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### 57 Elmhurst, LLC v. Castillo

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[\*1]

<b>57 Elmhurst, LLC v Castillo</b>
2023 NY Slip Op 50920(U) [80 Misc 3d 1205(A)]
Decided on August 30, 2023
Civil Court Of The City Of New York, Queens County
Schiff, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on August 30, 2023

Civil Court of the City of New York, Queens County

<p><b>57 Elmhurst, LLC, Petitioner-Landlord,</b></p> <p><b>against</b></p> <p><b>Rafael Castillo et al., Respondents-Tenants.</b></p>
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Index No. L&T 55521/20

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Logan J. Schiff, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Respondent's motion to dismiss pursuant to CPLR 3211: NYSCEF 18-27.

Upon the foregoing cited papers, the Decision/Order on Respondent's motion to dismiss this proceeding is as follows:

This is a nonpayment proceeding filed in July 2020 in connection with a rent-stabilized tenancy. The Petition seeks rental arrears in the amount of \$4,833.32 for the months of May-July 2020. Prior to commencement, Petitioner served a fourteen-day rent demand for the months of May and June 2020 at a monthly rental rate of \$1,611.14. The proceeding was delayed extensively upon Respondent Rafael Castillo's filing of a hardship declaration pursuant to the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, and subsequently upon his application for rental assistance pursuant to the COVID-19 Emergency Rental Assistance Program of 2021. All COVID-19-related stays were lifted by order of this court on May 25, 2023.

Respondent now moves to dismiss pursuant to CPLR 3211(a)(7) due to a defective fourteen-day rent demand. Respondent argues that Petitioner failed in its predicate notice to account for an open rent reduction order issued by the Division of Housing and Community Renewal ("DHCR") on January 3, 2020, under Docket Number HP110012B, which reduced the collectible rent to the amount charged prior to Respondent's preceding renewal lease. According to Respondent, this rent reduction order remains open to this day and reduced the collectible rent [\*2] in the unit to \$1,556.21, a difference of \$54.93 per month from the amount sought in the Petition.

It is axiomatic that a "proper rent demand is a statutory prerequisite to a nonpayment proceeding (RPAPL 711 [2]) and an element of a landlord's prima facie case." (*EOM 106-15 217th Corp. v Severine*, 112 N.Y.S.3d 861 [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2019]). The demand must "set forth the approximate good faith amount of rent owed" (*id.* quoting [\*Dendy v McAlpine\*, 27 Misc 3d 138\[A\]](#) [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2010]).

In its opposition, Petitioner does not dispute the validity of the rent reduction order in question, which was based on DHCR's determination that Petitioner failed to provide keys to the door to the building to numerous tenants, including Respondent. Rather, Petitioner argues through an affidavit by Rajesh Subraj, the registered managing agent, that the rent sought in the Petition "was a good faith approximation" because Petitioner believed the rents would be restored retroactively given that it subsequently provided keys to tenants, including Respondent, "[d]uring the course of this litigation." Petitioner attaches a copy of a subsequent DHCR order dated July 25, 2023, which it claims subsequently restored the rent in the subject apartment (NYSCEF 26). In point of fact, while the order notes that Respondent was among several tenants who ultimately received keys, DHCR nonetheless denied the rent restoration application in its entirety because "the owner has not yet provided

sufficient keys" to tenants in the building.

Where DHCR has issued a rent reduction order in a rent-stabilized apartment due to a reduction in services, the owner is barred from applying for or collecting any rent in excess of the frozen rental amount "until the DHCR finds that all required services are being provided and a rent restoration order is issued authorizing the owner to charge and collect the actual legal regulated rent" (*Diagonal Realty, LLC v Estella*, 155 N.Y.S.3d 273 [App Term, 1st Dept 2021]) [internal citation omitted]; [see also \*Matter of Cintron v Calogero\*, 15 NY3d 347 \[2010\]](#)).

Here, it is apparent from Petitioner's opposition papers that it simply took it upon itself to disregard DHCR's order based on a mistaken assumption that the rent in Respondent's apartment would be restored retroactively. Generally, a rent demand that fails to account for a rent reduction order will be considered defective and require dismissal, particularly where there is a knowing violation of a DHCR order (*see PWV Acquisition, LLC v Paradise*, 100 NYS3d 611 at \*3 [App Term, 1st Dept 2018]; *1920 Walton LLC v. Ruiz*, 2020 NYLJ LEXIS 1953 [Civ Ct, Bronx Co 2021]).

It is true, as Petitioner notes, that the difference between the legal and collectible rent at issue as of the filing of the Petition was only \$54.93 per month for a three-month period, comprising less than 4% of the total amount sought. Were this a mere accounting error this defect might be deemed sufficiently de minimis such that it would not render the rent demand fatally defective in view of the attendant circumstances (*see e.g. Friedman v Eisner*, 886 N.Y.S.2d 70 [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2009]; *Almark Holdings Co., LLC v Pizza147 NY LLC*, 178 NYS3d 361 [App Term, 1st Dept 2022]; [cf. \*Diversified Equities, LLC v Russell\*, 50 Misc 3d 140 \[A\]](#) [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2016]. But that is not what occurred here, as Petitioner by its own admission knowingly flouted DHCR's rent reduction order. Such conduct, "thwart[s] the goals of the Legislature in enacting Rent Stabilization Law § 26-514, namely, to 'motivate owners of rent-stabilized housing accommodations to provide required services, compensate tenants deprived of those services, and preserve and maintain the housing stock in New York City.'" (*Matter of Cintron*, 15 NY3d at [\*3]356 [2010]) [internal citation omitted]). Nor can Petitioner plausibly claim ignorance of the Rent Stabilization Law and Code, as the subject building is part of Zara Realty Holding Corporation's vast portfolio (*see New York State Div. of Hous. & Community Renewal v Zara Realty Holding Corp.*, 2023 NY Slip Op 32843 [U] [Sup Ct, NY Co 2023]).

Accordingly, the court finds that the rent demand served in this proceeding, which neglected to account for an open DHCR rent reduction order, is not a good faith approximation of the rent owed and is therefore defective. As a defective predicate notice in a summary proceeding is non-amendable, Respondent's motion is granted and the Petition is dismissed without prejudice (*see Chinatown Apartments Inc. v. Chu Cho Lam*, 51 NY2d 786 [1980]; [Bray Realty, LLC v Pilaj](#), 59 Misc 3d 130(A) [App Term, 2d, 11th & 13th Jud Dists, 2d Dept 2018]). This constitutes the decision and order of the court.

Dated: August 30, 2023  
Queens, NY  
HON. LOGAN J. SCHIFF  
Judge, Housing Court

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