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Espinoza v. Huai Qiong Ke

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[*1]

Espinoza v Huai Qiong Ke
2023 NY Slip Op 50606(U)
Decided on May 31, 2023
Civil Court Of The City Of New York, Queens County
Guthrie, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected in part through June 26, 2023; it will not be published in the printed Official Reports.

Decided on May 31, 2023

Civil Court of the City of New York, Queens County

Rafael Espinoza, Petitioner,
against
Huai Qiong Ke, Hai Zhong Pan, Respondents.

Index No. L&T 10133/23

Rafael Espinoza, Petitioner pro se

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Clinton J. Guthrie, J.

This illegal lockout proceeding brought pursuant to RPAPL § 713(10) was commenced in April 2023. Petitioner defaulted at the initial hearing date (May 1, 2023); as a result, the petition was dismissed. However, petitioner brought an order to show cause (OSC) to vacate the dismissal. The OSC was granted over respondents' opposition on May 24, 2023 and the dismissal was vacated. The matter was set again for hearing on May 30, 2023. The hearing was conducted on May 30, 2023 and May 31, 2023. The hearing concluded on May 31,

2023; after closing statements, the court reserved decision.

Petitioner Rafael Espinoza and respondent Huai Qiong Ke (testifying through a Mandarin interpreter) were the only witnesses at the hearing. The facts at the hearing that were undisputed are as follows: petitioner was residing in the subject premises and left for an extended period of time as of August 12, 2022; petitioner removed certain belongings via a U-Haul truck on August 11, 2022; petitioner returned in April 2023 and sought access to the subject premises; upon his return, petitioner learned that the locks to the subject premises were changed, which respondent Ke confirmed during her testimony; and respondent Ke had commenced a summary nonpayment (eviction) proceeding against petitioner in 2022, prior to the events of August 11, 2022 and August 12, 2022. Where the parties differed was on the issue of whether petitioner had [*2]surrendered/abandoned the subject premises on or after August 12, 2022. Petitioner testified that he did not surrender or abandon the subject premises and that he left on August 12, 2022 to attend to his fiancée, who was experiencing a high-risk pregnancy. He further testified that he left belongings in the subject premises, including luxury goods that he intended to sell as part of a business. Respondent Ke testified that petitioner left his key in the subject premises on August 11, 2022 and did not contact her thereafter. She also testified that when she entered the subject premises on September 6, 2022 with the police [she stated that she requested their presence because of assumed illegal activity in the premises] because the windows were open and it was raining, she testified that she only disposed of some garbage and that otherwise there was a computer left behind, which she did not dispose of, since it could be returned to petitioner. Ms. Ke denied on cross-examination that anyone resided in the subject premises after petitioner left on August 12, 2022.

Under RPAPL § 713(10), a special proceeding may be maintained where "[t]he person in possession has entered the property or remains in possession by force or unlawful means and he or his predecessor was not in quiet possession for three years before the time of the forcible or unlawful entry or detainer and the petitioner was peaceably in actual possession at the time of the forcible or unlawful entry or in constructive possession at the time of the forcible or unlawful detainer." Petitioner established at the hearing that he was lawfully occupying the subject premises as a tenant at all times from the commencement of his tenancy until August 12, 2022. Respondent's defense (as articulated in the affirmation and affidavit in opposition dated April 27, 2023) is that petitioner surrendered possession as of August 12, 2022 and that no illegal lockout proceeding may be maintained as a result. [\[EN1\]](#)

The Court of Appeals has held that "[a] surrender by operation of law occurs when the

parties to a lease both do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated . . . As distinguished from an express surrender, a surrender by operation of law is inferred from the conduct of the parties." *Riverside Research Inst. v. KMGA, Inc.*, 68 NY2d 689, 691-692 [1986] [internal citations omitted]. Here, the acts indicating a surrender include petitioner's removal of certain belongings, including furniture, before he vacated for an extensive period lasting more than eight (8) months (photographs and a video admitted into evidence depicted the removal of one or more mattresses and a couch), petitioner's lack of any contact with respondents during the 8-plus months that he was away, and petitioner's lack of any participation in the eviction proceeding until his return. While petitioner testified that he left several luxury goods in the apartment, he presented no proof of this at the hearing. Moreover, the court finds that petitioner's testimony that he removed one bed and one couch before leaving in August 2022 but left one bed and one couch behind to lack credibility.

While Ms. Ke's admissions that she did not enter the subject premises until September 6, 2022 and only did so with police presence and that she and her husband (the co-respondent) waited until April 2023 to change the locks indicate some reluctance to take advantage of any surrender, the court finds that the facts at the hearing established that a surrender by operation of [*3]law had occurred at least as of the time that the locks were changed, after petitioner had been gone without contact for 8 months and had removed substantial belongings immediately prior to his vacatur. For the same reasons, petitioner did not demonstrate that he was in "peaceably in actual possession" at the time that the locks were changed. This conclusion is supported by petitioner's admission during cross-examination that his initial contact with respondents upon his return was for the purpose of requesting access to remove belongings, rather than for resuming possession.

For each of these reasons, the petition is dismissed after the hearing/trial. The parties reserve any other claims that they may have against each other, and defenses thereto. The clerk is directed to issue a judgment dismissing the petition. *See* CPLR § 411. The parties are directed to pick up their exhibits within 35 days or they may be destroyed at the court's discretion in compliance with DRP-185.

This Decision/Order will be emailed to petitioner and to respondents' attorney. [\[FN2\]](#)

THIS CONSTITUTES THE DECISION & ORDER OF THE COURT.

Dated: May 31, 2023
Queens, New York

Footnotes

Footnote 1: As this is a proceeding brought pursuant to RPAPL § 713(10), it is also a special proceeding subject to Article 4 of the CPLR. While it was brought on by order to show cause, the petition is the basis of the proceeding. Accordingly, the court deems the opposition filed in response to the initial OSC and petition to be deemed an answer (*see* CPLR § 402).

Footnote 2: While respondents' attorney indicated on May 31, 2023 that he had converted the case to NYSCEF, the court did not find the case to exist on NYSCEF as of the rendering of this Decision/Order.

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