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### The Fortune Society v. S- B-

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

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THE FORTUNE SOCIETY

L&T Index No.: 29800/2019

Petitioner,

**DECISION/ORDER**

-against-

S [REDACTED] B [REDACTED]  
"JOHN DOE" AND "JANE DOE"

Respondents.

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

<b>Papers</b>	<b>Numbered</b>
Notice of Motion and Affidavits Annexed.....	1-6
Order to Show Cause and Affidavits Annexed.....	
Answering Affidavits.....	7-8
Replying Affidavits.....	
Exhibits.....	
Other.....	

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

**BACKGROUND & PROCEDURAL POSTURE**

The Petitioner, The Fortune Society ("Petitioner"), commenced this holdover proceeding against S [REDACTED] B [REDACTED] ("Respondent"), based on expiration of a lease. The Notice of Termination dated March 26, 2019 ("Termination Notice"), expired on May 14, 2019. Both sides are represented by counsel in this proceeding.

Respondent now moves to dismiss this proceeding pursuant to CPLR §3211(a)(7), for failure to state a cause of action and failure to state the facts on which the proceeding is based pursuant to RPAPL §741. In the alternative, Respondent seeks leave to interpose a late answer pursuant to RPAPL §743 and, if leave is granted, to deem the proposed Verified Answer filed *nunc pro tunc*. Respondent also seeks the sealing of any sensitive information contained in the

instant motion and contained in the Court file, including all medical and/or psychiatric information, pursuant to 22 NYCRR §216.1.

### **The Law and Its Application**

RPAPL §741(4) requires that, in order to properly commence a summary proceeding, the petition is required to state the facts upon which the proceeding is based. It is well established law that among the facts required to be plead is the applicable regulatory status of the subject premises. (*MSG Pomp Corp v Jane Doe*, 185 AD2d 798 [1st Dept 1992]). A petition must plead the applicable regulatory status of the subject premises as well as any government contracts to which it is a party as “[t]he contract provide[s] the tenant with certain potential defenses.” (*Volunteers of Am.-Greater New York, Inc. v Almonte*, 65 AD3d 1155, 1157 [2d Dept 2009]).

To be entitled to relief in a summary proceeding, it is necessary that a landlord “plead rent regulatory status and compliance with the appropriate statutes and codes... and actually be in compliance therewith.” Failure to do so renders the petition subject to dismissal. (*Villas of Forest Hills Co. v Lumberger*, 128 AD2d 701, 702 [2d Dept 1987][“Although the failure to make the required allegation will not deprive the hearing court of jurisdiction of the matter since the defective petition may be corrected by amendment, the need to plead rent regulatory status and compliance with the appropriate statutes and codes and to actually be in compliance therewith is necessary for a court to order the requested relief.”][internal citations omitted]; *East 168th Street Associates v. Castillo*, 60 Misc 3d 774, 2018 NY Slip Op 28165 [Civ Ct, Bronx County 2018]; *Giannini v Stuart*, 6 AD2d 418 [1st Dept 1958]; *Homestead Equities v Washington*, 176 Misc 2d 459, 1998 NY Slip Op 98225 [Civ Ct, Kings County 1998]; *Westchester Gardens, LP v Lanclos*, 43 Misc 3d 681, 2014 NY Slip Op 24062 [Civ Ct, Bronx County 2014][“Landlord’s failure to particularly allege the existence of these contracts, rules and regulations appears fatal to this proceeding because neither tenant nor the court were put on notice of the laws governing the tenancy or the substantive rights involved.”])

Respondent’s motion states her tenancy is subject to participation in the NY/NYIII supportive housing program<sup>1</sup>. NY/NYIII is a permanent supportive housing program funded

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<sup>1</sup> The New York/New York III (NY/NY III) supportive housing program provides single-site and scatter-site housing for homeless, single adults who have completed some level of substance abuse treatment, as well as chronically homeless or at-risk families in which the head of household suffers from a substance use disorder.

through and regulated by the New York State Office of Alcohol and Substance Abuse Services (“OASAS”) and the New York City Department of Health and Mental Hygiene (“DHMH”).

Respondent argues the Petition in the instant proceeding is defective due to Petitioner's failure to include any reference to the NY/NYIII agreement, Petitioner's compliance with OASAS or DHMH regulations related to that program, or that Respondent is a supportive housing recipient. Petitioner, in opposition, does not seek to contest the existence of any regulatory agreement or that Respondent is a recipient of supportive housing. Petitioner instead cross-moves pursuant to CPLR 3025(b) for leave to amend petition to reflect Respondent's participation in the NY/NYIII program. Petitioner argues that amendment of the Petition is appropriate and that dismissal is not warranted as Respondent has failed to demonstrate how the terms of the underlying regulatory agreement provide potential defenses or substantive rights or establish that Respondent has suffered prejudice as a result of Petitioner's failure to include such reference in its initial Petition.

Failure to accurately state the regulatory status in a petition is a defect that “may be overlooked where no prejudice results to the tenant” and may be corrected by amendment in certain cases. (*PCMH Crotona, LP v. Taylor*, 57 Misc 3d 1212[A], 2017 NY Slip Op 51401[U][Civ Ct, Bronx County 2017]; *OLR ECW, LP v Myers*, 59 Misc 3d 650, 2018 NY Slip Op 28060[Civ Ct, Bronx County 2018][motion to amend pleading granted where respondents were licensees and failure to establish prejudice from failure to plead that subject premises was subject to a regulatory agreement between petitioner and HPD]; *Coalition Houses LP v Bonano*, 12 Misc 3d 146[A], 2006 NY Slip Op 51516[U][App Term, 1st Dept 2006][“We find no abuse of discretion in the grant of landlord's motion to amend the petition to conform to the proof concerning the rent regulatory status of the apartment premises, where tenant failed to object to the misstatement in the petition during the trial proceedings or to demonstrate that she was prejudiced by the amendment.”][internal citations omitted].). It is well-settled law that leave to amend pleadings should be freely given, in the absence of significant prejudice to the opposing party. (*Edenwald Contracting Co v New York*, 60 NY2d 957 [1983]). While there exists some precedent for finding that failure to properly state the regulatory status of the subject premises is a defense that may be waived and will not deprive the court of subject matter jurisdiction, such cases may be distinguished from the instant case in that Respondents here are, in fact, raising this defense. (*433 West Associates v Murdock*, 276 AD2d 360 [1st Dept 2000][finding that

requirement to properly plead tenancy's Section 8 status was an essential element "to the landlord's prima facie case, and, accordingly noncompliance therewith constituted defenses to the holdover petition" but that tenant had waived such defenses by executing a stipulation recognizing landlord's prima facie case and failing to appeal the judgment of possession]). Petitioner has conceded its participation in the NY/NYIII program and it cannot be said that any misstatement of the regulatory status may be attributable to confusion as to the regulatory status of the subject premises or Respondent's tenancy. (*546 West 156th Street HDFC v Smalls*, 43 AD3d 7 [1st Dept 2007] ["Here, any perceived misstatement concerning whether the premises were subject to the Rent Stabilization Law resulted from the uncertainty surrounding the status of respondent's tenancy and cannot be ascribed to a venal motive. Thus, it was error to dismiss the petition."])).

Respondent argues that while it is not necessary to prove prejudice, Petitioner's failure to plead the regulatory status of the subject premises leaves Respondent unable to determine the full extent of her rights and defenses. Respondent further asserts that the failure to plead the regulatory status blinds the court to the potential vulnerability of the Respondent, by not making clear to the court that Respondent may be in need of some protections such as the appointment of a guardian *ad litem*. Respondent supports this argument by noting Respondent receives ongoing mental health programming, treatment, and counseling for alcohol and/or substance dependence, ongoing psychiatric services, and on-site case management.

Respondent annexes as Exhibit C a copy of the Annual Participant Occupancy Agreement.<sup>2</sup> Paragraph 13 of this agreement states "...before terminating my occupancy of the apartment, I will give (The Fortune Society) 30 days written notice. I understand that (The Fortune Society) will give me 30 days written notice—containing a clear statement of reasons for termination—before they terminate the agreement. (The Fortune Society's) decision to terminate this agreement can be appealed. During the review process, I will have an opportunity to present written or verbal objections before a person other than the person (or subordinate thereof) that made or approved the termination decision. Prompt written notice following the final decision will be provided to me." Petitioner, in its Cross-Motion, provides no evidence or argument that it fully complied with the termination procedures as set forth in this occupancy agreement.

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<sup>2</sup> Respondent's Exhibit C is the Annual Participation Occupancy Agreement between The Fortune Society's (The Fortune Society) Permanent Supportive Housing Program and Respondent, which also states a monthly rent of \$1500 for the period of 2/15/2018 to 2/14/2019.

Further, Petitioner 's argument that Respondent fails to assert specific examples of potential defenses arising from the underlying agreement is unavailing. This argument fails to address that, as a participant in a supportive housing program, Respondent may assert the defense that her tenancy may only be terminated for good cause or that Petitioner has failed to comply with the termination procedures set forth in its occupancy agreement. As such, the court cannot agree that Petitioner's failure to properly state the regulatory status of the subject premises did not result in prejudice to the Respondent.

### Conclusion

Petitioner's failure to plead the regulatory status and Respondent's participation in supportive housing is a fatal defect. Respondent's participation in NY/NYIII permanent supportive housing creates potential defenses and alerts the court to potential protections to which the court may be otherwise unaware are appropriate. Further, participation in the NY/NYIII program requires the Petitioner to take certain actions prior to terminating the tenancy. Due to Petitioner's failure to plead the existence of this government contract, the Court is unable to determine Petitioner's compliance with its terms. Accordingly, the Respondent is prejudiced by these defective pleadings. Respondent's Motion to Dismiss is granted and Petitioner's Cross Motion to amend pleadings is denied. The Court shall seal all sensitive information contained in the Court file pursuant to 22 NYCRR 216.1. The remaining portions of Respondent's motions are denied as moot. This constitutes the decision and order of this Court.

Dated June 16, 2020

Hon. Bryant Tovar  
Judge, Housing Part C

*[Handwritten signature]*  
**BY ORDER OF THE COURT**  
**THIS DOCUMENT IS NOT TO BE REPRODUCED OR**

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