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Fisher v Burke
2021 NY Slip Op 50828(U)
Decided on September 7, 2021
Civil Court Of The City Of New York, Kings County
Stoller, J.
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Decided on September 7, 2021

Civil Court of the City of New York, Kings County

<p>Michael Fisher, Petitioner,</p> <p>against</p> <p>Dennis Burke and KASSANDRA CAMPBELL, Respondents.</p>

Index No. 50204/2021

For Petitioner: Leigh Mangum

For Respondent: Kassandra Campbell, pro se, and Dennis Burke, pro se

Jack Stoller, J.

Michael Fisher, the petitioner in this proceeding ("Petitioner"), commenced this proceeding against Dennis Burke ("Respondent"), a respondent in this proceeding ("Respondent"), and Kassandra Campbell ("Co-Respondent"), another respondent in this proceeding (collectively, "Respondents"), seeking possession of 133 Van Buren Street, Room

on the 3rd Floor, Brooklyn, New York ("the subject premises") on the basis that Respondents illegally locked Petitioner out of the subject premises. Respondent interposed an answer with a defense that Petitioner only resided in the subject premises for two weeks. Co-Respondent interposed an answer with a defense that she did not know who Petitioner is. The Court held a trial of this matter on August 24, 2021, August 26, 2021, and August 27, 2021.

The record at trial

Petitioner testified that the subject premises is his address; that Petitioner had first moved into the building in which the subject premises is located ("the Building") on August 3, 2020; that the Building has three floors and a basement; that he initially lived in a unit on the ground floor of the Building that was artificially divided into two rooms by a sheetrock wall ("the Ground Floor Unit"); that both rooms in the basement were rented out; that the Building has a small anteroom which is a small common room, a kitchen, a bathroom which is used by everyone in the Building, and a small laundry room; that the second floor of the Building has three rooms, Respondent's room, a bathroom, and another larger room which is occupied by someone else; that the third floor of the Building ("the Third Floor") is another apartment with a small room at the beginning which faces to the street; that next to that room is the subject premises, the room where he stayed; that the Third Floor also has a bathroom, another larger room, and a kitchen; that in front of the Building is a large commercial refrigerator in front of the Ground Floor Unit ("the Refrigerator"); that when he moved into the Building in August of 2020, Respondent gave him keys; that the Ground Floor Unit did not have a lock, but a latch at [*2] the time; that he had to buy a lock; that to get into the Building there is a locked door on the ground floor and a vestibule with a gate that is usually not locked; that there is also a regular door on the ground floor; and that there is one key for all the doors to enter the Building.

Petitioner introduced into evidence an email thread that begins with an email Respondent sent Petitioner on July 29, 2020 with the subject line, "Roommate agreement for [the Building]". No unit at the Building is specified anywhere in the email. At the bottom the email is a line reading, "I have read and agree" with a blank line beneath it. The next email in the thread is from Petitioner to Respondent the same day, according to which Petitioner writes, "Sounds good. Agree." The next email in the thread is from Respondent to Petitioner on the same day, according to which Respondent wrote, "Great!" The email with the

purported "roommate agreement" says that Petitioner shall pay a monthly rent of \$680 and a security deposit in the same amount of \$680; that Petitioner will live communally with others; that there is a three-month probationary period; that there is a late fee for rent received after the fifth of the month; and that Petitioner will receive his security deposit back if "the room and house are in good shape". [FN1] Petitioner introduced into evidence documentation that Petitioner made monthly rent payments to Respondent from August of 2020 through June of 2021.

Petitioner testified that he paid a debt that Respondent owed to another tenant that Respondent could not pay when that the other tenant threatened violence; that in return, Respondent refunded Petitioner the security deposit; that Petitioner moved from the Ground Floor Unit to another room in the Building on January 1 and continued paying rent; that the Refrigerator was loud, such that he wanted to move; that Respondent asked him if he wanted to move to an upstairs room; that he turned in the keys to the room on the lower floor to Respondent; that on July 19 he moved to the subject premises; that he started sleeping in the subject premises on July 31; and that the subject premises had been vacated by a previous tenant, Miguel Brown ("the Prior Occupant").

Petitioner introduced into evidence an undated text exchange between Petitioner and Respondent ("the Text Exchange") according to which Respondent asked Petitioner, "would you be willing to pay rent for the upstairs room?" Petitioner responded, "Yeah" and says that Respondent could deduct the monthly rent of \$680 from a debt that Petitioner said that Respondent had owed Petitioner for Petitioner's property that Respondent threw out. Respondent responded, "Ok". Petitioner replied, "Ok. Done deal!" Petitioner then sent the following texts: "When do you want me to move upstairs? End of month or today?"; "Or this week? Let me know"; "Remember what I texted on June 18? 'Figure out a mutually beneficial solution.' You did. Congrats. New beginning."; and "I'll even help you out again with the fridge if you want." Respondent then responded, "Before the end of the month, I have to talk to people upstairs first". [FN2] Petitioner responded, "Ok. But do it asap, please, I need to get away from this noisy fridge. It's driving me nuts."

Petitioner testified that he paid Respondent a first months' rent and security deposit on August 3, 2021; that when he moved into the subject premises he changed the locks to it, which was a normal procedure in the Building; that he informed Respondent that he changed the locks [*3] and Respondent did not object; that he later noticed that his keys did not work;

that he asked Respondent for a key; that Respondent said no, you don't belong here; that Respondent then rushed out and pushed him and locked an inner door; that he has had no issues with Co-Respondent; and that he knew from the beginning that Co-Respondent owned the Building.

Petitioner testified on cross-examination that he had a lease for the subject premises; that by a lease, he is referring to the Text Exchange; that he paid rent for the subject premises by deducting money from the debt that Respondent owed him; that Respondent agreed to that; that he cut the cord to the Refrigerator; that the subject premises is not a living room; that he did not see the subject premises used as a living room; and that he saw an advertisement for rooms at the Building before he moved in. Respondent introduced into evidence a text that Petitioner sent on April 1, 2021 referring to a living room. Petitioner testified on cross-examination that he knew that there was a living room but he did not know what was used as a living room; that he had not been to the subject premises; that all of the rooms in the Building had different furniture in them; that there was no bed in the subject premises; that there was a bed in the Ground Floor Unit; and that there was no couch in the Ground Floor Unit.

Respondent testified that he met Petitioner in August of 2020; that he was looking for a roommate; that they connected through Craigslist; that he used the roommate agreement in evidence that a past roommate had drafted; that he shared the roommate agreement with Petitioner; that Petitioner agreed to it; that there was a lot of drama, where Petitioner would get into fights, which sometimes got physical, with other occupants of the Building; that he tried to be understanding and work with Petitioner; that a half dozen people who had issues with Petitioner moved out of the Building; that Petitioner originally was helpful with community assistance efforts; that when Petitioner was not in control of the Refrigerator, he unplugged it at night so food would spoil; that Respondent had to clean it up; that Petitioner cut the cord; that Petitioner said that the Refrigerator was broken; that Respondent had a repair person come; that he knocked on Petitioner's window; that Petitioner threatened him with jail for knocking on his window; that Petitioner was hospitalized a number of times; that he told Petitioner that Petitioner had to move; that Petitioner was resistant to that; that Petitioner said he was going to take over the Building and that Respondent should pay Petitioner tens of thousands of dollars because of the assault and because Petitioner said that the room was illegal; that he stopped engaging with Petitioner; that he would say "okay" to Petitioner so to not have to engage with him; that one of the times that Petitioner was in the

hospital, he found blood and foul-smelling human waste in Petitioner's room at the time; that his housemate and he cleaned up the room at Petitioner's request; that after Petitioner came back, things were tense; that Petitioner shouted at him, accusing him of not caring about Petitioner; that Petitioner agreed that he would move out if he could stay on the Third Floor; that Respondent said that Petitioner could stay on the Third Floor for a while; that he thought this would be temporary and resolve some problems; that he cannot rent the subject premises, which had been used as a living room on the Third Floor, without the consent of his roommates on the Third Floor; that after two weeks of Petitioner there, people got frustrated because Petitioner changed the lock to the door; that after two weeks of Petitioner crashing rent-free on the couch upstairs, he told Petitioner that it was time to go; that Petitioner called 911 a number of times; that Co-Respondent's husband came out and spoke to Petitioner; that Petitioner forced his way into the Building; that Petitioner made a cut-throat gesture; that another occupant of the Building who was pregnant was carrying cans and Petitioner smashed the cans out of her hands; that Respondent and his housemates pay rent; that every room has a [*4] window and its own door; that all the bedrooms seems like legal bedrooms to him; that Respondent does not owe Petitioner thousands of dollars; that Petitioner left personal property in the Building; that Petitioner moved out of the Ground Floor Unit and returned the key; that Petitioner left human waste in the subject premises; that Respondent lived in the Building for six years; and that the subject premises is a living room and has been used that way, although people have crashed there.

Respondent introduced into evidence photographs of the Ground Floor Unit, which does look as if it had been abandoned; the subject premises, which is furnished as a living room would be; and an ad that says that the Building has two living rooms.

Respondent testified on cross examination that he rents the entirety of the Building from Co Respondent; that he originally signed a lease for downstairs apartment; that he never officially signed a lease for the Third Floor; that he helped out when people moved out from the Third Floor; that he does not know if he is formally Co Respondent's tenant for the Third Floor; that there are two separate apartments with different doors and different doorbells; that one mailbox fell down, so the remaining one says 1 and 2 and they sort it out; that he collected rent and a security deposit from Petitioner; that he gives the rent to Co Respondent or Co Respondent's husband; that the people on the Third Floor were kind enough to let Petitioner crash in the subject premises for two weeks; that he has authority to rent out rooms throughout the Building; that he does not collect utilities for the Third Floor; that he rented

the subject premises to the Prior Occupant; that he did not rent the subject premises to Petitioner; that he had Petitioner pay rent to a Paypal account that is his; that he asked Petitioner if he would pay rent for the subject premises; that they did not agree on rent; that he was curious if he would pay rent because Petitioner was refusing to pay rent for another room; that he did not rent the subject premises to the Prior Occupant exclusively as a bedroom; and that the Prior Occupant would sleep in the subject premises.

Respondent had introduced into evidence a photograph of the subject premises, which depicts a room with a mattress on the floor and personal effects strewn about. Respondent testified on cross-examination that the photograph depicts Petitioner's mattress; that there is a door to the subject premises; that the door has doorknob; that the door did not have a lock; that Petitioner subsequently added a lock; that he changed the lock on August 15; and that he did not give a key to Petitioner.

Respondent testified on redirect examination that when Petitioner moved into the subject premises Petitioner knew that the subject premises was used as a living room; that the subject premises did not have a lock; that the doorknob did not have a lock; that at some point when Petitioner was living there Petitioner sought to restrict access to the subject premises and he added a lock; that when Petitioner stayed in the subject premises, Petitioner changed the locks again so that no one else in the Building could enter the subject premises; that that continued to be the state of the subject premises until the morning of August 16, when Petitioner's lock was removed; and that Petitioner came to get his belongings, including the lock Respondent testified on recross examination that he removed the lock on August 16

Bridget Peck ("Former Resident No 1") testified that she lived at the Building in November and December of 2020 when Petitioner lived there; that her relationship with Petitioner was nice; that they spent a lot of time together; that she was pregnant; that in the last week before she moved out Petitioner took out his aggression on her; that she and Petitioner got in an altercation; that Petitioner slapped a can of beans out of her hands; that they stopped [*5]communicating; that she felt threatened physically; that Petitioner had been upset about a holiday party that was in the subject premises; that Petitioner knew where the party was; that the Building had two entries; that the first floor has two bedrooms; that the second floor has three bedrooms and a bathroom; that the Third Floor had two bedrooms, a kitchen, and a living room; that she lived on the first floor; that people freely went from one part of the Building to the other; that she helped Respondent interview two roommates in the

subject premises; that she never saw Petitioner in the subject premises; that in return for payment of rent, she had access to the subject premises; that Petitioner did not talk about changing the subject premises; that Petitioner wanted to put a door on the lower living room and make it part of his space; and that she and Respondent said no to Petitioner.

Former Resident #1 testified on cross-examination that she has not returned to the Building since she has moved; that she has been friends with Respondent for five years; and that she helped Respondent do what he wanted to do with regard to the Building.

Kristina Ahzah ("Respondent's Associate") testified that she met Petitioner at the Building; that she had helped get roommates for the Third Floor; that she was involved with sublease agreements that residents who live in the Building sign; that Petitioner did not sign a sublease agreement; that Petitioner did not fill out an application, as other people who live there did; that they ask for references and proof of income; that she called all references for people who live on the Top Floor; that Petitioner did not supply references; and that she does this work because she wants to live in the Building as a collective. Respondent's Associate testified on cross-examination that Respondent is the sublessor.

David Kahn ("Former Resident #2") testified that he lived on the second floor of the Building from February through July of 2020; that he recognized the photograph of the subject premises; that when he lived in the Building he used the subject premises for watching television, having meetings, and having meals; that he was in the subject premises once a day; that the subject premises had a door that was usually open but sometimes closed; that he did not remember if there was a lock on the door; that residents of the Building used a schedule on a whiteboard to schedule times for exclusive use the subject premises; and that from time to time people stored personal property, like an air conditioner, in the subject premises.

The Prior Occupant testified that he lived at the Building from April to June of 2021 with Respondent; that he paid rent with a friend of Respondent; that he moved out two weeks after he should have; that he had a room in the front of the apartment on the Third Floor with a lock and key; that the walls of the room were yellow or white; that there were two large windows; that he put air conditioning there; that there was a door on the room with a lock and he had a key; that Respondent had installed the lock and Respondent gave him a key; that he saw an ad on Craigslist with an image of the room; that Respondent was the one he reached

out to when he responded to the ad; and that Respondent had arranged to get him the key to the Building.

The Prior Occupant testified on cross-examination that he rented the subject premises; that he was told the subject premises was a living room before he lived there and that it would be after he left; that he signed a roommate agreement; and that he was in touch with Respondent's Associate and he gave references. The Prior Occupant testified on redirect examination that he rented the subject premises for bedroom purposes and that he had a bed in that room.

Discussion

Respondent concedes that he excluded Petitioner from the subject premises by changing the locks, an element of a lockout cause of action. *3855 Broadway Laundromat, Inc. v. 600 [*6] West 161st Street Corp.*, 156 AD2d 202, 203 (1st Dept. 1989), *Cetin v. Sung Jin Choe*, 2019 NY Slip Op. 30526(U)(S. Ct. NY Co.), *Morgan v. 440 St. Marks Realty LLC*, 2020 N.Y.L.J. LEXIS 1025 (Civ. Ct. Richmond Co.). Petitioner bears the burden of proving the other element of a lockout cause of action, that he was peaceably in actual or constructive possession at the time of the forcible or unlawful entry. *Andrews v. Acacia Network*, 59 Misc 3d 10, 12 (App. Term 2nd Dept. 2018), *Brown v. 165 Conover Assoc.*, 5 Misc 3d 128(A)(App. Term 2nd Dept. 2004). "Possession," for these purposes, essentially means that Petitioner must prove that he has been a tenant of the subject premises. *Zhu v. Li*, 70 Misc 3d 139(A) (App. Term 2nd Dept. 2021). If Petitioner proves that he has a right to exclusive possession of the subject premises by operation of a lease, then he can prevail even though he occupied the subject premises for less than thirty days before Respondent locked Petitioner out. *Alcindor v. Raphael*, 2018 N.Y.L.J. LEXIS 569, *6 (Civ. Ct. NY Co.), *citing Massare v. Di Nardo*, 35 AD3d 1157 (4th Dept. 2006), *Lyke v. Anderson*, 147 AD2d 18 (2nd Dept. 1989).

Petitioner argues that the Text Exchange amounts to a lease. A lease is a contract. *Vt. Teddy Bear Co. v. 538 Madison Realty Co.*, 1 NY3d 470, 475 (2004), *Geraci v. Jenrette*, 41 NY2d 660, 665 (1977), *D'Alto v. 22-24 129th St., LLC*, 76 AD3d 503, 506 (2nd Dept. 2010). *See Also Stern v. Equitable Tr. Co.*, 238 NY 267, 269 (1924), *Hispano Americano Advert. v. Dryer*, 112 Misc 2d 936, 937 (Civ. Ct. NY Co. 1982)(Saxe, J.), *Scarborough Manor Owners Corp. v. Robson*, 57 Misc 3d 24, 28 (App. Term 2nd Dept. 2017), *Bhatti v. Goings*, 65 Misc

[3d 1231](#)(A)(Civ. Ct. Kings Co. 2019)(parties create a landlord/tenant relationship between them by a contract — expressed or implied — which defines their rights and obligations).

While an exchange of text messages is not a writing subscribed to by the parties, *Dominion Capital LLC v. Philippe Equities LLC*, 2018 NY Slip Op. 32478(U), ¶¶ 13-14 (S. Ct. NY Co.), neither is an exchange of letters, and yet an exchange of letters may give rise to a binding contract in general, *Wyllie v. Palmer*, 137 NY 248, 252 (1893), [Dahan v. Weiss](#), [120 AD3d 540](#), 542 (2nd Dept. 2014), and a lease in particular. *Bernstein v. 1995 Assocs.*, 185 AD2d 160, 162 (1st Dept. 1992). An exchange of text messages constitutes a series of written communications just like an exchange of letters is. Accordingly, it is theoretically possible for parties to enter into a landlord/tenant relationship with one another by an exchange of text messages.

Respondent argues that he did not intend to give Petitioner exclusive control of the subject premises, the critical factor distinguishing a landlord/tenant relationship from other types of occupancies. [Women's Interart Ctr., Inc. v. New York City Economic Dev. Corp.](#), [97 AD3d 17](#), 21 (1st Dept. 2012), *leave to appeal dismissed*, 20 NY3d 1034 (2013), [Shearin v. Back on Track Grp., Inc.](#), [46 Misc 3d 910](#), 914 (Civ. Ct. Kings Co. 2014). Respondent instead characterized Petitioner's occupancy of the subject premises as Petitioner just crashing on a couch in a living room. But that is not how Respondent characterized Petitioner's occupancy of the subject premises in the Text Exchange. Crucially, the Text Exchange begins with Respondent asking Petitioner if he wanted to "rent" the subject premises [\[FN3\]](#) and an exchange [\[*7\]](#) ensues about an amount of rent Petitioner would pay and the date he would move in. Such an exchange evinces a mutual intent to create a landlord/tenant relationship. To the extent that the exchange reveals any ambiguity about a mutual intent to create a landlord/tenant relationship, however, the context in which the Text Exchange took place comes into play. *Cf. Deckoff v. W. Manning Family P'ship*, [193 AD3d 812](#), 814 (2nd Dept. 2021)(where the language used in a deed is ambiguous such that it is susceptible of more than one interpretation, Courts will look beyond the written instrument to the surrounding circumstances)

Petitioner originally occupied the Ground Floor Unit according to terms consistent with a tenancy, demonstrated by the Roommate Agreement, Petitioner's payment of rent, and the extent to which Petitioner could exclude others from the Ground Floor Unit. Respondent's testimony and Petitioner's texts about figuring out a "mutually beneficial solution" give rise to

the inference that the parties were in a dispute with one another about Petitioner's tenancy in the Ground Floor Unit. However, rather than deal with that dispute by straightforwardly terminating Petitioner's tenancy, Respondent instead asked Petitioner if he wanted to "rent" the subject premises. Petitioner answered "Yeah," proposed some more specifics about the amount of rent, and Respondent answered "Ok." In testimony, Respondent characterized his use of the word "Ok" as a terse means by which to dismiss Petitioner rather than as a means by which to ratify a landlord/tenant relationship. However, Respondent's assertion is not consistent with Respondent's own offer, in the Text Exchange, to "rent" the subject premises to Petitioner, thus inducing Petitioner to surrender his tenancy at the Ground Floor Unit.

There is no evidence in the record concerning the rent-regulatory status of the subject premises and the Court makes no findings as such. However, cases involving rent-regulated tenants who relocate to different apartments in the same buildings at the invitation of their landlords provide instructive authority. A tenant's relocation upon a landlord's initiative enables the tenant to continue their regulatory status. [*Saad v. Elmuza*, 12 Misc 3d 57](#), 59 (App. Term 2nd Dept. 2006), [*91 Real Estate Assoc. LLC v. Eskin*, 46 Misc 3d 40](#), 41-42 (App. Term 1st Dept. 2014). Cf. [*Valsac 906 LLC v. Orenstein*, 42 Misc 3d 1206\(A\)](#)(Civ. Ct. NY Co. 2014)(no vacancy occurred in a regulated tenancy when a landlord induced a tenant to execute a surrender, the tenant remained in occupancy, and the tenant signed a new lease with a co-tenant). Similarly, as Respondent initiated Petitioner's relocation out of a room from which Petitioner's tenancy protected him eviction by self-help with an offer to "rent" another room, Respondent may not exploit whatever dubious status there is of Petitioner's occupancy of the subject premises to evict Petitioner by self-help.

Respondent's use of the verb "rent" in this context is therefore significant. Even if Respondent did not actually intend to create a landlord/tenant relationship with Petitioner vis a vis the subject premises, Respondent's internal intention does not control so much as the manifestation of Respondent's intention by his words. [*Utica Builders, LLC v. Collins*, 176 AD3d 897](#), 899 (2nd Dept. 2019), [*Four Seasons Hotels v. Vinnik*, 127 AD2d 310](#), 317 (1st Dept. [*8]1987).

Respondent argues that the subject premises is a common area of the Building and that Petitioner may therefore not obtain exclusive occupancy of it. If Petitioner does not have exclusive occupancy of the subject premises, he has a license, not a lease, [*Layton v. A. I. Namm & Sons, Inc.*, 275 A.D. 246](#), 249 (1st Dept. 1949), [*aff'd*, 302 NY 720](#), 722 (1951), and

is therefore subject to removal by self-help. *Zhu, supra*, 70 Misc 3d at 139(A). While the evidence shows that the occupants of the Building have been using the subject premises as a common area, the Prior Occupant also had exclusive possession of the subject premises. Respondent's offer to rent the subject premises to Petitioner, combined with the subject premises' previous use as a bedroom show that previous use of the subject premises as a common area does not preclude Petitioner's exclusive occupancy of it.

Respondent also argued that Petitioner's exclusive use of the subject premises effectively denied common area space to other tenants in the Building and that they would therefore be necessary parties. However, Petitioner in this proceeding does not seek a warrant of eviction against any unnamed individual or entity. No evidence in the record shows that Petitioner's restoration would deprive any individual of possession of their home. Petitioner's restoration to the subject premises would continue the status quo that had been in effect for four months prior to Respondent's lockout of Petitioner. Accordingly, the Court can accord complete relief the parties named hereto without joinder of any other party and other occupants are not necessary parties to this proceeding. [Almah LLC v. AIG Emp. Servs., Inc., 159 AD3d 532](#) (1st Dept. 2018), [Malaty v. Malaty, 95 AD3d 961](#), 962 (2nd Dept. 2012).

Conclusion

As Petitioner made no showing with regard to Co-Respondent, the Court dismisses this proceeding against Co-Respondent. However, the Court awards Petitioner a final judgment of possession against Respondent. The Court directs Respondent to provide Petitioner a key to the subject premises forthwith. On default, Petitioner may seek the assistance of the New York Police Department or move to hold Respondent in contempt of Court. This order is without prejudice to any determination as to the rights of any party in any other summary proceeding between any occupants, any managers, and any owners of the Building.

This constitutes the decision and order of the Court.

Dated: Brooklyn, New York

September 7, 2021

HON. JACK STOLLER

J.H.C.

Footnotes

Footnote 1: The Court refers to this thread as the "Roommate Agreement."

Footnote 2: A text immediately preceding that one said almost the same thing but had a typographical error

Footnote 3: The Text Exchange is not explicit about the exact location of the subject premises, only referring to it as a room upstairs. However, the Court may resort to parol evidence to resolve any uncertainty about the demised premises *Cordua v Guggenheim*, 274 NY 51, 57 (1937), *JPMorgan Chase Bank, Nat'l Ass'n v. Zhan Hua Cao*, 160 AD3d 821, 822 (2nd Dept. 2018). *See Also Maccioni v. Guzman*, 145 AD2d 415, 416 (2nd Dept. 1988)(for purposes of the Statute of Frauds property need only be described with such definiteness and exactness as will permit it to be identified with reasonable certainty). The record at trial shows that there is no dispute as to the location of the subject premises as the room where Petitioner had been sleeping in the first half of August, the same room where the Prior Occupant slept.

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