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2020-09-24

### 105 E. 177th Assocs. LLC v. Scott

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#### Recommended Citation

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

-----X Index No. 041263/18  
105 EAST 177<sup>th</sup> ASSOCIATES LLC Motion Seq. No. 4

Petitioner,

-against-

**DECISION/ORDER**

JONNIE SCOTT, DIANE FIELDS  
JOHN DOE

Respondent.

-----X  
**HON. STEVEN WEISSMAN:**

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

<u>Papers</u>	<u>Numbered</u>
Notice of motion and affidavits annexed & Memo of Law . . . . .	1
Order to Show Cause and affidavits annexed. . . . .	
Answering affidavits . . . . .	2
Replying affidavits . . . . .	3
Exhibits. . . . .	
Stipulations. . . . .	
Other _____	

Petitioner was represented by: Hertz, Cherson & Rosenthal, PC  
Gregory Smith, Esq.

Respondent was represented by: Mobilization for Justice  
Nora Kenty, Esq.

Petitioner moves for an order dismissing respondents defenses and/or counterclaims for their failure to pay use & occupancy (U&O) as directed by this Court’s order of August 23, 2019, entry of a final judgment of possession, issuance of a warrant of eviction and a money judgment for all unpaid U&O to-date. Respondents oppose. For the reasons set forth below, the Court denies petitioner’s motion.

Petitioner moves under RPAPL 745(2)(c)(I) (as noted in a prior decision this matter is

under the law as it was before HSTPA 2019, which made substantive changes to that section of the RPAPL). The Court is, however, still troubled by the issue of repairs in the subject apartment and the allegations that petitioner has failed to timely restore the apartment to the condition it was in before petitioner took it upon itself to attempt to make the apartment uninhabitable. As this Court stated in that prior decision, “...once petitioner undertook to make repairs, which, undisputed by petitioner it did in March, 2019 (seven months after the proceeding first appeared on this Court’s calendar), it is bound and required to finish said repairs.”. Petitioner has, apparently, failed to make those repairs (really a restoration to its prior condition) timely, and thus comes before this Court seeking equitable relief with unclean hands. As this Court further stated, “If the conditions are not rectified, without delay, this Court will entertain a motion for contempt against petitioner, ...”. That respondent did not file a motion for contempt does not change the fact of the allegations, and the Court takes into consideration that abatement claims should be factored into any award of U&O. *Silverman v D'Arco*, 149 A.D.3d 527, 53 N.Y.S.3d 624, 2017 N.Y. Slip Op. 02916 (app Div, 1<sup>st</sup> Dept, 2017) “Judgment, ... in favor of plaintiff, unanimously reversed, on the law and the facts, ... the answer reinstated, and the matter remanded for further proceedings ... taking into account ... any evidence of defendant tenant's defenses and counterclaims that might offset the sum due. ... the court improperly ... failed to consider defendant's defenses and counterclaims” (at p. 528). Further, if respondent should prevail on his succession claim, the law is quite clear that he would only owe rent from the time he is offered and executes a lease in his own name forward. Given that petitioner has been sent over \$11,000.00 (if the most recent money orders were received by petitioner), and the warranty of habitability claims that are likely to come up, the Court is disinclined to grant petitioner’s motion.

The Court always retains discretion to do what is right. Here, respondent has set forth a claim of succession. Whether or not respondent will be successful on that claim remains to be determined at trial, but given the law’s preference for matters to be resolved on their merits (*London Terrace Assoc. v Rubin*, 55 Misc.3d 129(A), 55 NYS3d 692 (Table), 2017 WL 1171855 (App.Term), 2017 N.Y. Slip Op. 50378(U) (AT 1<sup>st</sup> Dept - 2017), and taking into account the pandemic we are all living through, this Court will not put respondent in the position of possibly

being evicted for failing to pay money he may ultimately not owe. For respondent to be made homeless under these circumstances, or to end up in a City shelter, never a good situation in the best of times, is simply not an acceptable alternative. And, though this proceeding is under the law as it was in 2018, the Court is cognizant that the Legislature has, with HSTPA 2019, eliminated that part of RPAPL 745(2) that required striking of the answer and entry of judgment. The Court can only surmise that this was done to foster resolution of matters on their merits, which coincides with, and is directly in line with, the Court's preference for the resolution of matters on their merits.

Accordingly, petitioner's motion is denied, the parties are directed to advise the Court if discovery has been completed, and the number of witnesses they expect to have for trial. If discovery is not yet complete, the parties are directed to complete discovery no later than October 30, 2020. Once discovery is completed the Court will refer the proceeding to part X to be put on the trial calendar.

This is the decision and order of the Court. Copies are being emailed to both sides.

Dated: Bronx, New York  
September 24, 2020

A handwritten signature in black ink, appearing to read 'S. Weissman', written over a horizontal line.

STEVEN WEISSMAN, JHC