

Westbeth Corp. HDFC Inc. v Gross
2016 NY Slip Op 32231(U)
November 4, 2016
Civil Court of the City of New York, New York County
Docket Number: 70844/2016
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART F

WESTBETH CORP. HDFC INC.,

X

Petitioner-Landlord

-Against-

DECISION & ORDER

Index No.: L&T 70844/2016

HON. SABRINA B. KRAUS

SIDONIA GROSS, As Administrator of the Estate
of Sally Gross
463 West Street, Apt. # 609(c)
New York, New York 10014

Respondent-Tenant

SIDONIA GROSS, "JOHN DOE"
and "JANE DOE"

Respondents-Undertenants

X

BACKGROUND

This summary holdover proceeding was commenced by **WESTBETH COPR HDFC INC** (Petitioner) to recover possession of 463 West Street, Apt. # 609C, New York, New York 10014 (Subject Premises), based on allegations that Sally Gross (Tenant) the last tenant of record died in July 2015, and her estate has sublet the Subject Premises to **SIDONIA GROSS** (Respondent).

PROCEDURAL HISTORY

Petitioner issued a ten day notice to cure dated June 15, 2016, asserting that Respondent was subletting the Subject Premises on behalf of the Estate to herself in her individual capacity

and others. The Notice further asserted Respondent resided at 417 Grand Street, Apt 606D, New York New York and/or at 38 Howard Street, Sag Harbor, New York, 10002. The Notice further asserted that Respondent was not permitted to occupy the Subject Premises in her capacity as Administrator, because she did not occupy the Subject Premises with Tenant for two years prior to Tenant's death.

Petitioner issued a Notice of Termination dated July 8, 2016.

The petition is dated July 27, 2016, and the proceeding was initially returnable, August 15, 2016.

Respondent appeared by counsel and filed an answer dated August 15, 2016, asserting failure to state a cause of action, succession and a claim for attorneys' fees. The answer asserts Respondent is Tenant's daughter and resided with Tenant in the Subject Premises for a "substantial period" before Tenant passed.

THE PENDING MOTIONS

On October 5, 2016, Petitioner moved for an order for leave to conduct discovery and for use and occupancy, and Respondent cross-moved for an order staying discovery, for summary judgment and related relief. On November 2, 2016, the court heard argument and reserved decision. The motions are consolidated herein for determination.

Respondent's motion for summary judgment and for a stay of discovery is denied. While Respondent is correct that there is a line of cases which hold that a landlord may not maintain an illegal subletting proceeding against a tenant's immediate family member with long-standing connections to the Subject Premises, even if the primary tenant no longer lives in the Subject Premises [*see eg 235 W. 71 St LLC v Chechak* 4 Misc3d 114 (App Term, 1st Dept. 2004), *affd* 16

AD3d 242 (1st Dept 2005)], this line of cases does not apply to proceedings where the primary tenant of record has died.

Respondent has the right to possession of the Subject Premises in her capacity as Executrix of the Tenant's estate, but not in her individual capacity (*Joint Properties Owners, Inc. v Deri* 113 AD2d 691), and Respondent is admittedly occupying in her individual capacity. The real issue before the court in this proceeding is Respondent's succession claim.

167 West 80th Street LLC v Voder [30 Misc.3d 129(A)] is a case almost directly on point. In that proceeding, the landlord commenced a holdover proceeding against the son of the deceased tenant of record in his capacity as administrator of the estate and individually, asserting that the estate had violated a substantial obligation of its tenancy by allowing the son to occupy in his individual capacity. The son asserted defenses including succession, but moved to dismiss the proceeding as against him as executor. The lower court granted the motion to dismiss, but was reversed by the Appellate Term which held:

Yoder's motion for summary judgment dismissing the petition as against him in his representative capacity should have been denied. Although a representative of a deceased tenant's estate has the right to possession of the demised premises in his capacity as representative until the expiration of the lease, when the representative places himself or herself individually in possession without landlord's consent, the representative violates a substantial obligation of the tenancy (see *Joint Props. Owners Inc. v. Deri*, 113 A.D.2d 691 [1986]; *Remford Corp. v. Rosenfeld*, 274 App.Div. 769 [1948]). Here, although it is not seriously disputed that Yoder is occupying the apartment at issue in his individual capacity, his succession claim is extant. Thus, at this juncture, a triable issue exists as to whether Yoder's occupancy was pursuant to his right as successor to his mother's tenancy, which right, though inchoate until ratified by judicial determination (see *245 Realty Assoc. v. Sussis*, 243 A.D.2d 29 [1998]), would "relate back to the date creating his statutory rights, the death of the tenant of record" (*id.* at 33).

As in *Yoder*, the real claim before the court and that will determine the rights of the parties with respect to possession of the Subject Premises is Respondent's succession claim.

There is no legal authority for Respondent's position that adjudication of the succession claim is premature, where the tenant of record has died [*see also ACP 233 East 70th St. Assocs., LP v Mourges* NYLJ, July 16, 2001, p.23, col. 5 (App Term 1st Dept)].

Petitioner's motion for discovery is granted. Respondent shall appear for a deposition and produce documents requested for the period of January 1, 2013 through July 2015, except those sought in items 3, 5, 14, 16, 19, 20, 22, 24, 25 c, d, e, f,g,i and j, and 27. Respondent shall produce said documents, to the extent they have not already been produced, within 45 days and appear for a deposition within 60 days.

Petitioner's motion for leave to conduct discovery as to Seward Park Housing Corp and Charles H Greenthal Management is also granted.

Respondent is directed to pay use and occupancy at the rate reserved in the lease for December 2016 forward by the tenth of each month *pendente lite* and without prejudice to either parties rights herein.

The proceeding is marked off calendar pending discovery.

This constitutes the decision and order of this Court.

Dated: November 4, 2016
New York, New York

Hon. Sabrina B. Kraus, J.H.C.

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