167 W. 80th St. LLC v Boucicaut
2015 NY Slip Op 31674(U)
September 3, 2015
Civil Court of the City of New York, New York County
Docket Number: 60162/2015
Judge: Jack Stoller

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART H
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167 WEST 80th STREET LLC,

Petitioner,

Index No. 60162/2015

- against -

DECISION/ORDER

GUY BOUCICAUT,

Respondent.
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Present: Hon. Jack Stoller
Judge, Housing Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of these motions.

Papers	Numbered
Notice of Motion and Supplemental Affidavits and Affirmation Annexed.....	1, 2, 3, 4
Notice of Cross-Motion and Supplemental Affidavits and Affirmation Annexed	5, 6, 7, 8
Notice of Motion For Discovery and Supplemental Affirmation Annexed	9, 10
Affirmation In Reply and In Opposition to the Cross-Motion	11
Reply Affirmation and Affidavit	12, 13

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

167 West 80th Street LLC, the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Guy Boucicaut, the respondent in this proceeding ("Respondent"), seeking possession of 167 West 80th Street, #2A, New York, New York ("the subject premises"), on the ground that Respondent is a licensee of the prior tenant of record of the subject premises ("the prior tenant") and that his license has been terminated. Respondent interposed an answer containing a defense that he is entitled to succession to the tenancy of the prior tenant. Petitioner served a subpoena on Respondent. Respondent now moves to quash the subpoena, for summary judgment in his favor, and for leave to obtain discovery. Petitioner

moves for summary judgment in its favor or, in the alternative, for leave to obtain discovery. The Court consolidates all motions for consideration herein. The Court first considers both parties' motions for summary judgment, as a determination of this matter on the merits would moot the parties' motions for leave to obtain discovery and to quash a subpoena.

Neither party disputes that the prior tenancy was subject to the Rent Control Law. Respondent submits evidence on his motion showing that he is the son of the prior tenant. Respondent avers in support of his motion that he moved into the subject premises in 1998, that the prior tenant died on December 12, 2014, and that he co-resided with the prior tenant until she died.

Petitioner argues that the prior tenant vitiated Respondent's succession claim by moving to Haiti in 2012, two years before her death, but continuing to pay rent in her name. In support of this proposition, Petitioner submits a death certificate for the prior tenant that appears to have been issued in Haiti, together with a translation from Haitian Creole into English. The translation provided by Petitioner states that the prior tenant was "[r]esiding and domiciled in Port-Au-Prince." Petitioner also submits its business records showing that it received rent for the subject premises for various months in 2013 and 2014 by checks numbered 1101-02, 1104-06, 1108-13, 1115-24, 1126-27, and 1129. Petitioner urges this Court to draw the inference that the check numbers follow one another so closely because the prior tenant wrote these checks out all at once in advance of her moving to Haiti so that Respondent could tender them to Petitioner. Petitioner also submits a deed for real property in Queens dated January 8, 1993, according to which the prior tenant is a grantee as a joint tenant, and which shows the subject premises as the

prior tenant's address. An assistant property manager of Petitioner avers that he knew the prior tenant, that he never saw her during the winters, that he saw the prior tenant in 2012, that she was not mobile at that time, and that he had not seen her since 2012. The principal of Petitioner also avers that he did not see the prior tenant after 2012.

There are circumstances according to which the conduct of a rent-controlled tenant can undermine a potential succession claim of a tenant's family member. See, e.g., Ludlow 65 Realty, LLC v. Chin, 42 Misc.3d 126(A) (App. Term 1st Dept. 2013) (when a rent-controlled tenant paid rent for several years after he departed, retained counsel to defend a nonpayment proceeding brought against him, and "most significantly," completed a Division of Housing and Community Renewal ("DHCR") form indicating that he was the record tenant, the tenant had not permanently vacated the demised premises, thus operating to deny a remaining family member succession to the tenancy); 3750 Broadway Realty Group, LLC v. Garcia, 2015 N.Y. Misc. LEXIS 2581 (Civ. Ct. N.Y. Co. 2015) (when a rent-controlled tenant moved out of the premises but continued to pay rent in her name, corresponded with her landlord as if she still lived there, listed the rent-controlled premises as her address, participated in litigation over the rent-controlled premises to the point of being provided with alternative housing in the context of an action pursuant to New York City Civil Court Act §110, and pursued a claim at DHCR as if she still occupied the premises, she had not permanently vacated the premises, thus operating to deny a remaining family member succession to the tenancy).

In order to be entitled to summary judgment on Petitioner's theory, Petitioner bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, tendering

sufficient evidence to eliminate any material issues of fact as to the claims at issue. People v. Grasso, 50 A.D.3d 535, 545 (1st Dept.), *aff'd*, 11 N.Y.3d 64 (2008). Petitioner must therefore prove that there is no issue of material fact that the prior tenant did not live in the subject premises in 2013 and 2014 and that the prior tenant or Respondent engaged in the same type of conduct as described in Ludlow 65 Realty LLC, supra, and 3750 Broadway Realty Group LLC, supra.

The only conduct Petitioner alleges that the prior tenant engaged in that bears any similarity to the conduct described in Ludlow 65 Realty LLC, supra, and 3750 Broadway Realty Group LLC, supra, is that the prior tenant or Respondent tendered rent in the prior tenant's name. However, Petitioner does not annex to its motion any rent checks in the prior tenant's name during this time period. But even assuming *arguendo* that rent checks were in the prior tenant's name during 2013 and 2014, Petitioner has not met its burden of proving entitlement to a judgment as a matter of law. It is possible for a remaining family member to succeed to a rent-controlled tenancy even when the previous rent-controlled tenant paid the rent. See Herzog v. Joy, 74 A.D.2d 372, 373-76 (1st Dept. 1980), *aff'd*, 53 N.Y.2d 821 (1981) (finding that a family member of a rent-controlled tenant "who, concededly, did not pay rent" because the rent-controlled tenant did so may still succeed to a rent-controlled tenancy "irrespective of who pays the rent, as long as it is paid").

Provisions particular to the Rent Control Law inform the Court in determining this issue. The Rent Control Law defines a "tenant" broadly, as a "tenant, subtenant, lessee, sublessee, or other person entitled to the possession or to the use or occupancy of any housing

accommodation." N.Y.C. Admin. Code §26-403(m).[1] Furthermore, a person entitled to succession to a rent-controlled tenancy has no affirmative obligation to do anything to assert his or her claim. Golden Mtn. Realty Inc. v. Severino, 47 Misc.3d 141(A) (App. Term 1st Dept. 2015). If the claimant qualifies to succeed, then he or she merely succeeds if that is his or her choice. Id., Klein v. N.Y. State Div. of Hous. & Cmty. Renewal, 17 A.D.3d 186, 188-189 (1st Dept. 2005), 9 N.Y.C.R.R. §2204.6(d)(1). If the prior tenant really vacated the subject premises in 2012 as opposed to the time of her passing in 2014, then, Respondent could still conceivably succeed to the prior tenancy if he co-resided with the prior tenant for the requisite time period before she vacated.

Even setting that issue aside, the record on this motion practice evinces ample issues of material fact as to whether the prior tenant lived in the subject premises in 2013 and 2014. Counterbalanced against the death certificate of the prior tenant and sworn statements of Petitioner's principal and assistant property manager are sworn statements of both Respondent and Respondent's sister in support of Respondent's motion that he co-resided with the prior tenant at the subject premises to the date of her passing. Respondent also submitted on his motion evidence that the prior tenant lived in the subject premises in 2013 and 2014, to wit, bank statements of a joint account of both Respondent and the prior tenant using the subject premises as the address for both of them dated in various months in 2013 through 2014 and tax documents

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[1] By instructive counter-example, the Rent Stabilization Code defines a "tenant" as "any person or persons named on a lease as lessee or lessees, or who is or are a party or parties to a rental agreement and obligated to pay rent for the use or occupancy of a housing accommodation." 9 N.Y.C.R.R. §2520.6(d).

connected with the pension of the prior tenant, showing the subject premises as her address from 2009 through 2014.[2]

All of the evidence submitted on a summary judgment motion must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party's favor. Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012), Gronsky v. County Of Monroe, 18 N.Y.3d 374, 381 (2011), Branham v. Loews Orpheum Cinemas, Inc., 8 N.Y.3d 931 (2007), People v. Greenberg, 95 A.D.3d 474, 484 (1st Dept. 2012), Udoh v. Inwood Gardens, Inc., 70 A.D.3d 563, 565 (1st Dept. 2010). Viewing the conflicting evidence in Respondent's favor, in accordance with this authority, Petitioner has not eliminated material fact issues of the prior tenant's residency in 2013 and 2014. Nor has Respondent, when viewing the evidence in the light most favorable to Petitioner.

Summary judgment is a drastic remedy, and is generally inappropriate with regard to questions of where an occupant of a rent-regulated dwelling primarily resides, which are fact-intensive inquiries. Extell Belnord LLC v. Uppman, 113 A.D.3d 1, 12 (1st Dept. 2013), West 157th Street Assoc. v. Sassoonian, 156 A.D.2d 137, 139 (1st Dept. 1989), 175-177 E. Third Assoc., L.P. v. Kunz, 47 Misc.3d 149(A) (App. Term 1st Dept. 2015), Goldman v. Massie, 15

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[2] Respondent also presents evidence that he has resided in the subject premises, to wit: his driver's license, issued in 2011 with the subject premises as his address; his tax returns from 2012 through 2014 with the subject premises as his address; documents connected with Respondent's pension from 2001, 2009, and 2014 showing the subject premises as his address; Respondent's insurance documents dated 2013 and 2014 showing the subject premises as his address; Respondent's bank statements from 2012 through 2015 showing the subject premises as his address; proof of Respondent's voter registration at the subject premises; and Respondent's cable bills in his name at the subject premises from 2010 through 2014.

Misc.3d 138(A) (App. Term 1st Dept. 2007), Goldman v. Downey, 13 Misc.3d 128(A) (App. Term 1st Dept. 2006), 151 E. 19th St., LLC v. Silverberg, 14 Misc.3d 139(A) (App. Term 1st Dept. 2007), 423 Madison Ave., LLC v. Blum, 9 Misc.3d 129A (App. Term 1st Dept. 2005), Tulip Apts., Inc. v. Sullivan, 8 Misc.3d 126A (App. Term 1st Dept. 2005), 75th St. Props. v. Debs, 1 Misc.3d 137(A) (App. Term 1st Dept. 2004), 250 West 78th LLC v. Scheifele, 2002 N.Y. Misc. LEXIS 98 (App. Term 1st Dept. 2002). This principle applies to succession disputes as well as to non-primary residence disputes. Regina Metro. Co., LLC v. Hartheimer, 40 Misc.3d 127(A) (App. Term 1st Dept. 2013). Given the conflicting sworn statements between the parties as to whether the prior tenant resided in the subject premises and the conflicting documentary evidence as to whether the prior tenant resided in the subject premises, neither party has met its burden of demonstrating that there is no issue of material fact to this point. Summary judgment does not deny the parties a trial, it merely ascertains that there is nothing to try. Suffolk County Dept. of Social Servs. ex rel. Michael V. v. James M., 83 N.Y.2d 178, 182 (1994). The Court cannot find on this record that there is "nothing to try."

Petitioner argues that Respondent did not adequately oppose Petitioner's cross-motion for summary judgment because Respondent's opposition did not include a sworn statement from an affiant with personal knowledge rebutting the evidence Petitioner submitted on its cross-motion. However, Respondent had already submitted evidence, both documentary evidence and sworn statements by affiants who demonstrate personal knowledge of the facts. Respondent just happened to make these submissions on his motion for summary judgment, and Respondent did not duplicate those submissions in his opposition to Petitioner's cross-motion. When the record

on a summary judgment motion discloses the existence of material triable issues of fact, the Court shall deny summary judgment. DG Liquidation, Inc. v. Anchin, Block & Anchin, LLP, 300 A.D.2d 70 (1st Dept. 2002). Cf. Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008) (if a movant fails to demonstrate an affirmative entitlement to summary judgment, the Court will deny the motion even on a failure to adequately oppose the motion).

Accordingly, the Court finds that there are issues of material fact precluding summary judgment for either party, and the Court denies both motions for summary judgment, without prejudice to the assertion of either party's position, theory, cause of action, and/or defense upon a trial of this matter.

Respondent moves to quash a subpoena *duces tecum* Petitioner served upon him. The subpoena *duces tecum* seeks production of the forty paragraphs' worth of pedigree information of the type normally sought in a discovery demand on a succession claimant. The subpoena *duces tecum* does not identify discreet documents to be produced but seeks production of whatever documents Petitioner surmises may or may not exist that are probative of Respondent's succession defense. For example, the subpoena demands production of "any deed or documents evidencing your ownership of any real property in the United States, Haiti[,] or any other country...." To give another example, the subpoena demands production of copies of "any and all birth certificates for children born to Respondent...." A subpoena *duces tecum* may not be used for the purpose of discovery or to ascertain the existence of evidence. Matter of Terry D, 81 N.Y.2d 1042, 1044 (1993). Rather, its purpose is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding. Id.

Accordingly, the Court grants Respondent's motion to quash the subpoena *duces tecum* that Petitioner served upon him.

Respondent also moves for leave to obtain discovery. The outcome of this proceeding turns on Respondent's succession defense, the elements of which – particularly his residency and the prior tenant's residency – are peculiarly within Respondent's own knowledge. Accordingly, Respondent does not show ample need to obtain discovery. Ludor Properties LLC v. Debrito, 2015 NY Slip Op. 051261(U) (App. Term 1st Dept. 2015). The Court therefore denies Respondent's motion for leave to obtain discovery.

Petitioner moves for leave to obtain discovery. Disclosure for a landlord is favored in cases in which a respondent raises a succession defense. Lemle v. Bascourt, N.Y.L.J. June 15, 2001 at 20:1 (App. Term 1st Dept.), Quality & Ruskin Assocs. v. London, N.Y.L.J. April 29, 2005 at 34:4 (App. Term 2nd& 11th Depts.). Fact disputes of the nature outlined above, together with Respondent's (presumed) knowledge of the residence of both him and any co-occupants he may have had demonstrate Petitioner's need for discovery. Accordingly, the Court grants Petitioner's motion for leave to obtain discovery and directs Respondent to produce to Petitioner documents responsive to the demand annexed as Exhibit F to Petitioner's motion within Respondent's dominion and control, redacted as to financial information and Social Security numbers, to execute the authorizations annexed as Exhibit G for Petitioner to obtain tax returns, and to supply a sworn statement to Petitioner concerning the availability of any items not in Respondent's possession and control on or before October 2, 2015.

The Court calendars this matter for a conference on compliance with so much of this

order as concerns document production on October 8, 2015 at 2:15 in part H, Room 523 of the Courthouse located at 111 Centre Street, New York, New York, at which point the Court will also address Petitioner's motion for leave to depose Respondent.

This constitutes the decision and order of this Court.

Dated: New York, New York
September 3, 2015

HON. JACK STOLLER
J.H.C.