525-2014
PEEKSKILL CITY COURT
COUNTY OF WESTCHESTER: STATE OF NEW YORK
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KOS P. STREET REALTY CORP
136-38 Park Street, Peekskill, N.Y. 10566

Petitioner,

--against--

ELW, INC.
1036 Park Street, Peekskill, New York 10566,

Respondents.
----------x

AMENDED DECISION & ORDER[1]

Index No. LT 525-2014

Landlord/Tenant Part

HON. REGINALD J. JOHNSON

Parties

The Petitioner, Kos P. Street Realty Corp., is represented by Durante, Bock & Tota, PLLC, by Aaron C. Bock, Esq. The Respondent, ELW, Inc., is represented by Stargiotti & Beatley, P.C., by Joseph A. Stargiotti, Esq.

Issues

The Petitioner moves for summary judgment regarding the following issues:

1. Whether a formal assignment of the lease is necessary to establish Petitioner's status as landlord

[1] The caption was amended from "Kos P Realty Corp." to "Kos P. Street Realty Corp," and page 13 was also amended to state "Kos P. Street Realty Corp."

after it purchased the underlying real property and acquired title to it;

2. Whether Respondent was dissolved in 2009, as evidenced by New York Department of State records;

3. Whether exercising an option to extend a lease four years after a corporation has been dissolved is part of winding up the affairs of the dissolved corporation, or constitutes impermissible new business.

4. Whether Respondent may continue in possession during the pendency of the holdover proceeding without having paid court-ordered use and occupancy?

In deciding this summary judgment motion, the Court considered the Notice of Motion, Affirmation of Aaron C. Bock, Esq., attached exhibits "A" through "F," and Memorandum of Law In Support of Motion for Summary Judgment.

For the reasons that follow, the Petitioner's motion for summary judgment is granted without opposition: judgment of possession and

warrant with no stay is granted and the remaining claims for money damages and rent are severed.

Background

During the trial, Petitioner's counsel, Kenneth J. Finger, Esq., moved by Order to Show Cause to be relieved as counsel for the Petitioner, citing an irretrievable breakdown of the attorney-client relationship. The Petitioner opposed the motion. The Court granted the motion and counsel was relieved based on a Consent to Change Attorneys duly executed by Petitioner and outgoing and incoming counsel.

Thereafter, the Court held a telephone status conference with counsel for the parties on May 5, 2015. During the conference, the Court identified several issues that could properly be disposed of by motion instead of at plenary trial. The two preeminent issues were whether Respondent was able to renew the lease term notwithstanding its dissolution by proclamation and whether Respondent was in good standing at the time of the attempted renewal. The Court specifically stated that counsel may raise additional issues as they deem appropriate on behalf of their respective clients.

The Court set a motion schedule as follows: motion papers to be served by May 22, 2015, opposition papers to be served by June 5, 2015, and reply papers, if any, to be served by June 12, 2015. On May 22, 2015, the Petitioner served within motion on the Respondent. In a

letter faxed to the Court on June 5, 2015, the Respondent requested an extension of time to June 8, 2015 in order to submit opposition papers. The letter further stated that Petitioner's reply papers should be served by June 19, 2015. Although the letter stated that attempts to contact Petitioner in order to obtain his consent to the extension were unsuccessful, the Court granted the request as no prejudice accrued to the Petitioner.

On June 11, 2015, the Court directed the civil clerk to contact counsel for Respondent and inquire about the non-receipt of Respondent's opposition papers. Counsel for Respondent informed the clerk that he did not submit opposition papers because he was unable to contact his client. Although Respondent was in default as of June 11, 2015, counsel for Respondent did not request a further adjournment or extension of time to in order to reach his client.

On June 11, 2015, the Court again directed the civil clerk to contact counsel for Respondent and inform him that the Respondent is in default and that a failure to respond by June 15, 2015 would result in the Court disposing of the motion on default. The clerk left a detailed message on Respondent's counsel's phone as directed.

On June 12, 2015, Petitioner faxed a letter to the Court and to counsel for the Respondent informing the Court that it did not receive opposition papers and that the time do so has not been extended by

stipulation or court order. In fact, the Court did extend the Respondent's time to submit opposition papers to June 15, 2015. In any event, the Respondent has failed to submit opposition papers by the June 15, 2015 deadline imposed by the Court.

Procedural History

On or about November 18, 2013, the Petitioner served the Respondent with a Demand to Vacate (Pet's Trial Exh. "3")[2] after the Respondent purported to exercise the renewal/extension option of the lease (Resp. Trial Exh. "A"; Motion, Exh. "D").

On or about August 29, 2014, the Petitioner commenced the instant summary proceeding upon the ground that the Respondent was a holdover tenant (Motion Exh. "A").

On or about September 25, 2014 (answer was filed with the Court on October 1, 2014), the Respondent served an answer to the holdover petition (Motion Exh. "B").

The trial in this proceeding commenced on October 28, 2014, continued and recommenced on several dates until March 20, 2015.

During the trial on March 20, 2015, the Petitioner made an oral application for past use and occupancy. The Court ordered the parties to submit briefs on the issue of whether the Petitioner was entitled to

[2] The Respondent disputed the validity of the Demand to Vacate based on a prior decision of this Court. The Court will not address that issue at this time.

past use and occupancy or whether Petitioner waived same when it rejected Respondent's tender of rent.

On March 24, 2015, the Court received the Respondent's letter brief.

On March 25, 2015, the Court received the Petitioner's Memorandum of Law.

On March 27, 2015, the Court issued a Decision and Order granting the Petitioner's application for past use and occupancy in the sum of $34,608.00. On April 1, 2015, the March 27th Decision and Order was amended downward to reflect an award of $21,569.00 for past use and occupancy.

On or about April 3, 2015, counsel for the Petitioner moved by Order to Show Cause to be relieved as counsel.

On April 17, 2015, the Petitioner opposed the application to be relieved.

On April 27, 2015, counsel for Petitioner submitted a reply.

On May 5, 2015, the Court held telephone status conference with new counsel for Petitioner, Aaron C. Bock, Esq. and counsel for Respondent. Based on a duly executed Consent to Change Attorneys, the Court granted prior counsel's application to be relieved.

During the conference, the Court identified the following two preeminent issues that could properly be resolved by motion instead of at a plenary trial: whether the Respondent could exercise the option to

renew the lease while in a state of dissolution and whether the Respondent was in good standing at the time of the attempted renewal. The Petitioner asserted additional issues: whether the Petitioner needed a formal assignment of the lease after acquiring title to the subject premises; whether the Respondent was dissolved by proclamation; and whether the Respondent's failure to pay court-ordered use and occupancy entitles the Petitioner to a judgment and warrant of eviction.

The Court set a motion schedule as follows: May 22, 2015 for the motion; June 5, 2015 for opposition; and June 12, 2015 for reply papers. The Respondent requested an extension of time to June 8, 2015 to submit reply papers. The Court granted the request. After not having received the Respondent's reply papers on June 11, 2015 or any communications from him, the Court contacted Respondent's counsel who stated that he was not able to reach his client. The Court informed Respondent's counsel that if opposition papers were not received by the Court by June 15, 2015, the Court would dispose of the motion on default.

On June 12, 2015, the Court received a fax from Petitioner stating that it did not receive opposition papers and requesting that the Court decide the motion as unopposed.

On June 15, 2015, the Court did not receive Respondent's opposition papers as directed.

On June 15, 2015, the Court deemed the motion fully submitted.

Discussion & Legal Analysis

I. Summary Judgment

A party may move for summary judgment in a proceeding after joinder of issue. See Civil Practice Law and Rules (CPLR) §3212(a). Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar those claims which can properly be resolved as a matter of law. See, Andre v. Pomeroy, 35 N.Y.2d 361 (1974). It is critical to note that where summary judgment-the procedural equivalent of a trial-is granted, it results in a bar to any further proceedings between the same parties based upon the same cause of action. See, Collins v. Bertram Yacht Corp., 42 N.Y.2d 1033 (1977).

That is why the drastic remedy of summary judgment should not be granted where there is any doubt as to the existence of material and triable issues of fact. See, Glick & Dolleck, Inc. v. Tri-Pac Export Corp., 22 N.Y.2d 439 (1968); Myers v. Fir Cab Corp., 64 N.Y.2d 806 (1985).

In deciding a summary judgment motion, the Court's duty "is not to resolve issues of fact, but merely to determine if such issues exist." Matter of Atiram, 25 Misc.3d 1241[A], 2009 Slip Op 52534 [U], *1 (Sur Ct, Kings County, Dec. 16, 2009). To prevail on a motion for summary judgment, the movant must demonstrate that summary judgment is appropriate because only legal questions exist. Zuckerman

v. City of New York, 49 N.Y.2d 557, 562 (1980). To defeat a motion for summary judgment, the opposing party must submit evidence in admissible form demonstrating the existence of a triable issue of fact. Id.

When no opposing evidence is submitted, the Court must still deny summary judgment if the moving party does not meet its burden. Liberty Taxi Mgt., Inc. v. Gincherman, 32 A.D.3d 276, 277 (1st Dept. 2006). However, the Appellate Term in the Second Department has found that a grant of summary judgment may be considered a default judgment if the opposing party fails to submit written opposition. Brown v. Chase, 3 Misc.3d 129 [A], 2004 NY Slip Op 50371 [U], *1 [App Term, 2d Dept, 2d & 11th Jud Dists, April 29, 2004].

During the telephone conference with the parties on May 5, 2015, the Court set a motion schedule as follows: May 22, 2015 for the motion; June 5, 2015 for opposition; and June 12, 2015 for reply papers. The Respondent requested an extension of time to June 8, 2015 to submit opposition papers. The Court granted the request and further *sua sponte* extended Respondent's time to submit its opposition papers by June 15, 2015. Since the Respondent has failed to oppose the Petitioner's motion for summary judgment, and has failed to request an adjournment or extension of time in order to submit opposition papers, the Court will decide the motion upon default. Brown v. Chase, *supra*.

II. Did the Petitioner Have Standing As the Property Owner to Commence a Holdover Proceeding Even Though It Never Received A Formal Assignment of The Lease?

In its answer and at trial, the Respondent contested that the Petitioner was the landlord of the demised premises because the Petitioner never received a formal assignment of the lease. (Motion, Exhs. "A", "B" and "F"). It is well settled that "[a] conveyance of the reversion without reservation itself constitutes an assignment of the lease without the necessity of any formal assignment," 74 N.Y. Jur.2d Landlord and Tenant §136, citing Stogop Realty Co. v. Marie Antoinette Hotel Co., 217 A.D. 555, 217 N.Y.S. 106 (1st Dept. 1926). Accordingly, the Petitioner has standing to commence the subject holdover proceeding against the Respondent.

III. Was the Respondent Dissolved by Proclamation At the Time It Sought to Exercise the Lease Extension?

In a prior decision of this Court involving the same parties herein and the same issue of whether the Respondent was dissolved by proclamation, Judge William Maher stated "[i]t is undisputed that Respondent-Tenant's corporation was dissolved by proclamation on October 28, 2009." (See LT-305-12, Decision and Order dated December 17, 2012 at p. 2). A prior ruling of this Court on the issue of whether the Respondent was dissolved by proclamation constitutes law of the case and may not be relitigated by the parties. See, Siegel, N.Y.

Prac. §448 (5th Ed.) ("Once a point is decided within a case, the doctrine of law of the case makes it binding not only on the parties, but on the court as well: no other judge of coordinate jurisdiction may undo the decision"), citing State of New York Higher Educ. Svcs. Corp. v. Starr, 158 A.D.2d 771, 551 N.Y.S.2d 363 (3d Dept. 1990); see, Proclamation document from NYS Dept. of State as Exh. "E" to Motion. Based on the aforesaid, the Court finds, as it must, that the Respondent was dissolved by proclamation on October 28, 2009 and also at the time that Respondent attempted to exercise the lease option to renew. Id.

IV. Did the Respondent Have The Capacity to Exercise The Lease Option To Renew During Its State of Dissolution?

The Petitioner argues that the Respondent could not exercise the lease option to renew during its state of dissolution, citing Business Corporation Law §1005(a)(1), which states that after a corporation has been dissolved, "[t]he corporation shall carry on no business except for the purpose of winding up its affairs." The Respondent's position is that it could, and did, properly exercise the lease option to renew. The determination of this issue turns on what constitutes "winding up its affairs" by a dissolved corporation.

It has been held that a dissolved corporation has no de jure or de facto existence, except for its limited de jure existence for the sole purpose of winding up its affairs. See, Speed Products Co. v.

Tinnerman Products, 179 F.2d 778 (2d Cir. 1949). In fact, a dissolved corporation continues to survive only for the purpose of liquidating its assets and satisfying any existing liabilities and obligations. See, Colburn v. Geneva Nursery Co., 29 N.Y.S.2d 892 (Sup 1941).

However, a dissolved corporation may fulfill or discharge its contracts, collect its assets, sell its assets for sale at a public or private sale, discharge or pay its liabilities, and do other acts in furtherance of winding down. See, N.Y. Bus. Corp. Law (BCL) §§ 1005(a)(2), 1117(a). Interestingly, the dissolution of a corporation during the term of a lease does not *ipso facto* terminate the lease, unless the lease so provides. See, Goldberg v. Harwood, 216 A.D.2d 152, 628 N.Y.S.2d 105 (1st Dep't 1995), aff'd, 88 N.Y.2d 911, 646 N.Y.S.2d 663, 669 N.E.2d 821 (1996).

In the case at bar, the undisputed evidence is that Respondent was dissolved by proclamation of the New York State Secretary of State on October 28, 2009 (See, Motion, Exh. "E"); see also, Point III, supra. Since the dissolution of the Respondent during the lease term did not effect an immediate termination of the lease, Respondent could legally remain a tenant for the duration of the lease, provided all other obligations of the lease were satisfied. The dispositive question is whether the Respondent had enough de jure existence to execute a lease option to renew its current lease.[3] The Court finds that due to the

[3] Petitioner argues that even if the Respondent's dissolved status did not affect its ability to renew

Respondent's dissolved status on October 28, 2009, the Respondent was prohibited by BCL § 1005(a)(1) from renewing the lease term, as doing so would have constituted carrying on business, instead of winding up affairs, after dissolution. Accordingly, the Respondent's attempted lease renewal dated October 16, 2013 (See, Motion, Exh. "D") is deemed a nullity. See, Lorisa Capital Corp. v. Gallo, 119 A.D.2d 99 (2d Dept. 1986).

V. Does Respondent's Failure to Pay Court-Ordered Use and Occupancy During the Pendency of the Holdover Proceedings Warrant a Judgment of Immediate Possession to the Landlord?

The Petitioner argues that the failure of the Respondent to pay this Court's award of use and occupancy in the sum of $21,569.00 warrants an immediate judgment of possession and warrant of eviction in its favor. In an Amended Decision and Order dated April 1, 2015, this Court stated

> Ordered that the Application for past use and occupancy is granted;
>
> Ordered that the Respondent transmit a certified or bank check (or an attorney's escrow check) made payable to Kos P Street Realty Corp. and Finger and Finger, P.C., as attorneys in the sum of Twenty One Thousand Five Hundred Sixty Nine and 00/100

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the lease term, it could not renew the lease term because Respondent was not in good standing due to its failure to pay outstanding rent, water and real estate taxes. See, Bock Affirm., ¶7b. In light of the Court's finding that Respondent could not renew the lease term due to its dissolved status, as doing so, under the circumstances of this case, would constitute carrying on business in violation of (BCL) §1005(a)(1), the Court need not reach these grounds in deciding this case.

($21,569.00) no later than April 8, 2015.

The Petitioner argues that the Respondent failed to pay use and occupancy as ordered by the Court and that to allow the Respondent to continue in possession with impunity would make a "mockery of this Court's own decision." (See, Memo of Law, Point IV). This Court agrees. The failure of a holdover tenant, particularly a commercial holdover tenant, to pay court ordered past use and occupancy warrants an immediate judgment of possession and warrant of eviction in favor of the landlord. See, MM Associates v. Dayan, 169 A.D.2d 422, 564 N.Y.S.2d 146 (1st Dept. 1991) ["The award of use and occupancy during the pendency of an action or proceeding 'accommodates the competing interests of the parties in affording necessary and fair protection to both' (Haddad Corp. v. Redmond Studio, 102 AD 2d 730, 731) and preserves the status quo until a final judgment is rendered (Corris v. 129 Front Co., 85 AD2d 176). It is manifestly unfair that defendant herein should be permitted to remain in possession of the subject premises without paying for their fair use (see, Abright v. Shapiro, 92 AD452, 453-454.)"]

Based on the Respondent's failure to pay court ordered past use and occupancy, the Petitioner is entitled to an immediate judgment of possession and warrant of eviction.

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Conclusion

Based on the foregoing, it is

Ordered that the Petitioner's motion for summary judgment is granted upon default;

Ordered that the Petitioner is entitled to an immediate judgment of possession and warrant of eviction with no stay; and

Ordered that the remaining claims for damages, rent and taxes are severed.

The foregoing constitutes the Decision and Order of the Court.

Enter,

_____

Honorable Reginald J. Johnson
City Court Judge

Dated: Peekskill, NY
June 26, 2015

Order entered in accordance with the foregoing on this _____ day of _____, 2015

_____

Cathey Richey
Deputy Chief Clerk

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