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OZ REALTY LLC v. RODRIGUEZ

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART J

-----X
OZ REALTY LLC,

Petitioner,

INDEX # 10830/17

-against-

DECISION / ORDER

██████████ RODRIGUEZ,

Respondent.

HON. KIMON C. THERMOS

-----X
Recitation, as required by CPLR §2219(a), of the papers considered in review of the instant motions.

Papers	Numbered
Notice of Motion, Affidavits and annexed (ex. A-M).....	1
Notice of Cross-Motion/Opposition, Affidavit and annexed (ex. A-G).....	2
Affirmation in Opposition/Reply.....	3
Supplemental Reply.....	4

Appearing for Petitioner: Mark H. Cohen & Associates, P.C., By: Paul Christ, Esq.

Appearing for Respondent: Bronx Legal Services, By: Bianca Cappellini, Esq.

Upon the foregoing cited papers, the Decision/Order on this motion and cross-motion is as follows:

This licensee holdover proceeding was commenced in March 2017. In the Petition, Petitioner alleges that Respondent ██████████ Rodriguez is a licensee of ██████████ Gonzalez, the former tenant of record of the subject rent stabilized apartment. A Ten Day Notice to Vacate was served upon Respondent on or about January 9, 2017. On or about February 23, 2017, a Notice of Petition and Petition was served upon Respondent. Respondent interposed a Verified Answer, by counsel, on or about May 15, 2017. In his Answer, Respondent claims to be the successor in interest to his mother, ██████████ Gonzalez, who permanently vacated the subject apartment in or about October 2016.

Respondent now moves for an Order, pursuant to CPLR §3212, granting summary judgment in his favor on his succession rights defense and granting legal fees and costs in his favor pursuant to Real Property Law §234. Respondent alleges that he is disabled and that he and his mother occupied the subject premises together for at least one year prior to her permanent vacatur in accordance with Rent Stabilization Code (“RSC”) §2523.5(b)(1).

Petitioner cross moves for an Order, pursuant to CPLR §3212, dismissing Respondent’s succession rights defense and granting Petitioner a Final Judgment of possession against Respondent.

The Court notes that, at oral argument on February 20, 2018, Respondent’s counsel filed a supplemental reply, over Petitioner’s objection. The Court permitted the supplement limited to the impact

of the recent Appellate Division Second Department decision, to wit: *Matter of Jourdain v DHCR, 2018 NY Slip Op. 00556 (2nd Dept. 2018)*, regarding the commencement date of the RSC cohabitation requirement which must be met by an occupant seeking succession. Petitioner was given an opportunity to brief the issue as well, but failed to submit papers as of the date of this decision.

It is well settled that summary judgment is a drastic remedy and cannot be granted where there is any doubt as to the existence of a triable issue of fact or if there is even arguably such an issue. *Hourigan v. McGarry, 106 A.D.2d 845, appeal dismissed 65 N.Y.2d 637 (1985); Andre v. Pomeroy, 35 N.Y.2d 361 (1974)*. The function of the court is to determine whether any issues of fact exist that preclude summary resolution of the dispute between the parties on the merits. *Consolidated Edison Co. v Zebler, 40 Misc.3d 1230A (Sup. Ct. N.Y. 2013); Menzel v Plotnick, 202 A.D.2d 558 (2nd Dept. 1994)*. The Court must accept, as true, the non-moving party's recounting of the facts and must draw all reasonable inferences in favor of the non-moving party. *Warney v Haddad, 237 A.D.2d 123 (1st Dept. 1997); Assaf v Ropog Cab Corp., 153 A.D.2d 520 (1st Dept. 1989)*. The movant must submit admissible evidence to demonstrate prima facie entitlement to summary judgment as a matter of law and the absence of any issues of fact that require a trial. *Zuckerman v City of New York, 49 N.Y.2d 557 (1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986)*. The movant's failure to make such a showing mandates denial of summary judgment, regardless of the sufficiency of the opposing papers. *Winegrad v New York Univ. Med. Ctr., supra; Alvarez v Prospect Hosp., supra*. Once a prima facie showing has been made, the burden shifts to the non-moving party to submit admissible evidence sufficient to raise a triable issue of fact. *Giuffrida v. Citibank Corp., 100 N.Y.2d 72 (2003); Zuckerman v. City of New York, supra*

RSC §2523.5 (b)(1) provides that

“Unless otherwise prohibited by occupancy restrictions based upon income limitations pursuant to federal, state or local law, regulations or other requirements of governmental agencies, if an offer is made to the tenant pursuant to the provisions of subdivision (a) of this section and such tenant has permanently vacated the housing accommodation, any member of such tenant's family, as defined in section 2520.6(o) of this Title, who has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years, or where such person is a “senior citizen,” or a “disabled person” as defined in paragraph (4) of this subdivision, for a period of no less than one year, immediately prior to the permanent vacating of the housing accommodation by the tenant, or from the inception of the tenancy or commencement of the relationship, if for less than such periods, shall be entitled to be named as a tenant on the renewal lease.”

9 N.Y.C.R.R. §2523.5(b)(1).

RSC §2523.5 (b)(4) further provides that

“(4) For the purposes of this subdivision (b), *disabled person* is defined as a person who has an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which

are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which substantially limit one or more of such person's major life activities.”

9 N.Y.C.R.R. §2523.5(b)(4).

In support of his motion, Respondent submitted, *inter alia*, a copy of his birth certificate, evincing the biological relationship between he and the former tenant of record ██████ Gonzalez as well as Social Security Administration records to establish that he was determined to be eligible to receive Supplemental Security Income (“SSI”) disability benefits and continues to receive said benefits. Respondent also submitted several documents to support his claim of residency at the subject premises, to wit: N.Y.C. Human Resources Administration (“HRA”) records, U.S. Housing and Urban Development Section 8 records, medical records, mailings, a copy of his NYS identification card and NYC Board of Election records. In addition, Respondent submitted his own affidavit as well as affidavits from his mother ██████ Gonzalez, ██████ Gonzalez, who is the sister of ██████ Gonzalez and his aunt, and ██████ Brown, who is a neighbor and family friend.

In support of its cross-motion, Petitioner submitted an affidavit from its agent ██████ Hay, who claims to be familiar with the relevant facts and circumstances. Mr. Hay states, in his affidavit, that he had a conversation with Respondent’s mother in 2015 about the subject apartment’s occupancy and was involved with obtaining a surrender agreement from her, in which she agreed to vacate and surrender the apartment by June 31, 2016 at the expiration of the lease renewal then in effect. The said agreement dated April 28, 2015 was also submitted and contains a statement that no other adults occupied the apartment and that there are no individuals with succession rights to the apartment. In his affidavit, Mr. Hay states that, in a conversation with ██████ Gonzalez, she stated to him that she had vacated the apartment in 2005, although she continued to fraudulently execute lease renewals for ten years thereafter. Ms. Gonzalez did not refute making these statements in her affidavit.

Herein, Respondent has sufficiently established that he is the son of the former tenant of record ██████ Gonzalez and that he is a “disabled person” in accordance with RSC §2523.5(b)(1) and §2523.5(b)(4). As such, pursuant to RSC §2523.5(b)(1), Respondent need only establish continuous co-residency with ██████ Gonzalez during the one year period immediately prior to her permanent vacatur to prove his entitlement to succession rights. However, in this case, there remain material issues of fact, as to whether ██████ Gonzalez permanently vacated the subject apartment in 2005 as alleged by Mr. Hay or 2016 as alleged by Respondent and whether Respondent continuously resided with ██████ Gonzalez in the subject apartment during the one year period immediately prior to her permanent vacatur, that must be determined at a trial. The various documents submitted by Respondent do not conclusively establish his claim of continuous co-residency with ██████ Gonzalez during the relevant time period to warrant the grant summary judgment as a matter of law, whether it be 2004-2005 or 2015-2016. The affidavits by

Respondent, [REDACTED] Gonzalez and [REDACTED] Gonzalez, the latter two being close relatives of Respondent, are to some degree self-serving and, alone, are insufficient to establish the requisite element of co-residency or [REDACTED] Gonzalez's vacatur date. As to the affidavit submitted by [REDACTED] Brown, there are contradictions with the statements therein and an affidavit submitted by [REDACTED] Brown in a prior non-payment proceeding against [REDACTED] Gonzalez that create credibility issues, requiring a trial. Furthermore, the date of [REDACTED] Gonzalez's permanent vacatur must be determined by the finder of fact before the element of co-residency can be established.

Accordingly, Respondent's motion seeking a finding that he is entitled to succession rights and attorneys' fees and Petitioner's cross-motion seeking a finding that Respondent is not entitled to succession rights and awarding Petitioner a Final Judgment of possession are denied, in their entirety.

The Court has considered the parties' remaining arguments and find them to be without merit.

The parties are directed to appear in Part J, Room 490, on May 3, 2018, at 9:30 a.m., for settlement or trial.

This constitutes the Decision and Order of the Court.

Dated: March 20, 2018
Bronx, New York



Kimon C. Thermos, J.H.C.