1425 U LLC v Heyward

Decided on February 27, 2017
Civil Court of the City of New York, Bronx County

1425 U LLC, Petitioner-Landlord,

against

Dorothy Heyward, Respondent-Tenant.

48821/2016
Diane E. Lutwak, J.

Recitation, as required by CPLR 2219(A), of the papers considered in the review of the Respondent's Order to Show Cause to Restore to Possession:

Papers Numbered

Order to Show Cause to Restore to Possession With Attached Affidavit 1

Supplemental Affirmation, Affidavit and Exhibits A-F in Support of Motion 2

Affirmation, Affidavit and Exhibits A-C in Opposition 3

Upon the foregoing papers, the court file, the testimony and documentary evidence presented at a hearing that took place on the afternoon of February 14, 2017 and the morning of February 22, 2017, and for the reasons stated below, Respondent's Order to Show Cause is hereby granted and Petitioner is hereby ordered to restore Respondent to possession forthwith.

PROCEDURAL HISTORY

This is a nonpayment eviction proceeding brought by Petitioner 1425 U LLC against Respondent Dorothy Heyward, a Rent Stabilized tenant. The Notice of Petition and Petition are dated August 15, 2016 and the Petition was filed with the court on August 18, 2016. According to the Affidavit of Service sworn to by Petitioner's process server Ahmad Rahman on August 20, 2016, the Notice of Petition and Petition were allegedly served upon Respondent by "conspicuous place" service: After unsuccessful attempts at personal service on August 18, 2016 at 6:12 pm and August 19, 2016 at 9:32 am, a copy of the Notice of Petition and Petition was affixed to the door of the premises with tape on August 19 and then additional copies were mailed to Respondent at the premises by certified mail and first-class mail on August 20. The Notice of Petition with proof of service was filed with the court on August 22, 2016.

The Petition seeks alleged rent arrears totaling $935.74, comprised of $5.53 for the month of February 2016, $98.04 per month for the three months of March 2016 through May 2016 and $123.95 per month for the three months of June 2016 through August 2016. The Petition also seeks "MCI Retro" charges of $264.24 for the month of August 2016. The Petition alleges that the rent was demanded from the tenant since it became due by a three-day written notice, a copy of which is attached to the Petition with proof of service by the same process server who served the Notice of Petition and Petition (Ahmad Rahman), in the same manner as those papers ("conspicuous place"). The rent sought in the rent demand is almost identical to that sought in the Petition, the only difference being that for the month of February 2016 the rent demand asserts unpaid rent of $83.53 instead of the $5.53 listed in the Petition. The Petition asserts that the premises are a registered multiple dwelling and the managing agent is Ben Rieder, whose office is located at 5676 Riverdale Avenue, Bronx, New York 10471.

Petitioner's attorney prepared a written request dated September 13, 2016 asking the court to issue a final order based upon two sworn affidavits:

The first, the Affidavit of Merit sworn to by Petitioner's managing agent Ben Rieder on September 8, 2016, asserts that the information in the Petition is true, that Respondent owed $795.45 through September 2016 and that Petitioner sought entry of a default judgment against Respondent, who had failed to answer.

The second, an "Affidavit of Investigation" sworn to by Petitioner's agent Cesar Morales on September 2, 2016, asserts that on that date he "called at premises No. 1425 University Avenue (aka 1425 Dr. M.L. King Jr. Blvd.); Apt.2G, Bronx, NY 10452 and had a conversation with DOROTHY HEYWARD, the tenant of record, at 11:30 am." Mr. Morales further asserts that, in addition to the conversation he had with the tenant at the premises on September 2, 2016, he is "personally familiar with the Tenants and have spoken to them on other occasions", that he reviewed the Tenant's file and questioned the superintendent "about the Tenant's living mode" and that, based on his investigation, he was convinced that the tenant presently is not in, or financially dependent upon someone in, the military service of the United States or of New York State.

On September 19, 2016 City Marshal John Villanueva filed with the court a Warrant Requisition. The court issued a warrant of eviction to Marshal Villanueva on October 5, 2016.

On Thursday, January 12, 2017 Respondent pro se took out a post-eviction Order to Show Cause seeking to be restored to possession. In the court's form Affidavit in support of that Order to Show Cause Respondent initialed and checked off three defenses:

"I was improperly served."

"The amount being claimed is incorrect."

"The rent has been partially/fully paid."

In addition, she explained, "Section 8 paid. I have all my payment receipts. All my furniture was not removed. Was locked out without my knowledge."

On the return date of the Order to Show Cause, January 18, 2017, both parties appeared by counsel and, after unsuccessful settlement negotiations, the proceeding was adjourned to January 23, 2017 for a hearing, with all stays remaining in effect. On January 23, 2017 Petitioner's counsel advised the court that the apartment had been re-rented to a new tenant, Karen Duran. Accordingly, the court issued an order requiring respondent by her attorney to serve a copy of the order along with a copy of Respondent's Order to Show Cause on Ms. Duran, allowing Respondent's counsel to serve supplemental papers by February 2, 2017, adjourning the hearing to February 14, 2017 at 2:15 pm for a hearing or settlement, and continuing all stays.

On February 14 Petitioner and Respondent both appeared by counsel; the alleged new tenant Karen Duran did not appear. The hearing started that afternoon, was completed on the morning of February 22 and both sides' counsel presented oral closing arguments.

THE HEARING

The first witness called by Respondent on February 14 was a paralegal from the City's Department of Housing Preservation and Development (HPD), Jin Ren Zhang. He has worked at HPD for ten years. He brought with him copies of four sets of HPD Rent Breakdown letters [*2]for Respondent, dated August 24, 2015, May 1, 2016, August 15, 2016 and December 1, 2016.[FN1] The letters are all from Section 8 Representative Sheila Young. Each set is comprised of two copies of letters bearing the same dates and containing almost identical information:

(1) The first copy of each set is addressed to Respondent Dorothy Heyward, advises her of the effective date of the Rent Breakdown, indicates whether it is based on an "Annual" or "Interim" recertification, sets forth the "Contract Rent", "Your Share", "HPD Share" and "Family Composition" (consisting solely of Dorothy Heyward) and advises the tenant that her landlord "will be informed of these new amounts and the effective date of the change." The Notice further states, "If you have been paying more than your share of the rent since the effective date of this change, please contact your landlord to reconcile your account."(2) The second copy is addressed to Petitioner 1425 U LLC at 5676 Riverdale Avenue, #307, Bronx, New York 10471. Following the name, address and salutation ("Dear 1425 U LLC") the letter states, "Please be advised that the following rent breakdown letter was sent to your tenant. If you have any questions, please call the Owner Services unit at (917) 286-4300 and press 0 to speak to an operator." There then follows the complete text and formatting of the letter addressed to Dorothy Heyward.

The Rent Breakdowns, effective dates and type of recertification listed in the four letters consist of the following:

August 24, 2015 letter:

Contract Rent: $545.84

Your [Tenant] Share: $78.00

HPD Share: $467.84

Effective Date: October 1, 2015

Type of Recert: Annual Reexamination

May 5, 2016 letter:

Contract Rent $554.77

Your Share: $ 78.00

HPD Share: $476.77

Effective Date: June 1, 2016

Type of Recert: Interim Reexamination

August 15, 2016 letter:

Contract Rent: $554.77

Your Share: $80.00

HPD Share: $474.77

Effective Date: October 1, 2016

Type of Recert: Annual Reexamination

December 1, 2016 letter:

Contract Rent: $565.87

Your Share: $80.00

HPD Share: $485.87

Effective Date: January 1, 2017

Type of Recert: Interim Reexamination

Respondent testified next, and her testimony was credible and consistent throughout. Respondent is 82 years old and, prior to her eviction, had lived in the apartment for 51 years. She lives alone, and her income consists of Social Security Retirement benefits of $472 per month. On November 21, 2016, her 82nd birthday, Respondent's daughter picked her up to take her to her home for an extended visit to celebrate her birthday and Thanksgiving. She ended up staying through the Christmas and New Year's Day holidays and returned to her apartment on January 8, 2017. At that time, she discovered that her lock had been changed and she could not enter her apartment. She spoke to the super, learned that she had been evicted and went back to her daughter's home. She returned to the Bronx and to this court on January 12 to take out the within Order to Show Cause. Respondent testified that before January 8 she did not know that her landlord had brought this eviction proceeding against her, and had no reason to think there was any problem, as she had paid her rent every month and had not received the Notice of Petition and Petition or any other papers relating to the eviction. She was familiar with Housing Court from several prior cases, and testified that she would have come to court if she had known about this case, just as she has done in the past.

With regard to her rent, Respondent testified that she has a Section 8 subsidy, had paid her share of the rent in and for every month at issue in this proceeding and has all of her money order receipts. She mails in her money order rent payments every month, after receiving a statement under her door. She testified that her share of the rent was $78 per month until this past October 1 when it went up to $80. She knows how much to pay because she receives letters from the Section 8 program which tell her. Copies of four Section 8 Rent Breakdown letters which Respondent had received from HPD dated August 24, 2015, May 5, 2016, August 15, 2016 and December 1, 2 016 were admitted into evidence as Respondent's Exhibit B. Copies of nine "Customer's Receipts" for US Postal Service Money

Orders in the amount of $78 each (dated January 11, 2016, February 8, 2016, February 29, 2016, April 1, 2016, April 29, 2016, June 3, 2016, July 8, 2016, August 9, 2016 and September 6, 2016), and two in the amount of $80 each (dated October 3, 2016 and November 4, 2016), were admitted into evidence as Respondent's Exhibit C. Respondent also mailed in a money order for her December 2016 rent payment, but this was returned to her by Petitioner under cover of a letter from Chestnut Holdings of New York Inc., dated December 5, 2016, a copy of which was admitted into evidence as Respondent's Exhibit D. That letter references an enclosed money order ("MO0172") which Respondent had submitted and states, "Due to pending legal action, we cannot accept a partial payment of $80. Your current rent balance through December 2016 is $494.14." No additional information was elicited from Respondent on her cross-examination or re-direct testimony, which was consistent with her direct testimony.

Petitioner then called two witnesses. First was Cesar Morales, who testified that he is a field manager for Petitioner. His duties include maintenance and other day to day operations at the subject building, which he visits a minimum of once a week for approximately a half hour or more, depending on what tasks he has to do. He did not know Respondent's name, and said he last saw her approximately three years ago. His most recent visit to Respondent's apartment was on the day of the eviction, which date he could not recall. He testified that Respondent was not present, the apartment was dusty, looked unlived in and looked the same as it did three years ago, which was the last time he had been there. He testified that at the time of the eviction he observed mail and other papers on the floor outside Respondent's door and a Marshal's eviction notice on the floor inside the apartment. He also testified that he had observed a build-up of papers outside Respondent's door on a regular basis, every three or four months. On cross-examination Mr. Morales testified that he is the field manager for 12 buildings in the Bronx, including the subject building.

Petitioner's second witness was David Tennenbaum, whose testimony began on the afternoon of February 14 and concluded on the morning of February 22. Mr. Tennenbaum manages the legal department at Chestnut Holdings, Petitioner's managing agent [FN2] . He is familiar with Chestnut Holdings' computer and accounting systems and his duties include overseeing entry of rents into Chestnut Holdings' computer database. He is one of only two people who are able to make changes in the database. A five-page "Resident Profile" for Respondent's apartment was admitted into evidence as Petitioner's Exhibit 1. While the name at the top of the document is "Duran, Karen", the purported new tenant of the premises, the ledger begins with the month of December 2015 and Mr. Tennenbaum discussed it as it relates to Respondent, not to Ms. Duran.

With regard to the Nonpayment Petition, Mr. Tennenbaum initially testified that the $935.74 listed as owed by Respondent was comprised of what he referred to as "Temporary MCI charges" and a carryover balance "from many months earlier". At this point, the hearing concluded for the day, and when it resumed on February 22 Mr. Tennenbaum testified that the $935.74 was comprised of rent for the months of February through August 2016. At the time of the eviction, which took place on December 8, 2016, Respondent owed $496 in rent and MCI charges. The eviction was a full eviction, and everything was moved out. As no Order to Show Cause was received within the next few weeks, renovations were commenced, a new tenant was found and a lease was signed with someone who is "waiting to move in." Page 4 of the 5-page "Resident Profile" lists an "Occupy Date" of 2/1/2017 for Karen Duran, with a rent of $1260.85, a "Lease Expiration" date of 1/31/2018 and a "Lease Term" of "12".

On cross-examination Mr. Tennenbaum testified that he was familiar with Section 8 rules and procedures, in particular the rule that a landlord cannot sue a tenant for more than the tenant's share of the rent. He testified that it was difficult to get information from HPD, and his office only received HPD notices sporadically. With regard to Respondent's tenancy he [*3]did not know when was the last time his office had received a Rent Breakdown letter from HPD or whether Petitioner had received any such letters in 2015 or 2016. He also testified that he "was not aware" of what the tenant's share of the rent is, and did not know that the tenant's share had been set at $78 since 2015 until it increased to $80 in October 2016. Mr. Tennenbaum acknowledged that the "Resident Profile", in evidence as Petitioner's Exhibit 1, reflected that Petitioner had received from Respondent and cashed monthly payments of $78 in and for the months of December 2015 through August 2016, payments adding up to $158 in October 2016 and $80 in November 2016. Mr. Tennenbaum confirmed that Respondent's Exhibit D, the letter from Chestnut Holdings dated December 5, 2016, was the cover letter which returned to Respondent her December 2016 rent payment.

Respondent was re-called as a rebuttal witness. She testified that she did not know and had never seen or spoken to Petitioner's first witness, field agent Cesar Morales. She also testified that the subject premises are her residence.

In closing, Respondent's attorney argued that the eviction was unlawful, as Respondent had paid her share of the rent in and for every month at issue in the Petition and it was illegal for Petitioner to sue for more than the tenant's share of the rent. In the alternative,

Respondent's attorney argued that there is good cause to reinstate Respondent to possession and that the balance of equities favors her.

Petitioner's attorney argued in closing that the Petition was correct at the time it was served. Further, Respondent did not receive the Notice of Petition and Petition and file an Answer because she was not living in the apartment. Petitioner waited a reasonable amount of time before renovating and re-renting the apartment.

DISCUSSION

As a preliminary procedural matter, with regard to the alleged new tenant of the premises, Karen Duran, the court has not added her as a Third-Party Respondent to this proceeding as she never appeared after being served with the papers by Respondent's counsel. Further, after the conclusion of the closing arguments, Petitioner's counsel advised the court that Petitioner had rented a different apartment to Ms. Duran in the meantime.

On the substance of this proceeding, the issue presented is whether or not there is good cause, Parkchester Apartments Co v St Clair Scott (271 AD2d 273, 707 NYS2d 55 [1st Dep't 2000]), and whether the facts of this case present "appropriate circumstances", Matter of Lafayette Boynton Hsg Corp v Pickett (135 AD3d 518, 23 NYS2d 204 [1st Dep't 2016]), quoting Brusco v Braun (84 NY2d 674, 682, 621 NYS2d 291 [1994]), for the court to order vacatur of the warrant of eviction and restoration of Respondent to possession of the Rent Stabilized apartment where she had been living, with the financial assistance of a tenant-based Section 8 voucher administered by HPD, for 51 years prior to her eviction on December 8, 2016.

Section 749(3) of the New York State Real Property Actions and Proceedings Law (RPAPL) authorizes the vacatur of warrants of eviction "for good cause shown" prior to execution of the warrant, and decisional law has extended this relief to post-eviction cases like the one now before this court. See, e.g., 102-116 Eighth Ave. Assocs, LP v. Oyola (299 AD2d 296, 749 NYS2d 724 [1st Dep't 2002]); Solack Estates, Inc v Goodman (78 AD2d 512, 513, 432 NYS2d 3, 4-5 [1st Dep't 1980]); 1240 Sheva Realty Assoc, LLC v. Ramos (51 Misc 3d 143[A], 38 [*4]NYS3d 831 [App Term 1st Dep't 2016]); 2203 Belmont Realty Corp v Gant (51 Misc 3d 140[A], 36 NYS3d 410 [App Term 1st Dep't 2016]); Nagle 112, LLC v Miqui (46 Misc 3d 149[A], 13 NYS3d 851 [App Term 1st Dep't 2015]); 2720 LLC v White (28 Misc 3d 1234[A] , 954 NYS2d 554 [Civ Ct Bx Co 2010])(and cases cited therein). See also, generally, Matter of Brusco v Braun, supra (84 NY2d at 682)("the Civil Court may, in appropriate

circumstances, vacate the warrant of eviction and restore the tenant to possession even after the warrant has been executed"); Matter of Lafayette Boynton Hsg Corp v Pickett, supra (affirming the Appellate Term's affirmance of an order of the Civil Court, Housing Part, Bronx County, granting post-eviction order to show cause and restoring respondent-tenant to possession).

As the Appellate Term, First Department has held:

Each application under RPAPL § 749(3) requires a sui generis inquiry devoted to the particular facts and circumstances of the case then before the court, including the extent of the delay and the nature and amount of the payment default(s), as well as a delicate balancing of the equities between the parties .

Parkchester Apartments Co v Heim (158 Misc 2d 982, 983-984 [App Term 1st Dep't 1993]). See also, e.g., Oyola, supra (affirming vacatur of a warrant and restoration of a tenant to possession "under the facts and circumstances of record").

There are a number of reasons why this court is restoring Respondent to possession. First, this is a proceeding that Petitioner never should have commenced. A nonpayment proceeding must be predicated upon an agreement by the tenant to pay the rents demanded. RPAPL 711 (2); Matter of Jaroslow v Lehigh Val RR Co (23 NY2d 991, 246 NE2d 757, 298 NYS2d 999 [1969]). Contrary to what is stated in the rent demand and Petition, Respondent owed nothing at the time those documents were generated. As a Section 8 tenant, under the governing federal regulations, all that she was responsible to pay, and all that Petitioner could sue her for if she did not pay it, was her share of the rent. 24 CFR 982.310 (b); 982.451 (b); Prospect Place HDFC v Gaildon (6 Misc 3d 135[A], 800 NYS 2d 355 [App Term 1st Dep't 2005]). Respondent's share of the rent was $78 per month from October 2015 through September 2016, and it increased to $80 per month in October 2016. These dollar amounts were established unequivocally by the certified copies of HPD's Rent Breakdown letters addressed to both Petitioner and Respondent dated August 24, 2015, May 5, 2016 and August 15, 2016. Respondent knew to pay these amounts because she had received those Rent Breakdown letters from HPD (her copies were admitted into evidence as Respondent's Exhibit B). Respondent paid her share of the rent in the correct amounts at all relevant times and Petitioner accepted, cashed and credited those payments. These facts are undisputed — they were not only testified to by Respondent and supported by her money order receipts (Respondent's Exhibit C) but they also were confirmed by Petitioner's witness Mr. Tennenbaum as well as by Petitioner's "Resident Profile".

Yet, Respondent was evicted pursuant to a Petition that sought alleged rent arrears totaling $935.74, comprised of $5.53 for the month of February 2016, $98.04 per month for the three months of March 2016 through May 2016, $123.95 per month for the three months of [*5]June 2016 through August 2016 and "MCI Retro" charges of $264.24 for August 2016. [FN3]

Mr. Tennenbaum dodged Respondent's counsel's questions about whether Petitioner knew the amount of Respondent's share of the rent, and whether Petitioner had received copies of HPD's Rent Breakdown letters, saying that he didn't know, wasn't aware, and that "usually based on experience" it is difficult to get this information from HPD. Mr. Tennenbaum conveyed a cavalier disregard for the facts regarding the amount of the tenant's share of the rent in 2015 and 2016, even though he also admitted knowing that Petitioner was not allowed to sue Respondent for anything more than that very same tenant's share. Petitioner's evasiveness at the hearing is beside the point; knowing that the tenant received a Section 8 subsidy, Petitioner — and its attorney, pursuant to Part 130 of the Rules of the Chief Administrator of the Courts, and, specifically, Section 130-1.1A(b) thereof - had an obligation prior to commencing a nonpayment eviction proceeding to determine whether it was entitled to sue for the rent amounts alleged.

Accordingly, "the basis for the landlord's underlying claim — nonpayment of rent — was incorrect", Matter of Lafayette Boynton Hsg Corp v Pickett, supra (135 AD3d at 525) (concurrence of the Hon. David B. Saxe, discussing Solack Estates, Inc v Goodman, supra), and Respondent is entitled to be restored to possession.

Further, in order to maintain a cause of action for nonpayment of rent, the predicate rent demand required by RPAPL § 711(2) must "clearly inform the tenant of the particular period for which a rent payment is allegedly in default and the approximate good faith sum of rent assertedly due for each such period." Schwartz v Weiss-Newell (87 Misc 2d 558, 561, 386 NYS2d 191 [Civ Ct NY Co 1976]), quoted in 542 Holding Corp v Prince Fashions, Inc (46 AD3d 309, 848 NYS2d 37 [1st Dep't 2007]). In the same way that the Petition was unfounded, the predicate rent demand seeks amounts above and beyond Respondent's $78 per month share of the rent [FN4] which Petitioner's own records reflect it had received, credited and cashed. Accordingly, the rent demand is fatally flawed as it cannot be found to contain a good faith sum of rent "assertedly due for each such period". A proper predicate rent demand is a condition precedent to commencement of a nonpayment proceeding and cannot be amended nunc pro tunc. Chinatown Apts v Chu Cho Lam (51 NY2d 786, 787, 412

NE2d 1312, 433 NYS2d 86 [1980]); Cypress Ct Assoc v McLauren (33 Misc 3d 1203[A], 938 NYS2d 226 [Civ Ct Kings Co 2011]); Vartarian v Brady (184 Misc 2d 333, 707 NYS2d 285 [Civ Ct NY Co 1999]); Parkchester Apts Co v Walker (1995 NY Misc LEXIS 738, 213 NYLJ 123 [Civ Ct Bx Co 1995]).

Similarly, the Affidavit of Merit sworn to by Petitioner's managing agent Ben Rieder on [*6]September 8, 2016 and submitted to the court in support of Petitioner's request for a default judgment incorrectly asserted that there were rent monies due from Respondent. As set forth above, as of September 8, 2016 Respondent had fully paid her $78 per month share of the rent in and for each month listed in the Petition and she owed no rent. The requirement of the filing of an accurate and reliable Affidavit of Merit where a nonpayment petition has not been personally verified by the landlord is a fundamental step to be taken by a petitioner seeking a default judgment from the court. Civil Court Directive DRP-191-A ("Entry of Default Judgments", eff. Date July 14, 2010, citing Sella Properties v DeLeon (25 Misc 3d 85, 890 NYS2d 254 [App Term 2nd Dep't 2009]); and see generally Brusco v Braun (199 AD2d 27, 605 NYS2d 13 [1st Dep't 1993], aff'd, 84 NY2d 674, 621 NYS2d 291 [1994]); 367 East 201st Street LLC v Velez (31 Misc 3d 281, 917 NYS2d 814 [Sup Ct Bronx Co 2011]); 104 Realty LLC v Brown et al (41 Misc 3d 1228[A], 981 NYS2d 637 [Table][Civ Ct Kings Co 2013]).

As explained by the court in 115 Mulberry LLC v Giacobbe (46 Misc 3d 1229[A][Civ Ct NY Co 2015]), "The whole purpose of that affidavit of merits is to confirm for the court that the rent sued for had not been tendered. The failure to do so is the equivalent of perpetrating a fraud upon the court." See also, e.g., Intervale Ave Assoc v Donlad (38 Misc 3d 1221[A], 969 NYS2d 803 [Table][Civ Ct Bronx Co 2013])("the practice of 'robo-signing' is as intolerable in Residential Housing Court proceedings as the Honorable Jonathan Lippman, Chief Judge of the Court of Appeals, found the practice to be in Residential Foreclosure actions").

In addition, Respondent testified that she did not receive any copies of the Notice of Petition and Petition, which were allegedly served on August 19, 2016 by "conspicuous place" service after reasonable application pursuant to RPAPL § 735(1). She further testified that she did not receive any other papers or otherwise know about this proceeding, that she was familiar with Housing Court from several prior proceedings, and that if she had received papers she certainly would have come to court, the same as she had done in the past. She had no reason to think there was a nonpayment case pending against her as she had paid her rent in and for every month over the past year and did not learn about the case until she learned about her eviction, which, although it had occurred on December 8, 2016 she did not discover until January 8, 2017. The delay in Respondent's discovery of the

eviction was due to happenstance: It just happened to be Respondent's 82nd birthday on November 21, 2016, her daughter had picked her up that day to take her to her home to celebrate, and Respondent then stayed with her daughter for a month through the holidays that began with Thanksgiving (on November 24, 2016), continued through Christmas and then through another a week after New Year's Day. These facts and circumstances constitute the requisite "good cause" to excuse Respondent's original default in answering the Petition, and then the one-month delay in appearing in court after the eviction.

Further, Respondent had raised the issue of defective service of process — lack of personal jurisdiction - in both her original affidavit sworn to on January 12, 2017 submitted in support of her Order to Show Cause ("I was improperly served") as well as in the supplemental affidavit sworn to on January 30, 2017 prepared by her subsequently-retained attorney ("I never received the court papers in this proceeding and that is why I never answered"). Yet Petitioner did not attempt to defend on this issue by calling its process server as a witness.

Finally, under federal and state law, a petitioner in a proceeding such as this is required to submit to the court proof that the individual against whom a default judgment is sought is not in the military service or dependent upon anyone in the military. Servicemembers Civil Relief Act, 50 USCS § 3901 et seq.; New York State Soldiers' and Sailors' Civil Relief Act, NY CLS Mil § 300 et seq. It is fundamental that the Affidavit of Investigation regarding military status must be accurate and reliable. Heritage East-West, LLC v Chi Won Chung (6 Misc 3d 523, 785 NYS2d 317 [Civ Ct Qns Co 2004]). "Obviously perjured affidavits will not be tolerated and will form the basis for a referral to a prosecutor for a contempt proceeding." New York City Housing Authority v Smithson (119 Misc 2d 721, 724, 464 NYS2d 672, 674 [Civ Ct NY Co 1983]).

The sworn hearing testimony of Petitioner's field manager Cesar Morales was that the last time he had seen or spoken to Respondent was three years earlier. However, the Affidavit of Investigation, which is contained in the court file, the complete contents of which the court has taken judicial notice of, contains Mr. Morales' contrary sworn statement that he spoke with Respondent at the premises on September 2, 2016 at 11:30 am to inquire about her military status. Both of these statements made by Mr. Morales cannot be true. Were there not other reasons to grant Respondent's Order to Show Cause and reinstate her to possession the Court would have to set the matter down for a hearing to determine which of Mr. Morales' conflicting statements is true, and whether the court issued a default

judgment in reliance on a false Affidavit of Investigation. Parkash v Almonte (41 Misc 3d 267, 967 NYS2d 902 [Civ Ct Bx Co 2013]). See also, e.g., Turin Hous Dev Fund v Suarez [40 Misc 3d 1221[A][Civ Ct Bronx Co 2013])(filing of a false non-military affidavit is a criminal act and may warrant the imposition of costs and/or sanctions under 22 NYCRR § 130-1.1 against the Petitioner and/or its attorneys); Davidson Ave SIP HDFC v Ellis (31 Misc 3d 1206[A], 929 NYS2d 199 [Civ Ct Bx Co 2011])(granting post-eviction order to show cause and restoring tenant to possession "where a false affidavit of non-military status is filed in connection with a landlord-tenant proceeding, the proceeding is deemed to be in violation of law").

CONCLUSION

Accordingly, for all of the reasons stated above, and bearing in mind the well-settled principle of equity that courts do not look favorably upon the forfeiture of leases, Sharp v Norwood (223 AD2d 6, 11, 643 NYS2d 39 [1996], affd, 89 NY2d 1068, 659 NYS2d 834 [1997]), as well as the strong preference for resolving cases on their merits, Pricher v City of New York (251 AD2d 242, 674 NYS2d 674 [1st Dep't 1998]), and based on the facts and circumstances of this case, the judgment and warrant are hereby vacated and Petitioner is ordered to restore Respondent to possession of the premises forthwith.

The court will notify the parties' counsel that copies of this Decision and Order are available and will provide them in hand at the courthouse. This constitutes the Decision and Order of this Court.

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Diane E. Lutwak, Hsg. Ct. J.

Dated: Bronx, New York

February 27, 2017 Footnotes

Footnote 1:While a proper foundation for admitting the four sets of HPD Rent Breakdown letters into evidence could not be laid through Mr. Zhang, Respondent's counsel secured certified copies of the letters the next day and they were admitted into evidence on

February 22, over Petitioner's objection, as Respondent's Exhibit F.

Footnote 2:Chestnut Holdings of New York is listed as Petitioner's managing agent on the New York City Department of Housing Preservation and Development's website, which this court takes judicial notice of pursuant to Multiple Dwelling Law § 328(3). The court also notes that the website reflects that the subject building has six stories and 55 apartments.

Footnote 3:While Petitioner had made no motion to amend the Petition and secure a money judgment for rent due after August 2016, the court notes that Petitioner's witness and "Resident Profile" also confirmed that Respondent owed nothing for any months subsequent to those covered by the Petition up to the time of her eviction, as she had paid her $78 share of the rent for September and her $80 share of the rent for October, November and December. Petitioner retained and cashed all of those payments, except for the December payment, which, as testified to by Mr. Tennenbaum, Petitioner had returned to Respondent under cover of its managing agent's letter dated December 5, 2016 (Respondent's Exhibit D in evidence).

Footnote 4:The rent sought in the written rent demand is almost identical to that sought in the Petition, the only difference being that for the month of February 2016 the rent demand lists alleged unpaid rent in the amount of $83.53 instead of the $5.53 listed in the Petition.