

**BSC Owner LLC v Holley**

2025 NY Slip Op 32655(U)

July 11, 2025

Civil Court of the City of New York, Kings County

Docket Number: Index No. 311507/23

Judge: Elyssa O. Slutzky

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This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS: HOUSING PART G

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BSC OWNER LLC  
Petitioner

Index No. 311507/23

-against-

**DECISION/ORDER**

TAMEL HOLLEY, JOHN DOE, JANE DOE  
Respondents.  
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**Present: Hon. Elyssa O. Slutzky, JHC**

Recitation, as required by CPLR §2219(a) of the papers considered in the review of Respondent TAMEL HOLLEY ‘s (“Respondent”) Notice of Motion (Seq. 1) seeking an Order dismissing the instant proceeding pursuant to CPLR §3211(a)(7) on the grounds that there was no rental agreement in effect at the time the proceeding was commenced or in the alternative, granting summary judgment as the Petitioner may not collect rent based on the absence of a Certificate of Occupancy (“CO”) for the premises.

**Papers Numbered**

Notice of Motion (Seq. 1) Affirmation, Affidavits and Exhibits .....NYSCEF #23-27  
Affirmation in Opposition and Exhibits.....NYSCEF #28  
Affirmation in Reply and Exhibits.....NYSCEF #30

**Procedural History and Facts**

Petitioner commenced this nonpayment proceeding seeking to recover possession of the premises located at 855 Louisiana Avenue, Apt #4F, Brooklyn, New York 11239 (“premises”). Prior to commencing this proceeding, Petitioner served Respondent with a Thirty Day Rent Demand (“demand”) requiring Respondent to pay \$19,848.50 or vacate the premises. The notice was dated January 11, 2023, and sought arrears from January 2022 to January 2023. Respondent failed to make payment or vacate, and Petitioner commenced this proceeding by Notice of Petition and Petition on April 12, 2023. Subsequently, the court made a referral to Adult Protective Services (“APS”) who requested that a Guardian Ad Litem (“GAL”) be appointed for Respondent. Counsel for Respondent submitted a Notice of Appearance on January 22, 2025. Counsel for Respondent now brings the within pre-answer motion to dismiss alleging that no rental agreement was in place at the time that the proceeding was commenced. Respondent is also requesting that the court make a summary determination under CPLR §3212 that the Petitioner is not entitled to collect rent based on their failure to maintain a valid CO with the Department of Buildings.

**Rental Agreement**

The proceeding was commenced on April 12, 2023. Respondent avers that the only lease that they received and signed is dated July 1, 2024. Respondent then argues that this nonpayment case should be dismissed under the Appellate Term’s decision in Fairfield Beach 9th, LLC v Shepard-Neely, 77 Misc. 3d 136(A), [AT 2<sup>nd</sup> Dept., 2022], which states plainly that “there must be a rental

agreement in effect at the time the proceeding is commenced pursuant to which rent is due and owing.” (Krantz & Phillips, LLP v Sedaghati, 2003 NY Slip Op 50032[U], [App. Term. 1st Dept. 2003]); (Foxwood House Assoc. LLC v Xu, 82 Misc3d 925, [Civ. Ct. Queens Co. 2024]) “[w]here a landlord cannot establish the existence of an ongoing agreement to pay rent, a nonpayment will not lie”. Petitioner, in opposition, annexes a HUD Model Lease purportedly signed on June 29, 2009, by the parties with an initial lease term commencing July 1, 2009, and terminating June 30, 2010. In arguing the existence of a lease, Petitioner relies on a paragraph of the lease stating that the agreement will continue for successive terms of one year.

Petitioner’s argument that the lease remains in perpetuity is unavailing as the rental amount shifts from year to year, thus the lease agreement lacks definiteness in regard to a material term. (Vize v. Vitale, 184 Ad3d 602, 604 [2nd Dept. 2020]). In the 2009 agreement, Petitioner’s initial lease term states that the monthly rent is \$914.00, whereas the lease provided by Respondent, dated July 1, 2024, states that the monthly rent is \$1477.00. The Petition alleges a written lease agreement at a monthly rent of \$1347.50. RPAPL § 741(4) requires that the petition state the facts upon which the special proceeding is based. A Petition which contains “fundamental misstatements and omissions” is subject to dismissal. (Brookwood Coram I, LLC v Olivia, 47 Misc3d 140[A], [App Term, 2nd Dept. 2015]). Here, Respondent is correct in arguing that even if the court were to find that the 2009 agreement allowed for successive terms, Petitioner cannot maintain this proceeding as they did not produce an agreement, either express or implied, at the monthly rent alleged in the Petition. While on a motion to dismiss for a failure to state a cause of action, the Court must deem the allegations of the petition as true and construe them in Petitioner’s favor, affording Petitioner the benefit of “every reasonable inference,” Cortlandt St. Recovery Corp. v. Bonderman, 31 NY3d 30, 38 [2018], conclusory statements unsupported by factual allegations in a complaint are insufficient. Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]. In light of the foregoing, Respondent’s motion to dismiss is granted. The court need not address the other branches in Respondent’s motion.

**WHEREFORE**, it is

**ORDERED** that Respondents’ motion to dismiss **GRANTED**, and it is further

This constitutes the Decision and Order of this Court.

Dated: Brooklyn, New York  
July 11, 2025

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Elyssa O. Slutzky, JHC