2024-02-06

1544-48 PROPERTIES LLC v. MARGARET MCCALLOUGH, ET AL.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART

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1544-48 PROPERTIES LLC,

Petitioner,

-against-

MARGARET MCCALLOUGH, ET AL.,

Respondents.

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Index No. 302060/23

DECISION/ORDER
PURSUANT TO CPLR 4401

WEISBERG, J.:

The petition in this summary eviction proceeding alleges that Respondent Margaret McCalla (sued herein as "McCallough") "is in possession of said premises pursuant to a license agreement." Underlying the petition is a ten day notice to quit that alleges that McCalla is "in possession of said premises as a licensee of the tenant of record…the tenant of record is no longer entitled to the premises as they have surrendered possession." McCalla and Respondent Jason James (sued herein as "John Doe") answered the petition, alleging that they had the right to succeed to the tenancy of Elizane Blaise, the tenant of record. Respondents moved pursuant to CPLR 4401 to dismiss the petition at the close of Petitioner's evidence.

"A motion for judgment as a matter of law pursuant to CPLR 4401 may be granted where the trial court determines that, upon the evidence presented, there is no rational process by which the trier of fact could base a finding in favor of the nonmoving party" (*Boriello v Loconte*, 181 AD3d 856, 857-858 [2d Dept 2020] [internal quotations omitted]). "In considering such a motion, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in light most favorable to the nonmovant" (*id.* at 858 [internal quotations omitted]).

Petitioner's case-in-chief comprised the testimony of its property manager, Levi Kalmenson, and McCalla. For the purposes of this motion, the evidence shows as follows. Elizane Blaise was the rent-stabilized tenant of record of the subject apartment. In August 2022, Petitioner received a telephone call from Elizane Blaise's son, informing it that she had died. Petitioner issued the notice to quit shortly thereafter. On direct examination as a witness called by Petitioner, McCalla confirmed Blaise's death.

Petitioner is "bound by the notice served, which is not subject to amendment" *(Hollis Partners, LLC v Artis*, 73 Misc 3d 128[A], 2021 NY Slip Op 50888[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2021] [internal citations omitted]) and thus must prove the allegations in the notice. Instead of proving that Blaise surrendered, Petitioner proved that she died, which McCalla concedes. Petitioner presented no evidence of surrender.

The court rejects Petitioner's argument that it need not plead the manner (e.g. surrender or death) in which Blaise lost her entitlement to the premises and that the notice to quit would have been sufficient had it merely alleged that McCalla was a licensee, without addressing Blaise's occupancy (*cf. Adelphi Assoc., LLC v Toruno*, 48 Misc 3d 126[A], 2015 NY Slip Op 50903[U] [App Term, 2d Dept, 2d, 11th, & 13th Jud Dists 2015] [judgment reversed where landlord did not allege or prove how tenancy of tenant of record had ended]).

Accordingly, it is ORDERED that the motion is granted; and it is further

ORDERED that judgment shall enter dismissing the petition.

This is the court's decision and order.

Dated: February 6, 2024

Michael L. Weisberg, JHC