

91 A.D.3d 532, 937 N.Y.S.2d 41, 2012 N.Y. Slip Op. 00400
(Cite as: 91 A.D.3d 532, 937 N.Y.S.2d 41)

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Supreme Court, Appellate Division, First Department,
New York.

THIRD LENOX TERRACE ASSOCIATES, Petitioner-Respondent,

v.

Cynthia EDWARDS, et al., Respondents-Appellants,
Eugene Smith, et al., Respondents.


Jan. 24, 2012.

Background: Landlord commenced summary holdover proceeding for possession of rent-stabilized apartment on ground of non-primary residency. Following bench trial, the Civil Court, New York County, Rubin A. Martino, J., dismissed landlord's summary holdover petition. On appeal, the Supreme Court, Appellate Term, 23 Misc.3d 126(A), 2009 WL 806812, reversed judgment. Tenant and her sister appealed.

Holding: The Supreme Court, Appellate Division, held that tenant's sister failed to establish that she resided in rent-stabilized apartment with tenant of record for required period.

Affirmed.

West Headnotes

Landlord and Tenant 233  278.9(2)233 Landlord and Tenant

233LX Re-Entry and Recovery of Possession by Landlord

233k278.1 Suspension of Remedies

233k278.9 Violation of Tenancy

233k278.9(2) k. Illegal or unauthorized use or occupancy. Most Cited Cases

Tenant's sister failed to establish that she resided in rent-stabilized apartment with tenant of record for a period of no less than two years prior to tenant of record permanently vacating apartment, for purposes of summary holdover proceeding for possession of rent-stabilized apartment on ground of non-primary residency, absent evidence that tenant of record re-

sided in apartment during required period. 9 NYCRR 2523.5(b).

**42 Cynthia Edwards, appellant pro se.

Rappaport Hertz Cherson & Rosenthal, P.C., Forest Hills (David I. Paul of counsel), for respondent.

GONZALEZ, P.J., TOM, ANDRIAS, MOS-KOWITZ, FREEDMAN, JJ.

*533 Order of the Appellate Term of the Supreme Court, First Department, entered March 27, 2009, which reversed a judgment of Civil Court, New York County (Rubin A. Martino, J.), entered on or about May 2, 2006, after a nonjury trial, dismissing petitioner landlord's summary holdover petition, granted the petition, and awarded petitioner a final judgment of possession, unanimously affirmed, without costs.

Respondent Linda Edwards is claiming succession rights to the rent-stabilized tenancy of her sister, respondent Cynthia Edwards. The record demonstrates that Cynthia, the tenant of record, initially entered into a two-year lease, beginning on November 15, 1995, with petitioner for the subject apartment. Cynthia remained the tenant of record by executing renewal leases every two years, with the last renewal being for the period beginning November 30, 2003 and ending November 30, 2005.

In August 2005, petitioner commenced the instant summary holdover proceeding for possession of the rent-stabilized apartment on the ground of non-primary residency, having discovered that Cynthia was not residing in the apartment as her primary residence, but that her sister Linda was residing there instead. Linda, who has admittedly been residing in the apartment since 1995, has the burden of proving that she resided with Cynthia, the tenant of record, in the apartment as her primary residence for a period of no less than two years prior to Cynthia permanently vacating the apartment (see Rent Stabilization Code [9 NYCRR] § 2523.5[b]; 68-74 Thompson Realty, LLC v. McNally, 71 A.D.3d 411, 896 N.Y.S.2d 323 [2010]).

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The trial evidence establishes, and it is not disputed, that Cynthia, the tenant of record, vacated the apartment in 1998 and established a residence elsewhere. She, however, continued to execute renewal leases for the apartment extending through November 2005 and continued to pay the rent by money orders issued in her name during that time. Thus, although the apartment was no longer her primary residence after 1998, Cynthia, having continued to pay the rent and execute**43 renewal leases extending through November 2005, cannot be found to have permanently vacated the apartment at any time prior to the expiration of the last lease renewal on November 30, 2005 (see *East 96th St. Co., LLC v. Santos*, 13 Misc.3d 133[A], 2006 WL 2975965 [2006]). Accordingly, the relevant two-year period during which respondent Linda must show that she co-occupied the subject apartment with Cynthia is 2003 to 2005. Although Linda did submit sufficient documentary evidence to *534 establish that she resided in the apartment during that period, there was no showing that Cynthia lived in the premises at that time, since she admittedly had been residing elsewhere since 1998.

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