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

-----X
709 EAST 226 LLC,

Petitioner,

-against-

DOREAN HENRY; KAREEM WILLIAMS,

Respondents,

-and-

“JOHN DOE;” and/or “JANE DOE,”

Respondents-Undertenants.
-----X

L&T Index No.
302310/21

Motion Seq. No. 1

DECISION/ORDER

Present:

Hon. HOWARD BAUM
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the motion by Respondent Dorean Henry:

Papers

Numbered

Notice of Motion; Affirmation and Affidavit in Support; Answer; and Exhibits A through Q	<u>NYSCEF Doc # 8 - 9</u>
Affirmation in Opposition; Exhibits A through F; and Exhibit G ...	<u>NYSCEF Doc # 16 – 22; 24</u>
Affirmation in Reply	<u>NYSCEF Doc # 23</u>

After oral argument and upon the foregoing cited papers, the decision and order on this motion and cross-motion is as follows:

This summary eviction proceeding was commenced by 709 East 226 LLC (“Petitioner”) against Dorean Henry (“Respondent”) and Kareem Williams based on the alleged termination of their month-to-month tenancy by a “Ninety (90) Day Notice of Termination” that is annexed to,

and referred to by, the petition.¹ The notice of termination and petition both allege the apartment is not subject to rent regulation. The petition alleges the apartment is in a “One-Three family home.”

In this motion, Respondent² seeks an order dismissing this proceeding, pursuant to CPLR 3211(a)(1), (2) and (7), RPAPL § 741 and/or CPLR 3212. Respondent argues dismissal on these grounds is appropriate because the apartment in which she resides is subject to rent stabilization and the notice of termination does not state the correct regulatory status of the apartment or a ground pursuant to the Rent Stabilization Code for the termination of the tenancy and/or because Petitioner allegedly accepted rent payments made on behalf of Respondent between the “date set for termination of the tenancy and prior to the initiation of this proceeding,” thereby vitiating the predicate notice terminating Respondent’s alleged month-to-month tenancy. Further, Respondent seeks an order, pursuant to CPLR 2004 and CPLR 3012(d), granting leave for her to file an answer.

Respondent asserts the apartment in which she resides is in a building, built in 1930, that has six residential apartments³ with two apartments on each of the building’s three floors.

Respondent alleges she has seen “people living in each of these apartments in the four years” she

¹ “John Doe” and/or “Jane Doe” are also named s respondents in the petition and described as undertenants of Respondent and Kareem Williams. They have not appeared in this proceeding.

² According to the “Case Detail” tab within the NYSCEF folder for this proceeding, an attorney with The Legal Aid Society consented to participate in the electronic filing of the proceeding on behalf of Respondent. Nine days later another attorney with The Legal Aid Society consented to participate in the electronic filing of the proceeding on behalf of both Respondent and Kareem Williams. However, the notice of appearance filed by The Legal Aid Society only states they are representing Respondent and the papers filed in support of the motion state the motion is filed solely on behalf of Respondent.

³ Respondent also asserts there is possibly a seventh apartment in the building.

has lived in the building and that there are six mailboxes, each of which she has seen being used. In support of these observations Respondent has annexed, as exhibits, photographs of what she alleges is each of the six apartments and of a set of six mailboxes. Additionally, Respondent has annexed documents from various sources that she contends demonstrate that there are at least six apartments in the building. Accordingly, Respondent argues her tenancy is subject to rent stabilization and that this proceeding should be dismissed in that Petitioner failed to state a necessary fact of this proceeding, the correct regulatory status of her tenancy, and failed to state a cause of action because the proceeding is not based on a ground pursuant to which a tenant of a rent stabilized apartment can be evicted.

In opposition to this aspect of Respondent's motion, Petitioner asserts there are five residential units at the building (one on the first floor and two on both the second and third floors) as well as a commercial storefront and an "office" on the first floor. Petitioner also acknowledges the building's superintendent lives in the office rent-free as an incident of his employment.⁴ Nevertheless, Petitioner argues Respondent has not demonstrated the building is rent stabilized. Considering rent for the occupancy of the office has never been paid, and the superintendent is a licensee, Petitioner argues the office occupied by the superintendent is not considered a residential unit. As to why there are six mailboxes, Petitioner asserts one is used by "building ownership to manage the premises."

Respondent also argues Petitioner vitiated the notice of termination by accepting rent payments during what she asserts is the relevant "window period," from the date the notice of

⁴ See, NYSCEF Doc. No. 22 – Exhibit F – Affidavit in Opposition sworn to by Ilusha Pulatov, para. 10 and 12; and NYSCEF Doc. No. 24 – Exhibit G – Affidavit in Opposition sworn to by Bruce Dickerson, para. 5 – 7.

termination states Respondent's month-to-month tenancy was terminated, March 31, 2021, to the date service of the notice of petition and petition on her was completed, April 28, 2021. Based on a printout of public assistance benefits issued on her behalf, that is provided as an exhibit to her motion, Respondent alleges that on April 12, 2021, Petitioner accepted two rent payments made directly to them. By accepting these payments, Respondent argues the proceeding should be dismissed because the notice of termination was vitiated and can no longer serve as the predicate to this proceeding and, as a result, Petitioner has failed to state a cause of action.

In opposition to this aspect of Respondent's motion, Petitioner acknowledges having received the rent checks issued by public assistance. However, Petitioner asserts the payments were received through an "online electronic transfer system;" that it never intended to renew Respondent's tenancy; and that the funds "were quickly mailed back to [public assistance]."⁵

Discussion

Preliminarily, Respondent's motion is denied to the extent it seeks the dismissal of this proceeding, pursuant to CPLR 3211(a)(1), based on documentary evidence, and pursuant to CPLR 3211(a)(2), for lack of subject matter jurisdiction in this court. Dismissal pursuant to CPLR 3211(a)(1) should not be granted unless the submitted documentary evidence utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law. *Leon v. Martinez*, 84 NY2d 83 (1994); *Guggenheimer v. Ginzburg*, 43 NY2d 268 (1977). Here, the documentation that has been presented does not conclusively prove

⁵ Annexed as an exhibit to Petitioner's papers in opposition to the motion are copies of two checks, dated April 17, 2021, allegedly mailed back to public assistance refunding the amounts of the checks that were allegedly accepted.

(*see, Leon v. Martinez*, 84 NY2d 83 [1994]; *Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]) the two central factual contentions made by Respondent in this motion that are the basis to her request for the dismissal of the proceeding – that there are at least six housing accommodations in the subject building⁶ or that Petitioner accepted rent payments on April 12, 2021, made by public assistance on behalf of Respondent (*see, below*).

Additionally, Respondent has not provided an argument as to why this proceeding should be dismissed, pursuant to CPLR 3211(a)(2). CPLR 3211(a)(2), is a ground for dismissal where the court lacks jurisdiction over the subject matter of the proceeding. Subject matter jurisdiction involves a court's legal authority to hear a type of case. *Lacks v. Lacks*, 41 N.2d 71 (1976); *Behringer v. 19407 Linden, LLC*, 139 AD3d 777 (2d Dept 2016); *Saccheri v. Cathedral Properties Corp.*, 43 Misc.3d 20 (App Term 9th & 10th Jud Dist 2014). There is no question Housing Court has subject matter jurisdiction to hear a summary holdover proceeding commenced by a landlord seeking possession of a residential dwelling unit. *433 West Assoc. v. Murdock*, 276 AD2d 360 (1st Dept 2000).

For these reasons, Respondent's motion is denied to the extent it seeks the dismissal of this proceeding pursuant to CPLR 3211(a)(1) and (2).

⁶ Screen shots from the New York City Department of Buildings ("DOB") website show complaints from unknown sources related to the alleged unlawful creation of apartments at the building but not that any findings were made that such apartments were in fact created; screen shot from the real estate websites Zillow, Trulia and Movoto websites show the building is described as "consisting of six apartments," but no statement is provided as to the source of the descriptions; and a screenshot from the court's case management system, UCMSLC, listing four eviction proceedings and one HP action filed between 2011 and 2020 related to an apartment on the first floor, variously described as 1 Rear, 1st Fl, Apt 1 and 1st Floor Back Room, does not meet the standard required of a motion to dismiss, pursuant to CPLR 3211(a)(1), to prove there are six apartments in the building.

Also, Respondent's motion to interpose an answer has not been opposed by Petitioner and is granted. In any case, under the factual circumstances of this proceeding, Respondent does not require leave of court to interpose her answer. When a summary holdover proceeding has been adjourned a respondent's time to answer is extended to the next court date. *City of New York v. Candelario*, 156 Misc 2d 330 (App Term 2nd & 11th Jud Dist 1993), rev'd, in part, on other grounds 223 AD2d 617 (2d Dept 1996); *Rochdale Village Inc. v. Harris*, 172 Misc 2d 758 (Civ Ct Queens County 1997); *Gluck v. Wiroslaw*, 113 Misc 2d 499 (Civ Ct Kings County 1982).

Accordingly, the "Answer" annexed to the motion is deemed as having been interposed from the time it was served on Petitioner.

Motion for Summary Judgment

To obtain summary judgment the movant must establish its claim sufficiently to warrant the court as a matter of law to direct judgment in its favor and it must do so by submitting evidence proving her entitlement to judgment in a form that would be admissible at trial. *Zuckerman v. City of New York*, 49 NY2d 557 (1980). Anything less requires a denial of summary judgment even where the opposing papers are insufficient. *DiMaggio v. Chase Manhattan Bank*, 266 AD2d 89 (1st Dept 1999); *Rosen v. Intermedics, Inc.*, 203 AD2d 271 (2d Dept 1994); *Avon Elec. Supplies, Inc. v. Baywood Elec. Corp.*, 200 AD2d 697 (2d Dept 1994). It is only upon the proponent of a summary judgment motion demonstrating its entitlement to judgment as a matter of law that the burden shifts to the party opposing the motion to produce proof demonstrating the existence of issues of fact that require a trial. *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986).

Summary judgment should not be granted where there is any doubt of the existence of triable issues of fact or even where the existence of such issues of fact is arguable. *Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223 (1978); *S.J. Capelin Associates v. Globe Manufacturing Corp.*, 34 NY2d 338 (1974); *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *In re Estate of Beckford*, 280 AD2d 472 (2d Dept 2001). Issue finding rather than issue determination is the court's function in deciding a motion for summary judgment. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bonaventure v. Galpin*, 119 AD3d 625 (2d Dept 2014); *Pearson v. Dix McBride, LLC*, 63 AD3d 895 (2d Dept 2009); *Doize v. Holiday Inn Ronkonkoma*, 6 AD3d 573 (2d Dept 2004).

Summary Judgment Based on Failure to Accurately State Regulatory Status and Ground, Pursuant to Rent Stabilization Code, for Respondent's Eviction

There are no issues of fact that there are six housing accommodations in the building, thereby subjecting Respondent's tenancy to coverage under rent stabilization, based on Petitioner's acknowledgment that the superintendent of the building resides in the portion of the building described as an "office."

Buildings constructed prior to January 1, 1974, containing six or more housing accommodations on the date the building first became subject to at any subsequent time are, absent an exemption, subject to rent stabilization coverage. Rent Stabilization Code § 2520.11(d); *Lashley-Smith v. Bradshaw*, 66 Misc 3d 143(A) (App Term 2d, 11th & 13th Jud Dist 2020); *Rosenberg v. Gettes*, 187 Misc 2d 790 (App Term 1st Dept 2000). There is no dispute that the subject building was built prior to 1974.

Further, Petitioner has not disputed that the office in which the superintendent resides is a housing accommodation for purposes of determining if there are six residential units in the building. Rent Stabilization Code § 2520.6 defines a housing accommodation, in relevant part, as “That part of a building...occupied or intended to be occupied by one or more individuals as a residence, home, dwelling unit or apartment...” This definition is not limited by any physical or structural requirements. *Gracecor Realty Co., Inc. v. Hargrove*, 90 NY2d 350 (1997). Rather, the court’s focus in determining whether there six housing accommodations for purposes of determining if Respondent’s tenancy is subject to rent stabilization is the function of the units in the building. *Feldheim v. Stuckey*, 58 Misc 3d 719 (Civ Ct Bronx County 2017). Here, Petitioner acknowledges the superintendent has lived in the “office” for “many years.”

Moreover, the office is required to be counted for purposes of determining whether the building has the requisite number of housing accommodations for Respondent’s tenancy to be subject to rent stabilization even if it is an illegal dwelling unit (*Matter of Gracecor Realty Co. v. Hargrove*, 90 NY2d 350 [1997]; *White Knight Ltd. v. Shea*, 10 AD3d 567 [1st Dept 2004]; *Joe Lebnan, LLC v. Oliva*, 39 Misc 3d 31 [App Term 2d, 11th & 13th Jud Dist 2013]) or part of a commercial unit in the building (*124 Meserole, LLC v. Recko*, 55 Misc 3d 146[A] [App Term 2d, 11th & 13th Jud Dist 2017]; *Barrington Travel Group, Inc. v. Nivens*, 14 Misc 3d 1224[A] [Civ Ct NY County 2006]).

Petitioner’s assertion that the superintendent is a licensee, who occupies the office as an incident of his employment and who pays no rent to live there, is misplaced for purposes of determining if Respondent’s tenancy is subject to rent stabilization based on there being six housing accommodations in the building. Petitioner may be correct that the superintendent, by

virtue of his legal status as an occupant of the housing accommodation, does not enjoy the protections of the Rent Stabilization Law and Code. *See*, Rent Stabilization Code § 2520.11(m). Nevertheless, housing accommodations occupied by a superintendent are counted for purposes of whether a building contains six housing accommodations and whether Respondent's tenancy is subject to rent stabilization. *Rosenberg v. Gettes*, 187 Misc 2d 790 (App Term 1st Dept 2000).

For all these reasons, there are six housing accommodations in the building and Respondent's tenancy is subject to rent stabilization. Accordingly, she is entitled to summary judgment on the "Second Affirmative Defense" raised in her answer – that the proceeding should be dismissed because she is a rent stabilized tenant – and her motion is granted to the extent it seeks dismissal of the proceeding, pursuant to RPAPL § 741(4), based on Petitioner's failure to plead a necessary fact of this proceeding, that Respondent's tenancy is subject to rent regulation (*Villas of Forest Hills v. Lumberger*, 128 AD2d 701 [2d Dept 1987]; *Henry v. Kingsberry*, 66 Misc 3d 143[A] [App Term 2d, 11th & 13th Jud Dist 2020]), and failure to state a cause of action in that the notice of termination does not cite a ground for this proceeding pursuant to RSC § 2524.3 (*Lashley-Smith v. Bradshaw*, 66 Misc 3d 143[A] [App Term 2d, 11th & 13th Jud Dist 2020]; *Commercial Hotel v. White*, 194 Misc 2d 26 [App Term 2d Dept 2002]).

Summary Judgment Based on Acceptance of Rent Checks

The motion is denied to the extent it seeks dismissal of the proceeding based on the alleged acceptance, on April 12, 2021, of rent checks issued by public assistance. The acceptance of rent from a tenant after the date a tenancy is terminated, as stated in a notice of termination, and before the commencement of a holdover proceeding results in the vitiation of the notice of termination thus nullifying the required predicate of the proceeding. *184 West 10th Corp. v.*

Westcott, 8 Misc 3d 132(A) (App Term 1st Dept 2005); *Roxborough Apt. Corp. v. Becker*, 176 Misc 2d 503 (Civ Ct NY County 1998). Further, the retention of a rent payment made during this “window period,” under certain circumstances, constitutes its acceptance resulting in the vitiation of a notice of termination and dismissal of a holdover proceeding. *205 East 78th St. Assocs. v. Cassidy*, 192 AD2d 479, (1st Dept 1991) reversing, NYLJ, Sept. 27, 1991, at 21, col 4 (App Term 1st Dept); *Hamann v. Claxton*, 110 NYS2d 138 (App Term 1st Dept 1952); *Metropolitan Insurance/Annuity Co. v. Rowinski*, NYLJ, Nov. 10, 2004 at 17, col 2 (Civ Ct NY County); *St. Luke’s/Roosevelt Hospital Ctr. v. Taft Pharmacy, Inc.*, NYLJ May 10, 1995, at 31, col 5 (Civ Ct 1069(A) (Dist Ct Nassau County 2006).

Whether the retention of a rent payment constitutes its acceptance, resulting in the vitiation of a notice of termination, is to be determined based on the specific factual circumstances of each case. *40 West 75th Street LLC v. Horowitz*, 25 Misc 3d 1230(A) (Civ Ct NY County 2009); *170 E. 177th 1 LLC v. Berenson*, 12 Misc 3d 1017 (Civ Ct NY County 2006). Moreover, even if a rent payment is retained after the termination of a tenancy and prior to the commencement of a holdover proceeding such retention may be excused where a reasonable explanation is given by the landlord for holding onto the check or even in some instances cashing the check. *170 E. 177th 1 LLC v. Berenson*, 12 Misc 3d 1017 (Civ Ct NY County 2006); *Roxborough Apt. Corp. v. Becker*, 176 Misc 2d 503 (Civ Ct NY County 1998).

Respondent’s argument that Petitioner’s acceptance of checks on April 12, 2021, vitiated the notice of termination is misplaced. The predicate notice terminated the tenancy as of March 31, 2021. In the First Department, a holdover proceeding is commenced when the notice of petition and petition are filed with the court and the filing fee is paid. *Brown v. Felton*, 58 Misc

3d 161(A) (App Term 1st Dept 2018); *ABN Assoc., LLC v. Citizens Advice Bur., Inc.*, 27 Misc 3d 143(A) (App Term 1st Dept 2010); *c.f. 92 Bergenbrooklyn, LLC v. Cisarano*, 50 Misc 3d 21 (App Term 2d, 11th & 13th Jud Dist 2015). According to the “Payment Receipt” link within the Case Detail tab within the NYSCEF folder for this proceeding, the notice of petition and petition were filed with the court, and the filing fee was paid, on April 8, 2021. Therefore, any acceptance by Petitioner of rent payments after April 12, 2021, occurred after this proceeding was commenced.

In any case, even if the alleged acceptance of checks on April 12th was within the “window period” during which Petitioner was not permitted to accept rent payments, based on the allegations made by Petitioner regarding the immediate return of the funds covered by the checks there are issues of fact as to whether the notice of termination would have been vitiated. Under these circumstances, the documentation submitted by Respondent in support of her motion, the public assistance printout, does not utterly refute Petitioner’s allegations.

Conclusion

Based on the foregoing, it is ordered that Respondent’s motion to interpose an answer is granted and her motion for summary judgment is granted to the extent that this proceeding is dismissed based on Respondent being a rent stabilized tenant and Petitioner having failed to plead a necessary fact of this proceeding, that Respondent’s tenancy is subject to rent stabilization, and cite a ground for this proceeding pursuant to RSC § 2524.3. Further, it is ordered the motion is denied in all other respects.

This constitutes the decision and order of the court.

Dated: Bronx, New York
May 8, 2023

HON. HOWARD BAUM, J.H.C.