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354 E. 66th St. Realty Corp. v Curry
2010 NY Slip Op 50025(U)
Decided on January 13, 2010
Appellate Term, First Department
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Decided on January 13, 2010

APPELLATE TERM OF THE SUPREME COURT, FIRST DEPARTMENT

PRESENT: McKeon, P.J., Heitler, Shulman, JJ
570485/09.

**354 East 66th Street Realty Corp., a Domestic Corporation, Petitioner-Appellant-
Cross-Respondent,**

against

Michael Curry and Mrs. Michael Curry, Respondents-Respondents-Cross-Appellants.

Petitioner appeals, as limited by its brief, from (1) those portions of an order of the Civil Court of the City of New York, New York County (Thomas M. Fitzpatrick, J.), dated March 24, 2009, which denied its cross motion for summary judgment on its petition and for leave to conduct further discovery, and (2) an order (same court and Judge), dated May 19, 2009, which, upon granting reargument, adhered to the prior determination. Respondents cross-appeal, as limited by their brief, from that portion of the March 24, 2009 order which denied their motion for summary judgment dismissing the petition.

Per Curiam.

Order (Thomas M. Fitzpatrick, J.), dated May 19, 2009, modified to grant respondents' motion for summary judgment dismissing the petition; as modified, affirmed, with \$10

costs, and matter remanded for further proceedings on respondents' claim for attorneys' fees. Appeal from order (same court and Judge), dated March 24, 2009, dismissed as superseded by the appeal from the order of May 19, 2009.

Respondents-appellants made a prima facie showing of entitlement to judgment as a matter of law on their claim that respondent Michael Curry is entitled to succession rights to the subject rent stabilized apartment premises previously occupied by the tenant of record, Michael Curry's mother (*see generally Sutton Place Mgt. Co. v Rainey*, 19 Misc 3d 133[A]; *Melohn v Franklin*, 2002 NY Slip Op. 50328[U]). Respondents' voluminous evidence overwhelmingly demonstrated that Michael Curry continuously resided in the apartment with his mother for roughly 12 years prior to the mother's permanent vacatur of the unit (*see* Rent Stabilization Code [9 NYCRR] § 2523.5[b][1]).

In opposition to respondents' prima facie showing, petitioner-building owner failed to raise a triable issue precluding summary judgment on the issue of respondent Michael Curry's [*2]succession rights. Petitioner did not seriously contest respondents compelling factual showing of a long-term, shared occupancy between the mother and son. Petitioner's contention that a triable issue exists with respect to whether respondents waived their succession claim based upon claimed deceptive conduct (*see South Pierre Assoc. v Mankowitz*, 17 Misc 3d 53 [2007]) is without merit. Notably, petitioner had actual notice by July 2003 (roughly 15 months after the mother moved to a nursing home and during the pendency of her last lease renewal term) that the mother no longer had a possessory interest in the apartment and that the son was asserting succession rights. In this posture, no showing was made that respondents' conduct represented a departure from the procedure established for the timely interposition of succession claims or caused any discernable prejudice to petitioner (*cf. Third Lenox Terrace Assoc. v Edwards*, 23 Misc 3d 126[A] [2009]; *South Pierre Assoc.*, 17 Misc 3d at 54-55).

We remand the matter to Civil Court to determine whether respondent Michael Curry is entitled to recover attorneys' fees as a successor tenant (*see 245 Realty Assoc. v Sussis*, 243 AD2d 29 [1998]) and, if so, the reasonable amount of such fees. THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Decision Date: January 13, 2010

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