2021-08-18

2114 Realty LLC v. Estate of Sanabria

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2114 Realty LLC v Estate of Sanabria
2021 NY Slip Op 50797(U) [72 Misc 3d 1218(A)]
Decided on August 18, 2021
Civil Court Of The City Of New York, Kings County
Slade, J.
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Decided on August 18, 2021

Civil Court of the City of New York, Kings County

2114 Realty LLC, Petitioner,

against

Estate of Rosa Sanabria, Jaime Lopez, as Next of Kin, Respondents.

L & T 96735/18
Kimberley Slade, J.

Recitation pursuant to CPLR § 2219 (a) of the papers considered in the review of this motion:

Notice of Motion 1

Affirmation in Opposition 2

Reply 3

This is a nonpayment proceeding in which a petition dated December 20, 2018 seeks

arrears due at the time for October 2018 (partial), and November and December 2018 at $942.32 per month. The case appeared on the calendar for the first time on January 24, 2019 at which point an order entered adjourning the matter to February 27, 2019 and which directed repairs. The court file for this day indicates that the Court contacted the office for Adult Protective Services (APS) and was informed that Jaime Lopez was already an APS client. Appropriate notifications and referrals were made for the February 27, 2019 adjournment. On February 27, 2019, Brooklyn Legal Services filed a notice of appearance and the matter was adjourned for Respondent to file an answer. The matter was again adjourned to April 30, 2019 and then to May 1, 2019 with no indication as to whether Petitioner or Respondent sought or consented to the adjournment. Then, on May 1, 2019, APS indicated that they had closed their case with Respondent as, in their assessment, he had "sufficient capacity." On May 18, 2019 the matter was adjourned to June 19, 2019 after Petitioner accepted Respondent's motion to dismiss and for leave to file an amended answer served in court. On June 19, 2019 the matter was adjourned to August 6, 2019 to permit Petitioner to assess the impact that the HSTPA might have on this proceeding.

On August 27, 2019, the case was adjourned to September 30, 2019 for Petitioner's opposition to the motion and for reply. On September 30, 2019, the Court directed Petitioner's opposition be served with a warning that in the event of default Respondent's motion would be decided on default. That motion was fully briefed, then decided, and upon allowing the amended answer and denying the remaining forms of relief sought, the matter was restored to the calendar on December 20, 2019. On this date the case was adjourned for Petitioner's motion for discovery as there was no consent to discovery by Respondent. On February 5, 2020 the motion [*2]appeared on the calendar. A portion of the discovery motion was settled by stipulation and the remainder taken on submission by this Court on March 10, 2020. On March 27, 2020, the decision on the remaining discovery motion was rendered, but that was shortly after the Courts had ceased functioning as to all but emergency matters due to the onset of the Covid-19 pandemic.

The matter was then restored to the Court's conference calendar on September 16, 2020. At this time Petitioner's verbal request for use and occupancy was denied, and Petitioner was instructed to make its motion in writing on notice to Respondent. The matter was adjourned to October 26, 2020, December 8, 2020 and finally to December 22, 2020 for completion of the within motion. Since the initial restoration to the calendar following the Court's shutdown, Respondent served multiple subpoenas, the case was conferenced multiple times, and Petitioner actively sought use and occupancy. Shortly thereafter the legislature enacted the Covid-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (CEEFPA) that

stayed all court proceedings for sixty days that did not involve nuisance type of activity. Thereafter, Respondent filed a Hardship Declaration and the proceeding was ultimately stayed through August 31, 2021.

Now, pursuant to RPL Section 220 and RPAPL Section 745(2)(a) Petitioner seeks an award of use and occupancy owed through November 2020 in the amount of $23,699.80 and seeks use and occupancy *pendente lite* at a rate of $942.32 from December 2020 and thereafter. Respondent opposes the motion in its entirety.

Prior to the enactment of the HSTPA, RPAPL 745(2)(a) provided the framework for assessing such a request. That statute provided:

> (a) In a summary proceeding upon the second of two adjournments at the request of the respondent, or, upon the thirtieth day after the first appearance of the parties in court less any days that the proceeding has been adjourned upon the request of the petitioner, whichever occurs sooner, the court shall direct that the respondent, upon an application by the petitioner, deposit with the court within five days sums of rent or use and occupancy accrued from the date the petition and notice of petition are served upon the respondent, and all sums as they become due for rent and use and occupancy.
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> Two adjournments shall include an adjournment requested by a respondent unrepresented by counsel for the purpose of securing counsel made on a return date of the proceeding. Such rent or use and occupancy sums shall be deposited with the clerk of the court or paid to such other person or entity, including the petitioner or an agent designated by the division of housing and community renewal, as the court shall direct or shall be expended for such emergency repairs as the court shall approve.

The HSTPA significantly changed the framework within and under what circumstances a request for use and occupancy can be made and granted. For cases commenced after the enactment of the HSTPA, a petitioner may only make such a motion in writing, at the earliest, on the sixtieth day after the case has appeared, less an initial adjournment sought for purposes of obtaining counsel. The only days that may be counted are adjournments at the *sole* request of respondent. The Court now *may*, upon a consideration of the equities, "direct that the respondent, upon a motion on notice made by the petitioner, deposit with the Court sums of rent and use and occupancy that shall accrue subsequent to the date of the court's order ". RPAPL Section 745(2)(a) as amended.

RPL Section 220 provides that "the landlord may recover reasonable compensation for the use and occupation of real property, by any person, under an agreement, not made by

deed; [*3]and a parol lease or other agreement may be used as evidence of the amount to which he is entitled."

Petitioner relies upon both RPL Section 220 and RPAPL 745(2) in support of its motion. Petitioner cites *MMB Assoc. v. Dayan*, 169 AD2d 422 (1st Dep't 1991) [citing *Haddad Corp. v. Redmond Studio*, 102 AD2d 730 (1st Dep't 1984) and *Corris v. 129 Front Co*., 85 AD2d 176 (1st Dep't 1982)] for the general proposition that such an award "accommodates the competing interests of the parties in affording necessary and fair protection to both and preserves the status quo until a final judgment is rendered." *MMB Assoc.*, 169 AD2d 422, 422 (internal citations omitted). Under a theory of *quantum meruit*, Petitioner relies upon *BGB Realty, LLC v. Annunziata*, 12 Misc 3d 136(A) (App. Term, 2d Dep't 2006), *Eighteen Assoc. v. Nanjim Leasing Corp.*, 257 AD2d 559 (2d Dep't 1991), and under a theory of unjust enrichment relies upon *Phillips & Huyler Assoc. v. Flynn*, 225 AD2d 475 (1st Dep't 1996). Petitioner argues both that if Respondent is not required to pay *pendente lite* use and occupancy that Respondent will be unjustly enriched, and that an obligation to pay use and occupancy is necessary to "bring about justice without reference to the intent of the parties." *Eighteen Assoc*., 257 Ad2d 559, 560.

Respondent opposes the motion arguing that as Respondent is disabled and has limited income, that an award of use and occupancy will severely prejudice him as he will be unable to make such payments because he does not have a lease. Respondent contends that without a lease he is ineligible for and precluded from seeking either arrears or ongoing payments through various programs that might otherwise assist him with a rent subsidy if he were awarded a lease. Respondent further argues that the portion of the motion made pursuant to RPAPL 745(2) should be denied as its timing within the context of this litigation is highly prejudicial to Respondent, and its application would violate Respondent's rights to due process as he would face the penalty of either potentially having his answer stricken and defenses dismissed or be sent to an immediate trial before the completion of discovery. He argues that this Court should be guided by the changes contained in the HSTPA, as those changes reflect a disavowal by the legislature of the potentially harsh and occasionally draconian application of the former iteration of RPAPL 745(2).

Respondent argues, correctly, that "it is clear that under 745 as amended, the Court could not order Mr. Lopez to deposit the accumulated arrears in this case and would be constrained to order only that, at most, he prospectively pay 30% of his social security benefit. Although courts have continued to apply the old version of RPAPL 745 to proceedings that were already pending when the HSTPA was enacted, the Court nevertheless

maintains its discretion to balance the equities in order to avoid the unduly harsh and prejudicial effects of the rent deposit law which the legislature sought to ameliorate." (Respondent's Memorandum of Law, page 3, *passim*).

Respondent argues that the court in *BAE 193 Realty LLC v. Rosales*, 63 Misc 3d 948 (Civ. Ct., Bronx Co. 2019) struck the right chord when it exercised its discretion to negate the due process concerns articulated in *Lang v. Pataki*, 271 AD2d 375 (1st Dep't 2000), *affirming* 176 Misc 2d 676 (Sup. Ct., NY Co. 1998) but that were discussed in that context as a potential concern that did not undermine the legality of the statute. Respondent further opposes the award of use and occupancy based on RPL 220 arguing that it is an "inappropriate remedy for the posture of the instant case." During the pendency of a proceeding, orders for use and occupancy are governed by RPAPL 745 and Respondent cites *Quality & Ruskin Assoc. v. London*, 8 Misc 3d 102 (App. Term, 2d Dep't 2005) for that proposition. There, petitioner commenced a licensee holdover proceeding and respondent answered raising succession among other defenses. [*4]Petitioner cross-moved for various forms of relief including discovery and use and occupancy *pendente lite.* The court in that decision did not specifically rule on the RPL 220 issue but determined that as thirty days had not elapsed when the motion was made, the motion was premature under that statute. The court there also treated petitioner's motion for discovery as an application by petitioner for an adjournment. In other words, petitioner sought relief and thus generated the delay by making a motion.

In concurring with the outcome of the majority as to the discovery ruling, Justice Patterson disagreed with the denial of a grant of use and occupancy stating, "[i]n my view, the court below retains the discretionary authority to grant interim use and occupancy as necessary to balance equitably the parties' competing interests, particularly where the proceedings are delayed by such motion practice and disclosure as the parties may require." *Quality & Ruskin Assoc.*, 8 Misc 3d 102, 106. But then he goes on to state, "[a]warding use and occupancy would not harm occupant, as he would be required to pay any outstanding rent in the event he were to prevail. Indeed, it would be patently unfair to permit occupant to remain in the premises without paying for its use." *Id.*, c*iting MMB Assoc. v. Dayan*, 169 AD2d 422 (1st Dep't 1991). As this case pre-dates *615 Nostrand Ave. Corp. v. Roach*, 15 Misc 3d 1 (App. Term, 2d Dep't 2006) the question as to how to balance all of these considerations in a case where a successor prevails on his claim, and therefore is not obligated to pay rental arrears, is not addressed. Additionally, if the delay in the proceeding is attributable to the Petitioner in *Quality & Ruskin Assoc.* for having moved for discovery why should principles of reciprocity not apply in this proceeding where Respondent, who bears

the burden on the affirmative defense of succession, fails to provide discovery upon a request and thereafter Petitioner is obligated to move for this relief and generate delay. This was not argued in this proceeding and thus is not ruled upon, but the guiding principles underscore the equitable considerations in these decisions. And while this Court does not view Petitioner as having moved at a time designed to generate prejudice, the use and occupancy motion could have been made in tandem with the discovery motion, but it was not.

In line with and underscoring the nuanced complications related to this issue, Respondent argues that Petitioner has not shown his liability for arrears that accrued under the lease of his mother and consequently under the authority of *615 Nostrand Ave. Corp.* he would not be obligated for arrears that accrued in the absence of an independent tenancy. He argues that a grant of such relief would inappropriately relieve Petitioner of its burden of proving the allegations in this nonpayment petition. While this may be correct as to rent, rent and use and occupancy serve different purposes and derive from separate authorities. One is contract-based and the other from principles of equity and fairness and derive from a Court's authority and obligation to balance the equitable interests of the parties.

In assessing whether or not the Respondent must, or should, be obligated to pay use and occupancy in this matter the Court notes that this case does fall within the ambit of the pre-HSTPA version of RPAPL 745(2) and further notes that that the HSTPA sought to prevent instances where respondents, such as Respondent in this matter, lack sufficient resources to pay a lump sum of accumulated arrears once the litigation is well underway. In instances such as this, the outcome of a strict application of the statute, assuming Respondent's responsibility for sufficient delay, would require a rent deposit of outstanding arrears and the ongoing payments of use and occupancy *pendente lite* without regard or consideration being given to the specific circumstances of a litigant within the confines of a case. And as it relates to potential successors, [*5]without regard to the impact of the Court awarding possessory relief based upon the failure to pay and where payments may be impossible without the assistance of an agency and where the occupant may ultimately be entitled to a lease as a matter of law.

Case law that has addressed this issue has identified and relied upon statutory authority in awarding or declining to grant use and occupancy, theories of fairness—implicit or explicit, [*eg.*, *Eli Haddad Corp. v Cal Redmond Studio*, 476 NYS2d 864, (1st Dep't 1984), *Phillips & Huyler Assoc. v. Flynn*, 225 AD2d 475 (1st Dep't 1996)], *quantum meruit* [*eg.*, *BGB Realty, LLC v. Annunziata*, 12 Misc 3d 136(A) (App. Term, 2d Dep't 2006), *Eighteen Associates, LLC v. Nanjim Leasing Corp.*, 257 AD2d 559 (2d Dep't 1991)], the court's

"inherent" authority, the "traditional powers of a court of equity" [*eg., Corris v. 129 Front Co*., 85 AD2d 176 (1st Dep't 1982)]. In many of the discussions at the appellate level surrounding this issue courts have rested their final analysis on the idea of whether or not a deciding court has providently exercised its discretion. *See eg.*: *500 Cathedral Parkway LLC, v. Gutierrez*, 111 NYS3d 798 (App. Term, 1st Dep't 2018), *Esposito v. Larig*, 106 NYS3d 92 (2d Dep't 2019), *Kingsley v. 300 W 106th St. Corp.*, 78 NYS3d 84 (1st Dep't 2018).

The recurring theme in all of the above cases, and the case law as a body, is that courts do have the authority to and should fashion relief to mitigate against harm where possible, but at the same time should attempt to balance the rights and interests of the parties so that neither is treated unjustly or unfairly. In this matter Petitioner's motion comes after many months of litigation. And Petitioner's moving papers do not spell out or particularize the specific timeframes or delay that it believes is attributable to Respondent. Rather, Petitioner observes that the case has been pending for a protracted period of time and asserts that it made its use and occupancy application at the first viable opportunity following resumption of court activities. Respondent relies on *Quality & Ruskin Assoc. v. London*, 8 Misc 3d 102 (App. Term, 2d Dep't 2005) for the proposition that RPAPL 745(2) is the only basis upon which use and occupancy may be granted, but that case assigns the delay in the proceeding to petitioner who moved for discovery—Respondent in this proceeding moved for dismissal and thereafter, Petitioner for discovery, and currently, this motion for use and occupancy.

In the initial phase of litigation, the delay in this case is attributable to the Court's efforts to involve APS. Although no motions were made during this stage, the adjournments, while at the Court's direction, do not appear from the record to be opposed by Petitioner. Subsequently, motion practice ensued and was consensually scheduled. The file does not indicate opposition to any of the adjournments attributable to the motion to dismiss. While it is arguable that Petitioner was forced to make a discovery motion as Respondent declined to consent to what Petitioner describes as "carefully or narrowly tailored discovery," the record again does not provide a meaningful history of opposition.

Upon restoration of the matter to the calendar following the Court's cessation of activities, Petitioner correctly asserts it commenced seeking use and occupancy as soon as it was possible or as practicable following the limited resumption of court operations. Thus, while there appears to be consent or acquiescence to the various events that caused delay and which are typical to this type of proceeding, this Court does not find that Petitioner failed to request use and occupancy in a manner or at a time that deliberately sought to prejudice Respondent. It appears instead that this case was proceeding in the normal course of events

when the pandemic disrupted normal court functions and caused significant delay.

The three sources of potential authority for the grant of use and occupancy are discussed [*6]above. A grant of use and occupancy under the earlier version of RPAPL 745, if granted, would presumably result at some point in a striking of Respondent's defenses and an immediate transfer to a trial part, *assuming arguendo* that Respondent was assigned sufficient blame for the delay in this proceeding. The affidavits indicate that Respondent is indigent and would be unable to pay the accumulated arrears or ongoing use and occupancy as his income is less than the monthly rent for the apartment and there appears to be no mechanism to obtain a commitment for repayment from any of the programs from which he might be eligible for a rental subsidy in the absence of a lease.

The subsequent version of RPAPL 745 contained in the HSTPA does not apply to this proceeding but provides guidance as to the current legislature's intent. However, this case was commenced and begun under the framework of a prior legislature whose intent was manifested in that legislation. It would be unfair to simply apply the current use and occupancy statute to Petitioner's request as it is entitled to rely on the statute in effect when this case commenced, and who correctly moved for this relief under the earlier version of the statute. If the current version of the law is applied Petitioner will be, at most, be awarded ongoing use and occupancy in the amount of one-third of Respondent's social security benefit from the time of this order — clearly a significant reduction in what Petitioner might otherwise be entitled to. Moreover, the old language mandates use and occupancy while the newer version leaves some aspects of the grant within a court's discretion. The language is permissive and not mandatory.

Finally, RPL 220 is the most amorphous of authorities in a summary proceeding, but it is available and has been utilized. While it is preferable to use the statute most specifically tailored to a case, not all cases and circumstances fit within the same mold. In its reply to the motion Petitioner argues at paragraph 44, "[n]othing in the text of RPL 220 limits recovery of use and occupancy to a plenary action. Further, courts frequently consider equitable principles and the theory of *quantum meruit* in determining and granting motions for use and occupancy in summary proceedings. Just because recovery under RPL 220 is an alternative and independent basis for recovery of use and occupancy does not limit the availability of recovery thereunder in a plenary action."

Respondent's mother passed on March 19, 2018. The petition seeks arrears from October 2018 through December 2018. The most recent lease expired on January 31, 2020.

Respondent is sued in his capacity as "next of kin" under the laws in effect prior to passage of the HSTPA. Pursuant to an order of the Honorable Kevin McClanahan this matter is to proceed on Respondent's succession claim as a party-in-interest asserting a possessory claim.

Respondent argues that he should not be liable for the arrears that accrued under the lease of his mother pursuant to *615 Nostrand Ave. Corp. v. Roach*, 15 Misc 3d 1 (App. Term, 2d Dep't 2006). In that proceeding the landlord refused to provide the tenant with a proper lease after a determination by the Division of Housing and Community Renewal (DHCR) that the tenant was entitled to succeed to the apartment. The court found that this prevented the tenant from obtaining the arrears from the Department of Social Services. The appellate court held that it was proper for the lower court to limit the landlord to a nonpossessory judgment for the period sought in the petition up until the landlord provided the tenant with a lease. The court stated, "because landlord refused to offer tenant a proper lease prior to December 2003, there was no agreement and no landlord-tenant relationship between the parties prior to that date." *615 Nostrand Ave. Corp.*, 15 Misc 3d 1, 3. As the court considered the landlord's failure to provide a lease to the tenant to have prevented the tenant from being able to obtain the arrears, the relief [*7]granted was limited to a nonpossessory judgment. The court inherently endorsed the lower court's use of equity where the lower court determined that the monies were owed but disallowed the landlord's possessory claim as that would have made payment impossible for the tenant through the only means available at the time. The assignment of blame to the landlord for failing to provide the lease as directed by DHCR is apparent throughout the decision. And the consequence the preclusion of the arrears from a possessory judgment and relegated to monetary relief only.

That case differs from this case in a few ways. In this case, Petitioner specifically disputes Respondent's succession claim and seeks to litigate this issue. In *615 Nostrand Ave. Corp.*, DHCR had already made the determination to award a lease to the tenant and the landlord then inexplicably refused to provide a lease for well over a year, and its failure to provide the lease was the direct cause of the tenant's inability to obtain payment of the then sizeable arrears owed. Here, no lease has been ordered or awarded and it would be inherently inequitable to make a determination that during a time where succession is being litigated, a landlord is fully precluded from receiving any payments as no landlord/tenant relationship, "express or implied," has been created, and while the tenant is using and occupying the premises

To determine that a landlord who disputes succession cannot collect monies during the time of litigation, as there is no lease "express or implied," would create an entirely

inequitable framework for such litigation and place a landlord at an immediate and unfair disadvantage. A landlord would have to choose between litigation without the ability to collect rents or other payments, and potentially prevailing on the succession issue but having no recourse as to the monies foregone. Providing use and occupancy to the landlord under some such circumstances is the only way to level the playing field where the question of whether a successor will become a tenant is in limbo during the course of the litigation and where the prospective successor remains in possession enjoying use and occupation of the premises. If a landlord in good faith disputes and prevails against the prospective successor it will receive possession and potentially a monetary judgment, and if he is unsuccessful on the succession claim, the tenant receives a lease and is only required to pay the rent going forward from the time he is offered a new lease. In either event, without awarding use and occupancy a landlord risks lengthy litigation without compensation while the tenant receives the benefit of housing.

Thus, in the absence of rent, use and occupancy is the remaining option if and when payments are to be required. And, it is noted, that while the two can be and frequently are the same or approximately the same amount the authority for their award and their purpose differs. Rent derives from a contract or an agreement, while use and occupancy derives, literally, from use and occupancy of a place and from a sense of equity, fairness and ultimately from a desire to "balance equities" between litigants where succession is asserted and disputed.

In this proceeding there are no monies sought from the time when Rosa Sanabria was alive. The demand and petition commenced after her demise but prior to the expiration of her lease. The case falls under pre-HSTPA RPAPL 745(2) but the realities of Respondent's financial situation and his dependency on a program to assist with his rent places him in a similar scenario to that of respondent in *615 Nostrand Ave. Corp.* However, unlike the scenario in that case and others cited above, this case is not characterized by Petitioner's delay or failure to provide a lease that prejudices Respondent.

Under the circumstances of this proceeding Petitioner is awarded use and occupancy *pendente lite* from the date of Petitioner's verbal application for use and occupancy in September [*8]2020, which shall commence retroactively to October 1, 2020 and continue until such time as this matter is resolved on the merits and Respondent's succession claim adjudicated. In the event that Respondent is able to obtain a written commitment from a program within 60 days of this order demonstrating that they will undertake to retroactively pay the remainder of his use and occupancy from the time in this order upon his being

granted a lease, he may pay one-third of his social security benefit from the time of such approval until such time as the matter is resolved. If there is no such approval he shall remain responsible for the full use and occupancy.

Under the facts of this case, as the Court does not find sufficient exclusive delay attributable to Respondent to trigger an award of all use and occupancy post-petition pursuant to RPAPL 745 (pre-HSTPA) that portion of the motion is denied with leave to renew at the

appropriate time or at the trial of this matter.

This matter was submitted for decision prior to the passage of CEEFPA and stayed pending Respondent's filing of a Hardship declaration. As *Chrysafis v. Marks*, 594 US — (2021), has stayed the enforcement of Part A of CEEFPA this case is no longer stayed. Pursuant to AO/245/21 this matter will be scheduled for a conference on August 30, 2021 with the Court Attorney of the Part in Part G at 10:30 AM at which time the status of discovery, potential settlement or referral to trial will be discussed.

Dated: August 18, 2021

Brooklyn, NY

Kimberley Slade, JHC