

11st St. Assocs. LLC v City of New York

2019 NY Slip Op 30064(U)

January 7, 2019

Supreme Court, New York County

Docket Number: 650674/2014

Judge: Alexander M. Tisch

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 52

-----X
11st ST. ASSOCS. LLC,

Plaintiffs,

DECISION & ORDER

Index No. 650674/2014

-against-

THE CITY OF NEW YORK AND THE CITY OF NEW
YORK HUMAN RESOURCES ADMINISTRATION/
DEPARTMENT OF SOCIAL SERVICES,

Defendants.
-----X

ALEXANDER M. TISCH, J.:

In an action seeking payment for providing temporary emergency housing to clients of defendant the City of New York Human Resources Administration, plaintiff moves for summary judgment on its complaint and defendant cross moves for summary judgment dismissing the complaint. For the reasons set forth herein, both the motion and cross-motion are denied.

Factual and Procedural Background

Defendant the City of New York (the City) is required to provide and subsidize emergency temporary housing accommodations to certain eligible homeless individuals, disabled people, and victims of domestic abuse. Plaintiff is the owner of a premises located at 320 East 11th Street, New York, New York (the Facility) which, in 2004, was designated as an Emergency Housing Facility by defendant Human Resources Administration (HRA), eligible to provide such emergency housing.

On December 16, 2004, plaintiff and the City entered into a memorandum of understanding (the MOU) in which plaintiff agreed to set aside, and make available, 26 rooms at the Facility for temporary emergency housing of HRA clients for a fee of \$70 per room per night, for as long as each eligible person remained at the Facility.

The MOU provides in relevant part:

“On behalf of each referred Eligible Person placed at the Facility during the term of this [Agreement], HRA shall pay Operator a nightly rate of seventy (\$70.00) dollars for each

Eligible Person occupying a room in the Facility. HRA shall pay this rate from the first night the Eligible Person registers at the Facility until (a) the day that the Eligible Person departs from the Facility with the Operator's knowledge, or (b) two weeks after the Eligible Person departs from the Facility without the Operator's knowledge"

(see Freid affirmation, exhibit C).

Thereafter, plaintiff accepted and admitted clients referred by HRA to the Facility, and submitted bills to the City. In 2007, HRA referred 9 clients, including Paul Grayton (Grayton), David McKenzie (McKenzie), and Guy Culley (Culley), to the Facility. Grayton, McKenzie, and Culley are clients of HRA's HIV/AIDS Services Administration Program (HASA). Plaintiff claims that, at certain points, the defendants stopped paying for these individuals, in breach of the MOU, even though they continued to reside at the Facility.

Plaintiff commenced this action in March 2014. In its first cause of action, plaintiff alleges that it provided emergency housing for Yolanda Molina for which it is owed \$47,300.00. In its second cause of action, plaintiff alleges that it provided emergency housing to Grayton from May 28, 2007 through August 7, 2012, when Grayton died. Plaintiff claims that defendants have not paid it for providing housing to Grayton from October 1, 2010 through August 7, 2012, and is seeking \$47,390.00. In its third cause of action, plaintiff alleges that it provided emergency housing to McKenzie from January 12, 2007 through December 31, 2016, and that defendants have not paid it for housing McKenzie from October 1, 2010 through December 31, 2016, and is seeking \$159,880. In its fourth cause of action, plaintiff seeks \$128,000 for emergency housing provided to Culley from December 21, 2011 through December 31, 2016. In its fifth cause of action plaintiff asserts an account stated claim for the funds owed to it for providing housing to Molina, Grayton, McKenzie, and Culley.

In 2016, plaintiff moved for summary judgment on its complaint and defendants cross-moved for summary judgment dismissing the complaint. On April 26, 2017, pursuant to a stipulation between the parties, the court (Margaret Chan, J.), granted plaintiff partial summary judgment on its first cause of action seeking \$47,300 for housing Yolonda Molina, and partial summary judgment on its fourth cause of

action, in the amount of \$31,220, for services provided to Culley.¹ In January 2017, the parties withdrew their motions and plaintiff amended its complaint.

Defendants filed an amended answer on March 31, 2017.

These claims were the subject of a prior litigation before the court (Margaret Chan, J.), commenced in 2010, *11th Street Assocs. LLC v The City of New York* (Sup Ct, NY County, Index No. 652302/2010), (the 2010 Case), in which, on June 19, 2014, the court awarded plaintiff partial summary judgment to the extent conceded by the City, but denied it recovery for damages that exceeded the amount alleged in plaintiff's Notice of Claim filed in 2010. That decision and order was affirmed by the Appellate Division, First Department in *11th St. Assoc. LLC v City of New York* (139 AD3d 352 [1st Dept 2016]). Thereafter, the plaintiff filed updated notices of claim reflecting the non-payment for the occupancy of Grayton, McKenzie and Cully through December 31, 2016, and commenced this action.

Plaintiff now moves for summary judgment on its second, third, fourth and fifth causes of actions. Plaintiff argues that, because defendants have litigated this issue on five separate occasions, and orders have been issued from four different judges in favor of plaintiff, defendants are collaterally estopped from re-litigating their liability to plaintiff under the MOU. With respect to its second cause of action, plaintiff notes that defendants have paid it for providing housing for Grayton from May 28, 2007 through May 31, 2010. Further, in the 2010 case, the City agreed that it owed plaintiff for Grayton's occupancy through September 30, 2010. Plaintiff argues that there are no issues of fact concerning the length of Grayton's occupancy because in an August 20, 2011 affidavit, Grayton stated that he had resided at the Facility continually without interruption since May 2007 (see Freid aff., exhibit R). Plaintiff claims that even though Grayton was hospitalized in May 2012, he still maintained possession of his room at the Facility until his death on August 7, 2012. Accordingly, plaintiff argues that it is entitled to payment for housing from September 30, 2010, until Grayton's death.

¹ Pursuant to the court's April 26, 2016 order, on July 28, 2016, a judgment in the amount of \$78,520, plus interest was entered against defendants.

With respect to its third cause of action seeking \$159,880.00 for the occupancy of McKenzie, plaintiff claims that McKenzie has resided at the Facility from January 2007 to present. In support of this claim, plaintiff submits an April 26, 2016 affidavit of McKenzie's in which he states that he has maintained exclusive occupancy of his room since January 2007 (see Freid aff. Exhibit S). Plaintiff also notes that McKenzie signed the Facility's signature logs in 2011, 2012, and from 2015 through April 2017, which according to plaintiff, establishes that he was a resident of the Facility from 2007 to 2017. Plaintiff also submits a picture of McKenzie standing in front of his room holding a copy of the NY Post dated November 12, 2015 and a picture of McKenzie standing in front of his room holding a copy of the NY Post dated April 5, 2017. Plaintiff also submits the August 17, 2017 affidavit of Glenn Westerlind, the Facility's building manager, in which he states that McKenzie continues to live at the Facility to the present date.

With respect to its fourth cause of action seeking payment of \$128,660 for the occupancy of Culley from December 21, 2011 through December 31, 2016, plaintiff submits an April 27, 2016 affidavit of Culley in which he states that he has occupied of his room since September 2007 (see Freid aff., exhibit R). Plaintiff also submits signature logs which Culley signed in 2011, 2012, 2015, 2016, and 2017, claiming that the logs confirm that Culley was, and still is, a resident at the Facility. Plaintiff also submits photographs of Culley standing in front of his room holding a New York Daily News dated June 15, 2015, a New York Post dated November 12, 2015, and a New York Post dated April 19, 2017. Plaintiff also submits the August 17, 2017 affidavit of Glenn Westerlind stating that Culley continues to live at the Facility to the present date.

With respect to its fifth cause of action seeking summary judgment on its account stated claims, plaintiff alleges that it submitted invoices to defendants, which they kept without objection or dispute.

Plaintiff seeks a total award of \$335,930.00 on its second through fifth causes of action.

In opposition to plaintiff's motion, defendants argue there is no dispute that Grayton, McKenzie, and Culley each departed the Facility and relocated to permanent residential programs, thereby ending

defendants' obligation to pay plaintiff for the men's occupancy. Defendant states the MOU provides, in relevant part:

"The Operator shall register each referred Eligible Person who presents the appropriate documentation to the Operator or Facility staff, and the individual shall then be permitted to occupy a dwelling unit . . . [the Operator shall] have the Eligible Person sign a registration log daily to verify that he/she is still an occupant, and to submit the daily registration log to [the Emergency Placement Unit] on a daily basis to verify each client's continued occupancy. In the event that the Operator is unable to obtain the signature of any referred Eligible Person on the daily registration log, the Operator is advised to contract [the Emergency Placement Unit] within 48 hours to determine whether the individual has been relocated from the Facility. . ."

(see Freid affirmation, exhibit C).

Article D of the Agreement also provides, in relevant part:

"In the absence of the daily signature log, and without proper explanation, HRA will assume that the client has left the Facility, and no payment is due for the client . . ."

(*id.*)

Defendants argue that plaintiff has not made a prima facie showing that Grayton, McKenzie, and Culley were residents of the Facility for the time it is seeking payment because the signature logs were not authenticated, and the men's signatures are absent for a significant amount of the time for which plaintiff seeks payment. In support of this argument, defendants submit the April 8, 2016 affidavit of Hank Freid, which was submitted to the court in support of plaintiff's previous motion for summary judgment (see Rothschild affirmation, NYSCEF doc. No. 164). In his affidavit Freid, a member and manager of plaintiff, stated that generally when a client refused to sign the signature log, "Ms Diane Mammet, an administrative assistant at Plaintiff's headquarters . . . sent the sign-in logs to HRA . . . and informed one of the HRA representatives by telephone that the HRA client refused to sign the log . . . and that defendants never objected to this procedure" (*id.* at 7-8). Defendants argue that plaintiff's failure to submit an affidavit from Mammet regarding the procedure she followed when Grayton, McKenzie and Culley refused to the sign the signature log renders plaintiff's claims conclusory and insufficient to establish that the men were residents of the Facility on the days when their names did not appear on the signature logs.

Defendants argue further that the photographs of McKenzie and Culley standing in front of their rooms with newspapers do not conclusively establish that they were residents of the Facility. Accordingly, defendants argue that plaintiff's motion for summary judgment must be denied.

Defendants cross-move for summary judgment dismissing the complaint on the ground that HRA's obligation to pay plaintiff terminated when Grayton, McKenzie, and Culley each departed the Facility. With respect to Grayton, defendants argue that he occupied a room at the Facility from May 28, 2007 through August 6, 2010, when he was moved to a permanent apartment in a supportive housing program at Huntersmoon Hall. Defendants submit Grayton's case records which indicate that on August 6, 2010, Grayton's case manager helped him move his belongings out of the Facility and transported them, by van, to Grayton's new apartment at Huntersmoon Hall. According to the case records, Grayton's caseworker visited him at Huntersmoon Hall on August 11, 2010, August 20, 2011, August 27, 2010, September 10, 2010 and September 30, 2010. Defendants claim that Grayton maintained his apartment at Huntersmoon Hall until August 19, 2011. Defendants note that the signature logs submitted by plaintiff do not contain Grayton's signature from August 6, 2010 through February 2011.

Defendants' argue that in February 2011, when Grayton voluntarily decided to return to the Facility, he did not do so pursuant to a referral from HRA for the return placement. Rather, when Grayton returned to the Facility, he had been living in his own apartment and, therefore, was not a person in need of emergency housing or eligible for a public assistance shelter allowance. Therefore, he was no longer eligible for an HRA referral to the Facility.

Defendants note that, even if Grayton did not move out of the Facility in 2010, he did not reside at the Facility at the time of his death on August 7, 2012. Defendants' argue that plaintiff's signature logs indicate Grayton was not at the Facility as of May 18, 2012, as noted by the words "Paul Grayton Hospital Beth Israel," "Hospital," or "Beth Israel Hospital" appearing next to his name on the signature logs (Flores aff.; Westerlind aff., exhibit L.) Defendants note that Grayton was hospitalized on May 3, 2012 (Flores aff., exhibit J). On June 1, 2012, he was discharged from Beth Israel Hospital and placed in long-term care

at Rivington House Health Care Facility (see Flores aff., exhibits J and H). On June 4, 2012, Grayton's case manager visited him at Rivington House and wrote in his notes that "he was asleep, appeared to be frail... and unable to care for himself" (see Flores aff., exhibit I). On July 14, 2012, Grayton was readmitted to Beth Israel Hospital. On August 6, 2012, Grayton was discharged from Beth Israel Hospital and transported back to Rivington House, where he died the next day. Therefore, according to defendants, Grayton did not reside at the Facility from May 2, 2012 until his death on August 7, 2012.

With respect to McKenzie, defendants argue McKenzie was referred to the Facility on January 12, 2007, and resided there until July 22, 2010, when he moved into his own apartment at Huntersmoon Hall (see Flores aff., exhibit L.) McKenzie lived at Huntersmoon Hall until March 15, 2011 when he decided to voluntarily return to the Facility (see Flores aff., exhibit K). On April 6, 2012, HRA learned that McKenzie's placement at Huntersmoon Hall had been canceled because he abandoned his apartment and returned to the Facility (see Flores aff. exhibit L). Defendants claim McKenzie's return to the Facility was not pursuant to an HRA referral because he was not homeless or in need of emergency housing at that time.

Moreover, defendants note that plaintiff has not produced signature logs for McKenzie from his departure from the Facility on July 22, 2010 until February 20, 2011, a period of seven months. Defendants also claim that there is no admissible evidence of any communications between plaintiff and HRA regarding McKenzie returning to the Facility (see Rothschild aff., exhibit A). Defendants claim that Westerlind's statement that he personally observed McKenzie residing at the Premises from October 1, 2010 through January 2016, along with some photos allegedly taken by housekeeping staff, are neither reliable nor admissible, and consequently are insufficient to show he resided at the Facility continuously from the date he first registered in 2007 until the mid-2017 (see Westerlind aff.; Flores aff.).

Defendants also argue that on September 2, 2010, McKenzie became ineligible for emergency housing, because on that day he was disqualified from receiving financial benefits through HASA after HRA's Bureau of Fraud Investigation determined he was using a false name to collect public assistance

under multiple identities (see Flores aff., exhibit M).

With respect to Culley, defendants argue that Culley was referred to the Facility on September 28, 2007, and he occupied a room there until December 20, 2011 (see Flores aff., exhibit N). On December 5, 2011, Culley accepted a placement in the Scatter Site I Housing Program, a permanent supportive housing program for people with special needs, and on December 20, 2011, with his HASA case manager's assistance, Culley moved his belongings into his new apartment (see Flores aff., exhibit O). Defendants argue that Culley has resided at his Scatter Site apartment continuously from December 20, 2011 to the present (see Flores aff., exhibits N and O). Defendants also claim that, pursuant to HASA records, after Culley departed the Facility he was routinely monitored and observed at his apartment by the Scatter Site Housing Program I Manager, Sara Stolfi (Stolfi), as well as his HASA case managers, until April 2016 (Flores aff., exhibits N and O; Stolfi aff.).

In support of this contention, defendants submit a letter dated September 18, 2015, in which Stolfi wrote that Culley had regularly completed the required home visits from the date he entered the program in January 2012, through July 2015, shortly before she wrote her letter. In the letter, Ms. Stolfi stated:

“Mr. Culley's apartment has always had the appearance of being "lived in" with numerous belongings present. He routinely reported repairs within his apartment and coordinated access for completion of these repairs. Mr. Culley has a cat residing with him in his apartment that appears well cared for. To the best of staff knowledge, Mr. Culley has maintained residence at this apartment since his admission to the program” (see Flores aff., exhibit N; Stolfi aff., exhibit P.)

Defendants also submitted an affidavit of Ms. Stolfi in which she identified 41 specific dates that a case worker visited Culley in his Scatter Site apartment. Several of the visits — on 1/26/15, 3/9/15, 5/14/15, and 6/5/15 — coincide with dates Culley's initials or a signature appear next to his name on the signature logs from the Facility (see Stolfi aff.).

Culley's case notes indicate that, on January 5, 2012, several HRA employees, including Culley's case manager, went to the Facility to determine if Culley was still living there. A person representing himself as the Facility Property Manager showed them the room Culley had previously occupied. When

they knocked on the door, a man answered who was unknown to Culley's case manager. It appeared that the room was being occupied, but not by Culley. On July 10, 2012, Culley's case worker wrote in his case file that Culley denied signing the Facility's signature logs. The case worker wrote: "On Monday Case Manager called client whom [sic] stated he has not been signing into the SRO because he has his own apt and he does not have any belongings there" (see Flores aff., exhibit O). Based on the foregoing, defendants argue that plaintiff has not established Culley resided at the Facility continuously since December 20, 2011.

Defendants also argue that plaintiff, upon the realization that HRA allegedly breached the MOU by not making timely payments, had a duty to mitigate its damages and re-let the rooms, which it failed to do. Defendants argue that plaintiff could have, but failed to, bring nonpayment and eviction proceedings against McKenzie and Culley, and Grayton (while he was alive), because plaintiff had a direct landlord tenant relationship with them pursuant to the rent stabilization laws set forth in 9 NYCRR § 2520.6 and NYC Administrative Code § 26-504 (a) (1). Defendants note that the right of plaintiff to sue tenant for nonpayment and eviction is incorporated into Article 1 § J of the MOU.

In its reply on its motion for summary judgment, plaintiff argues that it has set forth prima facie entitlement to summary judgment as a matter of law.

In opposition to defendants' cross motion for summary judgment, plaintiff submits the affidavit of Freid who argues that defendants failed to submit any evidence in admissible form to raise an issue of fact precluding summary judgment in plaintiff's favor or establishing prima facie entitlement to summary judgment in favor of defendants. Freid further argues that the documents upon which defendants rely, unsworn cancellation letters, computer print outs, confidential medical evidence, and unsworn case reports, are inadmissible hearsay and insufficient as a matter of law.

Plaintiff also argues that, even if defendants' evidence was admissible, they did not raise an issue of fact precluding summary judgment in plaintiff's favor, because it is unrefuted that Grayton, McKenzie, and Culley did not surrender legal possession of their rooms at the Facility. Rather, at all times the men

had exclusive possession of their rooms. Plaintiff argues that, by virtue of placing Grayton, McKenzie, and Culley in the Facility, the defendants gave each man legal possession of their rooms, room 205, 206, and 309, respectively. According to plaintiff, once defendants gave the men legal possession of the rooms, they were required to pay for the use and occupancy of those rooms, regardless of whether the men were in continuous occupancy. Plaintiff contends that, since defendants never returned legal possession of these rooms to plaintiff, they are required to pay for the occupancy of these rooms until legal possession is surrendered to plaintiff. Plaintiff argues, therefore, that the issue of continuous occupancy is irrelevant and does not raise an issue of fact precluding summary judgment in plaintiff's favor.

Plaintiff argues that the issue of its inability to obtain complete signature logs for Grayton, McKenzie and Culley has already been litigated in *Branic International Realty Corp. v City of New York*, (2010 NY Slip Op 34005[U] [Sup Ct, NY County 2010]), in which the court held that an emergency housing provider provided proper evidence of continuing occupancy even in the absence of signature logs.

Finally, plaintiff argues that it should be granted summary judgment on its account stated cause of action.

Discussion

“To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor [CPLR 3212, subd. (b)], and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact [CPLR 3212, subd. (b)]” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks omitted], quoting *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]). If the movant fails to establish entitlement to summary judgment as a matter of law, summary judgment must be denied, regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Plaintiff has established prima facie entitlement to summary judgment on its second, third and

fourth cause of action, by presenting evidence that Grayton resided at the Facility until the time of his death in 2012, and that McKenzie and Culley have continuously resided at the Facility from 2007 through December 31, 2017, by submitting the signature logs, and the affidavits of Grayton, McKenzie, and Culley. With respect to its fifth cause of action for an account stated, plaintiff did not sustain its burden of establishing prima facie entitlement to summary judgment since, by its own admission, the amounts being sought (payment for occupancy from 2010 to 2016), have been litigated since 2010.

In opposition to plaintiff's motion, defendants have raised an issue of fact regarding whether Grayton, McKenzie and Culley continuously resided at the Facility, by noting that the men did not sign the signature logs during some of the time for which plaintiff seeks payment, and by submitting evidence that each of the men had moved to permanent supportive housing, and that the men remained in that permanent housing for extensive periods of time. Further, defendants have raised an issue of fact regarding whether plaintiff is entitled to payment for the period when Grayton, McKenzie and Culley voluntarily returned to the Facility, by noting that when the men returned to the Facility it was not done pursuant to an HRA referral, and therefore, defendants have no obligation to pay plaintiff for that period of occupancy.

With respect to Grayton, defendants have shown that on August 6, 2010, Grayton moved to his own permanent apartment at Huntersmoon Hall and that defendants learned that Grayton had returned to the Facility without an HRA referral August 31, 2011. Further, Grayton was hospitalized on May 3, 2012 and did not return to the Facility before he died on August 7, 2012. Defendants support these factual allegations by submitting Grayton's case notes (see Flores aff., exhibit I), and medical records (see id., exhibit J).

With respect to McKenzie, defendants have demonstrated that McKenzie's placement with plaintiff ended on July 22, 2010, the day he moved to his own apartment at Huntersmoon Hall. McKenzie left Huntersmoon on March 15, 2011 and returned to the Facility without an HRA referral. McKenzie was also disqualified from receiving financial benefits from HASA, because he was already receiving public assistance benefits using a false name. Defendants supported these factual allegations by submitting

McKenzie's case notes (see Flores aff., exhibit L) and a copy of HRA's Bureau of Fraud Investigation report (see Flores aff., exhibit M).

With respect to Culley, defendants note that on December 20, 2011, he moved to his own permanent apartment, and has remained there to the present. Defendants support this factual allegation with his case notes (see Flores aff., exhibit N and O), and the affidavit and notes of Sara Stolfi, Scatter Site I Housing Program Manager (see Stolfi aff.).

Plaintiff argues that the documents upon which defendants rely are inadmissible hearsay, and, therefore, do not raise an issue of fact. Further, plaintiff contends that even if the court considers these documents, they are irrelevant since whether or not the men moved out of, and back into, the Facility, they remained occupants of their rooms as tenants, and plaintiff as landlord could not regain occupancy of the rooms until defendants relinquished their legal possession of the rooms.

Contrary to plaintiff's arguments, the case records and other documents attached to the affirmation of Ramon Flores, assistant general counsel in the Office of Legal Affairs at the HRA, fall within the business record exception to the hearsay rule because Flores provided a proper foundation for the admissibility of those records. A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures (*see Citibank, N.A. v Cabrera*, 130 AD3d 861 [2nd Dept 2015]; *Palisades Collection, LLC v Kedik*, 67 AD3d 1329 [4th Dept 2009]). In his April 18, 2016 affirmation submitted on the first motion for summary judgment and referred to in this motion, Flores states that the records upon which he relies are generated in the normal course of business and are maintained by the HRA. Flores states that an integral part of his responsibilities as an HRA attorney is to review the HRA records of various HRA programs including HASA, and he is the custodian of these records. Flores describes how the records are created, stored and maintained by HRA. He further states that, while he has access to the HRA records, he cannot change any of the content or create documents in the various HRA systems. Thus, while these records are admissible, the fact that Flores did not personally enter the information in the HRA reports merely goes to the weight

to be given the records by the trier of fact (see CPLR 4518[a]).

Moreover, a court is permitted to consider hearsay in opposition to a motion for summary judgment motion, so long as it is not the only evidence submitted in opposition (*see Narvaez v NYRAC*, 290 AD2d 400, 400–401 [1st Dept 2002]). With respect to Grayton, defendants submit the HRA records but they also submit the affidavit of Rob Hunter, a Huntersmoon Housing Coordinator, who states that Grayton lived at Huntersmoon Hall from August 1, 2010 – August 19, 2011 (see Flores affirmation, exhibit H). With respect to McKenzie, defendants submit an affidavit of Ron Hunter who states that McKenzie resided at Huntersmoon Hall from July 23, 2010 – March 15, 2011. With respect to Culley, defendants submit the affidavit of Sara Stolfi, the Program Manager for the Scatter Site Housing Program, who states that Culley’s caseworker made 41 home visits to Culley at his Scatter Site apartment and that he continues to reside there. Defendants also rely upon the signature logs submitted by plaintiff arguing that, the fact that the logs contain long stretches in which neither Grayton, McKenzie nor Culley signed, is proof that the men did not reside continuously at the Facility.

Plaintiff argues that defendants cannot rely on the signature logs as proof that the men did not live at the Facility since the absence of signature logs has already been deemed not to be a bar to defendants’ obligation to pay plaintiff (see *Branic International Realty Corp. v The City of New York*, 2010 NY Slip Op 304085[U] [Sup Ct NY County 2010]). However, *Branic* is distinguishable from the facts of this case. In *Branic*, plaintiff sought payment from the City for a room it provided to HRA client Phillip Pitt. In support of its motion for summary judgment, the *Branic* plaintiff provided the sign-in logs for Pitt until 2005, when, according to plaintiff, Pitt refused to sign the registration logs, yet continued to live at the facility. The plaintiff also provided proof that, for two years after Pitt refused to sign the log, the City continued to pay for Pitt’s housing. In granting summary judgment to plaintiff, the motion court found that, in 2005, when Pitt stopped signing the registration log, plaintiff immediately informed an HRA employee, and continued submitting monthly bills to the City, which it paid. Therefore, the *Branic* plaintiff established prima facie entitlement to summary judgment. The court also found that the City failed to offer

any evidence that Pitt had not continuously lived at the Facility, and did not deny that HRA was notified about Pitt's refusal to sign the log. Here, however, defendants have submitted evidence that Grayton, McKenzie and Culley did not continuously lived at the Facility, have denied that plaintiff contacted them about the men's refusal to sign the logs, and have refused to pay for the men's housing for the period in question.

Plaintiff further argues that defendants are barred from relitigating the issue of the signature logs, because it submitted the same signature logs in the 2010 action as are submitted here, and in the 2010 action, defendants conceded partial liability. Therefore, plaintiffs argue that defendants are precluded from challenging the signature logs because, defendants did not challenge them in the 2010 action.

Contrary to plaintiff's arguments, in the 2010 case the court made no determination regarding the credibility or weight to be afforded to the signature logs. Therefore, defendants are free to challenge the veracity of the logs in this action.²

Finally, plaintiff argues that whether Grayton, McKenzie and Culley left the Facility is not relevant because, upon making the HRA referral to the Facility, plaintiff surrendered legal possession to Grayton's, McKenzie's, and Culley's rooms to defendants, and that defendants remain in possession of those rooms, since they have not surrendered the room keys to plaintiff.

Contrary to this argument, defendants do not have legal possession of the rooms occupied by HRA clients. Rather, it is Grayton, McKenzie and Culley who had legal possession of their rooms, and a tenant/landlord relationship with plaintiff. Pursuant to Rent Stabilization Code a permanent tenant is defined as an individual who has resided in an SRO building for a period of at least 6 months (see 9 NYCRR § 220.6[j]; NYC Admin. Code § 26-504[a][1]). Here, there is no dispute that each man resided in his room at the Facility for more than six months. Thus, it was Grayton, McKenzie, and Culley who had legal possession of their rooms, not defendants.

² The court notes that plaintiff seeks to prevent defendants from challenging the signature logs on the ground that defendants did not challenge them in the 2010 case. However, in the 2010 case, defendants submitted the same case and medical records as they do in this action without objection from the plaintiff.

Further, in *Matter of Davis v Dinkins* (206 AD2d 365 [2d Dept 1994]), the Second Department determined that an agreement between an SRO hotel and the City does not give rise to a legal right of possession (*id.* at 367-368). The *Davis* court noted that the agreement between the SRO and the City did not give rise to a lease because the agreement was not for a specific period of time, nor was it for a specific number of rooms, essential elements of a lease. Here, while the defendants requested that plaintiff set aside 26 rooms, defendants did not guarantee that any number of rooms would be occupied. Further, there is no agreement regarding how long the HRA clients would stay at the Facility. Thus, in the absence of those elements of a lease, there is no lease agreement between plaintiff and defendants, and, therefore, defendants herein have no legal right of possession of Grayton's, McKenzie's and Culley's rooms.

Based on the foregoing, plaintiff's motion for summary judgment is denied. Likewise, defendants' cross motion for summary judgment is denied as there are many issues of fact regarding the duration of Grayton's, McKenzie's and Culley's residency at the Facility, and whether their residency was pursuant to referrals from the HRA. With respect to defendants' claim that plaintiff failed to mitigate its damages by not re-letting the men's rooms, since there has been no determination regarding the men's residency, this claim is premature.

Accordingly, it is ORDERED that plaintiff's motion for summary judgment is denied and defendants' cross motion for summary judgment is denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 103, 80 Centre Street on April 10, 2019 at 2:00 PM.

DATED: January 7, 2018

ENTER:



J.S.C.

HON. ALEXANDER M. TISCH