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Edgecombe Preservation LLC v. Goings

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

-----X

Edgecombe Preservation LLC

Petitioner-Landlord,

L & T INDEX NO.: 65262/19

-against-

DECISION/ORDER

Joshua Goings,

Respondent-Tenant,

-----X

J. SIKOWITZ:

RECITATION, AS REQUIRED BY CPLR SECTION 2219(A), OF THE PAPERS
CONSIDERED IN THE REVIEW OF THIS MOTION:.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVIT ANNEXED.....	-----
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	--1-----
ANSWERING AFFIDAVITS.....	--2-----
REPLYING AFFIDAVITS.....	--3-----
EXHIBITS.....	-----

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS
MOTION IS AS FOLLOWS:

Respondent moves by Order to Show Cause (OSC) pursuant to CPLR 2221(d) granting leave to reargue
respondent’s prior motion, determined by decision and order dated December 21, 2020. Respondent
seeks dismissal of the petition, without prejudice, based on petitioner accepting rent after the

termination date and before the commencement of the proceeding, thereby vitiating the notice of termination. Petitioner opposes the motion in all respects.

Petitioner commenced this licensee holdover proceeding seeking possession of the subject rent stabilized apartment. Respondent seeks dismissal of the petition pursuant to CPLR 3211(a)(7) based on the landlord accepting rent payments after the date of termination and prior to the filing of this proceeding, thus vitiating the predicate notice. In his affidavit submitted with his initial motion to dismiss the petition, respondent states that he lived in the subject apartment since 2013 with his step-mother, the tenant of record. The tenant died in 2018, and respondent states the landlord and its agents knew he resided in the apartment as he was home for repairs in 2018, and he informed petitioner's agents he lived there. He states the former and current supers know him, and saw him in the apartment. He has signed the exterminator's monthly reports since September 2018. Respondent filed an answer in a prior nonpayment proceeding in February 2019, and he informed petitioner his mother was deceased. On March 13, 2019 he showed petitioner his mother's death certificate, and the nonpayment case was discontinued. He states he informed petitioner's agents on several occasions that he was asserting succession rights to the apartment.

The following facts are undisputed: on February 28, 2018 respondent mailed a cashier's check with his name on it to petitioner for \$390.00, and petitioner credited this payment on March 5, 2019. Between March 14th and March 20th, 2019, petitioner accepted two separate cashier's checks for \$1090.00, and one money order representing back rent. \$1090.00 was paid in respondent's name from his bank account. On March 20, 2019, petitioner's agent, Edith Minaya, requested a \$25.00 application fee for obtaining a lease in his name, and respondent paid \$25.00. In March 2019 respondent received a tenant application. By June 2019 respondent still did not receive a lease, and he filed a complaint at the DHCR. In April 2019, he gave management a money order in his name for \$790.25. From May through October 2019, respondent paid the rent every month by sending in a cashier's check in his name to petitioner at Edgecombe Preservation LLC, PO Box 383, Emerson, NJ 07630. According the USPS' tracking system, the monthly payments were delivered. To date, none of respondent's rent payments were returned, and petitioner never informed respondent the rent payments were being rejected, or were being considered use and occupancy (U&O).

It is undisputed that petitioner issued a Ten Day Notice of Termination dated June 10, 2019 that stated respondent's license to remain in the apartment terminates July 5, 2019. The holdover proceeding was commenced around August 5, 2019 by filing a Notice of Petition and Petition dated July 30, 2019. Respondent sent cashier's checks in his name for June, July and August 2019 by certified mail, and these payments were delivered to the landlord. It is undisputed that all of respondent's rent payments from April to November 2019 were never returned and respondent was not informed the landlord was rejecting the payments. There is no dispute that petitioner retained rent in the form of cashier's checks from respondent after the date in the termination notice and prior to the commencement of this holdover proceeding.

In support of the motion, respondent argues that his rent payments were never returned to him, and he was never informed by the landlord that it was rejecting his payments, or that petitioner considered the payments as U&O. There was never an agreement for respondent to pay U&O. Respondent had no access to the funds he sent the petitioner as rent. Respondent is moving to reargue solely the branch of the underlying decision and order regarding vitiating of the predicate notice.

In opposition to the motion, petitioner fails to dispute the facts as stated by respondent. Petitioner relies on the holding in *49 Terrace Corp v. Richardson*, 36 Misc3d 143[A], (AT, 1st Dept. 2012) that the acceptance of one rent payment, post-termination and pre-petition, is not conclusive proof that petitioner waived its right to pursue an eviction claim. The court in *Richardson* held that “Waiver is an intentional relinquishment of a known right and should not be lightly presumed.” Petitioner fails to claim that the acceptance and retention of numerous rent payment sent in by respondent was inadvertence or a mistake by petitioner.


In reply, respondent states he is only raising the issue of whether petitioner’s acceptance and retention of numerous rent payments, including several payments accepted and not rejected during the period between the termination date and the commencement of this holdover proceeding, vitiates the termination notice requiring dismissal of the petition without prejudice.

Discussion

Petitioner’s acceptance of rent undermines the petitioner’s ability to claim it terminated the tenancy, or the license. Herein petitioner fails to claim, or allege any facts, to support a claim that acceptance of multiple rent payments was inadvertent or explain why it failed to return the funds. The landlord has offered no factual support for its claim that the deposit of rent payments was inadvertent or represented payments of U&O pursuant to any agreement between the parties. *184 West 10th Corp, v. Westcott and Pocock*, 8 Misc3d 132[A] (AT, 1st Dept. 2005) The Appellate Term in *Westcott* held that, “The holdover petition was properly dismissed upon tenant’s undisputed showing that landlord accepted and deposited rent checks for at least three months after termination of the tenancy, but prior to the commencement of the instant nonprimary residence holdover proceeding, vitiating the predicate nonrenewal notice.”

Petitioner’s reliance on *49 Terrace Corp v. Richardson* is misplaced as respondent is not seeking to reargue the portion of the underlying decision finding that there are sufficient facts in dispute regarding whether or not petitioner knowingly waived a known right. Respondent is requesting re-argument on the issue of the effect of accepting and retaining rent during the window period and whether it vitiates the termination notice. *205 E. 78th St Assocs v Cassidy*, 192 AD2d 479, (1st Dept. 1993) The facts are undisputed that respondent paid monthly rent in his name to petitioner from April through November 2019, the funds were never returned, there was no agreement between the parties that these payments represented U&O, petitioner never rejected the payments, and several payments were made during the window period between the termination of the license and the commencement of the holdover. Therefore, based on the foregoing, respondent’s motion is granted and the petition is dismissed without prejudice. This constitutes the decision and order of the court.

DATED: May 3, 2021



Marcia J. Sikowitz, JHC