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### 7 E. 14, LLC v. Libson

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[\*1]

<b>7 E. 14, LLC v Libson</b>
2023 NY Slip Op 50752(U)
Decided on July 18, 2023
Civil Court Of The City Of New York, New York County
Bacdayan, 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This opinion is uncorrected and will not be published in the printed Official Reports.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 July 18, 2023

Civil Court of the City of New York, New York County

<p><b>7 East 14, LLC, Petitioner,</b></p> <p><b>against</b></p> <p><b>Sydney Libson, Respondent.</b></p>
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Index No. 319323-22

Borah Goldstein Altshuler Nahins & Goidel, PC — for the petitioner

Sydney Libson, pro se respondent

Karen May Bacdayan, J.

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by NYSCEF Doc Nos. 8-15.

## **PROCEDURAL POSTURE AND BACKGROUND**

This is a nonpayment proceeding seeking rent arrears from Sydney Libson ("respondent"), a rent stabilized tenant. Petitioner commenced this proceeding by filing a notice of petition and petition on December 13, 2022. (NYSCEF Doc No. 1, petition; NYSCEF Doc No 2, notice of petition.) The petition pleads that respondent is in "possession

of [the] premises pursuant to a rental agreement; in writing wherein [r]espondent[] promised to pay to landlord as rent \$1,231.15 each month[.]" (NYSCEF Doc No. 1, petition ¶ 1.) Respondent answered the proceeding alleging that part of the rent claimed has been paid, breach of the warranty of habitability, and a general denial. (NYSCEF Doc No. 7, answer.) After numerous adjournments, the proceeding was calendared for a pre-trial conference.

During the pre-trial conference, respondent sought to dismiss the petition on the basis that a lease was not in effect at the time the proceeding was commenced. The court adjourned the case for respondent to file a motion, which he did via email to petitioner on June 15, 2023. (NYSCEF Doc No. 15, email from respondent to petitioner's attorney.) The email was entitled "petition to dismiss" and comprised the index number of the proceeding, the parties' names, and basis for dismissal, to wit, "I respectfully request the landlord's action be dismissed because of absence of lease, and for not billing rent." (*Id.*) [\[EN1\]](#)

Petitioner rejected the motion in a reply email as not adhering to proper form under CPLR Article 22. (*Id.*) Petitioner also formally opposed the motion, arguing first that the court should not consider that motion for failing to comply with the CPLR. (NYSCEF Doc No. 9, petitioner's attorney's affirmation in opposition ¶ 5.) In the alternative, petitioner argued that "[s]hould the court elect to treat an email as a motion, it should be denied. The alleged failure to bill for rent is not a defense to its payment. The absence of a renewal lease for a portion of the period for which petitioner seeks rent in the circumstances presented here does not preclude a [\*2]nonpayment proceeding." (*Id.* ¶ 8.) The gravamen of petitioner's second argument is that, notwithstanding that no lease was in effect at the time the proceeding was commenced, there was an agreement in effect for a portion of the arrears for which petitioner sued; thus, this nonpayment proceeding may continue to trial. Petitioner further argues that "this is not a case where the landlord seeks to hold the tenant to a rent different then (sic) that contained in the expired lease," a fact which petitioner concedes would preclude the instant proceeding.

The court will consider respondent's motion, filed without the assistance of counsel, in the interests of justice. (*Montes v Manufacturers Hanover Tr. Co.*, 197 AD2d 357, 358 ["We have taken into consideration that plaintiff has represented herself *pro se* through much of the proceedings in this litigation, and would therefore apply the rules of procedure liberally."])

## **DISCUSSION**

The court finds that petitioner's failure to "bill" for rent is not a bar to this proceeding.

(*Goldman v Segal*, 278 AD2d 74 [1st Dept 2000].)

Regarding petitioner's second argument, it is undisputed that no lease was in effect at the commencement of the proceeding, as the last rent stabilized renewal lease expired November 30, 2020. (NYSCEF Doc No. 12, petitioner's exhibit C, one-year renewal lease.)

Notwithstanding that the last renewal lease expired November 30, 2020, and the petition claims rent for, *inter alia*, 10 months between February 2020 through November 2020, when the lease was still in effect, the law in this department requires that this court dismiss the proceeding.

In [\*West 152nd Assoc., LP v Gassama\*, 65 Misc 3d 155](#) (A), 2019 NY Slip op 51926 (U) (App Term, 1st Dept 2019), after the purportedly unregulated tenant filed a complaint with DHCR, the landlord voluntarily conceded the tenant's regulated status and offered the tenant a lease which the tenant did not sign. Previously, the parties had executed a series of "license agreements" which "expressly stated that they were not leases, granted no tenancy rights to tenant and required payment of monthly license fees, not rent." (*Id.*, \*1.) The license agreements further expressly stated, "the rights of the Licensee shall not be deemed to be or construed as a month-to-month tenancy...." (*Id.*) When the tenant did not sign the rent stabilized lease, the landlord filed a nonpayment petition claiming "rent" was owed in the amount of the initial "license agreement" between the parties. (*Id.*) The trial court held that "[a] nonpayment proceeding can be maintained only to collect rent owed pursuant to an agreement between the parties, and here landlord failed to meet its burden to establish the existence of an agreement to pay the rent demanded in the petition, for the period sought in the petition (internal citation omitted)." (*Id.*) Citing to *Krantz & Phillips, LLP v Sedaghati*, 2003 NY Slip Op 50032 (U) (App Term, 1st Dept 2003), the court held that "even assuming that a month-to-month tenancy was created following expiration of the license agreement, there was no agreed rental amount for any month ensuing after tenant ceased paying rent." (*Id.*)<sup>[FN2]</sup>

The court has reviewed the Housing Court paper file in the 2017 nonpayment proceeding filed against Gassama. (*West 152 Assocs. LP v Gassama*, Civ Ct, New York County, Index No. 77046/2017.) The file reveals that the landlord sought arrears from August 2017 through October 2017, in the amount of \$1,550, and commenced the proceeding during the period of time when the last license agreement was in effect. The trial court found, due to the plain language of the license agreements, discrepancies between the DHCR registrations and the rent registered with DHCR, that there was no meeting of the minds regarding the monthly rental rate upon which respondent had defaulted, thus a nonpayment proceeding

pursuant to RPAPL 711 (2) was without legal basis. Because rent stabilization is a "lease-based regulatory scheme. . . . a tenant's obligation to pay the stabilized rent does not relieve petitioner of proof of a meeting of the minds." (*West 152 Assocs. LP v Gassama*, Civ Ct, New York County, Index No. 77046/2017, Stoller, J., September 24, 2018, decision and order at 4.) The court held that "[a]s petitioner failed to produce a rent stabilized lease with a rental amount of \$1,550.00 for a time period for which petitioner seeks a judgment based on nonpayment of rent, the court dismisses this proceeding." (*Id.*)

Thus, because there was no rent stabilized lease at the commencement of the proceeding which would have satisfied proof of petitioner's pleading that the apartment was rent stabilized and that there was a written agreement in effect at the time of commencement, the nonpayment proceeding was without legal basis.

In *Fairfield Beach 9th, LLC v Shepard-Neely*, 77 Misc 3d 146 (A), 2022 NY Slip Op 51351 (U), (App Term, 2d Dept 2022), the Second Department is factually more on point with this proceeding, and very clear as to its holding. There, the tenant's prior renewal lease had expired on April 30, 2018. Thereafter, the tenant made rent payments to the landlord. The nonpayment proceeding was filed in August 2010. Belatedly, on November 8, 2019, respondent signed a renewal lease retroactive to May 1, 2018. As stated in *ZB Prospect Realty v Olenick*, — NYS3d —, 2023 NY Slip Op 23115 (Civ Ct, Kings County 2023), "the salient points [of *Shepard-Neely*] are that 1) the landlord commenced the proceeding in August 2019 alleging nonpayment of rent for September 2016 through April 2018; 2) at that time the last lease between the parties had expired in April 2018; and 3) the tenant had made rent payments after the lease expired at the end of April 2018." (*Id.*, \*2.) Thus, as in the instant proceeding, a portion of the rent sought in *Shepard-Neely* was attributable to a rent stabilized lease that had once existed, but had since expired. [\[FN3\]](#)

The *Shepard-Neely* court held:

"It is undisputed that no rental agreement was in effect when this proceeding was commenced, and a nonpayment proceeding lies only where a tenant has defaulted in the payment of rent, pursuant to the agreement under the agreement under which the premises are held or, in other words, *there must be a rental agreement in effect at the time the proceeding is commenced pursuant to which rent is due and owing*. Thus, this nonpayment proceeding does not lie." (*Id.*, \*3.)

Here, as in *Shepard-Neely*, in addition to rent that accrued after the expiration of respondent's lease, respondent owes rent under an expired lease for which the landlord specifically sued in the nonpayment petition. However, notwithstanding that petitioner can

demonstrate a written agreement to pay rent for some of the months in the petition, a lease was not actually "in effect" at the time the nonpayment proceeding was commenced. It was on this very basis that the court in *Shepard-Neely* dismissed the petition. (*Shepard-Neely*, \*3.) The facts of the instant proceeding square precisely with the relevant facts in *Shepard-Neely*, which cites to *Gassama*.<sup>[FN4]</sup> The aforementioned cases also dispose of petitioner's argument that this proceeding should survive respondent's motion to dismiss because it is seeking no rent of that in excess of that agreed upon in the expired lease.

Petitioner is not without a remedy. As respondent has purportedly refused to sign the purportedly properly offered renewal lease, petitioner may commence a summary holdover proceeding pursuant to RSC 2524.3 (f); or may seek unpaid use and occupancy in a plenary proceeding.

Accordingly, it is

ORDERED that respondent's motion is GRANTED and this proceeding is dismissed without prejudice to a holdover proceeding or a plenary proceeding.

This constitutes the decision and order of this court.

Dated: July 18, 2023  
New York, NY  
HON. KAREN MAY BACDAYAN  
Judge, Housing Part

### Footnotes

**Footnote 1:** While respondent did not raise the absence of a written lease agreement in his self-represented answer, petitioner must still prove this element of its prima facie case at trial.

**Footnote 2:** Petitioner does not advance the argument that respondent is a month-to-month tenant against whom it may maintain a nonpayment proceeding. Nevertheless, the argument is unavailing in both the First and Second Departments. In *West 152nd Assocs. LP v Gassama*, 65 Misc 3d 155 (A), 2019 NY Slip Op 51926 (U) (App Term, 1st Dept 2019), the Appellate Term First Department held: "[E]ven assuming that a month-to-month tenancy was created following expiration of the license agreement, there was no agreed rental amount for any month ensuing after tenant ceased paying rent." 2019 NY Slip Op 51926 (U), \*2; see also *Krantz & Phillips, LLP v Sedaghati*, 2003 NY Slip Op 50032 (U), 2003 WL 222778 (App Term, 1st Dept 2003). In 2021, the Appellate Term Second Department held: "A rent-stabilized tenancy cannot be monthly because the respective rights and responsibilities of a landlord and tenant under a month-to-month tenancy cannot be reconciled with the respective

rights and responsibilities of a landlord and tenant of a rent-stabilized apartment. To the extent our prior cases suggested otherwise . . . they should no longer be followed (internal citations omitted)." [Fairfield Beach 9th, LLC v Shepard-Neely, 74 Misc 3d 14](#), 15—16 (App Term, 2d Dept 2021).

**Footnote 3:** *Shepard-Neely* also arguably stands for the proposition that signing a lease that commences retroactively to a time before a summary nonpayment proceeding is filed, does not resurrect the defective petition.

**Footnote 4:** At oral argument, petitioner emphasized [FAV 45 LLC v McBain, 42 Misc 3d 1231](#) (A), 2014 NY Slip Op 50292 (U) (Civ Ct, New York County 2014), a summary proceeding for nonpayment of rent. That decision was issued by the same trial court judge who was affirmed in *Gassama*. Moreover, the cases relied upon in that decision are not apropos. [Sacchetti v Rogers, 12 Misc 3d 131](#) (A) (App Term, 1st Dept 2006), an unreported disposition, is no longer good law; and [B.N. Realty Assocs. v Lichtenstein, 96 AD3d 434](#) (1st Dept 2012) was not a summary nonpayment proceeding commenced pursuant to RPAPL 711 (2). The other decision emphasized by petitioner which was decided in the context of a summary nonpayment proceeding is [NYSANDY12 CBP7 LLC v Negron, 64 Misc 3d 1238](#) (A) (Civ Ct, Bronx County 2019). *Negron* followed *McBain*, but pre-dated *Gassama* by two months.

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