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2020-03-01

### Erik James LLC v. Bruna

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

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ERIK JAMES LLC

Petitioner,

-against-

CHARLES BRUNA

Respondent.

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L&T Index No.: 53374/19

DECISION/ORDER

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

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1-13
Order to Show Cause and Affidavits Annexed.....	
Answering Affidavits.....	14-23
Replying Affidavits.....	24
Exhibits.....	
Other.....	25

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

**BACKGROUND & PROCEDURAL POSTURE**

Erik James LLC (“Petitioner”), commenced this summary nonpayment proceeding against Charles Bruna (“Respondent”), in February of 2019. The Petition seeks unpaid rent in the amount of \$1,905.54 and alleges that the subject premises are subject to Rent Stabilization. Both sides are represented by counsel.

Respondent initially filed a *pro se* answer, following which the matter was made returnable on January 6, 2020. Subsequently, Respondent, by counsel, moved for leave to file an amended answer which was granted on consent on July 21, 2020. Respondent’s amended answer alleges as a first affirmative defense a general denial. As a second and third affirmative defense, Respondent alleges a defective rent demand and Petition in that both are seeking a monthly rent in excess of the contract rent. As a fourth affirmative defense and first counterclaim Respondent alleges rent overcharge. The alleged overcharge is based on a recent inconsistent rent registration and an unexplained increase in the legal regulated rent of approximately 55% in

2013 when Respondent was a tenant of the subject premises. In addition, Respondent alleges Petitioner's failure to file a proper rent registration in 2013 bars Petitioner from collecting any rent in excess of the legal regulated rent in 2012.

Petitioner moves pursuant to CPLR § 3211(b) seeking an order striking Respondent's affirmative defenses and counterclaims and for summary judgment pursuant to CPLR§ 3212. Respondent cross-moves and seeks an order dismissing the proceeding as moot on the basis the Respondent has vacated the subject premises. Respondent also seeks dismissal pursuant to CPLR § 3211(a)(7) based on a defective predicate notice and failure to comply with RPAPL § 711. Respondent further seeks leave to conduct pre-trial discovery pursuant to CPLR § 408 on the rent overcharge defense and counterclaim. Respondent also seeks an order directing that the file in this proceeding be sealed, or in the alternative that Petitioner redact the personal and sensitive information included in the exhibits attached to its motion.

## **DISCUSSION**

### **Vacatur of the Subject Premises Rendering This Proceeding Moot**

It is undisputed that Respondent vacated the subject premises during the pendency of this proceeding. Respondent argues that when a tenant vacates after the commencement of a summary nonpayment proceeding, the proceeding should be dismissed as moot. While Respondent cites to a number of cases in support of this proposition, Petitioner contends in its opposition that the authority cited by Respondent in support of this proposition is distinguishable, as all of the cited cases involve scenarios where the Petitioner is seeking post termination rent or where arrears prior to vacatur have been resolved. (*Patchogue Assoc v Sears, Roebuck & Co*, 37 Misc 3d 1, 2012 NY Slip Op 22160 [App Term, 2d Dept 2012][monies owed prior to surrender of the subject premises were put in escrow]; *Nissman v Loria*, 51 Misc 3d 1208[A], 2016 NY Slip Op 50454[U][Civ Ct, Westchester County2016] [monies during lease period had been paid and only monies during month to month tenancy were in dispute]; *615 Nostrand Ave Corp v Roach*, 15 Misc 3d 1, 3, 2006 NY Slip Op 26535 [App Term, 2d Dept 2006][dismissed upon tenant's tender of all arrears accruing after succession lease offered]).

The Courts of this state have found that "jurisdiction is not divested merely because of the removal of the respondent subsequent to the commencement of the proceeding." (*Eastrich*

*No 80 Corp v Patrolmen's Benev Ass'n of New York City Tr Police Dept*, 180 Misc 2d 98, 99, 1999 NY Slip Op 99192 [App Term, 1st Dept 1999]). Further, the Courts have found that “[w]here the proceeding is properly instituted for nonpayment of rent.... after the preliminary requirement of demand, followed by refusal by the tenant to pay or to remove, it is not a ‘sufficient cause’ to defeat the proceeding that the tenant has given up possession...” (*Four Forty-One Holding Corp v Bloom*, 148 Misc 565, 568, 266 NYS 233 [App Term 1st Dept 1933]).

Accordingly, this proceeding is not rendered moot nor is the court’s jurisdiction divested by because of Respondent’s vacatur of the subject premises.

### **Improper Rent Demand**

Pursuant to CPLR § 3211(b), “[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.” In its motion, Petitioner seeks to strike Respondent’s second and third affirmative defenses which allege an improper rent demand.

When considering a motion to strike a tenant’s affirmative defenses, the courts have found that “in light of the seriousness of the allegations and the possible forfeiture of the premises herein, [the t]enant should be permitted to raise all applicable defenses which are not ‘palpably insufficient or patently devoid of merit’” (*769 Realty Associates, LLC v McKinnon*, 41 Misc 3d 1231[A], 2013 NY Slip Op 51950[U][Civ Ct, Bronx County 2013]; *Foley v D’Agostino*, 21 AD2d 60 [1st Dept 1964]; *Greco v Christoffersen*, 70 AD3d 769 [2d Dept 2010]).

A proper demand for rent must fairly afford the tenant, at least, actual notice of the alleged amount due and of the period for which such claim is made. At a minimum, the landlord or his agent should clearly inform the tenant of the particular period for which a rent payment is allegedly in default and of the approximate good faith sum of rent assertedly due for each such period. (*542 Holding Corp v Prince Fashions, Inc*, 46 AD3d 309, 311 [1st Dept 2007], citing *Schwartz v Weiss–Newell*, 87 Misc 2d 558, 561, 386 NYS2d 191 [Civ Ct, NY County 1976]).

Respondent alleges a monthly discrepancy of \$8.54 for two of the months sought in the rent demand for a total of \$17.08 between what is sought in the rent demand and the contract rent for the relevant time period. The rent demand and Petition seek rent in the amount of \$1,905.54

per month for September and October of 2019 when the lease in effect is in the amount of \$1,897.50 per month. Petitioner concedes and argues this discrepancy is due to a scrivener's error and constitutes a good faith approximation as required by law. Respondent notes that the defect in the rent demand cannot solely be attributed to a typographical error as the same error exists in the DHCR Rent registration of the subject premises (Petitioner's Exhibit E).

This Court agrees with Petitioner to the extent that the difference in the amount sought and the actual contract rent due is *de minimus* and does not warrant dismissal of the Petition. However, Petitioner's failure to register the "current rent" amount with DHCR in compliance with 9 NYCRR § 2528.3 renders the Petition defective and precludes collection of the rent sought.

Rent Stabilization Code § 2528.4(a) provides, in pertinent part:

"The failure to properly and timely comply, on or after the base date, with the rent registration requirements of this Part shall, *until such time as such registration is completed*, bar an owner from applying for or collecting any rent in excess of: the base date rent, plus any lawful adjustments allowable prior to the failure to register. Such a bar includes but is not limited to rent adjustments pursuant to section 2522.8 of this Title. The late filing of a registration shall result in the elimination, *prospectively*, of such penalty . . . ." (9 NYCRR § 2528.4[a] [emphasis added]).

The statutes provide that if a building owner fails to file a proper and timely rent registration with DHCR, the penalty is a rent freeze at the amount of the legal regulated rent of the last registration that was in fact filed with DHCR. Subsequently, once the late registration is filed, and if the increases in the legal regulated rent were lawful, then the rent freeze is lifted going forward **as of the date** of the filing and an owner can charge a higher rent amount. (*Samson Mgt, v Cordero*, 62 Misc 3d 129[a], 2018 NY Slip Op 51879[U] [App Term, 2d Dept 2018]; *125 Ct St, LLC v Sher*, 58 Misc 3d 150[A], 2018 NY Slip Op 50092[U] [App Term, 2d Dept 2018]; *Bradbury v 342 West 30th Street Corp*, 84 AD3d 681 [1st Dept 2011], *citing Jazilek v Abart Holdings, LLC*, 72 AD3d 529 [1st Dept 2010]).

"In order to obtain a judgment against a rent-stabilized tenant in a nonpayment proceeding, a landlord must not only plead compliance with the Rent Stabilization Code, but actually comply therewith." (*554-558 W 181 Street LLC v Cochrane*, 61 Misc 3d 1203[A], 2018 NY Slip Op 51341[U] [Civ Ct, NY County 2018]; *citing Villas of Forest Hills Co v Lumberger*,

128 AD2d 701, 702 [2d Dept 1987]; *Homestead Equities v Washington*, 176 Misc 2d 459, 462 [Civ Ct. Kings County 1998]; *251 East 119th Street Tenants Assoc v Torres*, 125 Misc 2d 279, 280 [Civ Ct, NY County 1984]; *Caceres v Golden*, 1991 NY Misc LEXIS 856 [App Term, 2d Dept 1991]). That the Petition seeks rent that has not been properly registered with DHCR renders it fatally defective.

Accordingly, Petitioner's motion which seeks an order striking Respondent's affirmative defenses is denied, Respondent's cross-motion is granted, and the Petition is dismissed.

### **Conclusion**

In the instant proceeding, the "current rent" pursuant to the last executed lease is \$1,897.00, however the "current rent" registered with DHCR is \$1,905.54 per month. 9 NYCRR §2528.3 (a) states:

"An annual registration shall be filed containing the current rent for each housing accommodation not otherwise exempt, a certification of services, and such other information as may be required by the DHCR, pursuant to the RSL, RSC or section 2527.11 of this Title."

Petitioner's failure to comply with the Rent Stabilization Code renders the Petition defective. Accordingly, Respondent's motion seeking an order dismissing the petition is granted and the proceeding is dismissed without prejudice. The Court need not reach the other portions of Petitioner's motion or Respondent's cross-motion. This constitutes the Decision and Order of the Court.

Dated: March 1, 2020

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Hon. Bryant Tovar  
Judge, Housing Part C

ROSENBLUM & BIANCO, LLP (by Tracy William Boshart, Esq.): Attorney for petitioner;  
MOBILIZATION FOR JUSTICE, INC. (by Nora Kenty, Esq.): Attorney for respondent