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

X

MARVIN SMITH

Petitioner,

-against-

Index No.

L&T 801170/20

Present:

Hon. Christel F. Garland

THE PARK CENTRAL 1 LLC,
NATHAN DESSLER (AGENT),
LAFAYETTE MORRISON HDFC,
SAUL FRIEDMAN (HEAD OFFICER),

Respondents.

DECISION/ORDER
(AMENDED)

X

Petitioner filed the heretofore ("OSC") in lieu of a notice of petition on or about May 1, 2020, seeking to be established to possession of apartment #3L and a return to the 5th Floor of the Bronx New York.

Respondent appeared by counsel and interposed an answer asserting a general denial and several counterclaims. When respondent's answer failed to appear on the first day that proceedings were scheduled to be heard in the court, the OSC on May 26, 2020 for a hearing in Petitioner's favor.

When the parties could not meet in person, the hearing over Skype at the time that the parties were sworn in during which the petitioner and Respondent's agent Nathan Dessler, testified in support of their respective positions.

Petitioner testified that the respondent of the subject apartment is Karen Newman and that they were together as a couple. She said Ms. Newman began staying together at the apartment from the end of last year, but that at the time he testified to occupy the apartment located at 2720 Grand Concourse. Petitioner testified that he did not officially move in to the apartment until the end of February 2020 when his New York State gave him a key fob which they obtained to the management office by that time a portion of his possessions were moved into the subject apartment. Petitioner testified that he obtained the key fob from the building from Ms. Newman and that it gives building residents access to the building's doors as

well as the back door of the building. Sometime in March 2020, Ms. Newman contracted COVID-19 and passed away. That month, he received communication from the management company and spoke to Nathan Dessler who asked him to either leave the apartment or fill out and sign some papers. He recalled that the conversation took place while he was standing in line to get tested for COVID-19 and that Respondent was also trying to gain access to the apartment at that time. Petitioner testified that his ability to access the building changed on April 20, 2020 when he returned to the apartment and the key fob did not work anymore. Now he is only able to gain access to the building with the assistance of other building residents who are familiar with him and this caused other issues such as Ms. Newman's daughter "popping up" at the building angry and telling him to leave the building. Petitioner then testified that since his last communication with management, he has not gone to management nor spoken to Mr. Dessler to try to get his key reactivated. The only other communication he received from Respondent is a 10-day notice to quit that arrived in the mail. Lastly, Petitioner testified that he did make a prior attempt to have this issue resolved in court.

On cross-examination, Petitioner clarified that he and Ms. Newman got together in August 2019 but had known each other for years before. Prior to moving into the subject apartment, he occupied apartment #501 which is an apartment located at 2720 Grand Concourse, Bronx, where he was occupying the apartment with someone else. Then sometime in November 2019, he and Ms. Newman decided that they wanted to live together but he did not physically move into the subject apartment until the end of February 2020 and Ms. Newman passed away the following month in March 2020 but Petitioner was unsure about when exactly because her daughter did not give him that information. Petitioner denied changing the locks to the subject apartment and testified that he is currently the occupant of the subject apartment which he now occupies alone since the death of Ms. Newman and acknowledged not having a lease for the apartment. Petitioner further testified that since Ms. Newman died, he has spent his nights including the two nights prior to his testimony at the apartment and goes out when he has to. Petitioner also testified that he did not change the locks to the apartment, and that he received the key fob from Ms. Newman and was present when they obtained the key fob together which was sometime in March 2020¹.

Respondent then called Nathan Dessler as its witness. Mr. Dessler testified that he has been employed by The Park Central 1 LLC as the property manager for approximately four years. Mr. Dessler testified that the subject building is a cooperative and a rental property but that the shares appurtenant to the subject apartment are owned by The Park Central 1 LLC. He testified that the tenant of record for the subject apartment is Karen Newman but that Ms. Newman passed away as per the death certificate he received. He testified that Respondent has no record of issuing a key fob to Petitioner, that only Ms. Newman and her daughter had a key fob because they were the only individuals who requested one. Mr. Dessler testified that every key fob must be photo registered and that residents are not permitted to use other residents' key fobs. Mr. Dessler explained that in order to obtain a key fob, the individual seeking one has to visit the

¹¹ Petitioner's seemed to be confused about the date and initially testified that it was in April 2020.

management office, and have a key fob photo registered to him or her which he explained means that the key fob may only be utilized by the individual registered whose photograph appears on it. If an individual's photograph is not taken with him or her, then the individual will not be issued a key fob. Mr. Dossle added that he did not ask Petitioner to let the apartment number change he locks on the part of it.

Consequently, Mr. Dossle testified that Ms. Newman was permitted to obtain a duplicate of the key fob and confirmed having had conversations with Petitioner's neighbors. Newman did not. In addition, he testified that the key fobs were distributed to the direction of Ms. Newman's daughter, and accordingly that respondent has taken steps to conceal a holdover proceeding against petitioner.

Petitioner's cause is a proceeding pursuant to § 713(1) of the Real Property Actions and Proceedings Law ("RPAL") which provides that a special proceeding may be maintained where the respondent is in possession of the property and remains in possession by force or unlawful means unless it is proved to the satisfaction of the trier of fact that the respondent is lawfully entitled to the possession of the property or in violation of the provisions of the Real Property Law or in violation of the provisions of the Real Property Law.

Accordingly, pursuant to § 26-521(1) of the New York City Administrative Code, it shall be unlawful for any person to attempt to violate any provision of the Code which shall be a violation of the Code unless it is proved to the satisfaction of the trier of fact that the respondent is lawfully entitled to the possession of the property or in violation of the provisions of the Code.

Despite the above, it is not necessarily the case that every occupant of a dwelling in New York City is a tenant in law and is entitled to be restored to possession in a summary proceeding (RPAL § 713(1)) proceeding (RPAL § 713(1) – Tenants of the City of New York 2015 update § 7: 3 "Self-help" Note: In view of the fact that a tenant who has held a license without a colorable claim to possession is not entitled to retain possession after a self-help eviction (RPAL § 713(1)). In this line of cases, the appellate courts have found that the eviction would be futile despite the use of self-help. For example, in *Quonoua 3rd and 1st Cr*, 48 D3 359 [2000], the Appellate Division affirmed the order of the Appellate Term which modified a judgment of the Civil Court restoring the tenant's right to possession on the lease premises and awarding him money damages. The Appellate Division held that although the Real Property Law and the RPAL "contemplate eviction by landlords seeking to recover premises by lessee for illegal purposes, restoring possession would be futile because summary proceeding brought by respondent would result in petitioner's certain eviction" (*id.*).

The Court also reviewed the case law submitted by the parties, including a recent decision by this very Court granting the petitioner in an alleged illegal lockout proceeding a judgment of possession. See, for example, in *Bas v Lakeview, Inc*, 2020 WL 3813206 (3d Cir. 2020), the petitioner had a colorable claim of possession which supports the granting of a writ of possession, his further relief was appropriate.

However, Section 68 of the RPAPL, a new addition to the RPAPL following the Housing Stability and Tenant Protection Act of 2019 ("STPA") appears to have codified the prohibition against self-help evictions. It prohibits a landlord from attempting to evict a tenant from a dwelling unit who lawfully occupied the dwelling unit for their one-year lease term or who agreed to lease with respect to such dwelling unit in a written lease agreement entered into pursuant to a court order of a court of competent jurisdiction or a governmental order.

Here, although the evidence adduced at the hearing established that the Petitioner's desire to evict the tenant was a direct result of the tenant's refusal to pay rent, the evidence also established that the tenant is in possession of the subject apartment. But, meaningful possession cannot be achieved if the tenant does not have the ability to enter the building. In this case, the tenant's refusal to pay rent is a direct result of the landlord's failure to provide the tenant with a habitable apartment. The Court notes that the Petitioner's application for a writ of possession is premature because the tenant's refusal to pay rent is a direct result of the landlord's failure to provide the tenant with a habitable apartment. The Court notes that the Petitioner's application for a writ of possession is premature because the tenant's refusal to pay rent is a direct result of the landlord's failure to provide the tenant with a habitable apartment.

Because of the foregoing, the Court grants the petitioner's application for a writ of possession and directs the petitioner to take the necessary steps to evict the tenant from the subject apartment. The Court's decision is final and its findings of fact are not subject to appeal.

A copy of this order will be mailed/mailed to the parties.

This concludes the decision and order of this Court.

DATED: June 18, 2020



Christel F. Garland, JHC

Appearances of the Counsel/Parties

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