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### THE REALTY ENTERPRISE LLC v. WILLIAMS

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

-----X  
THE REALTY ENTERPRISE LLC,

INDEX #: 53712/18

*Petitioner,*

**DECISION/ORDER**  
**MOTION SEQ. 10**

*-against-*

LEONARD WILLIAMS, "JOHN DOE  
and "JANE DOE",

*Respondents.*

-----X  
*Present: Kimon C. Thermos, J.H.C.*

Recitation, as required by CPLR §2219(a), of the papers considered in review of the instant moving papers.

<b>Papers</b>	<b>Numbered</b>
Notice of Motion and Affirmation.....	1
Notice of Cross-Motion/Opposition, Affirmation and Annexed (Ex. A-B).....	2
Affirmation in Opposition/Reply.....	3

Appearing for Petitioner: Law Offices of Scott D. Gross, By: Scott D. Gross, Esq.  
Appearing for Respondent Leonard Williams: The Legal Aid Society, By: Atusa Mozaffari, Esq.  
and Guardian Ad Litem Jonathan Rubin  
No other respondents have appeared in this proceeding.

Upon the foregoing cited papers, the Decision/Order on this motion and cross-motion is as follows:

Petitioner commenced this holdover proceeding in accordance with RPAPL §713 against Respondent Leonard Williams ("Respondent") to recover possession of the subject rent stabilized apartment, after the death of Respondent's mother, the tenant of record, and expiration of the lease term. In the predicate Ten-Day Notice to Quit, it is alleged that Respondent is either a licensee pursuant to RPAPL §713(7), whose license to occupy expired upon the tenant's passing, or a squatter pursuant to RPAPL §713(3), who entered the apartment without the Petitioner's consent after the tenant passed away.

Respondent, by counsel, interposed an answer alleging, *inter alia*, that he is the lawful successor tenant. After protracted motion practice, mostly relating to discovery, a pre-trial conference was held and the matter was scheduled for trial. Thereafter, Respondent filed a

hardship declaration under the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (“EEFPA”). *2020 N.Y.Ch. 381*. Upon the filing of the hardship declaration, the court rescheduled the trial to May 5, 2021, a date after the presumptive stay imposed by the statute expires. (It is undisputed that the hardship declaration is otherwise sufficient to trigger the statute’s protections and would serve to stay this proceeding through the statute’s May 1, 2021 expiration date, but for Petitioner’s challenge of the hardship declaration as discussed below).

Petitioner now moves for an Order finding that Respondent’s hardship declaration does not serve to effectuate a stay of this proceeding through May 1, 2021, because the nature of Respondent’s occupancy does not fall within the definition of “tenant” as defined in the EEFPA and, therefore, he is not eligible for the protective stay under the statute.

In opposition, Respondent argues that he is a “tenant” as defined by the EEFPA, since he is a protected occupant as the licensee of his deceased mother and since he became liable for the payment of use and occupancy by Court Order.

Respondent also cross moves for dismissal of the petition pursuant to CPLR §3211(a)(7) for failure to state a cause of action and pursuant to CPLR §3212, seeking a grant of summary judgment in his favor on the basis that the alternative licensee/squatter grounds alleged in the predicate notice, in addition to creating a facial insufficiency of the notice requiring dismissal, also results in confusion and unfair prejudice because, on the squatter grounds, Respondent would lack standing as a “tenant” under EEFPA. Respondent also seeks legal fees and costs.

In opposing the cross-motion, Petitioner argues, *inter alia*, that Respondent is improperly basing his request for summary judgment on a defense that was never pleaded, since Respondent withdrew this potential defense when he withdrew a motion to amend his answer. Similarly, Petitioner contends that Respondent’s request for dismissal of the petition for failure to state a cause of action must be denied, since there is no facial insufficiency, confusion or unfair prejudice, as the law permits alternative licensee/squatter grounds to be alleged in a predicate notice.

The Court will first address Respondent’s cross-motion. Respondent’s request for summary judgment is denied, as Respondent’s application is not based upon a properly pleaded affirmative defense. As argued by Petitioner, Respondent previously withdrew his request to amend his answer to include this defense. Therefore, as the defense was not asserted in a properly filed and served pleading, it cannot serve as a basis for a summary judgment motion.

Next, Respondent's request for relief under CPLR §3211(a)(7) is also denied, since Respondent's argument that Petitioner's alternative theories of liability subjects the petition to dismissal for failure to state a cause of action is unavailing. The alternative pleading in this case has been held to be sufficient in the Second Department Appellate Term for the 2<sup>nd</sup> & 11<sup>th</sup> Judicial District, where this Court sits. See, *Kew Gardens Portfolio Holdings LLC v Bucheli*, 69 Misc.3d 129A (App. Term 2<sup>nd</sup> Dept., 2<sup>nd</sup> & 11<sup>th</sup> Jud. Dists. 2020), where the court held that a licensee/squatter alternative pleading does not create unfair prejudice or confusion, but instead was reasonable under the attendant circumstances of the tenant's death and sufficient to enable the occupants to prepare a defense. As such, those branches of Respondent's cross-motion seeking dismissal of the petition pursuant to CPLR §3211(a)(7) and CPLR §3212 are denied. Similarly, Respondent's request for legal fees and costs is also denied, in light of the denial of the other branches of the motion.

As for Petitioner's motion, the relevant sections of Part A of the EEFPA state as follows:

“Section 1. Definitions. For the purposes of this act: ...3. “Tenant” includes a residential tenant, lawful occupant of a dwelling unit, or any other person responsible for paying rent, use and occupancy, or any other financial obligation under a residential lease or tenancy agreement but does not include a residential tenant or lawful occupant with a seasonal use lease where such tenant has a primary residence to which to return to.

...Section 6. Pending proceedings. In any eviction proceeding in which an eviction warrant has not been issued, including eviction proceedings filed on or before March 7, 2020, if the tenant provides a hardship declaration to the petitioner, the court, or an agent of the petitioner or the court, the eviction proceeding shall be stayed until at least May 1, 2021. If such hardship declaration is provided to the petitioner or agent, such petitioner or agent shall promptly file it with the court, advising the court in writing the index number of all relevant cases.

...Section 11. Rebuttable presumption. A hardship declaration in which the tenant has selected the option indicating a financial hardship shall create a rebuttable presumption that the tenant is experiencing financial hardship, in any judicial or administrative proceeding that may be brought, for the purposes of establishing a defense under chapter 127 of the laws of 2020, an executive order of the governor or any other local or state law, order or regulation restricting the eviction of a tenant suffering from a financial hardship during or due to COVID-19 provided that the absence of a hardship declaration shall not create a presumption that a financial hardship is not present.”

Herein, Petitioner seeks to rebut the presumption created by Respondent's filed hardship declaration on the basis that Respondent is not a "tenant" as defined in Part A, Section 1(3), of the EEFPA, because he is neither a "residential tenant" nor a "lawful occupant." Petitioner contends that, even if Respondent was a licensee of the deceased tenant of record, he became an unlawful occupant upon her demise. In addition, Petitioner argues that Respondent is not "any other person responsible for paying rent, use and occupancy, or any other financial obligation under a residential lease or tenancy agreement" under the EEFPA, since the parties never had any privity or agreement to pay rent or use and occupancy.

It is undisputed that had Respondent been indefensibly sued solely as a squatter, the EEFPA would not protect him, since he would not be a "tenant" as defined therein. However, as Petitioner alternatively sued Respondent as a licensee and Respondent alleges that he is not a mere licensee, but the lawful successor tenant, this Court finds that the protective stay under the EEFPA applies to this proceeding.

A mere licensee is "one who enters upon or occupies lands by permission, express or implied, of the owner [or tenant], or under a personal, revocable, nonassignable privilege from the owner [or tenant], without possessing any interest in the property..." *Rosenstiel v Rosenstiel*, 20 A.D.2d 71, 76 (1<sup>st</sup> Dept 1963).

Therefore, a special proceeding brought to remove a licensee is commenced pursuant to RPAPL §713, which allows a special proceeding, where no landlord-tenant relationship exists, as an additional means of effectuating the removal of non-tenants without replacing a landlord's common-law right to peaceably remove a licensee from their property without legal process. See, *Bliss v. Johnson*, 73 N.Y. 529 (1878) and *P & A Bros. v. City of N.Y. Dept. of Parks & Recreation*, 184 A.D.2d 267 (1<sup>st</sup> Dept. 1992). Contrast this with tenants, who may only be evicted through legal process. See, *P & A Bros. v. City of N.Y. Dept. of Parks & Recreation*, *supra*. and RPAPL §711, which establishes the grounds for removal where a landlord-tenant relationship exists. Therefore, since licensees lack privity with the landlord, unlike tenants, licensees generally cannot maintain an unlawful entry and detainer proceeding (also known as an "illegal lockout" proceeding). *Andrews v Acacia Network*, 59 Misc.3d 10 (App. Term 2<sup>nd</sup> Dept., 2<sup>nd</sup>, 11<sup>th</sup> & 13<sup>th</sup> Jud. Dists. 2018) and RPAPL §713(10).

However, an exception to this rule is where a licensee alleges "a viable family member succession rights claim to the prior tenant of record's (TOR) tenancy". *Jimenez v 1171 Wash.*

*Ave., LLC*, 67 Misc.3d 1222A (Civ. Bronx 2020), citing “*Rostant v 790 RSD Acquisition LLC*, 21 Misc.3d 138A (App. Term 1st Dept. 2008), stepdaughter of deceased rent controlled TOR restored to possession where evidence established that she ‘was in constructive possession of the premises [see, RPAPL §713(10)], and that landlord's principal was aware of petitioner's possessory claim at the time of the lockout’; *Banks v 508 Columbus Props*, 8 Misc.3d 135A (App. Term 1st Dept. 2005), husband of deceased rent stabilized TOR restored to possession where evidence established that he tendered and landlord accepted at least two rent checks prior to lockout and landlord ‘was well aware of petitioner's stated interest in a renewal lease in his name’; *Dixon v Fanny Grunberg & Assoc, LLC*, 4 Misc.3d 139A (App. Term 1st Dept. 2004), son of deceased TOR restored to possession where evidence established he had given landlord written notice that he was asserting possessory rights; *Bascus v Lake*, 2020 NY Misc. LEXIS 1451 (Civ. Bronx 2020), son of rent stabilized TOR restored to possession after being locked out by a non-family member licensee of the TOR...”. *Jimenez v 1171 Washington Ave, LLC, supra*.

Notably, as stated, in *Watson v NYCHA-Brevoort Houses*, “on June 14, 2019, the Legislature enacted RPAPL §768, which codified that an owner of a dwelling faces civil and criminal penalties if the owner does not restore to possession [‘an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer...’ RPAPL §768(a)] who has been dispossessed by, *inter alia*, changing the lock to the dwelling. One interpretation of this statute is that [mere] licensees now have standing to maintain a lockout proceeding, *Salazar v. Core Servs. Grp., Inc.*, 67 Misc.3d 1206A (Civ. Bronx 2020), while another interpretation is that it does not. *Jimenez v 1171 Wash. Ave., LLC, supra*. The Legislature did not amend RPAPL §713(10), under which illegal lockout proceedings are brought, an omission that supports the proposition that [mere] licensees still do not have standing to maintain lockout proceedings, as the Court may infer a failure to amend as such to reflect the intent of the Legislature.” *Watson v NYCHA-Brevoort Houses*, 70 Misc.3d 900 (Civ. Kings 2020).

Notwithstanding the differing interpretations of RPAPL §768 regarding mere licensees, it is well settled that a licensee who has a viable succession rights claim is a lawful occupant. *Rostant v 790 RSD Acquisition LLC, supra.*; *Banks v 508 Columbus Props, supra.*; *Dixon v Fanny Grunberg & Assoc, LLC, supra.*; *Jimenez v 1171 Wash. Ave., LLC, supra.*; *Bascus v Lake, supra*. Contrary to Petitioner’s assertion, a lawful occupant, who is in possession by permission/license of the tenant of record and then holds over after the tenant’s demise, does not

become an unlawful occupant simply because he refuses to surrender possession in pursuit of his succession rights.

New York City Rent Stabilization Code (“RSC”) §2523.5(b)(1) provides for the right of a remaining family member to succeed to the tenant of record’s tenancy as follows:

“...if ...such tenant has permanently vacated the housing accommodation, any member of such tenant’s family, as defined in section 2520.6(o) of this Title, who has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years, or where such person is a “senior citizen,” or a “disabled person” as defined in paragraph (4) of this subdivision, for a period of no less than one year, immediately prior to the permanent vacating of the housing accommodation by the tenant, or from the inception of the tenancy or commencement of the relationship, if for less than such periods, shall be entitled to be named as a tenant on the renewal lease.”

*9 NYCRR §2523.5(b)(1).*

RSC §2520.6(o)(1) defines a tenant’s family member as

“[a] spouse, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law or daughter-in-law of the tenant...”

*9 NYCRR §2520.6(o)(1).*

In this case, Respondent, the tenant of record’s son, asserts that he resided in the subject apartment as his primary residence for approximately 35 years with his mother until her passing. Given this and in light of the foregoing, Respondent is a “lawful occupant” and thus, a “tenant” as defined by the EEFPA by virtue of his viable possessory claim as the successor tenant to his mother’s rent stabilized tenancy.


Moreover, contrary to Petitioner’s contention, that portion of the EEFPA’s definition of “tenant” that includes “...any other person responsible for paying rent, use and occupancy, or any other financial obligation under a residential lease or tenancy agreement...” also applies to Respondent. Respondent was directed to pay ongoing use and occupancy in this proceeding at \$245.55 per month by Court Order dated November 26, 2018, thereby creating an obligation which satisfies that portion of the definition. As the language is in the disjunctive, it serves to expand the protected class rather than restrict it, as expounded in the preamble of the statute. Furthermore, as the EEFPA’s definition of “tenant” includes lawful occupants and addresses use and occupancy, clearly the intent of the definition was not to solely include those in privity with the landlord.

Accordingly, Petitioner's motion and Respondent's cross-motion are denied, in their entirety.

As this Court has been reassigned from Trial Part S, this matter shall be placed on the court's administrative calendar pending reassignment to a new trial part. The parties will be notified by the new trial part or the Clerk's Office of the next court date.

This constitutes the Decision and Order of the Court.

Dated: April 21, 2021  
Queens, New York



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Kimon C. Thermos, J.H.C.