

Jacob Cram Coop., Inc. v Ziolkowski

2020 NY Slip Op 33318(U)

October 7, 2020

Supreme Court, New York County

Docket Number: 156980/2017

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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JACOB CRAM COOPERATIVE, INC.,

Plaintiff,

- v -

THOMAS ZIOLKOWSKI,

Defendant.

-----X

INDEX NO. 156980/2017
MOTION DATE 10/06/2020
MOTION SEQ. NO. 011 012

ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 011) 255, 256, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275

were read on this motion to/for ATTORNEY - TO BE RELIEVED

The following e-filed documents, listed by NYSCEF document number (Motion 012) 257, 258, 259, 260, 261, 262, 263, 264, 265

were read on this motion to/for DISMISS

Upon the foregoing documents, it is

ORDERED that the motion of George Vomvolakis, Esq., Law Office of George Vomvolakis, to be relieved as attorney for defendant is granted without opposition to such withdrawal upon filing of proof of compliance with the following condition, that, within 14 days from entry, such attorney shall serve a copy of this order with notice of entry upon the former client at his last known address by overnight mail, and upon the attorneys for all other parties appearing herein by posting to the New York State Courts Electronic Filing System; and it is further

ORDERED that to the extent that such outgoing attorney seeks a stay of further proceedings against the former client, such application is denied; and it is further

ORDERED to that extent that the outgoing attorney seeks to adjourn plaintiff's cross motion for a default judgment against the former client and to extend the former client's time to respond to such cross motion, such application to adjourn/extend is denied; and it is further

ORDERED to that extent that the outgoing attorney seeks to adjourn plaintiff's motion to dismiss the counterclaim with prejudice (Mot. Seq. No. 012) and to extend the former client's time to respond to such motion, such application to adjourn/extend is denied; and it is further

ORDERED that, as set forth in the attached judgment and order of even date, which are incorporated by reference herein, plaintiff having established that defendant has willfully and contumaciously failed to provide discovery as directed in the status conference order dated July 31, 2020 of this court and past orders dated February 5, 2019 and August 22, 2019 in that defendant has failed and refused, despite specific directives in such orders, and without good cause, to produce documents material to his counterclaim for discrimination and/or to his defenses to plaintiff's complaint, it is hereby

ORDERED that the motion of plaintiff to strike and dismiss the defendant's counterclaim with prejudice (Mot. Seq. No. 12) is granted and such counterclaim is stricken and dismissed; and it is further

ORDERED that plaintiff's cross motion for a default judgment against defendant is granted and the answer of defendant Thomas John Ziolkowski is stricken; and it is further

ORDERED ADJUDGED that the Clerk is directed to enter a declaratory judgment and judgment of possession on default against defendant and in favor of plaintiff, as set forth in the attached Order and Judgment, which is incorporated by reference herein; and it is further

ORDERED that the departing attorney shall, within 10 days from entry, serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (Room 119); and it is further

ORDERED that such service upon 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).

10/7/2020

DATE

DEBRA A. JAMES, J.S.C.

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|-----------------------|-------------------------------------|----------------------------|---------------------------------|-------------------------------------|--------------------------|---|
| CHECK ONE: | <input checked="" type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | NON-FINAL DISPOSITION | <input type="checkbox"/> | |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> OTHER |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | | <input type="checkbox"/> | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input checked="" type="checkbox"/> REFERENCE |

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

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JACOB CRAM COOPERATIVE, INC.,

Index No. 156980/2017
(James, J.)

Plaintiff,

JUDGMENT and ORDER
(Mot. Seq. 011 and 012)

-against-

THOMAS JOHN ZIOLKOWSKI,

Defendant.

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The summons and verified complaint in the above entitled action having been served upon defendant Thomas John Ziolkowski ("Ziolkowski") on August 24, 2017; and the Decision and Order of this Court dated July 26, 2018 denying Ziolkowski's motion to dismiss the verified complaint (Motion Seq. 001, NYSCEF Doc. 96) and directing Ziolkowski to serve an answer to the verified complaint within 20 days of service upon defendant of a copy of the Order with notice of entry; and Ziolkowski having been served with a copy of said Order with notice of entry on July 26, 2018 (NYSCEF Doc. 98); and the time for Ziolkowski to serve an answer having expired, and plaintiff Jacob Cram Cooperative, Inc. not having extended defendant's time to do so; and the Decision and Order dated November 7, 2018 (NYSCEF Doc. 168) denying Jacob Cram Cooperative, Inc.'s motion for a default judgment (Mot. Seq. 006) and granting Ziolkowski's motion (Mot. Seq. 007) to vacate the default and to file an answer in the action upon Ziolkowski taking certain actions, including Ziolkowski's service and filing of a verified answer to the verified complaint within ten (10) days from service of a copy of said Order with notice of its entry; and Ziolkowski having efiled an answer with counterclaim in the action on November 19, 2018 (NYSCEF Doc. 171); and the Jacob

Cram Cooperative, Inc. having efiled a reply to counterclaim on December 20, 2018 (NYSCEF Doc. 174); and this Court having issued discovery Orders dated February 5, 2019 (NYSCEF Doc. 177), and August 22, 2019 (NYSCEF Doc. 223; and Ziolkowski having retained four (4) different attorneys to represent him in this action¹, the last three (3) of which moved to be relieved; and the Decision and Order of this Court dated May 22, 2018 and entered on May 24, 2028 (NYSCEF Doc. 64) granting the motion of Ziolkowski's second set of attorneys to be relieved (Mot. Seq. 004, NYSCEF Doc. 64); and the Decision and Order of this Court dated and entered on March 16, 2020 granting the motion of Ziolkowski's third set of attorneys to be relieved (Motion Seq. 010, NYSCEF Doc. 237, 239); and Ziolkowski having failed to comply with his discovery obligations in this action; and upon the application of Jacob Cram Cooperative, Inc. for a Conditional Order dismissing Ziolkowski's First Counterclaim and Fourth Defense in his answer, and upon the Court's June 26, 2020 video conference in this action and in the 2016 Ziolkowski Action that was scheduled by the Court by email to Ziolkowski and counsel for Jacob Cram Cooperative, Inc. in both this action and in the 2016 Ziolkowski Action, concerning (a) an incident involving Ziolkowski occurring on May 14, 2020 at the building owned by Jacob Cram Cooperative, Inc., (b) Ziolkowski's failure to comply with the Order of this Court dated March 16, 2020 relieving his third set of attorneys (NYSCEF Doc. 239) and directing that he retain substitute counsel within 30-days of service of notice of entry of that Order, notice of entry of which was e-filed on May 5,

¹ Those attorneys also represented Ziolkowski in a separate action commenced by him in this Court on or about February 29 2016 captioned *Thomas J. Ziolkowski v. Jacob Cram Cooperative, Inc., Jack M. Saul, Lynton A. Wells, Emilie Godfrey and Joan Gruzen*, New York County Index No. 650457/2016 (the "2016 Ziolkowski Action"). The counsel defending Jacob Cram Cooperative, Inc. and the individual board member defendants in the 2016 Ziolkowski Action is making a separate cross-motion to dismiss that action, which has been consolidated for discovery purposes.

2020 (NYSCEF 239)², or, if he intended to represent himself, to so advise the Court in writing within said time period, which 30-day period expired no later than June 10, 2020, and (c) outstanding discovery due from Ziolkowski arising out of past discovery Orders in this action dated February 5, 2019 (NYSCEF Doc. 177) and August 22, 2019 (NYSCEF Doc. 223); and upon the affidavit of Sara Schiller, sworn to on June 29, 2020 (NYSCEF Doc. 246, 249); and the conditional order of this Court dated July 31, 2020 (NYSCEF Doc. 254³) ("Conditional Order"), which Ordered that Ziolkowski's First Counterclaim shall be dismissed with prejudice and that Ziolkowski's Fourth Defense based upon the same facts would be stricken with prejudice unless Ziolkowski:

- (1) either (a) retained new counsel and caused said new counsel to e-file a notice of appearance on the NYSCEF website for both Actions No. 1 and 2, and cured the discovery deficiencies in Action No. 2 set forth in Paragraph number 2 in the Conditional Order, or
- (b) e-filed a letter on the NYSCEF website addressed to the Court advising that he would represent himself in this action and in the 2016 Ziolkowski Action; and
- (2) make the certain enumerated disclosure to counsel for Jacob Cram Cooperative, Inc. so as to be received within the thirty (30) day period set forth in Paragraph number 1 of the Conditional Order; and

the Conditional Order further Ordering that should Ziolkowski fail to comply with Paragraph number 1 of the Conditional Order, in addition to the aforementioned relief,

² E-filing of notice of entry of the March 16, 2020 Order in this case was delayed as a result of the mandatory cessation of e-filings under Administrative Order 78/20 of the Chief Administrative Judge of the Courts resulting from the COVID-19 pandemic. Notice of entry of the Order was further served on Defendant Ziolkowski by mail on May 6, 2020 (NYSCEF 240) and notice of entry of the Order also was e-filed with the Clerk of the General Clerk's Office on May 6, 2020 (NYSCEF Doc. 241).

³ Efiled in this action although applicable to both this action and to the 2016 Ziolkowski Action.

Jacob Cram Cooperative, Inc. could also move for judgment on default in the 2016 Ziolkowski Action and in this action for his failure to appear and his failure to comply with the Conditional Order; and the notice of Entry of the Conditional Order having been e-filed on August 10, 2020 (NYSCEF Doc. 254), and the 30-day period set forth in the Conditional Order having expired on September 9, 2020; and Ziolkowski having retained his fourth attorney, George Vomvolakis, Esq. prior to the expiration of the 30-day time period set forth in Paragraph number 1 of the Conditional Order, but his attorney having moved on August 31, 2020 by order to show cause to be relieved (Motion Seq. 011) on the grounds of lack of cooperation and direction by Ziolkowski to cease representation of him in the 2016 Ziolkowski Action and this action (NYSCEF Doc. 256), and Ziolkowski having failed to produce any of the disclosure ordered in the Conditional Order; and Jacob Cram Cooperative, Inc., by Braverman Greenspun, P.C., its counsel defending against Ziolkowski's First Counterclaim, having moved this Court by notice of motion dated September 10, 2020, returnable on October 6, 2020 to dismiss the First Counterclaim with prejudice based upon Ziolkowski's failure to comply with the Conditional Order (Mot. Seq. 012, NYSCEF Doc. 257); and this Court having conducted a virtual status conference on September 10, 2020 attended by the counsel for all parties in the 2016 Ziolkowski Action and in this action, and this Court having at said conference set a briefing schedule for Jacob Cram Cooperative, Inc. to respond, by its attorneys, to the order to show cause to be relieved brought by Ziolkowski's fourth attorney, and to cross-move with respect to striking Ziolkowski's Fourth Defense in this action and issuing a default judgment against Ziolkowski in both Actions for failure to comply with the July 31, 2020 Conditional Order (the "Cooperative's Cross-Motion");

and this Court's Order to Show Cause dated September 10, 2020 directing the parties to virtually appear on October 6, 2020 for a virtual hearing on Ziolkowski's attorney's Motion To Be Relieved (Mot. Seq. 011) to be heard together with Jacob Cram Cooperative, Inc.'s motion to dismiss the First Counterclaim with prejudice (Mot. Seq. 012); and Jacob Cram Cooperative, Inc. having efiled its response to counsel's Motion To Be Relieved and the Cooperative's Cross-Motion, and the Court having duly heard oral argument on the Motion to Be Relieved and the motion of Braverman Greenspun, P.C. on the behalf of Jacob Cram Cooperative, Inc. to dismiss the First Counterclaim with prejudice and the Cooperative's Cross-Motion;

NOW, upon the Cross-Motion of Jacob Cram Cooperative, Inc., it is hereby

ORDERED, that Jacob Cram Cooperative, Inc.'s Cross-Motion for a default judgment is granted pursuant to CPLR 3126(3), and it is further

ORDERED, ADJUDGED AND DECREED, that Thomas John Ziolkowski's answer with counterclaim (NYSCEF Doc. 171) hereby is stricken with prejudice, and Jacob Cram Cooperative, Inc. is granted a judgment on default as against Thomas John Ziolkowski; and it is further

ORDERED, ADJUDGED AND DECREED, that the rights and obligations of the parties are declared and determined as follows: (a) plaintiff Jacob Cram Cooperative, Inc. is a cooperative apartment corporation owning the land and building located at and known as 307 West Broadway, New York, New York, which includes the 6th Floor Unit ("Unit") occupied by defendant shareholders/lessee Thomas John Ziolkowski (Ziolkowski), (b) that Ziolkowski occupies the Unit pursuant to a proprietary lease ("Lease") with Jacob Cram Cooperative, Inc. , (c) that the Lease includes a provision

that authorizes two-thirds (2/3) of all shareholder/lessees to determine that a shareholder/lessee's tenancy is undesirable based upon objectionable conduct as that term is defined in the Lease at a meeting called for that purpose and that such shareholder/lessee's lease should be terminated on that basis, (d) that pursuant to the Lease and By-Laws, Jacob Cram Cooperative, Inc. served all shareholders/lessees, including Ziolkowski, with a notice dated June 6, 2017 of the time, date, location and purpose of a special meeting of shareholders ("Notice of Special Shareholders' Meeting") to be held on June 19, 2017 to determine whether Ziolkowski's tenancy was undesirable based upon objectionable conduct detailed in an accompanying notice to Ziolkowski dated June 6, 2017 ("Hearing Notice"), (e) that the Notice of Special Shareholders' Meeting and the Hearing Notice were served together on all shareholders/lessees, including Ziolkowski, (f) that all shareholders/lessees of Jacob Cram Cooperative, Inc. except Ziolkowski attended the Special Meeting of Shareholders in person or by proxy on June 19, 2017, (g) that pursuant to the Lease the shareholder/lessees duly discussed and then voted on the issue of whether Ziolkowski's tenancy was undesirable because of objectionable conduct on his part as defined in the Lease and as specifically stated in the Hearing Notice, and the motion made and seconded that his tenancy was undesirable was passed by at least two-thirds (2/3) of all the votes of all shareholders/lessees, (h) that at the meeting of the Board of Directors of Jacob Cram Cooperative, Inc. ("Board") held on June 19, 2017 after the adjournment of the Special Shareholders' Meeting the Board considered the allegations of objectionable conduct as set forth in the Hearing Notice and voted that Ziolkowski's Lease should be terminated on the basis of objectionable conduct pursuant to the

Lease, (i) that pursuant to the Lease Jacob Cram Cooperative, Inc. served Ziolkowski with a notice terminating his Lease effective July 31, 2017, and (j) accordingly, Jacob Cram Cooperative, Inc. duly terminated the Ziolkowski Lease effective July 31, 2017 (Action No. 2, NYSCEF Docs. 102, 103, 105, 106, 108 – 112) ; and it is further

ORDERED, ADJUDGED AND DECREED, that Jacob Cram Cooperative is entitled to, and shall have, a judgment of possession of the premises 307 West Broadway, 6th Floor Unit (all rooms), New York, New York, and the Clerk of the Court shall enter judgment against defendant Ziolkowski for that relief. The Sheriff of the City of New York, or the Marshal of the City of New York is hereby directed to eject Thomas John Ziolkowski from the aforesaid 6th Floor Unit and shall put Jacob Cram Cooperative, Inc. in possession of said 6th Floor Unit, and it is further

ORDERED, ADJUDGED AND DECREED, that within twenty (20) days from the date of entry of this Judgment and Order, plaintiff shall cause a copy of this Judgment and Order with notice of entry to be filed with the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) to schedule a date for a reference to hear and report pursuant to CPLR 4320 on (a) the fair market rental value of the 6th Floor Unit, 307 Broadway, New York, New York from August 1, 2017 to the date Jacob Cram Cooperative, Inc. obtains legal possession of the Unit, to be paid by Ziolkowski after giving credit for prior use and occupancy paid by him, and (b) the amount of attorneys' fees and expenses incurred by Jacob Cram Cooperative, Inc. in connection with Ziolkowski's default under the Lease and in prosecuting this action; and it is further

ORDERED, ADJUDGED AND DECREED, that any motion to confirm or disaffirm the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules of the Trial Courts, as they may be modified by any relevant Administrative Order of the Chief Administrative Judge.

Dated: OCT 07 2020


Debra A. James, J.S.C.

DEBRA A. JAMES