2020-02-18

BPE REALTY OWNER LLC v. GARRICK

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART F

x

BPE REALTY OWNER LLC & BPE II LLC
& BPE BARKER LLC,

Petitioner-Landlord,

-against-

DIONNA GARRICK,

Respondent-Tenant.

x

L&T Index No. 045677/2019

DECISION/ORDER

MOTION SEQUENCE 1

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of this motion.

Papers Numbered

Notice of Motion [With Affirmation & Exhibits A-I] 1

Affirmation in Opposition [With Affidavit, Affirmation & Exhibits A-F] 2

Reply Affirmation in Support [With Exhibits A-D] 3

After oral argument held on February 6, 2020, and upon the foregoing cited papers, the decision and order on this motion is as follows:

FACTUAL AND PROCEDURAL HISTORY

BPE Realty Owner LLC & BPE II LLC & BPE Barker LLC, ("petitioner"), commenced this summary non-payment proceeding alleging Dionna Garrick ("respondent"), owed $12,900.00 in rental arrears through October 2019.[1] The matter first appeared on calendar on November 6, 2019 and respondent obtained her attorney through the Universal Access to Counsel program, ("UAC"). The proceeding was adjourned first for trial or settlement, to December 5, 2019, and subsequently for trial, to December 20, 2019. Respondent interposed a motion for leave to serve and file an amended answer and for pre-trial discovery returnable on the trial date. As a result, the proceeding was adjourned to February 6, 2020 for motion practice and oral argument.

[1] See non-payment petition.

Respondent's counsel, without an affidavit from respondent, argues she should be allowed to amend her answer as she was not aware of her defenses prior to retaining counsel. Respondent also argues that there is no prejudice to petitioner, and that she has meritorious defenses and counterclaims, including improper rent demand due to charging more than the allowable rent, inability to collect rent increases until proper registrations are filed due to failure to register the subject premises with the Division of Housing and Community Renewal ("DHCR") from 1984 through 2011, a rent overcharge, breach of the warranty of habitability, and attorneys' fees.

Petitioner opposes the motion arguing that the proposed defenses and counterclaims are without merit and/or prejudicial, that respondent failed to show ample need for discovery and that the proposed discovery is too broad and not narrowly tailored.

DISCUSSION

Motion to Amend Answer

CPLR 3025(b) provides that leave to amend a pleading shall be freely given upon such terms as may be just. (*Norwood v City of New York*, 203 AD2d 147, 148-149, 610 NYS2d 249 [1st Dept 1994]). Amendment can be at any time, especially where there is not significant prejudice to the opposing party. (*National Union Fire Ins. Co. v Schwartz*, 209 AD2d 289, 290, 619 NYS2d 542 [1st Dept 1994]). Further, the proposed amended answer contains meritorious defenses (*Thomas Crimmins Contracting Co. v New York*, 74 NY2d 166, 170, 544 NYS2d 580 [1989]), including improper rent demand, inability to collect rent increases, overcharge and breach of the warranty of habitability.[2]

Petitioner argues that the proposed defenses are meritless. While proposed defenses which "plainly lack merit" should be denied, (*Thomas Crimmins Contracting Co.*, 74 NY2d at 170), at least some of the proposed amendments are, in fact, potentially meritorious. (*see Goldman v City of New York*, 287 AD2d 482, 483, 731 NYS2d 212 [2nd Dept 2001]).

The court finds that respondent's rent-related defenses of improper rent demand seeking more than the allowable rent, improper petition and inability to collect rent increases due to missing and/or improper DHCR registrations and rent overcharge all have merit.

[2] See Amended Answer attached to motion as Exhibit H.

Respondent argues that petitioner has been charging her an incorrect rent and charging her more than the allowable legal regulated rent since she moved into the subject premises in August 2018 with an initial legal regulated rent of $2,762.69 and a preferential rent of $2,150.00.[3] Respondent's claim is based upon the apartment registration history with DHCR, which shows that the legal rent for the subject premises increased by over 67% between the 2018 and 2019 registrations, from $1,646.65 to $2,762.69.[4]

Respondent's claim is also based upon the fact that the apartment registration history shows that the subject premises were not registered with DHCR from 1984 through 2011, a period of 27 years, and was *first* registered in 2012 with a legal regulated rent of $1,345.61.[5] The court also notes that the 2012 registration was pursuant to a lease renewal, *not* a vacancy lease, which would imply that there was at least one prior lease not registered with DHCR.

Petitioner provides no explanation for the failure to register the subject premises from 1984 through 2011 and, in fact, concedes in paragraph 52 of its opposition papers that the DHCR rent registration for the subject premises annexed to respondent's motion is "[a] true copy."

Consequently, there is no dispute that the rent increased by over 67% between the 2018 and 2019 DHCR registrations.[6]

The 2019 Housing Stability and Tenant Protection Act, ("2019 HSTPA"), while limiting rent overcharge damages [including treble damages] to six years, does not provide any temporal limitations on this court in determining the legal regulated rent *or* in investigating overcharge complaints.

Indeed, Part F § 5 of the 2019 HSTPA amended RSL § 26-516 as follows:

> "h. The division of housing and community renewal and the courts, in *investigating complaints of overcharge* and *in determining legal regulated rents, shall consider all available rent history which is reasonably necessary to make such determinations*, including but not limited to (i) any rent registration or other records filed with the state division of housing and community renewal, or any other state, municipal or federal agency, regardless of the date to which the information on such registration refers; (ii) any order issued by any state, municipal or federal agency; (iii) any records maintained by the owner or tenants;

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[3] See Exhibit A to motion and exhibit D to opposition.

[4] See Exhibits F & H to motion. The court notes that although respondent argues that the subject premises were not registered properly for 2018-2019, petitioner attaches a copy of the 2019 registration for the subject premises showing the proper 1-year lease term from August 15, 2018 through August 14, 2019 with a legal regulated rent of $2,762.69 and a preferential rent of $2,150.00. See Exhibit F to opposition.

[5] See Exhibits F & H to motion.

[6] See exhibits F & H to motion and exhibit F to opposition.

and (iv) any public record kept in the regular course of business by any state, municipal or federal agency. *Nothing contained in this paragraph shall limit the examination of rent history relevant to a determination as to*:

(i) whether the legality of a rental amount charged or registered is reliable in light of all available evidence including, but not limited to, whether an unexplained increase in the registered or lease rents, or a fraudulent scheme to destabilize the housing accommodation, rendered such rent or registration unreliable;

.....

(iv) whether an overcharge was or was not willful;

.....

(vi) the existence or terms and conditions of a preferential rent, or the propriety of a legal registered rent during a period when the tenants were charged a preferential rent;
(vii) the legality of a rent charged or registered immediately prior to the registration of a preferential rent; or

.....

[emphasis added].

This significant change to the law means that a mere "unexplained" increase in rent, like the over 67% increase here from $1,646.65 to $2,762.69 in 2018, can give rise to an overcharge claim.[7]

The HSTPA also allows an examination into whether the rent registered with DHCR for the first time was proper. This is especially true here, where the subject premises were unregistered for decades so that the initial rent is not inherently reliable, where the initial registered rent was the only legal rent registered "immediately prior" to the registration of a preferential rent given to all tenants to date, and where the propriety of the legal rent to date is called into question by the continuous charging of a preferential rent. [8]

Part F, § 7 of the 2019 HSTPA further states, "[t]his act shall take effect immediately and shall apply to any claims pending or filed on the after such date." As such, the act applies to this case so that respondent's rent related defenses, affirmative defenses and counterclaims, all sounding in overcharge and improper registration, are potentially meritorious.

The breach of the warranty of habitability claim also has merit. While petitioner alleges that respondent has already preserved this claim in her *pro se* answer, the court sees no reason

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[7] Compare, *Grimm v State Div. of Hous. & Community Renewal*, 15 NY3d 358, 367 [2010] ("a mere allegation of fraud alone, without more, will not be sufficient to require DHCR to inquire further"); *Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 [2014] (significant rent increase alone was insufficient indicia of a fraudulent scheme).

[8] See Exhibit F to motion.

she should not be allowed to *amend* her claim by including the alleged conditions and providing supplemental details and factual allegations to a claim that respondent herself has already asserted.

As to the arguments that respondent does not show proof of notice to petitioner or reasonable opportunity to cure, that the alleged conditions are violations of record, that petitioner failed or refused to make repairs, or that the alleged conditions affect the livability of the subject premises and are not merely *de minimis* conditions, these are issues for trial which may provide petitioner with a defense to respondent's counterclaim and demand for an abatement, but do not affect the merit of respondent's claim.

In any case, the court notes that respondent need not prove her claim at this time. The existence of violations, for instance, may be proved by DHPD or inspection reports; DHPD or other governmental computerized records; photographs; or through testimony. (Scherer and Fisher, *Residential Landlord-Tenant Law in New York § 19:65* [2018 Update]; *See Mite v Pipedreams Realty*, 190 Misc. 2d 543, 740 NYS2d 564 [Civ Ct, Bronx County 2002]).

As to respondent's counterclaim for attorneys' fees, the court notes that not only does the petition seek attorneys' fees costs and disbursements,[9] but petitioner attaches the initial lease which contains an attorney's fees clause allowing either party to seek legal fees. [10] As such, respondent's counterclaim for legal fees does not "plainly lack merit." As it is settled law that only the prevailing party may collect legal fees, (*Nestor v McDowell*, 81 NY2d 410, 415, 599 NYS2d 507 [1993]), respondent's counterclaim is simply a reservation of a claim she may have under the parties' lease.

Finally, the court cannot credit petitioner's boilerplate claims of prejudice. Prejudice in this context is shown where the nonmoving party is "hindered in the preparation of his case or has been prevented from taking some measure in support of his position." (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23, 444 NYS2d 571 [1981]; *Jacobson v McNeil Consumer & Specialty Pharmaceuticals*, 68 AD3d 652, 654-655, 891 NYS2d 387 [1st Dept 2009] (prejudice does not occur simply because a defendant is exposed to greater liability or because a defendant has to expend additional time preparing its case) [internal citations omitted]). Petitioner's non-specific allegations of prejudice are unsupported.

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[9] See Petition "wherefore" clause.
[10] See Paragraph 20 of the lease (exhibit D to opposition).

Motion for Discovery

The availability of discovery in summary holdover proceedings is well established, and courts have consistently held that discovery is not "inherently hostile" to the nature of a summary proceeding. (*see New York Univ. v Farkas*, 121 Misc. 2d 643, 645, 468 NYS 2d 808 [Civ Ct, New York County 1983] *quoting 42 West 15th Street Corp. v Friedman*, 208 Misc. 123, 125, 143 NYS2d 159 [App Term, 1st Dept 1955]).

Leave to conduct discovery in a summary proceeding may be granted by leave of court pursuant to CPLR §408 where "ample need" is shown by the party requesting disclosure. (*see New York Univ. v Farkas*, 121 Misc. 2d at 646; *Mautner-Glick Corp. v. Higgins*, 64 Misc. 3d 16, 18 [App Term, 1st Dept 2019]). Courts will consider the following factors in determining whether the "ample need" standard is met:

> "In determining whether ample need has been established, courts consider a number of factors, not all of which need to be present in every case, including whether the party seeking discovery has asserted facts to establish a claim or defense; whether there is a need to determine information directly related to the claim or defense; whether the requested disclosure is carefully tailored and likely to clarify the disputed facts; whether prejudice will result from granting leave to conduct discovery; whether any prejudice caused by granting a discovery request can be diminished by an order fashioned by the court for that purpose; and whether the court, in its supervisory role, can structure discovery so that pro se tenants in particular will be protected."

(*Mautner-Glick Corp. v Higgins*, 64 Misc. 3d at 18-19, citing *New York Univ. v Farkas*, 121 Misc. 2d at 647).[11]

Here, there is no dispute that the subject premises were not registered with DHCR from 1984 through 2011 and that there is no explanation for the failure to register or for how the first registered rent was calculated. It is also undisputed that the DHCR rent registration attached by respondent is correct. [12]

Furthermore, there is no dispute that the legal rent for the subject premises increased by over 67% between the 2018 and 2019 DHCR registrations.[13]

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[11] *See 699 Venture Corp. v Zuniga*, 64 Misc. 3d 847, 854, 105 NYS3d 806 [Civ Ct, Bronx County 2019] (" Notwithstanding the factors set forth in Farkas, the language of the Act in and of itself justifies the discovery sought by Respondent"). *See also Widsam Realty Corp. v Joyner*, 66 Misc. 3d 132[A], 2019 NY Slip Op 52097[U] [App Term, 1st Dept 2019]).

[12] See Par. 52 of opposition.

[13] See exhibits F & H to motion and exhibit F to opposition.

Petitioner alleges that individual apartment improvements ("IAIs") justify and explain this approximately 67% increase, but provides no explanation for the failure to register the subject premises from 1984 to 2011, for how the first registered rent was calculated or why the first registered rent was pursuant to a renewal lease rather than an initial lease. However, petitioner maintains that respondent cannot challenge the failure to register the rents or seek discovery going back to 1984 and further alleges that its explanation as to the IAIs more than justify the large increase in rent from 2018 to 2019.

The HSTPA allows the respondent to challenge the first registered rent and determine whether such rent is reliable, especially given the lack of explanation from petitioner and the fact that a preferential rent was provided to tenants nearly the entire time the subject premises *were* registered, giving tenants no incentive to earlier challenge the purported "legal" rents. Additionally, petitioner's own self-serving explanation as to the substantial rent increase from 2018 and 2019 is certainly not decisive and does not preclude respondent from seeking discovery to determine *whether petitioner's claims are correct.*

Respondent's challenge to the failure to register the rents, the reliability of the initial registered rent and the over 67% rent increase is proper under the HSTPA. The HSTPA, while limiting rent overcharge damages [including treble damages] to six years, does not have any temporal limitations when determining the legal regulated rent, in investigating overcharge complaints, determining the propriety of legal registered rents during a period when tenants were charged preferential rents, or in determining the legality of a rent charged or registered immediately prior to the registration of a preferential rent.

Most importantly, the change to the law imposes no time limit on either how far back DHCR and courts can look to determine whether an overcharge has occurred or whether the rents charged or registered are proper and reliable.

Similarly, Part F § 6 of the 2019 HSTPA amended CPLR § 213-a which originally imposed a four-year statute of limitations for commencing an overcharge, for awarding damages on an overcharge, and for examining rental records to determine if an overcharge occurred.

Part F § 6 of the 2019 HSTPA amended CPLR § 213-a to read as follows: "No overcharge penalties or damages may be awarded for a period more than six years before the action is commenced or complaint is filed, *however, an overcharge claim may be filed at any time*, and the calculation and determination of the legal rent and the amount of the overcharge

shall be made in accordance with provisions of law governing the determination and calculation of overcharges." [emphasis added].

Thus, the statute of limitations for commencing an overcharge complaint was eliminated in its entirety so that an overcharge complaint "may be filed at any time."

Finally, the new CPLR § 213-a also eliminated in its entirety the provision prohibiting courts and DHCR from examining the rental history more than four years prior. In fact, the amended CPLR § 213-a in conjunction with the amended RSL § 26-516 makes it clear that courts and DHCR shall "consider all available rent history" necessary to determine the legal rent and any overcharge that may have occurred.

Here, it is clear that respondent has shown ample need for certain discovery where this court has already held that respondent's rent related defenses and claims, including the overcharge and failure to register claims, have merit.

Respondent has demonstrated ample need for disclosure going back to 1984 because she has identified and asserted facts, i.e., an unexplained failure to register, an unreliable initial registered rent and an unexplained increase in rent resulting in consistently unreliable registrations, to establish her rent-related claims and defenses, including overcharge and improper registration. Additional information is necessary and directly related to these claims and defenses. (*see 699 Venture Corp. v Zuniga*, 64 Misc. 3d 847, 854-855, 105 NYS3d 806 [Civ Ct, Bronx County 2019]).

Additionally, there is no dispute that respondent herein was charged a lower preferential rent from the commencement of her tenancy to date, as were all tenants since 2013, the year after the subject premises were first registered with DHCR. Whether there has been an overcharge is uncertain. The lower rents, however, further justify discovery. With the lower rents, respondent had no incentive to earlier challenge the purported "legal" rents and/or deregulation. (*see 560-568 Audubon Realty Inc. v Rodriguez*, 54 Misc. 3d 1226[A], 2017 NY Slip Op 50323[U] [Civ Ct, New York County 2017]; *also see* DHCR Fact Sheet #40, revised 1/14—in effect prior to the 9/19 revision; *656 Realty LLC v Cabrera*, 27 Misc. 3d 1225[A], 2009 NY Slip Op 52767[U] [Civ Ct, New York County 2009]).

The first document demand, seeking all leases from 1984 to the present, including all of respondent's lease and all documents executed in connection therewith, is granted in part and denied in part. Petitioner is directed to produce any leases from 1984 to the present, to the extent

petitioner has same in its possession, custody or control. If no such documents exist, petitioner is to provide an affidavit so stating.

However, the demand for production of respondent's lease documents is denied as she offers no explanation why such documents sought should be discoverable when respondent has, or should have, copies of all such documents within her possession or control and therefore these documents are not solely within petitioner's custody, possession and/or control. (*see City of New York v 330 Continental LLC*, 2019 NY Slip Op 31532 [U], 2010 WL 2572598 [Sup Ct, New York County 2010], *citing Cornex Inc. v Carisbrook Indus., Inc.*, 161 AD2d 376, 555 NYS2d 322 [1st Dept 1990]; *Roger Morris Apt. Corp. v Varela*, 51 Misc. 3d 1220[A], *7, 41 NYS3d 452 [Civ Ct, New York County 2016] ("parties do not evince sufficient need in order to obtain such leave when their adversaries do not have exclusive knowledge of the matter at hand or where the parties seeking discovery are themselves the ones with the knowledge of the matter")).

Respondent's second demand, seeking all original and amended rent registrations from 1984 to the present, along with all documents underlying said registrations, is also granted in part and denied in part. Petitioner is directed to produce any rent registrations and underlying documents *for the subject premises only* from 1984 to date, to the extent petitioner has same in its possession, custody or control. If no such documents exist, petitioner is to provide an affidavit so stating.

The portion of respondent's demand seeking "all documents underlying these registrations" is denied. (*see 1234 Broadway LLC v Jing Yong Xu*, 10 Misc. 3d 655, 658, 809 NYS2d 825 [Civ Ct, New York County 2005] ("This request does not sufficiently specify the items sought with reasonable particularity, and as the burden of specificity is on the [party seeking discovery] said request is stricken.")).

In *New York v M. Paul Friedberg & Assoc.*, the Appellate Division, First Department undertook an extensive analysis of discovery principles, and the consequences of failure to seek discovery which is specific and narrowly tailored:

> The principle has general application and requires that a discovery notice properly designate the documents and records to be produced with required specificity. Time and again, when confronted with a discovery notice which failed specifically to designate the records and documents to be produced, this court has vacated such notice as palpably improper, relegating the party to the appropriate deposition procedure in advance of discovery announced in *Rios*. (*Wood v Sardi's Rest. Corp.*, 47 AD2d 870, 871.) Very recently in *King v Morris* (57 AD2d 530)

> this court again observed, also in reliance upon *Rios*, that "lacking knowledge of the existence of specific documents, the party seeking discovery and inspection pursuant to CPLR 3120, should initially make proper use of the deposition and related procedures provided for in the CPLR in order to ascertain the existence of such documents in order that they may be designated with specificity in a CPLR 3120 notice." No reason appears why we should now erode the *Rios* doctrine by sustaining as sufficient a notice to produce which so palpably lacks any semblance of reasonable specificity or particularity.

62 AD2d 407, 409-410, 404 NYS2d 868 [1st Dept 1978]).

This portion of respondent's second demand is vague and overbroad and is not narrowly tailored. Respondent's vague discovery demand gives no indication of what documents she actually seeks, and it is clear that respondent cannot identify such items with particularity or whether such documents exist.

Respondent's third discovery demand, seeking production of rent records showing the rents charged or paid for the subject premises from 1984 to the present, essentially a rent history for the subject premises, is granted to the extent petitioner has same in its possession, custody or control. If no such documents exist, petitioner is to provide an affidavit so stating.

Respondent's fourth discovery demand, seeking all documents concerning rent increases for the subject premises from 2018 to the present, including IAIs and other increases, is granted to the extent petitioner has same in its possession, custody or control. If no such documents exist, petitioner is to provide an affidavit so stating. [14]

Respondent's last discovery demand, seeking "any and all documents concerning the length(s) of any tenancy in effect from 1984 to present" is denied as vague, overbroad, not narrowly tailored and lacking any particularity. As such, this demand is patently improper. (*see New York v M. Paul Friedberg & Assoc.*, 62 AD2d at 409-410;; *Kantor v Kaye*, 114 AD2d 782, 782, 495 NYS2d 42 [1st Dept 1985]; *WM Wellington, LLC v Grafstein Diamond, Inc.*, 22 Misc.3d 1123[A], *7-8, 880 NYS2d 228 [Civ Ct, New York County 2009] ("a demand for the production of documents must specify the items sought with 'reasonable particularity,' and the burden of specificity is on the requesting party … the utilization of the language 'any and all,' which is the case here, is an indication of a lack of the requisite specificity. To the extent that the

[14] The court notes that petitioner has already provided a several documents in support of its claim to IAIs for the subject premises. See Exhibit E to opposition. If additional documents exist, petitioner is directed to produce same. Petitioner need not reproduce documents already submitted in its opposition and, if no additional documents exist, petitioner is to provide an affidavit so stating.

respondents lack knowledge of the existence of specific document(s), then they should make use of a deposition and/or related procedures as provided for in the CPLR so as to ascertain the existence of such documents in order that they may be designated with specificity in a notice to produce.") [internal citations omitted]).

Finally, while respondent has shown ample need for certain discovery, as limited above, petitioner fails to show prejudice. Petitioner's claim that it would suffer prejudice because respondent is seeking evidence going back beyond 2013 where petitioner was not required to keep records going back beyond four years prior to the HSTPA is unpersuasive.[15]

It is important to point out that such claims of prejudice are made by petitioner's attorney with no personal knowledge of the facts. However, an "affirmation by the plaintiffs' attorney, who clearly has no such knowledge," is insufficient and cannot be given any weight. (*Arriaga v Michael Laub Co.*, 233 AD2d 244, 649 NYS2d 707 [1st Dept 1996]; *see Iandoli v Lange*, 35 AD2d 793, 794, 315 NYS2d 752 [1st Dept 1970]). Petitioner's agent's affidavit claims no prejudice; it merely states that petitioner bought the building in 2016 and therefore would have no knowledge of why the subject premises were not registered.

Therefore, respondent is entitled to discovery going back to 1984. This is especially true in light of the subsequent Appellate Division decision in *Zitman v Sutton LLC*, (177 AD3d 565, 566, 2019 NY Slip Op 08527 [1st Dept 2019]) allowing a respondent to maintain an overcharge complaint stemming from a rent increase in 1986. (*see also Widsam Realty Corp v Joyner*, 65 Misc. 3d 132[A], 2019 NY Slip Op 52097[U] [App Term, 1st Dept 2019] [affirming look back to 1989]).

If petitioner finds this harsh and unreasonable, and this is an "undesirable result, the problem is one to be addressed by the Legislature." (*Chazon, LLC v. Maugenest*, 19 NY3d 410, 415, 948 NYS2d 571 [2012]; *see Harris v. Israel*, 65 Misc. 3d 155(A), *2, 2019 NY Slip Op 51925[U] [App Term, 1st Dept 2019]).

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[15] In the simplest terms, respondent is entitled to discovery as petitioner did not register the subject apartment for almost three decades (1984-2012), and petitioner provides no explanation how the first rent was set (or why it would have been pursuant to a lease renewal). In this court's view, respondent is entitled to discovery under "old" law or new.

CONCLUSION

Based on the foregoing, it is So Ordered, that respondent's motion for leave to serve and file an amended answer is granted. The attached amended answer is deemed served and filed. Respondent's application for discovery is granted to the extent discussed herein and as limited by this Order and is denied in all other respects; petitioner is directed to comply with this Order and respond to respondent's discovery demands within 30 days of service of this Order upon petitioner with notice of entry. This matter is adjourned to April 14, 2020, 9:30 A.M, Part F, Room 320, for the court to monitor compliance.

Dated: February 18, 2020
Bronx, New York

SO ORDERED

SO ORDERED

Hon. Shorab Ibrahim
Judge of the Housing

HON. SHORAB IBRAHIM
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