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140 W. End Ave. Owners v. Dinah L.

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2019 NY Slip Op 29388 [66 Misc 3d 555]

November 26, 2019

Wan, J.

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

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[*1]

140 West End Avenue Owners Corp., Petitioner,
v
Dinah L., Respondent.

Civil Court of the City of New York, New York County, November 26, 2019

APPEARANCES OF COUNSEL

Axelrod, Fingerhut & Dennis (*Jared M. Langenthal* of counsel) for petitioner.

Selfhelp Community Services, Inc. (*Jordi Fernandez* of counsel) for guardian.

{**66 Misc 3d at 556} OPINION OF THE COURT

Lillian Wan, J.

In this nuisance holdover proceeding, the court held a trial to determine whether the respondent tenant created a nuisance{**66 Misc 3d at 557} condition in her apartment in violation of the proprietary lease, thereby entitling the petitioner landlord to a final judgment of possession and warrant of eviction. For the reasons set forth below, the court finds that the petitioner established a prima facie case of nuisance and is entitled to a judgment of possession and warrant of eviction. However, execution of the warrant shall be stayed for 90 days to allow the respondent an opportunity to further cure the condition or to relocate to another dwelling.

The respondent tenant, Dinah L., who is 72 years old, currently occupies apartment 12V at 140 West End Avenue in Manhattan, a cooperative apartment where she has lived for over 10 years. In a 30-day notice to cure dated May 12, 2017, petitioner landlord 140 West End Avenue Owners Corp. alleged that respondent engaged in behavior that violated paragraphs 13, 18 (b), 20, and 25 of the

proprietary lease, resulting in a failure to meet the substantial obligations of her tenancy. Petitioner alleged that respondent kept her apartment in poor condition by amassing clutter in the form of garbage, books, and newspapers, which resulted in infestation, unreasonable odors, and an increased risk of fire hazard. In a notice of termination dated July 28, 2017, petitioner alleged that these violations had not been cured and directed respondent to surrender possession of the premises. Petitioner commenced the instant nuisance holdover action on September 12, 2017.

On June 12, 2018, the New York City Department of Social Services filed a petition pursuant to article 81 of the Mental Hygiene Law seeking the appointment of a guardian for Ms. L. On July 5, 2018, the Honorable Shawn T. Kelly appointed Selfhelp Community Services, Inc. as temporary guardian of Ms. L. and granted Selfhelp the authority to access Ms. L.'s place of abode, arrange for a heavy-duty cleaning of the abode, inform her about the cleaning, and, if necessary, temporarily remove her from the premises to complete the cleaning. On August 21, 2018, Justice Kelly amended the temporary guardian order to include the powers to apply for government and private benefits, marshal and manage income and assets, determine whether Ms. L. is entitled to any additional assets, arrange for and encourage outpatient psychiatric treatment, and assist in selling and auctioning any items of value that may be in Ms. L.'s abode. After a full hearing, Justice Kelly adjudicated Ms. L. to be a person in need of a guardian and appointed Selfhelp as guardian for a period of two years. (*See* order{**66 Misc 3d at 558} and judgment appointing guardian of person and property dated Feb. 7, 2019.) Justice Kelly found that Ms. L. has functional limitations that impair her ability to provide for her personal needs and property management, and that the appointment of a guardian is necessary. Selfhelp's authority included, inter alia, defending Ms. L. in the housing court proceeding, arranging for heavy-duty cleanings of her residence, arranging for and maintaining the appropriate level of home care services, and entering into contracts subject to prior court approval.

After multiple attempts to resolve the matter, the case was set down for trial at the petitioner's request. The trial commenced on June 27, 2019, and concluded on September 20, 2019. At the trial, the petitioner introduced witness testimony and documentary evidence of respondent's violations of the proprietary lease. Helen Basurto, an employee of managing agent AKAM Associates, Inc., testified that strong smells of urine and garbage continued to emanate [*2]from the apartment as recently as the day before the trial commenced. Ms. Basurto further stated that respondent's apartment is located directly across from the 12th floor elevators, making it impossible for residents and visitors of that floor to avoid the odors. Ms. Basurto stated that these odors are not present on other floors of the building. Ms. Basurto also testified that while a cleaning of the apartment occurred in October 2018, this only alleviated the odors for a few weeks.

The petitioner also presented the testimony of Robbie Persaud, a handyman employed with the subject building for the last seven years. Mr. Persaud is familiar with Ms. L. as he does yearly maintenance in her apartment. Mr. Persaud testified that he was inside the respondent's apartment in April 2019 and on June 19, 2019, to inspect her air conditioning units. Mr. Persaud testified that he observed piles of garbage, clothing, papers, and other debris that made navigating the apartment difficult, and that there were extreme odors of urine and feces. The petitioner introduced into evidence 15 photographs taken by Mr. Persaud while inside the premises on June 19, 2019, which depict garbage and clutter strewn throughout respondent's apartment. Mr. Persaud testified that this condition was also present when he entered the apartment on previous dates. Mr. Persaud stated that strong odors of urine have continuously emanated from the respondent's apartment. Mr. Persaud did concede that respondent allowed him{**66 Misc 3d at 559} access on three previous occasions when he knocked on her door.

The petitioner also offered the testimony of Ms. L.'s neighbor, Martin Izaak, who lives in the apartment adjacent to her. Mr. Izaak testified that he is immediately able to smell pungent odors entering the 12th floor hallway and that the smell gets stronger the closer you get to Ms. L.'s apartment. Mr. Izaak further stated that the smell is there constantly and that he is concerned that the smell may cause health issues and diminish the value of his apartment. He also had concerns about inviting his friends to his apartment.

The respondent, represented by counsel to the guardian, presented the testimony of Yajaira Rincon-Brown, the Selfhelp caseworker assigned to Ms. L. Ms. Rincon-Brown testified that a heavy-duty cleaning occurred in October 2018. Ms. Rincon-Brown also testified that she did not notice a smell when she was last in Ms. L.'s apartment on July 30, 2019, and that she did not believe the apartment was cluttered, stating instead that the premises were in need of organization. The respondent introduced five photographs into evidence which were taken after the heavy-duty cleaning conducted in October 2018; however, Ms. Rincon-Brown admitted that these photographs did not reflect the current condition of the apartment.

The petitioner then called Ms. L. as a rebuttal witness. Ms. L. testified that Mr. Persaud did visit her apartment to change the filters in her air conditioning unit but she claimed he did not take photographs. Ms. L. stated that the petitioner's photographs depict the state of her apartment before it was cleaned out and that it does not look like this today. Ms. L. further testified that the current condition of her apartment is slightly different in that it is neater and furniture has been moved around. Ms. L. testified that her apartment is now much more livable and that she is able to move

around freely. Petitioner also recalled Mr. Persaud as a rebuttal witness, at which time 12 additional photographs of Ms. L.'s apartment were admitted into evidence. Mr. Persaud testified that he took these photographs in August 2019 and stated that they displayed a condition similar to the one portrayed in the June 2019 photographs. Mr. Persaud also testified that the strong stench of urine and feces was again present in August 2019 and that he saw flies in the apartment.

On summation, the petitioner contends that it established its prima facie case in [*3]demonstrating that respondent breached{**66 Misc 3d at 560} her proprietary lease by interfering with other building residents' use and enjoyment of their homes. The petitioner further argues that the expanded stay provision of the Housing Stability and Tenant Protection Act of 2019 (hereinafter HSTPA) does not apply to the instant proceeding, as this provision only applies to those actions and proceedings commenced on or after June 14, 2019. Petitioner also contends that the respondent is not entitled to a stay under Real Property Actions and Proceedings Law § 753, arguing that a tenant is required to pay all use and occupancy currently owed to obtain a stay under this provision. Petitioner claims that even if respondent is eligible for a stay, respondent is not entitled to a postjudgment opportunity to cure and a stay of the warrant of eviction because respondent has had ample opportunity to cure during the pendency of the proceeding but has failed to do so.

Counsel for the guardian argues that the petitioner's evidence was insufficient to establish the existence of a nuisance condition. Respondent claims that the testimony of Ms. Basurto and Mr. Izaak cannot establish a pattern of objectionable conduct because neither ever entered Ms. L.'s apartment. While respondent concedes that Mr. Persaud did enter Ms. L.'s apartment, Mr. Persaud also testified that he was able to move about the apartment and complete repairs. Respondent further argues that, in the alternative, she is entitled to an indefinite stay of the execution of the warrant of eviction pursuant to RPAPL 753 (4) on the grounds that even if petitioner met its burden of demonstrating that respondent's behavior constituted a nuisance, respondent established that any nuisance conditions that did exist have been cured.

[1] The elements of a common-law claim for a private nuisance are an interference that is (1) substantial in nature; (2) intentional in origin; (3) unreasonable in character; (4) interfering with a person's property right to use and enjoy land; and (5) caused by another's conduct in acting or failure to act. (*Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564 [1977].) The Court of Appeals has noted that not every annoyance will constitute a nuisance, and to prevail on a cause of action for nuisance, the plaintiff must establish "a pattern of continuity or recurrence of objectionable conduct." (*See Domen Holding Co. v Aranovich*, 1 NY3d 117, 124 [2003], quoting *Frank v Park*

Summit Realty Corp., 175 AD2d 33, 34 [1st Dept 1991], *mod on other grounds* 79 NY2d 789 [1991].) In the instant matter, it is clear that Ms. L.'s failure to keep her apartment{**66 Misc 3d at 561} free of clutter and in a sanitary condition over the course of at least two years represents a pattern of continuity and a recurrence of objectionable conduct. The court determined that petitioner's witnesses testified credibly in this regard. The testimony of respondent's witness, Ms. Rincon-Brown, was insufficient to rebut petitioner's evidence, and is more relevant to this court's determination on whether a postjudgment opportunity to cure is warranted. Mr. Izaak, Ms. L.'s neighbor, testified firsthand about the odor emanating from the apartment, and about how it has negatively impacted his life. The photographs in evidence clearly depict the poor and excessively cluttered condition of Ms. L.'s apartment. Therefore, the court finds that the petitioner has met its prima facie burden in establishing the existence of a nuisance and is entitled to a judgment of possession and issuance of a warrant of eviction.

[2] In determining whether a stay of the execution of the warrant is appropriate, the court must consider the fact that the respondent is an article 81 ward of the court. The court notes that in arguing against a stay, the petitioner does not cite any cases that involve tenants with article 81 guardians. Recent case law makes clear that the court has broad discretion in determining whether a disabled tenant should be given an opportunity to cure a condition or be allowed additional time to relocate, and must consider the equities in reaching that [*4]determination.

In *Matter of Prospect Union Assoc. v DeJesus* (167 AD3d 540 [1st Dept 2018]), a case involving a disabled article 81 ward, the Appellate Division, First Department disagreed with the housing court's determination that the tenant was not entitled to a permanent stay of eviction because the conditions in the apartment were ongoing and not timely cured. The Court went on to state that there needs to be a "proper evaluation of whether the article 81 guardian's management of their personal (and property) affairs will now make a difference in their ability to stay in their home without harming others." (*Id.* at 543.) The Court also concluded that the appointment of an article 81 guardian sufficiently establishes that the tenant is "handicapped" within the meaning of the Fair Housing Act, and as such "a landlord is obligated to provide a tenant with a reasonable accommodation if necessary for the tenant to keep his or her apartment." (*Id.*) The trial court must consider whether with ongoing supportive services and monitoring, tenants can continue to live in the apartment without harming or{**66 Misc 3d at 562} affecting their neighbors. (*Id.* at 544.) The issue for determination is "whether, with the involvement of the article 81 guardian and its management of their affairs, tenants can fulfill their lease obligations and avoid eviction." (*Id.*) Furthermore, the Court remanded the case for a hearing to determine whether the accommodations

proposed by the guardian were reasonable, whether they would curtail the recurrence of the nuisance, and whether a permanent stay of eviction was appropriate.

Furthermore, in *642-654 Whippersnapper LLC v Mahoney* (63 Misc 3d 46 [App Term, 1st Dept 2019]), the Supreme Court, Appellate Term, relying on *DeJesus*, also remanded the matter back to the housing court for a hearing on whether the tenant was entitled to a permanent stay of eviction as a reasonable accommodation. *Mahoney* involved a stipulation of settlement that was entered into by the tenant's guardian ad litem. An article 81 guardian was subsequently appointed, and the guardian performed a heavy-duty cleaning with extermination services, and implemented home care services to ensure that its ward had regular assistance to maintain the apartment in a sanitary condition. The court held that the circumstances were sufficient to warrant a temporary stay and remittal on the issue of a permanent stay. In noting that the First Department's holding in *DeJesus* represents a clear departure from the prior approach previously taken in nuisance cases, the *Mahoney* court recognized that

> "[w]hile the protection of the premises and the other tenants who reside therein remains paramount, serious efforts must be undertaken to examine whether such risks can be minimized to thus afford a reasonable accommodation to a physically or mentally disabled tenant, even for one whose conduct has previously been highly problematic." (*Id.* at 49 [internal quotation marks and citations omitted], quoting *Matter of Prospect Union Assoc. v DeJesus*, 167 AD3d at 543.)

The *Mahoney* court also instructed the housing court to consider equitable principles in determining whether to provide the tenant an opportunity to cure, including assessing factors such as the tenant's advanced age, disability, the hardship that an eviction would cause, and the tenant's long-term tenancy of over 50 years at the subject apartment. (*Mahoney*, 63 Misc 3d at 50; *see also Matter of Strata Realty Corp. v Pena*, 166 AD3d 401 [1st Dept 2018] [though respondent previously had many{**66 Misc 3d at 563} opportunities to cure the nuisance she had created, the tenant was granted another stay in light of her advanced age, long-term occupancy, disability, hardship that eviction would cause her, and her willingness to grant petitioner access to the apartment].)

In *529 W. 29th LLC v Reyes* (63 Misc 3d 65 [App Term, 1st Dept 2019]), the Appellate Term, First Department affirmed the housing court's determination that the tenant had a handicap under the Fair Housing Act and was thus entitled to a reasonable accommodation. The court held that a stay of the execution of the warrant of eviction for six months was an objectively reasonable accommodation. *Reyes* involved a tenant who had been diagnosed with schizophrenia; however, the evidence established that the tenant's condition had greatly improved as a result of an intensive

hospital treatment program and social service assistance. Significantly, the court held that the determination of whether an accommodation is required is highly "fact specific," and should be made on a case-by-case basis. The overarching guiding factor, however, is that a landlord has an obligation to provide a tenant with a reasonable accommodation, if necessary, for the tenant to remain in the apartment. (*Id.* at 68.)

In reviewing recent First Department precedent, it follows that if a tenant should have an opportunity to cure a nuisance condition, then the tenant should also be afforded the opportunity to safely relocate. In the instant matter, the article 81 guardian recently filed a motion seeking to expand its powers in order to retain an appraiser and real estate broker to sell Ms. L.'s apartment with the intention of relocating her. On October 11, 2019, the court granted the guardian's motion. The factors set forth in *Pena* and *Mahoney* are not exclusive, and it is logical to presume that the need to relocate to another apartment is an appropriate factor to consider. (*See Beuhler 1992 Family Trust v Longo*, 63 Misc 3d 508 [Civ Ct, NY County 2019] [the execution of a warrant of eviction was stayed to allow tenant to obtain relocation assistance from her article 81 guardian].)

In determining whether to allow a further stay, this court is also guided by the HSTPA. The HSTPA has increased the protections for tenants statewide, and augments, amends, repeals and enacts provisions of a wide range of laws salient to rent regulation and landlord-tenant relations in New York. Specifically, HSTPA (L 2019, ch 36, § 1, part M, § 21 [2019 NY {**66 Misc 3d at 564}Senate Bill S6458]) amends RPAPL 753 (1), and allows a judge to issue a stay of eviction for up to one year where the tenant cannot secure suitable housing in the same neighborhood, or where the eviction would cause "extreme hardship."[FN*] Similarly, the new legislation provides an automatic 30-day stay of eviction where the eviction is based on a violation of a provision of the lease to allow the tenant an opportunity to cure the breach. The justification behind these expanded time frames is to "allow more leniency throughout any eviction proceeding, including stays of eviction and executions of warrants; and ensure that any eviction that is executed is done so in the interest of justice." (Senate Mem in Support, Bill Jacket, L 2019, ch 36 [2019 NY Senate Bill S6458], 2019 McKinney's Session Law News of NY, No. 3 at A-102.)

In the instant matter, Ms. L. would likely suffer extreme hardship if a stay were not granted. Ms. L. is an elderly article 81 ward of the court who has lived in the current apartment for 10 years. Furthermore, the guardian is making good faith efforts to secure a safe, affordable dwelling for Ms. L., and it is reasonable to afford the guardian some time to do so. In the meantime, Ms. L. has allowed the landlord to have access to her apartment and has cooperated with the guardian's efforts to

keep the apartment clean and free of clutter.

The court declines to condition any stay upon the payment of use and occupancy. The [*5]language of RPAPL 753 (2) clearly gives the court discretion to determine what amount of ongoing use and occupancy, if any, will be paid: "The amount of such deposit shall be determined by the court upon the application for the stay," including in "installments thereof from time to time as the court may direct, for the occupation of the premises for the period of the stay." In fact, with regard to past due rent or maintenance, a deposit made pursuant to the statute "*may* also include all rent unpaid by the occupant prior to the period of the stay." (RPAPL 753 [2] [emphasis added].) Notably, in *Tessler v Tessler* (81 AD3d 408 [1st Dept 2011]), the Appellate Division, First Department found that the trial court acted within its discretion by taking respondent's limited financial resources into account when denying an award of an additional amount of use and occupancy permitted by RPAPL 753 (2).

In *326-330 E. 35th St. Assoc. v Sofizade* (191 Misc 2d 329, 332 [App Term, 1st Dept 2002]), the Appellate Term, First{**66 Misc 3d at 565} Department noted that circumstances may exist that warrant the issuance of a stay of a possessory judgment "upon such terms as may be just" pursuant to CPLR 2201 in order to avoid a leasehold forfeiture in a holdover proceeding. While there is no "bright-line standard" for determining the appropriateness of a discretionary stay, factors to be considered include the length of the tenancy, the tenant's payment history, the circumstances and severity of the rent defaults, and the tenant's present financial status. (*Id.* at 332.) Ms. L. does not appear to have the financial means to afford maintenance payments, which is in part why the article 81 guardian has obtained an expansion of powers to sell the co-op and relocate Ms. L. to a home that she can afford. Significantly, the court notes that paragraph 32 (c) of the proprietary lease allows for the petitioner to collect on any debt owed pursuant to the sale of a tenant's shares. It follows that once the apartment is sold, the petitioner can be reimbursed for all maintenance due from the proceeds of the sale.

Equity would not be served with the immediate execution of a warrant of eviction. Accordingly, based on the foregoing, the petitioner is entitled to a final judgment of possession and warrant of eviction. However, after a careful review of the facts and circumstances of this case, and upon balancing all of the equities, the execution of the warrant is stayed for 90 days to allow the guardian time to sell Ms. L.'s apartment and relocate her to a suitable environment or, in the alternative, to allow the guardian an opportunity to cure the nuisance condition without prejudice to the guardian to seek a further stay upon a showing of good cause. Upon expiration of the stay, if the condition is

cured, and the respondent should remain in possession of the apartment, petitioner may commence a nonpayment proceeding for any unpaid maintenance. (*See Novak v Fischbein, Olivieri Rozenholc & Badillo*, 151 AD2d 296 [1st Dept 1989].)

It is hereby ordered that a final judgment of possession and warrant of eviction shall issue in favor of the petitioner; and it is further ordered that execution of the warrant of eviction is stayed for 90 days to allow the guardian time to sell Ms. L.'s apartment and relocate her to a suitable environment or, in the alternative, to allow the guardian an opportunity to cure the nuisance condition, without prejudice to the guardian to seek a further stay upon a showing of good cause.

Footnotes

Footnote *: The prior statute allowed a stay for up to six months but also contained the "extreme hardship" provision.