2020-04-14

Cordova v. 1217 Bedford Realty LLC

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART

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JOSEPH CORDOVA,

Petitioner,

-against-

1217 BEDFORD REALTY LLC,

Respondent.

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Index No. 11488/2020

DECISION/ORDER
PURSUANT TO CPLR 409(B)

Present: Hon. Michael Weisberg
Judge, Housing Court

Petitioner Joseph Cordova commenced this RPAPL 713(10) "illegal lockout" proceeding by order to show cause returnable April 3, 2020, during the COVID-19 public health emergency. Respondent 1217 Bedford Realty LLC answered the petition and filed a demand for a trial by jury. As no new jury trials were being held during the public health emergency, and because of the nature of the proceeding and the relief being sought, the court held a hearing on whether a preliminary injunction should issue restoring Petitioner to physical possession of the subject premises.

The hearing was held remotely over the course of several days. Cordova testified on his own behalf and then rested. Respondent moved for dismissal of the petition. As discussed below, the petition is dismissed, pursuant to CPLR 409(b), because it would be futile to order that Cordova be awarded possession.

CORDOVA'S TESTIMONY

The subject building, 1221 Bedford Avenue in Brooklyn, is a four-story (plus cellar) office building (based on the most recent certificate of occupancy). Cordova testified that he moved into the mezzanine level floor for use as his residence in June 2019, and that the building

was otherwise vacant. According to a bargain and sale deed, Respondent 1217 Bedford Realty LLC obtained title to the building in September, from the prior owner, 1217 Bedford LLC. On January 6, 2020, after spending a week away, Cordova returned to the building to find that the locks were changed. He broke the locks to enter the mezzanine level space. Later that day, he was walking to the hardware store to buy replacement locks when he was arrested for breaking and entering. He has not returned since and has not been provided any keys by Respondent.

Cordova testified that he was renting a room in an apartment in a small house when he responded to an advertisement for the space on Craigslist. He met with an individual named Michael Willaby, to whom he paid $12,500.00 in cash, representing rent at $2,500.00 per month for the months June through October 2019. Cordova attempted to admit four documents into evidence which he testified were receipts for payment. The court denied their admissibility as hearsay statements of Willaby, because they were out of court statements offered for the truth (*see Standard Textile Co. v National Equip. Rental,* 80 AD2d 911, 911 [2d Dept 1981] [document from third party confirming receipt of goods from plaintiff was inadmissible hearsay, absent proper foundation]). In exchange for $12,500.00, Cordova received the combination code to a lock placed on an outside gate and two keys, one to access the building and one to access the mezzanine level space.

Cordova and Willaby also executed a form residential lease for a two-year period. The lease, which was admitted into evidence, does not specify any floor number or otherwise identify any particular space in the building. Cordova set up a cable account in the building, but not an electric account. Although the lease provides otherwise, Cordova testified that it was included in the rent. Notwithstanding that the building is meant for use as professional offices, Cordova testified that the mezzanine floor had a bathroom with a shower and toilet, a kitchen (albeit with

a portable electric stove and apparently no oven), and spaces that he identified as his "bedroom" and "living room." Pictures were admitted into evidence showing the spaces that Cordova identified as such.

At no time did Cordova discuss or inquire as to Willaby's connection to the building or to the building's owner. In response to his attorney's question regarding how he knew that Willaby had authority to rent the space, Cordova testified that it was based on Willaby's actions: his provision of the combination to the outside lock and the keys. Cordova explicitly declined to call Willaby as a witness, though he acknowledged that he was in possession of a telephone number for Willaby. The lease also contains an address for Willaby.

On January 6, 2020, Cordova returned to the building after a week away to find that his keys no longer worked. He broke the locks to enter the building and the mezzanine space, then later left the building to purchase new locks at the hardware store. While en route, he was stopped by the police and arrested for breaking into the building.

DISCUSSION

The relief available to a prevailing petitioner in a summary RPAPL 713(10) proceeding is a judgment entitling him to possession of the subject premises.[1] However, the appellate courts have repeatedly held, in both the commercial and residential context, that a petitioner in an RPAPL 713(10) proceeding should not be awarded possession if it would be "futile" to do so. That is, notwithstanding that an occupant is unlawfully ousted from real property without authorization by the court, it does not necessarily follow that the occupant is entitled to be

[1] In comparison, RPAPL 853 entitles one who is forcibly or unlawfully ejected from real property to damages from the wrongdoer. Recently enacted RPAPL 768 makes similar conduct punishable by civil and criminal penalties. However, Housing Court does not have jurisdiction to adjudicate claims under these statutes (*see Rostant v Swersky*, 79 AD3d 456, 457 [1st Dept 2010] [as to claims for damages]).

restored to possession. Here, then, even were the court to find that Cordova established all the elements of the cause of action as set forth in RPAPL 713(10), under the circumstances here the court could not award him judgment.

Wagman v Smith (161 AD2d 704 [2d Dept 1990]) was an RPAPL 713(10) proceeding commenced by the former owner of a piece of real property against the purchaser of the property at a foreclosure auction. Rather than affording the petitioner due process and seeking authorization to evict him from the court, the respondent changed the locks to the property, after which the petitioner was arrested "after he objected to the changing of the locks" (*id.* at 704). While suggesting that the respondent "could have been better advised to [seek relief via the courts] rather than resorting to the common-law remedy of self-help...there is no need to restore the petition to possession as the respondent would have been entitled to a writ of assistance and possession under RPAPL 221" (*id.*).

Eight years later, in a case concerning commercial lease of a parking garage, the Appellate Term, Second Department, explicitly declined to apply *Wagman* and similar decisions when it reversed the lower court's dismissal of an RPAPL 713(10) petition (*110-45 Queens Blvd. Garage, Inc. v Park Briar Owners, Inc.* (177 Misc 2d 555, 557 [App Term, 2d Dept 1998] ["we respectfully decline to adopt the reasoning of these cases"], *revd* 265 AD2d 415 [2d Dept 1999]). But the Appellate Division reversed, affirming the lower court's order (*110-45 Queens Blvd. Garage, Inc. v Park Briar Owners, Inc.*, 265 AD2d 415 [2d Dept 1999]). In doing so, the court noted that the petitioner may seek damages if the reentry was forcible, instead of peaceable. But found that "restoring the petitioner to possession would be futile, because [the landlord] would prevail in a summary proceeding to evict the petitioner [because the ten-year lease had expired and because the petitioner had defaulted in the payment of rent]" (*id.* at 416).

Later, the Appellate Term cited *110-45 Queens Blvd. Garage, Inc.* in the residential context when it reversed the lower court and dismissed the petition in *Bernstein v Rozenbaum* (20 Misc 3d 138[A], 2008 NY Slip Op 51558[U] [App Term, 2d Dept, 2d & 11th Jud Dists 2008]). Bernstein concerned a condominium unit rented to the petitioner's mother. The respondent had defaulted, and his motion to vacate the default judgment was denied. Reversing the lower court and dismissing the petition, the Appellate Term stated, "[W]e note that neither the petitioner nor her mother had a right to remain in the premises subsequent to the expiration of petitioner's mother's lease…[i]n these circumstances, the proceeding to be restored to possession...should have been dismissed as futile" (*id.*).

Here, restoration of Cordova to physical possession of the premises would be futile. Cordova presented no evidence establishing Willaby's connection to the premises or authority to grant him possession, except for his testimony that Willaby had the combination code to the outside lock and keys to the main door and mezzanine level door. Cordova argued that Willaby was the agent of the owner of the time based on his "apparent authority," as evidenced by his access to the lock and the keys. But "apparent authority" is only created by the words or conduct of the principal, not of the agent (*Begley v City of New York*, 111 AD3d 5, 30 [2d Dept 2013]). Even if the court were to find that Willaby was an agent of the landlord, Respondent correctly argued that the two-year lease would be invalid due to the Statute of Frauds, because there was no evidence of any writing authorizing Willaby to act on behalf of the landlord (*see Fortes v Estate of Magoon*, 160 AD2d 756, 757 [2d Dept 1990]). At best, then, Cordova has a month-to-month tenancy in a space that he is occupying in contravention of the certificate of occupancy. Restoring him to possession would be as futile as in the cases above.[2]

[2] Though not necessarily relevant here, it is worth drawing attention to the decision of the Appellate Division in *Paulino v Wright* (210 AD2d 171 [1st Dept 1994]), wherein the court reversed the lower court's order restoring the

CONCLUSION

It is hereby ORDERED that judgment shall enter in favor of Respondent and that the petition is dismissed. In view of the procedural posture of the proceeding, this is order is made pursuant to the power granted by CPLR 409(b) to make any order permitted on a motion for summary judgment upon the pleadings, papers, and admissions of a party and where no triable issue of fact is raised (*cf. e.g. 901 Bklyn Realty, LLC v Woods-Najac*, 65 Misc 3d 158[A], 2019 NY Slip Op 51976[U] [App Term, 2d Dept, 2d, 11th, & 13th Jud Dists 2019]; CPLR 409[b]).

This is the court's decision and order.

Dated: April 14, 2020

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Michael L. Weisberg
J.H.C.

plaintiffs, who were squatters, to physical possession. The court rejected the plaintiffs' argument that the city landlord was required to commence eviction proceedings, instead of using self-help. "RPAPL 713 merely permits a special proceeding as an additional means of effectuating the removal of nontenants, *but it does not replace an owner's common-law right to oust an interloper without legal process*" (*id.* at 171 [emphasis in original], quoting *P & A Bros. v City of NY Dept of Parks & Recreation*, 184 AD2d 267, 268 [1st Dept 1992]). *Paulino* was followed by the Appellate Term, Second Department, in *Almonte v City of New York* (166 Misc 2d 376 [App Term, Second Dept 1995]).