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CIVIL COURT OF THE CITY OF NEW YORK
BRONX COUNTY: HOUSING PART D
--X L&T Index # 21642/19
LORAN, L.P.,

Petitioner-Landlord,

-against-

DECISION & ORDER

JOSEPH CRUZ,

Respondent-Tenant.

Address:
1505 Macombs Road, Apt 2D, Bronx, NY 10452
--X
Hon. Diane E. Lutwak:

Recitation, as required by CPLR Rule 2219(A), of the papers considered in the review of Respondent's Cross-Motion for Leave to Engage in Pre-Trial Discovery:

Papers	Numbered
Respondent's Notice of Cross-Motion, Attorney's Affirmation & Exs AA-GG	1, 2, 3-9
Respondent's Memorandum of Law	10
Petitioner's Attorney's Affirmation & Affidavit in Opposition	11, 12
Respondent's Attorney's Reply Affirmation	13
Petitioner's Attorney's Affirmation & Affidavit on Sur-Reply	14, 15
Respondent's Attorney's Affirmation & Affidavit on Sur-Sur-Reply	16, 17

After oral argument, upon the foregoing papers and for the reasons stated below, respondent's motion for leave to engage in pre-trial discovery is decided as follows.

PROCEDURAL HISTORY & FACTUAL BACKGROUND

This is a nonpayment eviction proceeding in which the petition, dated April 22, 2019, alleges that the premises are subject to Rent Stabilization and seeks rent arrears of $17,108.78, comprised of: $2367.60 per month for the months of February, March and April 2019; $1430 per month as a "preferential rent" for the months of September 2018 through and including January 2019; and a balance of $1299.50 for August 2018. On May 6, 2019, respondent by counsel filed a verified answer to the petition raising three Objections in Point of Law, three Affirmative Defenses and four Counterclaims. After an initial court appearance on May 13,

2019, motion practice followed and by Decision and Order dated April 28, 2020 Housing Court Judge Weissman, then sitting in this Resolution Part D, granted respondent's motion to dismiss, without prejudice, due to a defective rent demand and petition; denied petitioner's cross-motion for use and occupancy; and restored the case to the calendar for trial on respondent's counterclaims. The April 28, 2020 Decision and Order referred the parties to the New York State Division of Housing and Community Renewal (DHCR) to determine the apartment's legal rent; however, by written stipulation the parties agreed instead that this issue would be decided at trial in this court as part of respondent's rent overcharge counterclaim. Judge Weissman thereafter denied petitioner's motion to re-argue by Decision and Order dated August 24, 2020, and clarified his earlier decision to the extent of stating that, "this Court did not make a determination as to the legal regulated rent, did not hold that the rent must necessarily be the lower amount charged, and petitioner has preserved its argument to seek what it believes is the full legal regulated rent for trial." Respondent's cross-motion for discovery was transferred back to the undersigned, now sitting in Part D, for determination.

The following facts relevant to this discovery motion are undisputed:

- Respondent's initial lease, which also included a second tenant named Stephen Fristed, was for a 1-year-and-15-day term running from 9/16/14 through 9/30/15; it stated a monthly rent of $2094.37 and was accompanied by a rider[1] "only for this Lease term" which gave the tenants a monthly credit of $794.37 "provided the monthly rent is paid on or before the first of each month." Petitioner charged respondent and Mr. Fristed a monthly rent of $1300 ($2094.37-$794.37) under this lease. Petitioner registered with the DHCR only the higher amount of $2094.37 on 6/11/15 as the "legal regulated rent" (LRR) for the 2015 registration year, with "LEAS/RNL" stated as the reason for the increase above the prior year's registered rent.
- Respondent and Mr. Fristed's second lease, on the DHCR's "RTP-8" renewal lease form, ran from 10/1/15 through 9/30/16 and stated the same LRR as in the initial lease,

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[1] Petitioner's managing agent Luis Delacruz in his Affidavit of July 8, 2019 - originally submitted in opposition to respondent's prior motion to dismiss, with a copy attached as Exhibit B to petitioner's opposition to this discovery motion (also attached as Exhibit CC to the discovery motion itself) - states that "all subsequent leases contained similar Riders with similar provisions," Delacruz Affid. at ¶ 11, and references documents attached as Exhibits "C" through "F". While petitioner's copies of the leases were not attached to its opposition to this discovery motion, they are in the court file as an attachment to petitioner's opposition to respondent's prior motion and the court deems them to be part of petitioner's opposition to this discovery motion. The leases appear to be identical to the ones respondent attaches as Exhibit EE to this discovery motion. However, the only lease provided to the court by either side with a rider similar to the one attached to respondent's original lease is the one described below as "Respondent's third lease".

$2094.37. Petitioner charged respondent and Mr. Fristed a monthly rent of $1325 under this lease[2] and registered with the DHCR only the higher amount of $2094.37 on 5/17/16 as the LRR for the 2016 registration year.

- Respondent's third lease was in his name alone, prepared on an initial lease form (not an RTP-8 renewal lease form), ran from 2/1/17 through 1/31/18 and stated a monthly rent of $2303.81 - a 10% increase above the prior rent of $2094.37. This lease was accompanied by a rider similar to the one that accompanied the initial lease: It stated that it was "only for this Lease term" and gave the tenant a monthly credit of $903.81 "provided the monthly rent is paid on or before the first of each month." Petitioner charged respondent a monthly rent of $1400 ($2303.81-$903.81) under this lease and registered with the DHCR only the higher amount of $2303.81 on 5/5/17 as the LRR for the 2017 registration year, with "VAC/LEAS" stated as the reason for the increase above the prior year's registered rent.
- Respondent's fourth and last executed lease - a renewal lease (on the RTP-8 form) in his name alone – ran from 2/1/18 through 1/31/19 and stated a monthly rent of $2332.61 - a 1.25% increase above the prior rent of $2303.81. Petitioner charged respondent a monthly rent of $1430 under this lease[3] and registered with the DHCR both the higher amount of $2332.61 as the LRR and the lower amount of $1430 as a "preferential rent" on 6/7/18 for the 2018 registration year. "LEAS/RNL" is stated on the DHCR registration statement as the reason for the increase above the prior year's registered rent.
- Petitioner offered respondent a fifth lease (on the RTP-8 form) to commence 2/1/19 in his name alone with a monthly rent option of either a 1-year renewal for $2367.60 or a 2-year renewal for $2390.93, reflecting increases calculated at a rate of 1.5% or 2.5%, respectively, above the prior rate of $2332.61. Respondent rejected this offer.
- Respondent interposed his claim of rent overcharge in May 2019.
- The DHCR rent history reflects an LRR of $1658.24 filed with the DHCR on 7/23/14 for the 2014 registration year, under a renewal lease in the name of the prior tenant for the period of 4/1/14 through 3/31/15.
- The DHCR rent history reflects an LRR of $1594.46 filed with the DHCR on 6/14/13 for the 2013 registration year, under a renewal lease in the name of the prior tenant for the period of 4/1/13 through 3/31/14.

Respondent seeks discovery pursuant to CPLR §§ 408, 3101 *et seq.* on his rent overcharge counterclaim; specifically, "regarding alleged individual apartment improvements"

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[2] No rider reflecting this lower rent of $1325 was provided to the court, *see* fn 1, *supra,* but petitioner's managing agent asserts that this is what respondent was charged and paid and is reflected in the ledger, Delacruz Affid. at ¶ 4 and Exhibit I thereto.

[3] No rider reflecting this lower rent of $1430 was provided to the court, *see* fn 1, *supra*, but petitioner's managing agent asserts that this is what respondent was charged and paid and is reflected in the ledger, Delacruz Affid. at ¶ 6 and Exhibit I thereto.

(IAIs), Respondent's Memorandum of Law at pp. 1 & 22, made to his apartment before he moved in and after the prior tenant moved out. Respondent argues that he has shown the requisite "ample need" for the requested discovery, citing, *inter alia*, *Hartsdale Realty Co v Santos* (565 NYS2d 527, 170 AD2d 260 [1st Dep't 1991]); *Mautner-Glick Corp v Higgins* (64 Misc3d 16, 18, 101 NYS3d 810, 812 [App Term 1st Dep't 2019]); and *New York University v Farkas* (121 Misc2d 643, 468 NYS2d 808 [Civ Ct NY Co 1983]). Respondent points to both his counterclaim for rent overcharge and the affidavit of petitioner's managing agent Luis Delacruz (*see* fn 1, *supra*), which explains that respondent's first rent of $2094.37 "was based on a vacancy increase of 16.25% from the previous legal registered rent of $1,658.24 plus an additional $10,040.50 in improvements to the subject apartment upon the vacature of the prior tenant." Delacruz Affid. at ¶ 3. Respondent notes that Mr. Delacruz did not provide any documentation of the IAIs and argues that to counter his rent overcharge claim "Petitioner will have to prove that [IAIs] were made in order to have a chance of recouping those costs," Resp's Mem. of Law at p. 23, and that discovery should be granted as he "should be afforded the opportunity to meaningfully prepare for this aspect of the trial." Id.

Respondent limits the scope of his requested discovery to interrogatories and/or document production requests for eight items for the period beginning "prior to Respondent's tenancy [which commenced September 16, 2014] and after the prior tenant vacated the premises"[4] and ending July 31, 2018. Six of the eight items explicitly refer to the alleged IAIs. The seventh requests either a copy of any rider given to respondent upon his taking occupancy of the premises or, if no rider was provided, a statement of the reason why.[5] The eighth item requests a detailed rent breakdown "from the inception of Respondent's tenancy through to July 31, 2018, reflecting all charges and payments".[6] In support of the motion respondent annexes, *inter alia*, copies of (1) all leases between the parties (Exhibit EE); the DHCR's rent registration history for respondent's apartment pursuant to a request dated 9/20/18, reflecting registration information for every year from 1984 through 2018 (Exhibit FF)[7]; and petitioner's deed to the premises, showing it acquired ownership on February 9, 1994 (Exhibit GG).

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[4] Without explanation, petitioner interprets this statement to mean that respondent seeks discovery dating back to January 1, 2014. *See* Pet's Affirm. in Opp. at ¶¶ 57, 83, 97. However, it appears that the prior tenant did not move out and the work to effectuate the IAIs did not begin until some point after April 1, 2014, which was the date the prior tenant's last lease at a monthly rate of $1658.24 commenced, as evidenced by the 2014 DHCR registration that was filed on July 23, 2014.

[5] In its sur-reply papers, petitioner produced a copy of what it asserts is the requested rider, likely rendering this discovery request to be moot.

[6] Exhibit I to the affidavit of petitioner's agent Luis Delacruz, *see* fn 1, *supra*, is a detailed rent breakdown covering the period stated, likely rendering this discovery request to be moot.

[7] Neither party has produced a more recent DHCR rent registration history than this one to include the filings for the 2019 and 2020 registration years, and no explanation has been provided for their failure to do so.

Respondent acknowledges the applicability of the old 4-year statute of limitations for rent overcharges under CPLR § 213-a and Section 26-516(a) of the Rent Stabilization Law, as opposed to the amended versions of these statutes effectuated by the Housing Stability and Tenant Protection Act of 2019 (HSTPA), *Matter of Regina Metro Co, LLC v New York State Div of Hous & Community Renewal* (2020 NY LEXIS 779, 2020 NY Slip Op 02127 [Ct of App, April 2, 2020]), and highlights the long-standing exception to this rule where the landlord engaged in a fraudulent scheme to deregulate the apartment, *Conason v Megan Holding, LLC* (25 NY3d 1, 29 NE3d 215, 6 NYS3d 206 [2015]); *Matter of Grimm v New York State Div of Hous & Community Renewal Off of Rent Admin* (15 NY3d 358, 362, 938 NE2d 934, 912 NYS2d 491 [2010]); *Thornton v Baron* (5 NY3d 175, 833 NE2d 261, 800 NYS2d 118 [2005]). Respondent argues that in this case there is sufficient indicia of fraudulent conduct by petitioner to warrant examination of records from 2014, the year respondent moved into the apartment and the year the alleged IAIs were presumably made, which is more than four years prior to the interposition of his rent overcharge claim in the answer he filed with this court in May 2019.

In support of his claim that petitioner has engaged in a fraudulent scheme to deregulate his apartment respondent recites the following actions by petitioner:

- Failing to identify alleged IAIs as a component of respondent's initial rent in both the 2015 DHCR registration and respondent's initial lease;
- Offering a reduced rent under riders which created an "illegal, unconscionable on-time discount scheme", Respondent's Memorandum of Law at p. 23;
- Not registering the reduced rent with the DHCR for the years 2015 through 2017;
- Raising respondent's rent by 10% after his co-tenant left;
- Increasing the rent by a total of 40.67% in just over four years from the $1658.24 charged to the prior tenant and registered with the DHCR in July 2014 to the $2332.61 charged to respondent in his most recently executed renewal lease.

In opposition, petitioner cites to many of the same decisions as respondent, as well as to others, and argues that respondent has neither met the "ample need" standard of *New York University v Farkas, supra,* nor made the requisite showing of a fraudulent scheme to deregulate the apartment to justify looking back beyond the applicable 4-year statute of limitations. Petitioner asserts that the base date for analyzing respondent's rent overcharge claim filed in May 2019 is May 2015, four years earlier, and that "the base date rent as of May 2015 was $1,658.24 per month which was the rent registered on July 23, 2014", Affirmation in Opposition at ¶¶ 60 & 70. Petitioner states that it has explained any discrepancies found within the rent registrations from 2015 through 2019 and that the rent calculations all comport with the applicable Rent Guidelines Board Orders.

Further, petitioner argues that discovery on the IAIs is irrelevant as it has provided calculations[8] showing what the rent would be, starting with the base date rent of $1,658.24, both with and without an IAI increase. Petitioner also asserts that at all times respondent has been charged and paid only a lower preferential rent. Regarding the vacancy increase that was taken in 2017, petitioner states that this was done under "the mistaken belief" that it was permissible, it has already conceded that it made an error and it has corrected this mistake in its calculations.

On reply, respondent asserts that petitioner's alternate rent calculations with and without the IAIs and explanations about discrepancies in the rent registrations and leases do not render the discovery request irrelevant or undermine the sufficiency of the indicia of fraud respondent has shown. Respondent asserts that petitioner's claim to have always charged a lower preferential rent is not correct and is belied by the predicate rent demand served in this proceeding which seeks rent at the rate of $2367.60 per month for the months of February, March and April 2019. Respondent further states he is not aware of any proceedings filed by petitioner at the DHCR seeking to amend the defective registration statements to correct the errors it now acknowledges having made.

On sur-reply, petitioner's managing agent Mr. Delacruz provides copies of two documents:

- the third page of an 8-page Rent Stabilization Rider (form # RA-LR1 [2/06]) that Mr. Delacruz asserts was given to respondent along with his initial lease in September 2014; this page reflects how respondent's initial rent of $2094.37 was calculated: the "Last Legal Regulated Rent" of $1658.24, plus a vacancy allowance of $269.46 (16.25%) plus a charge for "New Equipment, Service, Improvement for this apartment" of $166.67;
- a "Lease Rider Acknowledgement" form that appears to have respondent's signature on it dated 9-13-14 acknowledging receipt of the "Rent Stabilization Lease Rider for Apartment House Tenants Residing in New York City".

In his sur-reply affidavit Mr. Delacruz explains that his office saves and scans tenants' leases and riders in separate folders and that while it gives the entire eight-page Rent Stabilization rider to the tenant it only keeps for its own records a copy of the rent calculation page.

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[8] Petitioner's counsel's Affirmation in Opposition to this motion includes only his calculations of what the current rent would be, after making certain corrections, without the IAI increase. However, petitioner's counsel refers to his prior Affirmation in Opposition to respondent's motion to dismiss which also included the calculations of what the current rent would be if an IAI increase of $166.67 per month is included.

In a sur-sur-reply affidavit, respondent states that he never before saw or received a copy of any pages of the Rent Stabilization rider which petitioner provided on sur-reply and that it was not included with the papers he was given along with his initial lease.

DISCUSSION

In summary proceedings a party requesting discovery must obtain leave of court (CPLR § 408) and, to obtain such leave, must demonstrate "ample need." *Antillean Holding Co v Lindley* (76 Misc2d 1044, 1047, 352 NYS2d 557 [Civ Ct NY Co 1973]). In determining whether a party has established "ample need", courts consider a number of factors, not all of which need to be present in every case, including:

- whether the movant has asserted facts to establish a claim or defense;
- whether there is a need to determine information directly related to the claim or defense;
- whether the requested disclosure is carefully tailored and likely to clarify the disputed facts;
- whether prejudice will result from granting leave to conduct discovery; and
- whether any prejudice caused by granting a discovery request can be diminished by an order fashioned by the court for that purpose.

See New York University v Farkas (121 Misc2d 643, 647, 468 NYS2d 808 [Civ Ct NY Co 1983]), *citing Antillean Holding Co v Lindley, supra*.

Courts routinely find there to be "ample need" for disclosure to respondents in eviction proceedings when there are disputes as to whether an apartment is subject to Rent Stabilization and/or there is a rent overcharge, especially where the landlord claims that IAIs were made to the apartment. *See, e.g., 2701 Grand Assn LLC v Morel* (50 Misc3d 139[A], 31 NYS3d 924 [AT 1st Dep't 2016])(reversing lower court's denial of tenants' motion to vacate stipulation and to file an amended answer and finding, "Tenants also demonstrated ample need for limited discovery relating to the apartment improvements that were the basis of the $891 rent increase"); *Aimco 322 E 61st St LLC v Brosius* (50 Misc3d 10, 12, 21 NYS3d 803, 805 [AT 1st Dep't 2015])(reversing lower court's denial of tenant's motion for discovery and finding, "Tenant demonstrated ample need for limited discovery relating to the apartment improvements that were the basis for the purported deregulation"); *150 W 82nd St Realty Assoc v Linde* (36 Misc3d 155[A], 964 NYS2d 61 [AT 1st Dep't 2012])(affirming lower court's order granting discovery to tenant who had "demonstrated ample need for limited discovery relating to the apartment improvements that were the basis of the $1,061 rent increase"); *Emporium Mgt Corp v Reyes* (48 Misc3d 1227[A], 22 NYS3d 137 [Civ Ct Kings Co 2015]).

As both parties acknowledge, the "sweeping changes" made to the Rent Stabilization Law by HSTPA last year do not apply to this case, *Matter of Regina Metro Co, LLC v New York State Div of Hous & Community Renewal, supra* (2020 NY LEXIS 779, *2, 2020 NY Slip Op 02127, 2), which must be determined by applying the prior 4-year statute of limitations found in former Rent Stabilization Law § 26-516(a) and former CPLR § 213-a, taking into consideration the "limited common-law exception to the otherwise-categorical evidentiary bar, permitting tenants to use such evidence only to prove that the owner engaged in a fraudulent scheme to deregulate the apartment." *Id.* (2020 NY LEXIS 779, *11, 2020 NY Slip Op 02127, 5).

Here, while respondent argues at length that he has demonstrated the requisite indicia of a fraudulent scheme to deregulate his apartment to warrant discovery beyond the 4-year lookback period, there is no need to undertake that analysis as the alleged IAIs were performed during the applicable 4-year period. As explained by the Court of Appeals in *Regina*, keeping in mind the former 4-year record retention rule, the base date and boundaries of the 4-year lookback period in any given case are determined by examining the annual rent registrations which owners of Rent Stabilized apartments generally are required to file with the DHCR under RSL § 26-517(f):

> Together, the statute of limitations, lookback provision and record retention rules formed an integrated scheme for calculating overcharges based on a closed universe of records pertaining only to the apartment's rental history in the four years preceding the filing of the complaint. Consistent with the lookback rule, the enforcement provisions provided that, except for certain claims filed shortly after initial registration of a unit, "the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement," i.e., the base date rent, plus "any subsequent lawful increases and adjustments" (former RSL § 26-516[a][i]).

Matter of Regina Metro Co, LLC, supra (2020 NY LEXIS 779, *8-10, 2020 NY Slip Op 02127, 5).

The mechanics for calculating the lookback period were well laid out in *HO Realty Corp v State of NY Div of Hous & Community Renewal* (46 AD3d 103, 106-110, 844 NYS2d 204, 207-209 [1st Dep't 2007]), where the court explained,

> When an overcharge complaint is filed, DHCR initially examines the relevant rental history of the premises to determine its lawful rent. It first determines the base rent for the premises, which ordinarily would be the rent listed on the annual rent registration statement filed four years prior to the most recent registration statement for the premises. It will then examine the rental history of the premises during the next four years, apply any appropriate increases or adjustments to the base rent, and arrive at a calculation

representing the lawful rent that ought to be charged for the premises at the time the claim of a rent overcharge was made by the tenant.

In other words, the process requires, after identifying “the most recent registration statement”, first a looking backward and then a looking forward:

- First, to determine the base date rent, looking backward to the rent “listed on the annual rent registration statement filed four years prior to the most recent registration statement for the premises”.
- Then, to determine the lawful rent at the time of the complaint, looking forward from that base date rent and applying “any appropriate increases” to calculate the rent to be charged the tenant at the time the rent overcharge complaint was made.

Applying the above principles to the DHCR’s records for respondent’s apartment, the starting point – that is, “the most recent registration statement for the premises” - is the registration filed on June 7, 2018 for the 2018 registration year.[9] Next:

- First, to determine the base date rent, looking backward to the rent “listed on the annual rent registration statement filed four years prior” to the date the most recent registration was filed (June 7, 2018) takes us to June 7, 2014; on that date the current registration was the one filed on June 14, 2013 for the 2013 registration year[10], reflecting the prior tenant’s penultimate lease renewal running from 4/1/13 through 3/31/14 with a rent of $1594.46.
- Then, to determine the lawful rent at the time respondent interposed his rent overcharge in May 2019, “any appropriate increases” must be applied to the base date rent. The “appropriate increases” include those used to calculate the amount of respondent’s first rent under his initial lease which commenced on September 16, 2014. As explained by petitioner’s managing agent Mr. Delacruz in his affidavit of July 8, 2019, and as reflected in page 3 of the Rent Stabilization Rider Mr. Delacruz produced in his sur-reply affidavit, the cost of IAIs done in the apartment after the prior tenant moved out and before respondent moved in was added to the prior tenant’s rent to calculate respondent’s first rent.

Accordingly, the IAIs petitioner allegedly performed in respondent’s apartment prior to the commencement of his tenancy on September 16, 2014 must be deemed to fall within the 4-year lookback period.

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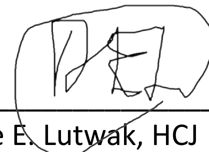
[9] As no documentation or other evidence was presented to show when the 2019 registration was filed or what information it contained, *see* fn 7, *supra*, the court necessarily treats the 2018 registration statement as the most recent one.
[10] As of June 7, 2014, the 2014 registration had not yet been filed (it was not filed until July 23, 2014).

A similar result follows from petitioner's assertion that "the base date rent as of May 2015 was $1,658.24 per month which was the rent registered on July 23, 2014", Affirmation in Opposition at ¶¶ 60 & 70, for the 2014 registration year. Using that 2014 registration as the starting point for the analysis, given that it reflects the last lease registered in the name of the tenant who immediately preceded respondent, it follows that any increase to the rent of $1,658.24 falls within the 4-year lookback rule.

Based on the above analysis, the only question is whether respondent has shown "ample need" for the requested discovery under *NYU v Farkas*. Respondent's discovery demand is directly related to his rent overcharge claim, seeks information within petitioner's exclusive control and/or knowledge and is not unduly burdensome as it is narrow in scope and from a recent vintage. The time frame lies within the 4-year lookback period, respondent seeks only eight items of rent-related documents, two of which it appears petitioner already has provided[11], and petitioner has been the owner not just during the relevant period but all the way back to 1994. The documents demanded should be producible promptly so as not to delay this proceeding further and are likely to clarify the disputed facts as to the basis for the rent petitioner charged respondent upon his initial occupancy in September 2014 and the legality of his current rent. Petitioner's after-the-fact and self-serving calculations of what respondent's rent would be with and without the IAIs is of no moment; if petitioner has the documentation to support the IAIs respondent should be provided with a copy so that he can properly prepare for trial. Accordingly, discovery regarding the IAIs petitioner allegedly completed in between the prior tenant's vacatur of the apartment and respondent's move-in is warranted.

CONCLUSION

For the reasons stated above, respondent's motion is granted, the proposed discovery demand is deemed duly served, petitioner is directed to respond by November 2, 2020 to respondent's eight "Interrogatories" (page 69 of respondent's 107-page motion), and the proceeding is restored to the Court's calendar for a pre-trial videoconference on November 18, 2020 at 12 noon. This constitutes the Decision and Order of this Court, copies of which will be emailed to the parties' attorneys.



Diane E. Lutwak, HCJ

Dated: Bronx, New York
October 19, 2020

[11] *See* fns 5 and 6, *supra*.

Attorneys for Petitioner:

Jeffrey Hulbert, Esq.
Horing Welikson & Rosen, P.C.
11 Hillside Avenue
Williston Park, New York 11596
jhulbert@hwrpc.com

Attorneys for Respondent:

Emilio Paesano, Esq.
Mobilization for Justice, Inc.
424 East 147th Street, 3rd Floor
Bronx, New York 10455
epaesano@mfjlegal.org