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SHAN ZHANG v. MERCADO

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

----- X
SHAN ZHANG & CHENG JUN KE

Petitioners-Landlords,

Index No. L&T 302514/23

- against -

DECISION/ORDER

MARY MERCADO & LUCIANO M. GARICIA JR.

Respondents-Tenants,

102-12 45th Avenue.
4th Floor,
Corona, New York 11368

“Subject Premises”

----- X
Present: HON. CLIFTON NEMBHARD

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

Papers	Numbered
Respondents’ Notice of Motion, with exhibits	NYSCEF # 7-11
Petitioners’ Affirmation in Opposition, with exhibits	NYSCEF # 12-15
Respondents’ Reply Affirmation	NYSCEF # 16

Factual and Procedural History

This non-payment proceeding was commenced on February 10, 2023 with the filing of a Notice and Petition. Petitioners seek possession of the subject premises from Respondents, as well as \$47,850.00 in rental arrears for the periods of July 2019 to February 2020 and June 2021 to February 2023.

Prior to the commencement of the present case, Respondents applied for ERAP on June 15, 2021. *See* NYSCEF Doc. No. 15. The application was approved on November 19, 2021, and Petitioners received arrears in the total amount of \$24,750.00, covering rent from March 2020 to May 2021. *See* NYSCEF Doc. No. 12 at Para 4; NYSCEF Doc. No. 15.

On December 28, 2022, a letter was mailed to Respondents advising them that arrears in the amount of \$44,550.00 was due by January 4, 2023. On January 14, 2023, Respondents were mailed copies of a 14 day rent demand notice and supporting papers, after a set of the same

papers were served by conspicuous service at the subject premises. The 14 day notice sought \$46,200 in arrears, now including the month of January 2023. The monthly rental amount owed for July 2019 to February 2020 and June 2021 to January 2023 is listed as \$1650.00.

Issue was joined when Respondent Mary Mercado filed a pro se answer on February 28, 2023 (NYSCEF Doc. No. 4), prior to Respondents' obtaining counsel as of July 10, 2023.

Mercado moves to dismiss the petition pursuant to CPLR 3211(a)7 and RPAPL 711 due to a defect in the predicate notice as well as failure to state a cause of action due to the fact that there was no lease in effect at the commencement of this action; or in the alternative, deeming the proposed amended answer filed and served.

Petitioners oppose Respondent's motion, arguing that there were no increases in rent in the entire period of the tenancy, as the original written lease covering the period of March 10, 2019 to March 31, 2020 set the monthly rent at \$1650, the same amount claimed for each month thereafter in the rent demands and the same monthly amount paid by ERAP for the period of March 2020 to May 2021. Petitioners also argue that the initial period of arrears, July 2019 to February 2020, were covered by the initial written lease, and that the continued payment of the same monthly rate (by ERAP) extended the tenancy on a month-to-month basis.

Respondent filed a reply.

Discussion

The Court grants Respondents' Motion:

Respondents argue that the petition should be dismissed because there was no lease in effect at the time the proceeding was commenced. That the written lease had expired is not in question; at issue is only whether the terms of that lease extended beyond March 31, 2020, in a month-to-month tenancy.

Real Property Law § 232-c considers the status of the landlord-tenant relationship when a lease expires: "Where a tenant whose term is longer than one month holds over after the expiration of such term, such holding over shall not give to the landlord the option to hold the tenant for a new term solely by virtue of the tenant's holding over. In the case of such a holding over by the tenant, the landlord may proceed, in any manner permitted by law, to remove the tenant, or, if the landlord shall accept rent for any period subsequent to the expiration of such term, then, unless an agreement either express or implied is made providing otherwise, the

tenancy created by the acceptance of such rent shall be a tenancy from month to month commencing on the first day after the expiration of such term.” RPL § 232-c.

Real Property Actions and Proceedings Law § 711(2) governs special proceedings wherein there is an existing landlord-tenant relationship, and relies on the existence of an agreement between the parties. The expiration of a lease alone does not necessarily terminate the landlord-tenant relationship so as to preclude RPAPL § 711 from governing. RPAPL § 711(2) states that a special proceeding may be maintained when “the 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). The agreement itself need not be written however, there cannot be a nonpayment proceeding to recover rental arrears without, at minimum, an implied agreement.

Interpretation of these statutes has produced different results in different districts, and there is disagreement between the Appellate Terms as to whether a nonpayment proceeding can be maintained against a tenant after the expiration of the written lease.

In the First Department, “when the month-to-month tenancy expires at the end of any given month, a new agreement is created only by paying rent on or about the first of the next month, and, if no rent is paid, there is no longer a valid contract under which to sue for past due rent.” *Mendez v Hidalgo*, 82 Misc. 3d 391, 397 (Civ. Ct., NY Co. 2023).

In contrast, no such clear holding exists in the Second Department. The Appellate Term for the 9th and 10th Judicial Districts (which falls within the Second Department, but does not include any of the five NYC counties) has held that generally upon the expiration of a written lease, a month-to-month tenancy is created and continues on the same terms as the expired lease when the unit is not subject to rent regulation schema. “[T]enants’ contention that a nonpayment proceeding cannot be maintained against them because they are month-to-month tenants is not correct.” *Tricarichi v Moran*, 38 Misc. 3d 31, 33 (A.T., 9th & 10th Dists., 2012). The Appellate Term goes on to state that “[... Real Property Law § 232-c did not abolish a landlord’s right to elect to hold a month-to-month tenant for a new term solely by virtue of his holding over. [...]] [B]oth the making of a rent demand by landlord and the commencement of a nonpayment proceeding constitute an election by landlord to treat the holdover tenants as tenants for a new

term and not as trespassers (see Friedman on Leases § 18:4). Their month-to-month tenancy continues on the same terms as were in the expired lease, if, in fact, the lease has expired..." *Id.*

Trial courts within New York City's Second Department counties, including Queens, have held that the expiration of a written lease does not create a month-to-month tenancy without some indication of intent to extend the terms of the expired written lease. Payment of rent by the tenant may be sufficient to trigger a month-to-month tenancy, however the Kings and Queens County Housing Courts have held that ERAP payments on behalf of the tenant do not imply an intent to continue the tenancy. "It is axiomatic that "a nonpayment [summary eviction] proceeding must be predicated on a rental agreement that is in effect at the time the proceeding is commenced" (e.g., *265 Realty, LLC v. Trec*, 39 Misc.3d 150[A], 2013 N.Y. Slip Op. 50974[U], 2013 WL 3111295 [App. Term, 2d Dept., 2d, 11th & 13th Jud. Dists. 2013]). In *Trec*, the tenants' lease had expired at the end of August 2009; the landlord sued in October 2009 alleging nonpayment of rent due for July 2009 through that month. After the lower court granted summary judgment to the landlord, the Appellate Term reversed the judgment and dismissed the petition. The court's reasoning appeared to be that since no rent had been paid or accepted after the lease expired, no month-to-month tenancy had been created, therefore there was no rental agreement in effect upon which the summary eviction proceeding could be predicated (*id.*). The implication, intended or not, seemed to be that if rent had been paid and accepted after the lease had expired, the result would have been different." *ZB Prospect Realty v Olenick*, 79 Misc. 3d 592, 593 (Civ Ct., Kings Co. 2023).

The Hon. Logan Schiff similarly concluded earlier this year after a well-reasoned review of the conflicting decisions within the Second Department, that "...the Appellate Term's holdings in the First Department relating to when a nonpayment may be commenced in the context of a month-to-month tenancy should be followed in Queens County until the Appellate Term for the 2d, 11th and 13th Judicial districts holds otherwise." *Foxwood House Assoc. LLC v Xu*, 82 Misc. 3d 925, 930 (Civ. Ct., Queens Co. 2024). In circumstances similar to the present case, the Court in *Foxwood House* found that a month-to-month tenancy was not created solely by receipt of an ERAP payment after the expiration of the market rate condo lease.

This action, begun three years after the expiration of the written lease's term, claims arrears that began during the term of the written lease agreement and continues after the period covered by the written lease expired. Payment through ERAP was applied for by the

Respondents, and was received by the Petitioners—however, this does not necessarily imply both parties' intent to enter into a month-to-month tenancy. That the Respondents never themselves tendered a payment of rent after the expiration of the written lease would imply under the precedent discussed above that they did not intend to extend the tenancy on a month-to-month basis, in spite of the fact that they retained possession of the premises.

Absent evidence or pleadings in the petition alleging that a month-to-month tenancy was implied or intended by the parties at the expiration of the written lease, this Court cannot imply such an agreement. In the absence of a lease agreement, written or oral, for the months following the expiration of a formal written lease, a special proceeding under RPAPL 711(2) cannot be sustained. Thus, dismissal is proper under CPLR 3211(a).

Respondents' motion is granted, without prejudice to the Petitioners.

This constitutes the decision and order of the Court.

Dated: October 29, 2024
New York, New York

SO ORDERED
HON. CLIFTON A. NEMBHARD

Hon. Clifton Nembhard
J.H.C.

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