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

PRESENT : DONNA M. MILLS **PART** 58
Justice

MAYA MARTIN,

Plaintiff,

-v-

BROADWAY SKY, LLC,

Defendant.

INDEX NO. 102551/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion for _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1+2
Answering Affidavits– Exhibits	3
Replying Affidavits	

CROSS-MOTION: ✓ YES _____ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER

FILED
JAN 13 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/9/11

J.S.C.
DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 58

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MAYA MARTIN,

Plaintiffs,

INDEX NO.
102551/11

-against-

BROADWAY SKY, LLC,

Defendants.

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DONNA MILLS, J.:

Plaintiff Maya Martin moves for a default judgment based on defendant's failure to timely respond to the complaint.

Defendant Broadway Sky, LLC cross-moves for an order: (i) pursuant to CPLR 3012(d) compelling plaintiff to accept defendant's verified answer, and (ii) pursuant to RPL § 220 requiring defendant to pay use and occupancy from March 2001 until the conclusion of this matter at the rate of $2,100 per month; or, (iii) alternatively, pursuant to CPLR 3212 for summary judgment dismissing the complaint with prejudice.

This action is based on plaintiff's claim of rent overcharge and illegal deregulation of premises subject to rent stabilization.

Plaintiff became the tenant of unit 2C in an apartment house located at 211 West 53rd Street in Manhattan pursuant to a written lease dated April 6, 2007 between defendant as landlord and plaintiff as tenant for a term commencing on April 1, 2007 and ending on March 31, 2008, at a monthly rent of $1,950. The parties executed three subsequent one-year renewals of the lease. Under the most recent renewal lease, from April 1, 2010 through March 31, 2011,

plaintiff paid $2,100 per month (see complaint, plaintiff's exhibit A, ¶¶ 12-16). In September 2010, defendant wrote to plaintiff advising her that her lease which was due to expire on March 31, 2011, would not be renewed (see id., ¶ 17).

Plaintiff commenced this action on March 2, 2011 by filing a copy of the summons and verified complaint with the Clerk of the Court. On March 15, 2011, defendant was duly served with a copy of the summons and complaint by service upon the Secretary of State pursuant to Limited Liability Company Law § 303. An additional copy of the summons and complaint was mailed to defendant by plaintiff on April 4, 2011, pursuant to CPLR 3215(g)(4)(i). Defendant, which does not dispute the validity of the service, failed to serve a timely answer (see CPLR 3012[c]), move to dismiss the action (see CPLR 3211), ask plaintiff for an extension of time to answer the complaint, or otherwise respond to it.

The gravamen of the complaint is that defendant deprived plaintiff of her rights under the Rent Stabilization Law and Code and/or the Emergency Tenant Protection Act, including her right to regulated rent, by wrongfully and fraudulently removing the apartment from rent regulation prior to plaintiff's tenancy based on defendant's false claim of improvements to the apartment for multiple tenants dating back to 1998 in order to prematurely subject the apartment to "high rent" vacancy deregulation (see id., ¶¶ 23-34).

Plaintiff now seeks a default judgment (i) declaring the apartment to be rent stabilized and declaring plaintiff to be a lawful rent-stabilized tenant thereof, (ii) declaring the rents of $1,950 through $2,100 collected by defendant throughout plaintiff's tenancy to be erroneous and/or unlawful, (iii) directing that a hearing be held pursuant to CPLR 3215(b) to determine the maximum legal rent for the apartment and to assess damages including treble damages, costs,

fashion should be excused. The question, which invokes the court's discretion, is frankly troubling.

Defendant argues that plaintiff should be compelled to belatedly accept the answer annexed to its cross-moving papers because the delay was reasonable and not severe. Defendant argues further that its delay should be sanctioned because public policy favors the resolution of disputes on the merits and plaintiff will suffer no prejudice resulting from acceptance of the verified answer which is annexed to defendant's cross-motion. The court finds that plaintiff will not suffer any prejudice (see *Jones v 414 Equities, LLC*, 57 AD3d 65, 80 [1st Dept 2008]; *Cirillo v Macy's Inc.*, 61 AD3d 538 [1st Dept 2009]); and, defendant's proposed answer, verified by Baradarian, contains affirmative defenses and counterclaims sufficient to demonstrate a meritorious defense (see *Juseinoski v Board of Education*, 15 AD3d 353, 356 [2d Dept 2005]). However, a showing a potential meritorious defense is not an essential component of a motion to serve a late answer where no default order or judgment has been entered (see *Jones, supra*, 57 AD3d at 81; *Terrones v Morera*, 295 AD2d 254 [1st Dept 2002]).

To be granted leave to serve an untimely answer, a defendant needs to show a reasonable excuse for the delay (see CPLR 3012[d]). Defendant's answer was not proffered until after plaintiff moved for a default judgment. Defendant does not attribute this delay to law office failure (excusable in the court's discretion under CPLR 2005), but rather to defendant's need to investigate plaintiff's allegations prior to contacting its lawyer, which is an inadquate excuse for delay (see *Stewart v State Farm Mutual Automobile Insurance Co.*, 71 AD2d 705, 706 [3d Dept 1979]). Baradarian would have the court believe that his record gathering and computations could not have been completed within the two-and-a-half month period between

defendant's receipt of the complaint and the date plaintiff served her instant motion. More than that, defendant landlord, comprised of sophisticated businessmen, expects the court to find it reasonable that when it took seven weeks to gather and interpret its own records it did not contact its attorney about the complaint until after the investigative process had been completed, presumably well after defendant's time to answer had elapsed (see Baradarian supporting affidavit, ¶¶ 4-7; counsel's supporting affirmation, ¶ 4) – a big contrast to the alacrity with which defendant had its counsel threaten plaintiff three weeks before her lease expired with doubling her rent and bringing a holdover proceeding against her (which apparently was never commenced) if she did not vacate the premises immediately upon the lease's expiration (see exhibit A to plaintiff's reply papers). Under these circumstances, defendant's conduct cannot be deemed reasonable by this court.

Nonetheless, defendant's failure to excuse its default does not automatically entitle plaintiff to a default judgment granting every request for relief asserted in her complaint. Even when a defendant defaults, a court cannot grant a plaintiff relief to which she is not entitled. Plaintiff, who signed an initial lease stating in boldface type at the top that it was not subject to the rent stabilization laws and who did not challenge the deregulation of her apartment until after defendant declined to renew her lease, must prove her case before the court can declare the premises subject to rent regulation.

The primary issues raised by plaintiff involve the status of her apartment in the context of the rent stabilization laws. Plaintiff's claims, gleaned from the complaint and counsel's reply affirmation, can be summarized as follows: the rent registration statement defendant filed with the DHCR in August 2003 alleging that the apartment was exempt from rent

stabilization was false and fraudulent; plaintiff's April 6, 2007 lease falsely states that the apartment is not subject to rent stabilization; defendant twice falsely claimed individual apartment improvements in DHCR filings after vacancies in 1998 and 1999 in order to prematurely subject the apartment to "high rent" vacancy deregulation; defendant's purported calculations, which are based on repeated vacancy lease increases, ignore the fact that the apartment would not have had year-after-year vacancies had defendant complied with the rent stabilization laws rather than unlawfully treating the apartment as permanently exempt from rent stabilization from 2003 onward; defendant's reliance on several one-year transient tenancies to support annual vacancy increases was improper and in violation of the rent stabilization laws; and, "at a bare minimum" discovery is necessary to determine the extent to which the individual apartment improvements claimed by defendant in 1998 and 1999 were fraudulent and whether DHCR rent-reduction orders and defendant's failure to register the apartment barred rent increases.

Not surprisingly, defendant disputes plaintiff's claims, some of which are arguably speculative. Defendant argues that its rent calculations, even when plaintiff is given the benefit of every doubt, reflect that the apartment would have been deregulated prior to April 2007 when plaintiff assumed occupancy. On the other hand, defendant's counsel's own recitation of how through churning tenancies and multiple improvements the legal rent for the apartment rose from $887.75 in 1998 to $2,108.92 in 2005 (counsel's supporting affirmation, ¶¶ 30-35) – more than a 237.5% rent increase in a mere 7 years – alone makes the validity of the apartment's deregulated status patently suspect.

There are many ambiguities and inconsistencies in the evidence presented, and the

papers before the court raise more questions than they answer, including: whether defendants failed to file required registration statements (see NYC Admin Code § 26-517) or filed fraudulent ones, which would bar defendant from raising the rent (see *Bradbury v 342 West 30th Street Corp.*, 84 AD3d 681, 683-684 [1st Dept 2011]); the validity of the various apartment improvements (as opposed to repairs) allegedly made by defendant, which defendant has the burden of establishing by documenting each specific improvement (see *Matter of Graham Court Owners Corp. [DHCR]*, 71 AD3d 515 [1st Dept 2010]); and, whether defendant perpetrated any fraud in escalating the legal regulated rent for the apartment (see *Matter of Grimm [DHCR]*, 15 NY3d 358).

In view of the foregoing, the court will grant plaintiff's motion for a default judgment only to the extent of holding the issue of the rent-regulated status of the premises in abeyance pending the outcome of the hearing to be held herein. Plaintiff may file a note of issue for an inquest on the issue of damages, which will perforce determine the issue of the validity of the apartment's deregulation.

In the second branch of its cross-motion defendant, citing Real Property Law § 220, contends that plaintiff, who remained in possession of the apartment without paying rent since March 1, 2011, should be required to pay rent and use and occupancy for the apartment at $2,100 per month (the rent charged under the last lease)[1] or the fair market value of the apartment.

The court finds defendant's request for rent for the month of March 2011 to be

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[1] Although the lease renewal form (exhibit C to defendant's cross-moving papers) clearly states that the rent is to be $2,100 per month, in his supporting affirmation defendant's counsel states it is "not in dispute" that "[s]aid lease contained a monthly rent in the sum of $2,125" (¶ 14).

disingenuous, since defendant currently holds a security deposit from plaintiff greater than her unpaid rent. However, the court will exercise its discretion to award defendant interim use and occupancy from April 1, 2011 continuing *pendente lite* (see *Andejo Corp. v South Street Seaport Ltd. Partnership*, 35 AD3d 174 [1st Dept 2006]). The award of use and occupancy during the pendency of an action accommodates the competing interests of the parties and preserves the *status quo* until a final judgment is rendered (see *Eli Haddad Corp. v Redmond Studio*, 102 AD2d 730, 731 [1st Dept 1984]). The amount of use and occupancy shall be fixed at $2,100 per month, the amount plaintiff agreed to pay in her last lease renewal, and shall be offset by any excess security held by defendant and any damages recovered by plaintiff herein.

Finally, the alternative branch of defendant's cross-motion seeks summary judgment dismissing the complaint. Such a request for relief is risible given defendant's failure to serve an answer and will not be entertained (see CPLR 3212[a]: motions for summary judgment cannot be made until after issue has been joined).

Accordingly, plaintiff's motion for a default judgment is granted only to the extent that plaintiffs may file a note of issue for an inquest on the question of damages upon filing of a statement of readiness and payment of appropriate fees. The issue of the apartment's rent-regulated status shall be held in abeyance pending the outcome of the inquest.

Defendant's cross-motion is granted only to the extent that it seeks use and occupancy at the rate of $2,100 per month from April 1, 2011, through the outcome of this litigation (assuming, of course that plaintiff remains in the apartment), and is otherwise denied.

This decision constitutes the order of the court.

DATED: January 9, 2012

J.S.C.
DONNA M. MILLS, J.S.C.