. The information sought is not tailored and Respondent fails to establish ample need for the blanket production of Respondent's tenant file. Additionally as Petitioner's motion for an examination has been granted Respondent's cross-motion for a protective order is denied.

This constitutes the decision and order of this court.

Dated: March 8, 2013
New York, New York

Hon. Sabrina Kraus

JEFFREY M. GOLDMAN, ESQ.
Attorneys for Petitioner
640 Fifth Avenue, Suite 4510
New York, NY 10019
212.265.2171

DAWN K. KELLY, ESQ
KOEHLER & ISAACS, LLP
Attorneys for Respondent
61 Broadway, 25th Floor
New York NY 10006
917.551-1300

ANNA NECHAYEV, ESQ
Guardian Ad Litem
3039 Ocean Parkway, Apt. B3
Brooklyn, New York 11235
917.582.5959