

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS : HOUSING PART Q

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SUMIT I ASSOCIATES, L.P.,

Petitioner-Landlord,

Index No. 103350/2011

-against-

CANDIDA PAGAN and JOSE PEREZ,

Respondents-Tenants,

**DECISION/ORDER
AFTER TRIAL**

JOHN VELASQUEZ,
"JOHN DOE" and/or "JANE DOE"

Respondents-Undertenants

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HON. INEZ HOYOS, J.H.C.

Petitioner, Sumet I Associates, L.P., commenced this proceeding to recover possession of Apartment 3B at 209 South 3rd Street, Brooklyn, N.Y. ("subject premises") from Candida Pagan and Jose Perez ("respondents" collectively), based on its allegation that respondents violated material terms of their Department of Housing and Urban Development ("HUD") "Model Lease" by, *inter alia*, engaging in and/or permitting their occupants or guests to engage in drug related criminal activity and criminal activity that affects the health, safety or right to peaceful enjoyment of the premises by other residents including property management and staff. At trial, both parties were represented by counsel. Undertenants John Velasquez, John Doe and Jane Doe did not

appear at trial.

The Testimony and the Evidence

Petitioner called Valerie Perez. Ms. Perez testified that she is the site manager for the subject building. She testified that the subject building is a federally subsidized HUD Project-Based Section 8 Building. Petitioner introduced a certified copy of the deed and a certified copy of the multiple dwelling registration for the subject premises. (Petitioner's Ex. 6 & 7 respectively). Petitioner also introduced the HUD Model lease and annual re-certification signed by both respondents. (Petitioner's Ex. 8).

Petitioner also called Jeffrey McAvoy to testify. Mr. McAvoy testified that he is an investigator for SecureWatch24, a security company hired by petitioner. He testified that security cameras were installed throughout the building. He further testified that on the 3rd floor of the subject building, the cameras were focused on the elevator, staircase and doors of two apartments including the subject apartment. Mr. McAvoy also testified that the approximate cost of each camera was \$400.00 and the installation cost was \$1300.00.

Petitioner introduced a video dated July 30, 2011 which showed respondent, Jose Perez coming out of his apartment with a chair, get up on the chair and move the focus of the camera elsewhere. Mr. McAvoy testified that he went to the location where the camera was installed and saw that the box within which the covert camera was installed was damaged but the camera could still record. He then repositioned the camera to record in the same area where previously focused. Then, video footage on that same day shows another individual standing in front of respondents' apartment door, make a phone call, then approach the camera which caused the video to stop and the camera to become inoperable.

Mr. McAvoy testified that he went again to the location where the camera was originally located and found it was missing as he only observed an empty metal box with frayed exposed wires. Subsequently, on August 16, 2011, Mr. McAvoy testified that he went to the respondents' apartment with the police and that the camera was recovered from within the subject premises.

Petitioner then called Police Officer Christopher Winiarz to testify. Officer Winiarz testified that on August 16, 2011 he was called to investigate an incident regarding a stolen camera at the subject premises. He testified that when he arrived at the subject premises he smelled a strong odor of marihuana when respondent, Jose Perez, opened the door. He testified that he also observed two individuals smoking what appeared to be marihuana in the first bedroom. Based on his observations, a search warrant was sought and executed by which the following was recovered: fifty-seven (57) ziplock bags of alleged marihuana of which twenty-four (24) bags were recovered from respondents' guest, Edwin Rodriguez; thirty-three (33) small ziplock bags of alleged marihuana which were found in plain view on the counter in the second bedroom; twenty-one (21) empty ziplock bags; two (2) digital scales from the second bedroom; two (2) ziplock bags of alleged cocaine in plain view on the counter in the second bedroom; a surveillance camera on the counter in the first bedroom; and one (1) key. Petitioner introduced the property clerk invoices reflecting the recovery of said items. (Respondents' B 1 - 4). Officer Winiarz testified that he showed the camera to Mr. McAvoy who positively identified it as the camera taken from the 3rd floor hallway, belonging to SecureWatch24. Respondent Jose Perez, together with Edwin Rodriguez and John Paez were subsequently arrested. Mr. Perez was charged and subsequently indicted on Criminal Mischief in the Third and Fourth Degree, Criminal Possession of Stolen Property in the Fifth Degree, Criminal Possession of a Controlled

Substance in the Seventh Degree and Unlawful Possession of Marihuana.

In her defense, respondent Candida Pagan testified that she has resided in the subject premises with her son, Jose Perez, for twenty years. She testified that she has never seen illegal drugs in the apartment nor has she seen her son conducting illegal business out of the apartment. Mrs. Pagan testified that she left the subject premises in the morning of August 16, 2011 because she received a phone call that her sister was sick in the hospital and she went to visit her. She testified that she later learned her son was arrested on that date.

Respondents also called Maria Caraballo to testify. Ms. Caraballo testified that she is the tenant of apartment 2A at 209 South 3rd Street. She testified that she has never seen Mr. Perez sell drugs at the apartment or building.

On cross-examination, she clarified that she was not present when Mr. Perez was arrested on August 16, 2011 because she was out of the country and thus was unaware of the items recovered from the apartment.

Respondents also called John Michael Paez to testify. Mr. Paez testified that he was present in the apartment on August 16, 2011. He testified that in the apartment were also Jose Perez and Edwin Rodriguez. He testified that police asked Mr. Rodriguez to takeout anything he had on him and that Mr. Rodriguez took out a large ziplock bag which contained smaller bags of alleged marihuana. He further testified that he was unaware of any drugs present in the apartment before then, and that he never entered the bedrooms nor was he present when police searched Mr. Perez. He testified that he did see the police officers take out a camera from one of the bedrooms.

Respondent, Mr. Perez testified in his defense. He testified that he did move the camera

to change the focus because he thought the camera was only focused on his apartment. He testified that once he learned that his friend, Mr. Mickey Devalle , had taken the camera, he took the camera away from him and kept it in his dresser drawer. He admitted that the camera was recovered from his room on August 16, 2011, pursuant to the execution of the search warrant. He also admitted that he was holding several shoe boxes for his cousin Alex Negron, in his closet, in his room and that one of those shoe boxes contained two scales but that he was unaware of this. He testified that his room is usually locked and that he and his mother have a key to his room. He also testified that he was unaware that his friend, Mr. Rodriguez, had illegal drugs on him.

The Law and Its Application

Petitioner brought the instant holdover on the basis that respondents have breached Paragraphs 13 and 23 (c) of the HUD Model Lease. Paragraph 13 provides in pertinent part:

The tenant agrees not to:

- (b) use the unit for unlawful purposes;
- (c) engage in or permit unlawful activities in the unit, the common area or on the project grounds.

Paragraph 23(c) provides in pertinent part, that:

The landlord may terminate this agreement for the following reasons:

- (3) drug related criminal activity engaged in on or near the premises, by any tenant, household member, or guest, and any such activity engaged in on the premises by any other person under the tenant's control;
- (6) criminal activity by a tenant, any member of tenant's household, a guest or another person under the tenant's control:
 - (a) that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including property management staff residing on the premises);

- (10) if the landlord determines that the tenant, any member of the tenant's household, a guest, or another person under the tenant's control has engaged in the criminal activity, regardless of whether the tenant, any member of the tenant's household, a guest or another person under the tenant's control has been arrested or convicted of such activity.

The Court finds that petitioner did not establish its prima facie case with regards to paragraph 23 (c) (3), drug related criminal activity engaged in on or near the premises. In cases involving allegations of illegal drug activity, the petitioner has the burden to prove that there were in fact illegal drugs on the premises. This is often done through the introduction of a laboratory report. *see New York County District Attorney's Office v. Rodriguez*, 141 Misc.2d 1050, 1057, 536 N.Y.S.2d 933 (N. Y. Civ. Ct., NY County, 1988). In this case, the laboratory report was never introduced into evidence which would show that the substances recovered from the subject premises were, in fact, cocaine and marijuana. As such, the Court is dismissing this portion of the petition.

However, as to paragraphs 13 and 23 (c) (6)(a) and (10), the Court does find that petitioner established its prima facie case. Petitioner clearly established that the camera was their property and that the camera was stolen and destroyed. Petitioner also established that the camera was found within respondents' apartment.

Petitioner established that respondents' breached paragraph 13 in that the tampering and unlawful possession of the camera within the apartment constitutes use of the unit for unlawful purposes and engaging in or permitting unlawful activities in the unit and in the common area. It is undisputed that respondent, Mr. Perez tampered with the camera when he broke the box which contained the camera. It is also undisputed that Mr. Perez's friend, Mr. Devalle stole the camera. Further, Mr. Perez admitted that he subsequently took the camera from Mr. Devalle and held it in

his room. The tampering with and unlawful possession of the camera by Mr. Perez constitutes unlawful activity as defined by New York Penal Law §145.05 (2) Criminal Mischief in the Fourth Degree, §145.00 (1) Criminal Mischief in the Third Degree and §165.40 Criminal Possession of Stolen Property in the Fifth Degree. Further, respondents' permitted the unlawful activity because Mr. Perez was aware that his friend, Mr. Devalle took the camera and could have called the police to report the crime but chose to hold the camera in his room instead. Also, Ms. Pagan offered no testimony that she was unaware that the camera had been stolen and that her son had it in his possession. In fact, Mr. Perez testified that he and his mother both have a key to his room which establishes that she had access to the room where the camera was found. A blanket statement that she was unaware is insufficient to rebut the evidence of the criminal activity committed within the subject premises.

As the Court has determined that the tampering and unlawful possession of the camera constitutes criminal activity, the next issue for the Court to address is whether the tampering and unlawful possession of the camera is such that threatens the health, safety, or right to peaceful enjoyment of the premises, in violation of paragraph 23 (c) (6) (a).

Respondents' argue that the tampering and unlawful possession of the camera is similar to that of the graffiti addressed in Sumet I Assoc. v. Irizarry, 33 Misc.3d 51, 933 N.Y.S.2d 799 (App. Term 2nd Dept., 2011). In Sumet I. Assoc. v. Irizarry, the Court held that if criminal conduct, for which the landlord seeks to terminate the tenancy, is not drug related, the landlord must establish that the criminal conduct is of a nature that threatens the health, safety, or peaceful enjoyment of the premises and found that the graffiti incident was not a threat to the health safety or right to peaceful enjoyment of the premises as it was an isolated incident and the landlord had

failed to demonstrate how the graffiti was a threat to the health, safety or peaceful enjoyment of the premises.

The case at bar is distinguishable in that the petitioner did in fact establish that the tampering with and unlawful possession of the camera is a threat to the safety and peaceful enjoyment of the premises. Security cameras are generally installed and used for the purpose of monitoring a specific area but more importantly, are used to prevent and investigate criminal activity. Having security cameras are an attempt to further the safety and right to peaceful enjoyment of the premises. Thus, the Court finds that respondent, Perez's, action of tampering with the camera and furthering the criminal activity of Mr. Devalle by harboring the camera in his room, instead of reporting the crime, is a threat to the safety and right to peaceful enjoyment of the premises by all others within the subject building. To find otherwise would contradict the very purpose of having the security cameras in the first place. As such, the Court finds that petitioner has established that the tampering and unlawful possession of the camera is criminal activity that threatens the safety and right to peaceful enjoyment of the premises.

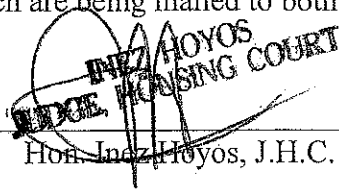
Respondents' argue that Mr. Perez's tampering and unlawful possession of the camera does not give rise to a substantial violation of respondents' lease. Respondents' argue that this amounts only to a minor violation as Section 8-13(4) of the HUD Model Lease states damaging, destroying or defacing the unit or property are examples of minor violations. However, the HUD Model Lease also explicitly states that the examples listed were only examples of minor violations and not a conclusive list. Further, even assuming the tampering with the camera only constitutes a minor violation, respondents' fail to demonstrate how the tampering coupled with the unlawful possession of the camera does not constitute a substantial violation. Thus, the Court

finds that the tampering and unlawful possession of the camera does constitute a substantial violation of the lease.

Based on the documentary evidence and the testimony adduced at trial, the Court awards the petitioner a final judgment of possession against all parties. Warrant is to issue forthwith and the execution is stayed until December 31, 2012 for respondents to vacate. Upon default, warrant is to execute upon service of a marshal's notice.

This is the decision and order of this Court, copies of which are being mailed to both parties.

Dated: November 14, 2012
Brooklyn, NY


INEZ HOYOS
JUDGE, HOUSING COURT
Hon. Inez Hoyos, J.H.C.