

<b>201 W 136 St Realty Mngmnt LLC v Roman</b>
2012 NY Slip Op 31898(U)
July 19, 2012
Civ Ct, NY County
Docket Number: 65723/2012
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK  
 COUNTY OF NEW YORK: HOUSING PART R

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 201 W 136 ST REALTY MNGMNT LLC, X

Petitioner-Landlord

**HON. SABRINA B. KRAUS**

-against-

**DECISION & ORDER**  
**Index No.: L&T 65723/2012**

MIGUELA ROMAN  
 ERCILIO ROMAN  
 201 WEST 136<sup>TH</sup> STREET, APT 3W  
 NEW YORK, NY 10030,  
 Respondent-Undertenant

\_\_\_\_\_  
 X

### **BACKGROUND**

This summary nonpayment proceeding was commenced by **201 W 136 ST REALTY MNGMNT LLC** (Petitioner) against **MIGUELA ROMAN** and **ERCILIO ROMAN** (collectively Respondents), the rent stabilized tenants of record, seeking to recover possession of **Apartment 3W, at 201 West 136<sup>th</sup> STREET, NEW YORK, NY 10030**, (Subject Premises) based on the allegation that Respondents failed to pay rent due for the Subject Premises. The issue before the Court is whether Respondents eviction on July 16<sup>th</sup>, 2012 was lawful. For the reasons discussed below, the Court finds it was not a lawful eviction.

### **PROCEDURAL HISTORY**

Petitioner issued a rent demand dated April 20, 2012 seeking \$2196.56 for a period through and including April 2012. The monthly rent sued for is \$678.00. Most of the arrears sought were based on an alleged default in the payment of \$25.00 per month for a period going back to December 2010 forward. The rider annexed to the demand and petition (Tenant Ledger)

only goes back to July 2011 and starts with an opening balance of \$4383.76. Additionally, pursuant to the annexed Tenant Ledger, the amount demanded appears to include late fees of approximately \$25.00 per month, as well as legal fees. Finally, the Tenant Ledger contains write off of rent in April 2012 totaling \$2863.91, which covers a period of October 2011 through February 2012, but is not otherwise explained.

On May 7, 2012 the petition issued seeking \$3,224.84. The petition sought a lump sum and refers to the annexed Tenant Ledger for details on when the arrears accrued. On May 30, 2012, Ercilio Roman (Ercilio), appeared and filed an answer to the petition, through the assistance of a Spanish interpreter. The answer asserted that a portion of the rent sued for had already been paid, and that there were conditions in the Subject Premises requiring repairs.

The proceeding was originally returnable on June 6, 2012. On the initial court date only Ercilio appeared. Ercilio entered into a stipulation of settlement that was so-ordered by the court (Stanley, J). The stipulation was on a pre-printed form used by counsel for Petitioner, with blanks that were filled in by hand. The stipulation provided for entry of a final judgment in the amount of \$2713.12, for rent due through June 2012. The stipulation further provided for the forthwith issuance of the warrant of eviction and that "... execution is stayed for Respondent(s) to pay petitioner as reflected hereunder. Upon default of any payment hereunder, warrant shall execute on marshal's notice."

Execution of the warrant under the stipulation was stayed through July 30, 2012 for payment of \$2713.12.

In a separate paragraph, below the payments agreed to, the stipulation contains the following preprinted language " Current rent is payable when due. All monies received shall

first be applied to current rent/use and occupancy and then to arrears. Petitioner may accept partial payments at anytime without prejudice. Upon default of any payment hereunder all sums shall accelerate and become due immediately.”

Miguela Roman (Miguela) never appeared, did not sign the stipulation and no default was ever sought against her. No judgment was ever entered against Miguela, no warrant issued as to Miguela and the proceeding was never resolved as to Miguela.

On June 6, 2012 the court (Stanley, J) entered a judgment against Ercilio in the amount of \$2713.12. On June 6, 2012 , Michael Cohen, Esq, counsel for Petitioner, submitted a written request to the clerk’s office for the issuance of a warrant. The request indicated it was

**Re: 201 W 136 ST REALTY                      VS                      MIGUELLA ROMAN, ERCILIO ROMAN  
MANAGEMENT LLC**

however, Miguela’s name was crossed out in blue ink. On June 11, 2012, City Marshall Charles Marchisotto submitted a warrant requisition seeking a warrant only against Ercilio.

The warrant of eviction issued on June 12, 2012.

#### **RESPONDENTS POST EVICTION ORDER TO SHOW CAUSE**

On July 16, 2012, Respondents were evicted and sought a post eviction order to show cause, seeking to be restored to possession. Ercilio’s affidavit in support asserted that he was evicted at 8:00 am, without any prior notice, and that the eviction was unlawful because the stipulation stayed execution of the warrant through July 30, 2012, for payment.

The motion was returnable on July 18, 2012. Both Respondents appeared in support of the motion.

Petitioner submits an affirmation in opposition, as well as another Tenant Ledger, which bears no resemblance to the Tenant Ledger annexed to the petition. The only “default” asserted

by Petitioner as justification for the execution of the warrant is that Respondents failed to pay July rent when due. The affirmation does not even assert when July rent was due, nor is any lease annexed which sets forth such information.

The court (Stanley, J.) transferred the motion and proceeding to Part X for a hearing pursuant to an order providing: "Post Evict- Full Eviction - based on failure to timely pay July rent. After eviction, Respondents allege they went to office with July rent, and were kept in office for hours, so could not come to court & in the meantime all belongings were removed."

The motion and proceeding were assigned to Part R for determination.

### **FACTS**

Upon the matter being assigned to Part R, the Court conducted a conference and discovered that the material facts regarding the legality of the underlying eviction were largely undisputed, and no hearing was required. The primary dispute was the interpretation of the stipulation, and whether Petitioner acted lawfully in executing the warrant, based on Respondents failure to tender July Rent .

Respondents are husband and wife and both are listed as tenants of record for the Subject Premises. Respondents assert they have been tenants since approximately 1995.<sup>1</sup>

Respondents were evicted at approximately 8:00 am on July 16, 2012. That same morning Respondents went to Petitioner's agents office to seek to be restored. Respondents brought a money order for \$678.28 for July Rent, which was purchased on July 16, 2012 (annexed to moving papers). The parties disagree as to how long Respondents were kept waiting in Petitioner's agents office. Respondents assert that they were waiting from approximately 9:30

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<sup>1</sup> The Court takes judicial notice that ACRIS records indicate Petitioner purchased the building in August 2009.

am to approximately 1:30 pm, and that Petitioner intentionally kept them there so a full, eviction could be accomplished. Petitioner asserts that Respondents were not kept waiting longer than thirty minutes. Both parties agree that the tender of July Rent was not accepted by Petitioner and that a full eviction was accomplished.

At approximately 3:00 pm that afternoon, Respondents obtained a post eviction order to show cause with a stay. The order was served on Petitioner's counsel on July 17, 2012. Between the time of the eviction on July 16<sup>th</sup> and service of the order on July 17, 2012, Petitioner demolished the kitchen and the bathroom in the Subject Premises.

### **EVICTION OF MIGUELA ROMAN**

The eviction of Miguela Roman was unlawful, and Petitioner's subsequent destruction of her home and removal of all of her belongings was illegal. As noted, it is undisputed that Miguela is a tenant of record and was named as a party in this proceeding. Petitioner neither sought, nor obtained, a judgment or a warrant as to Miguela, and had no basis in law to evict her or remove her belongings or demolish her home of twenty years. Petitioner's actions in this regard appear to be sanctionable, as there appears to be no justification for their actions. Moreover, this Court pointed out to Petitioner's counsel on the record on July 18, 2012, that there appeared to be no judgment nor any warrant pertaining to Miguela, yet counsel and Petitioner refused to agree to restore Miguela to possession. 2

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2 Respondents both assert that they received no marshal's notice prior to the eviction, however the court does not address this, as even if true, it would not be a basis for restoration (*Presidential Management Co. v. Farley* 78 Misc2d 610).

## EVICITION OF ERCILIO ROMAN

Assuming *arguendo* that Petitioner legally had the right to evict one out of two tenants of record, without terminating the lease of the other tenant, the eviction of Ercilio was never the less also unlawful. Petitioner had no right to execute on the warrant of eviction for any sum beyond what was included in the judgment amount pursuant to which the warrant issued. Petitioner had no right to execute on the warrant prior to the expiration of the stipulated stay on July 30, 2012.

Courts have consistently held that the failure to pay future rent in a non-payment proceeding cannot form the basis for an eviction of a tenant [*Nathanson v Mitchell* 14 Misc3d 1211(A)]. “The covenant to pay rent creates no debt until the time stipulated for the payment arrives... the obligation upon the rent covenant is altogether contingent. In some contingencies the stipulated rent payable in the future by a lessee for the right to occupy leased premises might never become due (*In re Ryan’s Estate* 294 NY 85, at 95’).”

A stipulation allowing a landlord to evict for rent that is not yet due is void as a matter of public policy. As held by the Hon. David B. Saxe, in *Ruppert House Co. Inc. v. Altmann* (127 Misc.2d 115) :

... the stipulation provides that in the event (respondent) fails to meet any payment of either the judgment amount of the future rent pursuant to the payment schedule, the landlord may move to obtain a warrant of eviction.

The difficulty with this proffered stipulation is apparent - **the landlord may obtain an agreement for the issuance and acceleration of a warrant of eviction for rent not presently due and for which the petition at hand could not yet be amended to include.**

. . .

... summary proceedings are a creature of statute and are in derogation of the common law. They provide a quick and efficient means of resolving housing disputes such as the non-payment of rent and are uniquely streamlined for quick disposition. But, such a streamlined procedure as fashioned here by stipulation, should not be allowed to work automatic evictions.

Plain and simple, the procedure outlined in the stipulation ... **still amounts to the obtaining of a warrant and an eviction for rent not presently owing.** This is an inequitable and unfair result.

( *Ruppert* at 115-116, emphasis added, citations omitted).

Judge Saxe concluded by holding:

**... a stipulation which, in essence, entitles the landlord to evict a residential tenant for non-payment of amounts of rent exceeding the amount of rent sought in the petition (or, in the event the amount sought in the petition does not reflect current rent, then the amount the petition could be amended to include at the time of the proposed stipulation), violates public policy.** The reason is apparent – this mode of coercing payments of rent not yet due would impede the tenant’s ability to assert against the landlord future defenses such as a breach of the warranty of habitability which, by statute, has been declared to be the public policy of this State.

[ *Id* at 116-117 (*emphasis added*) ; *see also Eastside NYC Corp. v. Olmedo* 28 Misc.3d 140(A)(App. Term, 1<sup>st</sup> Dept.) (*stipulation affording landlord the ability to evict tenants merely upon the failure to make future rent payments void as a matter of public policy*); *141 East 3<sup>rd</sup> Street Co. v. Munoz*, NYLJ Apr. 24, 1990, at 22, col. 2 (App. Term, 1<sup>st</sup> Dept); *Fairgate Associates, Inc. v. Adams* 2002 NY Slip Op 50288(U)(App. Term, 1<sup>st</sup> Dept); *Clark v Williams* 149 Misc.2d 945 (App Term, 2<sup>nd</sup> Dept)].

The stipulation of settlement in this proceeding afforded Petitioner no right to evict for future rent, and can not be interpreted to have such meaning. The warrant of eviction may only issue pursuant to a judgment for rent past due. In this case the judgment was entered for \$2713.12 for all rent due through June as of June 6, 2012. The execution of the warrant was explicitly stayed through July 30, 2012. Petitioner had no right at all to execute on said warrant



until after July 30, 2012. Petitioner could only execute on the warrant if the judgment amount remained outstanding at the time the agreed upon stay on execution had expired.

The language regarding future rents can only be interpreted to be an agreement as to how future payments shall be applied.

Pursuant to New York Law, payments made upon general account with no direction as to their application, the Law requires that the payment be made to the oldest account. Another way to view this matter is that payments must be first credited to prevent an eviction and not to the current rent owed (unless agreed otherwise).

*Nathanson v Michhall supra.*

In this case, the language of the stipulation stating “Current rent is payable when due” reflects Respondents on-going obligations under their lease, which are not altered by the stipulation. The following sentence, commonly referred to as a “current rent provision”, provides “all monies received shall first be applied to current rent/use and occupancy and then to arrears.” This is intended be the specific agreement necessary to allow Petitioner to collect both July rent and the judgment amount as of July 30, 2012. It in no way gives Petitioner the right to evict prior to the agreed upon stay of execution of the warrant, for rent which had not yet become due at the time the stipulation was entered and the judgment agreed upon.

Based on the foregoing the Court finds the eviction of Ercilio was also unlawful.

**RESPONDENTS ARE TO BE RESTORED TO POSSESSION FORTHWITH**

The Respondents are to be restored to possession forthwith. Petitioner is also directed to deliver all of the possessions removed as a result of the unlawful eviction back to the Subject Premises on or before July 23, 2012. Petitioner is further directed to restore the bathroom and

the kitchen of the Subject Premises on or before August 20, 2012. Based on Petitioner's unlawful actions the judgment, warrant and underlying stipulation of settlement are vacated.

### **PRIOR LITIGATION**

The Tenant Ledger attached to the petition in this proceeding shows that a lump sum payment was made by Respondents in February 2012 totaling \$4972.47. This led the Court to surmise that there may have been a prior non-payment proceeding between the parties that was resolved at that time. That is indeed accurate.

The Court takes judicial notice of a prior nonpayment proceeding between the parties under index number 95215/2010 (2010 Proceeding), and the entire contents of the said file. There are several important facts to be drawn from the 2010 Proceeding, that bear directly on the issues before the Court.

The first is that the 2010 Proceeding resulted in a so-ordered stipulation finding that all rent due through February 2012 had been paid. The implication of this is Petitioner had no right to sue for arrears for any period before February 2012, in this proceeding. The rent demand in this proceeding sought \$2196.56 through April, deducting late and legal fees and sums sought for period prior to February 2012, the most Petitioner could have claimed due was \$1356.56. Even this figure does not appear to have been actually due, for example as discussed below, Petitioner stipulated that the monthly rent would be \$643.20 through September 2012.

The second fact is that Petitioner attempted to prematurely execute on the warrant of eviction in the 2010 Proceeding, based on a default in current rent and was reprimanded by the court (Kaplan, J) for doing so in a written order.

The petition in the 2010 Proceeding is dated December 14, 2010, and sought \$12,951.66 in arrears for a period going back to June 2009, at a monthly rent of \$690.37. On March 21, 2011, Ercilio and Petitioner entered into a stipulation of settlement, wherein Ercilio consented to entry of a judgment in the amount of \$9201.72 for all rent due through March 2011. The parties agreed to a pay out schedule through June 2011. The stipulation also provided **“Lease modified to reflect rent of \$643.20 for 10/1/10 to 9/30/12.”**

Additional, stipulations were entered on May 25, 2011 and July 27, 2011. The July 27, 2011 stipulation provided that \$1636.04 remained due though July, and stayed execution of the warrant through August 29, 2011 for the first of a series of payments towards arrears. The July 27, 2011 stipulation was on the same preprinted form as the form used by counsel in this proceeding.

Just as Petitioner attempted to do in this proceeding, Petitioner attempted to execute on the warrant of eviction, after entering the July 27, 2011 stipulation, prior to the agreed stay through August 29, 2011, on the theory that Respondents failed to pay August rent on time. On August 18, 2011, Respondent sought an order to show cause asserting that the notice of eviction had been prematurely served. Petitioner cross-moved for an order “modifying the judgment amount to reflect the correct amounts due.” Petitioner’s cross-motion is supported by an affidavit from Steven Neuman who asserted that the May 25, 2011 stipulation contained an incorrect figure because it did not include an \$85.00 increase pursuant to an un-executed renewal lease for a period from October 2010 through September 2012.

The court (Kaplan, J) issued the following decision and order on August 29, 2011:

**Respondent's osc granted solely as follows: the 8/16/11 marshal's notice was improper as the payment due under the 7/27/11 stipulation was not due. In light of petitioner's improper conduct & to avoid further unnecessary court dates,** the time to comply with payment of "2d" under the 7/27/2011 stipulation is extended to 9/9/11 (Resp represents he lost wages based on the two court dates resulting from the marshal's notice). Petitioner's cross-motion is granted to the extent of setting up new access dates for the repairs 8/30-9/2 & 9/6 & 9/7 from 9-5. The court notes that petitioner's claim of no access is completely contradicted by the 8/4/11 resource assistant report & that the "C" violations from the 7/13/11 HP report are alleged to have not been completed despite certification to the contrary. Petitioner's motion is otherwise denied.

On February 17, 2012, Respondent moved for an order to show cause asserting that all arrears had been paid. The court (Elsner, J) signed the order to show cause indicating that "Respondent paid all arrears today & has a receipt 0 balance." That motion was granted on consent pursuant to a stipulation of settlement that provided "motion granted, judgment and warrant vacated, case discontinued as to all rent through 2/29/12 has been paid."

Finally, after suing for a rent of \$690 per month in the 2010 Proceeding, Petitioner stipulated Respondent's rent would be \$643 per month through September 2012, and then ignored that and charged more in subsequent stipulations in the 2010 Proceeding, and suing for a rent of \$678 in this proceeding.

**PETITIONER AND ITS ATTORNEYS APPEAR TO HAVE INTENTIONALLY ENGAGED IN UNLAWFUL AND SANCTIONABLE CONDUCT**

This Court orders Petitioner and Petitioner's counsel to appear for a hearing on August 20, 2012 and show cause why sanctions should not be imposed against Petitioner and Counsel for what appears to be frivolous conduct. The Court notes that counsel has years of experience in the field of landlord tenant matters and should have known that the eviction of Respondents was entirely unlawful, yet refused to restore Respondents to possession. The Court notes counsel was previously cautioned for attempting to evict a tenant for failure to pay current rent,

both in the 2010 proceeding and a prior proceeding under index number 82672/07 as referenced in *1557 Realty Corp LLC v Reiff* 2008 NY Slip Op 52475(U). Additionally, the immediate full eviction and demolition of the kitchen and bathroom of the Subject Premises in less than 24 hours, appears to have been an intentional act by Petitioner to prevent Respondents restoration after the unlawful eviction.

Finally, Petitioner and counsel should be prepared to address at the hearing why they sued twice for the same rent for the same period, what the legal rent is, the discrepancy in the various Tenant Ledgers provided, the multiple attempts to evict Miguela without ever obtaining a judgment or warrant against her, and the legality and ethics of their conduct in this proceeding.

Petitioner is directed to produce at said hearing rent registrations for the Subject premises from 2008 forward, as well as the original lease for Respondents and all renewal leases.

This constitutes the decision and order of this Court.

Dated: New York, New York  
July 19, 2012

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Sabrina B. Kraus, JHC

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