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Not Followed as Dicta 95 River Co. v. Burnett, N.Y.City Civ.Ct., December 30, 1993

173 A.D.2d 338
Supreme Court, Appellate Division,
First Department, New York.

170 WEST 85TH STREET TENANTS ASSOCIATION and 170 West 85th Street Housing Development Fund Corporation, Petitioners–Respondents,
v.
Nilda CRUZ, Respondent,
and
Freddy Mosquera, Respondent–Appellant.

May 23, 1991.

Landlord commenced proceeding against tenant and occupant of apartment, seeking a judgment of possession. The Civil Court, Housing Part, Zarkin, J., awarded judgment to the landlord, and the Appellate Term, First Department, affirmed. Occupant appealed. The Supreme Court, Appellate Division, held that: (1) neither the ten-day notice to quit provision nor the 30–day notice of a proceeding to terminate a month-to-month tenancy applied to the occupant of the apartment once the landlord commenced proceedings against the named tenant for a judgment of possession; (2) the occupant received sufficient notice of the proceedings and, therefore, he was not denied due process when his rights were extinguished by a judgment of possession; and (3) the occupant had the burden of proof to show that he was in a legal relationship with the tenant that would have entitled him to retain possession.

Order affirmed.

West Headnotes (5)

[1] **Landlord and Tenant**
Necessity

Any failure to provide apartment occupant with statutory notice to quit did not divest city civil court of subject matter jurisdiction to award possession to landlord of apartment in which tenant no longer resided and was being occupied by person who had no legal relationship to tenant that would entitle occupant to retain possession. McKinney's Real Property Law § 232–a; McKinney's RPAPL § 713, subds. 3, 7; McKinney's N.Y.City Civ.Ct.Act § 110.

4 Cases that cite this headnote

[2] **Landlord and Tenant**
Right to Maintain Action and Conditions Precedent
Landlord and Tenant
Necessity

Absent surrender of possession of apartment by tenant, who no longer lived in apartment, landlord was obligated to obtain judgment of possession against tenant and could not proceed directly against undertenant, whether he was licensee, subtenant or occupant; therefore ten-day notice to quit provision for regaining possession did not apply, nor was occupant entitled to 30–day notice applicable in proceedings against tenant to terminate month-to-month tenancy. McKinney's Real Property Law § 232–a; McKinney's RPAPL § 713, subds. 3, 7; McKinney's N.Y.City Civ.Ct.Act § 110.

15 Cases that cite this headnote

[3] **Constitutional Law**
Eviction and proceedings therefor
Landlord and Tenant
Service

Service of occupant with copy of petition for judgment of possession was sufficient to give occupant notice of proceeding and, therefore, occupant's due process rights were not violated when his rights to possess apartment were extinguished upon entry of judgment of possession against tenant; occupant was served with copy of petition, naming him as “Freddy Doe (Undertenant).” McKinney's N.Y.City Civ.Ct.Act § 110(d); U.S.C.A. Const.Amends. 5, 14.

13 Cases that cite this headnote

[4] **Constitutional Law**
Eviction and proceedings therefor

Apartment occupant was not denied due process by failure to appoint counsel to represent him as party in proceedings for judgment of possession against tenant; parties were allowed to proceed pro se in housing part of city civil court. McKinney's CPLR 1102(a); McKinney's N.Y.City Civ.Ct.Act § 110(d, *o*); U.S.C.A. Const.Amends. 5, 14.

2 Cases that cite this headnote

[5] **Landlord and Tenant**
Presumptions and burden of proof

Once named tenant no longer lived in apartment and its occupant was not her spouse, occupant had burden of proving that he was member of named tenant's immediate family or in legal relationship that would entitle him to retain possession of premises after tenant's departure. McKinney's Real Property Law § 235–f, subd. 3.

Cases that cite this headnote

****706** Before MURPHY, P.J., and MILONAS, ROSS and RUBIN, JJ.

Opinion

MEMORANDUM DECISION.

***338** Order of the Appellate Term, First Department (entered October 27, 1989), which affirmed a judgment of the Civil Court, Housing Part (Steven Zarkin, H.J.), awarding a final judgment of possession to petitioner-landlord, unanimously affirmed, without costs.

***339** Petitioner operates the subject building as net lessee and managing agent for the owner, the City of New York, under the Tenant Interim Lease Program. Respondent Nilda Cruz is the tenant of record of apartment 3NE. Respondent Freddy Mosquera is the occupant of apartment 3NE who, although unrelated to the tenant, claims to have lived "as a family with Nilda Cruz for almost 10 years." The net lease requires petitioner tenants association to terminate the tenancy of any tenant who sublets or assigns an apartment without the prior written consent of the Division of ****707** Housing Preservation and Development ("HPD"). It is uncontested that no such consent was obtained from HPD. The Housing Judge found that respondent Cruz had not resided in the apartment for at least five months. The court further found that there was no legal relationship between Cruz and the occupant Mosquera which would entitle him to retain possession of the premises.

On this appeal, respondent-occupant Mosquera first contends that Civil Court lacked subject matter jurisdiction over him because he did not receive statutory notice, either a 30–day notice as required by Real Property Law § 232–a or a 10–day notice as required by the Real Property Actions and Proceedings Law § 713(3) or (7).

[1] **[2]** At the outset, we note that Civil Court is vested with subject matter jurisdiction over housing matters by statute (N.Y. City Civ.Ct. Act § 110). The failure of a petitioner to comply with a statutory notice requirement, where applicable, represents merely the failure to comply with a condition precedent to suit and cannot properly be said to affect the court's jurisdiction. In the instant proceeding, respondent can point to no statutory basis requiring him to be served with notice. Absent a surrender of possession by the tenant (*see, Matter of Eight Cooper Equities v. Abrams,* 143 Misc.2d 52, 54–55, 539 N.Y.S.2d 673 [surrender is accomplished by vacating the premises and returning the keys to landlord]), which is not established by the record before us, the lessor must obtain a judgment of possession against the lessee pursuant to RPAPL § 711 and may not proceed directly against the undertenant, whether licensee, subtenant or occupant, pursuant to RPAPL § 713 (*100 West 72nd St. Assoc. v. Murphy,* 144 Misc.2d 1036, 1039, 545 N.Y.S.2d 901). Therefore, the 10–day notice provision of RPAPL § 713 is inapposite, and the 30–day notice provision of Real Property Law § 232–a is applicable only to respondent Cruz as the immediate tenant of the lessor.

[3] The rights of a person whose claim to possession derives from the lessee are subordinate and are extinguished by a judgment of possession in favor of the

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lessor. Due process requires only that, for the warrant to be effective against a ***340** subtenant, licensee or occupant, he be made a party to the proceeding, either by naming him in and serving him with the petition and notice of petition or by joining him as a party during the pendency of the proceeding (CPLR 401; NYCCCA § 110[d]). Mosquera was served with a copy of the petition and notice of petition, naming him as "Freddy Doe (Undertenant)", which was legally sufficient to give him notice of the proceeding.

[4] Respondent Mosquera next maintains that the failure of the court to appoint an attorney to represent him in this proceeding denied him due process of law. As we noted in *Donaldson v. State of New York,* 156 A.D.2d 290, 293, 548 N.Y.S.2d 676, *lv. dismissed* 75 N.Y.2d 1003, 557 N.Y.S.2d 308, 556 N.E.2d 1115, the appointment of counsel is ancillary to an order granting leave to proceed in forma pauperis and is entirely within the discretion of the motion court (CPLR 1102[a]). It should also be observed that the Civil Court Act contemplates pro se litigation in the Housing Part (N.Y.City Civ.Ct. Act § 110[*o*]).

[5] Finally, respondent is mistaken in his contention that the burden to prove that he was a tenant of record or a member of the tenant's immediate family was improperly placed upon him. The provisions of law governing the occupancy of apartments are explicit. Occupancy by the tenant's immediate family and one additional person (plus children) is permitted only so long as "the tenant or the tenant's spouse occupies the premises as his primary residence" (Real Property Law § 235–f[3]). As it is conceded that the tenant, Cruz, no longer occupies the premises and that respondent Mosquera is not her spouse, the lease may not be construed to permit his continued occupancy of the premises. Moreover, any person claiming a right to occupancy based upon the Court of Appeals' expansive definition of "family" contained in *Braschi v. Stahl Associates Company,* 74 N.Y.2d 201, 211, 544 N.Y.S.2d 784, 543 N.E.2d 49, is obliged to prove that ****708** he resided in a household with the tenant "having all of the normal familial characteristics" (*Id.*). Thus, whether Mosquera's claim is predicated on statutory or case law, the burden of proof is his. The record of the proceeding clearly supports the conclusion reached by the Housing Judge that this burden was not met (*Claridge Gardens v. Menotti,* 160 A.D.2d 544, 554 N.Y.S.2d 193).

All Citations

173 A.D.2d 338, 569 N.Y.S.2d 705

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