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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART S

-----X
1560 GC LLC.,

Petitioner,

Index No. L&T 47930/18

DECISION/ORDER

-against-

ONEKA DUNBAR,
"JOHN DOE" & "JANE DOE,"

Respondents-Occupants.

-----X
Bernadette G. Black, J.

Petitioner commenced this licensee holdover proceeding against Oneka Dunbar and unknown occupants, on or about September 12, 2018, seeking a judgment, pursuant to RPAPL 713(7), for possession of the subject premises, 1560 Grand Concourse, Apartment 104, Bronx, New York. Petitioner asserts that respondents' license to occupy the premises terminated upon the death of the tenant of record, Conciana Smiley-Wood. On September 25, 2018, respondent Ms. Dunbar (hereinafter "respondent") appeared and the parties stipulated to an adjournment for her to seek counsel. On November 28, 2018, respondent appeared with counsel and the parties agreed to adjourn the matter for settlement or trial. On January 29, 2019, respondent filed an answer, asserting affirmative defenses, including a succession claim pursuant to 9 NYCRR 2523.5(b)(1). Respondent asserted that she was the granddaughter of the deceased tenant of record and that, based upon their relationship, she was entitled to succeed to the lease. Respondent also raised the warranty of habitability as both a defense and counterclaim, presumably related to petitioner's claim for use and occupancy. On April 20, 2019, the matter was transferred to the trial part for pre-trial conference and was subsequently adjourned for trial to June 29, 2019. On that date, the parties stipulated to adjourn the matter further for trial on September 25, 2019, and

respondent agreed to pay ongoing use and occupancy by specified dates. Respondent failed to pay petitioner the use and occupancy, and this court granted petitioner's motion seeking a money judgment for the outstanding balance due through November 2019. The only issue addressed by the parties at the pre-trial conference was respondent's succession claim. Petitioner discontinued the proceeding as against "John Doe" and "Jane Doe" prior to commencement of the trial.

FINDINGS OF FACT

At trial, petitioner supported its *prima facie* case with certified copies of petitioner's deed for the subject building, the Division of Housing and Community Renewal apartment registration, the NYC Housing Preservation and Development property registration, and a rent stabilized renewal lease for the subject apartment signed by Conciana Smiley-Wood for the period, July 1, 2012 through June 30, 2014. David Tennenbaum testified for petitioner that he is employed by the management company which oversees the subject building. Mr. Tennenbaum stated that petitioner became aware of the former tenant's death during the pendency of a prior nonpayment proceeding. Thereafter, petitioner commenced this licensee holdover proceeding against the occupants. The parties agree that Ms. Smiley-Wood passed away on September 7, 2017.

Respondent supported her succession claim with her own testimony and that of her father, Devon Kirkpatrick Benjamin Dunbar. Respondent and Mr. Dunbar testified that the tenant of record had been Mr. Dunbar's mother and respondent's grandmother. Respondent introduced certified copies of her father's birth registration form from Jamaica, W.I., reflecting Devon Kirkpatrick Benjamin, born on April 15, 1956, male child of "Consie" Smiley, and a certified birth registration slip reflecting Devon Kirkpatrick Benjamin, birth date April 15, 1956, born to

“Consey” Smiley. Mr. Dunbar testified that his mother, Conciana Smiley-Wood, had answered to the names “Conciana”, “Consie”, and “Consey”.

Respondent also introduced a deed poll issued in Jamaica, W.I., on April 13, 2016, reflecting the witness’s name change from “Devon Kirkpatrick Benjamin” to “Devon Kirkpatrick Benjamin Dunbar.” Mr. Dunbar testified that he obtained these documents for the purpose of his application for permanent residency with the United States Citizenship and Immigration Services. Mr. Dunbar’s permanent resident card, reflecting the name “Devon K. Dunbar,” bearing the witness’ photograph and birth date of April 15, 1956, was also admitted into evidence.

Respondent testified that she began living with her grandmother in August 2015. Prior to that time respondent had been residing in Connecticut for about eight months. Respondent was intending to return to New York, needed a place to live, and her then 84 year-old grandmother asked respondent to stay with her because she suffered with health issues, including hypertension and diabetes, and had been falling a lot in the apartment. At first, respondent brought only some of her clothing and an air mattress to her grandmother’s apartment. With the help of her ex-husband and a friend’s truck, respondent brought the larger items, including her furniture and kitchen supplies, within the next month.

Respondent testified that her elderly grandmother needed help with household cleaning, cooking, errands, and personal care, which respondent provided for the tenant. In further support of her succession claim, respondent submitted her New York State driver’s license, issued on March 16, 2016, and income tax records filed by respondent for the year 2017, both listing the subject premises as respondent’s address. Respondent testified that she did not have any utility bills for the apartment in her name, as all utility bills remained under her grandmother’s name until after her death.

Respondent's father, Mr. Dunbar testified that his daughter Oneka Dunbar moved in with his mother around July or August 2015. Mr. Dunbar testified that he would visit his mother at the subject premises, almost daily, and had observed respondent assisting her grandmother with personal care tasks. Petitioner presented no rebuttal witness.

APPLICABLE LAW

To qualify as a successor to a rent stabilized tenancy, Rent Stabilization Code (hereinafter "RSC") § 2523.5 (b)(1) requires an occupant to show that the tenant of record permanently vacated the subject premises, and that the occupant co-resided with the tenant of record, who must meet the definition of family member pursuant to RSC § 2520.6 (o), for two years prior to the date of vacatur (except where the potential successor is disabled or a senior citizen, in which case, a one year period of co-residency is required). RSC § 2520.5 (b)(1), § 2520.6(o).

A claim of succession is an affirmative defense, and the burden of proof rests on the party asserting the defense. See Cenpark Realty LLC v. Gurin, 118 A.D.3d 553 (1st Dept 2014); 339-347 E. 12th St. LLC v. Ling, 35 Misc. 3d 30 (App Term, 1st Dept 2012). The Rent Stabilization Code at § 2520.6 (u) provides a number of factors which may be considered in determining whether an apartment functions as a person's primary residence, and no single factor is determinative. WSC Riverside Drive v. Williams, 125 A.D.3d 458 (1st Dept 2015); Village Development Associates LLC v. Walker, 282 A.D.2d 369 (1st Dept 2001); Pendias v. 3 East 69th Street Assoc., 119 A.D. 2d 467 (1st Dept 1986); Chelsmore Apts., LLC v. Garcia, 189 Misc. 2d 542, 544 (Civ Ct, New York County 2001)

The absence of documentary evidence does not invalidate a succession claim where "the totality of the testimonial evidence" supports such a claim. Matter of 530 Second Ave. Co., LLC v. Zenker, 160 A.D.3d 160 (1st Dept 2018), citing Armie Realty Corp. v Torres, 294 A.D. 2d 193

(1st Dept 2002); Lenoxville Associates, LP v. Downs, 40 Misc. 3d 138(A) (App Term, 1st Dept 2013). In a bench trial, the fact-finding court must make its determination based on a fair interpretation of the evidence, including making credibility determinations as to the testimony offered. 409-411 Sixth Street, LLC v. Mogi, 22 N.Y.3d 875 (2013); 135 West. 13 LLC v. Stollerman, 151 A.D.3d 598 (1st Dept 2017); 300 East 34th Street Co. v. Habeeb, 248 A.D.2d 50 (1st Dept 1997).

Where a party makes a *prima facie* showing of a succession claim, the burden shifts to the party opposing succession to rebut the *prima facie* showing with contrary evidence. See 585 W. 204th LLC v. Peralta, 53 Misc. 3d 131(A) (App Term, 1st Dept 2016) (affirming trial court finding of succession based primarily on testimony that was “essentially unrebutted by any witness with factual knowledge”); Kelly Mgt LLC v Soltero, 27 Misc. 3d 984 (Civ Ct, Bronx County 2010) (succession granted where no showing was made to rebut respondent’s sworn testimony and documentary proof of familial relationship and qualifying co-residency); Partita Partners LLC v. Mo Ling Lam, 21 Misc. 3d 1101(A) (Civ Ct, New York County 2008) (no rebuttal proof presented to challenge foreign documents accepted by federal government in granting respondent permanent resident visa).

ANALYSIS

In order to prove her entitlement to succeed to the tenancy of the subject premises based upon the Rent Stabilization Code, respondent must prove that she resided with her grandmother, the tenant of record, for at least two years prior to her grandmother’s permanent vacatur on September 7, 2017. RSC § 2523.5 (b). This court finds that respondent has sustained her burden of proof.

Both during trial and in its post-trial memorandum petitioner attacked the sufficiency of respondent's proof, particularly proof of family relationship with the tenant of record. Petitioner points out that on Mr. Dunbar's birth registration form and birth registration slip his mother is listed as 'Consie' and 'Consey' Smiley, not Conciana Smiley-Wood. While the court notes these discrepancies, the court is aware that there may well have been somewhat more informal record keeping practices in 1950's Jamaica, W. I., than in New York State today, and the fact that it is not uncommon for multi-part names to vary slightly across different documents. Finally, given this rather uncommon name, it is also more probable than not, that the Consie/Consey Smiley listed as Mr. Dunbar's mother on his birth records is the same person as Conciana Smiley-Wood, the decedent tenant of the subject premises. The court also notes that petitioner did not question the Dunbars' father-daughter relationship.

Petitioner also challenged the validity of the name change document for Mr. Dunbar reflecting that his name changed from the birth name of Devon Kirkpatrick Benjamin to Devon Kirkpatrick Benjamin Dunbar. However, the court has no basis to doubt the validity of this document, which was also used by the witness to successfully petition the federal government for permanent residency in the United States. See Kelly Mgt LLC v. Soltero, supra; Partita Partners LLC v. Mo Ling Lam, supra.

As to the period of her co-residency with her grandmother, respondent credibly testified that she moved in with her grandmother in August 2015, and that she has continuously resided at the subject premises since. Respondent's father also credibly testified to their co-residency. In addition, respondent supported her claim with documentary evidence, specifically, her New York State driver's license issued on March 16, 2016, and tax returns for the year 2017 featuring the subject address as respondent's address. While respondent did not present documents connecting

her to the subject premises for the period of September 2015 through March 2016, this absence of documentation for a part of the co-residency period is not fatal to respondent's claim where the totality of the testimony as to her continued residence at the premises is credible and unrebutted. See 585 W. 204th LLC v Peralta; Kelly Mgt LLC v Soltero; Partita Partners LLC v. Mo Ling Lam; all, supra.

Based upon the totality of the credible evidence presented at trial, including respondent's demeanor on the witness stand and the logic and consistency of her sworn testimony, the court finds that respondent has proven that she is the successor tenant of the subject premises, not a licensee. Accordingly, this licensee holdover is dismissed with prejudice. The court does not address any other issues raised in respondent's answer. The parties must collect their exhibits from Part S within the next 14 days.

This constitutes the decision and order of the court.

Dated: Bronx, New York
January 29, 2020

SO ORDERED
~~BERNADETTE G. BLACKH.C~~
~~HON. BERNADETTE G. BLACKH.C~~