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Tilden Towers Hous. Co., Inc. v. Edwards

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[*1]

Tilden Towers Hous. Co., Inc. v Edwards
2023 NY Slip Op 50160(U) [78 Misc 3d 1205(A)]
Decided on March 6, 2023
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected in part through March 9, 2023; it will not be published in the printed Official Reports.

Decided on March 6, 2023

Civil Court of the City of New York, Bronx County

<p>Tilden Towers Housing Co., Inc., Petitioner,</p> <p>against</p> <p>Michael Edwards, AS NEXT OF KIN TO BETTE EDWARDS, DECEASED, AND MICHAEL EDWARDS, OCCUPANT, Respondent.</p>

L&T Index No. 10479-2019

For Petitioner:

Sontag & Hyman, P.C.

165 Roslyn Road

1st Floor

Roslyn Heights, New York 11577

For Respondent:

The Legal Aid Society

60 Bay Street

Staten Island, New York 10301

Shorab Ibrahim, J.

RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED

IN THE REVIEW OF THIS MOTION BY THE RESPONDENTS TO DISMISS THE CASE: NYSCEF Documents # 12 through 18, 20.

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

RELEVANT FACTS AND PROCEDURAL POSTURE

The petition in this non-payment proceeding alleges that the respondents are in possession pursuant to a rental agreement wherein they agreed to pay \$1463 per month. (*see* NYSCEF Doc. 3 at p. 3). The premises are a Mitchell-Lama cooperative apartment under the jurisdiction of the New York City Department of Housing Preservation and Development (HPD). The "tenant" of record, as noted in the caption, was deceased at the time this matter started. Approximately six (6) months after this case commenced, occupant Michael Edwards applied for succession rights. (*see* NYSCEF Doc. 17). Succession was granted on or about January 27, 2021. (*see* NYSCEF Doc. 16).

Respondent now moves to dismiss this proceeding on a simple ground: that there was and is no rental agreement between the parties as required by RPAPL § 711(2). Respondent alleges that absent such an agreement, the petitioner fails to state a cause of action. (*see* NYSCEF Doc. 13 at par. 11). Petitioner responds that the motion is untimely, made almost four (4) years after respondent obtained counsel. (*see* NYSCEF Doc. 15 at p. 6). Petitioner further maintains this proceeding is appropriate because an occupant seeking succession is obligated to pay ongoing [*2]monthly charges while the determination is being made. (*id.* at p. 5). Finally, petitioner argues that, at a minimum, respondent must pay monthly rent charges since he was granted succession. (*id.*). In his reply, respondent reiterates that no rental agreement has *ever* existed between the petitioner and Michael Edwards. (*see* NYSCEF Doc. 20 at par. 3 & 4) [emphasis added]).

DISCUSSION

Where there is no agreement to pay rent, either express or implied, a non-payment proceeding pursuant to RPAPL §711(2) cannot be maintained. (*see* [6 West 20th St. Tenants Corp. v Dezertov](#), 75 Misc 3d 135(A), *1 [App Term, 1st Dept 2022]; [Strand Hill Associates v Gassenbauer](#), 41 Misc 3d 53, 54 [App Term, 2nd Dept, 2013]). Even when there is an agreement to pay rent, it must be in effect at the time the non-payment proceeding is commenced. (*see* [Fairfield Beach 9th, LLC v Shepard-Neely](#), 2022 NY Slip Op 51351(U) [App Term, 2nd Dept 2022] (holding "there must be a rental agreement *in effect at the time*

the proceeding is commenced pursuant to which rent is due and owing") [emphasis added]).

Consequently, successor tenants are not liable for any rent accruing before they become party to a lease. ([see *East Harlem Pilot Block Building IV HDFC Inc. v Diaz*, 46 Misc 3d 150\(A\)](#), *1 [App Term, 1st Dept 2015] *citing* *Strand Hill Associates v Gassenbauer*, 41 Misc 3d at 54-55). Critically, an occupant is not bound "by any language in the deceased tenant's expired lease providing that the lease "is binding on Landlord, Tenant and their ... *successors* and assigns" ([71 West 68th Street, LLC v Roach](#), 57 Misc 3d 144(A), *1 [App Term, 1st Dept 2017]).

In *Rochdale Village, Inc. v Chadwick*, the court dismissed a nonpayment petition finding, among other things, that the successor tenant in a Mitchell-Lama cooperative was not bound by the deceased tenant of record's occupancy agreement. (65 Misc 3d 1039, 1042 [Civ Ct, Queens County 2019]). While *Chadwick* involved DHCR regulations and the subject premises involve HPD regulations, the Appellate Term notes in its affirmance of Judge Guthrie's dismissal:

The successor-in-interest clause contained in the occupancy agreement does not, as petitioner argues, allow the enforcement of the payment of use and occupancy in a nonpayment proceeding. A "successor-in-interest is not yet a tenant" and the occupancy agreement therefore only extends "certain benefits" to respondents, which does not include the obligation to pay "rent." Neither the Mitchell-Lama regulation, nor DHCR memorandum #2019-B-02 dated April 15, 2019 allows an owner to obtain a possessory judgment for the failure to pay use and occupancy, as they do not alter the statutory scheme restricting the maintenance of nonpayment proceedings to certain claims, as set forth in RPAPL 711 (2). (73 Misc 3d 131(A), *1 [App Term, 2nd Dept 2021]). [FN1](#)

The court in *BSC Owner LLC v Nicholson* posed the following question: whether holdings in cases such as *Gassenbauer* [requiring a landlord-tenant relationship and an existing agreement to pay rent] apply equally to Mitchell-Lama apartments. (*see* 67 Misc 3d 1015(A), *1 [Civ Ct, Kings County 2020]). This court agrees.

The petitioner here cannot rely on the deceased tenant's occupancy agreement both [\[*3\]](#) because the respondent is not a party to the agreement and the agreement does not require payment of "rent." (*see* NYSCEF Doc. 15 at par. 18, reciting the relevant provisions of the occupancy agreement: "Pending the agency's determination, the applicant may continue in occupancy and shall be required to pay for *use and occupancy* of the apartment ") [emphasis added]). Use and occupancy, of course, is not "rent." (*see* RPAPL §702; [Putnam Realty Assoc., LLC v Piggot](#), 44 Misc 3d 141(A) [App Term, 2nd Dept 2014]; [615 Nostrand](#)

[*Ave. Corp. v Roach*, 15 Misc 3d 1](#) [App Term, 2nd Dept 2006] (the failure to pay use and occupancy is not a proper basis for a nonpayment proceeding)).

The landlord, if it so wishes, may seek relief for use and occupancy through a plenary action. ([*see Underhill Ave. Realty LLC v Ramos*, 49 Misc 3d 155\(A\)](#), *1 [App Term, 2nd Dept 2015]; *Strand Hill Associates v Gassenbauer*, 41 Misc 3d at 55). As to petitioner's timeliness argument, the court notes that the petitioner never had a cause of action for "rent," and one is not created by waiver through the passage of time. ([*see Kales v City of New York*, 169 AD3d 585](#), 586 [1st Dept 2019] (CPLR 3211(a)(7) motion may be made at *any time*)).

Based on the above, the respondent's motion is granted, and the petition is dismissed. Judgment shall enter accordingly. This constitutes the decision and order of the court. It will be posted on NYSCEF.

Dated: March 6, 2023
SO ORDERED,
Bronx, New York

_____/S/_____
HON. SHORAB IBRAHIM
JUDGE, HOUSING PART

Footnotes

Footnote 1: Appellate courts have commented on the similarities between the DHCR and HPD's procedures governing succession rights. ([*see Rochdale Village, Inc. v Goode*, 16 Misc 3d 49](#), 52 [App Term, 2nd Dept 2007]).

[Return to Decision List](#)