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Casa Pasiva HDFC v. Wise

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART E
----------X
CASA PASIVA HDFC

Petitioner,

-against-

LATASHA WISE, JOHN DOE, and JANE DOE

Respondents
----------X

Index No.: LT-304732-21/KI

DECISION/ORDER

Present:
Hon. Shantonu J. Basu
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Petitioner's motion for lifting of the ERAP stay, substituting certain Respondents for John Doe and Jane Doe, and restoring the case to the calendar (motion sequence 1); Respondent's cross-motion for summary judgment (motion sequence 2); and Petitioner's cross-motion for discovery (motion sequence 3).

PAPERS	NUMBERED
Petitioner's Motion & Affidavits & Exhibits Annexed	12-14 (mtn 1)
Respondent's Cross Motion with Affidavit and Exhibits	18-21 (mtn 2)
Petitioner's (Cross) Motion with Affidavit and Exhibits	25-28 (mtn 3)
Respondent's Opposition and Reply	31-36

Upon the foregoing cited papers, Petitioner's motion sequence 1 to lift the ERAP stay, substitute named Respondents for John Doe and Jane Doe, and restore the case to the calendar is granted in part.

Respondent's cross motion sequence 2 for summary judgment is denied with leave to file a new motion for summary judgment as detailed below.

Petitioner's cross motion sequence 3 seeking discovery is granted as detailed below.

FACTUAL AND PROCEDURAL BACKGROUND

This is a summary licensee holdover proceeding where Respondent Destin Wise has asserted a succession defense. Respondent alleges that he is the adoptive son of the tenant of record, Denise Wise who passed away in November of 2020.

Petitioner now moves the court for various forms of relief but principally to lift the ERAP stay and to substitute named Respondents in place of the pseudonyms.

Respondent cross-moves for summary judgment on his succession claim.

Petitioner opposes Respondent's motion and cross-moves for discovery.

LEGAL ANALYSIS

Petitioner's initial motion raises two main questions, namely whether the ERAP stay should be lifted and whether a substitution for pseudonyms should be allowed. The court will address each question in turn.

a. Should the ERAP stay be lifted?

Petitioner moves to lift the ERAP stay based on theory that Respondent does not have an obligation to pay rent.

The court grants this branch of Petitioner's motion, albeit for a different reason. The court takes judicial notice of the ERAP website that is available through the UCMS system. USMS indicates that Destin Wise was approved for ERAP benefits some time before September 20, 2023 under application J1K5U, DOB **/**/1996.

When OTDA approves an ERAP application, that approval will serve to lift the ERAP stay. Indeed most courts have ruled that a provisional approval of eligibility for ERAP also counts as a determination of eligibility and have lifted ERAP stays on this basis (*Park Tower S. Co. LLC v. Simons*, 75 Misc 3d 1067, 1070 [Civ Ct NY County 2022]).

Although the ERAP website states that Petitioner's submissions are still pending, an approval is sufficient to lift the ERAP stay. Thus, the court grants that part of Petitioner's motion seeking lifting of the ERAP stay and restoration of the proceeding to the court's calendar.

b. Should Destin Wise and Carlton Bunyan be substituted for the pseudonyms?

Petitioner moves to substitute Destin Wise and Carlton Bunyan for the pseudonyms now listed in the caption.

It is abuse of discretion to deny this type of motion unless there is prejudice to the other side (*Countrywide Home Loans Servicing, L.P. v Vorobyov*, 188 AD3d 803, 805 [2d Dept 2020]).

Typically the prejudice results from an expiration of a statute of limitations or the failure of the moving party to demonstrate diligent efforts to discover the true names prior to resorting to the use of pseudonyms (*Holmes v City of New York*, 132 AD3d 952, 954 [2d Dept 2015]).

In this case, Destin Wise has not opposed being substituted for the pseudonym. Thus, Petitioner's motion is granted to that extent. Destin Wise is hereby substituted for "John Doe," and the pleadings are deemed amended accordingly.

However, with respect to Carlton Bunyan, this court lacks sufficient information to rule on whether he should be substituted into the petition.

Petitioner's attorney's affirmation states that on "June 22, 2022, Destin Wise and Carlton Bunion appeared, represented that they lived in the subject premises and that Destin Wise had submitted an ERAP application" (NYSCEF # 13, ¶ 3).

Respondent's attorney's affirmation notes that "Respondent Destin Wise and Carlton Bunyan continued to pay rent for the subject premises after the passing of Diane Wise" (NYSCEF # 19 ¶ 10).

Although it would not affect substantive rights, the court notes that the parties do not agree on the spelling of Carlton's last name.

In any event, Carlton has not answered the proceding in writing. For this reason the court holds in abeyance that part of Petitioner's motion seeking to substitute Carlton's name for a pseudonym. Since as detailed below this proceeding will be adjourned, the adjournment will give Carlton an opportunity to decide if he wishes to participate in this proceeding under his own name or whether he wishes to oppose the substitution.

This resolves Petitioner's initial motion. The court now turns to whether Respondent should be granted summary judgment.

c. *Should Respondent Destin Wise be granted summary judgment?*

At the outset, the court notes that Second Department case law requires that Respondent Destin show that he lived in the subject premises with his adoptive mother, the tenant-of-record, Diane Wise, for two years prior to her death, and that he maintained the subject premises as his primary residence.

However, case law from the Second Department does not require that Diane also lived in the subject premises as her primary residence.

Therefore, Petitioner's opposition to summary judgment is misplaced on this issue.

The Honorable Guthrie recently issued a scholarly analysis of this point. Citing to *Jourdain v DHCR*[1] and *Mexico Leasing, LLC v Jones*,[2] Judge Guthrie ruled that:

> "[The focus is on the] remaining family members having resided in the apartment as a primary residence within the two-year . . . period prior to the tenant's permanent vacating of the apartment, and does not insist upon the tenant of record's having so resided during that period. What has been required in the wake of the Appellate Division, Second Department's decision in *Jourdain* are (1) primary residency at the subject premises by the family member seeking succession; and (2) co-residency with the tenant of record during the required one or two years prior to the tenant of record's permanent vacatur (but not primary residency by the tenant of record during the required period)." (*Queens Fresh Meadows, LLC v Farrer*, 76 Misc 3d 1226[A], 2022 NY Slip Op 51056[U] *3 [Civ Ct Queens County 2022] [citations and quotation marks omitted]).

Thus, there is no need for Respondent to prove that Diane Wise lived in the subject premises as her primary residence.

Rather, all Respondent has to do is prove that he lived in the subject premises as his primary residence for the requisite period and that Diane maintained "some connection" to the apartment during that period (*Matter of Jourdain v DHCR*, 159 AD3d 41, 47 [2d Dept 2018]).

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[1] *Matter of Jourdain v New York State Div. of Hous. & Community Renewal*, 159 AD3d 41 (2d Dept 2018).

[2] *Mexico Leasing, LLC v Jones*, 45 Misc 3d 127(A), 2014 NY Slip Op 51456(U) (App Term, 2d Dept 2014).

Nonetheless, on these papers, Respondent has not removed sufficient doubt about his primary residence to justify a grant of summary judgment.

Respondent states that his mother died towards the end of November 2020. This makes the relevant period of co-residency November 2018 to November 2020.

Unlike a nonprimary residence proceeding in which the court may evaluate the entire history of the tenancy, the inquiry in a succession case is limited to a specified, finite period, *i.e.*, the two-year period immediately preceding the tenant's death or permanent vacatur (*72A Realty Assoc. v Kutno*, 15 Misc 3d 100, 102 [App Term 1st Dept 2007]; *50 Lefferts LLC v Cole*, 56 Misc 3d 1216[A], 2017 N.Y. Slip Op 51044[U], *1 [Civ Ct Kings County 2017]).

For this reason, the documents that Respondent submitted that fall outside the period of November 2018 to November 2020 are not strictly relevant.

Documents from before November 2018 or after November 2020 could perhaps serve at trial to paint a picture supporting Respondent's contention that he lived in the subject premises for nearly his entire life. However documents outside the relevant period do not and cannot support a motion for summary judgment.

Thus, this court only has before it three relevant documents, a W2 form for 2020 (NYSCEF # 20, page 30), a New York State driver's license issued July 26, 2020 (NYSCEF # 33, page 33), a 1040 form for 2019 (NYSCEF # 35).

In opposition to summary judgment, Petitioner's agent avers that she has reason to believe that in 2019 Respondent lived with someone named Arianna Reyes at 61 Melrose Avenue in Brooklyn (NYSCEF # 27, ¶ 9).

Respondent in turn denies this and states that he does not know anyone named Arianna Reyes (NYSCEF # 34, ¶ 1).

On a motion for summary judgment, the court's role is not to determine credibility but rather to simply determine whether a factual issue exists (*S. J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 [1974]).

Where, as here, a genuine factual issue exists, summary judgment cannot be granted. Thus, Respondent's motion is abeyance pending the completion of discovery as discussed below.

However, Petitioner does not challenge the assertion of familial relationship. Respondent has submitted sufficient proof that the tenant-of-record Diane Wise is his mother. Respondent's unchallenged affidavit is sufficient and is supported by documents (*c.f.*

Accounting by Pub. Adm'r of Kings County, 71 Misc 3d 1204[A], 2021 NY Slip Op 50275[U] [Sur Ct Kings County 2021][explaining the pedigree exception to hearsay]).

Therefore, pursuant to CPLR § 3212(g), and after examining the papers, the court finds that Respondent has established that the former tenant-of-record is his mother.

The remainder of Respondent's motion for summary judgment (motion sequence 2) is denied, but the court grants both sides leave to file new motions for summary judgment as detailed below (*see Aurora Loan Services, LLC v Yogev*, 194 AD3d 996, 997 [2d Dept 2021] [explaining when successive motions for summary judgment are appropriate]).

The court now addresses Petitioner's motion for discovery.

d. Should Petitioner be granted discovery?

In a summary proceeding, the party seeking discovery is required to obtain leave of court. When deciding whether to grant discovery, courts employ the "ample need" test first announced in *New York University v Farkas*.

Under that test, the proponent of discovery must establish several factors not all of which need to be shown (*Mautner-Glick Corp. v Higgins*, 64 Misc 3d 16, 18 [App Term, 1st Dept 2019] [holding that when reviewing discovery motions "courts consider a number of factors, not all of which need to be present in every case"]).

In its simplest form, ample need under *Farkas* requires a court to determine whether the proponent of discovery has stated a claim, whether the proponent genuinely needs the information requested, and whether the proponent cannot obtain the information other than from one of the parties in the case or from a third party. (*New York Univ. v Farkas*, 121 Misc 2d 643, 647 [Civ. Ct. NY County 1983]).

Since speed and economy are the underlying concerns, there are few obstacles to granting discovery if discovery will likely result in greater efficiency rather than less (*See Malafis v Garcia*, 2002 NY Slip Op 40180[U] [App Term, 2d Dept 2002]).

With these concerns in view, recent cases have further streamlined the *Farkas* test.

For example, the *Abdur-Rahim* doctrine urges courts to ask whether granting discovery will speed a case along the path to a fair resolution whether by stipulation or trial (*see 50th St. HDFC v Abdur-Rahim*, 72 Misc 3d 1210[A], 2021 NY Slip Op 50693[U] [Civ Ct Kings County 2021]; *717 Sterling Corp. v Cook*, 78 Misc 3d 1224[A], 2023 NY Slip Op 50345[U] [Civ Ct Kings County 2023]; *969 Carroll Assoc., LLC v Mendes*, 9 Misc 3d 724 [Civ Ct Kings County 2023]).

In the instant case, Petitioner's motion for discovery is granted.

Respondent will suffer little if any prejudice since it is Petitioner's case which will be delayed by discovery (*Hartsdale Realty v Santos*, 170 AD2d 260 [1st Dept 1991]).

Although there is no absolute right to discovery in any summary proceeding, landlords are routinely granted discovery where a respondent raises a succession defenses (*PRC Westchester Ave., LLC v Feliciano*, 65 Misc 3d 1062, 1065 [Civ Ct Bronx County 2019]; *Lancaster 160 LLC v Shklyar*, 35 Misc 3d 1230[A], 2012 NY Slip Op 50955[U] [NY Dist Ct Nassau County 2012] ["Discovery is particularly appropriate where the issue involves periods of co-residency and succession rights."]).

There is good reason why discovery should be granted in succession cases: a respondent who asserts succession has access to probative information that the landlord lacks (*217 E. 82nd St. Co. v. Perko*, 10 Misc 3d 146[A], 2006 NY Slip Op 50157[U][App Term, 1st Dept 2006]; *Bromley Co., LLC. v Rachman*, 4 Misc 3d 136[A], 2004 NY Slip Op 50828(U) [App Term, 1st Dept 2004]).

Where the housing court denies discovery in succession cases, appellate courts typically reverse (*see, e.g., supra, 217 E. 82nd St. Co. v Perko*, 10 Misc 3d 146[A]; *656 W. Realty, LLC v Blanco*, 32 Misc 3d 128[A], 2011 NY Slip Op 51254[U] [App Term, 1st Dept 2011]).

Prudence dictates therefore that disclosure should be granted where there is a dispute of fact that could be resolved after discovery. The documents that Petitioner requests are reasonable (NYSCEF # 28).

However, Respondent does not need to produce any documents for Diane Wise. This is because, as explained above, case law from the Second Department does not require Respondent to prove that Diane lived in the subject premises as her primary residence. In addition, the relevant time period is November 2018 to November 2020. Bank statements and other financial documents may be redacted as to dollar amounts.

Respondent to provide the documents listed in NYSCEF # 28 within 45 days of this order. Respondent to sit with Petitioner's counsel for a deposition at a mutually convenient time and place within 20 days after submission of documents.

The proceeding is adjourned to December 19, 2023, at 9:30 am for a status conference. If discovery is completed prior to this date, the parties may restore the proceeding by stipulation after securing an available date from the clerk.

This resolves Petitioner's motion for discovery (motion sequence 3).

CONCLUSION

For the reasons stated above, Petitioner's motion (sequence 1) to lift the ERAP stay and substitute Destin Wise is granted. That part of Petitioner's motion seeking to name Carlton Bunayan a/k/a Carlton Bunion is held in abeyance until December 19, 2023 at 9:30 am.

Respondent's cross motion (sequence 2) for summary judgment denied, but it is established that Diane Wise is Respondent Destin Wise's mother.

Petitioner's cross motion (sequence 3) seeking discovery is granted subject to the limitations set forth above.

Accordingly, it is ORDERED that Respondent produce the documents in the proposed demand (NYSCEF # 28) but production is limited to his own documents that are in his possession and limited to the period starting November 1, 2018 and ending November 30, 2020; and it is

ORDERED that the production of these documents shall be completed within 45 days of the date of this order; and it is

ORDERED that within 20 days of the production of documents Respondent must sit for a deposition at a time and place convenient to both parties; and it is

ORDERED that Respondent's motion for summary judgment is denied, it is established that Diane Wise is Destin Wise's mother, and both parties are granted leave to file motions for summary judgment after the completion of discovery; and it is

ORDERED that Petitioner serve a notice of entry of this order on Carlton Bunyan a/k/a Carlton Bunion and file same on NYSCEF by October 27, 2023; and it is further

ORDERED that this proceeding is adjourned to December 19, 2023 at 9:30 am for a status conference. Upon completion of discovery, the parties may restore the case to the calendar to an earlier date by stipulation after securing an available date from the part clerk.

This constitutes the decision and order of this court.

Dated: October 11, 2023
Brooklyn, NY

Hon. Shantonu J. Basu
Housing Court Judge