

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

All Decisions

Housing Court Decisions Project

2020-12-18

1 BEACH 105 REALTY, LLC v. Murphy

Follow this and additional works at: https://ir.lawnet.fordham.edu/housing_court_all

Recommended Citation

"1 BEACH 105 REALTY, LLC v. Murphy" (2020). *All Decisions*. 1095.
https://ir.lawnet.fordham.edu/housing_court_all/1095

This Housing Court Decision is brought to you for free and open access by the Housing Court Decisions Project at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in All Decisions by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART D

-----X
1 BEACH 105 REALTY, LLC,

Index No. L&T 73225/19

Petitioner,

-against-

DECISION/ORDER

THERESE MURPHY

Respondents-Tenant,

“JOHN DOE” and “JANE DOE”

Respondents-Undertenant.

-----X
Present:

Hon. Sergio Jimenez
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Respondent’s motion for summary judgment and Petitioner’s cross-motion striking respondent’s various defenses as well as for any other relief as the court may deem proper:

Papers	Numbered
Notice of Motion and Affidavits Annexed	<u>1</u>
Notice of Cross-motion and Affidavits Annexed	<u>2</u>
Answering Affirmations/Affidavits	<u>2, 3</u>
Replying Affirmations.....	<u>3</u>
Exhibits	
Memorandum of law.....	

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

PROCEDURAL HISTORY

Petitioner, 1 Beach 105 Realty, LLC (petitioner), commenced the instant nonpayment proceeding on December 16, 2019 seeking possession of the subject premises located at 1 Beach 105th Street, Apt. 7C, Rockaway Park, New York 11694. Petitioner alleges the proceeding was based on a failure to pay rent as required by the lease between the parties. After the answer was filed, the proceeding was adjourned from February 7, 2020 to March 12, 2020. The court

entered a phase of unexpected emergency procedures following the global pandemic crisis and this proceeding was administratively adjourned indefinitely. It was conferenced while the courts remained closed to in-person hearings. After the instant motions were filed and briefed, the court held virtual arguments using the Microsoft Teams App. Once arguments were heard, the court reserved decision

Respondent's motion and Petitioner's opposition

Respondent seeks CPLR §3212 relief with regard to the propriety of the rent demand. To obtain summary judgment the movant bears the burden of proving, by competent admissible evidence, that no material and triable issues of fact exist. *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 (Ct. App., 1985). Here respondent seeks to bypass trial and believes that as a matter of law, the rent demand was inappropriate and without a proper rent demand the petition must be dismissed. Respondent, to prove their argument, provide six (6) checks allegedly tendered to the petitioner. Petitioner opposes stating the submission of these checks was not technically correct as there is no affidavit stating that the checks have been authenticated to such a degree as to be admissible. The Second Department appellate courts, however, have instructed lower courts to overlook technical admissibility defects when making determinations on dispositive motions. See *Rosenblatt v. St. George Health & Racquetball Assoc.*, 119 AD3d 45 (App. Term 2d Dep't, 2014). This is tempered by further instruction that even in situations where the nonmoving party has not opposed at all, the burden of proof remains on the movant and the court may deny summary judgment. *Rivera v. State of New York*, 34 NY3d 383 (2019); *Exit Emire Realty v. Zilelian*, 137 AD3d 742 (2d Dep't 2016). The evidence required by CPLR §3212 must be in "admissible form."

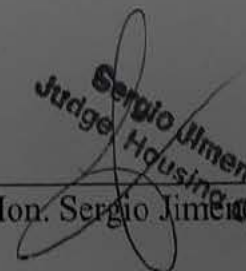
Since respondent did not provide an affidavit and it is axiomatic that reply papers may not remedy defects in the original motion, petitioner is correct that the motion is technically deficient. However, the court must weigh various factors into making such determinations, one of which is the ultimate resolution of a summary proceeding. Petitioner does not oppose the motion with an affidavit denying that they received the payments alleged. In fact, they maintain, in their well-drafted affidavit, that the amount sought is correct but do not address whether any of the specific checks were received and cashed. Weighing the constraints of CPLR §3212 with the guidance given to the court by the *Rosenblatt* Court, this court may, at its own discretion, determine which documents are relevant and prima facie admissible for the purposes of making a determination of a dispositive motion. Weighing those factors, the court grants respondent's requested relief and finds that, accepting the checks that show the bank account information after having been deposited, the court may use the copies of the cashed check statements to determine this motion. While technically deficient in the original motion papers, petitioner did not deny receiving those payments and does not substantively attack them. While not taken into consideration, respondent would be able to remedy this technical error in a subsequent motion or, at worst, at trial. Given the information presented, petitioner had enough information to check their own records. Since only a technical objection is raised, which the *Rosenblatt* Court has empowered this court in dispositive motions to move past, in conjunction with an interest in judicial economy, the court finds the rent demand to be defective. This rent demand does not apply the checks in question to the months they were earmarked for and therefore, the notice is deficient. Earmarked rent payments must be applied to the periods for which they are earmarked (see *EOM 106-15 217th Corp. v Severine*, 62 Misc 3d 141[A], 112 N.Y.S.3d 861, 2019 NY Slip Op 50068[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019]; *Greenbrier Garden Apts. v*

Eustache, 50 Misc 3d 142[A], 31 N.Y.S.3d 921, 2016 NY Slip Op 50210[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2016]; *134-38 Maple St. Realty Corp. v Medina*, 3 Misc 3d 134[A], 787 N.Y.S.2d 682, 2004 NY Slip Op 50469[U] [App Term, 2d Dept, 2d & 11th Jud Dists 2004]). Without a proper rent demand, the proceeding cannot stand and must be dismissed. RPAPL 711(2); *Severin v. Rouse*, 134 Misc.2d 940 (Civ Ct NY Co, 1987); *97-101 Realty LLC v. Sanchez*, 51 Misc. 3d 1202(A) (Civ Ct Bk Co, 2016).

Conclusion

For the reasons set forth above, respondent's motion is granted. Petition is dismissed without prejudice. Since respondent waived, on the record, the traverse claim and the second counterclaim, and the court is at a reduced capacity in light of the pandemic, the other remaining counterclaims are severed for affirmative (HP) proceedings, with all of petitioner's defenses reserved. Petitioner's cross-motion is denied as moot. All other arguments are not reached, including the collectability of the previous stipulation moneys. Every aspect of this order must comply with any court procedures, directives, administrative orders, new legislation and/or executive orders that may be in place at that time now and at that time. This constitutes the Decision and Order of the Court.

Dated: December 18, 2020
Queens, New York


Sergio Jimenez
Judge Housing Court
Hon. Sergio Jimenez

To: Valiotis & Novella PLLC

Attn: Jaelyn L. LaPorta, Esq.
31-10 37th Avenue
Suite 500
Long Island City, New York 11101
Attorneys for Petitioner – Avail 1 Beach 105 Realty LLC

Queens Legal Services
Attn: Heather Goldberg, Esq.
89-00 Sutphin Boulevard
5th Floor
Jamaica, New York 11435
Attorney for Respondent – Therese Murphy