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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART C

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1357 TELLER AVENUE REALTY, LLC,
Petitioner-Landlord,

L&T Index # 313273/2022

-against-

CHRISTINA ROMERO, CESAR ROMERO,
Respondents-Tenants,

-and-

"JOHN DOE" and "JANE DOE",
Respondents-Undertenants.

DECISION & ORDER

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Hon. Diane E. Lutwak, HCJ:

Recitation, as required by CPLR R 2219(a), of the papers considered in the review of Respondents' Motion for Summary Judgment and other relief:

<u>Papers</u>	<u>NYSCEF Doc #</u>
Notice of Petition, Petition, Exhibit A ("Golub Notice")	1, 2, 3
Affidavit of Service of Notice of Petition and Petition	6
Answer	7
Respondents' Notice of Motion	9
Attorney's Affirmation in Support	10
Exhibits A-C in Support	11-13
Respondent's Affidavit in Support	14
Exhibits A-C in Support	15-17
Attorney's Affirmation in Opposition	18
Petitioner's Agent's Affidavit in Opposition	19
Exhibits A-C in Opposition	20-22
Attorney's Affirmation in Reply	23

Upon the foregoing listed papers, Respondents'¹ motion for summary judgment is decided as follows.

¹ As used hereinafter, "Respondents" refers to Christina Romero and Cesar Romero; while Petitioner also names "John Doe" and "Jane Doe" as Respondents, they have not appeared.

BACKGROUND

This is a nonprimary residence holdover eviction proceeding against Rent Stabilized tenants whose last lease expired on August 31, 2020 and was not renewed. The petition is dated May 13, 2022 and is based upon a “Combined Notice to Tenant of Non-Renewal of Lease, Termination of Tenancy, Landlord’s Intention to Recover Possession, and Intention to Recover Possession Upon the Grounds of Tenant’s Non-Primary Residence” dated April 27, 2020 (“the Golub² Notice”). Substituted service of the notice of petition and petition was completed upon the filing of proof of service on June 6, 2022. Respondent Christina Romero, *pro se*, filed an answer on June 10, 2022. Respondents then retained counsel who filed the motion now pending before the court seeking summary judgment and dismissal of the petition based on (1) nullification of the Golub Notice by Petitioner’s acceptance of rent after the purported termination of the tenancy and prior to the commencement of this proceeding; and (2) a stale and therefore defective predicate Golub Notice, citing to, *inter alia*, *Raffone v Schreiber* (18 Misc3d 925, 850 NYS2d 851 [Civ Ct NY Co 2008]).

In opposition, as to rent payments Respondents made after their lease ended on August 31, 2020 Petitioner’s agent explains that, “In September 2020, we tried to send back a payment via FedEx” but the FedEx envelope was returned. Affidavit of Yisroel Brody, sworn to October 31, 2022, at ¶ 7. Additional payments Respondent made in 2021 and 2022 were not cashed and, “In April 2022 we sent back additional payments that were again returned to our office by FedEx.” *Id.* at ¶ 8. Petitioner’s attorney asserts that “Landlord used best efforts during a pandemic” to reject Respondents’ payments, Attorney’s Affirmation at ¶ 16, and argues that summary judgment should be denied as there are material issues of fact.

Regarding the delay in commencing this proceeding after service of the Golub Notice, Petitioner notes the “limited window” of 90 to 150 days prior to lease expiration for serving the required predicate notice, Brody Affidavit at ¶ 4, and explains that since Respondents’ lease ended August 31, 2020 the Golub Notice had to be served when it was. The delay in filing this proceeding thereafter was because of the COVID-19 pandemic and Petitioner’s decision “that it did not make sense to commence the holdover until we knew we could proceed meaningfully on the case.” Brody Affidavit at ¶ 7. Petitioner’s attorney argues, “This court is more than well-aware of the fact that most cases from March 2020 through January 2022 were stayed or adjourned a multitude of times” and the delay in commencing this proceeding “was to save Petitioner the wasted time and financial resources of commencing a case during the pandemic.” Attorney’s Affirmation at ¶ 16.

² See *Golub v Frank* (65 NY2d 900, 493 NYS2d 451, 483 NE2d 126 [1985]).

On reply Respondents' attorney argues that Petitioner's undisputed retention of Respondents' rent payments for pre-petition months after August 2020 requires dismissal under applicable case law. Regarding Petitioner's excuse for delaying the commencement of this proceeding Respondents' attorney cites to Administrative Order 121/20 and asserts that, "Housing Court was only fully closed to new cases for a few months at the beginning of the pandemic, and by June 2020 at the latest (i.e. before the termination date had even arrived) new cases were being accepted." Attorney's Affirmation at ¶ 8.

DISCUSSION

The proponent of a summary judgment motion under CPLR R 3212 must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact. *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]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Alvarez v Prospect Hospital* (68 NY2d 320, 324, 501 NE2d 572, 508 NYS2d 923, 925-926 [1986]); *Zuckerman v New York* (49 NY2d at 562, 427 NYS2d at 598).

Regarding Petitioner's acceptance of pre-petition rent payments after Respondents' lease ended on August 31, 2022, the court agrees that Petitioner has raised issues of fact that warrant denial of summary judgment. However, the 21-month delay in commencing this proceeding following the August 31, 2020 end date of Respondents' last lease renders the Golub Notice stale and requires dismissal of this proceeding as a matter of law. See *Briskin v Williams* (43 Misc3d 1219[A], 993 NY..2 643 [Civ Ct NY Co 2014]); *Raffone v Schreiber* (18 Misc3d 925, 850 NYS2d 851 [Civ Ct NY Co 2008]).

Petitioner's argument that the delay in commencing this proceeding should be excused because of the effects of the COVID-19 pandemic on court proceedings is misplaced. Certainly, at the pandemic's onset, eviction proceedings were suspended statewide, see March 16, 2020 Administrative Order (AO) 68/2020, and New York State Courts remained open only to address "essential matters", AO 3/2020. Paper and electronic filings for new "non-essential matters" were suspended. AO 78/2020, AO 85/2020 and DRP (Directives and Procedures) 207. However, electronic filing of new matters in the New York City Civil Court resumed pursuant to AOs 114/20, 115/20 and 121/20 (issued May 25, 2020, May 28, 2020 and June 10, 2020, respectively), either through "NYSCEF" (New York State Courts Electronic Filing system) or, where "NYSCEF" was not yet available, by mail or through "EDDS" (Electronic Document Delivery System). See also DRP-208 and DRP-208A (issued May 5, 2020 and June 15, 2020).

AOs 127/20 and 160A (June 18, 2020 and August 13, 2020), and DRP-213 (August 12, 2022), specifically acknowledged that new eviction proceedings could be filed, and then suspended until further order, unless both sides were represented by counsel, in which case they were eligible to be calendared for virtual settlement conferences. *See also* New York City Civil Court Chief Clerk's Memoranda (CCM) 210 and 211, dated July 30, 2020, entitled, respectively, "Procedure for scheduling Holdover Proceedings filed in person, by mail or e-filed during the COVID-19 Pandemic" and "Notice Required on Holdover Proceedings filed during the COVID-19 Pandemic". AO 231/20 directed that, as of October 12, 2020, "consistent with the Governor's determination approving the easing of restrictions on commerce imposed due to the COVID-19 health emergency," all residential eviction matters could resume and "proceed in the normal course," subject to certain limitations, including "individual court scheduling requirements occasioned by health and safety concerns arising from the coronavirus health emergency." Effective September 21, 2021, under DRP-218, the Housing Part of the Civil Court resumed "regular calendars for newly filed cases".³

Given this carefully phased-in and well-documented approach to reopening New York State's courts for "non-essential" matters, including permission to file new eviction proceedings as of August 13, 2020, Petitioner proceeded at its own peril in failing to file and diligently prosecute this nonprimary residence holdover proceeding. The 20-month gap between the last day of Respondents' expired lease on August 31, 2020 and completion of service of the notice of petition and petition by filing on June 7, 2022, *see* RPAPL § 735(b)(2), rendered the Golub Notice stale and defective. An eviction proceeding based upon a defective predicate notice must be dismissed. *Chinatown Apartments, Inc v Chu Cho Lam* (51 NY2d 786, 433 NYS2d 86, 412 NE2d 1312 [1980]). This is not a "mistake, omission, defect or irregularity" which this court can permit to be corrected or disregarded under CPLR § 2001. *Compare Hamilton v Carter* (2022 NY Slip Op 22345 [Civ Ct Bx Co 2022]). Accordingly, Petitioner must accept the well-known consequences of a defective notice in a nonprimary residence holdover proceeding. *See generally Berkeley Assocs Co v Camlakides* (173 AD2d 193, 569 NYS2d 629 [1st Dep't], *affd* 78 NY2d 1098, 586 NE2d 55, 578 NYS2d 872 [1991]).

³ All AOs, DRPs and CCMs are available on the New York State Court System's website, <https://nycourts.gov>.

CONCLUSION

For the foregoing reasons, it is hereby ORDERED that Respondents' motion is granted and this proceeding is dismissed without prejudice. This constitutes the Decision and Order of the Court, which is being uploaded on NYSCEF.


Diane E. Lutwak, HCJ



Dated: Bronx, New York
November 21, 2022

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