2022-09-23

West 49th St., LLC v. O'Neill

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West 49th St., LLC v O'Neill
2022 NY Slip Op 22296
Decided on September 23, 2022
Civil Court Of The City Of New York, New York County
Bacdayan, J.
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Decided on September 23, 2022

Civil Court of the City of New York, New York County

West 49th Street, LLC, Petitioner,

against

Markyus O'Neill, Respondent,
JANE DOE, JOHN DOE Respondent-undertenants.

Index No. 301352/2022

SDK Heiberger (Steven B. Sperber, Esq.), for the petitioner

Thomas John Hillgardner, Esq., for the respondent-Markyus O'Neill

Karen May Bacdayan, J.

PROCEDURAL HISTORY AND BACKGROUND

This is a licensee holdover proceeding brought by petitioner against Markyus O'Neill ("respondent") after the death of the rent stabilized tenant of record, Scott Anderson ("Mr. Anderson"). The tenant of record's last renewal lease expired on December 21, 2021.

(NYSCEF Doc No. 13, exhibit A to petitioner's motion sequence 1.)[FN1] Petitioner served respondent with a licensee notice to quit pursuant to Real Property Actions and Proceedings Law ("RPAPL") 713 (7), and subsequently with a notice of petition and petition. (NYSCEF Doc No. 1, petition; NYSCEF Doc No. 2, notice of petition, NYSCEF Doc No. 6, affidavit of service of notice of petition and petition.)

Respondent filed an answer, verified by his attorney, on March 21, 2022. (NYSCEF Doc No. 8.) Respondent raised the following defenses: failure to properly serve the predicate notice and the notice of petition and petition (third and fourth affirmative defenses); failure to state a cause of action (first affirmative defense); failure to name the estate as a necessary party (second affirmative defense); a defense and counterclaim that petitioner has breached the warranty of habitability (fifth affirmative defense and first counterclaim); and the right to a renewal lease in his own name as a nontraditional family member (sixth affirmative defense).

Petitioner moved to strike respondent's defenses and counterclaims, and for summary judgment (NYSCEF Doc No. 9, notice of motion [sequence 1]). Respondent cross-moved for a traverse hearing and summary judgment based on improper service of the court papers, and, pursuant to CPLR 408, for discovery. (NYSCEF Doc No. 46, notice of motion [sequence 3].) It is not disputed that the former tenant of record, Scott Anderson, died on October 27, 2021 (NYSCEF Doc No. 15, petitioner's exhibit C, death certificate), or that the lease expired two [*2]months after Mr. Anderson's death on December 31, 2021. (NYSCEF Doc No. 19, petitioner's exhibit G, expired renewal lease.)

Petitioner argues that it has stated a cause of action, that the lease is expired, and that there is no estate to join. Petitioner contends that respondent has waived his jurisdictional claims by failing to provide a sworn statement rebutting the process server's affidavit in that the answer was not a sworn statement made by respondent. Regarding respondent's warranty of habitability claim, petitioner defends that the violations issued against petitioner were placed after this proceeding was commenced, that petitioner was previously unaware of the conditions, and that the conditions have been cured. Lastly, petitioner claims that respondent is a roommate who is not entitled to a lease in his own name as a nontraditional family member. (NYSCEF Doc No. 10, petitioner's attorney's affirmation.)

Petitioner argues that "[respondent and Scott Anderson] never comingled their finances or jointly owned real or personal property, held themselves out as a family unit, executed documents formalizing legal obligations, jointly celebrated most major holidays, or attended important events with each other's families." (*Id*. ¶ 36.) Petitioner further states that the deceased tenant of record had a life partner of 25 years and that respondent is nothing more than a roommate. (*Id*. ¶ 31.) This statement is supported by the affidavit of Robert Romano ("Mr. Romano"), who avers that he "loved Scott Anderson." (NYSCEF Doc No. 12, Romano affidavit ¶ 1.) They were "life partners" who met 25 years ago, and that "[d]uring the 25 years that [we] shared together, we held ourselves out as a couple, an exclusive couple (*Id*. ¶¶ 1-5.) As support for this, Romano avers that he and the deceased "traveled frequently together, never with Mr. O'Neill." (*Id*. ¶ 7.) They "considered each other family and incorporated one another into each other's immediate family." (*Id*. ¶ 6.) Mr. Romano and Mr. Anderson shared cell phone accounts and credit card accounts. (*Id*. ¶¶ 8-10.) Mr. Anderson was the beneficiary of his retirement fund, and he was the beneficiary of Mr. Anderson's retirement fund. (*Id*. ¶ 10.) "[We] shared good times and bad times together. During his last few years of life, as he battled liver cirrhosis, I was his caretaker." Mr. Romano attaches photographs with a summary sheet detailing "who, what, where, and when the photos were taken." (*Id*. ¶ 15, NYSCEF Doc No. 22, petitioner's exhibit J, photographs.) Mr. Romano also attaches a Verizon bill demonstrating a joint account, a bill from a joint TD Bank account, and credit cards under the same account issued to both the deceased and Mr. Romano. (*Id*. ¶ 16, NYSCEF Doc No. 23, petitioner's exhibit K.) They "formed a life together, yet kept [their] own apartments in order to provide [them] comfort and space." (*Id*. ¶ 4.) Mr. Romano knew about respondent, but they were not friends. (*Id*. ¶ 13.) "We all grieve the loss of Scott." (*Id*. ¶ 14.)

In opposition, respondent submits a detailed affidavit to dispute the process server's affidavits in support of his fourth and fifth affirmative defenses. Respondent does not oppose petitioner's motion to strike his second affirmative defense that a surrender from the estate must be demonstrated. He maintains that conditions continue to exist in the premises and have not been cured.

He also recounts his relationship with the deceased. Respondent states that he met Mr. Anderson in 2011. They "hit it off immediately." (NYCSECF Doc No. 48, O'Neill affidavit ¶ 5-6.) "After hanging out together" and sharing various activities, they "became more than

friends and more than close despite [Mr. Anderson] being in another relationship." (*Id.* ¶ 7.) When respondent was searching for a new apartment, Mr. Anderson "immediately offered [him] a room in the subject premises, a one-bedroom apartment, provided that I agreed to keep [their] [*3]relationship quiet and discreet." (*Id.* ¶ 8.) Respondent avers that he "moved in in 2012." (*Id.* ¶ 12.) Respondent "know[s] all about Robert Romano and his relationship with Scott, and [he] know[s] [Mr. Romano] does not like me." (NYSCEF Doc No. 40, O'Neill affidavit ¶ 2.) Respondent states that Mr. Anderson spent "substantially more time" with him than with Mr. Romano." (NYSCEF Doc No. 48, O'Neill affidavit ¶ 10.) He describes a trip they took together to Boston for respondent's birthday, where they shared the cost of the train and Spamalot tickets. Mr. Anderson surprised him with two Spamalot goblets "which [he] still cherishes and [has] to this day." (*Id.* ¶ 11.) Respondent states he was never invited to visit Mr. Anderson's family in Maine where Mr. Anderson traveled several times a year. He would miss Mr. Anderson whenever he was absent, the "late night cocktails and banter, or watching old movies together, or sometimes just falling asleep holding each other then getting up and making breakfast since I love to cook and he loved my cooking." (*Id.* ¶ 12.) On one of those trips, Mr. Anderson brought respondent a candle which he keeps on his nightstand "to keep his memory and ours alive and loved." (*Id.* ¶ 13.) Respondent states that when Mr. Anderson had problems with Mr. Romano, Mr. Anderson would cry on his shoulder, grateful for his love and support, and said that "someday [they would] be able to make [their] relationship official." (*Id.* ¶ 14.) Respondent states that he provided a "loving, understanding, and forgiving heart to come home to." (*Id.* ¶ 15.) "When [respondent] contributed to the household expenses," including rent, he would make those contributions to Mr. Anderson in cash from his tips as a bartender. (*Id.* ¶ 19.) He often made deposits into what he later discovered to be a joint bank account that Mr. Anderson held with Mr. Romano. Often, he simply gave Mr. Anderson "walking around money" when he asked for it. (*Id.*) He "would make the payments . . . however [Mr. Anderson] requested each month." (*Id.*)

Discovery is needed, respondent urges, to show that he made cash deposits into Mr. Anderson's joint bank account with Mr. Romano, to contribute to household expenses and rent. (NYSCEF Doc No. 48, respondent's affidavit ¶¶ 20-21.)

In reply, petitioner's attorney characterizes respondent's affidavit as a "fairytale," unsupported by any documents in support of a nontraditional family member succession defense. (NYSCEF Doc No. 51, petitioner's attorney's affidavit ¶ 3.) Petitioner contrasts this

lack of documentary evidence to that provided by Mr. Romano who does not reside in the premises. (*Id.*) Petitioner opposes respondent's motion for discovery, stating that it would yield nothing further than additional proof that respondent was a roommate (NYSCEF Doc No 51, petitioner's attorney's affirmation ¶ 3)

DISCUSSION

Petitioner's Motion to Strike Respondent's Third and Fourth Affimative Defenses - Traverse

Petitioner is correct that respondent's answer is unverified. As such, at the time of his appearance and answer, he had not provided a sworn affidavit refuting the affidavit of the process server. Petitioner provided respondent with notice that the verification was defective in this manner when it moved to strike respondent's affirmative defenses and counterclaims. (CPLR 3022.) After many months on the calendar, and for all the time respondent has had to oppose petitioner's motion to strike his traverse claims, respondent has not moved to amend his answer. Regardless respondent does not oppose petitioner's argument that his motion is unsupported by a [*4]sworn affidavit and that jurisdictional issues have already been waived. (*See Chao Jiang v Ping An Ins.*, 179 AD3d 517 [1st Dept 2020]; *Glorius v Siegel*, 5 Misc 3d 1015 [A] [Civ Ct, New York County 2004].)

Petitioner's motion to strike respondent's third and fourth affirmative defenses is granted. **[FN2]** , **[FN3]** ,**[FN4]**

Petitioner's Motion to Strike Respondent's Sixth Affirmative — Noneviction Protections

Before gay marriage was legalized in any state, *Braschi v Stahl Assocs. Co.*, 74 NY2d 201 (1989) was decided. The New York State Court of Appeals became the first American appellate court to recognize that a nontraditional, two-person, same-sex, committed, family-like relationship is entitled to legal recognition, and that the nontraditional family member is entitled to receive noneviction protections. The *Braschi* Court interpreted the Rent Control Law in effect at a time when same-sex marriage was not legal in any state, and broadly construed the law to effectuate its remedial purposes. *Braschi* is widely regarded as a catalyst for the legal challenges and changes that ensued. By the end of 2014, gay marriage was legal

in 35 states through either legislation or state court action [FN5] *Obergefell v Hodges et al.*, 576 US 644, 135 S Ct 2584 (2015), the seminal Supreme Court decision that established same-sex marriage as a constitutional right, was also heralded as groundbreaking. However, *Braschi* and its progeny and *Obergefell* limit their holdings to two-person relationships. The instant case presents the distinct and complex issue of significant multi-person relationships.

The *Braschi C*ourt held:

> "The determination as to whether an individual is entitled to noneviction protection should be based upon an objective examination of the relationship of the parties. In making this assessment, the lower courts of this State have looked to a number of factors, including the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services . . . These factors are most helpful, although it should be emphasized that the presence or absence of one or more of them is not dispositive since it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control.

(*Braschi v Stahl Assocs. Co.*, 74 NY2d 201, 212-13 [1989].)

The plurality, perhaps desiring not to go "too far," concluded that "the Legislature [*5]intended to extend protection to those who reside in households having all of the *normal* familial characteristics (emphasis added)." Appellant *Braschi* should therefore be afforded the opportunity to prove that he and Blanchard had such a household." (*Id.* at 211.) The dissent, took issue with the plurality's legal analysis and suggested that it unreasonably strained reach its ultimate holding. ". . . [W]e have no direct evidence of the term's [family] intended scope. The plurality's response to this problem is to turn to the dictionary and select one definition, from the several found there, which gives the regulation the desired expansive construction." (*Id.* at 219 [1989], Simons, J., dissenting].)[FN6] However, had the *Braschi* Court not extended itself to interpret the statute to provide noneviction protections to an unmarried same-sex couple, that community would have waited for over 20 years, when gay marriage was legalized in New York, to receive an equal opportunity to maintain housing stability after the death of a partner. (L 2011, ch 95 [eff July 24, 2011].)

In one of many incremental steps toward the legalization of same-sex marriage, shortly after *Braschi* was decided the legislature amended the Rent Stabilization Code to reflect the

Braschi holding and added evidentiary factors to be considered when determining whether a person has sufficient emotional and financial commitment to the former tenant of record to qualify for non-eviction protections. (Rent Stabilization Code [9 NYCRR] § 2204.6 [d] [3] [i] [*a*] — [*h*].) These factors, none of which are solely determinative, include, without limitation:

> 1) "longevity of the relationship;
>
> 2) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life;
>
> 3) intermingling of finances as evidenced by, among other things, joint ownership of bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget for purposes of receiving government benefits, etc.;
>
> 4) engaging in family-type activities by jointly attending family functions, holidays and celebrations, social and recreational activities, etc.;
>
> 5) formalizing of legal obligations, intentions, and responsibilities to each other by such means as executing wills naming each other as executor and/or beneficiary, conferring upon each other a power of attorney and/or authority to make health care decisions each for the other, entering into a personal relationship contract, making a domestic partnership declaration, or serving as a representative payee for purposes of public benefits, etc.;
>
> 6) holding themselves out as family members to other family members, friends, members of the community or religious institutions, or society in general, through their words or actions;
>
> 7) regularly performing family functions, such as caring for each other or each other's extended family members, and/or relying upon each other for daily family services;
>
> 8) engaging in any other pattern of behavior, agreement, or other action which evidences [*6]the intention of creating a long-term, emotionally committed relationship[.]"

This section further states, "In no event would evidence of a sexual relationship between such persons be required or considered." (*Id*.)

Despite the documentary nature of many of the enumerated factors, "absence of documentary evidence does not undermine a succession claim when the totality of the *testimonial* evidence . . . establishes the requisite emotional and financial commitment

(emphasis added)." (*530 Second Ave. Co., LLC v Zenker*, 160 AD3d 160 [1st Dept 2018], *citing Arnie Realty Corp. v Torres*, 294 AD2d 193 [1st Dept 2002].) The purported nontraditional family member need not demonstrate all factors; rather it is the sum of the circumstances adduced. (*See e.g. Arnie Realty* at 193 ["roommate had lived in apartment with tenant for eight years prior to tenant's death [and] tenant financially supported household while roommate provided domestic support"].)

While considering sexual relations is already explicitly prohibited by the RSC when determining whether a nontraditional, family-like, committed relationship exists between two people, appellate courts remain vigilant about judges excising any such consideration from their determinations. (*Zenker*, 160 AD3d at 166, n 3 [reversing the lower court which noted testimony regarding the "platonic" nature of a relationship, "lack of sexual intimacy does not diminish [a] relationship to that of roommates"].)

Why then, except for the very real possibility of implicit majoritarian animus, is the limitation of *two* persons inserted into the definition of a family-like relationship for the purposes of receiving the same protections from eviction accorded to legally formalized or blood relationships? Is "two" a "code word" for monogamy? Why does a person have to be committed to one other person in only certain prescribed ways in order to enjoy stability in housing after the departure of a loved one? Why does the relationship have to be characterized by "exclusivity"? (*Id*. at 212.) Why is holding each other out to the community as a family a factor? (RSC § 2204.6 [d] [3] [i] [f].) Perhaps, as in the instant case, the triad has chosen to closet their relationship from others? Perhaps the would-be successor is not "out".[FN7] Maybe they do not believe their "real" family is open to alternative kinds of relationships. "Holding [each other] out" discounts the existence of prejudice and misunderstanding about communities and people that are not "normie."[FN8] Do all nontraditional relationships have to comprise or include only two primary persons?

Indeed, the *Braschi* Court's referral to "normal familial activities" reveals an intent to limit the application of noneviction protections to someone who can demonstrate a traditional marriage *but for* their sexual orientation. The *Braschi* decision, heralded as a radical leap — a discouragingly accurate characterization given the decades that passed before gay marriage was [*7]legalized — was still decided in "a relatively narrow and safe context."[FN9]

Paradoxically, the *Braschi* Court's formulation of what comprises a nontraditional relationship is rooted in traditional ideology.[FN10]

However, what was "normal" or "nontraditional" in 1989 is not a barometer for what is normal or nontraditional now. Indeed, the definition of "family" has morphed considerably since 1989. Many articles have been written about multi-person relationships in recent years, revealing a preference that for some has long been known. For example, a recent article in The New Yorker magazine describes the broadening recognition of such relationships and how these relationships are challenging the norm:

> "In February 2020, the Utah legislature passed a so-called Bigamy Bill, decriminalizing the offense by downgrading it from a felony to a misdemeanor. In June [2020], Somerville, Massachusetts, passed an ordinance allowing groups of three or more people who 'consider themselves to be a family' to be recognized as domestic partners. . . .[T]he neighboring town of Cambridge followed suit, passing a broader ordinance recognizing multi-partner relationships. The law has proceeded even more rapidly in recognizing that it is possible for a child to have more than two legal parents. In 2017, the Uniform Law Commission, an association that enables states to harmonize their laws, drafted a new Uniform Parentage Act, one provision of which facilitates multiple-parent recognition. Versions of the provision have passed in California, Washington, Maine, Vermont, and Delaware, and it is under consideration in several other states. Courts in New Jersey, Pennsylvania, Delaware, Texas, Arizona, and Louisiana have also supported the idea of third parents. American conservatism has long mourned the proliferation of single parents, but, if two parents are better than one, why are three parents worse?" [FN11], [FN12]

This begs the question: Should a person who would not meet the requirements for succession to a rent stabilized apartment after *Braschi* was decided in 1989, now, 33 years later, be evicted when they may qualify, as was concluded in *Braschi*, under a more inclusive interpretation of a family?

As stated by the Hon. Jenny Rivera in *Green v Esplanade Venture Parthership*, 26 NY3d 513 (2021) (Rivera, J., concurring), "scores of cases decided before and after *Braschi* prove that [*8]New York courts are well-equipped to apply a functional mode of analysis in order to identify strong and caring bonds, when the important remedial purposes of New York law so require." (*Id*. at 542.) Citing to *Zimmerman v Burton*, 107 Misc 2d 401 (Civ Ct, New York County 1980), Judge Rivera notes that "[t]he law must keep abreast of changing moral

standards" as the *Zimmerman* court did in recognizing the tenant succession rights of unmarried partners. (*Id*. at 403; *Greene* at 542.)

In sum, the problem with *Braschi* and *Obergefell* is that they recognize only two-person relationships. Those decisions, while revolutionary, still adhered to the majoritarian, societal view that only two people can have a family-like relationship; that only people who are "committed" in a way defined by certain traditional factors qualify for protection from "one of the harshest decrees known to the law—eviction from one's home." (*Braschi* at 215 [Bellacosa, J., concurring].)

Those decisions, however, open the door for consideration of other relational constructs; and, perhaps, the time has arrived.[FN13] As Justice John Roberts foretold in his *Obergefell* dissent:

> "Although the majority randomly inserts the adjective 'two' in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not.
>
> It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. . . . If not having the opportunity to marry serves to disrespect and subordinate gay and lesbian couples, why wouldn't the same imposition of this disability . . . serve to disrespect and subordinate people who find fulfillment in polyamorous relationships (internal quotation marks and citation omitted)?"

Obergefell, 576 US at 704—05, 135 S Ct at 2621—22 [2015, Roberts, J., dissenting].)[FN14]

Merriam-Webster's Collegiate Dictionary (11th ed, 2020 [Note: online version]), defines relationship as "the state of being related or interrelated." Here, Mr. Anderson, Mr. Romano, and Mr. O'Neill had a relationship to one another. There was knowledge of all persons about the others and, at least, passive consent, even if they did not all like each other. Was the relationship a "good" one? Mr. Romano describes Mr. O'Neill as "intimidat[ing]," (NYSCEF Doc No. 12, Romano affidavit ¶ 13), and Mr. O'Neill describes Mr. Romano as "abusive." (NYSCEF Doc No. 48, O'Neill affidavit ¶ 14.) It seems equally as unimportant as considering sexual relations to delve into the level of happiness in a relationship. Is one stripped of their rights to "marital property" on the basis of having a "bad" marriage? Would noneviction protections not devolve to an emotionally abusive spouse?

Both respondent and Mr. Romano profess to have loved and cared for Mr. Anderson deeply. (NYSCEF Doc No. 48, O'Neill affidavit ¶ 14; NYSCEF Doc No. 12, Romano affidavit ¶ 1.) Read together, their affidavits imply that Mr. Anderson loved both of them in different ways. The relationship between Mr. O'Neill cannot be dismissed based on the allegations that he did not always contribute to household expenses, or "did not pay his fair share of the rent or household expenses." (NYSCEF Doc No. 12, Romano affidavit ¶ 13.) This may, in fact, indicate a desire on Mr. Anderson's part to provide for Mr. O'Neill. Had Mr. Romano and Mr. Anderson chosen to live together, Mr. Anderson would very likely enjoy noneviction protections. However, they chose to live apart, and respondent was the one "at home." The existence of a triad should not automatically dismiss respondent's claim to noneviction protections. If respondent could potentially qualify in his own right, it should not be a dispositive factor that another person who does not live in the subject premises could also qualify if only they lived in the apartment.

While so many celebrated the *Braschi* Court's holding, others decried it as a poorly reasoned, slippery slope. Similarly, 26 years later, Justice Roberts challenged the analysis of the majority in *Obergefell*, now the law of the land, as an "act of will, not legal judgment" (*id.* at 687); and, in so doing, willfully ignores the changing world by characterizing the holding as a "dangerous" stretch inspired by a desire to "live in the heady days of the here and now." (*Id*. at 706.) Justice Roberts recounted, "When asked about a plural marital union at oral argument, petitioner asserted that a State 'doesn't have such an institution.' Tr. of Oral Arg. on Question 2, p. 6. But that is exactly the point: the States at issue here do not have an institution of same-sex marriage, either." (*Obergefell* at 705.) That is also the point here: Neither did New York have an institution of marriage for gay and lesbian partners when the *Braschi* Court interpreted the remedial nature of the rent control laws broadly to provide for noneviction protections for same-sex relationships between two people.

If an issue is "fairly debatable, a motion for summary judgment must be denied." (*Stone v Goodson*, 8 NY2d 8, 12 [1960].) In determining whether noneviction protections inure to a would-be successor, no single factor is determinative and non-eviction protections can be conferred based on the "totality of testimonial evidence." ([9 NYCRR] § 2204.6 [d]; *Second Ave. Co., LLC v Zenker*, 160 AD3d 160, 163 [1st Dept 2018].) Moreover, many questions of fact are raised by the two remaining parties to the relationship, most of which will be determined on credibility. *(Park Tower S. Co., LLC v Mandal*, 63 Misc 3d 134 [A], 134 [App

Term, 1st Dept 2019] ["issues of credibility [are] inappropriate for summary judgment treatment"]; *Glick & Dolleck, Inc. v Tri-Pac Export Corp*., 22 NY2d 439, 441 [1968].) This court posits that these facts do not have to fit neatly into the *Braschi C*ourt's definition of a "nontraditional family relationship" which, at the time, had even *less basis* in law than recognizing the legitimacy of multi-partner arrangements. (S*upra*; n 11.)

The court recognizes the difficulty and potential implications of not interpreting the *Braschi* Court's interpretation of the word "family" as drawing a bright line which must end at what is now considered a traditional dyadic relationship. (The internet is rife with articles bemoaning the estate planning and child custody complications that arise from these new relational constructs.) But, "[w]e just do not know the answers or implications for an exponential number of varied fact situations, so we should do what courts are in the business of doing—deciding cases as best they fallibly can." (*Braschi*, 74 NY2d 201, 215—16, [1989, Bellacosa, J., concurring].) Accordingly, the court declines to award either party summary [*9]judgment.

Discovery

Respondent's motion for discovery pursuant to CPLR 408 is denied. The bank records from Mr. Romano's joint account with Mr. Anderson will simply not be illuminating, and ample need for them is not demonstrated on this record. (*New York Univ. v Farkas*, 121 Misc 2d 643 [Civ Ct, New York County].) The court further declines to sign respondent's subpoena for same without prejudice to respondent providing a proposed subpoena *ad testificandum* on Mr. Romano. (NYSCEF Doc No. 50, proposed subpoena on non-party witness.)

Use and Occupancy

The branch of petitioner's motion for use and occupancy *pendente lite* is granted pursuant to Real Property Actions and Proceedings Law ("RPAPL") 745 (2).

RPAPL 745 (2) states in relevant part:

> "In a summary proceeding upon the second of two adjournments granted solely at the request of the respondent, or, upon the sixtieth day after the first appearance of the parties in court less any days that the proceeding has been adjourned upon the request of the petitioner, counting only days attributable to adjournment requests

> made solely at the request of the respondent and not counting an initial adjournment requested by a respondent unrepresented by counsel for the purpose of securing counsel, whichever occurs sooner, *the court may, upon consideration of the equities*, direct that the respondent, upon a motion on notice made by the petitioner, deposit with the court sums of *rent or use and occupancy that shall accrue subsequent to the date of the court's order*, which may be established without the use of expert testimony (emphases added)."

At this juncture in this proceeding, under the facts and circumstances herein, use and occupancy *pendente lite* is granted

However, petitioner's motion for *past due* use and occupancy is denied It is this court's position that RPAPL 745 (2) is the only vehicle for obtaining use and occupancy in a summary proceeding, and RPAPL 745 (2) clearly prescribes that "only rent or use and occupancy that shall accrue subsequent to the date of the court's order" may be collected. (RPAPL 745 [2].)

Even prior to the Housing Stability and Tenant Protection Act ("HSTPA") amendments to RPAPL Section 745, courts found that the payment of use and occupancy in a summary proceeding is governed by RPAPL 745 (2) which limits the relief to certain situations. In *Central Hudson Assoc v Brown,* 1986 NY App Div LEXIS 16708, the Appellate Division First Department upheld the lower court's exercise of discretion in awarding use and occupancy where the proceeding was protracted and the money was needed to provide essential services The *Brown* court cited to a prior incarnation of RPAPL 745 (2) as the legal basis for seeking and awarding such relief in a summary proceeding. Portending the HSTPA amendments, the Appellate Division modified the lower court's award to allow for *prospective* relief only. (*See also Quality & Ruskin Assoc. v London,* 8 Misc 3d 102 [App Term, 2d Dept 2005] ["as for that branch of the motion seeking use and occupancy *pendente lite*, the availability of same is governed by RPAPL 745(2)"]; *1747 Associates, LLC v Raimova*, 56 Misc 3d 1216[A], 2017 NY Slip Op 51040 [U] [Civ Ct, Kings County, 2017] [in denying a motion for use and occupancy [*10]under the prior RPAPL 745 [2] holding that " [a]s compelling as the equities may be in a summary proceeding, the court's power to direct payment of use and occupancy is not an inherent one governed by a consideration of the equities, but instead derives solely from RPAPL 745"].)

Thus, respondent is directed to pay $1,095.38 each month to petitioner (NYSCEF Doc No. 19, petitioner's exhibit G [motion sequence 1], expired renewal lease), *pendente lite*, by

the 10th of each month commencing October 1, 2022, without prejudice to either party's rights. (*Kingsley v 300 W. 106th St. Corp.*, 162 AD3d 420 [2018].)

CONCLUSION

Accordingly, it is

ORDERED that petitioner's motion to strike respondent's first affirmative defense is DENIED; and it is further

ORDERED that petitioner's motion to strike respondent's second affirmative defense is GRANTED; and it is further

ORDERED that petitioner's motion to strike respondent's third and fourth affirmative defenses are GRANTED; and it is further

ORDERED that petitioner's motion to strike respondent's fifth affirmative defense and first counterclaim is DENIED; and it is further

ORDERED that petitioner's motion for summary judgment is DENIED; and it is further

ORDERED that petitioner's motion for use and occupancy pendente lite is granted and respondent shall pay to petitioner by the 10th of each month commencing October 1, 2022 the amount of $1,095.38 each month without prejudice to respondent's remaining claims and defenses and without prejudice to either party's rights; and it is further

ORDERED that respondent's cross-motion for summary judgment is DENIED; and it is further

ORDERED that respondent's motion for a discovery is DENIED; and it is

ORDERED that the parties shall appear in person in Part F, Room 523 of the New York City Civil Courthouse on October 4, 2022 at 10:00 a.m. for settlement or a pre-trial conference. No further motion practice will be considered in the resolution part, and motions that should have been made in the resolution part at this juncture will be denied if made in the trial part and returned for consideration to Part F.

DATED: September 23, 2022
New York, NY

_____
Karen May Bacdayan, JHC

Footnotes

Footnote 1: The automatic, statutory stay occasioned by respondent's filing of an Emergency Rental Assistance Program application was lifted by order on July 29, 2022 (NYSCEF Doc No. 45, decision and order, motion sequence 2.)

Footnote 2: Petitioner's motion to strike respondents first affirmative defense that petitioner has not stated a cause of action is denied The defense of failure to state a cause of action may be pleaded at any time and as such is mere "surplusage" which is not susceptible to a motion to strike pursuant to CPLR 3211 (b) (*Riland v Frederick S Todman & Co* , 56 AD2d 350 [1st Dept 1977; CPLR 3211, [a] [7]; CPLR 3211 [e].)

Footnote 3: Petitioner's motion to strike respondent's second affirmative defense that the decedent's estate has not surrendered the premises is granted as unopposed

Footnote 4: Petitioner's motion to strike respondent's fifth affirmative defense and first counterclaim sounding in breach of the warranty of habitability is denied as it is related to petitioner's prayer for use and occupancy, and the fair value of the premises

Footnote 5: *The Before and Aftermath of the Supreme Court's 2015 Same Sex Marriage Decision*, 2015 WL 9435702 , New York City Bar Center for Continuing Legal Education, November 18, 2015

Footnote 6: The plurality relied on the definition of family in Webster's Ninth New Collegiate Dictionary 448 (1984), Ballantine's Law Dictionary 456 (3d ed 1969), and Black's Law Dictionary 543 [Special Deluxe 5th ed 1979)

Footnote 7: As defined by Webster's Dictionary, "out" means "to identify (someone) publicly as being such secretly . . . especially: to reveal the covert sexual orientation or gender identity of (someone) " https://www.merriam-webster.com/dictionary/out (last accessed September 17. 2022)

Footnote 8: A person gravitating to social standards, accepted practices, and fads of their own time [and] geographic grouping without broader cultural perspectives from which they draw." (Urban Dictionary, https://www.urbandictionary.com/define.php?term=Normie.)

Footnote 9: Historical Society of New York Courts website, *The Braschi Breakthrough: 30*

Years Later, Looking Back on the Relationship Recognition Landmark, Sept 12, 2019, available at *https://history.nycourts.gov/the-braschi-breakthrough-30-years-later-looking-back-on-the-relationship-recognition-landmark* (last accessed September 22, 2022.)

Footnote 10: "The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of 'family' and with the expectations of individuals who live in such nuclear units...". *Braschi*, 74 NY2d 201, 211.

Footnote 11: The New Yorker magazine, March 22, 2021 issue, *How Polyamorists and Polygamists Are Challenging Family Norms*, available at https://www.newyorker.com/magazine/2021/03/22/how-polyamorists-and-polygamists-are-challenging-family-norms (last accessed September 22, 2022).

Footnote 12: *See also Polyamory and the Law*, Harvard Law Today, August 3, 2021, available at https://hls.harvard.edu/today/polyamory-and-the-law/ (last accessed September 22, 2022) ("[Polyamory creates] a problem for health insurance, for living arrangements such as leases and deeds . . . a few of the areas that need legal protection.")

Footnote 13: There are only two reported New York decisions searchable on Westlaw as of the date of this decision that discuss multi-partner or polyamorous relationships, even tangentially: *Hunsinger v Hunsinger*, 45 Misc 3d 1219 (A]) (Sup Ct, Cortland County 2014), and *Napoli v Bern*, 73 Misc 3d 1222 (A) (Sup Ct, New York County 2021). The third and only other case to reference the term involved "polyamorous substance abuse." (*People v Wachtel*, 61 Misc 3d 1206 (A) (Sup Ct, New York County 2018), *aff'd*, 188 AD3d 580, (1st Dept 2020).

Footnote 14: One definition of polyamory is "the state or practice of having more than one open romantic relationship at a time." Merriam-Webster's Collegiate Dictionary (11th ed 2020), https://www.merriam-webster.com/dictionary/polyamory (Note: online version). "Polyamory, or consensual nonmonogamy, is the practice of having multiple intimate relationships, whether sexual or just romantic, with the full knowledge and consent of all parties involved. *Polyamory*, Psychology Today magazine, https://www.psychologytoday.com/us/basics/polyamory (Note: online version.)

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