

**B.L.M., Inc. v White**

2008 NY Slip Op 33747(U)

October 2, 2008

Supreme Court, New York County

Docket Number: 117663/05

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF YORK  
COUNTY OF NEW YORK

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B.L.M., INC., a/k/a BEACH LANE  
MANAGEMENT, INC., as agent for 16-26  
EAST 105, LLC,

Plaintiff,

-against-

ARI WHITE and GEMMA WHITE,

Defendants.

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KORNREICH, SHIRLEY WERNER, J.

**DECISION  
and  
ORDER**

Index No.: 117663/05

**FILED**  
OCT 07 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiff moves to reargue an order, dated March 3, 2008, issued by Justice Leland DeGrasse, which granted on default a motion by defendant Gemma White to vacate the money judgment against her entered on June 6, 2007 (Judgment). Defendants consent to reargument by stipulation and ask that Ms. White's motion to vacate the judgment be considered on the merits. Ms. White urges that there was no basis in law or fact for the entry of a money judgment against her for rent or attorneys' fees. Defendants oppose the motion to vacate the Judgment on the ground that Ms. White has not established one of the grounds contained in CPLR 5015.

*Background*

This is an action for ejectment that was brought by plaintiff to recover possession of an apartment, Unit 1, in the premises located at 26 East 105<sup>th</sup> St., New York, NY (Apartment). The complaint also sought rental arrears, use and occupancy and attorneys' fees. Defendant Ari White (Tenant) was the named rent-stabilized tenant under a lease for the Apartment. Defendant Gemma White (Wife) is the Tenant's wife.

Essentially, the facts are undisputed. The Apartment is located on the ground and first

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floors of a building owned by plaintiff 16-26 East 105, LLC (Landlord). The Lease contains a clause requiring the Tenant to obey all city, state and federal laws and regulations. The Landlord terminated the Lease for illegal use of the basement as a bedroom, pursuant to a notice of termination effective December 8, 2005. The Wife was an occupant of the Apartment. The last rent for the Apartment was \$1,823.20 per month. The Lease contains a clause requiring the Tenant to pay the Landlord's attorneys' fees in the event of a default under the Lease.

On July 10, 2006, Justice DeGrasse issued an order and judgment that: 1) granted a judgment in favor of Landlord for possession of the Apartment; 2) severed the Landlord's claims for rent, use and occupancy and legal fees; 3) referred the issue of the amount of damages to a special referee to hear and determine; 4) ordered the Clerk to enter judgment on the special referee's report without further application to the court; and 5) granted a judgment for use and occupancy in the amount of \$1,800.00 per month until the earlier of entry of final judgment or the defendants' eviction.

On December 19, 2006, a hearing was held before Special Referee Leslie S. Lowenthal. The transcript reflects that defendants did not appear, that their counsel left a voice mail message for the Referee stating that there was no defense, and that defendants' attorney consented to the assessment of damages. The Landlord testified that defendants had made just one rent payment since July 2003 and that they surrendered possession in September 2006, at which time the balance owed was \$69,192.26. Plaintiffs' attorney then testified that the legal fees and costs incurred were, respectively, \$32,500.17 and \$1,668.70.

The Referee placed his findings on the record. He found that there were rent arrears in the amount of \$69,192.26 and attorneys fees and disbursements of \$34,168.87, for a total sum of

\$103,361.13. In the transcript, the Referee directed both defendants to pay said sum within 30 days after service upon them of a certified copy of the transcript, failing which plaintiff could enter judgment for that amount. Plaintiffs served a certified copy of the transcript on defendants' attorney on January 11, 2007. The Judgment against defendants, jointly and severally, in the amount of \$108,441.86, was entered by the Clerk on June 6, 2007. Plaintiffs did not serve defendants with a copy of the Judgment with notice of entry.<sup>1</sup>

The only factual dispute is the Wife's claim that the complaint did not seek to recover rent and attorneys' fees from her. The Landlord points to ¶15 of the complaint, which alleges that no rent and/or use and occupancy had been received or accepted for the period after July 18, 2003. Defendants filed a joint answer, by their current attorney, which admitted the allegations of paragraph 15 and did not raise the defense that the Wife was not obligated for rental arrears or attorneys' fees because she was not a tenant. The *ad damnun* clause, upon which the Wife relies, requested a money judgment against the Tenant, not the Wife, for rent arrears through December 2005, totaling \$55,163.80, and use and occupancy from January 1, 2006 forward.

### *Discussion*

The Wife now claims that the Judgment should be vacated because she was an occupant, not a tenant, under the Lease and the complaint did not seek to recover rent or attorneys' fees from her.

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<sup>1</sup> Plaintiffs' claimed in their papers on this motion that they served defendants with notice of entry of the Judgment. However, the record contains only a notice of entry of the transcript of the Referee's hearing, not the Judgment. During a conference call with the court, plaintiff's counsel was asked to provide notice of entry of the Judgment, with proof of service. Subsequently, he informed the court that his file did not contain a notice of entry of the Judgment with proof of service on defendants.

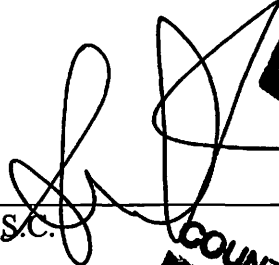
The Wife's motion is denied for failure to assert a sufficient reason to vacate a judgment pursuant to CPLR 5015. The Court of Appeals has held that a judgment cannot be vacated under CPLR 5015 for substantive errors of fact or law. *Lacks v. Lacks*, 41 N.Y.2d 71, 77 (1976)(judgment should not be vacated for substantive errors of law or fact because it would undermine significantly doctrine of *res judicata*). Under CPLR 5015, the grounds for vacating a judgment are excusable default, newly discovered evidence, fraud, misrepresentation, misconduct of an adverse party and lack of jurisdiction. None of these grounds is present in this case. The Wife's stance that the Judgment is incorrect because a non-tenant cannot be held liable for rent or attorneys' fees under the Lease raises a substantive error. However, the wife is not without a remedy. As the Judgment was not served with notice of entry, an appeal may still be taken. *See*, CPLR 5513(a). Accordingly, it is

ORDERED that plaintiffs' motion to reargue the motion by defendant Gemma White to vacate the Judgment entered against her on June 6, 2007 is granted on stipulation of the parties; and it is further

ORDERED that, upon reargument, the motion by Gemma White to vacate the Judgment entered against her on June 6, 2007 is denied.

Dated: October 2, 2008

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 J.S.C.  
**FILED**  
 OCT 07 2008  
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 NEW YORK