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### ROCHDALE VILLAGE, INC v. STONE

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

-----X  
ROCHDALE VILLAGE INC.,

Index No. L&T 62496/19

Petitioner-Landlord,

-against-

**DECISION/ORDER**

PRISCILLA RICHARD,

Respondent-Tenant.

-----X

Present:

Hon. CLINTON J. GUTHRIE  
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Respondent's motion to dismiss pursuant to CPLR § 3211(a), or in the alternative, for leave to file an amended answer pursuant to CPLR § 3025(b):

<b>Papers</b>	<b>Numbered</b>
Notice of Motion & Affirmation/Affidavit/Exhibits Annexed.....	<u>1</u>
Affirmation in Opposition & Exhibits Annexed .....	<u>2</u>
Affirmation in Reply.....	<u>3</u>

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

PROCEDURAL HISTORY

The immediate nonpayment proceeding is based on a Notice of Petition and Petition dated June 5, 2019. The Petition alleges that Respondent is a tenant in the premises, which is a Mitchell-Lama cooperative apartment. Respondent filed a *pro se* Answer on June 17, 2019. On the first court date, July 3, 2019, the proceeding was adjourned to July 3, 2019 for Respondent to

obtain counsel through the Universal Access program. On the next court date, August 20, 2019, Queens Legal Services appeared for Respondent and the proceeding was adjourned to October 9, 2019. On October 9, 2019, Respondent, through counsel, filed a motion to dismiss based on an alleged running of the statute of limitations, an alleged failure to provide proper notice pursuant to 9 NYCRR § 1727-2.7 prior to collecting the arrears sought, and alleged service of an improper rent demand. The proceeding was adjourned to November 20, 2019 for submission of opposition and reply. The Court heard argument on the motion on November 20, 2019 and reserved decision.

## ANALYSIS

### Respondent's Motion to Dismiss

Respondent moves to dismiss this proceeding pursuant to CPLR §§ 3211(a)(1), (a)(2), and (a)(7). As for Respondent's first argument that the proceeding should be dismissed based on an alleged running of the statute of limitations pursuant to CPLR § 213(2), none of the grounds under CPLR § 3211(a) cited in the motion address the statute of limitations. Only CPLR § 3211(a)(5) specifically references dismissal based on the statute of limitations. Since Respondent does not seek relief pursuant to CPLR § 3211(a)(5), the prong of the motion seeking dismissal as a result of the running of the statute of limitations is denied.

Respondent's second argument is that Petitioner failed to meet a "necessary condition precedent" insofar as no notice was given to Respondent pursuant to 9 NYCRR § 1727-2.7 before demanding the arrears sought herein (which are wholly attributable to "2012 Adjusted Rent as per Income Verification" in the rent demand). Under 9 NYCRR § 1727-2.6(a), "[t]he failure, neglect or refusal of a tenant or cooperator to furnish information concerning their

income or that of any household member, or to cooperate in the verifying of such reported income, will be assumed to indicate excess income. In such cases, rent will be raised to the maximum in the surcharge schedule.” However, 9 NYCRR § 1727-2.7 specifically refers to the “effective date” of rent changes: “The housing company shall establish an effective date for all rent changes resulting from annual income reviews. Each tenant or cooperator whose rent is being changed will be given notice of such change one calendar month prior to this date. Such notice *shall also be given to* tenants or cooperators whose rent is being changed to maximum surcharge rent for failing to submit required proof.” (Emphasis added). No allegation is made in the Petition or the rent demand that notice was given pursuant to 9 NYCRR § 1727-2.7 prior to the surcharge as “adjusted rent” being demanded from Respondent. Although Petitioner annexes copies of the notices that were purportedly given to Respondent prior to the imposition of the surcharge to its opposition papers, no proof of mailing or service, nor an affidavit from anyone with personal knowledge of the delivery or service of the documents is annexed to the opposition papers.

As this Court held in *Rochdale Vil. Inc. v. Blackman*, 64 Misc.3d 1235(A), 2019 NY Slip Op 51426(U) (Civ. Ct. Queens County 2019), in the absence of proof that notice was given to a Mitchell-Lama shareholder pursuant to 9 NYCRR § 1727-2.7, a housing company lacks a cause of action to collect any surcharge imposed pursuant to 9 NYCRR § 1727-2.6(a). *See also* *Vigilant Ins. Co. of Am. v. Housing Auth. of City of El Paso, Tex.*, 87 N.Y.2d 36, 43 (1995); *Starrett City, Inc. v. Brownlee*, 22 Misc.3d 38, 874 N.Y.S.2d 663 (App. Term 2d Dep’t 2008); *SEBCO IV Assoc. LP v. Colon*, 63 Misc.3d 1227(A), 2019 NY Slip Op 50765(U) (Civ. Ct. Bronx County 2019); *Remeeder Houses LP v. Myrick*, 2019 LEXIS 1251, NYLJ, Apr. 17, 2019 at 34


(Civ. Ct. Kings County 2019). Here, Petitioner has not pled nor credibly demonstrated that the required notice was given to Respondent prior to the imposition of the surcharge that it seeks to collect herein as “adjusted rent.” As a result, Petitioner lacks a cause of action; additionally, its rent demand is defective insofar as the entirety of the rents demanded therein are not collectible in the absence of a proper notice pursuant to 9 NYCRR § 1727-2.7. *See EOM 106-15 217th Corp. v. Severine*, 62 Misc.3d 141(A), 2019 NY Slip Op 50068(U) (App. Term 2d, 11th & 13th Jud. Dists. 2019) (Holding that a proper rent demand is a “statutory prerequisite to a nonpayment proceeding” and “must ‘set forth the approximate good faith amount of rent owed’ and ‘fairly apprise the tenant of the periods for which rent is allegedly due and in what amounts.’”) (Citing *Dendy v. McAlpine*, 27 Misc.3d 138(A), 911 N.Y.S.2d 691 (App. Term 2d, 11th & 13th Jud. Dists. 2010) and *Pantigo Professional Ctr., LLC v. Stankevich*, 60 Misc.3d 133(A), 2018 NY Slip Op 51039(U) (App. Term, 9th & 10th Jud. Dists. 2018)); *see also Rochdale Vil. Inc. v. Blackman, supra*. A defective rent demand is not subject to amendment. *See 125 Court St., LLC v. Sher*, 58 Misc.3d 150(A), 94 N.Y.S.3d 539 (App. Term 2d, 11th & 13th Jud. Dists. 2018) (citing *Chinatown Apts. v. Chu Cho Lam*, 51 N.Y.2d 786, 787 (1980)).

Accordingly, Respondent’s motion to dismiss is granted pursuant to CPLR § 3211(a)(7). Respondent’s motion to file an amended answer is denied as moot and without prejudice. The immediate proceeding is dismissed without prejudice.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: Queens, New York  
February 13, 2020

To: Henry M. Graham, Esq.  
Cooper & Paroff, P.C.

  
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HON. CLINTON J. GUTHRIE  
J.H.C.

SO ORDERED - HON. CLINTON J. GUTHRIE

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