

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

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310 EAST 74<sup>TH</sup> LLC, X

Petitioner

-against-

**DECISION & ORDER**

Index No.: L&T 57374/2010

**HON. SABRINA B. KRAUS**

PATRICK FARRELL, LINDA BARR GALE,  
HILLARY GALE, "JOHN DOE" and/or "JANE DOE"  
310 EAST 74<sup>TH</sup> STREET - APT 6G  
NEW YORK, NY 10021

Respondents

\_\_\_\_\_  
X

**BACKGROUND**

The underlying summary holdover proceeding was commenced by **310 EAST 74<sup>TH</sup> LLC** (Petitioner) against **LINDA BARR GALE** (Respondent), **HILLARY GALE** (Gale) and **PATRICK FARRELL** (Farrell) based on the allegations that the respondents are licensees with no right to continued possession of 310 EAST 74<sup>TH</sup> STREET - APT 6G, NEW YORK, NY 10021 (Subject Premises) after the death of the last rent control tenant of record Edgar Vincent (Vincent).

**PROCEDURAL HISTORY**

Petitioner issued a notice to quit dated December 24, 2009. The notice asserted that Vincent was the last rent control tenant of record, and died in June 2008. The notice asserted that, at the time of Vincent's death, there were no persons entitled to succession in occupancy of the Subject Premises. The notice repeats the same allegation in the alternative

asserting that Vincent may have permanently vacated prior to his death. The notice asserts that respondents did not contemporaneously occupy the Subject Premises with Vincent for two years prior to his death or permanent vacateur, but acknowledged that respondents had keys to the Subject Premises and access to occupy the Subject Premises, and were therefore identified as licensees of Vincent. The notice adds that to the extent Respondent or her daughter, Gale asserted a claim to tenancy through Farrell, Farrell was never a tenant of the Subject Premises.

The petition is dated February 22, 2010, and the proceeding was initially returnable on March 9, 2010. On or about March 8, 2010, Respondent appeared herein through counsel, and filed an answer, counterclaims, and a demand for a bill of particulars. Farrell died in December of 2009, and Gale never filed an answer or appeared as a party herein, although she did testify at trial.

On August 13, 2010, the court (Hahn, J.) denied Respondent's motion to strike Petitioner's demand for use and occupancy. On August 20, 2010, the court (Hahn, J.) issued a decision regarding discovery, use and occupancy and other preliminary issues raised by the parties, and the proceeding was marked off calendar. The court order dismissed Respondent's first and second objection in point of law, as well as Respondent's first affirmative defense. Additionally, Paragraphs 6, 7 and 8 of the answer were withdrawn, as was Respondent's first counterclaim.

On February 25, 2011, Petitioner moved for relief pursuant to CPLR § 3126, but that motion was withdrawn on the return date, and the proceeding remained off calendar.

Respondent's deposition took place on April 27, 2011 and May 12, 2011.

Additional motion practice took place in the Fall of 2011, and the proceeding was restored to the calendar for trial in February 2012. The parties adjourned the proceeding to

March 30, 2012, as a control date, pursuant to a stipulation which addressed remaining pretrial deadlines. On October 2, 2012, the proceeding was transferred to Part X for assignment to a trial judge.

The proceeding was assigned to Part R for trial. The trial commenced on October 26, 2012, and continued on the following dates November 5, 26, 29, 30, 2012, December 7, 2012, January 17, 18, 30, 31, 2013, February 14, 15, 2013, and the trial concluded on March 15, 2013.

The parties submitted post trial memoranda on May 31, 2013, and the court reserved decision.

### **RELATED PRIOR PROCEEDING**

A prior proceeding was commenced by Petitioner under Index Number 83720/2009. The court takes judicial notice of said proceeding and the contents of said file. That proceeding was a nonprimary residence proceeding, brought by Petitioner against Farrell. Petitioner issued a thirty day notice dated March 11, 2009, asserting that Farrell was the tenant of record of the Subject Premises under Rent Control, but had failed to primarily reside in the Subject Premises for at least two years prior to said date and was instead residing at 367 Hoop Pole Hill Road, Woodbury, CT 06798 (Connecticut Home).

The petition is dated September 1, 2009, and the proceeding was originally returnable on September 21, 2009. Respondent appeared in said proceeding through counsel and served and filed an answer on October 19, 2009.

Farrell did not appear in said proceeding, but Respondent's answer in said proceeding asserted the right to succeed to Farrell's tenancy.

On October 19, 2009, the parties entered into a stipulation adjourning the proceeding to December 1, 2009 for discovery practice.

On December 1, 2009, the court (Spears, J) issued an order as noted on the file providing “Petition dismissed w/out prejudice to the rights of either party.” This proceeding followed.

### **FINDINGS OF FACT**

Petitioner is the owner of the subject building pursuant to deed dated August 11, 1999 (Ex 1). Vincent was the rent control record of the Subject Premises pursuant to a lease dated July 16, 1957, for a term commencing August 1, 1957 (Ex DD-1). Farrell moved into the Subject Premises with Vincent in the 1984 (Ex 7), and first met Respondent in 1985. Farrell and Vincent went into business together by the late 1980s.

Respondent lived in New Jersey at the time she met Farrell. In 1989, Respondent moved from New Jersey to a home in Slingerlands, New York. In the mid 1990s, Respondent and Farrell married and they lived in the Subject Premises with Respondent and the home in Slingerlands, New York.

The Subject Premises is a one bedroom apartment. Respondent testified that she and Farrell slept on a pull out couch in the living room. The Woodbury home has four bedrooms is on a three acre plot and is approximately 300 square feet.

In 2003, Respondent sold her home in Slingerlands, New York and she and Farrell purchased a home in Woodbury, Connecticut. In the same year, Respondent became the tenant of record of Apartment 5E at 165 East 83<sup>rd</sup> Street. Respondent’s initial lease ran for a term through and including November 30, 2004. Respondent renewed her lease on or about August 19, 2004 for a two year term running through November 30, 2006 (Ex 2). The court finds that said apartment was primarily rented for use by Gale, who now resides at the Subject Premises, as she indicated when she was sworn in to testify on January 18, 2013. Gale testified she tried to

have the apartment put in her name but her income was not high enough. In 2003 Gale filed for bankruptcy and in 2004 her debts were discharged.

From the Spring of 2003 forward, Farrell's health began to decline, and by 2006 Farrell was primarily residing in the Woodbury home. Farrell advised his Connecticut doctors that he was living at his home in Connecticut with Respondent (EX FF). To the extent Respondent sought to establish at trial that Farrell had to move to Connecticut because he could not get medical treatment needed in New York City, the court did not find that established by any credible evidence, including Dr. Silverman's testimony.

Vincent died in June 2008, at the age of 90 (Ex X). Farrell died in December 13, 2009 (Ex W). The death certificate indicates Farrell died at his home, which is identified as the Woodbury home and lists his residence as 367 Hoop Pole Hill Road, Woodbury Ct.

#### **PRIMARY RESIDENCE**

It is undisputed that the Subject Premises was the primary residence of Vincent through and including the date of his death. The Court finds that from at least 2006 forward Farrell's primary residence was in the Woodbury home. The evidence shows that Farrell stopped living at the Subject Premises once his health started to decline. Dr. Silverman who treated Farrell from March 2005 through Farrell's death, noted in his records that Farrell lived at his home in Woodbury Connecticut, with Respondent (Ex FF-1). Those notes also indicate that Farrell had two children, however, there was little to no other evidence related to Farrell's children at trial.

Respondent's primary residence during this period is more ambiguous. Respondent and Farrell filed taxes from the Subject Premises from 2006 through 2009 (EX K1 & K2). As discussed below, Respondent's documentary evidence ties her to the Subject Premises, as did the fact that she was working full time in Manhattan from April 1997 to September 2009.

However, she never truly adopted the Subject Premises as her home. Most of the belongings in the Subject Premises were Vincent's. Respondent only slept on the pull out couch. Respondent never entertained or had family gatherings at the Subject Premises. To the extent that 'home is where the heart is' it is clear that Respondent's heart was always in her homes located outside the city first in Slingerlands and then in Woodbury. This is where she maintained her cars. This is the household she spent her money on maintaining and decorating. This is where she kept all of her belongings, this is where she kept her pets, this is where most celebrations took place and this is where she chose to be any time she was not required to be in Manhattan for work purposes. Respondent had two dogs from 2000 through the date of the trial. There was no credible evidence that the two dogs stayed at the Subject Premises, rather the dogs only lived in the homes maintained by Respondent outside of New York City. Respondent's use of the Subject Premises was more akin to a crash pad, used because she was working full time in New York City, in a job that required her to maintain a city residence.

Respondent was an employee of the New York City Department of Health and Mental Hygiene. Respondent's employment there commenced on or about April 22, 1997. Respondent was required to be a New York City resident, as a condition of her employment. Respondent and Farrell married on December 21, 1996, in Guiderland, New York in a civil ceremony(Ex JJ). The certificate of Marriage Registration lists Farrell's residence as the Subject Premises and Respondent's residence as 406 Vesper Ct, Guiderland, NY 12159.

However, Respondent offered strong documentary evidence regarding her residency at the Subject Premises. Respondent had a New York State Driver's license issued to her on February 17, 1999 listing the Subject Premises as her address. That license expired in March

2004, when a new license also listing the Subject Premises was issued which was valid through 2012. (Ex Q). Respondent was registered to vote from the Subject Premises (Ex P).

For promotion purposes, Respondent was required to certify her compliance with residency requirements, and did so for in 2002 and 2007, at which time she was asked to certify that both she and her spouse were City residents and filed taxes listing New York City as her residence (EX PP). In 2002, Respondent listed Farrell as her emergency contact, in 2007 Respondent listed Gale as her emergency contact. In 2002, her initial application for a promotion was deemed incomplete due to insufficient proof of residency, which was provided by May 15, 2002.

Respondent took a leave of absence from work from September 2009 through January 2010 (Ex PP). Respondent's retirement was finalized effective July 2010.

Respondent and Farrell's checks from 2004 through 2006 list the Subject Premises as their address, and after 2006 list the Woodbury Home as their address (Exs L1- L4). The mortgage for the Woodbury home requires that Respondent and Farrell occupy said home as their primary residence for at least one year (EX 4).

Respondent submitted her credit card statements from 2006 through 2009. The statements were sent to Respondent at her home in Woodbury, and show many transactions in Connecticut (Ex M & M-1). However, most of the transactions in Connecticut take place on the weekends.

It is worth noting that the only evidence in the record directly from Vincent as to the other occupants of the Subject Premises, indicates that he did not reside with Respondent. Specifically, in On October 14, 1999, two years after Respondent started working in New York City, and four years after Respondent alleges she moved into the Subject Premises, Vincent

executed a statement before a notary public asserting that the only people living in the Subject Premises as of said date were Vincent and Farrell (Ex 7). Similarly, the medical records produced by Lenox Hill Hospital show that when admitted in June 2008, Vincent asserted as part of the information he provided on admission that he lived alone (Ex MM & MM-1 Patient admission Database, pg 4 of 4).

However, on the whole, the court finds that the preponderance of credible evidence at trial shows that Respondent maintained the Subject Premises as her legal primary residence from 2006 through August of 2009. Therefore she primarily resided with Vincent at the Subject Premises for two years prior to the death of Vincent.

#### **RELATIONSHIP BETWEEN RESPONDENT AND VINCENT**

Respondent argues in her post trial memo that she and Vincent shared a non-traditional family relationship akin to that of father and daughter. It is clear to the court that Respondent cared for Vincent deeply, and considered him to be part of her and Farrell's extended family. However, the court does not find that the relationship between Respondent and Farrell was akin to that of father and daughter, or that the relationship rose to the level required to meet the statutory criteria for succession as set forth in 9 NYCRR § 2204.6(d)(3).

Respondent failed to sustain her burden of establishing financial interdependence with Vincent. Respondent and Vincent had no shared bank accounts, never owned any property together, and financially conducted themselves more like roommates. For example, Vincent and Respondent each had their own phone lines in the Subject Premises and each paid for same separately.

Moreover, as argued by Petitioner relatively speaking Respondent led a comfortable life enjoying her country home, two cars, and putting her daughter through a private college . By



contrast Vincent led a relatively austere and simple life style in his one bedroom rent control apartment. Respondent took no portion of her earnings or assets to make significant improvements to the Subject Premises, which was primarily considered to be Vincent's apartment. Respondent was generous about consistently inviting Vincent to her country home for weekend getaways and family dinners but that is not sufficient to establish the level of commitment and interdependence required by the statute.

Respondent and Vincent were more like roommates, brought together by the relationship between Vincent and Farrell, which was far more substantial as far as financial interdependence and emotional commitment than that between Vincent and Respondent.

Respondent and Vincent did not share household expenses. Most expenses associated with maintenance of the Subject Premises were paid out of the business account for Vincent and Farrell. Respondent did not contribute to these expenses. There was no intermingling of finances between Respondent and Vincent, and no financial interdependence between the two. While Respondent emphasizes that she paid for Vincent's cremation, and that Vincent lent Gale some money for college, these transactions are insufficient to rise to the level set forth in the applicable statute.

Respondent and Vincent did engage in some family type activities such as holiday dinners and birthday celebrations. They also ate meals together, and shared household chores. However, this is consistent with how one would treat a roommate or an extended family member, and not necessarily indicative in particular of a father daughter relationship.

To the extent that Vincent formalized legal obligations it was primarily with Farrell, and only incidentally with Respondent. For example, Vincent named Farrell as the primary

beneficiary of his will in 1988 (Ex OO). Vincent named Farrell as the beneficiary of his life insurance policy in 1991 (Ex SS) and as his health care proxy in 2007 (Ex MM1) .

Two of the documents which Respondent relies upon as formalizing legal obligations were prepared by Farrell and presented for Vincent to execute days before his death, after he was hospitalized.

On June 6, 2008, Vincent was alone in the Subject Premises and he fell. He lay on the floor until the Superintendent found him and called an ambulance which transported him to Lenox Hill Hospital (Ex MM). Vincent arrived at the hospital on a stretcher having been accompanied by an EMS worker in ambulance. He had fractured his hip. On the date of his admission, the hospital records indicated he had no living will. On June 7, 2008, Vincent had a blood transfusion. Vincent was given morphine for his pain, was on a liquid diet, and was confined to his bed. Vincent underwent surgery on June 10, 2008.

On June 9, 2008, Vincent executed a power of attorney in favor of Farrell, which listed Respondent as a substitute (Ex D) and a living will designating Farrell as his health care proxy and Respondent as an alternate agent if Farrell was unavailable. While there is no evidence as to Vincent's incompetency to execute such documents, given that they were prepared by Farrell and presented under the above referenced circumstances, any reference to Respondent is primarily based on Farrell's input and does not reflect a father daughter relationship between Respondent and Vincent.

Approximately one week before these documents were executed, Farrell prepared a new will for Vincent to sign (Ex F). The will indicates it was signed on May 31, 2008 and witnessed by three individuals who live in Woodbury Connecticut. While the 2008 will did include Respondent as a beneficiary, this was executed immediately prior to his death while Vincent was

hospitalized. Additionally the will signed in 2008 was drafted by Farrell for Vincent and presented to Vincent while hospitalized to be signed without the benefit of counsel. Petitioner alleges that Vincent lacked capacity at that time to execute the document, but the evidence in the record is insufficient for the court to make a finding on this point. It is, however, undisputed that Respondent did not include Vincent as a beneficiary in any of her documents and took no steps to formalize legal obligations between herself and Vincent.

Respondent did hold Vincent out to be part of her extended family, but never held him out to be like her parent. Vincent was the type of extended family member who was included in large gatherings or holidays.

To the extent Respondent relies on the testimony of Gale to establish the emotional and financial commitment aspect of her case, the court did not find Gale's testimony to be credible. For example, Gale testified that she called Vincent Uncle but did not naturally refer to him as her Uncle. Gale's testimony about finding the latest will prepared by Farrell, in her East 83rd Street apartment, particularly lacked credibility, as did her testimony that she visited Vincent daily. Similarly the court did not find Gale's testimony regarding interactions between Respondent and Vincent credible. Moreover, Gale has a great interest in the outcome of this proceeding, perhaps even a greater interest than Respondent, as Gale currently lives in the Subject Premises and stands to lose her home if Respondent's succession claim fails.

Similarly, the testimony of Roseanna DePalma did not establish that Respondent and Vincent held each other out as father and daughter. Rather DePalma described Farrell as Vincent's "business partner" and "friend." While DePalma later went as far as to testify that Vincent was a paternal figure for Farrell, regarding Respondent, DePalma only testified that Respondent and Vincent were "very friendly."

Moreover, DePalma's testimony further establishes that Vincent and Respondent did not intermingle finances. Vincent owned a home in Blauvelt, New York that had belonged to his parents. Vincent sold the home in or around 1988. Farrell asked Vincent to loan DePalma \$25,000 from the proceeds of the sale which Vincent did. DePalma was a credible witness. She testified that she considered Vincent a friend, she acknowledged that Vincent was not considered family, but that the family tried to include him in many family celebrations.

There was some testimony regarding behavior that Respondent asserts constitutes performing family functions. For example, Respondent asserts that the court should consider that Vincent held the door open for Respondent or helped her with packages. Other examples provided were that Respondent helped Vincent button his shirts and encouraged Vincent to quit smoking. These kinds of behaviors do not necessarily imply a greater relationship than roommates, and do not evince the type of nontraditional family relationship contemplated by statute.

Respondent's claim that she was able to get Vincent to stop smoking is contradicted by Vincent's medical records, which indicate that he stopped smoking in the 1980s, years before he met Respondent (Ex MM & MM-1). Additionally, Farrell smoked through 2002, and reported that he had not been exposed to any passive smoke (EX FF).

Admitted into evidence were Vincent's medical records from Lenox Hill Hospital (EX MM & MM-1). The first recorded date of Vincent's treatment at Lenox Hill was September 20, 2007. It was upon being admitted for an outpatient procedure that Vincent signed at the hospital a health care proxy appointing Farrell. This is true even though by this date Farrell was living full time in Connecticut, and his Contact information has his phone number in Connecticut, and Respondent was still living in the Subject Premises.

The records show that Vincent was also admitted to the hospital in March 2008 and June 2008. Vincent was discharged on March 19, 2008 to a nursing home.

On June 26, 2008, Vincent was transferred back from the nursing home to Lenox Hill Hospital. He was unaccompanied by Respondent, Farrell, or Gale. He died that day in the hospital. The hospital notified Farrell by phone at his Connecticut home.

### CONCLUSION

In order to be entitled to succession, Respondent has the burden of proving by a preponderance of the credible evidence that she meets the statutory criteria of a nontraditional family member, and that she primarily resided with Vincent at the Subject Premises for two years prior to his death. As noted above, while Respondent met this burden regarding primary residence, Respondent failed to meet it regarding the criteria for being a nontraditional family member.

Specifically, the court finds Respondent failed to establish an intermingling of finances, formalizing of legal obligations, holding Vincent out as her father, or performing family obligations. Overall, Respondent failed to meet her affirmative obligation of establishing succession, and failed in particular to establish that the relationship was characterized by the emotional and financial commitment and interdependence requisite for nontraditional family succession [*1477 Second Corp v. Lindeman* 2002 N.Y. Slip Op 50423(U); *Caru v Ramos* 2007 N.Y. Slip Op 50280(U)].

Based on the foregoing, Petitioner is awarded a final judgment of possession as to Linda Barr Gale and Hillary Gale. The warrant of eviction shall issue forthwith. Execution of the warrant is stayed through September 30, 2013.

This constitutes the decision and order of this court.

Dated: August 16, 2013  
New York, New York

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Hon. Sabrina Kraus  
JHC

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