

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART 52

-----X
RRG STERLING OWNER, LLC,

Petitioner-Landlord,

-against-

STERLING MANAGEMENT, LLC,

Respondent-Tenant.
-----X

DECISION AND ORDER

L&T No. 074874-2016

APPEARANCES: Petitioner-Landlord RRG STERLING OWNER, LLC is represented by Rivkin Radler LLP, by Dana Gold, Esq., 477 Madison Avenue, New York, NY 10022-5843 (212-455-9555; dana.gold@rivkin.com); Respondent-Tenant STERLING MANAGEMENT, LLC is represented by David A. Kaplan, Esq., 225 West 25th Street (6-F), New York, NY 10001 (917-208-2105; davekaplannyc@aol.com).

Respondent-Tenant's motion by Order to Show Cause to restore to possession and for other relief came before the Court on January 2, 2018. In addition to the oral arguments of counsel, the Court has considered the following listed submissions of the parties, pursuant to CPLR 2219(a):

<u>Title</u>	<u>Number</u>
Respondent-Tenant's Order to Show Cause dated December 29, 2017 to be restored to possession; Attorney Affirmation of David A. Kaplan, Esq., affirmed on December 29, 2017; and Affidavit of Eric Brown, sworn to on December 29, 2017 (unmarked exhibits comprised of Judgement of Possession entered on August 19, 2016 and warrant issued on August 29, 2016 and a stipulation of adjournment dated July 20, 2016).....	1
Petitioner-Landlord's Attorney Affirmation in Opposition of Dana E. Gold, Esq., affirmed on December 30, 2017; Affidavit of Ashley Lherisson, sworn to on December 30, 2017; Affidavit of Zac Bron, sworn to on December 30, 2017.....	2

MONTELLIONE, RICHARD J., J.:

The court held a hearing on January 3, 2018 because of the Respondent-Tenant's application to be restored to possession. There was testimony taken from two witnesses: Eric Brown, the managing agent for Respondent-Tenant, and Zac Bron, a building manager employed by Plaza Management USA Inc., the managing agent of the Petitioner-Landlord. The issue considered by this court was whether or not the Respondent-Tenant breached the stipulation between the parties by failing to pay its rent and/or timely pay its rent.

It is undisputed that the parties entered into a stipulation of settlement dated August 19, 2016 (Exhibit A) which was "so ordered" by the court. In addition to \$13,390.00 being payable upon the execution of the stipulation, the Respondent-Tenant was required to pay six equal payments of \$2,500.00 on the 15th of each month commencing on September 1, 2016 through February 1, 2017, and \$50,345.00 on or before March 15, 2017. These payments were in addition to ongoing rent payments.

The following are other pertinent terms of the stipulation: "(r)espondent waives any and all defenses," "(if tenants fails to make payments)...all compliance dates provided herein shall be accelerated and all payments shall be due immediately, all stays shall be vacated, and the warrant of eviction shall execute forthwith, without any further notice other than service of a Notice of Eviction by

the Marshal,” “(the) stipulation constitutes the entire agreement,” “(the) stipulation may only be modified by an agreement in writing signed by all of the parties,” “(n)o oral understanding or agreement shall be effective to modify, change or alter the terms or conditions of this stipulation,” “(t)he failure or omission...to enforce...any provision (shall not be) construed as a waiver,” and “(p)etitioner may accept late and/or partial payments or other forms of payment without prejudice to its rights to execute upon the warrant of eviction and without waiving any of its rights hereunder.”

The Petitioner-Landlord produced check # 1012, payable to Petitioner-Landlord by Respondent-Tenant in the amount of \$10,000.00 (Exhibit 1). The Petitioner-Landlord also provided a bank statement showing this amount debited from its business account because the check bounced. The Respondent-Tenant failed to provide a bank statement showing that the check in fact cleared or was replaced.

The Respondent-Tenant produced check #1025, payable to cash, dated November 29, 2017, in the amount of \$9,012.53 (Exhibit D-3) which was debited from the Respondent-Tenant's account on November 29, 2017 (Exhibit E). But Petitioner-Landlord's ledger (Exhibit B) and bank statement (Exhibit 2) does not show a deposit. Other than testimonial evidence, Respondent-Tenant failed to provide any direct evidence as to where this check was deposited.

The Respondent-Tenant only produced two bank statements and failed to show that payments were made timely and/or that it did not breach the stipulation of settlement (Exhibit A) by failing to pay over \$50,000.00 in rent arrears. The failure to produce all Respondent-Tenant's bank statements and other proof as to checks drawn on the account and either copies of check endorsements or other evidence showing where the checks were deposited from April 2017 to date is fatal to proving that Respondent-Tenant did not breach the terms of the stipulation by failing to pay rent arrears. Further, Respondent-Tenant does not deny requesting a delay in depositing certain checks and there was no evidence that a payment of \$50,345.00 was made on March 15, 2017 pursuant to the stipulation.¹ Moreover, Respondent-Tenant testified that he did have a ledger showing payments to the landlord but did not bring the ledger to court.

The court file indicates that the Marshal served a Notice of Eviction dated December 20, 2017 by certified mail on December 20, 2017. There is also an affidavit of service of conspicuous service showing service of the Notice of Eviction on December 20, 2017. The Stipulation of the parties could have provided for Respondent-Tenant's counsel to receive additional notice but it did not. The court finds these documents within the court file facially sufficient and

¹ Although there is a "no waiver clause," it is still noteworthy that the amount which was required to be paid on March 15, 2017 is approximately the same amount due as of December 1, 2018.

over respondent-tenant's counsel's objection the court finds it unnecessary to hold a traverse hearing under the particular facts of this case. First, the Respondent-Tenant's supporting affidavit only contains bald conclusory allegations of denial and is an insufficient basis for the Respondent-Tenant to be granted the relief requested. *See, Rosario v. Beverly Road Realty Company*, 38 AD3d 875, 833 NYS2d 166 (2nd Dept. 2007); *NYCTL 2009-A Trust v Tsafatinos*, 101 A.D.3d 1092, 1094, 956 N.Y.S.2d 571, 2012 N.Y. App. Div. LEXIS 8967, 2012 NY Slip Op 9037 (N.Y. App. Div. 2d Dep't 2012). Second, a traverse hearing would be unnecessary in any event because even when there is an illegal lock-out, let alone the current situation where a warrant was executed, to restore Respondent-Tenant to possession when the evidence clearly indicates a breach of the stipulation is ultimately a futile endeavor. *See and cf. SITC Inc. v Riverplace I Holding LLC*, 23 Misc 3d 219 [Civ Ct, New York County 2008; *see also Xui v Iron City Prop., Inc.*, 2013 NY Slip Op 31741[U], [Sup Ct, Queens County 2013].), "(i)t appears from this record that restoring the plaintiff to possession would be futile, because the defendants would prevail in a summary proceeding to evict the plaintiff (*see Matter of 110-45 Queens Boulevard Garage v Park Briar Owners*, 265 AD2d 415, 696 N.Y.S.2d 490 [1999]; *Wagman v Smith*, 161 AD2d 704, 555 N.Y.S.2d 839 [1990]; *Bressler v Amsterdam Operating Corp.*, 194 Misc 76, 86 N.Y.S.2d 250)."

Based on the foregoing, the Respondent-Tenant's motion to be restored to the premises is denied.

The parties' respective exhibits may be picked up at the chambers of the judge which is located on the 7th floor of the court house where the trial took place or they will be discarded in 30 days unless the parties request otherwise. Each party will provide the opposing party with copies of the exhibits upon request.

This constitutes the Decision and Order of the Court.

Dated: JAN 05 2018


Richard J. Montelione, A.J.S.C.