

1588-1600 AMS LLC v Gil
2019 NY Slip Op 34461(U)
April 15, 2020
Civil Court of the City of New York, New York County
Docket Number: L&T Index No. 61088/17
Judge: Clifton A. Nembhard
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART C

Motion Seq. # 6

1588-1600 AMS LLC

L&T Index # 61088/17

Petitioner-Owner

-against-

DECISION/ORDER

LOUIS GIL a/k/a LUIS GIL
502 West 139th Street, Apt. #1
New York, New York 10031

Respondent-Licensee

Hon. Clifton A.
Nembhard

“JOHN DOE” and “JANE DOE”

Respondents-Underlicensees

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of petitioner’s motion for an order pursuant to RPAPL § 745(2)(c)(I) striking respondent’s answer and granting it a final judgment of possession, a warrant of eviction and a monetary judgment.

Papers

Numbered

Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits	2
Replying Affidavits	3
Exhibits	_____
Other	_____

Upon the foregoing papers, the Decision / Order on this motion is as follows:

Background

Petitioner commenced the instant licensee holdover proceeding in April 2017 to recover possession of apartment 1 located at 502 West 139 Street, New York, New York. Respondent interposed an asserting succession rights to the apartment. By a two attorney stipulation in September 2017, respondent agreed to pay ongoing use and occupancy beginning October 1,

2017. Respondent defaulted on the agreement prompting petitioner to move for alternative relief including an order striking respondent's answer and awarding it a final judgment of possession and a money judgment for the arrears due. On November 25, 2019, the Court issued a decision/order requiring respondent to pay \$6,935.50 in arrears plus December's use and occupancy of \$277.30 by December 6, 2019. The decision also noted that upon respondent's default, petitioner may move for the appropriate relief pursuant to pre-2019 RPAPL §745. Petitioner now moves for the same relief on the ground that respondent again failed to make the payments.

Discussion

Petitioner argues that it is entitled to the relief it seeks based on the language of the statute. This language, petitioner asserts, is clear and cannot be ignored. Respondent in turn proffers a laches defense claiming that petitioner's more than two year delay in seeking to enforce its right mitigates against striking his answer. In addition, respondent asserts that he now has all the money he was directed to pay however petitioner rejected his attempt to tender it.

RPAPL § 745(2)(c)(I) states in pertinent part that "[i]f the respondent shall fail to comply with the court's directions with respect to direct payment to the petitioner ... as directed by the court of the full amount of the rent or use and occupancy required to be deposited, the court upon an application by the petitioner shall dismiss without prejudice the defenses and counter-claims interposed by the respondent and grant judgment for petitioner." The statute further provides that the only exception is where respondent alleges and proves full payment.

In the face of this language, respondent cites to the holdings in *BAE 193 Realty LLC v. Rosales*, 63 Misc3d 948 [Civ Ct Bx 2019] and *Mysinski v. Genuine Realty Corp.*, 2016 NY Misc LEXIS 10184 [Civ Ct NY 2016]. In *Rosales* the court credited respondent's laches argument reasoning that he was prejudiced by petitioner's six adjournments and 210 day delay in moving for a rent deposit. In so doing the court declined to strictly apply the statute opining that to do so would deprive respondent of his due process right to a trial while also running afoul of the statute's legislative intent which is to protect landlords against prejudice from delays caused by the tenants. Similarly in *Mysinski*, the court declined to direct the tenants to pay arrears and only directed payment of ongoing use and occupancy. There the court reasoned that the landlord made the motion on the eve of trial and nearly three years after the action was commenced.

As an initial matter the Court notes that *Mysinski* did not involve a 745 motion. Instead, it was brought pursuant to RPL § 220. The facts here are also distinguishable from those in *Rosales* in that here respondent agreed to pay the ongoing use and occupancy. He therefore cannot be heard to express surprise or claim that he would have acted sooner had he known about the issue.

Moreover, respondent was on notice that petitioner sought these monies as a result of the November 25, 2019 motion. In contrast, the tenant in *Rosales* never agreed to make any payments and in fact challenged the legality of the rent charged including an improper 80% vacancy increase which was not refuted by the landlord.

Respondent next contends that since he has all the money available to tender and can afford the relatively modest rent, it would make little sense to apply RPAPL § 745 which was intended to prevent abuses from tenants who had absolutely no financial ability to satisfy a judgment. *Lang v. Pataki*, 176 Misc2d 676 [1st Dept 2000]. Respondent argues that it would be an injustice for the court not to exercise its discretion and modify its order given these circumstances. In support of this claim, respondent notes that the Court did just that in *Hillside Park v. 168 LLC v. Hossain*, NYLJ, Sept. 8, 2016 [Civ Ct Qns 2016]. That case, respondent insists, is distinguishable from *370 Columbus Investors, LLC v. Lepeter*, L&T No. 53563/19 [Civ Ct NY] in which the Court applied 745 because the landlord did not delay in making its claim.

The Court is not persuaded by these arguments. Respondent claims that, but for petitioner's delay, he would have had an easier, smoother and faster application for a One Shot Deal or might have been able to pay the arrears using his own resources within the allotted time. However, he offers no explanation why he did not seek the financial assistance sooner or simply make the payments out of pocket after signing the stipulation. And as previously noted, respondent had roughly six weeks between the motions to make the necessary arrangements.

Respondent's reliance on the Court's previous decisions is also unavailing. In *Hossain*, the rent deposit order was stayed by the Appellate Term. Once the stay was lifted, respondent's attorney immediately attempted to deposit the funds however payment was rejected by the court clerk. As a result, the Court found that it was impossible for respondent comply with its order and declined to strictly apply RPAPL § 745. Respondent here faced no such obstacles nor did he timely attempt to make the payment. His attorney did not offer payment to petitioner's counsel until December 24, 2019. Given these distinctions and the fact that respondent has made only one payment since the September 2017 stipulation, as with the tenant in *Lepeter*, the Court finds no grounds to relieve him of the unambiguous language of RPAPL § 745(2)(c)(I).

Conclusion

Based on the foregoing, the motion is granted. Respondent's answer is stricken and petitioner is awarded a final judgment of possession. Issuance and execution of the warrant is stayed pursuant to Executive Order 202.8 as it pertains to evictions during the COVID-19 health crisis. Petitioner is also awarded a money judgment in the amount of \$7,209.80 for arrears due through January 2020.

This constitutes the decision and order of the Court.

Dated: April 15, 2019

New York, New York

Hon. Clifton A. Nembhard, JHC