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111-39 76th Rd., LLC v. Rothman

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[*1]

111-39 76th Rd., LLC v Rothman
2022 NY Slip Op 50771(U)
Decided on July 15, 2022
Appellate Term, Second Department
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This opinion is uncorrected and will not be published in the printed Official Reports.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 July 15, 2022

SUPREME COURT, APPELLATE TERM, SECOND DEPARTMENT, 2d, 11th and 13th
JUDICIAL DISTRICTS

PRESENT: : THOMAS P. ALIOTTA, P.J., MICHELLE WESTON, WAVNY TOUSSAINT,
JJ
2020-771 Q C

111-39 76th Road, LLC, Appellant,

against

Anne Rothman, Steven Pastor and "John Doe," Respondents.

Rose & Rose (Phillip L. Wartell of counsel), for appellant. Anne Rothman, Steven Pastor and "John Doe", respondents pro se (no brief filed).

Appeal from a decision of the Civil Court of the City of New York, Queens County (Malaika Scott-McLaughlin-Bland, J.), dated April 30, 2020, deemed from a final judgment of that court entered May 5, 2021 (see CPLR 5512 [a]). The final judgment, upon the decision, after a nonjury trial, dismissed the petition in a holdover summary proceeding.

ORDERED that the final judgment is affirmed, without costs.

Landlord commenced this holdover proceeding to recover possession of a rent-stabilized apartment located in Forest Hills, Queens, upon the ground that tenant did not use the apartment as her primary residence as required by Rent Stabilization Code (RSC) (9 NYCRR) § 2524.4 (c), and instead lived primarily in a house located in Cambria Heights, Queens. After a nonjury trial, the Civil Court held that landlord failed to prove, by a

preponderance of the evidence, that tenant did not occupy the subject apartment as her primary residence during the relevant period. A final judgment dismissing the petition was entered on May 5, 2021.

In a nonprimary-residence holdover proceeding, the landlord has the burden of showing, by a preponderance of the evidence, that the tenant did not use the subject premises as a primary residence (*see Glenbriar Co. v Lipsman*, 5 NY3d 388, 392 [2005]). The court may consider several factors when determining whether the premises is being occupied as a primary residence, [*2] and "no single factor shall be solely determinative" (RSC § 2520.6 [u]; *see Glenbriar Co. v Lipsman*, 5 NY3d at 392-393; [Carmine Ltd. v Gordon](#), 41 AD3d 196 [2007]).

In reviewing a determination made after a nonjury trial, this court gives substantial deference to the determination of a trier of fact as to issues of credibility, as a trial court's opportunity to observe and evaluate the testimony and demeanor of the witnesses affords it a better perspective from which to assess their credibility (*see Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]; [Hamilton v Blackwood](#), 85 AD3d 1116 [2011]; [Zeltser v Sacerdote](#), 52 AD3d 824, 826 [2008]). Upon a review of the record, we find no basis to disturb the Civil Court's conclusion that landlord did not prove, by a preponderance of the evidence, that tenant did not occupy the subject apartment as her primary residence during the relevant period.

Accordingly, the final judgment is affirmed.

ALIOTTA, P.J., WESTON and TOUSSAINT, JJ., concur.

ENTER:

Paul Kenny

Chief Clerk

Decision Date: July 15, 2022

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