2020-03-10

Nixon v. Henry

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

LATOYA NIXON,
Petitioner,
Against
\MARK HENRY,
Respondent.

L&T Index No. 010391/20
Decision and Order After Hearing

HON. ENEDINA PILAR SANCHEZ

This is an alleged illegal lockout proceeding. Petitioner seeks to be restored to possession of 159-01 116th Avenue, Basement Unit, Jamaica, NY 11434. Petitioner also seeks to enjoin respondent from "further harassment of Petitioner[1]."

On February 27, 2020, both parties appeared by counsel. Respondent filed an answer which contained four Affirmative Defenses. The First Affirmative Defense alleged improper services. The Second Affirmative Defense alleged that petitioner voluntarily surrendered possession of the premises. The Third Affirmative Defense alleged that the unit could not be legally occupied. The Fourth Affirmative Defense alleged that the premises were uninhabitable.

Respondent waived his First Affirmative Defense and consented to the jurisdiction of the Court. A hearing on the issue of the illegal lockout ensued[2].

There is no dispute that petitioner Latoya Nixon lived in the "Basement Unit" of the subject premises. The dispute arises as to whether petitioner vacated the premises or whether respondent unlawfully locked her out.

Petitioner's Case:

Latoya Nixon was sworn in and credibly testified that she has lived in the basement "room 2" for the past several years. She testified that respondent Mark Henry lives on the first floor. "Stephanie and family" live on the second floor. Dell, Smokey, Jodie and the petitioner live in the basement unit. Each of them has a room and shares a bathroom and cooking facilities.

On December 15, 2019, petitioner could not enter the Basement Unit because one of the locks was changed. Petitioner testified that she called the police and that the occupant of room 4, Smokey, let her in. Petitioner took another photo of her room (*Petitioner's 4*). The photo shows the same room as *Petitioner's 3*, however, the bed is missing. The photograph shows various personal items on the floor including medications, personal hygiene items and clothing.

On or about December 21, 2019, petitioner returned home and found that the key to the top lock did not work. She called the police. The police made the respondent change the locks.

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[1] The Court notes that while the Order to Show Cause seeks that respondent be enjoined from "further harassment" of petitioner, there was no testimony regarding harassment or harassing behavior during the hearing. The Court cannot enjoin respondent from "further harassment" if there is no underlying finding of harassment.

[2] Parties were to submit post-trial briefs on or before March 3, 2020. Petitioner's brief was submitted timely. Respondent did not submit a post-trial brief.

After December 21, 2019, respondent did not say much to the petitioner. Petitioner was "kept out" on various occasions and one of the roommates would let her in.

On January 9, 2020, petitioner was locked out again. She called the police. Police came and gave her permission to enter her room through the window in her room. Ms. Nixon took a photo (*Petitioner's 6*) which shows that the room was "destroyed." More specifically, petitioner testified that the walls and ceiling were damaged. *Petitioner's 6* shows a large section of the wall to be damaged, to wit, the drywall was broken, and the insulation was visible. It appears that pieces of drywall and debris are on the floor.

On January 13, 2020, petitioner was locked out again. The door to her room was locked and everything was removed. Ms. Nixon called the police and filed an incident report for an illegal eviction. After January 13, 2020, Ms. Nixon did not attempt to go back to the room but attempted to contact the respondent and worked with the police instead.

Upon cross-examination, petitioner stated that she did not have any police reports for the incidents on December 15, 2019 and December 21, 2019. She explained that she did not ask for a police report because she was restored to possession and thought the issue was resolved.

Petitioner stated that sometime in December 2019, she had a conversation with respondent about moving out but there was no final agreement and she did not give him a move out date.

Respondent's Case:

Respondent, Mark Henry was sworn in and testified that he lives at the subject building. He testified that petitioner lived in the basement at one time. She was not paying rent. Mr. Henry stated that on many occasions, petitioner said she will move out.

Mr. Henry disputes that he locked her out on December 15, 2019. He did not get any calls from the police. Respondent states that on December 15, 2019, he had a conversation with petitioner to the effect that petitioner would be leaving on December 21, 2019. On December 21, 2019, petitioner allegedly returned and asked for more time to move. She needed until December 27, 2019 to vacate.

Mr. Henry testified that on December 27, 2019, Ms. Nixon told him she was leaving. Mr. Henry testified that he saw petitioner getting into a cab with garbage bags. He felt that it was "ok to do work in her room" because he saw her leave. There was no testimony as to when exactly he saw Ms. Nixon get into a cab.

Respondent testified that on January 9, 2020, he went into petitioner's room and saw that everything was packed into bags. He moved all the bags to the kitchen. He then took down the walls and the ceiling in "room 2".

On cross-exam, respondent admitted that he demolished the walls without having any permits. He denied that he entered Ms. Nixon's room at any time prior to January 9, 2020.

Respondent testified that the petitioner agreed to move out. Respondent did not present any evidence of a written surrender. There were no written notes or emails or text messages memorializing Ms. Nixon's vacatur.

Discussion:

On June 24, 2019, *The Housing Stability and Tenant Protection Act of 2019* was passed.

Among the many changes was *RPAPL Section 768* – a section regarding unlawful evictions. The relevant section states that a person who has occupied a dwelling for thirty consecutive days cannot be removed without legal process. An eviction may be a result of "*engaging in any behavior which prevents or is intended to prevent such occupant from the lawful occupancy of such dwelling unit or to induce the occupant to vacate the dwelling unit including but not limited to, removing the occupant's possessions from the dwelling unit, removing the door at the entrance of the unit; removing, plugging or otherwise rendering the lock on such entrance door inoperable, or changing the lock on such entrance door without supplying the occupant with a key.*" *RPAPL Section 768(a)(iii)* An illegal lockout case may be found where the petitioner was in actual or constructive possession of the premises and the respondent's entry was either forcible or unlawful. *Romanello v. Hirschfield, 98 A.D.2d 657, (1st Dept., 1983),* aff'd as modified *63 N.Y.2d 613 (1984); Mondrow v. Days Inns Worldwide, Inc.*, 53 Misc.3d 85 (App. Term, 1st Dept. 2016); *Truglio v. VNO 11 East 68th Street, LLC.*, 35 Misc.3d 1227(A) (N.Y. Civ Ct., New York County 2012).

Parties agreed that Ms. Nixon was the tenant of "room 2" in the "Basement Unit" for at least 30 consecutive days. As such, she could not be removed from the premises without the benefit of legal process.

Respondent's Second Affirmative Defense alleges that Ms. Nixon surrendered the subject premises and moved out. Respondent claims that the alleged surrender gave him the right to change the locks and demolish the premises. Ms. Nixon disputes that she surrendered her room. While there were conversations as to her moving out, she disputes that she ever surrendered the subject premises.

Surrender of an apartment is defined as "a tenant's relinquishment of possession before the lease has expired, allowing the landlord to take possession and treat the lease as terminated." *Coleman v. Onsite Property Management, Inc.*, 805127/14, NYLJ, 1202664230667 (Civ. Ct. Bronx Co., 2014). Surrender can be by written document or by operation of law or by abandonment. Abandonment requires "engag[ing] in some act or failure to act that indicates that the tenant no longer has an interest in the premises. *See Malik v. Hillside Clearview Apts. Realty,* LLC, 192 Misc 2d 181 (Civ. Ct. Queens Co. 2002) When a respondent asserts that petitioner executed a valid surrender of the apartment, the respondent bears the burden of proving this defense. *see Wilson v. Raput LLC*, 60 Misc 3d 1213(A) (Civ. Ct. Bronx Co., 2018), *Sam & Mary Housing Corp. v. Jo/Sal Market Corp.*, 121 Misc2d 434 (Sup. Ct. 1983)

The testimony presented shows that Mr. Henry's action rose to the level of behavior "which prevents…such occupant from lawful occupancy of such dwelling unit…" Mr. Henry changed the locks without the benefit of legal process and made the room uninhabitable.

The Court finds that Mr. Henry did not meet his burden of proof in establishing that a valid surrender took place. Respondent's testimony was inconsistent and not credible. Respondent testified that he saw the petitioner get into a cab with some garbage bags. Putting some garbage bags in a cab, without any additional evidence, cannot be seen as a surrender or an abandonment. Respondent testified that he believed that Ms. Nixon moved out. However, he later testified that when he went into "room 2", petitioner's belongings were in garbage bags and he had to move them to the kitchen. Respondent can't have it both ways – he can't say that petitioner moved out with her things and then claim that her things were left in the premises.

There was no writing memorializing the alleged surrender. Ms. Nixon credibly testified that she did not surrender the premises. In fact, she continued to return to the premises and contacted the police to gain access. Her actions show that she did not intend to abandon her room.

Respondent's Third Affirmative Defense alleges that "it is unlawful for Respondent" (*sic)* to occupy the premises. There was no testimony provided to support the Third Affirmative Defense. As such, the Court will not consider this defense. Assuming, *arguendo*, even if it is unlawful for the petitioner to occupy the premises, she was in possession for at least 30 consecutive days. As such, she was entitled to the benefit of legal process before an eviction could take place.

Respondent's Fourth Affirmative Defense alleges that the premises are uninhabitable. Based on the testimony and the evidence presented, it is clear that petitioner's room was demolished by the respondent. Respondent's actions rendered the room uninhabitable. In *Truglio v. VNO 11 E. 68th St. LLC*, 35 Misc 3d 1227(A) (Civ. Ct. N.Y. Co. 2012), petitioner was unlawfully evicted and the premises were immediately and intentionally demolished. The Court in *Truglio* ordered the respondent to "comply with its existing legal obligations and restoring the parties to the *status quo* that existed prior to Respondent's unlawful acts." The Court finds that respondent's actions here were similar to the respondent in *Truglio*. There was no excuse or testimony regarding why the premises were demolished immediately after the alleged surrender.

Based on the above, the Court finds that petitioner has established that an unlawful eviction took place. Respondent is to restore petitioner to possession of subject premises forthwith. Petitioner is awarded a final judgment of possession for Basement Unit, Room 2 located at 159-01 116th Avenue, Jamaica, New York 11434.

RPAPL Section 768(2)(b) provides that a person who violates the provisions of *RPAPL 768* shall be subject to a civil penalty of not more than one hundred dollars per day from the date on which restoration to occupancy is requested until the date on which restoration occurs, provided, however, that such period shall not exceed six months.

Respondent is ordered to take all reasonable and necessary steps to restore Ms. Nixon to occupancy of her room in the "Basement Unit."

The Court finds that petitioner did not establish a *prima facie* case for the harassment claim.

Decision/Order:

The Court finds that respondent unlawfully evicted petitioner from the subject premises.

It is ORDERED that a final judgment of possession for Basement Unit 2 located at 159-01 116th Avenue, Jamaica, New York, 11434, is awarded to petitioner Latoya Nixon. Warrant may issue forthwith and execution of the warrant is stayed pursuant to this Decision/Order.

It is ORDERED that respondent Mark Henry is to take all reasonable and necessary steps to restore petitioner Latoya Nixon to possession of subject premises within 20 days of the service and the filing of a Notice of Entry of this Decision/Order. This means that the premises are to be restored to a habitable condition and petitioner is to be given a key.

It is ORDERED that if petitioner Latoya Nixon is not restored to possession of subject premises within 20 days of the service and the filing of the Notice of Entry of this Decision/Order, a civil penalty shall start accruing from the date this case was commenced until the date petitioner Latoya Nixon is restored to possession. The rate of the civil penalty shall be $50.00 per day.

It is ORDERED that any claims for damages are severed for a plenary action. Petitioner may seek treble damages pursuant to *RPAPL Section 853*.

It is ORDERED that upon default, petitioner may restore this proceeding by Order to Show Cause for any further relief.

Petitioner may obtain it exhibits from Part Q, Room 407.

This Decision and Order is being mailed to all parties.

This constitutes the Decision and Order of the Court.

Dated: March 10, 2020
Bronx, New York

So ordered,

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ENEDINA PILAR SANCHEZ
Judge, Housing Court

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