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

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7825 REALTY ASSOCIATES, LLC,

Petitioner,

Index No. L&T 53941/15

- against-

DAVID DOLL,
"JOHN DOE" and "JANE DOE,"

DECISION/ORDER AFTER TRIAL

Respondents.

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Present:
Hon. BRUCE E. SCHECKOWITZ
Judge, Housing Court

The court *sua sponte* revisits its February 2, 2017 Decision and Order after trial, with the instant Decision and Order, and replaces "7825 Associates, LLC," with "7825 Realty Associates, LLC."

In this holdover proceeding, 7825 Realty Associates, LLC ("Petitioner") seeks to regain possession of the rent controlled, cooperative, apartment located at 7825 4th Avenue, Apartment C-1, Brooklyn, NY 11209 ("Premises") from David Doll ("Respondent") on the grounds that his license to occupy the Premises expired upon the death of the tenant of record, Mary Grogan on October 22, 2014. Both parties are represented by counsel.

Relevant to this trial is that Petitioner moved for summary judgment on June 1, 2016. In a decision dated August 16, 2016, the Honorable Marcia Sikowitz held that "[t]he petitioner has successfully demonstrated there are no triable issues of fact regarding respondent's succession defense," and made a number of findings of fact, to wit:

> In opposition to the motion, respondent submits his affidavit and provides no documentary evidence connecting him to the tenant to establish a non-traditional family relationship. The tenant had a health care proxy, and respondent is not the proxy. The tenant had a will, and respondent was neither executor nor a beneficiary of the

> will. Respondent was not the emergency contact person for the tenant. Respondent has credit cards and a savings account, and the tenant was not on any of the accounts, nor did the tenant have survivor's benefits under respondent's bank account . . . Respondent failed to produce any photographs . . . where he and the tenant presented themselves as a family to the community . . .

However, Judge Sikowitz ultimately denied summary judgment, holding that while "[r]espondent's defense rests solely on his credibility without any documentary evidence or corroborating testimony from another witness," Respondent was "entitled to present his testimony at trial and have his credibility assessed by the trial judge."

Having assessed the evidence presented at trial, this court does not disturb the findings made by Judge Sikowitz that Respondent has failed to provide documentary evidence in support of his succession claim. However, the court also makes the following findings and determinations based upon the evidence and testimony presented at trial:

Petitioner, through the testimony of its witness, Mehmet Kalkan, who managed the subject building for twenty years, established its *prima facie* case. Petitioner introduced into evidence a deed for the subject building, stock certificate for the shares of the cooperative premises, original proprietary lease for the Premises, certified DHCR and MDR records for the Premises and building, and certified copy of Mary Grogan's death certificate. Mr. Kalkan testified that he first met Respondent in 2013 when he visited the Premises in response to a leak. At that time, he observed that Ms. Grogan was terminally ill, and that a female aid was present in the apartment, along with Respondent Doll. The witness stated that Respondent informed him that he was Mary Grogan's cousin and has been living at the Premises since 2012. Respondent continued to reside there after she passed away. Mr. Kalkan also asserted that he was unaware that Respondent was seeking to succeed to Ms. Grogan's tenancy until he received notice of a

DHCR complaint, Docket Number DM 220015 AD, in which Mr. Doll claimed that he was Ms. Grogan's cousin and asserted succession to the rent controlled Premises. (Pet. Ex. 4-A).

Respondent called four witnesses on his defense, including himself. His first witness, Reverend Robert W. Emerick, pastor of the Bay Ridge United Methodist Church, testified that Respondent is a member of his congregation and that he has known him since 2005. He stated that was familiar with Mary Grogan since the Reverend and Ms. Grogan were both members of the Bay Ridge Peace Action Corp. Reverend Emerick testified that Ms. Grogan and Mr. Doll, "had a special bond," liked each other and paid attention when each spoke. He asserted that it was typical of the two to sit together at meetings and that they had an affection for each other. The Reverend explained that a few years ago Mr. Doll approached him and asked if he would marry him and Ms. Grogan, and the Reverend agreed to do it. However, Ms. Grogan got sick and eventually passed away. Prior to her death, Reverend Emerick never spoke to Mary Grogan about a possible marriage. The witness explained that he did not see Ms. Grogan as often as he saw Mr. Doll since Respondent was a member of the Church, and attended Church on a regular basis, while Ms. Grogan was not a member.

Respondent next called Mary Grogan's former home health aide, Marle Nicolas, as a witness. Ms. Nicolas worked for Ms. Grogan from 2009 until 2012 and visited Ms. Grogan in the hospital until she passed away in 2014. The witness stated that she worked for Ms. Grogan Monday through Friday, initially six hours per day, and later seven hours per day. She asserted that another home health aide attended to Ms. Grogan on Saturdays and Sundays. During this time, Ms. Nicolas provided that Mr. Doll would visit Ms. Grogan "all the time" and that he eventually moved in one day. The witness could not identify the date he moved in. Ms. Nicolas also explained that Mr. Doll made payments for food and that she once saw him write a rent

check. However, she did not produce any receipts for same, and stated that she did not know where the money was coming from, or whose checking account the money was being drawn from. She also attested that Mr. Doll would help her get Ms. Grogan out of bed, shower her, clean the apartment and drive Mary to doctor's appointments.

On cross-examination, when asked why Mr. Doll moved in, Ms. Nicolas responded, "[t]hey are friends. Ms. Grogan has nobody." She also asserted that Mr. Doll moved into the Premises when Ms. Grogan became very ill. The witness provided that Mr. Doll and "Vicky . . . Ms. Grogan's best friend" made Ms. Grogan's health care decisions and that when Mary passed away, Vicky called Mr. Doll to inform him of her passing. Ms. Nicolas stated that Mr. Doll slept in one of the bedrooms in the two-bedroom apartment and that Ms. Grogan slept in a hospital bed in the living room.

Respondent called his brother, Daniel Doll ("Daniel"), as his third witness. Daniel testified that he lives in Lincroft, New Jersey, which is an hour's drive from Brooklyn, and that he retired from his job as an operating engineer in New York City in 2015. He asserted that he speaks to his brother every two months and "hooks up with him occasionally." The witness explained that he first met Mary Grogan in 2011 or 2012 and that she had visited his home in New Jersey twice for Christmas and twice for a Fourth of July barbeque. Daniel Doll last saw Mary in 2012, 2013 or 2014 at which time she was "able bodied." While he would meet his brother occasionally after work for dinner, Ms. Grogan never attended. Daniel Doll stated, "I think they were partners . . . they appeared that way . . . he lived in her apartment."

Daniel asserted on cross-examination that he and his brother are "family" and "close" but that Respondent never mentioned that he and Mary Grogan were getting married. The witness was shown Respondent's DHCR claim seeking succession in which he alleges that he is Ms.

Grogan's cousin (Pet. Ex. 4-A). Daniel responded that he and Mary Grogan were not cousins. Daniel Doll provided that he never visited his brother at the Premises, and was not aware of how long he and Ms. Grogan were allegedly together.

Respondent called himself as a final witness. He testified that he moved into the Premises in June 2012, at which time he and Mary Grogan had been together, "in a loving and committed relationship," for "6, 7 or 8 years." Respondent explained that he met Mary at an Alcoholics Anonymous ("AA") meeting in 2003 and that she was "like a sponsor" to him. They were part of a group formerly called "Peace Action Bay Ridge," lead by Vicky McFadyen "a very dear friend of Mary Ellen and [his]." The witness attested that his relationship with Ms. Grogan "started to blossom" in 2004, and that he lived five blocks away from her when they first met. Ms. Grogan was then diagnosed with lung cancer in 2009, which metastasized to her brain and "affected her drastically." He maintained that he did not move in with Mary prior to 2012 because he had a dog and she had two cats and "they would not be compatible." Respondent asserted that he makes an income of approximately $30,000.00 per year. Prior to June 2012, Mr. Doll lived in his accountant's cooperative apartment. However, the accountant eventually needed to sell the apartment and Mr. Doll testified that he could not afford to buy it. He stated that when he moved into the Premises in 2012, Ms. Grogan was sleeping in an electric hospital bed.

David Doll testified that neither her nor Mary Grogan had many friends or relatives in New York City, and that their closest friends were Victoria McFadyen and friends from AA. Victoria visited the Premises every two to three weeks. He explained that he was Ms. Grogan's "boyfriend" and that he paid for any activities they engaged in because Mary did not have much money. Mr. Doll stated that Ms. Grogan's only source of income was social security and

disability and that the two did not marry because his income would have hampered her ability to collect social security. The witness attested that they would use Ms. Grogan's social security checks to pay the rent, and that towards the end he would write the checks and place them in the mail. He maintained that the does not own real property, have a pension, retirement account, will or life insurance, but that he paid all of the utilities and expenses for the Premises, aside from the rent. Mary Grogan's home health aide was paid for by Medicaid. Mr. Doll asserted that the only time he paid rent for the Premises was when Ms. Grogan was sued in a non-payment proceeding in 2013, during which time, he contributed $5700.00 towards the arrears, $2700.00 of which he borrowed from Victoria McFadyen. He also maintained that he cleaned the apartment, and cooked once or twice a week. When he played music once a month, he hired someone from AA to stay with Ms. Grogan at night. Mr. Doll explained that he was at work when Mary passed away and that he had visited her in hospice the day before. Respondent attested that Mary's cousin from California took care of the funeral arrangements.

On cross-examination Mr. Doll asserted that he moved out of his former cooperative apartment and into the Premises because the owner of the cooperative was selling the apartment and the Respondent was not going to buy it. He also testified that Ms. McFadyen was his friend but he did not call her as a witness because he "did not think [he] needed her." Respondent maintained that he was not Ms. Grogan's health care proxy because Ms. McFadyen "has more experience with these things," but he did not elaborate further. The witness explained that it was more "convenient" for Ms. McFadyen to pick up the ashes so she was given them rather than Respondent.

Legal Analysis

9 NYCRR §2204.6(d)(1) provides in relevant part that a member of the tenant's family "...shall not be evicted under this section where the tenant has permanently vacated the housing accommodation and such family member has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two (2) years..." "Family member" is defined both as certain persons related to the tenant by blood, marriage or adoption, and as "...any other person residing with the tenant in the housing accommodation as a primary residence who can prove emotional and financial commitment, and interdependence between such person and the tenant." See 9 NYCRR § 2204.6(d)(3)(i); see also *Braschi v. Stahl Associates Co.*, 74 N.Y.2d 201 (1989).

The Court may consider the following factors in determining whether such emotional and financial commitment and interdependence existed:

> (a) longevity of the relationship; (b) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life; (c) intermingling of finances as evidenced by, among other things, joint ownership of bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget for purposes of receiving government benefits, etc.; (d) engaging in family-type activities by jointly attending family functions, holidays and celebrations, social and recreational activities, etc.; (e) formalizing of legal obligations, intentions, and responsibilities to each other by such means as executing wills naming each other as executor and/or beneficiary, conferring upon each other a power of attorney and/or authority to make health care decisions each for the other, entering into a personal relationship contract, making a domestic partnership declaration, or serving as representative payee for purposes of public benefits, etc.; (f) holding themselves out as family members to other family members, friends, members of the community or religious institutions, or society in general, through their words or actions; (g) regularly performing family functions, such as caring for each other or each other's extended family members, and/or relying upon each other for daily family services; [and] (h) engaging in any other pattern of behavior,

agreement, or other action which evidences the intention of creating a long term, emotionally-committed relationship.

See 9 NYCRR § 2204.6(d)(3)(i). *See also East 10th Street Assoc. v. Estate of Goldstein,* 154 A.D. 2d 142 (1st Dept. 1990); *Lepar Realty Corp. v. Griffin,* 151 Misc.2d 579 (App. Term 1st Dept. 1991); *Weehawken St. Assoc. v. Estate of Nudorg,* N.Y.L.J., March 26, 1991 at 21, col. 3 (App. Term 1st Dept.).

Here, Respondent does not meet the standard articulated above. While the definition of family for the purposes of succession has expanded over the years since *Braschi*, Respondent has not demonstrated the important factors relevant for making such a determination. First, as Judge Sikowitz stated in the August 16, 2016 decision denying summary judgment, Respondent failed to provide the court with any documentary evidence of a financial interdependence, formalization of legal obligations, or shared household expenses. At trial, Respondent conceded that he was not Mary Grogan's health care proxy, not named as a beneficiary or executor of her will, did not share any bank accounts with Ms. Grogan, did not make her funeral arrangements, and was not provided with her ashes after her death. Respondent testified that the bulk of the expenses, the rent and home health aide for Ms. Grogan, were paid for by the deceased's social security and Medicaid. Respondent asserted that he paid for household expenses and utilities, but his failure to provide a single receipt in support undermines this testimony. The court recognizes that a non-traditional familial relationship may be demonstrated in the absence of intermingled finances. *See RHM Estates v. Hampshire*, 18 A.D.3d 326 (1st Dept. 2005). However, unlike in *Hampshire*, Respondent has not demonstrated an analogous familial relationship.

None of Respondent's witnesses testified that he and Ms. Grogan regularly performed family functions, held themselves out to the community as family or were in a "spouse-like

relationship" as Respondent's post-trial brief suggests. Rather, the testimony at trial shows that Respondent and Mary Grogan were very close and dear friends, and that Respondent also assumed the role of one of Ms. Grogan's caretakers. Reverend Emerick acknowledged that Ms. Grogan and Respondent appeared to have a close and "special" relationship, yet, despite knowing them both, never described them as a "couple." He testified that Respondent approached him regarding performing a marriage ceremony for the two of them but that he never spoke with Ms. Grogan about such an arrangement. This is despite a purported ten year relationship that Respondent testified "blossomed" within the church walls.

Similarly, Ms. Nicolas, who was Mary Grogan's home health aide from 2009 to 2012, and was by her side six to seven hours per day, never referred to Respondent and Ms. Grogan as a couple. She never used the term "boyfriend" for Respondent, or "significant other." Her testimony reflected her belief that Mr. Doll was fond of Ms. Grogan and assisted in some of her care, but did not describe a familial relationship or one that rose to the level beyond a strong friendship. In fact, when asked why Mr. Doll moved in, Ms. Nicolas responded, "[t]hey are friends. Ms. Grogan has nobody" and attributed the title of "best friend" to Victoria McFadyen.

Daniel Doll, Respondent's brother, also testified regarding Ms. Grogan and Respondent, "I think they were partners . . . they appeared that way . . . he lived in her apartment." During his testimony, he never asserted unequivocally that the two were in a spouse-like relationship, intended to marry, or were a couple. Daniel stated that he only spent a handful of occasions in Mary's presence. And, despite having worked in the New York City area prior to Ms. Grogan's illness, during what Respondent maintained was the "peak" of their relationship, Daniel Doll never went to dinner with his brother and Mary. Respondent described the relationship as

covering a ten-year span. However, Respondent did not call one witness who could testify without hesitation that they were a couple, or familial, during that significant period of time.

The court finds Respondent's testimony that he loved and took care of Mary Grogan to be credible. He and his other witnesses certainly described a loving, caretaking relationship, between the two. However, even Mr. Doll's reference to Ms. Grogan as a familial partner was scarce. And Respondent did not provide a single piece of documentary evidence to the court, a birthday or holiday card, letter, photograph of the two of them, that would indicate a "spouse-like relationship" or that they held themselves out to the community as family. The court was also presented with a credibility issue with regard to Respondent's own testimony. It is undisputed that Respondent misrepresented that he was Ms. Grogan's cousin to the landlord's agent, Mehmet Kalkan, and on his sworn affidavit to the DHCR. While this does not wholly negate Respondent's testimony, it certainly harms his claim which relies solely on testimony to prove succession; especially when none of Respondent's other witnesses described the two in a non-traditional family member sense.

The facts here are akin to those in *54 Featherco, Inc. v. Correa*, 251 A.D.2d 23 (1st Dept. 1998) where the Appellate Division affirmed the Civil Court finding that a non-traditional familial relationship did not exist. In *54 Featherco*, the respondent failed to produce any documentary evidence in support of his testimony and the testimony of his witnesses. However, unlike in *54 Featherco*, here, the witnesses did not describe Respondent's relationship with Ms. Doll as "one involving sharing of household expenses and activities, traveling and celebrating holidays and birthday together and holding themselves out as a couple." 251 A.D.2d 23 at 23. *See also, Hazel Towers Co., L.P. v. Gonzales,* 41 Misc.3d 1230(A) which distinguished *54 Feathrco* because in *Hazel* "there was undisputed evidence of a close, romantic relationship

between the parties for a long period of time, as well as correspondence, photos and cards of family functions and of holding themselves out as a couple." Respondent's and his witnesses' testimony certainly paint the portrait of a loving friend, but not of a non-traditional family member as the term has been utilized and interpreted by legal statute and precedent.

Relevant, but not essential to this case is whether the court should take a missing witness inference against Respondent for failing to call Victoria McFadyen as a witness. In *Brown v. City of New York*, 50 A.D.3d 937, 938 (2008), the court held that "[the trier of fact] may, but is not required to, draw the strongest inference that the opposing evidence permits against a party who fails to testify at trial." As the Court of Appeals explained in *Crowder v. Wells & Wells Equip., Inc.*, 11 A.D.3d 360, 361 (2004):

> [a] missing witness charge is appropriate when it appears that the nonappearing witness is knowledgeable about a material issue upon which evidence is already in the case; that the witness would naturally be expected to provide noncumulative testimony favorable to the party who has not called him, and that the witness is available to such party. However, the missing witness formulation is but a particular expression of a broader principle: A trier of fact may draw the strongest inference that the opposing evidence permits against a witness who fails to testify in a civil matter. The inference is equally available against a party who fails to testify, for whatever reason. It is well settled that where one party to an action, knowing the truth of a matter in controversy and having the evidence in his possession, omits to speak, every inference against him warranted by the evidence may be considered.

Here, Ms. McFadyen appears to be in the best position to testify about Respondent and Mary Grogan's relationship since she was the closest person to Ms. Grogan, with the exception of Respondent. She was referred to by Reverend Emerick, Marle Nicolas and Mr. Doll himself, as Ms. Grogan's good friend or "best friend." Ms. McFadyen was Mary's health care proxy, the informant on her death certificate and caretaker of Ms. Grogan's ashes after cremation.

Moreover, Ms. McFadyen is a Brooklyn local, as per her address on Mary Ellen Grogan's death certificate. Therefore, Ms. McFadyen presumably would have been available to testify at a trial that took place in her borough of residence. *See People v. Gonzales,* 68 N.Y.2d 424 (1986). Victoria McFadyen and Mr. Doll also scattered Ms. Grogan's ashes together after she was cremated, which evidences she was under his control, or that she would have been able to produce her at trial. *Id.* Mr. Doll testified that Victoria was one of his closest friends and visited the Premises every two to three weeks. Therefore, had Victoria testified at trial, she would have naturally been expected to testify in Respondent's favor. *Id.* Nor would Ms. McFadyen's testimony have been cumulative of other witnesses' testimony, as Respondent argues. Rather she is in a unique position where she knew the Respondent and Mary since their relationship purportedly began, visited the Premises regularly and was a close friend to both of them. This is in contrast to the witnesses at trial who either had a closer relationship with Respondent than Mary or, as in the case of Ms. Nicholas, stopped working for her in 2012.

Respondent argues that a missing witness inference is not appropriate here because Petitioner did not provide the court and Respondent with the requisite notice. Respondent maintains that Petitioner knew that Respondent was only calling four specific witnesses, which did not include Victoria McFadyen, at the outset of Respondent's defense at trial and should have raised the missing witness inference at that time. Petitioner argues that Respondent never provided the court with a binding witness list and was free to call Ms. McFadyen at any time. Therefore, a missing witness charge was not appropriate until it was certain that Ms. McFadyen would not be called. Petitioner further states that it was unclear how close Ms. McFadyen was to Ms. Grogan until all of Respondent's witnesses had testified.

In *People v. Gonzales,* the court held that a missing witness charge requires an "opportunity for the party against whom the missing witness charge is being sought to counter this charge." 68 N.Y.2d 424 at 431. However, the court found that such an opportunity included the chance to argue against the inference in summation and "seek to explain the witness' absence by reference to evidence in the record." *Id.* Here too, the court gave Respondent an opportunity to counter the missing witness charge both in writing, in the form of a post-trial memorandum, and on the record in his closing argument. Furthermore, as Petitioner argues, Respondent never submitted a witness list to the court which would bind him to his choice of witnesses. Rather, he was free to call Ms. McFadyen as a witness at any time.

Notably, nowhere in the brief or at oral argument did Respondent contend that had he known of the missing witness charge he would have called other witnesses to explain Victoria McFadyen's absence or that he would have called her to testify. Rather, Respondent explained that he purposely did not produce Ms. McFadyen at trial "because her testimony would have been cumulative" of other witnesses' testimony at trial. Respondent argued that Ms. McFadyen, would have merely substantiated the fact that she was the declarant on Ms. Grogans' death certificate, her health care proxy, participated in the Bay Ridge Peace Action Group, scattered Ms. Grogan's ashes, works in a law office and was her close friend. Respondent also did not seek a continuance to call Ms. McFadyen as a witness.

Therefore, this court may draw the strongest inference the opposing evidence permits against Ms. McFadyen. *See 16-172 BRG 321 LLC v. Hirschorn,* NYLJ, June 30, 2016 at 22 col 3 [App. Term 1st Dept.] ("Whether to draw a negative inference from tenant's failure to call her estranged husband as a witness was within the Court's discretion") *citing 318 East 93, LLC v. Ward,* 276 A.D.2d 277, 278 (1st Dept. 2000). However, the court finds that it does not need to

resort to so drastic a remedy, in order to find that Respondent did not meet his burden to establish succession. Here, even without invoking a missing witness inference, the testimony and evidence presented by Respondent at trial was wholly insufficient to establish a defense of succession as a non-traditional family member. Accordingly, Respondent's succession defense is dismissed with prejudice.

After trial, Petitioner is awarded a final judgment against Respondent, with the issuance of the warrant of eviction forthwith. Execution of the warrant is stayed through June 30, 2017 for vacatur. Respondent shall continue to pay use and occupancy, by the tenth day of the month, through the vacate date. Petition is discontinued against "John Doe" and "Jane Doe." The parties may pick up their exhibits from Part O, Room 505 within thirty-five days.

This constitutes the decision and order of the court.

Dated: Brooklyn, New York
February 8, 2017

HON. BRUCE E. SCHECKOWITZ
J.H.C.