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RIVERDALE OSBORNE TOWERS HOUSING ASSOC LLC v. BURDEN

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART S

RIVERDALE OSBORNE TOWERS HOUSING ASSOC LLC,

Petitioner- Landlord,

L&T Index No.: 071636/19

-against-

DECISION/ORDER

KALLENA BURDEN
ELIZABETH WASHINGTON

Respondents-Tenants,

Address: 440 WATKINS STREET
APT. 8E
BROOKLYN, NEW YORK 11212

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Respondent's Motion.

PAPERS	NUMBERED
Respondent's Notice of Motion, Affirmation in Support, Affidavit in Support & Exhibits ("A" - "D")	1, 2,3
Petitioner's Affirmation in Opposition, Affidavit In Opposition & Exhibits ("A" – "C")	4, 5
Respondent's Affirmation in Reply & Exhibit ("A" – "B")	6

Upon the foregoing cited papers, the Decision and Order is as follows:

In this nonpayment proceeding respondent Kallena Burden, now represented by counsel, seeks to amend her answer and for summary judgment dismissing this proceeding for a defective rent demand. At the outset the court recognizes that no substantial delay of this proceeding resulted from this motion or the relief sought. The original court date was July 29, 2019. On that date respondent received an adjournment until August 26, 2019 to obtain counsel through the HHP program (Housing Help Program) administered by The Legal Aid Society, which officially appeared on respondent's behalf on the adjourn date. At that time a second adjournment occurred until October 10, 2019, during which the proceeding was set for trial without prejudice to respondent's counsel filing a pre-trial motion should it be determined that one was necessary; hence the current motion. On November 20, 2019 the motion and opposition papers were taken under submission subject to the court receiving reply papers by December 9, 2019.

Furthermore, once a pro-se litigant is represented, they often become aware of defenses and counterclaims they previously had no knowledge of. In fact, the right of a pro-se individual to file an amended answer has been upheld even after the tenant has entered into a post eviction stipulation, see *Chauncey Equities, LLC v Murphy*, 62 isc3d 141(A), (App. Term, 2nd Dept., 2019).

Petitioner correctly argues that in allowing an amended answer a court must first consider if the proposed amended answer's defenses and counterclaims meet the legal sufficiency necessary to actually constitute a defense or counterclaim. It is consistently held that leave to amend pleadings should be freely given, *unless* the proposed amendment is palpably insufficient, devoid of merit, or would unfairly prejudice or surprise the opposing party, see *Matter of Rhoda v. Avery*, 155 A.D.3d 737 (2d Dep't 2017); *McCaskey, Davies and Assocs, Inc v. N.Y.C. Health and Hospitals Corp.*, 59 N.Y.2d 755 (1983); *Favia v. Harley-davidson Mototr Co., Inc.*, 119 A.D.3d 836 (1st Dep't 2014).

In her pro-se answer respondent asserted conditions in the subject premises. Respondent's proposed amended answer seeks to amend the pro-se answer to reflect:

- (a) First Affirmative Defense- defective rent demand;
- (b) Second Affirmative Defense-warranty of habitability;
- (c) First Counterclaim- warranty of habitability and an order to correct conditions;
- (d) Second Counterclaim-reciprocal legal fees

In the opinion of the court the Affirmative Defenses contained in the Amended Answer are sufficiently pled. As to the improper rent demand the foundation for this affirmative defense is set forth sufficiently to wit: lack of a "good faith" sum due for the relevant time period. As to warranty of habitability the affirmative defense (incorporated into the counterclaim) sufficiently sets forth a failure of petitioner to address repairs and lists the repairs alleged. Anything further could normally be ascertained through a Demand for a Verified Bill of Particulars. Furthermore, it should not come as a surprise in light of tenant's allegation of conditions in the pro-se answer. Accordingly, the court grants that portion of respondent's motion to amend her answer and accepts the proposed amended answer (Exhibit "D" to the motion) and deems it served and filed.

As to respondent's request for summary judgment based upon a defective rent demand, Petitioner is correct that CPLR §3212(b) states:

"A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions"

CPLR §2001, however, states:

"Mistakes, omissions, defects and irregularities. At any stage of an action... the court may permit a mistake, omission, defect or irregularity,.... to be corrected, upon such terms as may be just"

In light of the inevitable need for dismissal of this proceeding as noted below, based upon the defective rent demand as raised by respondent, this court chooses to apply its discretion and allow respondent's attachment of the underlying petition to respondent's rely papers (also attached to petitioner's opposition papers as exhibit "A"). In so doing the court notes that respondent did attach to the moving papers the rent demand in question which forms the basis for the relief sought. Respondent's counsel is cautioned that the court may not similarly apply its discretion in future proceedings with different facts and adherence to the provisions of CPLR §3212 should be maintained.


As to the substance of respondent's request for summary judgment, it has been consistently held that a rent demand must inform the tenant of the particular period for which rent is owed and of the approximate "good faith" sum of rent due for such period, see *ShopRite Supermarkets, Inc v Yonkers plaza Shopping, LLC*, 9 AD3d 564, 817 NYS2d 291, (AD 2nd Dep't 2006); *Dendy v McAlpine*, 27 Misc3d 138(A), 2010 NY Slip Op 50890(U), (App Term, 2nd Dep't, 2nd, 11th & 13th Jud Dists 2010). Here petitioner focuses repeatedly on the fact that the "amount" of arrears in the rent demand was a "good faith" approximation while completely ignoring that the second prong of the legal standard i.e a good faith approximation *for the period sought* is absent.

Here, the rent demand dated June 13, 2019 states a total sum due of \$1775.90 due, calculated as "May 2019 \$802.89/ Jun 2019 \$973.01 (see exhibit "B" to the motion). It is undisputed from petitioner's rent history (exhibit "C") to the motion that the monthly rent is \$973.01. It is also clear that the rent demand simply divides the arrears by the monthly rent, without any regard to payments made during the "period sought". While this may be appropriate in some circumstances, it is not appropriate where ongoing payments are designated for specific periods e.g. PA, FHEPS payments etc.

A debtor is free to direct how payment are to be applied toward a debt. Only in the absence of any such direction can a creditor apply such payments as the creditor sees fit. See *Snide v Larrow*, 62 NY2d 633 (1984); *134-38 Maple St. Realty Corp. v Medina*, 3 Misc.3d 134(A), 787 NYS2d 682 (App. Term, 2nd Dept. 2004); *Greenbrier Garden Apts. v Eustache*, 50 Misc3d 142(A), 31 NYS3d 921, (App. Term, 2nd Dept., 2016). Here petitioner could have set forth the good faith amount of \$1775.90 and attached and referenced the rent history since the last zero balance (or prior proceeding stipulation). This would have clearly showed the month to month shortfalls that according to petitioner resulted in a \$1775.90 balance in June 2019. Alternatively, petitioner could have set forth the shortfall month by month within the demand itself. Instead, the rent demand gives the impression that ongoing FHEPS payments were not being received during the period sought.

Based upon the acceptance of the amended answer and the affirmative defense of an improper rent demand the court grants respondent summary judgement on this issue and dismisses the proceeding in its entirety. Respondent reserves her other defense and counterclaims for any future proceeding¹. This constitutes the Decision and Order of the Court.

DATED
December 17, 2019

SO- ORDERED

KENNETH T. BARANY
J.H.C

¹ While the court grants the motion, the court strongly urges the parties to communicate as soon as possible for a resolution of the issues while the arrears remain low and the issues are limited in scope.