MEMORANDUM DECISION

CIVIL COURT OF THE CITY OF NEW YORK, COUNTY OF BRONX

PRESENT:
Hon. Javier E. Vargas,
J.H.C.

ANDERSON HOUSING ASSOCIATES,

Petitioner-Landlord,

- against -

JOHANIA GONZÁLEZ, MANUEL SENA and MARIA KAPLANI,

Respondents-Tenants.

Housing Part	I
Index No.	L&T 060155/2013
Motion No.	002
Return Date	July 15, 2015

Papers Numbered

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Upon the foregoing papers and following the hearing, the motion by Petitioner-Landlord Anderson Housing Associates ("Landlord"), for an order restoring the matter back to the trial calendar and declaring that Respondents-Tenants Johania González and Maria Kaplani ("Tenants") breached the parties' Stipulation of Settlement, is denied, and the proceeding is hereby dismissed.

I.

Since June 2013, the sister Tenants have been the rent-stabilized tenants-of-record of the subject Premises, known as 1230 Woodycrest Avenue, Apt. 2A, in the Bronx, New York, which are owned and operated by Landlord. The Premises are subject to the Rent Stabilization Laws of 1969 and have been duly registered with the New York State Division of Housing and Community Renewal. Although Tenants initially resided there with their father, Tenant Manuel Sena, he passed away during the pendency of these proceedings. Even before his passing,

unfortunately, it is undisputed that problems arose with Landlord almost from their inception of the tenancy as a result of the alleged presence of a dog at the Premises.

As a result, on August 29, 2013, Landlord served upon Tenants a Ten-Day Notice to Cure, alleging that they had breached a substantial obligation of their tenancy by permitting or committing a nuisance, "interfering substantially with the comforts and safety of other tenants, in that" they "are illegally harboring a dog in [their] apartment without the Landlord's prior written permission in violation of * * * your Lease Agreement" and the accompanying House Rules and Regulations. Tenants were afforded until September 14, 2013 to cure by removing the dog from the Premises under penalty of the commencement of legal proceedings to terminate their tenancy. According to Landlord, no cure was undertaken by Tenants, prompting Landlord's subsequent service of a Ten-Day Notice to Terminate their tenancy on October 7, 2013, for continuing to illegally harbor the dog at the Premises. Specifically, Landlord alleged that:

> On or about August 20, 2013, and on a continuous basis thereafter, the dog that you have been harboring in your apartment has been barking at various hours of the day and night. This has annoyed and disturbed other tenants and severely interfere with other tenants' right to comfort, safety and quiet enjoyment of the Premises. This conduct has been chronic and persistent and constitutes a nuisance.

Since neither of the Tenants vacated the Premises on the appointed date, Landlord then commenced the instant holdover summary proceeding against them, by Notice of Petition and Petition dated October 8, 2013, to recover possession of the Premises, fair use and occupancy, the issuance of a Warrant and reasonable costs and disbursements, on the grounds that Tenants are harboring a dog at the Premises which action is alleged to be contrary to the provisions of their Lease Agreement and House Rules. On the appearance date of October 30, 2013, the parties entered into a Stipulation of Settlement so-ordered by the Bronx County Housing Court (Doherty, J.), wherein Tenants acknowledged that their older sister's dog, Cookie, visits the Premises, but agreed that "no pets shall be harbored at the Premises in violation of the Lease Agreement and/or house rules and regulations," and that they will provide Landlord reasonable access to the Premises for confirmation of the same. Upon default, Landlord could seek to restore the matter to the calendar for appropriate relief up through April 30, 2014.

On May 2, 2015, Landlord sought to restore the matter to the calendar and the entry of a Judgment of Possession in its favor, alleging that Tenants had continued to harbor the unauthorized dog as observed on March 27, 2014. Upon retaining counsel, Tenants filed

opposition papers denying that they are harboring any dog and asserting that Landlord had been harassing and discriminating against them since the last proceeding. By Stipulation of Settlement dated July 17, 2014, Tenants again acknowledged that "a sister visits with her [Pomeranian] dog periodically," but agreed that "no pets shall be harbored at [the] Premises in violation of the Lease Agreement and/or House Rules and Regulations," and that they will provide Landlord reasonable access to the Premises for confirmation. The Stipulation also provided that, upon default, Landlord reserved the right to restore the matter to the calendar up "through December 31, 2014 for appropriate relief. At that time, the sole issue to be determined shall be breach of this agreement."

Now, by Notice of Motion dated February 25, 2015, Landlord again moves for an order restoring the matter to the trial calendar for the entry of a Judgment of Possession against Tenants and the issuance of a Warrant of Eviction based on their alleged continuous harboring of the unauthorized dog. Particularly, Landlord claimed that the "dog has been observed barking inside the subject Premises on numerous occasions" by its agents and an exterminator on November 14, 2014, January 6 and 20, 2015, to the detriment of other tenants. In opposition to the motion, by Affirmation in Opposition dated March 8, 2015, Tenants argue that Landlord has been illegally harassing and discriminating against them as other tenants with pets at the building are not being bothered, and they deny violating the Stipulation of Settlement because they are not harboring any dogs at the Premises, only that their sister's dog, Cookie, visits periodically.

Because the parties did not reach an agreement in this proceeding, the matter proceeded to a full evidentiary hearing before the undersigned on July 7 and 15, 2015 in order to determine whether Tenants breached the July 2014 Stipulation of Settlement. First to testify at the hearing was Landlord's Property Manager, Ramona Smith, who is employed by Metro Management Development, Inc., which company manages Landlord's Building. She testified that management became aware that Tenants had a dog at the Premises not long after they moved in June or August 2013 and that they immediately served a Notice to Cure upon them in August 2013, retained counsel and commenced the instant proceeding. On several occasions while doing "vertical" patrol of the building two or three times a week, Ms. Smith testified that she heard the dog barking from inside Tenants' Premises. She testified that not only her, but the Superintendent, her secretary, other tenants and staff members have told her that they have heard the dog "multiple times." She further testified that she was familiar with the Stipulation of

Settlement dated July 17, 2014, stating that no pets shall be living at the Premises, but that they could visit "periodically." On cross-examination, however, Ms. Smith acknowledged that she has never actually seen the dog, and has only heard it during the day because she never stays overnight in the Building. She has been on the hallway outside the Premises and has "consistently heard the animal," which made her determine that Tenants were harboring the barking dog.

Next to take the stand on Landlord's behalf was Jennifer Blanco, the Assistant Property Manager, who testified that she goes to the Building once a week to lease apartment units to prospective tenants between 9:00 a.m. to 5:00 p.m., and has heard the dog from inside the Premises on two occasions in the afternoons of November or December 2014 and February 2015. She testified that she has never heard the dog at night because she does not stay there overnight. Similar testimony was provided by Serenity White, who is Landlord's Administrative Assistant, and testified that she has never seen the dog, but has heard it in the background while speaking with Tenants on the telephone. According to her, Tenants came to the management office to ask whether the dog can visit the Premises. "Periodically visits" to her does not mean to visit "everyday." Finally, she acknowledged that she is never there at night or overnight, and has not seen the dog at night hours. After this, Landlord rested its case.

In opposition to Landlord's case, Tenants' older sister, Elizabeth González, took the stand to testify that she used to live in New Jersey some years back with her family while working in New York City. During the week, she did not want to leave her dog, Cookie, all day in New Jersey by herself, so she will bring Cookie to visit with Tenants and leave it there during the day "once in a while," only to be picked up in the evenings at the end of her workday. She testified that Cookie took a course to reduce her barking, and "does not bark that much." She also stated that the dog was recently registered as an emotional support dog to help one of Tenants' daughter to recover from a surgery to correct a curvature in her niece's spine. On cross-examination, Ms. González recognized that on some weeks she will leave the dog at Tenants for either four or five times a week, while she worked, but was never left overnight at the Premises.

Tenant Johania González next testified that she lives with her sister, Tenant Maria Kaplani, and that neither have a dog, but that Cookie will visit them two to three times a week while her older sister went to work since last July until the present. She corroborated that Cookie comes some times during the week, but "never" stays overnight. She asserted that her daughter,

Ambar Nicole González, who is 17 years old, had a recent operation to correct a medical condition she had since childhood, a curvature of her spine known as Scoliosis, and is currently receiving treatment and therapy at home. According to Tenant González, her daughter Ambar is benefitting tremendously from the presence of Cookie at her home because the dog relieves her anxiety and depression, and actually helps her exercise and complete her therapy sessions. On cross-examination, Tenant González acknowledged that Cookie comes to the Premises two or three times a week. She further admitted that the surgery was very recently in April 2015, and that she would like to have Cookie visit more with her daughter, but not to stay permanently. According to González: "Even if the dog visits, it says 'periodically,' so two or three days is periodic;" the dog never "stays to sleep" in the house.

Finally, Tenant Maria Kaplani testified on her own behalf that Cookie visits her home but has never "stayed until really late." She explained that the dog never stays with them at the Premises because her older sister has a minor daughter and son who are very attached to Cookie and need her home every night. Tenant Kaplani emotionally testified that she raised and is like a second mother to Ambar and would like to have the dog, Cookie, continue to visit her Premises because it helps Ambar with her depression, especially given the fact that she had tried to commit suicide in the past apparently due to her spinal condition. On cross-examination, Tenant Kaplani admitted that they have a dog cage and plates for Cookie because her older sister brings dog food and they feed her at the Premises. She testified that she signed and knew that the Lease prohibits dogs, but that the dog "never stayed at home." She further explained that her older sister leaves the dog only certain days because she only works four times a week.

Following the testimony in chief, both parties rested and gave oral summations to the Court. The Court afforded the parties an opportunity to submit Memoranda of Law, but neither party submitted the same.

II.

It is well-settled that clauses in lease agreements prohibiting the harboring of pets by tenants are "reasonable and enforceable," and their violation "constitutes a substantial breach of an occupancy agreement" (*Pollack v Green Constr. Corp.*, 40 AD2d 996 [1972], *affd no opn* 32 NY2d 720 [1973]; *see Linden Hill No. 2 Coop. v Leskowitz,* 41 AD2d 741 [1973], *affd no opn* 34 NY2d 580 [1974]; *Landmark Properties v Olivo*, 5 Misc 3d 18, 20 [AT 2nd 2004]). Such provisions may also be contained in stipulations of settlement between parties on pending

proceedings, which are binding contracts favored and enforceable by the court, and not "lightly cast aside" (*Hallock v New York*, 64 NY2d 224, 230 [1984]; *see Matter of Galasso*, 35 NY2d 319, 321 [1974]), "especially where, as here, the party * * * was represented by counsel" (*Kelley v Chavez*, 33 AD3d 590 [2d Dept 2006]; *see Town of Clarkstown v M.R.O. Pump & Tank, Inc.*, 287 AD2d 497 [2001]). "Harboring" a dog has been interpreted to mean more than occasional visits by a pet, but to keep a pet "openly and notoriously," taking the dog out for walks during the day, and sleeping at the premises, all these for a significant amount of time without the landlord's permission (*see 184 W. 10th St. Corp. v Marvits,* 59 AD3d 287, 288 [2009]; *3720 Homes, Inc. v Hyman*, 30 Misc 3d 79, 80 [AT 2010])

Applying the foregoing principles to the matter at bar, Landlord has failed to demonstrate that Tenants breached the Stipulation of Settlement based on the purported Lease Agreement allegedly in existence between the parties. Preliminarily, there are two threshold questions not raised by either party which appear to prevent this Court from substantively considering the merits of Landlord's case. First, Landlord has failed to submit to this Court for examination either as an attachment to its moving papers, or as evidence at the trial, the actual Lease Agreement governing the parties herein or the alleged House Rules and Regulations ostensibly containing the No-Pets rule. This Court is not inclined to, nor can just assume the existence of a Lease Agreement or of House Rules, much less the existence of the No-Pets Rule purportedly contained therein (*see Jefferson Assocs. v Miller,* 63 Misc 2d 1056, 1058 [NYC Civ Ct 1970] ["It should be noted that nowhere in the lease itself is there any mention made of the harboring of a dog so as to constitute a substantial violation"]). Secondly, the July 2014 Stipulation clearly stated that Landlord may restore the proceeding for a determination of the existence of a breach "through December 31, 2014." Because the Notice of Motion to restore herein is dated February 25, 2015, the instant proceeding appears to be time-barred in accordance with Landlord's own probationary period. That the Tenants allegedly violated the Stipulation in November 2014 did not permit Landlord to sit idly and wait for over three months to institute this motion.

Nevertheless, even if this Court were to consider the substantive merits of the instant motion based on Tenants' failure to raise the abovementioned threshold issues, it would still fail. With the testimonial evidence offered at the hearing, Landlord did not clearly establish that Tenants breached the July 2014 Stipulation of Settlement. One by one Landlord's agents merely testified that they have heard a dog barking inside the Tenants' Premises some days during

regular business hours, but they all acknowledged that they have never seen the dog or heard the dog during the evening or overnight hours. None of them had stayed at the Premises before nine o'clock in the morning or after five o'clock in the afternoon, so none could testify that the dog was there at all hours of the day and night and slept at the Premises.

Although Tenants candidly admitted that Cookie visited them during the day two to four times per week, it was undisputed that the dog never stayed overnight or beyond an hour "really late" at night. Nor is there any evidence from other tenants, the exterminator or other individuals to the effect that Cookie's presence at the Premises some days of the week constituted a nuisance or that she "annoyed and disturbed other tenants and severely interfere with other tenants' right to comfort, safety and quiet enjoyment of the Premises" (*see 3720 Homes, Inc. v Hyman*, 30 Misc 3d at 80-81 [AT 2010]). Under these circumstances, it cannot be said that Tenants harbored the dog at the Premises other than for her visits on periodic occasions.

III.

In accordance with the foregoing, Landlord's motion to restore the matter to the calendar and for the issuance of a Judgment of Possession against Tenants, is denied and the proceeding is hereby dismissed. The foregoing constitutes the decision, order and judgment of the Court.

E N T E R:

Dated: August 24, 2015
Bronx, New York

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J.H.C.

To: Barbara Cadet, Esq.
Gutman, Mintz, Baker & Sonnenfeldt, P.C.
813 Jericho Turnpike
New Hyde Park, New York 11040

Nestor Rosado, Esq.
55 Overlook Terrace
Suite 1H
New York, New York 10033