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CARROLL STREET PROPERTIES v. BARKER

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART E

-----X

CARROLL STREET PROPERTIES,
Petitioner-Landlord,

L & T Index # 301678/20

-against-

DECISION/ORDER

AKIM BARKER,
Respondent,

JOHN DOE 1 and JOHN DOE 2 and
JANE DOE 1 and JANE DOE 2

Respondents-Occupants

-----X

HON. JULIET P. HOWARD, J.H.C.:

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of Respondent’s Cross-Motion Sequence #3 to Dismiss the Petition.

Papers	Numbered
Order to Show Cause and Affirmation Annexed	<u>1, 2</u>
Opposition Papers.....	<u>3, 4</u>
Replying Affidavit	<u>5</u>
Sur-Reply.....	_____
Exhibits	_____

After oral argument and upon the foregoing cited papers, the decision and order on Respondent’s Cross=Motion to Dismiss the Petition is as follows:

PROCEDURAL BACKGROUND

This is a licensee holdover filed on NYSCEF (Doc #1) on September 2, 2020. Due to mandatory stays as a result of the COVID-19 pandemic this licensee holdover was not immediately calendared. On November 12, 2020, On November 23, 2020, Respondents appeared pro se and Petitioner appeared through counsel before Judge Kenneth T. Barany in Part E and was adjourned to January 15, 2021. The January 15th court date was adjourned to January 26, 2021.

Petitioner initially filed a motion seeking summary judgment on January 22, 2021 (NYSCEF Doc #7). Petitioner filed another motion on NYSCEF (Doc #12) seeking to amend the petition to set forth additional and/or supplemental alleged nuisance type occurrences to show compliance with The COVID Emergency Eviction and Foreclosure Prevention Act of 2020 Chapter 381 of the Laws of 2020 (hereinafter referred to as CEEFPA) and with Administrative Order (A/O 340/20). Thereafter, the proceeding was calendared on February 23, 2021 in the nuisance part due to nuisance allegations in petitioner's second motion to amend the petition. The court notes this motion to amend is currently not before this court. Legal Aid Society appeared as a friend of the court and Judge Malikah Sherman issued a transfer order (NYSCEF Doc #22) on February 23, 2021, transferring the proceeding to Part E, directing Legal Aid Society to put in a Notice of Appearance by March 5, 2021 and adjourning both of petitioner's motions to April 12, 2021 and set up a briefing schedule for both of petitioner's motions and any potential cross-motion. Legal Aid Society subsequently filed a notice of appearance on behalf of respondent Akim Barker on March 4, 2021 (NYSCEF Doc # 23) and on March 19, 2021 filed a Cross-Motion to Dismiss the Proceeding or in the alternative, granting respondent Akim Barker, leave to interpose an answer (NYSCEF Doc #24)

Thereafter, the proceeding was heard in Part E on April 7, 2021. Counsel for both parties appeared on the Microsoft Teams conference, as did Serge Joseph, of Himmelstein McConnell Gribben Donoghue & Joseph LLP and who advised the court he would be putting in a substitution of counsel for respondent, Akim Barker. A consent to change attorneys with Himmelstein et.al, substituted as counsel for respondent Akim Barker in place of The Legal Aid Society was filed on April 7, 2021 (NYSCEF Doc 40). During a subsequent court appearance this court discontinued the proceeding against Joann Aubin without prejudice on April 22, 2021. Petitioner thereafter

discontinued the proceeding against Nandi Barker on May 12, 2021. Both parties and the court agreed that the court would first hear oral argument solely on respondent's cross motion to dismiss the proceeding, with petitioner's remaining two motions held in abeyance.

CROSS-MOTION TO DISMISS

This court heard oral argument solely on respondent's cross-motion to dismiss. Respondent cross-moves to dismiss this licensee holdover proceeding pursuant to CPLR 3211 (a)(1) and/or CPLR 3211 (a)(7) and/or CPLR 3211(a)(1), asserting petitioner may not maintain a licensee holdover proceeding directly against respondents during the term of the tenant of record's unexpired lease. In the alternative, respondent seeks leave to interpose an answer on behalf of respondent Akim Barker. Petitioner opposes respondent's cross-motion in its entirety.

It is undisputed that Joyce Atherley (Ms. Atherley) was the longtime rent stabilized tenant of record of the subject premises until she passed away on or about August 13, 2020 and that Ms. Atherley executed a two-year rent stabilized renewal lease for the subject apartment for the lease term June 1, 2020 through May 31, 2022 (NYSCEF Doc #10 Exh C). On August 14, 2020, approximately one day after Ms. Atherley's death, petitioner served respondents with a ten-day notice to quit, alleging respondents were licensees of Atherley and that their license had expired and/or was removed by the death of Joyce Atherley as a matter of law (See NYSCEF Doc# 1). The Notice to Quit did not seek to terminate the tenancy of Ms. Atherley's estate and was neither addressed to nor served on the executor or administrator of her estate. It was only addressed to occupants Akim Barker, Nandi K. Barker, Joanne Aubin aka JoAnne Aubin and various John and Jane Does. Thereafter, petitioner filed a licensee holdover petition against respondents on September 2, 2020 (NYSCEF Doc #1), alleging respondents entered into the unit with permission of the tenant of record, Joyce Atherley, on or about February 2020 and that upon the death of the

tenant of record all right, title, permission and interest in and to the subject premises had been rendered null and void as a matter of law. The petition neither named nor served the executor or administrator of Ms. Atherley's estate in this proceeding.

Respondent cross-moves to dismiss the petition pursuant to CPLR 3211(a)(1) and/or CPLR 3211(a)(7) and/or CPLR 3211(a)(1), alleging that petitioner may not maintain a licensee holdover proceeding directly against respondents during the term of the deceased tenant of record's unexpired lease. A court should grant a motion to dismiss under CPLR 3211 (a)(1) only if documentary evidence conclusively establishes a defense to the asserted claims as a matter of law." *See, Leon v. Martinez*, 84 NY2d 83, 88 (1994)

When considering a motion to dismiss pursuant to CPLR § 3211(a)(7), if "evidentiary material is . . . considered . . . , the question becomes whether the [petitioner] has a cause of action, not whether the [petitioner] has stated one, and unless it has been shown that a material fact claimed by the [petitioner] to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate." 68 16th Realty, LLC, 190 A.D.3d at 796 (citing *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977)). A motion to dismiss under CPLR § 3211(a)(7) may be made at any time, "irrespective of whether [the movant] made a pre-answer motion or asserted the defense in [his] answer." *Butler v. Catinella*, 58 A.D.3d 145, 151 (2nd Dept. 2008); CPLR § 3211(e).

For the purposes of CPLR § 3211(a)(10), a "necessary party is one who is necessary in order to accord complete relief in the action; it is a party who has such an interest in the litigation that the controversy cannot be settled without considering this party's interests." *DHPD v. Simply Better Apt. Homes*, 67 Misc.3d 1225(A), 2020 N.Y. Slip Op. 50637(U), *9 (Civ. Ct., Bronx County 2020) (citing CPLR § 1001(a); *Joanne S. v. Carey*, 115 A.D.2d 4, 7 (1st Dept. 1986)).

Respondent asserts that a landlord cannot proceed directly against alleged licensees when a deceased tenant of record's lease is still in effect. RPAPL § 713(7) permits a summary eviction proceeding against "a licensee of the person entitled to possession of the property at the time of the license, and (a) his license has expired, or (b) his license has been revoked by the licensor, or (c) the licensor is no longer entitled to possession of the property." The only party authorized to maintain such a licensee holdover proceeding is "[t]he person entitled to possession of the property occupied by a licensee who may be dispossessed." RPAPL § 721(7).

Respondent cites a series of cases in support of its argument. "A lease for a term of years is not terminated by the tenant's death prior to the lease's expiration." *Visutton Assoc. v. Fastman*, 44 Misc.3d 56, 58 (App. Term, 2nd Dept. 2014) (citing *Joint Property Owners, Inc. v. Deri*, 113 A.D.2d 691, 693 (1st Dept. 1986)). See also *Marine Terrace Assoc. v. Kesoglides*, 24 Misc.3d 35, 37 (App. Term, 2nd Dept. 2009). The lease instead becomes "the personal property of [the] tenant of record's estate." *Westway Plaza Assoc. v. Doe*, 179 A.D.2d 408, 409 (1st Dept. 1992).

"Absent a surrender of possession by the tenant . . . , [a] lessor must obtain a judgment of possession against the lessee pursuant to RPAPL 711 and may not proceed directly against the undertenant, whether licensee, subtenant, or occupant, pursuant to RPAPL 713" *Visutton Assoc.*, 44 Misc.3d at 58 (quoting *170 W. 85th St. Tenants Assn. v. Cruz*, 173 A.D.2d 338, 339 (1st Dept. 1991)). Here, Petitioner has annexed to its motion papers a lease executed by Petitioner and Ms. Atherley in May 2020. NYSCEF Doc No. 10 The renewal lease commenced on June 1, 2020, before Ms. Atherley's death on or about August 13, 2020, and does not expire until May 31, 2022. Petitioner has not terminated the tenancy of Ms. Atherley's estate and has sued only Ms. Atherley's alleged licensees. Appellate and trial courts in both the 1st and 2nd Departments have held that these circumstances require dismissal of the Petition.

In Visutton Assoc. v. Fastman, supra, the landlord commenced a holdover proceeding against the son of a deceased rent-stabilized tenant of record whose last renewal lease had not yet expired. The court held that the “landlord was required to terminate the tenancy of the estate of [the tenant of record] and to bring this proceeding against the estate.” See also, *Westway Plaza Assoc. v. Doe*, supra, where the court held a failure to join a representative of an estate renders a licensee holdover petition against a deceased tenant’s licensee defective ab initio for failure to name a necessary party.

Caselaw, as outlined herein, sets forth a clear rule that a landlord cannot proceed directly against alleged licensees while a deceased tenant of record’s lease is still in effect. As in the cases above, Ms. Atherley’s last renewal lease had not yet expired when this proceeding was initiated. Upon her death, the lease became the personal property of her estate.

Petitioner in opposition argues that this court is constrained to rely on *Fagan v. Nowitz*, 65 A.D.3d 1184 (2nd Dept. 2009), an Appellate Division 2nd Department case. The court in *Fagan* sued to rescind an irrevocable trust agreement but failed to join some of the remainder persons and beneficiaries of the trust. The court in *Fagan* held that the remainder persons and beneficiaries were necessary parties, and, after weighing the five factors in CPLR § 1001(b), ultimately dismissed the case. As respondent explains, in *Fagan*, there was no question that the plaintiff had a cause of action against the defendant. The primary issue was whether the court should allow the case to proceed against the defendant in the absence of other necessary parties. Petitioner, in opposition, also asserts that the family of the Ms. Atherley’s refusal to file an estate is an admission that they waive any right to the remainder of the lease term by showing lack of interest. There is no case law to support this allegation and furthermore, there is no privity of estate or contract between the parties as Ms. Atherley’s estate was the tenant of record when this holdover was filed.

Furthermore, there has been no supporting documentation that there was a surrender of the premises by the tenant of record prior to her demise or documentation of a surrender by the estate of the tenant of record.

Courts have consistently held that where a tenant of record passes away, their unexpired renewal lease becomes the personal property of the estate. Here it is undisputed the lease had not expired at the time this proceeding was commenced and petitioner had failed to terminate the estate's tenancy or join a representative of the estate. As such petitioner cannot proceed directly against the alleged licensee respondents as it has done here. The court is constrained to grant respondent's cross-motion to dismiss the proceeding. Accordingly, petitioner's pending motions seeking summary judgment, use and occupancy and seeking to amend the pleadings are denied as moot. The proceeding is dismissed without prejudice to the commencement of the same cause of action if the proper parties are named.

This constitutes the decision and order of this court which is to be uploaded to NYSCEF with notification to counsel for both sides.

Dated: Brooklyn, New York
July 12, 2021



Hon. Juliet P. Howard, JHC