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[*1]

Jeremy Props. LC v Franklin
2021 NY Slip Op 50811(U) [72 Misc 3d 1220(A)]
Decided on August 19, 2021
Civil Court Of The City Of New York, Kings County
Capell, J.
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Decided on August 19, 2021

Civil Court of the City of New York, Kings County

<p>Jeremy Properties LC, Petitioner,</p> <p>against</p> <p>Sheila Franklin AKA SHEILA DIXON, DANA BROWNE, "JOHN DOE"/"JANE DOE", Respondents.</p>
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Index No. L & T 53851/19

For Petitioner:

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Heela D. Capell, J.

After trial, the court makes the following findings and determination:

Jeremy Properties, LLC ("Petitioner") commenced this holdover proceeding against the rent stabilized tenant of record, Sheila Franklin A/K/A Sheila Dixon ("Tenant" or "Sheila"), Dana [*2]Browne ("Respondent" or "Dana"), "John Doe" and "Jane Doe," to recover possession of 1 Chester Court, Apartment No.2J, Brooklyn, NY 11225 ("Premises") based upon the allegation that Sheila was no longer occupying the Premises as her primary residence. Dana retained counsel and filed an answer claiming a succession defense, in addition to raising traverse and breach of the implied warranty of habitability.

The court conducted its trial on October 30, 2020, November 19, 2020, and December 14, 2020, and the parties filed post trial briefs on January 25, 2021. [\[FN1\]](#)

Recitation of Facts:

Respondent consented to Petitioner's *prima facie* case at trial. Respondent acknowledged that Petitioner is the deed owner of the subject building (Pet. Ex. 1), that the rental registrations for the Premises are properly filed with DHCR (Pet. Ex. 2), that the Premises are properly registered as a multiple dwelling with DHPD (Pet. Ex. 3).

The parties agreed that Respondent would first present her succession defense. Respondent testified on her own behalf. She explained that Sheila was her paternal aunt but characterized their relationship as a "mother-daughter" relationship because Sheila took the place of her mother, who did not raise her. Respondent asserted that she was raised in Trinidad, and saw Sheila once per year when Sheila visited Trinidad for a month. She also spoke to Sheila four to five times per month by telephone. Respondent recounted that while she was growing up, she was closer with Sheila than she was with her mother; she spoke with Sheila about "growing up" and "boys," which she never discussed with her mother.

Respondent moved to the United States in September 2010. She visited her biological mother in Florida for a month and moved into her cousin Heston, Sheila's son's, house in New York in October 2010. Dana explained that she grew closer to Sheila when she came to the United States and spoke to her almost every day. In contrast, Dana stated that she only spoke to her mother once every two months, or if something important happened.

In 2013, Sheila's cognitive functioning was deteriorating. To ensure that Sheila was not alone, Heston asked Respondent to move in with and help care for her. Dana explained that at that time Sheila would go out for walks and could not recall where she had been, and that

Sheila was ultimately diagnosed with Alzheimer's disease. Respondent moved into the Premises with Sheila, on May 2, 2013, and slept on the couch in the living room, where she still sleeps.

Respondent recalled going for walks in the park and to the grocery store with Sheila. Dana regularly prepared breakfast, lunch and dinner for Sheila and left Sheila food in the fridge when Respondent had to go to work. Respondent recounted cleaning the Premises, making sure Sheila bathed, and ensuring Sheila took her daily medications, which Respondent picked up from the pharmacy. She also remembered shopping for groceries and clothes for Sheila. Dana regularly brushed Sheila's hair, assisted her with dressing, and watched TV with Sheila. Respondent commonly took Sheila to her medical appointments, and spoke to her doctors, although Heston [*3] regularly scheduled Sheila's medical appointments. Dana testified that she and Sheila celebrated holidays together, such as Thanksgiving, Christmas, Labor Day and Independence Day, along with cousins, aunts, brothers, and sisters. Respondent introduced into evidence photographs of Sheila and herself which were taken at one of these family functions, but added that Sheila did not like to take photos. (Resp. Ex. B.)

Sheila's condition eventually worsened; Respondent remembered that Sheila started forgetting to take her medication. Sheila began staying with Heston at Heston's house in mid-2017 because she needed 24 hour care, which Respondent could not provide because of her work schedule. At that time, Heston's wife left her job so that she could stay at home with Sheila. Respondent noted that Sheila never removed her belongings out of the Premises and that they still remain there. Respondent would visit Sheila at Heston's house once per week, until Sheila passed away on March 15, 2019 at the age of 79. Respondent attended Sheila's funeral and explained that she greatly misses Sheila.

Respondent introduced the following documents into evidence:

Two New York State Driver's Licenses (Resp. Ex. A), issued in 2016, and 2018, which list the Premises as her address;

Respondent also admitted into evidence pay stubs, reflecting the Premises as her address, from May 3, 2015 to May 27, 2017 and from August 27, 2018 to February 3, 2019. (Resp. Ex. C);

W-2 forms from 2017 and 2018 listing the Premises as her address (Resp. Ex. D & E);

Tax returns for the years 2015, 2016, 2017, and 2018 listing the Premises as her

address (Resp. Ex. F, G & H);

Bank statements for the entirety of 2017, listing the Premises as her address.
(Resp. Ex. I through T);

Money order receipts representing rent payments made by Respondent for the Premises dated October, 2016; December 2016; January, 2017; March - December, 2017; and February - September, 2018 (Resp. Ex. AJ - BC); and

Two W-9 tax forms Petitioner supplied for transfer of the security deposit between banks in 2018, and again in 2019. (Resp. Exs. AI & AH).

Dana noted that she pays her bills in cash and money orders, which she commonly takes to a check cashing facility to process. She stated that she has a credit card which lists the Premises as her address, is not registered to vote, and does not own a vehicle. Dana testified that at the end of 2015 she started paying the rent, and sometimes the utilities, because Sheila had medical bills to pay. Sheila contributed to the household by shopping for groceries.

Respondent maintained that she requested repairs from Petitioner in writing and was always present at the Premises when Petitioner effectuated the repairs. She introduced into evidence receipts for repairs performed by Petitioner and signed by Respondent, dated 7/15/2017, 9/24/2018, 10/22/2018, 10/27/2018, 5/2/2019, and 5/10/2019. (Resp. Ex. AG.)

Respondent testified that she did not share a bank account with Sheila because Heston managed Sheila's funds. Dana could not recall whether Sheila had a checkbook or what her source of income was, and asserted that she never accompanied Sheila to the bank. Respondent also maintained that the electric, cable and gas bills were in Sheila's name until she passed, and were then transferred to Respondent's name. Respondent discontinued the cable service after Sheila died. Respondent was unsure whether Sheila had a will, but testified that she did not receive anything from Sheila's estate after she passed. Dana did not know whether Sheila had designated a "Power of Attorney."

Respondent called her cousins, Heston Browne and Nicole Browne, as witnesses. Heston Browne ("Heston") testified that he is Sheila's son and resides at 504 Chestnut Street Brooklyn, NY 11208 with his wife and two children. He explained that he has resided in this house since December, 2001. Heston testified that Sheila and Respondent were like mother and daughter, and otherwise confirmed the entirety of Respondent's testimony. Heston confirmed that Respondent resided with him from October, 2010 to May, 2013 when she moved into the Premises with Sheila. Heston asserted that Sheila received social security

which was directly deposited into an HSBC bank account in her name only, and that Respondent contributed to the household finances. He explained that Respondent took care of Sheila by preparing her meals, making sure that she ate and that she took her medications.

Heston testified that Respondent lived with Sheila at the Premises from 2013 forward. He corroborated Dana's testimony that Sheila's health declined in the summer of 2017, and required 24 hour per day care, which Respondent could not provide due to her work schedule. Accordingly, Heston and his wife took care of Sheila at Heston's house. Heston explained in the summer of 2017, Sheila was diagnosed with Alzheimer's disease and eventually end stage dementia. He remembered that Respondent regularly visited Sheila at his home to check on her and help with her care. He confirmed that Respondent celebrated holidays with Sheila such as Thanksgiving, the Fourth of July, and birthdays. Heston also noted that although some photos were introduced into evidence, Sheila did not like to take pictures. Heston also explained that Sheila co-signed the deed and mortgage to his home at 504 Chestnut Street, and that the mortgage has a clause requiring that the buyers utilize the mortgaged premises as their primary residence. However, he asserted that Sheila never moved into the home, nor received any mail there.

Nicole Browne ("Nicole") asserted that she lives in Queens Village, New York, that Sheila is her paternal aunt, and that Heston and Respondent are her cousins. Nicole also confirmed Respondent's testimony; She described the relationship between Sheila and Respondent as "mother and daughter." She elaborated that Respondent and Heston growing up in their paternal grandmother's house along with Sheila for around five years. She confirmed that since May 2013, Respondent has resided at the Premises, and that she knows this because she was close to Sheila and Dana. Nicole noted that her father used to live in Apartment #2A, which was on the same floor of the subject building and so Sheila would stop by to check in on him. Nicole appreciated this because she lives in Queens. Nicole stated that Respondent also helped take care of and visit Nicole's father, as Sheila would. She recalled that it was Respondent who discovered that her father had passed in his apartment.

Nicole described Respondent as going above and beyond to care for Sheila. She confirmed that when Sheila's memory started to deteriorate, and it was no longer safe for her to live alone, Respondent helped Sheila take her medication, cleaned for Sheila, fed Sheila and [*4]made her feel comfortable. Nicole testified that when Sheila's condition worsened, Heston decided to take her to his house because she was not able to be left on her own. For example, Nicole explained that on one occasion when Sheila was left alone she broke a window, and on another, she locked herself out of the Premises. Sheila also forgot who

Nicole was when they were walking from Nicole's father's apartment to the Premises.

Nicole maintained that she has worked as an accountant since 1998 and that she prepared Respondent's tax returns, which were submitted into evidence. She clarified, however, that the date on the tax returns was the date they were printed, not the date they were prepared. For example, the 2017 tax return does state on its face that it was prepared on February 17, 2019, but the witness recalled that it was actually submitted to the IRS on March 30, 2018. She confirmed the same printing error for the tax returns for 2016 and 2015, and submitted photos into evidence to demonstrate that this was an error in the way they were printed, and that in fact they had been sent to the IRS timely. (Resp. Ex. BF.)

Respondent also called multiple witnesses who work for Petitioner. First was Lawrence Bernstein, an officer of the Petitioner corporation and the Vice President of Jonas Equities, the managing agent. He confirmed that management does not reject rent checks or written repair requests that they receive from non-tenants, and did not obstruct payments of money orders from Respondent. He stated that he does not have a record of Respondent's W-9 tax forms. (Resp. Exs. AH & AG.) He agreed that these forms would have been necessary to process a security deposit. He also noted that he has no record of a security deposit being received in conjunction with these forms.

Mr. Bernstein noted that this proceeding was commenced because management completed "due diligence" and learned that the tenant was no longer residing at the Premises. However, he was not aware of the specifics of the investigation; he could only state that the superintendent and property manager, Sam Jacobowitz, would have been involved. He was not sure whether written repair requests or rent payments would have been examined. He acknowledged that he believes Respondent is an occupant of the Premises, and confirmed that Sheila never surrendered the Premises.

Jose Liranzo, the superintendent of 1 Chester Court since 2018, testified next. He confirmed that Respondent's Exhibit AG contains multiple work orders and that he signed all but one. The work orders he signed are dated September 24, 2018, October 22, 2018, October 27, 2018, May 2, 2019, and May 10, 2019 (Resp Ex. AG). He also testified that "Sheila's niece" also signed these work orders, and that he believed that Sheila was not living in the building at the time. He asserted that "Sheila's niece" was living at the Premises.

Respondent also called Sam Jacobowitz, the property manager for 1 Chester Court since April 2015, as a witness. He explained that he does investigate when someone moves out of an apartment, but that he did not do an investigation for the Premises. He also stated that

Sheila never surrendered the Premises, and that he would have been the one responsible for handling a surrender if there was one.

Finally, Cheryl Yodice, who identified herself as Petitioner's comptroller, testified. She testified that she handles Petitioner's finances, including rent payments and security deposits. She confirmed that rent payments are not examined to determine the payor, but when W9 forms are received, she checks them to ensure there is a social security number and a signature. While Respondent introduced into evidence two W-9 forms, one dated August 8, 2018, and April 18, 2019 (Resp. Exs. AH & AI), Ms. Yodice was not familiar with nor could recall seeing those [*5] documents. Additionally, she denied that she had ever spoken with Respondent.

Legal Analysis

Section 2523.5 [b][1] of the Rent Stabilization Code provides, "if an offer [to renew the lease] is made to the tenant...and such tenant has permanently vacated the housing accommodation, any member of such tenant's family...who has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years, or where such person is a 'senior citizen'...no less than one year, immediately prior to the permanent vacating of the housing accommodation by the tenant...shall be entitled to be named as a tenant on the renewal lease" (9 NYCRR 2523.5[b][1]). However, in order to succeed to Sheila's tenancy Respondent does need not to qualify as a "traditional family member," and may qualify under the broader definition of "family member," pursuant to (9 NYCRR § 25.20.6[o][2]).

A "family member" is defined in 9 NYCRR § 2520.6[o][2] as:

"Any other person residing with the tenant or permanent tenant in the housing accommodation as a primary or principal residence, respectively, who can prove emotional and financial commitment, and interdependence between such person and the tenant or permanent tenant. Although no single factor shall be solely determinative, evidence which is to be considered in determining whether such emotional and financial commitment and interdependence existed, may include, without limitation, such factors as listed below. In no event would evidence of a sexual relationship between such persons be required or considered:

- (i) longevity of the relationship;
- (ii) sharing of or relying upon each other for payment of household or family

expenses, and/or other common necessities of life;

(iii) intermingling of finances as evidenced by, among other things, joint ownership of bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget for purposes of receiving government benefits, etc.;

(iv) engaging in family-type activities by jointly attending family functions, holidays and celebrations, social and recreational activities, etc.;

(v) formalizing of legal obligations, intentions, and responsibilities to each other by such means as executing wills naming each other as executor and/or beneficiary, granting each other a power of attorney and/or conferring upon each other authority to make health care decisions each for the other, entering into a personal relationship contract, making a domestic partnership declaration, or serving as a representative payee for purposes of public benefits, etc.;

(vi) holding themselves out as family members to other family members, friends, members of the community or religious institutions, or society in general, through their words or actions;

(vii) regularly performing family functions, such as caring for each other or each other's extended family members, and/or relying upon each other for daily family services;

(viii) engaging in any other pattern of behavior, agreement, or other action which evidences the intention of creating a long-term, emotionally committed relationship."

(9 NYCRR § 2520.6[o]; *see also Braschi v Stahl Assoc. Co.*, 74 NY2d 201 [1989]).

Respondent seeks to succeed to Sheila's tenancy based upon their relationship as "family members" as defined in (*Braschi v Stahl Assoc. Co.*, 74 NY2d 201) and codified in (9 NYCRR § 2520.6[o]). Indeed, the court finds that Respondent satisfies the "family member" criteria based [*6] upon her credible testimony. At trial, Respondent testified that she is Sheila's maternal niece and that she moved into the Premises in 2013, where she still resides. She explained that the Tenant, her paternal Aunt, was like a mother to her; that she did not have a close relationship with her biological mother, and that she was raised in Trinidad alongside her Aunt. Respondent asserted that she spent time with the Tenant during her lengthy yearly visits to Trinidad, and after that, spoke frequently with her by telephone about "growing up" and about "boys." It was clear that Sheila and the Respondent shared a close familial relationship.

The court is not persuaded by Petitioner's argument that Respondent has not made a

sufficient showing that she and Sheila shared an emotionally committed relationship within the meaning of the succession regulations (9 NYCRR § 2520.6[o][2]). Petitioner notes particularly that the photos submitted from Respondent of the two of them together are from one event. However, when Respondent introduced photos of herself and Sheila at a family function (Resp Ex. B1, B2 & B3), she credibly testified, as did Heston Browne, that these photos were limited because the Tenant did not like to take photos.

Furthermore, courts have found there to have been an emotionally interconnected familial relationship even without voluminous documentary evidence ([*Riv. Park Residences, L.P. v Carter*, 62 Misc 3d 1223\[A\]](#), 2019 NY Slip Op 50243[U] [Civ Ct, Bronx County 2019] [*citing Matter of 530 Second Ave. Co., LLC v Zenker*, 160 AD3d 160](#) [1st Dept 2018]). Respondent credibly explained that she, from a young age, had formed a mother-daughter relationship with Sheila, which lasted throughout their lives. She recounted how she had been raised in a household in Trinidad alongside Heston, her father, her grandfather, and Sheila, and she described how although she did have an open line of communication with her biological mother, she was not close with her throughout her life. She cared for Sheila once it became apparent that she was losing the ability to do so for herself, until the time at which she required 24 hour care. At trial, Respondent appeared emotional when she spoke about her relationship with Sheila, as well as her passing, and it was clear she cared deeply for her Aunt.

Both Heston and Nicole, credibly testified that Sheila and Dana interacted like mother and daughter. They confirmed Respondent's testimony that she helped care for Sheila in many ways, including cooking her meals, monitoring her medications and cleaning the Premises. Respondent also asserted that she and Sheila spent quality time together by going for walks in the park, attending family gatherings together and visiting family together.

Petitioner also argues that the Tenant and Respondent did not sufficiently intermingle their finances. However, while Respondent testified that she and the Tenant did not have a shared bank account and did not otherwise directly "intermingle" their finances, she established that they both contributed financially to the household bills. Dana introduced into evidence proof of payment(s) of rent for the Premises, which she explained she started exclusively paying in 2015 because Sheila needed to pay her medical bills and utilities. The payments introduced were for the rent due for October, 2016; December 2016; January, 2017; March - December, 2017; and February - September, 2018. (Resp. Ex. AJ - BC.)

"The absence of documentary evidence does not undermine a succession rights claim

when the totality of the testimonial evidence . . . establishes the requisite emotional and financial commitment" ([1035 Washington Realty, LLC v Weston, 67 Misc 3d 138](#)[A], [App Term 2nd Dept 2020] [citing Matter of 530 Second Ave. Co., LLC v Zenker, 160 AD3d 160](#) [1st Dept 2018]). In [354 Atl. Ave., LLC v Noronha, \(64 Misc 3d 134](#)[A] [App Term 2nd Dept 2019]), the court explained: "in a situation such as this one, where the relationship between occupant and his [*7] aunt can be best compared to one between a parent and child, lack of such proof may be particularly irrelevant, as many adults who live with their parents do not choose to intermingle their finances." Indeed, "the absence of an intermingling of finances has specifically been found not to negate a conclusion that two individuals had a family-like relationship ([1035 Washington Realty, LLC v Weston, 67 Misc 3d 138](#)[A] [citing RHM Estates v Hampshire, 18 AD3d 326](#) [1st Dept 2005]).

Petitioner urges this court to follow the holding in [Third Lenox Terrace Assoc. v Edwards, \(91 AD3d 532](#) [1st Dept 2012]) and find that the relevant time period here is two years prior to the tenant's death (2017-2019). Petitioner argues that Sheila resided with Heston from 2017-2019, rather than co-residing with Dana at the Premises, and therefore succession cannot lie. However, in the Second Department, the controlling case on this issue is [Matter of Jourdain, 159 AD3d 41](#) [2d Dept 2018]. In *Jourdain*, the tenant permanently vacated the apartment in 2008, but signed a two year renewal lease in September 2009. Similarly to this proceeding, the landlord argued that the successor could not prove she co-resided with the tenant of record for the two year period prior to the lease expiration and could not succeed to the tenancy. Finding for the successor, the court in *Jourdain* reasoned "we can discern no reason why the DHCR would intend to deny succession rights to a family member who had been residing in a unit for a long period of time merely because there was a period of time when the named tenant no longer resided there but still maintained some connection to the property," and held that the tenant permanently vacated in 2008, not at the end of the subsequently signed lease renewal.

The facts in [EB Bedford, LLC v Lee, \(64 Misc 3d 39](#) [App Term 2nd Dept 2019]), which follows *Jourdain*, are similar to the facts here. In *EB Bedford*, the tenant of record was hospitalized in 2007 and thereafter resided at a nursing and rehabilitation center where she died in 2013. The tenant signed three two-year renewal leases and continued to pay rent while she was living at the rehabilitation center. The tenant of record's daughter, who asserted succession rights to the apartment, had moved in with her mother in 1988. The court held that the two year relevant time period was two years before the tenant permanently left the apartment, which was when she was hospitalized in 2007. Critically, the court reasoned that the tenant had not established a new permanent residence, but rather, "...intended to return to

the premises. As admittance to a nursing rehabilitation center may or may not be permanent, it is only in hindsight that it can be known whether a tenant's health would improve enough for her to be able to return to her home" (*EB Bedford*, 64 Misc 3d at 42; [see also 700 Bklyn Realty, LLC v Samuel](#), 69 Misc 3d 126[A], [App Term, 2nd Dept 2020], 2258 *Assoc., LLC v Monperemer*, 2021 NY Slip Op 50033[U], [App Term, 2nd Dept]).

Petitioner does not contest Respondent's assertion that she occupies the Premises and has done so for some time. Indeed Dana credibly testified that she works at JFK airport, and has done so since 2014. All of her pay stubs and tax returns list the Premises as her address. (Resp Exs C, F, G & H.) Respondent, Heston Browne, and Nicole Browne, all testified that Sheila's health declined in the summer of 2017, when she began to require 24 hour care. However, Respondent could no longer be Sheila's primary caretaker as she also went to work, so Sheila stayed at Heston's home where his wife could care for Sheila full time. Although Sheila was residing with Heston and his wife, she did not remove her furniture and belongings from the Premises because Sheila expected to return to the Premises. Accordingly, the facts here are similar to those in *Jourdain* and *EB Bedford*.

The court is unpersuaded by Petitioner's argument that Sheila resided at Heston's home [*8] located at 504 Chestnut Street, Brooklyn, New York, simply because she is listed on the deed and a signatory on the mortgage. Co-residency is not defeated as a matter of law when the tenant's name appears on a mortgage document of a different residence, rather, the issue of the tenant's residence is an issue of fact. (*see Nanyang Realty Corp. v Vincent*, 2020 NY Slip Op 31394[U] [Sup Ct, Kings County 2020].) While Heston acknowledged that Sheila helped him purchase his home, he credibly testified that she never lived there nor received mail there.

Respondent established that she and Sheila co-resided for at least two years prior to the Sheila's permanent vacatur of the apartment, in the middle of 2017, and during that time period had a relationship characterized by "emotional and financial commitment, and interdependence" (9 NYCRR § 2520.6[o][2]). Respondent qualifies as a nontraditional family member and is therefore entitled to succession rights to the Premises.

Accordingly the petition is dismissed with prejudice. The second affirmative defense, tenancy by waiver, is dismissed as moot and the sixth affirmative defense pursuant to the warranty of habitability is dismissed without prejudice because Respondent did not submit any evidence in support of the defense. The parties are directed to pick up their exhibits within thirty days or they will be sent to the parties or destroyed at the court's discretion in

compliance with DRP-185.

This constitutes the decision and order of this Court.

Brooklyn, New York

August 19, 2021

HON. HEELA D. CAPELLJ.H.C.

Footnotes

Footnote 1: On December 28, 2020, the Governor signed the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 into law, which, as is relevant here, stayed this eviction proceeding for 60 days. (COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, L 2020, ch 381, Part A § 2.) Subsequently, Respondent filed a Hardship Declaration pursuant to this law, which stayed this case until May 1, 2021. (*Id.*) The stay was later extended to August 31, 2021 by the Legislature. (2021 NY SB 6362.) The United States Supreme Court enjoined the enforcement of Part A of the COVID-19 Emergency Eviction and Foreclosure Prevention Act on August 12, 2021, thereby vacating the stay. (*Chrysaftis v Marks*, 594 US ___ [2021].)

[Return to Decision List](#)