CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART C

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PARK FRONT APARTMENTS LLC,

Petitioner,

Index No. 85352/2015

- against -

DECISION/ORDER

VERONICA CHOPLIN PETERSON, et al.,

Respondent/Tenant.

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Present:
Hon. Jack Stoller
Judge, Housing Court

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

Papers	Numbered
Notice of Motion and Supplemental Affirmation and Affidavit Annexed.....	1, 2, 3
Notice of Cross-Motion and Supplemental Affirmation and Affidavit Annexed	4, 5, 6
Affidavits and Affirmation In Opposition and Reply	7, 8, 9, 10, 11
Affidavit and Affirmation In Reply	12, 13

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

Park Front Apartments LLC, the petitioner in this proceeding ("Petitioner"), commenced this summary proceeding against Veronica Choplin Peterson, the respondent in this proceeding ("Respondent")[1] seeking a money judgment and possession of 435 Central Park West, #3S, New York, New York ("the subject premises") on the basis of nonpayment of rent. Respondent answered. Respondent now moves for summary judgment in her favor or, in the alternative, for a

[1] Petitioner also named other respondents in this proceeding, but Veronica Choplin Peterson is the only respondent to move for relief on this motion, so for the sake of convenience, and without prejudice to the rights of any party, the Court only refers to Veronica Choplin Peterson as "Respondent."

stay of these proceedings. Petitioner cross-moves for summary judgment in its favor and for an order directing a deposit of rent.

Neither party disputes that the building in which the subject premises is located ("the Building") was, at least at one point in time, dating back to 1969, subject to a subsidy pursuant to §§221(d)(3) and (d)(5) of the National Housing Act, codified at 12 U.S.C. §1715l(d)(3), which subsidizes affordable housing by offering owners of real property interest rates at below-market value in return for keeping rents for the tenants thereof affordable. Neither party disputes that Respondent has been a tenant of the subject premises from 1971 to the present day. Neither party disputes that the Department of Housing and Urban Development ("HUD") set a rent for tenants at the Building to pay, called the Below Market Interest Rate ("BMIR") contract rent. Neither party disputes that, after many years of operating according to the above-cited statute, Petitioner entered into an agreement with HUD dated October 12, 2000 ("the use agreement").

The use agreement, which both parties annex to their motion papers, refers to a "BMIR market rent," defined as a rent that is 110% of the BMIR contract rent. The use agreement also provides that an extant tenant paying a BMIR market rent because of a prior failure or refusal to disclose information to Petitioner concerning her income and household composition, a process called "recertification," shall have twenty-one days after written notice from Petitioner to recertify and, on default, Petitioner may increase the rent for that tenant by 7.5% annually.

Neither party disputes on this motion practice that Petitioner has increased Respondent's rent at a rate of 7.5% per year in the years following the execution of the use agreement. Respondent's motion challenges the legality for such rent increases. In particular, Respondent,

while acknowledging that she received written notice from Petitioner to recertify in March of 2001, avers in support of her motion that she made attempts to recertify with Petitioner, which Petitioner thwarted. However, Petitioner's managing member avers in opposition that Respondent did not in fact make the efforts that she alleged to have made to recertify. Such a material fact dispute about whether Respondent made efforts to recertify renders summary judgment for Respondent inappropriate. Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039, 1043 (2016).

Petitioner argues on its cross-motion that it is entitled to summary judgment on this point despite the evident material factual dispute between the parties. Petitioner insists that Respondent's narrative cannot be true, as Petitioner was engaged in meetings with HUD, other tenants in the Building, and tenant organizers around the time of the implementation of the use agreement, and that Petitioner did not receive any complaints about Petitioner frustrating tenants' efforts to recertify. Asking this Court to find that there is no dispute of fact because an issue was not raised at meeting that Respondent did not intend requires a level of speculation and inference that is manifestly inappropriate for summary judgment purposes. Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012), Gronsky v. County Of Monroe, 18 N.Y.3d 374, 381 (2011), Branham v. Loews Orpheum Cinemas, Inc., 8 N.Y.3d 931 (2007), Rollins v. Fencers Club Inc., 128 A.D.3d 401, 402 (1st Dept. 2015)(on a motion for summary judgment, all of the evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party's favor). To the extent that any party moves for summary judgment on the question of Respondent's compliance with recertification after the

letter Petitioner sent Respondent in March of 2001, the Court denies both motions.

HUD promulgates a handbook, known as HUD Handbook 4350.3 ("the HUD Handbook") which governs certain types of housing subsidized by HUD. Impac Assocs. Redevelopment Co. v. Robinson, 9 Misc.3d 1065, 1067 (Civ. Ct. N.Y. Co. 2005). The HUD Handbook contains very specific notice requirements a participating owner must fulfill in order to discontinue a subsidy for a tenant's failure to recertify. See HUD Handbook ¶7-7. Neither party disputes that Petitioner did not serve this series of notices upon Respondent prior to taking increases in rent of 7.5% annually. Respondent moves for summary judgment in her favor on this basis.

If Petitioner was required to serve notices in compliance with the HUD Handbook and failed to do so, Respondent would indeed plead a basis upon which to dismiss this proceeding, insofar as the petition herein seeks a judgment based upon nonpayment of that part of the rent Respondent is liable for as a consequences of not recertifying. Starrett City, Inc. v. Brownlee, 22 Misc.3d 38 (App. Term 2nd Dept. 2008), Bedford Gardens Co. v. Rosenberg, N.Y.L.J., March 27, 1998 at 33:6 (App. Term 2nd & 11th Depts.), 1199 Hous. Corp. v. McCartney, 171 Misc.2d 239, 240 (App. Term 1st Dept. 1997), Clinton Towers Hous. Co., Inc. v. Ryan, 26 Misc.3d 1229(A)(Civ. Ct. N.Y. Co. 2010), Park Lane Residences, L.P. v. Boose, 26 Misc.3d 1233(A) (Dist. Ct. Nassau Co. 2010), Terrace 100, L.P. v. Holly, 28 Misc.3d 1208(A) (Dist. Ct. Nassau Co. 2010), E. Harlem Pilot Block Bldg. 1 HDFC v. Cordero, 196 Misc. 2d 36, 38-39 (Civ. Ct. N.Y. Co. 2003) (Acosta, J.), Goldstein v Bush, N.Y.L.J., Oct. 31, 2001, at 21:3 (Civ. Ct. Kings Co.). In opposition to the motion, Petitioner argues that the HUD Handbook does not apply to

the subject premises. Petitioner presents evidence that it entered into the use agreement because Petitioner pre-paid a subsidized mortgage from HUD in 2000, which Petitioner argues terminated the applicability of the HUD Handbook to the subject premises.

Petitioner does not dispute that the subject premises was at least at one time subject to §221(d)(3) of the National Housing Act. The HUD Handbook applies to housing subject to §221(d)(3) of the National Housing Act. HUD Handbook Fig. 1-1. Petitioner argues that the HUD Handbook no longer applies to the subject premises because HUD does not "subsidize" the subject premises.

However, the HUD Handbook states that "[f]amilies living in Section 221(d)(3) BMIR properties are considered subsidized because the reduced rents for these properties are made possible by subsidized mortgage interest rates." HUD Handbook at ¶1-3(A)(1). In other words, the HUD Handbook contemplates that "subsidies" do not necessarily look like cash transfers from HUD to an owner of housing, but rather like a low-interest mortgage HUD and an owner enter into. See Marshall v. Lynn, 497 F.2d 643, 645 (D.C. Cir. 1973)(in return for mortgage insurance, an owner agrees to be regulated). Thus, benefits that Petitioner may have received from HUD in return for maintaining rents at the levels Petitioner kept them for the Building can shed light on whether Petitioner was "subsidized" for purposes of HUD Handbook coverage.

In the 1980s Congress became concerned that the availability of affordable housing would decline as mortgages pursuant to §221(d)(3) of the National Housing Act expired. Fredericksburg v. United States, 113 Fed. Cl. 244, 247 (Fed. Cl. 2013), *aff'd sub nom.* Fredericksburg Non-Profit Housing Corp. v. United States, 579 Fed. Appx. 1004, 1005 (Fed. Cir.

2014), Carabetta Enters. v. United States, 68 Fed. Cl. 410, 411 (Fed. Cl. 2005). To address this concern, Congress enacted the Low-Income Housing Preservation and Resident Homeownership Act of 1990 ("LIHPRHA"). Pub. L. No. 101-625, § 601(a), 104 Stat. 4249 (codified at 12 U.S.C. §§ 4101-4147), according to which owners wishing to prepay their mortgages and exit the low-income housing programs were barred from doing so until after they offered their property for sale to owners who would preserve the rent restrictions of the programs. Fredericksburg, supra,113 Fed. Cl. at 247. Owners willing to stay in the program could also elect to receive financial incentives by signing a use agreement with HUD, in exchange for which owners had to agree to maintain the rent restrictions, Id. at 247, according to plans that owners would devise themselves. Carabetta Enters., supra, 68 Fed. Cl. at 411-412, *citing* 12 U.S.C. §§ 4107-09. Such plans could include incentives such as second mortgage loan insurance and access to equity in the owners' housing projects, in exchange for their continued operation of low-income units. Carabetta Enters., supra, 68 Fed. Cl. at 412, citing 12 U.S.C. §§ 4109(b)(5), (b)(7).

The record on this motion practice shows that Petitioner entered into the use agreement, which compels the conclusion that Petitioner sought to prepay the mortgage it owed before Petitioner executed the use agreement; that Petitioner would have then been faced with a possible requirement that it sell the Building to another entity that would maintain the Building as affordable housing; and that Petitioner instead elected to stay in the program which, as noted above, would have entitled Petitioner to financial incentives. The record, however, does not indicate what, if any, financial incentives there were. If HUD indeed conferred financial incentives upon Petitioner in return for Petitioner continuing to maintain rents at the Building at a

below-market rate, then Petitioner on the record on this motion practice does not adequately or meaningfully distinguish the "subsidized" status of the subject premises before or after the execution of the use agreement, as, once again, the HUD Handbook characterizes a "subsidy" for coverage purposes of housing subject to §221(d)(3) of the National Housing Act so as to encompass housing with the reduced rents made possible by subsidized mortgage interest rates. HUD Handbook at ¶1-3(A)(1).

Put more succinctly, HUD required Petitioner to charge tenants at the Building below-market rents both before Petitioner executed the use agreement and after Petitioner executed the use agreement.[2] The record on the motion practice does not indicate the reason that Petitioner did not just charge tenants at the Building rents obtainable in arms'-length transactions upon the execution of the use agreement. If the reason was that Petitioner received some benefit from HUD, then Petitioner's argument that it has not been "subsidized" for purposes of HUD Handbook coverage is obviously challenged. Accordingly, the Court finds that neither party has eliminated questions of fact affecting the applicability of the HUD Handbook to the subject premises and denies both parties' summary judgment motions on this point.

Respondent also moves for summary judgment on the argument that Petitioner violated Respondent's due process rights in the manner in which Petitioner raised her rent, which Respondent argues effectively removed a subsidy she was a beneficiary of. As a general matter, owners in HUD programs become government actors for purposes of the due process clauses of

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[2] Petitioner's reply papers state that tenants of the Building who paid BMIR market rent and/or failed to recertify, even while paying rent increases of 7.5% per year, continued to pay rents substantially below a true market rent.

the Fifth and Fourteenth Amendments. West Farms Estates Co., L.P. v. Aquino, N.Y.L.J. 1202759552429, at *1 (Civ. Ct. Bronx Co. 2016), *citing* Green Park Assocs. v. Inman, 121 Misc.2d 204 (Civ. Ct. Kings Co. 1983). Cf. Henry Phipps Plaza S. Assoc. v. Quijano, 137 A.D.3d 602 (1st Dept.), *reversing for reasons stated in the dissenting opinion of Schoenfeld, J.*, at 45 Misc.3d 12, 13-14 (App. Term 1st Dept. 2014), *appeal dismissed*, 27 N.Y.3d 1120 (2016)(the HUD Handbook protects the due process rights of covered tenants). However, even assuming *arguendo* that the unresolved factual matters referenced above about the "subsidized" status of the subject premises resolved in Respondent's favor, Respondent would merely be a beneficiary of §221(d)(3) of the National Housing Act. In this federal circuit, such tenants do not have a statutorily created property interest sufficient to sustain such a claim. Grace Towers Tenants Asso. v. Grace Housing Dev. Fund Co., 538 F.2d 491, 494 (2nd Cir. 1976).[3] Accordingly, the Court denies so much of Respondent's motion as seeks summary judgment in her favor on the basis of denial of due process.

Petitioner cross-moves for summary judgment in its favor on one other ground. The use agreement allows Petitioner to raise an extant tenant's rent by 7.5% a year if the tenant pays the BMIR market rent because of a prior refusal to recertify instead of the BMIR contract rent on the date of the use agreement. The use agreement permits such increases notwithstanding other provisions of the use agreement, which indicates that Petitioner may have raised the rent as such

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[3] But See Marshall, supra, 497 F.2d at 644(tenants of low-rent public housing are entitled not only to receive notice of proposed rent increases but also to participate in the process of official consideration of rent increases by making written presentations, opportunities that must also be afforded tenants of low- and moderate-income housing constructed pursuant to §221(d)(3) of the National Housing Act, with, *inter alia*, below-market-interest-rate loans).

even if Respondent recertified after receiving Petitioner's letter in March of 2001.

In support of its motion, Petitioner's managing member avers that, as of the date of the use agreement, Respondent was paying BMIR market rent. Petitioner offers as evidence a letter from HUD dated June 25, 1997 stating that two-bedroom apartments at the Building shall have a rent of $724.00. As Respondent's rent was $796.40, and as $796.40 is 110% of $724.00, Petitioner asks this Court to draw the inference that Respondent must have previously failed to recertify.

Petitioner's managing member avers in support of the motion that he has worked with recertifications at the Building for years, and elsewhere in his affidavit disputes Respondent's account of her attempts to recertify in 2001, claiming the personal knowledge necessary to do so. Petitioner's managing member does not allege that Respondent refused to recertify in or before 1997 with the same level of knowledge and specificity. The Court draws the inference that Petitioner's managing member does not have personal knowledge as to whether Respondent actually refused to recertify at that time. Even if the Court finds that Respondent paid a BMIR market rent in 1997, and Petitioner's argument that she did is reasonable, drawing the next inference, that Respondent must have refused to recertify is harder for a summary judgment proponent to justify. Vega, supra, 18 N.Y.3d at 503.

Even assuming *arguendo*, however, that Petitioner proved as a *prima facie* matter that Respondent refused to recertify on its summary judgment motion on this record, Respondent avers in opposition to Petitioner's cross-motion that she never refused to recertify in 1997. More importantly, there is no dispute that in 1997 the Building was still operating pursuant to

§221(d)(3) of the National Housing Act and thus subject to the HUD Handbook. HUD Handbook Fig. 1-1. The HUD Handbook requires an owner to send a series of notices to a tenant who does not recertify before taking benefits away. HUD Handbook ¶7-7 *et. seq.* Failure to prove compliance with this provision of the HUD Handbook bars an owner from collection of the resultant market rent. Starrett City, Inc., supra, 22 Misc.3d at 38, Bedford Gardens Co., supra, N.Y.L.J., March 27, 1998 at 33:6, 1199 Hous. Corp., supra, 171 Misc.2d at 240, Clinton Towers Hous. Co., Inc., supra, 26 Misc.3d at 1229(A), Park Lane Residences, L.P., supra, 26 Misc.3d at 1233(A), Terrace 100, L.P., supra, 28 Misc.3d at 1208(A), E. Harlem Pilot Block Bldg. 1 HDFC, supra, 196 Misc.2d at 38-39, Goldstein, supra, N.Y.L.J., Oct. 31, 2001, at 21:3. Respondent's denial that she failed to recertify coupled with an absence of evidence that Petitioner complied with HUD Handbook ¶7-7 *et seq.* compels the conclusion that Petitioner has not eliminated issues of material fact as to whether Respondent refused to recertify in 1997 and the Court denies so much of Petitioner's cross-motion as seeks summary judgment on this ground.

Petitioner argues that Respondent faithfully paid the rent increases of 7.5% every year until recently and thus waived her right to challenge them. Waiver should not be lightly presumed and must be based upon a clear manifestation of intent to relinquish a contractual protection. Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P., 7 N.Y.3d 96, 104 (2006). The existence of an intent to forgo a contractual right is a question of fact. Id. Thus, the establishment of a waiver, requiring the intentional relinquishment of a known right, is ordinarily a question of fact which precludes summary judgment. Boston Concessions Group v.

Criterion Ctr. Corp., 200 A.D.2d 543, 545 (1st Dept. 1994). On this standard, the Court does not find that Petitioner has proven entitlement to summary judgment on the basis of Respondent's waiver of the defenses she now interposes by payment of rent increases and the Court denies Petitioner's motion for summary judgment on this ground.

Petitioner moves to dismiss so much of Respondent's cause of action as seeks damages for payment of a rent greater than legally allowed for more than six years. Respondent first raised this defense by an amended answer dated April 27, 2016. Although an amended answer takes the place of an original answer, 100 Hudson Tenants Corp. v. Laber, 98 A.D.2d 692 (1st Dept. 1983), an amended pleading only tolls a statute of limitations if the original pleading gave an adversary notice of the transactions thereto. CPLR §203(f). Respondent's original answer does not give any reasonable reader notice that she would be raising a defense of overpayment of rent because of Petitioner's frustration of her attempts to recertify or Petitioner's failure to comply with the HUD Handbook. Accordingly, Respondent did not toll the statute of limitations until April 27, 2016. As Respondent's cause of action, overpayment of rent because of Petitioner's frustration of her attempts to recertify or Petitioner's failure to comply with the HUD Handbook, does not have a statute of limitations otherwise prescribed by law, a six-year statute of limitations applies. CPLR §213(1). The Court therefore grants so much of Petitioner's summary judgment cross-motion as seeks dismissal of Respondent's counterclaim for damages incurred for overpayments made on or before April 27, 2010.

Petitioner cross-moves to dismiss Respondent's affirmative defense of breach of the warranty of habitability and annexes to its motion a stipulation in a Housing Part action that

Respondent had previously commenced against Petitioner pursuant to New York City Civil Court Act §110(c) dated May 10, 2016 that indicates that Petitioner had corrected violations of the New York City Housing Maintenance Code. The law is well-settled that a party, in opposition to a motion for summary judgment, must assemble and "lay bare" affirmative proof to establish that the matters alleged are real and capable of being established upon a trial. Alfred E. Mann Living Trust v ETIRC Aviation S.a.r.l., 78 A.D.3d 137, 142 (1st Dept. 2010), Johnson v. Phillips, 261 A.D.2d 269, 270 (1st Dept. 1999); Fileccia v. Massapequa General Hospital, 99 A.D.2d 796 (2nd Dept.), *aff'd*, 63 N.Y.2d 639 (1984); Hasbrouck v. Gloversville, 102 A.D.2d 905 (3rd Dept.), *aff'd*, 63 N.Y.2d 916 (1984). All that Respondent avers to in opposition to Petitioner's cross-motion is that repairs needed in the subject premises were not minor, but she does not say anything more than that. This bare statement is insufficient to rebut Petitioner's evidence. Accordingly, the Court grants Petitioner's cross-motion to dismiss Respondent's defense of breach of the warranty of habitability.

Petitioner also moves for an order of this Court directing Respondent to pay use and occupancy *pendente lite* in a monthly amount exceeding $2,000.00. Given the multiple issues as to the propriety of Petitioner's increase of Respondent's rent by 7.5% a year, as outlined above, the Court does not find that such relief is appropriate at this posture of the proceeding. Compare RPAPL §745(2)(b)(i)(the Court shall not order a tenant to deposit that portion of the monthly rent payable by a government subsidy). The Court has already ordered payment of use and occupancy at the rate Respondent paid before the controverted rent increases, and there is no dispute that Respondent has complied with this Court's order. The Court denies Petitioner's

motion, without prejudice to renewal if Respondent does not comply with the Court's most recent order or if Respondent makes an application for an adjournment when Petitioner is ready for trial.

Respondent moves for a stay of the proceeding pending litigation that another attorney may commence against Petitioner concerning issues raised herein. Respondent, however, concedes that no party has yet commenced such litigation. A stay can be a drastic remedy on the simple basis that justice delayed is justice denied. 660 Riverside Drive Aldo Assocs. LLC v. Marte, 178 Misc.2d 784, 786 (Civ. Ct. N.Y. Co. 1998). Accordingly, a stay is normally only justified where the decision in one action will determine all the questions in the other action, and the judgment on one trial will dispose of the controversy in both, requiring complete identity of the parties, the causes of action and the judgment sought. 952 Assoc., LLC v. Palmer, 52 A.D.3d 236, 236-37 (1st Dept. 2008). Without any actual "other action," the Court does not find that the drastic relief of a stay is warranted and the Court denies Respondent's motion.

This matter is now in a trial posture. The Court calendars this matter for trial on October 27, 2016 at 9:30 a.m. in part C, Room 844 of the Courthouse located at 111 Centre Street, New York, New York.

This constitutes the decision and order of this Court.

Dated: New York, New York
September 15, 2016

HON. JACK STOLLER
J.H.C.