2018 WL 6492517
City Court, New York,
Albany.

KDG ALBANY, LP, Petitioner-Landlord,
v.
Shirley DIXON, Respondent-Tenant.

LT-3532-18/AL
|
Decided on December 4, 2018

Attorneys and Law Firms

John T. Keenan III, Esq. Albany, NY, for Petitioner-Landlord.

Shirley Dixon, Respondent-Tenant, pro se.

Opinion

Thomas Marcelle, J.

***1** KDG Albany, LP ("KDG") brought a holdover proceeding against Shirley Dixon ("Dixon"). The court held a trial, and it finds that the credible evidence established the following.

In September 2017, Dixon entered into a lease with KDG to rent an apartment at 105 Philips Street in Albany. In March of the following year, Dixon began dating Ahmed Carroll ("Carroll"). Things went well for a while but, in May, the relationship soured and devolved into verbal and physical altercations. The abuse by Carroll got so bad that Dixon felt compelled to go to Albany County Family Court for an order of protection. On May 23, 2018, Albany County Family Court (Rivera, J.) issued a full stay away order of protection—Carroll could no longer have contact of any kind with Dixon.

The order of protection proved to be of little deterrence to Carroll. Two days later, he violated it. On May 25, Carroll smashed the lock on Dixon's door and entered her home. Dixon called the Albany Police who responded. Ultimately, Carroll was arrested and charged with criminal trespass in the third degree (Penal Law § 140.10), criminal mischief in the fourth degree (Penal Law § 145.00), and criminal contempt in the first degree (Penal Law § 215.51).

Carroll was released on the charges. Still, he refused to cease harassing Dixon, constantly coming to her apartment over a two-week period. Dixon testified that she kept calling the police but since Carroll would flee the scene, the police never charged him. On June 13, 2018, Carroll again broke into Dixon's apartment, this time he beat her. Dixon suffered injuries to her face, arms and legs. It appears from court records that on July 28, 2018, Carroll was apprehended and formally charged with assault in the third degree (Penal Law § 120.00) and upon arraignment of the assault charge, the court issued a new full no contact order of protection (Albany City Ct, Trexler, J., index No. CR 1000-18/AL).

Sadly, Carroll could not be dissuaded from coming to Dixon's apartment building, knocking on her window and causing a commotion. She would call the police, but Carroll eluded arrest. On August 23, 2018, the police caught Carroll and, according to Dixon, he was sent to jail for violating the order of protection.

Against this backdrop, the present landlord tenant dispute arose. KDG's property manager Mary Kelly testified that two tenants had made a series of complaints about noise coming from Dixon's apartment. According to Kelly, between June and September, Elijah Williams and Mercedes Peno made multiple noise complaints. Williams, the basement tenant, complained four to five times in person and another four to five times by phone. Peno, the next-door neighbor, complained four to five times by phone. Kelly testified that tenant complaints made in this manner (in person and by telephone) are considered informal complaints. To register a formal complaint, a tenant must submit it via the management company's internet-based portal.

Nevertheless, without a formal complaint, on August 15, 2018, KDG notified Dixon that she had violated her lease by making bothersome noises and disturbances. KDG further notified Dixon that she had one week to remedy the noise, or it would end her lease. On September 1, KDG accepted Dixon's rent. This indicates that at least between August 15 and September 1 that no further complaints were made about Dixon. This quiet period neatly coincides with the period that Dixon testified that Carroll was incarcerated.

***2** The peace and quiet ended in the early morning hours of September 10, 2018. At about 2:00 a.m., when

Dixon got up for a snack, she saw Carroll standing in her bedroom.[1] Carroll told her that he had a knife. Dixon was scared and shocked, so she screamed for help. She then attempted to bolt from the apartment, but Carroll grabbed her. A struggle ensued, but Dixon made it to the hallway and yelled for help. Her neighbor, Peno and Peno's boyfriend, opened their door and came out. Dixon told the couple that Carroll was threatening her and pleaded with them to call the police. Peno began to express compassion towards the situation but her boyfriend pulled her into their apartment and slammed the door.

Dixon, now alone, accompanied Carroll back into her apartment upon his assurance he would not harm her. Once inside, Carroll told Dixon that if she was not going to be with him, he was not sticking around Albany to do probation. Carroll left Dixon's apartment. In the morning she called the police and Carroll's probation officer to tell these agencies of the events that transpired in the early morning hours.

Later on September 10, Mary Kelly came by to discuss the 2:00 a.m. incident. She told Dixon that she again had been the subject of a complaint concerning an early morning ruckus.[2] Dixon explained that the early morning episode was not her fault. Rather, Carroll had caused the disturbance by breaking in and threatening her. Kelly was decidedly unsympathetic. She scolded Dixon, "you need to contact the police and ask them why they aren't doing their job." At the end of their conversation, Kelly served Dixon with a termination notice which provided:

> On August 15, 2018, we gave you a final notice regarding your objectionable conduct wherein we demanded that you cease certain actions that we deem objectionable. In order to prevent our termination of your tenancy, you were directed to cease your loud and boisterous conduct that disturbs the neighbors' right to quiet enjoyment of their homes. We have now received another complaint regarding loud arguments between you and another person that recently spilled out into the common areas of the building as late as 2:00 a.m. In light of the above, we hereby terminate your tenancy effective September 16, 2018.

***3** Dixon refused to vacate; KDG sued for possession. Dixon invoked RPAPL 744 as a defense—that is, she asserted that KDG was discriminating against her because she was a victim of domestic violence.[3] To establish a defense under RPAPL 744, a tenant must prove two elements: (1) that she is entitled to domestic violence victim status and (2) that the landlord commenced an eviction proceeding because of such status. If the tenant establishes both elements, then the eviction proceeding will be dismissed—unless the landlord establishes a lawful reason for the eviction (for example, the non-payment of rent) (*cf. 390 West End Associates v. Raiff,* 166 Misc 2d 730, 734 [App Term 1st Dept 1995] [tenant's claim for retaliatory eviction will fail where the tenant owes rent because failing to pay rent provides a lawful justification for the landlord to seek eviction]).

Turning to the first element, the parties disagree over whether Dixon is entitled to domestic violence victim status. "[A] person possesses domestic violence victim status if such person is or has been a victim of an act that would constitute a family offense and such act is alleged to have been committed by a member of the same family or household" (RPL 227-d [1] [internal quotations omitted]). Thus, to be a domestic violence victim, a person must have suffered from a family offense committed by a family or household member.

KDG does not dispute that Dixon was a victim of a family offense. This assessment is correct. Family offenses include disorderly conduct (Penal Law § 240.26), harassment in the second degree (Penal Law § 240.26), assault in the third degree (Penal Law § 120.00) and stalking in the fourth degree (Penal Law § 120.45) [Family Ct Act § 812 [1]]. The evidence supports that Carroll committed all such offenses upon Dixon between May 2018 and September 2018. The court finds that Dixon was a victim of a family offense.

However, KDG argues that while Dixon may have suffered abuse at the hands of Carroll, Carroll is not a member of the same family or household as Dixon. KDG says Dixon cannot be considered a domestic violence victim. It is true, as KDG says, that Carroll and Dixon are neither married nor have ever lived together in the same household. However, Family Court Act § 812 (1)

(e) contains a broader definition than a literal reading of Subdivision 1 might suggest. The statute provides that members of the same family or household includes persons "who are or have been in an intimate relationship *regardless of whether* such persons have lived together at any time" (Family Ct Act § 812 [1] [e] [emphasis added]).

The question becomes whether Dixon and Carroll had an intimate relationship. Although the term "intimate relationship" is not defined, the statute provides factors to be considered in determining whether such a relationship exists, "including but not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an intimate relationship" (*Jessica D. v. Jeremy H.*, 77 AD3d 87, 89 [3d Dept 2010] [internal quotations omitted]).

***4** Guided by this standard, the court has carefully reviewed the credible evidence. Such evidence together with the inferences that the court draws therefrom establishes that Carroll and Dixon had an intimate relationship. Besides this finding, Judge Rivera's May 23, 2018 order of protection from Albany County Family Court is significant. The family court would have had subject matter jurisdiction to issue the order *only if* it found that an intimate relationship existed between Carroll and Dixon (*Parrella v. Freely*, 90 AD3d 664, 665 [3d Dept 2011]). Thus, Judge Rivera was persuaded that an intimate relationship existed between Carroll and Dixon. Considering the foregoing, the court holds that Dixon has suffered from a family offense committed by a family or household member, and therefore she has domestic violence victim status.

This brings the case to the more difficult question—does KDG seek to evict Dixon because she is a victim of domestic violence. RPAPL 744's advent is recent. Apparently, no court has yet discussed the parameters of the statutory protections. The court is forced to write on a clean slate. [4]

KDG is quite clear why it thinks Dixon is an objectionable tenant —she engaged in "loud arguments [with] another person that spilled out into the common areas of the building as late as 2:00 a.m." This commotion and prior ones intruded upon the solitude of the other tenants, of that there is no doubt. As a result, KDG has suffered a real financial loss from the tumult—two tenants have vacated the apartment building. KDG says that it brought this eviction proceeding against Dixon for commercial reasons. Indeed, it points out that it had rented the apartment to Dixon knowing she had previously been a victim of domestic abuse. Thus, KDG's decision to seek eviction was not driven by Dixon's status as a domestic violence victim per se, but by a business calculus.

The court accepts KDG's position as genuine, but it misses the point. Seldom is discrimination overt; it is often clothed in legitimacy *See 300 Gramatan Ave. Assocs. v. State Div. of Human Rights*, 45 NY2d 176, 183 [1978] [noting that "discrimination is rarely so obvious that recognition of it is instant and conclusive"]). This is particularly true in domestic violence cases. Domestic violence status is not a static concept, it arises not from a person's inherent identity but from the nefarious conduct of another. This precept is critical to understanding how discrimination against victims of domestic violence manifests itself. Thus, when an otherwise lawful reason for eviction (like loud noise) is pegged to an event the abuser created directly or indirectly, the otherwise valid reason for eviction is actually illegal discrimination against a domestic violence victim.

Still, to prove her case under RPAPL 744, Dixon must show that "but for" her status as a domestic violence victim, KDG would not be seeking to evict her. This standard requires Dixon to show that the harm, here the termination of her lease, would not have occurred absent her status. "It is textbook tort law that an action is not regarded as a cause of an event if the particular event would have occurred without it" (*Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 US 338, 346—47 [2013] [internal citations and quotations omitted]).

***5** Here, the objectionable conduct, loud noises and disturbances, is sourced in domestic abuse. The notice to terminate was served upon Dixon because of screaming and shouting between her and Carroll. Simply, "but for" Carroll committing a family offense against Dixon, KDG neither would have served her with notice to terminate her lease nor commenced this eviction proceeding. Dixon has made a prima facia defense of an unlawful discriminatory eviction under RPAPL 744.

This does not end the case. The landlord can still prevail if it establishes a lawful reason for the eviction other than one sourced in domestic violence. Here, KDG alleged that Dixon blasted her television broadcasts and her music to the point that it disrupted another tenant's, Williams', quiet enjoyment of his apartment. Playing a TV or music too loudly is something totally divorced from being a victim of domestic violence.

Dixon says, however, that she cured her noisy ways after being notified by KDG on August 15, 2018. She testified that the noise resulted from having only one outlet in her apartment. This issue she claimed, required her to rest the TV on the floor near the outlet. Dixon said she could understand how the location of the TV caused the basement tenant, Williams, problems. She testified that the TV sustained electrical damage by a power surge (which stemmed from, or so the court infers, the fact that all electronics in the apartment were being serviced from a single outlet). As a result, her TV could only reach 10% of its maximum volume. This limitation on her TV's volume stopped the audio from invading Williams' apartment.

However, KDG produced evidence to suggest that Dixon continued to blare her TV and Stereo. It offered a complaint made through its portal by Williams dated September 1, 2018. Williams' portal complaint alleged that he had a situation of unnecessary noise "in the afternoon hours of the night [sic]" over the prior three months—which would have been June, July and August of 2018. This complaint was admissible as a business record (CPLR 4518). However, CPLR 4518 does not "permit the receipt in evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto" (*Johnson v. Lutz*, 253 NY 124, 128 [1930]). Williams was under no business duty to report loud noises made by Dixon. Thus, the portal complaint is admissible to show that a complaint was made to KDG, but the statements of Williams himself are inadmissible hearsay.

Moreover, even if the contents of Williams' complaint were admissible, it is still problematic. The Williams complaint is too vague and imprecise with respect to time—it never states that Dixon continued to be noisy after August 22. The court is disinclined to draw an adverse inference that Dixon failed to cure the noise problem based solely upon Williams' electronic complaint. Additionally, as noted, when KDG served the notice of breach of the lease on September 10, it never mentioned that Dixon played her electronics in a manner that disturbed Williams or any other tenant. Thus, KDG has failed to prove to the court's satisfaction that Dixon continued to play her TV in excessive volumes after August 15, 2018. Thus, such allegations serve no basis for an eviction.

In a real sense, both parties are innocent victims of Carroll's criminal conduct. Before 2016, when RPAPL 744 was enacted, the common law would have mandated that the court look solely to the lease to decide which innocent was to bear the wrong (*see Kel Kim Corp. v. Cent. Markets, Inc.*, 70 NY2d 900, 902 [1987]). Invariably, and not surprisingly, leases place the consequences of loud disturbances coming from a tenant's apartment, upon the tenant. In other words, if the abusive relationship infringed on other tenants, under traditional notions of law, the victim of domestic violence had to move. That has changed. The Legislature has made landlord's like KDG assume the risk of financial burdens stemming from domestic violence issues rather than forcing a victim out of her home for reasons having to do with her abuser. When a statute "crafts a balance between victims' and landlords' economic rights [,] the balance set by the Legislature should [be strictly honored] by a court" (*Riverwalk on Hudson, Inc. v. Culliton*, No. LT-394-18/CO, 2018 WL 5831248, at *3 [Nov. 7, 2018]).

***6** KDG's holdover petition is dismissed. To the extent that it has not been yet paid, Dixon must pay November's and December's rent. If the parties are unable to agree upon a reasonable date to achieve these payments, either party may request that the clerk of the court set the matter for a hearing for the court to order a payment date.

The foregoing constitutes the Decision and Order of the Court.

All Citations

--- N.Y.S.3d ----, 2018 WL 6492517, 2018 N.Y. Slip Op. 28384

Footnotes

1 Although there was no explicit testimony on how and why Carroll was released from jail, the court surmises, based upon the various documents before it and its experience with domestic violence cases, that Carroll had been released pursuant to a plea agreement which most likely involved time served and a period of probation.

2 Peno filed complaint through the portal and the court received it as a business record. The complaint provided:
"For the past 3 nights I have to listen to my neighbors screaming and hitting each other at all times during the night. My daughter has been very sick over the weekend. she was woken up every hour because my neighbors are throwing screaming and hitting each other in the hallway. I'm sick of the screaming all night long. When I finally got up at 2:30am to let her know she needs to take this fight inside and not right below my daughter room she stated he's threatening me and this and that but after two hours of her attacking him they finally go inside. I'm sick of the drama and the screaming for no reason my daughter is 2 years old listening to that everyday and crying Bc she is scared. that's not okay with me and I would like someone to contact me and let me know how much it is to break my lease I refuse to allow my daughter to grow up in this type of environment" [SIC] [grammar and spelling mirror the original exhibit].
It is interesting that the complaint references that the fighting between Carroll and Dixon had been going on for three days. This allegation, if true, would substantially undermine Dixon's credibility and cast the case in a different light. All the court had though was Peno's written account without explanation and context. So, while Peno's electronic complaint showed that KDG had cause to terminate the lease, the details of the incident provided by Peno, without her live testimony, were insufficient to discredit Dixon's version of events, at least as the court assessed the evidence.

3 RPAPL 744 provides, in relevant part: "It shall be a defense to a proceeding to recover possession of a residential unit that a landlord seeks such recovery because of a person's domestic violence victim status, and that, but for such status, the landlord would not seek to recover possession. A landlord may rebut such defense by showing that he or she seeks to recover possession of a residential unit because of any other lawful ground."

4 Accepted for Miscellaneous Reports Publication
The court finds itself in the unenviable position to interpret law without authority. At this juncture, it seems all together appropriate to note the indispensable role of the New York State Reporter to city and town courts. These courts have unique jurisdiction and since generally the cost of appeal dwarfs the cost of the judgment, few cases are appealed from these local courts. This means that the Appellate Divisions and the Court of Appeals seldom can provide learned instruction to local courts. Instead, these courts, which are not resourced in the same manner as Supreme and County courts, rely upon the State Reporter to disseminate and publish small, yet important, decisions. This service is invaluable and this court and those similarly situated owe an enormous debt of gratitude to the State Reporter and his able staff, for publishing and disseminating precedent from which courts and litigants can be guided.