

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 52

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EZRA ASHEN

Petitioner,

-against-

658 WEST 188TH STREET LLC,
ROSE ASSOCIATES, INC., and LEANN CREMIN

Respondent-Tenant,

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HON. JUDY H. KIM

Index No.: L&T 300410/20

DECISION/ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

| Papers | Numbered |
|--|----------|
| Notices of Motion and Memorandum of Law | |
| Order to Show Cause and Affidavits Annexed | 1 |
| Opposing Affidavits and Memorandum of Law | 2 |
| Replying Affidavits | 3 |

CIVIL COURT OF THE
CITY OF NEW YORK

OCT 22 2020

ENTERED
NEW YORK COUNTY

BACKGROUND

By Order to Show Cause, Petitioner Ezra Ashen commenced this illegal lockout proceeding pursuant to RPAPL §713(10) seeking to be restored to possession of the “Basement Recreation/Meeting Room of 666 West 188th Street, New York, NY 10040” (the “Subject Premises”). In opposition, Respondent seeks a judgment dismissing the Petition with prejudice and an injunction prohibiting petitioner from using or accessing the Subject Premises.¹ As the Court determines that there are no triable issues of fact necessitating a hearing, it now makes a summary determination upon the papers submitted (CPLR §409[b]).

¹ To the extent that Respondents seek an order from this Court prohibiting Petitioner from entering or accessing the Subject Premises, the Court has no authority to order such injunctive relief (Broome Realty Assoc. v Sek Wing Eng, 182 Misc 2d 917, 918 [App Term, 1st Dept 1999]).

FACTUAL BACKGROUND

Petitioner contends that he has “continuously occupied and had use of” the Subject Premises with the permission of the prior landlord, Mauer Bach Realty LLC, since at least 2006 (Petition at ¶2). Since that time, the Subject Premises have been locked by a combination lock to which Petitioner had the combination as well as cylinder locks on the front and back doors to the Subject Premises, to which Petitioner had the only keys (Id. at ¶2). Petitioner used the Subject Premises for, inter alia, religious observance with others (Glambosky Affirm. in Opp., ¶5). Respondent 658 West 188th Street LLC, purchased the building on September 17, 2015 (Petition at ¶2). On or about April 2, 2020, 658 West 188th Street LLC or its agents changed the locks to the front and back doors of the Subject Premises in an effort to comply with Governor Cuomo’s “New York On PAUSE” Executive Order (Id. at ¶3, Ex. B [Closure Notice]). This prevented Petitioner from accessing the Subject Premises (Id.). While Petitioner was subsequently granted access to the Subject Premises to retrieve his wallet and coat, he has otherwise been excluded from the Subject Premises since that date (Id. at ¶¶4, 7).

DISCUSSION

A special proceeding pursuant to RPAPL §713(10) may be maintained where:

The person in possession has entered the property or remains in possession by force or unlawful means and he or his predecessor in interest was not in quiet possession for three years before the time of the forcible or unlawful entry or detainer and the petitioner was peaceably in actual possession at the time of the forcible or unlawful entry or in constructive possession at the time of the forcible or unlawful detainer; no notice to quit shall be required in order to maintain a proceeding under this subdivision

(RPAPL §713[10]).

In other words, “to maintain a proceeding under that statute, the petitioner must establish” that: 1) the petitioner was peaceably in actual or constructive possession of the premises at the

time of the respondent's forcible or unlawful entry; 2) the respondent entered the premises by force or unlawful means; and 3) the respondent was not in quiet possession for three years prior to the forcible or unlawful entry (Echelon Photography, LLC v Dara Partners, L.P., 11 Misc 3d 1064(A) [Civ Ct, NY County 2006]).

Petitioner has failed to satisfy this standard. Even taking the allegations in the Petition as true, Petitioner has not alleged any facts establishing actual or constructive possession in the Subject Premises. Actual or constructive possession requires a possessory interest in the property in question and is not satisfied by mere occupancy of the premises alone (See Viglietta v Lavoie, 33 Misc 3d 36, 37-38 [App Term, 2d Dept 2011]). Petitioner's claim that he has "continuously occupied and had use of the Subject Premises with the permission of the prior landlord" establishes, at most, that he was a licensee of the Subject Premises (See City Enterprises, Ltd. v Posemsky, 184 Misc 2d 287, 288 [App Term, 2d Dept 2000] ["A licensee [is] as a person to whom an owner has granted a mere right to occupancy. The person solely has permission to do a particular act or series of acts upon the land of another and has no estate in the land"]; Sun v New World Shopping Ctr. Ny, Inc., 2020 N.Y. Slip Op. 31974[U], 5-6 [Sup Ct, Queens County 2020] [a license "confers only the non-exclusive, revocable right to enter the land of the licensor to perform an act"]). As a licensee, Petitioner does not have the possessory interest in the Subject Premises necessary to maintain this proceeding and the Petition must therefore be dismissed (See Padilla v Rodriguez, 61 Misc 3d 133(A) [App Term, 1st Dept 2018]).


Even assuming that Petitioner was unlawfully evicted, the Court cannot restore him to possession where, as here, a summary proceeding brought by Respondents would result in his certain eviction from the Subject Premises (See Pied-A-Terre Networks Corp. v Porto Resources, LLC, 33 Misc 3d 126(A) [App Term, 1st Dept 2011] [internal citations omitted]).

Accordingly, it is

ORDERED that the Clerk of the Court is directed to enter judgment in favor of Respondents and against Petitioner dismissing the petition with prejudice.²

This constitutes the decision and order of the Court.

Dated: October 21, 2020
New York, New York



Hon. Judy H. Kim, J.C.C.

² The parties are strongly encouraged to confer and determine a mutually agreeable date and time for Petitioner to remove any of his personal property that remains in the Subject Premises.