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Polyclinic Owner LLC v Castillo
2022 NY Slip Op 32363(U)
July 12, 2022
Civil Court of the City of New York, New York County
Docket Number: Index No. LT 300759/20
Judge: Daniele Chinae
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This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NY: HOUSING PART G

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Index No. LT 300759/20

POLYCLINIC OWNER LLC,
Petitioner,

DECISION/ORDER

-against-

ALONSO CASTILLO,
Respondent,

JOHN DOE AND JANE DOE,
Under-Respondents.

----- X

Present: Hon. Daniele Chinae
Judge, Housing Court

Recitation, as required by CPLR 2219(A), of the papers considered in the review of this motion for summary judgment and leave to obtain and execute a warrant of eviction:

PAPERS	NYSCEF NUMBER
Notice of Motion & Affirmation/Affidavits	22-30
Answering Affirmation/Affidavit	32-42
Replying Affirmation/Affidavit	43-44

Upon the foregoing cited papers, the Decision/Order on Petitioner’s motion is as follows: Denied.

In this licensee holdover proceeding, Petitioner seeks to recover possession of premises from Respondent Alonso Castillo, who claims he is the brother of the deceased tenant of record (“TOR”), Leonor Castillo.

Petitioner, through counsel, filed a notice of petition and petition on August 14, 2020, alleging that the TOR’s first HUD Section 8 lease expired on September 30, 1983, and thereafter it was repeatedly renewed for successive one-month terms terminating on April 17, 2020, the date the TOR died. The papers further allege that the TOR was the sole individual listed on the leases and recertifications, Respondent was not on the family composition and any license granted by the TOR expired upon her death. The ten (10) day notice to vacate incorporated in the petition refers to Respondent Castillo as the TOR’s son and states that unless the Respondents remove themselves from the subject premises, 345 West 50th Street, Apt. 4P, New York, NY 10019, the landlord will commence a summary proceeding for their removal.

On April 23, 2021, a Notice of Appearance was filed by Respondent Castillo’s attorney. On April 27, 2021, counsel filed Respondent’s COVID-19 Hardship Declaration staying the proceeding until the eviction moratorium expired.¹ No answer has been interposed.

¹ NYSCEF documents numbers 11 and 12.

Now, in its motion, Petitioner seeks an order pursuant to CPLR § 3212 granting summary judgment and leave of the Court to obtain and execute a warrant of eviction.² The motion is supported by an affidavit from Jennell Howard, the regional property manager for Winn Residential (Petitioner's managing agent), an attorney's affirmation and several exhibits. The exhibits are copies of various documents including the pleadings, the building's deed, the multiple dwelling registration, e-mail correspondence, the TOR's death certificate, the TOR's last renewal lease and the TOR's last certification.

Petitioner's view is that the TOR had a HUD Section 8 lease and subsidy that terminated upon her death. Jennell Howard's affidavit states it was made following a review of the office's files concerning this proceeding and the premises. Howard's affidavit and the affirmation from Petitioner's attorney both state that the TOR's leases and certifications do not list Respondent Castillo. They emphasize that the last recertification, which occurred in 2019, was prepared by a person named Romulo Castillo on the TOR's behalf, which they allege is a further indication that Respondent Castillo was not in possession of the apartment. They allege that Respondent has no lease nor right to succession, he took occupancy after the TOR's death and upon information and belief, the TOR gave Respondent keys to the apartment.

Per Howard's affidavit and the affirmation from Petitioner's attorney, Petitioner processed Respondent's application and HUD denied the same because Respondent is not a qualified remaining family member under HUD's regulations insofar as Respondent's possession of the premises commenced after the TOR's death and Respondent was not on the lease when the TOR died. The affidavit and affirmation rely on HUD's correspondence with Petitioner (Exhibit E) to assert that HUD rejected Respondent's claim and therefore the Court must reach the same result. Exhibit E consists of fourteen pages of various e-mail communications and is labeled on NYSCEF as communications with HUD. However, some e-mails are solely between employees of Petitioner's managing agent and Petitioner's attorneys. Two are between employees of Petitioner's managing agent and Rita Smith of CGI Federal Inc. Others include Jennell Howard, Sabrina M. Basile, the Regional VP of Winn Residential, Jonelle Stewart, Branch Chief of the NY Account Executive Branch, Multifamily Asset Management Division – Federal Region 2, U.S. Department of Housing and Urban Development ("HUD") and Justine Rivera, another individual employed by HUD.

The e-mail communication from Howard to Smith sets forth Petitioner's position as of June 29, 2021:

"I am reaching out regarding a unit that we terminated subsidy after the death of the head of household. April 17th, 2020 the HOH Leonor Castillo passed away, there is a family member residing in the apartment that is claiming succession after the death of his sister. There is a language barrier and a translator was needed. The household was sent to legal but due to the moratorium in effect we were unable to proceed with eviction. During this time, the family member stayed in the unit, recently he received legal assistance and has completed the paperwork necessary to add him as head of household because he is unable to pay the contract rent for the unit. I am asking is it possible to have him added as the head of household effective of the initial certification 05/01/2020 to regain subsidy for this unit."

Smith's reply is as follows:

"You need HUD or court approval to add him to the lease. You should contact your HUD Contract Administrator and provide them with the details of the situation. Because the

² The motion is premature given the procedural posture of this case. Nonetheless, in the interest of judicial economy, the Court has rendered a decision on Petitioner's premature application, which was marked submitted on May 2, 2022.

tenant was not added to the HUD 50059 by any of the households members, they do not have rights to the subsidy, and they did not go through the waiting list process as required by the TSP. Only, the courts or HUD can approve them to MI."

Thereafter, a pertinent e-mail from Howard to Stewart and Basile, dated August 4, 2021, states:

"The reasoning for adding this person to the apartment is during the pandemic, Mr. Castillo was occupying the apartment as a caregiver for ill sister, the head of household Ms. Castillo during her illness and to assist with her medical care. Unfortunately April 17th, 2020 the HOH Leonor Castillo passed away without adding Mr. Castillo to the required lease documents. Notification was sent to the apartment due to the finding of Ms. Castillo passing away but due to the language barrier a translator was needed. The household was sent to legal but with the moratorium in effect we were unable to proceed with eviction. During this time, the family member stayed in the unit, obtained legal representation and has completed the application and paperwork necessary to add him as head of household however he is unable to pay the contract rent for the unit. Also at this time, the property's waiting list is closed. I am asking is it possible to have him added as the head of household effective of the initial certification 05/01/2020 to regain subsidy for this unit due to him occupying the unit during the 2020 period while residing in the unit caring for his loved one."

Stewart's reply, dated August 5, 2021, states in relevant part:

"Unfortunately, this practice is adverse to the HUD guidelines. As you know, a live-in aide should only remain in the unit as long as the HOH receiving support services is a resident. Live-in aides cannot "flip-flop" their role when the circumstances change. At the time of qualification, does management have the live in aid sign an addendum stating they cannot remain in the unit? "

That same day, Basile, wrote Stewart and Howard:³

"I guess the difference here is that we were unaware of this situation, the tenant never let us know this family member was living in the unit as an aid. The resident passing in the middle of a pandemic, made the situation harder to reconcile. If there is any way to assist this person in need of housing and subsidy, that would be great. He has agreed to pay back rent, if the subsidy can be restored."

No reply from HUD is attached in the Exhibit. Instead, Petitioner's attorney acknowledges that decisional law would permit Respondent to succeed to the TOR's tenancy if he lived in the premises prior to the TOR's death and should have been listed on a lease, but was not, through no fault of his own. This is followed by the claim that Respondent provided no evidence in this regard. In sum, Petitioner's position is that there are no triable issues of fact regarding Respondent's succession claim and therefore the Court should award summary judgment in Petitioner's favor.

Respondent's opposition concentrates on two arguments. First, the motion should be denied because it was submitted without a sworn statement from an individual with personal knowledge of the facts. Second, there are triable issues of fact regarding the succession defense. The opposition includes an affirmation from Respondent's counsel, an affidavit from Respondent, an affidavit from Romulo Castillo,

³ Ms. Rivera was copied on the three e-mails discussed above.

who states he is Respondent's nephew and the TOR's son, an affidavit from Lillian Valentine, who states she resides in the building, pharmacy records and additional exhibits.

Respondent's first argument is that the affirmation of Petitioner's attorney and the affidavit from Jennell Howard fail to meet the personal knowledge requirement of CPLR § 3212(b) because neither has firsthand knowledge about the TOR's tenancy, the occupants of the apartment prior to the TOR's death and the circumstances surrounding Respondent's occupancy. Counsel states, upon information and belief, that Petitioner's attorney does not work at the building at issue. It is explained that Howard only reviewed the file prior to making an affidavit. It is further advanced that Howard's job title, regional property manager, implies she may not be familiar with the daily comings and goings of people in Petitioner's buildings. It is also suggested that Howard may not have been employed by the building's management company for the entirety of the relevant period. The affidavit omits the start date of her employment and the building's deed, annexed as Petitioner's Exhibit A, shows the building was sold in 2017. The moving papers do not discuss the sale nor whether the management company changed or remained the same before and after the sale.

The second argument is that Respondent's opposition demonstrates that triable issues of fact exist. Respondent alleges he moved to the premises in 2015 and readily admits that at that time, his sister needed constant care. However, he claims that he assisted his sister with daily tasks before he lived with her and thereafter because that is the tradition and natural part of being in his family and that he did not do so as a live-in aide. Respondent and his attorney further claim that prior and current management company knew he lived in the building, at least as early as 2017, and they refused repeated requests to add him to the household composition even though he was eligible pursuant to the building's selection plan and HUD regulations. Management would only add him as a live-in aide, which was contrary to the TOR and Respondent's wishes. To bolster this claim, Respondent includes an affidavit from Romulo Castillo, his nephew, wherein he describes his efforts and his mother's wishes to have Respondent added to the lease. For instance, Romulo Castillo names a specific individual at the management office, Richard Vardy, that he spoke with in 2017. Mr. Vardy allegedly denied a request to add Respondent Castillo to the lease and instead offered the live-in aide option. Both Respondent and his nephew discuss enlisting Housing Conservation Coordinators, the same legal services provider that is currently representing Respondent, to further this effort.

Petitioner filed a reply to challenge Respondent's arguments. Counsel first argues that the Howard affidavit satisfies the personal knowledge requirement because summary judgment is often granted to the custodian of documents. No case law is cited to support this proposition. Next counsel contends that Respondent, in his affidavit, admits he provided care for his ill sister and that he moved into the premises for that express purpose. He further contends that the absence of proof that care was provided by other individuals proves Respondent was the TOR's twenty-four hour caregiver. A citation to 24 CFR § 5.403 is provided to highlight that HUD regulations permit a live-in aide when such care is critical to a TOR's well-being, where such aide is not obligated for the TOR's support and the individual would not be living in the premises but for the needed services. Counsel asks this court to conclude that Respondent's opposition actually proves he was a live-in aide not entitled to succession.

Counsel posits that this Court should follow the reasoning of Bronx Preserv., L.P. v Rodriguez, 59 Misc 3d 1210[A], 2018 NY Slip Op 50457[U], [Civ Ct, Bronx County 2018]). The decision clearly sets forth the Court's analysis and for that reason is excerpted below:

"Respondent applied to petitioner for a tenancy in the subject premises. Petitioner rejected respondent's application due to a poor credit history/score. Analysis of and rejection based on a poor credit score is a permissible criterion for tenant selection under

the HUD Handbook and federal law. Upon his rejection on the basis of his credit score/history, respondent applied for and accepted his occupancy as a 'live in aide' for his mother. The status of 'live in aide' has disadvantages including ineligibility for succession. By the knowing acceptance of the limitations for the 'live in aide' status respondent cannot now reject the restriction after having accepted the benefit. Respondent's reliance on the standard analysis to determine that he is eligible for succession is misplaced. Unlike many other cases, the instant matter involves someone who made themselves known, went through the application process, was rejected for a reason that is within the relevant regulations and is now being asked to leave based upon the conditions upon which he entered the premises. Summary judgment cannot lie here."

In the case at bar, Petitioner admits Respondent did not affirmatively accept his status as a live-in aide but maintains Respondent's actions must be deemed an acceptance. Acceptance, per Petitioner, is that Respondent lived in the premises for seven years without paying rent after refusing to be designated as a live-in aide. When making this argument, counsel apparently concedes that Respondent did make his occupancy known to management prior to the TOR's death, was offered the option of a live-in aide and declined said offer.⁴

Petitioner's arguments are unpersuasive. The correspondence from HUD includes Petitioner's claim that Petitioner was unaware of Respondent's presence prior to the TOR's death. Petitioner's reply papers, seemingly, contradicts this lack of knowledge. Indeed, it is doubtful whether there remains a triable issue of fact as to whether Respondent's occupancy satisfied the residency requirement. The primary issue for the trial court is to determine whether Respondent should have been included on the lease and recertification forms, but not for the actions of the landlord.

The Court relies on 2013 Amsterdam Ave. Hous. Assoc. v Estate of Almeda Wells, 10 Misc 3d 142[A], 2006 NY Slip Op 50084[U] [App Term 2006]), which provides that the absence of person's name on an annual recertification form is not dispositive when other evidence proves the succession claim. This was aptly discussed by Justice Kraus in 5th & 106th St. Assoc. LP v Montanez, 2015 NY Slip Op 31876[U], *9 [Civ Ct, New York County 2015]), and is therefore cited below:

"[w]here the required residency and family relationship has been established by a preponderance of credible evidence at trial, courts have continued to find that a remaining family member is entitled to succession, even in the absence of compliance with the requirement to be listed on annual forms [*2013 Amsterdam Avenue Housing Associates v. Wells*, 10 Misc. 3d 142(A), 814 N.Y.S.2d 893, 2006 NY Slip Op 50084(U); *Bronx 361 Realty, L.L.C. v. Quinones*, 26 Misc. 3d 1231(A), 907 N.Y.S.2d 98, 2010 NY Slip Op 50334(U); *Los Tres Unidos Associates, LP v. Colon*, 45 Misc. 3d 129(A), 3 N.Y.S.3d 285, 2014 NY Slip Op 51566(U); *Marine Terrace Associates v. Kesoglides*, 44 Misc. 3d 141(A), 998 N.Y.S.2d 306, 2014 NY Slip Op 51303(U)]. The inquiry remains fact specific and includes consideration as to the bona fide family relationship, whether the owner knew of the occupancy, **whether the owner frustrated earlier attempts to have the occupants added to the lease**, and other relevant factors. [emphasis added]

⁴ Specifically, the reply states: "The only difference here is that Respondent did not affirmatively accept his occupancy as live-in aide, but having been advised of the situation by Petitioner, having refused to accept the offer, but then reaping the benefit (of a rent-free residence for now seven years), while also having his family obtain the benefit of the 24-hour care that Mr. Castillo required without any cost whatsoever, must be deemed to be an acceptance."

Accordingly, Petitioner's motion is denied. The parties are directed to appear on August 2, 2022 @ 9:30 in Part G to discuss whether settlement can be reached or if further motion practice is needed. If neither, then the case will be sent to Part X for trial assignment.

Respondent shall file an answer within two weeks of the date of this Order without need of further motion for late answer given that Petitioner will not be surprised after this untimely exercise in summary judgment. A copy of this order will be uploaded to NYSCEF.

DATED: July 12, 2022

SO ORDERED



Hon. Daniele Chinea, JHC

**HON. DANIELE CHINEA
JUDGE, HOUSING COURT**