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Bam Go LIHTC LLC v. Oquendo

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Bam Go LIHTC LLC v Oquendo
2023 NY Slip Op 51270(U) [81 Misc 3d 1205(A)]
Decided on October 17, 2023
Civil Court Of The City Of New York, Kings County
Jimenez, J.
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Civil Court of the City of New York, Kings County

Bam Go LIHTC LLC, Petitioner,

against

Elexiss Oquendo, JOHN DOE and JANE DOE, Respondents.

Index No. 78858-19

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Sergio Jimenez, J.

This holdover proceeding seeks recovery of the property located at 250 Ashland Place, Apartment 10F, Brooklyn, New York 11217. The prior procedural history is outlined in Hon. David Harris' decision of August 17, 2021. Briefly, the parties entered into a two-attorney stipulation outlining a probationary period whereby respondent was to refrain from certain conduct. Namely she was to refrain from smoking, making significant noise and being aggressive with other residents or building staff. Petitioner brought a motion seeking a judgement, which, after a hearing held by Hon. David Harris the petitioner received. Judge Harris, however, extended the probationary period. Petitioner then brought a motion seeking to enforce their judgment and execute the warrant of eviction. This motion was granted by the Hon. Malikah Sherman setting a hearing for the probation violation. The court took testimony and evidence and reserved decision on September 29, 2023 when the parties submitted post-hearing memoranda.

[*2]Hearing

Petitioner called three witnesses: Sarah Kwan, the tenant of 10G; Merlin Betances, the tenant of 10E; Vanessa Guzman, one of the property managers. Ms. Kwan credibly testified that she, in the time period of September 2021 through May 2022, heard "loud music" and noise at least one to two times a week, but sometimes every other day. She described the noise as "screaming," "children dribbling balls" and "really loud music," which she described as most disturbing between the hours of 11pm and 4am, though at least on one occasion it went until 7am. She testified that she could discern no pattern for the noise. Ms. Kwan testified that she lives in a studio and that she shares the right-side wall with the respondent. While she testified to smelling marijuana "pretty often," she could not specifically tie the smell to the respondent. On cross, Ms. Kwan testified that she believed it to be very clear that the noise and smells came from the respondent's apartment.

Mr. Betances, the tenant in 10E, credibly testified that he was the tenant who shared a wall with the respondent on the other side of the wall. He stated that he heard the respondent was noisy, playing loud music, causing "commotion" — which he characterized as guests becoming rowdy, fighting, and banging on the door. He stated that he experienced this happening three or four times a week ranging in time from 12-5am sometimes. The witness stated he would be often be woken up by the noise. The court notes that he credibly testified that he recognized the respondent's voice on a microphone during one of the parties instructing her guests to "make some noise." He stated he never approached the respondent

directly because he did not want any problems. On cross-examination he stated that he preferred to go to management rather than speak with the respondent.

The third witness put forth by petitioner was Vanessa Guzman, who works for the managing agent for the owner. Her title is community manager, and she has been in that role for four (4) years but has been affiliated with the building for the past seven (7) years. She stated that the respondent smoked, made noise and engaged in aggressive behavior. For example, she testified that respondent had slammed the door in the face of building staff. She stated that porters go to investigate every time there was a complaint. The complaints consisted of smoking and loud noises. She authenticated P1 (the lease between the parties), which petitioner noted has a no-smoking clause. On cross-examination she admitted she had not personally seen/experienced the door being slammed in the face of her staff but that she knocked on the door once with the police.

Respondent testified on her own behalf. She testified that she moved into the premises in 2017, that she had been in a domestic violence shelter prior to living there. She lives with her four (4) children aged 14, 13, 9 and 4. She disputed all of the allegations put forth by the witnesses. She countered that her party of November 6, 2021 ended at 10:30pm at which point she left and did not return until 4am to another apartment in the building. She testifies that she did not receive any notice of her behavior being unacceptable. On cross she admitted that there was music being played after 9pm the day of the party and that she was not sure what happened after she left, which was some time after 10:30pm but admittedly she was unsure of the time and it could have been closer to 11:20pm.

Discussion

The question at the heart of this hearing that the court must answer here is whether respondent's behavior justifies a forceable forfeiture of her rent stabilized apartment? Petitioner argues that they have shown through non-party witnesses that respondent's behavior does rise to [*3]that level. Respondent counters stating that petitioner has not met their burden of proof.

Given the nature of the agreement sought to be enforced here, it would not be unjust to literally and strictly construe the language in the stipulation as both parties engaged in sophisticated negotiation prior to entering into the agreement (*McKenzie v. Vintage Hallmark, PLC.*, 302 AD2d 503 [2d Dept 2003]; *Ruru & Assoc. LLC v. Weinberg Holdings LLC*, 78 Misc 3d 132[A][App Term 1st Dept 2023]).

The court first notes that it is established law that noise and odors (like smoke) are "inescapable realit[ies] of urban life" and that the sylvan silence of a mountain lodge cannot be expected in a multiple dwelling (*Stiglianese v. Vallone*, 255 AD2d 167[1st Dept 1998]). That said, the court returns to the previous question: did respondent's behavior overcome that expectation? Here, based on the testimony of two uninterested witnesses, the court answers in the affirmative. Respondent argues that both neighbors used coded racist language is unconvincing given the rest of the testimony. Respondent also avers that she never received any complaints from any of the neighbors about the noise and that they should have notified her. The court finds that Mr. Betances' description of what he experienced through the wall of the neighboring apartment or in the hallways of the building are not racially motivated or code words, but rather experiential. The court also does not find Ms. Kwak's testimony to be based on stereotypes but rather on her experiences. However, even were the court to find respondent's arguments to be true, there is no requisite for the witness-neighbors to notify or interact with the respondent with regards to noise, smoke or any other offending behavior.

The court notes that this decision is based not on any one incident, such as the November 6, 2021 party, which is an admitted breach, but rather the totality of the circumstances and testimony presented. The court, however, does not consider noises of children playing ("dribbling balls") to constitute a breach of the stipulation in any capacity and ignored that part of the testimony. Respondent's argument that the stipulation was substantially complied with is unconvincing as respondent's own testimony admitted breaches during the time in question. Further, the court finds that the stipulation of settlement, one drafted by two attorneys, did not state the respondent would refrain from engaging in the prescribed behavior a majority of the time, or some of the time. Rather, it was a complete bar on the offending behavior. The court refuses to imply qualifications into an agreement drafted by two practicing attorneys. The stipulation also does not carry a notice requirement. The notice requirement was the eight (8) day notice of motion. That said, the court finds credible the petitioner's witness' statement that they attempted to inform the respondent but that the door was not answered.

The court finds that the credible testimony of two neighbors is sufficient to support the petitioner's position. Further, respondent's argument that the claims of behavior do not constitute a nuisance could be correct in a different posture, but the court is not relitigating a trial that was settled by two attorneys. What is before the court is the enforcement of a two-attorney stipulation carefully negotiated and drafted. Even were the court to agree that the offending behavior did not rise to the level of nuisance-based forfeiture, the standard for

enforcement of a stipulation is lower.

Conclusion

Petitioner has made out their case and, as such, the court allows for the execution of the warrant of eviction. However, that execution is stayed until June 30, 2024 for respondent to vacate, contingent on a payment of on-going use and occupancy by the 15th of each month, after the service of a marshal's notice (which may be done by mail with reasonably contemporaneous [*4]email service to respondent's counsel) and continued compliance with the stipulation. The court notes the presence of school age children as part of the calculus of this decision. Nothing in this decision/order should be construed as preventing the parties from negotiating a new agreement should they choose to do so. Upon default of the payment of two (2) months of payments, petitioner may, after service of a two (2) day notice of default to counsel, serve the marshal's notice. Upon default of behavior as outlined by the stipulation, the petitioner may serve a notice of eviction which must be preceded by a five day notice of default accompanied by an affidavit of someone with personal knowledge as to the alleged breach. Nothing in this decision stops petitioner from obtaining their warrant, if they have not yet done so. Should either party appeal this decision, they are instructed to inform the court within fifteen (15) business days from the date of notice of appeal. This constitutes the decision and order of the court.

Dated: October 17, 2023
Brooklyn, New York

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Sergio Jimenez, JHC