

Appellate Term of the
Supreme Court of the State of New York
for the 2nd & 11th Judicial Districts,
held in Kings County on

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FEB 18 2002

GLORIA COHEN ARONIN J.P.
MICHELLE WESTON PATTERSON
JOSEPH G. GOLIA JJ.

FEBRUARY 6, 2002 TERM
2001-738 Q C

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LAFRANCE LEASING L.P.,

Appellant,

-against-

NANCY D. SHEPHERD,

Respondent.

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The above named appellant having appealed to this court from an ORDER of the CIVIL COURT, CITY OF NEW YORK, COUNTY OF QUEENS entered on FEBRUARY 7, 2001 and the said appeal having been submitted by DENISE M. MAY, ESQ. counsel for the appellant and NO BRIEF SUBMITTED for the respondent and due deliberation having been had thereon; it is hereby,

ORDERED AND ADJUDGED that the order is modified by providing that the branch of the landlord's motion which sought restoration of the proceeding to the trial calendar is granted and the branch of the motion which sought to amend the petition to include all unpaid rent which accrued prior to the restoration is denied without prejudice to renewal in the court below; and as so modified, affirmed without costs.

Aronin, J.P. and Golia, J., concur.

Patterson, J., dissents, in part, in a separate memorandum.

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Nancy T. Sunshine

NANCY T. SUNSHINE

CHIEF CLERK

APPELLATE TERM

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1873E (9933T)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM : 2nd and 11th JUDICIAL DISTRICTS

PRESENT: ARONIN, J.P., PATTERSON and GOLIA, JJ.

LAFRANCE LEASING L.P.,

Appellant,

-against-

NO. 2001-738 Q C

DECIDED

NANCY D. SHEPHERD,

Respondent.

Landlord appeals from an order of the Civil Court,
Queens County (P. Jackman-Brown, J.), entered February 7,
2001, which denied its motion to restore the proceeding to
the trial calendar, amend the petition to include all unpaid
rent through the date of restoration and to obtain a final
judgment and warrant of eviction.

RE: LAFRANCE LEASING L.P. v NANCY D. SHEPHERD
 NO. 2001-738 Q C

Order modified by providing that the branch of landlord's motion which sought restoration of the proceeding to the trial calendar is granted and the branch of the motion which sought to amend the petition to include all unpaid rent which accrued prior to restoration is denied without prejudice to renewal in the court below; as so modified, affirmed without costs.

Contrary to the opinion of the court below, the stipulation of settlement does not contain an express or implied condition that landlord was to complete the specified repairs before it could move to have the proceeding restored to the trial calendar upon tenant's default in making the required payments. As a result, landlord is not required to allege in its moving papers that the repairs were completed (see, 2160-2164 Caton L.L.C. v Epps, NYLJ, May 6, 1998 [App Term, 2nd & 11th Jud Dists]). Since the affidavit in support of landlord's motion sufficiently demonstrated tenant's default in making payments, that branch of landlord's motion should be

1873E

RE: LAFRANCE LEASING L.P. v NANCY D. SHEPHERD
NO. 2001-738 Q C

granted insofar as it sought restoration (see, 2160-2164 Caton L.L.C. v Epps, supra). Notwithstanding the fact that landlord's motion was unopposed, insofar as it sought a final judgment and warrant of eviction, landlord is not entitled to such relief. As landlord based its claim for such relief solely upon a breach of the stipulation which, by its terms, only authorizes restoration of the proceeding to the trial calendar and does not authorize entry of a final judgment, tenant's default only constituted a concession that she breached the stipulation.

Aronin, J.P. and Golia, J., concur.

Patterson, J., dissents, in part, in a separate memorandum.

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM : 2nd and 11th JUDICIAL DISTRICTS

PRESENT: ARONIN, J.P., PATTERSON and GOLIA, JJ.

LAFRANCE LEASING L.P.,

Appellant,

-against-

NO. 2001-738 Q C

DECIDED

NANCY D. SHEPHERD,

Respondent.

Patterson, J., dissents, in part, and votes to modify the order and grant landlord's motion to the extent of restoring the proceeding to the calendar, entering final judgment in the sum of \$2,225.25 and authorizing the issuance of a warrant of eviction in the following memorandum:

While I agree with the majority's holding that, given the terms of the stipulation of settlement, the branch

RE: LAFRANCE LEASING L.P. v NANCY D. SHEPHERD
NO. 2001-738 Q C

of landlord's motion which sought to restore the proceeding to the calendar should have been granted inasmuch as landlord was not obligated to allege in its moving papers that the repairs were completed (see, 2160-2164 Caton L.L.C. v Epps, NYLJ, May 6, 1998 [App Term, 2nd & 11th Jud Dists]), I further believe that the branches of landlord's motion which sought a final judgment and warrant of eviction should have been granted.

After tenant moved to vacate the default judgment, she executed a stipulation whereby she admitted that the arrears, which included the rent for August 2000, totaled \$2,222.25. Tenant agreed to satisfy the arrears by making four payments, the first of which was to be made on August 9, 2000. Tenant failed to make any payments. In response to landlord's motion seeking, inter alia, restoration, a final judgment and a warrant of eviction, tenant did not submit opposition papers or appear in court to oppose the motion. Having conceded the amount owed under the stipulation and having failed to make any

1873E

RE: LAFRANCE LEASING L.P. v NANCY D. SHEPHERD
 NO. 2001-738 Q C

payments, I believe tenant's failure to oppose landlord's motion was a concession that she had no defense and landlord was entitled to such relief.