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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH Justice J.S.C. PART 54

Peck

-v-

Lodge Lord

INDEX NO. 117199-02

MOTION DATE 7/24/03

MOTION SEQ. NO. 03

MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-4
Replying Affidavits	5-6

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision, Order and Judgment.

SCANNED OCT 31 2003

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 10/28/03

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 54
..... X
NORMAN PECK,

Plaintiff, Index No.: 117199/02

-against- **DECISION, ORDER and JUDGMENT**

LILY LODGE, OLDEST DAUGHTER ENTERPRISES, INC. d/b/a ALL ***AROUND*** THE TOWN d/b/a NEW WORLD BED & BREAKFAST, "JOHN DOES 1-5"and 'JANE DOES 1-5,"

Defendants.
----------X

SHIRLEY WERNER KORNREICH, J.:

I. FACTUAL AND PROCEDURAL BACKGROUND:

A. *Facts:*

Plaintiff Norman Peck ("plaintiff" or "Peck") is the owner of shares and holder of the proprietary lease appurtenant to rent-controlled Apartment 11C ("the premises" or "Apartment 11C") located at 325 West End Avenue, New York, New York ("the building"). Defendant Lily Lodge ("defendant" or "Lodge") is a long-time tenant who occupies the premises pursuant to City Rent and Rehabilitation Law Sections 26-401 et seq. and New York City Rent and Evictions Regulations Sections 2200.1 et seq. Defendant Oldest Daughter Enterprises, Inc. d/b/a All Around the Town d/b/a New World Bed & Breakfast ("ODE") is in the business of "booking" "affordable" accommodations for out-of-town visitors in the homes of its Manhattan "clients."[1]

[1]Plaintiff's action against ODE was settled by Stipulation dated October 24, 2002.

On or around April 15, 2002, plaintiff received a letter from 325 West End Avenue Owners, Inc. ("the Cooperative Corporation"), the entity that owns the building, advising him that Lodge was operating a "Bed and Breakfast" out of Apartment 11C, in violation of his proprietary lease. The Cooperative Corporation informed Peck, inter alia, that Lodge's stream of transient tenants was compromising the safety and security of the other residents in the building, and that it was incumbent upon him to remedy the violation or risk losing his $1.5 million worth of shares as well as his leasehold interest in the premises. Enclosed with the Cooperative Corporation's letter were several documents reflecting that individuals – many of whom had been referred to Lodge by ODE – paid approximately $100 a night (plus a "fee" to ODE) for a room plus bath in Apartment 11C. These "guests" were issued keys, were given limited use of the apartment's kitchen, and were told to "check out" by 11:00 a.m. A 'Welcome'' flyer with these and other instructions was also enclosed, as was a "Bed and Breakfast Receipt" issued to a three-night guest (in reality a detective hired by the Cooperative) named Ed Riley dated March 26, 2002.

B. Legal proceedings:

On May 21, 2002, plaintiff served on Lodge a Notice of Termination, based upon her alleged profiteering from the use of the apartment "in breach of a substantial obligation of [her] tenancy." Peck threatened, inter alia, that if Lodge did not move out by June 20, 2002 (the date on which her month to month tenancy would expire), he would commence summary proceedings to remove her, and would demand the fair market value of her use and occupancy during the period of her holding over. In footnote 1 on page 2 of the Notice of Termination, Peck informed Lodge that "a breach of a substantial obligation of a tenancy based upon use of the Premises for impermissible business purposes resulting in profiteering is not subject to cure as a matter of law

and accordingly this is the only Notice you will receive."

When Lodge did not move out, on or around July 31,2002, Peck commenced the instant lawsuit in which he sought: (a) an order of ejectment (causes of action #1 and #2), and (b) a judgment for the fair market use and occupancy of the apartment from July 1,2002 through the date of judgment, in an amount to be determined by the Court.[2] In her answer, Lodge asserted eleven affirmative defenses, as follows: (1) the complaint should be dismissed because plaintiff had not served the statutorily required "Notice to Cure" upon Lodge; (2) Lodge was permitted to have "roommates" under RPL 235-f; (3) Lodge had at all times complied with the rent control laws and had not run a "bed and breakfast" out of Peck's apartment; (4) Lodge's "roommates" had come and gone on a regular and "open and notorious" basis since 1991, without any objection from the cooperative owner of the building or its staff, with the result the landlord had "waived" his current complaints; (5) any cause of action accrued in 1991, and so was time-barred; (6) "upon information and belief," the Notice of Termination was not properly served; (7) estoppel; (8) laches, coupled with the argument that Lodge needed roommates to meet plaintiffs exorbitant rents; (9) plaintiff's (unspecified) culpable conduct; (10) any violation had been "cured" because since receipt of the Notice of Termination plaintiff had not had any further roommates; and (11) plaintiff could collect only the rent controlled rent, and not market-value "use and occupancy" charges. By way of counterclaims, Lodge asserted that: (1) Peck owed her at least $60,000 for forcing her to relinquish her legal right to have "roommates"; and (2) Peck owed her treble damages, or at least $250,000, for charging rent in excess of the legal rent for the apartment.

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[2]Causes of action #2 and #3 sought injunctive relief and damages against Oldest Daughter.

Simultaneously with his lawsuit, plaintiff brought on an Order to Show Cause, seeking, inter alia, a preliminary injunction pursuant to CPLR 6301 and 6311 directing that defendant Lodge and/or anyone acting on her behalf immediately cease and refrain from reserving and/or renting any room or rooms at Apartment 11C at 325 West End Avenue, New York, New York on a transient basis for a fee, as well as directing defendant Lodge to pay plaintiff for her use and occupancy of said apartment as it became due at the current rate of $2,753.46 per month. Peck's application was supported by affidavits from two other shareholders, who are neighbors of Lodge's, and who complained that Lodge was defeating their and the other resident families' expectation of security by admitting a steady stream of strangers into elevators and other public areas of the building; and they expressed anxiety about the safety of the building's children. In opposition, Lodge did not dispute plaintiff's allegations except to explain that her rent was so high that she was obliged to supplement her income by "rent[ing] rooms on an occasional basis to different roommates." Lodge acknowledged that some of these "roommates" were "referred" to her by ODE. Lodge believed that her "roommate" practice was entirely legal, not least because the building's concierge staff observed and even assisted her guests for more than a decade without complaining.[3] She accused plaintiff and the two tenants who had supported his application of acting out of venal motives. By Decision and Order dated November 18, 2002, this Court granted Peck's application to the extent of restraining Lodge from renting any of her rooms to transient lodgers during the pendency of this action.

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[3]Two building employees have also submitted affidavits on Peck's behalf, acknowledging that they had indeed over the years delivered keys, carried luggage and otherwise helped Lodge's "guests," but emphasizing that it was not their place to investigate the terms and conditions of the guests' sojourns with Lodge.

C. The instant motion and cross-motion:

1. Lodge's motion for summary judgment:

In support of her application for summary judgment, Lodge has submitted an affidavit in which she relates that she is 73 years old, has lived in the contested apartment for 39 years, and, as an "acting teacher," subsists on a limited income. In 1991 Lodge, needing a source of money to supplement her income in order to pay her steep rent, consulted "a service," ODE, to help her find "roommates." She had put up "temporary roommates" ever since. At no time did she "profit" from the "roommate" arrangement; and she has since discontinued accommodating "roommates."

Lodge argues that Peck's complaint should be dismissed because it is legal in New York for a rent controlled tenant to charge "rent and even excessive rent to her roommate" – i.e., "profiteering" is impossible in the "roommate" context. In the alternative, Lodge insists, Peck's complaint should be dismissed because a pre-termination Notice to Cure must, under the applicable Rent Control Laws, be served to afford a long-term rent-controlled tenant like Lodge the opportunity to save her leasehold by giving her ten days to cure whatever "violation of a substantial obligation of her tenancy" the landlord is alleging. This is not a case of an "incurable" violation, since Lodge's "roommate" complaint could be simply cured by Lodge's promise that she will never again rent out rooms in her apartment.

2. Peck's cross-motion to dismiss Lodge's affirmative defenses and counterclaim, and for summary judgment on causes of action #1, #2 and #5:

Peck opposes Lodge's motion, and cross-moves to dismiss Lodge's affirmative defenses and counterclaims as well as for summary judgment on causes of action #1, #2 and #5. Peck

points out that this is not a case of "roommates" but of a commercial "bed and breakfast" business; and he insists that he was not required to serve a Notice to Cure since Lodge's behavior is not susceptible of cure.

Appended to Peck's papers is an affidavit from Kathleen Kruger, the President of ODE. Kruger relates that she has for twelve years been "in the business of arranging affordable accommodations for out-of-towners in the homes of our clients here in Manhattan." Kruger does not operate a "roommate referral service," and has never referred a "roommate" to Lodge. She has, however, regularly booked transient guests in Lodge's two spare bedrooms, pursuant to a "bed and breakfast" contract signed by Lodge and Kruger on June 10, 1992. Said contract provided, among other things, that Lodge would provide "guests" with a bedroom, bath, and limited kitchen privileges by the night, week or month, in exchange for which Lodge would receive 75% and Kruger 25% of the monies charged. Kruger has supplied a substantial quantity of booking tickets representing referrals from her to Lodge between 1997 and May 2002.

3. Lodge's "Opposition"/"Reply" and Peck's Response:

Lodge certifies that Kruger's records of her "referrals" of guests to Lodge during 1997-2002 are essentially accurate, although she otherwise accuses Kruger of lying. According to Lodge, Kruger assured Lodge that her hosting of "roommates" was perfectly legal, and Lodge reiterates that no one from the building ever challenged her or her customers. Lodge contradicts Kruger's assertion that Lodge's guests were confined to their bedrooms, insisting that they had the run of the whole apartment. Moreover, Lodge herself was always in residence, and she never overcharged her guests. Lodge speculates that over the years she has given shelter to a multitude of scholars and artists, whose sojourns here have benefitted the City. At the least, defendant

submits, there are issues of fact requiring a trial, not least because Peck -- as he admitted at his deposition – has no first-hand knowledge of the facts, including how much "rent" Lodge collected from her guests. Lodge insists that she needs further discovery from, inter alia, the cooperative owner, whom she is prepared to implead.

Peck and Kruger have thereafter submitted affidavits in which they take issue with several of Lodge's assertions (e.g., that Kruger ever counseled Lodge on the legality of her bed and breakfast). In addition, a neighbor of Lodge's has submitted a further sworn statement to the effect that even after Peck acquired his TRO, she saw strangers with suitcases coming and going out of Lodge's apartment, causing her to fear for the safety of herself and her three children. A former building superintendent further avers that he did question Lodge about her numerous visitors, but that she explained that they were relatives and friends.

II. DISCUSSION:

A. Peck is entitled to summary judgment:

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact requiring a trial. See Alvarez v. Prospect Hospital, 68 N.Y.2d 320,324 (1986); Winegrad v. New York University Medical Center, 64 N.Y.2d 851,853 (1985). Here, Lodge has failed to carry her burden of proving her entitlement to judgment as a matter of law, since she has not produced any convincing evidence supporting her argument that she hosted only occasional "roommates" and so was not "profiteering." Lodge has also not established that Peck was obliged to serve her with a Notice to Cure before he could evict her. Conversely, Peck has proved by voluminous admissible evidence that he is entitled to summary

judgment on his first and second causes of action, for an order of ejectment. In response to Peck's showing, Lodge has not come forward with specific facts suggesting that a genuine issue for trial exists. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980); Soho Center for *Arts* and Education v. Church of Saint Anthony of Padua, 146 A.D.2d 407 (1st Dept. 1989).

As a general rule, a landlord may not evict a tenant from a rent-controlled or rent-stabilized apartment unless "[t]he tenant is violating a substantial obligation of [her] tenancy." Rent Stabilization Code, Section 53, Subdivision A. A lease provision limiting use and occupancy of an apartment to private residential purposes has been declared to be a substantial obligation of the tenancy. Park West Village v. Lewis, 62 N.Y.2d 431,436 (1984). The lease at issue here contains such a restriction in Paragraph 14.[4]

Eviction is warranted only where the violation of such a substantial obligation – i.e., use of a residential rent-controlled or stabilized apartment as other than a private dwelling – is "significant." Id., at 436-437. For example, it has been found that an artist's painting of pictures in the apartment where he also resided did not rise to the level of a "significant" breach because his use did not materially affect the character of the building, damage or burden the value of the landlord's property, or disturb the other tenants. Haberman v. Gotbaum, 182 Misc.2d 267 (Civ. Ct., N.Y. Co. 1999). Similarly, when assessed against the same three-pronged test, a tenant who used his apartment to do paper work, make and receive faxes and phone calls, and send and receive mail did not "significantly breach" the dwelling-only provision of his lease. Nissen v. Wang, 105 Misc.2d 251 (Civ. Ct., N.Y. Co. 1980). By contrast, the Court in Park West Village

[4]The controlling lease is between Peck and 325 West End Avenue Owners, Inc., dated December 1, 1972. There is apparently no separate (sub)lease between Peck and Lodge.

v. Lewis, supra, found that the defendant's use of her residential unit as a counseling office out of which she conducted her psychotherapy practice constituted a "significant" breach of the lease, in that, inter alia, her professional use of the apartment was "completely at odds with the character of the complex as a whole." Id. At 438. Similarly here, the evidence produced by plaintiff establishes that Lodge's use of her apartment as a "bed and breakfast" materially diverges from the character of the residential building, seriously threatens her landlord Peck's $1.5 million worth of shares as well as his leasehold interest in the premises, and significantly disturbs the building's other tenants in the peaceful use of their apartments. See Nissen v. Wang, supra, at 253.

Lodge insists that her "guests" were actually "roommates" such that she is protected by RPL 235-f ("the Roommate Law") and cannot be charged with profiteering.[5] However, this contention is unsupported by any credible evidence. A "roommate" is a long-term co-occupant of an apartment with the lease-holder, with whom s/he shares the entire living area. See, e.g., 520 East 81st Street Associates v. Roughton-Hester, 157 A.D.2d 199,201-203 (1st Dept. 1990). All of the evidence in the instant case – except for some self-serving representations by Lodge – indicate that her guests were numerous, short-term, and restricted in their use of the apartment's space. If, as the record indicates, they were also charged sums which in the aggregate exceeded the legal monthly rent, which the landlord himself could not legally charge a sublessee, the subtenant is making a profit or "profiteering" – that is, she is commercializing the apartment and defrauding her landlord. See Continental Towers Limited Partnership v. Fruman, 128 Misc.2d 680 (App. Term, 1st Dept., 1985) (subtenant in stabilized apartment cannot be charged more than

[5]The Court notes that, at least in the rent stabilization context, a prohibition against a tenant's charging a roommate a disproportionate share of the rent has recently been enacted. See Rent Stabilization Code 2525.7(b).

stabilized rent plus 10% surcharge if unit is furnished, or violators' tenancy will be terminated, Admin. Code YY51-6.0[c][12][a], [c]); Padilla v. Levy, 300 A.D.2d 62 (1st Dept. 2002), lv. den. 100 N.Y.2d 502 (2003) (petitioner properly evicted for using apartment as "bed and breakfast" for three years, in violation of lease and DHPD's rules). Here, the evidence shows that Lodge rented two of her rooms at $100 a day apiece over eleven years. When Lodge succeeded in renting both rooms every night, as she wished, she netted $4,500 a month ($6,000 a month, less ODE's 25%) – far in excess of her 2003 rent of $2,753.46 a month. Lodge also charged her guests 8.25% sales tax, although it is not clear whether she thereafter remitted these sums to the proper authorities.

As with rent stabilization laws, one of the purposes for which the rent control laws were enacted was to forestall profiteering, since profiteering "subverts the integrity of the rent-stabilized[/controlled] scheme ... to prevent 'exactions of unjust, unreasonable and oppressive rents'" in a desperately tight residential housing market. See N.Y.C. Rent and Eviction Regulations, 9 NYCRR 2205.1[a]; N.Y.C. Admin. Code 26-401 *et seq.*, 26-412[a]; Hurst v. Miske, 133 Misc.2d 362 (Civ. Ct., N.Y. Co. 1986) (rent controlled tenant who "profiteered" by subleasing her apartment for 247% above regulated rent was summarily stripped of the protection of the rent control/stabilization laws and was subject to immediate eviction). Profiteering, in the context of rent control and rent stabilization, has been declared to be an "incurable ground for eviction." See BLF Realty Holding: Corp. v. Kasher, 299 A.D.2d 87 (1st Dept. 2002), appeal dismissed 100 N.Y.2d 535 (2003).

Courts have held that where a ground for eviction is "incapable of any meaningful cure" (e.g., where there has been a chronic pattern of nonpayment of rent), the landlord need not serve

the pre-petition, 10-day notice to cure which is otherwise required by the New York City Rental and Eviction Regulations 2204.2[a][1] and Rent Stabilization Code 2524.3[a]. See, e.g., 326-330 Est 35th Street Assoc. v. Sofizade, 191 Misc.2d 329,330 (App. Term, 1st Dept. 2002) (landlord need not serve notice to cure as predicate to commencement of holdover proceeding based upon tenant's chronic misbehavior, such as chronic nonpayment of rent, because such a "cumulative pattern of tenant['s] course of conduct'' is incapable of meaningful cure); 3363 Sedgwick, L.L.C. v. Medina, 187 Misc.2d 421 (App. Term, 1"Dept. 2000) (same); Adam's Tower Ltd. Partnership v. Richter 186 Misc.2d 620,622 (App. Term, 1st Dept. 2000) (same); see also Hurst v. Miske, supra, at p. 365. It is worthy of emphasis that there is no lease running between Peck and Lodge, and consequently no contractual provision "requiring" a Notice to Cure. Although §2204.2 of the New York City Rental and Eviction Regulations would appear to require service of a ten-day Notice to Cure in all cases, it is well established that "[t]he fact that a lease or statute provides time for a cure "does not necessarily imply that a means or method to cure must exist in every case." See National Shoes v. Annex Camera, 114 Misc.2d 751 (Civ. Ct., N.Y. Co. 1982); see also Adam's Tower, supra.

Lodge objects that the instant case is distinguishable from the "chronic non-payment" ones, that she can "cure" simply by ceasing her "bed and breakfast" activities, and that Courts have allowed a "profiteering" tenant to "cure" in order to preserve a long-term leasehold. For example, Lodge cites Ariel Associates, L.L.C. v. Brown, 271 A.D.2d 369 (1st Dept. 2000), leave dismissed 95 N.Y.2d 844 (2000), where a 20-year tenant was allowed to "cure" an illegal summer sublet by refunding all sums to the subtenants and notifying the landlord of the cure prior to the commencement of the holdover proceedings. Lodge also invokes Husda Realty Corp. v. Padien,

136 Misc.2d 92 (Civ. Ct., N.Y. Co. 1987), where the Court ruled that it had no jurisdiction over the landlord's eviction application, because the lease allowed the tenant to "cure" under all circumstances, and because the tenant had indeed undertaken to "cure" her violation by, inter alia, ejecting the subtenant and refunding the subtenant's money prior to the landlord's commencement of the proceeding to recover possession. In contrast to these last two cases, however, the defendant at bar has not "refunded" the sums that she extracted from her guests over the past eleven years. Indeed Lodge cannot do so, with the result that her profiteering is incapable of being "cured." As in the chronically-unpaid-rent cases, the Court finds that where a cure is impossible, the landlord is relieved of his obligation to serve on the tenant the usual 10-day Notice to Cure.

B. Lodge's affirmative defenses and counterclaims must be dismissed:

Further, for, inter alia, the reasons outlined above, Lodge's affirmative defenses and counterclaims should be dismissed, as follows:

First affirmative defense: Peck's failure to serve 10-day Notice to Cure. Contrary to Lodge's contention, Peck was not foreclosed from bringing the instant action because of his failure to serve a Notice to Cure.

Second affirmative defense: Lodge protected by "the Roommate Law." Lodge is not protected under "the Roommate Law" because her guests were not "roommates."

Third affirmative defense: No evidence of Lodge's wrongdoing. To the contrary, the evidence in the record proves that Lodge ran a "bed and breakfast" out of her apartment.

Fourth affirmative defense: Waiver by Lodge. The fact that the building staff saw Lodge's guests does not make Lodge's "bed and breakfast" legal, nor does it result in a waiver of

the illegality by Peck.

Fifth affirmative defense: Statute of Limitations. Plaintiff's action is not barred by the six-year statute of limitations provided for in CPLR 213. Rather, although she started her "bed and breakfast" in 1991, Lodge committed a new violation and restarted the statute of limitations clock every time she rented out one of her rooms on a daily, weekly or monthly basis. See 1050 Tenants Corp. v. Lapidus, 289 A.D.2d 145 (1st Dept. 2001). Peck's action is therefore timely.

Sixth affirmative defense: Peck's alleged improper service of his Notice of Termination. Peck has submitted an affidavit of service and receipts proving that Lodge was served with the Notice of Termination both in person and by certified mail, in full compliance with New York City Rent and Eviction Regulation 2209.1. Lodge does not specify in her answer how she is claiming that service was defective, and she does not address plaintiff's proof of proper service in her Reply papers.

Seventh affirmative defense: Estoppel. See Fourth Affirmative Defense, supra.

Eighth affirmative defense: Laches. See Fourth Affirmative Defense, supra.

Ninth affirmative defense: Peck's culpable conduct. Lodge alleges no facts indicating how Peck has behaved "culpably." The pleading is deficient and must be stricken. See Glenesk v. Guidance Realty Corp., 36 A.D.2d 852 (2d Dept. 1971).

Tenth affirmative defense: Lodge has "cured" the violation. Lodge contends that she has "cured" the violation because she has had no "roommates" since she received Peck's Notice of Termination. Peck never objected to Lodge's having "roommates;" and if Lodge has stopped housing "roommates," she has not "cured" the problem created by her operation of a "bed and breakfast" out of her apartment. On the other hand, if she has stopped running a "bed and

breakfast," without reimbursing the money that she collected from her guests over eleven years, she has not satisfactorily "cured" her violation.

Eleventh affirmative defense: Peck may not charge "market rent" for use and occupancy, but rather is limited to the rent-controlled rent. As discussed below, plaintiff is not restricted to receiving the rent controlled rent for use and occupancy from the date Lodge's tenancy was terminated, but rather is entitled to collect fair market rent from Lodge.

First Counterclaim: Damages for loss of "roommate" income. This counterclaim must be dismissed because Peck has not prohibited Lodge from having "roommates" in violation of RPL 235-f – only from operating a "bed and breakfast" out of the apartment.

Second Counterclaim: Treble damages for illegally high rent. Lodge does not identify how her rent is illegally high, when Peck began overcharging her, what she has done to obtain an adjustment of her rent, and/or how much Peck allegedly owes her. Peck has averred, in opposition, that all of the rent increases he has obtained over the years have been perfectly legal, and that they have never been challenged by Lodge. Indeed, Exhibit 13 to Peck's May 2, 2003 Affidavit documents that all of his rent increases were authorized by DHCR, and this demonstration has not been countered by Lodge. Accordingly, Lodge's second counterclaim must be dismissed.

C. Use and occupancy charges:

It is well established that a holdover tenant retaining possession of real property is liable to the landlord for the reasonable value of the use and occupancy of the premises. "Reasonable value is fair market value, that is, the amount ... which a willing [tenant] would pay and a willing [landlord] would take." Beacwav Operating Corp. v. Concert Arts Society, Inc., 123 Misc.2d

452,454 (Civ. Ct., N.Y. Co. 1984). The "rent reserved under the lease is not conclusive, although it is certainly of some probative value." Id. at 453; see also 2641 Concourse Co. v. City University of New York, 137 Misc.2d 802,805 (Ct. of Claims 1987). Similarly, RPAPL §601 provides that in an action to recover possession of real property (an ejectment action), a landlord may recover the fair value of its use and occupancy, as well as damages for the deprivation of the use of the property, from the commencement of the ejectment proceeding until the date of the issuance of the order of ejectment. See East 4th Street Garage, Inc. v. Estate of Berkowitz, 265 A.D.2d 249 (1st Dept. 1999). Plaintiff is therefore granted summary judgment on its fifth cause of action, for use and occupancy at the market rate from August 2,2002 (the date when plaintiff filed his summons and complaint), through the date of judgment, taking into account the apartment's rent controlled status, and adjusting the final sum owed to Peck to reflect amounts already paid by Lodge. Accordingly it is

ORDERED that defendant Lodge's motion for summary judgment is denied; and it is further

ORDERED that that branch of plaintiff's cross-motion which seeks summary judgment on plaintiff's first and second causes of action, for an order of ejectment, is granted; and it is further

ORDERED that that branch of plaintiff's cross-motion which seeks summary judgment on plaintiff's fifth cause of action, to recover the fair market value of Lodge's use and occupancy of the subject apartment from the inception of this action on August 2,2002 until the date of judgment, is granted; and it is further

ORDERED that counsel for plaintiff shall serve and file a copy of this order with notice of entry on the Clerk of the Judicial Support Office (Room 311) for the purpose of arranging a

calendar date for hearing and assignment of the issue of the amount of use and occupancy owed by defendant Lodge to plaints, and it is further

ORDERED that all of defendant's affirmative defenses **and** counterclaims are dismissed.

The foregoing constitutes the Decision, Order and Judgment of the Court,

Date: October **28,2003**
New York, New York

SHIRLEY WERNER KORNREICH