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2020-03-16

### Clinton Arms Associates v. Robinson

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

CLINTON ARMS ASSOCIATES

L&T Index No.: 036836/2018

Petitioner

DECISION/ORDER

-against-

NIA S ROBINSON  
EMANUEL RICHARDSON

Respondents

Address: 2160-2166 Clinton Avenue  
Apartment 5-N  
Bronx, New York 10457

Recitation, as required by CPLR § 2219 (a), of the papers considered in review of Respondent's Motion and Petitioner's Cross-Motion.

PAPERS	NUMBERED
Respondent's Motion; Affirmation in Support; Affidavit & Exhibits ("A" – "T")	1, 2, 3, 4
Affirmation in Opposition; Affidavit & Exhibits ("1" – "7")	5, 6, 7
Reply Affirmation & Exhibits ("A" – "G")	8, 9

Upon the foregoing cited papers, the Decision and Order on Respondent's Motion and Petitioner's Cross-Motion is as follows:

**BACKGROUND**

Clinton Arms Associates ("Petitioner") commenced the within nonpayment proceeding seeking a possessory and money judgment against Nia S. Robinson and Emanuel Richardson<sup>1</sup> (collectively, "Respondents") who occupy the subject premises located at 2160-2166 Clinton Avenue, Apartment 5-N, Bronx, New York 10457. The

<sup>1</sup> Respondents contend that Petitioner has misspelled the name of one of the above captioned Respondents to this proceeding. Respondents aver that "Emmanuel Robinson" occupies the subject premises and not "Emanuel Richardson."

Petition here seeks the sum of \$2,140.94 in rent for the period commencing in July of 2018 and ending in January of 2019. The Petition and by extension this nonpayment proceeding has been predicated upon a written demand for rent which sought a partial sum of monthly rent in the amount of \$90.94 for July of 2018; a monthly rent of \$334 for each month commencing in August of 2018 and ending in October of 2018; and \$284 for the month of November 2018.

Respondents have now filed an omnibus motion seeking several prongs of relief. Respondents primarily seek dismissal of the instant action pursuant to CPLR § 3211 (a)(2) and CPLR § 3211 (a)(7) for lack of subject matter jurisdiction and for failure to state a cause of action. In the alternative, absent dismissal, the Respondents seek leave to interpose an amended answer and partial summary judgment. For the reasons cited below, the Respondents' Motion is GRANTED, in part, and DENIED, in part.

## DISCUSSION

### I. Respondent's Motion Pursuant to CPLR § 3211 (a)(2)

At the outset, Respondents' motion to dismiss pursuant to CPLR § 3211 (a)(2) is without merit and must be denied outright as it represents an antiquated view that has long been invalidated. The Civil Court is vested with subject matter jurisdiction over housing matters by statute [NY City Civ Ct Act §§ 110; 204]. Service of the written demand notice and any defects, as to service or sufficiency that lie within the demand itself, do not implicate the court's jurisdiction but instead are "essential elements" to a Petitioner's *prima facie* case (*433 West Associates v Murdock*, 276 AD2d 360 [1st Dept 2000]; see also, *Nguyen v Perparim*, 64 Misc 3d 129 [A] [1st Dept 2019]; *Pantigo Professional Center, LLC v. Stankevich*, 60 Misc 3d 133 [A] [App Term 2018]). Petitioner's purported noncompliance, if any, would represent a failure to comply with a condition precedent to suit and such purported failure would constitute a proper defense" (*170 W. 85th St. Tenants Assn. v. Cruz*, 173 AD2d 338, 339 [1st Dept 1991]).

Accordingly, this Court has subject matter jurisdiction over this nonpayment proceeding, and this prong of Respondents' motion to dismiss is denied.

### II. Respondents' Motion Pursuant to CPLR § 3211 (a)(7)

#### a. Standard on a CPLR § 3211 (a)(7) Motion

The standard on a CPLR § 3211(a)(7) motion is "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*High Definition MRI, P.C. v Travelers Cos., Inc.*, 137 AD3d 602 [1st Dept 2016]). In its review, the court takes the facts as alleged in the pleadings as true and accords the plaintiff or petitioner the benefit of every possible favorable inference (*Leon v Martinez*, 84

NY2d at 87-88; *African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]).

“In deciding such a pre-answer motion, the court is not authorized to assess the relative merits of the [petitioner’s] allegation against the [respondent’s] contrary assertions or to determine whether or not [petitioner] has produced evidence to support his claims” (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]). However, “allegations consisting of bare legal conclusions, as well as factual claims flatly contradicted by documentary evidence are not” presumed to be true or accorded every favorable inference (*David v Hack*, 97 AD3d 437, 438 [1st Dept 2012]), and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

#### b. Sufficiency of the Rent Demand

Respondents here have moved this Court to dismiss the instant proceeding pursuant to CPLR § 3211 (a)(7) on the ground that the Petition fails to state a cause of action. Respondents aver that the instant proceeding is subject to dismissal as the underlying rent demand is defective. Although the rent demand underlying the instant nonpayment proceeding claimed \$1,376.44 in outstanding rent for a specifically designated period of time, Respondents aver that such demand is defective in that a portion of the amount claimed represents retroactive rent increases which the Respondents dispute.

While this nonpayment proceeding was pending, legislation entitled “The Housing Stability and Tenant Protection Act of 2019” was signed into law. A technical correction by way of a Chapter Amendment passed the Legislature on June 20, 2019 and was signed by the Governor on June 25, 2019. This legislation significantly changed New York State’s rent laws and changed the statutory language concerning rent demands. The changes eliminated oral demands for rent and extended the statutory length of a written demands from three (3) days to fourteen (14) days (HSTPA Part M, § 12). It is important to note, however, that the amendments to RPAPL § 711 are only applicable to cases commenced on or after the effective date of the legislation (HSTPA Part M, § 29). The changes therefore do not implicate the instant matter as this proceeding was commenced before the effective date of the legislation.

The Court must therefore apply the law as it existed before the enactment of the HSTPA. Irrespective of the changes provided for in the new law, it was and remains a basic tenet that a landlord is required to demand payment of outstanding rent from a tenant prior to the commencement of a nonpayment proceeding (RPAPL 711 [2]). A proper demand for rent, before the recent amendments, could be made orally or in writing on three days’ notice. Regardless of the manner in which it was made,

the rent demand itself had to fairly afford the tenant actual notice of the alleged amount due and of the period for which such claim is made (*Schwartz v Weiss-Newell*, 87 Misc 2d 558 [Civ Ct, New York County 1976]). The sum demanded need not be precise but, at the very least, must be a good faith approximation of the rent owed so as to allow the tenant an opportunity to avoid litigation (*FAV 45 LLC v McBain*, 42 Misc 3d 1231[A] [Civ Ct, New York County 2014]; *545 W. Co. v Schachter*, 16 Misc 3d 431, 432 [Civ Ct, New York County 2007]). A rent demand that is defective cannot be amended and renders the proceeding subject to dismissal (see generally, *Chinatown Apts. v Chu Cho Lam*, 51 NY2d 786, 787 [1980]).

In this proceeding, the subject premises receives a project-based Section 8 subsidy from the Department of Housing and Urban Development (HUD). As such, Petitioner is required to follow the procedures set forth in the HUD Handbook in determining Respondents' rent: procedures which are not mere recommendations but which are obligatory (*Lower East Side II Association v. Aaron*, 58 Misc 3d 1213 [A] [Civ Ct, New York County 2017]). It is undisputed that the Respondents anniversary date for recertification of their household income occurs annually on November 1st. What the Court has before it in the underlying motion is a competing and divergent set of facts concerning the events that lead up to the annual recertification in November of 2018. Respondents claim that they attempted to submit an interim recertification to reflect changes in their circumstances and income. It is claimed that Nia Robinson's unemployment income ended on March 11, 2018 and, following termination of those benefits, Respondent Nia Robinson applied for public assistance shelter benefits. Said benefits began to issue to the Petitioner at the end April of 2018. Respondents represent that they attempted to notify Petitioner of these changes in May of 2018. When Emmanuel Robinson<sup>2</sup>, a member of the household, commenced gainful employment in July of 2018, it is averred that he submitted information to the management office concerning the same. Despite their attempts at an interim recertification, Respondents claim that the Petitioner continued to charge a monthly rent of \$109. Then, in September and October of 2018, Respondents began to submit documentation for their annual income recertification. Respondents further claim that the Petitioner, based on the annual recertification, determined that monthly rent for the subject premises would be \$284 starting in November of 2018. Respondents also posit that the Petitioner retroactively adjusted Respondents' rent for the period of May 2018 to October 2018. It is averred that there was an upward adjustment in the monthly rent from \$109 to \$334 during that time period.

Petitioner, in turn, claims that it attempted to comply with all HUD requirements including those which require the Petitioner to utilize the Enterprise Income

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<sup>2</sup> Erroneously captioned as Emanuel Richardson.

Verification (“EIV”) system<sup>3</sup> to ensure that the information provided by its tenants, such as the Respondents, is accurate. Petitioner further claims that it learned that the household underreported income for the time period preceding the November 2018 annual recertification. Following receipt of this information from the EIV system, Petitioner alleges that it attempted to verify the system’s information with Emanuel Richardson a/k/a Emmanuel Robinson but said individual did not provide a response until the Respondents came in for their annual recertification in 2018.

Neither party disputes that the Respondents executed two lease amendments dated November 19, 2018. The first lease amendment set Respondents’ rent at \$284 per month effective November 1, 2018. The second lease amendment retroactively set Respondents’ rent at \$334 per month effective May 1, 2018.

Based on the protocols set forth in the HUD Handbook, it is abundantly clear that Petitioner was required to review and resolve any discrepancies in income reported through the EIV system and the Income Discrepancy Report<sup>4</sup> that the system generates at the time of Respondents’ recertification (United States Department of Housing and Urban Development Handbook 4350.3 REV-1, ch 8, ¶ 8-20 [A]). Furthermore, the Petitioner was required to conduct an independent investigation by notifying the Respondents of such discrepancy and was also required to meet with them to determine if the report was valid (United States Department of Housing and Urban Development Handbook 4350.3 REV-1, ch 8, ¶ 8-20 [A]). Respondents had an opportunity at such time to dispute the employment, wage or unemployment information in the EIV system and, where disputed, the Petitioner was required, in turn, to obtain third party verification (United States Department of Housing and Urban Development Handbook 4350.3 REV-1, ch 8, ¶ 8-20 [A][2]; see also, ch 9, ¶ 9-10). Where, as here, Petitioner determines through its investigation that the Respondents should have reported the increase in income as

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<sup>3</sup> The EIV system is a web-based application which provides owners with employment, wage, unemployment compensation and Social Security benefit information for tenants participating in HUD’s assisted housing programs. Information in EIV is derived from computer matching programs initiated by HUD with the Social Security Administration (SSA) and the U.S. Department of Health and Human Services (HHS), for all tenants with valid personal identifying information (name, date of birth (DOB), and Social Security number (SSN)) reported on the form HUD-50059. Information in the EIV system is used by owners to verify employment and income at the time of recertification and to reduce errors in subsidy payments. (United States Department of Housing and Urban Development Handbook 4350.3 REV-1, ch 9, ¶ 9-4)

<sup>4</sup> The Income Discrepancy Report identifies households where there is a difference of \$2,400 or more annually in the wages, unemployment compensation and/or Social Security benefit income reported by NDNH and SSA and the wages, unemployment compensation and/or Social Security benefit income reported in TRACS for the period of income (POI) used for the discrepancy analysis. The report identifies tenants whose income may have been under- or over-reported. Negative numbers on the report represent potential tenant under reporting of income while a positive number represents a potential decrease in a tenant’s income. In either case, the owner must investigate all discrepancies identified to determine whether or not they are valid (United States Department of Housing and Urban Development Handbook 4350.3 REV-1, ch 9, ¶ 9-11 [C] [1])

required by their lease, Petitioner was permitted to process an interim recertification in accordance with Chapter 7, Paragraph 7-13.D of Handbook 4350.3 REV-1; was permitted to notify the Respondents of funds due and their obligation to reimburse the owner; was further permitted to collect funds due from the Respondents and/or enter into a repayment agreement and reimburse HUD for funds collected from the Respondents less the amount retained for pursuing collection. (United States Department of Housing and Urban Development Handbook 4350.3 REV-1, ch 9, ¶ 9-11 [C] [Example 2]; see also, ch 8, ¶ 8-18 [E] [2]; see also, ch 8, ¶ 8-21; ch 8, ¶ 8-23; ch 8, ¶ 8-24).

Although Petitioner appears to have undertaken an investigation to determine the accuracy of the EIV system information, the Petitioner failed to offer a repayment plan as required by the HUD Handbook after determining that the Respondents underreported income (United States Department of Housing and Urban Development Handbook 4350.3 REV-1, ch 8, ¶ 8-18 [E]; see also, ch 8, ¶ 8-18 [E] [2]; see also, ch 8, ¶ 8-21; ch 8, ¶ 8-23; ch 8, ¶ 8-24). Petitioner, instead, has attempted to circumvent this requirement by seeking the undercharged rent in the form of a possessory judgment: an action it is prohibited from undertaking (*Remeeder HDFC, Inc. v Robertson*, 16 Misc 3d 1133 [A] [Civ Ct, New York County 2007]; see, e.g., *Manhattan Ave Assoc v Payano*, NYLJ, 1202761664407, \*1 [Civ Ct, New York County 2016]). Since the undercharged rent could not be sought as a possessory judgment in nonpayment proceeding, the underlying rent demand is defective because, at best, the demand consisted of \$675 of underreported rent or, at worst, \$900 of the total amount claimed (\$1,376.44). In either scenario, a large portion of the sum demanded represented monies that the Petitioner could not collect in a summary proceeding. And, as a result of Petitioner's inclusion of these sums, Respondents may have been prejudiced in their ability to respond to the demand and avoid litigation by paying those sums which may be collectible in the instant proceeding.

In dismissing this proceeding, Respondents' motion pursuant to CPLR § 3212 and Respondents' motion seeking leave to amend their answer are denied as moot.

### CONCLUSION

Accordingly, it is hereby:

ORDERED, that the prong of Respondents' motion seeking dismissal of the instant nonpayment proceeding pursuant to CPLR § 3211 (a)(2) is DENIED; and it is further

ORDERED, that the prong of Respondents' motion pursuant to CPLR § 3211 (a)(7) is GRANTED. This proceeding is dismissed without prejudice; and it is further

ORDERED, that the prong of Respondents' motion pursuant to CPLR § 3212 and the remaining prong that sought leave to amend their answer is DENIED, as moot.

This constitutes the Decision/Order of this Court.

Dated: March 16, 2020  
Bronx, New York



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HON. KRZYSZTOF LACH  
Judge, Housing Court