CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART E

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ROCHDALE VILLAGE, INC.,

Index No. L&T 65972/18

Petitioner-Landlord,

-against-

DECISION/ORDER

SHIRELL BAKER,

Respondent-Cooperator,

"JOHN DOE" & "JANE DOE,"

Respondents-Undertenants.

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Present:

Hon. CLINTON J. GUTHRIE
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of petitioner's motion to enforce the warrant of eviction and respondent Shirell Baker's cross-motion to vacate the stipulation of settlement and judgment and warrant, for dismissal, and for denial of petitioner's motion:

Papers	**Numbered**
Notice of Motion & Affirmation/Affidavit/Exhibits Annexed.....	1
Notice of Cross-Motion & Affirmation/Affidavit/Exhibits Annexed.....	2
Affirmation in Opposition to Cross-Motion and Reply & Exhibits Annexed.....	3
Reply Affirmation (Cross-Motion) & Affidavit Annexed.....	4

Upon the foregoing cited papers, the decision and order on petitioner's motion and respondent's cross-motion (consolidated for determination herein) is as follows.

PROCEDURAL HISTORY

This is a residential holdover proceeding commenced by Petitioner in July 2018. Petitioner's notices to cure and to terminate respondent's tenancy of the subject Mitchell-Lama cooperative apartment allege that respondent failed to submit a 2015 income affidavit, failed to pay surcharges resulting from said failure, and failed to pay surcharges relating to a 2012 DHCR audit of an income affidavit. Following two adjournments, the proceeding was scheduled for trial on October 29, 2018. Respondent, appearing *pro se*, entered into a stipulation of settlement whereby she consented to the entry of a final judgment of possession, a money judgment in the amount of $14,050,93, and issuance of a warrant of eviction. Execution of the warrant was stayed for payments of $585.46 (plus ongoing maintenance) by the 7th of each month until the judgment amount was paid.[1] Upon any default, petitioner could execute upon the warrant after service of a marshal's notice. The stipulation also acknowledged that respondent had submitted her 2017 income affidavit and "agree[d] to comply with DHCR rules and regulations noted in the preliminary notices," subject to restoration for a hearing upon respondent's default.[2] The stipulation was so-ordered by Judge Julie Poley and a judgment and warrant issued against respondent thereafter. Judge Poley conducted an inquest against the non-appearing respondents (John Doe and Jane Doe) on December 6, 2019 and granted a judgment and warrant against them on the same date.

Following the suspension of all eviction proceedings as a result of the COVID-19 public

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[1] The stipulation does not include an end-date for the payments. The court notes that the proceeding was commenced prior to the amendment to RPAPL § 749(1) to require that all warrants of eviction include an earliest execution date (EED). *See* L 2019, ch 36, § 19 (effective June 14, 2019).

[2] This obligation is not specifically time-limited, but the stipulation provides that the proceeding will be discontinued and the judgment and warrant vacated upon timely compliance. The court interprets this to mean compliance with the judgment payments.

health emergency (*see* Administrative Order (AO) 68/20), Petitioner moved pursuant to DRP-213, which was issued by Administrative Judge Anthony Cannataro on August 12, 2020, to execute upon the warrant of eviction based on an allegation of a breach in payments under the October 29, 2018 stipulation. Petitioner's motion first appeared on the Queens HMP calendar on November 20, 2020, at which time respondent was referred to The Legal Aid Society for representation. Subsequently, The Legal Aid Society appeared as counsel for respondent and served a cross-motion to vacate the October 29, 2018 stipulation and the judgment and warrant, to dismiss the proceeding, and to deny petitioner's motion. Before the motions could be heard and briefing completed, the COVID-19 Emergency Eviction and Foreclosure Prevention Act [L 2020, ch 381] (hereinafter "EEFPA") became law on December 28, 2020 and stayed all pending eviction proceedings for 60 days. The proceeding was restored on April 13, 2021 and the court heard argument (via Microsoft Teams) on petitioner's motion and respondent's cross-motion and reserved decision.

PETITIONER'S MOTION

Petitioner's motion to enforce the warrant of eviction is made within the confines of DRP-213. DRP-213 permits a petitioner with a warrant issued before March 17, 2020 to seek leave of court to execute upon the warrant. Petitioner's motion includes an affidavit from Debrena Reid, the legal coordinator for Rochdale Village, which was dated August 31, 2020 and states that respondent defaulted on the October 29, 2018 stipulation insofar as she: 1) failed to pay the balance of $.59 of the maintenance from November 2018 to the present; 2) failed to pay the [monthly] maintenance $1,166.59 from April 2020 to the present; 3) failed to pay the balance of $.46 of the additional [monthly] payment of $585.46 from November 2018 to the present; and 4) failed to pay the additional [monthly] payment of $585.46 from March 2020 to the present. Petitioner also attaches

a rent breakdown going back to January 1, 2018 and Ms. Reid's affidavit states that $11,760.28 was due through August 31, 2020.

In opposition, respondent argues that the court should balance the equities and deny petitioner's motion insofar as permitting execution of the warrant would lead to her facing increased health and mortality risk from COVID-19 if she were rendered homeless (citing, *inter alia*, the Centers for Disease Control and Prevention (CDC) eviction moratorium order dated September 4, 2020).[3] Respondent, via her cross-motion, also seeks vacatur of the underlying stipulation of settlement and the judgment and warrant granted therein. Since the potential vacatur of the judgment and warrant would render petitioner's motion moot, the court will address the cross-motion before making a final determination thereon. *See e.g. Datta v. Terrapin Indus., LLC*, 2011 NY Slip Op 33562[U] [Sup Ct, Queens County 2011].

RESPONDENT'S CROSS-MOTION

I. Motion to vacate October 29, 2018 stipulation, judgment, and warrant.

Respondent's cross-motion first seeks vacatur of the October 29, 2018 stipulation and the judgment and warrant contained therein. Respondent, who states in her affidavit in support of the cross-motion that she has lived in the subject apartment since 1973, argues that the stipulation should be vacated because she "inadvertently waived a complete defense" (Redmon Affirmation, ¶ 13), namely Petitioner's failure to state a cause of action.

Generally, "[s]tipulations of settlement are favored by the courts and not lightly cast aside…[and] [o]nly where there is cause sufficient to invalidate a contract, such as fraud, collusion,

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[3] In the reply in support of her cross-motion, Respondent also attempts to raise a Tenant Safe Harbor Act [L 2020, ch 127] (hereinafter "TSHA") defense to the arrears at issue.

mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation." *Hallock v. State*, 64 NY2d 224, 230 [1984]; *see also Union St. Houses Owners, LLC v. Kriegsman*, 70 Misc 3d 143[A], 2021 Slip Op 50180[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2021]. Here, respondent does not allege any specific contractual basis to invalidate the October 29, 2018 stipulation. However, the Court of Appeals has also recognized that a court may vacate a stipulation where it has been entered "inadvertently, inadvisably or improvidently" such that it took the case "out of the due and ordinary course of proceeding in the action, and in so doing may work to [a party's] prejudice." *In re Estate of Frutiger,* 29 NY2d 143, 150 [1971]; *see also Molinelli v. Gouldbourne-Fontan*, 70 Misc 3d 139[A], 2021 NY Slip Op 50088[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2021]. Moreover, "'[u]nder almost any given state of facts, where to enforce a stipulation would be unjust or inequitable or permit the other party to gain an unconscionable advantage, courts will afford relief.'" *RCS Recovery Servs., LLC v. Mensah*, 166 AD3d 823, 825 [2d Dept 2018] [quoting *Goldstein v. Goldsmith*, 243 AD 268, 272 [2d Dept 1935]].

Respondent states in her affidavit that she was unrepresented when she came to court on October 29, 2018 (after she failed to qualify for The Legal Aid Society's services) and signed the stipulation of settlement. She further states that she made payments under the agreement until April 2020, when she was out of work, experienced the deaths of three (3) close family members, and was helping her elderly father find housing. However, respondent does not allege that she did not understand the stipulation, nor that its terms were not explained to her in court.[4] Therefore, there is

[4] The court has listened to the FTR audio recording of the allocution of the stipulation of settlement. The allocution lasted for approximately 5 (five) minutes and respondent did not express a lack of understanding, even after being asked at the conclusion if she had any questions.

no demonstration that the stipulation was entered inadvertently.

Respondent's attorney argues that respondent's ignorance of the law resulted in a failure of a meritorious defense, namely failure to state a cause of action. The crux of the defense is that this proceeding is predicated, in part, on a failure to pay certain income audit surcharges and that said surcharges are prohibited from being collected in a summary proceeding under RPAPL § 702. However, this proceeding was commenced well before the adoption of RPAPL § 702 as part of the Housing Stability and Tenant Protection Act (hereinafter "HSTPA"). By the express terms of the HSTPA, the provision including RPAPL § 702 "shall apply to actions and proceedings commenced on or after such effective date [June 14, 2019]." *See* L 2019, ch 36, § 29. Although respondent's attorney asserts that the court should give the statute retroactive effect notwithstanding its plain applicability language since the HSTPA is a "remedial statute," such an interpretation would not comport with appellate law binding upon this court. *See Hillside Park 168, LLC v. Benjamin*, 66 Misc 3d 133[A], 2019 NY Slip Op 52119[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019]; *see also Regency Vil. Mgt. v. Rodriguez*, 66 Misc 3d 142[A], 2020 NY Slip Op 50168[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2020].

This proceeding was brought upon allegations in the predicate notice to cure and notice of termination that respondent failed to submit her 2015 income affidavit and failed to pay surcharges resulting therefrom in the amount of $6,802.20, and that she failed to pay $6,474.48 resulting from a 2012 DHCR audit of her income affidavit. Failure to timely pay non-surcharge carrying charges is not alleged in the predicate notices, nor the petition. However, the October 29, 2018 stipulation granted petitioner not only a possessory judgment but also a money judgment of over $14,000.00. In reviewing the rent breakdown commencing in January 2018 attached as "Exhibit B" to

petitioner's motion, $11,337.10 of the total amount coming due between January 1, 2018 and October 29, 2018 (the date of the stipulation) is solely attributable to non-surcharge carrying charges; only $2,267.40 over this period is attributable to "additional rent" (i.e. surcharges) and the remaining amounts are unidentified carryover charges and other fees. Therefore, the money judgment that petitioner obtained was mostly comprised of carrying charges that were not demanded before this proceeding was commenced as per the specific 3-day demand requirement contained in respondent's occupancy agreement (found at Paragraph 20(B) of "Exhibit A" to petitioner's affirmation in opposition to respondent's cross-motion) and that were not specifically sought in the petition.[5] *See e.g. 36 Main Realty Corp. v. Wang Law Off., PLLC*, 49 Misc 3d 51, 53 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015] ["[O]nce the proceeding has been properly commenced, it is the petition which alleges the relevant facts upon which the proceeding is based and sets forth the relief sought (*see* RPAPL 741)."]. Moreover, by terminating respondent's tenancy, petitioner would not have been permitted to maintain a summary nonpayment proceeding for the carrying charges that it ultimately obtained via the money judgment in this holdover proceeding. *See Lakeview Affordable Hous., LLC v. Turner*, 66 Misc 3d 142[A], 2020 NY Slip Op 50163[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2020]; *265 Realty, LLC v. Trec*, 39 Misc 3d 150[A], 2013 NY Slip Op 50974[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2013].

Petitioner argues that in spite of the advantages that it obtained within the October 29, 2018 stipulation, respondent nonetheless received the "benefit of her bargain" (Pena Affirmation, ¶ 26) because she avoided being evicted for noncompliance with her occupancy agreement and the

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[5] As the stipulation does not specify what component charges make up the money judgment amount, the true nature of those charges could not have been addressed during the allocution.

Mitchell-Lama rules and regulations. While it is true that respondent avoided the risk of trial (and a potentially unfavorable outcome) and obtained a 24-month payout for the judgment amount, the court may not overlook the fact that petitioner not only obtained the ultimate relief that it sought (a possessory judgment) but also relief that was substantially in excess of what it sought (a money judgment including carrying charges not specifically demanded nor sought in the petition), which kept respondent at risk of eviction for a two-year period during which *any* default in payment would result in execution of the warrant.[6] *See e.g. Weitz v. Murphy*, 241 AD2d 547, 548-549 [2d Dept 1997]. Additionally, in the absence of notice that regular carrying charges would be sought herein, respondent had no ability to formulate a defense prior to consenting to a stipulation that included those charges. *See e.g. EOM 106-15 217th Corp. v. Severine*, 62 Misc 3d 141[A], 2019 NY Slip Op 50068[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019].

In conclusion, upon reviewing the October 29, 2018 stipulation with the benefit of the papers submitted on petitioner's motion and respondent's cross-motion, it is apparent, for the reasons outlined herein, that its terms took the case "out of the due and ordinary course" (*Frutiger,* 29 NY2d at 150) and effectuated an unconscionable advantage in favor of petitioner (*see RCS Recovery Servs., LLC*, 166 AD3d at 825), who had the benefit of counsel, and to the detriment of respondent, who was unrepresented. *See e.g. Cabbad v. Melendez*, 81 AD2d 626 [2d Dept 1981]; *600 Hylan Assoc. v. Polshak*, 17 Misc 3d 134[A], 2007 NY Slip Op 52225[U] [App Term, 2d Dept,

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[6] In this holdover proceeding, the assessment of whether to excuse any such default is also subject to a higher standard than would be the case in a nonpayment proceeding. *Compare Brigham Park Co-Operative Apts., Sec #3, Inc. v. Rock*, 42 Misc 3d 141[A], 2014 NY Slip Op 50220[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2014] [Defaults that went to the "heart of the proceeding and settlement" were not to be excused in holdover proceeding], *with 450 Clinton, LLC v. Bowe*, 63 Misc 3d 156[A], 2019 NY Slip Op 50828[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019] [Applying "good cause" standard in affirming vacatur of judgment and warrant in nonpayment proceeding].

2d & 11th Jud Dists 2007]. Therefore, the court grants respondent's motion to vacate the October 29, 2018 stipulation and the judgments (possessory and monetary) and warrant contained therein.

II. Motion to dismiss.

The court next addresses respondent's request to dismiss the proceeding for failure to state a cause of action. The court has previously observed that RPAPL § 702, which is cited as the primary basis for dismissal, is not applicable to this proceeding. Respondent also argues that failure to comply with income reporting requirements and/or failure to pay resulting surcharges is not a basis for termination under the Mitchell-Lama regulations. The grounds for terminating a Mitchell-Lama tenancy are set out in 9 NYCRR § 1727-5.3(a). Petitioner cites four (4) subsections of 9 NYCRR § 1727-5.3(a) in its notice to cure and notice of termination. The first, 9 NYCRR § 1727-5.3(a)(2), states that "[t]enant, cooperator, or other individual violates a substantial agreement, covenant or obligation of the lease, or fails to comply with any substantial provision of the by-laws, subscription agreement or other governing document." Under the terms of respondent's occupancy agreement (Paragraph 3(B)), she agreed that "the family income and composition and other eligibility requirements are substantial and material obligations [the] tenancy and that [she] will comply promptly with all requests by Company or the Commissioner for information and certification concerning the Cooperator's family income, family composition and other requirements for continued occupancy." Accordingly, Petitioner has stated a cause of action under 9 NYCRR § 1727-5.3(a)(2).

The second subsection cited by petitioner, 9 NYCRR § 1727-5.3(a)(6), states that "[i]ncome of tenant, cooperator or other individual: (i) exceeds amount permitted by law; or (ii) he or she refuses to divulge his or her true income or that of other persons residing in the apartment." The

facts alleged, that respondent failed to submit her income affidavit for 2015 and failed to pay surcharges resulting form that failure and from a 2012 income audit, are sufficient to state a cause of action under this subsection.

The third subsection, 9 NYCRR § 1727-5.3(a)(7), states that "[t]enant, cooperative [sic], or other individual willfully misrepresented or concealed any material fact which would affect eligibility for admission or continued occupancy or rent or maintenance charges to be paid." The predicate notices do not make any allegation of *willful* misrepresentation or concealment of income. Therefore, pursuant to CPLR § 409(b), the court hereby dismisses petitioner's claim based on 9 NYCRR § 1727-5.3(a)(7) without prejudice. *See e.g. DLB of NY, LLC v. Billan*, 70 Misc 3d 143[A], 2021 NY Slip Op 50158[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2021] [Landlord "bound by the notice served" in summary proceeding].

Finally, the fourth subsection cited by petitioner is 9 NYCRR § 1727-5.3(a)(8), applies where "[t]enant, cooperator, or other individual obtained occupancy or continues in occupancy of a dwelling unit in any manner not in conformity with the provisions of this Part, or with any other applicable statute or regulation." Since the income reporting requirements are contained in respondent's occupancy agreement and the Mitchell-Lama regulations, the alleged failure to comply with these requirements necessarily renders continued occupancy to be "not in conformity" with those provisions. *See generally Matter of Murphy v. New York State Div. of Hous. And Community Renewal*, 21 NY3d 649, 654 [2013]. Accordingly, Petitioner has stated a cause of action under 9 NYCRR § 1727-5.3(a)(8).

In summary, respondent's motion to dismiss is granted solely to the extent of dismissing petitioner's claim under 9 NYCRR § 1727-5.3(a)(7) without prejudice. The motion to dismiss the

remainder of the claims asserted by petitioner is denied. In light of the considerable length of respondent's tenancy in the subject state-subsidized Mitchell-Lama cooperative (*see Murphy*, 21 NY3d at 654), pursuant to CPLR § 404(a), the court will permit respondent to serve an answer within 10 days of service of this Decision/Order with notice of entry. *See Eklecco Newco LLC v. Chagit, Inc.*, 12 Misc 3d 143[A], 2006 NY Slip Op 51421[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2006]. Petitioner's motion to execute upon the warrant of eviction, which has been vacated herein, is denied as moot.[7] This proceeding will be restored to Part E for a virtual conference via Microsoft Teams on May 25, 2021 at 12:00 PM.[8]

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: Queens, New York
May 4, 2021

HON. CLINTON J. GUTHRIE, J.H.C.

AA APPROVED - HON. CLINTON J. GUTHRIE

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[7] Although the court does not vacate the default judgment and warrant as against John Doe and Jane Doe, execution upon the warrant issued against them was "per" the October 29, 2018 stipulation so the vacatur of that stipulation renders the relief sought by petitioner against them to be moot, without prejudice to petitioner's claims upon a final disposition as to respondent Shirell Baker.

[8] The restored appearance shall be subject to all laws and orders affecting eviction proceedings in effect at the time.