

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

All Decisions

Housing Court Decisions Project

2021-08-24

Jones v. New York City Hous. Auth.: Managed by Borinquen Plaza I Houses

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

Recommended Citation

"Jones v. New York City Hous. Auth.: Managed by Borinquen Plaza I Houses" (2021). *All Decisions*. 315. https://ir.lawnet.fordham.edu/housing_court_all/315

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]

Jones v New York City Hous. Auth.: Managed by Borinquen Plaza I Houses
2021 NY Slip Op 50806(U) [72 Misc 3d 1220(A)]
Decided on August 24, 2021
Civil Court Of The City Of New York, Kings County
Capell, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on August 24, 2021

Civil Court of the City of New York, Kings County

<p>Kevin Jones, Petitioner,</p> <p>against</p> <p>New York City Housing Authority: Managed By Borinquen Plaza I Houses, Respondent.</p>
--

Index No. L & T 10075/21

Attorney for Petitioner:

Catherine Mcguire Frizell, Esq.

Legal Services NYC

105 Court St Fl 4

Brooklyn, NY 11201

Attorney for Respondent:

Alan Harris Liskov, Esq.

New York City Housing Authority

90 Church St Fl 11

New York, NY 10007

Heela D. Capell, J.

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

Kevin Jones ("Petitioner") commenced this RPAPL 713[10] "illegal lockout" proceeding on May 12, 2021 against the New York City Housing Authority, ("NYCHA") alleging that [*2]NYCHA had illegally locked him out of 125 Seigel Street, Apt 4K Brooklyn, NY 11206 ("Premises"). Both parties were represented by counsel. The court conducted a trial on June 3, 2021 and August 5, 2021. The parties submitted post-trial briefs on August 13, 2021.

Petitioner credibly testified that he began residing at the Premises during the summer of 2019, and continued to do so until he was locked out of the Premises on May 11, 2021. Petitioner asserted that he moved into the Premises with his mother, Vernice Jones, ("Vernice"), the tenant of record. Petitioner maintained that he initially moved into the Premises temporarily so that he could assist Vernice, who was healing from hip replacement surgery. However, he remained at the Premises after Vernice passed away in March of 2020.

Petitioner explained that after he moved in, through May 11, 2021, he received mail and food delivery to the Premises; his pharmacy, Woodhull Prescription Center, is located approximately a quarter of a mile away from the Premises (Pet. Ex. A); and that a social service provider that assists with food stamps visited him at the Premises five or six times (Pet. Exs B & C). Petitioner also testified credibly that he tendered rent for the Premises, in cash, at a nearby "check cashing place" on Grand Street. Petitioner's witnesses, his cousin Sheila Johnson, and brothers, Rodney Jones and Donald Jones, corroborated his testimony that he moved into the Premises in the summer of 2019 to care for Vernice, and that they observed him at the Premises through the time that Vernice passed away.

Petitioner explained that from the summer of 2019 through May 11, 2021 he had limited interaction with NYCHA employees, including: obtaining a mailbox key from the leasing office, submitting Vernice's signed lease to the management office, and requesting repairs from building staff. However, he testified that he did not inform the leasing office that he was living at the Premises while he was there, adding that he was trying to maintain a "low

profile." Petitioner recalled asking at the leasing office, "can *we* have the key?" instead of "can *I* have the key?" He also acknowledged that he did not inform NYCHA after his mother passed away and that NYCHA staff were not present at the Premises when she passed.

NYCHA called Margie Taylor, the property manager as its only witness. Ms. Taylor testified that Vernice, the former tenant of record, was the sole known occupant at the Premises. She introduced into evidence the lease (Resp. Ex. A), tenant data summary (Resp. Ex. B), and Public Housing Lease Addendum and Rent Notice (Resp. Ex. C), for the Premises. The documents range from December 2016 through March 2020 and list only Vernice as an occupant of the Premises. Ms. Taylor testified that she did not meet Petitioner until May 11, 2021. She stated that all rent payments are sent directly to a lockbox and that she was not aware whether Petitioner paid any rent for the Premises. Ms. Taylor explained that if Petitioner spoke to a member of the maintenance staff directly about repairs, the repair would not be processed; repair requests are only processed through the office in the form of a "ticket."

Ms. Taylor explained that NYCHA was not on notice that Petitioner was occupying the Premises until May 2021. Petitioner entered into evidence notes compiled by management employees which reflect that, after receiving complaints, management attempted to call the phone numbers in Vernice's file, but they did not receive a response (Pet. Ex. E). Ms. Taylor asserted that in May, 2021, management received complaints of "people hanging out and smoking at all times of day and night," by the Premises. Ms. Taylor testified that the NYPD was called to the Premises and that Petitioner was there when the NYPD and NYCHA representatives arrived. Ms. Taylor's notes from May 11, 2021 state: "[Petitioner] says he lives in the [Premises]. He moved in when his mother passed away" (Pet. Ex. E). It is undisputed that [*3]NYCHA changed the locks and secured the Premises on that date.

Ms. Taylor asserted that as part of her duties and responsibilities as building manager, she is familiar with the protocols for succeeding to a NYCHA apartment. She explained that if a tenant passes away or vacates an apartment, the person who is considered a "remaining family member" must be an "authorized occupant." An "authorized occupant" is listed on the requisite forms, and has resided in the apartment for a year prior to the tenant of record's vacatur. Ms. Taylor maintained that Petitioner was not an "authorized occupant" since he was not listed on the household composition or lease, nor on any other requisite form with respect to the Premises. The witness also could not verify whether Petitioner lived with Venice for a year prior to her death.

The Law and its Application:

In his post-trial brief, Petitioner asserts that he should be restored to possession of the Premises because he resided at the Premises for over thirty days and was peaceably in actual possession at the time of the unlawful entry (*see* RPAPL 711; RPAPL 768; NYC Admin Law 26-521). NYCHA maintains that Petitioner has not demonstrated that he was in "possession" of the Premises and should not be restored (RPAPL 713[10]).

RPAPL 713[10] states that an individual who was evicted without due process of law, and was "peaceably in actual or constructive possession at the time of the forcible or unlawful detainer"...may be restored to possession (RPAPL 713[10]). As it is undisputed that Petitioner was locked out of the Premises without due process of law, the issue is whether Petitioner was "peaceably in actual or constructive possession at the time of the forcible or unlawful detainer" and entitled to restoration.

The Appellate Term, Second Department recently confirmed that a licensee, does not have a "possessory interest" in the context of an unlawful entry and detainer proceeding and is not entitled to restoration. (*Qian "Lily" Zhu v Xiao "Joy" Hong Li*, 70 Misc 3d 139[A], [App Term, Second Dept 2021], [citing *Andrews v Acacia Network*, 59 Misc 3d 10](#) [App Term, Second Dept 2018].) *Zhu* followed the Appellate Term, Second Department's holding, in *Andrews v Acacia Network*, that a licensee is not in "possession" for the purposes of RPAPL 713[10], and that neither NYC Administrative Code 26-521 nor RPAPL 711 change a license, or other nonpossessory interest, into a possessory interest (*Acacia Network*, 59 Misc 3d 10).

Petitioner argues that the Housing Stability and Tenant Protection Act of 2019 ("HSTPA") and its promulgation of RPAPL 768 require this court to restore Petitioner to possession of the Premises. (RPAPL 768; [see e.g. *Watson v NYCHA-Brevoort Houses*, 70 Misc 3d 900](#) [Civ Ct, Kings County 2020]; [but see *Jimenez v. 1171 Wash. Ave. LLC*, 67 Misc 3d 1222\[A\]](#), [Civ Ct, Bronx County 2020].) RPAPL 768 states, in pertinent part, "[i]t shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer..." First, *Zhu*, which is binding upon this court, post-dates RPAPL 768. Second, as the court stated in *Andrews*, while the provisions of RPAPL 768 may 'subject a violator to criminal liability and civil penalties, [they] do not provide an avenue through which [an occupant] can be restored to possession of an apartment.'" (*Andrews*, 59 Misc 3d 10 [App Term, 2nd Dept 2018], citing *Barclay v Natoli*, 1998 NY Misc. LEXIS 799 [App Term, 2nd Dept 1998]; accord [Padilla v](#)

[Rodriguez, 61 Misc 3d 133](#)[A] [App Term 1st Dept 2018]).

Similarly, in *Jimenez v 1171 Washington Ave, LLC*, the court denied restoration to a [*4]licensee in a supportive/transitional housing and explained that RPAPL 768 was not intended to create a cause of action for restoration. (*Jimenez v. 1171 Wash. Ave, LLC, 67 Misc 3d 1222*[A], (Civ Ct, Bronx County 2020.) Rather, the court found that as RPAPL 768 is nearly identical to NYC Admin Code 26-521, it must be "interpreted similarly, as it is evident from the legislative history that this section was intended to make available statewide what already exists in New York City." (*Jimenez, 67 Misc 3d 1222*[A].) Accordingly, Petitioner must establish that he has rights to the Premises that exceed those of a licensee if restoration is to be warranted.

A party seeking succession in a NYCHA building must generally have resided in the apartment as an "authorized occupant." (*see Matter of New York City Hous. Auth. Hammel Houses v Newman, 39 AD3d 759* [2d Dept 2007]) [respondent did not qualify as remaining family member because she was not listed on income affidavits, did not have authorization to reside at the apartment and NYCHA was not aware of her occupancy]; *see also Jamison v NYCHA, 25 AD3d 501* [1st Dept 2006]). Ms. Taylor explained that an "authorized occupant" must fill out a request that includes social security and other information, along with the tenant of record, to lawfully reside at a NYCHA apartment. If NYCHA authorizes the request, the authorized occupant must live at the apartment for a year with the tenant of record to be eligible for succession.

Petitioner concedes he did not inform NYCHA he was residing at the Premises, was not listed on the household composition, and did not receive authorization from NYCHA to reside at the Premises. However, Petitioner argues that he is a "remaining family member" with possessory rights to the Premises. In support, Petitioner relies upon (*Matter of Russo v NY City Hous. Auth., 128 AD3d 570* [1st Dept 2015]). In *Matter of Russo*, the Supreme Court remanded the case back to NYCHA for a fair hearing to determine whether "there are circumstances that may relieve petitioner of the requirement of written consent to her occupancy" and cites (*McFarlane v NY City Hous. Auth., 9 AD3d 289* [1st Dept 2004]). (*Matter of Russo v NY City Hous. Auth., 128 AD3d at 571*). *McFarlane*, provides that "one type of circumstance that *could* be of critical importance in establishing a right to be treated as a remaining family member despite the absence of notice or written consent, would be a showing that the Authority was aware of the petitioner having taken up residence in the unit, and implicitly approved it." (*McFarlane, 9 AD3d 289, 291*). In *McFarlane*, however, the proposed remaining family members had "failed to apply for and obtain the written consent

of management" during the tenancy of their grandparent, and no proof was shown that management was "aware of their presence and implicitly approved it." (*Id.*)

Here, Petitioner acknowledged at trial that he does not fit into the purported exception posited by the *Matter of Russo* and *McFarlane* courts. Rather, he maintained that he actively concealed his presence at the Premises from NYCHA, and that he was trying to keep a "low profile" so as not to "make waves." Petitioner also testified that his residency was only meant to be temporary until he found somewhere else to stay. Although Petitioner explained that he spoke to maintenance staff and made rent payments, Ms. Taylor asserted that these actions would not put management on notice of Petitioner's occupancy. Rather, rent payments are sent directly to a lockbox and a formal maintenance request does not get processed without a "ticket."

While Petitioner was a credible and sympathetic witness, the court is constrained by the precedent in the Second Department, as well as NYCHA's extensive waiting list replete with people formally seeking to obtain affordable housing in the midst of a global pandemic. [*5] Petitioner was merely Vernice's licensee, and therefore does not have the right to be restored to possession. (*Zhu*, 70 Misc 3d 139[A], *citing Andrews*, 59 Misc 3d 10.) The proceeding is dismissed without prejudice to Petitioner's rights, if any, pursuant to RPAPL 768, RPAPL 853, and NYC Admin Code 26-521, and NYCHA's defenses thereto.

This constitutes the decision and order of the court.

Brooklyn, New York
August 24, 2021
HON. HEELA D. CAPELL
J.H.C.

[Return to Decision List](#)