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### 631 Edgecombe, LP v. Walker

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SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT

November 2020

Cooper, J.P., Higgitt, McShan, JJ.

631 Edgecombe, LP, NY County Clerk's No.  
Petitioner-Landlord-Appellant, 570144/20

-against-

Ronald Walker, Calendar No. 20-143  
Respondent-Respondent,

-and-

Sharday Bernal, Ronald Polson,  
"Ronnie Doe" and "Jane Doe,"  
Respondents.

Petitioner appeals from an order of the Civil Court of the City of New York, New York County (Michelle D. Schreiber, J.), entered on or about September 6, 2018, after a nonjury trial, in favor of respondent Ronald Walker dismissing the petition in a holdover summary proceeding.

**Per Curiam.**

Order (Michelle D. Schreiber, J.), entered on or about September 6, 2018, affirmed, with \$10 costs.

A fair interpretation of the evidence supports the trial court's finding that respondent Ronald Walker, the son of the deceased rent stabilized tenant, primarily resided with the tenant of record for two years immediately prior to her death in March 2016, so as to entitle respondent to succession

rights (see Rent Stabilization Code [9 NYCRR] § 2523.5[b][1]; *WSC Riverside Dr. Owners LLC v Williams*, 125 AD3d 458, 459 [2015], *lv dismissed* 25 NY3d 1221 [2015]; *318 E. 93 v Ward*, 276 AD2d 277 [2000]). This finding is amply supported by testimonial evidence from respondent and his witnesses, which the trial court expressly credited, and documentary evidence connecting respondent to the apartment, such as his driver's license, social security and health insurance statements and prescription receipts. The absence of certain other documentation, such as respondent's tax returns and cell phone records, is not dispositive, since the court accepted his excuse for failing to produce such records, i.e., he lacked assets and did not file tax returns, and "there is a preponderance of credible personal testimony" (*300 E. 34th St. Co. v Habeeb*, 248 AD2d 50, 55 [1997]).

Contrary to petitioner's contention, neither the documentation from the Human Resources Administration (HRA) indicating that respondent was "undomiciled" or "homeless" for purposes of receipt of food stamps under the Supplemental Nutrition Assistance Program (SNAP), nor respondent's mother's nursing home records, which contained inconsistent references to respondent's residence, warrant a contrary

result. No single factor is dispositive of the issue of primary residence (see Rent Stabilization Code § 2520.6[u]), and the HRA documents and nursing home records did not preponderate over the credible testimony and other proof connecting respondent to the subject apartment for actual living purposes (see *23 Jones St. Assoc. v Keebler-Beretta*, 284 AD2d 109 [2001]).

In reaching our conclusion, we reject petitioner's contention that the information in the HRA records as to respondent being undomiciled or homeless should be treated as outcome determinative as to respondent's primary residence, rather than one of many factors to be considered.

The cases relied upon by petitioner, such as *Katz Park Ave. Corp. v Jagger* (11 NY3d 314, 317 [2008] [tenant's status as holder of a B-2 tourist visa logically incompatible with primary residence in New York]), and *Matter of Ansonia Assoc. L.P. v Unwin* (130 AD3d 453, 454 [2015] [tenant's tax returns on which she deducted her entire rent as a business expense logically incompatible with primary residence]), are factually inapposite and do not compel a contrary result. Unlike those cases, here, no testimony or other evidence was adduced to show that the information in the records was based

upon respondent's sworn declarations that he resided elsewhere (see *Matter of Brookford, LLC v New York State Div. of Hous. & Community Renewal*, 142 AD3d 433, 435 [2016], *affd* 31 NY3d 679 [2018]). In any event, assuming arguendo, that respondent made declarations to HRA that he was undomiciled or homeless, petitioner failed to show that such declarations are logically incompatible with a determination of "primary residence" - a term the Rent Stabilization Code does not define except to say that "no single factor shall be solely determinative," and to list "evidence which may be considered" in making the determination (RSC § 2520.6[u]).

Finally, petitioner waived any right to a missing witness inference for respondent's failure to call any building tenants as witnesses by failing to timely request it at trial (see *Spoto v S.D.R. Constr.*, 226 AD2d 202, 204 [1996]). In any event, the inference that a trier of fact would draw from a missing witness charge is not mandatory, but merely permissive (see *318 E. 93 v Ward*, 276 AD2d at 278).

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur

I concur

I concur

November 20, 2020