CE Eastern Parkway LLC v. Martin, L&T 77223/11

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Judge Phyllis K. Saxe

Decided: April 26, 2012

DECISION/ORDER

Background

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The issue that I must decide in this summary holdover proceeding is whether or not the daughter of a deceased tenant can blow life into an otherwise moribund tenancy. To properly answer this question we must examine the laws of succession rights, waiver, estoppel and laches.

Petitioner — landlord, C. E. Eastern Parkway LLC (CE), brings this licensee holdover proceeding against Yanthy Martin to recover possession of apartment D16 in 255 Eastern

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Parkway, Brooklyn, New York. Petitioner served a notice to quit and commenced this proceeding alleging that Yanthy Martin's license to occupy the apartment was derived from her deceased mother's (Pearl Martin) tenancy and terminated when Pearl Martin died.

Yanthy Martin, interposed a verified answer with a general denial and five affirmative defenses including: lack of personal jurisdiction, succession rights, estoppel and laches. Not unexpectedly, respondent wants to secure succession rights to this rent-stabilized apartment. Succession rights are commonly advanced by family members when the tenant of record dies and the remaining occupants wish to seek tenancy in their own names (Rent Stabilization Code (RSC) §2523.5(b)). What makes this case different from the standard succession rights scenario, is that tenant from whom Yanthy is seeking succession rights died in 1978, overv thirty three (33) years ago! Since 1978, Pearl's daughter, Yanthy the respondent herein and proposed successor to her mother's

tenancy paid rent in Pearl Martin's name, executed 10 renewal leases as Pearl Martin, and signed her mother's name on work orders.[1] In fact, it was by happenstance this charade was uncovered when the parties r ecently appeared in court on a non-payment proceeding brought by petitioner against Pearl Martin. In that case, Yanthy Martin submitted an answer in Pearl Martin's name, claimed to be Pearl Martin, and check-in as Pearl Martin. However, she eventually confessed to landlord's counsel that she was actually Yanthy, Pearl's daughter, and that Pearl died in 1978. Petitioner's counsel promptly withdrew the nonpayment proceeding and commenced this licensee holdover proceeding.

The Motion Before the Court

Petitioner now brings this omnibus motion seeking:

a) to strike all five affirmative defenses;

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b) to compel respondent to comply with petitioner's document demand, and directing respondent to appear for a deposition pursuant to CPLR §408 and §3101; and

c) an order for use and occupancy.

The First Affirmative Defense

The motion to strike the first affirmative defense alleging improper service is granted. The first defense is unsupported by sufficient facts to create an issue of fact and warrant a traverse hearing. The respondent asserts that the notice of petition and petition were not affixed to the door. Respondent states, "I deny that the petition was affixed to my door…he did not affix the…to my door and I was not properly served".

Petitioner points to the affidavit of service from the process server which is prima facie proof of service. When supported by an affidavit of service from a process server a traverse hearing is warranted only if the respondent can offer specific probative facts pointing to a failure to properly serve the petition and notice of petition — unsubstantiated and conclusory denials of receipt are insufficient (Deutsche Bank National Trust Co. v. Campbell, 26 Misc. 3d 1206(A), 906 NYS 2d 799 (Sup. Ct. Kings County 2009).

Yanthy Martin does not come forward with probative facts to support her defense. It is well settled that a mere denial of service or claim that service was improper will not suffice. She fails to describe the details to support her claim that the papers were not properly affixed and

therefore fails to create an issue of fact sufficient to justify a hearing. The cases cited by respondent are unavailing. The first affirmative defense is therefore stricken.

The Second Affirmative Defense Seeking Succession Rights to this Rent-Stabilized

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Apartment is Stricken

The second affirmative defense attempts to establish succession rights by stating that Yanthy Martin is Pearl Martin's daughter, thus they moved into the subject apartment together, lived together until Pearl died, and that therefore, Yanthy is entitled to succeed to the tenancy of Pearl Martin.

This court is mindful that a motion to strike an affirmative defense tests the legal sufficiency of that defense and the pleading should be afforded a liberal construction and given the benefit of every possible inference. However, at the end of the day the affirmative defense under scrutiny must state a legally cognizable claim if it does not, it should be stricken.

Accordingly, central to deciding this motion is the question: when Pearl died, as the tenant of record, did family members have a legal right to demand that a landlord to give them a rent stabilized lease? The answer is no. The Rent Stabilization Code did not have a provision granting family members succession rights until 1987. Rent Stabilization is a creature of statute and legislative power. Since its 1987 enactment, the statute provides in pertinent part that, "…if a rent-stabilized tenant permanently vacates, then any member of such tenant's family who has resided with that tenant (for a sufficient length of time) shall be entitled to be named as a tenant on the renewal lease."

Prior to May 1, 1987, when a tenant of record died it was up to the landlord to decide whether or not to offer a new lease to the occupants of the apartment. The controlling authority on this point is Sullivan v. Brevard Association, 66 NY 2d. 489 (1985). In Sullivan, the Court of Appeals refused to require a landlord to grant tenancy rights to a sister who was living with the tenant of record. The Court of Appeals ruled, "a landlord need offer a renewal lease only to a tenant of record, and it is not obligated to offer a renewal lease to a relative of the tenant who

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occupies the apartment with the tenant during a portion of the lease term". The court explained that the rent control laws offered tenants greater rights then the rent stabilization laws, which were not interpreted to require landlords to give family members leases when the tenant of record vacated. Sullivan made it clear that the Rent Stabilization Code would have to be amended before lease renewals had to be offered to immediate family members occupying the apartment.

Respondent's counsel does not advance any case law that supports Yanthy's claim to succession rights prior to 1987. If respondent had wanted to be the tenant of record and replace her mother, she did not advise the landlord that her mother died and request a lease in her name. She obviously failed to take any affirmative action for 33 years. In this regard we cannot overlook the DHCR record that indicates that when in 1988 the landlord offered her a proposed renewal lease it was returned and signed Pearl Martin. Accordingly, the second affirmative defense is stircken.

The Third Affirmative Defense Seeks Succession Rights from Respondent's Sister Yva

The third affirmative defense is stricken. It is impermissible for Yanthy Martin to claim that she is entitled to succession rights from her sister, Yva, who it is alleged was never the tenant of record and who, can only be considered the tenant of record if she had prevailed in a prior succession rights claim from Pearl Martin. If Yanthy Martin cannot succeed from her mother's tenancy, then she is not entitled to seek succession from her sister Yva whose tenancy status was never acknowledged by landlord and registered with the DHCR. For the reasons cited above, the third affirmative defense must also fail. Accordingly, the third affirmative defense is stricken.

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The Fourth Affirmative Defense Survives this Motion

The claim of waiver/estoppel is alleged in the fourth affirmative defense. This is respondent's only viable defense. Respondent contends the prior landlords "were fully aware of my tenancy in the subject premises and consented to it…waived any rights they may have had to commence this proceeding…Moreover, the petitioner may also have been aware of my tenancy…."

In support, respondent's counsel submits letters from neighbors who claim to have resided in 255 Eastern Parkway, since on or before 1978. The affidavits all mirror each other, in that each affiant claims that they were neighbors with the Martins and they knew Pearl, Yanthy and Yva since 1978. Furthermore, each affiant swore that they saw Yanthy on a regular basis, for at least 180 days of each year. Unfortunately, not one of these affidavits state that either the landlord or one of its agents knew or should have known that Pearl Martin had died and her daughter who was claiming to be Pearl Martin was not.

Respondent's attorney advances these affidavits along with his own affirmation to supplement this vague affirmative defense and defeat its dismissal. Respondent does not even remember when they moved into the apartment. Respondent's attorney, engages in a lengthy diatribe concerning the historical backdrop of Brooklyn real estate including his complaint that if the landlord intended to evict, it should have happened in the 1980's or 1990's when rents were low and before it became so difficult to get a rent-stabilized apartment.

The burden of proving an affirmative defense rests with the proponent of that defense. Respondent does not dispute landlord's agent, who submitted affidavits and rent documents, including every renewal lease that was signed by "Pearl Martin" and all of the documents here (dated ten or twenty years after Pearl's death) and signed "Pearl Martin". The DHCR statement

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lists either "Pearl Martin" or just "Martin" as the tenant from 1988 to 2010. And, of course, Yanthy answered the 2011 non-payment petition as respondent "Pearl Martin".

In order for respondent to defeat this holdover proceeding she must establish that after Pearl Martin died, the landlord knew that she was not Pearl Martin, but nevertheless accepted rent from Yanthy Martin and intended to treat her as a tenant. While cases decline to permit a tenant to gain rent stabilization status from committing fraud this is a pleading motion and not a motion for summary judgment. As such, the claim of waiver survives but the respondent must replead the affirmative defense within 30 days following completion of discovery which should be completed before the next court date of July 20, 2012.

The Fifth Affirmative Defense of Laches is Stricken

Respondent's fifth affirmative defense is stricken as a matter of law because laches is not a bar to the commencement of this proceeding. Dwyer v. Mazzola, 171 A.D.2d 726, 567 N.Y.S 2d 281 (2nd Dept. 1991), set forth four requirements that must be met in order to assert a laches defense and here respondent fails to set forth any facts substantiating her affirmative defense based upon laches, which meet this requirements. First, respondent fails to set forth any facts describing specific conduct of petitioner (or its predecessors). Second, respondent fails to set forth any facts describing any delay. Third, respondent fails to set forth any facts describing lack of knowledge or notice. Fourth, and most critically, respondent fails to set forth any facts demonstrating prejudice or injury. Most importantly, the petitioner acted expeditiously to commence this holdover proceeding after learning of Pearl's death. As a result, respondent's fifth affirmative defense is stricken.

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Discovery

Petitioner's motion to seek discovery is granted. In the landmark case, New York University v. Farkas, 121 Misc.2d 643 (1983) the court held that a party seeking disclosure must establish "ample need," and set forth the following factors a court should consider when determining whether to grant discovery in a summary proceeding:

(1) whether, the petitioner asserted facts to establish a valid claim;

(2) whether there is a need to determine information directly related to the cause of action;

(3) whether the requested disclosure is carefully tailored and is likely to clarify the disputed facts;

(4) whether prejudice will result from the granting of an application for disclosure;

(5) whether the prejudice can be diminished or alleviated by an order fashioned by the court for this purpose; and

(6) whether the court, in its supervisory role can structure discovery so that pro se tenants, in particular, will be protected and not adversely affected by a landlord's discovery requests.

Application of the standards set forth in New York University v. Farkas, to the case at bar compels the court to conclude the disclosure sought is warranted. Petitioner has established that respondent is in possession or control of the sought after documents, and therefore the requested discovery is needed. The court has carefully evaluated petitioner's proposed notice for discovery and inspection of documents. Respondent must provide all documents requested except with regard to Yva Martin within 45 days of notice of entry of this Decision and Order. Yanthy Martin shall appear for an oral deposition on June 27, 2012 at 10AM at the law office of petitioner's

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counsel.

To the extent that respondent asserts a fifth amendment right against self-incrimination to avoid testifying, it is denied. In 54 West 16th Apartment Corp. v. Dawson, 179 Misc.2d 264, (Civ. Ct. NY 1988) the court has held that requiring a defendant to choose between preserving his 5th Amendment privilege and losing a civil suit was not unconstitutional. Respondent can always assert her 5th amendment right in response to specified question, but she cannot use it to avoid discovery altogether. If respondent does not submit to a deposition the petitioner may seek appropriate relief.

Use and Occupancy

The court awards petitioner use and occupancy from the date of the petition in the amount of $9,064.33 (from June 2011 through April 2012). $9,064.33 shall be paid in 3 installments. $3,000 on May 10, 2012 along with May's use and occupancy of $824.02; $3,000 on June 10, 2012 along with June use and occupancy and $3,064.33 on July 2012 along with July use and occupancy of $824.03. Ongoing use and occupancy continuing from August 10, 2012 shall be paid pendente lite on the 10th of each month after the last arrears payment in August at $824.03 per month.

Accordingly, this constitutes the decision and order of this court.

1. For the purposes of disposition of this motion, it is irrelevant precisely which documents respondent signed as Pearl Martin.

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