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BEC CONTINUUM OWNERS LLC v. DURAN

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART R

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BEC CONTINUUM OWNERS LLC,

Index No. L&T 301275-22/KI

Petitioner,

-against-

**DECISION/ORDER
AFTER TRIAL**

ELVIRA DURAN,

Occupant,

“J. DOE,”

Occupant.

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Present: HON. KIMBERLEY SLADE, J.H.C.

FTR: 1/19/2023; 11:47am; ROOM 403.

Petitioner commenced this summary holdover proceeding after service of a 30-Day Notice to Vacate dated September 28, 2021. The notice alleged that the named Respondent entered into possession pursuant to a license granted by Jennifer Lozada (“Lozada”) the named tenant who permanently vacated the premises located at 67 Hanson Place, Apt. 4H, Brooklyn, NY 11217. The premises are subject to Rent Stabilization Law and are also subject to a Low Income Housing Tax Credit program (“LIHTC”). In her answer Respondent alleged that she was entitled to succession rights as a nontraditional family member of Lozada. A trial was held on January 19, 2023 in Part R. The Parties stipulated to Petitioner’s *prima facie* case and Respondent testified.

For the Petitioner, the following exhibits were admitted or deemed admitted onto the record by stipulation: Deed, (Petitioner’s 1); Nominee Agreement (Petitioner’s 2); Regulatory Agreement (Petitioner’s 3); Surrender letter (Petitioner’s 3A).

For the Respondent, the following exhibits were admitted or deemed admitted onto the record including Photographs (Respondent’s A1-6); Federal Loan Documents (Respondent’s B1-

2); 2019 IRS Tax return 1040 and 1095B (Respondent's C); 2019, 2020, and 2021 W2 forms (Respondent's D1-3); Housing court report (Respondent's E); 2015, 2016, 2017, and 2018 1095B forms (Respondent's F1-4); 4/25/2016, 5/9/2016, 10/31/2020 Dental insurance explanation of benefits (Respondent's G1-2); 03/08/19 to 04/08/19 and 04/08/19 to 05/08/19 HSBC Bank Statements (Respondent's H1-2); May 2017, May 2020, and October 2020 Public Assistance Applications (Respondent's I 1-3); Driver's licenses issued in August 2018 and October 2019 (Respondent's J1-2).

Respondent testified that Lozada lived in the apartment prior to their meeting. They started exclusively dating in December 2012 and she moved into the apartment in 2013. She testified that both the current super, Rolando, and the former super visited the premises several times for repairs in 2015 and 2016. She described the premises as a studio apartment. There was only one bed and when they lived together they had 2 cats, Milo and Sanso.

Respondent next testified regarding their travels during the years they were together and asserted that Lozada paid for them. They always returned together to the apartment after the trips, and respondent has not lived elsewhere since they commenced living together. She also testified that even after they broke up Lozada continued to keep in touch with the Respondent's family, including her mother. Respondent was aware that Lozada had contacted management to tell them she was moving out, however neither Lozada nor respondent returned the keys when she moved. Respondent testified that although they discussed marriage they decided not to because they were already serious enough.

Respondent testified that she was a student at Lehman College while she lived with Lozada and graduated in December 2014. She testified that she paid for college via financial aid and

student loans. Lozada was aware of the loans because she was listed as a reference. Respondent used the premises as her address in the loan documents and testified for that reason Lozada supplied her work address, and her mother supplied her home address. While the purpose of this is not apparent it does not undermine the totality of respondent's testimony and evidence. Additionally, Respondent testified that she was a full-time student and did not work while attending college.

Respondent testified that she was no longer receiving financial assistance in 2019 and acknowledged that the tax returns were prepared in Florida. She confirmed that her filing status was single, that she listed the loans as income and that she received SNAP benefits starting in 2017 and has every year since. She acknowledged that Lozado's name did not appear on the paperwork, and she reported no income.

Respondent testified that she opened a bank account with HSBC in 2019 (which then became Citizens Bank). She provided the subject premises as her address. This is her only bank account, and it is solely in her name. She testified the Lozada covered most of the household expenses and helped her with her student loans. She testified that she contributed to rent and groceries by using her SNAP benefits. She stated that she was otherwise completely financially dependent on Lozada. She does not own a car or other property.

Lozado still resided at the premises when she applied in May 2020, but she did not list her as part of the household because she was moving out. October of 2020, Lozado was not listed as part of the household because she had moved by then. She confirmed that she listed herself as "single." Respondent's J1-2, driver's licenses issued in August 2018 and October 2019 lists 67 Hanson Place as her address. Respondent was questioned as to whether she informed management

that Lozada had vacated, she replied that she had not because Lozada would not add her to the lease fearing that the rent would be increased.

On cross examination Respondent confirmed that she did not appear on any recertifications. She confirmed that the relationship ended in June 2020 and that Lozada moved out a month later, taking the cats with her.

Petitioner's 3A (Lozada's surrender letter) was admitted into evidence. Respondent is unaware of why Lozada wrote the surrender letter. She re-iterated that she did not have a bank account prior to 2019, and only had SNAP and a benefits card. She did have proof of paying the bills, but that was in 2021, after Lozada vacated and they did not share a bank account.

On redirect Respondent testified that she went to Miami in 2019, and that she visited Lozada's aunt in 2020, that she would see her in Florida even when not together. Lozada now lives in Clearwater, Florida. They visited with each other's family whether the other was present or not. Lozada visited with her family in Florida in 2021.

She confirmed that she did not disclose the household members on her 2017 benefits application because she feared losing benefits.

Discussion

Rent Stabilization Code("RSC") (9 NYCRR) § 2523.5 (b) (1) provides, in relevant part, that if the prior "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... , shall be entitled to be named as a tenant on the renewal lease." "RSC §2523.5(b)(1) focuses on the remaining family member's having resided in the apartment 'as a primary residence' within the

two-year period prior to the tenant's permanent vacating of the apartment, and does not insist upon the tenant of record's having so resided during that period." Mexico Leasing, LLC v. Jones, 45 Misc3d 127(A) (App term 2d Dept 2014). Petitioner argues that because the prior tenant permanently vacated prior to the expiration of the lease, respondent cannot meet her burden of showing that she resided with Lozada for two years before she permanently vacated. However, in the Second Department "the relevant one- or two-year period (depending on whether or not the family member is a senior citizen or disabled) in which the family member must 'reside with' the tenant is the one- or two-year period immediately prior to when the tenant ceases residing at the housing accommodation". EB Bedford, LLC v Lee, 64 Misc 3d 39, 42 (App Term 2d Dept 2019) citing Matter of Jourdain v New York State Div. of Hous. & Community Renewal, 159 AD3d 41 (2d Dept 2018). Therefore, here the relevant co-occupancy two-year period began two years before Lozada's permanent removal from the premises, in the summer of 2020, not when the lease expired.

In support of her succession claim Respondent submitted into evidence tax documents and returns, filed contemporaneously with her cohabitation with the tenant-of-record, bank statements, public assistance records, insurance documents, and her driver's license. Each of these documents submitted into evidence show Respondent's address, during the relevant period, as the premises. Respondent also testified that while she and Lozada would often travel for vacation together, the two would always return to the apartment and continue to co-reside together. The credible evidence and testimony demonstrate that Respondent resided in the premises as her primary residence from January of 2013 and continued to co-reside there with Lozada until Lozada's permanent vacatur, in or around the summer of 2020.

RSC § 2520.6 (o) (2) defines "family member" as including "[a]ny other person residing with the tenant or permanent tenant in the housing accommodation as a primary or principal residence, respectively, who can prove emotional and financial commitment, and interdependence between such person and the tenant or permanent tenant." As emphasized in Braschi v Stahl Assoc. Co., 74 NY2d 201, 213 (1989), and codified in RSC §2520.6(o)(2)(i)-(viii)¹, no single factor shall be solely determinative. Rather "[t]hese factors are most helpful, although it should be emphasized that the presence or absence of one or more of them is not dispositive since it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control." Braschi v Stahl Assoc. Co., id.

¹ Those factors include, but are not limited to:

"(i) longevity of the relationship;

"(ii) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life;

"(iii) intermingling of finances as evidenced by, among other things, joint ownership of bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget for purposes of receiving government benefits, etc.;

"(iv) engaging in family-type activities by jointly attending family functions, holidays and celebrations, social and recreational activities, etc.;

"(v) formalizing of legal obligations, intentions, and responsibilities to each other by such means as executing wills naming each other as executor and/or beneficiary, granting each other a power of attorney and/or conferring upon each other authority to make health care decisions each for the other, entering into a personal relationship contract, making a domestic partnership declaration, or serving as a representative payee for purposes of public benefits, etc.;

"(vi) holding themselves out as family members to other family members, friends, members of the community or religious institutions, or society in general, through their words or actions;

"(vii) regularly performing family functions, such as caring for each other or each other's extended family members, and/or relying upon each other for daily family services;

"(viii) engaging in any other pattern of behavior, agreement, or other action which evidences the intention of creating a long-term, emotionally committed relationship" (RSC § 2520.6[o][2]).

At trial Respondent credibly testified that she and Lozada had emotional and financial interdependence. She stated that she and Lozada were in a relationship where they held themselves out to be a family unit to their friends and family, even though they never formalized their union. In support she demonstrated that they lived together in a studio apartment for the pendency of their seven-year relationship, that they cared for two pet cats together and provided pictorial support evidencing their time as a family unit. She testified that she and Lozada spent every holiday and birthday together and would regularly vacation together, both alone and to visit their families. She testified that Lozada spent time with her family in New York and that both of their families knew they were together. Respondent testified that though they terminated the romantic aspect of their relationship, Lozada was so close with her family that she visited them in Florida even after their relationship was over. As with a divorced couple, Respondent's testimony demonstrated an emotional and familial connection between them and with each other's families.

It has been consistently held that "[t]he absence of documentary evidence of intermingling of finances does not undermine respondent's claim where the parties had limited assets, and where other criteria for succession are present." Roberts Ave. Assoc. v Sullivan, 2003 NY Slip Op 51091(U) (App Term 1st Dept 2003) ; see also Arnie Realty Corp. v Torres, 294 AD2d 193 (1st Dept 2002); 530 Second Ave. Co., LLC v Zenker, 160 AD3d 160 (1st Dept 2018); St. Marks Assets, Inc. v. Herzog, 196 Misc. 2d 112 (App. Term 1st Dept 2003). Here, Lozada qualified for the LIHTC program, which then made her eligible to rent the rent stabilized premises. Based on the unrefuted testimony, Respondent further testified that she and Lozada intermingled their finances, as limited as they were. She testified that she has had very little income for much of her time at 67 Hanson Place and was a full-time student until she graduated in December 2014. She

took out loans to help her afford tuition and stated that Lozada helped her to repay those loans, though no documents were provided to that effect. Respondent stated that while she was unemployed, and financially dependent on Lozada, she received Public Assistance and would use her SNAP benefits to shop for groceries, committing the only steady income that she had to the financial maintenance of their household.

Finally, without condoning financial behavior that is highly problematic, this court notes that “the prior tenant's apparent improprieties in reporting her household composition ... does not impair the merits of Respondent's succession claim, *Levine v. Costanzo*, NY L.J. Feb. 17, 1994 at 24:3 (App. Term 1st Dept.), *leave to appeal denied*, 1994 NY App. Div. LEXIS 8461 (1st Dept. 1994), *I.N. Covington Corp. v. Surdo*, N.Y.L.J. July 8, 1998 at 31:4 (Civ. Ct. NY Co.), which rest upon Respondent's family relationship and co-residency with the prior tenant.” 170 Spring St. LLC v. Doe, 61 Misc 3d 1222(A) (Civ Ct 2018) (J. Stoller, J.) Therefore, any alleged fraud by the prior tenant cannot be ascribed to Respondent within the context of a succession claim.

Accordingly, while there are some issues with respondent's case the court did find her testimony credible and lends weight to that in this decision. Similarly, petitioner elected to not offer a rebuttal witness to refute respondent's testimony leading the Court to find that Respondent has proven on the merits that she had been a non-traditional family member of the prior tenant and co-resided with the prior tenant at the subject premises for the two years before the prior tenant permanently vacated. Respondent therefore is entitled to succeed to the prior tenant's tenancy. The Court therefore dismisses the petition with prejudice.

The parties are directed to pick up their exhibits within thirty days or they will either be sent to the parties or destroyed at the Court's discretion in compliance with DRP-185.

A copy of this decision/order shall be mailed to all parties and uploaded to NYSCEF. This constitutes the decision and order of this court.

Dated: Kings, New York
June 29, 2023

HON. KIMBERLEY SLADE, J.H.C.



Kimberley Slade
Judge, Housing Court