Elk 300 E 83 LLC v Dowd
2015 NY Slip Op 32443(U)
December 23, 2015
Civil Court of the City of New York, New York County
Docket Number: 59258/2011
Judge: Michael Weisberg
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART

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ELK 300 E 83 LLC,

Index No. 59258/2011

Petitioner,

DECISION/ORDER

-against-

ROSEMARY DOWD, ET AL.,

Respondents.

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Present: Hon. Michael Weisberg
Judge, Housing Court

Law Offices of Santo Golino, New York City (by *Brian Shaw*), for Petitioner.
Lenox Hill Neighborhood House, New York City (by *Lauren Sismondo*), for Respondent Michael Dowd.
Catherine Dowd, Respondent *pro se*.

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of this motion.

Papers	**Numbered**
Notice of Motion and Affidavits and Exhibits Annexed……..	1
Answering Affidavits and Exhibits Annexed…….....	2
Reply Affidavits……..……...	3

Upon the foregoing cited papers, the decision and order on this motion are as follows:

This holdover summary eviction proceeding was originally premised on an allegation that Rosemary Dowd, the rent controlled tenant of record, had not used the subject apartment as her primary residence. Rosemary Dowd died during the pendency of the proceeding.[1] Michael Dowd appeared in the proceeding by counsel and has asserted that he has the right to succeed to Rosemary's tenancy because he is her grandson and has lived in the apartment for over 25 years.

[1] Although ordinarily a case based on nonprimary residence of the tenant of record might have to be dismissed if the tenant of record dies while the case is pending, here the remaining parties stipulated to convert the proceeding to one based on allegations that Michael and Catherine are licensees whose license has been revoked and to forego the necessity of any predicate notice.

Petitioner has moved for summary judgment against Michael Dowd and Catherine Dowd, another alleged grandchild of Dowd who has appeared *pro se* but does not assert that she has the right to succeed to the apartment. Petitioner argues that Michael cannot prevail on his succession claim because Rosemary did not permanently vacate the apartment until between three and five years after she physically moved out.

It is undisputed that Rosemary last resided in the apartment in July 2008, at which time she entered a rehabilitation and long-term care facility, the Kateri Residence, never to return to her home. As is not uncommon when an elderly individual is first admitted into such a facility, her initial admittance may have been anticipated to be only temporary. A letter from the residence indicates that she was originally admitted for "rehabilitation" (apparently for a broken hip) and subsequently transferred to the "dementia floor for long-term care." While she was in the facility the rent and utilities continued to be paid by checks drawn on her account, albeit signed by her daughter Kathleen who was her attorney-in-fact. Also during that time the Con Edison account for the apartment remained in Rosemary's name and the Department of Social Services issued shelter checks payable to Rosemary on behalf of Catherine. Rosemary died in 2013, about two years after Petitioner commenced this proceeding.

The thrust of Petitioner's motion is that, in light of the above and because Petitioner was allegedly never notified that Rosemary had moved to Kateri, Rosemary cannot be said to have permanently vacated the apartment until she died or, alternatively, in June 2011, when the guardian *ad litem* appointed for Rosemary notified the court that she would not be returning to the apartment. As a result, Petitioner contends, Michael's succession claim must fail, as he cannot be said to have resided with Rosemary for the two years prior to either her death or June 2011.

Though a tenant may no longer reside in an apartment as her primary residence, or at all, certain conduct by the tenant may give rise to the finding that she has not permanently vacated the apartment (*see generally Third Lenox Terrace Assoc. v. Edwards*, 91 AD3d 532 [1st Dept 2012]). Though often straightforward enough where the tenant of record has died, the determination of the date of a tenant's permanent vacatur can be a contentious matter. For example, in *Third Lenox* the tenant of record had moved out the apartment seven years prior to commencement of a holdover summary eviction proceeding based on nonprimary residence. But during those seven years she had continued to pay rent by money orders issued in her name and to sign renewal leases. The Appellate Division held that she had not permanently vacated until the expiration of the last lease that she had signed, not in 1998. As a result, the required two-year period of co-residency for succession was not 1996-1998, but 2003-2005. Since the tenant of record was concededly not residing in the apartment during that period, there was no period of co-residency and therefore no succession. (*Id.*)

At first blush, the results in *Third Lenox* and similar cases discussed below appear at odds with the protections against eviction afforded to certain family members protected by the rent control and rent stabilization laws and regulations. A family member's right to succeed to a tenancy "was intended to regulate 'disruptive rent and eviction practices'…and to 'spare family members the disruption of relocation at a time of emotional and possible financial turmoil" (*245 Realty Assoc v. Sussis*, 243 AD2d 29, 32 [1st Dept 1998] [internal citations omitted]; *cf. Matter of Murphy v. New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 653 [2013] [citing cases involving rent control and rent stabilization succession in noting that Mitchell-Lama succession regulations "serve important remedial purpose of preventing dislocation of long-term residents due to the vacatur of the head of household"). In light of these policy goals and in a

case where a family member seeking succession otherwise qualifies for protection from eviction, one might wonder as to the necessity for so closely parsing the difference between a tenant's permanent vacatur and a less complete vacatur, i.e., merely ceasing to use the apartment as her primary residence. In a case such as the one here, where the potential successor may have resided with the tenant of record for 25 years and where the tenant of record spent the last five years of her life in a nursing home suffering from dementia, why might it be important to distinguish between the date she entered the nursing home and some later date of so-called permanent vacatur? Why might it matter if the landlord was notified the very day the tenant entered the nursing home instead of five years later?

At the root of the creation of the distinction between merely moving out and permanently vacating in circumstances such as these is courts' concern about prejudice. In certain cases, though not all, a landlord may be prejudiced in its prosecution of an eviction case if it delayed in commencing the case because the tenant or occupant concealed the fact that the tenant had moved from the apartment (*see Third Lenox Terrace Assoc. v. Edwards*, 23 Misc 3d 126[A] [App Term, 1st Dept 2009] ["Respondent and tenant affirmatively misrepresented the fact that tenant no longer resided in the apartment for more than eight years and, by necessity, unduly prejudiced landlord in the prosecution of its eviction claim"]). In *Third Lenox*, the Appellate Term found it "disturbing" that the respondent and tenant "purposefully concealed" the fact that the tenant had not resided in the apartment for more than eight years (*id.*). Because the concealment of the tenant's vacatur resulted in prejudice to the landlord, the court held that the putative successor "must be deemed to have waived any succession claim" (*id.*).

Execution of renewal leases by the tenant after moving out or a forgery by the occupant is a common method of concealment of a tenant's absence from the apartment. In *610 LLC v.*

Lewis, the tenant of record moved out in 1994 but signed lease renewals through 2009 (he also appeared in court in defense of a nonpayment proceeding in 2009 (36 Misc 3d 151[A] [App Term, 1st Dept 2012]). Likewise, in *Metropolitan Life Ins. Co. v. Butler*, the court relied on the tenants' continuing execution of renewal leases for its conclusion that they did not permanently vacate the apartment (2002 NY Slip Op 50014[U] [App Term, 1st Dept 2002]). The tenant in *East 96th Street Co., LLC v. Santos* continued to sign renewal leases (or his signature was forged) from the time he relocated to Florida in 1995 through 2004 (13 Misc 3d 133 [App Term, 1st Dept 2006]). Notable for the egregiousness of the successor's conduct is *South Pierre Assoc. v. Mankowitz*, 17 Misc 3d 53 (App Term, 1st Dept 2007). There the tenant of record actually died and the putative successor forged his signature on renewal leases for the next thirteen years. Highlighting the significance of prejudice in these determinations, as opposed to mere conduct involved in signing or forging signatures on renewal leases, the court held that the successor's "ruse…unduly prejudiced petitioner in the prosecution of its eviction claim" and noted that the creation of a landlord-tenant relationship, through succession or other means, "should not be reduced to a matter of gamesmanship, seduction and artifice" (*id.* [internal citation omitted]).

But conduct, concealment, or delay alone is not sufficient to find prejudice in every case, as illustrated by the Appellate Term's decision in *Riverton Assoc. v. Knibb*, 11 Misc 3d 14 (App Term, 1st Dept 2005), which reversed the lower court and dismissed the petition. In *Riverton* the granddaughter of the tenant of record moved into the apartment in 1991 to care for her infirm grandmother. The grandmother died in 1999. But instead of notifying the landlord, the granddaughter concealed her grandmother's death and went so far as to forge her grandmother's signature on two renewal leases. Nonetheless, in light of the granddaughter's persuasive showing of co-occupancy and because the granddaughter's misrepresentations were "relatively short-

lived," "any fraud or irregularities committed in the aftermath of the grandmother's death cannot reasonably be said to have caused petitioner any discernible prejudice in the prosecution of its eviction claim." (*Id.*) Similarly illustrative and closer in facts to this case is *354 E. 66th St. Realty Corp. v. Curry*, 26 Misc 3d 130(A) (App Term, 1st Dept 2010). In *Curry* the tenant entered a nursing home and her son waited fifteen months before notifying the landlord. But in light of the son's evidence that he had continuously resided in the apartment for twelve years and in the absence of any prejudice to the landlord due to the delay, the son was awarded succession rights. *Curry* is especially notable because the Appellate Term found the absence of prejudice on summary judgment.

All of the above cases concern rent stabilized tenancies. In the context of succession to a rent controlled tenancy at least one court has distinguished those cases based on the differences between the two regulatory schemes (*see Patmund Realty Corp. v. Foon Mui*, 32 Misc 3d 1232(A) (Civ Ct, NY County 2011). But during the time this case has been pending the Appellate Term decided *Ludlow 65 Realty, LLC v. Chin*, 42 Misc 3d 126(A) (App Term, 1st Dept 2013). *Ludlow* concerned a rent controlled tenancy, so there were no renewal leases for the tenant of record to sign. Instead, while the tenant moved out in 1979, he continued to pay rent for some years after he moved, appeared via counsel to defend a nonpayment proceeding, maintained belongings in the apartment, and continued to "come[] and go[]" to the apartment. In addition to all that, 32 years after he moved out of the apartment, the tenant completed a DHCR form stating that he was the tenant of record and that the potential successor was residing with him as a family member. On those particularfacts, the court held that the tenant of record could not have permanently vacated until no earlier than May 2011, after the submission of the DHCR form.

On the record before it, this case is closer to *Riverton* (without the evidence of intentional concealment) and *Curry* than it is to *Ludlow* or other cases cited by Petitioner. Also, Petitioner does not allege any prejudice as the result of any conduct by Rosemary, Michael, Catherine, or anyone else. Instead Petitioner urges this court to adopt a bright line rule that does not take the question of prejudice or any of the particulars of the case into account: that the failure to notify the landlord (within some unspecified timeframe) about a tenant's vacatur and any ties to the apartment preclude a succession defense. But in cases like *Riverton* and *Curry* the Appellate Term has made clear that there is no bright line rule or easy formula to be used in deciding these cases. The lesson of *Riverton* and *Curry*, and those relied on by Petitioner, is that the totality of the circumstances regarding a tenant's vacatur and the conduct of all parties concerned surrounding that vacatur must be taken into account. The ultimate question is one of prejudice, not mere conduct. On the undisputed facts before it, the court cannot conclude that Michael Dowd cannot prevail on his defense that he is entitled to succeed to his grandmother's tenancy.

Petitioner's motion for summary judgment is denied.

That portion of Petitioner's motion seeking to amend the caption to name Michael Dowd and Catherin Dowd in place of John and Jane Doe is granted and the caption is so amended.

The proceeding is restored to the calendar for January 26, 2016 at 9:30 AM as a control date for the selection of a date for trial.

This constitutes the decision and order of this court.

Dated: December 23, 2015

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Hon. Michael Weisberg
J.H.C.