

<b>Grand Concourse Estates, LLC v Toure</b>
2018 NY Slip Op 30940(U)
May 17, 2018
Civil Court of the City of New York, Bronx County
Docket Number: 900160/2015
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF BRONX: PART 52

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GRAND CONCOURSE ESTATES, LLC, X

Petitioner

-against-

**DECISION & ORDER**

Index No.: L&T 900160/2015

**HON. SABRINA B. KRAUS**

DURAGA TOURE  
BAWAKA SAMURA  
1420 Sheridan Avenue AKA  
1420 Grand Concourse, Street Level 1PB-Mosque  
Bronx, New York 10456

Respondents

\_\_\_\_\_  
X

**BACKGROUND**

This commercial summary nonpayment proceeding was commenced by Petitioner against Respondents seeking to recover possession of 1420 Sheridan Avenue AKA 1420 Grand Concourse, Street Level 1PB-Mosque, Bronx, New York 10456 (Subject Premises).

**RELATED LITIGATION**

The court takes judicial notice of a subsequent summary nonpayment proceeding between the parties under Index Number 901085-2015. Petitioner issued a rent demand dated June 5, 2015, seeking \$3706.00 for rent due from April 2015 through June 2015 at a monthly rent of \$1850.00.

The petition was filed on July 1, 2015 and sought \$1994.00 for May and June 2015. Respondents appeared by counsel on July 13, 2015 and filed an answer denying that the rent sued for was due. On July 17, 2015, Respondents filed an amended answer acknowledging that

\$352.00 was due for the period covering April through July 2015, and stating that a check for said sum would be delivered to Petitioner.

The proceeding was initially returnable on July 20, 2015. The parties entered into a stipulation discontinuing the proceeding on that date. The stipulation provided:

Petitioner acknowledges receipt and credit of ch# 1017 dtd 5/2/15 for \$1762.00. Credit for this amount given and Tenant balance thru July 2015 hereby adjusted accordingly.

Personal ch# 1020 for \$352.00 hereby given in open court, subject to collection. This amount represent the \$88.00 shortfall in rent each month for months April 2015 thru July 2015.

Upon clearance, all rent thru July 2015 shall be satisfied.

Proceeding discontinued. Petitioner reserves legal/late fees.

### **PROCEDURAL HISTORY**

Petitioner issued a three day demand dated January 5, 2015 seeking \$5,460.00 in rent for October 2014 through January 2015 at a monthly rent of \$1762.00. The petition was filed on January 30, 2015. Proof of service was filed on February 13, 2015.

Respondents failed to appear or answer and on March 30, 2015, the court (Miles, J) awarded Petitioner a judgment of possession on default. The warrant of eviction issued on March 30, 2015.

Respondents appeared by counsel on July 17, 2015,, and on July 29, 2015 and moved for an order vacating the judgment and restoring the proceeding to the trial calendar. Respondents alleged that they were unaware of the proceeding prior to "Petitioner" appearing at the Subject Premises on April 24, 2015, and informing them of the default judgment. Respondents paid \$4000 in cash to the Super on that date, which is the amount they were advised required to stop an eviction in this proceeding. Respondents alleged improper service and that as they had

already paid the months sued for in the petition they wished to assert a counterclaim for the refund of the \$4000.00.

The court (Cannataro,J) granted the motion pursuant to a decision and order dated July 29, 2015, only to the extent of allowing Respondent to proceed on its counterclaim, the default judgment of possession remained in place. The court held:

Motion to vacate and restore is granted to the extent the respondent's counterclaim for \$4,000.00 overpayment is severed and set down for trial on 8/20/15.<sup>1</sup>

On August 20, 2015, the trial was adjourned to September 22, 2015, for motion practice. On September 22, 2015, Respondent moved for summary judgment<sup>2</sup> and on October 21, 2015 Petitioner moved for an order dismissing the counterclaim or alternatively awarding Petitioner summary judgment on the counterclaim. On October 28, 2015, the court (Alpert,J) denied Respondents' motion for summary judgment, granted Petitioner's motion for summary judgment, and dismissed the counterclaim. The court held that the stipulation of discontinuance in the subsequent proceeding precluded Respondent's counterclaim in this proceeding, and that the payments made by Respondents had been credited to older outstanding arrears, leaving the balance sued for in the petition.

Respondents appealed Judge Alpert's decision. On February 17, 2017, the Appellate Term modified Judge Alpert's decision to the extent of denying Petitioner's motion for summary judgment and reinstating Respondent's counterclaim for trial [54 Misc3d 143(A)].

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<sup>1</sup> The order did not make specific reference to service of a pleading by Respondent, but an answer dated July 17, 2015 is in the court file, and was part of the record on the appeal of Judge Alpert's decision.

<sup>2</sup> Respondent's motion though served first, was labeled a cross-motion.

The Appellate Term held:

Civil Court should have denied landlord's motion for summary judgment. On this record, it cannot be determined that the July 20, 2015 stipulation, entered in settlement of a subsequent nonpayment proceeding between the parties, barred tenants' extant counterclaim in this proceeding seeking a rent refund. There is no mention of the counterclaim in the stipulation (*see Cahill v Regan*, 5 NY2d 292 [1959]), nor is there any language indicating that the parties intended the stipulation to resolve anything other than the limited rent claims at issue in the subsequent proceeding (*see Morales v Solomon Mgt. Co., LLC*, 38 AD3d 381, 382 [2007]). In the absence of an express intention to settle the counterclaim or all claims between the parties (*see Fifty CPW Tenants Corp. v Epstein*, 16 AD3d 292 [2005]; *Zimmerman v West Nicholas Assoc. LLP*, 49 Misc 3d 127[A], 2015 NY Slip Op 51375[U] [App Term, 1st Dept 2015]), the stipulation fails to resolve the factual issues as a matter of law (*see Dunleavy v First Am. Tit. Ins. Co. of NY*, 117 AD2d 952, 953 [1986]).

On February 1, 2018, Respondents moved for an order restoring the proceeding for trial, in accordance with the Appellate Term's order. The motion was granted by the parties' stipulation, which provided that Petitioner would respond to the counterclaims by February 21, 2018 and set a trial date on Respondents' counterclaim for March 7, 2018.

On March 7, 2018, Respondents filed a Notice to Admit, dated February 15, 2018, Petitioner filed its Response to the Notice, and the parties further adjourned the trial for additional motion practice.

On April 18, 2018, each party, yet again moved for summary judgment. This Court denied the second round of summary judgment motions pursuant to a decision and order dated April 18, 2018, and set a final trial date for May 16, 2018.

On May 16, 2018, the Court held a trial on Respondents' counterclaim, and at the close of the trial the court reserved decision.

## FINDINGS OF FACT

Respondents are the tenants of record of the Subject Premises, pursuant to a written lease dated April 5, 2010, for a term through and including March 31, 2020.<sup>3</sup>

The premises are used as a Mosque. Respondents do not run the Mosque and are not involved in the payment of rent for the Subject Premises. Respondents' first witness at trial was Ousman Jaiteh (OJ). OJ is a trustee of Masjid Darl Arqam Inc., the not for profit corporation that runs the Mosque. OJ was in charge of making all rent payments for the Subject Premises, and the payments were tendered by the corporation. When Petitioner's predecessor was the owner of the building, OJ paid rent on line. When this proceeding was commenced OJ was not around. Respondent Djarga Ture, a named Respondent and tenant of record also testified.

Mr. Toure testified that he runs his own business at another location and he was not really looking at mail addressed to him at the Subject Premises or monitoring in anyway the rent payments. Mr. Toure does go to the Subject Premises as a place of worship.

Petitioner became the owner of the Subject Building on or about October 2014.<sup>4</sup> In connection with the closing on the purchase of the subject building, Petitioner obtained an assignment of leases and security deposits (Ex 1). In connection with the closing, Petitioner also received a tenant profile listing the arrears of each of the tenants of record in the Subject Building as of October 28, 2014. The tenant profile for Respondents shows that as of said date, Respondents had arrears totaling \$1936.00. That profile has an opening balance of \$198.00 for Respondents as of October 2013. In addition to said opening balance, there were under payments

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<sup>3</sup> The lease was not entered into evidence at the trial, however, many copies of the lease are in the court file, and the lease was included as part of the record on appeal of Judge Alpert's decision.

<sup>4</sup> See Petitioner's response to Notice to Admit.

through October 2014 totaling \$488.00 and a \$1250.00 insurance charge assessed in September 2014.

Petitioner's own tenant profile (Ex 3) starts with the opening balance of \$1936 in October 2014. Respondents made a payment for rent in November 2014, but made no payment in December 2014, bringing Respondents total arrears as of December 2014 to \$3698.00. Petitioner issued a rent demand dated January 5, 2015, including a demand for January's rent for a total of \$5460.00 in arrears. Petitioner applied payments received as of that date to the oldest outstanding arrears and thus the rent demand while seeking the \$5460 due, listed it as being due for the most recent months of October 2014 through January 2015.

Between January 5, 2015 and April 23, 2015, Respondents made five payments of \$1762, however one of those payments in March 2015 bounced. Thus as of April 15, 2015 Respondents owed a total of \$3956.00 in arrears.

As noted above, Petitioner obtained a default judgment against Respondent in this proceeding and the warrant of eviction issued on April 5, 2015.

On April 24, 2015, Mr. Toure received a call at his place of business that Petitioner was prepared to have a Marshall execute on the warrant of eviction. Mr. Toure went to the Subject Premises to try and stop the eviction. He met with the Super, who stated that if the \$4000 in arrears were paid, the eviction would be cancelled. Mr. Toure paid \$2000 of the arrears and had another friend pay the other \$2000.00. The Super gave Mr. Toure a hand written receipt for the \$4000 which was paid in cash (Ex F). The \$4000 did constitute an overpayment of \$44.00, but that was credited to Respondents towards rent for May 2015. As per the parties' agreement Petitioner did not proceed with execution of the warrant.

## DISCUSSION

Respondents have been in possession of the break down for the arrears through October 2014 since prior to the appeal. The break down, which was admitted as Exhibit 2 at trial, was also part of the record on appeal. Respondents have never challenged any of the charges<sup>5</sup> listed on that document, nor have they have shown proof of any uncredited payment.

Respondents only argument has been because Respondents made payments for the months listed on the rent demand, no money was due in this proceeding and the \$4000 constitutes an overpayment.

It is well settled that Petitioner's application of the payments to the oldest arrears is proper in the absence of an agreement to the contrary [*600 Hylan Associates v Polshak* 17 Misc.3d 134(A)].

## CONCLUSION

Based on the foregoing the court finds that there was no overpayment, and that Respondents tender of \$4000 on April 24, 2015 was properly applied to arrears due through said date. The counterclaim is therefore dismissed.

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<sup>5</sup> The \$1250 insurance charge was not challenged by Respondents prior to trial or at trial, and presumably is covered by the parties lease. See eg Paragraph 42 of the rider which provides that Respondents would be responsible for any increase in insurance premiums due to assessments based on the use of the premises by Respondents as a Mosque.



This constitutes the decision and order of this court.

Dated: May 17, 2018  
Bronx, New York

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Hon. Sabrina B. Kraus  
JCC

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