

CIVIL COURT of the CITY of NEW YORK
NEW YORK COUNTY
HOUSING COURT: PART N

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60 WEST 57 REALTY, INC.,
Petitioner-Landlord,

-against-

L & T Index No. 55826/09

WILLIAM BOYCE, AS EXECUTOR OF
THE ESTATE OF LEDA LIOUNIS,
Respondent-Tenant

Decision & Order

-and-

WILLIAM BOYCE, "JOHN DOE" and
"JANE DOE",
Respondents-Undertenants.

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Hon. Brenda S. Spears, J., H.C.:

The petitioner commenced this holdover proceeding against William Boyce, as executor of the Estate of Leda Liounis, and in his personal capacity, to regain possession of the subject rent stabilized apartment on the grounds that the tenant of record, Leda Liounis, died and, under these circumstances, William Boyce's right to reside in the apartment ended with her death. Respondent William Boyce (hereinafter referred to as "Mr. Boyce" or the respondent), interposed an answer wherein he claimed that he has the right to succeed to Ms. Liounis' interests to the subject apartment because they were married.

This matter was transferred to the instant Part for trial. Based on the evidence presented and testimony at trial, this court finds that the respondent has established that, under the applicable rent-stabilized regulations, statutes and case law, he is entitled to succeed to the his wife's interests in the subject premises. Therefore, this proceeding is dismissed.

The parties stipulated to the petitioner's *prima facie* case. And, the parties further stipulated to the admission of several documents relating to the respondent's long-term rental of an apartment located Reston, Virginia; these documents established that the respondent had rented the Virginia apartment before his marriage and continued to renew the lease for said apartment after his marriage.

Thus, the parties agreed that the tenant of record, Leda Liounis, became a tenant

of the subject premises as of January 1, 1995, and signed several lease renewals, with the last renewal ending as of as of December 31, 2008. At the time she signed the original lease, Ms. Liounis was not married. Ms. Lionuis and the respondent were married in New York City in October 2003. She died about 4½ years later.

The issue that is squarely before the court is whether the respondent was maintaining the subject apartment as his primary residence for the two years prior to his wife's 's death. Section 2323.5 (b)(1), the relevant portion of the Rent Stabilization Code, provides in pertinent part that:

Unless otherwise prohibited by occupancy restrictions based upon income limitations pursuant to federal, state, or local law, regulations or other requirements of governmental agencies, ... and such person has permanently vacated the housing accommodation, any member of such tenant's family, as defined in subdivision (o) of section 2520.6 of this Title, who has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two (2) years...immediately prior to the permanent vacating of the housing accommodation by the tenant, or from the inception of the tenancy or commencement of the relationship, if less than such periods, shall be entitled to be named as a tenant on the renewal lease.

In determining whether a person maintains a specific premises as his or her primary residence, the courts have routinely ruled that, in most circumstances, the person seeking succession rights must be able to establish that he or she was physically present in the apartment for ordinary living purposes for more than 183 days per year. See, e.g., *Emay Properties v. Norton*, 136 Misc. 2d 127, 519 N.Y.S.2d 90 (App. Term 1st Dept, 1987); *Sommer v. Ann Turkel, Inc.*, 137 Misc. 2d 7, 522 N.Y.S. 765 (App. Term, 1st Dept, 1987); *Glenbriar Co. v. Lipsman*, 11 A.D. 3d 352, 783 N.Y.S. 2D 546 (1st Dept. 2004), *aff'd*, 5 N.Y. 3D 388, 804 N.Y.S.2d 719 (2005); *Toa Const. Co., Inc. v. Tsitsires*, 54 A.D. 3D 109, 861 N.Y. 2D 719, 861 N.Y.S. 2D 335 (1st Dept 2008).

William Boyce testified in support of his claim for succession rights to the subject apartment. Mr. Boyce stated that he was born in New York City, but attended college and graduate out of the area, receiving a Master's degree in aerospace engineering from

the University of Texas. He moved to Virginia and began working for a company located in Leesberg, Virginia. In 1998, he rented an apartment in Reston, Virginia, a town located 14 miles from his place of employment; he still leases that apartment. When he moved to that apartment, he arranged for utilities, including cable service, and a telephone. He registered his car in Virginia and had a Virginia driver's license until 2008; he now has a New York driver's license. He obtained a new car in 2001, which was registered in Virginia. That car is presently registered and insured in Virginia. The respondent claims that he has not driven his car to New York since 2007.

In 1998, Mr. Boyce opened a checking account in 1998 in the Chevy Chase bank and continues to maintain that account. He claims that he has seen no reason to open an account in a New York City bank because he is able to obtain cash from local ATMs and can make any necessary payments by checks drawn on that account.

Mr. Boyce is presently a Chief Engineer in Orbit Analysis for Boeing, a job that consists of monitoring satellite positions. He testified that this work is done primarily on computers. Thus, he stated, it is not necessary for him to be the offices in Virginia unless he has to attend meetings. In 2005, his employer provided him with a laptop so that he would be able to work from New York City.

The respondent originally registered to vote in Virginia. He stated that he only votes in presidential elections and, as a result, voted in the 2000 and 2004 presidential elections. He registered to vote in New York in 2008.

The respondent testified with respect to his relationship with Ms. Liounis, which began in April 2002. During the early stages of the relationship, he came to New York every other weekend. But, by late 2002, he was coming to New York every weekend. In the Spring of 2002, Ms. Liounis rearranged the dining room furniture to create a place for him to work; she also cleared out a closet and dresser drawers so that there would be room for his belongings. He got a cell phone in 2002 with a New York City area code because he knew he would be spending the majority of his time here. The couple vacationed together in Paris, France during June and July 2002.

He and Ms. Lionis were married in October 2003. He continued to spend some time in Virginia until about 2005 or 2006, when, as previously stated, his employer gave him a laptop. He would only stay in the Virginia apartment when he had to be in the area to attend meetings.

During the relevant two-year period, the respondent traveled between New York and Virginia by train, automobile and, on rare occasions, by plane. When he took the

train to New York City, Mr. Boyce drove from the Virginia apartment to the Amtrak station in New Carrollton, Maryland, where he was able to park his car. He further testified that he and his wife used the Virginia apartment for about two to three weeks in 2006, about one week in 2007 and at no time during 2008. The couple also traveled to Europe and New England on vacation in 2006 through 2007. However, according to the respondent, the couple spent the majority of their time together in the subject apartment.

The respondent alleged that he purchased several items for the subject apartment, including decorative objects, appliances and furniture.

The respondent conceded that until 2008, he and his wife separately filed income taxes, listing themselves as "married, filing separately". He further conceded that he used the Virginia address as the address on his taxes, under the mistaken belief that he had to use that address because he earned his income in that state.

Mr. Boyce further testified with respect to Ms. Liounis' health problems. He stated that he was aware that she had had cancer before they were married and that the disease was in remission until about May 2007. She had surgery in May 2007. After this surgery, she underwent radiation treatment and chemotherapy in September 2007. She had a second round of these treatments in January and February 2008. His wife's health continued to decline. She was hospitalized several times during the Spring of 2008. The respondent stated that during this period he was either with his wife in the hospital or in the apartment. Ms. Liounis died on May 26, 2008.

The voluminous documents produced by the respondent, and admitted into evidence, support his contention that the subject apartment was his primary residence during the relevant time period. The Amtrak and American Express records establish that over 80% of the respondent's spending activities occurred in Manhattan, in the general area of the subject apartment. Purchases were made in local restaurants, supermarkets, drug stores and other local businesses. The records reflect that the respondent was in Virginia during the relevant period. However, for the most part, his spending activities involved purchases of gas, train fare and restaurants between the Virginia area and New York City.

The testimony of three non-party witnesses was also offered in support of the respondent's contention that he was residing in the subject apartment for the requisite number of days prior to Ms. Liounis' death. The first non-party witness, Lois Levinson, testified that she met the decedent in either 1995 or 1996, when they were working for the same publishing company. She recalls meeting the respondent shortly after he began dating Ms. Liounis. Through the years, she socialized with the couple: they met

frequently for meals; and celebrated special days together, such as their respective birthdays and anniversaries.

Ms. Levinson further testified that in 2006 she worked for Simon & Shuster and in 2007 she began to work for TimeOut; her office was located about 10 blocks from the subject apartment. She went to a gym located on 56th Street and Avenue of the Americas, just a short distance from the subject apartment. As a result, she would frequently stop by the subject apartment after work and after going to the gym. She often saw the respondent in the apartment after he began dating Ms. Liounis. He would be engaging in normal activities, such as cooking, reading and watching movies. She also saw him entering the apartment on several occasions, carrying groceries and dry-cleaned clothes and laundry. This witness was aware that Ms. Liounis re-arranged the furniture in the subject apartment to make space for the respondent. Ms. Liounis removed the dining table, replacing with it with two desks so that the respondent would have a work area.

On cross-examination, Ms. Levinson could not recall with certainty the exact year that the respondent began to date Ms. Liounis. However, this did not undermine the credibility of her testimony with respect to the respondent's presence in the subject apartment during the time period relevant to the instant litigation.

Elisabeth Doyle, a childhood friend of the decedent's, also testified with respect to the respondent's presence in the subject apartment. Ms. Doyle was a frequent visitor at the subject premises during the relevant time period. She would often stop by the apartment in mid-afternoon after getting her hair-cut; she would see the respondent in the apartment on these occasions. In addition, this witness stated that she was a member of a Board of the Child Development Center Division of the Jewish Board of Children and Family Services, which had offices very close to the subject apartment. She attended meetings at the agency on Wednesdays from 12 Noon to 1:30 PM every 6 to 8 weeks. She would usually stop by the apartment after these meetings. Ms. Doyle stated that the respondent would be in the subject premises during these visits either alone or, after Ms. Loinius' cancer returned, the couple would be in the apartment together.

This witness described her relationship with the couple as close. In fact, she stated that her children called the couple "Uncle Bill" and "Aunt Leda". Like Ms. Levinson, Ms. Doyle celebrated important days, such as birthdays, with the respondent and his wife. During May 2006 through May 2007, they frequently went out to restaurants together, especially an Italian restaurant close to the subject premises. The

respondent and Ms. Lionuis came to her Long Island on numerous occasions. Once Ms. Lionuis' cancer returned, from May 2007 until her death in Mat 2008, the couple were confined to the apartment; she visited them there and assisted the respondent in caring for his wife as she became more incapacitated.

Ms. Doyle stated that once the couple became seriously involved, and were married, the decedent made numerous changes to accommodate the respondent. The decedent removed the dining room table, replacing it with two desks. This witness saw the respondent's clothes in a closet. She saw additional *indicia* that the respondent was living in the apartment, including: tie studs and cufflinks on the dresser; wedding gifts in the kitchen, bookcases; photographs of the couple and their respective families through the apartment, as well as other male and female items. She saw men's items in the bathroom such as razors, a razor brush, shaving cream and shampoo.

Craig Boyce, the respondent's brother, was the respondent's final non-party witness. He was the best man at the respondent's wedding. He now lives in Battery Park City, but visited his brother and his wife at the subject apartment, particularly during the relevant time period. He was with his brother and his wife during the holiday celebrations. He further stated that on one occasion he stayed at the Reston, Virginia apartment during a visit to the Washington D.C. area. He observed that one of the Virginia apartment's rooms was being used as for storage.

Darius Raden, a doorman who has worked at the subject building for 32 years, was the sole rebuttal witness called by the petitioner. His testimony was not inconsistent with the respondent's claims. According to this witness, there are three entry points to the building: the main entrance on 57th Street, the garage entrance and the rear entrance on 56th Street. Mr. Raden stated that he worked at the building from Sunday to Thursdays, 7:30 AM through 3:30 PM. During his shift, Mr. Raden was stationed at the main lobby, but he was often called away from this post because he sorted mail, received packages, laundry and dry cleaning, and provided other general assistance to tenants and their guests. He stated that he knows the respondent and has seen him a number of times in the building, although Mr. Raden was not clear as to whether he saw the respondent several times several times each month or several times over a period of months. Nevertheless, Mr. Raden made no entries in the Visitor's Log when the respondent entered the building because the respondent was not considered a visitor.

The court finds that the credible testimony of all the witnesses and the documentary evidence support the respondent's contention that he is entitled to succeed to his wife's interest in the subject apartment. It is clear from the testimony that the respondent

began to spend a considerable amount of time in the subject premises early in his relationship with Ms. Liounis. The evidence further establishes that the respondent had moved into the subject premises by the time of their marriage and that this apartment was the couple's primary residence.

The petitioner has maintained that certain documents require this court to conclude the alternative. Thus, the petitioner claims, the fact that the respondent continued to lease the Virginia apartment after his marriage, did not change his bank to a New York City bank, was registered to vote in Virginia until 2008 and filed his taxes separately as a Virginia resident until 2007 requires a determination that the respondent did not maintain the subject apartment as his primary residence during the requisite period. However, this not the state of the law.

The case law requires that the respondent present as complete a picture as possible as to where he was actually living two years prior to the vacatur by the tenant of record. This picture can be drawn from the documents presented, particularly where testimony may be unavailable or not credible. But, the documents alone are not the determining factor.

As the First Department, Appellate Division ruled in 300 East 34th Street Co. v. Habeeb, 248 A.D. 2d 50, 683 N.Y.S.2d 175 (1st Dept 2007) in reversing the Appellate Term's holding:

The question posed by Appellate Term ruling, then, is whether documentary evidence is necessary as well as sufficient. We conclude that it is not. Although we have found 'the traditional indicia of primary residence', including driver's license, voter's registration, tax returns, telephone and bank records, to be competent evidence in establishing a period of residency (Lesser v. Park 65 Realty Corp., 140 A.D.2d 787, *appeal dismissed*, 72 N.Y. S.2d 940, 531 N.E.2d 660), we have not found it to be required. While documentation, or the absence thereof, might be a significant factor (Matter of Rose Associates v. State Division of Housing & Community Renewal, *supra*, ... in evaluating primary residence, especially in the case of the dubious credibility of witnesses, it would not be a dispositive factor (West 157th St. Assosicates v. Sassonian, 156 A.D. 2d 137, 548 N.Y.S. 2d 184), especially when there is a preponderance of credible personal testimony.

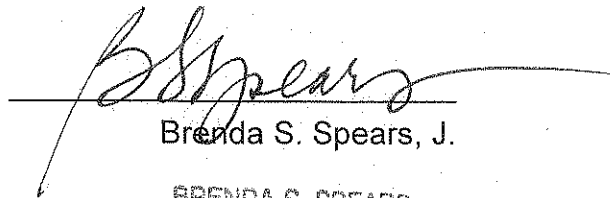
Thus, as the Appellate Division has reasoned, in succession rights proceedings, documentary evidence can serve as a way to augment questionable testamentary

evidence or as a substitute if there is no such credible testimony. In the instant proceeding, however, the court has heard testimony from four witnesses, including the respondent and the petitioner's rebuttal witness. Each testified credibly with respect to the respondent's nexus to the subject apartment. Their testimony was not shaken or substantially modified during cross-examination. Moreover, the petitioner offers no evidentiary challenge to the respondent's claim that he continued to lease an apartment in Virginia so that he would have a place to stay during sporadic visits to his place of employment. Similarly, there is no challenge to the respondent's claim that he was able to conduct his business affairs on-line even while in New York City.

Therefore, the court finds that as William Boyce has established that he lived in the subject apartment with Ms. Liounis, the decedent for the two years prior to her death, he is entitled to succeed to her interest in the subject apartment and, a rent-stabilized lease in his name.

This proceeding is dismissed.

This constitutes the decision and order of this court.



Brenda S. Spears, J.

BRENDA S. SPEARS
JUDGE, HOUSING PART

Dated: New York, New York
January 17, 2012

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