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TIFFANY GARDENS, L.P. v. IDI

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CIVIL COURT OF THE CITY OF NEW YORK
BRONX COUNTY: HOUSING PART C
---X L&T # 300343/2020
TIFFANY GARDENS, L.P.,
Petitioner (Landlord),

-against-

LINDA IDI and GLORIA EZERIOHA, **DECISION & ORDER**
Respondents (Tenants),
-and-

VINCENT "DOE", "JOHN DOE" AND/OR "JANE DOE",
Respondents (Occupants).
Address:
870 Southern Blvd, Apt. #1A a/k/a 001A, Bronx NY 10459
---X
Hon. Diane E. Lutwak, HCJ:

Recitation, as required by CPLR Rule 2219(a), of the papers considered in the review of Petitioner's motion for discovery and the cross-motion of Respondents Linda Idi and Gloria Ezerioha for partial summary judgment:

Papers	NYSCEF Doc #
Notice of Motion	8
Attorney's Affirmation in Support of Motion	9
Affidavit in Support of Motion	10
Exhibits A-F	11-16
Notice of Cross-Motion	17
Attorney's Affirmation in Support of Cross-Motion & Opposition to Motion	18
Affidavit in Support of Cross-Motion	19
Memorandum of Law	20
Exhibits A-C	21-23
Attorney's Affirmation in Opposition to Cross-Motion	26
Exhibits A-D	27-30
Attorney's Reply Affirmation	32
Exhibit A	33

Upon the foregoing papers and for the reasons that follow, the cross-motion of Respondent-Tenants Idi and Ezerioha for partial summary judgment is granted, Petitioner's discovery motion is denied as moot and the proceeding is set down for an in-person, pre-trial conference on Petitioner's remaining grounds for eviction on June 2, 2022 at 2:30 p.m.

BACKGROUND & PROCEDURAL HISTORY

This is a holdover proceeding brought against the tenants and alleged occupants of a Rent Stabilized apartment on two grounds: illegal sublet and failure to comply with household composition and income recertification requirements. The attorney-verified Petition is based on a notice to cure dated February 19, 2020 and a termination notice dated March 16, 2020, copies of which are attached to the Petition. These notices assert that since December 2018 Respondent-Tenants have not been seen at the subject apartment and Respondent-Occupants Vincent “Doe”, “John Doe” and “Jane Doe” - who are not on the lease or included on “Tax Credit Recertification” forms - have been observed coming and going.

Due to the COVID-19 pandemic, the case was not calendared until November 16, 2021, when it was heard in “Intake Part 2” and then assigned to Resolution Part C. Shortly thereafter, Respondent-Tenant Idi retained counsel and filed a Verified Answer, sworn to December 10, 2021, in which she, *inter alia*, denies any illegal sublet and asserts that (1) she lives in the premises with her minor son and her mother, Respondent-Tenant Gloria Ezerioha; (2) Vincent “Doe” is her brother Vincent Ezerioha; and (3) Vincent, his girlfriend and his twin brother often visit the apartment to babysit Ms. Idi’s son while she is at work.

After several unsuccessful settlement conferences, Petitioner moved for discovery related to its illegal sublet claim, seeking document production and depositions of the Respondent-Tenants. Petitioner’s motion is supported by the affidavit of its agent Juliana Nicole Addo, who asserts that Petitioner believes Respondent-Tenants are illegally subletting their apartment because, “Gloria Ezerioha has been in Nigeria for approximately the past three years, and Linda Idi lives elsewhere as evident by documents she submitted during a recertification...”. Addo Affidavit, sworn to February 23, 2022, at ¶ 2. The documents mentioned – Federal and State tax returns for 2018 and pay stubs from September 2019 – reflect an address on Darrow Place in the Bronx, and are attached as Exhibits A, B and C (NYSCEF Document ## 11, 12 and 13). Further, Ms. Addo asserts that (1) the Respondent-Tenants “are never seen in and about the Building and the Premises”; (2) during “the last unit inspection” in October 2020 the only occupants were “Vincent Doe, and persons unknown to Petitioner”; and (3) “Vincent and another male individual are the only ones seen in or about the Premises and Building on a regular basis.” Addo Affidavit at ¶ 3.

Respondent-Tenants, both now represented by the same counsel, oppose Petitioner’s motion for discovery as overly broad and moot and cross-move for partial summary judgment and dismissal of Petitioner’s illegal sublet claim. The motion is supported by the affidavit of Respondent-Tenant Idi, who asserts that she has lived in the subject apartment as her primary residence since 2010 with her mother, Respondent-Tenant Gloria Ezerioha, and her son who is autistic and “requires adult supervision at all times.” Idi Affidavit, sworn to March 14, 2022, at ¶¶ 4, 5, 6 and 9. Ms. Idi denies having ever assigned or subleased the apartment, Idi Affidavit at ¶ 11, and asserts that she works as a “home-care nurse”, that her job requires her to “occasionally stay at my client’s homes into the evenings, overnight, and even for weekends”

and that her brother Vincent Ezerioha – who lives elsewhere, at a specified address on Woodycrest Avenue in the Bronx - often babysits for her, sometimes with his girlfriend. Idi Affidavit at ¶¶ 8, 9 and 12. Accompanying Ms. Idi's affidavit as proof that Vincent is her biological brother are their respective Certificates of Baptism from "The Diocese of Orlu", each of which lists the child's parents as Eric Ezerioha and Gloria/Glory Ezerioha.

In opposition to Respondent-Tenants' motion, Petitioner's attorney argues that Respondent-Tenants failed to establish that Respondent-Occupant Vincent "Doe" has a "long-standing" connection to the apartment. Petitioner also argues that there are issues of fact as to where Vincent "Doe" resides as Respondent-Tenants' evidence does not include his affidavit, lease or any other proof of his residency; that Respondent-Tenants have failed to address Petitioner's claim that there is another "John Doe" occupant; and that there are issues of fact as to Respondent-Tenants' "primary residence", which Petitioner argues is a factor to be considered in an illegal sublet holdover as a matter of law. In addition to the documents already submitted showing Respondent Idi at another apartment in the Bronx on Darrow Place, copies of more recent income and banking statements in Respondent Idi's name at the Darrow Place address accompany Petitioner's attorney's affirmation in opposition.

On reply, Respondent-Tenants argue that, as a matter of law, the case rests on their familial relationship with the alleged illegal sublessee, as to which no issues of fact have been raised, not the length of the alleged sublessee's connection to the apartment. Further, if Petitioner believes they are not occupying the premises as their primary residence, Respondent-Tenants argue, it must bring a proceeding based on that claim, not on illegal sublet. As to Petitioner's claim of insufficient proof of Vincent's residence, Respondent-Tenants argue that where he lives is irrelevant, given that he is a family member. Further, Respondent-Tenants assert that prior to this motion practice Petitioner was given a letter dated December 18, 2021 (Exhibit A to Reply Affirmation), from the person whose apartment Vincent rents a room in on Woodycrest Avenue in the Bronx.

After briefing was completed, the motion and cross-motion were argued on April 25, 2022 and marked submitted, decision reserved. The motions are consolidated herein for disposition.

DISCUSSION

Respondents' cross-motion for partial summary judgment will be addressed first. Under CPLR § 3212(b), to obtain summary judgment, the movant must establish their cause of action or defense sufficiently to warrant a court's directing judgment in their favor as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v New York Univ Med Center* (64 NY2d 851, 853 [1985]); *Zuckerman v City of New York* (49 NY2d 557, 562, 427 NYS2d 595 [1980]). Once this showing has been made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial. Mere conclusions,

expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a motion for summary judgment. *Alvarez v Prospect Hospital* (68 NY2d 320, 324, 508 NYS2d 923, 925-926 [1986]); *Zuckerman, supra* (49 NY2d at 562, 427 NYS2d at 598).

Where the opposing party offers nothing but conclusory assertions and tenders no evidentiary proof, summary judgment to the moving party is appropriate. *Friends of Animals, Inc v Associated Fur Mfrs* (46 NY2d 1065, 1067-1068, 416 NYS2d 790, 792 [1979]); *Indig v Finkelstein* (23 NY2d 728, 296 NYS2d 370[1968]). An opposing affidavit should indicate that it is being made by one having personal knowledge of the facts. *S J Capelin Associates, Inc v Globe Mfg Corp* (34 NY2d 338, 342, 357 NYS2d 478, 481 [1974]). The existence of a factual issue cannot be established on the hearsay information of one with no personal knowledge of the facts. *Zuckerman v City of New York, supra*. *See also, e.g., Matter of New York City Asbestos Litig* (123 AD3d 498, 1 NYS3d 20 [1st Dept 2014]).

Here, Respondent-Tenants' defense upon which they seek partial summary judgment is that they do reside in their apartment and have not sublet it to Vincent "Doe", an immediate family member who, while frequently present in the apartment, lives elsewhere. The law is clear that there can be no illegal sublet where the alleged sublessee is the tenant of record's family member and no evidence of a sublease has been presented. *235 W 71 St LLC v Chechak* (16 AD3d 242, 790 NYS2d 871 [1st Dep't 2005]); *Morris Asset Mgmt, LLC v Hammel* (34 Misc3d 148[A], 950 NYS2d 609 [App Term 1st Dep't 2012]). The reason for this is that tenants are permitted to have their immediate family members live with them. *See* New York Real Property § 235-f ("Unlawful restrictions on occupancy").

The supporting sworn affidavit of Respondent-Tenant Idi, along with the attached documents – specifically the Baptismal Certificates for herself and her brother Vincent Ezerioha and her Verified Answer - constitute sufficient evidence to meet Respondent-Tenants' burden as proponent of a summary judgment motion. As Respondent-Tenants have made a *prima facie* showing of entitlement to judgment as a matter of law on their defense, the burden of proof shifts to Petitioner to demonstrate the existence of material issues of fact warranting denial of the motion. *Alvarez v Prospect Hosp, supra*; *Winegrad v New York Univ Med Center, supra; Zuckerman v City of New York*, *supra*.

No such material issues of fact have been shown to exist. Petitioner has not contested that Vincent Ezerioha, sued as Vincent "Doe", is the brother of Respondent-Tenant Idi and son of Respondent-Tenant Gloria Ezerioha and has offered no evidence of an illegal sublet in opposition to Respondent-Tenant Idi's sworn statements in her affidavit and Verified Answer denying any such illegal sublet. Petitioner's opposition to the motion consists solely of the affirmation of its attorney and, attached to that affirmation, additional banking and earnings statements for Respondent-Tenant Idi showing her to have an address on Darrow Place, not at the subject premises. Not only is the affirmation "without evidentiary value and thus unavailing" as the affirmant demonstrates no personal knowledge of the facts, *Zuckerman v New York, supra* (49 NY2d at 563, 404 NE2d at 720, 427 NYS2d at 598), but it raises no factual

dispute about the immediate family relationship among Respondent-Tenant Idi, Respondent-Tenant Gloria Ezerioha and Respondent-Occupant Vincent "Doe" and offers no evidence to contradict Respondent-Tenant Idi's denial of the existence of any sublet agreement and her explanation about Vincent's limited connection to the premises.

Instead, Petitioner focuses on the inapposite claims that Respondent-Tenants "failed to establish whether Vincent Doe's connection to the Subject Premises is longstanding," Affirmation in Opposition at ¶ 12, and are not using the premises as their primary residence, Affirmation in Opposition at ¶ 14. As Respondent-Tenants' position is that they do reside in the subject premises and that Vincent – who has not appeared – comes often to babysit but does not live with them, the length of Vincent's connection to the apartment is of no import. That is, whether Vincent has been babysitting his nephew over a short or long period of time is not a material fact. Further, where a landlord's evidence focusses on a theory that the tenants are not using an apartment as their primary residence a claim of illegal sublet does not lie. *PLWJ Realty, Inc v Gonzalez* (285 AD2d 370, 726 NYS2d 858 [1st Dep't 2001]).

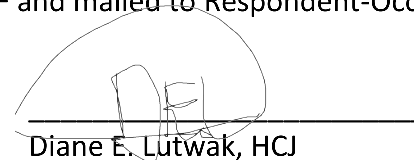
Petitioner correctly points out that Respondent-Tenant Idi has not offered any explanation for why her financial documents she provided Petitioner list an address other than the subject premises. However, if Petitioner believes that Respondent-Tenant Idi lives at the Darrow Place apartment and that Respondent-Tenant Gloria Ezerioha also primarily resides elsewhere, rather than proceeding under an illegal sublet theory it instead must follow other procedures for terminating their tenancy. *235 W 71 St LLC v Chechak*, *supra*.

That Respondent-Tenant Idi does not mention any "John Doe" in her supporting affidavit is also of no moment. She does include a sworn statement as to who lives in the apartment – herself, her son and her mother – and a sworn statement that her brother Vincent does not live with her. Petitioner did not oppose Respondent-Tenants' motion with an affidavit of anyone with personal knowledge asserting any facts to support a claim that there is a "John Doe" sublessee residing at the premises. Even if Respondent-Tenants did have another, non-family member living with them, this would not constitute an illegal sublet and would be protected under Real Property Law § 235-f, which, in addition to "immediate family", allows tenants to have one or more other "occupants" reside with them. Further, in her Verified Answer's "Second Defense", where Respondent-Tenant Idi denies any sublet, she explains who Vincent "Doe" is and asserts that, "He, his girlfriend, and his twin brother often visit the premises to babysit Respondent's son while she is working." Verified Answer at ¶ 13.

As Petitioner opposed Respondents' motion only with "mere conclusions, expressions of hope or unsubstantiated allegations or assertions," *Zuckerman v New York* (49 NY2d at 563-564, 427 NYS2d at 598), and failed to raise any material issues of fact, Respondents' motion for partial summary judgment on Petitioner's illegal sublet claim must be granted. Accordingly, Petitioner's motion for discovery on the illegal sublet claim is denied as moot.

CONCLUSION

For the foregoing reasons, it is hereby ORDERED that Respondent-Tenants' motion for partial summary judgment is granted, the illegal sublet claim in the Petition is dismissed, Petitioner's motion for discovery on its illegal sublet claim is denied as moot and the parties and their counsel shall appear for an in-person, pre-trial conference on Petitioner's remaining claim of failure to comply with household composition and income recertification requirements **in Resolution Part C on June 2, 2022 at 2:30 p.m.** This constitutes the Decision and Order of this Court, copies of which are being uploaded on NYSCEF and mailed to Respondent-Occupants at the premises.



Diane E. Lutwak, HCJ

Dated: Bronx, New York
May 11, 2022

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Unrepresented Respondent-Occupants

Vincent Ezerioha (sued as Vincent "Doe")
870 Southern Boulevard, Apt. 1A, a/k/a 001A
Bronx, New York 10459

"John Doe"
870 Southern Boulevard, Apt. 1A, a/k/a 001A, Bronx, New York 10459

"Jane Doe"
870 Southern Boulevard, Apt. 1A, a/k/a 001A, Bronx, New York 10459