

**CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS: PART O**

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Westminster Apartments LLC

Petitioner

Against

David Santoro,

Respondent

**Decision/Order**

“John Doe” , “Jane Doe”

Respondent-Undertenants

Index No. 92843/07

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**Memoranda 1-2**

Petitioner commenced this licensee holdover proceeding on or about September 20, 2007 seeking possession of the subject apartment. Respondent interposed an answer in which respondent alleged six affirmative defenses and asserted one counterclaim. Petitioner claims that respondents were granted a license by the tenant of record, Jean Battle, and the license terminated upon her death in August 2006. Further, petitioner states that its lease with Ms. Battle expired on July 31, 2007.

Respondent, David Santoro contends that he is the son of Jean Battle, and he resided with her in the subject apartment for at least two years prior to her death. Therefore, respondent Santoro asserts that he has succession rights pursuant to the Rent Stabilization Law. Currently, respondent Santoro resides in the subject apartment with his girlfriend, Kathleen Jones. Previously, Ms Jones resided in apartment LB4 in the subject building. Both respondent Santoro and Ms. Jones signed a two year lease for Apt. LB4 on August 22, 2005.

Prior to the trial, in a stipulation dated March 16, 2009 the parties stipulated to the fact that respondent Santoro occupied the subject apartment with his mother “through and including August 2005 on a full time basis.”

Petitioner presented two witnesses. Gary Flippen, petitioner’s regional property manager testified that in May or June 2005 he received a letter from respondent Santoro stating that he was a resident of the building, and he was seeking an apartment for himself and his girlfriend. The letter also stated that respondent Santoro wanted to remain close to his mother whose health was failing. Mr. Flippen testified that he extended a courtesy and approved the application of

respondent Santoro and Ms. Jones without completing the full background investigation. However, Mr. Flippen did ascertain that both parties had excellent credit and had the required level of income for the apartment. Mr. Flippen also noted that Ms. Jones had an annual income of \$90,000.00 and would have qualified to rent the apartment by herself.

On Labor day, after respondent Santoro and Ms. Jones signed the lease for Apt. LB4, Mr. Flippen testified that he observed respondent Santoro moving boxes on a dolly to the left side of the building, and he surmised that respondent Santoro was moving the boxes to Apt. LB4. Mr. Flippen also observed respondent moving boxes on more than one occasion over the next week or two.

Mr. Flippen testified that although he was aware of Ms. Battle's death, the management office was not informed of her death. The issue came to light when respondent Santoro returned the renewal lease sent to Ms. Battle and asserted that he had succession rights to his mother's apartment. Respondent Santoro had not made any requests to have the lease placed in his name prior to his receipt of the renewal lease sent to Ms. Battle. Mr. Flippen stated that Ms. Battle's apartment and the apartment rented by respondent Santoro had the same layout. However, there was a difference in the rent for the two apartments. In 2005, the rent for Apartment LB4 was \$1300.00 and it is currently approximately \$1550.00. The last lease renewal for the subject apartment was at monthly rent of is \$972.47.

Mr. Michael John Grant, a licensed funeral director at Lintz and Brown Funeral Home testified for petitioner. Mr. Grant testified that he made the funeral arrangements for Ms. Battle, and information obtained from respondent's sister was used on the form submitted to obtain the death certificate. The information sheet listed Ms. Battle's apartment number for respondent Santoro. An alteration was subsequently made on the form and the apartment number for respondent Santoro was changed to Apartment LB4. However, Mr. Grant testified that he had never spoken directly with respondent Santoro.

Respondent Santoro testified that he completed and submitted an application for an apartment, and signed the lease for Apt. LB4, but never moved into that apartment. Respondent further testified that, although he did not intend to move in, he signed the lease because he was under the impression that his girlfriend could not get the apartment without him. After respondent's mother, Jean Battle, fell on Canal Street in July 2005 her health began to deteriorate. Respondent Santoro testified that he realized that he had to spend more time taking care of his mother, and he became his mother's primary caretaker. His girlfriend moved into the apartment LB4 alone. Mr. Santoro testified that he was working on research for his PHD in electrical engineering, and studying for his qualifying examination in September 2005, and because he was so focused on his studies, he did not even assist Ms. Jones when she moved into Apt. LB4. Mr. Santoro testified that he stored approximately 20-30 boxes of books and CDs in Apt. LB4, but did not move any other possessions into that apartment. In addition, Mr. Santoro testified that he did not pay the security deposit, nor did he ever pay or contribute to any of the bills for Apt. LB4.

Respondent Santoro introduced a multitude of documents into evidence in support of his claim that his primary residence was always his mother's apartment during the two year period prior to

August 2006 when Ms. Battle died. The documents included vehicle registration and insurance, motorcycle insurance for 2005 and 2006, tax returns for 2005, 2006, and 2007, social security statements, credit card bills, credit union statements, bank statements, personal correspondence, and telephone records. In addition, respondent admitted into evidence rent checks, drawn on respondent's account from 1999 through 2009 which were paid to petitioner.

Craig Raphael, a friend of respondent Santoro, testified on his behalf. Mr. Raphael testified that he had visited respondent at his mother's apartment two or three times between September 2005 and September 2006. Mr. Raphael saw respondent Santoro regularly, and called him frequently at the telephone number in Ms. Battle's apartment. In addition, Mr. Raphael had also visited Ms. Jones in Apt. LB4 and did not observe any of respondent Santoro's belongings in Ms. Jones' apartment.

Heather Cochrane, a former neighbor of respondent Santoro at the subject building testified that she resided in the building from 2001-2007. Ms. Cochrane testified that she would see respondent Santoro at the elevator as he left for work between 7AM and 7:30AM approximately three times per week. Ms Cochrane also observed respondent Santoro using the laundry room on the right side of the building.

Respondent's sister Adrienne Herlihy also testified that respondent Santoro resided with their mother in the year prior to her death, and never moved out of the subject apartment. Ms. Herlihy stated that she observed respondent's books and magazines when she visited her mother's apartment, and she would also speak with respondent Santoro when she called the apartment

Ms. Herlihy testified that her mother spent three weeks in Hospice care at Beth Israel in May 2006. Ms. Battle requested release from Hospice because she wanted to be at home. Ms. Herlihy asked Ms. Jones' permission for Ms. Battle to use the second bedroom in her apartment since Ms. Jones' apartment had more space for the hospital bed. After Ms. Battle moved into Ms. Jones apartment, Ms. Herlihy ordered cable service for her mother in Apt. LB4 because Ms. Battle loved cable programming and Ms. Jones was not a cable subscriber.

Kathleen Jones testified that she and respondent Santoro began dating in 1999. At that time Ms. Jones lived in Prospect Heights. Ms. Jones stated that she wanted to live with respondent Santoro, and to marry him. Ms. Jones and Ms. Santoro learned that there was an apartment available in the subject building, and they both completed an application for the apartment in July 2005. Ms. Jones testified that she subsequently had a conversation with respondent Santoro and he informed her that he could not move into the new apartment with her because his mother needed full time care. Ms. Jones stated that she was financially able to manage the apartment. Ms. Jones sold her apartment in Prospect Heights, and moved into the apartment in the subject building alone. Ms. Jones secured renter's insurance in her name only for her property. In addition, Ms. Jones opened all the utility accounts for the apartment. Respondent Santoro made no financial contributions for anything related to the apartment.

In addition, Ms. Jones testified that respondent Santoro placed 15-20 boxes in her apartment when he needed space in his apartment because his mother had trouble walking. Ms. Jones

testified that these boxes were never opened, and some were moved to storage and some back to the subject apartment when she moved into the subject apartment with respondent Santoro.

Ms. Jones testified that she agreed to have Ms. Battle stay in her apartment after leaving Hospice because she wanted to help the family. While Ms. Battle lived in Ms. Jones' apartment, respondent Santoro also slept in the apartment. However, Ms. Jones testified that respondent Santoro never moved any of his belongings into her apartment, and he returned to his apartment to shower.

Ms. Jones admitted that she never informed management that Mr. Santoro did not reside in Apt. LB4 until she received the renewal lease dated April 26, 2007. Ms. Jones testified that she crossed out respondent Santoro's name and returned the lease to management. The rent on Ms. Jones' apartment was \$1300.00.

Respondent asserts that he has proven that he resided with his mother in the two year period prior to her death in August 2006. Therefore, respondent claims that, as his mother's successor, he is entitled to a renewal lease in his name. Further, respondent contends that petitioner's assertion that respondent acted improperly, by waiting until the renewal lease was sent in April 2007 to request that the lease be placed in his name is without merit, since the law does not require notification of the departure of the tenant. Moreover, respondent argues that he is a family member as defined in RSC§2520.6 (o) who resided in the apartment for two years prior to his mother's death, and he is entitled to a renewal lease in his name pursuant to RSC §2523.5(b).

In addition, respondent contends that the fact that he signed a lease for another apartment in the building does not impact on his right of succession in his mother's apartment. Respondent argues that the only relevant issue is whether his primary residence was at the apartment to which he is claiming succession rights for the relevant period of time.

Further, respondent argues that petitioner is estopped from denying respondent's tenancy by virtue of the fact that petitioner has accepted rent from respondent from 1999 through the present time. Therefore, respondent asserts that petitioner cannot maintain this proceeding on the ground that he is a licensee.

Petitioner asserts that succession rights do not automatically vest, and the person claiming succession has the burden of proving his primary residence for at least two years with the tenant of record from the time of the tenant of record's vacatur of the apartment. Further, petitioner maintains that respondent cannot prove that his mother's apartment was his primary residence for the two years prior to her death at which time his rights would have vested. This claim is based on respondent's admission that he slept in Ms. Jones' apartment from the time that his mother was transferred to hospice care until December 2006.

Moreover, petitioner contends that respondent's actions undermine the goals of the Rent Stabilization regulations. Petitioner claims that respondent attempted to retain rights to two rent stabilized apartments, and made choices based on his convenience. Petitioner characterized respondent's move back to his mother's apartment in December 2006, even though the lease in Apt. LB4 had not yet expired, as respondent's attempt to establish his succession claim.

In its ten day Notice to Quit served on August 3, 2007, petitioner alleged that respondent was granted a license to occupy the apartment by Ms. Battle, the tenant of record, and that license was terminated by operation of law upon Ms. Battle's death. Further, the Notice states that respondent was granted a lease in his name for a different apartment and respondent has been seen occupying /and or residing in that apartment through the time of death of Ms. Battle in August 2006. The Notice goes on to state that respondent did not occupy the subject apartment as his primary residence for two years prior to the death of Ms. Battle.

In 1969 the Rent Stabilization Code (RSC) was enacted to address the shortage of housing, for the benefit of tenants and the public interest and to protect against unreasonably high rents, *Festa v. Leshen*, 145 A.D.2d 49 (1<sup>st</sup> Dept. 1989). The RSC, as enacted, did not provide for succession rights of family members( see *Sullivan v. Brevard Associates*, 66 N.Y.2d 489,[1985]). Subsequently, in 1987 the RSC was amended, and RSC §2523.5(b)(1) was added to grant succession rights to family members of tenants whose primary residence was with the tenant for two years prior to the death of the tenant. Family members are defined in RSC §2520.6 (o) as “[a] husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, nephew, niece, uncle, aunt, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law or daughter-in-law of the tenant or permanent tenant.” In *Lesser v. Park 65 Realty Corp.* 140 A.D.2d 169 (1<sup>st</sup> Dept. 1988), the court noted that the succession provisions “were included in the new Code to prevent the grievous harm that would ensue from the wholesale eviction of family members which would otherwise be permitted under the law as set forth in the *Sullivan* decision and to address the inadequacies in this area of the law in light of its history.”

The succession provision addresses the need for continuity of possession of the homes of family members, *Hughes v. Lenox Hill Hospital*, 226 A.D.2d 4 (1<sup>st</sup> Dept.1996), and the public policy underlying the statute aims at protecting affordable housing and not the furtherance of tenants' interest in pecuniary gain, *Hughes, supra*.

Petitioner asserts that respondent seeks the subject apartment because of the lower rent, and claims that respondent's actions are fraudulent since respondent was a leaseholder for another apartment in the building for the same period of time that respondent claimed to have his primary residence in the subject apartment.

Petitioner cites three cases in which succession rights were not granted because succession in those cases would contravene the intent of the Rent Stabilization Law. In *Hughes v. Lenox Hill Hospital*, 226 A.D.2d 4 (1<sup>st</sup> Dept.1996), the court found that the claimed successor made no immediate use of the apartment and maintained his primary residence elsewhere for seven years. The severity and duration of the fraudulent conduct of the claimed successor in *South Pierre Associates v. Mankowitz*, 17 Misc.3d 53 (App. Term 1<sup>st</sup> Dept. 2007) who forged the tenant's name on renewal leases for more than a decade was found to have prejudiced the petitioner's prosecution of its eviction claim. In *Cox v. J.D Associates*, 217 A.D.2d 179, (1<sup>st</sup> Dept., 1995) the court determined that plaintiffs' action seeking declaratory relief was improper, and the findings of fact of the trial court regarding the date of vacatur of the tenants of record and plaintiffs' claims of primary residence in the apartment were based on insufficient evidence. The facts in the instant matter are not analogous to any of the aforementioned cases.

The evidentiary support for petitioner's claim that the subject apartment was not respondent's primary residence consisted of the lease for Apt. LB4, Mr. Flippen's testimony that he observed respondent moving boxes, the use of Apt. LB4 in respondent's address on his mother's death certificate and one piece of mail from the United Kingdom postmarked on November 11, 2007 addressed to "Kathy and David" at Apt. LB4.

Respondent presented an overwhelming amount of documentary and testimonial evidence attesting to his continuous residence in the subject apartment for the relevant period prior to his mother's death in August 2007. Although, this court finds incredulous respondent's claim that he did not move any his belongings into Ms. Jones' apartment during his mother's stay in that apartment, the fact that he slept there for a period of time, under the circumstances, does not make it his primary residence.

Petitioner contends that respondent resided in Ms. Jones' apartment from the time his mother entered Hospice care in May 2006 until December 2006, and therefore cannot prove continuous occupancy in the subject apartment through the time of her death. However, temporary relocation from the rent stabilized apartment to take care of an ill parent has been found to be a reasonable excuse for absence from the apartment, *Hudsoncliff Building Co. v. Houpouridou*, 22 Misc. 3d 52, ( App. Term 1<sup>st</sup> Dept. 2008).

Primary residence is "basically a determination of the intention of the tenant" *Heller v. Joy*, NYLJ, February 22, 1984, p. 9, col. 1. , as demonstrated by an ongoing physical nexus with the apartment, *Emay Properties Corp. v. Norton*, 136 Misc. 2d 127 [App. Term 1<sup>st</sup> Dept. 1987]. In the instant matter, respondent proved by a preponderance of the evidence that his primary residence was the subject apartment for two years prior to his mother's death. The evidence presented by petitioner was insufficient to show that Apt LB4 was respondent's primary residence from September 2005.

Although, this court is troubled by the fact that respondent was a leaseholder for Apt. LB4 while maintaining his primary residence in the subject apartment, and respondent's interest in two apartments is inconsistent with the policy underlying the Rent Stabilization Law to address the shortage of affordable apartments, respondent's explanation for not moving into Apt. LB4 is reasonable. Further, respondent's reason for staying in his mother's apartment is consistent with the letter he sent to petitioner requesting an apartment in which he stated that he wanted to be in the building to be close to his mother because of her illness.

Petitioner was neither surprised or prejudiced by respondent's actions. Respondent properly and timely informed petitioner that he wanted a renewal lease in his name when petitioner sent a renewal lease to his mother. ( See *South Pierre Associates v. Mankowitz*, 17 Misc.3d 53 (App. Term 1<sup>st</sup> Dept. 2007), *245 Realty Assoc. v Sussis*, .243 A.D.2d 29,( 1<sup>st</sup> Dept. 1998). Also, petitioner had been accepting respondent's checks during this period. Further, petitioner admitted that Ms. Jones would have qualified for the apartment by herself, and petitioner stated no reason that she would not have been given a lease in her name only. The evidence showed that Apt. LB4 was not respondent's primary residence, and respondent has met the residency requirements for succession to the subject apartment under RSC §2523.5(b)(1).

Petitioner is hereby directed to offer respondent a renewal lease pursuant to RSC§2523.5 (a) within thirty days of service of notice of entry of this decision.

Accordingly, based on the foregoing, the petition is hereby dismissed.

This constitutes the decision and order of this court.

Dated: January 25, 2010

**CHERYL J. GONZALES**  
**JUDGE, HOUSING COURT**

Cheryl J. Gonzales, JHC