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### 936 TYH RM Bronx LLC v. Brujan

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<b>936 TYH RM Bronx LLC v Brujan</b>
2022 NY Slip Op 33642(U)
October 24, 2022
Civil Court of the City of New York, Bronx County
Docket Number: L&T Index No. 311191-2022
Judge: Shorab Ibrahim
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This opinion is uncorrected and not selected for official publication.

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

\_\_\_\_\_X

936 TYH RM BRONX LLC,

Petitioner,

L&T Index No. 311191-2022

-against-

Present: Hon. Shorab Ibrahim

FRANCISCO BRUJAN & ROSA PEREZ,

DECISION/ORDER

Respondents (Tenants).

Motion Seq. 1 & 2

\_\_\_\_\_X

RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION BY THE PETITIONER FOR A DEFAULT JUDGMENT AND ISSUANCE OF A WARRANT OF EVICTION AND BY THE RESPONDENT TO DISMISS: NYSCEF Documents # 5 through # 8 and # 10 through # 27.

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

RELEVANT FACTS & PROCEDURAL POSTURE

The petition in this non-payment proceeding seeks rent allegedly accruing from May 2020 to April 2022. (*see* NYSCEF Doc. 1). Respondent filed a pro-se answer on May 9, 2022, raising a “general denial” and alleging petitioner failed to do repairs. (*see* NYSCEF Doc. 4).

Thereafter, petitioner moved for entry of a default judgment. (*see* NYSCEF Doc. 5).<sup>1</sup> Respondent appeared, obtained counsel, and now cross-moves for dismissal.

Respondent argues the rent demand is defective because it seeks rent that petitioner is barred from collecting.

DISUSSION

Respondent’s argument is simple. From January 1, 2020 through March 1, 2022, a violation existed for “occupancy contrary to that allowed by” the certificate of occupancy. (*see* NYSCEF Doc. 13 at p. 10, referencing OATH/ECB Violation #35465505N; *see also* NYSCEF

<sup>1</sup> On information and belief, the matter was not calendared due to a pending ERAP application.

Doc. 18). According to the respondent, this non-conforming use means petitioner was not in compliance with Multiple Dwelling Law (MDL) § 301. MDL § 301(1) states, in relevant part,

No multiple dwelling shall be occupied in whole or in part until the issuance of a certificate by the department that said dwelling conforms in all respects to the requirements of this chapter, to the building code and rules and to all other applicable law, except that no such certificate shall be required in the case of: (a). Any class B multiple dwelling existing on April, eighteenth, nineteen hundred twenty-nine, for which a certificate occupancy was not required before such date and which no changes or alterations have been made except in compliance with this chapter...

MDL § 302, in turn, states that in a “dwelling or structure...occupied in whole or in part for human habitation in violation of” § 301, “[n]o rent shall be recovered by the owner...for said period, and no action or special proceeding shall be maintained therefor, or for possession of said premises for nonpayment of such rent.”

Respondent argues dismissal is required because the rent demand seeks rent petitioner cannot collect in this proceeding.

Petitioner counters that respondent’s argument is entirely incorrect because she relies on a misfiled certificate of occupancy to conclude the premises were somehow converted from (2) stories to the current (6) stories. Critically, however, petitioner’s opposition concedes the OATH/ECB violation issued on January 3, 2020. (*see* NYSCEF Doc. 25 at par. 4). Petitioner argues that respondent misinterprets the MDL provisions. Petitioner states the violation is not for respondents’ unit, and that the violation [which was in the cellar] did not affect any other legal unit. (*id.* at par. 6). Indeed, the summons indicates, and the parties agree, that the violation is for an illegal unit in the cellar.<sup>2</sup>

On a motion to dismiss the complaint pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704, 864 NYS2d 70 [2nd Dept 2008]). However, where evidentiary material is submitted and

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<sup>2</sup> The summons speaks for itself. (*see* NYSCEF Doc. 25). It is not disputed. Petitioner acknowledges it had to correct the condition and pay a fine. Petitioner may not relitigate the summons/violation here.

considered on a motion to dismiss a pleading pursuant to CPLR § 3211(a)(7), the question becomes whether the proponent of the pleading has a cause of action, not whether the proponent has stated one. (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]). Dismissal is inappropriate unless the movant can show that a purported fact is no fact at all. (*see Cajigas v Clean Rite Centers, LLC*, 187 AD3d 700, 701, 132 NYS3d 428 [2<sup>nd</sup> Dept 2020]).

The undisputed OATH/ECB violation requires dismissal of this case.<sup>3</sup>

When a violation exists for occupancy at odds with the certificate of occupancy, the building, essentially, lacks a certificate of occupancy. (*see 12 East 88<sup>th</sup> LLC v Fox*, 72 Misc. 3d 1221(A), \*4, 2021 NY Slip Op 50815(U) [Sup Ct, New York County 2021]). No rent may be collected during *any* period the *dwelling's* occupancy is at odds with the certificate of occupancy. (*see MDL § 302; GVS Properties LLC v Vargas*, 172 AD3d 466, 466, 100 NYS3d 230 [1<sup>st</sup> Dept 2019]; *742 Realty LLC v Zimmer*, 46 Misc. 3d 1204(A), \*1, 2014 NY Slip Op 51845(U) [Civ Ct, Kings County 2014]).

Petitioner's arguments must fail because rent is barred even if the tenant's unit is not the illegal unit. (*see West 47<sup>th</sup> Holdings LLC v Eliyahu*, 64 Misc. 3d 133(A), \*1-2, 2019 NY Slip Op 51066(U) [App Term, 1<sup>st</sup> Dept 2019]; *49 Bleecker, Inc. v Gatien*, 157 AD3d 619, 620, 69 NYS3d 863 [1<sup>st</sup> Dept 2018] ("The owner of a 'dwelling or structure ... occupied in whole or in part for human habitation in violation of [§ 301]' may not recover rent for the period during which there is no certificate of occupancy for 'such premises'"); *see also 1165 Fulton Ave. HDFC v Goings*, 65 Misc. 3d 1210(A), 2019 NY Slip Op 51567(U) [Civ Ct, Bronx County 2019] (noting the change in how courts in this department apply MDL 302 after the Court of Appeals holding in *Chazon LLC v Maugenest* (19 NY3d 410, 948 NYS2d 571 [2012])). In *Goings*, the petitioner argued that the violation for use contrary to the certificate of occupancy involved a room in the basement that had no impact on the tenant's unit. (*see 65 Misc. 3d 1210(A), \*2*). Dismissal was still required. Petitioner here makes the same argument, and the same outcome is required.

The rent demand in this proceeding is clearly defective because it seeks rent petitioner is barred from collecting. A rent demand, of course, must fairly afford the tenant actual notice of the alleged amount due and of the period for which such claim is made. (*542 Holding Corp. v*

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<sup>3</sup> The violation is a "Class 1" violation. Class 1 violations are "immediately hazardous": "those where the violating condition(s) poses a threat that severely affects life, health, safety, property, the public interest, or a significant number of persons so as to warrant immediate corrective action..." (*see [What is an OATH Summons? - Buildings \(nyc.gov\)](https://www.nyc.gov)* [last accessed on October 23, 2022]).

*Prince Fashions Inc.*, 46 AD3d 309, 311, 848 NYS2d 37 [1st Dept 2007] citing *Schwartz v Weiss–Newell*, 87 Misc. 2d 558, 561, 386 NYS2d 191 [Civ Ct, New York County 1976]). A proper rent demand is a prerequisite to maintain a non-payment proceeding. (RPAPL § 711(2); see *Vartarian v Brady*, 184 Misc. 2d 333, 707 NYS2d 285 [Civ Ct, New York County 1999]; *EOM 106-15 217th Corp. v Severine*, 62 Misc. 3d 141(A) [App Term, 2nd Dept 2019]).

The rent demand seeks rent portions for twenty (20) different months. Petitioner may only collect rent for one (1) of those months (March 2022). Under these circumstances, the case must be dismissed. (see *3463 Third Avenue Realty LLC v Vasquez*, 59 Misc. 3d 1224(A), \*2, 2018 NY Slip Op 50674(U) [Civ Ct, Bronx County 2018]; see also CPLR 409(b) (requiring summary determination at any stage of the proceeding when no issues of fact are raised)).

#### CONCLUSION

Based on the foregoing, it is Ordered, judgment shall enter in respondents' favor dismissing the petition.<sup>4</sup> This constitutes the Decision and Order of the court. It will be posted on NYSCEF.

Dated: October 24, 2022  
Bronx, NY

SO ORDERED,  
/S/  
SHORAB IBRAHIM, JHC

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<sup>4</sup> Petitioner's motion is denied as moot.