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### BX PK PHASE II PRESERVATION v Lawrence

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BX PK PHASE II PRESERVATION,

Petitioner (Landlord),

-against-

**DECISION & ORDER**

██████████ LAWRENCE,

Respondent (Tenant).

Address: 18 ████████ Valentine Avenue, Apt. ████████ Bronx, NY 10457

-----X  
Hon. Diane E. Lutwak:

Recitation, as required by CPLR Rule 2219(A), of the papers considered in the review of Respondent's Motion to Dismiss and/or for Summary Judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion with Supporting Affirmation, Affidavit & Exhibits A-F	1

After argument, upon the foregoing papers and for the reasons stated below, respondent's motion to dismiss or for summary judgment is decided as follows.

**PROCEDURAL HISTORY & FACTUAL BACKGROUND**

This is a nonpayment eviction proceeding in which the petition, dated April 27, 2018, states that the monthly rent is \$1268 and seeks rent arrears of \$5350, comprised of \$278 for December 2017 and \$1268 for each of the four months of January through April 2018. The petition states that the rent was demanded by a written three-day notice, a copy of which is attached to the petition with proof of service. The rent demand, dated March 29, 2018, seeks arrears of \$4082, comprised of \$278 for December 2017 and \$1268 for each of the three months of January 2018 through March 2018.

Respondent *pro se* answered the petition on May 4, 2018, using the Court's "Answer in Person" form (CIV-LT-91 Rev'd Oct 2014), checking off a "General Denial" and inserting under "Other counterclaims" that, "Checks went to old management." The Court calendared the proceeding for May 9, 2018, on which date respondent retained legal representation through the City's Universal Access to Counsel project. Respondent thereafter served and filed an amended answer and then this motion, which was argued and marked submitted on December 6, 2018.

In her motion, respondent seeks dismissal of the petition pursuant to CPLR R 3211(a)(7) due to a defective rent demand or summary judgment pursuant to CPLR R 3212(e) "setting off all HRA/CityFeps<sup>1</sup> checks negotiated by petitioner and its agents". Respondent asserts that her monthly rent of \$1268 is paid in full by the New York City Department of Social Services/Human Resources Administration (DSS/HRA) through a combination of semi-monthly shelter allowance payments of \$141.50 each and semi-monthly FEPS payments of \$492.50 each which are "earmarked" for specific time periods. Respondent's counsel attaches a five-page printout reflecting DSS/HRA payments issued during the period of October 2017 through September 2018; copies of DSS/HRA checks payable to petitioner for respondent during this time period; petitioner's rent ledger covering the period of November 2016 through September 2018; and her own chart of rent billed and payments made from November 2017 through September 2018.

Respondent's attorney asks the court to dismiss the proceeding "based on fatal defects in the predicate rent demand" or "to use the documentary evidence provided ... [to] reach a conclusion and set-off the cashed checks against the total amount in rent arrears". Respondent's attorney asserts that after obtaining the DSS/HRA records and check images she requested reissuance by DSS/HRA of three uncashed checks issued in March and April 2018 (totaling \$777.50) and issuance of two omitted payments for February and March 2018 (totaling \$985). Respondent argues that when all DSS/HRA checks are credited, her balance due through August 30, 2018 is \$278, not \$4574.50 as listed in petitioner's rent ledger.

Petitioner submitted no written opposition to respondent's motion, and at oral argument its attorney explained that this was because petitioner had a new management company that was in the middle of reorganizing the billing records for the entire complex of buildings and had not yet had an opportunity to review respondent's account and address her claim that all DSS/HRA payments had not been properly credited.

## DISCUSSION

The records respondent provides in support of her motion warrant dismissal of the petition, without prejudice, as the rent demand fails to account for DSS/HRA payments petitioner received in and for the months listed in that demand. To state and maintain a cause of action for nonpayment of rent, the petition must state the facts upon which the proceeding is based. RPAPL § 741(4). One of those facts is that a proper rent demand was made as required by RPAPL § 711(2); to be sufficient, such a demand must "clearly inform the tenant of the particular period for which a rent payment is allegedly in default and the approximate good faith sum of rent assertedly due for each such period." *Schwartz v Weiss-Newell* (87 Misc2d

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<sup>1</sup> "FEPS" is a reference to the City's Family Eviction Prevention Subsidy, a rent supplement provided by the State to eligible families.

558, 561, 386 NYS2d 191 [Civ Ct NY Co 1976]), *quoted in 542 Holding Corp v Prince Fashions, Inc* (46 AD3d 309, 848 NYS2d 37 [1st Dep't 2007]).

With respect to how payments are applied to debts, "the general rule is that the debtor may direct application of his payments, but if he fails to do so, then the creditor is permitted to apply the payments as he sees fit." *Snide v Larrow* (62 NY2d 633, 634, 464 NE2d 480, 476 NYS2d 112 [1984]). One exception is where a tenant earmarks a rent check to indicate the period for which the payment is intended: a landlord is required to apply any such earmarked payment to the month or period specified. *See Greenbrier Garden Apts v Eustache* (50 Misc3d 142[A], 31 NYS3d 921 [App Term 9<sup>th</sup> & 10<sup>th</sup> Jud Dists 2016]); *134-38 Maple St Realty Corp v Medina* (3 Misc3d 134[A], 787 NYS2d 682[A][App Term 2<sup>nd</sup> & 11<sup>th</sup> Jud Dists 2004]). Here, while respondent asserts that the DSS/HRA checks are "earmarked", this is not correct: There is nothing on the face of those checks that reflects what time period they were intended to cover. *Compare 8206 Third Ave Realty LLC v Resto* (54 Misc3d 1202[A], 50 NYS3d 24 [Kings Co Civ Ct 2016]).

However, "a direction as to how a payment is to be applied may be evidenced by circumstances as well as words. A payment may be attended by circumstances which demonstrate its application as completely as words could demonstrate it." *L & T East 22 Realty Co v Earle* (192 Misc2d 75, 76, 745 NYS2d 369 [App Term 2<sup>nd</sup> Dept 2002])(internal citations omitted); *see also A & E Tiebout Realty, LLC v Johnson* (23 Misc3d 1112[A], 885 NYS2d 710 [Civ Ct Bx Co 2009]). Petitioner's rent ledger shows that beginning in August 2017 its practice was to accept and negotiate semi-monthly shelter checks issued by DSS/HRA on behalf of respondent which, at least in some months, added up to the full monthly rent of \$1268 comprised of two payments for \$141.50 each and two for \$492.50 each. The rent demand does not reflect this practice, or any of the payments made by DSS/HRA during the period covered by the demand, even though these payments were credited by petitioner in its rent ledger for the months in which they were made. Rather, petitioner appears to have simply taken the amount assertedly due to date and divided it by the monthly rent to arrive at the breakdown in the rent demand. Under the circumstances, the Court finds that respondent intended the DSS/HRA payments to be applied to the month in which they were made, that petitioner's practice of crediting those payments on its rent ledger to the month in which they were received evinces a similar intention and that, accordingly, the rent demand should have reflected the DSS/HRA payments which petitioner "was bound to apply" to the intended months, *L & T E 22 Realty Co v Earle, supra*, as opposed to applying them to the oldest arrears according to other accounting principles, *3463 Third Ave Realty LLC v Vasquez* (2018 NY Slip Op 50674[U], 59 Misc3d 1224[A][Civ Ct Bx Co 2018]); *Cypress Ct Assoc v McLauren* (33 Misc3d 1203[A], 938 NYS2d 226 [Civ Ct Kings Co 2011])("the fact that the rent demand fails to include any information from which it can be gleaned that petitioner gave credit for DSS payments and applied those payments to the months intended calls into question whether the petitioner has made a good faith approximation of the rents due").

On a motion to dismiss under CPLR R 3211(a)(7) for failure to state a cause of action, the court is required to afford a liberal construction to the pleading, accept the facts alleged as true

and ascertain whether the petition alleges facts which fit within any "cognizable legal theory." *Leon v Martinez* (84 NY2d 83, 638 NE2d 511, 614 NYS2d 972 [1984]). A court may consider evidentiary material submitted by a defendant (or a respondent in a special proceeding under CPLR Article 4) in support of a motion to dismiss pursuant to CPLR R 3211(a)(7). *Sokol v Leader* (74 AD3d 1180, 1181, 904 NYS2d 153 [2nd Dep't 2010]).

The DSS/HRA printout, the cancelled checks and petitioner's rent ledger are all evidentiary materials which this court can consider on this motion to dismiss, *Sokol v. Leader*, *supra*, and they establish that monies received in and for the months listed in the rent demand were not reflected therein such that the petition fails to state a cause of action. While respondent may owe rent, the rent demand does not inform her of when her alleged arrears arose and fails to "clearly inform the tenant of the particular period for which a rent payment is allegedly in default and the approximate good faith sum of rent assertedly due for each such period." *Schwartz v Weiss-Newell*, *supra*.

CONCLUSION

Accordingly, there is no need to address respondent's request for summary judgment and this proceeding is dismissed without prejudice pursuant to CPLR R 3211(a)(1) based on documentary evidence and CPLR R 3211 (a)(7) for failure to state a cause of action. This constitutes the Decision and Order of the Court, copies of which will be made available to the respective parties' counsel in the courthouse.



Diane E. Lutwak, HCJ

Dated: Bronx, New York  
December 11, 2018

Attorneys for Petitioner

Gutman, Mintz, Baker & Sonnenfeldt, LLP  
813 Jericho Turnpike, New Hyde Park, New York 11040  
(516) 775-7007

Attorneys for Respondent:

Bianca Cappellini, Esq.  
Bronx Legal Services  
349 E. 149<sup>th</sup> Street, 10<sup>th</sup> Floor, Bronx, New York 10451  
(718) 928-2883

HON. DIANE E. LUTWAK  
Judge, Housing Court