

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK, HOUSING PART N

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46 DOWNING STREET, LLC,

Petitioner-Landlord

-against-

OTTO THOMPSON,

Respondent-Tenant.

L&T Index No. 81450/09

Judge Phyllis K. Saxe

**DECISION/ORDER**

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of Respondent's motion:

Papers	Numbered
Notice of Motion & Affidavits Annexed.....	<u>  1  </u>
Notice of Cross-Motion & Affidavits Annexed.....	<u>  2  </u>
Answering Affidavits.....	_____
Replying Affidavits.....	_____
Exhibits.....	_____
Memorandum of law.....	<u>  3, 4  </u>

\_\_\_\_\_  
J. Saxe:

Otto Thompson (“Respondent”) in this now recently dismissed illegal sublet holdover proceeding, seeks to be restored to occupancy and possession of Apt. 1C at 46 Downing Street, New York, NY 10014. To do so, Ms. Watabe, who has been living at the premises for three (3) years, must be dispossessed. The background is as follows:

Petitioner, 46 Downing Street LLC, is the landlord/owner of unit 1C. It commenced this holdover proceeding in 2009 against Respondent on the grounds that he sublet the apartment without obtaining the landlord’s consent. Respondent failed to appear in this proceeding, as he had been incarcerated in 2008, serving a five-year prison term. A default judgment in favor of Petitioner was entered on February 8, 2010 after inquest. On April 30, 2010, Respondent was evicted (and all of his belongings eventually discarded).

In March 2012, Petitioner executed a one-year market-rate lease at \$2,400 per month with Ms. Watabe. Another one-year lease was executed by Ms. Watabe in March 2013 at \$2,500. In January 2013, Respondent was released from jail. He then filed a *pro se* post-eviction order to show cause to be restored. On October 7, 2013, Judge Kraus granted Respondent’s motion to vacate the default judgment after inquest. At the same time, Judge Kraus permitted Ms. Watabe to be joined as a necessary party to the action. On September 24, 2014, the Appellate Term affirmed the vacatur of the default judgment and held that:

“The tenant’s incarceration and his demonstrated efforts to respond to the petition while in prison provided a reasonable excuse for his failure to appear to defend the proceeding and tenant’s submissions were sufficient to establish a potentially meritorious defense to the landlord’s illegal sublet claim. Further on this record, and considering the roughly 50-year duration of the rent-controlled tenancy, we are not prepared to say that tenant’s delay was fatal to his vacatur application” (46 Downing Street LLC v. Thompson, 44 Misc 3d 143 (A)[2014]).

Thereafter, Respondent, with retained counsel, interposed an Answer and filed a motion to dismiss the petition or, alternatively, for summary judgment. On May 26, 2015, Judge Wendt granted Respondent's motion for summary judgment and dismissed the petition for the stated reason that Petitioner did not provide the thirty-day requisite notice to terminate the tenancy as required by 9 NYCRR Section 2204.3(d)(2). The facts here indicate that the Notice of Termination is dated June 3, 2009 and sought to end the tenancy on June 25, 2009. Therefore, Mr. Thompson had only twenty-two (22) days notice instead of the thirty-day requisite time period.

The hearing now before me requires the Court to balance the competing interests to possession of the subject premises between Respondent and Ms. Watabe. The landlord argues that given Mr. Thompson's incarceration and granting of a judgement of possession, he had the right to re-rent this apartment as a market-rate apartment to Ms. Watabe. Petitioner notes that he advised the Court *ab initio* that Mr. Thompson was incarcerated and never resisted adjournment for the Court to have him produced.

Mr. Thompson testified that he lived in this apartment with his mother since he was seven (7) years old. He went to school in the neighborhood and was a musician in various clubs in the neighborhood. He became ill in 2004, which resulted in some motor problem, but currently does not receive medical care—and he walks with a cane. He is fifty-nine (59) years old and has one daughter who lived with him for three (3) years after her birth but has not lived with him since. She now lives and attends high school in Kuwait where her mother now lives and works. Mr. Thompson testified that he intends for his daughter to return to live with him in the

near-future but it is not clear if he could support her on the \$800 per month he receives from social security.

Since being released from jail, he has successfully completed a drug program. He was living in a three-quarter house but currently lives, as a guest, with a friend. The living situation is extremely difficult as he has curfew hours and cannot come and go as he pleases. In other words, he has not found another home. He also stated that while in prison he tried to communicate with the Court to advance his defenses in the case but was obviously unsuccessful and the default occurred. He wants the opportunity to return to his home of fifty (50) years. Furthermore, the rent of the apartment was \$450 per month and frozen due to his DRIE benefits. Given that his income is \$800, this apartment is affordable and will prevent him from having to go into the homeless shelter system.

Ms. Watabe testified that she moved into the apartment in 2012, which she found through a broker. Before 2012, she lived in the Upper West Side. She has been living in Manhattan since 2005, and before that lived in Hawaii and Los Angeles. She is a native of Tokyo. Ms. Watabe is an analyst for a Bank located in Mid-town New York and earns in excess of \$70,000 per year. She lives with her cat in the Downing Street apartment. She became aware of the instant lawsuit in 2013, and, in part due to the consideration of the issues embedded therein, entered into a two-year lease at a reduced rent of \$2,000. Ms. Watabe indicated that her current plan is to purchase a home in Manhattan. She testified that she is upset and anxious about her precarious living status and she is worried that she will not live in this apartment until the end of the lease term, which is February 28, 2016.

A tenant wrongfully evicted may be restored to possession even after the execution of the warrant. In Golde Clothes Shop v. Loew's Buffalo Theatres, 236 NY 465 (1923), Justice Cardozo, speaking for the Court, stated that "the plaintiff [the ousted tenant] shows itself to be the owner of a legal estate, and asks to be restored to...that which is his own...One does not lose what is one's own because its utility would be greater if it were awarded to some one else" (Golde Clothes Shop v. Loew's Buffalo Theatres, supra).

The facts here establish that Mr. Thompson was evicted following an inquest and the inquest was conducted while he was in prison despite failed attempts by the Court to have Mr. Thompson appear by way of a Notice to Produce. Since this underlying holdover proceeding has been dismissed, the predicate reason for Mr. Thompson's eviction has been totally eviscerated as a matter of law. The Court notes that while in prison and ten (10) weeks following his release from prison that Mr. Thompson advocated to retain his rent-controlled apartment. In Pomeory Company v. Thompson, 784 NYS2d 278, 2004 Slip Op 24367, the Appellate Term affirmed the vacatur of the warrant. Specifically, it held that the Civil Court had properly exercised its discretionary authority in tenant's favor based on the extensive evidence produced at the hearing, including the age and disability of the tenant and the near-fifty year duration of the rent-controlled tenancy and the lapses and inactivity of both the Department of Social Service and the tenant's court-appointed guardian. The Appellate Term rejected the argument that the tenant's two-month delay in seeking restoration of possession was fatal to its case.

The fact that Mr. Thompson was incarcerated for five (5) years and was not able to appear in the proceeding is not enough to defeat the tenancy. In Kelly Mgt LLC v. Soltero, 27 Misc 3d 984 (2010), the petitioner argued that respondent had no claim to succession to the rent-

controlled premises because he was incarcerated for four (4) years. The court quoted Corr v. Westchester County Dept. Of Social Services, 27 Misc3d 984 (1970) in which the Court of Appeals held that “a patient or inmate of an institution does not gain or lose a residence or domicile, but retains the domicile he had when he entered the institution” (supra, at 986).

In McKinsey v. Calla, 34 HCR927A, NYLJ 11/6/06: 22, where petitioner and her family surrendered possession of their rent-regulated apartment located in Manhattan and moved into a duplex apartment in the neighborhood in 2003 subject to a lease that allowed the owner to terminate the tenancy by written notice, given within ninety (90) days after a fire occurred, if the apartment was rendered wholly unusable. In 2006, a fire occurred in the duplex and the petitioner was relocated to a homeless shelter. While petitioner and her family were staying at the shelter, the landlord renovated the duplex and sublet it to someone else. The court, finding that the landlord had used to fire as a pretext to evict the petitioner from the apartment where the petitioner was paying a preferential rent, held that the petitioner was wrongly evicted from the premises. Weighing the equities, it pointed out that the petitioner was a seventy-nine (79) year old woman who was in poor health. Her husband was seventy-one (71). They have lived in Harlem for over thirty (30) years and developed substantial contacts with the neighborhood. They have no savings, and had they not been restored to possession, would become homeless.

Weighing the equities in this case compels the Court to find in Mr. Thompson’s favor. The facts show that Mr. Thompson is nearly sixty (60) years old and not in ideal health. He has lived in the neighborhood where his apartment is located for fifty(50) years. On the other hand, Ms. Watabe has lived in the apartment for over three (3) years. She has the funds to move and only needs one-bedroom. The landlord has also been letting her rent the apartment at a reduced rate (\$2,000), which evidences both the landlord and Ms. Watabe’s admissions that in 2013

when she was entering into the current lease that they were conscious of Mr. Thompson's intent to return home.

Accordingly, for all the above reasons, the Court restores Respondent Otto Thompson to possession of the subject premises located at 46 Downing Street, Apt. 1C in New York, NY. The Court awards Mr. Thompson a judgment of possession. Issuance of the warrant is stayed until September 30, 2015 to allow Ms. Watabe to vacate the subject premises with dignity. The Court's decision is without prejudice to Ms. Watabe's right to sue in a plenary action for damages related to her lease with Petitioner, 46 Downing Street LLC.

The foregoing constitutes the Decision and Order of this Court.

Dated: New York, NY  
June 25, 2015

PHYLLIS KRULIK Saxe  
HOUSING COURT JUDGE  
By: Phyllis K. Saxe  
Phyllis K. Saxe  
Housing Court Judge