

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

Index No. L&T 75480/17
Motion Cal.# Motion Seq.#
Papers Submitted on 1/29/18

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82nd St. JACKSON HEIGHTS LLC,

Petitioner,

-against-

PRETTY GIRL OF 82nd JACKSON HEIGHTS
CORP. d/b/a YOUNG GIRL
Ground Floor Store and Basement
37-35 82nd Street
Jackson Heights, NY 11372

Respondent-Tenant.

ABC INC**,

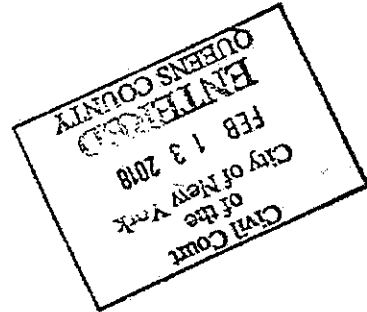
Respondent-Undertenant.

(*Fictitious name meant to represent an unknown
occupant)

DECISION AND ORDER

Recitation as required by CPLR 2219(a) of the
papers considered in the review of this
Motion:

	Papers Numbered
Notice of Motion & Affs.	<u>1</u>
Cross-Motion	<u>2</u>
Opposition to Cross-Motion	<u>3</u>
Supplemental Affidavits	<u> </u>



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Upon the foregoing cited papers and after oral argument, the Decision/Order on petitioner's motion seeking a default judgment of possession based upon respondent's failure to timely appear or answer or alternatively, amend the petition to include all base rent and additional rent due through the return date of the motion, December 4, 2017, and grant summary judgment to petitioner; entering a judgment of possession, a final money judgment in favor of the petitioner in the sum of \$55,135.39, together with legal fees and respondent's cross-motion to vacate any default that is entered against it is as follows:

On October 26, 2017, petitioner commenced this commercial nonpayment summary eviction proceeding against the respondent seeking a final judgment of possession, and a money judgment in the amount of \$39,585.39, for the ground floor store and basement premises located at 37-35 82nd Street, Jackson Heights, New York 11372, in the building known as 37-11 to 37-39 82nd Street, Jackson Heights, (hereinafter "subject premises").

Respondent, Pretty Girl of 82nd Jackson Heights Corp. d/b/a Young Girl has never interposed an answer to the petition. Proof of service of the notice of petition and petition was filed with the clerk of the court. On November 24, 2017, Young Girl 10, Inc., a

nonparty to the proceeding interposed a late answer without first seeking leave of court to intervene. Young Girl 10, Inc. sued herein as "ABC INC", admitted its occupancy of the subject premises. Accordingly, the Court *sua sponte* amends the petition to substitute Young Girl 10, Inc. for ABC INC. Therefore, the appropriate title of this case is 82nd St. Jackson Heights, LLC, Petitioner, against Pretty Girl of 82nd Jackson Heights Corp. d/b/a Young Girl, Respondent-tenant., Young Girl 10, Inc., Respondent-Undertenant.

On December 4, 2017, counsel for Young Girl 10, Inc. appeared in court and asked for time to oppose petitioner's motion seeking a default judgment of possession and a money judgment. In the cross-motion submitted to the Court, counsel represents that he is counsel for respondent, Pretty Girl of 82nd Jackson Heights Corp. d/b/a Young Girl. However, the answer counsel submitted to the Court was on behalf of Young Girl 10, Inc., not respondent Pretty Girl of 82nd Jackson Heights Corp. d/b/a Young Girl.

At oral argument, counsel for Young Girl 10, Inc. admitted that his client is the current business entity occupying the subject premises. Furthermore, counsel does not dispute that five months' rent was never paid to the petitioner, whether by the respondent-tenant, or the respondent-undertenant. Nor does he offer a viable defense for the nonpayment.

Accordingly, petitioner's motion for summary judgment is granted to the extent that the petition is amended to include all rent due through December 4, 2017 and a money judgment in the sum of \$55,135.39, representing the sum of rent arrears through December 4, 2017, is awarded in favor of petitioner against respondent, Pretty Girl of 82nd Jackson Heights Corp. d/b/a Young Girl. Petitioner is awarded a judgment of possession against all respondents. The warrant is to issue forthwith and the warrant shall execute forthwith. The petitioner's claim for legal fees is granted pursuant to ¶19 of the lease and ¶51 of the lease rider, both dated September 27, 1999, between petitioner's predecessor-in-interest and respondent's predecessor-in-interest (which lease was modified by the petitioner and respondent tenant on March 1, 2009 and further modified by the same parties by the modification of lease dated July 1, 2017), to the extent that a hearing shall be held to determine the amount of legal fees to be awarded to petitioner against the respondent tenant, Pretty Girl of 82nd Jackson Heights Corp. d/b/a Young Girl.

Counsel for respondent, Young Girl 10, Inc., has brought a cross-motion on behalf of Pretty Girl of 82nd Jackson Heoghts [sic] Corp., d/b/a Young Girl, a party which is not represented by counsel. The only answer in the instant proceeding was interposed on behalf of Young Girl 10, Inc., which was substituted in place and instead of the respondent named as the Undertenant, i.e. ABC Inc. This procedural deficiency is sufficient to deny the cross-motion.

However, respondent tenant's cross-motion is also substantively deficient. The purported discrepancies in physical appearance between the process server's affidavits of service in which he states he delivered the predicate notice and the pleadings to the same person, are *de minimus* differences in descriptions and therefore, are of no moment. Even a height discrepancy of 5 inches has been found to be insignificant. These minimal differences do not rise to the level of requiring a traverse hearing *See, US Bank N.A. v Cherubin*, 141 AD3d 514, 36 NYS3d 154 (2nd Dept 2016). Moreover, the answering respondent and the

cross-movant respondent fail to raise any viable defense to the nonpayment of rent for five months (August 2017 – January 2018).

Respondent's counsel also seemingly argued that petitioner's acceptance of rent payments made by Young Girl 10 Inc., demonstrated the petitioner's knowledge and recognition of that entity to in some way elevate it to the status of a tenant. This argument ignores the nonwaiver provision of ¶24 of the lease, which states in pertinent part,

The receipt by Owner of rent and/or additional rent with knowledge of the breach of any covenant of this lease shall not be deemed a waiver of this breach and no provision of this lease shall be deemed waived by Owner unless such waiver be in writing signed by Owner."

Non-waiver clauses in commercial leases have been consistently upheld for over 30 years. See, *Jefpaul Garage Corp. v Presbyterian Hosp. in City of New York*, 61 NY2d 442, 474 NYS2d 458 (1984). And, assuming the acceptance of rent did amount to a waiver of objection of Young Girl 10 Inc., as a tenant, the five months' rent indisputably remains unpaid.

Counsel for the respondent undertenant also raises an issue with respect to the demise of a principal of the respondent, as a justification for the respondent tenant to default in its appearance. However, respondent undertenant's counsel has no standing to make the cross-motion on behalf of the tenant; and in any event, the death of a principal of a corporate entity is not an acceptable reason to default by a corporation.

Moreover, counsel erroneously seeks support in CPLR §1015(a), which provides for a substitution of parties in circumstances where a party dies. See, *Aurora Bank FSB v Albright*, 137 AD3d 1177, 29 NYS3d 394 (2nd Dept 2016). The Court notes that the relief of substitution of parties was not sought in the notice of cross-motion. Nonetheless, in the instant case, no party to the litigation has died. The respondent tenant is a corporation whose officer passed away. The death of a principal of a corporation does not necessitate the substitution of parties. Furthermore, at oral argument it was disclosed that the subject premises is being utilized by the son of the decedent, who is running a business in the subject premises.

Accordingly, the cross-motion is denied in its entirety.

The legal fees hearing shall be held on March 19, 2018 at 2 p.m. in Room 408.

This constitutes the Decision and Order of this Court.

February 13, 2018


SALDY E. UNGER, J.C.C./A.J.S.C.