CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART S

----------X

SJF FOOD CORP.,

Petitioner- Landlord,

Index No. L & T 95118/2010

-against-

DECISION/ORDER

FRANK STEWART
a/k/a FRANK L. STEWART
54 West 74th Street
Apt. #301
New York, New York 10023

Respondent-Tenant,

-and-

MEI-TEI-SING SMITH a/k/a "JANE DOE"

Respondent-Undertenant.

----------X

Present:
Hon. David Kaplan

Introduction and Procedural History

Petitioner, SJF Food Corp., commenced this proceeding to recover possession of Apartment 301 located at 54 West 74th Street, New York, New York ("subject premises"), from rent-stabilized tenant of record Frank Stewart a/k/a Frank L. Stewart ("Stewart") based on the allegation that he does not primarily reside at the subject premises. The subject premises is a condominium unit that is subject to rent stabilization because respondent-Stewart took occupancy of the unit prior to the building's conversion. The petition alleges that Stewart resides at 160 West 73rd Street, Apartment 9F, New York, New York, and that respondent-undertenant Mei-Tei-Sing Smith ("Smith") is occupying the subject premises without petitioner's consent.

Smith, through counsel, answered the petition by asserting a general denial and the following affirmative defenses: (1) failure to state a cause of action; (2) illusory prime tenancy; (3) that Smith succeeds to the tenancy rights of respondent Stewart; (4) that the Notice of Termination, Notice of Petition and Petition are defective; (5) waiver; (6) lack of subject matter jurisdiction; (7) unclean hands; (8) estoppel; and (9) a counterclaim for attorney's fees. Stewart did initially appear in the proceeding or file a written answer. However, after the matter was adjourned several times, Stewart appeared and orally answered the petition with a general denial.

The Trial

The trial was conducted on December 12, 2012 and December 17, 2012. Petitioner called two witnesses at the trial – Aaron Iseson, the property manager of the subject premises, and respondent Stewart. Respondent-undertenant Smith testified on her own behalf.

Through documentary and testimonial evidence, petitioner demonstrated that it owns the subject premises. It presented a certified copy of the deed and a current certified Multiple Dwelling Registration for the subject building. Petitioner also presented evidence that the subject premises is currently registered with the Division of Housing and Community Renewal ("DHCR") and that it is subject to rent stabilization. Petitioner further established that Stewart is the tenant of record of the subject premises, having entered into a lease with petitioner's predecessor-in-interest. Petitioner entered numerous renewal leases into evidence – each executed by Stewart with the most recent renewal lease for the rental period November 1, 2009 to October 31, 2010.[1]

---

[1] Petitioner entered the following renewal leases into evidence: (1) a renewal lease, dated September 11, 2009, between Marbrose Realty, Inc. and Frank Stewart for the rental period November 1, 2009 to October 31, 2010; (2) a renewal lease, dated November 1, 2007, between Marbrose Realty, Inc. and Frank Stewart for the rental period November 1, 2007 to October 31, 2009; (3) a renewal lease, dated November 1, 2005 to October 31, 2007; (4) a renewal lease, dated November 26, 2003, between Marbrose Realty, Inc and Frank Stewart for the rental period of November 1, 2003 to October 31, 2005; (5) a renewal lease, dated November 28, 2001,

The evidence at trial showed that Stewart moved into the subject premises sometime in 1971 or 1972. Around 1978 or 1979, Smith moved into the subject premises, where Stewart was already residing, and they had two children together that were born in 1980 and 1982, respectively. In 1984, Stewart moved out of the apartment due to differences he was having with Smith. Stewart testified that the prior superintendent assisted him in moving his belongings out of the subject premises.

Despite moving out in 1984, Stewart continued to pay the rent for the subject premises each month, as well as sign renewal leases, up until the commencement of this proceeding. Stewart, in part, paid the rent for the subject premises each month as he was obligated to pay rent for an apartment for his children to live in with Smith pursuant to a Family Court Support Order.[2] However, respondents' children reached the age of majority in the 2001 and 2003, respectively, and Stewart continued to pay the rent and sign renewal leases for the subject premises in his own name through 2010. Stewart explained that he continued to do so in the hope that he could buy the apartment one day. Stewart further acknowledged that nothing in the Family Court Support Order

---

between Marbrose Realty, Inc. and Frank Stewart for the rental period November 1, 2001 to October 31, 2003; (6) a renewal lease, dated October 3, 1999, between SJF Corp. c/o Marbrose Realty, Inc. and Frank Stewart for the rental period November 1, 1999 to October 31, 2001; (7) a renewal lease, dated July 31, 1997, between SJF Corp. and Frank Stewart for the rental period November 1, 1997 to October 31, 1999; (8) a renewal lease, dated November 5, 1995, between Snowflake Development Corp. c/o Marbrose Realty, Inc. for the rental period November 1, 1995 to October 31, 1997; (9) a renewal lease, dated July 30, 1993, between Crest Management Co., Inc., agent for Snowflake Development Corp. and Frank Stewart for the rental period November 1, 1993 to October 31, 1995; (10) a renewal lease, dated October 1, 1991 between Crest Management Co., Inc., agent for Snowflake Development Corp. and Frank Stewart for the rental period November 1, 1991 to October 31, 1993; and (11) a renewal lease, dated November 22, 1989, between Crest Management Co., Inc., agent for Snowflake Development Corp. and Frank Stewart for the rental period November 1, 1989 to October 31, 1991.

[2] Neither side offered a copy of the Family Court Child Support Order into evidence.

obligated him to pay rent for the subject premises, just for an apartment. He stated that he paid rent for the subject premises in particular as it was a good neighborhood to raise their children.

Smith, during her examination, corroborated Stewart's testimony regarding their living arrangement and child support obligations. According to Smith, Stewart agreed to pay the monthly rent for an apartment as child support and Smith covered trips and food expenses for the children. Smith acknowledged that her children fully moved out of the subject premises in 2003 and 2007, respectively and that Stewart continued to pay the rent and sign renewal leases long after the children reached the age of majority and even after they moved out.

Nonprimary Residence

The Rent Stabilization Code ("RSC") provides that "a landlord may recover possession of a rent stabilized apartment from a tenant whose lease has expired if the apartment 'is not occupied by the tenant . . . as his or her primary residence'" (9 NYCRR § 2524.4[c]; *see Katz Park Avenue Corp. v Jagger*, 11 NY3d 314, 317 [2008]; *see also 542 East 14th Street LLC v Lee*, 66 AD3d 18, 20–21 [1st Dept 2009]). Primary residence is "judicially construed as 'an ongoing, substantial, physical nexus with the . . . premises for actual living purposes'" *(542 East 14th Street LLC v Lee*, 66 AD3d at 21 [citation omitted]).

Here, it is undisputed that Stewart has not primarily resided at the subject premises for numerous years. Stewart admitted that he left the subject premises in 1984 and never returned. However, as Stewart continued to pay the rent and sign renewal leases he cannot be said to have permanently vacated the subject premises despite any representations he may have made to the building's superintendent when he moved out his belongings in 1984 (*see ST Owner LP v Nee-Chan*, 16 Misc3d 1122[A] [NY County, Civ Ct 2008] ["A determination that a housing accommodation

is not the tenant's primary residence does not necessarily mean that the tenant has permanently vacated"]; *72A Realty Assoc. v Kutno*, 15 Misc 3d 100, 102 [App Term, 1st Dept 2007] [tenant did not permanently vacate the subject apartment primarily because he "continued to maintain a nexus with the apartment . . . executing a renewal lease, paying rent, and staying in the apartment . . . on a sporadic basis"]; *East 96th St. Co. LLC v Santos*, 13 Misc 3d 133[A][App Term, 1st Dept 2006] [tenant did not permanently vacate the apartment because, among other things, renewal leases listed his name and were either personally signed by him or bore his forged signature]; *360 W. 55th St. L.P. v Anvar*, 13 Misc 3d 7, 8 [App Term, 1st Dept 2006] [tenant's permanent vacatur occurred, at the earliest, when she surrendered rights to the apartment in writing]). Accordingly, the evidence demonstrates that Stewart does not maintain an ongoing, substantial, physical nexus with the subject premises and petitioner is entitled to a judgment against respondent Stewart on its possessory claim (*cf. East End Temple v Silverman*, 199 AD2d 94 [1st Dept 1993]).

Succession

The court will now address respondent-undertenant Smith's claim that she has succession rights to the subject tenancy. The right to succession to the tenancy of a rent-stabilized apartment is exclusively derived from the RSC (*see Hughes v Lenox Hill Hosp.*, 226 AD2d 4, 5-6 [1st Dept 1996]). RSC § 2523.5(b)(1) provides that: "if an offer [to renew the lease] is made to the tenant and such person has permanently vacated the housing accommodation, any member of such tenant's family . . . 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 . . . shall be entitled to be named as a tenant on the renewal lease" (*ST Owner LP v Nee-Chan*, 16 Misc3d 1122[A]). In order to qualify as a successor to a

tenancy, the RSC "requires simultaneous tenancy by the potential successor with the rent-stabilized tenant for the two years immediately prior to the tenant's permanent removal from the premises" (*Glass v Brookford LLC*, 29 AD3d 347, 349 [1st Dept 2006]; 9 NYCRR §2523.5[b][1]). "Unlike a nonprimary residence proceeding in which it is 'generally desirable' for the court 'to evaluate the entire history of the tenancy,' [the court's] inquiry in this succession case is narrowly limited by the governing Code regulation to a clearly specified, finite time period, viz., the two-year period immediately preceding the tenant's permanent vacatur" (*72A Realty Assoc. v Kutno*, 15 Misc3d at 102).

Notably here, the date a tenant stops primarily residing at a premises is not necessarily the same date that he or she permanently vacated the premises as relevant to a succession claim analysis (*see Warren LLC v Carbello*, NYLJ, May 6, 2009, at 30, col 1 [Civ Ct, Queens County]). In instances where the tenant of record fails to surrender the premises and continues to pay the rent as well as execute renewal leases, the permanent vacatur date is generally defined as the date the last renewal lease expired (*see Third Lenox Terrace Assoc. v Edwards*, 91 AD3d 592 [1st Dept 2012]; *72A Realty Assoc. v Kutno*, 15 Misc3d at 102; *Clinton Realty Assoc. LLC v De Los Angeles*, 29 Misc3d 142[A] [App Term, 1st Dept 2010]; *Metropolitan Life Ins. Co. v Butler*, 2002 NY Slip Op 50014[U] [App Term, 1st Dept 2002] [noting that the "tenants of record cannot be said to have permanently vacated the apartment premises until the spring of 1999, since they never surrendered possession and continued to execute renewal leases extending through September 1999. During the immediately preceding two year period, there was no showing that respondent lived in the premises with the tenants, since the tenants were concededly not residing there primarily"]; *East 96th Street Co., LLC v Santos*, 12 Misc 3d 133[A]).

Here, it is undisputed that Stewart stopped primarily residing at the subject premises in 1984 yet Smith failed to assert any claim to succession to his tenancy at that time. Instead, Stewart, who did not surrender the apartment, continued to pay the rent and execute renewal leases until the commencement of this proceeding. Stewart asserted that even though he vacated the subject premises, he continued to execute renewal leases and pay the monthly rent in his name pursuant to a Family Court Child Support Order. However, there was no evidence presented that the Family Court order required him to do anything more than pay rent for an apartment, not this particular apartment. Furthermore, respondents' children became the age of majority in the early 2000s and each child vacated the subject premises within a few years thereafter. Nonetheless, upon satisfying his child support obligations, respondent continued to pay the monthly rent in his name and execute renewal leases while primarily residing at another residence because of his desire to possibly one day purchase the apartment.

Based on respondent Stewart's actions detailed above, the earliest date that he could have permanently vacated the subject premises for the purposes of a succession claim is October 31, 2010 when his last renewal lease expired (*cf. Third Lenox Terrace Assoc. v Edwards*, 91 AD3d at 592; *72A Realty Assoc. v Kutno*, 15 Misc3d at 102; *Metropolitan Life Ins. Co. v Butler*, 2002 NY Slip Op 50014[U]). Therefore, the relevant two-year period during which Smith must show that she "co-occupied" the subject premises with Stewart is 2008 to 2010. During the relevant time period, there is no evidence showing that respondent Stewart lived at the subject premises with Smith since he vacated the subject premises in 1984 (*cf. Metropolitan Life Ins. Co.*, 2002 NY Slip Op 50014[U]). Thus, Smith did not simultaneously reside with Stewart during the two years immediately prior to his permanent vacatur. Accordingly, Smith's succession claim must fail (*see Third Lenox Terrace*

Assoc. v Edwards, 91 AD3d at 592; *72A Realty Associates v Healey*, 26 Misc3d 132[A][App Term, 1st Dept 2010]; *315 East 72nd St., Owners, Inc. v Siegel*, 22 Misc3d 10, 12 [App Term, 1st Dept 2008]; *Clinton Realty Assoc. LLC v De Los Angeles*, 29 Misc3d 142[A]).

Illusory Prime Tenancy

The court now turns to Smith's claim of illusory prime tenancy. "An illusory tenancy is defined generally as a residential leasehold created in a person who does not occupy the premises for his or her own residential use and subleases it for profit, not because of necessity or other legally cognizable reason" (*Matter of Badem Bldgs.*, 70 NY2d 45, 52-53 [1987]; *see also Primrose Mgt. Co. v Donahoe*, 175 Misc2d 503, 504 [App Term, 1st Dept 1997]). "Such tenancies are condemned because they permit the unscrupulous to use the provisions of the rent stabilization laws for financial gain, at the expense of those entitled to the laws' protections to obtain living quarters at reasonable cost, and thereby frustrate the laws' purposes" (*Matter of Badem Bldgs.*, 70 NY2d at 53).

In an analyzing whether a tenancy is illusory, courts have traditionally considered the following non-exclusive factors: (1) whether the prime tenant ever occupied or intended to occupy the premises for residential use; (2) whether the prime tenant had dominion and control over the apartment; (3) whether the prime tenant and the landlord colluded in the scheme or whether the landlord had constructive knowledge of it; (4) whether the subtenant reasonably expected to continue in possession indefinitely as a rent-regulated tenant when the sublease ends; and (5) whether the prime tenant profited by overcharging the subtenant (*Art Omi Inc. v Vallejos*, 15 Misc3d 870, 875-876 [Civ Court, NY County 2007]; *see also Bruenn v Cole*, 165 AD2d 443, 447 [1st Dept 1991]). Here, respondent-undertenant Smith has not demonstrated the existence of any of the traditional hallmarks of an illusory tenancy and thus her claim fails. Notably, Stewart previously

resided in the subject premises; there was no sublease agreement between Smith and Stewart; and Smith failed to pay rent to Stewart. The court further notes that although there was evidence that the landlord knew or should have know that Stewart was no longer primarily residing at the subject premises, there was no evidence of collusion or other indication that the landlord benefitted from the status quo.

Waiver & Estoppel

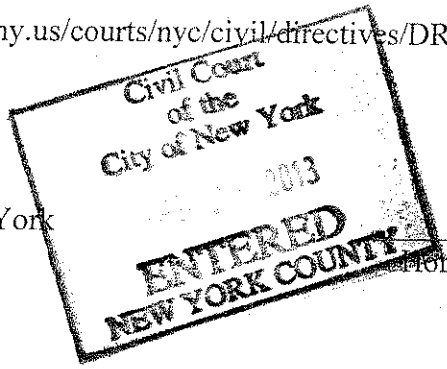
Respondent-undertenant Smith also asserts claims of waiver and estoppel. Smith alleged that petitioner knowingly accepted rental payments from her in the past and that this action constituted a waiver of all its claims asserted in this proceeding and estopped it from bringing this proceeding. "A waiver is the voluntary abandonment or relinquishment of a known right [and] is essentially a matter of intent which must be proved" (*Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984]). "[A] tenancy may not generally be created by waiver or estoppel" (*Riverside Holdings, LLC v Murray*, 2002 NY Slip Op 50176[U][App Term, 1st Dept 2002]). Irrespective of whether a rent regulated tenancy may be created by waiver or estoppel, the evidence presented at trial, including the testimony of both Stewart and Smith, established that Stewart was the only person to pay the rent for the subject premises to petitioner. Thus, Smith has failed to set forth a claim of estoppel or waiver based on the acceptance of rent as she failed to offer any evidence that she paid rent directly to petitioner.

Conclusion

Accordingly, petitioner is awarded a judgment of possession against Frank Stewart a/k/a Frank L. Stewart and Mei Jei Sing Smith a/k/a Jane Doe. The warrant is to issue forthwith with execution of the warrant stayed through June 30, 2013 for respondents to vacate. The stay of

execution of the warrant is conditioned on respondents paying ongoing use and occupancy at the last lease amount by the 5th of each month. Upon default in payment, execution of the warrant may accelerate upon service of a marshal's notice. The court has considered respondents' remaining defenses and finds them to be without merit.

The foregoing constitutes the decision and order of this Court, copies of which are being sent to all parties. The parties are directed to pick up their exhibits withing 30 days or they will either be sent to the parties or destroyed at the court's discretion and in compliance with DRP-185 (http://www.courts.state.ny.us/courts/nyc/civil/directives/DRP/DRP185.pdf).



Dated: February 22, 2013
New York, New York

HON. DAVID J. KAPLAN

Hon. David J. Kaplan, J. H. C.

Attorney for Petitioner
David Scudieri, Esq.
Goldberg Scudieri & Lindenberg, P.C.
45 West 45th Street, Suite 1401
New York, New York 10036
(212) 921-1600

Attorney for Respondent Stewart
William Gribben, Esq.
Himmelstein McConnell Gribben Donoghue & Joseph
15 Maiden Lane
New York, New York 10038
(212) 349-3000

Attorney for Respondent Smith
Tracy William Boshart, of Counsel
Rosman and Associates
488 Madison Avenue, Suite 1120
New York, New York 10020
(212) 752-1330