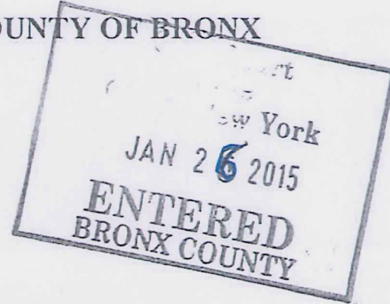
**SHORT FORM ORDER**

**CIVIL COURT OF THE CITY OF NEW YORK, COUNTY OF BRONX**




PRESENT:

**Hon. Javier E. Vargas,**
**J.H.C.**

GLEN BOLAND and VELMORE BOLAND,

Petitioners-Landlords,

- against -

ODETTE BURRELL,

Respondent-Tenant,

- and -

NYCHA SECTION 8,

Respondent.

Housing Part D
Index No. L&T 022094/2014
Motion No. 001 & 002
Return Date January 8, 2015

| | Papers Numbered |
|---|---|
| Order to Show Cause & Affidavit Annexed | 1 |
| Supplemental Affirmation in Support | 2 |
| Notice of Motion, Affirmation & Exhibits Annexed | 3 |
| Affirmation in Opposition | 4 |
| Reply Affirmation | 5 |

Upon the foregoing papers and for the following reasons, the motions by Respondent-Tenant Odette Burrell ("Tenant"), for, inter alia, vacatur of a default Judgment of Possession and dismissal of the proceedings, are denied.

Since at least 2008, Tenant has resided at the subject Premises, located at 4073 Hill Avenue, Apartment 1, in the Bronx, New York, owned by Petitioners-Landlords Glen Boland and Velmore Boland ("Landlords"), pursuant to an Apartment Lease Agreement dated November 1, 2008, and apparently thereafter renewed yearly. The Premises consist of a two-bedroom apartment in a building containing three apartments, and are not subject to Rent Control or Stabilization Laws. Tenant, who resides at the Premises with her 12-year old twins, is the recipient of New York City Housing Authority ("NYCHA") Section 8 Housing Choice Voucher

Program benefits of $798 per month. Essentially, according to the parties, Tenant's Lease expired on December 31, 2013, but she remains in possession of the Premises pursuant to a month-to-month tenancy paid in part by NYCHA.

By Notice of Petition and Petition dated April 10, 2014, Landlords commenced the instant summary proceeding to recover possession of the Premises (*see* RPAPL 701 *et seq.*), on the grounds of nonpayment of her personal portion of the rent at $802 per month, totaling $6,210 from April 2013 to March 2014. The Petition affirms that the apartment is not subject to rent regulation "because it was vacant after 06/30/71 and is within a building containing less than 6 apartments." Prior thereto, Landlords had served upon Tenant a Five-Day Notice dated March 11, 2014, advising her that she was indebted to then to the tune of $6,210, which sum must be paid by March 25, 2014, in pain of the commencement of a summary proceeding to recover possession of the Premises. It should also be noted that Landlords duly notified NYCHA of their intention to commence this proceeding against her by Certification dated March 11, 2014, and NYCHA accepted the Landlords' Certification on March 31, 2014.

Despite the Five-Day Notice, and proper substitute service of process upon a middle-aged African-American female, "a person of suitable age and discretion" at the Premises, who refused to give her name to the process server on April 22, 2014 at 5:44 p.m., Tenant failed to answer or appear on the scheduled court date. As a result, Landlords successfully applied for a default judgment against her, which Judgment of Possession was signed and entered by Housing Court Judge Eardell Rashford on August 5, 2014, and a Warrant of Eviction issued shortly thereafter. Facing imminent execution of the Warrant, Tenant now moves, by Order to Show Cause dated August 20, 2014, for vacatur of the Default Judgment based on her failure to appear and permission to file an Answer, conclusorily claiming that she did not receive the Notice of Petition and Petition and that, in any event, she does not owe any rent to Landlords.

Upon retaining legal representation, Tenant's counsel filed a Supplemental Affirmation in Support of her Order to Show Cause dated December 4, 2014, arguing that Tenant never received notice of the proceeding, and "first learned of the existence of this case when she received a Marshal's notice of eviction on or about August 15, 2014." Without describing Tenant's physical appearance, counsel explained that the person allegedly served with process was not Tenant, and that she and her children are never home before 7:00 p.m. on weekdays because of

several after-school and extracurricular activities. Counsel failed to attach to his Supplemental Affirmation any Affidavit from tenant or other evidence supporting the aforementioned allegations.

By separate Notice of Motion dated December 1, 2014, Tenant also moves for dismissal of the instant proceedings pursuant to CPLR 3211(a)(7), on the grounds that it fails to state a cause of action because she has allegedly paid all rent arrears to date and there is no current and valid Lease Agreement between the parties for the $1,600 per month claimed by Landlords. Tenant explains that Landlords are precluded from commencing a nonpayment proceeding against her in the absence of a Lease, but may only commence a holdover proceeding to recover possession of the Premises and use and occupancy ("U&O") from her, requiring dismissal of this proceeding under *Matter of Jaroslow v Lehigh Valley R.R. Co.* (23 NY2d 991 [1969]) and *1400 Broadway Assocs. v Henry Lee & Co. of NY, Inc.* (161 Misc 2d 497, 499–501 [NY Civ Ct 1994]).

By Affidavit in Opposition dated December 29, 2014, Landlords argue that they should recover possession of the Premises immediately because Tenant owe them over $6,210 in rent arrears through March 2014, based on the Lease and, after its expiration, pursuant to the ensuing month-to-month tenancy in this unregulated Premises. Landlords also contend that the monthly rent is $1,600 – not the $1,400 claimed by Tenant – as evidenced by their 2011-2012 Lease, Tenant's own correspondence of April 2013, NYCHA's documents calculating her portion of the rent based on the $1,600 sum, and by her own admission and course of conduct by undisputedly paying $802 per month with NYCHA paying $798, for a total of $1,600 monthly. The aforementioned documents were apparently obtained by NYCHA, following Tenant's own subpoena of their records. Based on these, this Court agrees with Landlords.

It is well-settled that the Housing Court is vested with broad discretionary and equitable jurisdiction over housing matters and judgments (Civil Court Act § 110). Among them is that a final judgment of possession in favor of a landlord obtained as a result of a tenant's default may be vacated by the issuing court (*see* CPLR 5015), pursuant to an order to show cause brought by the tenant "based upon both a showing of underlying merit and a reasonable excuse for the default" (*Brusco v Braun,* 199 AD2d 27, 34 [1993], quoting *New York City Hous. Auth. v Torres*, 61 AD2d 681 [1978]; *see 160–62 East 2nd St. H.D.F.C. v Beaumont*, 29 Misc 3d 138[A], 2010

NY Slip Op. 52037[U] [AT 1st 2010]). Moreover, "in the absence of good cause, the judgment and warrant should not be vacated" (*1199 Hous. Corp. v Warren*, 2003 NY Slip Op 51046[U] [2003]; *see* RPAPL § 749[3]; *New York City Hous. Auth. v. Torres*, 61 AD2d at 681).

Applying these legal precepts to the instant matter, Tenant has failed to sufficiently establish either a reasonable excuse for her default in answering or a meritorious defense to this proceeding. Aside from the fact "that an affidavit of counsel[, as here provided,] is of no probative value for purposes of summary determination" (*Brusco v Braun, supra* at 32; *Hasbrouck v City of Gloversville*, 102 AD2d 905, *affd for reasons stated below* 63 NY2d 916 [1984]), Tenant has failed to herself provide any factual support for the circumstances surrounding her purported failure to receive service of process. Tellingly, her only Affidavit attached to the Motion, studiously avoid actually: (1) denying her receipt of service of process at her own residence; (2) corroborating her absence from the Premises on the relevant date and time of the substitute service; and (3) disputing the physical description of the person who received process at the Premises. No documentary evidence whatsoever accompanies her allegations of non service. Her default in appearance appears, thus, inexcusable, especially in light of the various notice provisions calculated to alert her to the imminence of litigation and to prompt her appearance in court, including the undisputed Five-Day Notice demand for rent and the Court's own postcard notice.

Nor does Tenant show a meritorious defense to this nonpayment proceeding. "Since the written lease had expired, a month-to-month tenancy on the same terms as those in the original lease is implied, inasmuch as tenants remained in possession after the expiration of the lease and continued to pay rent" (*Priegue v Paulus*, 43 Misc 3d 135[A], 2014 NY Slip Op *50662[U]* [AT 2nd 2014]; *see Baiocco v Charles H. Greenthal Mgt.*, 220 AD2d 322 [AD 1st 1995]; *Tricarichi v Moran*, 38 Misc 3d 31, 33 [AT 9th & 10th JD 2012]). Consequently, it was proper for Landlords to bring a nonpayment summary proceeding against Tenant to recover for the unpaid rents up to December 2013, as well as the accumulating U&O following the expiration of the lease, since Tenant has remained in possession of the Premises and NYCHA has continued paying at least its portion of the U&O in 2014, which portions have been accepted by Landlords (*see* Real Property Law § 232-c; *Tricarichi v Moran*, 38 Misc 3d at 33). Tenant's claim that she owes nothing appears disingenuous and belied by the record evidence.

The continued payment of U&O by NYCHA to Landlords and the unregulated nature of the Premises appear to differentiate this case from *1400 Broadway Assocs. v Henry Lee & Co. of NY, Inc.* (161 Misc 2d 497) and its progeny, where the court held that a landlord may not bring a *commercial* nonpayment proceeding for rent that accrued after the expiration of a lease and after the tenant totally stopped paying for the rent. On that situation, where the tenant only owed the U&O in a commercial or rent-regulated premises, the landlord's only remedy would have been to bring a separate holdover proceeding or a plenary action for past and currently accruing U&O against the tenant (*see id.*). Such does not appear necessary herein given the extant circumstances, and Tenant's inexcusable default in answering.

In accordance with the foregoing, Tenant's motions for dismissal and vacatur of the default Judgment of Possession are denied, and execution of the Warrant of Eviction is hereby stayed until ten days after service of this Order with Notice of Entry upon her in order to pay the remaining arrears and vacate the Premises. This constitutes the Decision and Order of the Court.

ENTER:

Dated: January 26, 2015
Bronx, New York

J.H.C.

CC: Daniel P. Phillips, Esq.
Balsamo & Rosenblatt, P.C.
200 Schermerhorn Street
Brooklyn, New York 11201

Mahandra Persaud, P.C.
400 White Plains Road, 2nd Floor
Bronx, New York 10466