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1371 Franklin Ave LLC v Pugh
2020 NY Slip Op 20055
Decided on February 24, 2020
Civil Court Of The City Of New York, Bronx County
Garland, J.
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Decided on February 24, 2020

Civil Court of the City of New York, Bronx County

<p>1371 Franklin Ave LLC, Petitioner,</p> <p>against</p> <p>Kitre Pugh, Respondent.</p>
--

L & T 50230/19

For Petitioner

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For Respondent Pro Se

Kitre Pugh

Christel F. Garland, J.

In this holdover proceeding, Petitioner seeks possession of Apartment No.1, an apartment located in a three-family house at 1371 Franklin Avenue, Bronx, New York, on the ground that Respondent's tenancy held under monthly hiring has been terminated.

Respondent appeared *pro se* in defense to this proceeding, and interposed an answer asserting acceptance of rent as a defense. In addition, Respondent alleged insufficient heat in the apartment, raised the presence of a sewage issue, holes in the floors and walls in the foyer, as well as mold and mildew in the apartment.

The issue for this Court to decide following the trial in this matter, is whether there has [*2]been acceptance of rent by Petitioner resulting in waiver.

The credible evidence at the trial established that Respondent moved into the subject apartment sometime in May 2019 and that the agreed upon monthly rent was \$1,500. Upon moving in, Respondent paid the security deposit and one month's rent to Petitioner via check for a total of \$3,000. Thereafter, Respondent paid rent directly to Petitioner's Wells Fargo bank account exclusively via Zelle[FN1], but her rent payments for the months of November 2019, December 2019 and January 2020 were returned to her along with letters explaining the returned funds.

In defense to this proceeding, Respondent contends that Petitioner's acceptance of her rent payments resulted in waiver which warrants dismissal of the petition.

Acceptance of rent during the window period, the period that comes "after the termination of the tenancy but before the commencement of the proceeding" may result in waiver (*ABN Associates, LLC v Citizens Advice Bureau Inc.*, 910 NYS2d 760 [App Term, 1st Dept 2010]). However, it is well-settled that "'waiver is the voluntary abandonment or relinquishment of a known right. It is essentially a matter of intent which must be proved' and should not be lightly presumed" ([145 East 16th Street LLC v Nanda](#), 61 Misc 3d 128 (A) [App Term, 1st Dept 2018]) (internal quotation marks and citation omitted). It has been held that where "rent is remitted to a bank through use of a lock-box", it is not sufficient to vitiate a predicate notice (*see Metropolitan Life Insurance Company v Sucdad*, NYLJ, Aug 8, 1985, at 6, col 1 [App Term, 1st Dept 1985]). In *ABN Associates*, the Court found that the landlord made a "prima facie showing that it did not waive its right to prosecute [the] proceeding by its inadvertent 'acceptance' through a lockbox of a single 'rent' payment, a payment expeditiously returned to tenant" (*id.*). Moreover, it was held that a "landlord's acceptance of rent for three months following termination of the tenancy and prior to the commencement of the holdover petition did not require a finding that landlord vitiated or waived its notice of nonrenewal—at least in circumstances where there was 'credible evidence' that landlord's housing complex, which receives thousands of rent checks, continued to bill the tenants because of a computer malfunction" (*PCV/ST LLC v Finn*, 2003 NY Slip Op 50897 [App Term, 1st Dept 2003]). Some of the additional factors the court in *Finn* relied upon to reach its conclusion that the landlord did not intend to relinquish a known right were the fact that there was no tender of a renewal lease or billing at an increased rent (*id.*).

What is *Zelle*? According to Wells Fargo's website, Petitioner's banking institution, *Zelle* is a convenient way to send and receive money from friends, family and other people you know and trust (see [wellsfargo.com/help/online-banking/zelle-faqs](https://www.wellsfargo.com/help/online-banking/zelle-faqs)). By using *Zelle*, you can send money to almost anyone with an eligible U.S.-based account using their email address or U.S. mobile phone number, and once the recipient registers payments are typically delivered within minutes (*id.*).

Similar to payments made via lockbox, payments made through *Zelle*, once established, can be unsolicited payments as they require nothing more than a few clicks and may even be made through an application on a cellular telephone. And, based on Petitioner's witness' credible testimony, it takes great effort to disable payments received through this service which does not permit that the feature be disabled for specific senders as a result of which he had to disable the [*3] feature from the account altogether [\[FN2\]](#) .

Here, the notice of termination is dated September 26, 2019 and terminates Respondent's tenancy effective October 31, 2019. The petition was filed on November 14, 2019. The relevant period for the purpose of determining whether there has been a waiver is thus the period between November 1, 2019 and November 13, 2019.

The credible evidence established that, with the exception of the security deposit and first rent payment, Respondent exclusively paid rent through *Zelle*. There was no evidence to establish that the rent payment made during the window period was a payment solicited by Petitioner. In any event, the evidence established that this payment was promptly returned to Respondent. The first letter Petitioner sent Respondent along with a check returning her rent payment is a letter dated November 6, 2019 drawn from Petitioner's account. The accompanying certificate of mailing from the postal service is dated November 14, 2019 and shows a mailing to Respondent at the subject address. In addition, Petitioner's witness testified that it was not Petitioner's intention to waive any rights to proceed herein and to continue its relationship with Respondent. The fact that the returned funds remain in Petitioner's account is of no consequence for the purposes of this analysis and may give rise to a claim for the return of said funds which is beyond this Court's jurisdiction.

Upon reviewing all the evidence and the relevant law, this Court finds that Petitioner established its prima facie case by a preponderance of the evidence, and that Respondent failed to establish her defenses. The Court notes that Respondent's claims as they relate to the conditions in the apartment and in the building are dismissed without prejudice as Petitioner did not seek an award for use and occupancy and no counterclaim for same was interposed.

Based on the foregoing, Petitioner is granted a final judgment of possession. A warrant of eviction may issue forthwith. Execution shall be following service of a notice of eviction as required by law. The earliest execution date shall be February 25, 2020.

This constitutes the decision and order of this Court.

A copy of this order will be mailed to all.

DATED: February 24, 2020

Christel F. Garland, JHC

Footnotes

Footnote 1: A detailed discussion of the *Zelle* method of payment will follow.

Footnote 2: Eli Weissman was Petitioner's sole witness at trial, who testified that he is the sole member the Petitioner LLC.

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