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[*1]

Royal Assoc. LLC v Gomez
2023 NY Slip Op 23187
Decided on May 30, 2023
Civil Court Of The City Of New York, Queens County
Schiff, J.
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Decided on May 30, 2023

Civil Court of the City of New York, Queens County

<p>Royal Associates LLC, Petitioner-Landlord,</p> <p>against</p> <p>Alicia Gomez & Jose Gomez, Respondents-Tenants, Marcela Henao, Ignacio Henao, John Doe & Jane Doe, Respondents-Undertenants.</p>

Index No. L&T 302054/22

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Logan J. Schiff, J.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of Respondent Ignacio Henao's motion for summary judgment pursuant to CPLR 3212.

Papers NYSCEF Doc.

Notice of Motion & Affirmation/Affidavits/Exhibits 18-21
Affirmation in Opposition & Exhibits 22-40
Reply 41

Upon the foregoing cited papers, the decision and order on Respondent's motion is as follows:

RELEVANT BACKGROUND AND PROCEDURAL HISTORY

The subject holdover was commenced by Petitioner Royal Associates LLC ("Petitioner") [*2] upon filing a Notice of Petition and attorney-verified Petition on February 23, 2022. The proceeding is premised on a 10-day termination notice, following a 10-day notice to cure, purporting to terminate the rent-stabilized tenancy of Respondents Alicia Gomez and Jose Gomez ("Respondents-Tenants") pursuant to 9 NYCRR (Rent Stabilization Code) § 2524.3(a) on the basis on an "illegal[] sublet and/or assign[ment] of the premises without the prior written consent of the landlord" in violation of Real Property Law § 226(b) and the Rent Stabilization Code ("RSC") § 2525.6. The termination notice states that "[u]pon information and belief, it has been years since the prime tenants Alicia Gomez and Jose Gomez occupied the apartment. It came to the attention of the landlord that the apartment is being occupied by Marcela Henao and Ignacio Henao when a renewal lease was sent to the tenants of record and Marcela and Ignacio attempted to sign and return the renewal with their names... No permission has been sought or received for a sub-let of this apartment."

Respondent-Undertenant Ignacio Henao ("Respondent") interposed an answer through counsel on January 30, 2023, and now moves for summary judgment. Respondent argues that he and his spouse Flor Henao a/k/a Jane Doe ("Co-Respondent"), along with their adult children (including Respondent Marcela Henao), are not unlawful sublessees but rather close family members of the tenants of record with extensive historical ties to the apartment, a defense which if established is fatal to an illegal sublet holdover. Respondent further argues that Petitioner's termination notice is impermissibly vague, as it fails to address the familial nature of his relationship with the tenants of record.

In support of his motion Respondent attaches an affidavit in which he states that his spouse Flor Henao is the daughter of the tenant of record Jose Gomez a/k/a Hugo Henao and stepdaughter of Hugo Henao's wife and co-tenant Alicia Gomez. Respondent alleges that he and Flor, along with their then-4-year-old son, moved into 37-19 83rd Street. Apt. 42, Jackson Heights, NY 11372 (the "subject premises") in 1983, where Flor's father Hugo Henao a/k/a Jose Gomez and his wife Alicia Gomez were already living, that Hugo Henao

used the pseudonym Jose Gomez when signing leases (which Respondent's attorney surmises was a result of his immigration status upon emigrating from Columbia), that at some point before 2003 Alicia and Hugo moved out of the premises and gave Respondent Ignacio Henao and Co-Respondent Flor Henao the apartment, that Alicia and Hugo lived elsewhere and remained married until Hugo's death in 2003, and that Alicia continued to sign leases long after vacating. Respondent further avers the landlord has been aware of his and Flor's occupancy of the apartment for many years as "the building's superintendent came to the apartment countless times to do repairs" and that Respondent has paid rent directly to the landlord. Respondent attaches substantial documentary evidence in support of his motion, albeit all lacking in certification markings pursuant to CPLR 4518(c) or CPLR 2105.

In opposing the motion Petitioner relies entirely on an attorney affirmation. Without challenging the authenticity or admissibility of Respondent's evidentiary submissions, Petitioner's counsel argues that Respondent has failed to prove that Jose Gomez and Hugo Henao are one and the same person and therefore have failed to establish an immediate family relationship. The remainder of Petitioner's opposition addresses Respondent's failure to show co-occupancy for the requisite two-year period prior to vacatur of the tenants of record as required under the Rent Stabilization Code in order to establish succession rights.

DISCUSSION

A rent-stabilized tenant who sublets their apartment without the consent of the landlord [*3] risks early termination of the lease pursuant to RSC §§ 2524.3(a) and 2525.6(f) upon service of a termination notice (*see* RSC § 2524.2(c)(2)). While typically a landlord must serve a 10-day notice to cure prior to termination (*see* RSC § 2524.3(a)), a cure period is not required where a tenant "sublets her apartment at market rates to realize substantial profits not lawfully available to the landlord, and does so systematically, for a substantial length of time," particularly through unlawful short-term rentals. ([*Goldstein v Lipetz*, 150 AD3d 562, 563 \[2d Dept 2017\]](#); [*see also Gruber v Anastas*, 100 AD3d 829, 829 \[2d Dept 2012\]](#); [*335-7 LLC v Steele*, 52 N.Y.S.3d 248 \[App Term, 1st Dept 2016\]](#)).

Perhaps because an illegal sublet holdover redresses behavior that undermines the integrity of the Rent Stabilization Law's statutory scheme, a respondent-occupant cannot assert succession rights as a defense (*see 901 Bklyn Realty, LLC v Woods-Najac*, 119 N.Y.S3d 811 [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2019]). Conversely, a rent-stabilized tenant who merely allows a close family member to reside in her apartment for an extended period without engaging in profiteering, has not engaged in an unauthorized sublet, even where the tenant of record resides elsewhere (*see id.*; [*235 W. 71 St. v Chechak*, 782 N.Y.S.2d](#)

498, 498-99 [App Term, 1st Dept 2004], *affd* 16 AD3d 242 [1st Dept 2005]; *Hudson St. Equities v Escoffier*, 2003 NY Misc. LEXIS 1073 at *2 [App Term, 1st Dept 2003]). Such conduct may justify the commencement of a holdover based on the tenant's failure to maintain the premises as their primary residence upon service of a termination notice 90-150 days before expiration of the lease (*see* RSC § 2524.2(c)(2); *888 E. 96th St., LLC v Hargrove*, 111 N.Y.S.3d 494 [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2018]; *PLWJ Realty, Inc. v Gonzalez*, 285 AD2d 370, 370-71 [1st Dept 2001]), however, in these cases a remaining family member may interpose a defense of succession rights (*see* *72A Realty Assocs. v Kutno*, 838 N.Y.S.2d 334 [App Term 1st Dept 2007]; *Wittenberg v. Ortega, Hernandez-Feneque*, N.Y.L.J., June 9, 1998, 25:1 [App Term 1st Dept 1998]).

Turning to the particular facts of this case, the court will address first the sufficiency of Petitioner's termination notice, which Respondent's counsel claims is impermissibly vague in that it fails to account for Respondent's familial relationship with the tenants of record (Resp.'s Affirm. ¶ 47). Respondent's Notice of Motion does not request dismissal on this basis, normally a bar to seeking relief (*see* [Carter v Johnson](#), 110 AD3d 656, 658 [2d Dept 2013]). Nonetheless, as summary eviction proceedings are special proceedings governed by Article 4 of the CPLR, it is this court's obligation to survey the sufficiency of all pleadings, papers, and admissions before trial and to render, *sua sponte* if necessary, any relief permitted on a motion for summary judgment (*see* CPLR 409(b); *Bahar v Schwartzreich*, 204 AD2d 441, 443 [2d Dept 1994]), including as to the sufficiency of any statutory predicate notice (*see* *Greenport Preserv. L.P. v Heyward*, 160 N.Y.S.3d 734, 735 [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2021]; [1646 Union v Simpson](#), 62 Misc 3d 142(A) [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2019]).

A landlord seeking to terminate a rent-stabilized tenancy is required to serve a predicate notice enumerating the ground for eviction under the Rent Stabilization Code prior to commencement (*see* RSC § 2524.2(b)). The termination notice must be supported by specific factual statements, not mere conclusions, to enable the tenant to adequately defend herself (*see* [Domen Holding Co. v Aranovich](#), 1 NY3d 117, 125 [2003]; *888 E. 96th St., LLC v Hargrove*, 111 N.Y.S.3d 494 [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2018] *69 E.M. LLC v Mejia*, 29 N.Y.S.3d 849 [App Term, 1st Dept 2015]).

In the context of illegal sublet holdovers, the First and Second Departments require [*4] different levels of specificity in the predicate notices. In the First Department, it has long been the case that a landlord need only need to state in the notice to cure and termination notice that it has observed individuals other than the tenant of record residing at the premises,

thereby triggering a presumption of an unlawful sublet or assignment (*see, e.g., East Vil. RE Holdings LLC v McGowan*, 72 N.Y.S.3d 516 [App Term, 1st Dept 2017]; *Amin Mgt LLC v Martinez*, 57 N.Y.S.3d 674 [App Term, 1st Dept 2017]).

In contrast, in the Second Department, in which this court sits, the Appellate Term has recently established a heightened notice requirement in cases where a landlord knows or has reason to know that the alleged sublessee is a close family member. In *888 E. 96th St., LLC v Hargrove*, the Appellate Term granted a pre-answer motion to dismiss where the predicate notice stated that the tenant "had not been observed residing at the premises 'for many months' and was actually residing at a different address, and that the tenant had sublet the premises to [the movant] without tenant's prior knowledge and written consent" (111 N.Y.S.3d 494 [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2018]). In granting dismissal, the court relied on the unrebutted affidavit from the movant stating that he was the respondent's son, that they had lived together for many years, and that he continued residing in the premises after she moved out. The court dismissed the matter, noting that in the absence of allegations in the predicate notice of a revokable contractual relationship between the respondent and her son, or other facts to support a claim the relationship rose to the level of a sublet, the allegations set forth were "more properly resolved in the context of a primary residence proceeding" (*id.*).

More recently in *901 Bklyn Realty, LLC v Woods-Najac*, on an appeal concerning the scope of pre-trial discovery, the Appellate Term emphasized that the general presumption that a sublet occurs where a person other than the lessee is shown to be in possession "does not apply where the person in occupancy is a close family member of the tenant, as the permissible occupancy of family members does not provide a basis for a claim of illegal sublet." (119 N.Y.S.3d 811 [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2019]). The court then exercised its authority to review the papers pursuant to CPLR 409(b) and dismissed the proceeding given that the predicates notices merely made conclusory allegations as to illegal sublet or assignment. In reaching this conclusion, the Appellate Term appears to have relied on extrinsic evidence that the respondent notified the landlord that she was the daughter of the deceased tenant of record and was asserting her right to succeed to the apartment, claims which are "not a cognizable defense to an illegal sublet proceeding, which must be based solely on the issue of whether there has been an illegal sublet" (*id.*).

Implicit in the *Woods-Najac* and *Hargrove* holdings is the fact that succession rights play an important remedial role in the Rent Stabilization Law's regulatory framework (*see [Matter of Jourdain v New York State Div. of Hous. & Community Renewal](#), 159 AD3d 41*, 45

[2d Dept 2018]; [Matter of Murphy v New York State Div. of Hous. & Community Renewal, 21 NY3d 649](#) [2013]), which is jeopardized when a landlord files an unlawful sublet holdover against possible successor family members in the absence of specific allegations of a contractual arrangement or profiteering.

Looking at Petitioner's termination notice, it suffers from the same infirmities as the predicate notices in *Hargrove* and *Woods-Najac*. The notice merely states that the Respondents-Tenants have not resided in the premises for an extended period, and that other individuals have attempted to sign the lease in their own names, without any specific allegations of a contractual relationship or discussion of the familial relationship between the parties. There is no allegation [*5] of profiteering or transient use. Moreover, Petitioner has not offered any admissible rebuttal evidence to the claim in Respondent's affidavit that the tenants of record are immediate family members, and that Respondent and his wife and Co-Respondent have lived continuously in the premises since 1983 with the superintendent's knowledge, and in fact have paid rent directly to the landlord for several years. [FN1] Finally, Petitioner's acknowledgment in its termination notice that Respondent attempted to sign his name to the most recent renewal lease is a fact that tends to rebut rather than support a claim of a concealed unlawful sublet. Under these circumstances, Petitioner's predicate notice fails to state the facts necessary to authorize commencement of a holdover based on unauthorized sublet or assignment, and the proceeding must be dismissed pursuant to CPLR 409(b). [FN2] Petitioner's remedy is to commence a primary residence holdover (*see 235 W. 71 St. v Chechak*, 782 N.Y.S.2d 498, 498-99 [App Term, 1st Dept 2004], *affd* 16 AD3d 242 [1st Dept 2005]; *Santorini Equities v Picarra*, 2003 NY Misc. LEXIS 246 [App Term, 1st Dept 2003]; *119 Grand Realty v. Imbert*, 2021 NYLJ LEXIS 414 [Civ Ct, NY Co 2021]; *Elk Cent. Props Orchard v. Shaon*, 2020 NYLJ LEXIS 667 [Civ Ct, NY Co 2020]). [FN3]

CONCLUSION

In light of the above findings, the court dismisses this proceeding pursuant to CPLR 409(b). The clerk is hereby directed to enter a judgment of dismissal in favor of Respondent Ignacio Henao. This constitutes the decision and order of the court.

Queens, New York
May 30, 2023
HON. LOGAN J. SCHIFF, J.H.C.

Footnotes

Footnote 1: The court need not consider Respondent's uncertified exhibits in concluding that the predicate notice is defective given that an un rebutted affidavit can, standing alone, shift the burden on a summary judgment motion where the affiant offers non-conclusory factual assertions within their personal knowledge that resolve all material issues of fact, as opposed to self-serving speculation (*see Song v CA Plaza, LLC*, 208 AD3d 760, 761 [2d Dept 2022]; *Hegy v Collier*, 262 AD2d 606, 606 [2d Dept 1999]; *Bendik v Dybowski*, 227 A.D.228, 228 [1st Dept 1996]). Here, Petitioner offers no admissible evidence in opposition to the affidavit, instead relying entire on an attorney affirmation, which has no probative value (*see Thompson v Pizzaro* 155 AD3d 423, 423 (1st Dept 2017); *Vermette v. Kenworth Truck Company*, 68 NY2d 714 [1986]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Footnote 2: To the extent there is some ambiguity whether Co-Respondent Flor Henao's father Hugo Henao and the tenant of record Jose Gomez are one and the same person, such a finding is not necessary at this stage, as it is un rebutted that Respondent and Co-Respondent are close family members of the tenants of record by virtue of Co-Respondent's father Hugo Henao's marriage to the joint tenant of record Alicia Gomez.

Footnote 3: The court notes that it does not and cannot determine in this proceeding whether any of the Respondents have established a right to succeed to the apartment, a fact-intensive inquiry that requires establishing a specific familial relationship and co-residency for at least two years before vacatur of the tenant of record (*see* RSC § 2523.5(b)(1). In contrast, the definition of a close family member for purposes of defeating an unauthorized sublet holdover is more flexible, nor is there a required showing a co-occupancy with the tenant of record for a specific period (*see Hudson St. Equities v Escoffier*, 2003 NY Misc. LEXIS 1073 at *2 [App Term, 1st Dept 2003] [foster brother of tenant of record with longstanding ties to apartment was a licensee or guest rather than a sublessee]).

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