

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART C

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CLAIRE MUSETTO,

L & T Index #: 70580/15

Petitioner,

-against-

DECISION/ORDER

277 WEST 10 OWNER, L.P.,

Respondent.

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HON. ARLENE H. HAHN, J.H.C.

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this order to show cause/petition and cross-motion to dismiss the petition.

Papers	Numbered
Order to Show Cause/Petition.....	<u>1</u>
Notice of Cross-Motion, Aff's & Exhibits.....	<u>2</u>
Answering Affirmation and Exhibits.....	<u>3</u>

After oral argument and upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Respondent moves for dismissal of the petition of the underlying illegal lockout proceeding based on CPLR § 3211(a)7 for failure to state a cause of action, in which petitioner seeks possession of 277 West 10th Street, Apt. #5F, New York, NY 10014 ("the apartment"). Petitioner opposes respondent's motion and both parties are represented by counsel.

The tenant of record of the subject premises was Vincent A. Musetto, Jr., who died June 9, 2015. Petitioner alleges to be Mr. Musetto's wife, although his Last Will and Testament dated September 19, 2003, refers to her as his "ex-wife." Upon close inspection of the Affidavit, License and Certificate of Marriage proffered by petitioner in her opposition to this motion, it appears as though this certificate, issued on November 10, 2006, evidences the second marriage between petitioner and the tenant of record. Although petitioner's maiden name was Claire Smolensky, the full name listed under "Bride" is "Claire Adele Musetto." Further, the Marriage License indicates that both the bride and groom were previously divorced on the same day, September 11, 1981, in Kingston, New York. Additionally, Vincent A. Musetto, Jr.'s address is listed as the subject premises, while petitioner's address is listed as 65 Nordic Dr., Woodstock, New York. No evidence was submitted regarding whether this second marriage between Claire and Vincent Musetto was terminated.

Although petitioner was married to Mr. Musetto at the inception of the tenancy, and was a named tenant on the original 1978 lease, petitioner submitted no proof that she ever lived in the apartment

subsequent to her divorce from him in 1981, nor did she allege to have done so. Lease renewal forms submitted by the respondent-landlord for the years 1994 through 2014 list only Mr. Musetto as the tenant, and nowhere list petitioner as ever again having been a tenant or an occupant, though subsequent to their re-marriage in 2006, she was listed as an emergency contact in each of the renewal leases from 2006 - 2014, except for 2007, in which their daughter was listed as the emergency contact. Notably, the telephone numbers listed for petitioner and her daughter indicate an "845" area code, the only area code associated with Woodstock, New York. Further, on the most recent Tenant Information Sheet for the subject premises signed and dated by Mr. Musetto on July 1, 2013, he indicated having a second residence at 65 Nordic Drive, Woodstock, NY 12498 and listed petitioner, Claire Musetto, as his emergency contact with an address at P.O. Box 413, Woodstock, NY 12498. Additionally, he listed Hyonju Lee as "Occupant #1" as the name of the only additional occupant on this form and on all other such forms submitted with his renewal leases from 2007 through 2014. Ms. Lee vacated the premises June 27, 2015.

CPLR § 3211(a)7 provides that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action. NYC Code §26-521, provides, in pertinent part: "Unlawful Eviction. a. It shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer. . . . (3) or changing the lock on such entrance door without supplying the occupant with a key." (Emphasis added.)

The amended petition¹ fails to allege that petitioner lawfully occupied the dwelling unit for at least thirty consecutive days before having been illegally evicted. The only facts alleged in the petition related to the timing of what allegedly transpired are that the tenant of record, Vincent Musetto, passed away on or about June 9, 2015, and that "petitioner was residing at the premises with Vincent prior to, at the time of, and following Vincent's death." These two assertions alone fail to allege facts sufficient to state a cause of action under NYC Code § 26-521, which applies only to occupants who have lawfully occupied a dwelling unit for thirty consecutive days or longer.

Petitioner's affidavit in opposition to this motion describes with additional specificity her travels back and forth between her long-term home in Woodstock, New York, and the subject premises. However, the

¹ The amended petition is dated July 22, 2015 and was received by the Court July 23, 2015, subsequent to the service of the within motion upon petitioner.

facts alleged therein, alone, taken as true, do not support a finding that respondent occupied the subject premises for more than twenty-seven consecutive days, at most. Further, factoring in petitioner's credit card statements, submitted to prove her location during the relevant time period, only weaken petitioner's position, contradicting her affidavit on at least two dates, and reducing the possible number of consecutive days she could have physically occupied the apartment to a maximum of seventeen.

From the period of May 16, 2015, the date petitioner alleges to have "moved in" with her husband², until July 7, 2015, the date she returned to the subject premises to discover the locks to the apartment had been changed, the most number of days she alleges to have consecutively occupied the apartment is twenty-seven.³ Comparing her affidavit testimony to her credit card statements, which, notably, list her mailing address as P.O. Box 413, Woodstock, NY 12498⁴, a charge on her credit card statement places petitioner at the Woodstock Animal Hospital on June 8, 2015, in contradiction to her affidavit testimony. Additionally, though petitioner alleges to have returned to New York on June 18, 2015 and stayed in the subject premises through July 2, 2015, a period of 14 days, her credit card statement shows a charge at Woodstock Gulf Oil⁵ on June 19, 2015, demonstrating another contradiction.

Additionally, petitioner did not allege in her petition or affidavit that she had moved out of her long-term, Woodstock residence or had moved any of her personal possessions into the subject premises. Rather, she stated that she moved for a very specific purpose, "to care for him [Mr. Musetto] on a long-term basis."⁶

² Petitioner's affidavit in opposition to respondent's cross-motion, paragraph 9. However, she further states that the very next day she returned to Woodstock and did not return to the subject premises until May 22, 2015. (Affidavit, paragraph 22.)

³ Petitioner alleged that she traveled to New York city May 22, 2015 and then traveled back to Kingston from New York city June 17, 2015. The number of days calculated was rounded up in favor of petitioner where days of travel locate petitioner both in Woodstock and in New York city.

⁴ This Woodstock, New York address appears on petitioner's two credit card statements for the periods May 5 - June 4, 2015 and June 5 - July 4, 2015, and is the same address listed on Mr. Musetto's leases for her as his emergency contact.

⁵ Respondent submitted evidence that petitioner has two motor vehicles registered to the P.O. Box 413, Woodstock, New York address which do not expire until 2016.

⁶ Petitioner's affidavit in opposition to respondent's cross-motion, paragraph 10. "On May 16, 2015, it became clear that Vincent's health had significantly worsened and he needed hospitalization. Therefore, I moved in to the Apartment, not to 'visit' him as Respondent's agents seem to suggest, but to care for him on a long-term basis."

Sadly, it appears from the papers submitted, that Mr. Musetto was admitted to the hospital May 16, 2015, and never returned to the subject premises before he died, thus thwarting petitioner's stated intention of moving in with him to care for him. She could have, but did not, state that it was her intention to move into his apartment without qualification, or for a different, less limited purpose, that was not rendered moot by circumstance, as here. In the final paragraph of petitioner's affidavit, she states one further basis to support her need to live in the apartment: "While it is no business of the Respondent, the Apartment is filled with Vincent's artifacts, writings and films and now, in this period of great mourning for me and my daughter, I as his wife and as Executrix of his estate, need to live in the Apartment to deal with publishers in New York City and others whom I will be working with to publish a book about his life and work."

As of the date of the hearing, petitioner had not been appointed Executrix. The Court notes that if it is true that the current lease term does not expire until August 31, 2016, and if Mr. Musetto's purported will is probated and petitioner is appointed executor of his estate, the leasehold will be an estate asset and petitioner will be able to legally access the apartment for the second stated purpose in her limited role as executor until the completion of the administration of the estate or the expiration of the lease at the latest.

As to petitioner's argument that this motion should be denied as untimely because a motion to dismiss under CPLR § 3211 must be brought prior to the time an answer is interposed, the Court finds this argument meritless as respondent's answer and motion are both dated July 20, 2015. Further, petitioner's argument was rendered moot by its submission of an amended petition⁷ subsequent to the date of respondent's answer (and motion), which extended respondent's time to file an amended answer, based on the amended petition, to a date after the motion was submitted.

In light of the foregoing, respondent's cross-motion to dismiss the petition is granted.

The foregoing constitutes the decision and order of this court.

Dated: New York, New York
August 14, 2015



HON. ARLENE H. HAHN, J.H.C.

⁷ The amended petition is dated, July 22, 2015, and was received by the Court July 23, 2015.