

# Ochs v. Gordon, LT-000264-17

April 13, 2017

- District Court, Nassau County
- LT-000264-17
- Judge Scott Fairgrieve
- For Plaintiff: Attorneys for Petitioner: The Law Office of Jack N. Posner, Garden City, New York.
- For Defendant: Attorneys for Respondent: Nassau/Suffolk Law Services Committee, Hempstead, New York.

Cite as: Ochs v. Gordon, LT-000264-17, NYLJ 1202783514354, at \*1 (Dist., NA, Decided April 4, 2017)

[Read Summary of Decision](#)

Decided: April 4, 2017

## ATTORNEYS

The following named papers numbered 1 to 3 submitted on this Motion to Dismiss on March 8, 2017

papers numbered

Notice of Motion and Supporting Documents 1

Order to Show Cause and Supporting Documents

Opposition to Motion 2

Reply Papers to Motion 3

\*1

Petitioner has commenced this holdover proceeding to recover possession of Apt. 2B located at 4415 Broadway, Island Park, New York, from Respondent.

A 30-Day Notice, dated November 28, 2016, attached to the verified Petition states that Petitioner terminated Respondent's monthly tenancy as of December 31, 2016. The proof of mailing states that service of the 30-Day Notice was accomplished on November 28, 2016.

Respondent moves for an order pursuant to CPLR §§404 and 3211(a)(1) dismissing the summary proceeding "because the parties have a one-year lease, from a date preceding the Petitioner's '30-Day Notice' of Termination of the lease that has not yet expired by its terms and the Petition does not allege for an accelerated termination."

Respondent submits the affirmation of Jane C. Reinhardt, dated February 2, 2017, in support of the motion to dismiss. Respondent states that the parties' lease was signed on

September 30, 2011, commencing the tenancy as of October 1, 2011. The lease agreement provides that the lease shall be renewed for a one-year term.

"The renewal term shall be for successive one-year terms."

Respondent asserts that the Respondent's lease, when still in effect, can only be terminated in accordance with the Tenancy Addendum Section 8 Tenant-Based Assistance Housing Choice Voucher Program. Section 8 of said Addendum states: \*2

"a. Requirements. The owner may only terminate the tenancy in accordance with the lease and HUD requirements.

b. Grounds. During the term of the lease (the initial term of the lease or any extension term), the owner may only terminate the tenancy because of:

(1) Serious or repeated violation of the lease;

(2) Violation of Federal, State, or local law that imposes obligations on the tenant in connection with the occupancy or use of the unit and the premises;

(3) Criminal activity or alcohol abuse (as provided in paragraph c); or

(4) Other good cause (as provided in paragraph d)."

Respondent contends that the Respondent's lease cannot be terminated by service of the 30-Day Notice because the lease was still in effect. Respondent asserts that the 30-Day Notice is defective because no breach or breaches were alleged, justifying termination. Respondent contends the foregoing is jurisdictional in nature.

Respondent asserts that the Respondent's lease was renewed yearly because the lease provides for renewal for successive one-year terms. Respondent cites to RPL §232c for the principal that a lease becomes a month-to-month tenancy unless the lease provides otherwise express or implied. Based upon the foregoing, Respondent asserts that the lease renewed automatically for one year as provided in the lease.

Respondent attaches, as Exhibit C, the payment record from the Nassau County Section 8 program demonstrating monthly payments for January 2016 to February 2017. Respondent states that these payments had two ramifications:

(a) vitiating the termination notice;

(b) proving lease renewal for October 2016 through September 2017.

Respondent points out that Congress ended the "endless leases" for Section 8 in 1996 and landlords may terminate a lease at the conclusion of a lease period. However, Respondent states that Petitioner chose to extend the lease for a one year period by accepting rent from September 2016 and going forward.

Petitioner's attorney, Paul I. Timpone, submits his affirmation in opposition dated February 22, 2017. Respondent contends that Respondent is a month-to-month tenant \*3 whose lease expired on or about September 30, 2011.

Petitioner states that Respondent's lease was terminated "for repeated and willful violation of the terms of said lease." Petitioner asserts that Respondent was given verbal warnings, but to no avail. Due to the foregoing, Petitioner terminated Respondent's tenancy by service of a 30-Day Notice on November 28, 2016.

Petitioner states that he has not accepted any payments during the pendency of this summary proceeding. According to Attorney Timpone, Petitioner didn't receive any money from Respondent, and "promptly refused and returned all monies from the Nassau County Department Office of Housing and Community Development."

The Petitioner contends the following violations were committed by Respondent:

"The Petitioner terminated the Respondent's tenancy for her willful failure to cure numerous breaches of the lease including, but not limited to, keeping numerous pets, keeping the premises in a state of disarray and disrepair, fighting with other tenants, refusing to allow maintenance personnel to work in the building, repeatedly reporting false "gas leaks" to LIPA and falsely identifying herself as the "building manager" to maintenance personnel. The Respondent's abhorrent conduct not only violates the terms of her lease but presents a danger to herself, the building and the other residents."

Attorney, Jane C. Reinhardt, submits her reply affirmation, dated March 2, 2017. The Respondent contends that Petitioner failed to allege any lease violations in the petition in order to terminate the one year lease.

Ms. Reinhardt avers that she spoke to Oriana Mazza, Esq., from Section 8, which confirmed that no payments were returned to it by Petitioner, between October 1, 2016 and December 31, 2016. It is pointed out that the 30-Day Notice didn't terminate the lease until December 31, 2016, which is "three months into the current year."

## Decision

This summary proceeding is dismissed for the reasons explained herein.

The evidence demonstrates that Petitioner accepted Section 8 payments from Nassau County Section 8 for the apartment in question from January 2016 through February 2017. The Petitioner's acceptance and retention of rent beyond the termination date of the lease is a \*4 waiver of the Petitioner's rights to terminate the lease. See *Timothy v. Matison*, 20 Misc 3d 1105(A), 866 NYS2d 96 (Table), 2008 WL 2486354 (Nassau Co, Dist Ct 2008); *Greenwich Garden Associates v. Pitt*, 126 Misc 2d 947, 484 NYS2d 439 (Nassau Co, Dist Ct 1984); *Youth Action Homes II HDFC v. Ash*, 8/7/2002 NYLJ 21 (col 1); *Rasch's Landlord and Tenant-Including Summary Proceedings*, §10:1 [4th Ed].

Thus, the acceptance of rent by Petitioner constitutes an implied continuance of the Respondent's tenancy subject to the same conditions and terms as the original lease between Petitioner and Respondent. *City of New York v. Penna, RR Co.*, 37 NY2d 298, 300 [1975]; *State Farm Fire & Cas. Co., v. Firmstone*, 9 AD3d 812 [3rd Dept 2004]; *McClennan v. Brancato Iron and Fence Works*, 282 AD2d 722, 724 [2nd Dept 2001]; *New York Country Dev'mt Group v. Demitasse*, 278 AD2d 728 [3rd Dept 2000]; *Lakeside Plaza, Inc. v. Impala Press*, 237 AD2d 334 [2nd Dept 1997]; *Rasch's Landlord and Tenant-Summary Proceedings*, §10:2 [4th Ed].

RPL §232c provides that a month-to-month tenancy is only created in the absence of either an express or implied agreement, when the landlord continues to accept rent from a holdover tenant for any period subsequent to the expiration of a lease. However, in the case at bar, the parties expressly agreed in the written lease that the renewal term for the

lease shall be for successive one year terms. Petitioner's acceptance of Respondent's payment of rent created a yearly renewal, not a month-to-month tenancy. The only way a landlord can terminate such a lease is by proof of good cause during the term of the lease, *Numme v. Lemon*, 191 Misc 2d 133 (NY Sup App Term 2002).

Since the tenancy was extended for a year, the lease could not be terminated by service of a 30-Day Notice. Petitioner has failed to demonstrate that good cause exists to terminate Respondent's lease.

#### Conclusion

This summary proceeding is dismissed without prejudice to renewal upon proper papers.

So Ordered:

Dated: April 4, 2017