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Decisions of Interest
New York Landlord/Tenant Law

OWNER'S **NUISANCE** HOLDOVER DISMISSED; COURT DOES NOT FIND **NUISANCE** CONDITION

Judge Jean T. Schneider

31175 LLC v. SHAPIRO, 62234/08, Decided 12/10/08--

CORRECTED DECISION/ORDER

The petitioner in this **nuisance** holdover proceeding is the investor-owner of an individual cooperative apartment on East 75th Street. Respondent is a rent stabilized tenant. He has lived in the apartment for 31 years. Petitioner became his landlord in 2004. Respondent is 71 years old and mentally and physically disabled. He appeared in this proceeding by his Article 81 guardian, Clifford **Meirowitz**.

The matter was tried before me on September 18 and 26, 2008 and on November 24, 2008. Both sides were represented by counsel. Petitioner's managing member testified for petitioner, as did the cooperative's managing agent and five other residents of the building. The guardian, Mr. **Meirowitz**, testified for respondent, and called respondent's treating physician, his full time home attendant, and the clinical social worker who manages his outpatient psychiatric care as additional witnesses.

Based upon the credible evidence at trial, I make the following findings of fact.

In July 2007, an attorney for the cooperative corporation sent a letter to petitioner, complaining that respondent appeared to need more care than he was receiving, and that his hygiene and behavior were causing a **nuisance**. The letter was followed by a formal Notice of Default dated October 10, 2007. The notice alleged that respondent's apartment was filthy and roach-infested, that it gave off odors of garbage and body odor, and that respondent's home attendants loitered in the elevators and in front of the building.

On October 24, 2007, petitioner's managing member, Tina Silver Lieberman, visited the apartment. She was accompanied by representatives of the cooperative and a representative from New York City Adult Protective Services ('APS'). Ms. Lieberman testified that this was her only visit to the apartment. In her testimony, she described the apartment as filthy, smelly, and full of debris piled to the ceiling in several rooms.

Ms. Lieberman's testimony is contradicted, however, by a letter agreement between petitioner and the cooperative corporation dated November 5, 2007. That letter agreement, signed just a few days after the October 24, 2007 apartment inspection, states that 'based upon the inspection of October 24, 2007, we do not believe that there is a present legitimate basis to commence eviction proceedings inasmuch as no actionable conditions were observed at the time of the inspection, as further confirmed by a representative of APS.' The letter agreement specifically withdrew the coop's October 10, 2007 notice of default.

Despite the conclusion of all parties after the October 24, 2007 inspection that the condition of the respondent's apartment was not a **nuisance**, respondent's guardian petitioned the Supreme Court in the Article 81 proceeding for permission to remove the respondent from the apartment temporarily so that the apartment could be cleaned, repaired and painted. The guardian testified at trial that he did this not because he believed the apartment was a **nuisance**, but because it was dark, cluttered, and needed repairs and painting. The moving papers specifically state that there was no odor in the apartment. It was the guardian's belief that the needed work could be done more easily if respondent were not in the apartment.

By order dated November 26, 2007, the Supreme Court directed the guardian to clean and improve the condition of the apartment, but did not direct that respondent be removed during this process. The guardian's efforts to accomplish these tasks over the next few months were not successful, apparently because the respondent, who is a paranoid schizophrenic, resisted.

In February 2008, petitioner served the Notice of Termination that forms the predicate for this proceeding, The notice attaches and incorporates by reference the October 10, 2007 notice from the cooperative corporation, but fails to mention that the notice was withdrawn based upon a specific understanding, committed to writing, that no actionable **nuisance** existed.

Shortly after service of the February 2008 notice, the guardian returned to Supreme Court. His moving papers indicated that the guardian had not been able to get the apartment cleaned pursuant to the November 26, 2007 order, but that efforts were ongoing. Again, the guardian sought temporary placement of the respondent so that he could be evaluated for psychiatric medication as well as to facilitate the cleaning. The motion was denied.

In May 2008, after this proceeding was commenced, the guardian returned to Supreme Court for a third time, again seeking permission to remove respondent involuntarily from the apartment, to have him institutionalized temporarily both for health reasons and so that the apartment could be cleaned. This time, Supreme Court approved a stipulation permitting respondent's removal from the apartment. Respondent was removed pursuant to this order and hospitalized for several months. During his hospitalization, respondent's apartment was thoroughly cleaned and renovated.

When respondent returned to the apartment in July, 2008, he was the subject of an involuntary outpatient treatment order. An interdisciplinary treatment team now visits respondent in the subject apartment at least six times each month, and sometimes more often. The treatment team is responsible for monitoring all aspects of respondent's mental health, including whether or not he is taking his medication. The clinical social worker who heads the treatment team, Richard Evans, testified at the trial that he had

visited respondent's apartment five or six times between July and September 2008, always at times that were not scheduled in advance. He testified that he found the apartment in good condition, and the respondent well groomed and cooperative. Mr. Evans testified that if respondent deteriorates, his treatment order permits him to be hospitalized involuntarily.

In addition to the treatment team, respondent has a treating physician who sees him at her office every few weeks, and a home attendant who assists him with household chores and personal care eight hours a day six days a week. The home attendant, Juraj Petrovka, testified that he had worked with the respondent on a daily basis for three years. For the first year and a half, he worked twelve hours a day. For the last year and a half, he has worked eight hours a day, six days a week. Before he began to work regularly with the respondent, Mr. Petrovka worked with him occasionally as a weekend or vacation substitute for another home attendant.

Mr. Petrovka testified that he assists respondent by shopping, cleaning the apartment, taking out the garbage, doing laundry, and with other household chores. He has his own key to the apartment but does not use it unless the respondent refuses to let him in. He described the apartment in February 2008 as 'fine,' although he acknowledged that it needed painting. He said there were more newspapers and magazines in the apartment than most people would keep, but that he did not consider the apartment cluttered. He acknowledged that there were roaches in the apartment and said that he used roach spray in the apartment once or twice a month. He said the respondent's bedroom was neat and clean and was used only for sleeping.

The other tenants who testified at trial spoke vividly about events that occurred in 2000, when the respondent, ill and emaciated, was forcibly removed from a filthy apartment by EMS. These events led ultimately to heavy duty cleaning and renovation of the apartment and the appointment of a guardian for the respondent. I find that, because they pre-dated the appointment of a guardian for the respondent, these events are not relevant to petitioner's current claim. Respondent's behavior at a time before he was receiving proper care cannot be considered part of a single course of conduct with more recent events.

With respect to the more recent period, from 2005 when the current guardian was appointed to the commencement of the proceeding, the tenants gave varying testimony. Gladys Szapary, the president of the cooperative corporation, said there was an 'unbelievable stench' coming from the apartment that would miraculously disappear whenever a social worker or other visitor came to the apartment. Ms. Petz described a 'constant sour smell.' Ms. Goff said that she could smell 'stale dirty air' if she stood very close to the apartment door. The other two tenants did not describe odors within the last two years.

All of the tenants testified that respondent 'yelled' at his home attendant a couple of times a week, made the home attendant wait outside the apartment door regularly, sometimes banging on the door, before letting him in, and sometimes spoke to the neighbors through his door, or stared at them through his peephole, or banged on the door from the inside as they went by in the hall.

Taking all of the evidence together, and relying particularly upon the credible testimony of the guardian and the current treatment team, as well as the November 5, 2007 letter agreement between petitioner and the cooperative, I do not find that there

is a **nuisance** condition in the subject apartment. Respondent is, admittedly, mentally ill. His behavior and appearance are unusual. His care requires interventions from time to time. However, the credible evidence does not establish any danger to his neighbors' health and safety or undue interference with their daily lives.

Rather, the evidence establishes that the respondent has a diligent guardian who is attentive to his needs and circumstances and who has responded responsibly to complaints and concerns expressed to him by petitioner and the cooperative. Supreme Court, which is responsible for reviewing the activities of the guardian, has permitted respondent to be returned to the community under an involuntary outpatient treatment order. He is carefully and constantly monitored pursuant to that order, and can be hospitalized at any time. It is difficult to imagine that a **nuisance** condition could exist in the apartment with this treatment team making unannounced visits more than once a week.

Accordingly the proceeding is dismissed on the merits.

1/16/2009 NYLJ 26, (col. 1)

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