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Elk Cent. Props. Orchard LLC v. Shaon

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Civil Court of the City of New York
County of New York
Part: Part F, Room: 830


Index #: LT-070268-16/NY
Motion Seq #: 4

Decision/Order

Elk Central Properties Orchard LLC
Petitioner(s)

Present: Frances A. Ortiz
Judge

-against-
Foyez Ahmed Shaon AKA Shaon Foyez Ahmed; "John" "Doe";
"Jane" "Doe"
Respondent(s)

Recitation, as required by CPLR 2219(A), of the papers considered in the review of this Motion for:
Judgment - Summary

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed	_____ 1 _____
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits	_____ 2 _____
Replying Affidavits	_____ 3 _____
Exhibits	_____
Stipulations	_____
Other _____	_____
_____	_____

Upon the foregoing cited papers, the Decision/Order in this Motion is as follows:

This is an illegal sublet holdover of a rent-stabilized tenant. It was initially filed on July 22, 2016. The Notice to Cure ("the Notice") alleges that respondent, Foyez Ahmed Shaon, ("Mr. Ahmed") sublet the subject premises without the landlord's written consent in violation of the lease. The Notice dated May 31, 2016 claims that Mr. Ahmed was not observed residing at the premises in at least two years. However, it claims that the landlord's agents observed a Jane Doe and a young child occupying the apartment. The matter was adjourned numerous times and marked off calendar on June 29, 2017 for discovery. Then it was restored to the calendar in June

2018 for use and occupancy and marked off calendar again on July 5, 2018. Now, respondent moves for summary judgment.

Respondent argues that he is entitled to summary judgment because he has established as a matter of law through the discovery process including document production and his affidavits that he did not sublet the subject premises. Alternatively, he argues that even if the court were to find that he illegally sublet the apartment in the past, he is still entitled to summary judgment now since he has cured any sublet claim.

During discovery, Mr. Ahmed provided his tax returns (*Exhibits F-G*), credit card statements (*Exhibits H-I*), driver's license, (*Exhibits J*), Con Edison bills, (*Exhibit K*), and phone/internet bills (*Exhibit L*). All these documents listed the subject premises as his address during the alleged illegal sublet period. He contends that not a single document provided in discovery showed any address other than the subject premises.

Petitioner in opposition claims that summary judgment is not appropriate at this time because it has not deposed Mr. Ahmed. Therefore, per the petitioner, the matter is not ripe for disposition because there are still factual issues in dispute. Laila Shirian, petitioner's managing agent, states in her affidavit that Mr. Ahmed has not resided at the subject premises since 2014 and has permitted multiple occupants to reside in and/or occupy the apartment. (*Shirian Affi'd* ¶ 6). She also states that it is petitioner's belief that Mr. Ahmed continues to permit multiple occupants to reside in and/or occupy the apartment. She avers that neither her nor the superintendent of the building or any agents have observed Mr. Ahmed at the building for at least two years prior to the commencement of this proceeding. (*Id.* ¶s 17 & 18). Lastly, she states that there are still issues of fact as to whether Mr. Ahmed resides at the apartment and

whether any illegal sublet has occurred. (*Id.* ¶ 22). Accordingly, she argues that respondent's summary judgment motion must be denied.

Respondent in reply argues that discovery was provided to petitioner's counsel on September 14, 2017. He asserts that after two and one half years of failing to ask for any further discovery or deposition, petitioner cannot use its own failure to proactively seek such discovery as an excuse to evade summary judgment. In fact, respondent's counsel contends that she made a good faith effort to move the case forward and schedule a deposition but petitioner's prior counsel never replied to her request. (*Shah Reply Affir'm* ¶10) & (*Exhibit O – email to petitioner's prior counsel dated August 16, 2018*). Lastly, respondent asserts that there is no genuine issue of fact that he lives at the subject premises with his family and has not illegally sublet the premises.

Summary judgment is appropriate where the movant establishes the claim by tender of evidentiary proof in admissible form sufficiently to warrant the court as a matter of law to direct judgment in its favor. *Rodriguez v. City of New York*, 31 N.Y.3d 312, 317 (2018); *Friends of Animals, Inc. v Associated Fur Manufacturers, Inc.*, 46 N.Y.2d 1065 (1979). The failure to make such a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers. *Alvarez v Prospect Hospital*, 68 N.Y.2d 320 (1986). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v Prospect Hospital*, 68 N.Y.2d at 324. In determining the motion, the Court must be mindful that summary judgment is a drastic remedy and should not be granted when there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v Ceppos*, 46 N.Y.2d 223, 231 (1978). The evidence must be considered

in the light most favorable to the party opposing the motion, *Henderson v City of NY*, 178 A.D.2d 129, 130 (1st Dept 1991), and the motion must be denied where conflicting inferences may be drawn from the evidence. *Nowacki v Metropolitan Life Ins. Co.*, 242 A.D.2d 265, 266 (2nd Dept 1997). *Rodriguez v. City of New York*, *supra*.

Here, respondent has established evidentiary proof in admissible form sufficient to warrant the court to direct judgment as a matter of law in his favor in the form of affidavits and documentary exhibits. First, Mr. Ahmed in his affidavit in support of the motion claims he never vacated the subject premises. He mostly works nights for ride-sharing companies like Juno, Uber and Lyft. (*Ahmed Affi'd* ¶ 5). Second, he contends that any additional occupants of the subject apartment were his family members and can not constitute an illegal sublet. His sister has two daughters, Maheen Mohammad and Aqssa Mohammad. He is very close to his nieces who would visit often. (*Id.* ¶ 6). In late 2014, he jointly decided with his nieces and their parents that they should come live with him to easily commute to New York University (“NYU”). As a result, they moved in with him. (*Id.* ¶ 7). Then, he placed a bed in his living room for his nieces to sleep in and live there. (*Id.* ¶ 8). His niece Aqssa Mohammad graduated from NYU in May 2016 and moved back with her parents that same month. (*Id.* ¶ 9). Thereafter, his niece Maheen Mohammad graduated from NYU in May 2017 and moved back with her parents to New Brunswick, New Jersey. (*Id.* ¶ 10). Subsequently, Aqssa Mohammad got a job in New York City at the end of 2018 and moved back with Mr. Ahmed. She currently still resides with him. (*Id.* ¶ 11). Additionally, Mr. Ahmed asserts that he has always continuously resided at the subject premises with his nieces and allowed them to live with him to help them with school and their commute. (*Id.* ¶ 12). Lastly, Mr. Ahmed contends that he has

never moved anywhere, since moving into the subject premises with his parents in 1992 nor has he sublet the premises. (*Id.* ¶ 13).

Additionally, Aqssa Mohammad ("Aqssa") and Maheen Mohammad ("Maheen") submit their own affidavits in support of Mr. Ahmed's motion. According to Aqssa, she currently works in New York City. She is looking for permanent housing while temporarily living at the subject premises with Mr. Ahmed. (*Aqssa Aff'd* ¶ 1). She explains that in 2012 she began her studies at NYU and commuted from New Jersey. The commute was over three hours daily. Then, her sister, Maheen enrolled at NYU in 2013 and commuted with her. (*Id.* ¶ 4). She moved into the subject premises with her sister Maheen in late 2014. (*Id.* ¶ 5). Aqssa corroborates everything Mr. Ahmed stated in his affidavit including that she is his niece, and she moved back in with him in late 2018.

Maheen states in her affidavit that she currently lives in New Brunswick, New Jersey. (*Maheen Aff'd* ¶ 1). She also corroborates everything Mr. Ahmed stated in his affidavit including that she is his niece, and she moved into the subject premises to live there with him and her sister for commuting purposes to NYU. (*Id.* ¶ 4). She vacated the premises after her graduation in May 2017. (*Id.* ¶ 10).

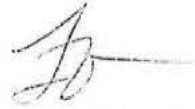
Petitioner in opposition has offered no proof in admissible form to establish that respondent illegally sublet his apartment. *Torres v. Mchedlishvili*, 24 Misc. 3d 1220(A) (NY Cty, Civ. Ct. 2009), *reargument granted, opinion vacated*, 28 Misc. 3d 1210(A) (NY Cty Civ. Ct. 2010). The allegations in the affidavit of Laila Shirian that Mr. Ahmed has not resided at the subject premises since 2014 and has permitted and continues to allow multiple occupants to reside in and/or occupy the apartment are conclusory and carry no weight. (*Shirian Affi'd* ¶ 6).

Torres v. Mchedlishvili, supra. Additionally, petitioner's contention that it was not able to depose Mr. Ahmed is not a basis for opposition to this motion. Petitioner had ample time in two and one half years from the discovery stipulation to arrange its deposition of Mr. Ahmed. However, it failed to do so, even after Mr. Ahmed's counsel made a good faith offer to arrange it. (*Reply Affir'm Shah* ¶10) & (*Exhibit O*). Moreover, the issue of Ms. Shirian, the superintendent of the building, and other agents not having observed Mr. Ahmed in at least two years prior to the commencement of this proceeding is irrelevant. *Shirian Id.* ¶s 17 & 18). This proceeding is predicated on an alleged illegal sublease not non-primary residence.

Here, petitioner has not met its burden to produce proof in admissible form sufficient to establish the existence of a genuine issue of material fact. The allegation that Mr. Ahmed was not observed residing at the premises in at least two years, before the Notice and that others including a Jane Doe were observed occupying the apartment is not, by itself, evidence of an illegal sublet. This is especially true when there are affidavits supporting the claim that occupants of the subject premises were family members of Mr. Ahmed who co-resided with him at the subject premises. Likewise, allegations that neither Ms. Shirian nor the superintendent of the building nor any agents have observed respondent at the building in at least two years prior to the commencement of this proceeding is not proof of an illegal sublet. Aside from making conclusory allegations, petitioner has not offered any admissible evidence to support a claim that respondent illegally sublet his apartment. *Torres v. Mchedlishvili, supra.* Accordingly, respondent's motion for summary judgment dismissing the holdover petition is granted.

ORDERED: Respondent's motion for summary judgment is granted and the petition is dismissed.

This is the decision and order of this court. Copies of this decision will be mailed to the parties.



Judge, Civil/Housing Court
Frances Ortiz

Date: February 3, 2020

So Ordered
Frances Ortiz
Judge Housing Court