

**Crotona Park W. HDFC v Diawara Bakery**

2010 NY Slip Op 32310(U)

August 26, 2010

Civil Court of the City of New York, Bronx County

Docket Number: L&T22783/10

Judge: Sabrina B. Kraus

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF BRONX: HOUSING PART B

\_\_\_\_\_  
CROTONA PARK WEST HDFC, X

Petitioner-Landlord

-against-

DECISION & ORDER  
Index No.: L&T 22783/10

**HON. SABRINA B. KRAUS**

DIAWARA BAKERY  
1485 Fulton Avenue, Apt. 5B  
Bronx, New York 10457

Respondent-Tenant

\_\_\_\_\_  
X

**BACKGROUND**

This summary non-payment proceeding was commenced by **CROTONA PARK WEST HDFC** (Petitioner) and seeks to recover possession of Apartment 5B at 1485 Fulton Avenue, Bronx, New York 10475 (Subject Premises) based on allegations that **DIAWARA BAKERY** (Respondent), the rent-stabilized tenant of record, has failed to pay rent due for the Subject Premises.

**PROCEDURAL HISTORY**

This proceeding was commenced by service of a written rent demand dated April 14, 2010. The demand sought rent for a period covering September 1, 2009 through April 30, 2010. The total sum sought was \$5,325.12 at a monthly rate of \$729.00. The demand was served by conspicuous place service on April 15, 2010. The petition is dated April 23, 2010, and seeks the

same sum for the same period.<sup>1</sup> Respondent filed an answer asserting a general denial on April 30, 2010, and the initial return date was May 7, 2010. After an initial conference between the parties, with the assistance of a Sonike Interpreter, it was determined that the amount sought by Petitioner was disputed by Respondent, due to “retroactive” charges for increases on the two most recent lease renewals between the parties, covering a period from 2007 forward.

Petitioner moved for summary judgment based primarily on two lease renewals entered for periods subsequent to 2007, and Respondent submitted opposition. The court reserved decision on August 23, 2010.

### **FACTS**

The record is devoid of factual allegations. Petitioner’s motion is not supported by an affidavit from an individual with first hand knowledge, and Respondent submits an “affidavit in opposition” that is neither signed nor notarized. The moving papers annex two lease renewals. Petitioner submits no facts as to the details surrounding the execution of these two lease renewals. Both lease renewals are dated October 20, 2009. Both renewals on their face indicate that they were signed on October 20, 2009. Exhibit “A” is a renewal for a period of November 1, 2007 through October 31, 2009 (Renewal 1). Thus at the time that Renewal 1 was executed, there remained only 11 days prior to the expiration of the term. Renewal 1 provides that the prior legal rent was \$689.37, and that a two year renewal was elected at an increase of \$39.64. Annexed as Exhibit B is another renewal for a period of November 1, 2009 through October 31, 2010 at an increase of \$30.00 per month (Renewal 2).

Respondent avers that he did sign a lease renewal on October 20, 2009, but that it is

---

<sup>1</sup> At the date of the writing of this decision the file does not contain a notice of petition nor affidavit of service for same, nor is a copy of the pleading annexed to Petitioner’s moving papers.

neither one of the documents produced by Petitioner. He states he entered an amount on the renewal he signed that was based on his then legal rent, that an agent crossed it out and wrote in a different figure and “ordered” him to sign it. This is not reflected on Renewal 1 as produced by Petitioner. Respondent states that Renewals 1 and 2 were signed on a second later date when Petitioner called him back to the management agent’s office for that purpose. Respondent states that his last legal rent is \$639.37 and that he has never paid a higher amount. Respondent states that he had been billed the lower amount at all times and Petitioner retroactively billed him for more rent after the execution of Renewals 1 & 2.

Respondent states he does not understand English and was forced to sign the defective Renewals under duress.

Petitioner’s Exhibit “3” is a rent history and appears to show that Respondent moved into the Subject Premises on or about November 1998, with an initial legal rent of \$621.81, the amount reflected on Renewals 1 & 2 as Respondent’s current security deposit. Petitioner billed Respondent \$689.37 per month for rent from January 2008 through March 2010.

### **DISCUSSION**

Petitioner has the burden of proving entitlement to summary judgment, a drastic remedy which should not be granted where there are any issues of contested fact material to the Court’s determination (*Winegrad v. NYU Medical Center* 64 NY2d 851; *Moskowitz v. Garlock* 23 ASD2d 943). In this case Petitioner has failed to sustain its burden. At the outset, the Court notes that Petitioner’s motion is based only on three supporting documents, two lease renewals, and a rent history. Petitioner has failed to annex a copy of the pleadings, certified documents from DHCR that the rent is legal, an original lease agreement between the parties, a copy of a deed showing Petitioner is the owner of the Subject Premises or even a certified copy of the

multiple dwelling registration for the Subject Premises. Petitioner's motion is also unsupported by an affidavit from anyone with first hand knowledge and only adds counsel's affirmation to the documents provided.

CPLR 3212 (b) provides :

**A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings** and by other available proof, such as depositions and written admissions. **The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts;** and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. .

Thus, Petitioner has failed to establish a *prima facie* case entitling it to a judgment of any kind. However, the Court grants summary judgment to Respondent, and dismisses the petition pursuant to CPLR 3212(b) which states "(i)f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The dismissal is based Renewal 1 and the defects in the underlying pleadings. § 2523.5 (a) of the Rent Stabilization Code requires landlords to offer tenants a lease renewal at least 90 days prior to the expiration of the tenants's term and to afford tenants 60 days to decide whether to accept the offer.

§ 2523.5 (c) of the Rent Stabilization Code provides that where the owner is late in making that offer the tenant can choose for the renewal to commence "... either (i) on the date a renewal lease would have commenced had a timely offer been made, or (ii) on the first rent payment date occurring no less than 90 days after the date that the owner does offer the lease to the tenant. **In either event, the effective date of the increased rent under the renewal lease shall commence on the first payment date occurring no less than 90 days after such offer is**

**made by owner...** (emphasis added)".

Therefore Petitioner's attempt to obtain a retroactive increase based on a Renewal 1, signed on the eve of the expiration of the term, is contrary to statute and to the extent that the Petition seeks rent increases pursuant to Renewal 1 for any period through and including January 2010 those claims are dismissed.

Additionally, pursuant to Renewal 2, Petitioner is asserting an entitlement to collect \$759.01 per month for the period commencing November 1, 2009. Yet Petitioner sues for a monthly rent of \$729.00 for the period of October 2009 through April 2010.

Given the forgoing the rent demand served by Petitioner is defective as it seeks a rent that is contrary to law for the first period sued for, and the pleadings as a whole fail to state the facts upon which the Petitioner's claim is based.

The Court can not determine on the record before it the term of Renewal 1, the validity of renewal 2, or the current legal rent for the subject premises. Respondent, if so advised, may pursue any claims regarding the renewals or the legal rent with the Division of Housing and Community Renewal.

Based on the forgoing, Petitioner's motion for summary judgment is denied. However, the Court awards Respondent summary judgment dismissing the petition herein without prejudice.

This constitutes the decision and order of this Court.

---

SABRINA KRAUS

Dated: New York, New York  
August 26, 2010

TO: GUTMAN, MINTZ, BAKER & SONNENFELDT  
By: Melissa S. Levin, Esq.  
Attorneys for Petitioner  
813 Jericho Turnpike  
New Hyde Park, New York 11040  
(516) 775-7007

DAIWARA BAKERY  
Respondent *Pro Se*  
1485 Fulton Avenue, Apt. 5B  
Bronx, New York 10457