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Nath v. Wei Xiong

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Nath v Wei Xiong

2021 NY Slip Op 31957(U)

June 22, 2021

Civil Court of the City of New York, New York County

Docket Number: 10061/21

Judge: Anne Katz

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This opinion is uncorrected and not selected for official publication.

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

-----X

PREETHI NATH,

L&T Index No. 10061/21
DECISION/ORDER

Petitioner,

-against-

WEI XIONG AND KWAN YEO TEO

Respondents.

-----X

HON. ANNE KATZ:

RECITATION AS REQUIRED BY CPLR §2219(A) OF PAPERS CONSIDERED IN THE REVIEW OF PETITIONER’S MOTION PURSUANT TO CPLR §3217(b) PERMITTING PETITIONER TO DISCONTINUE THIS PROCEEDING AND RESPONDENTS’ CROSS-MOTION PURSUANT TO CPLR §3211(7) TO DISMISS PETITIONER’S COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION, AMENDING THE PETITION TO NAME “JOHN DOE” AND “JANE DOE”, RESTORING RESPONDENTS TO POSSESSION OF THE PREMISES, ISSUING A JUDGMENT OF POSSESSION AND WARRANT OF EVICTION AGAINST PETITIONER, “JOHN DOE” AND “JANE DOE” AND ISSUING A MONEY JUDGMENT FOR USE AND OCCUPANCY

PAPERS:	NUMBERED
NOTICE OF MOTION, AFFIRMATION, AFFIDAVIT & EXHIBITS	1-7;A-B
NOTICE OF APPEARANCE AND CROSS-MOTION, AFFIRMATION & EXHIBITS	1-5;C-E
AFFIRMATION IN OPPOSITION TO CROSS-MOTION & EXHIBITS	1-7;A-E

Petitioner commenced this illegal lock out proceeding by Order to Show Cause dated June 4, 2021. Petitioner alleged she was illegally locked out of 136 East 38th Street, New York, New York 10016 (“premises”). In her Affidavit in Support, Petitioner alleged that Respondents changed the locks on the door and she could no longer access the premises. The proceeding appeared on this Court’s calendar on June 7, 2021 and, during the conference, it became clear that Petitioner was in possession of the premises. In fact, Petitioner attended the virtual conference from the premises. On the initial return date, Petitioner was referred to a legal services provider and the case was adjourned to June 22, 2021.

Prior to the adjourned date, Petitioner and Respondents submitted the instant motion and cross-motion. Petitioner’s motion requests that this Court allow her to discontinue this proceeding as she had access to the premises. Respondents opposed Petitioner’s motion and cross-moved to dismiss Petitioner’s complaint for failure to state a cause of action, to amend the caption of the Petition to include a “John Doe” and “Jane Doe”, to restore Respondents to possession of the premises, to issue a judgment of possession and warrant of eviction against Petitioner, “John Doe” and “Jane Doe” and to issue a money judgment for use and occupancy.

The Court conducted a virtual conference and heard oral argument on the motion and cross-motion on June 22, 2021. Both parties appeared by counsel.

Petitioner's Motion to Discontinue the Proceeding

This Court believes Petitioner's motion to discontinue this proceeding is appropriate. The limited purpose of an illegal lock out proceeding is for the Petitioner to be restored to possession of the premises. Petitioner has stated that she is currently in possession of the premises. Moreover, Respondents concede that Petitioner is in possession of the premises as they have commenced an ejectment action in the Supreme Court, New York County by Summons With Notice dated June 16, 2021 entitled *Wei Xiong v. Preethi Nath, Hamsa Nath and HRB Tax Group*. Based upon these facts the Court grants the motion to discontinue pursuant to *CPLR §3217(b)*.

Respondents' Cross-Motion to Dismiss the Complaint

Respondents' cross motion to Dismiss the Complaint is denied as moot. The Court has granted Petitioner's motion to discontinue.

Restore Respondents and Judgment of Possession against Petitioner

Respondents' cross-motion is denied. Respondents may not obtain a possessory judgment against Petitioner in this proceeding. Pursuant to *Real Property Actions and Proceeding Law §741*, to maintain a summary proceeding and obtain possession, the landlord must file a verified petition which specifically states the required elements mandated by *RPAPL §741*. While *RPAPL §743* does allow for a party to assert a legal counterclaim in an Answer, it does not allow such party to circumvent the requirements of *RPAPL, Article 7* and obtain a judgment of possession without a verified petition. *Martinex v. Ulloa, 50 Misc3d 45, 467 (App. Term 2nd Dept 2015)*.

It is clear to this Court that Respondents' cross-motion improperly tried to circumvent the statute in an attempt to obtain a judgment of possession and warrant of eviction for the premises. Petitioner-tenant commenced the proceeding *via* Order to Show Cause in Lieu of Notice of Petition to Restore to Possession and Verified Petition in Support of an Order to Show Cause dated June 3, 2021. There is no verified petition filed by Respondent-Landlords. As summary proceedings mandate strict adherence to statutory requirements, *MSG Pomp Cor v. Jane Doe, 185 AD2d 798, 586 NYS2d 965 (App Div 1st Dept 1992)*, and *RPAPL* requires a verified petition to obtain a judgment of possession, Respondent's cross-motion must be denied. The Court also notes that Respondents have chosen their forum as stated above, Respondents commenced an ejectment action in the Supreme Court, New York County.

Amend the Caption

Based upon Respondents cross-motion being denied, Respondents' cross-motion to amend the caption is denied as moot.

Use and Occupancy

Respondents' cross-motion for use and occupancy is also denied. Respondents' request is not in compliance with the Housing Stability and Tenant Protection Act of 2019 which allows the court to direct a payment of use and occupancy when there has been two adjournments or 60 days have passed since the first appearance on the parties. *Wenyi Liang v. Tarantaol*, 65 Misc3d 1231(A), 119 NYS3d 823 (2019). Lastly, as stated in *Ulloa, supra.*, a claim for possession and use and occupancy should be tried together. The motion to discontinue is granted and the cross-motion seeking, *inter alia*, a judgment of possession and a warrant of eviction is denied.

This constitutes the Decision and Order of this Court.

Dated: New York, New York
June 22, 2021



HON. ANNE KATZ, J.H.C.