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Persain v. Persane

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[*1]

Persain v Persane
2022 NY Slip Op 22380
Decided on December 12, 2022
Civil Court Of The City Of New York, Queens County
Guthrie, J.
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Decided on December 12, 2022

Civil Court of the City of New York, Queens County

<p style="text-align: center;">Indranie Persain, Petitioner,</p> <p style="text-align: center;">against</p> <p style="text-align: center;">Khemraj Persane, Respondent.</p>
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Index No. L&T 306368/21

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Clinton J. Guthrie, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondent's motion to dismiss pursuant to CPLR § 3211(a)(2) for lack of subject matter

jurisdiction and for other relief:

Papers	Numbered
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Notice of Motion & Affirmation/Affidavit Annexed 1 (NYSCEF #8-10)

Affirmation in Opposition & Affidavit/Exhibits Annexed 2 (NYSCEF #11)

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

PROCEDURAL HISTORY

This holdover proceeding based on a 90-Day notice was commenced in September 2021. In November 2021, respondent filed a COVID-19 hardship declaration, which stayed the [*2] proceeding pursuant to L 2021, ch 417. [\[FN1\]](#) The case was restored to the court's calendar in October 2022, after respondent was provisionally approved for ERAP (the Emergency Rental Assistance Program). According to the court comments on NYSCEF, at a court date on October 27, 2022, respondent was directed to file an answer or motion by November 28, 2022 and the case was adjourned to December 9, 2022. On November 30, 2022, respondent, through counsel, filed the instant motion to dismiss. Prior to the December 9th court date, petitioner (also through counsel) filed opposition papers. This court heard argument on the motion on December 9, 2022 and reserved decision.

DISCUSSION

The court first addresses petitioner's argument that the motion should be denied because it was untimely. It is apparent that the comments recorded on NYSCEF incorporated the court's direction to file an answer or motion by November 28, 2022. The court does not condone the late filing. However, since there was no written order setting the deadlines and no apparent prejudice since petitioner's opposition papers were filed prior to the return date, the court excuses the late filing and will decide the motion on the merits. *See* CPLR § 2001.

Respondent's motion is made pursuant to CPLR § 3211(a)(2), which concerns lack of subject matter jurisdiction. It is a basic principle that Housing Court is "vested with subject matter jurisdiction over housing matters by statute (NY City Civ. Ct. Act § 110)." *170 West 85th Street Tenants Ass'n v. Cruz*, 173 AD2d 338, 339 [1st Dept 1991]; *see also 433 West Assocs. v. Murdock*, 276 AD2d 360, 360-361 [1st Dept 2000]; *716 Realty, LLC v. Zadik*, 38 Misc 3d 139[A], 2013 NY Slip Op 50194[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2013]. The crux of respondent's argument is that petitioner (who is respondent's sibling) cannot bring a proceeding against him as a licensee pursuant to RPAPL § 713 since he is

petitioner's family member and (according to the statements in his affidavit) he helped finance the purchase and ongoing mortgage payments for the subject premises, where he lives with his mother.

Contrary to the first part of respondent's argument, this is not a licensee proceeding. Annexed to the petition is a 90-day notice issued pursuant to Real Property Law (RPL) § 226-c. Both the 90-Day notice and petition allege that respondent is a *tenant* pursuant to a month-to-month rental agreement. There is no statement that respondent is a licensee or that he has any other status corresponding with a ground set out in RPAPL § 713. Therefore, the court does not find relevant the line of cases exemplified by [Heckman v. Heckman, 55 Misc 3d 86](#) [App Term, 2d Dept, 9th & 10th Jud Dists 2017], which held that there is no general "familial exception" to the maintenance of summary proceedings brought pursuant to RPAPL § 713. More germane is the case law holding that there is no per se familial exception to the maintenance of a summary holdover proceeding based on the termination of a tenancy or other rental agreement. [See Pugliese v. Pugliese, 51 Misc 3d 140](#)[A], 2016 NY Slip Op 50614[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2016];^[FN2] *see also Tausik v. Tausik*, 11 AD2d 144 [1st Dept 1960], *affd* 9 NY2d 664 [1961]; [Readick v. Green, 73 Misc 3d 132](#)[A], 2021 NY Slip Op 50973[U] [App [*3]Term, 1st Dept 2021].

The narrow exception to the maintenance of summary proceedings against family members relates to those relationships where there is a "support" obligation, whether to a spouse or to a minor child. *See Rosenstiel v. Rosenstiel*, 20 AD2d 71, 76-77 [1st Dept 1963]; *Heckman*, 55 Misc 3d at 88. There is no allegation in the motion at bar that any such obligation of ongoing support exists between petitioner and respondent. To the extent that respondent asserts that he may have some equitable defense (*cf. Nissequogue Boat Club v. State*, 14 AD3d 542, 544 [2d Dept 2005]) based on his alleged financial contributions to the purchase of the property and mortgage payments, there is no proof of any such contributions annexed to the motion. Moreover, petitioner, in her affidavit in opposition, disputes the contributions and states that she was the sole purchaser of the property (and annexes the stock certificate of the subject cooperative apartment, which solely names her as the holder of the shares). She also states in her affidavit that respondent only paid her rent, not contributions to the maintenance, for one year after he moved in (in 2016). Ultimately, these factual disputes must be resolved at trial. However, respondent has not established that this court lacks subject matter over the instant proceeding. Accordingly, the motion to dismiss is denied.

The court will grant respondent's request, made in the alternative, to interpose an

answer. However, the court grants this request pursuant to CPLR § 404(a), which applies to summary proceedings, rather than CPLR § 3012(d). *See Matter of Cardinale v. NYC Dept. of Education*, 204 AD3d 994, 997 [2d Dept 2022]. Respondent shall file an answer on NYSCEF no later than December 23, 2022.

CONCLUSION

Respondent's motion to dismiss is denied for the reasons set out herein. Respondent's request to interpose an answer is granted to the extent stated herein. This proceeding shall be restored to the Part A (Room 401) calendar on January 20, 2023 at 9:30 AM for an in-person pretrial conference. This Decision/Order will be filed to NYSCEF.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: December 12, 2022
Queens, New York
HON. CLINTON J. GUTHRIE
J.H.C.

Footnotes

Footnote 1: At around the same time, The Legal Aid Society filed a notice of appearance on behalf of respondent.

Footnote 2: In *Pugliese*, the Appellate Term held that there was no familial exception to the maintenance of the proceeding but that petitioner had failed to establish the existence of a rental agreement with respondent, who was petitioner's daughter, at trial.

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