

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

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5539-181 and 182 PROSPECT PARK WEST :
BROOKLYN, LLC, : **L&T Index No.: 59131/18**
Petitioner, :
-against- : **POST-TRIAL**
MIGUEL ANGEL LOPEZ CASERES, : **DECISION AND ORDER**
Respondent/Tenant, :
MIGUEL A. LOPEZ. JR., JOHN DOE & :
JANE DOE, :
Respondents/Undertenants. :
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PRESENT: JEANNINE BAER KUZNIEWSKI, J.H.C.

After a digitally-recorded trial held on March 18, 2019; March 20, 2019; June 19, 2019; June 20, 2019 and July 22, 2019, and after due deliberation and consideration of the credible documentary and testimonial evidence adduced at the trial, the Court makes the findings of fact and conclusions of law set forth below.

Petitioner commenced this holdover summary proceeding against respondents Miguel Angel Lopez Caseres (“Lopez Sr.”), and Miguel A. Lopez, Jr. (“Miguel Lopez Jr.” or “respondent”) seeking to recover possession of apartment 13 (the “Apartment”) in the building located at 182 Prospect Park West, in Brooklyn (the “Building”) on the grounds that Lopez Sr. is not occupying the Apartment as his primary residence and that Miguel Lopez Jr. is occupying the Apartment now as an undertenant without the permission of the landlord.

Lopez Sr. has failed to appear in this proceeding. Miguel Lopez Jr., represented by counsel, appears and defends against this proceeding asserting a succession claim to his father’s

rent controlled tenancy and waiver.

The parties stipulated into evidence, petitioner's prima facie documents, namely, the certified MDR statement and the certified deed as well as Miguel Lopez Jr.'s birth certificate, board of election records and Chase bank statements.

First to testify was Rachel Bonna, a property manager for Akelius Real Estate Management. She testified that her company managed several properties including the Building which the petitioner purchased in December 2017. She stated that she had managed the Building from 2017 until last month. Ms. Bonna further testified that there was a lease audit done for the Building and that the file for the Apartment was sparse but showed that Lopez Sr. was the rent controlled tenant of record. She testified that upon Petitioner taking ownership they notified the tenants in the Building by posting a sign in the lobby and distributing a welcome packet. Ms. Bonna further stated that she was unaware that there was a Miguel Lopez Jr.

Ms. Bonna testified that on December 22, 2017 she went to the Apartment with the superintendents' facility operation manager and that Miguel Lopez Jr, let them in. She described how the Apartment was in "dire need" of substantial renovation with no electricity, no furniture, broken radiators, a leak in the kitchen, no working stove or working refrigerator, no working toilet, black tar in the bathtub, no glass panes in the windows, no bed, television or couch and no utensils or clothing. Petitioner offered photographs which were admitted into evidence to show the condition of the Apartment.

Ms. Bonna testified that when he showed them into the Apartment, Miguel Lopez Jr. identified himself only as "Miguel Lopez", not Jr. or Sr. She stated that his age made them question the rent controlled status of the tenancy and that after a few weeks of back and forth

they heard about his father, Lopez Sr. When they inquired about his co-residency and requested supporting documentation, Ms. Bonna stated that Miguel Lopez Jr. only provided them with a copy of his driver's license. The witness stated that management performed repairs in the Apartment starting in January 2018 and took several weeks. She stated that there had been no prior correspondence regarding repairs and no prior cases about conditions. She testified that Miguel Lopez Jr. commenced an H.P Action after the Notice of Termination was served.

On cross-examination Ms. Bonna confirmed that the December 2017 visit to the Apartment was due to complaints from the other tenants and that her observations supported those complaints. She testified that Miguel Lopez Jr. did not answer when questioned about where his personal belongings were and that she observed only an air mattress in a cupboard that he supposedly slept on. Ms. Bonna stated that he never discussed not living there or moving out. She confirmed that there was a "C" violation of record for the entire Apartment for the electrical wiring.

Next to testify was the respondent, Miguel Lopez Jr. Respondent testified that he usually goes by the name Miguel Lopez and that he moved into the Apartment when he was 10 or 11 years old. He testified that his parents separated and that he stayed in Brooklyn for school. He stated that he lived together with his father for 20 years until his father was arrested about 10 years ago. Respondent stated that his father only returned to the Apartment for a few minutes after he was released from his one year sentence. He stated his father got his things and did not return after that. Certified NYC Department of Correction records show that Miguel Lopez Sr. was incarcerated on June 24, 2008 and discharged from custody on February 2, 2009.

Respondent introduced into evidence certified work records from Rite Aid, voting records

and medical records. Respondent testified further that prior to 2009, his father paid all of the bills including the rent, for which he gave his father cash. He stated that after 2009 the utility bills were in his name and that he paid them with his bank account but could not produce any records.

Respondent also submitted National Grid and Con Edison bills. Miguel Lopez, Jr. testified that at some point he began to pay rent to the landlord via personal check which he delivered to the office in person. He stated that he told the office staff that his father was arrested and that he would be taking over the rent payments. He testified that the landlord brought a non-payment proceeding in 2014 and that he appeared. Respondent further testified that beginning in 2015 he began requesting repairs. He testified to some fairly important repairs that needed to be made, like the window panes, the bathroom tiles, the tub, the stove and the outlets. Miguel Lopez Jr. stated that when the current management company took over he emailed them regarding the repairs as well.

Finally, respondent testified that he began seeing a therapist in 2017 for depression and anxiety, which he attributed partly to the condition of the Apartment. He stated that his therapist helped him be less passive about the Apartment and get things taken care of.

On cross-examination respondent conceded he could not produce any documentary evidence to support his co-occupancy prior to his father vacating the Apartment in 2009. He also was questioned about discrepancies between his testimony at trial and that taken at an earlier deposition. At the deposition respondent testified that he did not speak to his father after his release from prison and he did not know that his father would not be returning to the Apartment until a year or two after his release from prison when the NYPD came around. At trial

respondent recounted a brief interaction with his dad after his release when he came to get his things from the Apartment. He confirmed he did see his father after his release and attributed his contradictory statement at the deposition to being tired.

Respondent testified that he did not have any written documents to show whether and/or when he notified either the current or prior owners and property managers that his dad was arrested and would not be returning to the Apartment.

Miguel Lopez Jr. testified, that he more than occasionally, omits the "Jr." from his name, contrary to his testimony at the deposition. He conceded that he omits "Jr." when he signs checks and that this might contribute to confusion as to whether he or his father was paying the rent post 2009.

Respondent then described the condition and contents of the Apartment in 2017. He told how in December 2017 he got rid of a lot of furniture including the sofa, his bed and a wall unit. He stated that there may not have been a bed in the Apartment at that time and confirmed that the bathtub was stained pretty badly at that time. He testified regarding many photographs depicting the contents and state of the Apartment and testified regarding the time line and their duration.

Respondent testified despite the fact that there was no heat in the Apartment from October 2017 through February 2018, he remained in the cold apartment. He testified that he sometimes stayed at his girlfriend's apartment but that she never stayed at his.

On re-direct respondent reiterated that he had last seen his father outside the Building about 10 years ago but was not sure if he was returning until the NYPD officers came looking for him. He testified that his dad paid the rent by check and that he paid by check initially after his dad was gone eventually paying online. He testified that the people in the office knew him since

his dad used to work for the landlord and he had been there since he was a little kid. Finally he testified that her met his girlfriend in 2016, they started dating in 2017 but that she did not see the Apartment until 2018.

Next to testify was respondent's fiancé, Veronica Komissarova. She testified regarding how she met the respondent in 2016 and how they began dating. She testified that after six months she thought it odd that she had not been invited to respondent's Apartment. She told of one occasion when they were nearby in the park, she needed to use a bathroom. Respondent refused to let her use his Apartment. It was then that she learned it was in bad condition. Sometime later in late October or early November 2017 she saw the Apartment for the first time and testified that it was much worse than she imagined.

The witness testified that she referred the respondent to a therapist and then in late November, early December 2017, hired someone to help throw out the garbage. She testified that she couldn't say whether the garbage was respondent's or his father's. She stated that she believed that the respondent lived in the Apartment since he was a child and that she was certain he lived there since she had known him. She had no personal knowledge where Miguel Lopez, Jr. lived prior to 2016.

On cross-examination she described the condition of the Apartment before they removed the bags and bags of garbage. She testified as to her address and stated that respondent had never slept over at her place but that she had slept at his Apartment after the renovations were done, sometime in March or April 2018. The witness testified that the repairs were significant and took about three months. According to her during that time Miguel Lopez Jr. continued to reside in the Apartment. She stated that she did not enter the Apartment from the time she helped him remove

the garbage until after the renovations so she did not know when respondent sent things to storage. She testified that she moved into the Apartment full time in April or May of 2018.

Ms. Komissarova testified regarding an unfavorable online review that she left about the management company. She also testified regarding an HP proceeding that was brought by the respondent.

Next to testify for respondent was James Lopez, Miguel Lopez Jr.'s older brother. He grew up in a different household than respondent but stated that Miguel Lopez Jr. moved into the Apartment with his father in 1991. He stated he saw him regularly. He stated that his step-father, Lopez Sr., was arrested around 2007 and that up until that time he lived in the Apartment.

James Lopez testified that after his step-father was released from prison in 2009, his brother called him to tell him that his father was going to the apartment. He went to the apartment building and spoke to Miguel Lopez, Sr. in the front of the building. They gave him his clothes and told him not to come back. He stated that he has not heard from him since.

James Lopez testified that his brother lived in the Apartment and had never moved out. The witness stated that in 2015 he discovered that his brother was a hoarder. He testified that the Apartment was always cluttered with building materials from Lopez Sr. and that at some point his brother stopped throwing out the garbage and caring for the cats. However, he conceded not seeing the inside of the Apartment between 2006 and 2015.

James Lopez testified that he hired a clean up crew in July 2015 to haul away the garbage and that after the Apartment was emptied his brother had a blowup bed by the window but that the Apartment was still in dire need of repair. The windows were "destroyed", there were electrical issues, there was no toilet seat and Tilex did not work on the tub stains. He stated that

he tried to start some repairs but his brother became defensive. He also refused his offers to provide him furniture.

Mr. Lopez testified that at some point he and his wife loaned his brother \$5000 to catch him up on back rent. He stated that the loan was paid up over ten months and during that time they checked in on the Apartment a few times to make sure that he wasn't hoarding again. James Lopez stated that after the loan was paid off his brother "dropped off the face of the earth". He testified that he did not know of any other address for his brother since 1991.

On cross-examination James Lopez testified that the last time he saw furniture in the Apartment was July 2015 and that the Apartment was empty as of June 2016. James stated that he had not been in the Apartment after June 2016. He further stated that he himself advised the landlord in 2015 that his father had left the Apartment. He stated that his brother never lived with him and that he had recently reconnected with him and that he does not want him to lose his home.

James Lopez testified that his wife had forwarded an email to the Respondent's counsel regarding his wife's attempt to hire a moving company. It is conceded that this email was not given to the Petitioner's counsel in response to the discovery demand. The Petitioner asks the Court to strike the testimony of James Lopez for the failure to disclose this information. It was argued that the Petitioner was "ambushed" by the testimony that there had been a deep cleaning in 2015 and that this is highly prejudicial to the Petitioner.

In opposition, the Respondent argues that the email was not relevant and was not encompassed by the discovery demand. The Court reserved decision of this application.

In rebuttal, counsel for Miguel Lopez Jr. called Topacio Nunez, a legal assistant with

counsel's office. She testified that she was responsible for obtaining Miguel Lopez Jr.'s tax returns. She testified that she tried to obtain his federal returns through the mail but received no response. She thereafter went to the local IRS office and met with an IRS agent. She was provided with a tax transcript. She conceded that she did not attempt to contact the accountant who allegedly prepared the returns and she did not attempt to obtain the city or state tax returns.

At the completion of her testimony the counsel for Petitioner seeks the Court to draw a negative inference for the failure to provide any of the tax returns. Additionally, a motion was made for a directed verdict. The Court reserved on both applications.

The Court will deny the application to strike the testimony of James Lopez for the counsel's failure to provide the emails regarding the 2015 clean up of the apartment. This testimony and email is outside the window period for the Court's consideration and weighing the totality of the testimony and evidence, it is not highly prejudicial to the Petitioner. Further, a review of both discovery demands supports the Respondent's position that this email does not fall within the detailed demands. However, the Court, in its discretion, will draw a negative inference for the Respondent's failure to supply his NYS tax returns. Despite Mr. Lopez testifying at the deposition that he filed returns and the granting of the discovery demand for these returns, they were not produced and the witness who was tasked with obtaining the returns conceded that she did not try to obtain the state tax returns.

The Court disagrees with the Petitioner's argument that Mr. Lopez did not produce proof of his familial relationship to Miguel Lopez Sr. The attorneys stipulated to the admission of Miguel Lopez Jr.'s birth certificate. There was nothing proffered to rebut the validity of the birth

certificate.¹

Based upon the testimony adduced at trial, the Court will determine the window period from the time that the tenant of record was last seen near the apartment to obtain his personal property; February 2009. This is consistent with the records from the Department of Corrections and the testimony of the respondent and James Lopez. The Court will apply the window period of February 2007 through February 2009. The Court recognizes the inconsistent testimony of Miguel Lopez Jr. from his deposition and trial regarding when he first believed his father was not returning.

Miguel Lopez Jr. argues that the Petitioner's two predecessors landlord's waived any challenge to his succession claim by accepting rent from respondent after 2009 and commencing a nonpayment proceeding against him. The Court rejects this argument as the checks submitted for the rent during this time period admittedly contained the name the prime tenant used, Miguel Lopez. Additionally, the nonpayment proceeding likewise did not specify and there was no argument as to the use of the "Caseres" name.

"The implications of Respondent's argument would penalize landlords who are not aggressive in, say, scrutinizing perceived inconsistencies between signatures on leases or checks or a tenant's choice about a use of a middle initial. In an era in which this style of aggressive scrutiny of tenants prompted the Legislature to amend the Housing Maintenance Code to combat harassment of tenants, N.Y.C. Admin. Code §§27-2004(a)(48), 27-2115(m), incentivizing

¹The Court notes that the original birth certificate shown in court was returned to Mr. Lopez with the order that it must be made available for an appeal if necessary.

landlords to engage in such conduct thwarts public policy.”²

Miguel Lopez Jr. did not provide documentary evidence to support a finding that he co-resided with his father for the two year period prior to his father relinquishing his rights to this rent controlled apartment, February 2007 to February 2009. The Respondent relies upon the line of cases that provide that the lack of documentary evidence can be overlooked in the face of credible testimony.

“The trial court was warranted in accepting the ‘very credible’ testimony of respondent, particularly since that testimony was essentially unrebutted by any witness with factual knowledge (see *300 East 34th St. Co. v Habeeb*, 248 AD2d 50, 56 [1997]; *Morton St. Assoc., v Volpe*, 19 Misc 3d 126[A], 2008 NY Slip Op 50483[U][App Term, 1st Dept. 2008]). In these circumstances, the minimal documentary evidence presented by petitioner does not preponderate over the plausible and fully credited testimonial evidence (see *23 Jones St. Assoc. v Keebler-Beretta*, 284 AD2d 109 [2001]).”³

Unfortunately, this argument fails for the respondent. The testimony of Miguel Lopez Jr. was not credible. He was repeatedly inconsistent with his testimony at the deposition and his testimony contradicted the testimony of his two witnesses. Further, Ms. Komissarova’s testimony on direct was very practiced and quick, however, on cross-examination she became evasive and hostile. This Court did not find her credible. However, the testimony of James Lopez was credible. While he was specific regarding the time that Miguel Lopez Sr. came to the apartment to retrieve his property and the events in 2015, he admitted that he was not in the apartment

²RSP UAP-3 Property LLC v Schulz, No. 86300/2015, 2017 WL 9534716, at *4 (N.Y.City Civ.Ct. Dec. 22, 2017)

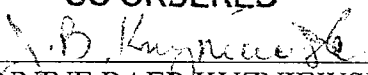
³585 W. 204th LLC v. Peralta, 53 Misc. 3d 131(A), 43 N.Y.S.3d 766 (N.Y. App. Term. 2016).

during the window period and had practically no interaction with his brother during this time. He testified that he only knew of this address for his brother, however, he could not offer personal knowledge to support a finding that this was his brother's primary residence during the applicable period or for much of the time after. His testimony is not sufficient to overcome the lack of documentary evidence to award succession.

Accordingly, petitioner is awarded a final judgment of possession as against Miguel A. Lopez, Jr. with issuance of the warrant forthwith, the execution of the warrant is stayed through January 31, 2020. The stay is conditioned on the Respondent paying use and occupancy on or before the 5th of each month throughout the stay. Further, the Court awards the Petitioner a final judgment of possession in favor of the landlord as against Miguel Angel Lopez Caseres and John Doe and Jane Doe based upon their failure to answer. The issuance and execution of the warrant is stayed pursuant to the same term and conditions as the warrant against Miguel A. Lopez, Jr.

This is the decision and order of the court.

Dated: Brooklyn, New York
August 1, 2019

SO ORDERED

JEANNINE BAER KUZNIEWSKI, J.H.C.
Jeannine Baer Kuzniewski
Judge, Housing Court