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McDonagh v. Kelleher

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McDonagh v Kelleher
2023 NY Slip Op 50815(U)
Decided on August 2, 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.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on August 2, 2023

Civil Court of the City of New York, Queens County

<p>Robert McDonagh, Helen McDonagh, Petitioners,</p> <p>against</p> <p>Catherine Kelleher, MICHAEL CAPAIN, JOHN DOE, JANE DOE, Respondents.</p>

Index No. L&T 301017/22

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Clinton J. Guthrie, J.

The Decision/Order after trial/inquest is as follows.

PROCEDURAL HISTORY

This holdover proceeding based on a 90-day notice of termination was filed in January

2022. After an ERAP application was filed by Michael Copas (an unnamed respondent herein), petitioner moved to vacate the stay imposed by the ERAP filing. By Decision/Order of Judge Kimon C. Thermos dated February 15, 2023, the ERAP stay was vacated and the case was transferred to Part X for trial. This court held a pretrial conference on July 19, 2023. The case was adjourned to August 1, 2023 for trial. On August 1, 2023, petitioner Robert McDonagh, his attorney, and Michael Copas appeared for trial. No other respondent appeared. After the court denied a further request for an adjournment by Mr. Copas on the record, a trial/inquest was held and decision was reserved upon its conclusion.

TRIAL/INQUEST

Robert McDonagh was the sole witness for petitioners at the trial/inquest. Mr. McDonagh testified that he is an owner of the subject building. He testified about the original deed, which lists both petitioners as grantees. The deed was admitted as petitioner's Exhibit 1.

Mr. McDonagh testified that he rented the 2nd Floor unit of the subject building to Catherine Kelleher. He further testified that he had a lease with Ms. Kelleher, but that it had expired. Mr. McDonagh stated that in September 2019, a renewal lease was sent to Ms. Kelleher but that it was not signed. Thereafter, he commenced a nonpayment proceeding, which was [*2] discontinued after LRAP (Landlord Rental Assistance Program) assistance was paid for the relevant arrears.

Mr. McDonagh testified that his signature appeared on the 90-day notice of termination. The court also took judicial notice of the affidavit of service annexed to the 90-day notice on NYSCEF. Mr. McDonagh testified that he had previously received a hardship declaration from respondents and that they had not vacated. Upon petitioners' attorneys' request, the court also took judicial notice of the pleadings and affidavits of service on NYSCEF.

Mr. McDonagh testified that the subject building is a 2-family building. He stated that the subject premises is not subject to any subsidy or other regulation. When asked what he received from LRAP, Mr. McDonagh testified that he received 12 months of rent at \$1,950.00 per month. The court admitted the LRAP approval as petitioners' Exhibit 3.

Mr. McDonagh was asked if over a year had elapsed from his acceptance of LRAP funds. He testified that it had. He also stated that he had received no other payments from respondents since LRAP paid. The court admitted a rent statement including rent from

December 2019 to present as petitioners' Exhibit 2. Mr. McDonagh testified that the total rent/use and occupancy due was \$62,400.00. Mr. McDonagh testified that he was not sure if Ms. Kelleher was still living in the subject premises but stated that her daughter may be living there.

On cross-examination, Mr. McDonagh was asked by Mr. Copas how much rent he used to pay. Mr. McDonagh replied that the first lease was for \$1,750.00 and that he sent another.

Upon conclusion of the cross-examination, petitioner requested that the court conform the pleadings to the proof and permit amendment of the pleadings to reflect "Michael Copas" in place of "Michael Capain" and to grant the relief sought in the petition. Thereupon petitioners rested.

Mr. Copas testified that he lives in the subject premises. He reiterated that he was hoping to get an adjournment. He stated that he had lived in the subject premises since 2014. He further stated that he had not worked for a year and a half during the COVID-19 pandemic. He stated that he did not make what he used to make. He explained that by applying for LRAP, Mr. McDonagh had caused him to lose out on 3 additional months of rent assistance and \$2,000.00 in utility assistance through the ERAP (Emergency Rental Assistance Program). He testified that he and Ms. Kelleher were paying \$1,750.00, not \$1,950.00, as was reflected in the LRAP approval.

On cross-examination, Mr. Copas was asked if Ms. Kelleher was still residing in the subject premises. He replied in the affirmative. He was asked if Ms. Kelleher was in the military or dependent on anyone in the military. He replied in the negative to both questions. He also confirmed that Ms. Kelleher knew about the trial date. The cross-examination ended with questions about Ms. Kelleher's employment status and history but the court ultimately sustained an objection to the line of questions.

DETERMINATION/CONCLUSION

Upon due consideration of the trial/inquest evidence and testimony, the court finds that petitioner is entitled to a final judgment of possession against Catherine Kelleher and Michael Copas. The court grants the application at trial to amend the pleadings and captions to reflect the name "Michael Copas" in place of "Michael Capain," in order to conform the pleadings to the proof at trial. *See* CPLR § 3025(c). The evidence, testimony, and pleadings established petitioner's prima facie case under Real Property Law §§ 226-c and 232-a against

Catherine [*3]Kelleher and Michael Copas, who were both acknowledged to be current occupants. No defense was proven to defeat the prima facie case.

The case is dismissed without prejudice against John Doe and Jane Doe. Mr. McDonagh gave equivocal testimony about whether Ms. Kelleher's daughter was living in the subject premises and could not even say if she was an adult or a minor. The use of fictitiously-named respondents as placeholders is not compatible with the law. Due diligence must be exercised before a John Doe or Jane Doe is named ([see *Wilmington Trust, N.A. v. Shasho*, 197 AD3d 534, 536 \[2d Dept 2021\]](#) [citing CPLR § 1024]; [Michaelangelo Preserv., LLC v. Burgos](#), 75 Misc 3d 1209[A], 2022 NY Slip Op 50424[U] [Civ Ct, Bronx County 2022]). No testimony was presented to describe any investigation before naming John Doe and Jane Doe herein.

The court denies without prejudice the use and occupancy claims against respondents. Ms. Kelleher, who defaulted, was only served by affix-and-mail service. Since affix-and-mail service with no explanation of due diligence does not comport with the CPLR § 308, no monetary judgment against Ms. Kelleher can be granted in this summary proceeding ([see *Merrbill Holdings, LLC v. Toscano*, 59 Misc 3d 129\[A\]](#), 2018 NY Slip Op 50410[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2018]; [Avgush v. Berrahu](#), 17 Misc 3d 85 [App Term, 2d Dept, 9th & 10th Jud Dists 2007]); *see also Prego v. Bartkowski*, 216 AD3d 679, 681 [2d Dept 2023]). As for any use and occupancy against Michael Copas, petitioner did not sustain its burden of proof at the trial/inquest. Petitioners attempted to show that \$1,950.00 was owed per month in rent/use and occupancy but presented no expired lease or proof of any other agreement setting the rent at that amount or the value of rentals for comparable premises ([see *Vanchev v. Mulligan*, 52 Misc 3d 138\[A\]](#), 2016 NY Slip Op 51121[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2016]). Indeed, Mr. McDonagh testified that petitioner had only sent a lease for \$1,950.00 to respondents but did not state that it was executed. Petitioners' claims for use and occupancy are reserved for a plenary action.

A warrant of eviction shall issue forthwith. The testimony given by Mr. Copas about Ms. Kelleher's lack of military status/dependency was sufficient to dispense with the filing of any non-military affidavit. Execution of the warrant shall be stayed through September 30, 2023 to permit respondents the opportunity to vacate the subject premises. Upon default, petitioner may execute upon the warrant after service of a marshal's notice (*see* RPAPL § 749(2)). The EED shall be October 2, 2023. Adult Protective Services (APS) shall be notified prior to execution, in light of Mr. Copas' statements about Ms. Kelleher being ill. This Decision/Order will be filed to NYSCEF and copies will be emailed to Mr. Copas and mailed to all respondents at the subject premises.

The parties are directed to pick up their exhibits within 35 days or they will be sent to the parties or destroyed at the court's discretion in accordance with DRP-185.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Queens, New York

August 2, 2023

CLINTON J. GUTHRIE, J.H.C.

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