Civil Court of the City of New York
County of Kings

Index # **LT-309299-20/KI**

1616 PRESIDENT STREET ASSOCIATES, LLC
Petitioner(s)
-against-
Silvester Brathwaite
Respondent(s)

Decision / Order

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

Papers	Numbered
Order to show Cause/ Notice of Motion and Affidavits /Affirmations annexed	_____
Answering Affidavits/ Affirmations	_____
Reply Affidavits/ Affirmations	_____
Memoranda of Law	_____
Other	_____

NYSCEF documents # 1 through 40 were considered in review of this motion.

Upon the foregoing cited papers, the Decision/ Order on the respondent's motion for summary judgment is decided as follows for the following reasons:

Petitioner filed this nonpayment proceeding in December 2020 seeking $4,720.92 in alleged rent arrears for the period June 2020 through November 2020 for this rent stabilized unit. This proceeding was filed during the height of COVID restrictions in the courthouse and respondent filed an initial Covid Hardship Declaration in May 2021. The Hardship Declaration stayed the proceeding from moving forward. See NYSCEF Doc # 4. Counsel for respondent filed a Notice of Appearance in May 2021 and in August 2021 counsel for both sides stipulated that if the parties did not settle before September 15, 2021, respondent's counsel would file an answer on NYSCEF no later than September 30, 2021. During the interim the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (CEEFPA) was further extended, and respondent filed a second Hardship Declaration on September 13, 2021 which stayed the instant nonpayment proceeding through January 15, 2022 (see NYSCEF Doc. No. 7). Immediately prior to the lifting of the stay (January 15, 2022), respondent, by counsel, filed his answer on January 14, 2022. Annexed to respondent's answer was a two attorney out-of-court agreement dated January 14, 2022. The written agreement signed by counsel for both sides stated that any

deposits necessary throughout the duration of legal proceedings between the parties would be kept in an escrow account owned and managed by Brooklyn Legal Services/Legal Services NYC, and that the money shall be released only upon court order or two-attorney agreement between the parties. *See,* NYSCEF Document # 8, page 11.

Respondent's answer raises various defenses, affirmative defenses and counterclaims including allegations of improper petitioner, improper rent demand, rent impairing violations, failure to serve notice of late payment, retaliation, the Tenant Safe Harbor Act (TSHA), rent overcharge, warranty of habitability, order to correct and civil penalties, harassment, and sought attorney's fees. Respondent, who has resided in the unit for over fifty-two years, now moves for summary judgment pursuant to CPLR § 3212(b) on his Rent Impairing Violation defense, per N.Y. Mult. Dwell. Law § 302-a; seeks a 100% rent abatement for the period of June 2020 through May 2022, pursuant to N.Y. Mult. Dwell. Law §302-a; and seeks an award of attorneys' fees. Petitioner opposes respondent's motion in its entirety.

Summary judgment is a drastic remedy where a movant must make a prima facie showing of entitlement to judgment as a matter of law, while submitting sufficient evidence to eliminate any material issues of fact from the case. *See, Winegrad v. New York Univ. Med. Ctr.*, 64 Misc NY2d 851 [1985]). Pursuant to CPLR § 3212(b), summary judgment may be granted as to any cause of action, or part thereof where, upon the proof submitted, said cause of action or defense is proven sufficiently for the court to direct judgment as a matter of law. Respondent moves for summary judgment as to his rent impairing violation defense pursuant to NY Mult. Dwell. Law § 302-a, and seeks an order for a 100% rent abatement for the period of June 1, 2020 through May 3, 2022. A tenant is entitled to an abatement of rent that has been withheld if there are rent-impairing violations in the tenant's apartment or in common areas of the building, if HPD rent-impairing violations have been on record and uncorrected for a minimum of six months and where a landlord has had notice of such violations. Pursuant to Multiple Dwelling

Law § 302-a(3)(a) no rent can be collected by the owners for the period that the violation remains uncorrected after the expiration of the six-month period. *See, Food First HDFC Inc v. Turner*, 69 Misc 2d 1202(A) (NY Civ Ct, 2020) (In *Food First HDFC Inc*, tenants were granted summary judgment on their MDL 302-a defense where they "fulfilled every condition to the letter of the statute." The landlord's position that there was no affidavit in support from respondent-tenants and that conditions were not in the tenants' apartment and that the tenants denied access was unpersuasive to the court. The court in *Food First* granted summary judgment in the tenant's favor based on tenant's rent impairing violation defense and awarded her a 100% rent abatement for the period beginning six months after the notice of violation was issued and until the violation was certified as corrected by HPD.) Respondent seeks the same remedy here and asserts that the relief he seeks is for a nearly identical rent impairing violation.

MDL § 302-a(3)(c) requires that to raise the defense of a rent impairing violation, "the resident must "affirmatively plead and prove the material facts under subparagraph a, and must also deposit with the clerk of the court in which the action or proceeding is pending at the time of filing of the resident's answer the amount of rent sought to be recovered in the action." In this proceeding there was at least one building-wide rent impairing violation in the common areas of respondent's building, HPD Violation Number 13170794, which was subsequently corrected as of May 3, 2022. The violation stated, as taken verbatim from the HPD violation report was: "M/D LAW PROPERLY FIRE RETARD IN ACCORDANCE WITH THE RULES AND REGULATIONS OF THIS DEPARTMENT THE CELLAR CEILING AT NORTHEAST." See, NYSCEF Doc. #21 HPD's notice of violation. Respondent asserts that he has met the required summary judgment standard by providing this Court with HPD records documenting the relevant facts necessary to direct judgment as a matter of law, specifically the existence and duration of the qualifying rent impairing violation. Respondent seeks a 100% rent abatement pursuant to NY Mult. Dwell. Law § 302-a, as the violation in question existed in a common area

of the subject building, becoming "ripe" under NY Mult. Dwell. Law § 302-a on January 17, 2020 (six months after the date reported in July 2019), and, upon information and belief, was not certified corrected until May 3, 2022. During oral argument it was confirmed that the HPD rent impairing violation was certified as corrected as of May 3, 2022. Petitioner did not dispute these facts in their opposition papers nor during oral argument, yet petitioner alleges in its opposition papers that the HPD printout attached to respondent's moving papers is not in admissible form and cannot be considered for the truth of the matters stated therein.

It is well established that pursuant to NY Mult. Dwell. Law § 328(3), HPD's database is prima facie evidence "of any matter stated therein" and the courts are to take judicial notice of it "as if [the] same were certified." Accordingly, this court takes judicial notice of the annexed HPD documents, which are not required to be certified. *See, Dept. of Hous. Preserv. & Dev. Of the City of NY v. Knoll*, 120 Misc 2d 813, 467 N.Y.S.2d 468 (App. Term, 2nd Dep't 1983). Also, see Exhibit H, NYSCEF Doc #21 HPD Notice of Violation of a rent impairing violation. Respondent correctly points out that petitioner makes no argument and provides no evidence to dispute that the rent impairing violation existed during the relevant period of June 2020 through May 3, 2022, or that they were corrected earlier than HPD certified them. Accordingly, those allegations are undisputed and there is no disputed issue of fact as to the HPD rent impairing violation.

Respondent's counsel asserts that respondent properly interposed his defense under NY Mult. Dwell. Law § 302- a(3)(c), by affirmatively pleading the defense in his answer and also by depositing the amount of alleged arrears sought in the petition with Brooklyn Legal Services' escrow fund, per the written agreement signed by counsel for both parties on January 14, 2022, stating that any deposits necessary throughout the duration of legal proceedings between the parties would be kept in an escrow account owned and managed by Brooklyn Legal Services/Legal Services NYC, and that the money shall be released only upon court order or

two-attorney agreement between the parties. *See*, NYSCEF Document # 8, page 11 of 11. Petitioner acknowledges that while there was a two attorney out-of-court agreement for funds to be kept in escrow by Legal Services, that the agreement was solely for the purpose of insuring funds were available at the conclusion of numerous summary proceedings involving multiple occupants in the same building in which this respondent resides and petitioner asserts there was never an agreement to disregard a condition precedent to raising a MDL §302-A affirmative defense and no agreement to eliminate the legislature's requirement that funds be deposited with the Clerk of the Court in order to raise such a defense.

The petition sought $4720.90 and respondent's counsel annexes proof of escrow deposits for respondent Braithwaite totaling $4720.92. See, Exhibit D, NYSCEF Doc # 18 which shows Legal Services for New York City Receipts for Escrow Funds with receipt #137918 showing a deposit of $4720.92 for respondent Sylvester Braithwaite dated January 18, 2022.

Petitioner asserts that respondent's answer raising a rent impairing violation defense is untimely and improperly before this court, relying on a two-attorney stipulation entered in August 2021 with the previous owner, which states that "[i]f parties do not settle on or before September 15, 2021, Respondent agrees to file their answer to NYSCEF no later than September 30, 2021." See, NYSCEF Doc #6. Respondent's counsel competently explained the reason for the delay was a result of the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (CEEFPA) being further extended prior to the deadline to file an answer under the August 2021 stipulation, and a filing of a second Hardship Application which effectively stayed this proceeding through January 15, 2022 (see NYSCEF Doc. No. 7.). Thereafter, on January 14, 2022, respondent filed his answer by counsel raising a rent impairing defense, along with other defenses, affirmative defenses, and counterclaims. (See NYSCEF Doc. Nos. 8.) See also RPAPL § 732. The court finds that due to permissible Covid-related stays and the filing of two hardship

declarations, respondent timely filed his answer immediately before expiration of the hardship stay and that the answer filed on January 14, 2022 is properly before this court.

Petitioner, in its opposition papers, asserts that respondent has failed to meet all requirements under NY Mult. Dwell. Law § 302-a (3) (c) to raise a rent impairing violation defense, specifically the requirement that the tenant deposit with the clerk of the court in which the action or proceeding is pending at the time of filing of the resident's answer, the amount of rent sought to be recovered in the action. MDL 302-a states that "to raise a defense under subparagraph a in any action to recover rent or in any special proceeding for the recovery of possession because of non-payment of rent, the resident must affirmatively plead and prove the material facts under subparagraph a, and must also deposit with the clerk of the court in which the action or proceeding is pending at the time of filing of the resident's answer the amount of rent sought to be recovered in the action or upon which the proceeding to recover possession is based, to be held by the clerk of the court until final disposition of the action or proceeding at which time the rent deposited shall be paid to the owner, if the owner prevails, or to be returned to the resident if the resident prevails. Multiple Dwelling Law § 302-a[3][c]." Generally, an affirmative defense based on the existence of rent impairing violations, upon the express language of the statute, can only be raised by those who have deposited with the clerk of the court all rent sought in a proceeding, at the time of filing the answer.

Here respondent relies on a two-attorney out of court agreement that provided for deposit of the rent into the tenant's attorney's escrow account as the exception to the rule that tenants who seek an abatement of rent under MDL 302-a for "rent impairing violations" must deposit with the clerk of the court the rent sought to be recovered. It is undisputed that the two-attorney agreement signed by counsel for both parties and annexed to respondent's answer provided that "any deposits necessary throughout the duration of legal proceedings between said parties shall be kept in an escrow account owned and managed by Brooklyn Legal Services / Legal Services

NYC. Money shall be released only upon court order or two-attorney agreement between the parties." However, a review of the specific language of the two-attorney out-of-court agreement is relevant here.

Petitioner opposes respondent's motion for summary judgment in its entirely. A party opposing a motion for summary judgment must lay bare and reveal its proofs and show that at least some factual issue exists. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented." *See, Sillman v. Twentieth Century-Fox Film Corp*., 3 NY2d 395, [1957]. Petitioner alleges the escrow funds were "for the purpose of insuring funds are available at the conclusion of numerous summary proceedings involving occupants at the building in which this respondent resides" and not for raising a rent impairing violations defense. Respondent asserts this is the exact purpose for which the funds were being held, as deposits made in conjunction with raising a rent impairing violation defense pursuant to NY Mult. Dwell. Law § 302-a are dispersed at the conclusion of the summary proceeding, either to the tenant or to the landlord depending on the outcome of the defense. Respondent argues petitioner cannot now try to pick and choose when and where the two-attorney agreement may be enforced. While the document relied on by respondents is not a full stipulation of settlement of this case, nor is it a stipulation so-ordered by this court, it is a two-attorney agreement, negotiated by counsel for both sides and it is well settled by the courts that stipulations of settlement entered into by attorneys for both sides "are favored by the courts and not lightly cast aside." *See, Ng v Chalasani*, 51 Misc 3d 134(A) (App. Term, 2nd Dep't 2016) (The court in *Ng* affirmed the lower court's holding denying tenant's motion to vacate a two-attorney stipulation that had been entered into after lengthy negotiations with counsel for both sides.) Courts have held where two attorneys stipulated that the rent would be held in the tenant's escrow account, the tenant was not prohibited from raising a NY MDL § 302-a defense for failing to deposit rent

with the clerk of the court. *See, Federal Home Loan Mort Corp v. Quezada*, 2/23/94, NYLJ, 22, col 6 (Civ Ct NY Co.)

Generally where a tenant raises a NY MDL § 302-a or a NY MRL § 305-a defense, the statute requires the tenant to deposit all rent sought by the landlord with the clerk of the court in which the action or proceeding is pending, less any payments made for repairs, or payments to landlord along with the answer and generally such affirmative defense of rent forfeiture under NY MDL § 302-a will be stricken where a tenant fails to deposit rent at the time of filing the answer. *See, Sohn v. Brennan*, 4/6/92, NYLJ 31, col.1 (AT 1st Dept), Claude *v. Williams*, 12/23/86, NYLJ 6, col 5 (AT 1st Dept). However, as stated above, there have been exceptions where the landlord and tenant stipulate to some other arrangements for deposit of the rent. In some instances, the court has held a tenant will not be barred from raising the NY MDL § 302-a or NY MRL § 305-a defense. *See, Federal Home Loan Mort Cor v. Quezada,* 2/3/94, NYLJ 22, col 6 (Civ Ct NY Co) (In *Federal Home Loan* both attorneys for landlord and tenant stipulated that the rent would be held in the tenant's attorney's escrow account and the court held that the tenant was not barred from raising a NY Mult Dwell Law §302-a defense for failing to deposit rent in court.) A review of the timeline in *Federal Home* is relevant. Petitioner in *Federal Home* asserted that respondent had failed to deposit the claimed rent with the clerk of the court as required by Section 302-a(3)(a) of the Multiple Dwelling Law. However, the court found petitioner specifically waived the deposit requirement pursuant to its two-attorney stipulation dated November 5, 1993, in which it was agreed that: "Respondent will pay petitioner …. Two month's rent on or before Nov. 10, 1993, without prejudice to respondent's claim for breach of his warranty of habitability or pursuant to Multiple Dwelling Law 302-a." The two-attorney stipulation also agreed that "Respondent's attorneys shall hold the balance of the funds in escrow pending a determination by the court of the issues in this nonpayment proceeding." The answer in *Federal Home* explicitly plead the MDL Sec.302-a affirmative defense and was dated August

20, 1993, and the relevant stipulation was entered into by two attorneys less than three months after the answer was filed, dated Nov. 5, 1993; petitioner in the two-attorney stipulation included language specifically agreeing to accept funds without prejudice to the MDL 302-a defense. There the court found the stipulation, which was entered into by counsel for both sides, clearly substituted respondent's payment of two months' rent directly to petitioner and his deposit of the balance of the funds in his attorney's escrow account, to be held therein subject to the Court's determination of the issues in those proceedings, as a substitute for the deposit of said funds with the Clerk of the Court. It is instructive that two-attorney stipulation in *Federal Home* explicitly stated that the payment was without prejudice to respondent's claim pursuant to Multiple Dwelling Law Section 302-a. The court there held that "Parties, particularly when represented by counsel, should where possible be free to chart their own course during a proceeding. Here, all the parties obviously found the actual payment of two months' rent to petitioner plus the deposit of the balance of petitioner's claim in respondent's attorney's escrow account preferable to a deposit in court. This in no way conflicts with the purpose of MDL Sec. 302-a; the parties, represented by counsel, were free to make this choice." There the court held that petitioner's attorney, having entered a two-attorney stipulation, cannot be heard to complain of its effect, and deprive respondent his MDL Sec. 302-a defense because he deposited the funds in escrow with his attorney rather than with the Clerk of the Court pursuant to MDL Sec. 302-a(3)(c). Here the two-attorney out of court agreement between the parties agreeing to the deposit of funds into respondent's attorneys' escrow account was entered into separately from the filing of respondent's answer raising a rent-impairing violation affirmative defense and no reference was made to the MDL Sec. 302-a(3)(c) defense in the two-attorney agreement at issue in this present proceeding, unlike the two-attorney stipulation in *Federal Home*, *supra*, which referenced and acknowledge respondent's MDL Sec 302-a defense in the two-attorney stipulation.

Petitioner does not deny the existence of the rent impairing violations in question for over six months and has raised no factual issue regarding its existence uncorrected for a period of longer than six months. Petitioner seeks to challenge the admissibility of the HPD printout. Petitioner further challenges the timeliness of the answer and as noted above, this court finds that Covid stays, and hardship applications extended any previous stays in effect and that respondent timely filed his answer immediately before expiration of all Covid-related stays. Petitioner asserts that the two-attorney out-of-court agreement consenting to the deposit of rent in respondent's attorney's escrow account is insufficient and requires denial of the motion for summary judgment. The court finds that the two-attorney agreement entered in this proceeding made no reference to the MDL defense and was negotiated separately than respondent's answer raising a rent-impairing violation. These facts are unlike the parties in *Federal Home Loan Morg Corp, supra,* where the two-attorney stipulation clearly contemplated the deposit into an attorney account with full knowledge of a rent impairing violation affirmative defense previously raised in the answer and referenced in said stipulation. Accordingly, this court is constrained to deny respondent's motion for summary judgment as respondent has failed to deposit said funds with the clerk of the court and only shown the deposit of funds sought in the petition into respondent attorney's escrow account.

Here due to Covid-19 delays and respondent's own actions the proceeding was stayed for approximately fourteen months after the filing of the petition, ultimately delaying respondent's filing of his answer asserting an MDL 302-a affirmative defense. Generally, a respondent would file an answer at the time they appear in a nonpayment proceeding such as this, and the amount due to be deposited would be the petition amount where an answer is timely filed. Here due to permissible stays of this proceeding for approximately fourteen months post filing of the petition, respondent delayed the filing of his answer asserting his MDL 302-a defense. Respondent, in his reply, seeks in the alternative, if the court requires that the deposit that is currently in escrow be

made with the clerk of the court, that the court grant him time to withdraw the monies from Brooklyn Legal Services' escrow fund to then deposit with the clerk of the court. Respondent in support of his alternative request for relief relies on *46 E. 91st St. Assoc. v. Bogoch*, 23 Misc. 3d 36, (AT 1st Dept, 2009). There the Appellate Term granted respondent's motion seeking to file an amended answer, asserting an MDL §302-a defense, conditioned upon a deposit of the amount allegedly due at the time of the tenant's motion to amend its answer seeking to add an MDL defense, and not the amount alleged in the petition. Likewise, this court finds that the statute requires a deposit of the amount due at the time of the filing of respondent's answer, not the amount sought in the petition. Accordingly, this court grants respondent's alternative relief and requires the deposit of funds due through the date of the answer, filed in January 2022.

Respondent is to deposit $11,787.63 in funds allegedly due through the date of his answer filed in January 2022 within fifteen days of the date of this order with the Clerk of the Court and submit proof of said deposit via NYSCEF. The court calculated the above sum using the amount sought in the petition of $4720.92, for the period June 2020 through November 2020 based on a monthly rent of $785.19, in addition to $7066.71, representing rent for the period December 2020 through August 2021, based on a monthly petition rent of $785.19. The amount to deposit excludes ERAP payments received on respondent Braithwaite's behalf for the remaining period at issue of September 2021through January 2022 (the filing of the answer). Furthermore, it is undisputed that ERAP issued payments on behalf of Mr. Braithwaite totaling $11,508.30 for the period of September 2021 through November 2022. See, NYSCEF Doc. #40 The amount to be deposited is to be adjusted if there were any legal rent increases during this period and/or rent payments previously credited to respondent's rent ledger, but not reflected above. A tenant cannot recover rent already voluntarily paid to the landlord during a period when the rent-impairing violation existed. NY MDL § 302-a(3). During oral argument it was confirmed by counsel for both sides that ERAP paid $11,508.30 for the period noted above (which includes a

portion of the period when the violation existed) and that respondent has subsequently been paying his ongoing use and occupancy.

This decision and order is without prejudice to the balance of the parties claims, defenses and/or counterclaims and without prejudice to any subsequent motion practice. A copy of this order to be uploaded to NYSCEF and a courtesy copy to be emailed to the counsel for both sides.

Date: September 8, 2023

Hon. Juliet P. Howard
Housing Court Judge