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2024-10-02

### Greenport Preservation LP v. Bennett

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<b>Greenport Preserv. LP v Bennett</b>
2024 NY Slip Op 33494(U)
October 2, 2024
Civil Court of the City of New York, Queens County
Docket Number: Index No. L&T 300056/24
Judge: Logan J. Schiff
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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF QUEENS: HOUSING PART D

-----X  
GREENPORT PRESERVATION LP

Index No. L&T 300056/24

Petitioner,

-against-

**DECISION/ORDER**

TONY BENNETT, et al.

Respondents.

-----X

Present: Hon. Logan J. Schiff  
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of  
Respondent’s motion to dismiss (mot. seq. #1): 7-14.

Petitioner filed this licensee holdover pursuant to RPAPL 713(7) seeking to recover possession of an apartment in Queens, New York on January 2, 2024. It is undisputed that the subject premises are a project-based Section 8 complex and are therefore exempt from the Rent Stabilization Law (*see Greenport Preserv., L.P. v Heyward*, [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2021]). Prior to commencement, Petitioner served a 30-day notice to vacate advising Respondent that it was revoking his license to occupy the premises following the death of the tenant of record Barbara Walker, and that his occupancy was no longer authorized and/or was unlawful.

Respondent now moves to dismiss on two grounds pursuant to CPLR 3211(a)(7). First, he argues that the predicate notice to vacate is confusing and contradictory in light of a letter sent by the leasing office in June 2023 stating that the former tenant of record Ms. Walker resided with her son (Respondent Tony Bennett) until her death in January 2022 (NYSCEF 9). Respondent argues that this alleged party admission renders the predicate notice fatally defective, presumably

insofar as it suggests Respondent has a status greater than that of a licensee, which was not mentioned in the notice. Separately, Respondent moves to dismiss or for a traverse hearing as to the predicate notice, alleging as follows in a supporting affidavit: “I was improperly served with it [the predicate notice] by only getting it on my door only and never receiving it by certified mail nor regular mail.”

In assessing the adequacy of a predicate notice, "the appropriate test is one of reasonableness in view of the attendant circumstances" (*Hughes v. Lenox Hill Hosp.*, 226 A.D.2d 4, 18 [1st Dept 1996], *lv denied* 90 N.Y.2d 829 [1997]; *see also Tzifil Realty Corp. v. Rodriguez*, 155 N.Y.S.3d 525 [App Term, 2d 11th & 13th Dists, 2d Dept 2021]).

Not all predicate notices require the same level of detail. A holdover based on the early termination of a lease must recite the specific prohibition violated in order to afford the tenant the opportunity to take the necessary “remedial action...required by the lease” to avoid a forfeiture (*Chinatown Apartments Inc. v. Chu Cho Lam*, 51 NY2d 786 [1980]; *Bray Realty, LLC v Pilaj*, 59 Misc.3d 130(A) [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2018]); *69 E.M. LLC v Mejia*, 49 Misc 3d 152[A] [App Term, 1st Dept 2015]; *888 E. 96th St., LLC v Hargrove*, 61 Misc 3d 137[A] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2018]; *London Terrace Gardens, L.P. v Heller*, 40 Misc. 3d 135[A] [App Term, 1st Dept 2009]).

In contrast, there is no requirement that a 10-day notice to quit under RPAPL 713(7) state the precise nature of the license or describe how the occupant came into possession (*see Kew Gardens Portfolio Holdings, LLC v Bucheli*, 130 NYS3d 878 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2020]); *see also Federation of Orgs. For the NY State Mentally Disabled, Inc. v Lindsay*, 80 Misc. 3d 131[A] [App Term, 1st Dept 2023]; *21st Mtge. Corp. v George*, 2024 NY Slip Op 50797[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2024]).

Here, the predicate notice meets the necessary pleading requirements for a notice to quit under RPAPL 713(7) as it alleges the tenant of record vacated by virtue of her death and that any license she granted to Respondent to live with her has been revoked by Petitioner. While RPAPL 713(7) only requires 10 days of notice prior to the vacate date following the revocation of a license, Petitioner's notice afforded Respondent with 30 days to vacate.

Nor is the purported letter from the leasing office in 2023 stating that Respondent was a co-occupant with his mother in any way inconsistent with characterizing Respondent as a licensee following his mother's death. "A license, within the context of real property law, grants the licensee a revocable non-assignable privilege to do one or more acts upon the land of the licensor, without granting possession of any interest therein" (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]). Shared possession is one of the hallmarks of a license, and a licensee holdover is an appropriate proceeding for recovering possession in the event a landlord determines a remaining family has no independent possessory rights following the death of the tenant of record (*see, e.g., Saito v Doe*, 71 Misc. 3d 135 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2021]). To the extent Respondent argues he has succession rights to the subject premises, this is an affirmative defense that Respondent may establish at trial. However, this inchoate defense in no way renders the predicate notice facially defect, particularly on a CPLR 3211(a)(7) motion "[w]here [once] evidentiary material is submitted...the question becomes whether the [petitioner] has a cause of action, not whether the [petitioner] has stated one and, unless it has been shown that a material fact as claimed by the [petitioner] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Fenton v Floce Holdings, LLC*, 229 AD3d 768 [2d Dept 2024]). Accordingly, for the foregoing reasons, the court does not find Petitioner's predicate

notice defective as a matter of law, and Respondent's motion to dismiss on this basis is denied (*see Gardens Portfolio Holdings, LLC v Bucheli supra; 21st Mtge. Corp. v George, supra; 307 W. 82nd St. Hous. Corp v Zacharias*, 59 Misc. 3d 148[A] [App Term, 1st Dept 2018]; *Great Jones St. Realty Corp. v Chimsanthia*, 67 Misc.3d 136[A] [App Term, 1st Dept 2020]; *Marine Terrace v Kesoglides*, 24 Misc. 3d 35 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2009]; *Oxford Towers Co., LLC v Leites*, 41 AD3d 144 [1st Dept 2007]; *Washington Muit. Bank, F.A. v Hanspal*, 18 Misc. 3d 127[A] [App Term, 2d Dept, 9th & 10th Jud Dists 2007]).

In denying Respondent's motion, the court notes that it is not relieving Petitioner of its ultimate burden at trial. Petitioner is "bound by the notice served" (*Singh v Ramirez*, 872 NYS2d 693 [App Term, 2d Dept, 2d & 11th Jud Dists 2008], and is therefore required at trial to prove the existence of a revocable license (*see 130-50 228th, LLC v Moseley*, 181 NYS3d 817 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2022]). To the extent Respondent alleges he meets the criteria for project-based succession, this may well defeat Petitioner's case (*see, e.g., Polyclinic Owner LLC v Castillo*, 2024 NY Slip Op [Civ Ct, NY Co 2024]). That, however, is a factual issue for trial.

With respect to Respondent's motion to dismiss or for a traverse as to service of the predicate notice, the process server's affidavit of service alleges personal service on Respondent (*see* NYSCEF 1), who is described as a female between 5'4 and 5'8. A process server's affidavit of service "constitute[s] *prima facie* evidence of proper service" of process (*Carver Fed. Sav. Bank v Supplice*, 109 AD3d 572, 572 [2d Dept 2013]; *see also Wilmington Sav. Fund Socy. FSB v Zabrowsky*, 212 AD3d 866, 869-870 [2d Dept 2023]; *U.S. Bank N.A. v Nakash*, 195 AD3d 651 [2d Dept 2021]; *Rox Riv 83 Partners v. Ettinger*, 276 AD2d 782, 783 [2d Dept 2000]). "Bare and unsubstantiated denials of receipt of [the initiating papers] are insufficient to rebut the

presumption of service” (*115 Essex St. LLC v Tenth Ward, LLC*, 2024 NY Slip Op 02290 [2d Dept 2024]). “However, a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the process server’s affidavit, and necessitates an evidentiary hearing” (*id.*, quoting *Deutsche Bank Natl. Trust Co. v DaCosta*, 97 AD3d 630, 631 [2d Dept 2012]; *see also Rattner v Fessler*, 202 AD3d 1011 [2d Dept 2022]) [“While a mere conclusory denial of service will not suffice to rebut a prima facie claim of proper service, the sworn denial, *combined with documentary and other evidence supporting such claim*, is sufficient to rebut the plaintiff’s prima facie showing of proper service and to necessitate an evidentiary hearing”] [emphasis added, internal quotation marks and citation omitted]).

While service of a predicate notice does not implicate personal jurisdiction, courts utilize the same evidentiary framework in assessing a challenge to the sufficiency of a process server’s affidavit of service (*see Marmon Realty Group, LLC v Khalil*, 72 Misc. 3d 136 [App Term, 2d Dept, 2d, 11th & 13 Jud Dists 2021]); *Citi Land Servs., LLC v McDowell*, 30 Misc. 3d 145 [App Term, 2d Dept, 2d, 11th & 13 Jud Dists 2011]).

Here, Respondent’s conclusory denial of receipt of the predicate notice, without other documentary evidence or probative facts, is insufficient to overcome the presumption of proper service (*see Rattner v Fessler*, 202 AD3d 1011 [2d Dept 2022]; *Cappa v Mahoney*, 2024 NY Slip Op 50192[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2024]; *OneWest Bank FSB v Perla*, 200 AD3d 1052 [2d Dept 2022]; *Marmon Realty Group, LLC v Khalil*, 72 Misc. 3d 136 [App Term, 2d Dept, 2d, 11th & 13 Jud Dists 2021]; *156 Nassau Ave. HDFC v Tchernitsky*, 112 NYS3d 859 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019]); *Deutsche Bank Natl. Trust Co. v*

*Quinones*, 114 D.3d 719 [2d Dept 2014]). Accordingly, the branch of Respondent's motion seeking dismissal or a traverse hearing as to predicate notice is denied.<sup>1</sup>

For the foregoing reasons, Respondent's motion to dismiss is denied in its entirety. The matter is adjourned to November 14, 2024, for settlement or release to a trial part. Respondent is directed to interpose an answer on or before November 1, 2024, or he will be afforded a general denial. Any further motions prior to the next court date must comply with the service requirements of CPLR 2214 or will be rejected as untimely.

This is the decision and order of the court.

Dated: October 2, 2024  
Queens, New York

  
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HON. LOGAN J. SCHIFF, J.H.C.

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<sup>1</sup> The court notes the Respondent, a male of approximately 5'11 in height, was present in court during oral argument on this motion on October 1, 2024, and plainly did not meet the description of the individual alleged to have been personally served in the process server's affidavit of service. Nonetheless, this was not part of the record and could not be considered for purposes of the instant motion (*see Capital Equity Mgmt., LLC v Weisz*, 28 NYS 3d 647 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]).