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Lewis v. Lewis

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

-----X
DERRICK LEWIS, Index No. 309550-22

Petitioner,

-against-

DECISION AND ORDER

RICHARD LEWIS,
JOHN DOE and JANE DOE,

Respondents.

-----X

Present:

Hon. Sergio Jimenez
Judge, Housing Court

This holdover proceeding seeks recovery of the property at 813 Saratoga Avenue Basement Floor in Brooklyn, New York 11212. Petitioner purports to have terminated the tenancy by way of a 90-day notice of termination following the conclusion of a month-to-month tenancy. Respondent alleged a jurisdictional defense stating that there was no mailbox where the respondent could receive mail. This proceeding was transferred from the resolution part to the trial part on October 27, 2022. The court held a hearing on June 22, 2023 and at the end of petitioner's case, respondent moved to dismiss the proceeding. The court reserved decision.

Hearing

Petitioner Derrick Lewis testified on his own behalf. He presented and authenticated (by stipulation or foundation) two pieces of documentary evidence: P1 (certified deed), P2 (December 2022 picture of mailbox). The court also took judicial notice of the Multiple Dwelling Registration with the Department of Housing Preservation and Development as well as the contents of the court file and the HP Action case number 151-22 between the parties.

Petitioner credibly testified that he has been the owner of the premises for about 40 years, that his son Richard Lewis, aged 43, took up living in the basement without his permission at some point in the past. Notably, he also testified that he placed the mailbox at some point in December 2022, which was close to a year after the service of the predicate notice as well as the notice of petition and petition. Prior to that, Mr. Lewis stated that the “postman knew” to put Mr. Richard Lewis’ mail in the mailbox owned by Derrick Lewis. He stated that Mr. Richard Lewis knew to look in the box when he came to the premises.

On cross-examination, respondent brought out the fact that in the HP action, the petitioner swore that there was no unit in the basement and that the mailbox with the name Lewis on it had the letter “D” removed at some point in the past. On re-direct Mr. Lewis attempted to clarify that his statement in the HP affidavit was essentially a miscommunication, presumably based on language, that meant that he never gave the respondent permission to live in the basement. Notably, the witness did not testify as to any rent ever received, any lease or any owner-tenant relationship.

Discussion

As the court must address personal jurisdiction prior to determining other issues, the court must address the motion made at the close of petitioner’s case-in-chief (*Elm Mgt. Corp. v. Sprung*, 33 AD3d 753 [2d Dept, 2006]), prior to continuing with the trial. Here, as presented by credible testimony, the court finds the respondent did not have a mailbox at the time of the service of the papers, that the mailbox had petitioner’s name not respondent’s name prior to the removal of the first letter, that petitioner handled respondent’s mail in his own mailbox prior to leaving the premises and the petitioner depended on “what the postman knew” about delivering mail to the respondent.

Attempts at service “must not be unlikely to succeed,” the court may find that it is akin to no effort at service at all (see *Fang Realty Corp. v. Prime Six, Inc.*, 77 Misc3d 129[A][App Term, 2d Dep’t, 2nd, 11th and 13th Jud Dists, 2022]; *91 Fifth Ave. Corp. v Brookhill Property Holdings LLC*, 51 Misc.3d 811 [Civ Ct New York County, 2016]). Since the court finds the service attempt to be a nullity, without a mailing effort, the service does not comply with RPAPL §735 and the petition must be dismissed. By showing that petitioner did not properly serve the petition, respondent has shown that they are entitled to dismissal (see CPLR 5015(a); *Countrywide Home Loans Servicing, LP v DiGiovanni*, 205 AD3d 676 [App Div 2d Dep’t, 2022]).

Even giving the petitioner every favorable inference, as is the standard in a motion to dismiss, the court finds that the service was pre-destined to fail and, as such, does not comply with the requisites of RPAPL §735 (See CPLR §3211; RPAPL §735; *Leon v. Martinez*, 84 NY2d 83, 87-88 [Ct App 1994]; *Robinson v. Robinson*, 303 AD2d 234, 235, 757 N.Y.S.2d 13 [1st Dept 2003]). Motion is granted, proceeding is dismissed.

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Conclusion

After a presentation of petitioner’s case-in-chief including testimony by petitioner, respondent’s motion is granted. The petition is dismissed for the reasons set forth above. Respondent is entitled to a judgment of dismissal. The court does not reach the issue of whether the respondent was correctly served with a 90-day notice or whether the occupancy required a different predicate notice. The parties may pick up their exhibits in Part O, but if it has not been done so within thirty (30) days from the date of this order, they will be discarded according to court directives. This constitutes the decision and order of the court.

Dated: June 27, 2023
Brooklyn, New York


Sergio Jimenez, JHC
Judge, Housing Court

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