

**Benjamin v Knickerbocker Plaza Assoc., L.P.**

2007 NY Slip Op 30882(U)

April 20, 2007

Supreme Court, New York County

Docket Number: 0105378/2006

Judge: Barbara R. Kapnick

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

**BARBARA R. KAPNICK**

PRESENT:

PART 12

Index Number : 105378/2006

BENJAMIN, BERNARD

vs

KNICKERBOCKER PLAZA ASSOC.

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO.

105378/06

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

**FILED**  
APR 24 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/20/07

  
\_\_\_\_\_  
J.S.C.

**BARBARA R. KAPNICK**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 12

-----X  
BERNARD BENJAMIN and MARCELLA  
BENJAMIN,

Plaintiffs,

DECISION/ORDER

Index No. 105378/06

Motion Seq. No. 002

-against-

KNICKERBOCKER PLAZA ASSOC., L.P.,  
RY MANAGEMENT CO., INC. and "XYZ" CORP.,

Defendants.

**FILED**  
APR 24 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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BARBARA R. KAPNICK, J.:

Plaintiffs are the tenants of Apartment 37K in the building located at 1783 Second Avenue in Manhattan, which is owned by defendant Knickerbocker Plaza Assoc., L.P., a limited-profit housing company, and managed by defendant RY Management Co., Inc.

The property is subsidized by the United States Department of Housing and Urban Development ("HUD") which makes monthly subsidy payments to Knickerbocker on behalf of certain qualifying tenants. This subsidiary is called a Rental Assistant Payment ("RAP").

By letter dated March 21, 2006, defendant RY Management Co. notified plaintiffs as follows:

This is to inform you that after receipt of documentation directly from the IRS, it has been revealed that from July 1, 1998 through August 1, 2005, you did not provide us with complete and accurate information on the household's income and assets.

Our findings are:

1. All sources, assets and dividends were not reported as required by HUD.
2. Mrs. Benjamin had been receiving pension benefits from The New York City Retirement System, since August 7, 1996 and an annuity.

As a result of the unreported assets, dividends and income, you received a RAP subsidy, which you were not entitled to and the rent was calculated and paid by you was understated. The total back rent that you owe is \$87,408.00.

In accordance with the US Dept. of HUD Regulations and Paragraph 38 of your lease agreement, this is to inform you that we hereby are informing you that we are terminating your tenancy effective April 21, 2006 for material non-compliance.

\* \* \*

On this day, we have scheduled a meeting for Thursday, April 6, 2006, at 3:00 PM, in the conference room of the management office located at 1619 Third Avenue.

If you fail to meet with us on the specified date or continue to occupy the apartment after the termination date of April 21, 2006, we will begin legal proceedings against you to enforce the termination, at which time you may present a defense.

Defendants subsequently commenced an action against the plaintiffs in the Civil Court seeking, inter alia, a judgment of possession. Pursuant to Stipulation dated April 19, 2006, so-ordered by Hon. Gerald Lebovits, that proceeding was "discontinued without prejudice to any arrears currently outstanding and w/o prejudice to any future legal actions that [Knickerbocker Plaza

Assoc., L.P.] may commence, including but not limited to a holdover proceeding."<sup>1</sup>

On the same day that the Civil Court action was discontinued, plaintiffs filed the Complaint in the instant action seeking a declaratory judgment declaring that the March 21, 2006 notice is a legal nullity because they complied with the terms thereof by attending a meeting with the defendants (first cause of action), and because the notice did not extend the 30-day cure period for an additional 5 days as plaintiffs contend is required when the notice is served by mail (second cause of action).

The Complaint also seeks a preliminary and permanent injunction enjoining defendants from terminating their lease during the pendency of this action (third cause of action).

Plaintiffs also moved by Order to Show Cause for a preliminary and permanent injunction. This Court signed the Order to Show Cause on April 20, 2006 containing the following temporary restraining order:

ORDERED, that pending the hearing of this motion, the termination of plaintiffs' lease with the defendants, currently scheduled for April 21, 2006 pursuant to defendants' notice of termination dated March 21, 2006 is hereby stayed and said notice is tolled and defendants, their employees, agents and all purporting to be acting

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<sup>1</sup> It appears that no proceeding was subsequently commenced in the Civil Court.

on their behalf are hereby stayed and enjoined from seeking termination of plaintiffs' lease and/or tenancy rights;

By Decision/Order dated May 10, 2006, this Court denied plaintiffs' Order to Show Cause for a preliminary and permanent injunction, but continued the temporary restraining order through June 12, 2006.

Defendants then served an Answer to plaintiffs' Complaint dated July 7, 2006 and interposed counterclaims for: (i) fraud (first counterclaim); (ii) breach of contract (second counterclaim); (iii) unjust enrichment (third counterclaim); (iv) a judicial declaration that plaintiffs' fraudulent conduct entitles Knickerbocker to terminate plaintiffs' tenancy (fourth counterclaim) and (v) ejectment (fifth counterclaim).

Defendants now move for summary judgment dismissing plaintiffs' Complaint pursuant to CPLR § 3212 and for a default judgment against plaintiffs on defendants' counterclaims by reason of plaintiffs' failure to reply to same.

Based on the papers submitted and the oral argument held on the record on February 7, 2007, this Court finds that the March 21, 2006 notice did not permit plaintiffs to avoid termination of their

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lease by simply meeting with defendants' representatives, as alleged in the first cause of action. Rather, the notice informed plaintiffs that "we are terminating your tenancy effective April 21, 2006 for material non-compliance." Therefore, the first cause of action must be dismissed.

This Court further finds that defendants were not required to provide plaintiffs with an additional five-day notice period, as alleged in the second cause of action. Although the Court of Appeals has held that owners who elect to serve a ten-day notice to cure upon a rent-stabilized tenant by mail "must compute the date certain by adding five days to the 10-day minimum cure period" in order "to ensure that tenants are not disadvantaged by an owner's choice of service method" (ATM One, LLC v. Landaverde, 2 N.Y.3d 472, 477-478 [2004]), the 30-day cure period set forth in the notice at issue was already substantially extended by the prior Orders of this Court.

Moreover, defendants have represented that the notice was not merely sent to plaintiffs by certified and regular mail, but was also hand-delivered to plaintiffs' apartment. Therefore, the second cause of action is also dismissed.

The third cause of action is dismissed for the reasons stated on the record on May 10, 2006.

That portion of the motion seeking a default judgment against plaintiffs on the counterclaims is denied, plaintiffs having annexed an Affirmation of Service dated August 10, 2006 representing that the Answer to Counterclaims was sent to defendants' counsel by first class mail on said date.

A preliminary conference shall be held in IA Part 12, 60 Centre Street, Room 341 on June 6, 2007 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: April 20, 2007

  
Barbara R. Kapnick  
J.S.C.

**FILED**  
APR 24 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**BARBARA R. KAPNICK**  
J.S.C.