2020-01-28

Vargas v. 112 Suffolk St. Apt. Corp.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART B

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MARIA VARGAS,

Petitioner,

Index No. HP 1465/2019

- against -

DECISION/ORDER

112 SUFFOLK ST. APT. CORP., et al.,

Respondents.

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Present: Hon. Jack Stoller
Judge, Housing Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion.

Papers	Numbered
Notice of Motion and Supplemental Affirmation and Affidavit Annexed	1, 2, 3
Notice of Cross-Motion and Supplemental Affirmation and Affidavits Annexed	4, 5, 6, 7
Affirmation In Further Support	8
Envelope and Certified Mail Documents	9, 10, 11
Affirmation and Affidavit of Respondents	12, 13

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

Maria Vargas, the petitioner in this proceeding ("Petitioner"), commenced this Housing Part proceeding ("HP proceeding") against 112 Suffolk St. Apt. Corp., the respondent in this proceeding ("Respondent"), and the Department of Housing Preservation and Development of the City of New York ("HPD"), seeking an order from the Court pursuant to New York City Civil Court Act §110 directing Respondent to correct the conditions that led to a vacate order being placed on 112 Suffolk Street, Apt. 5C, New York, New York ("the subject premises"). Respondent interposed an answer ("the Answer"). The Court calendared this matter for trial to March 4, 2020. Petitioner now moves to dismiss the defenses in the Answer and for summary

judgment. Respondent cross-moves to hold Petitioner in contempt. The Court consolidates these motions for resolution herein.

The record on this motion practice shows that no party disputes that Petitioner is 75 years old; that Petitioner has resided in the subject premises since 1984; that Petitioner is protected by the Rent Stabilization Law with a two-year lease commencing June 1, 2018 with a monthly rent of $750.98; that Respondent purchased the building in which the subject premises is located ("the Building") in 1986; that the subject premises is one of fifteen apartments in the Building; that there was a fire at the subject premises on July 24, 2019; that HPD placed a partial vacate order[1] dated August 20, 2019 on the subject premises ("the Vacate Order"); that the Vacate Order is specific to the subject premises; that the Vacate Order cites fire damage to the ceiling, walls, and floor of the subject premises, a lack of electricity at the subject premises, and broken windows of the subject premises; that HPD ordered Respondent to correct the conditions pursuant to N.Y.C. Admin. Code §27-2125(a)(2); and that Respondent has not, as of the submission of the motion, corrected the conditions.

The First Affirmative Defense of the Answer raises a personal jurisdiction defense. The pleading consists of a bare denial of receipt of service, which is insufficient to warrant a traverse hearing under normal circumstances. Benson Park Assoc. LLC v. Herman, 93 A.D.3d 609 (1st Dept. 2012), Slimani v. Citibank, N.A., 47 A.D.3d 489 (1st Dept. 2008), Omansky v. Gurland, 4 A.D.3d 104, 108 (1st Dept. 2004). Be that as it may, the record contains the envelope that

[1] HPD has the power to order any dwelling which is unfit for human habitation to be vacated. N.Y.C. Admin. Code §27-2139.

Petitioner used to mail Respondent the pleadings, and the envelope, sent to Respondent by certified mail, return receipt requested, had been returned to Petitioner marked "RETURN TO SENDER / INSUFFICIENT ADDRESS / UNABLE TO FORWARD".

A tenant commencing an HP proceeding may serve the pleadings as provided in the Housing Maintenance Code ("the Code"). New York City Civil Court Act §110(m)(1). The Code provides for service by certified mail, return receipt requested. N.Y.C. Admin. Code §27-2115(j). MDL §325(1) requires owners of multiple dwellings, like Respondent, to register an address with HPD. Petitioner addressed the envelope to Respondent, care of "Nancy Shuh" at 551 Pacific Street, Brooklyn, New York 11217,[2] the very name and address that Respondent previously registered with HPD pursuant to MDL §325(1). Petitioner's reliance on the address Respondent itself previously registered with HPD was reasonable and Respondent's use of that address on the prior registration estops Respondent from contesting the validity of service made on that address. Compare Toure v. Harrison, 6 A.D.3d 270, 271 (1st Dept. 2004).

Furthermore, the HPD records, which the Court can take judicial notice of pursuant to MDL §328(3) and which are part of the record on this motion practice, show that Respondent has not kept its registration current. Respondent cannot fail to comply with the statutory requirement to provide a valid address for notice regarding housing standards and then benefit from that failure when, as a consequence, Respondent does not receive service of a pleading in an HP proceeding. Compare Dep't of Hous. Pres. & Dev. of City of N.Y. v. Barrett, 20 Misc.3d

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[2] An exhibit annexed to Petitioner's motion papers is a photocopy of the certified mail slip which cuts off the address so that it looks like "51 Pacific Street." The submission of the copy of the envelope clarifies that Petitioner mailed the pleadings to "551 Pacific Street."

135(A)(App. Term 1st Dept. 2008), Dep't of Hous. Pres. & Dev. City of N.Y. v. 532-536 W. 143rd St. Realty Corp., 8 Misc.3d 136(A)(App. Term 1st Dept. 2005), Dep't of Hous. Pres. & Dev. of City of N.Y. v. 373 8th St. Realty, 35 Misc.3d 147(A)(App. Term 2nd Dept. 2012)(a failure to comply with the registration requirements of MDL §325 deprives a defaulting party in an HP proceeding from demonstrating the reasonable excuse needed to vacate a default judgment). See Also Matter of Mujahid v. N.Y.C. Dep't of Hous. Pres. & Dev., 2012 N.Y. Slip Op. 30322(U), ¶¶ 15-16 (S. Ct. N.Y. Co.)(an owner cannot meritoriously claim that HPD should have notified her of certain violations when she listed someone else as a managing agent). Petitioner's service of the pleadings by certified mail, return receipt requested at Respondent's most recent although outdated registered address was therefore sufficient and the Court grants Petitioner's motion to dismiss the First Affirmative Defense of the Answer.

The Second Affirmative Defense of the Answer alleges that Respondent did not receive notices of violation. This defense misapprehends the nature of a tenant-initiated HP proceeding as opposed to an HPD-initiated HP proceeding. The Code does require HPD to serve a notice of violation upon an owner, N.Y.C. Admin. Code §27-2115(b), and a failure to do so can constitute a defense to an HPD-initiated HP proceeding. D'Agostino v. Forty-Three E. Equities Corp., 12 Misc.3d 486, 489-90 (Civ. Ct. N.Y. Co. 2006), *aff'd on other grounds*, 16 Misc. 3d 59 (App. Term 1st Dept. 2007). However, a tenant "may ... apply to the [H]ousing [P]art for an order" if HPD "fail[s] to issue a notice of violation ...." N.Y.C. Admin. Code §27-2115(h)(1).[3] In a

[3] While the statute requires that HPD have thirty days to place a violation before a tenant initiates an HP proceeding, HPD has waived this requirement for all cases after February 11, 1977. Bing Chung Chan v. 60 Eldridge Corp., 129 Misc.2d 787, 788 (Civ. Ct. N.Y. Co. 1985).

tenant-initiated HP proceeding, then, HPD's putative failure to serve a notice of violation can constitute a basis for a tenant's cause of action, not a defense to the tenant-initiated proceeding, according to which HPD is a respondent as well.

While Respondent claims in the Second Affirmative Defense that the Court lacks subject matter jurisdiction, the Housing Court in fact maintains jurisdiction in an HP proceeding over repairs necessary to have a vacate order rescinded. Rivellini v. Relf, 43 Misc.3d 1202(A)(Civ. Ct. N.Y. Co. 2014), Various Tenants of 515 E. 12th St. v. 515 E. 12th St., Inc., 128 Misc.2d 235, 238 (Civ. Ct. N.Y. Co. 1985), *citing* Matter of Miller v. Notre Dame Hotel, N.Y.L.J., December 17, 1980 at 11:3 (Civ. Ct. N.Y. Co.). Accordingly, the Court grants Petitioner's motion to dismiss the Second Affirmative Defense of the Answer.

The Third, Sixth, and Seventh Affirmative Defenses of the Answer essentially blame Petitioner for causing the fire that precipitated the vacate order. The Fifth Affirmative Defense of the Answer alleges that Respondent cannot repair the subject premises because Petitioner has failed to vacate possession thereof. The Tenth Affirmative Defense of the Answer alleges that Petitioner has denied Respondent access. The few defenses to an order to correct include lack of standing or jurisdiction, completed repairs, that conditions are not code violations, that a notice of violation is facially insufficient, that the respondent is no longer the owner, and economic infeasibility. D'Agostino, supra, 12 Misc.3d at 489-90, Castillo v. Banner Grp. LLC, 63 Misc.3d 1235(A)(Civ. Ct. N.Y. Co. 2019). While the Court may consider Petitioner's role in the fire, an allegation of denial of access, and/or an allegation of a failure to cooperate with correction of conditions upon a potential motion for contempt or civil penalties, Respondent does not state a

defense to an order to correct as a matter of law. Accordingly, the Court grants Petitioner's motion to dismiss the Third, Fifth, Sixth, Seventh, and Tenth Affirmative Defenses of the Answer, without prejudice to any defenses Respondent may have to any future motion for civil penalties and/or contempt, without prejudice to any cause of action or motion Respondent may seek to bring against Petitioner on those grounds, and without prejudice to any defense and/or opposition Petitioner may have to such a defense or cause of action.

The Fourth and Ninth Affirmative Defenses of the Answer allege that Petitioner lacks standing. Ordinarily, a lawful occupant of a premises has standing to commence an HP proceeding. N.Y.C. Admin. Code §27-2115(h)(1). Respondent does not dispute that Petitioner is a rent-stabilized tenant of the subject premises with a lease in effect as of this writing, a status moreover entitling her to lease renewals. N.Y.C. Admin. Code §26-511(c)(4), 9 N.Y.C.R.R. §2523.5(a). As a matter of law, the Vacate Order, in and of itself, did not terminate Petitioner's tenancy. Eyedent v. Vickers Management, 150 A.D.2d 202, 204 (1st Dept. 1989), *citing* Matter of Department of Bldgs. (Philco Realty Corp.), 14 N.Y.2d 291, 302 n.2 (1964), Garber v. Egger, 132 N.Y.S.2d 371 (App. Term 1st Dept. 1954).

Respondent argues that the fire destroyed the subject premises such that there is no longer any subject premises for Petitioner to be a tenant of, thus effectively terminating Petitioner's tenancy. Respondent's CEO and the president of a contractor that Respondent retained both aver in opposition to Petitioner's motion that smoke damage, water damage, and mold in the subject premises require the removal and replacement of all ceilings, walls, floors, and what they call "attachments" therein. For the purposes of this motion, the Court assumes the truth of these

factual allegations. In re Liquidation of Ideal Mut. Ins. Co., 140 A.D.2d 62, 67 (1st Dept. 1988), Vigna v. Galeano, 18 Misc.3d 1121(A)(Civ. Ct. N.Y. Co. 2008).

Respondent relies upon the proposition that when a fire damages a "building" to the extent that an owner has "no real choice but to demolish it," a prior tenancy in such a building ceases to exist. Quiles v. Term Equities, 22 A.D.3d 417, 421 (1st Dept. 2005). Similarly, when a fire reduces a "building" to an "empty shell," with no windows, collapsed floor joists and stairwells, and an absence of a boiler, copper piping, or other functioning systems, such a fire effectuates an "effective demoli[tion]" of that building that operates to terminate the tenancies that had been there. Gregoretti v. 92 Morningside Ave. LLC, 166 A.D.3d 466, 466 (1st Dept. 2018). However, assuming *arguendo* the truth of Respondent's factual assertions, Respondent does not address the fact that the subject premises is only one of fifteen apartments in the Building. Respondent does not allege that the Building is an "empty shell" without functioning systems. The Vacate Order does not apply to other apartments in the Building, compelling the conclusion that other apartments in the Building are fit for occupancy.

If whatever existed in the same place as the subject premises after repairs was a "new" apartment, Respondent would have a colorable argument. However, Petitioner is protected by the Rent Stabilization Law. To show the birth of a "new" unregulated apartment in the same location as a prior rent-stabilized apartment, an owner must show a substantial move and change of the perimeter walls to the extent that the previous apartment essentially ceases to exist, such as when an owner converts a single two-bedroom apartment into two studio apartments, or, conversely, two smaller units into a single larger unit. Devlin v. New York State Div. of Hous.

& Cmty. Renewal, 309 A.D.2d 191, 194 (1st Dept. 2003), *leave to appeal denied*, 2 N.Y.3d 705 (2004), 325 Melrose, LLC v. Bloemendall, 65 Misc.3d 43, 46 (App. Term. 2nd Dept. 2019). Similarly, an extension of an apartment into new construction on a rooftop reconfigures an apartment to the extent of rendering it "new." Dixon v. 105 W. 75th St. LLC, 148 A.D.3d 623, 626 (1st Dept. 2017). Notably, Respondent does not allege that the dimensions of whatever would exist in the same place as the subject premises after repairs would be any different from the subject premises nor that its use would be for a purpose other than a residential apartment.

As noted above, Petitioner moves in the alternative for summary judgment. In opposition to the motion, Respondent must lay bare and reveal its proofs in order to show real issues of fact that it is capable of establishing at trial. Rodriguez v. City of N.Y., 142 A.D.3d 778, 788 (1st Dept. 2016). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment. Justinian Capital SPC v. WestLB AG, N.Y. Branch, 28 N.Y.3d 160, 168 (2016). If all that Respondent can offer is that the subject premises requires a replacement of walls, floors, ceiling, and attachments, Respondent does not show that the Building would undergo a "demolition" of the scale necessary to effectively terminate Petitioner's tenancy, nor does Respondent show that a "new" apartment will replace the subject premises. Summary judgment does not deny the parties a trial, it merely ascertains that there is nothing to try. Suffolk County Dept. of Social Servs. ex rel. Michael V. v. James M., 83 N.Y.2d 178, 182 (1994). Assuming the truth of Respondent's factual submissions, Respondent simply does not demonstrate an extent of repairs necessary to outweigh the endurance of a rent-stabilized tenancy during a vacate order. Farrell v. E.G.A. Assocs., Inc., 9 Misc.3d 1118(A)

(Civ. Ct. N.Y. Co. 2005), *citing* Carrasquillo v. 197 Columbia Realty Corp., N.Y.L.J., Dec. 2, 1992, at 25:2 (Civ. Ct. Kings Co.).

Respondent also argues that Petitioner's tenancy terminated by operation of the objectionable conduct Respondent alleges. However, Respondent may only terminate Petitioner's rent-stabilized tenancy on such a ground upon service of an appropriate notice. See 9 N.Y.C.R.R. §2524 *et seq*. Respondent, of course, would then have to commence a holdover proceeding against Petitioner and then obtain a final judgment against her ratifying its termination of her tenancy in order to obtain possession of the subject premises from her. Be that as it may, even the issuance of a warrant of eviction against a tenant pursuant to such a possessory judgment does not deprive the tenant of standing to commence and prosecute an HP proceeding against that tenant's landlord. Cruz v. Square Block Assoc., Inc., 29 Misc.3d 1207(A)(Civ. Ct. N.Y. Co. 2010), *citing* Shapiro v. Townan Realty Co., 162 Misc.2d 630, 632 (Civ. Ct. N.Y. Co. 1994). Respondent does not show any proof of any such cloud on Petitioner's lease and rent-stabilized status. Accordingly, the Court grants Petitioner's motion to dismiss the Fourth and Ninth Affirmative Defenses of the Answer.

The Eighth Affirmative Defense of the Answer pleads the defense of economic infeasibility. Respondent, in opposition to Petitioner's motion to dismiss this defense, presents evidence that it obtained an estimate of $520,230.97 to correct the conditions and that Respondent will only receive $382,000.00 from insurance to correct the conditions. Respondent also posits that, at a legally-stabilized rent of $750.98, Respondent could not expect the recoup the cost of restoring the subject premises to habitability on any reasonable time horizon. For the

purposes of this motion, the Court assumes the truth of Respondent's factual allegations. Vigna, supra, 18 Misc.3d at 1121(A).

The Housing Maintenance Code does not provide a defense of economic infeasibility. The defense has arisen from case law as an exercise of equitable discretion. 153-155 Essex St. Tenants Ass'n v. Kahan, 4 Misc.3d 1008(A)(Civ. Ct. N. Y. Co. 2004). An owner states such a defense if it can prove that the cost to repair a building exceeds its value after the repairs. Id., Hous. & Dev. Admin. v. Johan Realty Co., 93 Misc.2d 698, 703 (App. Term 1st Dept. 1978), Farrell v. E.G.A. Assocs., Inc., 9 Misc.3d 1118(A)(Civ. Ct. N.Y. Co. 2005).[4]

Respondent focuses on the subject premises itself rather than the Building. However, the relevant authority addresses an economic infeasibility defense with reference to the value of a "building," not an individual apartment in a building. For example, a landlord fails to support an economic infeasibility defense when the record does not contain proof of the current value of a "premises," the premises being defined as an entire building. Eyedent, supra, 150 A.D.2d at 205.[5] Similarly, in evaluating an economic infeasibility defense, the Court looks to factors such as the actual or assessed value of the premises, current offers for the property, the tax assessment of the building, and the financial operating statement of the premises, including the rent roll,

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[4] Respondent, as well as various authorities cited here, cite Bernard v. Scharf, 246 A.D.2d 171 (1st Dept. 1998) in support of this proposition. However, the Court of Appeals reversed and remitted the matter for dismissal on the grounds of mootness, Bernard v. Scharf, 93 N.Y.2d 842 (1999), which has the effect of depriving the decision of precedential value. Hearst Corp. v. Clyne, 50 N.Y.2d 707, 718 (1980).

[5] This decision identified "premises" as "residential premises (premises) ... consist[ing] of two adjacent buildings[] contain[ing] 20 apartments." Eyedent, supra, 150 A.D.2d at 202.

Farrell, supra, 9 Misc.3d at 1118(A), Gonzalez v. Navarro, N.Y.L.J., August 10, 1994, at 25:2 (Civ. Ct. Kings Co.), measures which do not apply to an individual rental unit as opposed to a building as a whole.

Jurisprudence concerning the "Takings" Clause of the Fifth Amendment[6] informs the Court's determination as to an appropriate baseline to apply to an economic infeasibility defense, especially given the role the Takings Clause plays in the development of the defense, Bernard, supra, 246 A.D.2d at 176,[7] and Respondent's own citation of the Takings Clause. The test to determine whether a governmental action effectuates a taking entails a comparison between the value that has been taken from the property with the value that remains in the property. Murr v. Wisconsin, 137 S. Ct. 1933, 1943-44 (2017). The "property" in such an analysis means the property "as a whole," Matter of Stahl York Ave. Co., LLC v. City of N.Y., 162 A.D.3d 103, 113 (1st Dept. 2018), *citing* Penn Central Transp. Co. v. New York City, 98 S. Ct. 2646, 2662 (1978), Darbonne v. Goldberger, 31 A.D.3d 693, 695 (2nd Dept. 2006), Jamaica Recycling Corp. v. City of New York, 2006 N.Y.L.J. LEXIS 432, *32 (Civ. Ct. N.Y. Co.)(Richter, J.), rather than on "discrete segments of the property." Matter of City of N.Y. (South Richmond Bluebelt, Phase 3—594 Assoc. Inc.), 60 Misc.3d 232, 237 (S. Ct. Richmond Co. 2018). After all, a regulatory burden on one part of the property does not leave the property economically idle if the owner retains an ability to engage in development or business on some other part of the property.

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[6] "[N]or shall private property be taken for public use, without just compensation...." U.S. Constitution, Amendment V.

[7] But See footnote 4.

Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2465 (2001). See, e.g., Matter of Stahl York Ave. Co., LLC, supra, 162 A.D.3d at 115 (a prohibition of demolition of landmarked property does not effectuate a taking given that the owner may still rent units in the extant property). The appropriate measure of "property" for this purpose can even encompass two adjoining parcels of property. Murr, supra, 137 S. Ct. at 1938.[8]

Respondent purchased this fifteen-unit rent-stabilized multiple dwelling in 1986, after Petitioner's rent-stabilized tenancy had commenced, not one unit of the Building at a time. A multiple dwelling like the Building generates building-wide rental income and incurs building-wide operations and maintenance costs. The appropriate measure of an economic infeasibility defense is not the income-generating potential of one apartment as against that one apartment's operational or maintenance cost, but the value of the entire property against the cost of repairs.

As noted above, on this summary judgment motion, Respondent must lay bare and reveal its proofs in order to show real issues of fact that it is capable of establishing at trial. Rodriguez, supra, 142 A.D.3d at 788. Respondent only interposed fact issues as to the subject premises itself, rather than the Building. As Respondent made no allegations comparing the cost of lifting the Vacate Order against the value of the Building, Respondent did not make a showing

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[8] Even the dissent in Murr, supra, does not support Respondent's position that one apartment in a fifteen-unit building is the appropriate measure against which a governmental action burdens a property owner, finding that boundaries of distinct units of land should "determine the parcel at issue." Murr, supra, 137 S. Ct. at 1953 (Roberts, J., dissenting). The "parcel" at issue herein is the block and lot the Building is located on, not the subject premises itself.

sufficient to defeat Petitioner's summary judgment motion. Belle Lighting LLC v. Artisan Constr. Partners LLC, 2019 N.Y. Slip Op. 09359, ¶ 1 (App. Div. 1st Dept.).

Lastly, Respondent's averment about an insufficient insurance recovery is irrelevant as a matter of law. Bing Chung Chan, supra, 129 Misc.2d at 791. "Respondent's unilateral decision on the amount of insurance it chose to carry cannot determine the required scope of repairs. Any other conclusion encourages underinsurance." Id. Accordingly, the Court grants Petitioner's motion to dismiss the Eighth Affirmative Defense of the Answer.

The Eleventh Affirmative Defense of the Answer denies that Respondent harassed Petitioner. The four corners of the petition do not contain the word "harassment," which is a distinct cause of action tenants have against landlords pursuant to N.Y.C. Admin. Code §27-2005(d). Otherwise refraining from harassing a tenant is not a cognizable defense to an HP proceeding. D'Agostino, supra, 12 Misc.3d at 489-90, Castillo, supra, 63 Misc.3d at 1235(A). Accordingly, the Court grants the motion to dismiss the Eleventh Affirmative Defense of the Answer, without prejudice to Respondent's defenses to any harassment petition Petitioner may ever file against Respondent.

As the Court has dismissed all of Respondent's defenses in the Answer, as Petitioner has moved for summary judgment, as no party disputes the existence of the Vacate Order, as Petitioner is a tenant of the subject premises, as Respondent is the owner of the subject premises, and as the Court has the jurisdiction pursuant to New York City Civil Court Act §110 to entertain Petitioner's cause of action, Rivellini, supra, 43 Misc.3d at 1202(A), Various Tenants of 515 E. 12th St., supra, 128 Misc.2d at 238, the Court enters into an order to correct, to wit, by directing

Respondent to correct conditions necessary so as to lift the Vacate Order on or before March 31, 2020. On default of this order, any party may move for any appropriate relief. As stated above, this order is without prejudice to any defenses of Respondent to such a motion, without prejudice any cause of action Respondent has against Petitioner, without prejudice to any motion of Respondent to extend the time to comply with this order, which may be granted upon good cause shown, and without prejudice to any opposition or defense to any such motion of Respondent. The Court strikes this matter from the trial calendar on March 4, 2020 and no party need appear on that day.

As Petitioner has obtained an order to correct by this order, the ultimate relief in an HP proceeding, N.Y.C. Admin. Code §27-2115(h)(I), Petitioner is the prevailing party in this litigation. The Court therefore grants Petitioner's motion to dismiss the First Counterclaim of the Answer seeking a judgment in Respondent's legal fees. 542 E. 14th St. LLC v. Lee, 66 A.D.3d 18, 24-25 (1st Dept. 2009), Sykes v. RFD Third Ave. I Assoc., LLC, 39 A.D.3d 279 (1st Dept. 2007), Board of Managers of 55 Walker Street Condominium v. Walker Street LLC, 6 A.D.3d 279, 280 (1st Dept. 2004).

Respondent cross-moves for contempt against Petitioner. As a threshold matter, Petitioner opposes the motion on the ground that Respondent served Petitioner with the motion on less than ten days' notice. Judiciary Law §756 requires service of such a motion on at least ten days' notice but no more than thirty days' notice except if otherwise ordered by the Court or in accordance with CPLR §5250. While the Court draws the inference that Respondent served its motion on the time frame it did because Respondent moved for contempt by notice of

cross-motion, where a law expressly describes a particular thing to which it shall apply, the Court must draw an "irrefutable inference" that the Legislature intended to omit or exclude what the Legislature omitted or excluded. Myers v. Schneiderman, 30 N.Y.3d 1, 12 (2017), Matter of Shannon, 25 N.Y.3d 345, 352 (2015), Matter of Raynor v. Landmark Chrysler, 18 N.Y.3d 48, 56 (2011), Town of Riverhead v. N.Y. State Bd. of Real Prop. Servs., 5 N.Y.3d 36, 42-43 (2005). As the drafters of the Judiciary Law §756 created an exception to the time for service with reference to CPLR §5250 and not CPLR §2215, the provision to which cross-motions apply, the Court must construe the omission to be intentional. The Court therefore denies Respondent's motion for contempt. As a determination on defective service does not reach the merits of the motion, See Wynn v. Sec. Mut. Ins. Co., 12 A.D.3d 1100 (4th Dept. 2004), Sumar v. Fox, 2010 N.Y. Misc. LEXIS 2307 (S. Ct. N.Y. Co. 2010), *aff'd*, 90 A.D.3d 577 (1st Dept. 2011), the Court denies the motion without prejudice, Komolov v. Segal, 96 A.D.3d 513 (1st Dept. 2012), if the facts warrant another such motion. The Court re-affirms its order of November 14, 2019, directing Petitioner not to occupy in the subject premises while the Vacate Order is in place. Accordingly, it is

ORDERED, that the Court dismisses all of the defenses and the counterclaim contained in Respondent's Answer, and it is further

ORDERED, that the Court directs Respondent to correct the conditions that caused HPD to place the Vacate Order on the subject premises on or before March 31, 2020, subject to the conditions set forth in the decision, and it is further

ORDERED, that the Court strikes this matter from the trial calendar, and it is further

ORDERED that the Court denies Respondent's motion to hold Petitioner in contempt, subject to the conditions set forth in the decision.

This constitutes the decision and order of this Court.

Dated: New York, New York
January 28, 2020

HON. JACK STOLLER
J.H.C.