



Cited

As of: Dec 05, 2012

60 West 57 Realty, Inc., Respondent, v Loretta A. Durante, Appellant.

[NO NUMBER IN ORIGINAL]

**SUPREME COURT OF NEW YORK, APPELLATE TERM, FIRST
DEPARTMENT**

*17 Misc. 3d 71; 847 N.Y.S.2d 321; 2007 N.Y. Misc. LEXIS 7128; 2007 NY Slip Op
27432*

October 23, 2007, Decided

PRIOR HISTORY: [*1]**

Appeal from a judgment of the Civil Court of the City of New York, New York County (John S. Lansden, J.), entered on or about February 21, 2006. The judgment, after a nonjury trial, awarded possession to petitioner in a nonprimary residence holdover summary proceeding.

CASE SUMMARY:

PROCEDURAL POSTURE: Respondent tenant appealed a judgment by the Civil Court of the City of New York, New York County (New York) that awarded possession of a stabilized apartment to petitioner landlord in a non-primary residence holdover summary proceeding.

OVERVIEW: The holdover proceeding was founded upon allegations that the tenant made only sporadic use of the stabilized apartment for the one-year period during which she was married to a New Jersey domiciliary. The appellate court found that the trial evidence unassailably showed that the tenant had no ownership or proprietary interest in her former husband's residence or any other

property. The tenant continuously resided in the stabilized apartment for more than eight years before she was married. During her short-lived marriage, the tenant kept most of her furniture and personal belongings in the apartment, did not sublet the apartment, and received her mail there, including bank and credit card statements. The tenant resumed full-time occupancy of the apartment roughly six months prior to the expiration of her most recent renewal lease. Consequently, because the record evidence failed to establish that the apartment was not the tenant's primary residence, the landlord failed to meet its burden of establishing non-primary residency, and the trial court erred in awarding possession of the apartment to the landlord.

OUTCOME: The judgment was reversed, and judgment was awarded to the tenant dismissing the holdover petition.

CORE TERMS: apartment, tenant's, holdover, marriage, primary residences, lv denied, nonprimary, full-time, occupancy, landlord's, married, failed to meet, burden of establishing, proprietary interest, personal belongings,

renewal lease, continuously, domiciliary, short-lived, expiration, residency, furniture, founded, resumed, sublet, mail

HEADNOTES

Landlord and Tenant -- Rent Regulation -- Primary Residence

In a holdover proceeding founded upon allegations that respondent used the subject rent-stabilized apartment only sporadically during a one-year period when she was married to a New Jersey domiciliary, petitioner failed to meet its burden of establishing nonprimary residency. Respondent had no proprietary interest in any other property, had lived continuously at the apartment for eight years prior to her short-lived marriage, kept furniture and personal belongings and received her mail at the apartment during the marriage, never sublet the apartment, and resumed full-time occupancy of the apartment approximately six months prior to the expiration of the renewal lease.

COUNSEL: *Lambert & Shackman, PLLC*, New York City (*Thomas C. Lambert* of counsel), for appellant. *Borah, Goldstein, Altschuler, Schwartz & Nahins, P.C.*, New York City (*Paul N. Gruber* of counsel), for respondent.

JUDGES: PRESENT: McKeon, P.J., Davis, Schoenfeld, JJ. McKeon, P.J., Davis and Schoenfeld, JJ., concur

OPINION

[**321] [*72] Per Curiam.

Final judgment, entered on or about February 21, 2006, reversed, with \$ 30 costs, and final judgment awarded in favor of tenant dismissing the holdover petition. The clerk is directed to enter judgment accordingly.

This nonprimary residence holdover proceeding, commenced in March 2003, is founded upon allegations that tenant made only sporadic use of the subject West 57th Street stabilized apartment for the one-year period from October 2001 to October 2002, during which tenant was married to a New Jersey domiciliary. The trial

evidence unassailably shows that tenant had no ownership or proprietary interest in her (now) former husband's Little Silver, New Jersey, residence or any other property; that tenant continuously resided in the Manhattan apartment for more than eight years before she was married; that during her short-lived marriage tenant [***2] kept most of her furniture and personal belongings in the apartment, did not sublet the apartment, and received her mail there, including bank and credit card statements; and that tenant resumed full-time occupancy of the apartment, at the latest, by October 2002, roughly six months prior to the expiration of her most recent renewal lease. Considering the entire history of the tenancy (*see 615 Co. v Mikeska*, 75 NY2d 987, 556 NE2d 1069, 557 NYS2d 262 [1990]) and applying the settled principle that a husband and wife can maintain two [**322] separate primary residences (*see e.g. Matter of Rose Assoc. v State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 121 AD2d 185, 503 NYS2d 13 [1986], *lv denied* 69 NY2d 601, 503 NE2d 695, 511 NYS2d 1027 [1986]), we conclude that landlord failed to meet its burden of establishing nonprimary residency. The record evidence failed to establish that, at the time the notice of termination was served in mid-December of 2002, well after the dissolution of tenant's brief marriage and her resumption of full-time occupancy in the subject apartment, the apartment was not the tenant's primary residence (*see generally Ascot Realty LLC v Richstone*, 10 AD3d 513, 514, 781 NYS2d 513 [2004]).

In view of our dismissal of the holdover petition, we have no occasion to consider [***3] whether the trial court's erroneous, sua sponte rulings in determining that a current employee of the landlord's management firm was a disinterested witness (*see Rountree v Manhattan & Bronx Surface Tr. Operating Auth.*, [*73] 261 AD2d 324, 327-328, 692 NYS2d 13 [1999], *lv denied* 94 NY2d 754, 723 NE2d 89, 701 NYS2d 340 [1999]; *Orloski v McCarthy*, 274 AD2d 633, 635, 710 NYS2d 691 [2000], *lv denied* 95 NY2d 767, 740 NE2d 653, 717 NYS2d 547 [2000]) and in drawing a negative inference from tenant's failure to subpoena her ex-husband or call him as a witness (*see 3134 E. Tremont Corp. v 3100 Tremont Assoc., Inc.*, 37 AD3d 340, 830 NYS2d 538 [2007]), were sufficiently prejudicial to warrant a new trial.

McKeon, P.J., Davis and Schoenfeld, JJ., concur.