

<b>Ocean Bay Rad LLC v Battle</b>
2021 NY Slip Op 32900(U)
November 12, 2021
Civil Court of the City of New York, Queens County
Docket Number: Index No. 70569/19
Judge: Sergio Jimenez
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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF QUEENS: HOUSING PART D

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OCEAN BAY RAD LLC,

Index No. 70569/19

Petitioner,

-against-

DECISION AND ORDER

VALDA BATTLE,  
NYCHA,

Respondents.

-----X

Present:

Hon. Sergio Jimenez  
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of petitioner’s motion seeking permission to execute on the warrant of eviction previously issued and respondents cross-motions seeking vacatur of the stipulation and dismissal of the proceeding and any other relief as the court may find appropriate:

<b>Papers</b>	<b>Numbered</b>
Order to Show Cause.....	
Notice of Motion and Affidavits Annexed .....	<u>1</u>
Notice of Cross Motion .....	<u>2</u>
Answering Affirmations/Affidavits .....	<u>2, 3</u>
Replying Affirmations.....	<u>3, 4</u>
Exhibits .....	
Memorandum of law.....	

This is a summary nonpayment proceeding where Ocean Bay Rad LLC (petitioner) seeks possession of the premises located at 439 Beach 54<sup>th</sup> Street, Apartment 2A in Arverne, New York 11692 from Valda Battle (respondent) based on allegedly unpaid rent. This proceeding was first calendared December 3, 2019, where the parties (petitioner through counsel and respondent pro se) entered into a stipulation resolving the matter resulting in the entry of a judgement against respondent for \$1,183.15. In the next two months, two orders to show cause were filed by

respondent, requesting more time to pay the balance. To resolve both motions the parties entered into subsequent stipulations on January 28, 2020 and March 10, 2020. The global pandemic then paused court functions. Pursuant to DRP 213, the petitioner moved for permission to execute on its pre-existing warrant of eviction in November of 2020. Respondent was connected to counsel and respondent, now represented, filed a cross-motion seeking to vacate the stipulations and to allow the respondent to file an answer. The court will consider petitioner's motion to be a DRP-217 motion which replaced the earlier DRP-213. The motions were both fully briefed by the parties and on October 26, 2021 the court held virtual argument and reserved decision on the motions.

#### Petitioner's motion for permission to execute on the warrant

Petitioner's DRP motion seeking permission to execute on the previously issued warrant of eviction is denied for the reasons set forth below.

#### Respondent's cross-motion

##### **Vacatur of the stipulation**

Respondent seeks, in her motion, the vacatur of all three of the stipulations dated December 3, 2021, January 28, 2020 and March 10, 2020. Respondents at that time did not have counsel prior to the signing of the stipulation. The stipulation was allocuted by Hon. Julie Poley who explained to the pro se respondent what the terms meant. The first stipulation calls respondent to pay \$1,183.18 as all rent due and owing through December 31, 2019. The second stipulation required respondent to pay \$2,675.00 as rent owed through January 31, 2020. Finally, in the last stipulation the respondent signed an agreement to pay \$4,607.36 as arrears owed

through March 31, 2020. A rent ledger was provided as Exhibit "J" of petitioner's DRP-213 motion, and a HRA printout was attached to respondent's cross motion as Exhibit "C".

Respondent seeks the vacatur of all three stipulation because by signing them she claims to have waived the defense of defective rent demand. Respondent claims that rent sought in the rent demand had been paid at the time she signed the first stipulation, as evidenced by the rent ledger provided by petitioner. That she inadvertently signed this stipulation because she was unrepresented and felt rushed into signing an agreement that ultimately waived her legal defenses.

Respondent asserts that the rent demand seeks rent for February 2019 in the amount of \$69.18 and \$150.00 per month for March 2019-August 2019. Respondent claims that because in fact payments were made in the demanded amounts from February 2019 through July 2020 the rent demand is defective as it does not set forth a good faith approximation of the rent which petitioner at the time claimed was owed. That because a predicate notice cannot be amended the stipulations should be vacated and respondent, now represented, should be allowed to proceed with her legal defenses.

Respondent further argues that the court should vacate the stipulation because as a pro-se respondent, she inadvertently waived the defense that petitioner was seeking HRA's portion of the rent. Respondent states that the HRA printout shows payments were earmarked for the specific months that petitioner claims were owed on the rent demand.

Petitioner's opposition to the respondent's cross motion argues that the stipulation should not be vacated as it does not meet any of the standards required by law to vacate a stipulation. That respondent signed three stipulations after having them explained by the court and allocated

by the Judge. That respondent had sufficient time to seek legal representation and ample time to seek financial assistance from HRA. That the stipulations were not haphazardly or inadvertently entered into but a product of negotiations between the parties. Petitioner seeks to go forward with the case and asks the court to direct the execution of their previously issued warrant of eviction.

The moving party bears the prima facie burden of proof to obtain the relief sought. *Matter of Stop & Shop Cos. Inc. v. Assessor of the City of New Rochelle*, 32 Misc.3d 496 (Sup. Ct. Westchester Co, 2011). In *Hegeman Asset, LLC v. Smith*, 783 N.Y.S.2d 192 (App. Term. 2d Dept, 2004) the court vacated a stipulation where a tenant owed no arrears prior to the commencement of the proceeding stating, “a proper rent demand must be in the approximate good-faith sum of the rent assertedly due”. A proper rent demand is a statutory prerequisite for a nonpayment proceeding and necessary in order for petitioner to prove their prima facie. *125 Ct. St., LLC v. Sher*, 94 N.Y.S. 3d 539, (App. Term 2d Dept, 2018). In the instant case, respondent has shown that the rent demand sought payment of rent for monies already paid by HRA as evidenced by the petitioner’s rent ledger and the uncontested HRA printout for the months of March 2019 through July 2019. Although the rent for the month of August 2019 was not credited until September 2019, having shown payment for five out the six months demanded is not a good faith approximation of what was owed at the time. To wit 83% of the rent demanded had been paid prior to service of the rent demand.

Petitioner in their opposition failed to address the claim of a defective rent dent, but instead focused their argument as to why the stipulations should not be vacated. “stipulations of settlement are favored by the courts and not lightly cast aside...only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident will a party be relieved from the consequences of a stipulation made during litigation. *Hallock v. State*, 64 NY2d

224 (Ct. of Appeals 1984) However, the court is not limited to these grounds alone, in examining the record, when vacatur of a stipulation is sought. The court may vacate a stipulation that was entered into “inadvertently, inadvisably or improvidently, in a way that took the case out of the ordinary course of a proceeding in the action, and in so doing may work to [a party’s] prejudice”. *In Re Estate of Frutiger*, 324 N.Y.S 2d 36 (Ct. of Appeals 1971) A court may not enforce a stipulation where it would be unjust or inequitable and permits the other party to gain an unconscionable advantage. *RCS Recovery Servs, LLC v. Mensah* 166 AD3d 823 (App. Term 2<sup>nd</sup> Dept. 2018). “In light of the magnitude of the inaccuracies on the amount sought in the rent notice, we find that the tenant may have been prejudiced in his ability to respond to the demand, formulate defenses, and avoid litigation or eviction.” *EOM 106-15 217<sup>th</sup> Corp v. Severine*, 62 Misc. 3d 141 (A) (App. Term 2<sup>nd</sup> Dept. 2019).

However, in *Shalimar Leasing, LP v. Medina*, 2021 NY Slip Op 21270 (App. Term 2<sup>nd</sup> Dept. 2021) the court held that respondent’s self-serving assertions that she lacked understanding and inadvisably entered into a stipulation was not sufficient to vacate the stipulation. The court held that the respondent’s claim that she was unaware of her defenses was not supported by the record as she had been represented by counsel from the beginning to the end of the proceeding. One important way in which the matter before the court differs is that respondent was self-represented when signing all three of the stipulations in question. Respondent did not have an attorney to advise her of her defenses. Petitioner argues that respondent had plenty of time to retain an attorney. However, time is not the only obstacle a litigant may face in availing themselves of legal representation.

Respondent credibly affirms that she was unaware of her legal defenses of a defective rent demand and did not believe she had any other option other than to seek a one-shot deal to

pay the alleged arrears. Since a rent demand is a pre-requisite to a petitioner's prima-facie, and since one cannot be amended, the defective rent demand took the case out of the ordinary course of the proceeding in a way that prejudiced the respondent. See *In Re Estate of Frutiger*. Based on the foregoing it is clear that the respondent inadvertently signed the stipulations, and the stipulations should be vacated.

Although the stipulations should be vacated for the reasons stated above, it should be noted that the second and third stipulations entered by the parties included arrears for Section 8's portion of the rent. Respondent's section 8 subsidy was terminated, and Petitioner began charging respondent for the section 8 portion in December of 2019 as evidenced by Petitioner's rent ledger. "A section 8 tenant agrees to pay only the non-section 8 share of the rent, and, absent a new agreement between the parties, a non-payment proceeding will not lie to recover the section 8 portion of the rent even after the subsidy has terminated." 7 *Highland Mgt. Corp. v. McCray*, 9 Misc. 3d 129(A) (App. Term 2<sup>nd</sup> Dept. 2005) 385 *LLC v. Marlow*, 42 Misc.3d 131(A)(App Term, 2d Dept, 9th and 10th Jud Dists, 2013); *MPlaza LP v. Corto*, 35 Misc.3d 139 (A) (App Term, 1st Dept 2012). Petitioner did not provide proof of a new agreement between the parties. Petitioner has only provided the court with a rent ledger, Exhibit J, to show the increase in rent to the full base rent for the apartment.

It is elementary that a nonpayment proceeding must be predicated on an agreement to pay rent. 265 *Realty LLC v. Trec*, 39 Misc.3d 150(A)(App Term, 2d Dept.2013); *Rutland Road Associates, LP v Grier*, 55 Misc.3d 128(A)(App Term 2d Dept 2d, 11th &13th Jud Dists, 2017). Here, the rent sought is outside of the scope of the agreement between the parties. Accordingly, respondent's motion seeking to vacate the previously entered stipulations is granted due to the rent demand lacking good faith and for failing to show the basis upon which the rent is sought.

Petition is dismissed without prejudice pursuant to CPLR §409(b). see CPLR §409(B); *1646 Union, LLC v. Simpson*, 62 Misc3d 142 (A)(App Term, 2d Dept, 2d, 11th & 13th Jud Dists, 2019).

Conclusion

Petitioner's motion is hereby denied. The branch of respondent's motion seeking vacatur of the stipulations is granted for the reasons set above. All other aspects of respondent's motion are denied as moot. Clerk is instructed to enter a judgement of dismissal in favor of respondent.

This constitutes the Decision and Order of the Court.

Dated: November 12, 2021  
Queens, New York

  
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Sergio Jimenez, JHC

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