

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IAS PART 32

_____ X INDEX NO. 28566/01
ILIAS LELEKAKIS,

Plaintiff,

MOTION SEQ. NO.: 21

- against -

BY: CHARLES J. MARKEY
J.S.C.

STANLEY KAMAMIS, et al.,
Defendants.

_____ X DATED: December 11, 2008

Plaintiff commenced this action for, among other things, specific performance of an option dated September 27, 1990 to purchase the subject real property, known as 46-13 243rd Street, Douglaston, New York, owned by defendants Stanley Kamamis and Olga Kamamis, as tenants by the entirety. Defendants interposed a counterclaim to recover use and occupancy.

Plaintiff moved to enjoin defendants from, among other things, terminating his occupancy pending the determination of the action, and by order dated March 18, 2002, the motion was granted, and plaintiff was directed to file an undertaking pursuant to CPLR 6312 in the amount of \$200,000.00. By decision and order dated March 3, 2003, the Appellate Division modified that order, by reducing the amount of the undertaking set forth therein from the sum of \$200,000.00 to the sum of \$108,000.00 (see, Lelekakis v Kamamis, 303 AD2d 380 [2003]). The Appellate Division determined the proper

amount of the undertaking should have been \$108,000.00, which represented "the three-year rental value of the premises at the average cost of \$3,000 per month." Plaintiff had already deposited into court the amount of \$52,000.00 (pursuant to a decision of the Appellate Division dated May 2, 2002), and then deposited \$56,000.00, for a total of \$108,000.00, in accordance with the March 3, 2003, Appellate Division order. Plaintiff thereafter deposited an additional undertaking in the amount of \$9,000.00, representing the rental value of the premises for the months of December 2004, January 2005 and February 2005, in accordance with an order of the Supreme Court dated December 6, 2004.

After a nonjury trial before Justice Joseph J. Risi, the court, by decision dated June 21, 2005, dismissed plaintiff's claim for specific performance, awarded plaintiff the principal sum of \$303,000.00 plus statutory interest from June 1, 2005, against defendant Stanley Kamamis, dismissed so much of defendants' counterclaim for use and occupancy for the period beginning September 27, 1990, up to and including August 27, 2001, and severed so much of their counterclaim to recover use and occupancy accruing subsequent to August 27, 2001. Justice Risi found that the payments made pursuant to the option agreement from September 27, 1990 to August 27, 2001 were not rental payments and that defendants could not recover such payments as rent or use and occupancy. He also determined that any use and occupancy due

defendants from August 28, 2001 forward "shall be recoverable, if at all, in a summary proceeding."

A judgment was entered on August 15, 2005, awarding plaintiff the sum of \$303,000.00 with interest from June 1, 2005, plus costs and disbursements, and dismissing the other causes of action, cross claims and counterclaims, except for defendants' counterclaim for use and occupancy subsequent to August 27, 2001, which was severed.

The preliminary injunction was vacated upon entry of the judgment. By order dated October 18, 2005, plaintiff was granted a stay pending appeal, upon condition that he post an additional undertaking of \$30,000.00. Plaintiff deposited \$30,000.00 into court as an additional undertaking pursuant to the October 18, 2005 order. By order dated June 8, 2006, the court continued the stay, upon condition that plaintiff post an additional undertaking of \$20,000.00. Plaintiff deposited such additional amount in accordance with the June 8, 2006 order. The Appellate Division subsequently vacated the stay (decision and order dated September 21, 2006). The total amount on deposit is \$167,000.00.

Following the vacatur of the stay, defendant Olga Kamamis resumed prosecution of an eviction proceeding in Civil Court, Queens County. Plaintiff and his family were evicted from the premises by the marshal on November 14, 2006.

On appeal, the Appellate Division, Second Department, by decision and order dated June 19, 2007, determined that the Supreme

Court had properly dismissed the claim for specific performance insofar as the option agreement was unenforceable (see Lelekakis v Kamamis, 41 AD3d 662 [2007]). The Appellate Division also determined that plaintiff was not entitled to recover damages for the loss of the bargain, but rather was entitled to the "purchase-money" paid by him, citing Walton v Meeks, (120 NY 79, 83 [1890]). The Appellate Division further determined that there was no evidence of fraud or bad faith on the part of defendants and therefore, plaintiff was not entitled to recover damages for the improvements he made to the property or the increased value of the premises produced by the improvements. In addition, the Appellate Division determined that the parties were never in a vendor-vendee relationship, because the option to purchase was never effectively exercised, and therefore, defendants were entitled to recover on their counterclaim for use and occupancy for the entire period in which plaintiff occupied the subject premises. It also determined that the entire amount of reasonable use and occupancy would partially offset the sum of \$303,000.00 awarded to plaintiff (as the purchase-money paid), and that severance would not serve the interests of judicial economy or the convenience of the parties. The Appellate Division, therefore, determined the Supreme Court had improvidently exercised its discretion in severing the portion of the counterclaim which was to recover use and occupancy accruing subsequent to August 27, 2001.

The Appellate Division modified the judgment deleting the provisions dismissing so much of defendants' counterclaim as was to recover use and occupancy for the period beginning September 27, 1990, up to and including August 27, 2001, and severing so much of defendants' counterclaim as was to recover use and occupancy accruing subsequent to August 27, 2001, and substituting therefor a provision in favor of defendants on their counterclaim for use and occupancy for the period in which plaintiff occupied the subject premises, beginning September 27, 1990, up to and including August 15, 2005, and as so modified, affirmed the judgment without costs and disbursements. The Appellate Division remitted the matter to the Supreme Court, Queens County, for a trial on the issue of the amount of use and occupancy owed to defendants, and for the entry of an amended judgment thereafter to be calculated by deducting the sum awarded to defendants for use and occupancy from the principal sum awarded to plaintiff.

During the course of the eviction, plaintiff was arrested. Plaintiff and his family failed to remove all of their personal belongings prior to their eviction, and items of their personalty remained in the premises following the eviction. Defendant Olga Kamamis hired Flatbush Moving Van, Co., Inc. (Flatbush Moving), a moving and storage company, to pack those items of personal property which remained in the house at the premises, and transport them and store them at the company's warehouse. On November 16,

2006, Flatbush Moving packed certain of the personal belongings remaining in the house into boxes and transported the boxes to its warehouse.

Plaintiff moved by order to show cause dated December 14, 2006 to direct defendants to turn over to him all personal property held by them in connection with the eviction, and to direct the clerk of the court to release to him all moneys which he had deposited with the clerk. By order dated January 16, 2007, plaintiff's motion was granted to the extent of directing counsel for the respective parties to arrange for plaintiff to remove all of plaintiff's property remaining in the garage at the subject premises, with at least 48-hours notice to defendants of such removal, and that the removal of the items be performed under police supervision. The court also directed that the removal of all plaintiff's property be completed no later than February 15, 2007, and that plaintiff pay defendants \$9,445.00 towards the moving and storage expenses. The court further directed plaintiff to reimburse defendants for any additional expenses incurred by them, to the extent the expenses were made necessary by the plaintiff's failure to remove his property from the garage or the moving company's warehouse. Lastly, the court directed that plaintiff pay Flatbush Moving any other charges incurred in connection with the storage and removal of his property from the company's warehouse.

Plaintiff paid defendant Olga Kamamis, by bank check dated

February 2, 2007, the amount of \$9,445.00, representing reimbursement of her expenses incurred in relation to the moving and storage of his personal property. He, thereafter, retrieved the stored items from Flatbush Moving.

Plaintiff obtained the instant order to show cause dated May 7, 2007, seeking to direct defendants to provide him with access to the subject property to permit him to remove the remainder of his personal property and other items under the supervision of the police, and turn over his personal property being held by defendants. He also seeks leave to reargue so much of the order dated January 16, 2007 as denied his motion to direct the clerk to release all monies on deposit with the court to the credit of this action, and upon reargument, to direct the clerk to turn over the monies deposited to the credit of this action, together with interest, after first deducting therefrom the fees and commissions allowed by law.

Defendants cross-move for an award of damages pursuant to CPLR 6315 sustained by them by reason of a preliminary injunction in favor of plaintiff, and to direct the Clerk to turn over to defendants the funds posted as security pursuant to CPLR 2606 and 2607.

In support of the instant order to show cause, plaintiff asserted that he had been given insufficient time by the marshal to gather his personal belongings prior to his arrest and eviction,

and that items of his personal property remained in the house and garage at the time of his eviction. This court directed, by undated order, that defendants turn over all keys to the vehicles in the garage to plaintiff. In addition, the court granted plaintiff the right of access only to the garage, and directed that plaintiff remove all of his personal property from the garage on August 15, 2007, and that all property not so removed be deemed abandoned. This court granted defendants permission to take any action they deemed necessary with respect to the abandoned property.

To the extent plaintiff seeks to recover any additional items of his personal property which he claims remain in the possession of defendants, that branch of the motion is denied without prejudice to any plenary action for replevin (see e.g. Mastrangelo v Manning, 17 AD3d 326 [2005]), or any application within the confines of the summary proceeding, plaintiff deems appropriate.

That branch of the motion by plaintiff for leave to reargue the order dated January 16, 2007 is granted. The order did not address the branch of plaintiff's prior motion seeking to direct the clerk of the court to release to plaintiff all monies deposited by him as an undertaking with the clerk.

CPLR 6312(b) provides:

"Undertaking. Except as provided in section 2512, prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the

plaintiff, if it is finally determined that he was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction."

For purposes of finally determining the propriety of a preliminary injunction to ascertain whether liability will attach as a consequence of the award thereof, the "final determination" envisioned by CPLR 6312(b) is the final determination of the merits of the plaintiff's claim for equitable relief (see Straisa Realty Corp. v Woodbury Associates, 185 AD2d 96, 99-100 [1993]). A damage award resulting from an improperly imposed preliminary injunction is grounded upon the "undertaking itself which is a contract between the parties 'that the plaintiff, if it is finally determined that [it] was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction'" (Honeywell, Inc. v Technical Bldg. Servs., 103 AD2d 433, 434 [1984], quoting CPLR 6312[b]).

In this instance, plaintiff's claim for specific performance of the option agreement finally was determined to be without merit (see Lelekakis v Kamamis, 41 AD3d 662 [2007], supra). As a consequence, defendants are entitled to all damages and costs which were sustained by reason of the preliminary injunction from March 18, 2002 through September 21, 2006. Such damages include the reasonable rent and profits of, and any wastes committed upon the real property during the period of the injunction (see Lelekakis v Kamamis, decision and order of the Appellate Division,

Second Department, dated May 2, 2002).

This court held a hearing on February 7, 2008, pursuant to the order of the Appellate Division, on the issue of the amount of reasonable use and occupancy owed defendants with respect to their counterclaim (see Lelekakis v Kamamis, 41 AD3d 662 [2007], supra). During the hearing, evidence was presented regarding the fair market rental value of the subject premises for the period beyond August 15, 2005.

Following the close of defendants' case, plaintiff moved pursuant to CPLR 4401 to dismiss the complaint as a matter of law on the ground that defendants failed to prove, by competent and sufficient evidence, a prima facie case that defendants are entitled to any use and occupancy. The court denied the motion. At the close of defendants' case-in-chief, plaintiff testified in rebuttal, and following the conclusion of the evidence, the court reserved its decision.

Plaintiff argues that defendants are guilty of laches and should be equitably estopped from obtaining any use and occupancy for any period, having failed to seek to collect rent or use and occupancy at any time prior to the assertion of the counterclaim for use and occupancy. In addition, plaintiff argues that defendants are not entitled to recover use and occupancy for any period prior to January 22, 1996, on the ground of the expiration of the applicable statute of limitations.

Plaintiff raised, among other things, the affirmative defenses of the expiration of the statute of limitations, laches, equitable estoppel and waiver in his amended reply. However, he failed to put forth arguments relative to the merits of those defenses at the trial before Justice Risi, and therefore, Justice Risi never ruled on their applicability. Plaintiff, therefore, waived such affirmative defenses. In addition, it does not appear that plaintiff made any argument before the Appellate Division relative to the applicability of the statute of limitations defense vis-a-vis defendants' counterclaim for use and occupancy.

Under such circumstances, this court shall not consider such defenses when determining the amount of use and occupancy owed defendants with respect to their counterclaim.

With respect to the issue of whether plaintiff is entitled to a set off as against the amount of the use and occupancy owed to defendants, based upon the improvements made by plaintiff to the premises, the court is constrained by the decision and order of the Appellate Division insofar as the Appellate Court determined that plaintiff was not entitled to recover for the improvements he made to the property (see Lelekakis v Kamamis, 41 AD3d 662 [2007], supra; see also Walton v Meeks, 120 NY 79, 82-83 [1890]).

Plaintiff further argues the court should not consider the testimony of defendants' witness, Nina Kowalsky, a licensed associate real estate broker, in reaching its determination as to

the amount of use and occupancy owed defendants. Plaintiff asserts that Ms. Kowalsky was incompetent to render an opinion as to the fair market rental value of the premises because she is not a certified or licensed appraiser, and lacks sufficient experience in renting single-family homes. Contrary to plaintiff's argument, Ms. Kowalsky's status as a licensed associate real estate broker does not render her incompetent to offer an opinion as to the fair market rental value of the premises (see Broward Nat. Bank of Fort Lauderdale v Starzec, 30 AD2d 603 [1968]; see also Malerba v Warren, 96 AD2d 529 [1983]; Westminster Presbyterian Church of West Twenty-Third St. v Trustees of Presbytery of New York, 170 AD 439 [1915]; C.Y. v H.C., 16 Misc 3d 1102[A] [2007]).

Furthermore, this court finds that Ms. Kowalsky's testimony was credible and that she has sufficient experience in connection with the rental of single-family homes in the vicinity of the subject premises, to render an opinion as to the fair market rental value of the subject premises (see King v Daru, 252 App Div 767 [1937]). Ms. Kowalsky credibly testified that over her 23-year career, she had been involved in the rental of 25-30 single-family homes in the vicinity of the subject premises, and that since 1990, she had been involved in two or three rentals of single-family homes per year. She also testified that she had knowledge of the sale and rental of houses in the area of the subject premises, and indicated homes rarely come on the market for rent in the vicinity

of the subject premises.

Ms. Kowalsky testified that in 1989, at the invitation of the owner of the subject premises, she visited the premises and took notes regarding the property. According to Ms. Kowalsky, the then owner had established a rental price and sought her opinion as to the appropriateness of the price. Ms. Kowalsky also testified that the property was 80 x 100 (feet), and the house was a four-bedroom, center hall, stucco Colonial, with a two-car garage. She further testified the house is on a tree-lined, quiet, residential street, away from traffic, but within walking distance of the train, and with access to all the highways. Ms. Kowalsky stated that the property was within the school district ranked "No. 1," and that most of the homes in the neighborhood are occupied by their owners. She testified she had records of listings of the house from 1985 and 1989, and that her records indicated the listing rental price in 1985 was \$1,850.00 and in 1989 it was \$2,300.00.

Ms. Kowalsky testified that to arrive at her opinion, as set forth in defendants' Exhibit "G" in evidence, regarding the fair market rental value of the premises for the years 1990 through 2006, she located her files from 1990 forward regarding rentals of one-family homes in the vicinity of Douglaston and Little Neck. She stated that she selected 47 properties from her files as comparable homes to the subject premises and compared the information therein to the information she possessed regarding the

subject premises. She also stated that in making the comparisons, she consulted the multiple listing service and the COMPS, Inc. database regarding the 47 properties. Ms. Kowalsky explained that when achieving her opinion, she took into consideration that the majority of the 47 homes had only three bedrooms, and that the actual rental price of the properties was \$200-\$300 less than the listing rental price. She conceded that she did not consider whether improvements had been made to the subject premises when rendering her opinion, but testified that even if the subject house had been in bad condition, "people would desire to rent it because of the number of bedrooms, the size, the lot, the proximity to transportation and school." She admitted that if the condition of the property had changed, it would affect her opinion. She stated that she had viewed the property on the day before the hearing, and observed that the landscaping needed "quite a lot of help" and that the house's exterior needed painting.

Ms. Kowalsky stated in her written opinion that the fair market rental value of the subject premises was \$2,000.00 per month for the years 1990 through 1994, \$2,500.00 per month for the years 1995 through 1999, \$3,000.00 per month for the years 2000 through 2003, and \$3,500.00 per month for the years 2004 through 2006.

The court also finds the testimony of Lorraine Collins, who testified regarding the Multiple Listing Service of Long Island and the multiple listings maintained by that service, and Thomas Volpe,

who testified regarding the North Shore Multiple Listing Service, to have been credible.

The court further finds that the testimony of defendant Olga Kamamis, was credible. Defendant Olga Kamamis testified that she and her husband bought the house in 1969, and at the time, it was in excellent condition, having undergone renovations following a fire. She also testified that in 1985, they moved out of the property and rented the house to a tenant for the first time, having advertised the property on their own and listed the property with a realtor. She stated the tenant, Dr. Jacomi, rented the property for \$1,850.00 per month, for a period of less than one year, when he moved out. She also stated they rented the property out again, but she could not recall any details regarding such rental. Defendant Olga Kamamis testified that in 1989, after having made some cosmetic improvements, including carpeting and painting, in possible preparation for the occupancy of the house by her own mother, defendants rented the property to another tenant, named Mr. Lagalbo, for \$2,300.00 per month. Defendant Kamamis additionally testified that Mr. Lagalbo remained in possession for less than one year. She stated that the tenants did not have written leases. She further stated that when plaintiff took possession in 1990, the walls in the house "had fresh wallpapers" and the bathrooms "were great." She testified that her husband paid the sewer, water, taxes and insurance bills for the property,

and that plaintiff paid the "utility."

Plaintiff testified that he and defendant Stanley Kamamis entered into an agreement in 1990 whereby he (plaintiff) took occupancy and agreed to pay defendant Stanley Kamamis approximately \$2,500.00 per month for five years and \$3,500.00 for six years, with the expectation that Kamamis would sell him the property at the "maturity date." Plaintiff also testified that at the time he took occupancy of the house, the house needed a lot of work, and had "no water or heat." According to plaintiff, the windows were shattered, walls were falling down, flooring was rotten, the unfinished attic had been used as a "dump," and the boiler needed repair. The court finds that plaintiff's testimony regarding the poor condition of the premises at the time he came into occupancy was less than credible, having been influenced by his disappointment regarding the outcome of his claims for specific performance and for damages related to his alleged improvements.

Therefore, upon the credible evidence adduced through the witnesses at the hearing, and the review of the exhibits received into evidence, this court finds that the reasonable use and occupancy of the premises to be awarded to defendants is as follows:

- 1) September 27, 1990 through 1994: \$2,000.00 per month (\$102,200.01),
- 2) 1995 through 2001: \$2,500.00 per month

(\$210,000.00),

3) 2002 through August 15, 2005: \$3,000.00 per month (\$130,451.61),

for a total of \$442,651.62 (\$102,200.01 + \$210,000.00 + \$130,451.61 = \$442,651.62). In making these findings, the court has considered that to the degree plaintiff agreed to pay certain amounts to defendant Stanley Kamamis when occupying the premises, he did so while under the belief he was paying, in part, for the purported option. The court also has considered that Ms. Kowalsky, defendants' expert witness, relied upon only one comparable rental listing for the years 1996, 1997 and 1999, and none for 2001. In addition, the court took into account that many of the alleged comparable premises had smaller lot sizes and houses with fewer bedrooms, and the listing rental amounts of the purported comparables often did not reflect the actual rental amount achieved.

Such sum of \$442,651.62 must be deducted from the principal sum awarded to plaintiff (\$303,000.00) (see Lelekakis v Kamamis, 41 AD3d 662, 665 [2007], supra).

Therefore, since the amount of the use and occupancy is greater than the purchase money paid, defendants are entitled to judgment in the amount of \$139,651.62, plus prejudgment interest (see CPLR 5001[a]; Rose Associates v Lenox Hill Hosp., 262 AD2d 68 [1999]). CPLR 5001(b) provides that "[w]here such damages were

incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date." In this instance, the court determines that the use and occupancy was incurred on a monthly basis from September 27, 1990 through August 15, 2005, and therefore, the court finds that March 1, 1998 is a single reasonable intermediate date (see GAB Management, Inc. v Blumberg, 226 AD2d 499 [1996]; see also Rose Associates v Lenox Hill Hosp., 262 AD2d 68 [1999], supra; see also GAB Management, Inc. v Blumberg, 226 AD2d 499 [1996]; Danka Office Imaging Co. v General Business Supply, Inc., 303 AD2d 883 [2003]).

With respect to the damages incurred by reason of the preliminary injunction for the period August 16, 2005 until September 21, 2006, this court finds that the reasonable rents and profits for such period would have been:

- 1) August 16, 2005 through December 2005:
\$3,000.00 per month (\$13,548.39), and
- 2) for the period January 2006 through
September 2006: \$3,500.00 per month
(\$30,450.00),

for a total of \$43,998.39.

Defendants assert that plaintiff committed waste at the premises, and offer copies of photographs purportedly taken by a photographer on November 14, 2006 showing portions of the house

interior and exterior. Plaintiff asserts that he does not recognize these photographs as depicting the subject premises, except for one photograph showing a window.

Defendants improperly first offered the affidavit of the photographer, in an effort to authenticate the photographs, in their reply papers. Nevertheless, even assuming the photographs are of the subject premises, to the extent they show the need for repairs, defendants have failed to offer proof that such necessity was occasioned by any misuse, waste, or neglect by plaintiff. Defendants make no claim that the parties had a written lease imposing a duty upon plaintiff to perform necessary repairs while in occupancy. To the extent defendants assert plaintiff had an obligation to notify them regarding needed repairs, and committed waste by creating hazardous conditions at the premises, defendants have failed to offer any proof of expenses incurred by them in remedying the repairs or hazards, or any estimate of the repair costs. Under such circumstances, defendants have failed to establish any damages by reason of the injunction due to waste committed by plaintiff upon the property.

To the extent defendants assert they are entitled to interest on the amount of \$43,998.39, they have failed to demonstrate entitlement to it. Although lost interest on funds which were restrained has been held to be a proper element of damages covered by an undertaking in connection with a preliminary injunction (see

Shu Yiu Louie v David & Chiu Place Restaurant, Inc., 261 AD2d 150 [1999]), the court is unaware of any statute or case precedent which allows for the awarding of interest on lost rents as damages covered by an undertaking because of a preliminary injunction.

Under such circumstances, the cross motion by defendants is granted only to the extent of awarding defendants damages pursuant to CPLR 6315 in the amount of \$43,998.39. That branch of the motion by plaintiff to direct the clerk to turn over the monies deposited to the credit of this action, together with interest, after first deducting therefrom the fees and commissions allowed by law to the clerk, is granted to the extent of directing the clerk to pay the sum on deposit to the credit of this action, amounting with interest to date and less the fees or commissions to which the clerk is entitled, to defendants in the amount of \$43,998.39, and the remainder of the sum on deposit shall be paid to plaintiff, upon delivery of two certified copies of the order and amended judgment to be settled hereon (CPLR 2606, 2007).

Settle order and amended judgment.

Hon. Charles J. Markey
J.S.C.