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OLLINVILLE ASSOCIATES v. OCHOA

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

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OLLINVILLE ASSOCIATES,
Petitioner,

Index No. L&T 42545/17
DECISION/ORDER

-against-

RICHARD ANDRES VIVAR OCHOA,
“JANE DOE,”

Respondents-Occupants.

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Bernadette G. Black, J.

BACKGROUND

Petitioner commenced this licensee holdover proceeding against Lydia Ochoa and unknown occupants on or about July 21, 2017, seeking a judgment of possession for the rent-stabilized premises, 2405 Olinville Avenue, Apartment 4E, Bronx, New York, based upon Ms. Ochoa’s alleged failure to sign a renewal lease in violation of the Rent Stabilization Code [hereinafter “RSC”]. Respondents failed to appear on the initial court date and the proceeding was adjourned to September 18, 2017 for inquest. On the return date Ms. Ochoa, *pro se*, appeared with her son, Richard Andres Vivar Ochoa, who was represented by counsel. Ms. Ochoa surrendered all rights and possession to the premises by stipulation, Mr. Vivar Ochoa was substituted for “John Doe,” and the caption amended accordingly. Petitioner discontinued the proceeding against Ms. Ochoa, and the parties agreed to adjourn the proceeding to November 8, 2017, for all appropriate purposes. Mr. Ochoa also agreed to submit an answer by October 31, 2017, and to pay use and occupancy by the 15th of every month without prejudice.

On November 8, 2017, the parties stipulated that respondent’s answer was deemed to interpose a succession defense and that respondent would provide proof of his right to succeed to the tenancy by January 3, 2018. On February 14, 2018, the parties agreed to mark the case off the calendar for discovery. On September 27, 2018, upon petitioner’s motion, the proceeding was restored to the court’s calendar, and adjourned several times more for settlement and motion

practice. On February 27, 2019, the proceeding was transferred for trial. The parties stipulated to exhibits and petitioner's *prima facie* case, and trial commenced on September 5, 2019.

FINDING OF FACTS

Respondent and Ms. Ochoa both testified at trial. Ms. Ochoa testified that she had lived at the subject premises with her son until she moved to 100 Bellamy Loop, Apartment 12A, Bronx, New York, on May 5, 2016. Respondent submitted a Riverbay Corporation Stock Certificate for the Bellamy Loop residence in Ms. Ochoa's name, dated March 25, 2016. Resp. Exh. II. Ms. Ochoa testified that she and her son intended for him to remain at the subject premises and take over the tenancy upon her vacatur of the apartment. She felt that her son, who was twenty-one at the time and had recently started a job as a security guard, was ready to live independently. To facilitate the transition of the tenancy from herself to her son, Ms. Ochoa, with the assistance of Neighborhood Initiatives Development Corporation [hereinafter "NIDC"], sent a letter to the landlord dated April 11, 2016, stating that:

“...Lydia Ochoa will be removing herself from the current lease and giving up all rights to said residence by the end of the month and allowing her son Richard Vivar Ochoa to continue to occupy the apartment under New York State DHCR Succession Fact sheet #30.” Resp. Exh. B.

On May 5, 2016, Ms. Ochoa moved from the subject premises to her current residence at 100 Bellamy Loop. Respondent submitted email correspondence with Flatrate Moving company, from mid-May 2016, in support of Ms. Ochoa's testimony. Resp. Exh. HH. Ms. Ochoa stated that she did not surrender her keys to the subject premises to the management office because she continued to use the keys when she visited her son.

After Ms. Ochoa moved out of the apartment in May 2016, she continued to pay the rent in her name with funds supplied by respondent. Ms. Ochoa explained that she continued to make rent payments for the subject premises in her name after she moved because petitioner rejected

her son's payments, stating they did not come from the tenant of record. This arrangement where respondent gave his mother money for rent which she then sent to the landlord under her name continued until respondent lost his job and was unable to pay the rent. Ms. Ochoa then loaned the rent money to her son, continuing to make rent payments for the subject premises under her own name. Ms. Ochoa also paid her son's electric and phone bill during this time. It was understood between them that respondent would repay this loan by surrendering his upcoming tax refund to his mother.

Hazel Mura is an employee of NIDC, a not-for-profit community organization which provides housing and community services to residents of the Bronx. Ms. Mura testified that she has known respondent his whole life, and that she has known his mother, Lydia Ochoa, even longer. Ms. Mura stated that to her knowledge, prior to May 2016, respondent and his mother had resided together at the subject premises, and that she occasionally provided Ms. Ochoa with housing-related resources as a part of her employment with the NIDC. Most recently, Ms. Mura assisted Ms. Ochoa with her plans to relocate from the subject premises to her current residence, and respondent's attempts to become the tenant of record of the apartment. Ms. Mura testified that she helped Ms. Ochoa with drafting letters to petitioner in April 2016 and February 2017, notifying petitioner of Ms. Ochoa's intention to move out of the apartment as well as her expectation that her son would succeed to the tenancy. To her recollection, petitioner never responded to Ms. Ochoa's letters. April 2017, Ms. Mura assisted respondent and Ms. Ochoa with filing a complaint to DHCR regarding petitioner's failure to issue a renewal lease to respondent. (Docket Number FP 610115 RV, filed on April 25, 2017). Resp. Exhs. Z and BB. With NIDC assistance Ms. Ochoa notified petitioner, by letter dated April 19, 2017, that she was filing the complaint with DHCR. Resp. Exh. Z.

Respondent testified that he had resided at the subject premises with his mother his entire life, until she moved out on May 5, 2016. Sometime thereafter he lost his job and his mother began loaning him money to help with expenses, including rent. Respondent and Ms. Ochoa agreed that respondent would repay the loan with his upcoming tax refund. To that end, they filed their taxes through the same tax preparer, and at the preparer's suggestion respondent and Ms. Ochoa both listed 100 Bellamy Loop as their residence.

Respondent's older brother, Edward Canfield, testified that he never co-resided with respondent. Mr. Canfield is significantly older than respondent and had lived with his father, while respondent resided with their mother at the subject premises. Mr. Canfield testified that he and his brother maintain a warm familial relationship; that he visited respondent at the subject premises many times over the years; and that respondent had lived at the subject premises with their mother his whole life, until Ms. Ochoa moved out on May 5, 2016. Mr. Canfield stated that their family had discussed the transition before it took place, and that he understood his mother's motivation for the move to be Ms. Ochoa's desire for herself and respondent to have their separate space, as well as his mother's growing concern about the stairs at the subject building, and their likely impact on her mobility as the years passed. Mr. Canfield testified that he has visited respondent at the subject premises since their mother moved out, usually by invitation, but sometimes without notice.

Ashley Calderon, Mr. Canfield's fiancé, testified that she first met respondent in 2011, and that he had been living with Ms. Ochoa at the time. Ms. Calderon stated that to her knowledge, when Ms. Ochoa moved out of the subject premises in 2016, respondent continued to live in the apartment. Ms. Calderon testified that she continued to visit respondent with her fiancé at the subject premises approximately five times each year, usually at respondent's invitation.

Respondent's friends, Mohammed Omar Ejaz, Danny Moreno, and Erwin Herrera Rodriguez also testified in support of his case. Mr. Ejaz testified that he first met respondent some time during the year 2010, while they were both skateboarding. Mr. Ejaz testified that he lives just a few blocks away from the subject premises, and has visited respondent often since the beginning of their friendship to "hang out" and play video games, and that he knew respondent to reside at the subject premises with his mother until she moved out.

Mr. Moreno testified that he has known respondent for over fifteen years, since about fourth or fifth grade. Mr. Moreno visited respondent throughout the years at the subject premises and had known respondent to reside there with his mother until she moved out of the apartment "three or four years ago." Mr. Moreno testified that he had helped Ms. Ochoa remove her belongings from the premises, and that respondent did not move out of the apartment with his mother.

Erwin Herrera Rodriguez testified that he met respondent around three or four years ago, through a mutual friend who invited him to a Christmas party respondent held at the subject premises. Mr. Herrera testified that he visits respondent three to four times a week and has known him to live at the subject premises throughout their friendship.

In support of his succession claim respondent also submitted the following documents into evidence:

- A copy of Richard Andres Vivar Ochoa's birth certificate, listing Lydia Ochoa as his mother (Resp. Exh. N);
- A letter from the New York State Department of State Licensing Services, dated July 7, 2014, and addressed to Richard A. Vivar Ochoa at the subject premises, referencing his security guard registration application (Resp. Exh. C);

- 2014 Federal and New York State tax return for Richard A. Vivar Ochoa, listing the subject address as his address (Resp. Exhs. E, Q);
- 2014 New York State tax return for Lydia Ochoa, listing the subject address as her address (Resp. Exh. P);
- 2015 New York State tax return for Lydia Ochoa, listing the subject address as her address (Resp. Exh. M);
- 2015 Federal and New York State tax return for Richard A. Vivar Ochoa, listing the subject address as his address (Resp. Exhs. D, L);
- Copies of Sterling National Bank statements, addressed to respondent at the subject premises, from May 2015 through July 2018 (Resp. Exh. JJ);
- New York State Department of Division of Licensing Services application, dated June 30, 2016, completed by Richard A. Vivar Ochoa listing the subject premises as his residential address (Resp. Exh. J);
- 2016 Federal tax return for Lydia Ochoa, listing 100 Bellamy Loop as her home address (Resp. Exh. K);
- 2016 New York State tax return for Richard A. Vivar Ochoa, listing 100 Bellamy Loop, Apartment 12A as his address (Resp. Exh. T);
- Payment Voucher for Income Tax Return for the year 2016 addressed to Richard A. Vivar Ochoa at 100 Bellamy Loop, Apartment 12A (Resp. Exh. V);
- 2014, 2015, 2016, and 2017 W-2 forms addressed to Richard A. Vivar Ochoa at the subject premises (Resp. Exh. Y);
- Certified bills from Jacobi Medical Center, for patient Richard A. Vivar Ochoa, listing the subject premises as his address, some listing Lydia Ochoa, reflecting the

- subject premises as her address, generated on following dates: June 24, 2014; September 20, 2014; October 4, 2014; October 30, 2014; November 21, 2014; February 25, 2016; March 8, 2016; April 7, 2016; July 19, 2016 (Resp. Exhs. W-X);
- A letter from Bzura's Tax Service – Tax Master, dated March 13, 2015, addressed to Richard A. Vivar Ochoa at the subject premises (Resp. Exh. O);
 - A letter from Bzura's Tax Service – Tax Master, dated March 22, 2017, addressed to Richard A. Vivar Ochoa at 100 Bellamy Loop, Apartment 12A, Bronx, New York (Resp. Exh. S);
 - T-Mobile monthly statement for September 2016 through November 2017, addressed to Richard A. Vivar Ochoa at the subject premises (Resp. Exh. H);
 - T-Mobile installment plan contract, dated July 5, 2017, addressed to Richard A. Vivar Ochoa at the subject premises (Resp. Exh. H);
 - Consolidated Edison subpoena response documentation, showing continuous billing under the name Richard Vivar at the subject premises, starting in April 2017 (Resp. Exh. KK).

Petitioner provided no rebuttal evidence at the conclusion of respondent's case.

APPLICABLE LAW

To qualify as a successor to a rent stabilized tenancy, 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). RSC § 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).

Courts routinely rely on credible testimony of co-residency in making succession determinations. WSC Riverside Dr. Owners LLC v. Williams, *supra*. (testimony of friends and neighbors credited in determining occupant resided with the tenant of record as a part of a family relationship); A & K Sanford Realty Corp. v. Galvez, 8 Misc. 3d 133(A) (App Term, 2nd Dept 2005) (citing 300 E. 34th St. Co. v. Habeeb, 248 A.D.2d 50 (1st Dept 1997)); Shuk Ying Sy v Doe, 4 Misc. 3d 139(A) (App Term, 1st Dept 2004).

Where a party properly 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).

ANALYSIS

Pursuant to RSC § 2523.5 (b), respondent must prove that he resided with his mother, the last tenant of record, for at least two years prior to her permanent vacatur of the subject premises on May 5, 2016. This court finds that respondent has amply sustained his burden of proof.

Petitioner did not dispute the familial relationship between Ms. Ochoa and her son. The main issue of contention between the parties here is whether respondent continuously co-resided with his mother at the subject premises for at least two years prior to her permanent vacatur, and whether respondent moved with his mother when she vacated the apartment in 2016. While there was some discussion over Ms. Ochoa's exact vacatur date, it is undisputed that Ms. Ochoa did in fact move out of the subject premises, and now resides in co-op city. While petitioner challenged the specific date of Ms. Ochoa's departure, the landlord did not present any alternative time frame. Notably, petitioner did not argue that Ms. Ochoa moved out of the premises before May 5, 2016, therefore the period of co-residency at issue is May 5, 2014 through May 5, 2016. Respondent submitted testimonial and documentary proof of Ms. Ochoa's efforts to properly inform the landlord of her intention move out of the apartment and her expectation that her young adult son would succeed to the tenancy of his life-long home following Ms. Ochoa's permanent vacatur of the subject premises. See BPP ST Owner LLC v. Nichols, 63 Misc. 3d 18 (App Term, 1st Dept 2019).

Extensive testimony by respondent's family and friends that he has continuously resided at the subject premises was consistent and very credible. In addition, respondent's array of documents supports a finding of his continuous and ongoing residence at the subject premises. It should be noted that petitioner did not dispute that Ms. Ochoa resided at the subject premises during this time, nor that she has since vacated and now lives at 100 Bellamy Loop. The only discrepancy as to respondent's address is contained in his 2017 tax records and respondent

provided a credible explanation as to why his mother's address was listed on his 2017 tax documents, corroborated by his mother's testimony. In addition, the 2014 - 2017 W-2 forms from respondent's employer list the subject premises as respondent's residence.

Based upon the credible and un rebutted evidence presented at trial, the court finds that respondent has sustained his burden of proving that he is the successor tenant of the subject premises. Accordingly, this licensee holdover is dismissed with prejudice. The parties must collect their exhibits from Part S within the next 15 days.

This constitutes the decision and order of the court.

Dated: Bronx, New York
February 18, 2020

BERNADETTE G. BLACK, J.H.C

For Petitioner: Rothenberg, Todd;
For Respondent: Urban Justice Center