

**63 Middle Neck Rd. LLC v Benlevi**

2012 NY Slip Op 30786(U)

March 19, 2012

Supreme Court, Nassau County

Docket Number: 19561/10

Judge: Joel K. Asarch

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU: I.A. PART 13

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**63 MIDDLE NECK ROAD LLC,**

Plaintiff,

- against -

**DECISION AND ORDER**

Index No: 19561/10

**IRA BENLEVI,**

Motion Sequence No: 001  
Original Return Date: 01-20-2012

Defendant.

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**P R E S E N T :**

**HON. JOEL K. ASARCH,**  
**Justice of the Supreme Court.**

The following named papers numbered 1 to 5 were submitted on this Notice of Motion on January 20, 2012:

	<u>Papers numbered</u>
Notice of Motion, Affirmation in Support	1-2
Memorandum of Law	3
Affidavit (not notarized) in Opposition	4
Reply Affirmation	5

The motion by plaintiff, 63 Middle Neck Road, LLC, for an Order of this Court granting summary judgment pursuant to CPLR §3212 as to the liability of defendant, Ira Benlevi, for the payment of rent, additional rent, and other charges, and setting the matter down for Inquest on the issue of damages, is decided as follows:

The underlying action for money damages, including additional rent, was commenced in this Court on October 15, 2010. Such action arose out of landlord/tenant litigation heard in the First District Court in the County of Nassau in April 2010.

The plaintiff leased the subject premises, 63A Middle Neck Rd., Great Neck, NY, to the defendant. Upon defendant's alleged non-payment under the lease agreement for the time period of September 2009 through April 2010, plaintiff commenced a landlord/tenant summary proceeding in the First District Court of the County of Nassau, Docket # LT-002570-10, in April 2010. In May 2010, based on the defendant's failure to appear in the proceeding, the Court awarded possession and a default judgment for money damages, including the outstanding rent, to the plaintiff. In October 2010, the plaintiff commenced the underlying action seeking payment for "rent, additional rent, and other charges" for the time period from May through August 2010, the remaining time period under the lease agreement.

#### FACTS

In August 1995, plaintiff leased to defendant, pursuant to a lease agreement, the subject premises. The lease term expired on August 31, 2005. The parties entered into an Extension and Modification Agreement and the lease was extended to August 31, 2010. In August 2007, upon the defendant's alleged non-payment of rent for the months of June, July and August 2007, the plaintiff commenced an initial summary proceeding in the First District Court of the County of Nassau. In November 2007, the parties settled the matter by way of a Stipulation of Settlement.

The Stipulation provided in relevant part, "...[r]espondent shall be given a reduction in the amount owed in the amount of \$7,500 in *full satisfaction of any and all claims respondent has against petitioner relative to the renovations done to the premises at 63 Middle Neck Road, Great Neck, New York...*" Defendant was represented by counsel at the time of the execution of the stipulation.

In April 2010, plaintiff commenced a second summary proceeding against the defendant upon

defendant's alleged failure to tender rent and other obligations pursuant to the lease agreement and its extensions and/or amendments thereto. As defendant failed to appear, a default judgment was entered against him in May 2010 in the amount of \$15,835.91, and a warrant of eviction was issued to the plaintiff. The judgment was entered in the office of the Nassau County Clerk in June 2010, and the same, with Notice of Entry, was personally served upon the defendant on June 10, 2010. The defendant was evicted from the premises in August 2010.

### ARGUMENTS

The plaintiff argues that there are no triable issues of fact, based on theories of documentary evidence, release, collateral estoppel, res judicata, and accord and satisfaction. It submits, as supporting evidence, deposition testimony of the plaintiff, the pleadings of the two summary proceedings in the First District Court, the November 2007 Stipulation of Settlement, copies of the lease agreement and its extensions, and the defendant's Responses to the instant action.

The *pro se* defendant contends, *inter alia*, that the plaintiff landlord participated in unethical conduct and breached the lease agreement by altering and renovating the subject premises in manner that was injurious to his enjoyment and use thereof. He also is requesting that this Court vacate the default judgment as he was subjected to countless court appearances and he made an error regarding the court date before the First District Court.

### DISCUSSION

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851[1985], *Zuckerman v. City of New York*, 49 NY2d 557[1980]). Once such a *prima facie* showing has been made, the burden

shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986], *Zuckerman v. City of New York*, *supra* ).

Here, the plaintiff has only established its *prima facie* entitlement to partial summary judgment on the issue of liability of the defendant. Although plaintiff produced the documentary evidence of the lease agreement and its extensions, the stipulation of settlement, the judgment as awarded by the First District Court, the defendant's testimony indicating acknowledgment of non-payment of rent and that rent is still due and owing, and an affidavit of service indicating personal service of the subject judgment and notice of entry on the defendant, such evidence supports defendant's liability for rent and other obligations under the lease for the time period from September 1, 2009 through April 2010.

Generally, the issuance of a warrant of eviction terminates the landlord-tenant relationship, thereby precluding a landlord from seeking rent after the eviction from a former, evicted tenant unless the lease specifically provides that the tenant remains liable for rent following an eviction (*see Holy Props. v. Cole Prods.*, 87 NY2d 130 [1985], *Johnston v. MGM Emerald Enterprises, Inc.*, 69 AD3d 674 [2nd Dept 2010], *Centre Great Neck, LLC v. Rite Aid Corp.*, 292 AD2d 484 [2<sup>nd</sup> Dept 2002]).

Here, a warrant was issued in May 2010. After a tenant has been evicted in summary proceedings, the lease is at an end and what survives is a liability, not for rent, but for damages (*see Bedford Myrtle Corp. v. Martin*, 28 Misc.2d 33 [N.Y. Sup Ct 1960]). A reading of article 18 of the lease, in conjunction with paragraphs A-16.01 of the rider thereto, indicates the tenant's obligation to pay damages in the event of an eviction.

The subject lease between the parties provides in relevant part that the lessee:

“...shall also pay Landlord as liquidated damages for the failure of Tenant to observe and perform said Tenant's covenants herein contained, any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of this lease...”(see Notice of Motion, Exhibit 1 ¶ 18).

It further provides:

“...[t]he failure of Owner to re-let the premises or any part or parts thereof shall not release or affect Tenant's liability for damages. In computing such liquidated damages there shall be added to the said deficiency such expenses as Owner may incur in connection with re-letting, such as legal expenses, reasonable attorneys' fees, brokerage, advertising and for keeping the demised premises in good order or for preparing the same for re-letting...” (see Notice of Motion, Exhibit 1 ¶ 18,).

In light of the foregoing, there is a distinction between rent and damages. As the lease and rider are silent regarding the payment of rent in the event of an eviction of a tenant, this Court is not empowered to hold the tenant/defendant liable for additional rent incurred after the issuance of the May 18, 2010 warrant of eviction.

In consideration of the documents submitted in opposition by the defendant, this Court notes the difficulty in reviewing motions filed by *pro se* litigants and, while approaching the issues they present with due care, it recognizes that such parties should not be afforded any more – or less – rights than the represented litigant. The Court notes that *pro se* litigants are unfamiliar with the law and/or its correct application, as well as court procedures. While this Court acknowledges this defendant must be given some latitude due to the lack of formal legal training and that his pleadings and papers should be given every favorable interpretation which can be drawn, the pleadings and legal arguments must satisfy minimum legal standards (*see Roundtree v. Singh*, 143 AD2d 995 [2<sup>nd</sup> Dept 1988]).

It appears, based on the record, that the defendant is making a cross motion seeking an Order of this Court opening his default, and permitting him to argue the merits of the case. For several reasons, such a cross-motion must be denied.

First, this Court did not render the default judgment. Rather, the District Court of the County of Nassau is the proper forum for such a motion.

Furthermore, to open a default, must show reasonable excuse *and* meritorious defense. CPLR § 5015 (a) provides in relevant part:

“...[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

.... excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry...”

Although the relief sought by the defendant is available under CPLR §317, he is limited to the provisions set forth in CPLR §5015, as CPLR §317 applies when “[a] person served with a summons other than by personal delivery to him or to his agent for service under Rule 318 within or without the state”. The undisputed evidence indicates that plaintiff was personally served with the Judgment and Notice of Entry. Further, he does not dispute receiving notice of the landlord/tenant action giving rise to the default judgment, nor does he indicate in his opposition that he was served alternatively.

Defendant alleges that he made an error regarding the court calendar, but he did not contact the court after he learned of default (see Notice of Motion, Exhibit 13, Tr. Ira Benlevi, p. 21, ln. 6 - 22). The only other reason he proffers for his non appearance is that he was “exhausted”. Defendant

has not proffered a meritorious defense, even if his non appearance was deemed to be excusable. He is attempting to argue the fairness of the November 2007 Stipulation of Settlement and the related facts regarding the renovation of the subject premises. As already noted herein, the parties, in consideration of a \$7,500 offset in rent, have settled the matter in full. Moreover, defendant was not a *pro se* litigant at that time.

A stipulation is a contract between the parties, and as such is to be construed according to general principles of contract law. Stipulations of settlement are favored by the courts and not lightly cast aside (see *Hallock v. State*, 64 NY2d 224 [1984]). Unless there is sufficient cause to invalidate a contract—such as fraud, collusion, mistake, accident, duress, or unconscionability; or where the agreement is contrary to public policy or suggests an ambiguity indicating that the words did not fully and accurately represent the parties agreement—parties will not be relieved from the consequences of a stipulation made during litigation. Further, “[j]udicial review is to be exercised circumspectly, sparingly and with a persisting view to the encouragement of parties settling their own differences” (see *Middleton v. Middleton*, 174 AD2d 655 [2nd Dept 1991], quoting *Christian v. Christian*, 42 NY2d 63 [1977]).

Additionally, the Stipulation entered into by the plaintiff and defendant contains release language, releasing plaintiff from any and all claims defendant has against plaintiff regarding the renovation work performed on the premises. Releases, like stipulations, are contracts and are construed according to the same general principles of contract law (see *Shklovskiy v. Khan*, 273 A.D.2d 371 [2<sup>nd</sup> Dept 2000]).

Finally, a motion to vacate a default judgment should also be made as soon as reasonably practicable after learning of the default. Here, defendant knew that a default judgment had been



entered in June 2010 when he was personally served with notice of same. He did not expeditiously move to vacate his default until the instant motion was filed and served upon him in December 2010 (see *Hoffman v. Sno Haus Ski Shops of Huntington, Inc.*, 185 AD2d 874 [2d Dept 1992]). Even if the delay is considered minimal and this Court gives deference to the theory that cases should be resolved on the merits, the issues complained of by the defendant were resolved by way of stipulation.

Accordingly, partial summary judgment is granted to the plaintiff as to the liability of defendant only for damages arising from his default and eviction from the premises, pursuant to the lease and its rider. The defendant's cross-motion is denied.

This matter is respectfully referred to the Calendar Control Part for Inquest and shall appear on the calendar of CCP on the 26<sup>th</sup> day of April, 2012 at 9:30 a.m. subject to the approval of the Justice there presiding.

The plaintiff shall serve a Notice of Inquest, together with a copy of this Order and the Note of Issue upon the defendant, by certified mail, return receipt requested, and shall serve copies of same together with receipt of payment upon the Calendar Clerk of this Court no later than ten (10) days prior to the date of Inquest.

The directive with respect to an inquest is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee as he or she deems appropriate.

The failure to appear as directed may be deemed an abandonment of the claims giving rise to the inquest.

The foregoing constitutes the Decision and Order of the Court.

Dated: Mineola, New York  
March 19, 2012

ENTER:



JOEL K. ASARCH, J.S.C.

Copies mailed to:

Salvatore E. Benisatto, Esq.  
Attorneys for Plaintiff

Ira Benlevi  
*Pro Se* Defendant

**ENTERED**  
MAR 22 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE