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### Hillside Place, LLC v. Rahman

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[\*1]

<b>Hillside Place, LLC v Rahman</b>
2023 NY Slip Op 50549(U) [79 Misc 3d 1207(A)]
Decided on June 5, 2023
Civil Court Of The City Of New York, Queens County
Guthrie, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on June 5, 2023

Civil Court of the City of New York, Queens County

<p style="text-align: center;"><b>Hillside Place, LLC, Petitioner,</b></p> <p style="text-align: center;"><b>against</b></p> <p style="text-align: center;"><b>MD Mustafezur Rahman, Naz Islam, JOHN DOE, JANE DOE, AL MAHEDI MASHUD, Respondents.</b></p>
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Index No. L&T 61972/19

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Clinton J. Guthrie, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of petitioner's motion for post-litigation rent/use and occupancy, and for use and occupancy

pendente lite pursuant to RPAPL § 745:

#### Papers Numbered

Notice of Motion & Affirmation/Affidavit/Exhibits Annexed 1 (NYSCEF No.4-13)

Affirmation in Opposition & Exhibits Annexed 2 (NYSCEF #14)

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

#### PROCEDURAL HISTORY

This holdover proceeding based on an alleged failure to renew a rent-stabilized lease was [\*2]commenced in early June 2019. Following an initial adjournment from June 19, 2019 to August 7, 2019 for respondents to retain counsel, The Legal Aid Society appeared on behalf of respondent Naz Islam. Subsequently, respondent Islam, through counsel, filed a motion to dismiss. After the motion was briefed, it was denied by Judge Sergio Jimenez by Decision/Order dated September 2, 2020. [\[FN1\]](#) In February 2021, respondent Islam filed a COVID-19 hardship declaration, which stayed the proceeding pursuant to L 2020, ch 381 and L 2021, ch 417 (COVID-19 Emergency Eviction and Foreclosure Prevention Act). The case appears to have been transferred to this trial part after the expiration of the stay and the court file indicates that a pre-trial conference was conducted on February 22, 2022. Thereafter, several adjournments of the trial date are recorded on the court file. Petitioner made the instant motion for use and occupancy in April 2023. After opposition papers were filed, the parties submitted the motion on consent and the court reserved decision on May 30, 2023.

#### DISCUSSION

Petitioner's motion first seeks an order requiring payment of rent/use and occupancy from July 2019 on a theory of quantum meruit. This request is not based on RPAPL § 745, which governs rent deposits and use and occupancy in summary eviction proceedings. Although petitioner cites to *Phillips v. Cohen*, 2002 NY Slip Op 40235[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2002] for the proposition that the court can entertain quantum meruit as basis for use and occupancy, it is apparent from the decision in *Phillips* that it involved a plenary action for previously-accruing use and occupancy, not a summary proceeding. [\[FN2\]](#) In the context of summary proceedings, pre-trial use and occupancy may only be granted within the confines of RPAPL § 745. [See \*Front St. Rest. Corp. v. Ciolli\*, 55](#)

[Misc 3d 104](#), 106 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2017]; [Myrtle Ventures Five, LLC v. Eye Care Opt. of NY, Inc.](#), 48 Misc 3d 4, 6 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]; [Quality & Ruskin Assoc. v. London](#), 8 Misc 3d 102, 105 [App Term, 2d Dept, 2d & 11th Jud Dists 2005].

Moreover, to the extent that "rent" is sought as part of petitioner's quantum meruit request, the petition acknowledges that the tenancy was terminated prior to the commencement of this proceeding by notice. No rent (as distinct from use and occupancy) may be sought in a summary proceeding where the tenancy has been terminated prior to the commencement thereof. [See Greenport Preserv., L.P. v. Heyward](#), 74 Misc 3d 46, 48 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2021]; [Lakeview Affordable Hous., LLC v. Turner](#), 66 Misc 3d 142[A], 2020 NY Slip Op 50163[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2020]. For each of these reasons, petitioner has not established an entitlement to rent/use and occupancy under a theory of quantum meruit. [\[FN3\]](#)

The second prong of petitioner's motion seeks use and occupancy pendente lite pursuant to RPAPL § 745, in the amount of \$1,850.00 "that shall accrue on a monthly basis subsequent to the date of the court's order until the conclusion of the litigation." The court notes at the outset that the version of RPAPL § 745 quoted in petitioner's motion is the version that was amended as a result of the Housing Stability and Tenant Protection Act (HSTPA). However, this proceeding was commenced *before* the enactment of the HSTPA, so the prior version of RPAPL § 745 applies. [See e.g. 1588-1600 AMS LLC v. Gil](#), 75 Misc 3d 1, 3 [App Term, 1st Dept 2022]; [Muraco v. Martinez](#), 2022 NY Slip Op 34502[U] [Civ Ct, Queens County 2022]. [\[FN4\]](#) While this court in *Muraco* and the Appellate Term, First Department in *Gil* noted the flexibility in dealing with rent deposits that is reflected in the amended version of RPAPL § 745, particularly with regard to elimination of penalty of the striking of claims and defenses, this court is bound by the plain language of the prior version of RPAPL § 745 in this proceeding. [See Riley v. County of Broome](#), 95 NY2d 455, 463 [2000] ["As a general rule, unambiguous language of [the] statute is alone determinative" of the legislature's intent.] [Internal citation omitted].

As is relevant to pendente lite use and occupancy, the prior version of RPAPL § 745(2) (a) provided, that "[i]n a summary proceeding upon the second of two adjournments at the request of the respondent, *or upon the thirtieth day after the first appearance of the parties in court less any days the proceeding has been adjourned upon the request of the petitioner*, whichever occurs sooner, the court shall direct that the respondent, upon an application by the petitioner, deposit with the court all sums as they become due for rent and use and

occupancy[.]" [Emphasis added]. The court notes that the first adjournment was at the request of respondent to procure counsel and exceeded thirty (30) days (specifically 49 days). Therefore, coverage of RPAPL § 745 was technically triggered. As this court pointed out in *Muraco*, the 30-day adjournment cutoff incorporated in the prior version of RPAPL § 745, even to retain counsel, is in tension with the advent with the Universal Access to Counsel law [Local Law 136 of 2017]. [See e.g. 2247 Webster Ave. HDFC v. Galarce, 62 Misc 3d 1036](#) [Civ Ct, Bronx County 2019]. Certainly, this informed the amendment of RPAPL § 745, which now specifies that an initial adjournment to secure counsel is not to be counted in determining whether the rent deposit provisions apply. *See* RPAPL § 745(2)(a).

As this court observed in *Muraco*, despite this tension, the court must nonetheless interpret the prior version of the statute as written, not as it would rewrite it in light of later developments. *See Muraco*, 2022 NY Slip Op 34502[U], \*4 [Citing [Kimmel v. State of New York, 29 NY3d 386](#), 394 [2017]]. However, other courts have held that strict adherence to the statute's mandates may be excused when either a party's due process rights would be deprived [\*3](*see Lang v. Pataki*, 271 AD2d 375, 376 [1st Dept 2000], *appeal dismissed* 95 NY2d 886 [2000]; *Yellen v. Baez*, 177 Misc 2d 332 [Civ Ct, Richmond County 1997]) or when delays caused by the petitioner and the strong public policy in favor of resolving disputes on the merits justifies it ([see BAE 193 Realty LLC v. Rosales, 63 Misc 3d 948](#), 951-952 [Civ Ct, Bronx County 2019]).

The court finds that the latter scenario exists here. Petitioner did not move for use and occupancy under the former RPAPL § 745 on or around the expiration of the first 30+ day adjournment by respondent. It did not move during the 9-plus months when this proceeding was pending in the resolution part before the COVID-19 pandemic suspended eviction proceedings in March 2020. Rather, petitioner's motion came *1,336 days* (nearly 4 years) after the first adjourned court date in this proceeding (i.e. the first date when petitioner could have moved for use and occupancy). Every adjournment of the case (at least according to the court file, NYSCEF, and UCMS) after the initial adjournment was either on consent or administratively caused by the court during the pandemic, except one that was at *petitioner's* request (as recorded on the stipulation of adjournment), on February 27, 2020. While the COVID-19 pandemic interrupted proceedings for the better part of 2 years, it strains credulity that the drafters of the former RPAPL § 745 could have foreseen any equitable application of the statute in these circumstances. *See Yellen*, 177 Misc 3d at 334 ["The objective of the legislation is to either require the rent to be posted and thereby secure the landlord of payment of victorious, or to have an immediate trial of the underlying issues."]; *BAE 193 Realty LLC*, 63 Misc 3d at 951 ["The statute is meant to protect landlords against prejudice

from delays caused by the tenant."].

The court also notes that if the motion were granted, a hearing would be required to set the fair value of use and occupancy, in light of the material challenge to the rent amount contained in the proffered renewal lease (of which the failure to renew is the basis for this case) that is contained in respondent's answer (*see e.g. Nasim v. Ramirez*, 73 Misc 3d 126[A], 2021 NY Slip Op 50877[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2021]). [\[FN5\]](#) Thus, the purpose of use and occupancy pendente lite, which is to preserve the status quo until a judgment is rendered (*cf. MMB Associates v. Dayan*, 169 AD2d 422 [1st Dept 1991]), would be undermined as further delay of a determination on the merits occurred while the hearing was adjudicated. [\[FN6\]](#)

For each of these reasons, petitioner's motion for use and occupancy pendente lite is denied. Petitioner is not without a remedy. Use and occupancy was requested in the notice of petition and petition; accordingly, if petitioner is granted a possessory judgment after trial, the court may also grant a monetary judgment for use and occupancy, if proven. *See Tzifil Realty [\*4]Corp. v. Mazrekaj*, 78 Misc 3d 128[A], 2023 NY Slip Op 50278[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2023] [citing RPAPL § 747(4)].

## CONCLUSION

For the foregoing reasons, petitioner's motion is denied in its entirety. The proceeding will be restored for trial on July 18, 2023 at 10:00 AM in Part O, Room 202. Any pre-marked exhibits may be emailed to [qn-housing-202@nycourts.gov](mailto:qn-housing-202@nycourts.gov) on or before July 14, 2023. Any subpoenas must be served no later than June 27, 2023. This Decision/Order will be filed to NYSCEF.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: June 5, 2023  
Queens, New York  
HON. CLINTON J. GUTHRIE  
J.H.C.

## Footnotes

**[Footnote 1:](#)** In the intervening period, the COVID-19 public health emergency caused a temporary suspension of the proceeding. *See generally* Administrative Order 68/20 *et seq.*

**Footnote 2:** In *Phillips*, the parties are referred to as plaintiffs and defendants, whereas the parties in a summary proceeding, which is a special proceeding subject to Article 4 of the CPLR, are petitioners and respondents. *See* CPLR § 401; RPAPL §701.

**Footnote 3:** To the extent that petitioner also makes reference to stipulations entered into by counsels for the parties earlier in the litigation that required use and occupancy payments, these were not so-ordered and thus not orders of the court (*see Will v. County of Nassau*, 90 AD2d 795 [2d Dept 1982]), nor was there any language contained in the stipulations setting out any penalty for failing to pay. Accordingly, they form no basis for relief under RPAPL § 745. *See Myrtle Ventures Five, LLC*, 48 Misc 3d at 6.

**Footnote 4:** The affidavit of service for the notice of petition and petition avers that service was complete on June 6, 2019. Therefore, the commencement date was no later than that date under binding appellate caselaw. *See 92 Bergenbrooklyn, LLC v. Cisarano*, 50 Misc 3d 21, 26 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]. The HSTPA was passed on June 14, 2019 and the amended RPAPL § 745 applies to proceedings commenced on or after July 14, 2019. *See* L 2019, ch 36, § 1, part M, §§ 17, 29; *Gil*, 75 Misc 3d at 3.

**Footnote 5:** Respondent's challenge to the rental amount is predicated on allegations of illegal increases. This type of defense, if proven, has been recognized as a basis to refuse to sign an offered renewal. *See Ink 967-969 Willoughby, LLC v. Cordero*, 74 Misc 3d 128[A], 2022 NY Slip Op 50063[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2022]; *Housing Dev. Assoc., LLC v. Gilpatrick*, 27 Misc 3d 134[A], 2010 NY Slip Op 50740[U] [App Term, 1st Dept 2010].

**Footnote 6:** The use and occupancy hearing's outcome would also have a strong potential of having a preclusive effect on the ultimate merits, which the court deems to be unsatisfactory where the case (as here) is otherwise trial-ready. If issues of fact in a special proceeding exist, a trial on the merits is the appropriate means for a final resolution. *See* CPLR § 410; *Emigrant Bank v. Solimano*, 209 AD3d 153, 161 [2d Dept 2022].

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