

Fordham Law School

## FLASH: The Fordham Law Archive of Scholarship and History

---

[All Decisions](#)

[Housing Court Decisions Project](#)

---

2021-03-12

### Zheng v. Lin

Follow this and additional works at: [https://ir.lawnet.fordham.edu/housing\\_court\\_all](https://ir.lawnet.fordham.edu/housing_court_all)

---

#### Recommended Citation

"Zheng v. Lin" (2021). *All Decisions*. 1139.  
[https://ir.lawnet.fordham.edu/housing\\_court\\_all/1139](https://ir.lawnet.fordham.edu/housing_court_all/1139)

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](mailto:tmelnick@law.fordham.edu).

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

-----X

SHAN XUE ZHENG,  
*Petitioner,*

INDEX #: 50453/20  
Motion Seq. 2

-against-

DECISION/ORDER

XIU FANG LIN, “JOHN DOE” and “JANE DOE”,

*Respondents.*

-----X

*Present: Kimon C. Thermos, J.H.C.*

Recitation, as required by CPLR §2219(a), of the papers considered in review of the instant motion.

<b>Papers</b>	<b>Numbered</b>
Notice of Motion, Affirmation and Annexed (Ex. A-E).....	1
Affirmation and Affidavit in Opposition.....	2
Affirmation in Reply.....	3

Appearing for Petitioner: David S. Harris, Esq., of counsel to Hui Feng, Esq.  
Appearing for Respondent Xiu Fang Lin: The Legal Aid Society, By: Sateesh Nori, Esq.  
No other Respondents have appeared in this proceeding.

Upon the foregoing cited papers, the Decision/Order on this motion to reargue this Court’s Decision/Order dated August 28, 2020 is as follows:

***PROCEDURAL HISTORY***

In January 2020, Petitioner commenced this nonpayment proceeding to recover possession of the subject apartment occupied by Respondents on a month-to-month basis, predicated upon \$8,800.00 owed in rent arrears from September 2019 through December 2019 at \$2,200.00 per month.

It is undisputed that Respondent Xiu Fang Lin (“Respondent”) has lived at the subject premises since 2006 or 2007 and that she did not have a written lease in effect for the months sought in the petition or at commencement of this proceeding. It is also undisputed that her agreed upon monthly rent during the months sought in the petition was \$2,200.00 per month and

that she was a month-to month tenant during that time period pursuant to an oral month-to-month rental agreement. The motion papers further reveal that Respondent had a lease when she first entered into possession, which had long since expired. The date of expiration was not stated.

In March 2020, Respondent, by counsel, moved for dismissal pursuant to CPLR §3211(a)(7) for failure to state a cause of action and/or pursuant to RPAPL §711, on the grounds that Petitioner failed to serve a proper rent demand as required by RPAPL §711, in that the rent demanded is grossly in excess of the one month of rent that may be legally sought. Respondent reasoned that Petitioner cannot base the petition on more than one month of rent, since “each term of a month-to-month tenancy is a separate contract that independently conveys a right to possession for a single monthly term.” Alternatively, Respondent sought dismissal of the petition on the grounds that it fails to state a cause of action, pursuant to CPLR §3211(a)(7), because the parties ceased having a landlord-tenant relationship after Petitioner served a 30-day notice terminating the month-to-month relationship, effective September 30, 2019, as a predicate to a prior holdover proceeding.

By Decision dated August 28, 2020, this Court denied Respondent’s summary judgment motion, in its entirety. First, this Court found that Respondent’s argument regarding the effect of the termination notice from the prior holdover proceeding on the parties’ landlord-tenant relationship was unavailing, since that proceeding was dismissed upon Petitioner’s failure to appear and Petitioner’s motion to vacate the default was denied by Order dated December 10, 2019. Therefore, this Court found that the 30-day month-to-month termination notice, which was served upon Respondent in August 2019 as a predicate for the prior holdover proceeding, was rendered a nullity when the petition was dismissed and not restored. The Court found that, consequently, the parties’ month-to-month, landlord-tenant relationship was reinstated upon dismissal of that holdover petition. Additionally, this Court found that, contrary to Respondent’s contentions, a nonpayment proceeding may be brought against a month-to-month tenant to collect rent accrued for more than the current month due, citing *Priegue v. Paulus*, 43 Misc.3d 135A (App. Term 2<sup>nd</sup> Dept., 9<sup>th</sup> & 10<sup>th</sup> Jud. Dists. 2014) and *Tricarichi v Moran*, 38 Misc.3d 31 (App. Term 2<sup>nd</sup> Dept., 9<sup>th</sup> & 10<sup>th</sup> Jud. Dists. 2012). The Court further found that Respondent’s reliance on *Bleeker St. Tenants Corp. v Bleeker Jones LLC*, 65 A.D.3d 240 (1<sup>st</sup> Dept. 2009) *rev’d on other grounds* 16 N.Y.3<sup>rd</sup> 272 (2011), was misplaced, not only because it was erroneously cited as authority in the Second Department, but also because it is distinguishable on the facts

and legal issues, since that case did not involve nonpayment of rent but dealt with the continuity of commercial lease terms into a subsequent month-to-month tenancy and the rule against perpetuities. Instead, the Court found that the rationale in *Priegue, supra.*, a case from the Second Department Appellate Term for the 9<sup>th</sup> and 10<sup>th</sup> Judicial Districts, was controlling and must be followed. The Court concluded that, based upon its findings and upon review of the subject rent demand, the rent demand serves as a proper predicate to this proceeding in accordance with RPAPL §711(2), as it represents a good faith approximation of the rent due, which was not specifically disputed by Respondent in her motion papers.

Respondent now moves, by counsel, for an Order, pursuant to CPLR §2221, granting leave to reargue that portion of her prior motion seeking dismissal of the petition on the basis that Petitioner failed to serve a proper rent demand as required by RPAPL §711. Respondent argues that dismissal is warranted because a month-to-month tenancy is merely a series of independent monthly contracts, which are only renewed upon the payment of rent for the current month. Therefore, Respondent argues that the subject rent demand, which seeks more than one month in rent arrears, violates the good faith approximation requirement of a proper rent demand under RPAPL §711, rendering it defective and the petition, upon which it is predicated, unequivocally dismissible.

In seeking leave to reargue, Respondent avers that, in denying her motion to dismiss, the Court erroneously followed, as binding precedent, *Priegue, supra.* and *Tricharichi, supra.* from the Second Department Appellate Term for the 9<sup>th</sup> and 10<sup>th</sup> Judicial Districts, because those cases are only persuasive authority for the Court, which sits in the 11<sup>th</sup> Judicial District under the controlling authority of the Second Department Appellate Term for the 2<sup>nd</sup>, 11<sup>th</sup> and 13<sup>th</sup> Judicial Districts. Therefore, Respondent argues that the Court should have given equal or greater persuasive value to cases from the First Department Appellate Division and First Department Appellate Term, such as *Bleeker St. Tenants Corp., supra.*, which stand inapposite to the rationales in *Priegue, supra.* and *Tricharichi, supra.* Upon grant of leave to reargue, Respondent seeks dismissal of the petition pursuant to CPLR §3211(a)(7) and/or pursuant to RPAPL §711, for failure to serve as a proper rent demand.

In opposition, Petitioner argues that the Court's Decision was proper and should stand.

## *DISCUSSION*

“A motion to reargue, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts or misapplied any controlling principles of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided.” *Mangine v Keller*, 182 A.D.2d 476 (1<sup>st</sup> Dept. 1992). See also, *Fosdick v Town of Hempstead*, 126 N.Y. 651 (1891).

The doctrine of *stare decisis*, which is defined as “[t]he binding force of a judicial construction... depends upon the court by which it was rendered and the rank of the tribunal in the judicial hierarchy...” *McKinney's Cons. Laws of N. Y., Book 1, Statutes, §72(b), p. 143*.

Therefore, the doctrine of *stare decisis* binds this Court to follow the rulings of its Appellate Term (the Second Department Appellate Term for the 2<sup>nd</sup>, 11<sup>th</sup> & 13<sup>th</sup> Judicial Districts), the Second Department Appellate Division and the New York Court of Appeals. As such, decisions from all other courts are persuasive authority (with an exception explained below), even decisions from the Second Department Appellate Term for the 9<sup>th</sup> & 10<sup>th</sup> Judicial Districts. However, an exception to this rule is that, if the Appellate Division in which a court sits has not ruled on an issue decided by the Appellate Division in another judicial department, then the decision of the Appellate Division in that other department must be followed, unless it can be distinguished as not having identical facts and legal issues, until the Appellate Division in its own department or the Court of Appeals renders a contrary determination. *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2 663 (2<sup>nd</sup> Dept. 1984), which held that “the Appellate Division is a single state-wide court divided into departments for administrative convenience and, therefore, the doctrine of *stare decisis* requires trial courts in one department to follow precedents set by the Appellate Division of another department until the Court of Appeals or the Appellate Division of its department pronounces a contrary rule. This is a general principle of appellate procedure necessary to maintain uniformity and consistency.” *Id. at 664*. See also, *Maple Med., LLP v Scott*, 2020 N.Y. App. Div. LEXIS 7587 (2<sup>nd</sup> Dept. 2020).

With respect to the Appellate Terms, both the Appellate Divisions for the First and Second Departments were authorized to create Appellate Terms to hear cases from certain lower courts by Article 6, Section 8 of the New York State Constitution. Unlike the First Department Appellate Division which created one Appellate Term, the Second Department Appellate

Division created two Appellate Terms, which are comprised of two separate courts, one to cover the 9<sup>th</sup> and 10<sup>th</sup> Judicial Districts and the other to cover the 2<sup>nd</sup>, 11<sup>th</sup> and 13<sup>th</sup> Judicial Districts.

See, the court's website at

[https://www.nycourts.gov/courts/ad2/appellateterm\\_aboutthecourt.shtml](https://www.nycourts.gov/courts/ad2/appellateterm_aboutthecourt.shtml).

As the court described the Second Department Appellate Terms for the 9<sup>th</sup> and 10<sup>th</sup> Judicial Districts and the 2<sup>nd</sup>, 11<sup>th</sup> and 13<sup>th</sup> Judicial Districts as two separate courts, contrast with the Appellate Divisions which are considered one court divided into four judicial departments, this Court agrees that *Tricarichi, supra.* and *Priegue, supra.* are not binding authority, but only persuasive authority. As such, this Court grants Respondent's request for leave to reargue that branch of her prior motion seeking dismissal of the petition for failure to state a cause of action pursuant to CPLR §3211(a)(7) and/or pursuant to RPAPL §711 for failure to serve as a proper rent demand, on the basis that the predicate rent demand improperly seeks an amount far in excess of the one month of rent that may be legally sought.

Upon such leave, this Court finds as follows:

In its Decision dated August 28, 2020, this Court distinguished *Bleeker St. Tenants Corp., supra.*, the First Department Appellate Division case proffered by Respondent, on the facts and the law as previously explained. Had *Bleeker St. Tenants Corp., supra.* been on point on the facts and legal issues, it would have been binding authority in absence of any cases from the Second Department Appellate Division and the Court of Appeals that ruled to the contrary. However, since *Bleeker St. Tenants Corp., supra.* was distinguishable, it could only be considered persuasive authority, like *Tricarichi, supra.* and *Priegue, supra.* Given this, it is within this Court's discretion to determine how much deference should be given to each case from persuasive authority when considering Respondent's motion.

Since *Priegue, supra.*, which held that a nonpayment proceeding for the total amount due over a prolonged default period can be maintained based on the principle that a month-to-month agreement continues explicitly or implicitly each month based upon the same terms and conditions as the prior month, as well as *Tricarichi, supra.*, which had a similar holding, are on point with the facts and legal issues presented in this case, those cases are entitled to greater deference than *Bleeker St. Tenants Corp., supra.* Notably, *Priegue, supra.* and *Tricarichi, supra.* relied upon the holding of *City of New York v Pennsylvania R.R. Co.*, 37 N.Y.2d 298 (1975), a Court of Appeals case.

In *City of New York v Pennsylvania R.R. Co.*, 37 N.Y.2d 298 (1975), the court held that after expiration of a written agreement granting exclusive possession, where rent continued to be paid and accepted, “there is implied a continuance of the tenancy on the same terms and subject to the same covenants as those contained in the original instrument,” for as long as the tenant remains in possession. *Id.* at 301.

The holding, in *City of New York v Pennsylvania R.R. Co.*, *supra.*, has been followed by both the Second Department Appellate Division and the First Department Appellate Division. See, *Casamento v Juareui*, 88 A.D.3d 345 (2<sup>nd</sup> Dept. 2011); *Logan v Johnson*, 34 A.D.3d 758 (2<sup>nd</sup> Dept. 2006); *McClenan v. Brancato Iron & Fence Works*, 282 A.D.2d 722 (2<sup>nd</sup> Dept. 2001); and *Yu Yan Zheng v Fu Jian Hong Guan Am. Unity Assn. Inc.*, 168 A.D.3d 511 (1<sup>st</sup> Dept. 2019).

Although not arising out of a summary proceeding, the Second Department Appellate Division, in *Logan v Johnson*, *supra.*, an action to, *inter alia*, compel specific performance of an option to purchase certain real property, affirmed the lower court’s grant of summary judgment to the defendant-landlord on her counterclaim to recover unpaid rent in the principal sum of \$100,500.00. In doing so, the court stated

The only issue on this appeal is whether the Supreme Court properly determined that the plaintiff was liable to the defendant for unpaid rent. When the plaintiff continued to reside at the defendant's premises through July 2004 after his written lease expired in July 1998, the provisions in the lease remained in force for as long as he remained in possession of the premises. Despite having an option contract with the defendant to purchase the premises during a portion of the holdover period, a month-to-month tenancy was created when, upon holding over, the plaintiff paid and the defendant accepted the agreed-upon monthly rent of \$ 1,500 for a number of months. Accordingly, the plaintiff was obligated to pay rent for the entire time he was in possession of the premises, and the Supreme Court did not err in awarding the defendant the sum of \$1,500 per month for the 67-month period during which the plaintiff did not pay rent.”

*Logan v. Johnson*, 34 A.D.3d 758, 759 (2<sup>nd</sup> Dept. 2006).

Notably, the Second Department Appellate Division did not denote the consideration due for the tenant’s continued possession of the premises as use and occupancy which connotes a lack of agreement, but rather it deemed the amount due under the extant month-to month tenancy as rent and held that the establishment of a month-to-month tenancy permitted an action, seeking the total amount owed for entire the 67-month period, to be maintained.

Additionally, other cases from the Second Department Appellate Division and the Second Department Appellate Term for the 2<sup>nd</sup>, 11<sup>th</sup> & 13<sup>th</sup> Judicial Districts have inferentially upheld

the precept that a nonpayment proceeding may be maintained for several months of rent arrears due under a month-to-month tenancy. See, *402 Nostrand Ave. Corp. v. Smith*, 19 Misc.3d 44 (App. Term 2<sup>nd</sup> Dept., 11<sup>th</sup> & 13<sup>th</sup> Jud. Dists. 2008); *265 Realty, LLC v Trec*, 39 Misc.3d 150A (App. Term 2<sup>nd</sup> Dept., 11<sup>th</sup> & 13<sup>th</sup> Jud. Dists. 2013); and *Samson Mgt. LLC v Hubert*, 92 A.D.3d 932 (2<sup>nd</sup> Dept. 2012).

In a nonpayment proceeding brought to collect several months of rent due after expiration of a written lease, the court found that, although landlord failed to prove that he was entitled to an increased rent of \$1,288.31 due to the absence of a fully executed written lease renewal, the landlord was still entitled to collect rent arrears for the months due at the rate of \$848.88 as stated in the expired lease, since the tenant's tenancy continued and, thus, she became a month-to-month tenant, when the landlord accepted rent after the written lease expired and was not renewed. The court also rejected the tenant's argument that the rent demand was fatally defective pursuant to RPAPL §711 since it demanded the higher rent, holding that "[t]he rent demand and petition permissibly set forth landlord's good faith claim as to the rents due and the periods for which they were due." *402 Nostrand Ave. Corp. v. Smith*, 19 Misc.3d 44, 46 (App. Term 2<sup>nd</sup> Dept., 11<sup>th</sup> & 13<sup>th</sup> Jud. Dists. 2008).

Likewise, the court, in *265 Realty, LLC v Trec*, 39 Misc.3d 150A (App. Term 2<sup>nd</sup> Dept., 11<sup>th</sup> & 13<sup>th</sup> Jud. Dists. 2013), also implicitly found that a nonpayment proceeding can be maintained for more than one month of outstanding rent, upon proof of the creation of a month-to month tenancy.

See also, *Samson Mgt. LLC v Hubert*, 92 A.D.3d 932 (2<sup>nd</sup> Dept. 2012), which is most often cited for its determination that the practice of deeming leases as renewed ran contrary to the RPL §232-c prohibition of the extension of a lease term without assent from the tenant. However, the court also implicitly found that a nonpayment proceeding based upon several months of rent arrears could be maintained, if there was proof that a month-to month tenancy was created. See, *FAV 45 LLC v McBain*, where the court held that, *Samson, supra*.

“does not, however, alter the proposition that a landlord/tenant relationship continues after the expiration of a rent-stabilized lease on a month-to-month basis at the same rent as the parties had previously agreed to so long as the tenant remains in possession...”

*FAV 45 LLC v McBain*, 42 Misc.3d 1231A (Civ. NY 2014).



Therefore, it is clear that, in the Second Department, a month-to-month tenancy is considered one rental agreement for the duration of a tenant's possession of the premises with the right to terminate by either party.

The notice required prior to instituting a holdover proceeding in a month-to-month tenancy, itself, is premised upon the principle that a month-to-month tenancy continues until it is properly terminated as delineated in RPL §232-a. The statute requires a landlord to state the intent to terminate the tenancy in writing and under RPL §226-c, as amended by Housing Stability and Tenant Protection Act of 2019 ("HSTPA"), afford the tenant the appropriate advance notice to vacate the premises. Notably, failure to serve a proper termination notice does not affect the right to a continued tenancy. Instead, such failure requires dismissal of a holdover proceeding for failure to state a cause of action. *Gerolemou v. Soliz*, 184 Misc. 2d 579 (App. Term 2<sup>nd</sup>, 11<sup>th</sup> & 13<sup>th</sup> Jud Dists 2000).

As such, this Court holds that, after a parties' lease expires, there is a surviving tenancy upon the payment and acceptance of rent, which continues month-to month as one continuous agreement until terminated by the required statutory predicate notice by the landlord and at least in New York City by the mere vacatur and surrender of possession by the tenant with all the surviving covenants of the expired lease, including the payment of rent and the right to commence legal action upon nonpayment of rent for all months due.

There is also accord with this Court's holding in the well-respected treatise on Landlord-Tenant Law, which describes the nature of a monthly tenancy as follows: "A month-to-month tenancy is a periodic tenancy for an indefinite period of time. A periodic tenancy was considered as a continuous one for the entire period of its duration, not by virtue of a new lease, but by force of the original one, each recurring period being "a springing interest, arising upon the first contract, and parcel of it," *Rasch's Landlord & Tenant including Summary Proceedings Fifth Edition (2017), Section 30:41, at page 432, citing Pugsley v. Aikin, 11 N.Y. 494 (1854).*

This Court acknowledges that in the Appellate Term First Department the prevailing approach seems to be that a nonpayment proceeding for the payment of rent cannot be brought for more than one month because the view is that a month-to-month tenancy is not one leasehold but a series of tenancies which are activated on a singular monthly basis upon payment of the rent. *Printerion Realty Corp. v. Fischer- Partelow, Inc.*, 167 Misc. 452 (App. Term 1<sup>st</sup> Dept. 1938); *Pendicini v. D&M Metal Specialties, Inc.*, 199 Misc. 223 (App. Term 1<sup>st</sup> Dept. 1951).

However, these cases are not binding precedent for this Court, which sits in the Second Department and do not comport at least in the view of this Department with the interpretation of the Court of Appeals on this issue in *City of New York v Pennsylvania R.R. Co.*, *supra*.

As for Respondent's argument that the rent demand does not comply with RPAPL §711, RPAPL §711(2), which governs nonpayment proceedings, provides, in relevant part, that a proceeding may be maintained when "[t]he tenant has defaulted in the payment of rent, pursuant to the agreement under which the premises are held, and a written demand of the rent has been made with at least fourteen days' notice requiring, in the alternative, the payment of the rent, or the possession of the premises." *RPAPL §711(2)*.

A proper rent demand, which serves as a prerequisite for a nonpayment proceeding, must give the tenant notice of the approximate amount of rent owed and specify the time period for which rent is due to give the tenant notice of the landlord's claim and afford the tenant an opportunity to pay the arrears. Although the rent demanded need not be the exact amount of rent due, it must be a good faith approximation. *ShopRite Supermarkets, Inc. v. Yonkers Plaza Shopping, LLC.*, 29 A.D.3d 564 (2<sup>nd</sup> Dept. 2006).

Herein, it is undisputed that the parties had an oral month-to-month rental agreement when this proceeding was commenced, wherein Respondent agreed to pay \$2,200.00 per month in consideration of her exclusive possession of the subject premises. Invariably month-to-month tenancies are based upon oral agreement, which constitute a valid leasing agreement as contemplated by RPL §232-c and RPAPL §711(2). In light of the foregoing, upon review of the predicate 14-day rent demand and since Respondent has not challenged service of the rent demand, this Court finds that the rent demand, and petition upon which it is predicated, "permissibly set forth landlord's good faith claim as to the rents due and the periods for which they were due", in accordance with RPAPL §711(2). *402 Nostrand Ave. Corp. v. Smith, supra. at 46.*


### **CONCLUSION**

Accordingly, Respondent's motion is granted to the extent of permitting reargument; and upon reargument, denied, except that this Court modifies its Decision and Order dated August 28, 2020 solely for the legal basis of the denial, as explained herein. All other aspects of the Court's Decision dated August 28, 2020 stand.

A pretrial conference shall be held in this matter on April 6, 2021, at 9:30 a.m., via Microsoft Teams.

This constitutes the Decision and Order of the Court.

Dated: March 12, 2021  
Queens, New York



---

Kimon C. Thermos, J.H.C.