

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: PART P
WARREN LLC

Petitioner

INDEX # 58865 /08

-against-

YANETH CARBELLO a/k/a YANETH CARBALLO
a/k/a YANETH JIMINEZ a/k/a JANETH JIMINEZ
HERNANDO CARBALLO a/k/a HERNANDO CARBELLO
ERICA "DOE", "JOHN DOE" and/or "JANE DOE"

DECISION/ORDER

Respondents

Birnbaum, J.

Petitioner brings this holdover proceeding to recover possession of apartment 1D located at 37-06 Warren Street, Jackson Heights, New York on the grounds that Respondent Yaneth Jiminez a/k/a Yaneth Carballo (hereinafter referred to as "Mrs. Carballo") sublet the rent stabilized apartment. Her son, respondent Hernando Carballo is asserting a claim to succeed to the tenancy of Mrs. Carballo. Mrs. Carballo appears pro se. Mr. Carballo is represented by counsel. Erica "Doe" is Mr. Carballo's wife and also appears pro se. Petitioner is represented by counsel. Based upon the credible testimony and evidence adduced at the trial, and briefs submitted post trial, the court makes the following findings of fact and conclusions of law.

The facts are essentially not in dispute. Mrs. Carballo lived in the apartment with her husband and children, including her son respondent Hernando Carballo. In 1998, Mrs. Carballo physically moved out of the apartment with her family leaving only respondents Hernando Carballo and Erica "Doe" to reside there. Mrs. Carballo bought a private house elsewhere and removed all her possessions when she vacated in 1998. She has not resided in the apartment since her 1998 vacatur. Mrs. Carballo has continued to execute the renewal leases in the name of Yaneth Carballo; the most recent lease renewal expiring March 31, 2008. The rent payments have continuously been tendered in the name of Yaneth Carballo. In October 2003, Petitioner commenced a holdover proceeding, Index # 80078/03, against Mrs. Carballo based upon chronic non-payment of rent. Mrs. Carballo appeared in court and entered into a

probationary stipulation to pay the rent on a timely basis. Upon her default, Petitioner restored that proceeding in May 2004. Mrs. Carballo again appeared in court and entered into another "so ordered" stipulation to pay the rent timely. Mrs. Carballo did not return any keys to Petitioner.

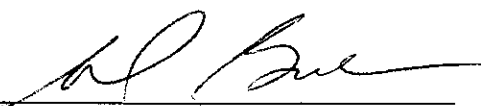
What remains in dispute is when Mrs. Carballo permanently vacated the apartment. Succession is permissible when the prime tenant voluntarily vacates the apartment which is the primary residence of both the prime tenant and the prospective successor. *Claridge Gardens, inc. v. Menotti*, 160 AD2d 544. It is the tenant of record's permanent vacatur that gives rise to a qualified successor's right to succeed to the tenancy. RSC § 2523.5(b)(1) The determination that an apartment is not the tenant's primary residence does not mean that the tenant permanently vacated the apartment. In recent years there have been several cases that have addressed the issue of a tenant's permanent vacatur. In Metropolitan Life Ins. Co. v. Butler, 2002 WL 83691 (NY Supp AppTerm), the court found that although the tenants of record had moved out of the apartment, they had not permanently vacated because they continued to execute lease renewals and they did not surrender the apartment back to the landlord. In 72A Realty Assoc. v. Kutno, 15 Misc3d 100 (AT, 1st Dept.), the tenant continued to execute lease renewals, pay rent in his name and occasionally stayed at the apartment. The court held that "[n]o reasonable view of the evidence can support a finding that a tenant permanently vacated the apartment premises until at the earliest...when his last renewal lease expired and he no longer actively used the apartment." The court in Third Lenox Terrace Associates v. Edwards, 23 Misc3d 126(A) (AT 1st Dept.), found that "having continued to pay rent and execute lease renewals...tenant cannot be found to have permanently vacated the premises at any time prior to the ...expiration of the last lease renewal that she executed." In Extell 609 West 137th Street, LLC v. Santana, 2009 WL 2407944 (NY Supp App Term), the tenant moved out of the apartment leaving her adult child in occupancy. The tenant continued to execute renewal leases in her name extending for three years after she moved out. Rent was paid in the name of the tenant, who did not surrender the apartment back to the landlord. Unbeknownst to the landlord, after moving out, the landlord commenced a nonpayment proceeding against the tenant. She appeared in court and entered into a "so ordered" stipulation wherein she

agreed to pay the rent. Thereafter, the tenant sent a letter surrendering the apartment to the landlord. The court found that through the tenant's actions, tenant had maintained a nexus to the apartment until she notified the landlord of her surrender of the apartment. RSC 2523.5(b)(1) contemplates that upon receipt of a renewal lease, a tenant of record, or occupant in receipt of the renewal lease, will notify the landlord of the tenant's vacatur from the premises and at that time a qualified successor will timely assert a succession claim. *245 Realty Associates v. Sussis*, 243 AD2d 29

In this case, Mrs. Carballo moved out of the apartment without informing the landlord. Mr. Carballo remained in occupancy for over ten years after the tenant moved out. He sent in the rent in the name of the tenant of record. Mrs. Carballo continued to execute lease renewals in her name. After Mrs. Carballo left, she continued to hold herself out as the tenant by executing stipulations before the court. Under these circumstances, Mrs. Carballo could not be found to have permanently vacated the apartment until March 31, 2008, the expiration of her last renewal lease. For a qualified successor to be successful, the successor must have "resided with the tenant in the housing accommodation as a primary residence for a period of no less than two (2) years" prior to the tenant's permanent vacatur. RSC 2523.5(b)(1). Since Mrs. Carballo did not reside in the apartment as her primary residence for more than two years prior to her permanent vacatur, Mr. Carballo has failed to establish that he is entitled to succeed to her tenancy.

Accordingly, Petitioner is awarded a final judgment of possession. Issuance of the warrant is stayed 10 days. Execution of the warrant is stayed until February 28, 2010 for Respondents to vacate.

This constitutes the decision and order of the court.



Ronni D. Birnbaum, J.H.C.

Dated: October 9, 2009