456 LLC v Wagstaff
2021 NY Slip Op 32861(U)
February 1, 2021
Civil Court of the City of New York, Kings County
Docket Number: L&T 89010/17-KI
Judge: Zhuo Wang

CIVIL COURT OF THE CITY OF NEW YORK
HOUSING PART R, COUNTY OF KINGS

456 LLC,

Petitioner,

- against -

Amanda Wagstaff, John Doe, and Jane Doe,

Respondents.

L&T 89010/17-KI

DECISION & ORDER
AFTER TRIAL

Zhuo Wang, J.:

After a trial held on the petition on March 3, 2020, November 5, 2020, November 6, 2020 and November 12, 2020, the following constitutes this Court's findings of facts and conclusions of law:

This is a holdover proceeding to evict an 81-year-old tenant from her rent-controlled home of over 50 years. Petitioner 456 LLC alleges that Respondent Amanda Wagstaff (Wagstaff) no longer maintains the subject apartment known as 456 Schenectady Avenue, Apt. 2F in Brooklyn (subject apartment) as her dwelling in violation of 9 NYCRR § 2204.6. Specifically, 456 LLC alleges by way of its notice of termination that one of Petitioner's members, Akiva Metal (Metal), has not seen Wagstaff at the subject apartment in the past three to four years, but has seen another person present there. Metal also alleges that Wagstaff has no intent to return to the apartment. Wagstaff's answer denies the gravamen of the nonprimary residence petition.

Section 2204.6 of the New York City Rent and Eviction Regulations permits a court of competent jurisdiction to evict rent-controlled tenants for failing to maintain the premises as their residence by way of a holdover proceeding (*First Sterling Corp. v*

Zurkowski, 142 Misc 2d 978, 979 [App Term, 1st Dept 1989]). Primary residence means an "ongoing, substantial, physical nexus with the controlled premises for actual living purposes—which can be demonstrated by objective, empirical evidence" (*Emay Properties Corp. v Norton*, 136 Misc 2d 127, 129 [App Term, 1st Dept 1987]). Petitioner bears the burden of proving by a fair preponderance of the evidence that Respondent maintained her primary residence in a place other than the subject premises (*Four Winds Assoc. v Rachlin*, 248 AD2d 352, 353 [2d Dept 1998]).

At trial, 456 LLC called Akiva Metal as its first witness. Metal credibly testified that he is the vice president of Petitioner. Having had the opportunity to see and hear his testimony and observe his demeanor, Metal's statements as to his role were essentially the only matter as to which he was credible. Indeed, the remainder of his testimony at trial had little to no probative value because Metal admitted that he lacked any personal knowledge as to many of the "facts" underlying the instant claim – including the primary allegations in the termination notice. Moreover, Metal's purported familiarity with Wagstaff and her unit was cast into serious doubt when he evinced a lack of knowledge of the basic makeup of the subject building. Despite asserting that he is responsible for collecting rent and coordinating repairs for the building, Metal could not even recall the number of units in said building. Although he claims he has been working for 456 LLC for over five years, Metal admitted that he could not recall how many times he went to Wagstaff's building. Although he initially adopted the termination notice's statement

that he had not seen Wagstaff in several years, Metal later admitted that he could not remember if he ever met Wagstaff. When pressed on cross-examination, Metal also admitted that he had no personal knowledge of the investigation performed to ascertain the factual predicate within the termination notice. Rather, Metal admitted that nearly all his knowledge was based on information obtained from attorneys and a superintendent whose name "may" be "Martin James." Lastly, and despite counsel's attempt to rehabilitate Metal by asking if he was "aware" of Amanda Wagstaff, Metal later returned to his original admission that he did not know who Wagstaff was until commencing the instant proceeding.

Wagstaff testified on both Petitioner's and her own case-in-chief. The credible testimony adduced shows that in or around February 2013, Wagstaff traveled to 817 Clearview Drive, Long Pond, Pennsylvania to be with her daughter Debra Wagstaff Legree (Debra), son-in-law Terrence Legree (Terrence), and grandson Noah Legree (Noah), following Debra and Terrence's decision to relocate there from New York City. Prior to the relocation, Terrence was a motorman for the Metropolitan Transit Authority who was operating the train that struck and killed a pedestrian allegedly pushed onto the tracks by another individual on December 3, 2012. Wagstaff credibly testified that the impetus of Terrence's decision to relocate was the psychological trauma and subsequent depression he experienced after the incident. Wagstaff's testimony was further corroborated by the testimony of Debra, who stated that she and her husband

moved because of the deleterious effects the incident had on his mental health and the unwelcome media attention.

The credible testimony reveals, however, that Wagstaff's primary impetus for staying in Pennsylvania from February through June 2013 was to ensure that 16-year-old Noah regularly attended his new school, as Noah struggled with the abrupt change in circumstances and Debra was preoccupied with looking after her husband. Wagstaff also credibly testified that she returned to the subject premises in the summer of 2013 because Noah wished to spend the summer back in New York City.

On the witness stand, Wagstaff proffered several reasons for why she did not remain for lengthy periods at 817 Clearview Drive after the summer of 2013. Specifically, the circumstances that led her to go to Pennsylvania were no longer present: Terrence began recovering from the trauma of the December 2012 incident and Noah was finishing high school. Indeed, this finding is amply supported by Debra's testimony, which stated that beginning 2014, her mother "did not need to come out as much because Noah was established" and her husband was back at work and "getting better." Wagstaff also credibly and consistently testified that she discovered that the winters in Pennsylvania were simply "too cold" and she had nowhere to go because she could not drive. Lastly, Wagstaff credibly asserted that she felt more independent and comfortable remaining in Brooklyn.

The credible testimony reveals that, other than a one-month stay in or around April 2015 at the Pennsylvania location because Terrence suffered a stroke and Debra was hospitalized for a severe asthma attack, Amanda Wagstaff spent only major holidays and a few weekends in Pennsylvania during 2014, the remainder of 2015, and the entirety of 2016 and 2017. Her assertion was corroborated by the statements of her neighbor, Phyllis Munroe, whose testimony Wagstaff elicited at trial. Although Wagstaff's testimony regarding her visits contradicted some statements she made at an earlier deposition, she credibly explained that her statements during her examination before trial were less accurate because she suffers from short-term memory problems and she was tired on that day she was deposed.

Assuming *arguendo* that her testimony as to the length and frequency of her stays in Pennsylvania is equivocal, the balance of the undisputed, objective evidence amply supports a finding that Wagstaff spent most of her time in Brooklyn after her initial 2013 visit. Despite Petitioner's reliance on a non-diagnostic notation from a Brooklyn dentist that Wagstaff alleged informed this individual that she "lives" in Pennsylvania, it is also uncontroverted that this octogenarian never changed medical providers – including her dentist – to those in Pennsylvania. Moreover, although her medication is mailed to 817 Clearview Drive, Wagstaff credibly reconciled this discrepancy by testifying that this practice is done to prevent her from overmedicating

herself. Rather, the credible testimony elicited shows that, on a weekly basis, Debra pre-fills the medication and drops it off to Wagstaff at the subject premises.

Moreover, the address on Wagstaff's most critical financial documents, including all her tax filings, pension documents, life insurance, and savings account, list the subject apartment as the mailing address. Despite the uncontroverted assertion that she is on a fixed income, Wagstaff also never ceased paying utilities at the subject premises, and it is undisputed that she never sublet or assigned the subject apartment (*compare 9 Richardson St., LLC v Deleon*, 69 Misc3d 137(A) [App Term, 2d Jud Dist 2020]). Lastly, both Debra and Wagstaff credibly testified that Wagstaff does not keep any furniture or belongings other than her coat and some undergarments at the Pennsylvania address. In sum, the totality of the credible evidence and testimony supports the conclusion that Wagstaff primarily resides at the subject premises (*see e.g. Four Winds Assoc.*, 248 AD2d at 353 [that tenant pays New York taxes, receives ongoing care from medical professionals in New York, and keeps her clothing in New York apartment constitutes objective evidence of New York apartment as tenant's primary residence]).

In its closing brief, Petitioner points to certain documents in evidence that it asserts are "traditional indicia" of Wagstaff's purported primary residence at 817 Clearview Drive, to wit, Wagstaff obtained a Pennsylvania non-driver identification, voted once in Pennsylvania, and has several credit card statements mailed to the Clearview Drive address. On each of these issues, however, Wagstaff offered credible

explanations largely negating the inference that she relocated to Pennsylvania in 2013 or anytime thereafter.

As to the Pennsylvania identification obtained by her shortly after she arrived in 2013, the credible testimony elicited shows that Wagstaff initially applied for this document – one that does not permit her to drive - to assist her with her primary purpose for being in Pennsylvania: assisting Noah in his transition to a new environment and school. Wagstaff also offered uncontroverted testimony that a car is necessary to travel in this rural Pennsylvania location. Thus, Wagstaff's explanation for obtaining a non-driver, Pennsylvania identification rings truer than Petitioner's argument that it signified her intent to memorialize a permanent relocation to Long Pond, Pennsylvania (*see e.g. Four Winds Associates*, 248 AD2d at 353 [tenant's retention of a restricted Florida driver's license and registering her car there insufficient to establish lack of primary residence in face of countervailing evidence]).

Petitioner also sought to capitalize on the undisputed fact that Wagstaff voted once in Pennsylvania in 2013. Wagstaff testified that she voted in a local election at the request of Terrence because he had a preferred candidate in that race. However, when Debra testified, she contradicted Wagstaff on this issue; accordingly, Petitioner urges this Court to find Wagstaff not credible *in toto*. Not only is the adoption of *falsus in uno, falsus in toto* unwarranted against the balance of Wagstaff's largely credible testimony, but this principle is unwarranted on this specific issue as well. Namely,

Petitioner's reliance on this "traditional indicia" ignores logical inferences made from the totality of the evidence. That is, it is undisputed that Wagstaff's entire voting record includes only one other instance of her voting, the 2008 presidential election. Petitioner fails to offer a credible explanation as to why, while in Pennsylvania, Wagstaff chose to vote for the second time in her entire life. Given her extremely sparse voting history, it is more likely than not that she voted in 2013 based on her version of events than upon a newfound sense of civic duty.

Lastly, Wagstaff credibly reconciled the reason for using the Pennsylvania address on her credit card statements and Banco Popular checking account. Namely, when asked why she had her Target, BJs, and Slate credit card statements mailed to the Pennsylvania address, Wagstaff stated that she sometimes forgets to pay her monthly bills and her daughter can assist her in ensuring the payments are timely made. Having had the opportunity to observe Wagstaff testify for multiple hours at trial, this Court credits her testimony on this issue (*see e.g. Second 82nd Corp v Veiders* (146 AD3d 697 [1st Dept 2017] [documents on which tenant listed relative's residence as his address sufficiently reconciled by his credible testimony]).

In conclusion, the totality of the evidence adduced at trial supports a finding that Wagstaff was utilizing the subject apartment in an ongoing and substantial manner consistent with physically living there. Petitioner has therefore failed to meet its burden of proof on the gravamen of its nonprimary residence petition. Accordingly, it is

ORDERED that the Clerk is directed to enter judgment in favor of respondent Amanda Wagstaff dismissing the petition; and it is further

ORDERED that the relief in the form of "attorneys' fees and costs associated with the defense of this action and/or ordering a hearing" conclusorily sought in Respondent's post-trial brief is denied as abandoned.

Dated: February 1, 2021

ENTER:

John Zhuo Wang

Digitally signed by John Zhuo Wang
DN: C=US, OU=Judge, O=OCA, CN=John Zhuo Wang, E=jwang@nycourts.gov
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Hon. Zhuo Wang