2020-03-25

Riverbay Corp. v. Scott

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Riverbay Corp. v Scott
2020 NY Slip Op 50366(U)
Decided on March 25, 2020
Civil Court, Bronx County
Lutwak, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on March 25, 2020

Civil Court, Bronx County

Riverbay Corp., Petitioner-Landlord,

against

Ophelia Scott, Respondent-Tenant, and Newby Sutana, Brianna Jones, James Northover, Markeno Broomfield (aka Markeno Rose), "John Doe" and "Jane Doe", Respondents-Undertenants.

L & T Index No. 39900/2018

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Diane E. Lutwak, J.

This is a holdover eviction proceeding against a Co-op City shareholder-tenant based on claims of illegal sublet, failure to report household composition and income, overcrowding and nuisance. After trial, and for the reasons below, this proceeding is dismissed with prejudice.

BACKGROUND & PROCEDURAL HISTORY

Petitioner Riverbay Corp., a cooperative corporation organized under Article II of the Private Housing Finance Law (commonly referred to as "the Mitchell-Lama Law") and subject to supervision by the New York State Division of Housing and Community Renewal (DHCR), seeks to recover possession of Apartment 19C at 120 Alcott Place, Bronx, New York from Respondent-Tenant and cooperative shareholder Ophelia Scott, and numerous Respondent-Undertenants. Petitioner's causes of action are enumerated in a Notice to Cure and a Notice of Termination which are annexed to and incorporated in the petition.

The Notice to Cure, dated November 22, 2017, alleges that Respondent-Tenant violated her Cooperative Occupancy Agreement as well as DHCR rules and regulations by (1) illegally subletting or assigning the apartment to Newby Sutana, Brianna Jones, James Northover, [*2]Markeno Broomfield (a/k/a Markeno Rose) or other persons unknown to the landlord; (2) failing to accurately report her complete household composition and income; (3) overcrowding by allowing seven people to occupy her two-bedroom apartment, in violation of DHCR regulations that limit occupancy to no more than four people; and (4) creating or permitting a

nuisance in that one of the occupants of the apartment, whom Petitioner believes to be Markeno Broomfield, "has started fires in the Apartment on numerous occasion[s], including, but not limited to, the fire initiated by him on or about November 3, 2017." The Notice to Cure states that Respondent-Tenant was required to cure these violations of her tenancy by December 15, 2017.

The Notice of Termination, dated July 5, 2018, alleges that Respondent-Tenant failed to comply with the Notice to Cure in that (1) on three specified dates in April and May 2018 Markeno Broomfield was seen entering the lobby elevator which stopped on the 19th floor; (2) she has not been seen at the building after the end of the cure period; and (3) she failed to report Markeno Broomfield as a member of her household.

Respondent-Tenant, represented by counsel, filed an answer denying Petitioner's claims and raising various defenses; she also moved to dismiss the petition. By Decision and Order of May 15, 2019 the court granted Respondent-Tenant's motion to the extent of dismissing the illegal sublet claim and setting the case down for trial, which took place on January 6 and 7, 2020. The only other Respondent to appear was Respondent-Tenant's husband, Respondent-Occupant James Northover, who retained the same counsel as his wife and filed an answer similar to his wife's just prior to the commencement of the trial.

FINDINGS OF FACT

At trial, each side presented the testimony of two witnesses: For Petitioner, a junior property manager, Tanysha Farley, and a Co-op City security officer, Shamel Pitt; for Respondents, the Respondent-Tenant Ophelia Scott and a New York City Fire Department (FDNY) fire marshal, Brian Lebow.

Petitioner established that it is the owner of the subject premises pursuant to a deed dated July 15, 1965 (Petitioner's Exhibit 1) and that the building is properly registered with the City as a multiple dwelling (Petitioner's Exhibit 2). There is an initial Occupancy Agreement between Petitioner and Respondent-Tenant dated January 19, 1999 (Petitioner's Exhibit 3). Respondent-Tenant completed and signed a household income affidavit in 2016 (Petitioner's Exhibit 5) listing six household members.

It was undisputed that a series of five or six fires took place in the subject apartment over a 24-hour period beginning on the morning of November 3, 2017 and ending on the morning of

November 4, 2017. Respondent-Tenant herself testified that "about three" of the fires took place on November 3, with the first starting in her bed when she was not home at about 11 a.m., which her husband put out. The second fire, for which Respondent-Tenant was home, started in a mattress that the FDNY had cut open and submerged in the bathtub; the third fire, which was put out by the FDNY, also occurred in her bedroom, also while she was not home. Respondent-Tenant testified that "about two" of the fires took place while she was home on November 4, [*3]first in her daughter's room which the FDNY put out and then in the living room, at about 10 a.m., which Respondent-Tenant herself put out. Present in the apartment on November 3 and 4 other than Respondent-Tenant were her husband James Northover, her daughter Brianna Jones and her son Markeno Broomfield; another daughter, Sharnette Richardson, was also present on November 4.

Petitioner's junior property manager Tanysha Farley went to the apartment twice in response to the fires, first in the early afternoon and then later that same night around 10 00 or 11 00 p m Petitioner's security officer Shamel Pitt went to the apartment once, at night Regarding the first visit, Ms Farley entered the apartment and observed the apartment to be in "disarray", with clothing and other household items strewn around and a mattress and blanket submerged in water in the bathtub Photographs taken during that visit were entered into evidence (Petitioner's Exhibits 4A 4U) Respondent Tenant was home, along with some of her relatives including her husband and daughter, who showed Ms Farley where the fire had started in a bedroom When she returned that night, Ms Farley did not enter the apartment because the fire marshal was there

When Officer Pitt went to the apartment, before entering he spoke with Respondent-Tenant who was leaving; she told him she had to go to work and could not wait for the fire marshal. Upon entering, Officer Pitt smelled burnt fabric, saw a mattress in the bathtub with charred marks on it and observed a burnt box spring in the first bedroom, burn marks on the sheets and blankets in the second bedroom and burn marks on the rug in a hallway closet near the bathroom. New York City firefighters were present along with Respondent-Tenant's husband, son Markeno, a daughter and the daughter's baby. Officer Pitt related a conversation he had with Markeno as follows: "I asked him if he knew who started the fires. He was telling me he started the fires. The daughter said don't say anything to him, be quiet. Then he would stop. Didn't say why he started the fires." Officer Pitt was not aware if anyone was charged or convicted after the fires.

FDNY Fire Marshal Brian Lebow testified that his role was to determine the origin and cause of the fires. His investigation included interviews with three of Respondent-Tenant's

relatives — her husband James Northover, her daughter Brianna Jones and her son Markeno Bloomfield. Nobody confessed to having started any of the fires and no one was charged with any crimes. He ruled out electrical and smoking materials as the cause and, although his investigation was to the best of his abilities, based on the information obtained his only conclusion was that it was "an incendiary fire". On cross-examination Fire Marshal Lebow explained that "incendiary generally means intentional" not "natural or accidental causes".

It was undisputed that no one was harmed by the fires, although beds, furniture and clothing were damaged It was also undisputed that the fires were not started by Respondent Tenant, who testified she did not see anyone start them; when asked by her lawyer if she "had any idea" how [*4]the fires started Respondent Tenant answered "no", which was also her answer when asked on cross examination if she was aware of her son starting any fires When asked if she had heard the security officer's testimony about her son Respondent Tenant answered, "Yes, but my son doesn't really talk to people" and that she was not present for that conversation as she had left the apartment by that time

Respondent-Tenant testified, and it was undisputed, that currently she lives in the apartment with just her husband James Northover (whom she referred to as "Junior"). Regarding her children, Respondent-Tenant testified that her daughter Brianna lived in the apartment her whole life, including at the time of the fires in November 2017, until moving to Rochester, New York in December 2017; her daughter Sharnette, who lived in the apartment from age nine until she left ten years ago, now lives in Connecticut; and her son Markeno, who lived in the apartment from age twelve until 2014, now lives in Jamaica, West Indies. Regarding her 2016 income affidavit, Respondent-Tenant testified that when she completed it the household consisted of herself, her daughter Brianna and one granddaughter. The other people listed were other grandchildren whom she listed "because they were going back and forth" and "they told me to put them on". In 2017 she did not include the grandchildren on the affidavit "because the Coop City representative told me not to since they just visit me."

Respondent testified that one other fire had occurred in her apartment, about ten years ago, in the air conditioner. She did not know what caused that fire either.

DISCUSSION

While three of Petitioner's alleged grounds for eviction remained after its illegal sublet claim was dismissed, the parties focused their evidence at trial on the nuisance claim. In State-supervised Mitchell-Lama housing, first on the list of fourteen grounds for eviction is where the "tenant, cooperator or other individual commits or permits a nuisance in the apartment". 9 NYCRR § 1727-5.3(a)(1). Nuisance is defined in the residential landlord-tenant context as "a condition that threatens the comfort and safety of others in the building" and generally is evidenced by "a pattern of continuity or recurrence of objectionable conduct". *Frank v Park Summit Realty Corp* (175 AD2d 33, 35-36, 573 NYS2d 655, 657 [1st Dep't], *mod on other grounds* 79 NY2d 789, 587 NE2d 287, 579 NYS2d 649 [1991]). "One incident a pattern does not make," *Goodhue Residential Co v Lazansky* (1 Misc 3d 907[A], 781 NYS2d 624 [Civ Ct NY Co 2003]), each case must be decided on its own facts, *Metropolitan Life Ins Co v Moldoff* (187 Misc 458, 460, 63 NYS2d 385, 387 [App Term 1946], *aff'd*, 272 AD 1039, 74 NYS2d 910 [1st Dep't 1947]), and a high threshold of proof is required for eviction based on nuisance, *Domen Holding Co v Aranovich* (1 NY3d 117, 124, 802 NE2d 135, 139, 769 NYS2d 785, 789 [2003]).

Here, on the one hand, Respondent-Tenant's conclusory assertion that she had no idea of who or what caused the fires simply was not credible. She has lived in the apartment for over twenty years, she was home when at least three of the fires occurred and members of her [*5]immediate family were there when she was at work. The absence of testimony from any of those family members, named as Respondent-Occupants and present during the relevant 24-hour period, only emphasized the shortcomings of Respondent-Tenant's testimony, as did her failure to provide any explanation for why no one else in the family testified. This is not a horror film and the fires were not incidents of spontaneous, poltergeist-inspired combustion. Surely one or more members of the family knows, or has an idea about, what happened.

On the other hand, the testimony of Coop City Officer Pitt that Respondent-Tenant's son told him he started the fires constitutes some evidence of the cause of the fires, which undisputedly occurred and by their very nature were dangerous. However, while FDNY Fire Marshal Lebow testified to his conclusion that the fires were "incendiary", that is, intentionally set, his report contains no information about the specific cause of the fires and no arrests were made. Further, Petitioner presented no evidence at trial of any objectionable conduct other than the essentially unexplained fires that occurred during one 24-hour period over eight months prior to the date of the termination notice and over two years prior to trial.

There are two reasons why the court concludes that Petitioner failed to meet its burden of proving that Respondents committed or permitted a nuisance warranting their eviction. First, the applicable regulations for State Mitchell-Lama housing require a ten-day notice to cure, 9 NYCRR § 1727-5.3(b)(1); *Sea Park W Houses v Williams* 2004 NYLJ LEXIS 2260 [Civ Ct Kings Co 2004]), and no notice of termination may be served "until the time to cure has expired and the violation has not been cured." 9 NYCRR § 1727-5.3(b)(2). Petitioner did serve a notice to cure, but then treated the cure period as a nullity: Despite the absence of any subsequent objectionable behavior, eight months later Petitioner served a termination notice. Not only is the termination notice faulty as it failed to state any facts indicating that the objectionable behavior had not been cured, *see 2704 Univ Ave Realty v Thompson* (2019 NYLJ LEXIS 1796 [Civ Ct Bx Co 2019]) *and cases cited therein,* but there was no evidence presented at trial of any nuisance behavior whatsoever following the events described in the notice to cure. The court will not speculate as to whether it is likely that fires will occur in Respondents' apartment in the future. *Metropolitan Life Ins Co v Moldoff, supra.*

Second, the series of fires that occurred over a 24-hour period beginning on the morning of November 3, 2017 essentially constituted one incident, which does not establish the requisite "pattern of continuity or recurrence of objectionable conduct". *Frank v Park Summit Realty Corp, supra, quoted in Domen Holding Co v Aranovich, supra*. *See, e.g., Metropolitan Life Ins Co v Moldoff, supra* (isolated attempt at suicide does not constitute nuisance "even though it might have endangered others"); *Singapore Leasing LP v Diaz* (59 Misc 3d 1222[A], 106 NYS3d 551 [Civ Ct Qns Co 2018]) (single incident of an alleged occupant, not the tenant of record, cursing and punching a security guard does not constitute nuisance); *Pelham 1130 LLC v Cause* (2017 NYLJ LEXIS 2018 [Civ Ct Bx Co 2017])(single instance of tenant striking building employee with a screwdriver, "although unconscionable", insufficient to maintain nuisance proceeding); *Goodhue Residential Co v Lazansky, supra* (single incident of [*6]urinating outside the building insufficient to establish nuisance claim); *Pamac Realty Corp v Bush* (101 Misc 2d 101, 420 NYS2d 614 [Civ Ct NY Co 1979])(single fire caused by tenant suffering from alcoholism who ignited his mattress by negligently dropping his lit cigarette on it insufficient to upon it).

As it is evident that the objectionable conduct, though certainly troubling, was both time-limited in scope and never repeated, that claim is dismissed. *See e.g., New York City Housing Authority v James* (186 AD2d 498, 589 NYS2d 331 [1st Dep't 1992]).

Left for the Court to determine are Petitioner's claims that the subject two-bedroom apartment is not Respondent-Tenant's primary residence and that it is over-occupied. Petitioner presented no evidence whatsoever on the alleged nonprimary residence claim, which accordingly is dismissed. As to overoccupancy, the only evidence that the apartment was occupied by more than four persons in violation of Mitchell-Lama occupancy rules, 9 NYCRR § 1727-2.8(a), was the Respondent-Tenant's 2016 affidavit of income, which listed six household members. However, Respondent-Tenant credibly explained that in 2016 she lived in the apartment with just her husband and daughter Brianna, that she included her grandchildren who visited frequently on the household composition affidavit at the instruction of one of Petitioner's employees and then removed them the following year. Petitioner called no witness to rebut this testimony and even if the apartment had been over-occupied in 2016 the only evidence as to the household composition after the cure period was Respondent-Tenant's testimony that her daughter Brianna moved out in December 2017 and that she now lives in the apartment with just her husband, Respondent-Occupant James Northover.

CONCLUSION

For the reasons stated above, and based on the credible evidence adduced at trial, the petition is dismissed, with prejudice.[FN1] This constitutes the Decision and Order of this Court, copies of which will be emailed to the appearing parties' respective attorneys. Counsel may pick up their documents that were submitted into evidence as trial exhibits from the Part D Clerk in Room 550 at 1118 Grand Concourse, Bronx, New York as soon as practicable.

Diane E. Lutwak, HCJ

Dated: Bronx, New York

March 25, 2020

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Footnotes

Footnote 1: Even if the court had found that Respondents had committed or permitted a nuisance due to the fires that occurred on November 3 and 4, 2017 and awarded Petitioner a judgment of possession, which it did not, given that there was no evidence of any objectionable conduct occurring after those dates the court would have found any such nuisance to have been cured and would have permanently stayed execution of the warrant of eviction *See, e.g., Matter of Strata Realty Corp v Pena* (166 AD3d 401, 86 NYS3d 74 [1st Dep't 2018]).

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