

<b>1511 Lexington Ave., HDFC v Acosta</b>
2018 NY Slip Op 33151(U)
December 4, 2018
Supreme Court, New York County
Docket Number: 151048/2016
Judge: David Benjamin Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: <u>HON. DAVID BENJAMIN COHEN</u>	PART	IAS MOTION 58EFM
	<i>Justice</i>	
-----X-----	INDEX NO.	<u>151048/2016</u>
1511 LEXINGTON AVENUE, HDFC,	MOTION DATE	<u>09/19/2018</u>
Plaintiff,	MOTION SEQ. NO.	<u>002</u>
- V -		
MARIA ACOSTA, JOHN DOE, JANE DOE		
Defendant.		<b>DECISION AND ORDER</b>

-----X-----

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for POSSESSION

Upon the foregoing documents:

Plaintiff 1511 Lexington Avenue Housing Development Fund Corporation moves for an Order pursuant to CPLR 3126 striking the Verified Answer of defendant, Maria Acosta (Acosta), with prejudice, on the grounds that Acosta wilfully obstructed discovery proceedings by disobeying two prior orders of this court awarding possession of the subject premises and setting this matter down for an inquest to determine use and occupancy. Plaintiff also moves for an order granting a default judgment against Acosta and a judgment of possession of Apartment 1. Plaintiff also moves for a declaratory judgment declaring that Acosta is not the owner of co-op apartment 1 located at 1511 Lexington Avenue. Acosta does not oppose the motion.

I. Background

Plaintiff is a cooperative housing corporation which converted an eight unit building located at 1511 Lexington Avenue, New York, New York (subject premises) to cooperative ownership pursuant to an eviction type plan of cooperative conversion sponsored by the City of

New York (Verified Complaint, Exhibit C, ¶¶ 1, 5). Prior to the conversion and sale of the subject premises from the City of New York to plaintiff, plaintiff participated in a New York City program known as the Tenant Interim Lease Program. As of the closing date of the cooperative (May 23, 2003), all tenants who resided in the premises prior to the conversion were permitted to purchase the shares and proprietary lease for their apartments. Only tenants who resided in their apartments and those who were current on their rent were permitted to purchase their apartments (*id.*, ¶ 5). Residential apartments in the subject premises are occupied by shareholders pursuant to the terms of a proprietary lease agreement.

Plaintiff asserts that Acosta resided in Apartment 1 (apartment) at the subject premises as a roommate of Roselia Garcia, the original owner of the apartment and continued in possession after the death of Ms. Garcia. In support of the instant motion, plaintiff submits the affidavit of Jing Kong, a lessee and shareholder of plaintiff and a member of plaintiff's board of directors. Mr. Kong argues that Acosta is a month-to-month tenant and has not been seen at the subject premises for more than two years. Mr. Kong further alleges that Acosta sublet the apartment and is in arrears to plaintiff in the sum of \$18,865.00 (Kong Aff at ¶¶ 5,7, 10).

Plaintiff further alleges that Acosta is an individual claiming ownership of the apartment and that defendants, "John Doe" and "Jane Doe" are Acosta's unauthorized subtenants (Verified Complaint, Exhibit C, ¶¶ 1, 11). It is submitted that Acosta does not have any interest in the proprietary lease or stock that are part of the deceased's estate (*id.*). Plaintiff alleges that the deceased owner never authorized the transfer of her interest in the apartment to Acosta. Plaintiff claims there is no record that Acosta is a legitimate shareholder or proprietary leaseholder of the apartment.

On February 9, 2016, plaintiff filed a Verified Complaint and asserted 6 causes of action, including an action for a declaratory judgment declaring that Acosta lacks ownership interest or other ongoing rights of occupancy in the subject premises and possession of the apartment (*id.*, ¶ 21). Acosta served a Verified Answer on March 9, 2016. Plaintiff submits that Acosta has failed to reply to the two outstanding discovery demands dated September 30, 2016. Subsequently plaintiff made an application to the court to compel compliance with their discovery demands. Acosta was granted adjournments to comply or oppose plaintiff's motion to compel. Acosta neither complied with plaintiff's demands nor opposed the motion. On June 15, 2017, the court granted plaintiff's motion to compel on default and ordered Acosta to respond to all outstanding discovery on or before July 14, 2017, or her failure could result in the striking of her answer. By order dated June 15, 2017, the court also directed Acosta to appear for a preliminary conference to be held on August 2, 2017 dated June 15, 2017 (court order, Exhibit J). It is undisputed that Acosta did not provide any discovery. However, Acosta's attorney attended the conference on August 2, 2017 and again directed Acosta to comply with discovery by August 16, 2017. The August 2, 2018 court order stated Acosta's answer would be stricken if she failed to provide discovery responses by August 16, 2017. It is undisputed that Acosta did not comply with either the June 15, 2017 or August 2, 2017 court order. On August 16, 2017, the court held that Acosta's answer would be stricken based on Acosta's failure to comply with discovery requests and directed this action be placed on the inquest calendar to determine liability and possession (exhibit B, order). On March 15, 2018, the court held that since the prior order placing it on the inquest matter was silent on the issues of a judgment of possession, use and occupancy and plaintiff's other ancillary relief, the matter was referred to this part for resolution on the merits (*id.*).

II. Discussion

CPLR 3126 provides that if a party “refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed ..., the court may make such orders ... as are just.” A court may strike an answer as a sanction where the moving party establishes that the failure to comply was “willful, contumacious or in bad faith” (*Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [1<sup>st</sup> Dept 2010]; quoting *Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492, 492, [1<sup>st</sup> Dept 2010]). A court may also grant relief as specifically set forth in CPLR 3126(3) which permits the court to render a judgment by default against the disobedient party. Once plaintiff makes such a showing, the burden “shifts to the nonmoving party to demonstrate a reasonable excuse” (*Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [1<sup>st</sup> Dept 2004]).

Plaintiff has adequately established that Acosta engaged in wilful and contumacious conduct by her repeated failure to comply with discovery demands and court orders (see CPLR 3126 [3]); *Suffolk P.E.T. Mgt., LLC v Anand*, 105 AD3d 462 [1<sup>st</sup> Dept 2013]). Moreover, Acosta has not submitted any opposition or offered any excuse or reason for failing to comply with the directives of the court despite being represented by counsel.

Therefore, those branches of plaintiff’s motion, pursuant to CPLR 3126 seeking that Acosta’s answer be stricken and a default judgment be entered against her are granted.

In view of the foregoing, those branches of plaintiff’s motion for ancillary relief are also granted. In particular, plaintiff is entitled to judgment on its first cause of action for a declaratory judgment, pursuant to CPLR 3001, declaring that Acosta lacks ownership or right

of occupancy in the apartment. Plaintiff is also entitled to a final judgment of ejectment on its

second cause of action. Since there is an issue of fact as to the amount of use and occupancy, if any, that should be imposed on Acosta from the time of her occupancy until plaintiff gains actual possession of the subject apartment, plaintiff's third, fourth, fifth and sixth causes of action are referred to a Special Referee to hear and report on the issue of use and occupancy.

Accordingly, it is hereby

**ORDERED** that the branch of plaintiff's motion pursuant to CPLR 3126, for an order striking the Verified Answer of defendant Maria Acosta, is granted; and it is further

**ADJUDGED AND DECLARED** that defendant Maria Acosta has no interest in the proprietary lease and share certificates for Apartment 1 located at 1511 Lexington avenue, New York, New York 10029; and it is further

**ORDERED** that plaintiff is awarded a final judgment of possession for Apartment 1 as against defendant Maria Acosta, and "John Doe" and "Jane Doe"; and it is further

**ORDERED** that plaintiff is awarded a final judgment of ejectment for Apartment 1 as against defendant Maria Acosta and "John Doe" and "Jane Doe"; and it is further

**ORDERED** that a writ of assistance to the Sheriff of New York City shall issue, granting the Sheriff to eject Maria Acosta, "John Doe" and "Jane Doe" from the subject apartment forthwith; and it is further

**ORDERED** that a Special Referee shall be designated to hear and report to this court on the issues of fact pertaining to an award, if any, of use and occupancy, which are hereby submitted to the Special Referee; and it is further

**ORDERED** that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or [spref@nycourt.gov](mailto:spref@nycourt.gov)) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which in accordance with the Rules of that Part

(which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

**ORDERED** that counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

**ORDERED** that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Center Street, Room 141B) and the Clerk of the General Clerk's Office (60 Center Street, Room 119); and it is further

**ORDERED** that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases [accessible at the "E-Filing" page on the court's website at the address ([www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh))].

---

12/4/2018  
DATE

CHECK ONE:

<input checked="" type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>

CASE DISPOSED

GRANTED

<input type="checkbox"/>
--------------------------

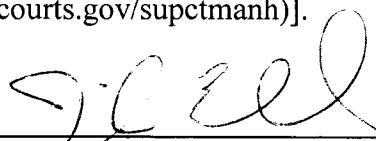
DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

  
DAVID BENJAMIN COHEN, J.S.C.

<input checked="" type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>

NON-FINAL DISPOSITION

GRANTED IN PART

<input type="checkbox"/>
--------------------------

OTHER

SUBMIT ORDER

<input type="checkbox"/>
--------------------------

REFERENCE

**HON. DAVID B. COHEN  
J.S.C.**