

175 Realty Associates LLC, Petitioner v. Alejandro Reynoso, Respondent "John Doe" and "Jane Doe", Respondents-Occupants, L & T 66058/14
L & T 66058/14

Civil Court, New York County, Housing Part D

NYLJ Publication Date: Mar 17, 2015

Cite as: 175 Realty Assoc. LLC v. Reynoso, L & T 66058/14, NYLJ 1202720637156, at *1 (Civ., NY, Decided March 4, 2015)
L & T 66058/14

Judge Cheryl Gonzales

[Read Summary of Decision](#)

Decided: March 4, 2015

ATTORNEYS

For Respondent-tenant: Shantonu Basu, of Counsel to Kenneth Rosenfeld, NMIC Legal Services.

For Petitioner-landlord: Eric Kahan, Sperber Denenberg & Kahan.

RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION BY RESPONDENT FOR SUMMARY JUDGMENT

PAPERS NUMBERED

Notice of Motion, Affidavits & Affirmation Annexed 1-2

Answering Affidavits 7-8

Replying Affidavits & Affirmation Annexed 12

Exhibits 3-6, 9-11

DECISION/ORDER

*1

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

Petitioner commenced this summary nonpayment proceeding on or about May 23, 2014, seeking possession of apartment #E, located at 539 West 179th Street, New York, NY, alleging that rent for the period of June 2013 through May 2014 remains outstanding.

The proceeding first appeared on the Court's calendar on June 17, 2014, and was adjourned. Prior to that, Respondent filed a pro se answer, and subsequently appeared by counsel.

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Respondent now seeks an order granting summary judgment based on his contention that he is not obligated to pay the arrears sought herein, and because the rent demand is defective as it seeks rent which Petitioner is not entitled to.

Respondent asserts that he sought succession rights to the apartment in a licensee holdover proceeding which Petitioner commenced prior to the instant proceeding. Respondent maintains that he occupied the apartment with his brother, the tenant of record, who passed away sometime in April 2013. Respondent states that Petitioner disputed his claim until June 17, 2014, when the parties entered into a stipulation discontinuing the holdover proceeding based upon Petitioner's recognition of Respondent as a successor.

In opposition, Petitioner contends that as the successor-in-interest, Respondent "steps into the shoes" of the predecessor immediately after the event giving rise to the succession right occurs. In support of its position, Petitioner states that Respondent's brother passed away in April of 2013, and that Respondent succeeded his brother as the tenant at that time. In addition, Petitioner states that it is not seeking any rent which accrued prior to the death of Respondent's brother, and asserts that prior to the death of the former tenant of record no arrears were due.

It is well-settled that on a motion for summary judgment pursuant to CPLR §3212, "it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do

so by tender of evidentiary proof in admissible form" (internal quotation marks and citation omitted) (Zuckerman v. City of New York, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). To defeat such a motion, "the opposing party must show facts sufficient to require a trial of an issue of fact", and "normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form" (id). However, the rule is more flexible for the opposing party who "may be permitted to demonstrate an acceptable excuse for his failure to meet the strict requirement of tender in admissible form" (id). Notwithstanding the flexibility of the rule, the party opposing summary judgment "must assemble and lay bare affirmative proof to establish that genuine material issues of fact exist" such that "bare, conclusory allegations are insufficient for this purpose" (Aetna Casualty & Surety Company v. Schulman, 70 AD2d 792, 417 NYS2d 77, 79 [1st Dept 1979]).

The facts of this case are largely undisputed. The sole issue to be determined by the Court in this proceeding is a question of law: whether Respondent as the successor tenant is responsible for arrears which accrued prior to him obtaining succession rights.

Both sides cite case law which supports their respective positions. However, although the First and Second Departments have found that a successor in interest is not liable for rent which accrued during the tenancy of the former tenant, the Second Department has specifically addressed when the successor becomes liable.

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In *Edelstein & Son, LLC v. Levin*, 8 Misc3d 135 (A), 803 NYS2d 18 [App Term, 1st Dept 2005], the Court held that "we agree that petitioner landlord is not entitled to recovery of rent from the statutory tenant's successor-in-interest, respondent Linda Levin, accruing prior to the tenant's August 1999 death." In the Second Department, where it is found that the landlord does not offer the successor tenant a lease after a determination is made that succession rights exist, there is no landlord tenant relationship and no agreement to pay rent which leaves the landlord with the remedy of seeking any arrears due in a plenary proceeding (see *615 Nostrand Ave Corp v. Roach*, 15 Misc3d 1 832 NYS2d 379 [App Term, 2nd Dept 2006; see also *Putnam Realty Assoc v. Piggot*, 44 Misc3d 141 (A), 998 NYS2d 308 [App Term, 2nd, 11th and 13th Jud Dists 2014]) ("a nonpayment proceeding does not lie to recover arrears from a successor to a rent-stabilized lease, since the successor is not a tenant until he becomes a party to a lease or rental agreement").

Notwithstanding the above, RPAPL §711(2) permits a landlord to commence a summary proceeding to recover rent due when the tenant has defaulted pursuant to the agreement under which the premises are held. In addition, of the petition states the following:

Respondent(s) ALEJANDRO REYNOSO, is(are) tenant(s) in possession of said premises pursuant to a(n) WRITTEN lease agreement where Respondents promised to pay to landlord or landlord(s) predecessor as rent \$799.87 each month in advance on the 1st day of each month.

Petitioner's argument that Respondent succeeded his brother at the time of his brother's death in April 2013 is curious since Petitioner did not recognize Respondent as a successor until June 2014. Further, Petitioner commenced this nonpayment proceeding prior to recognizing Respondent as a successor in the holdover proceeding.

The parties do not dispute that Respondent was never offered a lease in his name after Petitioner agreed to recognize him as a tenant. As a result, the petition is defective as it seeks rent pursuant to a written agreement which does not exist (see *33-39 East 65th Street, LLC v. McEntyre*, 39 Misc3d 1210(A), 971 NYS2d 75 [Civ Ct, NY County 2013]).

Based on the foregoing, Respondent's motion is granted to the extent that the proceeding is dismissed. This order is without prejudice to Petitioner seeking any use and occupancy due in a plenary action.

This constitutes the decision and order of the Court.

DATED: March 4, 2015