

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 23

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HONG QUON LEE, et al.

- against -

MIGUEL REYES, et al.

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INDEX NO. 22545/02

BY: GLOVER, J.

DATE: MARCH 10, 2003

Plaintiffs bring this motion for summary judgment in their favor in their underlying action for ejectment pursuant to RPAPL article 6. Plaintiffs seek to eject defendant Miguel Reyes, and any other party residing there, from an apartment located in plaintiffs' home at 87-51 52nd Avenue, Elmhurst, New York 11373. In support of their claims, plaintiffs submit a copy of the deed evidencing that they purchased the premises in question in December 1969. Plaintiffs assert that, since the time of their purchase of the premises, the same has always included three apartments and that they were unaware that the premises is a de facto illegal multiple dwelling. As such, plaintiffs acknowledge that they are precluded from bringing a summary proceeding in Landlord/Tenant part of the Civil Court under RPAPL article 7.

Plaintiffs submit evidence that they entered into a written lease with defendant Miguel Reyes in December 1999, and that upon the expiration of the lease, defendant became a month-to-month tenant. Plaintiffs allege, and defendant Reyes does not deny, that Reyes ceased paying rent in July 2002. On July 18,

2002, plaintiffs served defendant Reyes "and/or John Doe or Jane Doe" with a written 30-day notice to terminate tenancy and vacate the premises as of August 22, 2002. However, defendant Reyes has continued to remain in possession of the premises to date. On August 25, 2002, plaintiffs commenced the instant action by the purchase of an index number and service upon defendant Reyes "and/or John Doe and Jane Doe".

Initially, defendant Reyes appeared and answered in the action pro se, alleging that he allowed his adult daughter and fiancée to move into the apartment temporarily, but that he did not allow "strangers" to move into the apartment as plaintiffs had alleged. Defendant Reyes at no time has denied that he has failed to pay rent since July 2002. Defendant Reyes has since obtained counsel and now seeks to have the action dismissed on grounds that his alleged wife "Pilar" has not been served. It is noted that in his pro se answer, defendant Reyes lists both his daughter and her fiancée as temporarily residing in the apartment, but makes no mention of his alleged wife.

In response to the instant motion, defendant Reyes cross-moves to dismiss, but submits no evidence, aside from his own self-serving affidavit, in support of his claims. Defendant's submission contains no affidavit from "Pilar", no marriage certificate, and no evidence that a party named "Pilar" ever appeared on a lease to the premises. It is axiomatic that a party opposing a motion for summary judgment is required to "lay bare"

its proof in order to defeat a defendant's prima facie showing of entitlement to judgment. (Zuckerman v City of New York, 49 NY2d 557.)

Defendant's reliance in Leist v Richburg (NYLJ Nov. 18, 1987, at 13 col 2) is misplaced, insofar as the same was a summary proceeding, and the jurisdictional limits and restrictions thereof do not apply to the instant matter. Moreover, defendant fails to make any showing that the alleged "Pilar" is a necessary party insofar as defendant Miguel Reyes is the only party named on the lease and, thus, only he as the tenant need be named in the action for ejectment. (Real Property Law § 232-a; Triborough Bridge & Tunnel Auth v Wimpfheimer, 165 Misc 2d 584.) In fact, in Wimpfheimer, a proceeding where the tenants were afforded the protections of RPAPL article 7, the court found that the failure to name a subtenant is not fatal to a landlord's action against the tenant. (Triborough Bridge & Tunnel Auth v Wimpfheimer, supra.)

Accordingly, insofar as defendant has failed to raise any triable issue of fact or other defense in opposition to plaintiffs' motion for summary judgment in their favor, the motion is granted and defendant Reyes' cross motion is denied. Notwithstanding the failure of defendant Reyes' proof as to the existence of any subtenants, plaintiffs shall have leave to apply for joinder of any said subtenant in order so that any warrant obtained in the proceeding will be effective against them. (Triborough Bridge & Tunnel Auth v Wimpfheimer, supra.)

Settle order.

J.S.C.