2022-10-14

Queens Fresh Meadows, LLC v. Farrer

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Queens Fresh Meadows, LLC v Farrer
2022 NY Slip Op 51056(U)
Decided on October 14, 2022
Civil Court Of The City Of New York, Queens County
Guthrie, J.
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Decided on October 14, 2022

Civil Court of the City of New York, Queens County

Queens Fresh Meadows, LLC, Petitioner,

against

Trelinda Farrer, Marilyn Farrer, Ethan Myers, John Doe, Jane Doe, Respondents.

Index No. L & T 55616/18

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Clinton J. Guthrie, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of petitioner's oral motion to dismiss respondent Marilyn Farrer's succession defense upon the

conclusion of Marilyn Farrer's prima facie case at trial:

Papers	**Numbered**
Petitioner's Memorandum of Law	1
Memorandum of Law in Opposition	2
Memorandum of Law in Further Support (Reply)	3

Upon the foregoing cited papers, the decision and order on petitioner's motion is as follows.

PETITIONER' S MOTION

Petitioner's motion was made at the close of respondent Marilyn Farrer's (hereinafter [*2]"respondent") prima facie case on her succession defense on May 31, 2022.[FN1] The court permitted briefing on the oral motion and reserved decision upon the completion of briefing. Petitioner argues that respondent did not meet her burden of proving her succession defense at trial insofar as she did not establish that she co-resided with Trelinda Farrer (the tenant of record of the subject premises) for the required one (1) year prior to Trelinda's permanent vacatur from the subject premises. Petitioner also argues, in effect, that the court should make a negative inference against respondent insofar as Trelinda Farrer failed to testify at the trial. Respondent, in opposition, asserts that the trial evidence established, prima facie, respondent's succession defense.

DISCUSSION

The instant proceeding was brought as a nonprimary residence holdover proceeding against Trelinda Farrer, with Marilyn Farrer named as an occupant. Marilyn Farrer retained counsel and Trelinda Farrer appeared as a self-represented litigant. Discovery, including depositions of both Trelinda Farrer and Marilyn Farrer, was conducted in relation to Marilyn Farrer's succession defense. Petitioner made a motion to restore upon the conclusion of discovery and the motion was granted without objection on May 3, 2022. On that date, Trelinda Farrer appeared and acknowledged her surrender from the subject premises on the record. Upon that representation, the case was discontinued against Trelinda Farrer, without prejudice to the remaining parties' claims and defenses vis-à-vis each other. The proceeding was scheduled for trial on May 31, 2022. Prior to trial, the attorneys for petitioner and

respondent Marilyn Farrer executed a stipulation of facts and documents, which included a stipulation to petitioner's prima facie case and consent to enter petitioner's prima facie exhibits and several of respondents' exhibits into evidence. The trial was conducted on May 31, 2022; petitioner's attorney made the instant motion upon the conclusion of respondent's prima facie case on her succession defense.

As for the succession defense, both sides agree that Trelinda Farrer and Marilyn Farrer are sisters and thus "family members" under Rent Stabilization Code (RSC) § 2520.6(o)(1) (9 NYCRR § 2520.6(o)(1)). Both sides also agree that Marilyn Farrer is a senior citizen under RSC § 2520.6(p) (9 NYCRR § 2520.6(p)), and thus must demonstrate one year of co-residency with Trelinda Ferrer prior to Trelinda's permanent vacatur. *See* RSC § 2523.5(b)(1) (9 NYCRR § 2523.5(b)(1)). The court notes at the outset that both parties' post-trial submissions assume a standard that has been repudiated by appellate courts in the Second Department. Specifically, there is a shared assumption that the tenant of record must have primarily resided in the subject premises during the one-year co-residency period. However, the Appellate Term, Second Department has held that "RSC § 2523.5(b)(1) focuses on the remaining family member's having resided in the apartment 'as a primary residence' within the two-year [for a non-senior citizen/disabled occupant] period prior to the tenant's permanent vacating of the apartment, and *does not insist upon* the tenant of record's having so resided during that period." *Mexico Leasing, LLC v. Jones*, 45 Misc 3d 127[A], 2014 NY Slip Op 51456[U], *2 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2014] [emphasis added]; *see also Matter of Jourdain v. New York State Div. of Hous. & Community Renewal*, 159 AD3d 41, 47 [2d Dept 2018] ["We can discern no reason why the DHCR would intend to deny succession rights to a *family member* who had [*3]been residing in a unit for a long period of time merely because there was a period of time when the *named tenant* no longer resided there but still maintained some connection to the property."] [emphasis in original]; *1150 Brighton Co. v. Persits*, 72 Misc 3d 133[A], 2021 NY Slip Op 50668[U], *2 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2021].

What has been required in the wake of the Appellate Division, Second Department's decision in *Jourdain* are (1) primary residency at the subject premises by the family member seeking succession; and (2) co-residency with the tenant of record during the required one or two years prior to the tenant of record's permanent vacatur (but *not* primary residency by the tenant of record during the required period). *Jourdain*, 159 AD3d at 46-47; *700 Bklyn Realty, LLC v. Samuel*, 69 Misc 3d 126[A], 2020 NY Slip Op 51115[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2020]; *EB Bedford, LLC v. Lee*, 64 Misc 39, 41-42 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019]. The court credits Marilyn Farrer's testimony that

Trelinda Farrer had permanently vacated on or around Christmas in 2017. While a notarized letter from Trelinda Farrer dated January 18, 2018, which relinquished her rights to the subject apartment as of that date, was admitted into evidence on consent (respondent's Exhibit L), Trelinda Farrer did not testify; the court will give greater weight to Marilyn Farrer's testimony than to the letter (about which no testimony was given). Accordingly, the date of permanent vacatur established at trial was December 25, 2017 and the one-year period relevant to the succession claim is the year immediately prior to December 25, 2017. **[FN2]**

Although not all of the documents relating to Marilyn Farrer's residence were from the one-year period at issue, those that were include New York State tax returns, W-2 statements, a Social Security Administration statement, Wells Fargo bank statements, MCU (Municipal Credit Union) statements, Verizon Fios (internet, television, and phone) statements, and a letter from the Department of Housing Preservation and Development Commissioner on the occasion of Ms. (Marilyn) Farrer's retirement in 2017.**[FN3]** No documents for the subject period that were admitted into evidence for Marilyn Farrer bore an address other than the subject premises. Additionally, Marilyn Farrer's testimony was consistent and credible insofar as she stated that she had lived in the subject premises for approximately 28 years and had lived nowhere else during that period. Accordingly, Marilyn Farrer met her prima facie burden of demonstrating her primary residence at the subject premises during the year prior to Trelinda Farrer's permanent vacatur. *See* RSC § 2520.6(u) (9 NYCRR § 2520.6(u)); *Katz Park Ave. Corp. v. Jagger*, 11 NY3d 314, 317 [2008] [Primary residence is "'an ongoing, substantial, physical nexus with the premises for actual living purposes'"] [quoting *Emay Props. Corp. v. Norton*, 136 Misc 2d 127, 129 [App Term, 1st Dept 1987]]; *542 E. 14th St. LLC v. Lee*, 66 AD3d 18, 20-21 [1st Dept 2009].

As for the co-residency requirement, the first issue the court must address is petitioner's request that the court draw a negative inference against respondent upon Trelinda Farrer's failure to testify at trial. It is a general principle that "[a] trier of fact may draw the strongest inference [*4]that the opposing evidence permits against a witness who fails to testify in a civil proceeding." *Nassau County Dept. of Social Servs. ex rel. Dante M. v. Denise J.*, 87 NY2d 73, 79 [1995] *see also In re Liccione*, 65 NY2d 826, 827-828 [1985]. The inference is applicable where "(1) the witness's knowledge is material to the trial; (2) the witness is expected to give noncumulative testimony; (3) the witness is under the 'control' of the party against whom the charge is sought, such that the witness would be expected to testify in that party's favor; and (4) the witness is available to that party." *DeVito v. Feliciano*, 22 NY3d

159, 165 [2013].

Here, there is no reasonable dispute that Trelinda Farrer's knowledge is material to the trial, specifically with regard to her co-residency with Marilyn Farrer. Additionally, although the subjects of her testimony may have overlapped with Marilyn's, Trelinda's testimony would likely have been noncumulative. However, as for whether Trelinda was under Marilyn's "control" such that she would be expected to testify on her behalf or that Trelinda is "available" to testify, the trial record is lacking in evidence and, thus, the court will not draw a negative inference. *See Orser v. Wholesale Fuel Distribs. CT, LLC*, 173 AD3d 1519, 1523 [3d Dept 2019] [Missing witness charge not warranted in the absence of evidence of control and availability]. While a family member may be considered to be under a party's control for the purposes of the missing witness rule in certain circumstances, the control cannot be inferred simply from the relationship itself. *See Matter of Spooner-Boyke v. Charles*, 126 AD3d 907, 909 [2d Dept 2015] [Trial court erred in giving a missing witness charge where mother failed to call maternal grandmother as a witness in a family court hearing without, inter alia, examining element of control]; *People v. Magett*, 196 AD2d 62, 65 [1st Dept 1994] [Stepsibling status "is insufficient by itself to give rise to the presumption that [stepsister] was under [stepbrother's] control[.]"]; *People v. Josan*, 92 AD2d 902, 903 [2d Dept 1983]. While Marilyn's testimony was that Trelinda resided with her at the subject premises until her permanent vacatur at the end of 2017, there was nothing in the testimony or evidence at trial that established that the sisters maintained such a relationship thereafter upon which the court could infer Marilyn's control over Trelinda. As the proceeding had been discontinued as against Trelinda prior to trial, she also had no presumed self-interest at stake at the trial. Accordingly, the request for a missing witness inference is denied.

At trial, Marilyn acknowledged that Trelinda also owned a home at 27-46 Curtis Street in East Elmhurst, New York (hereinafter "the Curtis Street home") when she was living at the subject premises and that she permanently moved to that home after she permanently vacated the subject premises. The address of the Curtis Street home also appears on Trelinda's New York State Driver's License (respondent's Exhibit B) and her 2016 and 2017 federal tax returns (respondent's Exhibit D). The sole documents in evidence tying Trelinda to the subject premises were tax returns pre-dating the relevant one-year period (respondent's Exhibit D). Marilyn Farrer's testimony was nonetheless that Trelinda was at the subject premises every day and was "always there" until she permanently vacated. She testified that Trelinda would either sleep on the sofa or in her (Marilyn's) bedroom. She further testified that upon permanently vacating, Trelinda took all of her clothing but left behind her furniture. On cross-examination, Marilyn was asked about whether Trelinda was responsible

for any expenses at the subject premises. She asserted that Trelinda paid for her own food and for cleaning supplies, but her deposition testimony (petitioner's Exhibit 5) was that Trelinda had no responsibilities.

While petitioner argues that the lack of documentation tying Trelinda Farrer to the subject premises during the relevant one-year period is fatal to respondent's succession claim, [*5]Marilyn Farrer's unrebutted (to this point) testimony that Trelinda continued to stay at the subject premises up until her permanent vacatur is sufficient to meet respondent's prima facie burden on the issue of co-residency, particularly given the Second Department appellate case law on succession. Under a central holding in *Jourdain*, the tenant of record must only retain "some connection to the property" for co-residency to be established. 159 AD3d at 47; *see also Mexico Leasing, LLC*, 2014 NY Slip Op 51456[U], *1-2 [Tenant of record moved to Pennsylvania but returned to the subject apartment several times per month during the relevant period]. Moreover, a lack of documentary evidence is not fatal to a succession claim when the totality of the testimonial evidence otherwise establishes the required elements. *See e.g. Matter of 530 Second Ave. Co. LLC v. Zenker*, 160 AD3d 160, 163 [1st Dept 2018]; *1035 Wash. Realty, LLC v. Weston*, 67 Misc 3d 138[A], 2020 NY Slip Op 50629[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2020].

For these reasons, petitioner's motion to dismiss Marilyn Farrer's succession defense is denied. Petitioner will now be permitted to put on its rebuttal of the succession defense and a final determination on the defense will be made at the conclusion of the trial. The proceeding will be restored to the Part Q calendar (Room 407) for the resumption of the trial on November 9, 2022 at 2:30 PM. This Decision/Order will be filed to NYSCEF.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Queens, New York
October 14, 2022
HON. CLINTON J. GUTHRIE, J.H.C.

Footnotes

Footnote 1: To the extent that there is another named respondent, Trelinda Farrer, she will be referred to by her name.

Footnote 2: The court notes that the last renewal lease signed by Trelinda Farrer (petitioner's Exhibit 4) expired on February 28, 2018. However, unlike in the First Department (*cf. Matter of Well Done Realty, LLC v. Epps*, 177 AD3d 427 [1st Dept 2019]), permanent vacatur is not

tied to the expiration of the last lease renewal in the Second Department. *See Jourdain*, 159 AD3d at 46.

Footnote 3: An NYC Board of Elections mailing addressed to Marilyn Farrer was also admitted (as part of respondent's Exhibit J) but it was undated.

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