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### Muraco v. Martinez

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**Muraco v Martinez**

2022 NY Slip Op 34502(U)

April 25, 2022

Civil Court of the City of New York, Queens County

Docket Number: Index No. L&T 57381/19

Judge: Clinton J. Guthrie

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This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF QUEENS: HOUSING PART A

-----X  
CARL MURACO,

Index No. L&T 57381/19

Petitioner,

-against-

**DECISION/ORDER**

ISOLINO MARTINEZ, AILEEN V. MARTINEZ,

Respondents.

-----X  
Present:

Hon. CLINTON J. GUTHRIE  
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of petitioner’s motion pursuant to reargue pursuant to CPLR § 2221, and upon reargument, to grant the petitioner’s underlying motion pursuant to RPAPL § 745:

<b>Papers</b>	<b>Numbered</b>
Notice of Motion & Affirmation/Affidavit/Exhibits Annexed.....	<u>1 (NYSCEF #4-11)</u>
Affirmation in Opposition.....	<u>2 (NYSCEF #13)</u>

Upon the foregoing cited papers, the decision and order on petitioner’s motion is as follows.

PROCEDURAL HISTORY

This nonpayment proceeding was commenced in March 2019. The first court date was adjourned for respondent to retain counsel through the Universal Access program. Thereafter, The Legal Aid Society appeared as counsel for respondent Aileen Martinez. By stipulation, the second court date, May 31, 2019, was adjourned for respondent to submit an answer. On July 12, 2019, the proceeding was adjourned for motion practice and the court, upon an oral application of petitioner, ordered payment of use and occupancy without prejudice in the amount of \$640.00 per month, to be paid by July 26, 2019, August 10, 2019, and September 10, 2019.

A subsequent adjournment on consent on September 13, 2019 is recorded on the file jacket. On November 6, 2019, the following court date, the attorneys for petitioner and respondent Aileen Martinez executed a stipulation of adjournment for briefing on a motion for discovery filed on behalf of Ms. Martinez. The stipulation includes a provision stating that “[r]espondent to tender \$640/mo U&O [use and occupancy] from July 2019 to date by November 8, 2019 by mail to petitioner[']s atty office.” On the adjourned court date, December 6, 2019, petitioner made a motion to dismiss respondent’s defenses and for a final judgment and warrant pursuant to RPAPL § 745(2)(c)(i), upon an allegation that respondent had failed to make court-ordered payments. Following additional adjournments for briefing, this court heard argument on petitioner’s motion on February 13, 2020. By Decision/Order of the same date (February 13, 2020), this court denied petitioner’s motion but nonetheless directed respondent to pay seven (7) months of use and occupancy by February 19, 2020. The proceeding was adjourned to March 18, 2020 for argument on respondent’s motion for discovery.

Before the March 18, 2020 court date, all eviction proceedings were suspended as a result of the COVID-19 public health emergency. *See* Administrative Order (AO) 68/20. Beginning in April 2021, multiple appearances were made with further briefing schedules on respondent’s motion for discovery. In August 2021, petitioner made the instant motion to reargue this court’s order on its motion pursuant to RPAPL § 745. However, in September 2021, the proceeding was stayed by the filing of a COVID-19 hardship declaration. Following restoration after the expiration of the hardship stay, the motion to reargue was referred to this court. After submission of opposition papers, this court heard argument on the motion on April 21, 2022 and reserved decision.



## DISCUSSION

A motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.” CPLR § 2221(d)(2). Petitioner asserts that this court erred in holding (in its February 13, 2020 Decision/Order) that the prior order to pay use and occupancy was not made within the confines of RPAPL § 745 and thus not subject to that statute’s remedies. Furthermore, the motion argues that petitioner was entitled to relief pursuant to RPAPL § 745, namely the striking of respondent’s defenses and the entry of a final judgment of possession and warrant of eviction. Respondent opposes the motion in its entirety.

As an initial matter, the court grants petitioner’s motion to the extent of permitting reargument. Upon reargument, the court modifies its February 13, 2020 Decision/Order to acknowledge that petitioner’s oral application for a rent deposit on July 12, 2019 was made pursuant to RPAPL § 745. The certified transcript of the July 12, 2019 appearance (annexed as petitioner’s Exhibit D) confirms this fact. While respondent argues that the transcript is new material that should have been submitted with the underlying motion, the court finds that the transcript is not a new “fact,” but merely a record of the proceedings at issue. While respondent argues that the amended version of RPAPL § 745 (part of the Housing Stability and Tenant Protection Act on 2019 (hereinafter “HSTPA”)) should apply to this proceeding, the amendment only applies to proceedings commenced on or after July 14, 2019. *See* L 2019, ch 36, § 17 (Part M); *1588-1600 AMS LLC v. Gil*, 2022 NY Slip Op 22080 [App Term, 1st Dept 2022]. This proceeding was commenced in March 2019, so the pre-HSTPA version of RPAPL § 745 applies.

At the time that the July 12, 2019 application was made, the case had been on the court’s calendar two previous times. The first court date was adjourned for respondent to retain counsel.

The file jacket reflects that respondent presented a letter from The Legal Aid Society. The second court date, on May 31, 2019, was adjourned by two-attorney stipulation on consent. For the purposes of RPAPL § 745, an adjournment on consent does not count towards the “two adjournments or 30 days” threshold required to invoke the pre-HSTPA version of the statute. *See Myrtle Venture Five, LLC v. Eye Care Opt. of NY, Inc.*, 48 Misc 3d 4, 6 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]. The file jacket indicates that the first adjournment (of over 30 days), to obtain counsel, was made at respondent’s request. The pre-HSTPA version of RPAPL § 745(2) specifically includes a provision stating that the two adjournments (for triggering the statute) “shall include” an adjournment to secure counsel.<sup>1</sup> Certainly, the advent of the Universal Access to Counsel law [Local Law 136 of 2017] was not foreseen by the drafters of the pre-HSTPA version of RPAPL § 745(2); nonetheless, the court cannot ignore the fact that the instant case arose in the Universal Access part nor that the subject premises is in a zip code (11385) then targeted for implementation of the law’s guarantee of full representation in Housing Court for eligible tenants. *See 2247 Webster Ave. HDFC v. Galarce*, 62 Misc 3d 1036 [Civ Ct, Bronx County 2019]; *see also Friedman Residence LLC v. Denson*, 2021 NYLJ LEXIS 1316 [Sup Ct, NY County, Mar. 29, 2021, Index No. 159576/20].

With that observed, however, the court must interpret the prior version of the statute as written, not as it would rewrite it in light of later developments. *See Kimmel v. State of New York*, 29 NY3d 386, 394 [2017]. Therefore, upon reargument, the court finds that that the payment ordered by the court on July 12, 2019 was within the confines of RPAPL § 745. The court nonetheless adheres to its February 13, 2020 Decision/Order insofar as the striking of

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<sup>1</sup> The amended version of the statute conversely provides that an initial adjournment to secure counsel is not to be attributed to a respondent.



respondent's defenses and the entry of a final judgment and warrant were denied. In *Gil*, the Appellate Term, First Department recently acknowledged the policy of "flexibility in dealing with rent deposits" reflected in the HSTPA amendment, even in (as here) a pre-HSTPA case. 2022 NY Slip Op 22080, \*2. In the instant proceeding, petitioner voluntarily agreed to extend the time for paying the court-ordered months of use and occupancy in the November 6, 2019 stipulation.<sup>2</sup> See *Lang v. Pataki*, 271 AD2d 375, 377 [1st Dept 2000], *appeal dismissed* 95 NY2d 886 [2000]. Moreover, respondent provided proof of funds for use and occupancy at the court-ordered amount for all months from July 2019 through January 2020 with its opposition papers (dated January 2020) to the underlying motion. While there was some dispute as to whether petitioner had refused payments, the court nonetheless ordered the payment of these funds and the rent ledger annexed to petitioner's motion for reargument indicates receipt of the same. In these circumstances, coupled with the fact that respondent is a rent-stabilized tenant with a pending overcharge counterclaim, the "drastic remedy" of striking respondent's answer and the entry of a judgment and warrant under the pre-HSTPA version of RPAPL § 745 was not warranted. See *Silverman v. D'Arco*, 149 AD3d 527, 528 [1st Dept 2017]; *Gil*, 2022 NY Slip Op 22080, \*1.

### CONCLUSION

In accordance with the foregoing determinations, petitioner's motion for reargument is granted to the extent of permitting reargument and the modifications of the court's underlying Decision/Order as set out herein. The motion is otherwise denied and the court adheres to its

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<sup>2</sup> The court notes that the stipulation extending the time to pay does not have any provision providing for the striking of respondent's defenses or any other remedy upon nonpayment. See *Myrtle Venture Five, LLC*, 48 Misc 3d at 6.

February 13, 2020 order to the extent that it denied the striking of respondent's defenses and the entry of a final judgment and warrant. This proceeding shall be restored to the Part A calendar (Room 401) for argument on respondent's motion for discovery on May 24, 2022 at 3:00 PM.

This Decision/Order will be filed to NYSCEF.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: Queens, New York  
April 25, 2022

  
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HON. CLINTON J. GUTHRIE  
J.H.C.

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SO ORDERED - HON. CLINTON J. GUTHRIE