

**Hess v Pinillos**

2024 NY Slip Op 33998(U)

November 1, 2024

Civil Court of the City of New York, Queens County

Docket Number: Index No. L&T 305772-24

Judge: Logan J. Schiff

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This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF QUEENS: HOUSING PART D

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JOSEPH RODRICK HESS

Petitioner-Landlord,

Index No. L&T 305772-24

-against-

**DECISION/ORDER**

ERIKA PINILLOS, et al.

Respondents-Tenants.  
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Present: Hon. Logan J. Schiff  
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Respondent’s motion to amend her answer and upon amendment for summary judgment (mot. seq. 1): NYSCEF 6-12.

Upon the foregoing cited papers, the Decision/Order is as follows:

Petitioner filed the instant nonpayment proceeding in April 2024 seeking possession of an unregulated apartment based on Respondent’s alleged default pursuant to a “written rental agreement made on or about February 15, 2023” (*see* NYSCEF 2 at ¶ 2). The Petition seeks rental arrears for the period of December 2023 through March 2024. Respondent, through counsel, now moves to interpose an amended answer and upon amendment for summary judgment arguing, *inter alia*, that there was no agreement to pay rent in effect upon commencement of this proceeding that would give rise to a nonpayment proceeding pursuant to RPAPL 711(2), as the parties’ last lease expired in February 2024 prior to commencement and was not renewed.

Petitioner does not oppose the branch of the motion seeking to amend, however it opposes the request for summary judgment. Petitioner appears to concede in its opposition papers, and certainly did during oral argument on October 30, 2024, that the parties’ lease expired in February 2024, and was not renewed prior to commencement of this proceeding in April 2024, nor does it dispute that it demanded and sued for the full months’ of February and March 2024, when it filed the Petition dated April 2, 2024 on April 8, 2024. Nonetheless, Petitioner argues that the parties’ tenancy continued on a month-to-month basis pursuant to RPL 232-c, presumably insofar as Petitioner received HRA shelter checks in the months of March and April 2024 after lease expiration in February 2024, which Petitioner inadvertently failed to credit on the rent demand and Petition (and which Petitioner argues was a *de minimis* non-prejudicial error).

It is axiomatic that RPAPL 711(2) requires "an existing unexpired agreement to pay rent when the proceeding was commenced" (*Shahid v Carillo*, 859 NYS2d 899 [App Term, 2d Dept, 2d & 11th Jud Dists 2008]); *see also Fairfield Beach 9th, LLC v Shepard Neely*, 182 NYS3d 486 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2022] ["[T]here must be a rental agreement in effect at the time the proceeding is commenced pursuant to which rent is due and owing."]. In the absence of a valid contract to pay rent as of commencement, a nonpayment proceeding will not lie (*see 41 Kew Gardens Road Assocs., LLC v Munarov*, 2024 NY Slip Op 51165[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2024]; *Reno Capital, LLC v Alvillar*, 2024 NY Slip Op 51202 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2024]; *Foxwood House Assoc. LLC v Xu*, 82 Misc. 3d 925 [Civ Ct, Queens Co 2024]).

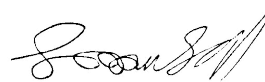
Insofar as an ongoing rental agreement is a prerequisite to maintenance of a nonpayment proceeding, the nature of such agreement must be pled in sufficient detail in the petition, which must state, among other things, "the interest of the tenant and the facts upon which the proceeding is based" (*Migliaccio v Childs*, 118 NYS3d 915 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019], citing RPAPL 741); *WFHA Rockaway L.P. v Stevens*, 81 Misc.3d 433 [Civ Ct, Queens Co 2023]). A petition containing a material omission is subject to dismissal, as it is incumbent on the landlord to allege all of the necessary core facts "so that tenant and the court [are] adequately apprised of the basis of landlord's claim" (*Aero Mgt. v Moghadasian*, 160 NYS3d 741 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists]); *582 Gates, LLC v Farmer*, 199 NYS3d 807 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019]; *Clark v Wallace Oil Co.*, 284 A.D.2d 492 [2d Dept 2001]).

Here, the court finds that even assuming, *arguendo*, that a month-to-month tenancy was created upon the expiration of the parties' lease, the failure by Petitioner to plead the nature of the parties' rental agreement in the Petition, which incorrectly alleges that Respondent is in possession pursuant to a "written rental agreement," is a material omission that warrants dismissal on motion in the absence of a cross-motion to amend (*see Foxwood House Assoc. LLC v Xu*, 82 Misc. 3d 925 [Civ Ct, Queens Co 2024]; *Aero Mgt. v Moghadasian*, 74 Misc 3d 132[A] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2022]; *Jamaica Seven v Villa*, 67 Misc.3d 138[A] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2020]).

The court further notes that even were the court to allow amendment to plead the existence of an alleged month-to-month tenancy, the mere tender of third party HRA shelter payments following lease expiration, in the absence of a more unequivocal agreement to pay rent for any ensuing months, is insufficient to create an ongoing rental agreement for purposes of a nonpayment proceeding under RPAPL 711(2) (*see Foxwood House Assoc. LLC v Xu*, 82 Misc. 3d 925 [Civ Ct, Queens Co 2024]). Petitioner's remedy, if it be so advised, is to commence a holdover proceeding.

Accordingly, the foregoing reasons Respondent's motion to amend her answer and for summary judgment is granted, and the Petition is dismissed without prejudice. This is the decision and order of the court.

Dated: November 1, 2024  
Queens, NY



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HON. LOGAN J. SCHIFF  
Judge, Housing Court