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NY SANDY3 NBP4 LLC v. PAGAN

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART F
-----X

NY SANDY3 NBP4 LLC,

Petitioner,

-against-

DECISION AND ORDER

Index No 335484/22

JACOBO PAGAN – TENANT
RITA ROSARIO – TENANT
CHRISTOPHER “DOE” – OCCUPANT
“JOHN DOE” – OCCUPANT(S)
“JANE DOE” – OCCUPANT(S)

Respondents.
-----X

MIRIAM BREIER, J.

Recitation, as required by CPLR §2219, of the papers considered in the review of the respondent’s motion for summary judgment dismissing the petition pursuant to CPLR §3212 and RPAPL §744 and petitioner’s opposition to said motion.

<u>Papers</u>	<u>NYSCEF Doc. No.</u>
Notice of Motion, Affidavits/Affirmations	12, 13, 14
Affirmation in Opposition	19
Reply Affirmation	20
Exhibits	15 - 17

Upon the foregoing cited papers, the Decision/Order in this matter is as follows:

Respondent, Rita Rosario, moves to dismiss this proceeding and for summary judgment pursuant to CPLR §3212 and RPAPL §744 on the grounds that the proceeding cannot be maintained because respondent is a victim of domestic violence and each act attributed to respondent, or more specifically her son, Christopher Pagan named herein as Christopher “Doe”, is the result of that violence. Petitioner opposes the motion on the grounds that this is a

nuisance proceeding where the conduct alleged has interfered with other tenants and building employees' safety and quiet enjoyment of the premises, and thus there are issues of fact that require adjudication before the court. For the reasons stated herein, the motion is granted, and the proceeding dismissed with prejudice.

DISCUSSION

Although no lease was exhibited to the court with the motion papers, respondent, Rita Rosario, alleges in her affidavit to have been a tenant of the subject apartment, 2D at 2180 Bolton Street, Bronx, NY 10462 for thirty years. Ms. Rosario began living in the apartment with her husband, Jacobo Pagan, now deceased but named as a respondent-tenant nonetheless, and their young son. Respondent further states that their son, Christopher Pagan, moved out of the apartment in 2019 and removed his belongings in 2021, the year Jacobo Pagan passed away. These facts are not disputed by petitioner who named Christopher Pagan/ Christopher "Doe" as an occupant only in the petition.

The petition seeks to recover possession of the subject apartment on the grounds that the tenant and family members have engaged in "anti-social, disruptive, dangerous and/or illegal behavior in and around the complex, in violation of Section 2524.3(b)(d) of the Rent Stabilization Code." The conduct described in the amended notice of termination dated September 15, 2022 is attributed almost exclusively to Ms. Rosario's son, Christopher Pagan. The allegations include Mr. Pagan threatening other tenants and building employees on or about October 15, 2021; Christopher Pagan threatening to "burn down" a neighbor's apartment on or about January 2, 2022; Christopher Pagan making death threats to building employees causing the police to be called to the premises; Christopher Pagan holding his mother, Ms. Rosario, hostage in the apartment on April 15, 2022, necessitating the NYPD SWAT team to be called to the premises; Christopher Pagan standing at his mother's door while wearing a ski mask, yelling and cursing for her to open the door, then urinating down the stairwell shortly after the police arrived. In only one of these incidents was Ms. Rosario mentioned as a perpetrator of nuisance behavior – the October 15th incident where she allegedly verbally abused and harassed other tenants and building employees.

Respondent Rosario appeared by counsel who filed an answer dated March 13, 2022 alleging that respondent is a domestic violence victim as defined by RPL §227(d) at the hands of her son, Christopher Pagan, who committed multiple offenses against his mother under Family Court Act 812(1), and demanded dismissal of the proceeding pursuant to RPAPL §744. (NYSCEF

Doc 11). Respondent sought a subpoena for all domestic violence incidents at the subject premises for a period commencing April 4, 2022 and continuing through January 13, 2023, for a total of 9 incidents. The subpoena was “so ordered” and issued to the NYC Police Department on March 10, 2023. (NYSCEF Doc 10).

The documents returned to the court and submitted in support of respondent’s motion (NYSCEF Doc. 15) contain nine instances of incidents of domestic violence, many in violation of existing orders of protection, perpetrated by Christopher Pagan upon his mother, Rita Rosario, at the subject premises. The first incident report on Monday, April 4, 2022 at 11:35 AM, describes a verbal dispute in which Pagan (age 26) got angry and broke coffee on his mother Rosario’s (age 63) table, causing coffee to spill on the table and floor. Rosario stated that Pagan was off his meds and needed to be evaluated, and requested Pagan be taken to the hospital.

The second incident report on April 22, 2022 at 10:30 PM, stated that Pagan told Rosario he wanted to burn down her apartment. The third incident report on July 13, 2022 at 11:15 PM, stated that Pagan grabbed Rosario by the neck and attempted to push her down the building steps. It also detailed a bruise on Rosario’s chest, but not from that incident. The fourth incident report of July 19, 2022 at 10:30 AM, stated that in violation of an active full stay away Order of Protection issued from Family Court Docket #0-03023-21, Pagan threatened to burn the house down if Rosario did not let him retrieve belongings. Rosario is described as being “fearful” of Pagan “due to prior physical incidents.”

The fifth incident report dated July 29, 2022 at 10:07 AM described a phone call from Pagan to Rosario in which he threatened to break the apartment windows. This phone call was in violation of the existing Order of Protection. The sixth incident report dated July 30, 2022 at 8:20 PM, stated that Pagan was off his medication and threatened to break down Rosario’s door and kill her. Pagan is described as being “known to consume heavy narcotics” and is “homeless.” The threat to Rosario caused her “fear and annoyance and alarm.” She requested from the responding officers that Pagan get help or be arrested. However, he was not located by police in the building after a search.

The seventh incident report from November 19, 2022 at 9:00 PM, stated that Pagan punched Rosario in the face and pulled out a knife. Rosario was bleeding and in pain. The report detailed prior history in which Rosario answered in the affirmative as to whether Pagan had ever threatened to kill her, if he strangled or choked her, if he was capable of killing her, if he was

violently of constantly jealous of her and also that the physical violence had increased in the past 6 months.

The eighth incident report from December 28, 2022 at 1:30 PM stated that Pagan pushed Rosario into her apartment and hit her, striking her multiple times in the head. He then attempted to cover her face with a pillow and used both hands to strangle her, causing Rosario to have difficulty breathing. Rosario stated that Pagan threatened to kill her. An Order of Protection CR-0022096 was in effect at the time of this incident. The ninth incident report dated January 13, 2023 at 8:10 AM, stated that in violation of a full stay away Order of Protection Docket #12842647K, Pagan came to the apartment and was banging on the door.

These subpoenaed records document a history of domestic abuse and violations of multiple Orders of Protection by Pagan against his mother at the subject premises. These incidents of domestic violence and their alleged impact on other tenants in the building and building staff, caused the commencement of this nuisance holdover proceeding against Rosario, a senior who has lived in the subject apartment for more than 30 years.

Respondent filed a verified answer to the petition dated March 13, 2023. The answer contained a general denial of the petitioner's allegations and the affirmative defense that respondent is a victim of domestic violence committed against her by her son. Respondent also filed this motion for summary judgment pursuant to CPLR §3212 and RPAPL §744 which prohibits eviction when the person is a domestic violence victim.

In opposition to respondent's motion, petitioner argues that it commenced the instant proceeding "due to the danger that Respondent and her son pose to the other tenants of the building." Petitioner claims that it is not just the actions of Pagan, but of respondent herself that led up to this proceeding. Petitioner refers to the allegations in the amended notice of termination in support of this claim. However, the termination notice cites only one instance where Rosario was "verbally abusive and harassing to other tenants and building employees," October 15, 2021. None of the other incidents alleged in the notice accuse Rosario of improper or nuisance behavior. Rather, they document the abuse perpetrated upon Rosario by her son, Pagan.

Petitioner further submits that "respondents" pose a danger to the other tenants and employees of the subject building, and that the conduct is nuisance conduct which is not the result of domestic abuse. Petitioner asserts

that the alleged threatening conduct of Pagan to the other tenants in the building, should cause his mother, the victim of that domestic violence, to lose her apartment. According to petitioner, the domestic violence heaped upon respondent by her son is separate from the incidents cited in the termination notice and not attributable to Pagan's violence against his mother.

In reply to the petitioner's opposition, respondent contends that she has met her burden for summary judgment by showing that respondent is a domestic violence victim and that but for the conduct of her son, Christopher Pagan, no grounds exist for the removal of respondent from the home she has lived in for 30 years. Respondent points out that only one incident in the termination notice is attributed to respondent, and that objectionable conduct must be recurring to constitute nuisance. There were no disputed factual issues raised that would prevent summary judgment.

DECISION

Summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action shall be established to warrant the court as a matter of law in directing judgment in favor of any party. If the facts are uncontested, summary judgment is appropriate. *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 (1974). Here there are no facts in dispute; only whether they constitute a cause of action against respondent, or they mandate dismissal of this proceeding.

RPAPL §744 prohibits the eviction of a tenant who is a victim of domestic abuse.

1. A tenant shall not be removed from possession of a residential unit pursuant to this article because of such person's domestic violence victim status, as defined in section two hundred twenty-seven-d of the real property law. It shall be a defense to a proceeding to recover possession of a residential unit that a landlord seeks such recovery because of a person's domestic violence victim status, and that, but for that status, the landlord would not seek to recover possession. A landlord may rebut such defense by showing that he or she seeks to recover possession of a residential unit because of any other lawful ground.

The plain language of the statute prohibits the eviction of a domestic violence victim if but for the domestic violence, the proceeding would never have been commenced. The landlord can rebut that defense by showing there

is another lawful ground present to proceed against the tenant who is a domestic violence victim.

In this proceeding, petitioner has failed to rebut respondent's defense, or shown that it is alleging another "lawful ground." This is entirely evident in the language of the amended termination notice which relies on incidents arising from the domestic violence perpetrated by Christopher Pagan against respondent. There is no denying that but for these incidents of domestic violence, there would be no cause to remove respondent from possession of the subject apartment.

In opposition to the instant motion, petitioner attempts to cast doubt on whether respondent is protected from eviction by RPAPL §744, citing the alleged danger posed by her son to the other tenants of the building. However, petitioner submits no evidence of any actual injury to its tenants or staff, no police reports, no affidavit of tenants and staff. Indeed, the predicate termination notice paraphrases many of the incidents of domestic abuse by Pagan against respondent and the police response to those incidents of domestic violence, and uses this as grounds for respondent's eviction.

Petitioner urges this court of follow the decision in *Magan Realty LLC v Anthony*, 64 Misc3d 686, 690 (2019) in which the court denied respondent's motion to dismiss. In that proceeding on respondent's motion to dismiss the tenant's alleged abuser was not proven to be a relation or member of her family, and there was no proof submitted to the court of any physical violence. There the court found that, "Other than respondent's affidavit, no independent proof is offered establishing Soumare and respondent's intimate relationship. There is no independent proof that Soumare and respondent were members of the same family or household (as defined by section 812 of the Family Ct Act). The affidavit is entirely conclusory regarding alleged threats and emotional abuse toward respondent. Respondent does not allege physical violence (that would constitute a violent felony). (See Real Property Law § 227-d; Penal Law § 70.02.) Respondent also has failed to establish that a "family offense" under section 812 of the Family Court Act has been committed."

The facts in *Magan Realty* are entirely different from those before this court on the summary judgment motion. Here there is no issue that Christopher Pagan is respondent's son, and a member of her family as defined by section 812 of the Family Court Act. There are numerous incidents of physical violence, threats, and emotional and physical abuse both in the police reports and Rosario's moving affidavit. Rosario states in her affidavit that the police are in contact every two weeks to check in with her because of the recurring domestic violence incidents.

Respondent embodies the definition of a domestic violence victim under RPL § 227-d,

§227-d. Discrimination based on domestic violence status; prohibited

1. Definitions. For the purposes of this section a person is a “domestic violence victim” and possesses “domestic violence victim status” if such person is or has been ...in a situation in which such person...is a victim of an act that would constitute a violent felony offense as enumerated in section 70.02 of the penal law, or a family offense as enumerated in subdivision one of section eight hundred twelve of the family court act, and such act is alleged to have been committed by a member of the same family or household, as defined in subdivision one of section eight hundred twelve of the family court act.

§70.05 of the penal law lists numerous definitions of violent felonies including assault in the first degree, strangulation in the first degree, aggravated strangulation, strangulation in the second degree, stalking, intimidation of a victim. §812of the Family Court Act, procedures for family offense proceedings, lists the same conduct and more including harassment and menacing of family members. Respondent Rosario is a victim of domestic violence possession domestic violence victim status pursuant to RPL §227-d.

The issue then becomes whether respondent has established on this motion for summary judgment the defense under RPAPL §744 that but for the domestic violence perpetrated by Christopher Pagan on respondent Rosario, the petition states no other “lawful ground” on which to proceed against respondent.

In *KDG Albany, LP v Dixon*, 62 MISC3d 557, 89 NYS3d 835 (2018 N.Y. Slip Op 28384), the court set forth the elements of a defense of domestic abuse under RPAPL §744 as follows,

To establish a defense under RPAPL 744, a tenant must prove two elements : (1) that she is entitled to domestic violence victim status and (2) that the landlord commenced an eviction proceeding because of such status. If the tenant establishes both elements, then the eviction proceeding will be dismissed – unless the landlord establishes a lawful reason for the evictions (for example, the nonpayment of rent)(cf. *390 W.End Assoc. v Raiff*, 166 Misc2d 730, 734 [App Term, 1st Dept 1995].”

Respondent is the victim of domestic violence at the hands of her son. Accordingly, respondent is entitled to domestic victim status. The sole basis for the commencement of this summary holdover proceeding is the domestic violence and its alleged effects on tenants and workers at the building. However, other than reiterating the abusive conduct of Christopher Pagan, there was nothing in the pleadings and no evidence submitted by petitioner in the form of affidavits, documentary evidence or otherwise to establish the conduct of Christopher Pagan affected anyone except the respondent, or that this conduct could be imputed to respondent to constitute a “lawful ground” for her eviction.

Moreover, it is clear that but for the actions of Pagan, respondent, the victim of domestic violence would not have had her lease terminated by petitioner. RPAPL §744 “has made landlords...assume the risk of financial burdens stemming from domestic violence issues rather than forcing a victim out of her home for reasons having to do with her abuse. When a statute ‘crafts a balance between victims’ and landlords’ economic right...the balance...set by the Legislature should [be strictly honored] by a court.” *KDG Albany, Supra* at 565, *Riverwalk on the Hudson, Inc v Culliton*, 62 Misc3d 351, 355 [Cohoes City Ct 2018].

Respondent Rosario is a domestic violence victim, a victim of domestic abuse at the hands of her son, Christopher Pagan. Pagan is not a tenant of the subject apartment and was sued as a mere “occupant”, although he does not live there. Petitioner’s commencement of this proceeding against respondent who they should have known to be a victim of domestic violence and abuse at the hands of her son, is a clear violation of RPAPL §744. Respondent is a 30 year tenant of the subject apartment, and but for the domestic violence perpetrated upon her by her own son, there would be no objectionable conduct or any legitimate cause to terminate her tenancy.

CONCLUSION

Based on the foregoing, respondent’s motion for summary judgment dismissing this proceeding is granted and the proceeding is dismissed with prejudice. This constitutes the Decision and Order of the Court.

**Dated: Bronx, New York
March 8, 2024**

So Ordered:
Miriam Breier
Hon. Miriam Breier, JHC