CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART R

SUMET I ASSOCIATES LP, Petitioner- Landlord,

-against-

MARIA HERNANDEZ and LISSETE LOPEZ Respondent- Tenant,

MANUEL LOPEZ,
"JOHN DOE" and "JANE DOE" Respondent- Undertenants

Index No. 98668/2010

DECISION AND ORDER

JOHN S. LANSDEN, J.H.C.:

Petitioner commenced this breach of tenancy proceeding to evict the tenants of record (Maria Hernandez and Lissete Lopez) from the subject premises based upon the allegation that there was drug-related activity at Respondents' apartment. Petitioner alleges that Ms. Hernandez's son and guest, Manuel Lopez (Mr. Lopez), has engaged in drug-related criminal activity in the subject premises, Apartment 5B at 209 South 3rd Street, Brooklyn, New York, constituting a breach of lease. At trial, Respondents asserted that they were unaware that Mr. Lopez had brought heroin into their apartment or sold heroin from the apartment. Hence, Respondents seek a stay of execution that allows them the opportunity to cure the alleged breach of lease. After trial, the Court reserved decision.

I. THE EVIDENCE AT TRIAL

A. Petitioner's Case

Petitioner called Valerie Perez (Ms. Perez), site manager for the subject building, as a witness. She testified that the subject building is a federally subsidized HUD project-based Section 8 building. A certified deed, certified MDR, 2009 and 2010 HUD Model Leases for Subsidized Programs, and Respondents' annual recertification documentation for the subject

premises were offered into evidence.

Ms. Perez further testified that it is Petitioner's policy to commence an eviction proceeding in the event that someone is arrested or charged with drug-related activity in or around the development. She also asserted that Petitioner enforces a "zero tolerance" policy regarding drug-related criminal activity as no mitigating circumstances such as the age of the tenant, the seriousness of the offending action, the extent to which the leaseholder has taken actions to correct the situation, or any other factors are considered.

Petitioner then called Police Officer Konata Hood (Officer Hood) as a witness. He asserted that he was specially trained in identifying and testing narcotics. According to Officer Hood, he was involved in an investigation relating to the subject apartment. He further testified that as of June 2010, he had information regarding drugs being sold at the subject apartment and knowledge of two undercover buys of heroin between Mr. Lopez and a confidential informant.

In connection with the investigation, Officer Hood supervised one of the transactions, which required him to search the confidential informant for contraband and money before the informant entered the subject premises. He then searched the confidential informant after the informant left the subject premises to ensure that the informant did not have possession of the "buy money," in addition to recovering and testing heroin obtained as a result of the transaction. However, Officer Hood conceded that he never saw direct contact between the confidential informant and Mr. Lopez.

Officer Hood also testified that on June 16, 2010, he and a team of police officers executed a "no knock" search warrant at the subject apartment. The police found twenty-four glassine envelops in the back bedroom of the subject apartment, where Mr. Lopez was sleeping, which tested positive as heroin. Additionally, Officer Hood testified that the glassine envelopes recovered at the subject apartment were stamped "Most Wanted." As an experienced police

officer trained in the identification of narcotics, Officer Hood asserted that "Most Wanted" was a well-known brand of heroin. No other drugs or devices, commonly used in the drug business, were found.

Officer Hood further asserted that Mr. Lopez identified himself to the witness; Mr. Lopez stated that he lived at the subject apartment; and Mr. Lopez admitted that the drugs belonged to him. Shortly thereafter, Mr. Lopez and Respondent Maria Hernandez (Ms. Hernandez) were arrested at the subject apartment. Following his arrest, Mr. Lopez pled guilty to Criminal Possession of a Controlled Substance in the Seventh Degree, a misdemeanor. However, charges against Ms. Hernandez were dropped. Petitioner entered the NYPD Field Test Report and a certified transcript of the disposition of the criminal case against Mr. Lopez into evidence. Petitioner then rested.

B. Respondents' Case

Following Petitioner presenting its prima facie case, Respondents called Emmanuel Logan (Mr. Logan), the owner of 95-05 Avenue A in Brooklyn, New York, as a witness. He testified that he has been Mr. Lopez's landlord for nine or ten years at said address. Respondents entered a certified deed of said address and a lease commencing on June 1, 2010 through June 1, 2012 signed by Mr. Logan and Mr. Lopez into evidence. On cross examination, Mr. Logan testified that he did not remember whether or not he saw Mr. Lopez at his building on June 16, 2010 but thought he saw him in the morning. Mr. Logan also testified that he saw Mr. Lopez most nights at his building.

Next, Respondents called Paula Encarnacion (Ms. Encarnacion), who lives on the same floor as Respondents, as a witness. She testified that there was nothing that would have led her to believe that any drug-related activity was taking place at the subject apartment. According to Ms.

Encarnacion, Mr. Lopez did not live at the subject apartment but he did visit his mother on several occasions. Moreover, Ms. Encarnacion also testified that she saw Mr. Lopez as recently as four weeks ago and a month before that.

While she acknowledged that a drug problem exists in the building, Ms. Encarnacion testified that she did not see heavy traffic in and out of the subject apartment. Rather, she saw heavy traffic in the building in general. However, she revealed to the Court that the discovery of drugs and the arrest of Mr. Lopez in the subject apartment made her feel "uncomfortable."

Respondents Ms. Hernandez and Lissette Lopez (Ms. Lopez) then testified in their own defense. First, Ms. Lopez testified that she has lived at the subject apartment with her mother for fifteen years. She asserted that Mr. Lopez did not live in the subject apartment but that he visited the apartment frequently. Additionally, she testified that Mr. Lopez did not have keys to the subject apartment and only came to the apartment when Respondents were present. Ms. Lopez contends that Respondents were unaware that Mr. Lopez had heroine on him at any time when he came to Respondents' apartment. Ms. Lopez also contends that subsequent to his arrest, Mr. Lopez has not come to the subject apartment and had been told by Respondents that he was no longer allowed to come to the apartment.

Following Ms. Lopez's testimony, Respondents called Ms. Hernandez as a witness. She testified that she is sixty-nine years old and suffers from diabetes, hypertension, cervical cancer, a thyroid condition, and mental health issues. Like Ms. Lopez, she testified that she has lived at the subject apartment for fifteen years with her daughter and that Mr. Lopez never lived at the subject apartment. Ms. Hernandez also asserted that on the day of Mr. Lopez's arrest, he came to her apartment to take her to an appointment. However, akin to Ms. Lopez's testimony, she asserted that she had no knowledge of Mr. Lopez bringing drugs into the subject apartment. Despite asserting that her son was not living in the apartment, Ms. Hernandez acknowledged that

Mr. Lopez was receiving mail in Respondents' apartment prior to his arrest on June 16, 2010.

As a result of his arrest, Ms. Hernandez contends that her son no longer comes to the subject apartment. He now waits for her outside the building. Thereafter, Respondents rested.

II. ANALYSIS

As their first defense, Respondents asserted that no evidence was presented by Petitioner regarding a decision to terminate the instant tenancy. However, the Court finds that Petitioner properly advised Respondents that they had ten days within which to discuss the proposed termination of tenancy dated July 15, 2010 and at least thirty days before the date the tenants would be required to move (August 31, 2010).

Moreover, Respondents do not deny that arrests were made at the subject apartment. Nor do they deny that Mr. Lopez was found sleeping in a bedroom at the apartment or that twenty-four glassine bags of heroin were also found in the bedroom after police searched the premises. Respondents also do not contest that mail addressed to Mr. Lopez was found in the apartment or that Mr. Lopez informed the arresting officers that he resided in the subject apartment. Additionally, Respondents do not contest that Mr. Lopez plead guilty to Criminal Possession of a Controlled Substance in the Seventh Degree.

A. "Known Or Should Have Known" Standard versus "Strict Liability" Standard

Respondents argue that an eviction can occur only if the Court finds that they "knew or should have known" that their guest possessed and sold drugs in the subject apartment. By contrast, Petitioner asserts that because the subject apartment is in a HUD regulated building, precedent and the terms of the lease therefore hold Respondents strictly liable for the behavior of household members and their guests. Thus, the primary question for this Court is to determine

what standard to apply to the instant proceeding: the New York "knew or should have known" standard or the more severe federal "strict liability" standard.

With respect to the "knew or should have known" standard, New York case law applies six factors to ascertain whether a tenant "knew or should have known" that a drug business was operating from the subject premises. The factors include: (1) whether the contraband and paraphernalia were in plain view; (2) the size of the premises; (3) the drug-arrest history of the named tenant or the occupant who is alleged to have committed the illegal activity; (4) whether intensive foot traffic occurred in and out of the premises; (5) the presence of contraband; and (6) the connection between the person alleged to possess the contraband and the apartment in which the alleged drug business occurs. Gerald Lebovits and Douglass J. Seidman, Drug Holdover Proceedings: An Overview From "Knew," to "Should Have Known," to "Strict Liability", 35 N.Y. Real Prop. L.J. 16, 20 (Spring/Summer 2007).

However, the United States Supreme Court has held that "42 U.S.C § 1437d(1)(6) unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for drug-related activity of household members and guests **whether or not the tenant knew, or should have known, about the activity**." Department of Housing and Urban Development v. Rucker, 535 U.S. 125 (2002). Although the *Rucker* decision gave courts the discretion to use the federal standard of strict liability, courts in New York and other states have not settled on a standard to apply to cases involving drug-related or other criminal activity. *See*, Housing Authority of Joliet v. Chapman, 780 N.E.2d 1106 (3d Dist. 2002) (since knowledge of the criminal activity is not a pre-requisite to eviction, eviction could occur regardless of a tenant's ignorance that her son, who was arrested for possession, possessed three bags of marijuana); Walker v. Franco, 713 N.Y.S.2d 164 (1st Dep't 2000) (termination of tenancy upheld based on discovery in tenant's apartment of packaged crack cocaine and drug sale

paraphernalia despite tenant's denial of knowledge of illegal activity), judgment aff'd, 730 N.Y.S.2d 785 (2001); Edwards v. Christian, 415 N.Y.S.2d 828 (1979) (the criminal conduct of an adult son who was excluded from the household by his mother was not good cause for eviction, even though the mother allowed him to visit on occasion).

Given the limited amount of public-housing apartments relative to the huge demand and the growing problem of drug dealing in housing-authority projects across the country, the federal government has taken steps in recent years to reprimand drug dealers and drug dealing in public housing. Lebovits & Seidman, N.Y. Real Prop. L.J. at 22. Hence, the need to be vigilant has led courts to shift towards using the strict liability approach. Id.

In the instant proceeding, Paragraph 23(c) of Respondents' HUD lease specifically tracks the language of 42 U.S.C. § 1437d and 24 C.F.R. 5.861, providing that:

> The Landlord may terminate this agreement for:
>
> (3) drug related criminal activity engaged in on or near the premises, by any tenant, household member, or guest, and any such activity engaged in on the premises by any other person under tenant's control;
> (10) if the landlord determines that the tenant, any member of the tenants household, a guest or another person under the tenant's control has engaged in the criminal activity, regardless of whether the tenant, any member of the tenant's household, a guest or another person under the tenant's control has been arrested or convicted for such activity.

Thus, Petitioner argues that a strict liability standard should apply in this holdover proceeding. In support of its argument, Petitioner cited a case strikingly similar to the case at bar. *See*, B&L Associates v. Wakefield, 6 Misc. 3d 388 (Hous. Part Civ. Ct., Kings Co. 2004). In *Wakefield*, the court awarded petitioner final judgment of possession after holding that the terms of a Section 8 lease bound a tenant to *Rucker's* "no-fault" standard, which forecloses any knowledge requirement. Under the circumstances herein, this Court agrees with Petitioner and finds the use of a strict liability standard is appropriate.

It should be noted that while the Court has chosen to apply a strict liability standard, applying a "knew or should have known" standard would not have lead to a different result. Respondents testified that Mr. Lopez did not have keys to the subject apartment and he was only present at the apartment when Respondents were present. Respondent also did not assert that they were elsewhere on the dates of the undercover purchases.

Respondents offered no testimony that Mr. Lopez exercised dominion over their objection nor did they present any claims that Mr. Lopez could have answered the door and engaged in drug-related transactions on two occasions without their knowledge. Mr. Lopez did not testify in this proceeding. While the Court does not take a negative inference from his absence, the Court does note that Mr. Lopez had personal knowledge of the incidents and activities in question and was not called to corroborate Respondents' testimony. Thus, the Court has no viable reason to believe that Respondents were not aware of who came to their front door and what actions transpired while Mr. Lopez was in their apartment.

In general, tenants have a responsibility to know of the activities taking place in their premises, especially if illegal drugs are present and are not hidden in an obscure location such as in a closet, in a locked box, or under a bed. Lebovits & Seidman, N.Y. Real Prop. L.J. at 20 (citing N.Y.C. Hous. Auth. v. Eaddy, 801 N.Y.S.2d 237 (App. Term 1st Dep't 2005). Here, officers found the glassine bags of heroin on top of a television in one of the bedrooms, hardly an obscure location.

Mr. Lopez was not an intruder or someone who stopped by the premises uninvited. Rather, the testimony indicates that Mr. Lopez was a frequent visitor and on at least one night, he slept over at the subject apartment. The Court finds it unlikely that the only instances where Mr.

Lopez had narcotics in his possession at the apartment were during the undercover purchases and the execution of the "no knock" warrant.

Thus, the Court finds that Respondents more likely than not knew that illegal drugs were present in the subject apartment or that illegal drug-activity was taking place in the apartment based on all of the evidence and credible testimony. Based on the foregoing, the Court awards a final judgment of possession and warrant of eviction to Petitioner. The only remaining issue is what, if any, discretion should be exercised by the Court in staying the warrant of eviction.

B. The Use Of Discretion To Determine If A Stay Should Be Granted

Respondents argue that when determining whether to grant a discretionary stay, a court should consider relevant factors such as the age of the tenant, the length of tenancy, the harm to the tenant that would be caused by forfeiture of the apartment and whether the person who is committing the actions which resulted in an eviction proceeding has been excluded from the apartment. Additionally, Respondents argue that even if the court does not grant a stay pursuant to RPAPL § 753(4), the court must apply principles of equity and grant Respondents a stay to correct the breach of lease.

However, Respondents' contentions are misguided. The Supreme Court in *Rucker* decided that public housing authorities have virtually limitless power to evict a public housing tenant, or even an entire household, when the lease is violated for illegal drug use on the premises. Rucker, 535 U.S. at 136. The *Rucker* decision does not mean, though, that public

housing authorities "must" evict. Instead, it merely gives courts the discretion to evict if they determine that lease provisions were violated[1].

With respect to Section 8 housing, it is the responsibility of the private owner to evict. Yet it is not mandatory for the landlord to exercise its discretion or consider any mitigating factors. *See*, Minneapolis Pub. Hous. Auth. v. Lor, 591 N.W. 2d 700, 703-04 (1999); Santosha Scarborough v. Winn Residential LLP, No. 05-CV-207 (D.C., Ct. of Appeals, 2006); Syracuse Housing Authority v. Boule, 265 A.D.2d 832 (4th Dept, 1999); Jamies Place LLC v. Reyes, NYLJ 11/27/09, 26:1 (Civ. Ct., NY Co.).

In the instant proceeding, Petitioner proceeded with the eviction of Respondents and is not required to offer a cure or "stay" option. Although Respondents argue that they are entitled to an opportunity to cure the breach of lease pursuant to RPAPL § 753(4) and principles of equity, the Court declines to issue a stay because Respondents "knew or should have known" that Mr. Lopez was involved in drug-related activity at the subject apartment. Regardless of knowledge, a tenant who "cannot control drug crime or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project" and thus not entitled to the court exercising discretion on its behalf. Housing Authority of Covington v. Turner, 295 S.W.3d 123, 125 (Kentucky 2009) (citing 56 Fed.Reg., at 51567).[2]

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[1] Allows HUD to ignore any possible defenses introduced by public housing tenants who face eviction. *See*, Letter from Michael Liu, Assistant Secretary of HUD, to Public Housing Directors (June 6, 2002), available at *http://www.nhlp.org/html/pubhsg/Liu%206-6-02%20ltr.pdf*; Letter from Carole W. Wilson, Associate General Counsel for Litigation for HUD, to Charles J. Macellaro, P.C. (Aug. 15, 2002), available at http://www.nhlp.org/html/pubhsg/HUD%20Rucker%C20Legal%C20Opinion%C20Yonkers%1□5aug2002.pdf.

[2] In *Turner*, the tenant had right to remedy a breach of lease caused by illegal drug activity to avoid eviction. The case at bar is distinguished from *Turner* because it was not disputed that the tenant in *Turner* had no knowledge of drug-related activity at her apartment. Thus, the *Turner* court exercised its discretion with compassion in allowing the tenant to remedy the breach.

Moreover, according to Ms. Encarnacion and Ms. Hernandez' testimony, Mr. Lopez still meets his mother near the subject building even after being arrested for drug possession. Given that his presence at or near the subject premises continues despite the pending eviction proceeding, the Court finds it unlikely that an agreement to exclude Mr. Lopez would be honored.

C. Public Policy

As a matter of public policy, the court in *Rucker* reasoned that Congress had a reasonable purpose in allowing no fault evictions: to provide tenants of public-housing projects with "housing that is decent, safe, and free from illegal drugs." Rucker, 535 U.S. at 131. Hence, the U.S. Supreme Court's ruling recognizes that residents must take responsibility for themselves, their families, their guests, and invitees. The PHAs will not allow drug-related crime, and neither should tenants, as the onus is on tenants to ensure compliance with HUD's leases. The one-strike rule "gives PHAs ... the tools for adopting and implementing fair, effective, and comprehensive policies for both crime prevention and enforcement .... [E]nforcement will be advanced by the authority to evict and terminate assistance for persons who participate in criminal activity." SoCheung Lee, Serving the Invisible and the Many: U.S. Supreme Court Upholds the Rucker One-Strike Policy, 11 SUM J. Affordable Hous. & Comty. Dev. L. 415, 435 (2002) (citing HUD Proposed Rule: One-Strike Screening and Eviction for Drug Abuse and Other Criminal Activity, 64 Fed. Reg. 40,602 (1999); 24 C.F.R. § 966.4f(12)).

Although some may argue that "the tenant should not be required to 'assure' the non-criminal conduct of household members," HUD rejected that suggestion. Id. at 436. Instead, HUD stated:

> [t]he power of a landlord to evict for the tenant's breach of lease requirements concerning behavior of any member of the household gives the tenant and other occupants a strong motive to avoid behavior which can lead to eviction. If the tenant does not control criminal or other harmful or disruptive behavior, by unit occupants, the landlord can evict by removing the occupants from the housing. If the landlord does not or cannot evict for such behavior, the continued presence of the tenant and household may result in harm to the housing and other residents, and the spread of such behavior.

Id. (citing 56 Fed. Reg. 51,566 (Oct. 11, 1991)). Thus, while applying the strict liability standard may be severe, it furthers the goal of keeping federally assisted low-income housing "decent, safe, and free from illegal drugs."

III. CONCLUSION

Based upon the foregoing, the Court grants the relief sought in the petition. Given the shortage of affordable housing in New York, the Court recognizes that strict liability maximizes deterrence against criminal activity in federal subsidized housing. Execution of the warrant of eviction is stayed through November 30, 2011 for Respondents to vacate, on condition that all back use and occupancy is paid within ten days of service of a copy of this order with notice of entry and current use and occupancy for September 2011, October 2011, and November 2011 are paid timely.

This constitutes the decision and order of the Court. The parties may retrieve their exhibits from the court clerk.

Dated: Kings, New York
August 5, 2011

John S. Lansden, J.H.C.