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

109TH AFFORDABLE HOUSING L.L.C.

Petitioner,

-against-

MATTHEW BECK, DENISSE BECK

Respondents.

LT-312349-23/NY

DECISION AND ORDER

Motion Seq. 2

HON KAREN MAY BACDAYAN, JHC

Novick Edelstein Pomerantz (Marybeth Hotaling, Esq.), for the petitioner
Manhattan Legal Services (Tycell M. Harris, Esq.), for respondent-Matthew Beck

Recitation as required by CPLR 2219 (a), of the papers considered in review of this motion by NYCEF Doc No. 10-28.

This is a summary eviction proceeding predicated upon respondent's failure to pay rent due under a "WRITTEN lease agreement wherein respondents promised to pay to landlord or landlord(s) predecessor as rent $1,975.00 each month in advance on the 1ST day of each month." (NYSCEF Doc No. 1, petition ¶ 2.) The premises are pleaded as exempt from any form of rent regulation. (*Id.* ¶ 7.) Service of the notice of petition and petition was completed on July 31, 2024. (NYSCEF Doc No. 3, affidavit of service; Real Property Actions and Proceedings Law ("RPAPL") § 735 [2] [b].) Respondents failed to answer the petition or otherwise appear in court, and a default judgment and warrant were issued.[1] Upon receipt of a marshal's notice of eviction, respondent filed an order to show cause to stay execution of the warrant of eviction. (NYSCEF Doc No. 8, order to show cause [sequence 1].) Subsequently, respondent retained Manhattan Legal Services. Respondent then moved to vacate the default judgment and to serve and file an amended answer asserting as his first defense "lack of lease." (NYSCEF Doc No. 10,

[1] Hereinafter, the only "respondent" to whom the court refers is Matthew Beck.

notice of motion [sequence 2]; NYSCEF Doc No. 14, proposed amended verified answer ¶¶ 13-17.)[2]

Respondent's excuse for not responding to the court papers is that he "was traveling to Nashville, Tennessee to visit close friends when I was served with the legal papers. I boarded a flight to Tennessee on July 19, 2023 and I did not return until August 22, 2023." (NYSCEF Doc No. 12, Beck affidavit ¶ 3.) Respondent supports this statement with copies of his digital itinerary for his trip. (NYSCEF Doc Nos. 16-17, respondent's exhibits C and D, trip itineraries.) Respondent states that he did not know what to do when he returned to the subject apartment and discovered the court papers. (NYSCEF Doc No. 12, Beck affidavit ¶ 5 ["After returning and seeing the court documents, I was not sure what to do since I missed the deadline to come to court and I thought that I would receive another court date. I believed there was nothing I could do until then. . . . At the time, I did not know I could file an [o]rder to [s]how [c]ause."]) Additionally, respondent contends they have several meritorious defense to the proceeding, most relevant to the instant decision/order, that there was no lease in effect at the time the proceeding was commenced. (NYSCEF Doc No. 13, respondent's mem of law at 5-6.)

At a conference held on the record on November 6, 2023, the court discussed the possibility of dismissing this proceeding pursuant to CPLR 409 (b) as it is undisputed that there was no "written agreement" in effect at the time the proceeding was commenced as pleaded in the petition. (NYSCEF Doc No. 1, petition filed June 21, 2024; RPAPL 711 [2].) The parties entered into a briefing schedule to enable petitioner to submit opposition to the immediate motion. Oral argument was held on January 22, 2024. The parties were given three days to finalize settlement discussions which ultimately did not bear fruit. The decision was reserved.

DISCUSSION

Vacatur of the Default Judgment

CPLR 5015 (a) (1) provides that a court may relieve a party from a judgment upon the ground of "excusable default." A party seeking relief under this statutory provision "must demonstrate both a reasonable excuse for the default and a meritorious defense (internal citations omitted)." (*Aetna Life Ins. Co. v UTA of KJ Inc.*, 203 AD3d 401, 401 [1st Dept 2022].)

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[2] Respondent also seeks to amend the answer to include defenses and counterclaims of unlawful deregulation and fraudulent overcharge, lack of standing, failure to plead proper regulatory status, breach of the warranty of habitability, an order to correct, and attorneys' fees.

It is true that respondent does advance a specific denial of service that would meet the burden of raising a personal jurisdiction defense warranting a traverse hearing. However, the standard for demonstrating a reasonable excuse for failing to appear under CPLR 5015 (a) (1) is not as rigorous as when arguing that personal jurisdiction was never obtained "and includes circumstances where a party simply did not receive notice and law office failure." (*EVBD LLC v John Doe et al.*, Civ Ct, Queens County, July 12, 2019, Guthrie, J., index No. LT-51426/19, citing *Donnelly v Treeline Companies*, 66 AD3d 563, 564 [1st Dept 2009], and *Latha Restaurant Corp. v Tower Ins. Co.*, 285 AD2d 437 [1st Dept 2001].) Moreover, "there exists a strong public policy in favor of disposing of cases on their merits (internal quotation marks and citation omitted)," rather than on default. (*Gecaj v Gjonaj Realty & Mgt. Corp.*, 149 AD3d 600, 602 [1st Dept 2017.]) Here, the lack of any discernible willfulness on respondent's part, and respondent's sworn, supported statement that he was not physically in the state of New York when service of the notice of petition and petition was effectuated and completed, warrant vacatur of the default judgment. "A determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the court (internal citation omitted)." (*38 Holding Corp. v City of New York*, 179 AD2d 486, 487 [1st Dept 1992].) Accordingly, the judgment and warrant are vacated.

Can a Nonpayment Proceeding Commenced Pursuant to RPAPL 711 (2) Be Maintained Against a Month-to-Month Tenant as Defined by Real Property Law § 232-c?

As this court has previously held, the law in the First Judicial Department is clear that for a landlord to commence a summary eviction proceeding pursuant to RPAPL 711 (2), it must be based upon an agreement to pay rent.

The RPAPL provides that a nonpayment proceeding may be maintained against a tenant when:

> "The tenant has defaulted in the payment of rent, *pursuant to the agreement under which the premises are held*, and a written demand of the rent has been made with at least fourteen days' notice requiring, in the alternative, the payment of the rent, or the possession of the premises, has been served upon [them] as prescribed in section seven hundred thirty-five of this article (emphasis added)." (RPAPL 711 (2).)

RPL § 232-c states:

> "Where a tenant whose term is longer than one month holds over after the expiration of such term, such holding over shall not give to the landlord the option to hold the tenant for a new term solely by virtue of the tenant's holding

> over. In the case of such a holding over by the tenant, the landlord may proceed, in any manner permitted by law, to remove the tenant, or, if the landlord shall accept rent for any period subsequent to the expiration of such term, then, unless an agreement either express or implied is made providing otherwise, the tenancy created by the acceptance of such rent shall be a tenancy from month to month commencing on the first day after the expiration of such term."

In 1969, 10 years after RPL § 232-c was enacted, *Jaroslow v Lehigh Valley R. Co.*, 23 NY2d 991 (1969) parsed the meaning of the statute. Notwithstanding that *Jaroslow* did not involve a summary eviction proceeding commenced pursuant to RPAPL 711 (2), *Jaroslow* provides guidance and comports with more recent First Department caselaw. In *Jaroslow*, the Court of Appeals held that if no rent is accepted after the end of the lease term, then no month-to-month tenancy is created. The *Jaroslow* court held that "[an] action for nonpayment of rent, based on a notice purporting to fix a rent, never agreed upon by tenant and never paid by tenant, does not lie, there being no tenancy in fact or at law obligating the tenant for such rent." (*Jaroslow*, 23 NY2d at 993.) In other words, rent must be tendered by the tenant and accepted by the landlord after the expiration of a lease term in order to create a month-to-month tenancy.

In *120 Bay St. Realty Corp. v City of New York*, 44 NY2d 907 (1978), the plaintiff's lease term had expired without the City's formal exercise of the lease renewal option, although the plaintiff continued in possession pursuant to a holdover provision in the lease. (*See 120 Bay St. Realty Corp.*, 59 AD2d 527, 528-529 [2d Dept 1977, Shapiro, J., dissenting], *revd* 44 NY2d 907 [1978].) The Court of Appeals made a clear distinction between an extension of a lease term and an extension of a tenancy as a month-to-month tenant, observing that "defendant occupies the subject premises as a month-to-month tenant *rather than* as a tenant under a valid and existing lease (emphasis added)." (*120 Bay St. Realty Corp.*, 44 NY2d at 909.)

Subsequent Appellate Division, First Department case law, discussed *infra*, is consistent with *Jaroslow* and *120 Bay Street Realty Corp.* and advises that while a month-to-month tenancy is created by the acceptance of rent in any given month, a month-to-month tenancy is just that: a tenancy from month *to* month. Put another way, a tenancy created by the payment of rent for the month in which rent is paid expires at the end of that month and can only be renewed by the payment of rent the next month.

Forty-two years after *Jaroslow* was decided, the Appellate Division, First Department held in *Bleecker St. Tenants Corp. v Bleeker Jones LLC*, 65 AD3d 240, 245–246 (1st Dept

2009), *revd on other grounds*, 16 NY3d 272 (2011), that it is improper to maintain a nonpayment proceeding against an unregulated month-to-month tenant for rent not paid after the end of any given month, because "each month is a *new term for a new period*, each a *separate and new contract* (emphasis added, internal citations omitted)." In other words, when a month-to-month tenancy is created by the acceptance of rent at the end of a lease for a fixed term, *see Jaroslow* and *120 Bay St. Realty Corp.*, that month-to-month tenancy expires at the end of the month. A new agreement is created *only* by paying rent on or about the first of the next month, and, if no rent is paid, there is no longer a valid contract under which to sue for rent.[3] Practically speaking, it follows that a landlord whose tenant becomes a month-to-month tenant and then ceases to pay rent is relegated to a summary holdover proceeding based on the expiration of a term for a definite time.

In *N. Shore Community Servs., Inc. v Community Dr. LLC*, 120 AD3d 1142 (1st Dept 2014), the court found that the language in the lease negated the formation of a month-to-month tenancy and was an example of what the legislature meant by the phrase "unless an agreement either express or implied is made providing otherwise." (RPL 232-c.) The court held that the lease which comprised certain language was "such an agreement." (*N. Shore Community Servs., Inc*, 120 AD3d at 1143.) The lease specifically negated recognition of a month-to-month tenancy at lease expiration and provided that "upon plaintiff's default of its obligation to surrender the premises at the end of the lease term, plaintiff's continued occupation of the premises, with or without defendant's consent or acquiescence, will be treated as a tenancy at will and 'in no event'

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[3] *Bleecker Jones* involved a lease provision which allowed a lease renewal option to be exercised during the lease term and further provided that the tenant shall "remain in possession as a month-to-month tenant," until the landlord gave written notice of the option to renew, at which point the tenant would have 60 days to act. *Bleecker St. Tenants Corp.*, 65 AD3d at 242 (internal quotation marks omitted.) The Court of Appeals reversed the Appellate Division and held that as "the parties agree that, under these [lease] provisions, a renewal option could be exercised even after the original lease term had expired, during [one of] the month-to-month tenancies resulting from the absence of written notice" without violating the rule against perpetuities. *Bleecker St. Tenants Corp.*, 16 NY3d at 275. Because each separate, month-to-month tenancy is a contract unto itself for which the original lease provided, it follows that exercising the lease option during a month in which the tenant had created a month-to-month tenancy as set forth in the lease, could satisfy the requirement that the option be exercisable during the lease term until after expiration of 60 days' written notice from the landlord that the tenant must exercise the option. *Id.* at 278. The *Bleecker Jones* court noted that the lease options at issue were "not inconsistent with the purpose of the rule against perpetuities because they continue the tenant's possession of the property without interruption[.]" So long as the lease options existed (which they did until the landlord gave 60 days' notice and the tenant failed to act), "the tenant would remain a tenant, lawfully in possession of the property, at least on a month-to-month basis." *Bleecker St. Tenants Corp.*, 16 NY3d at 278.

a tenancy from month to month." (*Id.*) Thus, plaintiff's argument that a month-to-month tenancy was created by the tender and acceptance of rent was refuted by the express language in the lease. Here, there is no such language apparent in respondent's expired lease. (NYSCEF Doc No. 15, respondent's exhibit B, respondent's expired lease.)[4]

More apropos authority can be found in Appellate Term, First Department decisions which, unlike the Court of Appeals and Appellate Division, First Department decisions discussed *supra*, involve RPAPL 711 (2) and the requirement that a nonpayment proceeding may be maintained against a tenant *pursuant to the agreement under which the premises are held.*

Most recently in *6 W. 20th St. Tenants Corp. v Dezertzov*, 75 Misc 3d 135 (A), 2022 NY Slip Op 50529 (U) (App Term, 1st Dept 2022), cited by respondent, the court held, "[a]lthough the petition alleged the existence of a written lease between the parties, petitioner admitted at trial that it was not in possession of any proprietary lease, share certificate, transfer agreement or other direct evidence of any lease agreement with respondents[.]" (*6 W. 20th St. Tenants Corp.*, 2022 NY Slip Op 50529 [U], *2.) The decision contains no analysis of month-to-month tenancies as, apparent from the trial court decision, the issue never arose. Petitioner attempted at trial to prove a lease agreement through circumstantial evidence which the trial court found to be "inconsistent" and "unreliable." (*6 W. 20th St. Tenants Corp. v Dezertzov*, 71 Misc 3d 1226 [A], *10 [Civ Ct, New York County 2021].) In dismissing the proceeding, commenced pursuant to RPAPL 711 (2), for petitioner's failure to prove its *prima facie* case, the trial court cited to *Stern v Equitable Trust Co. of NY*, 238 NY 267, 269 (1924), for the proposition that "[t]he relation of landlord and tenant is always created by contract, express or implied, and will not be implied where the acts and conduct of the parties negative its existence (internal citation and quotation marks omitted)." (*Id.*, *2.) The trial court noted that "[p]ursuant to RPAPL 711 (2), a nonpayment proceeding must be based on a default in the payment of rent pursuant to an agreement under which the premises are held (internal quotation marks omitted)." (*Id.*) In affirming the decision, the Appellate Term also held that "[a] nonpayment proceeding may only be maintained to collect rent owed pursuant to an agreement between the parties, express or implied," citing to *West 152nd Assoc., L.P. v Gassama*, 65 Misc 3d 155 (A), 2019 NY Slip Op

[4] The court notes that respondent has neglected to attach the entire lease, but petitioner does not dispute that the lease expired on June 30, 2021, and does not argue that the lease comprised language negating the creation of a month-to-month tenancy.

51926 (U) (App Term, 1st Dept 2019) (*6 W. 20th St. Tenants Corp.*, 2022 NY Slip Op 50529 [U], *1-2.) In *Gassama*, the Appellate Term noted at *1,

> "The Court also properly rejected landlord's claim that tenant became a month-to-month tenant after the expiration of the November 2014 license agreement, since that document expressly indicated that the rights of the Licensee shall not be deemed to be or construed as a month-to-month tenancy.... Moreover, even assuming that a month-to-month tenancy was created following expiration of the license agreement, *there was no agreed rental amount for any month ensuing after tenant ceased paying rent* (internal quotation marks omitted, emphasis added)."

In *Krantz & Phillips, LLP v Sedaghati*, 2003 NY Slip Op 50032 (U) (App Term, 1st Dept 2003), a proceeding commenced pursuant to RPAPL 711 (2), the Appellate Term, First Department affirmed dismissal of a nonpayment petition which sought rent for January 2022 and February 2022, but was premised upon a lease that expired October 31, 2021. The court held that "[e]ven assuming that a month-to-month tenancy was created following expiration of the lease, there was no agreed upon rental for any month ensuing after tenant ceased paying rent and no basis for holding tenant contractually liable for the rent reserved in the expired lease (internal citation omitted)." (*Sedaghati*, 2003 NY Slip Op 50032 [U], *1.) Citing to *Jaroslow*, the court noted the landlord was consigned to commencing a holdover proceeding in which it could seek use and occupancy. (*Id.*)

Petitioner's Remaining Arguments

Petitioner's argument that a statutory 12-month tenancy was in effect after the acceptance of Emergency Rental Assistance Program ("ERAP") funds is flawed. Citing to *JSB Properties LLC v Yershov*, 77 Misc 3d 235, 2022 NY Slip Op 22294 (Civ Ct, New York County 2022), petitioner argues that ERAP funds were accepted within the year after ERAP monies were first received. (*Yershov*, 2022 NY Slip Op 22294, *52 ["[O]ccupant's ERAP application constitutes an effort to bind a landlord to treat the applicant as a tenant for one year, an act consistent with an intention to continue a landlord-tenant relationship."])[5] Petitioner's own exhibits demonstrate

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[5] The consequences for a landlord when it accepts ERAP monies are set forth in the ERAP statute:

> "*Acceptance of payment* for rent or rental arrears from this program . . . shall constitute *agreement* by the recipient landlord or property owner . . . (iii) to *not increase the monthly rent due* for the dwelling unit such that it shall not be greater than the amount that was due at the time of application . . . (iv) *not to evict for*

that respondent was approved for ERAP on March 6, 2022, and petitioner received and credited ERAP funds on March 17, 2022. (NYSCEF Doc No. 25, petitioner's exhibit B, ERAP approval email; NYSCEF Doc No. 26, petitioner's exhibit C, rent ledger.) Petitioner commenced this proceeding on June 21, 2023, by electronically filing the notice of petition and petition, 16 months after ERAP funds were first received. (NYSCEF Doc No. 1, petition.) Thus, even *if* a 12-month statutory tenancy agreement supporting a summary proceeding had been created with the acceptance of ERAP funds, a proposition with which this court does not agree,[6] that tenancy also expired prior to the commencement of this proceeding.

Finally, at oral argument, petitioner brought to the court's attention a recent Supreme Court, New York County commercial landlord-tenant decision, *2 Riverside Dr. LLC v Truth*, 81 Misc 3d 1228 (A), 2024 NY Slip Op 50020 (U) (Sup Ct, New York County 2024). In *Truth*, respondent remained in possession pursuant to an expired lease, and "defendant made, and plaintiff accepted, one lump sum payment after the expiration of the renewal lease, presumably to cover many months' rent." (*Truth*, 2024 NY Slip Op 50020 [U], *2.) The complaint alleges causes of action for breach of contract, unjust enrichment, and quantum meruit. Defendant defaulted and the court entered a default judgment, stating, with little analysis, that defendant became a month-to-month tenant upon making the lump sum payment. In support, the court cites only to RPL § 232-c and *Jaroslow*, *supra*. Notwithstanding that *Truth* is not binding upon this court, this court disagrees with Supreme Court's characterization of defendant's liability as rent rather than use and occupancy for the reasons set forth in this decision and order.

Dismissal of the Petition Pursuant to CPLR 409 (b)

For the foregoing reasons, the proceeding is dismissed pursuant to CPLR 409 (b). CPLR 409 (b) requires that the court "shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised. The court may make any orders permitted on a motion for summary judgment."

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reason of expired lease or holdover tenancy any household on behalf of whom rental assistance is received for 12 months after the first rental assistance payment is received . . . . (emphases added)" L 2021, ch 56, part BB, subpart A, § 9 (2) (d) (iii)-(iv), as amended by L 2021, ch 417, part A, § 5.

[6] *417 E. Realty LLC v Kejriwal*, 80 Misc 3d 583, 2023 NY Slip Op 23190 (Civ Ct, New York County 2023).

"Though a summary judgment motion may be made by one or both of the parties, under CPLR 409 (b), the court must also make summary determination on its own." (*Sukaj Group LLC v Mallia,* 66 Misc 3d 1223[A], 2020 NY Slip Op 50218[U], *3 [Civ Ct, Bronx County 2020], citing *New 110 Cipriani Units LLC v Bd. of Mgrs. of 110 E. 42nd St. Condominium*, 166 AD3d 550, 551 [1st Dept 2018].) A court may grant summary judgment and dismiss a proceeding even on grounds not raised by the parties. (*Id.*; *1646 Union, LLC v Simpson*, 62 Misc 3d 142 [A], 2019 NY Slip Op 50089 [U] [App Term, 2d Dept 2019] [upon review, dismissing a summary eviction proceeding on grounds not raised by tenant pursuant to CLPR 409[(b].)

This proceeding is fatally defective as it is not disputed that no lease was in effect when this proceeding was commenced, respondent's last lease having expired on June 30, 2021. (NYSCEF Doc No. 15, respondent's exhibit B, expired lease.) Petitioner states that "the [p]etitioner did offer the [r]espondents a new lease, which they did not execute." (NYSCEF Doc No. 23, Jimenez affidavit ¶ 10.) While respondent avers that no renewal lease was ever offered, this inconsistency is of no moment because, in either case, the only lease agreement between the parties expired on June 30, 2021.

CONCLUSION

Accordingly, it is

ORDERED that respondent's motion is GRANTED and the default judgment is vacated; and it is further

ORDERED that the petition is dismissed pursuant to CPLR 409 (b) as there was no default in the payment of rent pursuant to an agreement under which the subject premises is held that was in effect at the time this proceeding was commenced; and it is further

ORDERED that the remaining branches of respondent's motion are denied as moot and not on the merits.

Respondent must serve petitioner with this decision and order by notice of entry.

This constitutes the decision and order of this court.

DATED: January 31, 2024
New York, NY

So Ordered:
Hon. Karen May Bacdayan

HON. KAREN MAY BACDAYAN
Judge, Housing Part