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Lin Ling v. Xiao Min Lu

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Lin Ling v Xiao Min Lu
2023 NY Slip Op 50943(U)
Decided on September 5, 2023
Civil Court Of The City Of New York, Kings County
Weisberg, J.
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This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on September 5, 2023

Civil Court of the City of New York, Kings County

<p style="text-align: center;">Lin Ling, Petitioner,</p> <p style="text-align: center;">against</p> <p style="text-align: center;">Xiao Min Lu, Respondents.</p>

Index No. 320871/23

Michael L. Weisberg, J.

The parties in this RPAPL 713(10) "illegal lockout" proceeding offer two competing and incompatible narratives:

Petitioner Lin Ling alleged that on July 3, 2023, she and her husband, along with their three children, left their Sunset Park apartment for a week-long vacation. When they returned, the locks to the building and the apartment had been changed and a new tenant was living in the apartment.

Respondent Xiao Min Lu, the owner of the building, countered that when Ling and her family left the apartment, they took their belongings and vacated permanently, telling neighbors that they were going to open a restaurant out of state. When they left, Lu entered into a rental agreement with Ling's subtenant, who had been living with Ling in the apartment since April 2023.

A bench trial was held over several days during which both sides were represented by counsel. Ling and her husband Ming Yu Wang admitted that they had a subtenant when they left but denied that they vacated permanently. Their subtenant, Kunyan Zhou, and some neighbors, testified variously that the family told them that they were moving out and that they saw them do so, though their testimonies lacked expected details. Lu testified that having been told that the family vacated, he changed the locks at the request of Zhou and other tenants as the result of an unrelated security incident and entered into a rental agreement with Zhou.

FINDINGS OF FACT

A preponderance of the credible evidence establishes the following facts:

The apartment is in a building approved for use as a three-family dwelling but that has been converted for use as a six-family dwelling, without issuance of a new certificate of occupancy. It comprises two bedrooms, a bathroom, and a combined living room and kitchen area. Ling and her family moved into the apartment around March 2021 as subtenants of the tenant of record at that time. When the tenant moved out, Ling and her family remained. Ling testified that she paid rent each month in cash, never obtaining a receipt. Lu denied ever [*2]receiving rent from Ling.

Ling was not employed, while her husband Wang worked at a restaurant in the neighborhood. Wang quit his job in April 2023 after the neighbor of a friend asked Wang to go to New Jersey to scout locations to open a business or a restaurant. Wang spent a week in New Jersey; during this time, Ling sublet one of the bedrooms to Zhou, who moved in with her baby. When Wang returned from New Jersey he worked delivering food for a few days and then quit. He has been unemployed since.

On July 3, 2023, the family left for New Hampshire, where Wang has family, removing all their belongings from the apartment, leaving the keys, and intending not to return. Despite their intentions, they did return on July 10th, finding that the locks to the front door of the building and the apartment had been changed. Lu admitted that he changed the locks to the doors. First, he changed the lock to the door of the apartment at the request of Zhou, who testified that there had been a break-in. Later he changed the locks to the building door and installed a camera at the request of other tenants, who complained about stolen mail and people entering the building. Lu entered into a lease agreement for the apartment with Zhou and her husband.

DISCUSSION

Credibility

The court found Lu and his witnesses more credible than Ling and Wang, though the court had reason to question the credibility of nearly all the witnesses. Zhou and three other tenants testified about seeing Ling and her family move out, referring variously to a "moving truck" or a "big van" or similar description. But none were very specific about their observations. There was no testimony about Ling and Wang going up and down the stairs, making several trips to move out all their belongings. Nor was there much description about items, whether boxes or specific items, that the witnesses observed being moved out of the apartment. Overall, there was a similarity in testimony and lack of detail that suggested coordination.

Ultimately, however, the court did not find Ling and Wang credible. First, in her petition, Ling alleges that when she returned to the apartment on July 10, 2023, "it appeared that someone else had moved into the premises" while she and her family were away. But as Ling readily admitted in her testimony, she knew that the person who was living in the apartment when she returned was Zhou, to whom she had been renting a room since April 2023.

Second, Ling and Wang gave conflicting testimony regarding the trip. Ling testified that the purpose of the trip was to get out of the city for a week and "take the kids to play." Wang concurred that the purpose of the trip was so that the children could have a vacation, but he added it was also to give him an opportunity to "understand the situation [in New Hampshire]" because he had thoughts about going there to start a business. He further explained that rather than planning on staying in New Hampshire for just a week, the family had no timeframe within which to return to Brooklyn (though he did testify that they intended to return before school started, though he didn't know when that was). Wang answered in the affirmative to the question on cross-examination, "you went to New Hampshire without knowing when you would come back?" He also conceded that the only reason they returned to Brooklyn after a week is because something was going on with one of the children, so they decided to return to see a doctor. This [*3] testimony, combined with his testimony regarding how he quit his job and did not return to work solely because he was scouting business locations in New Jersey with the neighbor of a friend, is consistent with Lu's allegations that the family left Brooklyn to open a business out-of-state.

Third, neither Ling nor Wang painted the expected picture of what they left behind in the apartment when they went away for, as they alleged, a vacation (even accounting for the different number of belongings that different families have). Except as described below, neither Ling nor Wang mentioned other items one might expect a family to have and that they wouldn't take on summer vacation, such as winter clothes, cooking supplies and tableware, a television and other electronics, furniture, and other personal items. Instead, on direct examination both initially referred to only to passports and medications as items that remained in the apartment when they left. Wang added "expensive" things. When asked on cross-examination why he wouldn't have taken medications with them when they went away, Wang acknowledged that they did have their medications but added that they also had medications in the apartment. Ling, upon further prompting from her attorney, added luggage, a bed, "important documents," cash, and jewelry as the items they left behind.

RPAPL 713(10)

An unlawful entry or detainer proceeding is maintainable where 'petitioner was peaceably in actual possession at the time of the forcible or unlawful entry or in constructive possession at the time of the forcible or unlawful detainer'" (*Gill v Central Queens Properties Corp.*, NYLJ, June 27, 2001 at 20, col 4 (App Term, 2d Dept 2001] [quoting RPAPL 713[10]). It is Lu's burden to prove his defense that Ling and her family abandoned the apartment and were thus not in possession ([see *Lee v Park*, 16 AD3d 986](#) [3d Dept 2005]). Lu met his burden: by removing all their belongings, leaving a set of keys in the apartment, and intending not to return, Ling and her family abandoned the apartment, surrendering their rights thereto.

CONCLUSION

Accordingly, it is ORDERED that judgment shall enter in favor of Respondent dismissing the petition.

Evidence will be held for 30 days for pickup and then will be disposed.

This is the court's decision and order.

Dated: September 5, 2023

Michael L. Weisberg, JHC

[Return to Decision List](#)