

**Kee Yip Realty Corp. v Wolinsky**

2005 NY Slip Op 30492(U)

September 13, 2005

Sup Ct, NY County

Docket Number: 112985/03

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

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KEE YIP REALTY CORP.,

Plaintiff,

-against-

SARAH WOLINSKY, "JOHN DOE" and "JANE DOE"

Defendants.  
-----x

Index No. 112985/03  
Mtn Seq. 003

**FILED**  
SEP 22 2005  
NEW YORK  
COUNTY CLERKS OFFICE

**WALTER B. TOLUB, J.:**

This action arises out of a disputed lease for the fifth floor of a commercial building located in downtown Manhattan and its subsequent conversion into an illegal residential apartment. Plaintiff and defendant Ms. Wolinsky have thus far been party to no less than three actions concerning the subject premises and have brought several motions for relief, one of which was reviewed and decided by the Court of Appeals.

In June 1997, plaintiff Kee Yip Realty Corp. (Kee Yip) and defendant Sarah Wolinsky (Wolinsky) entered into a commercial lease for the fifth floor (the premises) of 135 Grand Street (the building). Under the terms of the lease, Ms. Wolinsky was to occupy the premises from July 1, 1997 until June 30, 2000. Defendants ceased paying rent on February 1, 2000, and upon expiration of the lease, refused to vacate the premises.

In March of 2000, prior to the expiration of the lease, Ms. Wolinsky, along with several other tenants occupying space within the building commenced the action captioned *Sarah Wolinsky, David*

Levin, Ben Reddy, James Dawson-Hollis, John Santiago, Steve Lee and Nicholas Guagnini v. Kee Yip Realty Corp., (Index No. 105231/2000) in Supreme Court, New York County. This action, brought before this court, sought a determination that the tenancies and the units occupied were subject to and protected by the Rent Stabilization Laws. By decision dated July 2, 2002, this court held that the subject units, including the unit occupied by Ms. Wolinsky, were not protected by either the Loft Laws or the Rent Stabilization laws. This decision was subsequently affirmed by the Appellate Division First Department (*Wolinsky v. Kee Yip Realty Corp.*, 302 AD2d 327 [1<sup>st</sup> Dept. 2003]) and the Court of Appeals, which not only noted the illegal conversion of the subject premises, but perhaps more significantly, that the units involved were incapable of becoming legalized residential apartments (*Wolinsky v. Kee Yip Realty Corp.*, 2 NY3d 487 [2004]).

While *Wolinsky* was pending, plaintiff Kee Yip commenced holdover proceedings against the individual tenants involved, including Ms. Wolinsky, in the New York City Civil Court/Commercial Landlord Part. These cases, bearing the captions, *Kee Yip Realty Corp. v. Flores*, (Index No. L&T 088321/2002); *Kee Yip Realty Corp. v. Lee* (Index No. L&T 08832/2002; *Kee Yip Realty Corp. v. Wolinsky* (Index No. 088324/2002; and *Kee Yip Realty Corp. v. Reddy* (Index No. 088325/2002) were heard before Hon. Karen Smith. Judge Smith, after conducting hearings between January 24, 2003 and May 15,

2003, dismissed the commercial petition on the basis that the premises were in fact, knowingly used for residential purposes:

"petitioner [Kee Yip] knew from the outset that these tenants intended to and did in fact reside in these units and acquiesced in the residential use of the premises. The lease rider's provision stating that the premises could only be used for commercial purposes, relied upon by the petitioner throughout the hearings, was nothing more than an attempt to disguise the fact [that] the premises were being used for residential purposes so as to avoid liability for any violations which may have been imposed by building inspectors. In this regard, the court credits the testimony of respondent Sarah Wollinsky [sic] that petitioner's president, Mrs. Lee, told her from the inception that she could live there but that she would have to hide her bed and toothbrush when the inspector came around " (Affirmation in Opposition, Exhibit D, Kip Yee (sic) Realty Corp. v. Flores, et. al. (Lead Index No. L&T 088321/2002 Civ. Ct . May 28, 2003, Smith, J.)).

In July 2003, while Appellate Division's decision in Wolinsky was on appeal, plaintiff commenced the instant action. Comprised of four causes of action, plaintiff seeks possession of the subject premises (first cause of action), use and occupancy (second cause of action), real estate taxes alleged owed under the lease (third cause of action), and legal fees alleged owed under the lease (fourth cause of action). The instant motion seeks summary judgment on all four causes of action.

#### *Discussion*

At the outset, recognizing that this is a motion for summary

judgment, the role of this Court is strictly limited to finding issues, and not resolving them (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]; Barr, Altman, Lipshie, and Gerstman; *New York Civil Practice Before Trial*, [James Publishing 2004] §37:91-92). It is therefore the burden of the opposing party to produce evidentiary proof in admissible form that is sufficient to establish the existence of material issues of fact requiring trial. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]), and, if there is any doubt that triable issues of fact exist, summary judgment will not be granted.

If after searching the record however, the court determines that summary judgment in favor of the nonmoving party is more appropriate, the court, pursuant to CPLR 3212(b), has the discretion to award judgment where appropriate. Moreover, it can do so notwithstanding the absence of a cross-motion (*Smerka v. Niagra Mohawk Power Corporation*, 206 AD2d 891 [4<sup>th</sup> Dept. 1994]; *Abramovitz v. Paragon Sporting Goods Co., Inc.*, 202 AD2d 206 [1<sup>st</sup> Dept. 1994]).

With respect to plaintiff's first cause of action, on the basis of the determination of the Court of Appeals, there is no question that the premises presently occupied by Ms. Wolinsky are illegal, and that plaintiff has an absolute right to immediate

possession<sup>1</sup> of those premises. Accordingly, summary judgment on the first cause of action is granted. Summary judgment on plaintiff's remaining causes of action are however, denied.

The subject premises, as determined by the Court of Appeals, are illegal and incapable of becoming legalized residential apartments by virtue of present zoning restrictions. Therefore, regardless of what theory is employed, plaintiff cannot collect rent/use and occupancy, and cannot collect taxes alleged to be owed under the lease. The lease entered into as between plaintiff and Ms. Wolinsky, by virtue of the premises being illegal, is an illegal contract, and cannot be enforced by the courts (see, *Valenza v. Coutier, Inc.*, 288 AD2d 114 [1<sup>st</sup> Dept. 2001]). As such, plaintiff cannot collect rent for the premises and defendants cannot occupy them. Accordingly, it is

ORDERED that summary judgment is granted as to plaintiff's first cause of action for possession of the fifth floor premises of 135 Grand Street; and it is further

ORDERED that the remaining portions of plaintiff's motion for summary judgment on the second, third, and fourth causes of action are denied; and it is further

ORDERED that summary judgment is granted to defendants on the

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<sup>1</sup> Plaintiff also has a stipulation entered into in open court on December 17, 2004 which granted the plaintiff the right to "enter order and judgment of possession/warrant of eviction/ judgment of possession/ writ of assistance" as to the fifth floor premises (Reply, Exhibit A).

second and third causes of action, the lease being unenforceable, and it is further


ORDERED that the remaining fourth cause of action is denied and dismissed as moot, as the underlying lease is unenforceable; and it is further

ORDERED that the within complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 7/13/05

  
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HON. WALTER B. TOLUB, J.S.C.

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