

**406 W. 48th, LLC v Vaituzis**

2009 NY Slip Op 32768(U)

November 24, 2009

Supreme Court, New York County

Docket Number: 113284-08

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 113284/2008

406 W. 48TH LLC

vs  
VAITUZIS, VIKTORAS

Sequence Number : 002

PRECLUDE

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

*§3212 and  
X/A to compel*

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  
THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

NOV 27 2009

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: NOV 24 2009

*JJG*  
\_\_\_\_\_  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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 10**

-----x  
406 W. 48<sup>th</sup>, LLC,

Plaintiff (s),

-against-

Viktoras Vaituzis, "John" Vaituzis,  
"John Doe" and "Jane Doe,"

Defendant (s).  
-----x

**DECISION/ORDER**  
Index No.: 113284-08  
Seq. No.: 002

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

**FILED**  
NOV 27 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

*Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):*

<b>Papers</b>	<b>Numbered</b>
Pltf's n/m (preclude) w/IK affirm, exhs . . . . .	1
Def's' x/m (CPLR 3212) w/JSG affirm, exhs . . . . .	2
Pltf's opp to x/m and in further support w/AJ affid, exh . . . . .	3

*Upon the foregoing papers, the decision and order of the court is as follows:*

Plaintiff 406 W. 48<sup>th</sup>, LLC is the landlord and owner ("landlord") of the building located at 406 West 48<sup>th</sup> Street, New York, New York ("building") wherein apartment 3RW ("apartment") is located. Defendant Viktora Vaituzis a/k/a and s/h/a "John" Vaituzis is the residential tenant of that apartment ("tenant") and he has answered the complaint. No answer has been interposed on behalf of "John Doe" or "Jane Doe," persons who may be occupants of the apartment.

This is an action by the landlord for an order of ejectment (1<sup>st</sup> cause of action), a permanent injunction (2<sup>nd</sup> cause of action) and the payment of use and occupancy (3<sup>rd</sup> cause of action). The court denied the landlord's prior motion for an order removing

and consolidating a summary proceeding pending in the Civil Court of the City of New York with this action ( Order, Gische J., 7/27/09 ["prior order"]). Another branch of that motion was for an order striking the tenant's first affirmative defense which is that defendant is a rent regulated tenant, the landlord never served a predicate notice terminating the tenant's tenancy, and therefore, this action for ejectment is without a predicate basis. The court denied that branch of the landlord's motion as well finding that the affirmative defense was a "good and valid defense" to the landlord's claims against him (prior order, p.3, third full paragraph).

Presently before the court is the landlord's motion for an order compelling the tenant's compliance with landlord's demand for documents dated July 13, 2009 (CPLR 3124). Although not in the notice provisions, but in the body of its motion, the landlord also seeks the imposition of CPLR 3126 discovery sanctions, precluding the tenant from offering any evidence in his defense at trial.

Tenant opposes the motion and has separately cross moved for summary judgment, dismissing all three causes of action in the complaint, to which the landlord is opposed.

Since this pre-note of issue motion complies with the requirements of CPLR §3212 [a], it can be decided on the merits. The court's decision is as follows:

### **Arguments Presented**

Defendant has lived in the apartment since 1980. In 1993, landlord's predecessor in interest reportedly discovered that the tenant had "wrecked" his apartment by removing and discarding the bathtub, and also removing the ceiling, walls and floors. The discovery was made when a construction worker doing work at the

premises mistakenly broke through a "dumbwaiter" wall adjacent to tenant's apartment.

According to Adam Jakubowicz ("Jakubowicz"), the principal of the predecessor in interest, and also the plaintiff, the landlord offered to restore the apartment to its former condition, provided however, that the tenant would agree his rent would be increased by 1/40th, the sum chargeable for major capital improvements (RSC § 2522.4). The parties could not reach an agreement and litigation ensued in the Civil Court of the City of New York, Housing Part. That action was later dismissed.

Tenant contends he is entitled to summary judgment because he is a rent regulated tenant and he was never served with any predicate notice. Thus, according to tenant, the landlord cannot simply terminate his lease, without any notice, as required under his lease (paragraph 19), or sections 2524.2[a], 3[a], 3[b] of the Rent Stabilization Code.

In opposition, the landlord does not present any proof that it served tenant with a predicate notice terminating his tenancy, but argues that it does not matter and the landlord is entitled to an order of ejectment nonetheless because even if a notice to cure were required, it would be "useless" since the tenant refuses to rectify the damage he has caused to the apartment, the landlord does not believe the tenant had a regulated tenancy, he has not paid rent since 2003. Alternatively, the landlord seeks discovery on the issue of whether the lease that the tenant relies on is authentic, and therefore, argues that the motion for summary judgment is premature.

### **Discussion**

The Rent Stabilization Code requires that a landlord serve its tenant with a predicate notice setting forth the reason the tenant's lease is being terminated before it

can be terminated (Rent Stabilization Code §§ 2524.2[a], 3[a], 3[b]). Although acknowledging this rule of law on the one hand, the landlord dismisses it on the other as being perfunctory and "futile." While there is appellate authority that an ejectment action does not have to be dismissed because the landlord failed to serve a predicate notice (East 82 LLC v. O'Gormley, 295 AD2d 173 [1<sup>st</sup> Dept 2002]), that case involved unique circumstances not present in the case at bar. Here, the tenant's apartment is not an illegal basement apartment (*compare*, East 82 LLC v. O'Gormley, *supra*). In those situations, a landlord cannot recover possession of the illegal unit by a summary proceeding (81 Bowery Realty, Corp v. Chen, 20 Misc.3d [Sup Ct N.Y. Co 2008]). Nor is there proof provided by the landlord that it sent any appropriate prior notice to the tenant, let alone a "surfeit of notices . . ." as alleged in the complaint (paragraph 17) (*compare*, East 82 LLC v. O'Gormley, *supra* . There is a legion of cases holding that a landlord must serve a predicate notice to terminate the tenant's tenancy and recover possession of the subject apartment (Domen Holding Co. v. Aranovich, 1 N.Y.3d 117 [2003]; Prana Growth Fund I, L.P. v. Lazala, 8 Misc.3d 667 [Sup Ct NY Co 2005]). The failure of the landlord to serve such notice requires that this action be dismissed.

The court is not persuaded by the landlord's argument, that this case should not be dismissed so it can proceed with discovery. The landlord is seeking the same relief here (possession of the apartment) that it is seeking in the Civil Court, Housing Part. That court is competent to hear the landlord's claims and tenant's defenses, as well as address any issues related to discovery (Rent Stabilization Code § 2524.1; 3054 Godwin Terrace Realty Co. v. Armstrong, 190 AD2d 617 [1<sup>st</sup> Dept 1993]).

Based upon the foregoing, the tenant has made a *prima facie* showing of

entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact (CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). In opposition to the motion, the landlord has failed to produce evidentiary proof that it served the tenant with a predicate notice which would establish the existence of material issues of fact requiring a trial of this action (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Therefore, the defendant-tenant's motion for summary judgment dismissing this action is hereby granted, without prejudice to the parties litigating their claims in the summary proceeding in Civil Court, Housing Part.

The plaintiff-landlord's motion to compel discovery is denied.

### **Conclusion**

*It is hereby*

**ORDERED** that the motion by defendants Viktoras Vaituzis and "John" Vaituzis for summary judgment is granted and this case is hereby dismissed without prejudice to the rights of each side to litigate their claims and defenses in the Civil Court, Housing Part; and it is further

**ORDERED** that the claims against "John Doe" and "Jane Doe" who have not appeared in this action are also severed and dismissed without prejudice; and it is further

**ORDERED** that the motion by plaintiff 406 W. 48<sup>th</sup>, LLC to enforce its discovery demands is hereby denied; and it is further

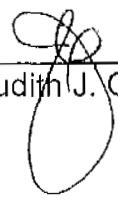
**ORDERED** that the Clerk shall enter judgment in favor of defendants Viktoras Vaituzis and "John" Vaituzis against plaintiff 406 W. 48<sup>th</sup>, LLC; and it is further

**ORDERED** that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

**ORDERED** that This constitutes the decision and order of the court.

Dated: New York, New York  
November 24, 2009

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
NOV 27 2009  
NEW YORK  
COUNTY CLERK'S OFFICE