

**149th St LLC v Hamm**

2024 NY Slip Op 34212(U)

July 9, 2024

Civil Court of the City of New York, Queens County

Docket Number: Index No. L&T 316393/23

Judge: Logan J. Schiff

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This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF QUEENS: HOUSING PART D

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149<sup>TH</sup> ST LLC,

Petitioner,

Index No. L&T 316393/23

-against-

**DECISION/ORDER**

LYDELL C. HAMM, SIMONE T. AVERY,

Respondents-Tenants

JOHN DOE, JANE DOE, YOLANDA T. SHIRE,  
JARED LUCAS, TYLER HAMM

Respondents-Undertenants.  
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Present: Hon. Logan Schiff  
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Petitioner’s motion for an order directing Respondent to pay use and occupancy and immediate trial (Motion Sequence 1), and Respondent’s motion for summary judgment, or, in the alternative, to dismiss for failure to state a cause of action (Motion Sequence 2): NYSCEF 6-36.

**Background**

The subject holdover was commenced by Petitioner 149th ST LLC (“Petitioner”) upon filing a Notice of Petition and Petition on September 19, 2023. The proceeding is premised on a 10-day termination notice, following a 10-day notice to cure, purporting to terminate the rent-stabilized tenancy of Respondents Lydell C. Hamm and Simone T. Avery pursuant to Rent Stabilization Code (RSC) (9 NYCRR) § 2524.3 or § 2524.4 for failing to cure an alleged unauthorized “assignment or sublet to one adult male individual without the landlord’s prior written consent.”

Respondent-undertenant Jared Lucas (“Respondent”) has appeared by counsel. Respondent claims he is the son of the tenant of record, Simone Avery, and stepson of

Respondent Lydell Hamm, and accordingly, raises in his answer several defenses, including an affirmative defense asserting succession rights, and a counterclaim seeking a rent abatement.

Respondent now moves for summary judgment on his affirmative defense for succession. In the alternative, if he is not awarded succession rights, Respondent argues dismissal is warranted as a matter of law, essentially pursuant to CPLR 3211(a)(7), because Petitioner's predicate termination notice is fatally defective in two ways. First, the notice fails to meet the standard for termination based on an illegal sublet because it lacks any specificity as to a contractual relationship between the alleged sublessee and the tenants of record. Second, Respondent argues that the termination notice fails to meet the Second Department's heightened notice requirement in cases where a landlord knows or has reason to believe that the alleged sublessee is a close family member. In support of the motion, Respondent includes various evidentiary material, including affidavits from himself and his parents, who state they are his mother and stepfather and that they advised the landlord by email that they moved out of the premises in 2021 and their son would be remaining in the apartment, a birth certificate establishing the requisite biological relationship, and a lease rider submitted to the landlord with a renewal lease listing Respondent as the son of the tenant of record (NYSCEF 18-28).

Petitioner opposes the motion and seeks an order for use and occupancy pursuant to RPAPL 745(2)(a). Petitioner's opposition does not address or refute that Respondent is the biological son of the tenant of record, Simone Avery. It also fails to address the insufficiencies in the notice as raised by Respondent such as Petitioner's knowledge that Respondent was an immediate family member when it commenced this case or the absence of any specific evidence of a revocable contractual relationship between Respondent and his parents. Instead, Petitioner

merely alleges issues of fact which preclude this court from finding Respondent is entitled to succession as a matter of law.

**Discussion**

As an initial matter, Respondent's motion for summary judgment seeking a determination that Respondent has succession rights to the subject apartment must be denied, as a respondent-occupant cannot assert succession rights as a defense to an unlawful sublet holdover (*see 901 Bklyn Realty, LLC v Woods-Najac*, 119 N.Y.S3d 811 [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2019]). The court also severs without prejudice Respondent's counterclaim seeking a rent abatement pursuant to CPLR 407, as these claims are not inextricably linked to Petitioner's claim for possession (*see City of New York v Canderlario*, 223 A.D.2d 617 [2d Dept 1996]; *cf. Matter of Rockaway One Co., LLC v Wiggins*, 35 A.D.3d 36 [2d Dept 2006]).

With respect to Respondent's motion to dismiss for failure to state a cause of action, it is well-established that a rent-stabilized tenant who merely allows a close family member to reside in her apartment for an extended period without engaging in profiteering has not engaged in an unauthorized sublet, even where the tenant of record resides elsewhere (*see 901 Bklyn Realty, LLC v Woods-Najac*, 119 N.Y.S3d 811 [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2019]; *235 W. 71 St. LLC v Chechak*, 4 Misc 3d 114, 115 [App Term, 1st Dept 2004], *affd* 16 AD3d 242 [1st Dept 2005]; *Hudson St. Equities Group, Inc. v Escoffier*, 2003 NY Slip Op 51213[U], \*3 [App Term, 1st Dept 2003]). Such conduct may justify the commencement of a holdover based on the tenant's failure to maintain the premises as their primary residence upon service of a non-renewal notice 90 to 150 days before expiration of the lease (*see RSC § 2524.2 [c] [2]*; *888 E. 96th St., LLC v Hargrove*, 61 Misc 3d 137[A], 2018 NY Slip Op 51558[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2018]; *PLWJ Realty v Gonzalez*, 285 AD2d 370, 370-371 [1st Dept 2001]);



however, this is a distinct cause of action under the Rent Stabilization Code, and in such cases remaining family member may interpose a defense of succession rights (*see 72A Realty Assoc. v Kutno*, 15 Misc 3d 100 [App Term, 1st Dept 2007]; *Wittenberg v Ortega*, NYLJ, June 9, 1998 at 25, col 1 [App Term, 1st Dept 1998]).

A landlord seeking to terminate a rent-stabilized tenancy is required to serve a predicate notice enumerating the ground for eviction under the Rent Stabilization Code prior to commencement (*see* RSC § 2524.2 [b]). The termination notice must be supported by specific factual statements, not mere conclusions, to enable the tenant to adequately defend herself (*see Domen Holding Co. v Aranovich*, 1 NY3d 117, 125 [2003]; *69 E.M. LLC v Mejia*, 49 Misc 3d 152[A], 2015 NY Slip Op 51765[U] [App Term, 1st Dept 2015]). In the context of an illegal sublet holdover, in order to be facially sufficient a predicate notice must “allege facts showing that any type of contractual agreement existed between tenant and [the undertenant or that the] occupancy was by virtue of a right that could not be revoked for a fixed period of time, or any other facts to support the claim that [the] occupancy had risen to the level of a sublet” (*888 E. 96th St., LLC v Hargrove*, 61 Misc 3d 137[A], 2018 NY Slip Op 51558[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2018]).

In *888 E. 96th St., LLC v Hargrove*, the Appellate Term granted a pre-answer motion to dismiss where the predicate notice stated that the tenant “had not been observed residing at the premises ‘for many months’ and was actually residing at a different address, and that tenant had sublet the premises to [the movant] without landlord’s prior knowledge and written consent” (61 Misc 3d 137[A], 2018 NY Slip Op 51558[U], \*1 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2018]). In dismissing the proceeding, the court relied on the un rebutted affidavit from the movant stating that he was the respondent’s son, that they had lived together for many years, and that he

continued residing in the premises after she moved out. The Appellate Term held that in the absence of allegations in the predicate notice of a contractual relationship between the respondent and her son, or other facts to support a claim the relationship rose to the level of a sublet, the allegations set forth were "more properly resolved in the context of a nonprimary residence proceeding" (2018 NY Slip Op 51558[U], \*2).

Beyond the prima facie requirements for specificity required in every termination notice alleging an unlawful sublet, the Appellate Term in the Second Department has established a heightened pleading standard in cases where a landlord knows or has reason to know that the alleged sublessee is a close family member. In *901 Bklyn Realty, LLC v Woods-Najac*, on an appeal concerning the scope of pretrial discovery, the Appellate Term emphasized that the general presumption that a sublet occurs where a person other than the lessee is shown to be in possession "does not apply where the person in occupancy is a close family member of the tenant, as the permissible occupancy of family members does not provide a basis for a claim of illegal sublet." (65 Misc 3d 158[A], 2019 NY Slip Op 51976[U], \*1 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019].) The court then sua sponte dismissed the proceeding pursuant to CPLR 409(b) holding that "where, as here, landlord has information that the occupant of the apartment is a close family member of the tenant and seeks to evict that occupant on the basis of an illegal sublet (as opposed to maintaining a licensee proceeding following the expiration of the lease), it must do more, in its predicate notices and petition, than make conclusory allegations of an illegal sublet or assignment; instead, the landlord must allege facts tending to establish that the occupancy rose to the level of an illegal sublet" (*id.*).

Petitioner's termination notice suffers from the same infirmities as the predicate notices in *Hargrove* and *Woods-Najac*. The notice merely states that on one occasion when access for

repairs was given, only one male occupant was observed residing in the unit, and that the respondent tenants have not been observed on video surveillance entering or exiting the premises. The notice lacks specific allegations of a contractual relationship or discussion of the familial relationship between the parties, and there is no allegation of profiteering or transient use. Moreover, Petitioner has not offered any admissible rebuttal evidence to the claim in Respondent's and his parents' affidavits that Respondent is the son of the tenants of record and that Petitioner had knowledge of the relationship before commencement, including by virtue of receiving riders to renewal leases that list him as an occupying immediate family member (*see* NYSCEF 22 at 5). Particularly under these circumstances, Petitioner's predicate notice fails to state the facts necessary to authorize commencement of a holdover based on unauthorized sublet or assignment. As a defective predicate notice is non-amendable, the Petitioner must be dismissed without prejudice (*see Chinatown Apartments Inc. v. Chu Cho Lam*, 51 N.Y.2d 786 [1980]; *Bray Realty, LLC v Pilaj*, 59 Misc.3d 130(A) [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2018]).

Petitioner is so advised that its remedy is to commence a failure to renew or primary residence holdover (*see 235 W. 71 St. LLC v Chechak*, 4 Misc 3d 114, 115 [App Term, 1st Dept 2004], *affd* 16 AD3d 242 [1st Dept 2005]; *Santorini Equities, Inc. v Picarra*, 2003 NY Slip Op 50645[U] [App Term, 1st Dept 2003]; *119 Grand Realty LLC. v Imbert*, 2021 NY Slip Op 32039[U] [Civ Ct, NY County 2021]; *Elk Cent. Props Orchard v Shaon*, 2020 NYLJ LEXIS 667 [Civ Ct, NY County 2020]), or, potentially, a licensee holdover given that the tenants of record have acknowledged their surrender in sworn affidavits in support of Respondent's motion and in prior correspondence to the landlord.

**Conclusion**

In light of the above findings, Respondent's motion to dismiss is granted and the proceeding is dismissed without prejudice. The branch of Respondent's motion seeking summary judgment is denied. Petitioner's motion for use and occupancy is denied as moot.

This constitutes the decision and order of the court.



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Hon. Logan J. Schiff, J.H.C.

Dated: July 9, 2024  
Queens, NY