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Court Decisions
First Judicial Department
Civil Court
New York County
Housing Part Q

Judge Waithe

ESTATE OF LAURA MARCUS V. DAVIS

Petitioner, the Estate of Laura Marcus, Net Lessee ("Estate of Laura Marcus") brings this holdover proceeding on the grounds of owner's use and non-primary residence. Respondent moves for dismissal pursuant to CPLR 3211(a)(2), (a)(3) and (a)(7). The Estate of Laura Marcus cross-moves to substitute Martin J. Marcus as its executor. The petitioner is represented by Borah, Goldstein, Altschuler & Schwartz, P.C., by David R. Brody, Esq. David E. Frazer, Esq. appeared for **Himmelstein**, McConell, Gribben & Donoghue on behalf of the respondent.

The respondent argues that the Estate of Laura Marcus does not have standing to commence this owner's use and non-primary residence holdover proceeding because it is not a natural person. Although Mrs. Marcus signed the Notice of Non-Renewal of the Lease ("Notice") while she was alive, this proceeding was commenced after Mrs. Marcus died. Respondent also argues that Martin J. Marcus cannot bring an owner's use or non-primary residence proceeding as a beneficiary or as executor. In addition, respondent argues that the Notice cannot be used as a predicate to the proceeding because it alleges insufficient facts.

In opposition, the petitioner asserts that the substitution of Martin J. Marcus, as executor of the Estate of Laura Marcus, along with the amendment of the petition and notice of petition is sufficient to confer standing because Mr. Marcus is the intended beneficiary under Mrs. Laura Marcus' will. Petitioner further asserts that the Notice is sufficient because it explicitly states Mrs. Marcus' intention to establish a residence for herself "and other members of her immediate family" as required by the Rent Stabilization Code 2524.2(b).

The court grants respondent's motion to the extent of dismissing the owner's use cause of action and grants petitioner's motion to substitute Martin J. Marcus as executor for the non-primary residence cause of action.

Rent Stabilization Code 2524.4(a)(1) provides that an owner is not required to offer a renewal lease to a tenant if the owner "seeks to recover possession of a

12/12/2001 N.Y.L.J. 19, (col. 4)

housing accommodation for such owner's personal use and occupancy as his or her primary residence in the City of New York ..." In addition, RSC 2524.4(3) states that only "one of the individual owners of any building" may recover possession for personal use and occupancy. In order to recover possession in an owner's use proceeding, the owner must establish good faith, which means that the owner "seeks the eviction with the honest intention and desire to gain possession of the premises for his own use." *Rosenbluth v. Finkelstein*, 300 NY 402 (1950).

An owner's right to withhold renewal of a lease "may only be exercised by a natural person." *Fanelli v. NYC CAB*, 90 AD2d 756, 455 NYS2d 814, 756, 757 816 (1st Dep't 1982), *affd*, 58 NY2d 952, 460 NYS2d 554 (1983). Courts, in interpreting RSC 2524.4, have found that corporations, partnerships, and trustees are not natural persons who can bring an owner's use proceeding. *Id.*; *S&J Realty v. Korybut*, 147 Misc.2d 259 (Civ. Ct. NY Co. 1990); *Rizzuto v. Gabb*, 140 Misc.2d 98 (Civ. Ct. Kings Co. 1988). An executor only acquires the rights of the estate in a representative capacity. See *Pemford Corp. v. Rosenfeld*, 274 AD 769 (AD 1st Dep't 1948). Accordingly, an executor is not acting in an individual capacity, such as is required for the commencement of an owner's use proceeding.

Neither the Estate of Laura Marcus nor Martin J. Marcus as beneficiary or executor of the Estate of Laura Marcus may maintain an owner's use proceeding. The Estate of Laura Marcus is a legal entity, not a natural person. Accordingly, the Estate of Laura Marcus may not maintain an owner's use proceeding. Martin J. Marcus as a beneficiary may not act on behalf of the Estate of Laura Marcus unless he is acting as executor. See *Jackson v. Kessner*, 206 AD.2d 123, 127 (AD 1st Dep't 1994). However, even as an executor, he still may not maintain an owner's use proceeding because his rights exist only in a representative capacity. Petitioner makes the point that it is unfair and elevates form over substance to refuse Martin J. Marcus as an executor the right to act in his individual capacity and bring the owner's use proceeding. The court empathizes with Mr. Marcus' predicament, but cannot in essence speed up the probate process. Accordingly, the owner's use cause of action is dismissed.

However, the issue of whether respondent occupies the subject premises as her primary residence is a question of fact which may be established by Martin J. Marcus acting as executor. An executor is authorized to "take possession of, collect rents from and manage ... any property or estate therein owner by the estate ..." EPTL 11-1.1(b)(5)A), *Johnson v. Depew*, 38 AD2d 675, (4th Dep't 1971, appeal dismissed, 30 NY2d 565, (1972). There is no requirement in a non-primary residence proceeding that an owner establish personal good faith or give factual reasons why he or she wishes to recapture an apartment for personal use. Instead, in a non-primary residence proceeding, it is only necessary for facts to be established which show whether a tenant maintains an apartment as a primary residence. Therefore, as executor of the Estate of Laura Marcus, Martin J. Marcus may maintain a non-primary residence proceeding and the court declines to dismiss that cause of action.

Further, the court finds that the Notice is sufficient. Rent Stabilization Code 2524.2 requires that when a tenant is notified to vacate or surrender an apartment on any grounds listed in sections 2524.3 or 2524.4, the notice must contain "the facts necessary to establish the existence of such ground, and the date when the

12/12/2001 N.Y.L.J. 19, (col. 4)

tenant is required to surrender possession." Rent Stabilization Code 2524.2(b). The facts listed in the notice must support the grounds on which the proceeding will be based and cannot be mere conclusions. See *The Berkeley Associates, Co. v. Camlakides*, 173 AD2d 193, (1st Dept 1991).

Here, the Notice provides that the respondent should vacate by September 30, 2000 because of her "failure to Occupy the premises as [their] primary or principal place of residence." The Notice lists the following five alleged facts which support its conclusion:

a. You have not maintained an ongoing, substantial, physical nexus with the premises for actual living purposes;

b. You maintain a home which you own with your husband as 15 South 4th Street, Hudson, New York 12534 ...;

c. Your voter registration lists your permanent address as the Hudson, New York address;

d. Your husband votes from the Hudson, New York address, and ownership of your cars is from the Hudson, New York address;

e. Based on the foregoing, it appears that you are primarily residing at the aforesaid Hudson, New York address.

These alleged facts support the petitioner's claim and, if true, could be enough to prove non-primary residence. In addition, the notice provides respondent with sufficient facts with which to properly defend her rights in this proceeding. Accordingly, the court finds the Notice sufficient to serve as a predicate for the non-primary residence proceeding.

The respondent's motion to dismiss is granted solely to the extent of dismissing the owner's use issue from this case. The petitioner's cross-motion is granted to the extent of substituting Martin J. Marcus, as executor of the Estate of Laura Marcus as the petitioner herein and amending the notice of petition and petition to reflect the substitution forthwith. The matter is set down for trial solely on the issue of non-primary residence of the respondent on December 5, 2001, at 9:30 a.m. in Part G Room 823.

This constitutes the decision and order of the court.

12/12/2001 NYLJ 19, (col. 4)

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