

Dexter 345, Inc. v Hanlon

[*1] Dexter 345, Inc. v Hanlon 2017 NY Slip Op 50269(U) Decided on February 27, 2017 Civil Court Of The City Of New York, New York County Wendt, J. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on February 27, 2017
Civil Court of the City of New York, New York County

Dexter 345, Inc., Petitioner-Landlord,

against

Julie Hanlon, Respondent-Tenant, TOM HANLON, "JOHN DOE" and "JANE DOE"
Respondents-Undertenants

L & T 66134/13

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Peter M. Wendt, J.

Following trial in this summary holdover proceeding, held on March 30, 2016, continued on various dates and concluded on November 28, 2016, the Court sets forth below its findings of fact and conclusions of law.

Petitioner commenced this holdover proceeding to recover possession of room 1409 ("Subject Premises") at 345 West 86th Street, New York, NY 10024 ("Subject Building").

Petitioner elected to terminate, Respondents, Julie Hanlon's tenancy on the grounds that Respondent does not occupy the Subject Premises as her primary residence, and has permitted Respondent-Undertenant, Tom Hanlon, to reside at the Subject Premises without the landlord's consent.

Petitioner claims in its predicate notice of termination that Julie Hanlon has not maintained an ongoing, substantial physical nexus with the premises for living purposes; she has not spent more than 183 days of the preceding year at the premises; she utilized the premises in a profit making scheme by renting out her room as a hotel or by subletting to others without the landlord's consent; she has sublet the premises to Tom Hanlon without permission of the landlord and it is believed that Julie Hanlon resides at an alternative address.

Julie Hanlon interposed an amended answer raising several defenses, affirmative defenses and counterclaims. Tom Hanlon, through his guardian ad litem, interposed an answer raising the defense that he is a rent stabilized permanent tenant of the Subject Premises.

At trial, Petitioner called Julie Hanlon as its first witness. Julie Hanlon's passport was admitted into evidence as Petitioner's Exhibit 2. The passport contained a "UK Entry Clearance" visa valid from August 28, 2009 through May 20, 2019. She testified that Mr. Hugh O'Donnell resides in the United Kingdom. She testified that she has been dating Mr. O'Donnell for the past twenty years. She testified that she obtained a "UK Entry Clearance" visa with the help of an immigration attorney although she had no intention of residing in the United Kingdom on a permanent basis. She also testified that despite the stamps in her passport, her passport was not always stamped when she entered the United States which is why her passport shows that she left the United States in March 2010 but with no entry date until the year 2013. Julie Hanlon testified that she kept her personal belongings in the Subject Premises during her trips to England. She also testified that during her time of travel in the years 2009, 2010, 2011 and 2012, Tom Hanlon was residing at the Subject Premises.

Julie Hanlon also testified that she used a P.O. Box for her mailing address on important documents because she believed that the landlord had been tampering with her mail. She also testified that her multiple travels out of the United States were work related.

Petitioner called Betty Kapone as a witness. Ms. Kapone testified that she resided in the Subject Building, for the past twenty two years, in room 1412, which is located two doors down from the Subject Premises. Ms. Kapone testified that she witnessed Julie Hanlon move boxes out of the Subject Premises in the year 2009 or 2010. She testified that she witnessed Tom Hanlon move boxes into the Subject Premises the same time Julie Hanlon moved boxes out of the Subject Premises. Ms. Kapone also testified, on cross-examination that she believed Tom Hanlon lived at the Subject Premises continuously since 2009. Ms. Kapone testified that she had not seen Julie Hanlon at the Subject Premises for the next two to three years until the year 2012.

Petitioner called Erica Ryan as a witness. Ms. Ryan testified that she moved into the Subject Building, in room 1408 on or about January or February 2010. She testified that her room is located immediately adjacent to the Subject Premises. She testified that she knew Tom Hanlon lived at the Subject Premises because she could hear him through the room walls chanting or playing his trumpet mostly in the year 2012. Ms. Ryan also testified, on [*2]cross-examination, that she believed Tom Hanlon lived at the Subject Premises continuously since 2010.

Petitioner called Luis Ortiz as a witness. Mr. Ortiz testified that he is employed by the Petitioner as a desk clerk. He testified that he was familiar with Tom Hanlon. He first starting seeing Mr. Hanlon in the year 2009 or 2010. He testified that Mr. Hanlon paid the rent on behalf of Julie Hanlon for approximately six or seven months "but after seven months he was there permanently." Mr. Ortiz testified that he believed Tom Hanlon lived in the Subject Building permanently since 2010, received mail regularly at the Subject Building and saw him on a daily basis. He further testified that Mr. Hanlon continuously resided at the Subject Premises, at least, since the summer of 2010.

Petitioner called Alvin Bonilla as a witness. Mr. Bonilla testified that he is and has been employed by Petitioner as a front desk clerk since 2010. He testified that he was familiar with Tom Hanlon because he resides at the Subject Premises. He testified that he recalled seeing Tom Hanlon in the Subject Building since the beginning of his employment. Mr. Bonilla testified, on cross-examination, that he believed Tom Hanlon lived at the Subject Premises continuously since 2010.

Mr. Bonilla testified that a tenant of the Subject Building, Helen Ball, was removed from her room, 1410, by police and paramedics sometime in August 2016. Mr. Bonilla observed personal possessions allegedly belonging to Tom Hanlon in Ms. Ball's room such as a jacket and tools. He testified that he recognized the jacket as Tom Hanlon's because he had seen Tom Hanlon wearing that same jacket previously.

Petitioner called Oscar Vega as a witness. Mr. Vega testified he is employed by Petitioner as a front desk clerk. He testified he was familiar with Tom Hanlon because he's seen Tom Hanlon in the Subject Building since he started working for Petitioner. He also testified that saw Tom Hanlon on a daily basis in 2012 and 2013.

Petitioner called Robert Goicochea as a witness. Mr. Goicochea testified that he has been employed by Petitioner since 2004 as a manager. He established that Petitioner is the net lessee of the Building and produced a certified deed for the Subject Building, and the net leases (Petitioner's Exhibits 10, 11[a] and 11[b]). He also established the building was currently registered as a multiple dwelling with the Office of Code Enforcement (Petitioner's Exhibit 12) and that the rents have been registered with New York Department of Housing and Community Renewal (Petitioner's Exhibit 13).

Mr. Goicochea testified that his office is located in close proximity to the lobby, in which a surveillance camera is installed. He also testified that the surveillance camera feed

was displayed on a screen which was located directly on his desk. He testified that he would see Tom Hanlon once a month from 2010 through 2011.

He testified that Tom Hanlon introduced himself as Julie Hanlon's brother. He also testified that the Tom Hanlon "was always around, always in the apartment". On cross-examination, Mr. Goicochea testified that an incident occurred in the Subject Building, where the tenant residing in room 1410, Ms. Helen Ball, had been removed by paramedics and the police. Mr. Goicochea testified that a few days later he entered Ms. Ball's room with detectives and observed two mattresses in the room, a larger one and a smaller one. He also observed clothing that he believed belonged to Tom Hanlon. He claimed he also observed a sign [*3]displayed on the wall with a phone number he believed to be Tom Hanlon's number.

Julie Hanlon called Tatiana Timanovskaia as a witness. Ms. Timanovskaia testified that she resides in room 1403 at the Subject Building and has been living there for the past twenty years. She testified that Julie Hanlon and Tom Hanlon lived in the Subject Premises. She further testified that she first saw Tom Hanlon about seven years ago and had seen him continuously coming in and out of the Subject Premises since that time.

Julie Hanlon called Hector Cruz as a witness. Mr. Cruz testified that he resided in room 1215 at the Subject Building for twenty three years. He testified he had seen Tom Hanlon in the Subject Building for seven or eight years.

Julie Hanlon called Robert Goicochea as a witness. Mr. Goicochea testified that he had sent an exterminator to the Subject Premises in the early part of December 2012 and that Tom Hanlon was there to provide access. He testified that he was personally present on several occasions when the exterminator was scheduled to treat the Subject Premises. He further testified that on those occasions, Tom Hanlon was there to provide access, specifically between December 2012 and February 2013.

Julie Hanlon called Stephen Carl Baldwin as a witness. Mr. Baldwin testified he was a longtime friend of Julie Hanlon. He testified that he spent the night of February 8, 2008 at the Subject Premises because his mother had passed away and he sought the emotional support of Julie Hanlon. Mr. Baldwin testified that he visited the Subject Premises once a month in 2010 and also in 2011. He believed that Tom Hanlon was residing with Julie Hanlon at least in 2009 since his and her belongings, which included clothes, books and family photos were in the room. He also testified that he visited Tom Hanlon in 2012 and that Julie had been away during his visit.

Julie Hanlon testified on her own behalf. She produced a certified copy of her Birth certificate (Exhibit H). Julie Hanlon testified that Tom Hanlon lived in the Subject Premises permanently since August 2009. She testified that he moved all of his belongings into the Subject Premises. Julie Hanlon testified that their sleeping arrangement was Tom Hanlon sleeping on the floor, on a mat, while she slept in the bunk bed.

Tom Hanlon testified on his own behalf. He produced a certified copy of his birth certificate (Exhibit AA). Mr. Hanlon testified that he moved in the Subject Premises in 2009. He testified that he moved in all of his personal possessions including clothing, musical instruments, records and tapes. He testified that he lived with his sister Julie Hanlon in 2009. He also testified that she was in and out of the Subject Premises in 2010 and 2011 but that he continued to live with her during that time period. Mr. Hanlon also testified that he would consistently pay the rent either weekly or monthly by giving it to the doorman. He testified that it was paid in the form of money orders that contained both Julie Hanlon's and his name on them. He further testified that he received mail at the Subject Premises with his name on it. This mail was delivered through the front desk. Mr. Hanlon testified that he applied for Medicaid. He also testified that he listed the address to the Subject Premises as his residence on the application (Exhibit BB).

Petitioner's Holdover Petition states that the Subject Premises are a single room occupancy building and subject to the rent stabilization law.

9 NYCRR § 2521.3 (c) provides, "Notwithstanding the provisions of subdivision (a) of [*4]this section, single-room occupancy facilities such as single-room occupancy hotels or rooming houses, as defined in the MDL, shall not be subject to reclassification pursuant to this section. However, such housing accommodations shall be included in the definition of hotel as set forth in section 2520.6 (b) of this Title for all other purposes of this Code, except that the four minimum services enumerated in such section shall not be required to be provided unless such services were provided on the applicable base dates pursuant to section 2520.6(r)(4) of this Title."

9 NYCRR § 2520.6 (j) "Permanent Tenant", provides, "For housing accommodations located in hotels, an individual or such individual's family members residing with such individual, who have continuously resided in the same building as a principal residence for a period of at least six months. In addition, a hotel occupant who requests a lease of six months or more pursuant to section 2522.5 (a)(2) of this Title, or who is in occupancy pursuant to a lease of six months or more shall be a permanent tenant even if actual occupancy is less than six months. Unless otherwise specified, reference in this Code to "tenant" shall include permanent tenant with respect to hotels."

9 NYCRR § 2520.6 (m) is clear that any person residing in a hotel shall be entitled to Become a permanent tenant upon compliance with the procedure set forth in subdivision (j). 9 NYCRR § 2520.6 (j) explicitly provides that family members of a permanent tenant can become permanent tenants upon continuous residence for six months. The regulation only requires that the family member lives in the building for six months. It does not require co-residency with the permanent tenant. Therefore, that family member's right to become a permanent tenant vests immediately after the six months of continuous residency and that family member is afforded the same statutory protections under the rent stabilization laws as the initial permanent tenant.

In *Branic International Realty Corp. v. Pitt*, 24 Misc 3d 940 (2009), the court found Pitt to be a permanent tenant within the context of 9 NYCRR § 2520.6 (j) and granted him

summary judgment. The court found that Pitt had met the "code's" only requirement of continuous residency for at least six months. Petitioner appealed. The Appellate Term, First Department reversed the lower court's determination and found that in the absence of an express or implied landlord-tenant relationship, the court should have granted Petitioner's cross-motion for summary judgment. *Branic International Realty Corp. v. Pitt*, 30 Misc 3d 29, 30 (2010).

Pitt appealed to the Appellate Division. However, before his appeal was heard, Pitt had voluntarily vacated the premises. The court declined to dismiss the proceeding as moot since the matter presented an issue of substantial public interest that was likely to recur and evade review. Therefore, the court made a determination on the merits, reversed the Appellate Term's decision and granted Pitt summary judgment finding that:

A plain reading of RSC 2520.6(j) reveals that the only requirement to be a "permanent tenant" is six months or more of continuous residence in a particular hotel building (see *Kanti-Savita Realty Corp. v. Santiago*, 18 Misc 3d 74, 852 N.Y.S.2d 579 [App. Term, 2d Dept. 2007] [criterion is not the payment of rent but continuous residence in the unit for six months]). Thus, even if Pitt and Branic did not have an express or implied landlord-tenant relationship, Pitt nevertheless qualified as a "permanent tenant", entitling him to the enumerated protections of the Rent Stabilization Code. As it is undisputed that [*5]Pitt lived in the subject SRO for well over six months he certainly acquired the status of a "permanent tenant." *Branic International Realty Corp. v. Pitt*, 106 AD3d 178 (1st Dept 2013)

Petitioner appealed to the Court of Appeals. The court "remitted to the Appellate Division with directions to dismiss the proceeding solely on the ground of mootness" since Pitt had vacated the premises. *Branic International Realty Corp. v. Pitt*, 24 NY3d 1005, 1007 (2014).

On remittitur, the Appellate Division dismissed the proceeding as moot, but still vacated and unanimously reversed the Appellate Term decision on the law. It reaffirmed the holding of its prior decision, that under 9 NYCRR § 2520.6 (j), the only requirement to becoming a permanent tenant is six months of continuous residence. *Branic International Realty Corp. v. Pitt*, 124 AD3d 421 (1st Dept 2015). The landlord therein appealed the Appellate Division's second decision. The Court of Appeals simply affirmed the Appellate Division's second decision without qualification. *Branic International Realty Corp. v. Pitt*, 26 NY3d 937 (2015)

Julie Hanlon's and Tom Hanlon's birth certificates both establish that they are brother and sister. Petitioner's and Julie Hanlon's witnesses all conceded that Tom Hanlon was residing at the Subject Premises as early as 2010. Petitioner commenced this case in 2013, at least three years subsequent to Tom Hanlon moving into the Subject Premises. Throughout the entire trial, the testimony of all witnesses, including Petitioner's, corroborated that Tom Hanlon lived at the Subject Premises as early as 2010 and had continued to live there for a period of greater than six months. Therefore, pursuant to the clear language of 9 NYCRR § 2520.6 (j), and the most recent *Branic* Court of

Appeals decision affirming the Appellate Division's last decision, Tom Hanlon is a permanent tenant since he met the requirement of residing at the Subject Premises for at least six months. *Smiley v. Williams*, 26 Misc 3d 170, 174 (2009). *Carlyle Johnson v. Richard Crandell a/k/a Richard Crendell*, 19 Misc 3d 1136(A) (2008). *143 E. 30th St. Corp. v Shankman*, 10 Misc 3d 126(A) (2005). *Benjamin Shapiro Realty Co. v. DHCR*, 2A.D.3d, 220, 221 (1st Dept 2003).

Every tenant has a superior right of possession to the landlord, although temporary. Since Tom Hanlon is a permanent tenant, he had an absolute right to possession of the Subject Premises superior to Petitioner's right of possession. A landlord has only a right of reversion after the tenancy is either surrendered or terminated. Here, Petitioner had no more than a right of reversion. Tom Hanlon had the first right of possession. Therefore, Petitioner, without first terminating Tom Hanlon's tenancy, had no right to commence this proceeding, regardless of whether Julie Hanlon utilized the Subject Premises as her primary residence.

For this reason, the issue of whether or not Julie Hanlon utilized the Subject Premises as her primary residence is at this point moot since Petitioner had no right to possession that was superior to Tom Hanlon's right to possession, Petitioner had only a right of reversion.

In addition, Petitioner failed to prove that Tom Hanlon abandoned the Subject Premises. Tom Hanlon, allegedly placing a mattress, a coat and tools in the neighboring room does not amount to an unequivocal act of surrender of the Subject Premises. There has been no evidence of a surrender of the Subject Premises by either Julie Hanlon or Tom Hanlon. Tom Hanlon interposed an answer raising a claim of a right to possession to the Subject Premises as a permanent tenant and throughout the trial he disputed any surrender of the Subject Premises. Petitioner utterly failed to prove any unequivocal act of surrender or abandonment by Tom [*6]Hanlon.

Petitioner's assertion that Tom Hanlon does not qualify as a permanent tenant because he allegedly surrendered the Subject Premises, by "moving" into the neighboring room, and therefore rendered his tenancy status a moot issue, is incorrect as a matter of law.

In *Branic*, the Court of Appeals remitted to the Appellate Division with directions to dismiss the case as moot. The Appellate Division dismissed it as moot but reaffirmed its holding of its prior decision that the only requirement to become a permanent tenant, under the code, is six months of continuous residence. *Branic International Realty Corp. v. Pitt*, 124 AD3d 421 (1st Dept 2015). The Court of Appeals affirmed. *Branic International Realty Corp. v. Pitt*, 26 NY3d 937 (2015). Therefore, the Appellate Division's decision determining that Pitt was a "permanent tenant" is binding law and applicable in this case although the case had ultimately been dismissed as moot.

Petitioner alleges that the Subject Building is an SRO, and that the building and the Subject Premises are subject to Rent Stabilization. Petitioner acknowledges that Tom Hanlon had been living in the Subject Premises since at least 2010. 9 NYCRR § 2520.6

(j) of the Rent Stabilization Code defines a permanent tenant as an individual who has "continually resided in the same building as a principal residence for a period of at least six months ...". Based on the undisputed facts established at trial, Tom Hanlon is entitled to the protections of Rent Stabilization as the permanent tenant for the Subject Premises.

At the time the case was commenced, Petitioner's own witnesses testified that the person who lived at the Subject Premises was Tom Hanlon and that he had been living there at least since 2010. The case was commenced in 2013, so as of the date the case was commenced, Tom Hanlon had a right of possession because he was a permanent tenant. Petitioner did not terminate Tom Hanlon's tenancy prior to commencing this proceeding. Petitioner does not have a right to possession which is superior to Tom Hanlon's therefore Petitioner did not have a right to commence this proceeding without first terminating Tom Hanlon's tenancy. Under these facts, the issue of whether Julie Hanlon utilized the Subject Premises as her primary residence is moot, since Tom Hanlon's right to possession to the Subject Premises is not derivative of Julie Hanlon's possessory right, but rather it's derived through his own independent right to possession.

9 NYCRR § 2520.6(j) contemplates that family members have co-equal rights to reside in a hotel as permanent tenants. Petitioner's focus on Tom Hanlon's time allegedly spent away from the Subject Premises entirely after the commencement of the proceeding is irrelevant, as Tom Hanlon's right to possession, as a Permanent tenant, had already vested prior to the commencement of the proceeding. In *Domen Holding Co. v. Irene S. Aranovich*, 1 NY3d 117 (2003) the court found that post-petition submissions cannot cure defects in a notice of termination.

A landlord cannot maintain a holdover proceeding against a tenant without first terminating the tenancy. A termination notice serves three basic functions. First, to terminate the tenancy; second to advise the tenant of the conduct causing the termination of the tenancy; and lastly to advise the tenant to surrender possession. A termination notice, which is a prerequisite to a holdover proceeding, is not amendable and the right to terminate a tenancy is dependent upon the service of an adequate notice. *Chinatown Apts., Inc. v. Chu Cho Lam*, 51 NY2d 786 (1980). Service of a valid termination notice is a prerequisite to commencement of a statutory [*7]holdover proceeding. *Kaycee West 113th St. Corp. v. Diakoff*, 160 AD2d 573 (1st Dept 1990). A proceeding rises or falls on the allegations in a termination notice, not on post-notice conduct. *Goodhue Residential Co. v. Lazansky*, 1 Misc 3d 907(A) (2003). Courts have consistently held that a notice must state the facts upon which the proceeding is brought. Mere conclusions are insufficient. *The Berkeley Associates Co. v. Camlakidis*, 173 AD2d 193 (1st Dept 1991).

9 NYCRR § 2524.4 provides as follows: "Grounds for refusal to renew lease, or in hotels, discontinuing a hotel tenancy, without order of the DHCR the owner shall not be required to offer a renewal lease to a tenant, or in hotels, to continue a hotel tenancy, and may commence an action or proceeding to recover possession in a court of

competent jurisdiction, upon the expiration of the existing lease term, if any, after serving the tenant with a notice as required pursuant to section 2524.2 "

9 NYCRR § 2524.2 provides as follows: (a) "Except where the ground for removal or eviction of a tenant is nonpayment of rent, no tenant shall be removed or evicted from a housing accommodation by court process, and no action or proceeding shall be commenced for such purpose upon any of the grounds permitted in section 2524.3 or 2524.4 of Part, unless and until the owner shall have given written notice to such tenant as hereinafter provided; (b) Every notice to a tenant to vacate or surrender possession of a housing accommodation shall state the ground under section 2524.3 or 2524.4 of this Part, upon which the owner relies for removal or eviction of the tenant, the facts necessary to establish the existence of such ground, and the date when the tenant is required to surrender possession."

Petitioner's notice of termination does not delineate a single ground to terminate the tenancy of Tom Hanlon who was a permanent tenant under 9 NYCRR § 2520.6 (j). Petitioner's post-petition evidence of Tom Hanlon, allegedly, utilizing the room next door to the Subject Premises as a primary residence is not only unproven but is irrelevant, since it cannot establish a cause of action that has not been sufficiently plead in a notice of termination. As a permanent tenant, Tom Hanlon had a possessory interest in the Subject Premises and could not be removed without his landlord first having terminated his tenancy. In this case, Tom Hanlon's tenancy was not terminated, therefore Petitioner cannot maintain this proceeding without first having served him with a proper notice of termination. Service of a valid termination notice is a prerequisite to commencement of a statutory holdover proceeding. Because Tom Hanlon is a permanent tenant pursuant to 9 NYCRR § 2520.6 (j) and no notice of termination was served terminating his tenancy, this holdover proceeding cannot be sustained.

Accordingly, the Petition is dismissed. Julie Hanlon's counterclaims are dismissed without prejudice as they were never proven during the trial.

This constitutes the decision and order of this Court.

Dated: February 27, 2017