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21 Realty Co. v. Caraballo

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[*1]

21 Realty Co. v Caraballo
2022 NY Slip Op 50456(U)
Decided on May 31, 2022
Civil Court Of The City Of New York, Bronx County
Ibrahim, 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This opinion is uncorrected and will not be published in the printed Official Reports.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 May 31, 2022

Civil Court of the City of New York, Bronx County

<p>21 Realty Co., Petitioner,</p> <p>against</p> <p>Rosalis Caraballo, Respondent-Tenant.</p>
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L & T Index No. 304146-22

For Petitioner: The Law Office of Andrea Zinno, by Andrea Zinno, Esq.

Shorab Ibrahim, J.

RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION BY PETITIONER SEEKING ENTRY OF A DEFAULT JUDGMENT AND ISSUANCE AND EXECUTION OF A WARRANT OF EVICTION: NYSCEF DOC NOS. 1-9

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

In this summary non-payment proceeding, commenced by petition dated February 18,

2022, the respondent has not answered or otherwise appeared. Petitioner now moves, pursuant to administrative rules, for entry of a default judgment and for issuance and execution of a warrant of eviction. [\[FN1\]](#)

Upon review of the entire record, the motion is denied, and the petition is dismissed. (*see* CPLR § 409(b) (requiring a summary determination be made regardless of the posture of the proceeding); [Torres v Sedgwick Avenue Dignity Developers LLC, 74 Misc 3d 1209](#)[A], 2, 2022 NY Slip Op 50085[U] [Civ Ct, Bronx County 2022]; *see also, Lakeview Affordable Housing v Turner, 66 Misc 3d 142*(A), 2, 2020 NY Slip Op 50163(U) [App Term, 2nd Dept 2020] (A default final judgment may not be granted on such facially insufficient papers)).

Petitioner concededly accepted Emergency Rental Assistance Program (ERAP) funds on or about September 30, 2021. (*see* NYCEF Doc. 7). The months paid include August, September and October 2021. (*see* NYSCEF Doc. 9).

Some four and a half months *after* accepting ERAP, petitioner brought this case claiming August, September and October 2021 rents were unpaid, in addition to several other months. (*see* NYSCEF Doc. 1).

When accepting ERAP payment, the landlord agrees "that the arrears covered by this payment are satisfied and will not be used as the basis for a non-payment eviction." In other words, once accepted, the landlord cannot commence a case seeking months covered by the [*2]ERAP payment. (*see* L 2021, c 417, Part A, § 5, amending L 2021, c 56, Part A; [Carousel Properties v Valle, 74 Misc 3d 1217](#)(A), 1, 2022 NY Slip Op 50168(U) [Dist Ct, Suffolk County 2022]). [\[FN2\]](#)

Furthermore, as a proper rent demand must fairly apprise the tenant of the periods for which rent is allegedly due, (*see 542 Holding Corp. v Prince Fashions, Inc., 46 AD3d 309*, 311, 848 NYS2d 37 [1st Dept 2007]; [Erik James LLC v Bruna, 70 Misc 3d 1223](#)(A), 2 [Civ Ct, Bronx County 2021]), the demand here is defective and petitioner cannot sustain its *prima-facie* case. (*see* RPAPL § 711(2); [Moniaci v Kelly, 73 Misc 3d 127](#)(A), 2, 2021 NY Slip Op 50884(U) [App Term, 2nd Dept 2021]).

The ERAP payments are "earmarked," meaning they must be applied to the period specified. (*see Greenbriar Garden Apts. v Eustache, 50 Misc 3d 142*(A), 1, 2016 NY Slip Op 50210(U) [App Term, 2nd Dept 2016]).

Nor does the fact that petitioner submitted an affidavit of merit change the court's

calculation. It is axiomatic that a reliable Affidavit of Merit is a prerequisite for entry of a default judgment against a tenant, where the petition has not been personally verified by the landlord. ([see *Sella Properties v DeLeon*, 25 Misc 3d 85](#), 890 NYS2d 254 [App Term, 2nd Dept 2009]). No affidavit can salvage what has been done here. ([see *115 Mulberry LLC v Giacobbe*, 46 Misc 3d 1229\(A\)](#), 7, 2015 NY Slip Op 50343(U) [Civ Ct, New York County 2015] ("This affidavit is intended to confirm for the court that no payments have been tendered for the sum sued upon.")).

Based on the above, judgment shall enter dismissing the petition. ([see *3463 Third Ave Realty LLC v Vasquez*, 59 Misc 3d 1224\(A\)](#), 2, 2018 NY Slip Op 50674(U) [Civ Ct, Bronx County 2018] (When the rent demand is defective, the petition must be dismissed, without prejudice).

This constitutes the decision and order of the court. It will be posted on NYSCEF.

Dated: May 31, 2022

Bronx, NY

SO ORDERED,

/S/

SHORAB IBRAHIM, JHC

Footnotes

Footnote 1: *see* Civil Court of the City of New York Directives & Procedures 222 (DRP-222). Compare, however, *Mennella v Lopez-Torres*, 91 NY2d 474, 479, 672 NYS2d 834 [1998] (Court of Appeals holding that additional procedural safeguards for defaulting tenants in non-payment proceeding is beyond policy choices made by the legislature).

Footnote 2: In this court's view, it matters not at all that the three months at issue here were "prospective" rental payments rather than "arrears" at the time paid. (*see* NYSCEF Doc. 9).

[Return to Decision List](#)