

**CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF RICHMOND**

3965 AMBOY ROAD INC.,

Index No.: 51596/08

*Claimant,*

**DECISION/ORDER**

*against*

Present: **HON. PHILIP S. STRANIERE**  
Judge, Civil Court

**RANDAZZO PASTRY SHOP**

*Defendant.*

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

Order to show cause seeking to vacate warrant of eviction submitted 10/22/2008.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	
Order to Show Cause and Affidavits Annexed.....	1&2
Affirmation in Opposition.....	3
Replying Affidavit of defendant.....	4
Exhibits.....	
Other: .....	

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Petitioner, 3965 Amboy Road, Inc., commenced this commercial summary proceeding against the respondent Randazzo Pastry Shop, alleging that the defendant failed to pay rent due and owing. Respondent defaulted in appearing and answering and a judgment of possession was awarded to the petitioner. No money judgment was issued owing to the default of the respondent in appearing and answering.

On July 10, 2008, respondent, without counsel, filed an order to show cause alleging that it could enter into a payment plan but had been withholding rent because of a flooding condition caused by the petitioner. The matter appeared on the court calendar on July 30, 2008 a stipulation was entered into allowing for the respondent to obtain counsel to submit supplemental papers and on the condition that respondent keeps the payment current as of August 1, 2008.

A warrant of eviction was issued on July 1, 2008.

Respondent then retained counsel and filed a motion to vacate the respondent's default and restore the case to the trial calendar for a decision on the merits. Petitioner opposed that application. Petitioner alleged that the payment due to petitioner for September 2008 was returned for insufficient funds. Petitioner contends that any repairs to the premises are the responsibility of the respondent under the terms of the lease.

By written decision dated September 26, 2008 the court denied respondent's application. The court concluded that respondent had not shown an excuse for defaulting initially and had not shown a meritorious defense. The court also found that the respondent was not in compliance with the terms of the stipulation entered into between the parties on July 30, 2008 which required that rent payments be kept current.

Currently before the court is an order to show cause submitted by the respondent asking that the warrant of eviction be vacated based on the tendering of the amount of rent due in the petition and dismissing the summary proceeding.

Petitioner submitted opposition to the order to show cause. Petitioner points out in its papers that the amount being tendered by petitioner, \$20,000.00, would have only satisfied the petition amount of \$16,112.98 and that at the time the warrant was issued, in excess of \$30,000.00 was owed by petitioner to respondent.

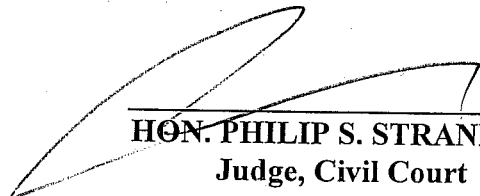
Respondent filed a reply.

Respondent's motion must be denied. There is no legal obligation on the part of the petitioner to accept payment of any monies from the respondent once a warrant was issued. Real Property Actions and Proceedings Law 749(3) provides that the issuance of a warrant cancels the agreement under which the respondent held the premises and annuls the landlord-tenant relationship. (See also *Frey v Rose*, 51 AD3d 859 (2008); *New York City Housing Authority v Torres*, 61 AD2d 681 (1978)). Even though the respondent remains in possession of the premises, this summary proceeding terminated the landlord-tenant relationship. The court cannot compel the petitioner to accept the rent due and owing. It is up to the parties at this point to resolve the outstanding issues between themselves. Petitioner still has the ability to commence a plenary proceeding to collect any monies due and owing by the respondent and the respondent retains the right to assert any monetary counterclaims.

**Respondent's motion is denied. Petitioner's request for sanctions is likewise denied.  
All stays are lifted.**

**The foregoing constitutes the decision and order of the court.**

**Dated: November 25, 2008  
Staten Island, NY**



**HON. PHILIP S. STRANIERE  
Judge, Civil Court**

ASN by TAB on 12/3/08