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

CLERMONT YORK ASSOCIATES LLC,

Petitioner/Landlord,

Index No. 73941/2012

- against -

DECISION/ORDER

EJ ZGODNY,

Respondents/Tenants.

Present:

Hon. Jack Stoller
Judge, Housing Court

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

Papers	Numbered
Order To Show Cause and Supplemental Affidavits Annexed	1
Affirmation In Opposition	2
Supplemental Affirmation and Affidavit In Support	3
Supplemental Affirmation In Opposition	4

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

Clermont York Associates LLC, the petitioner in this matter ("Petitioner"), commenced this summary proceeding against Ej Zgodny, the respondent in this matter ("Respondent"), seeking possession of 444 East 82nd Street, Apt. 8F, New York, New York ("the subject premises") on the ground of nonpayment of rent. The petition alleged, *inter alia*, that the subject premises is rent-stabilized. Respondent answered, proceeding while *pro se*. The only defense Respondent raised in the answer was a breach of the warranty of habitability.

The parties settled this matter by a stipulation dated September 21, 2012 ("the Stipulation"), according to which Respondent, while still *pro se*, consented to a final judgment in

the amount of $24,900.00, based upon a monthly rent of $4,150.00. The Stipulation permitted issuance of the warrant of eviction forthwith and stayed execution thereof for payment according to a payout schedule. A warrant of eviction subsequently issued.

Respondent now moves by order to show cause for an order vacating the Stipulation on the ground that he was unaware of a potential rent overcharge defense. Respondent was *pro se* at the time that he initially moved by order to show cause and subsequently retained counsel, who interposed supplemental papers on Respondent's behalf. Petitioner submitted opposition to both Respondent's *pro se* motion and the subsequent supplemental papers.

When a *pro se* party stipulates to a judgment in a nonpayment summary proceeding because he or she is unaware of a rent overcharge defense until subsequently consulting counsel and raising that defense to the Court, that party shows grounds to vacate the stipulation, Cretans Ass'n 'Omonoia,' Inc. v. Perkis, 4 Misc.3d 136A (App. Term 1st Dept. 2004), Chong King Enterprises, Inc. v. Nunez, N.Y.L.J. Jan. 28, 2003 at 18:2 (App. Term 1st Dept.); 144 Woodruff Corp. v. Lacrete, 154 Misc.2d 301, 302 (Civ. Ct. Kings Co. 1992), upon showing a "potentially meritorious" defense of rent overcharge. Grand Concourse 2075 LLC v. Rivera, N.Y.L.J. Dec. 5, 2000 at 26:1 (App. Term 1st Dept.). The Court thus evaluates Respondent's motion according to the potential merit of his defense.

Prior to 2009, the Division of Housing and Community Renewal ("DHCR") had determined that landlords are permitted to deregulate rent-stabilized apartments as luxury units pursuant to N.Y.C. Admin. Code §26-504.3(a)(3) even if they were receiving a tax abatement pursuant to N.Y.C. Admin. Code §11-243 known colloquially as a "J-51." In 2009, the Court of

Appeals held that landlords may not in fact avail themselves of luxury deregulation if they benefit from a J-51 tax abatement, DHCR's prior determination notwithstanding. Roberts v. Tishman-Speyer Properties L.P., 13 N.Y.3d 270 (2009).

There appears to be no dispute from the evidence adduced on the motion practice before the Court that Petitioner registered the subject premises with DHCR with a monthly rental of $1,018.88 for a lease commencing October 1, 1996 and expiring September 30, 1998. Thereafter, there is no dispute that Petitioner deemed the subject premises to be deregulated pursuant to N.Y.C. Admin. Code §26-504.3(a)(3) although it was a the beneficiary of a J-51 tax abatement. After the decision of Roberts, supra, Petitioner recognized that the subject premises was rent-stabilized and registered the rent for the subject premises with DHCR.

A DHCR rent history dated November 28, 2012 attached to Respondent's motion shows no rent registration after the aforementioned $1,018.88 registered rent until July 23, 2012, when Petitioner registered Respondent's rent of $4,100.00 for a lease commencing February 1, 2011 and expiring January 31, 2012 and rent of $4,150.00 for a lease commencing February 1, 2012 and expiring January 31, 2013. Petitioner also attaches to its opposition registrations for the subject premises for leases with Respondent commencing February 1, 2008 and expiring January 31, 2009 in the amount of $4,150.00, commencing February 1, 2009 and expiring January 31, 2010 in the amount of $4,300.00, and commencing February 1, 2010 and expiring January 31, 2011 in the amount of $4,100.00. The registrations that Petitioner attaches to its papers indicate that it amended the registrations pursuant to the decision of Roberts, supra.

The legal regulated rent for the purposes of determining an overcharge shall be deemed to

be the rent charged on the base date, plus in each case any subsequent lawful increases or adjustments. 9 N.Y.C.R.R. §2526.1(a)(3)(I). The base date is four years prior to the filing of a rent overcharge claim. 9 N.Y.C.R.R. §2520.6(f)(1). On this rule, Respondent does not show a potentially meritorious overcharge, as his rent has not increased from its 2008 level of $4,150.00. However, a recent Appellate Division decision, 72A Realty Assoc. v. Lucas, 2012 NY Slip Op. 8241, 955 N.Y.S.2d 19 (1st Dept. 2012), stands for the proposition that the deregulation of a rent-stabilized apartment in a building with a J-51 tax abatement prior to the ruling in Roberts, supra., combined with a lack of clarity as to the establishment of a vacancy rent at such a level to merit luxury deregulation pursuant to N.Y.C. Admin. Code §26-504.3(a)(3) warrant an examination of any available record of rental history necessary to set the proper base date rate.

This authority opens up the question of the rent increase from $1,018.88 in 1997 to $4,150.00 eleven years later. Petitioner annexes to its supplemental opposition a document purporting to show that Petitioner engaged in $29,231.73 in individual apartment improvements pursuant to 9 N.Y.C.R.R. §2522.4(a)(1) to effectuate an increase the rent above the vacancy allowance. However, the document appears to be a worksheet prepared by Petitioner itself, not a receipt or invoice from a contractor. Moreover, the document is vague about some of the purported improvements. Aside from bathroom floors and various kitchen appliances that the worksheet represents were installed at the subject premises, the worksheet has one line item of $7,345.00 for "kitchen" and another of $19,000.00 for "bathroom." For the purposes of determining whether there is a lack of clarity as to how the rent increased to its current level, part of the criteria set forth in 72A Realty Assoc., supra, Petitioner's submission is insufficient to

rebut the proposition that Respondent has set forth a "potentially meritorious" rent overcharge defense. Grand Concourse 2075 LLC, supra, N.Y.L.J. Dec. 5, 2000 at 26:1.

Accordingly, the Court grants the motion and vacates the Stipulation along with the judgment entered and the warrant issued pursuant to the Stipulation. The Court calendars the proceeding for all purposes to March 1, 2013 at 9:30 a.m. at part D, Room 524, at the Courthouse located at 111 Centre Street, New York, New York.

This constitutes the decision and order of this Court.

Dated: New York, New York
January 29, 2013

HON. JACK STOLLER
J.H.C.