

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: HOUSING PART H

----- X  
217-227 HAVEN AVENUE LLC,

Petitioner/Landlord,

Index No. 50063/2015

- against -

BRIAN BITTNER,

**DECISION/ORDER**

Respondents/Tenants.

----- X

Present: Hon. Jack Stoller  
Judge, Housing Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of these motions.

<b>Papers</b>	<b>Numbered</b>
Notice of Motion and Supplemental Affirmation and Affidavit Annexed	1, 2, 3
Notice of Cross-Motion and Supplemental Affirmation and Affidavit Annexed	4, 5, 6
Affirmation and Affidavit In Opposition to the Cross-Motion	7, 8
Reply Affirmation	9

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

217-227 Haven Avenue LLC, the petitioner in this proceeding (“Petitioner”), commenced this summary proceeding against Brian Bittner, the respondent in this proceeding (“Respondent”), seeking a money judgment and possession of 217 Haven Avenue, Apt. 2A, New York, New York (“the subject premises”) on the ground of nonpayment of rent. Respondent answered, raising a defense, *inter alia*, of rent overcharge and that the monthly rent being sued for is not the legal rent or the amount on the current lease. Respondent now moves for summary judgment or, in the alternative, for an order staying this proceeding pending the outcome of a plenary action between the parties. Petitioner cross-moves for an order striking Respondent’s

defenses. The Court consolidates both motions for resolution herein.

The petition in this proceeding pleads that the subject premises is subject to the Rent Stabilization Law. The petition also pleads that the legal monthly rent for the subject premises is \$3,555.24.

Respondent submits documentation on his motion that his initial lease commenced February 1, 2010 and expired January 31, 2011 with a monthly rent of \$2,700.00,<sup>1</sup> the rent in effect four years prior to Respondent's interposition of his rent overcharge defense by his answer on January 8, 2015. Respondent submitted evidence on his summary judgment motion that Petitioner deemed Respondent's lease to be renewed for one year commencing February 1, 2011. A rent-stabilized tenant's failure to execute an offer of a renewal lease does not entitle a property owner to deem the lease renewed, as had been provided by 9 N.Y.C.R.R. §2523.5(c)(2), Samson Mgt. LLC v. Hubert, 92 A.D.3d 932 (2<sup>nd</sup> Dept. 2012), so Respondent's rent should have continued to be \$2,700.00.

Even assuming *arguendo* that Petitioner could have deemed the lease to be renewed for one year, under N.Y.C. Admin. Code §26-510(b), the Rent Guidelines Board ("RGB") establishes rent adjustments for the units subject to the Rent Stabilization Law. The adjustment for a one-year renewal lease commencing February 1, 2011 is 2.25 percent. RGB Order 42. An increase of 2.25 percent over \$2,700.00 is \$2,760.75. Respondent submitted evidence on his summary judgment motion that he entered into a two-year renewal lease commencing February

---

<sup>1</sup> The record contains information that Petitioner may have construed this rent to be a preferential rent. However, a preferential shall be set forth as one in the lease, 9 N.Y.C.R.R. §2521.2(b), and Respondent's lease does not indicate this.

1, 2012. The adjustment for a two-year renewal lease commencing February 1, 2012 is 7.25 percent. RGB Order 43. An increase of 7.25 percent over \$2,760.75 is \$2,961.10. Respondent submitted evidence on his summary judgment motion that Petitioner offered him a one- or two-year renewal lease commencing February 1, 2014. Respondent did not countersign this lease on those terms. Accordingly, there is no lease for a rent of \$3,555.24, the two-year lease amount that Petitioner now sues for. Even assuming *arguendo* that Petitioner could increase the rent for a two-year renewal rate, the adjustment for a two-year renewal lease commencing February 1, 2014 is 7.75 percent. RGB Order 45. An increase of 7.75 percent over \$2,961.10 is \$3,190.59.

Even affording Petitioner allowances for a deemed lease, which it is not entitled to, and to increase the rent according to a lease that Respondent did not fully execute, allowances which have the effect of increasing the rent more than would otherwise be allowed, the legal regulated rent would only be \$3,190.59, not the \$3,555.24 sued for in the petition and upon which Petitioner demanded the rent prior to the commencement of this proceeding pursuant to RPAPL §711(2).

In order to be entitled to relief in a summary proceeding, it is not only necessary that a landlord plead the rent regulatory status and compliance with the appropriate statutes and codes, but that the landlord actually be in compliance therewith. Caceres v. Golden, 1991 N.Y. Misc. LEXIS 856 (App. Term 2<sup>nd</sup> Dept. 1991). As Respondent has demonstrated as a *prima facie* matter on his summary judgment motion that, even affording Petitioner all favorable inferences, the rent demanded is not the legal rent, the law is well-settled that Petitioner, in opposition to a motion for summary judgment, must assemble and “lay bare” affirmative proof to establish that

the matters alleged are real and capable of being established upon a trial. Alfred E. Mann Living Trust v. ETIRC Aviation S.a.r.l., 78 A.D.3d 137, 142 (1<sup>st</sup> Dept. 2010), Johnson v. Phillips, 261 A.D.2d 269, 270 (1<sup>st</sup> Dept. 1999); Fileccia v. Massapequa General Hospital, 99 A.D.2d 796 (2<sup>nd</sup> Dept.), *aff'd*, 63 N.Y.2d 639 (1984); Hasbrouck v. Gloversville, 102 A.D.2d 905 (3<sup>rd</sup> Dept.), *aff'd*, 63 N.Y.2d 916 (1984). Petitioner has not submitted any evidence that rebuts the simple math of the rent increases since Respondent's initial lease. Accordingly, Respondent prevails on his position that Petitioner fails to prove an element of his *prima facie* case, to wit, that the rent demanded is the legal rent.

The Court therefore grants Respondent's motion for summary judgment, which determination is limited to Petitioner's proof on its *prima facie* case in a nonpayment summary proceeding and is not preclusive on any issue in any other proceeding. The Court dismisses this proceeding. The Court denies Respondent's motion for a stay as moot and denies Petitioner's cross-motion for the reasons stated above.

This constitutes the decision and order of this Court.

Dated: New York, New York  
July 8, 2015



---

HON. JACK STOLLER  
J.H.C.