SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ~~PETER B. TOM~~ PART 15

0112985/2003

KEE YIP REALTY CORP.
vs
WOLINSKY, SARAH

INDEX NO. _____

MOTION DATE 7/30/02

MOTION SEQ. NO. _____

SEQ 2

DEFAULT JUDGMENT

MOTION CAL. NO. 69

The following papers, numbered 1 to 3 were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
SEP 16 2004
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/13/04

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 1]

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

KEE YIP REALTY CORP.,

Plaintiff,

Index No. 112985/03

-against-

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

Defendants.

KEE YIP REALTY CORP.,

Plaintiff,

Index No. 112986/03

-against-

BEN REDDY, JAMES HOLLIS a/k/a
JAMES DAWSON-HOLLIS, "JOHN DOE"
and "JANE DOE",

Defendants.

KEE YIP REALTY CORP.,

Plaintiff,

Index No. 112987/03

-against-

STEVE LEE,
"JOHN DOE" and "JANE DOE",

Defendants.

FILED
SEP 16 2004
COUNTY CLERK'S OFFICE

KEE YIP REALTY CORP.,

Plaintiff,

Index No. 112988/03

-against-

MARIO M. FLORES, JOHN SANTIAGO,
BRIAN CUNNINGHAM, "JOHN DOE"
and "JANE DOE",

Defendants.

WALTER B. TOLUB, J.:

Motions under Index Nos., 112985/03 ("Action One"), 112986/03 ("Action Two"), 112987/03 ("Action Three"), and 112988/03 ("Action Four"), are consolidated for disposition.

Plaintiff Kee Yip Realty Corp., ("Kee Yip") moves for an order, pursuant to CPLR 3215 [a], granting default judgment on the first cause of action in Action One through Action Four, seeking award of possession of the defendants' lofts, located in its building 135 Grand Street, New York, New York (the "Premises"), including all persons or entities claiming under them any possession, and a writ of execution or warrant of eviction forthwith. In addition, Kee Yip seeks an order compelling defendants to refile their motions seeking dismissal of Kee Yip's second and third causes of action or alternatively, to interpose an answer to the second and third causes of action.

Defendants Sarah Wolinsky, Ben Reddy, Steve Lee and Mario Flores (collectively "tenants-defendants") cross-move for an order restoring their prior motions to dismiss the second and third causes of action, pursuant to CPLR 3211 [a] [5], on the ground they are barred by res judicata/collateral estoppel.

BACKGROUND

The salient facts giving rise to the four separate actions - consolidated herein for disposition of their identical motions - are set out in the prior order of this Court, and the affirmance by the Appellate Division, First Department and the New

York Court of Appeals (see, *Wolinsky et al., v Kee Yip Realty*, 302 AD2d 327, 756 NYS2d 515, *affirmed* 2 NY3d 487, 779 NYS2d 812).

In brief, the tenants-defendants entered into commercial leases between July 1997 and June 1998 for the rental of raw loft space on the second through seventh floors of the Premises. The leases provided for monthly rental payments of approximately $1,700.00. The tenants-defendants renovated their rentals at their expense and converted the loft space for personal residential use. As noted in the record there is no residential certificate of occupancy for the building and Kee Yip made no attempt to obtain a variance or other relief from the zoning restriction.

With the expiration of their commercial leases approaching, the tenants-defendants collectively commenced a prior declaratory action (Wolinsky v Kee Yip Realty, Index No., 135231/2000) seeking injunctive relief and a declaration that they were protected by the Rent Stabilization Law and Rent Stabilization Code through the ETPA. Kee Yip Realty moved for summary judgment.

On or about July 9, 2002, this Court granted summary judgment to Kee Yip and dismissed the proceeding on the ground that ETPA was inapplicable and that the ETPA did not provide a mechanism for converting commercially-zoned property to residential use and the tenants-defendants could not legalize their conversions. Judgment was entered on July 16, 2002.

On or about February 27, 2003, the Supreme Court, Appellate Division, First Department affirmed and held that the tenants-defendants did not qualify for rent stabilization

protection as the premises did not have a residential certificate of occupancy and were located in a zoning district permitting use only for light manufacturing and joint living-work quarters for artists (id., 302 AD2d 327, 756 NYS2d 515). The Appellate Division also declared that the tenancies were not covered by the ETPA, holding that the statute did "not extend to tenancies that [were] illegal and incapable of becoming legal" (302 AD2d 327, 328, 756 NYS2d 515).

In the interim, Kee Yip commenced holdover proceedings in the New York City Civil Court/Commercial Landlord Tenant Part against the tenants-defendants. In their answers, the tenants-defendants interposed affirmative defenses, among them, that the proceedings were improper. Hon. Karen S. Smith of the New York City Civil Court ordered a hearing to determine if the New York City Civil Court/Commercial Landlord Tenant Part had jurisdiction to hear the issues. After reviewing the testimony and documentary evidence, Judge Smith determined that Kee Yip acquiesced in the tenants-defendants' intent to reside on the subject premises, although the respective leases clearly provided that their uses were limited to mixed commercial and artists. Accordingly, Judge Smith dismissed the proceedings on jurisdictional grounds, finding that the holdover proceedings could not be brought in the New York City Civil Court/Commercial Landlord Tenant Part where it was plainly evident that the subject premises were used for residential purposes (citing, *UBO Realty Corp. v Mollica*, 175 Misc2d 897, 673 NYS2d 507, *affd* 257 AD2d 460, 683 NYS2d 532; *Ten Be Or Not Ten Be*,

Inc., v Dibbs, NYLJ 6/12/85 p 11 col 4, *affd* 117 AD2d 1028 499 NYS2d 567; *Zada Assoc v Seven*, NYLJ 2/1/01, p 28 col 3]).

In or about July 2003, Kee Yip commenced the above separate, but related four actions against the tenants-defendants and undertenants after termination of their respective leases. Kee Yip pleads four causes of action: (1) removal of the tenants-defendants and immediate possession of the premises on the ground that they are not subject to rent control, rent stabilization or the EPTA; (2) use and occupancy of $1,800.00 a month to be measured from February 1, 2000 as to tenants-defendants in Action One; use and occupancy of $1,700.00 a month to be measured from February 1, 2000 as to tenants-defendants in Action Two; use and occupancy of $1,900.00 a month to be measured from January 1, 2000 (with exception to payment of $900.00), as to tenants-defendants in Action Three; and use and occupancy of $1,900.00 a month to be measured from January 16, 2000 as to tenants-defendants in Action Four; (3) payment of a portion of water and sewer charges and real estate taxes; and (4) payment of costs, disbursements, including reasonable attorneys' fees incurred by Kee Yip in the four separate, but related actions.

The complaints were served on the tenants-defendants in the four actions on or about July 21, 2003 (see, Notices of Motion, Ex B). However, on or about August 6, 2003, tenants-defendants' attorney confirmed in writing his agreement to waive any objections to personal jurisdiction and the plaintiff's agreement to consent to tenants-defendants' time to answer the complaints. The time to

answer was extended to September 2, 2003 (id., Ex C).

On or about August 29, 2003, tenant-defendants served plaintiff with their motion for an order dismissing the plaintiff's second and third causes of action on the ground that they were barred by res judicata/collateral estoppel (id., Ex D).

By decision and order, dated March 15, 2004, this Court denied the motion without prejudice to renew pending disposition of the tenants-defendants' appeal to the New York Court of Appeals. This Court specifically held that the action was "stayed pending the issuance of a decision by the Court of Appeals" (id., Ex E [Dec., & Ord., 03/15/04]).

On or about June 8, 2004, the New York Court of Appeals affirmed the Appellate Division and held that the tenants were not entitled to protect their conversions under the ETPA (2 NY3d 487, 779 NYS2d 812). The Court of Appeals concluded that ETPA protections are not available as the Premises are situated in an M1-5B zoning district and use was limited to light manufacturing and joint living-work space for artists.

In view of the Court of Appeals affirmance, Kee Yip now moves for default judgment on the first cause of action. The tenants-defendants cross move to dismiss the second causes of action for use and occupancy and the third causes of action for water, sewage and real estate taxes.

DISCUSSION

Plaintiff's motions for default judgment are denied. There can be no default in view of the parties' mutual agreement to

extend the time to answer, coupled with the stay issued by this Court pending the decision by the Court of Appeals. In view of the disposition of that appeal, the stay is hereby lifted. The tenants-defendants are now ***on notice*** that they shall forthwith serve their respective answers to the complaint no later than seven (7) days of the service of a copy of this order. The decision to engage in the limited motion practice shall not entitle them to move on an alternative ground to dismiss, pursuant to CPLR 3211 [e], in order to delay the service of an answer (*Ouyang v Jeng,* 260 AD2d 618, 689 NYS2d 175 [one motion rule permits a party to move to dismiss cause of action only once upon one or more of the grounds enumerated in rule governing such motions]; *Schwartzman v Weintraub,* 56 AD2d 517, 391 NYS2d 416).

The tenants-defendants' cross motions for an order dismissing the second and third causes of action on the ground of res judicata/collateral estoppel are also denied. The tenants-defendants' successfully demonstrated before Judge Smith that plaintiff improperly commenced the commercial proceeding because the Premises were being used by them as residences and not for commercial use. There is no dispute that a summary proceeding in the Civil Court Commercial Landlord-Tenant Part encompasses the recovery of possession of real property, removal of tenants, and rendering judgment for rents due (CCA § 204; *Subkoff v Broadway-13th Assocs.*, 139 Misc2d 176, 176, 527 NYS2d 147, citing *Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 28, 475 NYS2d 821 ["It is well settled that Civil Court has jurisdiction over

landlord-tenant disputes encompassed in summary proceedings and that when it has the power to decide the dispute, it is desirable that it should do"]).

Here, however, Judge Smith never entertained the issues of use and occupancy or water, sewage and real estate taxes. In fact, Judge Smith found no jurisdiction to determine the issues as it was plain the tenancies were not solely commercial. Her reasoning was that jurisdiction of the New York City Civil Court/Commercial Landlord Tenant part was limited to commercial tenancies.

Thus, plaintiff did not have the opportunity to litigate the issues of use and occupancy and sewage, water and real estate tax before Judge Smith. Its claims were never brought to a final conclusion in the hearing before Judge Smith as she did not allow plaintiff to raise them nor did she address them (but see, *O'Brien v City of Syracuse*, 54 NY2d 353, 357, 445 NYS2d 687).

Moreover, it is noted that the tenants-defendants have remained on the Premises, but have not paid rent for years. It is ironic that they continue to reside on the Premises in view of the prior order of this Court and the affirmance that followed, and not expect a demand for use and occupancy. The history of litigation between the parties demonstrates beyond cavil that the tenants-defendants knew, or should have known, by the very terms of their leases as well as surrounding conditions that their occupancies were illegal (see, Kolodny 06/30/04 Affirm., in Reply and Opposition to Cross Motion, Ex F [Dec., & Ord., Smith, J.,]; see

also, *Lipkis v Pikus*, 96 Misc2d 581, 409 NYS2d 598, *affd.*, 99 Misc2d 518, 416 NYS2d 694; *affd.*, 72 AD2d 697, 421 NYS2d 825; *appeal dism.*, 51 NY2d 874, 433 NYS2d 1019). Here, the parties were content with their arrangement until the plaintiff decided to terminate the leases. The tenants-defendants should not be permitted to reap benefits of occupancy and at the same time avoid payment of rent.

The doctrine of res judicata/collateral estoppel does not apply. Plaintiff's motions are denied without prejudice to renew. The cross-motions are denied. Plaintiff shall forthwith serve a copy of this order upon tenants-defendants' attorney. In turn, the tenants-defendants shall serve their answer within seven (7) days of the service of a copy of this order.

Counsel for the parties on all four cases shall appear for preliminary conferences at I.A. Part 15, Room 335, 60 Centre St., New York, NY on October 22, 2004 at 11:00 a.m.

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

Dated: 9/13/04

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