

170 Spring St. LLC v Jane Doe
2021 NY Slip Op 31994(U)
May 5, 2021
Civil Court of the City of New York, New York County
Docket Number: 071782/19
Judge: Marcia J. Sikowitz
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CIVIL COURT OF THE CITY OF NEW YORK

COUNTY OF KINGS: HOUSING PART F

-----X

170 Spring Street LLC,

Petitioner

L & T INDEX NO.: 071782/19

71782/19

-against-

DECISION/ORDER

Jane Doe,

Respondent

-----X

J. SIKOWITZ:

RECITATION, AS REQUIRED BY CPLR SECTION 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION AND CROSS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIRMATION AND AFFIDAVIT AND EXHIBITS ANNEXED.....	-----1-----
NOTICE OF CROSS MOTION AND OPPOSITION TO THE MOTION AND AFFIRMATION AND AFFIDAVIT AND EXHIBITS ANNEXED.....	-----2-----
REPLYING AFFIRMATION IN SUPPORT OF THE MOTION AND IN OPPOSITION TO THE CROSS MOTION	-----3-----
REPLYING AFFIRMATION IN REPLY TO THE OPPOSITION TO THE CROSS MOTION AND IN FURTHER SUPPORT OF THE CROSS MOTION.....	-----4-----

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION AND CROSS MOTION IS AS FOLLOWS:

Petitioner commenced this nonpayment proceeding against "K. P.," as the tenant of apartment 3, at 174-6 Spring Street, New York, NY 10012, seeking monthly rent from July 2016, and MCI and fuel passalong charges from May 2015. Paragraph (10) of the petition states that the apartment is subject to rent stabilization, and paragraph (2) pleads that "K. P." is the tenant based on a written lease agreement with a monthly rent of \$891.41. Respondent filed an answer and a Demand for a Bill of Particulars. Petitioner served an amended petition on January 7, 2020, and respondent served a verified

amended answer and a Demand for a Bill of Particulars on December 9, 2020. Petitioner rejected respondent's amended answer as untimely as it was served eleven months after the amended petition.

The amended petition, dated January 3, 2020, sues respondent as "Jane Doe," the tenant of the subject apartment 3 pursuant to a written rental agreement, subsequently renewed, wherein respondent agreed to pay a monthly rent of \$891.41. Paragraph (10) of the amended petition states that the apartment is subject to the City Rent Laws of 1983 (Rent Control).

Respondent moves by notice of motion for an order amending the original caption of this case to replace respondent's true name with Jane Doe, and pursuant to CPLR 3012(d) compelling petitioner to accept the respondent's answer to its amended petition. Respondent seeks an order pursuant to CPLR 3212 granting summary judgment in respondent's favor and dismissing the petition, and applying respondent's previously paid use and occupancy (U&O) to any rent obligation found due for the period after the commencement of her tenancy. Petitioner opposes the motion in all respects and cross moves for an order pursuant to CPLR 3212 granting summary judgment in favor of petitioner.

The following facts are undisputed: The deceased tenant of record for the subject rent controlled apartment, "Concetta, a/k/a Tina Doe" was respondent's grandmother. The tenant of record died on December 29, 2012 at the age of 87. Respondent moved into the subject apartment in 2009 to live with her grandmother and she remained in the apartment after her grandmother died in 2012. Petitioner issued rent bills to respondent's deceased grandparents until 2019, failed to recognize respondent as a successor to the deceased tenant of record, and in July 2014 commenced a licensee holdover against respondent. A trial was conducted in the licensee holdover proceeding over the course of a year from 2017 to 2018. The trial court held that respondent proved her affirmative defense that she is a family member of the deceased tenant and co-resided with her at the subject apartment for two years before the tenant of record died, respondent is entitled to succeed to the tenancy and the petition was dismissed with prejudice. Petitioner commenced this nonpayment proceeding in November 2019 seeking rent arrears for a period of fifty six months dating back to July 2014 .

In support of the branch of respondent's motion seeking permission to serve and file an amended answer, respondent states that her verified answer was served and filed in response to the initial petition that was served in November 2019. The case was marked off the resolution part calendar after two court appearances, January 7 and February 19, 2020 respectively, due to housing court "pause" caused by the Covid-19 pandemic. Respondent's counsel states that while preparing a summary judgment motion, he discovered that petitioner served an amended petition in January 2020. Respondent then served a verified amended answer to the amended petition containing all the defenses and counterclaims asserted in the original answer as well as a revised Demand for a Bill of Particulars. The original answer alleged a defense based on the improper regulatory status of the apartment, the amended petition cured that defect, and the amended answer does not contain that defense. Petitioner rejected the amended answer, served in response to the amended petition, and therefore, respondent now moves for an order compelling petitioner to accept the amended answer.

Respondent points out that prior to the licensee holdover proceeding, petitioner agreed to name respondent as a Jane Doe to avoid the harm of "blacklisting," and petitioner named her as Jane Doe in the holdover case. Petitioner corrected its error of using respondent's name in its amended petition,

and named respondent as a Jane Doe. Petitioner does not oppose this branch of respondent's motion. Respondent seeks an order correcting the caption to ensure the clerk amends the caption in the court file and UCMS.

Respondent argues that she is entitled to summary judgment dismissing all alleged rent arrears claimed to have accrued prior to November 2018 because it is undisputed she was not the tenant during this period. In addition, respondent seeks summary judgment dismissing the balance of rent sued for in the amended petition because she tendered to the landlord all of the rent claimed to have accrued from November 2018, when her tenancy commenced and the funds were tendered prior to the commencement of this nonpayment proceeding. Petitioner rejected this tender of rent, and returned the funds to respondent. Respondent seeks summary judgment dismissing the amended petition to the extent it seeks Maximum Base Rent increases (MBR) and Fuel Pass Along charges for the period 2013 through 2018, following the death of the tenant of record until the recognition of respondent's succession claim. Respondent states that the landlord failed to comply with 9 NYCRR 2201.6[c] by failing to send RN-26 notices to her of any such increases, and precluding her from objecting to the increases. Petitioner took a 7 ½ % MBR increase from 2015 through 2019 and sent RN-26 notices to the respondent's deceased grandfather. Based on this defense, respondent states any rental amount found due and owing from respondent prospectively must be rolled back to the rent controlled rent at the time of the last tenant's death. Respondent interposed other defenses in her answer including failure to serve a proper rent demand in violation of RPAPL 711, failure to serve a rent demand for a portion of the rent sought in the petition, inclusion of non-rent charges in the petition in violation of RPAPL 702, and laches based on the landlord's delay in prosecuting its claim for rent. Respondent interposed counterclaims for harassment, breach of the warranty of habitability, constructive eviction and attorney's fees.

Respondent states she began residing in the apartment with her grandmother Concetta in 2009, and following the tenant of record's death in December 2012, respondent continued residing in the unit. Respondent argues that despite her grandparents, the tenants of record, dying in 2006 and 2012, respectively, petitioner kept sending rent bills addressed to her grandparents, and did not seek to recover rent from her until 2019. In July 2014 the landlord served a 10 Day Notice to Quit to Licensee alleging that respondent's license to reside in the apartment terminated on the death of her grandmother. The parties, through counsel, entered a written agreement wherein it was acknowledged that the respondent was asserting a succession defense to her deceased grandmother's rent controlled tenancy. (exh. B) This agreement is dated August 7, 2014. Two months later, in October 2014, petitioner commenced the licensee holdover proceeding. Respondent produced documents in discovery in the holdover proceeding, and she and her father were deposed. Respondent consented to pay use and occupancy (U&O), pendente lite, in a December 4, 2014 stipulation without prejudice. Respondent has paid U&O since October 2014 through April 2018 in the amount of \$640.25/month, and increased to \$688.27/month. Respondent states she paid \$28,228.00 during this period. (exh. I) The holdover was tried over the course of a year, and the decision and order, dated November 18, 2018, held that respondent established her succession defense to the subject apartment, and the petition was dismissed with prejudice.

In support of respondent's motion seeking an order compelling petitioner to accept the amended answer, respondent states that she timely filed an answer to the original petition and was never in default. The original answer also included a demand for a bill of particulars which petitioner has failed to respond to. In response to the respondent's answer with affirmative defenses, petitioner served an amended petition without seeking leave of court. The respondent's original answer was served December 12, 2019, and the amended petition is dated January 3, 2020, more than ten (10) days after respondent's answer. The housing court was on "pause" beginning March 16, 2020, and this case was not conferenced in Part F until August 31, 2020. Respondent states that her amended answer is nearly identical to the original answer with defenses deleted due to petitioner amending errors in the original petition. Respondent also states that there is no prejudice to petitioner as the answers are nearly the same, and there was no activity in the proceeding for eight months due to the Covid-19 pandemic and the housing court "pause."

Respondent seeks summary judgment dismissing, with prejudice, the portion of the petition seeking rent arrears that accrued prior to November 5, 2018, the date the trial court held respondent is the successor tenant to her grandmother's rent controlled tenancy. Respondent relies on RPAPL 711(2) requiring that a nonpayment proceeding be predicated on a default in rent owed pursuant to "the agreement under which the premises are held." RPAPL 711(2) Respondent states that her tenancy did not automatically vest upon the death of her grandmother as the landlord vigorously opposed her succession claim during four years of litigation in housing court. If the landlord had recognized respondent's succession claim upon the death of her grandmother, respondent's rent controlled tenancy would commence upon the tenant of record vacating. However, where the landlord forces the occupant to establish her claim during four years of litigation including a lengthy trial, the obligation to pay rent does not relate back to the time of the permanent vacatur. There was no agreement between the parties that respondent was the tenant upon the death of her grandmother, and no meeting of the minds regarding payment of rent. Respondent states that where the landlord vigorously opposes the succession claim, it cannot seek rent prior to the time it either recognized the claim, or a court did so, regardless of whether it is a tenancy subject to rent stabilization or rent control.

Respondent seeks dismissal of the petition to the extent it seeks rent accruing after November 2018 because it was paid by respondent, without conditions, and petitioner refused the payment and returned it. Upon receipt of the rent demand, respondent paid 100% of the rent that accrued since November 2018. (exh J) Petitioner rejected and returned the payment claiming that respondent was liable for rent arrears accruing since 2015 (exh K). Respondent argues that where a tenant tenders all the rent due before the commencement of a nonpayment proceeding, and the landlord refuses to accept it, the petition must be dismissed as there has been no default as required by RPAPL 711(2).

Respondent also seeks dismissal of the petition because it is based on an improper written rent demand. RPAPL 711(2) requires a landlord to serve a proper demand for the rent due as a predicate to a summary nonpayment case. Respondent argues that the predicate rent demand, utilized for the petition and the amended petition, are facially defective and improper. Respondent states that seventy five percent (75%) of the rent demanded consists of "rent" allegedly accruing before the respondent's tenancy commenced, and respondent is not liable for rent that accrued before she was the tenant. In addition, the rent demand is improper because it seeks rent for a period of fifty six (56) months and is "stale."

The rent demand fails to credit the \$28,228.00 respondent paid in U&O during the pendency of the licensee holdover proceeding.

In addition, respondent argues that the predicate notice improperly demands payment of rent increases purportedly accruing for months when the landlord failed to serve RN-26 forms upon respondent as required by 9 NYCRR 2201.6[c]. Based on all of these claims, respondent states that the predicate rent demand is not a good faith estimate of rent allegedly due, and is therefore not a proper rent demand as required by RPAPL 711(2). Respondent relies on *542 Holding Corp v. Prince Fashions, Inc*, 46 AD3d 309, 310 (1st Dept. 2007) holding that [A] 'proper demand for rent must fairly afford the tenant, at least, actual notice of the alleged amount due and of the period for which such claim is made. At a minimum, the landlord or his agent should clearly inform the tenant of the particular period for which a rent payment is allegedly in default and of the approximate good faith sum of rent assertedly due for each such period.'"

Respondent states that petitioner is not entitled to collect rent increases for the period 2013 through 2018 based on its failure to serve an RN-26 form on the "tenant in occupancy." Following the death of the tenant of record, for the years 2013 and 2019, petitioner sought and received Orders of Eligibility for Maximum Base Rent (MBR) increases of 7.5% per year pursuant to 9 NYCRR 2201. In addition, petitioner received Fuel Pass Along charges during this period which it added to the rent claimed due from respondent. Respondent states the notice to the tenant, required by 2201.6[c] is known as the RN-26 form. 9 NYCRR 2201.6[c] provides, "No increase in maximum rent pursuant to this section...shall be collectible until the landlord shall have given notice thereof to the tenant..." 9 NYCRR 2201.6(a)(1) provides, in part, that "No new maximum rent established pursuant to 2201.4...shall increase the rent collectible from a tenant in occupancy..." It is undisputed that during the period 2013-2019, petitioner issued RN-26 notices to the deceased tenants of record, Salvatore (Doe) and Tina (Doe) despite having actual notice that Salvatore died in 2006, and Tina died in 2012. Respondent states that the landlord continued this practice in January 2019, three months after the decision and order of the trial court granting respondent's succession claim. Exhibit U is the RN-26 notice, dated January 4, 2019, addressed to "Salvatore and Tina Petrillo" for the subject apartment.

Respondent argues that petitioner's failure to comply with the mandatory obligation of 9 NYCRR 2201.6[c] renders the MBR increases taken during this period a nullity and not collectible from respondent. The rent should be rolled back to not more than \$554.02, the MCR in effect in 2012 when respondent's grandmother, Concetta (a/k/a Tina) died.

Respondent argues that the \$28,228.00 in U&O pendente lite she paid, without prejudice, during the licensee holdover proceeding, should be applied to any rent obligation she may have for the period starting November 2018. Any determination of post November 2018 rent obligations would be subject to respondent's affirmative defenses including breach of the warranty of habitability and constructive eviction.

Petitioner cross moves for an order pursuant to CPLR 3212 granting summary judgment in favor of petitioner, and opposes respondent's motion, except that petitioner does not oppose a court order directing the amendment of the caption to reflect respondent as "Jane Doe." In opposition to the branch of respondent's motion to compel acceptance of respondent's amended answer, petitioner

argues that respondent waited eleven months to serve an amended answer during which time the parties were making court appearances and conferencing the case. In addition petitioner states that respondent's delay of eleven months in moving to file an amended answer has delayed the litigation. Petitioner fails to address the undisputed fact that the amended answer is essentially the same as the original answer, which was timely filed. The demand for a bill of particulars was served with the original answer and petitioner failed to respond, and it is not clear what prejudice is created by permitting respondent to serve an amended answer.

In reply, respondent states that the landlord is silent on the fact that petitioner failed to move for permission to file an amended petition. In addition, petitioner's claim that the parties were before the court for eleven months before the amended answer was served, is incorrect. The proceeding was on "pause" from March 16, 2020 through August 31, 2020 during which time the proceeding was not before the court or conferenced. Respondent states that petitioner fails to allege any prejudice, and any delay in this litigation is due to the Covid-19 pause on litigation in the housing court.

Petitioner argues that respondent is not entitled to summary judgment and dismissal of claims for rent pre-November 2018. Petitioner states that respondent's claim that there was no landlord tenant relationship or agreement to pay rent until November 2018, when the trial judge ruled in her favor on her succession defense, is not relevant in this nonpayment case. Petitioner relies on respondent's affirmative defense in the prior licensee holdover proceeding, ie, that her right to succeed to the tenancy commenced on her grandmother's death, to support its claim, in this nonpayment case, that it is entitled to sue for rent arrears dating back to the death of the tenant of record. Petitioner states respondent cannot claim in the licensee holdover she was the successor tenant as of the date her grandmother died, and now claim she did not become the tenant until the trial court ruled in favor of her succession claim in November 2018. The landlord fails to provide case law to support these claims.

Petitioner argues that the case law "makes clear" that respondent is responsible for all rent accruing from the time her grandmother passed away through the present. Petitioner fails to cite any applicable statute or case law to support this position. It is undisputed that petitioner did not recognize respondent as a successor tenant to the subject rent controlled tenancy when her grandmother passed away, and commenced a licensee holdover proceeding to evict her engaging in four years of litigation including a lengthy trial. Petitioner argues that there is a difference between a rent stabilized tenancy and one subject to rent control when it comes to a landlord suing for rent arrears pursuant to RPAPL 711 against a successor tenant. Petitioner fails to cite a case or statute that supports this position. It is true that a successor tenant, pursuant to NYC Rent and Eviction Regulations (9 NYCRR 2204.6(d)(1) is an "other person entitled to possession" and therefore becomes a tenant by operation of satisfying the requirements of statute, in a case where a landlord recognizes the family member's succession right and accepts their tenancy. Petitioner herein specifically rejected respondent's succession claim, terminated her license to occupy the unit, and sued for possession of the apartment. Petitioner rejects respondent's reliance on *WSC Riverside Dr. Owners LLC v. Williams*, 125 AD3d 458, (1st Dept. 2015) alleging that the subject unit in *WSC Riverside* is rent stabilized. This rejection of *WSC Riverside* is misplaced as the subject apartment is subject to rent control.

Petitioner fails to cite legal precedent supporting its claim herein that when a landlord rejects a family member's succession claim to a rent controlled apartment, and spends four years fighting the

succession defense in court, it can back date a landlord-tenant relationship four years to the death of the tenant of record based on a court decision, four years later, that the occupant is entitled to succeed to the apartment. Petitioner cites no authority to support its position that the landlord tenant relationship and the agreement of the parties on rent date back to the death of the tenant of record, rather than commencing on the date the judge ruled the occupant is the successor tenant in a case where petitioner rejected the succession claim. Petitioner cites to *In the Matter of Andrew Duell et at, v. Condon*, 84 NY2d 773 (1995) to support its claim that there is a difference between a statutory tenancy and one subject to rent stabilization and governed by leases. However, that case dealt with the question of attorney's fees and carrying forward an attorney's fee lease provision from a lease into a statutory tenancy of a tenant not signatory to the lease. Reliance on this case is misplaced.

Petitioner argues that tender and refusal of rent, after the rent demand and before the petition is served, does not support dismissal of those rent claims. Petitioner attaches an affidavit from its director of residential rents administration for Time Equities, Inc, James T. Morgan. Mr. Morgan fails to state that respondent's tender of \$6,958.87 did not represent or cover the rent arrears. Counsel states that petitioner did return that check, and withdrew the rent demand that elicited the check. Five months later another rent demand was served which is the predicate notice for the instant case.

Petitioner argues that the predicate rent demand was proper, and the petition should not be dismissed. Petitioner states that assuming arguendo some of the rent demanded is stale, it does not render the entire demand defective. Petitioner argues that all of respondent's payments are reflected in its ledger, however, this claim is not in the rent administrator's affidavit, but in counsel's affirmation.

Petitioner also argues that it is entitled to all the rent increases it assessed including increases during the period 2013 to 2018. Rather than addressing the substance of respondent's claim that the landlord's failure to provide notice in RN-26 forms pursuant to 9 NYCRR 2201.6[c] and 9 NYCRR 2201.6(a)(1) bars any increases in the maximum rent, petitioner merely states that there is no DHCR determination disallowing rent increases for the subject apartment. Petitioner fails to dispute the facts supporting respondent's claim that the rent increases are improper.

Petitioner states it does not disagree with respondent's claim that her previously tendered payments should be allocated to rent which accrued at the beginning of her tenancy. Petitioner claims the tenancy commenced in December 2012 on the death of the tenant of record, despite the undisputed fact that petitioner rejected the occupant's claim to succession, and commenced a licensee holdover proceeding to regain possession of the unit. Respondent claims her tenancy commenced in November 2018 with the decision and order, after trial, holding that she is entitled to succeed to the tenancy.

In support of its cross motion for summary judgment in petitioner's favor, petitioner states that respondent became obligated to pay all rent which accrued since the date her grandmother passed. Petitioner relies on the holding in *Golden Mountain Realty Inc v. Severino*, 47 Misc3d 141[A], (AT, 1st Dept. 2015) to support its claim that respondent's rent obligations commenced once she met the criteria for succession, and not when the court acknowledged the meeting of the criteria in a decision after trial. Petitioner's reliance on this case is misplaced, and in fact, that is not the holding of the trial court or the Appellate Term when it affirmed the lower court in *Severino*. The court held that a family member can succeed to the decedent tenant's rights if they choose. This finding was in response to

petitioner’s claim that the deceased rent controlled tenant of record did not establish succession when his wife predeceased him in their rent controlled apartment. The petitioner raised this issue to bar the respondent-son’s succession claim by claiming his deceased father did not take any steps to establish succession right when his co-tenant-wife predeceased him. The court did not hold that the respondent-son- successor-tenant, defending a holdover proceeding with a succession defense, can succeed to the apartment merely because he chooses, when the landlord is suing for possession.

Petitioner’s reliance on the holding in *In the Matter of Doris Klein et al v. DHCR, and Colorado Associates, LLC*, 17 AD3d 186, (1st Dept. 2005) is also misplaced. The court was ruling on a question of service of DHCR notices on the tenants notifying them of the landlord’s efforts to decontrol the apartment. When the court ruled that there are no guidelines involving a successor tenant regarding what action a landlord or a tenant needs to take, it was solely with respect to changing the identification information for notification purposes.

In reply and in opposition to the cross motion, respondent states that pursuant to NYCCCA 909(a), petitioner was required to obtain leave of court for permission to serve an amended petition as it was served well more than ten (10) days after respondent’s answer. Respondent states that the amended answer is nearly identical to the original answer, and the demand for a bill of particulars was served with the original answer as well, and therefore there is no prejudice to petitioner. Respondent also states that there was no activity in this case from February 19, 2020, the last court appearance before the “pause,” until August 2020 when the case was conferenced virtually in Part F. This delay was not caused by the respondent’s failing to file an amended answer timely.

In opposition to petitioner’s cross motion for summary judgment, respondent states that petitioner has failed to raised any credible factual or legal opposition to respondent’s motion for summary judgment. Respondent seeks summary judgment in her favor finding that her obligation to pay rent commences from November 5, 2018 when the trial court held she was the successor tenant. Respondent states that petitioner fails to cite a single legal precedent that establishes respondent’s obligation to pay rent relates back to the death of the tenant of record where the succession claim is challenged by the landlord, and petitioner sues for possession in a licensee holdover proceeding. She states petitioner has failed to produce a case that disputes respondent’s claim that her obligation to pay rent commences only upon the recognition of her tenancy rights to the apartment.

Respondent states that petitioner cannot recover rent in the absence of an agreement to pay rent or recognition of a landlord tenant relationship, pursuant to RPAPL 711(2) regardless of whether the unit is subject to rent stabilization or is a statutory tenancy. Either the landlord consents to the succession claim and recognizes the tenancy, or a court finds that the occupant is entitled to succeed to the tenancy. Respondent states that the trial court’s 2018 decision and order did not hold that respondent is responsible for the rent that accrued since her grandmother passed. The civil court does not have the jurisdiction to issue a declaratory judgment, and a reading of Judge Stoller’s decision reveals he did not make that finding or ruling.

Respondent reiterates her claim that she tendered 100% of the undisputed rent demand (exh J), and the landlord rejected the payment. Respondent argues the tender of rent due from the commencement of

her tenancy, based on the trial court's decision dated November 5, 2018, was proper and covered any rent arrears petitioner could obtain in a nonpayment case.

In response to petitioner's opposition to the branch of respondent's motion to dismiss claims for any rent increases for the period 2013-2018, respondent states that *Matter of COD, LLC v. NYS DHCR*, 2008 NY Misc Lexis 7756 (S Ct, NY Cty, 2008), a case respondent relies on, is, in fact, a reported decision, contrary to petitioner's claim. Petitioner discounted the precedent of this case, that respondent cites to, by stating that it is an unreported decision and respondent failed to attach a copy. The holding in *In Matter of COD, LLC* involved a DHCR interpretation of the Rent Control regulations, wherein it was held that there can be no rent control MBR increases where the landlord failed to serve RN-26 forms upon the tenant in violation of the applicable rent control regulations. Respondent points out that petitioner fails to rebut her claim that the landlord failed to properly serve those notices on respondent. Respondent's exhibit U evidences that petitioner continued to serve MBR notices on the deceased tenant, Salvatore Doe, who died in 2006, into 2019 and after the date of Judge Stoller's decision after trial. (NYCRR 212-A; 213) Respondent states that the housing court has concurrent jurisdiction with the DHCR. The absence of a DHCR decision disallowing the increases for failure to serve the tenant with the required MBR notices, does not preclude the housing court from determining the increases are improper.

In reply petitioner reiterates its reliance on two cases, which petitioner states hold that in a succession claim to a rent controlled apartment, the successor's rights and obligations commence upon the meeting of the applicable succession criteria. *Golden Mtn. Realty Inc. V. Severino*, 47 Misc3d 141[A](AT, 1st Dept. 2005); *Klein v. NYS DHCR*, 17 AD3d 186, (AD, 1st Dept. 2005) The court in *Severino* held that, "A family member who qualifies merely succeeds to the decedent's tenant's rights if that is his or her choice," solely in reference to the right of a husband, who co-resided with his wife, in their rent controlled apartment. The respondent in *Severino*, was the son of the deceased husband-tenant in the apartment, and his right to the apartment rested on a holding of the trial court, as the landlord commenced a holdover proceeding against the son. The court in *Severino* did not hold that the respondent-son's tenancy commenced upon the death of his father, the tenant of record, where the landlord did not recognize the successor tenant.

The court in *In the Matter of Klein*, an Article 78 proceeding, was faced with the question of whether or not the successor-tenant, whose succession claim was accepted by the landlord, received proper notice of the order of decontrol issued by DHCR. Petitioner's reliance on these two cases does not shift the burden to respondent to establish that her obligation to pay rent does not commence when the tenant of record vacates where, as here, the landlord rejects the succession claim. Petitioner rejected respondent's succession claim and commenced a holdover proceeding to gain possession of the subject apartment resulting in five years of litigation and a lengthy trial. Respondent's right to succeed to the subject apartment, and the creation of a landlord tenant relationship, was established by the decision and order of Judge Stoller in November 2018.

In reply, petitioner restates its reliance on the holding in *In the Matter of Andrew Duell et al, v. Condon*, 84 NY2d 773 (1995), which is misplaced. The language that petitioner quotes from the Court of Appeals' holding in *In the Matter of Andrew Duell et al*, is actually language from the *Severino* case discussing the relationship to the rent controlled tenancy between a husband and wife who co-resided in the

apartment until the wife died. Upon the wife's death, her husband and co-tenant merely succeeds to the tenancy if that is his choice. In *Severino*, the husband was a tenant in his own right when his wife predeceased him, and the Court rejected the landlord's claim that the husband did not properly inherit the rent controlled apartment. Upon the husband's death, the Appellate Term, 1st Dept, affirmed the decision of the trial court, awarding tenancy rights to the decedent's son. The language that petitioner relies on is the Appellate Term's response to the landlord's claim that the respondent's father, the deceased rent controlled tenant, did not properly succeed to the apartment when his wife and co-tenant pre-deceased him years before.

Petitioner states it is not seeking a declaratory judgment regarding respondent's obligation to pay rent dating back to the vacatur of the tenant of record, and it is seeking a final judgment for all rent arrears from the tenant of record's death, including Fuel Pass Along charges and MBR's. Petitioner states that it is merely seeking an order "confirming that Respondent is obligated to pay rent which accrued immediately after her grandmother's passing and prior to Judge Stoller's Decision/Order."

Discussion

The branch of respondent's motion seeking an order compelling petitioner to accept her amended answer, pursuant to CPLR 3012(d), is granted in all respects. The attached amended answer is deemed served and filed. The original answer and the proposed amended answer are nearly identical. The amended answer is offered by respondent in response to the amended petition, which was served without leave of court. Nearly all the months of inactivity in this proceeding are due to the Covid-19 "pause" in housing court, and none of the delay is attributable to respondent. The branch of the motion seeking an order amending the original caption to substitute respondent's name with Jane Doe is granted on consent, and the clerk is directed to reflect this amendment in UCMS.

A nonpayment proceeding can be maintained only where there is a landlord tenant relationship between the parties and must be predicated on an "agreement" between the parties to pay rent. (RPAPL 711[2]) *East Harlem Pilot Block Building IV HDFC Inc v. Diaz*, 46 Misc3d 150(A) (AT, 1st Dept. 2015) Relying on *Strand Hill Assoc v. Gassenbauer*, 41 Misc3d 53, 54-55 (AT, 2nd Dept, 11th & 13th Jud Dists (2013), the Appellate Term in *Diaz* held, "Because a successor in interest is not a tenant until he becomes a party to a lease or rental agreement...and because tenant did not become a party to the lease until after the arrears sought had accrued, a nonpayment proceeding does not lie to recover those arrears." If a respondent is not in privity with the landlord or bound by a lease or rental agreement, and s/he is claiming rights of succession, it is only after the adjudication that the respondent has a successful succession claim that s/he can be added to a lease. *245 Realty Associates v. Sussis*, 170 Misc2d 901, 903 (At 1st Dept. 1996) Although the appellate court in *Sussis* was dealing with the issue of a successor-occupant seeking legal fees, the court held that where the decedent's brother was not a tenant at the time the proceedings were commenced he was not entitled to attorney fees under the terms of the lease.

An occupant, who interposes a succession claim, that is rejected by the landlord, does not create a landlord-tenant relationship with a landlord, nor does it obligate the successor-occupant to pay rent. The petitioner herein rejected respondent's succession defense after receiving documents in discovery and conducting EBT's of respondent and her father, and commenced a licensee holdover proceeding.

After four years of litigation, and a prolonged trial, the court ruled in respondent's favor and held she is the successor tenant to her grandmother's rent controlled tenancy. The trial court held, "...that Respondent has proven on the merits that she had been a family member of the prior tenant and co-resided with the prior tenant at the subject premises for the two years before the prior tenant died. Respondent therefore is entitled to succeed to the prior tenant's tenancy. The Court therefore dismisses the petition with prejudice." *170 Spring Street LLC v. Jane Doe*, L&T 81294/14, (Civ Ct, NY Cty, J. Stoller, 2018) The trial court did not hold that there was a landlord tenant relationship between the parties dating back to the death of respondent's grandmother, nor did the court hold that respondent is responsible for rent that accrued prior to the tenant of record's death, or one day prior to the date of the decision which establishes respondent's tenancy rights to the apartment.

RPAPL 711(2) provides the statutory authority for the commencement of summary non-payment proceedings only where "The tenant has defaulted in the payment of rent, pursuant to the agreement under which the premises are held..." A person who is entitled to succession rights who has not yet signed a lease is not a tenant under the RSC. In fact, "[t]he relationship of landlord and tenant is always created by a contract, express or implied, and will not be implied where the acts and conduct of the parties negative its existence." *WSC Riverside Drive Owners, LLC v. Williams*, L&T 50839/16, (Civ Ct, NY Cty, 2016) It is elementary that a nonpayment proceeding must be predicated on a default in rent owed pursuant to the agreement under which the premise is held. *615 Nostrand Ave, Corp, v. Roach*, 15 Misc3d 1, 3-4, (AT, 2nd Dept., 2006) The successor-in-interest is not yet a tenant, and the relation of landlord-tenant is always created by contract, express or implied, and it will not be implied where the acts and conduct of the parties negative its existence. *615 Nostrand* at 4

Respondent moves for summary judgment in her favor on petitioner's claim for rent arrears that accrued prior to November 5, 2018, the date of the housing court decision holding that she is entitled to succeed to her grandmother's tenancy. Respondent also seeks summary judgment and an order dismissing the petition based on a defective rent demand as petitioner is not entitled to the years of MBR increases and Fuel Pass Along increases it took, rendering the predicate rent demand defective pursuant to RPAPL 711, and RPAPL 702 for the inclusion of non rent charges. Respondent seeks summary judgment on rent arrears that came due after November 5, 2018 based on her tender of rent and rejection and return of those funds by the landlord.

Respondent seeks summary judgment on the issue of MBR increases and Fuel Pass Along charges claimed for the period 2013-2018, following the death of the prior tenant of record until the recognition of respondent's succession claim, based on petitioner's undisputed failure to comply with 9 NYCRR 2201.6[c] by failing to send RN-26 notices to respondent as required by DHCR. An owner may apply for an increase in the MBR on a building-wide basis every two years if it meets the eligibility requirements established by DHCR. An owner's ability to increase the MBR pursuant to DHCR's permission is conditioned on proper notice to the tenant. RER Section 2201.6[c]3 provides that

"No increase in maximum rent pursuant to this section,shall be collectable until the landlord shall have given proper notice thereof to the tenant on a form prescribed by the administrator."

Matter of COD, LLC v. NYS DHCR, 2008 NY Misc Lexis 7756 (S Ct., NY Cty, 2008) When DHCR grants an owner permission to increase the MBR, the owner must serve a specific rent increase notice on the

individual tenant and this notice is known as an RN-26. It is undisputed that petitioner served the notices on the deceased tenant(s), and not on respondent, even through 2019, after Judge Stoller's decision finding that respondent is the rent controlled successor tenant. Petitioner never served an RN-26 notice on respondent, the only occupant of the apartment after the tenant of record died. These facts are not disputed by petitioner.

The court in *COD, LLC* was presented with facts similar to this proceeding. While the successor-occupant was residing in the apartment, the tenant of record was deceased, and the landlord had notice of the successor-in-interest's claim, the landlord continued to serve the RN-26 notices to the deceased tenant. The court found that the landlord was required to notify the occupant-successor directly with RN-26 notices of rent increases for the MBR's to be valid. There are no facts in dispute on this issue of notice for MBR's and Fuel Pass Along increases. Exhibit U contains RN-26 notices all sent to the deceased tenants. Respondent seeks summary judgment on MBR increases and Fuel Pass Along increases from 2013-2018 as it is undisputed petitioner failed to comply with 9 NYCRR 2201.6[c] and failed to send RN-26 notices to respondent. Respondent also seeks an order dismissing the petition as the predicate rent demand is wholly inaccurate throughout and includes non-rent charges in violation of RPAPL 702.

Where there are no triable issues of material fact, it is appropriate to grant summary judgment. *Andre v. Pomeroy*, 35 NY2d 361, 362 (1974) The court may make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact exist. CPLR 409(b) The movant, to make a prima facie showing of entitlement to judgment as a matter of law, must submit evidence sufficient to remove any material issues of fact from the case. *Winegrad v. New York University*, 64 NY2d 851 (1985) There are no material factual disputes in this proceeding regarding rent arrears prior to November 2018. The branch of respondent's motion seeking summary judgment is granted to the extent that the portion of the petition seeking rent arrears through November 4, 2018 is dismissed with prejudice including any MBR or Fuel Pass Along increases. The portion of the petition seeking rent arrears from November 5, 2018 through April 1, 2019 contained in the predicate rent demand, is dismissed without prejudice based on a defective predicate notice. Petitioner failed to serve a proper rent demand pursuant to RPAPL 711 as the monthly rent sued for is wholly inaccurate, and contains non-rent charges in violation of RPAPL 702. This is without prejudice to respondent's affirmative defense(s) of laches, and defenses and counterclaims for breach of the warranty of habitability, constructive eviction, harassment, and attorney's fees. The branch of respondent's motion seeking an order dismissing, with prejudice, the balance of arrears sought in the petition post November 2018 is denied without prejudice as there are factual disputes regarding the amount of the legal rent for those months, and whether respondent's tender of funds covered those months. The portion of the petition seeking rent arrears post November 2018 is dismissed without prejudice to both sides' claims, defenses, and counterclaims. Petitioner's cross motion for summary judgment in its favor pursuant to CPLR 3212 is denied in all respects. This constitutes the decision and order of the court.

DATED: May 5, 2021



Marcia J. Sikowitz, JHC