2020-07-07

Gloreen Realty LLC v. Wright

CIVIL COURT OF THE CITY OF NEW YORK

COUNTY OF NEW YORK, HOUSING PART F

----------X

GLOREEN REALTY LLC,

Petitioner, Landlord,

-against- **Index No. L&T 55619/18**

SCOTT WRIGHT **POST-HEARING**

Respondent, Tenant. **DECISION AND ORDER**

----------X

FRANCES A. ORTIZ, JUDGE

Petitioner, the owner of 321 West 80th St., New York, NY, commenced this holdover proceeding against Scott Wright, the rent-stabilized tenant of Apartment 8, alleging that Mr. Wright had violated a substantial obligation of his tenancy. The notice of termination alleged breach of paragraphs 7 and 12 of the written lease between the parties. Those lease paragraphs refer to objectionable conduct by a tenant. Specifically, the termination notice alleges that there is excessive cigarette odor emanating from Mr. Wright's apartment which interferes with the quiet enjoyment of other building tenants. Additionally, there is a claim that Mr. Wright engages in vulgar verbal attacks on neighbors and building personnel. After several adjournments, the court appointed a guardian ad litem for Mr. Wright. Counsel appeared on his behalf. Thereafter, on June 3, 2019, the parties entered into a stipulation settling the matter.

Pursuant to that stipulation, the matter would be marked off the court's calendar for a year and during that year respondent would refrain from engaging in certain behavior. If respondent abided by the terms of the stipulation during the one-year probationary period, the

matter would be deemed discontinued at the end of that year. Respondent would be allowed one opportunity to cure an alleged breach of the stipulation, but in the event of a second breach petitioner could restore the matter to the court's calendar for a hearing. The parties agreed that it would be petitioner's burden to prove that the breach occurred at this hearing. The respondent would preserve defenses and be allowed to introduce evidence that the breach had been cured. If petitioner proved that the breach occurred at a hearing, petitioner could seek any and all available relief.

Petitioner alleged that respondent first breached the terms of the stipulation on October 14, 2019. Pursuant to the terms of the stipulation, this breach was reported to Respondent's counsel by Notice of Default, but the alleged breach did not give rise to a hearing or any negative consequence for respondent.

After notifying respondent of a second alleged breach on October 29, 2019, petitioner moved the court to restore the matter for a hearing and asks that the court issue a final judgment of possession in favor of petitioner. Petitioner claims that the stipulation was breached when respondent's guest allegedly brandished a firearm in response to an exterminator knocking on the apartment door on October 16, 2019. The court restored the matter for a hearing via a decision dated November 22, 2019. The hearing was held on February 13 and February 21, 2020. Based upon the credible documentary and testimonial evidence, this Court makes the following findings of fact and conclusions of law.

Evidence Presented

Petitioner introduced one witness in support and introduced no documentary evidence. The witness, Radwin Rosario, testified that he was an exterminator working for a company hired

by petitioner to provide monthly pest management services. Mr. Rosario testified that he visited the subject apartment on October 16, 2019 at approximately 5:00 pm. He said that, after knocking on the door, someone answered the door, immediately shouted "No!" and slammed the apartment door. Mr. Rosario testified that the person who answered the door seemed to have something in his hand and that the object appeared to be a handgun. He described the person as a white male, approximately five-feet seven inches to five-feet nine inches tall wearing a t-shirt and shorts. The parties agree that the description given does not match the respondent, who is much taller. Mr. Rosario said he was sure that the apartment was the respondent's because respondent's apartment has a distinctive doorknob not found on other apartments in the building.

Mr. Rosario said this was the first time he had been confronted by someone with a handgun while on a service call. However, he did not notify the police when this occurred or at any time thereafter. He gave no explanation for not notifying the police. No police reports, arrest records, or other investigative reports were entered into evidence and no one from the police department testified on the petitioner's behalf. Mr. Rosario testified that he notified his employer of the incident fifteen to twenty minutes after the incident allegedly occurred, but no testimonial or documentary evidence was introduced to support this claim. No testimony was entered as to what actions Mr. Rosario's employer took after allegedly receiving the claim. No one employed by petitioner testified as to what steps they took, other than requesting this hearing, after they learned of the alleged incident.

Respondent called two witnesses to testify in his defense and introduced several photos into evidence. The first witness, Joann Wright, is the respondent's mother. She testified that she and the respondent were not present on October 16, 2019 when the incident allegedly occurred, as they had consecutive appointments with the same dentist at that time.

Respondent's second witness was Larry Esposito. Mr. Esposito testified that he has been the respondent's friend for over twenty-five years and that he was at the subject apartment when the incident allegedly occurred. He testified that he was on his cellphone speaking with his boss when the exterminator knocked on the door. According to Mr. Esposito, he answered the door with his cell phone in his hand. He stated, it was most likely the cellphone, and not a gun, that the exterminator saw. Respondent entered photos of Mr. Esposito's cellphone into evidence *(Ex. G & H)* that showed his cellphone to be completely black. Mr. Esposito also testified that the hallway leading to the subject apartment was dark on the day in question. Specifically, he testified that the main light for the hallway, located above the stairwell, was not working properly in October 2019. He also testified that, because an archway separates the respondent's front door and the light in the hallway, the doorway was darkened even when the light was working properly. Respondent entered a photograph into evidence supporting his claim that the archway blocked the sole light in the hallway from reaching his door in October 2019. Lastly, Mr. Esposito testified that a shelf inside the apartment prevented the front door from opening fully. A photograph of this shelf was introduced into evidence to support Mr. Esposito's claim. *(Ex. F).*

There was some inconsistency in Mr. Esposito's testimony regarding how he came to be in the apartment on October 16, 2019. In a signed affidavit dated November 20, 2019, Mr. Esposito said that he had keys to the apartment and let himself in. *(Esposito Aff'd ¶ 3).* On the witness stand, Mr. Esposito said that the respondent let him into the apartment. However, Mr. Esposito's testimony was consistent regarding the two main points at issue: that the respondent was not home when the exterminator came to the door and that Mr. Esposito was holding a cell

phone, and not a handgun, when he answered the door. The issue as to whether Mr. Esposito let himself into the apartment or not is at best tangential to the matter at hand.

Discussion

Evidentiary Inferences

Both parties request that the court draw negative inferences against the other party. Petitioner asks the court to draw a negative inference against the respondent because the respondent did not testify on his own behalf to rebut the testimony of the petitioner's witness. Petitioner cites *Richardson on Evidence (10th ed.* § 3-140*)* in support of its request. According to that treatise, a court may draw a negative inference against a party if "….(i) ..the uncalled witness is knowledgeable about a material issue upon which evidence is already in the case; (ii) that the witness would naturally be expected to provide non-cumulative testimony favorable to the party who has not called him; and (iii) that the witness is available to such party." *Prince, Richardson on Evidence (10th ed. § 3-140) (quoting People v Gonzalez, 68 NY2d 424, 427 (1986)) (internal quotation marks omitted.).* It's uncontested that respondent is not knowledgeable about the issue in this case, i.e. whether Mr. Esposito brandished a handgun when opening the door to the exterminator. Mr. Wright was not home when this incident occurred, and therefore would not be able to testify about what had occurred while he was away. Any testimony he gave regarding whether Mr. Esposito brandished a handgun would be trivial at best or conjecture at worst. Respondent's testimony is therefore immaterial. Accordingly, petitioner is not entitled to a negative inference.

Likewise, respondent seeks an adverse inference against petitioner. Here, respondent points out that petitioner did not introduce documentary evidence of a text message sent from the

exterminator to his employer and that petitioner did not introduce video footage of the encounter between the exterminator and Mr. Esposito. Respondent argues that because petitioner did not introduce these into evidence, the court should infer that these pieces of evidence would not have corroborated Mr. Rosario's account.

Respondent is likely confused about the applicability of an adverse inference charge. This charge relates to the spoliation of evidence or a party's failure to comply with a discovery demand. *2 Modern New York Discovery § 30:42 (2d ed.); Pegasus Aviation I, Inc. v. Varig Logistica S.A., 26 N.Y.3d 543 (2015); Horizon Inc. v. Wolkowicki, 55 A.D.3d 337 (1st Dep't 2008).* The purpose of the adverse inference charge is to preserve the discovery process. A party should not benefit by destroying or refusing to produce evidence that is the subject of a discovery demand. If a party is found to have perverted the discovery process in this manner, the court can issue specifically worded charges allowing a factfinder to find that the non-produced evidence would have benefited the party who was entitled to receive it in discovery. Respondent's contention that the charge should be used because petitioner did not present evidence at a hearing is clearly a misapplication of that rule. Petitioner may present whatever evidence it feels will help it get its desired result and cannot be penalized for not proceeding at the hearing in the way respondent feels would have been most helpful to it.

Moreover, even if the court were to adopt the test put forth by respondent for finding a negative inference, the evidence cited by respondent clearly does not pass that test. Respondent, citing *Wilkie v. N.Y.C. Health & Hosps. Corp. (274 A.D.2d 474 (2nd Dep't 2000))* among others, describes the prima facie showing he must make in order to justify the negative inference charge: (1) that respondent must show the documents actually exist, (2) that they are within petitioner's control, and (3) that there is no reasonable explanation why petitioner failed to produce them.

Though respondent introduced unrebutted evidence that there was a camera in the hallway on the date of the incident *(Ex. A, B and C)*, respondent did not show that the surveillance system produced a tape or was functioning that day. As for the text message, this evidence would have been the subject of a judicial subpoena from a third-party witness. This evidence could therefore not be claimed to be within petitioner's control. As such, the court declines to issue a negative inference charge against petitioner.

Credibility of the Witnesses

The court did not find the testimony of the petitioner's sole witness, Mr. Rosario, credible. Mr. Rosario states in his November 7, 2019 affidavit that he "saw the entire gun in the palm of the hand of the person who opened the Apartment door. This was nothing other than a gun." *(Rosario Aff'd ¶ 6).* However, Mr. Rosario's testimony on the stand belied some uncertainty about what he saw. On cross-examination he differed on what exactly he saw, saying that the person who answered seemed to have something in their hand and that it looked to him like a weapon or a firearm. In some respects, this uncertainty is understandable.

Respondent established by unrebutted evidence that the hallway where the incident occurred was dark, both because of lack of adequate light sources and because of an archway that blocked what little light there was from reaching the apartment door. *(Ex. A-E).* Moreover, respondent presented unrebutted testimony that the door to the apartment was obstructed by a bookshelf and that the door could not be opened fully. *(Ex. F).* According to Mr. Rosario's testimony and his affidavit, the length of his interaction with Mr. Esposito was very brief. Mr. Rosario knocked on the door, Mr. Esposito opened the door, shouted "No!" and slammed the door on Mr. Rosario. In sum, petitioner's sole evidence is one person's eyewitness testimony

about an episode that lasted mere seconds in a dark hallway through a partially closed door. It would be hard for anyone to be sure of what they saw given those conditions.

Mr. Rosario also did not call the police after allegedly seeing the firearm and gave no reason why the police were not called. This fact also casts doubt on Mr. Rosario's credibility about how sure he was that he saw the firearm. In order to determine if it is irregular to have accusations of a firearm in a holdover proceeding without any police testimony or police documents entered into evidence, the Court examined twenty (20) decisions by New York City courts. These were court decisions where there were allegations of a firearm or other projectile weapon present in the subject unit. In seventeen (17) of those twenty (20) cases, the police were called in response to the incident and testimony or documents by law enforcement were entered into evidence at trial or considered in pre-trial motions. *Paul Robeson Houses Assocs., L.P. v. Harris, 55 Misc. 3d 144(A) (AT 1st Dep't 2017); 14 Morningside Ave. H.D.F.C. v. Murray, 53 Misc. 3d 149(A) (AT 1st Dep't 2016); MS Hous. Assocs. v. Greene, 28 Misc. 3d 131(A) (AT 1st Dep't 2010); New York City Hous. Auth. v. Eaddy, 7 Misc. 3d 131(A) (AT 1st Dep't 2005); New York City Hous. Auth. v. Otero, 5 Misc. 3d 134(A) (AT 1st Dep't 2004); City of New York v. Wright, 162 Misc. 2d 572, 573 (AT 1st Dep't 1994), aff'd, 222 A.D.2d 374 (1st Dep't 1995); W. Haverstraw Pres., LP v. Diaz, 58 Misc. 3d 150(A) (AT 2nd Dep't 2018); Cudar v. O'Shea, 78 A.D.3d 1177, 1178 (2nd Dep't 2010); Beuhler 1992 Family Tr. v. Longo, 63 Misc. 3d 508, 512 (Civ. Ct., Kings County 2019); New York City Hous. Auth. v. Williams, 28 Misc. 3d 1223(A) (Civ. Ct. Bronx County 2010); New York City Hous. Auth. v. Lipscomb-Arroyo, 19 Misc. 3d 1140(A) (Civ. Ct., Kings County 2008); Starrett City Inc. v. Jeffrey, 10 Misc. 3d 525, 526 (Civ. Ct. Kings County 2005); ARJS Realty Corp. v. Perez, No. 55477/2003, 2003 WL 22015784, at *1 (Civ. Ct. N.Y. County Aug. 14, 2003); Boulevard Gardens Owners Corp. v. 51-34*

Boulevard Gardens Co., L.P., 170 Misc. 2d 755, 757 (Civ. Ct. Queens County 1996); Lloyd Realty Corp. v. Albino, 146 Misc. 2d 841, 842 (Civ. Ct., N.Y. County 1990); City of New York v. Prophete, 144 Misc. 2d 391, 392 (Civ. Ct. N.Y. County 1989); New York County Dist. Attorney's Office v. Rodriguez, 141 Misc. 2d 1050, 1054 (Civ. Ct. N.Y. County 1988).

Only two (2) of the twenty (20) cases examined were unclear as to whether the police were informed, but in both cases the court found in favor of the tenant accused of brandishing the weapon and did not issue a final judgment of possession. *Riverbay Corp. v. Hart, 65 Misc. 3d 141(A) (AT 1st Dep't 2019); Giga Greenpoint Realty, LLC v. Mounier, 61 Misc. 3d 135(A), 110 N.Y.S.3d 867 (AT 2nd Dep't 2018).*

Lastly and significantly, this Court in the twentieth (20th) case was only able to locate a case where a court specifically noted that the police were not called. In *CDC Dev. Co. III LLC v. Rivera, (8 Misc. 3d 132(A) (AT 1st Dep't 2005))*, the Appellate Term found no cause to disturb the trial court's finding in favor of the tenant and refusing to evict. At the trial, the landlord claimed that the tenant showed a "blank gun" to the building superintendent and made a threat to use the gun against the building maintenance supervisor. In its decision, the Appellate Term noted that the trial court's finding "was not an unfair interpretation of the record evidence, which contains no indication that the incident was reported to the police." *Id.* In other words, the Appellate Term in *Rivera* specifically notes that the police were not called in agreeing with the trial court's interpretation of the evidence and refusal to issue a judgment of possession.

This Court does not mean to suggest that calling the police is a prerequisite to bringing the type of claim at issue. Instead, this Court is pointing out that it is *extremely* unusual for someone to witness the display of a firearm and not call the police. As such, credibility is sacrificed when the police are not called, especially when a witness, like Mr. Rosario, gives no

reason for failing to call them. Mr. Rosario would have this Court believe that he witnessed, for the first time in his career, an apartment occupant or tenant threatening him with a handgun but did not deem it necessary to notify the authorities. Despite discovering that a man was allegedly threatening him with deadly force simply for deigning to knock on a door, Mr. Rosario waited fifteen to twenty minutes to inform his employer via text. The contents of said text are still unknown, and this Court has no reason to believe such text contained any level of urgency regarding the situation.

The actions of Mr. Rosario's employer and the petitioner are likewise suspect. Mr. Rosario's employer learned of the incident at least twenty minutes after it occurred, but likewise did not call the authorities. Although petitioner certainly did not fear reprisal for reporting the incident, it chose not to do so. The record is bare as to when the petitioner learned of the incident, but the record is clear that petitioner waited thirteen days after the incident allegedly occurred to notify the respondent, respondent's counsel, or respondent's guardian ad litem of the incident. *(Exhibit C – Second Notice of Default dated October 29, 2019).* Certainly, the police would have responded and conducted an investigation had they been called at any time. If petitioner believes the action it alleges occurred is a "..threat to the safety of the Building and its residents and staff." *(Pet. Post-Hearing Memorandum at 2*), the Petitioner should have been compelled to notify the authorities. This could quickly rectify the alleged situation and protect the other tenants in the building.

The actions (or lack thereof) of Mr. Rosario, his employer, and petitioner not only damage Mr. Rosario's credibility regarding his account of the incident, it also deprives petitioner of crucial evidentiary support for its claim. If the police had been notified and found a handgun, there would be arrest records and expert witness testimony that would support Mr. Rosario's

testimony. In fact, Mr. Rosario may not have had to testify at all because a police officer could give his/her account.

Instead of putting forth this mountain of evidence, petitioner asks the court to find in its favor based on one witness' incredible testimony. The court declines to do so. The court finds that Mr. Esposito's testimony is more credible and finds in favor of the respondent. Petitioner has failed to establish by a preponderance of the evidence that a breach of the June 3, 2019 stipulation occurred. As such the terms of that stipulation remain in full force and effect until June 3, 2020.

Clearly, this decision is dated over a month after the June 3, 2020 expiration of the probationary stipulation. Accordingly, petitioner reserves the right to restore the matter if there has been any alleged breach of the June 3, 2019 stipulation, after the completion of the February 13, 2020 hearing.

This is the decision and order of the Court, copies of which are being emailed and mailed to those indicated below.

Dated: New York, NY
July 7, 2020

Frances Ortiz

Frances A. Ortiz, JHC

Belkin Burden Goldman, LLP
Brian Y. Epstein, of counsel
270 Madison Ave.
New York, NY 10016

William Gilinsky, Guardian Ad Litem
41 West 86th Street, apt.17F
New York, NY 10024
(917) 951 - 5554

(212) 867 – 4466, ext. 363 beavnyc@aol.com
bepstein@bbgllp.com

Housing Conservation Coordinators, Inc.
Ashley Minett, of counsel
777 10th Ave.
New York, NY 10019
(212) 541 – 5996, ext. 22
aminett@hcc-nyc.org