

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

All Decisions

Housing Court Decisions Project

2022-12-23

130-50 228th, LLC v. Moseley

Follow this and additional works at: https://ir.lawnet.fordham.edu/housing_court_all

Recommended Citation

"130-50 228th, LLC v. Moseley" (2022). *All Decisions*. 780.
https://ir.lawnet.fordham.edu/housing_court_all/780

This Housing Court Decision is brought to you for free and open access by the Housing Court Decisions Project at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in All Decisions by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

[*1]

130-50 228th, LLC v Moseley
2022 NY Slip Op 51372(U)
Decided on December 23, 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This opinion is uncorrected and will not be published in the printed Official Reports.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 December 23, 2022

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

PRESENT: : THOMAS P. ALIOTTA, P.J., MICHELLE WESTON, CHEREE A. BUGGS, JJ
2019-1461 Q C

130-50 228th, LLC, Petitioner-Respondent,

against

Monica Moseley, Appellant, and Walter Moseley, Respondent.

SLG, PC (David Spiegelman of counsel), for appellant. Augustin D. Tella, for petitioner-respondent (no brief filed).

Appeal from a decision of the Civil Court of the City of New York, Queens County (John S. Lansden, J.), dated June 25, 2019, deemed from a final judgment of that court entered June 27, 2019 (see CPLR 5512 [a]). The final judgment, upon the decision, after a nonjury trial, awarded petitioner possession in a summary proceeding.

ORDERED that the final judgment is reversed, without costs, and the matter is remitted to the Civil Court for the entry of a final judgment dismissing the petition.

In this RPAPL 713 summary proceeding commenced in 2018, petitioner was awarded a final judgment of possession after a nonjury trial. It was undisputed that occupant previously owned the house but transferred ownership to a third party, who then transferred ownership to another entity, which transferred ownership to petitioner in 2017. However, the petition, which was not amended, alleged both that occupant "entered into possession without the

consent [sic] and permission of the owner," which describes a squatter (*see* RPAPL 713 [3]), and that the "term for which said Premises were granted [sic] licensed to [occupant] expired January 5, 2018," describing the revocation of a license (*see* RPAPL 713 [7]).

Contrary to occupant's contention, it is not necessarily unreasonable for an RPAPL 713 petition to assert, as alternative grounds for the proceeding, that the respondent is either a squatter or a licensee (*see* RPAPL 713 [3], [7]; [Kew Gardens Portfolio Holdings, LLC v Bucheli](#), 69 Misc 3d 129[A], 2020 NY Slip Op 51137[U] [App Term, 2d Dept, 2d, 11th & 13th Jud [*2]Dists 2020]; *see also* [Matter of 148 S. Emerson Partners, LLC v 148 S. Emerson Assoc., LLC](#), 157 AD3d 889 [2018]; [Matter of Kern v Guller](#), 40 AD3d 1231 [2007]). Here, however, petitioner is not entitled to a final judgment of possession because it failed to demonstrate at trial that occupant was in possession as either a squatter (*see* RPAPL 713 [3]; [Goffe v Goffe](#), 14 Misc 3d 130[A], 2007 NY Slip Op 50048[U], *1 [App Term, 2d Dept, 9th & 10th Jud Dists 2007]) or a licensee (*see* RPAPL 713 [7]; *Hok Kwan Chu v Lee*, 39 Misc 3d 147[A], 2013 NY Slip Op 50859[U], *1 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2013] ["Petitioners failed to establish that occupants were mere licensees, as there was no proof at trial that occupants did not have exclusive possession of the apartment"]; *see also* *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [2001] ["A license, within the context of real property law, grants the licensee a revocable non-assignable privilege to do one or more acts upon the land of the licensor, without granting possession of any interest therein"]).

We note that the failure to allege in the petition that occupant entered into possession as the owner or to describe the purported license were fundamental omissions, and the allegation that occupant entered into possession without permission was a fundamental misstatement (*see* RPAPL 741; [Jeffco Mgt. Corp. v Local Dev. Corp. of Crown Hgts.](#), 22 Misc 3d 141[A], 2009 NY Slip Op 50455[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2009]; *see also* [Migliaccio v Childs](#), 65 Misc 3d 131[A], 2019 NY Slip Op 51575[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019]).

Accordingly, the final judgment is reversed and the matter is remitted to the Civil Court for the entry of a final judgment dismissing the petition.

ALIOTTA, P.J., and BUGGS, J., concur.

WESTON, J., dissents and votes to affirm the final judgment in the following memorandum: In this summary proceeding there are no disputes as to the facts. At a nonjury trial where both parties were represented by counsel, petitioner presented evidence of

ownership of the premises. The undisputed facts also indicated that respondent no longer possessed ownership of the property, having sold the property in 2017.[\[FN1\]](#) This petition was filed under RPAPL 713, pleading, in the alternative, grounds based on RPAPL 713 (3) and RPAPL 713 (7). Pleadings in the alternative are permissible under RPAPL 713, as the majority properly recognizes.

However, here the majority is creating an additional burden not contemplated by the statute, as the majority is denying possession to the owner alleging that the proof was insufficient to prove licensee or squatter. The Civil Court heard all the evidence and conformed the pleadings to the proof presented.

The majority suggests that petitioner must prove at trial that respondent is a licensee or squatter, since respondent was a prior owner.

Respondent was obligated to demonstrate how she acquired a right to possession of the property. Respondent did nothing at this trial. Indeed, prior to rendering a decision, the Civil Court inquired of respondent whether she had any proof of her right to possession of the property, but respondent presented no documentary or testimonial evidence and rested.

Accordingly, I vote to affirm.

ENTER
Paul Kenny
Chief Clerk
Decision Date: December 23, 2022

Footnotes

[Footnote 1:](#) Respondent's attorney confirms there was a sale of the property.

[Return to Decision List](#)