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### Abacus Clinton LLC v. Ramos

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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: HOUSING PART N

----- X  
ABACUS CLINTON LLC,

Petitioner,

Index No. 57569/2017

- against -

ISIDRO RAMOS,

Respondent.

**DECISION/ORDER**

----- X  
Present: Hon. Jack Stoller  
Judge, Housing Court

Abacus Clinton LLC, the petitioner in this proceeding (“Petitioner”), commenced this holdover proceeding against Isidro Ramos, the respondent in this proceeding (“Respondent”), seeking possession of 544 West 49<sup>th</sup> Street, Apt. 3, New York, New York (“the subject premises”) on the basis that Respondent is a licensee whose license has been terminated. Respondent interposed an answer denying that he is a licensee. The Court held a trial of this matter on January 26, 2018 and March 12, 2018 and adjourned the matter for submissions to April 10, 2018.

The Court finds that neither party disputes the following material facts: the prior owner of the building in which the subject premises is located (“the Building”), who was also Petitioner’s predecessor-in-interest (“the prior owner”), executed a power of attorney appointing his paramour (“the prior owner’s paramour”) as his attorney-in-fact. The prior owner’s paramour then purported to convey the Building to her son (“the prior owner’s paramour’s son”) for no consideration by a purported deed dated May 8, 2008. The prior owner’s paramour’s son proceeded to lease various apartments in the Building to various people, including leasing the

subject premises to Respondent.

By an order dated August 28, 2014, the Surrogate's Court declared the deed of the Building to the prior owner's paramour's son to be a nullity. The public administrator, acting on behalf of the prior owner's estate, then conveyed the Building to Petitioner by a deed dated March 25, 2016. Respondent had continued to remain in possession of the subject premises through that time period and through the date of trial.

After Petitioner took title to the Building, Petitioner registered the subject premises with the New York State Division of Housing and Community Renewal ("DHCR") pursuant to 9 N.Y.C.R.R. §2528.3, registering Respondent as the rent-stabilized tenant of record for 2015 and 2016, both by a filing on April 11, 2016, and again registering Respondent as the rent-stabilized tenant of record for 2017 by a filing on May 4, 2017.<sup>1</sup> Petitioner billed Respondent for rent on a monthly basis from April of 2016 through October of 2017 and collected rent from Respondent on April 25, 2016 and May 9, 2016 in the amount that Petitioner billed.

Multiple tenants of the Building, not including Respondent, had commenced an action against the public administrator pursuant to New York City Civil Court Act §110(c) ("the HP Action") on February 5, 2016, about one-and-a-half months before Petitioner took title to the Building on March 25, 2016. After Petitioner took title to the Building, the HP Action continued, and by a stipulation in the HP Action dated April 14, 2016, Petitioner stipulated to be substituted as the respondent therein and stipulated to add Respondent as one of the petitioners in

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<sup>1</sup> The petition in this proceeding was verified on March 3, 2017.

the HP Action, identifying Respondent in part by the apartment number of the subject premises.<sup>2</sup>

Petitioner offered Respondent a rent-stabilized renewal lease for the subject premises in Respondent's name pursuant to 9 N.Y.C.R.R. §2523.5(a) that would have commenced on September 1, 2016, by an envelope postmarked August 25, 2016.

Petitioner commenced a nonpayment summary proceeding against Respondent pursuant to RPAPL §711(2), by a notice of petition and petition captioned at Abacus Clinton LLC v. Ramos, Index # 077119/2016 (Civ. Ct. N.Y. Co.). The petition, verified September 22, 2016, pled that Respondent is the rent-stabilized tenant of the subject premises and was predicated on a rent demand pursuant to RPAPL §711(2) dated September 12, 2016 and served on September 14, 2016, demanding that Respondent pay rent by a certain date or face a summary proceeding. Petitioner discontinued the nonpayment proceeding by stipulation on January 31, 2017.

Assuming *arguendo* that the prior owner's paramour's son had no authority to lease the subject premises to Respondent, Petitioner has an argument that Respondent is a licensee rather than a tenant. Respondent argues that he is not a licensee. In an evaluation of this dispute, the Court considers six undisputed facts adduced at trial, all of which Petitioner – not any predecessor-in-interest of Petitioner, but Petitioner itself – engaged in:

Petitioner billed Respondent for rent for the subject premises in Respondent's name after Petitioner took title to the Building. Demanding payment of rent can be a factor in finding the establishment of a landlord/tenant relationship. Gagnier v. Alexis, 11 Misc.3d 1061(A)(Dist. Ct. Nassau Co. 2006);

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<sup>2</sup> After the substitution and amendment of the caption referred above, the caption of the HP Action was Avila, et al. v. Abacus Clinton LLC and Wilder Realty LLC, Index # HP 6035/2016 (Civ. Ct. N.Y. Co.).

After Petitioner billed Respondent, Respondent tendered money to Petitioner by checks with Respondent's name on them and with memos designating the payments for "rent." Acceptance of rent in and of itself does not necessarily create a landlord/tenant relationship, 171 West Fourth LLC v. Fennel, N.Y.L.J., Feb. 24, 1999 (App. Term 1<sup>st</sup> Dept.), *leave to appeal denied*, 1999 N.Y. App. Div. LEXIS 8200 (1<sup>st</sup> Dept. 1999), and if Petitioner's acceptance of Respondent's tenders were all that were in the record, Petitioner would have a strong argument. However, acceptance of rent for an occupant constitutes at least one indicium that a landlord accepted an occupant as a tenant. Johnny v. Tolbert, 8 Misc.3d 130(A)(App. Term 2<sup>nd</sup> Dept. 2005);

Petitioner stipulated to add Respondent as a petitioner in the HP Action. Settling an HP action with an occupant can also indicate a landlord's acceptance of an occupant as a tenant. Pomeroy Co. v. Thompson, 2000 N.Y. Misc. LEXIS 687 at \*1-2 (App. Term 1<sup>st</sup> Dept. 2000). Cf. Munro v. Prescott, N.Y.L.J., July 9, 2002 at 19:1 (Civ. Ct. N.Y. Co.)(Gonzalez, J.)(mere occupancy of a residential premises does not establish standing to bring an HP action);

Petitioner offered Respondent a rent-stabilized lease renewal for the subject premises in his name, an act that can also evince an intent to establish a landlord/tenant relationship. Cf. Related Broadway Dev. LLC v. Malo, 58 Misc.3d 154(A)(App. Term 1<sup>st</sup> Dept. 2018)(a landlord's offer and counter-execution of a renewal lease re-establishes a landlord/tenant relationship with a tenant after the landlord had stipulated to a final judgment against that tenant);

Petitioner commenced a nonpayment proceeding against Respondent in his name pleading, *inter alia*, that Respondent is a rent-stabilized tenant of the subject premises. A cause

of action for nonpayment of rent sounds in contract, Solow v. Wellner, 86 N.Y.2d 582, 589-90 (1995), Rutland Rd. Assoc., L.P. v. Grier, 2017 N.Y. Misc. LEXIS 1025 (App. Term 2<sup>nd</sup>, 11<sup>th</sup>, and 13<sup>th</sup> Dists. 2017), Underhill Ave. Realty, LLC v. Ramos, 49 Misc.3d 155(A)(App. Term 2<sup>nd</sup> Dept. 2015), Fasal v. La Villa, 2 Misc.3d 137(A) (App. Term 1<sup>st</sup> Dept. 2004), so the initiation of a nonpayment proceeding necessitates a sworn allegation that Respondent had been a tenant of the subject premises, Frost Equities Co., LLC v. N.Y. Brasserie Ltd., 3 Misc.3d 1004(A)(Civ. Ct. N.Y. Co. 2004), Harris v. Timecraft Indus., 132 Misc.2d 386, 389 (Civ. Ct. N.Y. Co. 1986), and moreover requires a number of affirmative steps to be taken. See Northeast Bronx Hillside Corp. v. Deas, N.Y.L.J., July 15, 1992, at 24:3 (Civ. Ct. Bronx Co.).

As a general proposition, estoppel and waiver do not create a tenancy. Riverside Holdings v. Murray, 2002 N.Y. Slip Op. 50176(U)(App. Term 1<sup>st</sup> Dept.). However, a landlord's affirmative recognition of an occupant as a tenant can give rise to a landlord/tenant relationship. Equity Properties Corp. v. Joy, 48 A.D.2d 630 (1<sup>st</sup> Dept. 1975), *aff'd*, 39 N.Y.2d 762 (1976).<sup>3</sup> Petitioner's witness testified that the variety of actions that Petitioner took, catalogued above, were mistakes. If Petitioner only accepted rent as a mistake, or only made one lease offer by mistake, Petitioner could potentially prove that Respondent's status did not rise above that of a licensee. See, e.g., FS 41-45 Tiemann Place LLC v. Estrella, 38 Misc.3d 29 (App. Term 1<sup>st</sup> Dept. 2012). However, a conclusory, unsupported assertion that Petitioner made a mistake does not

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<sup>3</sup> This authority demonstrates that Petitioner's argument that estoppel cannot create a rent regulatory status is a non sequitur. The question of whether an occupant of an apartment is a licensee or something else is a distinct question from the rent regulatory status of a tenant. Just because an occupant is a tenant — even uncontroversially so — that tenant is not necessarily subject to the Rent Stabilization Law. See, e.g., 546 W. 156<sup>th</sup> St. HDFC v. Smalls, 43 A.D.3d 7 (1<sup>st</sup> Dept. 2007).

overcome Petitioner's litany of serial, affirmative, unforced acts recognizing Respondent as a tenant of the subject premises. Petitioner billed Respondent for rent, Petitioner accepted payment from Respondent designated as rent, Petitioner registered Respondent as a tenant with DHCR, Petitioner offered Respondent a renewal lease, Petitioner stipulated that Respondent was a proper petitioner in an HP Action, and Petitioner commenced a nonpayment proceeding against Respondent. The totality of these actions demonstrate that Petitioner ratified Respondent as a tenant of the subject premises.

Petitioner argues that Respondents did not plead that Petitioner created a tenancy with Respondent by waiver. However, Respondent denied the allegation of the petition that Respondent is a licensee, putting Petitioner on notice that it had to affirmatively prove that Respondent was a licensee and putting Petitioner on notice that Respondent would be introducing evidence to prove that Respondent was not a licensee which, logically, could only mean that Respondent would be seeking to prove that he is a tenant.

Accordingly, the Court dismisses this proceeding after trial as the preponderance of evidence adduced at trial does not support the pleading that Respondent is a licensee.

The parties are directed to pick up their exhibits within thirty days or they will either be sent to the parties or destroyed at the Court's discretion in compliance with DRP-185.

This constitutes the decision and order of this Court.

Dated: New York, New York  
April 24, 2018



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HON. JACK STOLLER  
J.H.C.