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### ANDREWS PLAZA HOUSING ASSOCIATES LP v. RODRIGUEZ

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CIVIL COURT OF THE CITY OF NEW YORK  
BRONX COUNTY: HOUSING PART K

-----X L&T Index # 310838-23/BX  
ANDREWS PLAZA HOUSING ASSOCIATES LP,  
Petitioner (Landlord),

-against-

### DECISION & ORDER

JUAN RODRIGUEZ,  
Respondent (Tenant).

-----X  
Hon. Diane E. Lutwak:

Recitation, as required by CPLR Rule 2219(A), of the papers considered in the review of Respondent's Motion to Dismiss:

<u>Papers</u>	<u>NYSCEF Doc #</u>
Notice of Motion, Supporting Affirmation	6, 7
Affirmation in Opposition, Exhibit A	8, 9
Reply Affirmation, Exhibit A	11, 12

After argument, upon the foregoing papers and for the reasons stated below, respondent's motion pursuant to CPLR RR 3211(a)(1), 3211(a)(7) and/or 3212 is granted and this proceeding is dismissed, without prejudice.

### PROCEDURAL HISTORY & FACTUAL BACKGROUND

This is a nonpayment eviction proceeding in which the petition, dated March 6, 2023, alleges a monthly rent of \$1187, Petition at ¶ 2; rent arrears of \$3548<sup>1</sup>, comprised of \$1152 for January 2023, \$1209 for February 2023 and \$1187 for March 2023, id. at ¶ 4; that the rent was demanded by a written 14-day notice, id. at ¶ 5; and the premises are "financed by HUD and are exempt from local registration," id. at ¶ 7. The relief stated in the petition's "Wherefore" clause includes a possessory judgment, issuance of a warrant of eviction, and a monetary judgment for \$3948. The accompanying 14-day rent demand advises respondent that he is required either to pay the sum demanded by a specified date "or surrender up the possession of said premises to the landlord, in default of which the Landlord will commence summary proceedings under the Statute to recover the possession thereof."

An answer to the petition was filed on March 23, 2023 by Florinda Rodriguez, identified as "Wife, Occupant", using the Court's answer form on which two defenses were checked off:

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<sup>1</sup> The petition also seeks a "Note payable balance" of \$400.00.

payment/partial payment and conditions in the apartment needing repair. The court calendared the proceeding for May 10, 2023 in Intake Part 1 and then transferred it to Part K and adjourned it to June 6, 2023. Respondent Juan Rodriguez retained counsel who appeared on June 6. The case was adjourned to August 2 and, in the interim, respondent by counsel filed a motion to dismiss which was fully briefed and marked submitted, decision reserved, on August 2.

#### RESPONDENT'S MOTION TO DISMISS

In his motion, respondent seeks dismissal of the petition based on documentary evidence and for failure to state a cause of action pursuant to CPLR RR 3211(a)(1) and/or 3211(a)(7) and/or for summary judgment pursuant to CPLR R 3212 based on petitioner's failure to serve a predicate 30-day notice as required by Section 4024 of the federal "CARES [Coronavirus Aid, Relief, and Economic Security] Act", 15 USC § 9058(c). The motion is supported by the affirmation of respondent's attorney, who points to the undisputed facts that the premises are exempt from local rent regulation because they are "financed by HUD", Petition at ¶ 7, and the proceeding is predicated on a 14-day rent demand, Petition at ¶ 5, and argues that the petition must be dismissed because non-compliance with the CARES Act is an unamendable defect, *Chinatown Apts v Chu Cho Lam* (51 NY2d 786, 787, 412 NE2d 1312, 433 NYS2d 86 [1980]).

In opposition petitioner makes four arguments<sup>2</sup>: First, that the motion to the extent it is brought under CPLR R 3211(a)(1) must be denied as such a motion can only be brought pre-answer. Second, that the motion to the extent it is brought under CPLR R 3211(a)(7) must be denied as pleadings should be liberally construed, petitioner is entitled to every favorable inference and the "sole criteria" is whether the pleading states a cause of action. Third, that the answer fails to raise a defense challenging the sufficiency of the rent demand. Fourth, that a rent demand does not fall within the CARES Act as it gives a tenant the choice to either pay or vacate and should be examined as a "Yellowstone Request".

On reply, respondent's attorney argues that where a nonpayment proceeding is based on a defective rent demand it is subject to dismissal under CPLR R 3211(a)(7) for failure to state a

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<sup>2</sup> Petitioner's attorney's affirmation in opposition includes other arguments inapplicable to this proceeding, starting with an incomplete sentence (beginning with the words "the fact that the Respondent is a tenant", after ¶ 11, followed by statements that contradict petitioner's earlier arguments (for example, "While the Respondent has preserved a defense concerning the rent demand") and/or are inaccurate (for example, after stating that respondent's remedy is to seek summary judgment on this defense, asserting that, "Here, no such motion is made"; as another example, referring to documentary evidence including a rent breakdown and copies of money orders which are not part of respondent's motion). Accordingly, petitioner's arguments beginning with the words "the fact that the Respondent is a tenant" through ¶ 20 are not addressed in the body of this Decision/Order.

cause of action, such a motion may be made at any time and the claim is not waived by failing to move prior to answering or to state the claim in an answer. As to petitioner's "Yellowstone" argument, respondent counters that such injunctions are available only in the context of commercial landlord-tenant law, citing to *Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave Assoc* (93 NY2d 508, 693 NYS2d, 715 NE2d 117 [1999]).

Respondent further points out that it is undisputed that the subject premises are covered by the CARES Act and argues that a predicate notice demanding either payment of rent or surrender of possession falls squarely within the plain text of that statute and all courts that have considered this question have come to this conclusion. Respondent cites to *In re Arvada Vil Gardens LP v Garate* (529 P3d 105, 2023 CO 24 [Colorado Sup Ct May 15, 2023])(dismissing eviction proceeding against tenant with federal Section 8 voucher finding CARES Act 30-day notice requirement to still be in effect, as opposed to State law 10-day notice, and applicable to proceeding where landlord demanded that tenant "either pay overdue rent and fees or surrender the premises"); *Sherwood Auburn, LLC v Pinzon* (24 Wash App 2d 664, 521 P3d 212 [Wash Court of Appeals Dec 5, 2022], *app den*, 1 Wn 3d 1005, 526 P3d 848 [Wash Sup Ct April 5, 2023])(dismissing nonpayment eviction proceeding against tenant brought by landlord with federally-backed mortgage where landlord served both a State law 14-day predicate notice demanding either payment or vacatur of the premises and a 30-day CARES Act notice, finding that the two notices were "misleading and contradictory"); *Nwagwu v Dawkins* (2021 Conn Super LEXIS 1026 [Conn Superior Ct Mar 2, 2021, No BPHCV215004438S])(dismissing eviction proceeding based on "serious non-payment" of rent against tenant with federal Section 8 voucher where 5-day "notice to quit" rather than 30-day CARES Act notice had been served as a predicate); *Watson v Vici Community Dev Corp* (2021 US Dist LEXIS 69774 [WD Okla Apr 12, 2021, No. CIV-20-1011-F])(in a tenant's action against landlord, denying landlord's motion to dismiss CARES Act claim, where parties disputed whether the eviction proceeding in question was based on nonpayment of rent).

## DISCUSSION

As is evident from the procedural history of this case described above, this is a pre-answer motion: The only answer on file was not submitted by respondent Juan Rodriguez but by Florinda Rodriguez, who identified herself as "Wife, Occupant". Accordingly, respondent's claim of a defective rent demand may be brought under either CPLR R 3211(a)(1) based on documentary evidence as it has not been waived under CPLR R 3211(e) or under CPLR R 3211(a)(7) based on failure to state a cause of action.

A motion to dismiss under CPLR R 3211(a)(1) based upon documentary evidence may be granted where the documents "conclusively establish[] a defense as a matter of law." *Goshen v Mut Life Ins Co* (98 NY2d 314, 326, 746 NYS2d 858, 865, 774 NE2d 1190, 1197 [2002]). On a motion to dismiss under CPLR R 3211(a)(7) for failure to state a cause of action the court is required to afford a liberal construction to the pleading, accept the facts alleged as true and

ascertain whether the petition alleges facts which fit within any "cognizable legal theory." *Leon v Martinez* (84 NY2d 83, 638 NE2d 511, 614 NYS2d 972 [1984]).

Section 4024 of the CARES Act, entitled "Temporary Moratorium on Eviction Filings", applies to this case as it is evident from the petition – and petitioner does not dispute - that respondent resides in a "covered dwelling", defined to include any property that has a "federally-backed mortgage loan". 15 USC § 9058(a)(2), (4). As to such covered properties, the CARES Act established two eviction-related requirements: The first, which applied for 120 days beginning on March 27, 2020, created a temporary moratorium against initiating a legal action against a tenant to recover possession for nonpayment of rent. The second, which commenced at the end of the 120-day temporary moratorium with no expiration date, prohibits a landlord from requiring a tenant to vacate a "covered dwelling" without first issuing a 30-day notice to vacate.

To state and maintain a cause of action for nonpayment of rent, the petition must state the facts upon which the proceeding is based. RPAPL § 741(4). One of those facts is that a proper demand for the rent was made as required by RPAPL § 711(2). *Schwartz v Weiss-Newell* (87 Misc2d 558, 561, 386 NYS2d 191 [Civ Ct NY Co 1976]), *quoted in 542 Holding Corp v Prince Fashions, Inc* (46 AD3d 309, 848 NYS2d 37 [1st Dep't 2007]). A proper predicate rent demand is a "long-established prerequisite to the maintenance of a summary proceeding" for nonpayment of rent, *Zenila Realty Corp v Masterandrea* (123 Misc2d 1, 22, 472 NYS2d 980, 987 [Civ Ct NY Co 1984]), which cannot be amended *nunc pro tunc*, *Chinatown Apts v Chu Cho Lam* (51 NY2d 786, 787, 412 NE2d 1312, 433 NYS2d 86 [1980]). *See also, e.g., 3463 Third Ave Realty LLC v Vasquez* (2018 NY Slip Op 50674[U], 59 Misc3d 1224[A]); *Vartarian v Brady* (184 Misc2d 333, 707 NYS2d 285 [Civ Ct NY Co 1999]).

The CARES Act 30-day notice requirement applies to this eviction proceeding based on nonpayment of rent where the landlord seeks either payment or surrender of the premises. This court adopts and follows the analyses set forth in *In re Arvada Vil Gardens LP v Garate* (529 P3d 105, 2023 CO 24 [Colorado Sup Ct May 15, 2023]) and *Sherwood Auburn, LLC v Pinzon* (24 Wash App 2d 664, 521 P3d 212 [Wash Court of Appeals Dec 5, 2022], *app den*, 1 Wn 3d 1005, 526 P3d 848 [Wash Sup Ct April 5, 2023]). Accordingly, dismissal is warranted under CPLR R 3211(a)(1) based on documentary evidence and under CPLR R 3211(a)(7) for failure to state a cause of action because the petition is based on a non-amendable, 14-day rent demand.

## CONCLUSION

Accordingly, it is hereby ORDERED that respondent's motion is granted and this proceeding is dismissed without prejudice. This constitutes the Decision and Order of the Court, which is being uploaded on NYSCEF.



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Diane E. Lutwak, HCL

Dated: Bronx, New York  
August 15, 2023