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Benjamin v. Milberry

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Benjamin v Milberry
2023 NY Slip Op 50279(U) [78 Misc 3d 128(A)]
Decided on February 24, 2023
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This opinion is uncorrected and will not be published in the printed Official Reports.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 February 24, 2023

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

PRESENT: : WAVNY TOUSSAINT, P.J., CHEREÉ A. BUGGS, MARINA CORA MUNDY,
JJ
2022-20 K C

Jeffrey Benjamin, Appellant,

against

Laura Milberry, Respondent.

Jeffrey Benjamin, appellant pro se.

Laura Milberry, respondent pro se (no brief filed).

Appeal from a final judgment of the Civil Court of the City of New York, Kings County (Jack Stoller, J.), entered January 18, 2022. The final judgment, upon a decision of that court dated June 14, 2021, after a nonjury trial, dismissed the petition in a summary proceeding brought pursuant to RPAPL 713 (10).

ORDERED that, on the court's own motion, the notice of appeal from the decision dated June 14, 2021 is deemed a premature notice of appeal from the final judgment entered January 18, 2022 (*see* CPLR 5520 [c]); and it is further,

ORDERED that the final judgment is affirmed, without costs.

In this summary proceeding petitioner commenced pursuant to RPAPL 713 (10), the

Civil Court dismissed the petition after a nonjury trial. A review of the record indicates that petitioner failed to show that respondent was a person in possession of the premises at the time the proceeding was commenced ([see *Kesoglides v Marine Terrace Assoc.*, 70 Misc 3d 140\[A\]](#), 2021 NY Slip Op 50126[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2021]), or that petitioner had a possessory interest in the premises at the time of any alleged forcible or unlawful [*2]entry/detainer ([see *Padilla v Rodriguez*, 61 Misc 3d 133\[A\]](#), 2018 NY Slip Op 51471[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2018]). Indeed, the record is devoid of any evidence showing that respondent had entered the premises by force or unlawful means, or that she remains in possession of the premises by force or unlawful means. Consequently, the Civil Court properly dismissed the petition. We note that this court has not considered evidence which is de hors the record on appeal ([see *Chimarios v Duhl*, 152 AD2d 508 \[1989\]](#)).

Accordingly, the final judgment is affirmed.

TOUSSAINT, P.J., BUGGS and MUNDY, JJ., concur.

ENTER:

Paul Kenny

Chief Clerk

Decision Date: February 24, 2023

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