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Bronx 444 E. 187 St., L.P. v Perea
2020 NY Slip Op 51173(U)
Decided on October 1, 2020
Civil Court Of The City Of New York, Bronx County
Lutwak, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on October 1, 2020

Civil Court of the City of New York, Bronx County

Bronx 444 East 187 Street, L.P., Petitioner-Landlord,

against

Myriam Perea, Respondent-Tenant.

32480/2019

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Diane E. Lutwak, J.

Recitation, as required by CPLR Rule 2219(a), of the papers considered in the review of Petitioner's motion and Respondent's cross-motion for partial summary judgment:

Papers/Numbered

Petitioner's Notice of Motion, Affirmation, Affidavit & Exs 1-7 1, 2, 3, 4-10

Respondent's Notice of Cross-Motion, Affirmation, Affidavit & Exs A-I 11, 12, 13, 14-22

Respondent's Memorandum of Law 23

Petitioner's Affirmation, Affidavit & Exs 1-3 in Opposition & Reply 24, 25, 26-28

Respondent's Affirmation in Reply 29

Upon the foregoing papers and for the following reasons, the motion and cross-motion are decided as follows.

UNDISPUTED FACTUAL BACKGROUND

Respondent is a Rent Stabilized tenant who has resided in the subject apartment since March 1, 2000. Respondent's first lease ran for a one-year term with a monthly legal regulated rent of \$1037.94. Attached to and executed at the same time as the original lease was a one-page, two-paragraph "Addendum to Lease" form, which has certain items filled in by hand (indicated below by combined use of italicized type and underlining) and reads in its entirety as follows:

34. The tenant has acknowledged that the legal regulated rent for premises *444 E 187th Street Apt # 3E* is *1,037.94*. The landlord has agreed to abate *337.94* and accept a lower rent in the amount of *700.00* for the duration of this lease period. From *March 1, 2000* to *Feb 28, 2001*.

35. Abatement at Lease Renewal

The tenant's collectible rent must be paid in full at the lease renewal date in order to continue with the fixed abatement of *337.94*. If rent is not current the full legal rent will be charged.

Respondent's initial lease was registered with the New York State Division of Housing and Community Renewal (DHCR), and the registration history statement (Exhibit A to Respondent's Cross Motion) reflects for the year 2000 both the "legal regulated rent" of \$1037.94 and the lower "actual rent paid" of \$700, with the notation "PREFEREN VAC/LEAS"

Respondent renewed her lease over the following years by signing standard "RTP-8" Renewal Lease forms which were all registered with the DHCR and which, until 2017, stated both a higher "legal regulated rent" and a lower preferential rent. Each of these lease renewal forms states that it is "based on the same terms and conditions as your expiring lease". The last lease renewal to include a preferential rent was the one which commenced March 1, 2015 and ended February 2017; it stated a legal regulated rent of \$1583.50 and a preferential rent of \$1067.96 and was accompanied by a new rider which stated that the landlord was offering a rent concession "due to market conditions for this lease term only."

A renewal lease which commenced March 1, 2018 [\[EN1\]](#) offered only the legal regulated rent. Respondent signed that lease, opting for a two-year term at the monthly rate of \$1615.17, with a [\[*2\]](#) "reduced monthly rent" of \$1418.04 to be charged because Respondent was now in the City's Disability Rent Increase Exemption/"Rent Freeze" program ("DRIE").

PROCEDURAL HISTORY

The petition in this nonpayment proceeding seeks rent at the monthly DRIE rate of \$1418.04 for the months of May, June and July 2019 and a balance of \$216.99 for April 2019. On August 7, 2019 Respondent pro se answered the petition raising a general denial, a defense of conditions in need of repair and, in the "Other counterclaims" section of the

answer form, "G/D, DISPUTES AMOUNT. REPAIRS." The case first appeared on the Part D calendar on August 12, 2019; the case was adjourned, and Respondent was referred for legal assistance. Respondent retained counsel who served and filed an amended answer raising three affirmative defenses - defective rent demand, improper rent amount and breach of the warranty of habitability - and counterclaims based on the second and third defenses. Respondent then moved for discovery seeking copies of all her leases, which motion was granted by the Honorable Steven Weissman in a Decision and Order dated March 16, 2020 that restored the case to the calendar for conference on April 30, 2020. That appearance did not take place due to the COVID-19 pandemic and the closure of the court for non-essential matters.

A videoconference was held on July 13, 2020, following which the parties stipulated that Petitioner had complied with the discovery order by providing all relevant documents in its possession. The parties further agreed that one of the central disputes in this case is the legal effect of the "Addendum to Lease" annexed to Respondent's original lease: Petitioner's position is that it is revocable, and Respondent's position is that it provides her with a preferential rent for the duration of her tenancy. It was agreed that this issue would be submitted to the court to be decided on motions for partial summary judgment.

Petitioner argues that it was entitled to terminate the lower rent because the lease addendum specifies that the preferential rent was only for the term of the original lease and allows the full legal rent to be charged upon renewal if the rent was not current at that time. In support of the claim that Respondent's rent account was not current at the time her last lease with a preferential rent came up for renewal Petitioner's motion papers include affidavits of its managing agent Moshe Stahl, sworn to on August 14, 2020 and September 15, 2020. Based upon his personal knowledge and "the books and/or records kept by me and my office in the regular course of business", Mr. Stahl asserts that Respondent had been indebted to Petitioner for rent since at least March 2016 [\[FN2\]](#), Stahl Affidavits of Aug. 14, 2020 and Sept. 15, 2020 at ¶ 7, and references a ledger attached as Exhibit 3. Mr. Stahl also describes a prior nonpayment proceeding, L & T Index # 43949/2017, which was settled in May 2018 in an agreement "whereby Respondent acknowledged owing a substantial amount of rent, which was later paid by HRA." Stahl Affid. of Sept. 15, 2020 at ¶ 8. Petitioner provides a copy of that agreement, dated May 17, 2018, which includes Respondent's agreement to pay \$11,396.50 as all arrears owed [\[*3\]](#) through May 31, 2018.

Respondent, who asserts in her affidavit in support of her cross-motion dated September 1, 2020 that she "understood [the preferential rent] to continue for my tenancy," Perea Affid. at ¶ 4, argues that the addendum to her initial lease should be interpreted to provide her with a preferential rent for the duration of her tenancy and the only condition was that she be current on her rent at the time of the first renewal. As no claim has been made that she was not current in her rent at that time, Respondent argues that Petitioner was not permitted to revoke the preferential rent. In the second paragraph of the addendum, entitled "*Abatement at Lease Renewal*" (underlining in original), Respondent emphasizes the word "the" in the phrase "rent must be paid in full at the lease renewal date" to support her argument.

Further, Respondent argues that to the extent the lease addendum is ambiguous, it should be resolved contra proferentum, against Petitioner, whose predecessor-in-interest was the drafter of the document. Respondent also argues that, in any event, Petitioner and its predecessor-in-interest waived the right to remove the preferential rent by continuing it for sixteen years. Respondent makes no representations as to the status of her rent account at any time, other than to say that, "without my prior preferential rent rate, I still struggle with my high monthly rent." Perea Affid. at ¶ 8.

Respondent also argues that Petitioner has not offered evidence in admissible form that her rent account was in arrears at the time her last lease with a preferential rent came up for renewal. Respondent asserts that Petitioner's rent ledger was not properly authenticated, and it includes an unexplained charge of \$7,742.48, labelled "Conversion", in the opening month of March 2016.

DISCUSSION

To determine whether the rent amount Petitioner seeks to recover from Respondent in this nonpayment proceeding is correct, it is necessary first to resolve the question of the meaning of the addendum to Respondent's original lease. Summary judgment on this issue is appropriate, as there are no factual disputes as to the existence and wording of that document and the only question is one of law. CPLR R 3212. *Winegrad v New York Univ Med Center* (64 NY2d 851, 476 NE2d 642, 487 NYS2d 316 [1985]); *Zuckerman v New York* (49 NY2d 557, 404 NE2d 718, 427 NYS2d 595 [1980]); *Andre v Pomeroy* (35 NY2d 361, 364, 320 NE2d 853, 854, 362 NYS2d 131, 133 [1974]).

The starting point is basic contract law, as it is well established that "the interpretation of the provisions of a lease is governed by the same rules of construction applicable to other agreements". *Missionary Sisters of the Sacred Heart, Ill v NY State Div of Hous & Cmty Renewal* (283 AD2d 284, 288, 724 NYS2d 742, 745 [1st Dep't 2001]); and *see Stern v Equitable Trust Co of New York* (238 NY 267, 269, 144 NE 578 [1924])("[t]he relation of landlord and tenant is always created by contract, express or implied"). A lease is a contract which, "achieves two ends, to wit: the conveyance of an estate in real property from lessor to lessee, and the delineation of the parties' rights and obligations pursuant thereto." *219 Broadway Corp v Alexander's, Inc* (46 NY2d 506, 509, 387 NE2d 1205, 414 NYS2d 889 [1979]). A lease is "the transfer of absolute control and possession of property at an agreed rental", *Feder v Caliguira* (8 [*4]NY2d 400, 404, 171 NE2d 316, 208 NYS2d 970 [1960]), and all the essential terms must be agreed upon, including "the area to be leased, the duration of the lease, and the price to be paid." *Davis v Dinkins* (206 AD2d 365, 366-67, 613 NYS2d 933 [2nd Dep't 1994]).

Here, there is no question that a valid residential rental contract exists between the parties; the question is the amount and nature of the rent agreed to under Respondent's original lease agreement. Under Section 2521.2 of the Rent Stabilization Code, a "preferential rent" is defined as a rent amount charged to and paid by a tenant that is less than the legal regulated rent. 9 NYCRR § 2521.2(a). Under the law in effect in 2017 [\[FN3\]](#) and 2018 when Respondent's lease came up for renewal and Petitioner no longer offered her a preferential rent, "where the amount of rent charged to and paid by the tenant is less than the legal regulated rent for the housing accommodation, the amount of rent for such housing accommodation which may be charged upon renewal may, at the option of the owner, be based upon such previously established legal regulated rent, as adjusted by the most recent applicable guidelines increases and any other increases authorized by law". Rent Stabilization Law of 1969 § 26-511(c)(14) [\[FN4\]](#) ; and *see Matter of Rania Mesiskli, LLC v New York State Div of Hous & Community Renewal* (166 AD3d 625, 88 NYS3 [2nd Dep't 2018]). The exception to this rule was where the parties executed a lease provision or rider that unequivocally established a rent concession for the duration of the tenancy. *See, e.g., Matter of Pastreich v New York State Div of Hous & Community Renewal* (50 AD3d 384, 386-387, 856 NYS2d 61, 63 [1st Dep't 2008]); *Colonnade Mgt, LLC v Warner* (11 Misc 3d 52, 53, 812 NYS2d 209, 2010 [App Term 1st Dep't 2006]); *Matter of Sugihara v State of New York Div of Hous & Community Renewal Off of Rent Admin* (13 Misc 3d 1239[A], 831 NYS2d 356 [Sup

Ct NY Co 2006]); and compare *Matter of Missionary Sisters of Sacred Heart, Ill v New York State Div of Hous & Community Renewal* (283 AD2d 284, 287, 724 NYS2d 742 [1st Dep't 2001]).

Here, Respondent's initial one-year lease stated a monthly rent of \$1037.94; the accompanying addendum, executed by both the landlord and the tenant on the same day as the lease, clearly states in the first of its two paragraphs the landlord's agreement "to abate" a portion of the rent and accept a lower amount of \$700.00 "for the duration of this lease period .[f]rom March 1, 2000 to Feb 28, 2001." The addendum references the term of the lease and does not state that the landlord agreed to accept a lower amount for the duration of the tenancy. Future availability of the rent concession is addressed in the addendum's second paragraph, entitled "*Abatement at Lease Renewal*", which states that for the abatement to continue the tenant's collectible rent "must be paid in full at the lease renewal date". This lease addendum does not [*5]"unequivocally and explicitly" provide for a rent concession for the duration of Respondent's tenancy. *Colonnade Mgt, LLC v Warner, supra*.

Respondent's argument that the second paragraph of the addendum should be interpreted to refer only to the first lease renewal following the original lease is unconvincing. The Rent Stabilization Code requires all lease renewals to be offered upon "the same terms and conditions as the expired lease", 9 NYCRR §§ 2522.5(g)(2) and 2523.5(a), with exceptions not relevant herein. [See *Rosario v Diagonal Realty, LLC* \(8 NY3d 755, 872 NE2d 860, 840 NYS2d 748 \[2007\]\)](#); *Century Operating Corp v Popolizio* (60 NY2d 483, 458 NE2d 805, 470 NYS2d 346 [1983]). None of the cases cited by Respondent in support of this argument involve a lease rider offering a rent abatement, like the one here, that clearly states it to be solely "for the duration of this lease period", with "Abatement at Lease Renewal" permitted only if the rent account "is paid in full". To interpret the rider as Respondent urges would undermine the significance of the "same terms and conditions" requirement as applied to a preferential rent rider and contrary to both the language of each renewal lease - by their own terms they are "based on the same terms and conditions as your expiring lease" - and the case law that strictly interprets this provision to require the terms of an initial rent rider to be carried forward to each subsequent lease renewal.

Further, Petitioner has sufficiently established that Respondent's rent account was in arrears when Petitioner opted not to offer a preferential rent in the lease renewals commencing March 1, 2017 and/or March 1, 2018 [\[FN5\]](#) . [See, e.g., *Dee Cee Assoc LLC v 44*](#)

[Beehan Corp. \(148 AD3d 636](#), 641, 51 NYS3d 41, 45 [1st Dep't 2017]); *DeLeon v Port Auth* (306 AD2d 146, 761 NYS2d 54 [1st Dep't 2003]). The rent ledgers attached to and referenced in the sworn affidavits of Petitioner's managing agent Moshe Stahl - whose affidavits were based upon his personal knowledge and the records kept by him and his office in the regular course of business - reflect arrears of \$11,549.06 as of March 1, 2017 and \$19,487.14 as of March 1, 2018 [\[FN6\]](#) and the Stipulation settling the prior nonpayment proceeding on May 16, 2018 acknowledges arrears at that time of \$11,396.50. Respondent does not deny or otherwise offer any proof as to the status of her rent account at any time so as to raise a material issue of fact.

As Petitioner has made a prima facie showing of entitlement to judgment as a matter of law on the issue of the revocability of the lease addendum which accompanied Respondent's original lease, tendering sufficient evidence to eliminate any material issues of fact, *see Winegrad and Zuckerman, supra*, and Respondent has not demonstrated by admissible evidence the existence of a factual issue requiring a trial, partial summary judgment in Petitioner's favor is warranted, [Branham v Loews Orpheum Cinemas, Inc. \(8 NY3d 931](#), 866 NE2d 448, 834 NYS2d 503 [2007]); *Alvarez v Prospect Hosp* (68 NY2d 320, 324, 501 NE2d 572, 574, 508 NYS2d 923, 925-926 [1986]).

Respondent's argument that Petitioner and/or its predecessor-in-interest waived the right [\[*6\]](#) to revoke the preferential rent cannot be determined on the papers now before the court. While Respondent cites no caselaw to support this argument, it is well-settled that a lease provision can be waived through nonenforcement, *Jeppaul Garage Corp v Presbyterian Hosp in NY* (61 NY2d 442, 462 NE2d 1176, 474 NYS2d 458 [1984]); *Schwartz v Certified Management Corp* (117 AD2d 521, 498 NYS2d 135 [1st Dep't 1986]), even where, as here, the lease contains a "no waiver" provision, *see, e.g., Lee v Wright* (108 AD2d 678, 485 NYS2d 543 [1st Dep't 1985]); *255 Fieldston Buyers Corp Michaels* (196 Misc 2d 105, 761 NYS2d 762 [App Term 1st Dep't 2003]). However, as a preliminary matter, waiver is an affirmative defense which Respondent did not raise in her Amended Answer as required by CPLR § 3018(b). *See generally Rehill v Rehill* (306 NY 126, 116 NE2d 281 [1953]). Further, Respondent has made no showing that Petitioner and/or its predecessor-in-interest ever previously offered her lease renewals with a preferential rent despite her rent account having been in arrears during the period of 2001 through 2015.

Based on the foregoing, the court's answer to the question presented by the parties through their respective motions for summary judgment is that the preferential rent set forth in the addendum to Respondent's initial lease was not for the duration of the tenancy and was revocable upon renewal in the event Respondent's rent account was in arrears, which it was upon the expiration of her lease which ended on February 28, 2017.

CONCLUSION

For the reasons set forth above, Petitioner's motion is granted to the extent set forth above, Respondent's cross-motion is denied and the matter is set for down for a videoconference on October 15, 2020 at 2:15 p.m. for all purposes. Counsel should contact the court by email to reschedule the conference if they are not available on the date and time stated herein. The foregoing constitutes the Decision and Order of the court, copies of which are being emailed to the parties' respective counsel.

Diane Lutwak, HCJ

Dated: Bronx, New York

October 1, 2020

Footnotes

Footnote 1: While neither side has provided a copy, the DHCR registration history statement reflects that there was also a one-year renewal lease for the period of March 1, 2017 through February 2018. Like the one that commenced on March 1, 2018, according to the DHCR statement the missing lease renewal appears to have offered only the legal regulated rent and no preferential rent. The monthly legal regulated rent registered for this 2017-2018 lease renewal was the same as in the 2015-2017 lease renewal which expired on February 28, 2017

(\$1583.50); this comports with the 0% increase for a one-year lease renewal authorized by the Rent Guidelines Board Order in effect at that time. See Rent Guidelines Board Apartment Orders Chart (Exhibit I to Respondent's Cross-Motion).

Footnote 2: As noted by Judge Weissman in his Decision and Order of March 16, 2020 granting Respondent's prior discovery motion, Petitioner became the owner of the subject building in March 2016.

Footnote 3: See fn 1, *supra*.

Footnote 4: Had Respondent's lease come up for renewal on or after June 14, 2019, the effective date of the Housing Stability and Tenant Protection Act of 2019 (HSTPA), the amended version of Rent Stabilization Law § 26-511(c)(14) would apply. As amended, that section now requires that upon renewal of any lease with a preferential rent, "the amount of rent for such housing accommodation that may be charged and paid shall be no more than the rent charged to and paid by the tenant prior to that renewal, as adjusted by the most recent applicable guidelines increases and any other increases authorized by law."

Footnote 5: See fns 1 and 3, *supra*.

Footnote 6: Under Rent Stabilization Code § 2523.5(a), tenants are entitled to at least 90 days' notice of the expiration of their leases. An examination of Petitioner's rent ledger 90 days earlier than the lease commencement dates reflects Respondent owing \$11,029.58 on December 1, 2016 and \$17,121.74 on December 1, 2017.

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