

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART P
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20-22 PRINCE LLC.,

Petitioner-Landlord,

-against-

TSUE KWAI YEN, MARK "DOE"
"JOHN DOE" and/or "JANE DOE,"

Respondents-Occupants.
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Index No. L&T 91628/2008

**DECISION/ORDER
AFTER TRIAL**

Present:

Hon. BRUCE E. SCHECKOWITZ
Judge, Housing Court

After trial and upon submission of post-trial briefs by petitioner and respondent, the decision and order of the court is as follows:

This licensee holdover proceeding was tried before this court over several days. In this proceeding 20-22 Prince LLC ("petitioner") seeks possession of apartment 27 at 20-22 Prince Street, New York, NY (the "Apartment") from Tsue Kwai Yen ("respondent"), the occupant of the Apartment. The Apartment is subject to rent control. Petitioner alleges that respondent's license to occupy the Apartment expired upon the death of Tuck Ming Yuen, the tenant of record. As her defense, respondent claims that she is over the age of sixty-two, is Ms. Yuen's daughter, and she succeeded to her mother's tenancy by residing with her at the Apartment for at least a year prior to her death. Both parties were represented by counsel.

Petitioner's Prima Facie Case

At trial, petitioner established its prima facie case. Petitioner successfully admitted into evidence a deed identifying petitioner as the owner of the subject building and a proper multiple dwelling registration for the subject building. Petitioner also admitted the DHCR registration for the Apartment, which listed Tuck Ming Yuen as the tenant of record of the rent controlled apartment, and a copy of Ms. Yuen's death certificate, reflecting that she died on November 26, 2007. Christine Bermudez, petitioner's agent, testified as petitioner's first witness that she had met respondent in March or April of 2008 but had never met her prior to that time. Ms. Bermudez also explained that respondent did not have any tenancy rights to the Apartment but was given the keys to the Apartment by petitioner's agent after the death of Ms. Yuen.

Respondent's Defense

Respondent called Kam Kwai Leong, as her first witness. Ms. Leong is respondent's younger sister who has lived in Boston for over twenty years. The witness testified that after Ms. Leong's husband's passing in 1983 or 1984, she would visit New York City once a year. Ms. Leong would also call the Apartment twice a year and speak to her mother, Tuck Ming Yuen - once to tell her mother she would be coming to visit and once on her mother's birthday. Ms. Leong claimed that respondent was present when she would telephone her mother. Ms. Leong both stated that she is not sure when respondent moved into the Apartment and that she believes respondent moved into the Apartment after the death of her husband. Ms. Leong further stated that when she came to visit her mother in 2006 respondent slept in the bedroom in the Apartment and her mother was in a separate hospital bed in the living room. The witness acknowledged that her mother had a caretaker but she did not know her name nor the length of the caretaker's employment. Ms.

Leong's recollection of the events was not precise.

Respondent's next witness was Theresa Iacuzzo, a tenant of the subject building who lived on the top floor of the building for thirty-two years. Ms. Iacuzzo testified that she met respondent in the late 1990s. She stated that while she could not speak Mandarin or Cantonese, she communicated with respondent and her mother through hand gestures. Ms. Iacuzzo explained that the door to the Apartment would often be open and she would witness respondent in the Apartment cooking, bringing groceries and wearing pajamas at different times of the day. She further testified that she would see Ms. Yuen lying on the couch-bed in the Apartment.

Shuet Sum Tsang next testified on respondent's behalf. Mr. Tsang has been the tenant of apartment 28, the neighboring apartment to the subject premises, since 1976. Mr. Tsang was seventy-two years of age at the time of his testimony. The witness testified that he knew Ms. Yuen and the respondent to have a mother/daughter relationship and that he too would see respondent in her pajamas in the Apartment. Mr. Tsang claims that he saw respondent visiting her mother on weekends for at least five to six years prior to Ms. Yuen's death.

Respondent's final witness was the respondent herself. Respondent explained that she came to the United States from China in 1955 and moved to Queens, NY with her husband. Her husband passed away twenty or thirty years ago and they never had children. Respondent sponsored her mother to come over to the United States and her mother lived in the Apartment since she arrived in the US. Respondent and her mother shared a joint bank account since Ms. Yuen came to the US.

Respondent's testimony regarding her own arrival at the Apartment is not as clear. At trial, Respondent first testified that she moved into the Apartment when her mother got sick, which was approximately ten years ago. Respondent then testified that she moved in after her husband passed

away, twenty to thirty years ago. Respondent later testified that she lived in the back of a store on Parsons Boulevard in Queens, NY for a few years after her husband died and was running the business in the store. Respondent claimed that she stopped working when her mother was sick and took care of her by buying groceries for the Apartment, cooking, and doing the laundry. On cross-examination, petitioner introduced respondent's deposition transcript in which she testified that she kept working in the garment business after she moved in with her mother (P's Ex. 6).

Respondent's testimony regarding her mail was also inconsistent. Respondent testified that her bank statements and pension statements had all been mailed to 150-27 87th Rd in Jamaica Queens ("Queens address"). Respondent averred that she never lived at the Queens address. She claimed that the mail went to that address because English speaking people from her village in China resided there who would read her mail for her and decide whether it was important. Respondent did not produce any witnesses to corroborate these statements.

Respondent further posited that she did not change her mailing address from the Queens address to the Apartment address because she did not speak English and did not know the procedure. However, respondent later testified that she requested that her address be changed three to four years ago. Respondent also testified at trial that she changed her bank statements to the Apartment address right after she moved into the Apartment. On cross-examination, Petitioner introduced HSBC statements from December 1, 2005- November 31, 2007 (P's Ex. 5) as well as from 2008 and 2009 (P's Ex. 7) that all listed the Queens address. Respondent stated that she instructed the bank to change the address, but the bank never did. Petitioner also introduced respondent's New York State identification card that was issued on March 6, 2005, which listed the Queens address (P's Ex. 4).

Respondent's testimony also varied with regard to the home attendants which took care of her elderly mother. During her deposition, respondent testified that her mother did not have a home attendant, but rather, she took care of her mother herself. At trial, however, respondent stated that a home attendant was recommended for her mother by a doctor. Respondent explained that the attendant stayed with her mother for a very short period of time - once a week for a few hours - and the attendant would never stay over at the Apartment.

Petitioner's Rebuttal

Petitioner called Lexuan Dai as its first rebuttal witness. Ms. Dai is a nurse and has been employed as the office manager for Dr. Kenneth Tam, who was both Ms. Yuen and respondent's physician, since 1996. Ms. Dai arranged for a home care worker for Ms. Yuen and explained that a 24/7 home aid was applied for. Ms. Dai also claimed that some records at the office indicated respondent's address as the Queens address, however a more updated version of respondent's records list the Apartment address as her address.

Petitioner next called Harriet Crowman who was the landlord for the subject building. Ms. Crowman testified that she visited the building on many occasions subsequent to 2006, when the building was purchased by petitioner. She claims to have visited the Apartment eight times, all during business hours, and that only Ms. Yuen and her aide were present on each of those times.

Petitioner then called three home health aides to the stand, all of whom were employed by First Chinese Presbyterian Community Affairs Home Attendant Corporation ("First Chinese"). The first of the three witnesses was Bik Sa Moy. Ms. Moy testified that she was employed as a home health aide for First Chinese for over ten years. Ms. Moy explained that from 2006 to 2007, she took care of Ms. Yuen from Monday morning until Thursday morning when another home attendant

would come to relieve her. Her duties included feeding, bathing, and generally taking care of Ms. Yuen. Ms. Moy was with Ms. Yuen twenty-four hours a day from Monday through Thursday morning and would spend the night in the bedroom while Ms. Yuen slept on the hospital bed in the other room.

Ms. Moy testified that during the time that she cared for Ms. Yuen no one else slept at the Apartment. She explained that respondent came to visit her mother once or twice a week, usually in the afternoon, and that she would stay for two to three hours at a time. The witness also asserted that respondent provided her with a telephone number, allegedly to her own apartment, and that when she would call respondent at the given number, respondent would generally answer the phone. Ms. Moy could not remember the exact number but believed it began with a "718" area code.

Petitioner's next rebuttal witness was Ai Reng Chen who was employed by First Chinese for six years as a home health aide. Ms. Chen testified that she was Ms. Yuen's home attendant from the beginning of 2006 until right before Ms. Yuen passed. The witness arrived at the Apartment to care for Ms. Yuen on Thursday mornings and would leave Saturday mornings. Ms. Chen performed the same duties as Ms. Moy and also slept in the bedroom at the Apartment during her shifts. Ms. Chen stated that respondent was never asleep in the Apartment when she would arrive and that she would usually see respondent once every two weeks. Respondent had the key to the Apartment and would sometimes bring food with her.

Hu Jin Jiabin also testified as petitioner's rebuttal witness. Ms. Jiabin explained that she had been Ms. Yuen's home care attendant for two months prior to her death. Ms. Jiabin took care of Ms. Yuen from Saturday morning through Monday morning. She had been employed by First Chinese for ten years. Ms. Jiabin testified that respondent visited the Apartment once during the

day and stayed for one and a half to two hours. Respondent had brought canned food with her when she visited. All three home attendants represented that they did not discuss their testimony with each other, other than possibly refreshing their recollection as to the time period they were being subpoenaed to testify about.

Petitioner's last rebuttal witness was Donna Zhao, who oversees home attendants for First Chinese. Ms. Zhao had been Ms. Yuen's case coordinator since August 2001. Ms. Zhao would make routine visits to the Apartment. Ms. Zhao testified that the New York City CASA program, through HRA, refers patients to First Chinese after a doctor decides that a patient needs twenty-four hour care and that she does not decide who receives such care. The patients have to be qualified by CASA, who determines whether the patient needs twenty-four hour care after a doctor's referral. Ms. Zhao further represented that she did not refresh any of the home attendants' recollections about their duties or testimony and that she did not accompany them to court on the day of trial. On cross-examination, Ms. Zhao testified that First Chinese has a requirement that a patient receiving twenty-four hour care must live alone.

Standard for Succession

The standard for succession rights under New York City Rent Control Law is as follows:

... any member of tenant's family shall not be evicted under this section where the tenant has permanently vacated the housing accommodation and such family member has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two (2) years, or where such person is a "senior citizen" or a "disabled person," as defined in paragraph (3) of this subdivision, for a period of no less than one (1) years, immediately prior to the permanent vacating of the housing accommodation by the tenant . . . N.Y.C. Rent and Eviction Regs. § 2204.6(d)(1).

N.Y.C. Rent and Eviction Regs. § 2204.6(d)(3)(I) defines a "family member" as a

member of the tenant's family including but not limited to a daughter. The provision further defines a "senior citizen" as "a person who is sixty two years of age or older." See N.Y.C. Rent and Eviction Regs. § 2204.d(3)(ii).

It is undisputed that Ms. Yuen died on November 26, 2007 and that respondent is her daughter. Petitioner also did not dispute respondent's testimony that she was born in 1932. Respondent being over the age of sixty two, had to establish that she resided at the Apartment with her mother from at least November 26, 2006 to November 26, 2007 in order to prove succession rights.

Court's Determination

The court finds that respondent failed to meet her burden of establishing her succession defense. Respondent introduced no documentary evidence that connected her to the Apartment during the period November 26, 2006 to November 26, 2007. While a party may establish succession rights based on credible testimony alone, see *300 East 34th St. Co. V. Habeeb*, 683 N.Y.S.2d 175, 178 (1st Dept 1977), the court finds that the testimony provided by respondent's witnesses did not prove respondent's entitlement to succeed to the Apartment.

Respondent's sister, though credible, testified to visiting New York City once a year. Accordingly, even though she claims that there was an occasion when she witnessed respondent lying in the bedroom in the Apartment in 2006, this testimony alone does not prove where respondent was residing the other 364 days of the year. Furthermore, Ms. Leong's memory was unclear due to age, which gives less credence to her statement that she saw respondent sleep in the bedroom at the Apartment in 2006. Further, this statement was directly contradicted by the home care attendants' testimony that they, rather than respondent, slept in the bedroom for at least a year

prior to Ms. Yuen's death.

Neither respondent nor her neighbors were able to persuade the court that respondent resided with her mother for a year prior to her mother's death. While respondent's neighbors claimed to have seen respondent at the Apartment in her pajamas, they were not specific as to dates and times. Further, the court finds that these witnesses have an interest in the outcome of the proceeding because they are respondent's neighbors.

Respondent was also unclear as to the precise date or time period she moved into the Apartment. She was not able to explain why she never changed the address on her bank statements and other records from the Queens address to the Apartment address, and she was not forthcoming regarding the home attendants who took care of her mother. Given all of these facts, the court is not persuaded by her testimony that she resided at the Apartment prior to her mother's death.

The court further finds the testimony of the three home attendants and their supervisor, to be credible and persuasive. Respondent's counsel suggests that the home attendants have an interest in establishing that respondent did not reside at the Apartment while they took care of Ms. Yuen since it is against First Chinese policy to provide twenty-four hour home care to a patient who does not reside alone. Counsel represents the same of the Visiting Nurse Services in relation to the M11-Q records they kept on Ms. Yuen which stated that Ms. Yuen lived alone. The court disagrees.

Respondent's assertion that each of the home attendants, their supervisor, and the Visiting Nurse Services would fabricate Ms. Yuen's living arrangement, is not believable. Moreover, if respondent provided the services she claims to have supplied to her mother, there would be no need for around the clock home health care. Ms. Zhao explained that CASA for HRA

directed First Chinese to take of Ms. Yuen. CASA would not have done so without first determining Ms. Yuen's living situation. Similarly, Ms. Dai explained that twenty-four hour home health care was applied for and recommended by her office. Being that Dr. Tam was both physician to respondent and her mother, surely he was familiar with Ms. Yuen's living situation and would not have applied for twenty-four hour home health care unless Ms. Yuen were truly living alone.

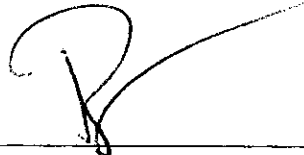
Finally, petitioner also admitted documentary evidence at trial, in the form of Visiting Nurse Services of New York, New York-Beckman Downtown Hospital, and NYC Department of Human Resources records which contain statements that Ms. Yuen lived alone. This court already ruled that these statements are admissible into evidence and also explained that the statements would be given the appropriate weight. Many of these documents are outside of the relevant time period, to wit, November 26, 2006 to November 26, 2007, and all of the statements contained in the records are third party statements. Therefore, the court finds that while the statements in the records are persuasive, they are not as compelling as the testimony given by the independent home attendants employed by First Chinese, nor will they be given the same weight.

Based on the credible testimony of petitioner's witnesses and the lack of respondent's documentary and testamentary evidence, it is clear that respondent did not reside in the Apartment with her mother for the requisite year prior to her mother's death. Accordingly, the court awards petitioner a final judgment of possession with a ten day stay on the issuance of the warrant of eviction. Execution of the warrant is stayed through January 31, 2012 for respondent to vacate the Apartment.

The stay on the execution of the warrant is further conditioned upon respondent's payment of ongoing use and occupancy, when due, at the last legal rent amount. Such payment shall be made monthly from September 2011 through and including January 2012.

This constitutes the decision and order of this court.

Dated: Brooklyn, New York
August 19, 2011



HON. BRUCE E. SCHECKOWITZ
J.H.C.