

<b>Williams v 29-35 W. 119th St. Hous. Dev. Fund Corp.</b>
2009 NY Slip Op 32026(U)
August 26, 2009
Supreme Court, New York County
Docket Number: 403196/05
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

KISHA WILLIAMS, LAURA DAWSON, ROCHELLE  
DAWSON, ROBIN JUDD,  
Plaintiffs,

Index No.: 403196/05

- v -

Hearing Date 01/26/09

29-35 WEST 119<sup>TH</sup> STREET HOUSING DEVELOPMENT  
FUND CORPORATION and LISA PORTER,  
Defendants.

Mot. Seq. No. 03

The following papers, numbered 1 to \_\_\_ were read on this show cause for judgment on default of use and occupancy payments \_\_\_\_\_

Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_

Notice of Cross-Motion/Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits - Exhibits \_\_\_\_\_

**FILED**  
SEP 08 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

PAPERS NUMBERED

1

2

3

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

Cross-Motion:  Yes  No

By Order dated October 30, 2008, this court set down a hearing on defendants' motion seeking a judgment for money and possession against plaintiffs Kisha Williams, Laurel Dawson, Rochelle Dawson, and Robin Judd, for their failure to pay use and occupancy and plaintiffs' cross motion to deposit use and occupation in the court.

The hearing on whether, when and how much use and occupancy was paid by the plaintiffs took place on October 12, November 13, December 15 and December 17, 2008. Decision was reserved upon submission of Proposed Findings of Fact and Conclusions of Law on January 26, 2009.

On the hearing on its motion for a judgment for money and

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

possession, defendant bears the burden to prove by a fair preponderance of credible evidence that plaintiffs failed to pay use and occupancy as set forth in this court's Order dated January 18, 2007 granting a preliminary injunction. That Order converted the temporary restraining order in the previous Order dated July 11, 2006 into a preliminary injunction. The July 11, 2006 Order stated in pertinent part:

[t]he existing stay as to those plaintiffs currently protected by a stay (K. Williams, L. Dawson, r. Dawson and R. Judd) is hereby modified to permit non-payment proceedings to proceed; however, execution of judgment, and service of a Marshall's notice and execution of a warrant is stayed pending final determination of the motion and cross-motion. Timely payment of U&O previously ordered is a condition of the continued stay.

The July 11, 2006 Order modified the existing temporary restraining order ("TRO") granted on September 15, 2005<sup>1</sup>, to the extent that it no longer prohibited defendants from continuing to prosecute its non-payment proceedings in Housing Court, but commencing from that time permitted defendants to seek and enter judgment on such non-payment proceedings, only staying execution of such judgment, service of a Marshall's notice and execution of the warrant, pending final determination of the motion and cross motion. The undersigned, in finally determining such motions and in the form of a preliminary injunction by its Order dated January 26, 2007, continued such provisional relief on the same terms and conditions as the July 11, 2006 Order.

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<sup>1</sup>The existing stay was extended pursuant to stipulated orders dated September 23, 2005, January 20, 2006, February 8, 2006, May 2, 2006 and May 17, 2006.

Despite the stay being modified, there is no evidence in the record before this court that defendant ever resumed prosecution of any non payment proceeding against the plaintiffs in the Housing Court after July 11, 2006, the date on which this action, the motion and cross-motion were transferred to the undersigned. Instead, a preliminary conference was held, after which defendant interposed an Answer dated July 2, 2007 to the Complaint in this action, which contained a single counterclaim for attorneys fees and court costs.

Thereafter, defendant filed the Show Cause Order at bar on October 12, 2007, which was followed by about a dozen court supervised mediation conferences that failed to yield a settlement agreement between the parties. Ultimately, defendant's counsel made a motion to be relieved, which was granted on September 30, 2008. Current counsel for defendant filed a Notice of Appearance on November 13, 2008, the first day of the hearing.

The court concurs with plaintiffs that Calvert v LeTam Realty Corp, 118 AD2d 426 (1<sup>st</sup> Dept 1992) is distinguishable from the facts of the case before this court. In Calvert, the trial court granted plaintiff's motion to remove and consolidate the summary proceeding with his plenary action for a declaratory judgment. Here, no such removal and/or consolidation took place. This is not merely a technical matter since defendant never interposed any counterclaim for rent arrears in its Answer. Therefore, unlike Calvert, the issue of how much back rent plaintiffs owe defendant is not before this court, as issue has not been joined in that regard.

Whereas plaintiff in Calvert "failed to make any use and

occupancy payments to the cooperative corporation", the indigent plaintiffs at bar have tendered payments, as well as pursued shelter allowance and other subsidies from governmental agencies to meet their use and occupancy obligations.

Unlike Calvert, it is defendant, and not plaintiffs, which has been dilatory. Defendant has failed to resume prosecution and pursue a judgment in any of the non payment proceedings pending against the plaintiffs in Housing Court. Conversely, at all times, including prior to defendant's filing the instant motion, plaintiffs have negotiated in good faith, including compiling and furnishing a set of detailed records concerning rent payments in furtherance of a settlement agreement. This is in marked contrast to defendant's failure to provide any rent receipts to date and its tardy post-trial submission of a balance sheet as required under Business Corporation Law § 624. Despite the court's urging, defendant neglected to provide a balance sheet to aid the court's supervised settlement conferences.

While defendant is correct that a non-profit cooperative corporation organized under Private Housing Finance Law article XI is statutorily exempt from rent stabilization (546 West 156h Street HDFC v Smalls, 43 AD3d 7 [1<sup>st</sup> Dept 2007]), the court may not consider the minutes of the board meeting of March 17, 2008 that, effective July 1, 2008, that purport to increase the rental of plaintiffs Williams, Judd and Laurel Dawson from \$540 to \$1,000 per month and the rent of plaintiff Rochelle Dawson from \$409 to \$850 per month. Consideration of such evidence is not permitted, as such document was never identified or introduced into evidence at trial, having been

submitted, along with the corporate defendant's balance sheet, only as an attachment to defendant's post-trial proposed findings of fact and conclusions of law.

Since defendant is exempt from rent regulation not only because it is a housing cooperative but also because it is operated for charitable purposes, the fair market value of its apartments would have to be considered in light of the provisions set forth in its articles of incorporation, including "The Corporation is organized exclusively for the purpose of developing a housing project (the "Housing Project") for persons of low income located at 29-35 West 119<sup>th</sup> Street, New York, New York." There is no evidence in the record probative on whether the purported rent increases reflect the fair market value of apartments for which only persons of low income are eligible.

Query whether rent rather than use and occupancy is owed by each plaintiff here, since defendant never sought a monetary judgment in Housing Court wherein each particular tenancy would expire, as a matter of law, upon the issuance of a warrant (C&N Camera & Electronics, Inc. v Farmore Realty, Inc., 178 AD2d 310, 311 [1<sup>st</sup> Dept 1991]). In any event, because defendant failed to introduce any evidence that tends to establish fair market rental value for each apartment and the only evidence in the record of the appropriate use and occupancy is the amount of rent that each plaintiff paid, respectively, when the court issued its preliminary injunction on January 26, 2007, the court utilizes the rental rate for each apartment on the date of the injunction, as the basis for its

calculation of use and occupancy. See Andejou Corp v South Street Seaport Corp, 35 AD3d 174 (1<sup>st</sup> Dept 2006).

Implicit in the Order of July 11, 2006, which "continued" the stay, is a finding that plaintiffs had tendered use and occupancy from the initial TRO of September 15, 2005 until the date of such Order. The court by its previous May 17, 2006 Order mandated payment of use and occupancy by June 5, 2006 and plaintiffs presumably made payment of use and occupancy by that date. Had that not been the case, there would have been no basis for the court to "continue" the stay on July 11, 2006. Therefore, the inquiry on this motion must be as to payment of use and occupancy from July 11, 2006 to December 2008.

Except for lump sum entries on Statements dated November 11, 2008, defendant has offered no evidence with respect to any of the plaintiffs' rent arrears, which are the subject of pending Housing Court non payment proceedings that are not before this court. Also, such entries, which are each labeled rent and not use and occupancy, contain no detail for either the amounts due or the payments made as of January 1, 2008, and list lump sum amounts allegedly due from each plaintiff as of that date. Defendant's entries also increase the rate of use and occupancy to rent rates, effective July 1, 2008. As stated above, the court must disregard such increases as they are based on inadmissible board minutes. Since defendant presents evidence that is not particularized, it fails to prove by a fair preponderance of credible evidence its position as to use and occupancy arrears, which is rebutted by plaintiffs' evidence.

The court credits plaintiff's evidence, which includes

detailed certified records from NYC Housing Preservation & Development Department and NYC Department of Social Services, and finds as follows:

(1) Plaintiff Laurel Dawson (Apt. #23), with use and occupancy at the rate of \$540 per month, since July 2006 to date, has overpaid the amount of use and occupancy by \$1271.50.

(2) Plaintiff Kisha Williams (Apt. #3), with use and occupancy at the rate of \$540 per month, since July 2006 to date, owes defendant \$4050 in use and occupancy;

(3) Plaintiff Robin Judd (Apt. #63), with use and occupancy at a rate of \$540 per month, since July 2006 to date, owes defendant \$9878.55 in use and occupancy;

(4) Plaintiff Rochelle Dawson (Apt. 27), with use and occupancy at a rate of \$409 per month, since July 2006 to date, owes defendant \$10690 in use and occupancy.

The complaint in the action before this court makes no claim for any abatement of rent, so the court disregards plaintiffs' testimony about conditions of their apartment and the building common areas, which are irrelevant to the issues at bar. Unlike in 664 West 161 Street Tenants Association v Leal, 154 AD2d 238 (1<sup>st</sup> Dept 1989), there are no claims or affirmative defenses that assert breach of warranty of habitability, and plaintiffs' Complaint states only causes of action for (1) breach of contract with respect to the purchase of shares in corporate defendant and (2) breach of fiduciary duty by defendant Porter, who allegedly departed from "precisely uniform treatment of stockholders and a resulting violation of [her] fiduciary

duty to treat stockholders fairly and evenly" (Schwarz v Marien, 37 NY2d 487 (1975)] and exercised bad faith in acting in pursuit of self-interest.

The court is also unable to make a determination as to any rent abatement since such calculation is dependent on the evidence with respect the issue of rent arrearage that is not before this court, but is the subject of the summary proceedings pending in the Housing Court.

Plaintiffs affirm that they made certain use and occupancy deposits with their attorneys. They do not assert any credit for same. Nor do they argue that such deposits constitute payment to defendant (see Thorton Burns Owner, Inc. v Navas, 195 Misc2d 872, 873-874 [App Term 2d Dept 1999]). Instead, they contend that they made such deposits because the defendant has not accounted for the receipts of their use and occupancy payments, has mismanaged funds and the building by failing to keep the common areas of the building and their apartments in good repair, and has not paid operating expenses of the buildings as they become due to the detriment of the safety and welfare of the residents of the building. They urge that the court issue an order directing that all such deposits and any future use and occupancy payments be deposited into court.

The court, in its discretion, must deny plaintiffs' cross motion for an order that directs use and occupancy arrearage and future use and occupancy payments be deposited into court. As a matter of its discretion, this court finds that such a directive would constitute an exercise in futility and only further dissipate funds

that the parties' building sorely needs. Defendant is clearly a bankrupt corporation and has no funds to carry out necessary repairs and meet its operating expense, including local real property taxes, let alone the costs of prosecuting this lawsuit and the summary proceedings in Housing Court. Withholding funds from defendant would only exacerbate the already perilous position of defendant, which circumstance favors none of the parties to this lawsuit.

However, since defendant has not refuted plaintiffs' claims that it failed to cooperate with plaintiffs with respect to government assistance for which plaintiffs qualify, defendant is entitled to neither a monetary judgment nor judgment of possession against the plaintiffs. The outstanding use and occupancy that three of the four plaintiffs concede they owe defendant must be tendered to defendant within thirty days after defendant executes all documents necessary to effectuate acceptance of governmental assisted rent payments, for which each such tenant has applied. Timkovsy v 56 Bennett, LLC, 23 Misc3d 997 (New York County Supreme Court 2009).

As an aside, defendant clearly lacks the technical capacity, skills and the resources to competently manage the building in accordance with its articles of incorporation. While it would be in the interest of both sides to agree to accept assistance and consultation from any reputable New York City organization that supports housing development fund companies, such as the Urban Homesteading Assistance Board ("UHAB"), so that the defendant might obtain government or other financing to rescue the building from tax foreclosure in rem and to set equitable rents, this court lacks the

authority to order such a sensible approach.

In the words of Wagner v Kurz, 92 AD2d 775, 776 (1<sup>st</sup> Dept 1983):

This action has been pending for approximately 15 months. Except for the voluminous motion practice, none of which is contributing to the ultimate solution of the problem, nothing has been done to bring the matter to a head. This case could have been tried and the matters in issue disposed of long ago. We think that a speedy trial is the basic solution.

The court has no choice but to set this matter down for an immediate trial on plaintiffs' breach of contract and corporate governance claims. Plaintiffs shall serve and file a note of issue on or before October 20, 2009.

Accordingly, it is hereby

ORDERED that defendant's motion for a judgment against plaintiffs is GRANTED only to the extent that the defendant shall have an order of outstanding use and occupancy from July 11, 2006 to December 2008, against plaintiffs(a) Kisha Williams in the amount of \$4050; (b) Rochelle Dawson in the amount of \$10,690; and (c) Robin Judd in the amount of \$9878.55, and each plaintiff shall tender each such amount, respectively, within thirty days after defendant executes all documents necessary to effectuate acceptance of governmental assisted rent payments, for which each such tenant has applied; and it is further

ORDERED that defendant's motion for a money judgment or alternatively a judgment of possession against plaintiffs is otherwise DENIED, without prejudice; and it is further

ORDERED that plaintiffs' cross motion for an order directing that use and occupancy be deposited with the clerk of the court is

DENIED; and it is further

ORDERED that plaintiffs shall serve and file a note of issue on or before October 20, 2009.

This is the decision and order of the court.

Dated: August 26, 2009

ENTER:

~~Debra A. James~~  
HON. DEBRA A. JAMES J.S.C.

**FILED**  
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