

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM : 9th and 10th JUDICIAL DISTRICTS

-----X

PRESENT : NICOLAI, P.J., MOLIA and IANNACCI, JJ.

-----X

JOHN McFADDEN,

Respondent,

-against-

NO. 2008-1427 W C

DECIDED

DORIS L. SASSOWER,

Tenant,

-and-

ELENA SASSOWER,

Appellant.

-----X

Appeals from an order, a final judgment, and a warrant of the City Court of White Plains, Westchester County (JoAnn Friia, J.), dated, respectively, July 3, 2008, July 21, 2008 and July 21, 2008. The final judgment, entered pursuant to the order dated July 3, 2008 granting landlord's motion for summary judgment, awarded possession to landlord in a holdover summary proceeding commenced in 1989. The appeal from the final judgment brings up for review an order of the same court (James B. Reap, J.)

SM-1

Ex N-1

RE: JOHN McFADDEN v DORIS L. SASSOWER
and ELENA SASSOWER
NO. 2008-1427 W C

dated September 18, 1989 denying tenants' motion to dismiss the March 27, 1989 petition.

ORDERED that the appeals from the order dated July 3, 2008 and the warrant are dismissed; and it is further,

ORDERED that the final judgment is reversed without costs, the order dated September 18, 1989 denying tenants' motion to dismiss the March 27, 1989 petition, and the order dated July 3, 2008 granting landlord's motion for summary judgment are vacated, landlord's motion for summary judgment is denied, and tenants' motion to dismiss the March 27, 1989 petition is granted.

The appeal from the order dated July 3, 2008 is dismissed because the right of direct appeal therefrom terminated with the entry of the final judgment (see Matter of Aho, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the final judgment (see CPLR 5501 [a] [1]). The appeal from the warrant is dismissed because no appeal lies therefrom (see UCCA 1702; Corrado v Harris, 13 Misc 3d 4 [App Term, 9th & 10th Jud Dists 2006]).

The petition in this holdover proceeding, dated March 27, 1989, alleges that tenants entered into possession "under a month to month rental agreement" and that their month-to-month tenancy was terminated effective November 30, 1988. Tenants

RE: JOHN McFADDEN v DORIS L. SASSOWER
and ELENA SASSOWER
NO. 2008-1427 W C

-----X

moved to dismiss the petition, arguing, among other things, that, contrary to what was stated in the petition, they were not month-to-month tenants but vendees in possession under a contract to purchase which was not to be performed within 90 days (cf. RPAPL 713 [9]). By order dated September 18, 1989, the City Court denied tenants' motion. Thereafter, landlord moved for summary judgment, now asserting that tenants had entered into possession pursuant to an occupancy agreement incident to a contract of sale, that the occupancy agreement had expired when the contract of sale had failed to close, and that tenants had thereafter become month-to-month tenants. Landlord's motion was held in abeyance while tenants challenged, in federal court, the cooperative board's refusal to approve their purchase of the shares. Over 15 years later, long after the federal litigation had been resolved and after landlord had, in 2007, commenced a new holdover proceeding against tenant Elena Sassower in which Sassower had asserted that prior summary proceedings remained pending, the City Court granted landlord's motion in the 1989 proceeding for summary judgment and entered a final judgment in favor of landlord.

In our view, tenants' motion to dismiss the March 27, 1989 petition should have been granted. Pursuant to RPAPL 741, a petition must state, among other things, the interest of the respondents and the facts upon which the proceeding is based. Under this section, a tenant is entitled to a concise statement of the ultimate facts upon which

RE: JOHN McFADDEN v DORIS L. SASSOWER
and ELENA SASSOWER
NO. 2008-1427 W C

-----X

the proceeding is based (Giannini v Stuart, 6 AD2d 418 [1958]), and a petition which contains "fundamental misstatements and omissions" will be dismissed (Jeffco Mgt. Corp. v Local Dev. Corp. of Crown Hgts., 22 Misc 3d 141[A], 2009 NY Slip Op 50455[U] [App Term, 2d, 11th & 13th Jud Dists 2009]). "With respect to the contents of the petition, adequacy of notice in a landlord-tenant proceeding is governed by a standard of reasonableness under the circumstances" (546 W. 156th St. HDFC v Smalls, 43 AD3d 7, 11 [2007]).

The instant petition contained fundamental misstatements and omissions and was not reasonable under the attendant circumstances. The petition alleged that tenants had entered into possession "under a month to month rental agreement," whereas it is undisputed that tenants had in fact entered into possession under an occupancy agreement executed in connection with a contract to purchase the apartment and not as month-to-month tenants. The petition also fails to set forth the facts giving rise to the alleged subsequent month-to-month tenancy. In view of these defects, the petition, which was not amended, did not adequately put the court and tenants on notice of landlord's claim and should have been dismissed (see Joseph M. d'Assern Hous. Corp. v Day, 24 Misc 3d 132[A], 2009 NY Slip Op 51377[U] [App Term, 9th & 10th Jud Dists 2009]; Jeffco Mgt. Corp., 22 Misc 3d 141[A], 2009 NY Slip Op

RE: JOHN McFADDEN v DORIS L. SASSOWER
and ELENA SASSOWER
NO. 2008-1427 W C

-----X
50455[U]; cf. Volunteers of Am.-Greater N.Y., Inc. v Almonte, 17 Misc 3d 57 [App Term, 2d & 11th Jud Dists 2007], affd 65 AD3d 1155 [2009]).

To the extent that landlord may be contending that tenants' challenge to the adequacy of the petition was barred by res judicata based on a decision purportedly made in prior proceedings, we reject this contention, as the earlier proceedings did not culminate in a final judgment in favor of landlord (see Brown v Cleveland Trust Co., 233 NY 399 [1922]; Zangiacomi v Hood, 193 AD2d 188 [1993]; Weldotron Corp. v Arbee Scales, 161 AD2d 708, 709 [1990]).

We incidentally note that "a summary proceeding may [not] be permitted to languish off calendar indefinitely, leaving the threat of eviction hanging over the respondents for years without resolution" (Matter of Henriques v Boitano, NYLJ, July 17, 2002 [Civ Ct, NY County]). Moreover, as found in the companion appeal (McFadden v Sassower, ____ Misc 3d ____, ____ NY Slip Op ____ [Appeal Nos. 2008-1428 W C, 2008-1433 W C], decided herewith) involving the 2007 holdover summary proceeding commenced by landlord against only Elena Sassower to recover the subject premises, a month-to-month tenancy was created subsequent to the commencement of this proceeding, thus vitiating the 1988 notice of termination.

Accordingly, the final judgment is reversed, the order dated September 18, 1989 denying tenant's motion to dismiss the March 27, 1989 petition, and the order dated

RE: JOHN McFADDEN v DORIS L. SASSOWER
and ELENA SASSOWER
NO. 2008-1427 W C

July 3, 2008 granting landlord's motion for summary judgment are vacated, landlord's motion for summary judgment is denied, and tenants' motion to dismiss the March 27, 1989 petition is granted.

Molia and Iannacci, JJ., concur.

Nicolai, P.J., taking no part.