Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

All Decisions

Housing Court Decisions Project

2020-05-13

William 165 LLC v. Ser-Boim

Follow this and additional works at: https://ir.lawnet.fordham.edu/housing_court_all

Recommended Citation

"William 165 LLC v. Ser-Boim" (2020). *All Decisions*. 166.
https://ir.lawnet.fordham.edu/housing_court_all/166

This Housing Court Decision is brought to you for free and open access by the Housing Court Decisions Project at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in All Decisions by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

[*1]

William 165 LLC v Ser-Boim
2020 NY Slip Op 20109
Decided on May 13, 2020
Civil Court Of The City Of New York, New York County
Ortiz, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the printed Official Reports.

Decided on May 13, 2020

Civil Court of the City of New York, New York County

William 165 LLC, Petitioner-Landlord,

against

DAN SER-BOIM A/K/A DAN SERO BOIN, Respondent-Tenant, ANASTACIA KURYLO, MICHAEL KURYLO, "JOHN DOE" and "JANE DOE" Respondents-Undertenants

L & T 52496/16

Belkin Burden Wenig & Goldman, LLP

William E. Baney, Esq.

270 Madison Avenue

New York, NY 10016

Attorneys for Petitioner

Ween & Kozek, PLLC

Nina Oksman, Esq.

20 Jay Street, Suite 814

Brooklyn, NY 11201

Attorneys for Respondents

Frances A. Ortiz, J.

Recitation as required by CPLR 2219(a), of the papers considered in the review of the respondents' cross motion to amend the answer and for a stay.

Papers/Numbered

Notice of Cross Motion, Affirmation, Affidavit & Memorandum of Law 1

Affirmation & Affidavit in Opposition to Cross Motion 2

Upon the foregoing cited papers, the Decision/Order of this Court on this motion is as follows:

This is a holdover proceeding initially commenced in January 2016 against respondent, Dan Serro-Boim ("Mr. Serro-Boim"). He is the rent stabilized tenant of record of the premises. The holdover claim is based upon non-primary residence. Anastacia Kurylo ("Ms. Kurylo") and Michael Kurylo ("Mr. Kurylo") are the respondents-undertenants in this proceeding. Ms. Kurylo is the daughter of Mr. Serro-Boim and Mr. Kurylo is the son-in-law of Mr. Serro-Boim. The undertenants appeared and interposed a written answer dated February 25, 2016. *(Exhibit R)*. The answer contained several affirmative defenses including waiver and illusory tenancy. Judge Sabrina Kraus in a decision dated July 11, 2016 dismissed the first affirmative defense of waiver, denied the prior owner's motion for discovery seeking production of documents, granted prior owner's motion to depose respondents, and ordered payment of use and occupancy. *(Exhibit S)*. Respondents appealed the July 11, 2016 decision. The Appellate Term, First Department on January 30, 2019 reversed Judge Kraus' dismissal of the first affirmative defense of waiver and reinstated the defense. *(Exhibit U)*. Specifically, the Appellate Term found:

> Respondents-undertenants' waiver defense should not have been summarily dismissed, since, in our view, an issue of fact is presented as to whether petitioner's acceptance of rent from respondents over at least a seven-year period, constituted a waiver of petitioner's right to object to respondents' continued occupancy of the premises .In addition to paying the rent in their own names, respondents claim to have made improvements in the apartment with the consent of petitioner, received a rent credit from petitioner in consideration for the same, and corresponded directly with petitioner concerning maintenance, rent and repair issues in their own names. Thus, on this record, the issue of whether petitioner waived its right to object to respondents' continued occupancy should be resolved at trial, and not on summary judgment

PB 165 William St. Holdings LLC v. Sero-Boim, 62 Misc 3d 144(A) (AT 1st Dep't 2019).

Thereafter, on January 31, 2019, the Appellate Division, Second Department issued *Matter of Marie Jourdain v. New York State Division of Housing and Community Renewal, 159 AD3d 41 (2nd Dep't 2018), lv dismissed 34 NY3d 1009 (2019).* The Appellate Division, Second Department concluded that under *RSC § 2523.5 (b) (1)*, "permanent vacating of the housing accommodation by the tenant" means the time that the tenant permanently ceased physically residing at the housing accommodation and that the mere execution of a renewal lease and the continuation of rent payments by the tenant after the tenant permanently ceases to reside at the housing accommodation does not extend the relevant time period.

Based on this holding in *Matter of Marie Jourdain, supra.,* respondents-undertenants filed a complaint with the Division of Housing and Community Renewal ("DHCR") on February 12, [*2]2019 seeking an order directing petitioner to issue them a rent stabilized lease renewal for the premises in Ms. Kurylo's name. *(Exhibit V — the DHCR complaint).*

Additionally, respondents-undertenants based on *Matter of Marie Jourdain, supra.,* move for leave to file and serve an amended answer in this proceeding. Now, they want to raise a succession defense in the answer. They are also seeking a stay of this proceeding pending DHCR's determination on their complaint. Respondents in their initial answer did not raise succession rights as an affirmative defense because from the date that Mr. Serro-Boim vacated the premises and moved to Florida, he refused to remove his name from the lease or to add respondents-undertenants to the lease. It is undisputed that Mr. Serro-Boim vacated the premises on or about 1998. *(Kurylo Aff'd ¶15).* Subsequently, Mr. Serro-Boim died in January 2018. *(Kozek Aff'rm ¶5, footnote 1).*

It is likely that respondents-undertenants did not raise a succession defense in their answer because the controlling First Department case law on permanent vacatur is that a tenant who vacates but continues to execute renewal leases and pay rent in his or her name cannot be found to have "permanently vacated" for purposes of *9 NYCRR §2523.5 (b) (1). Third Lenox Terrace Assoc. v. Edwards, 91 AD3d 532 (1st Dep't 2012).* Accordingly, respondents seek to amend their answer to raise succession rights as a defense, after the holding in *Matter of Marie Jourdain, supra.,* since they believe their factual circumstances are similar to those in *Jourdain. (Exhibit B — proposed Amended Answer).*

Under *CPLR §3025 (b),* leave to amend pleadings should be freely given, and denied only if there is prejudice or surprise directly resulting from the delay or if the proposed amendment is palpably improper or insufficient as a matter of law *McCaskey, Davies & Assocs , Inc v New York City Health & Hosps Corp , 59 NY2d 755, 57 (1983); McGhee v Odell, 96 AD3d 449, 450 (1st Dep't 2012)* When deciding whether to permit an amended answer, a court considers the following factors merit to defenses, reason for delay, and prejudice to the petitioner caused by the delay *Norwood v City of New York, 203 AD2d 147 (1st Dep't 1994), lv dismissed, 84 NY2d 849 (1994)* A party opposing leave to amend must overcome a heavy presumption of validity in favor of allowing the amendment *Otis El Co v 1166 Ave of Ams Condominium, 166 AD2d 307 (1st Dep't 1990)* Prejudice to warrant denial of leave to amend requires some indication that the opposing party has been hindered in the preparation of its case or has been prevented from taking some measure in support of its position *Kocourek v Booz Allen Hamilton Inc , 85 AD3d 502, 504 (1st Dep't 2011)*

Here, respondents-undertenants seek to amend their answer to include succession rights pursuant to *9 NYCRR §2523.5 (b) (1).* In the appellate courts of the First Department the only relevant time period for establishing succession rights is the period immediately prior to the tenant's permanent vacatur. If the tenant has not maintained the apartment as a primary residence during that legally defined time frame, then there is no succession. A tenant who vacates but continues to execute renewal leases and pay rent in her name cannot be found to have "permanently vacated." *Third Lenox Terrace Assoc. v. Edwards, supra. In Third Lenox* the court precluded succession rights to the sister of the tenant of record because she could not show co-occupancy with the tenant of record during the last two years of the latest renewal lease.

Moreover, recently on February 26, 2020 the Appellate Term, First Department acknowledged in two decisions the split in authority between the Appellate Divisions of the First

and Second Department regarding the interpretation of when the "permanent vacating of the housing accommodation by the tenant" occurs pursuant to *9 NYCRR §2523.5 (b) (1). W. 48th Holdings [*3]LLC v. Herrera, 66 Misc 3d 150(A) (AT 1st Dep't 2020) and Diagonal Realty LLC v. Arias, 66 Misc 3d 150(A) (AT 1st Dep't 2020*). In both decisions the Appellate Term, First Department stated the identical language:

> We acknowledge that there is a split in authority between the Appellate Divisions of the First and Second Department regarding when the "permanent vacating of the housing accommodation by the tenant" occurs (Rent Stabilization Code [9 NYCRR] § 2523.5[b][1]; *compare Matter of Well Done Realty, LLC v. Epps*, 177 AD3d at 428 and *Third Lenox Terrace Assoc. v. Edwards*, 91 AD3d at 533 with *Matter of Jourdain v. New York State Div. of Hous. & Community Renewal*, 159 AD3d 41 [2018], *lv dismissed* 34 NY3d 1009 [2019]). Clearly, we are bound by the law as promulgated in the Appellate Division, First Department, until the Court of Appeals makes a dispositive ruling on the issue (*see D'Alessandro v. Carro*, 123 AD3d 1, 4 [2014]).

W. 48th Holdings LLC v. Herrera, supra. and *Diagonal Realty LLC v. Arias, supra.*

Applying the factual circumstances of these respondents to the above discussed First Department appellate case law, they have not presented a meritorious defense of succession pursuant to *9 NYCRR §2523.5 (b) (1)*. *Norwood v City of New York, supra.* Actually, their claim for a succession defense is insufficient as a matter of law in the First Department.**[FN1]** *McCaskey, Davies & Assocs., Inc. v. New York City Health & Hosps. Corp., supra.* Moreover, the petitioner in its opposition has overcome the heavy presumption of validity in favor of allowing the amendment. *Otis El. Co. v 1166 Ave. of Ams. Condominium, supra.* As such, this Court cannot grant the cross motion to amend the answer to include a succession defense.

First, Mr. Serro-Boim, the tenant of record vacated the premises and moved to Florida in 1998 but refused to remove his name from the lease or add respondents-undertenants to the lease. *(Kurylo Aff'd ¶15).* After his 1998 vacatur, he executed nine (9) renewal leases solely in his name. *(Baney Aff'rm ¶31).* His last renewal lease expired on December 31, 2015. *(Id.).* Therefore, the Kurylos would have to show co-occupancy with Mr. Serro-Boim, during the last two years before December 31, 2015. However, this is not possible because Mr. Serro-Boim vacated the premises on or about 1998. Accordingly, respondents' cross motion to amend the answer is denied.

Additionally, the part of respondents' cross motion seeking to stay this proceeding pending DHCR's determination on their complaint is denied as moot. According to *Exhibit 1* to the [*4]affirmation in opposition, the DHCR Rent Administrator in an Order dated November 12, 2019 terminated the proceeding. The Administrator found that because the parties had the instant pending holdover petition, the issue of whether respondents are entitled to a renewal lease offer would be addressed by this Court.

This matter is marked off calendar It may be restored by motion of either party or pursuant to two attorney stipulation, when normal court operations resume

ORDERED that respondents' cross motion to amend the answer is denied; and it is further

ORDERED that respondents' cross motion to stay this proceeding is denied as moot.

This is the decision and order of the Court, copies of which are being emailed and mailed to those indicated below.

Dated: New York, NY

May 13, 2020

____

Frances A. Ortiz, JHC

Footnotes

Footnote 1: After the Appellate Division, Second Department decided *Matter of Marie Jourdain*, *supra.,* this Court while sitting in the Second Department decided a motion for summary judgment by the landlord regarding when the "permanent vacating of the housing accommodation by the tenant" occurs under *9 NYCRR §2523.5 (b) (1).* The decision analyzed the split in authority between the Appellate Divisions of the First and Second Department on the issue. This Court denied the landlord's request to apply the holding of *Third Lennox supra*. to its case. Instead, it concluded that the doctrine of *stare decisis* required it as a trial court to follow decisions and precedents established by the Appellate Division of its own department, if the Court of Appeals has not ruled on the same precedent. Hence, it denied the landlord's motion for summary judgment and applied the Second Department's holding in *Matter of Marie*

Jourdain to the decision. *5712 Realty LLC v. Taylor, 63 Misc 3d 922, 929 (Kings Cty, Civ. Ct. 2019).*

Return to Decision List