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NEW CHOICE INC. v. DOE

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

NEW CHOICE INC.,
Petitioner,
against

Index No. LT-073403-19/QU

Decision/Order
After Trial

GARY MORGAN, BARRY BATTS,
TECKLA HARDING,
JOHN DOE and JANE DOE,
116 Beach 61 Street
All Rooms on the Second Floor
Arverne, New York 11692
Respondents.

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

NEW CHOICE INC.,
Petitioner,
against

Index No. LT-073404-19/QU

Decision/Order

JOHN DOE and JANE DOE,
116 Beach 61 Street
All Rooms in the Basement Apartment
Arverne, New York 11692
Respondents.

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

NEW CHOICE INC.,
Petitioner,
against

Index No. LT-073405-19/QU

Decision/Order

CHRISTOPHER SUTTON,
RENDEROS MANUEL,
HOWARD MARK,
JOHN DOE and JANE DOE
116 Beach 61 Street
All Rooms on the First Floor
Arverne, New York 11692
Respondents.

HON. ENEDINA PILAR SANCHEZ,

Procedural History:

These three cases are summary post-foreclosure holdover proceedings. They were filed on December 19, 2019. These cases seemed to have appeared on the calendar in January 2020 and then adjourned. On or about March 11, 2020, the COVID-19 pandemic was declared. The cases were placed on pause. In December 2020, case LT-073403-19/QU was converted to electronic documents by the stipulation of two attorneys. (NYSCEF Doc 2)

Regarding LT-073403-19/QU, the premises are identified as 116 Beach 61st Street, Second Floor, Arverne, New York 11692. The two other cases concerning the subject building are LT-073404-19/QU seeking possession of All Rooms in the Basement Apartment, and LT-073405-19/QU seeking possession of All Rooms on the First Floor.

In sum, petitioner alleges that respondents are licensees, of the corresponding floors and they are holding over after the house was foreclosed. The house has three floors and petitioner has filed a holdover corresponding to each floor in the house.

The trial was held regarding the Second Floor (LT-073403-19/QU), the petition seeks possession of all the rooms on the Second Floor. Respondent Teckla Harding appeared by counsel and filed an Answer. The Answer is dated May 19, 2022. It asserts that the house is a multiple dwelling, and it is a “6-unit SRO built prior to 1974 and therefore subject to the Rent Stabilization Law.” The Answer contains 8 defenses and a counterclaim alleging harassment under §27-2005(d) of the New York City Administrative Code. (NYSCEF Doc.5)

No other respondent appeared by counsel or filed an Answer. Some respondents never appeared in court.

At one point petitioner’s counsel had sought sanctions against respondent’s counsel, the Legal Aid Society. Pursuant to the *January 19, 2022 Decision/Order* of Hon. S. Jimenez the motions for sanctions were withdrawn and the court warned counsel that “*seeking sanctions as a knee-jerk opposition to motions is something the court may consider sua sponte sanctionable in the future.*”

The cases were adjourned to February 24, 2022, to be transferred to Part X for trial.

The Trial:
Petitioner’s Case:

Petitioner called Krishna Lakharam as its witness. He was sworn in and testified that he is the agent of the petitioner. He has been a licensed real estate broker for 20 years. He is familiar with the subject property and the area of Arverne. He stated that based upon his knowledge of the neighborhood and observation, the area is mostly zone for 1-2 family homes.

He testified that petitioner is the owner of the property. Petitioner presented a Referee’s Deed to the subject premises which was admitted into evidence as P’s1. The property was sold

because of a foreclose action and petitioner was the highest bidder. Mr. Lakharam stated that he was present at the closing and recognizes the seller's signature.

Mr. Lakharam testified that he met Ms. Harding approximately 15 years ago. She asked him to rent a space inside her house on her behalf. That is how he knows the configuration of the Second Floor. He knows that the Second Floor has three bedrooms, a living room, a dining room, a kitchen, and a bathroom. He is not aware of the living arrangements between the occupants of the home. He does not know how many people are residing on the Second Floor.

He testified that he was not given access to the Second Floor after the sale. He stated that he recognized respondent Harding as the prior owner, he saw her but did not have a conversation with her at that time. The time frame for this attempted inspection is not clear.

The signature on the predicate notice was identified. The witness stated that respondents have not vacated the Second Floor. Petitioner asked the Court to take judicial notice of the predicate notice and the affidavits of service in the court file.

Petitioner then made an oral motion to amend the petition and notice of petitioner based upon the proof presented. No other witnesses were presented by the petitioner.

Respondent's counsel made an oral application for a "directed verdict" because the Second Floor does not identify the separate rooms. Petitioner counsel opined that in a post foreclosure case petitioner does not have to bring a case against each individual room occupant but against the entire Second Floor. The pleading does not identify separate rooms.

On cross-examination Mr. Lakharam was questioned about the buildings around the subject premises. He was cross-examined about the 3 respondents named in the Second Floor case. The witness stated that he came to know of these other individuals when he called the City Program called CityFHEPS. He learned that Gary Morgan and Barry Batts have CityFHEPS.

On further cross-examination, Mr. Lakharam was asked to examine the Notice of Termination, specifically paragraph 3, and he stated that it does not say that there are separate units on the Second Floor.

Mr. Lakharam was asked to review the first page of the petition, specifically paragraph 2. Paragraph 2 of the petition states that *respondents are the occupants of the premises, who occupies [sic] the premises for dwelling purposes and who entered into possession heretofore and continued therein pursuant to said agreement*. Over petitioner's counsel's objection, respondent asked about, "said agreement." Mr. Lakharam stated that there was no agreement. He stated that there are no terms, no lease terms, no monthly rent, and no rental agreement.

Mr. Lakharam was asked to read Paragraph 6 of the petition. Paragraph 6 states that the premises are not subject to Rent Stabilization Law. Upon further questioning, petitioner stated that the house was built around 1940.

Mr. Lakharam was cross-examined about Gary Morgan and Barry Batts, who are alleged to reside on the Second Floor. He stated that he had no recollection. He stated that CityFHEPS was called because a tenant living on the First Floor, Howard Mark, told him about CityFHEPS¹ and the Second Floor occupants.

Petitioner requested a final judgment of possession and rested.

Respondent' Case:

Respondent Teckla Harding was sworn in and testified that she lives in Room (Unit) 1 located on the Second Floor. She testified that she has lived there since 2004. The house was left to her by her mother. She testified that Barry Batts lives in Room 3 and Gary Morgan lives in Room 2 in the Second Floor Apartment. Gary Morgan and Barry Batts were stated to have been "brought into the house" by the Linc Program sometime in May 2018.

Regarding the First Floor, Ms. Harding testified that Mark Howard is in Room 3; that Christopher Sutton is in Room 2; and that Manuel Renderos is in Room 1. Respondent Harding testified that she met Manuel Renderos and Christopher Sutton in December 2014. Mark Howard was "brought" in through the Linc Program in March 2018. She described her connection to these other respondents as that of "landlord/tenant relationship."

Respondent Harding testified that these respondents, she called them tenants, do not have access to each other's unit. Respondent Harding offered as evidence photographs of the First and Second Floor doors to each rented room with numbers on the doors. The photographs were admitted into evidence as (R's A-H).

On the Second Floor, respondent Harding testified that her unit, Room 1, has its own bathroom. The other two units on the Second Floor share a bathroom. The First Floor's bathroom is located on the right side of the hallway. All the tenants on the First Floor share the same bathroom. The basement is for storage.

Respondent Harding testified that she placed the number on each door in 2014. She testified that she was required to do so by the Linc Program. She was required to show that each unit is assigned to a tenant and separate. Respondent testified that the Linc Program became CityFHEPS. The other respondents shared the kitchen, the living room and dining room.

On cross-examination respondent Harding testified that she lived in the house as a child. She was questioned about litigation in the Supreme Court of Queens County regarding the title to this property. She stated that she had an attorney representing her in that matter and that the Supreme Court "took title" without notice to her. During cross-examination she was asked if the Supreme Court decision was appealed.

Respondent further stated that she was not asked by petitioner to give access, to pay rent and that petitioner sought to enter the basement without the consent of the respondent.

¹ Howard Marks in named as a respondent in the case for the First Floor. LT-073405-19/QU. There is no indication that respondent Howard Marks appeared in the holdover relating to the First Floor.

On re-direct respondent Harding testified that petitioner did not ask to pay the electric bill, the maintenance or to enter the premises. Respondent rested on her defenses.

Petitioner's Rebuttal:

Petitioner called Edward Sawchuk as it's rebuttal witness. Mr. Sawchuk was sworn in and testified as to his credentials as an attorney and a professional engineer. His work as an engineer includes the New York City building code and he addresses building code violations. He testified that he has been hired by the City of New York, by various firms, and by the attorney general to address violations with ECB. He now works on his own.

Mr. Sawchuk had the occasion to inspect the house on or about August 5, 2022. He viewed what type of structure it is and its occupancy. On the said inspection day, he saw a 2-family house. He visited the First Floor and had limited access for about half-hour. He stated that the zoning for this property is R6. This means that a multiple family dwelling is allowed. He stated that the premises are not fireproof and that to have a legal 6 family it would be required to be fireproof. On the First Floor he saw three rooms, a kitchen, a bathroom, small hallway, and a front room. Two doors were closed and one person (called a tenant by the witness) gave access to the room. While he had access to one door, he did not speak to the tenant in the room.

He did not have access to the Second Floor because the door was locked. The basement door was also locked, and he did not have access.

Mr. Sawchuk was asked to state his opinion as to the First Floor and whether it can be made into a legal Single Room Occupancy residence (SRO) or multiple family dwelling. The witness stated that the house would have to be demolished and "built something new."

On cross-examination, Mr. Sawchuk was questioned about his credentials and whether he had practiced in landlord/tenant law. He replied that he has been an attorney since 1985. He has not practiced in the landlord/tenant field. He was asked if he has ever seen more than 2 families living in a 2-family house. He stated that he has seen people occupy [space] contrary to the multiple dwelling [law].

He was asked how many doors he saw, and the witness stated that he walked around the exterior of the building and he saw 3 entrance doors.

The parties rested and respective counsels were permitted to make their closing statements. In summary, respondent argued that a summary holdover proceeding requires that petitioner describe the premises sought to be recovered and that in this case it has failed to do so. Both sides gave testimony about multiple units occupied by different respondents. Respondent further argued that the building was erected prior to 1972 and it is a *defacto* Rent Stabilized building because there are 6 separate units.

Petitioner seeks a final judgment of possession and argued that the testimony of respondent Harding, while given with particularity, was not supported by the testimony of other tenants in the building. It argued that respondent failed to present any witness in support of the defense presented. Petitioner argued that it has describe "all rooms" on the Second Floor and

this is sufficient. Respondent cannot prove that the building has 6-units to come under the Rent Stabilization rules. It argued that the testimony of Mr. Sawchuk confirms that one cannot legalize the structure into a legal Rent Stabilized building. Petitioner asked the court to draw a negative inference in its favor as no other occupant testified in court.

The attorneys agreed to submit respective letter brief in support of their arguments. Regarding the holdover for the First Floor and the Basement, it was agreed that those cases would be adjourned for trial or dismissed based upon the decision for the Second Floor case.

Discussion and Conclusion:

Summary proceedings are a creature of statute and “*there must be strict compliance with the statutory requirements to give the court jurisdiction.*” *MSG Pomp Corp v. Doe*, 185 A.D.2d 798 [1st Dept 1992] See also, *Matter of Volunteers of America-Greater N.Y., Inc. v. Almonte*, 65 A.D.3d 1155 [2nd Dept. 2009].

Real Property Actions and Proceedings Law (RPAPL)§741(3) requires that the petition “*describe the premises from which removal is sought.*” It is well settled that “*the petition must contain a proper description of the premises involved so that [the premises] may be identified with certainty. Clearly, if the warrant is to be execute properly, the premises must be identified properly, and with certainty, so that the officer executing the warrant will be enabled to locate the premises from such description*” See, *US Airways, Inc. v. Everything Yogurt Brands, Inc*, 18 Misc. 3d 134(A), [App Term, 2d, Dept, 2d and 11th Jud Dists 2008] citing 3 Dolan, Rasch’s Landlord and Tenant – Summary Proceedings §41:14, at 25 [4th ed].

The wording alone is not essential to the analysis, but rather, it is the practical application of the descriptive words to the physical space(s) of the subject premises. For example, a premises described as ‘all rooms in a building known as 123 Main Street, New York, New York’ may be adequate for a stand-alone one-story building bearing the street address of 123 Main Street, New York, New York. However, the same wording is vague when describing one unit inside of a multi-story building with multiple storefronts, tenants and various entrances and exits. 181st Washington Hgts. Associates LLC v. Children’s Place, Inc., 72 Misc. 3d 1212(A) [Civ Ct, New York County 2021]

The Notice to Vacate Property names Gary Morgan, Barry Batts, Teckla Harding, John Doe, and Jane Doe. The premises are identified as 116 Beach 61st Street, Second Floor, Arverne, New York 11692. The petition names Gary Morgan, Barry Batts, Teckla Harding, John Doe, and Jane Doe. Paragraph 3 of the petition states: The premises are described as follows: all rooms on the second floor at 116 Beach 61st Street, Arverne, NY 11692. The predicate notice and the petition both refer to the respondents as one group and the premises as a single unit. The testimony presented established that these respondents do not reside in a single unit. The predicate notice and the petition do not adequately describe the premises from which removal is sought. Unit 1 is different than Unit 2 and different than Unit 3.

The testimony of respondent Teckla Harding was undisputed. She testified that when she was the owner of the subject premises, she had rented several rooms to different tenants on

the First and the Second Floor of the house. She testified that she had individual contracts with each of her tenants. The description of the Second Floor and the First Floor as all room is ambiguous. While there are rooms on each floor, the testimony indicates that petitioner was aware that these rooms on the Second and First Floor were rented individually as units through CityFHEPS and to the different respondents.

Petitioner's witness and expert rebuttal witness did not contradict or challenge Ms. Harding's testimony in any way. Mr. Lakharam, petitioner's agent, testified that he had familiarity with Ms. Harding. She even once asked him (some years ago) to help her rent out a space in the building. Mr. Lakharam testified that he was given information about Barry Batts and Gary Morgan regarding their participation in the CityFHEPS program. He was, or should have been, aware that these respondents had rental contracts for their rooms. Mr. Sawchuk, the rebuttal witness, testified that the property is not a multiple dwelling and that for this property to become a multiple dwelling it would have to be knocked down and rebuilt. The multiple dwelling status of the property, however, is not at issue here. What is at issue here is whether the premises sought to be recovered were sufficiently described to satisfy *RPAPL §741(3)*.

The facts presented here are analogous to those in *Wells Fargo Bank, N.A. v Mekamkwe*, 64 Misc. 3d 1208(A) [Civ Ct, Bronx County 2018]. In *Mekamkwe*, the court dismissed the case for failure to comply with *RPAPL 741(3)*. There the court found that petitioner commenced three separate proceedings naming all the building occupants as occupants of all the three floors in the building without specifying which occupant occupied which unit. The court further found that petitioner's argument that it lacked requisite knowledge to provide specific descriptions of where the respondents resided within the subject building was unavailing as there was prior litigation between the parties. Petitioner had the opportunity to investigate.

An occupant can only be evicted from the space she/he occupies. *City of New York v. Mortel*, 156 Misc. 2d 305 [Civ Ct, Kings County 1992] aff 161 Misc.2d 681[App Term, 2d, Dept, 1994] *Mortel* was a holdover squatter proceeding wherein the petition described the premises as "Apt. No. HOUSE on the ALL floor consisting of ALL rooms in the premises located at 984 Sutter Ave." The court found that "Although petitioner may aver no knowledge as to the living arrangements of the respondents, petitioner did know the dwelling contained two residential units." The Appellate Term affirmed the dismissal as the petition had failed to comply with *RPAPL §741(3)*.

Here, respondent argues that since the rooms were individually rented to various persons, and through a city agency, the premises must be described specifically to know which respondent is sought to be removed from which room. Under these specific circumstances, this Court agrees with respondent and follows *Mortel*. Even though petitioner avers it was not aware of the specific living arrangements on the Second Floor, it is undisputed that petitioner was aware that Ms. Harding has rented rooms to other occupants of the premises. Mr. Lakharam was asked to assist in brokering such a rental at one time. Furthermore, Mr. Lakharam's own testimony was that he was aware of the rental arrangements for Barry Batts and Gary Morgan as he obtained the information from the CityFHEPS program similar and like the arrangement with Howard Mark, who occupies a unit of the First Floor.

Petitioner seems to have had actual knowledge of the living arrangements and it had an opportunity to investigate and describe the premises to comply with *RPAPL 741(3)*.

The *Mortel* (supra) opinion eloquently explains why an accurate description of the premises is strictly required: “...assume two occupants of separate units in the dwelling appear and enter into stipulations of settlement agreeing to vacate the premises which stipulations provide for entry of a final judgment of possession and issuance of a warrant of eviction. Supposed they do not voluntarily vacate. From which units does the Marshal evict? How can the Marshal evict as the premises described in the petition is the entire dwelling...” at 307.

In the case before this Court, petitioner has group 5 unrelated respondents, residing in separate rooms and stated that they all occupy the Second Floor. These respondents, however, reside not just on the Second Floor or First Floor but in separate and individual units. They share a common area. As in *Mortel*, there is ambiguity and from which unit does the Marshal evict each tenant? In the event of an eviction, how would the Marshal inventory the belongings when the warrant of eviction is for the entire Second Floor, but the occupants occupy distinct and individual rooms. Moreover, a warrant for all the rooms on the Second Floor would not provide adequate notice to each respondent that she or he will be removed from her or his unit.

Petitioner’s request for a missing witness charge is declined. Petitioner’s testimony provides independent evidence, and it corroborates respondent’s testimony regarding the use of units as separate and distinct. “[A] negative inference may only be drawn from the absence of reasonably anticipated testimony when there is some independent evidence presented which allows the court to make such an inference.” *SF 878 E. 176th, LLC v Molina*, 2019 NY Slip Op 51661(U), 65 Misc.3d 1216(A) [Civ Ct, Bronx County 2019] The negative inference requested is irrelevant and would not be dispositive to the undeniable finding that the petition fails to accurately describe the premises sought to be recovered. The analysis applies to the petition for the First Floor and to the petition for the Basement Space. The petition for each floor must be dismissed as it has treated separate and distinct units as one big space per floor.

Based on the above, the holdover, and the companion holdovers for the First Floor and the Basement are dismissed without prejudice for failure to satisfy *RPAPL 741(3)*. Since the matter is dismissed on procedural grounds, the Court does not need to reach the other arguments advanced by the respondent whether the subject premises are covered by Rent Stabilization.

Respondent’s claim for harassment under pursuant to §27-2005(d) of the New York City Administrative Code is severed.

Finally, the Court is asked to address the very serious allegations in respondent’s letter brief. Respondent seeks a court date to be heard as to why petitioner’s counsel should not be subject to sanctions for his conduct during this proceeding. As per the *January 19, 2022 Decision/Order of Hon. S. Jimenez*, counsels are to act professionally. All counsels are on notice that conduct that is unbecoming, such as baseless attacks, mischaracterization of the record and or insulting counsel may be sanctionable.

This Court will consider, *sua sponte*, the imposition and assessment of sanctions if such behavior continues or is repeated before this Court.

Accordingly, it is

ORDERED that the petition for the Second Floor LT-073403-19/QU; the petition for the Basement LT-073404-19/QU; and the petition for the First Floor LT-073405-19/QU are dismissed without prejudice.

This Decision/Order will be filed NYSCEF. Petitioner is directed to mail a copy of this Decision/Order to each of the named and unrepresented respondents via First Class Mail by August 15, 2023, and file proof of mailing to NYSCEF using Index No. LT-073403-19/QU.

This constitutes the Decision/Order of the court.

Dated: July 30, 2023
Queens, New York

So Ordered:

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JHC

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