

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

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1150 BRIGHTON CO.,

Petitioner,

Index No. L&T 100123/2010

Mot. Seq. No. 1

-against-

DECISION/ORDER

MYRA ROTHENBERG
STEVEN STECKMAN
DIANA STECKMAN
"JOHN DOE" and/or "JANE DOE",

Respondents.

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HON. LAURIE L. LAU, J.H.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of petitioner's motion for summary judgment

Papers	Numbered
Notice of motion & Affidavits Annexed	<u>1</u>
Order to Show Cause and Affidavits Annexed	_____
Notice of Cross-motion and Affidavits Annexed	_____
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Exhibits	_____
Other	_____

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

After the service of a Notice to Tenant of Non-Renewal of Lease, Termination of

Tenancy and Landlord's Intention to Recover Possession dated July 2, 2010 (the "Golub Notice"), petitioner commenced this summary proceeding seeking to recover possession of Apartment 6A (the "Apartment"), in the building located at 1150-1170 Brighton Avenue, in Brooklyn (the "Building"), on the grounds that respondent Myra Rothenberg ("Myra") failed to occupy the Apartment as her primary residence. Respondents interposed a written answer that included defenses of succession rights asserted on behalf of Steven Steckman ("Steven"), laches, equitable estoppel, acceptance of rent so as to vitiate the Golub Notice, and the insufficiency of the Golub Notice because its signer is not known to respondents.

The proceeding first appeared on the court's calendar on November 19, 2010, when it was marked off the court's calendar pending the completion of discovery. Petitioner now brings the instant motion for summary judgment, asserting that no triable issues of fact exist. Respondent opposes the motion, asserting that the claim of succession rights has been asserted sufficiently and cannot be determined without findings of fact so as to preclude summary judgment, and that their defense of waiver similarly raises questions of fact that cannot be resolved in the context of a motion for summary judgment.

Summary judgment is the procedural equivalent of a trial (*S. J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]), and is warranted only when the proponent makes an un rebutted prima facie showing of entitlement to judgment as a matter of law (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851 [1985]). If there is any doubt as to whether a triable issue of

material fact exists, summary judgment should not be granted (*See Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]).

The Rent Stabilization Code (the "RSC") provides for succession by a family member:

who has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years, or where such person is a "senior citizen," or a "disabled person" as defined in paragraph (4) of this subdivision, for a period of no less than one year, immediately prior to the permanent vacating of the housing accommodation by the tenant, or from the inception of the tenancy or commencement of the relationship, if for less than such periods, shall be entitled to be named as a tenant on the renewal lease.

(RSC §2523.5[b][1]). Petitioner asserts that although Myra ceased to permanently reside in the Apartment as her primary residence, she continued to have ties to it sufficient that she cannot be said to have permanently vacated the Apartment. Petitioner asserts that Myra's status as someone neither primarily residing in the Apartment nor having permanently vacated it precludes Steven from asserting succession rights.

Petitioner attached as exhibits to the motion the deed to the Building; the multiple dwelling registration form; registrations with the New York State Division of Housing and Community Renewal (the "DHCR"); the initial lease between Martin Rothenberg ("Martin") and Myra, as tenants, and Rose Realty Co., as landlord; the most recent renewal lease, executed by

Myra on September 20, 2008, and on behalf of petitioner on October 23, 2008; Myra's Florida driver's license, issued in 2009 and listing a Florida address for respondent; Myra's deed for a condominium in Florida; 2007, 2008 and 2009 tax federal tax returns, all showing a Florida address for respondent; proposed statements of Florida property taxes for 2009 showing a homestead exemption for Myra; Chase bank statements addressed to Myra in Florida; American Express statements addressed to Myra in Florida; and electrical and telephone bills addressed to Myra in Florida.

Myra, when asked for her address during her examination before trial, gave the address of her condominium in Florida. She testified that she began occupying the condominium in Florida as a "snowbird," traveling there during winter months, but at the time of her examination before trial, spent most of each year there. Both Steven and Diane Steckman ("Diane") testified during their examinations before trial Myra had not been in the Apartment at all during the period from 2008 to 2010.

Paragraph 10a of the petition asserts that:

The within premises are not being used by the respondent as her primary residence and because of same the landlord is entitled to possession of said premises and is not required to renew tenants' lease or tenancy.

Respondent's answer, addressing that paragraph of the petition denies the allegations "to the extent that petitioner alleges that the landlord is not required to renew tenant's lease or tenancy."

Thus, the answer does not controvert the allegation that Myra does not occupy the Apartment as her primary residence, and allegations not denied are deemed admitted (CPLR 3018[a]). The documentary and testimonial evidence presented by petitioner establish a prima facie case for nonprimary residence. The remaining issue is whether respondent has raised a triable issue of fact as to one of the defenses sufficient to defeat summary judgment.

There is uncontroverted evidence that, even after Myra made the transition from "snowbird" to Florida resident, she continued to execute renewal leases, and continued to submit rent payments drawn on her own accounts. She conceded that she spent more of the year in Florida than in New York, and both Steven and Diane testified that she had not been at the Apartment in 2008, 2009 or 2010. The only documentary evidence Steven attaches in opposition to petitioner's summary judgment motion is various renewal leases, and notices filed by Myra informing the landlord that Steven resided in the Apartment.

Respondent's first argument in opposition to summary judgment is that an occupant can establish a claim for succession rights by demonstrating occupancy from the inception of the tenancy prior to the voluntary vacatur of the tenant. The language employed in the RSC, however is unambiguous and permits succession for a family member who "has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years ... immediately prior to the permanent vacating of the housing accommodation by the tenant, or from the inception of the tenancy or commencement of the

relationship, *if for less than such periods,* " (RSC §2523.5[b][1][emphasis supplied]). The provisions allowing for occupancy from the inception of the tenancy or commencement of the relationship unambiguously apply if the tenancy in question or the relationship in question are of less than two years' duration. In support of this proposition, respondent relies on *Festa v Leshen*, 145 AD2d 49 [1st Dept 1989]). Such reliance, however is misplaced. The RSC has been amended since that decision was rendered; it previously permitted succession for "any member of [the] tenant's family ... who has resided in the housing accommodation as a primary resident from the inception of the tenancy or commencement of the relationship," (former RSC §2523.5). With the amendment of the statute cases interpreting a prior iteration of the section are of little utility.

Steven also claims succession rights based on his assertion that he was listed annually on forms promulgated by the DHCR. Those forms, however, are notification to the DHCR of people living in the apartment who may have succession rights, and note that "the tenant may point to the submission of this form to show that this information was provided to the owner. This may provide some evidence of the family member's succession rights; however, an owner may later challenge the statements made on this form." Here, however, petitioner has not contested the duration or continuity of Steven's occupancy of the Apartment. Rather, petitioner asserts that Myra's failure to utilize the Apartment as her primary residence in the years precludes Steven's succession claims. Since respondent has erred in the assertion that occupancy from the inception of the tenancy, by itself, suffices to confer succession rights, this argument

offers no defense to petitioner's summary judgment motion.

The salient case law establishes that Myra's failure to occupy the Apartment as her primary residence and Steven's concomitant inability to prove that they both utilized the Apartment as their primary residence precludes Steven from asserting flowing from Myra (*Metropolitan Life Ins. Co. v Butler*, 2002 NY Slip Op 50014[u][App Term 1st Dept]). Execution of renewal leases, as was done by Myra, has been found inconsistent with permanent vacatur (*See Clinton Realty Assoc., LLC v De Los Angeles*, 29 Misc 3d 142[a][App Term 1st Dept]). The first point at which Myra can be held to have permanently vacated the Apartment would be the expiration date of the last lease she executed (*Third Lenox Terrace v Edwards*, 23 Misc 3d 126[a] [App Term 1st Dept 2009]). Therefore, Steven fails to raise any question of fact as to succession to Myra's tenancy.

Alternatively, Steven argues that he is a successor to the tenancy of Martin, his stepfather, who died in 1995. Steven, however, offers no evidence that he ever asserted that succession claim prior to the commencement of this proceeding, let alone that he asserted it at the time. In fact the only assertion regarding a request that Steven be added to the lease is that Myra asked to have Steven added to the lease.

The first lease for the Apartment listed both Myra and Martin as tenants, and upon his death, her tenancy continued. Nothing in the Rent Stabilization Law or Code provides

for a succession claim to be asserted when one tenant permanently vacates but another remains in an apartment. Allowing an occupant to assert succession rights based upon the vacatur of one, but not all tenants would be inconsistent with provisions of the RSC addressing the adjustment of rents upon vacancy or succession. The RSC, addressing increases at the time of a second succession, characterizes the first succession as a situation:

where all tenants named in a lease have permanently vacated a housing accommodation, and a primary-resident family member of such tenant or tenants (first successor) is entitled to and executes a renewal lease for the housing accommodation, as provided in section 2523.5 of this Title.

(RSC §2522.8[b]). Thus, the RSC specifically contemplates succession upon the permanent vacatur of all tenants, rather than the permanent vacatur of one tenant when a housing accommodation has multiple tenants. As a matter of law, Steven could not assert a claim of succession to Martin's tenancy while Myra's tenancy continued.

The remaining claims asserted in opposition to summary judgment are a defense that petitioner or its predecessor accepted Steven and Diane as tenants, and that claims of waiver raise issues of fact that preclude summary judgment. In essence, the assertion is that petitioner's predecessor, when informed of his death, was asked by Myra to add Steven to the lease and was told it was unnecessary because he and Diane were considered "secondary tenants." Respondents represent that Steven relied on that statement and argue that by making it

petitioner's predecessor accepted Steven as a tenant. Respondent's further argue that waiver, whether the issue is waiver of succession rights to Martin's tenancy by Steven, or waiver of petitioner's right to dispute Steven's tenancy, is a question of fact precluding summary judgment.

There is no dispute that petitioner did not add Steven to any lease, or list him as a tenant; and Steven acknowledges that the only time he ever attempted to send a rent payment in his own name, it was rejected. The lease executed by Martin and Myra contains, at paragraph 22, a "no waiver" clause which requires that there be a writing to waive any provision of the lease. The lease also provides that:

any executory agreement hereafter made shall be ineffective to change, modify, discharge or effect an abandonment of [the lease] in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment is sought.

Respondents present no evidence of a writing by petitioner or by petitioner's predecessor-in-interest consistent with petitioner's acceptance of Steven as a tenant. In fact, it is undisputed that the only time Steven attempted to pay rent in his own name, petitioner rejected the payment and returned it.

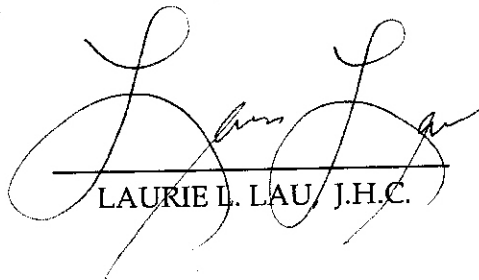
The argument that petitioner's predecessor in interest used the term "secondary tenant" to describe Steven's occupancy of the Apartment, and that Steven relied on that

statement is not of legal consequence. "Secondary tenant", however, is not a term that appears anywhere in the Rent Stabilization Law or the RSC, and there is no relevant precedent defining or applying the term. Respondents also argue that petitioner knew or should have known that Myra ceased to occupy the apartment as her primary residence. That assertion, however, is squarely addressed by the "no waiver" provisions of the lease, the authenticity and validity of which is not in question.

Petitioner has established its prima facie case, and respondent has failed to raise any issue of fact that would preclude summary judgment. Petitioner is therefore awarded a final judgment of possession, with issuance of the warrant stayed 10 days.

This is the decision and order of the court.

Dated: Brooklyn, New York
December 8, 2011



LAURIE L. LAU, J.H.C.

Petitioner's attorney:

Rose & Rose
291 Broadway, 13th floor
New York, New York 10007
(212) 349-3366

Respondent's attorney:

Michael J. Good, Esq.
26 Court Street, Suite 1901
Brooklyn, New York 11242
(718) 852-4612