Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

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KAYGREEN REALTY CO., LLC, Index No.: 3992/07

- against -

IG SECOND GENERATION PARTNERS, L.P., et al.

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x

KAYGREEN REALTY CO., LLC, Index No.: 10073/08

- against

IG SECOND GENERATION PARTNERS, L.P., et al.

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x

IG SECOND GENERATION PARTNERS, L.P., et al. L & T Index Number 17296 2009

- against - Motion Date February 3, 2010

KAYGREEN REALTY CO., LLC Motion Cal. Number 29

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x

Motion Seq. No. 1

The following papers numbered 1 to 14 read on this motion by IG Second Generation Partners, L.P. and I Bldg. Co., Inc., the petitioners in *IG Second Generation Partners, L. P. v Kaygreen Realty Co., Inc.* (L&T Index No. 17296/09) for, inter alia, summary judgment on their petition against respondent Kaygreen Realty Co., LLC., on this cross motion by Kaygreen Realty Co., Inc. for, inter alia, summary judgment dismissing the L&T proceeding brought against it, and on this second cross motion by Kaygreen Realty Co., Inc., also the plaintiff in *Kaygreen Realty Co., LLC v IG Second Generation Partners, L.P.* (Index No. 3992/07) and *Kaygreen Realty Co., Inc. v IG Second Generation Partners, L.P.* (Index

No. 10073/08) for, inter alia, summary judgment on its complaints asserted against defendant IG Second Generation Partners, L.P. and defendant I Bldg. Co., Inc.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1
Notice of Cross Motion - Affidavits - Exhibits.....	2-3
Answering Affidavits - Exhibits.....	4
Reply Affidavits.....	5-7
Memoranda of Law	8-14

Upon the foregoing papers it is ordered that the motion by IG Second Generation Partners, L.P. and I Bldg. Co., Inc., the petitioners in *IG Second Generation Partners, L. P. v Kaygreen Realty Co., Inc.* (L&T Index No. 17296/09) for, inter alia, summary judgment on their petition against respondent Kaygreen Realty Co., LLC. is denied. The cross motion by Kaygreen Realty Co., Inc. for, inter alia, summary judgment dismissing the L&T proceeding brought against it, and on this second cross motion by Kaygreen Realty Co., Inc., also the plaintiff in *Kaygreen Realty Co., LLC v IG Second Generation Partners, L.P.* (Index No. 3992/07) and *Kaygreen Realty Co., Inc. v IG Second Generation Partners, L.P.* (Index No. 10073/08) for, inter alia, summary judgment on its complaints asserted against defendant IG Second Generation Partners, L.P. and defendant I Bldg. Co., Inc. are granted.
(See the accompanying memorandum.)

Dated: April 9, 2010

J.S.C

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

KAYGREEN REALTY CO., LLC X Index No.: 3992/07

- against-

IG SECOND GENERATION PARTNERS, L.P., et al.
X

KAYGREEN REALTY CO., LLC
Index No.: 10073/08

- against -

IG SECOND GENERATION PARTNERS, L.P., et al.
X

IG SECOND GENERAL PARTNERS, L.P., et al.
INDEX NO. 17269/09

MOTION SEQ. NO. 1

- against -

MOTION CAL NO.: 29

KAYGREEN REALTY CO., LLC
MOTION DATE: October 14, 2009
X

BY: KITZES, J.

IG Second Generation Partners, L.P. and I Bldg. Co., Inc., the petitioners in *IG Second Generation Partners, L.P. v Kaygreen Realty Co., Inc.* (L&T Index No. 17296/09) (sometimes hereinafter the petitioner landlords), have moved for, inter alia, summary judgment on their petition against respondent Kaygreen Realty Co., LLC (sometimes hereinafter the respondent tenant). Kaygreen Realty Co., Inc. has cross-moved for, inter alia, summary judgment dismissing the L&T proceeding brought against it. Kaygreen Realty Co., Inc., also the plaintiff in *Kaygreen Realty Co., LLC v IG Second Generation Partners, L.P.*

(Index No. 3992/07) (Action No. 1) and *Kaygreen Realty Co., Inc. v IG Second Generation Partners, L.P.* (Index No. 10073/08) (Action No. 2) has also cross-moved for, inter alia, summary judgment on its complaints asserted against defendant IG Second Generation Partners, L.P. and defendant I Bldg. Co., Inc. (sometimes hereinafter the defendant landlords).

I. Plaintiff Kaygreen's cross motion for summary judgment in Action No.1 and Action No. 2.

The defendant landlords own premises known as 89-41 164th Street, Jamaica, New York. Plaintiff Kaygreen, a tenant at the premises under a lease dated February 11, 1948, received from the defendant landlords a "Notice and Demand" dated March 13, 2003 and a "Notice of Default" dated April 4, 2003. The notices concerned Kaygreen's alleged failure to (1) remove certain violations found by New York City agencies, (2) defend the landlords in several personal injury actions, (3) maintain insurance, and (4) keep elevators in a state of good repair. On or about June 4, 2003, plaintiff Kaygreen, denying that it had defaulted on its obligations under the lease or asserting that it had cured any defaults, brought an action in the New York State Supreme Court, County of Queens against the defendant landlords for a judgment declaring that it had not defaulted under the terms of the lease (*Kaygreen Realty Co. v IG Second Generation Partners, L.P.* [Index No. 13633/03]) (the 2003 action).

On July 15, 2008, this court, after a trial, found that Kaygreen had not defaulted under the terms of the lease as alleged in the Notice of Default dated April 4, 2003. The defendant landlords appealed the order and judgment (one paper) dated July 31, 2008, but the Appellate Division, Second Department, affirmed. (*Kaygreen Realty Co. v IG Second Generation Partners, L.P.,* 68 AD3d 933 [December 15, 2009].) The Appellate Division held, inter alia: "[T]he Supreme Court providently exercised its discretion by excluding evidence regarding other alleged maintenance issues and/or violations not specifically set forth on schedule A annexed to the notice of default, as irrelevant or outside of the scope of

the default notice ***." (*Kaygreen Realty Co. v IG Second Generation Partners, L.P., supra.)* Prior to the trial, Kaygreen had successfully made a motion in limine "to exclude any evidence concerning any alleged defaults outside of those set forth in [the defendant landlords'] Notice of Default dated April 4, 2003." (Chartan affirmation dated May 16, 2008.) During the course of the trial, this court ruled: "[W]e are only concerned with the notice of default. *** Any proof in this case would be limited to the notice of default." (Tr. 153.)

During the pendency of the 2003 action, Kaygreen attempted to exercise an option to purchase the premises. Article XXV, Section 1.(e) of the lease provided that "the Tenant shall not have the right to extend the term of this lease beyond December 31,2008, if prior to July 1, 2006, the Landlord shall notify the Tenant that the right to extend said term for the period from January 1, 2009 to December 31, 2023 is cancelled and that the Tenant shall have the option to purchase the Demised Premises pursuant to Article XXVI of this lease." Article XXVI of the lease gave Kaygreen an option to purchase the premises if the landlord cancelled the former's right to extend the lease to December 31, 2023, but the tenant could only exercise the option if, inter alia, "(a) *** at the time of the exercise of such right the Tenant is not in default in performance of any of the terms, covenants, conditions, provisions or agreements of such lease unless such default is not substantial and is cured within sixty (60) days ***." *** [and] (c) on or before December 31, 2006, the Tenant shall notify the Landlord of its election to exercise the right to purchase the Demised Premises and deposit with the Landlord an amount equal to two times the then annual rent hereunder ***." Article XXVI also set out an appraisal process to determine the purchase price.

In June, 2006, the defendant landlords cancelled Kaygreen's right to extend the lease, thereby intending to terminate the lease as of December 31, 2008, but also thereby triggering the tenant's option to purchase. On December 16, 2006, Kaygreen notified the defendant landlords of its exercise of the option to purchase and tendered a deposit of $100,000, allegedly twice the sum of the specified annual rent under the lease. On or about

December 29, 2006, the defendant landlords sent Kaygreen a notice rejecting the tenant's exercise of the option to purchase on the stated grounds that (1) the tenant had not cured the defaults listed in a March 19, 2000 notice of default, (2) the tenant had defaulted under the lease by failing to pay rent and additional rent in the amount required by the lease, (3) the tenant had not cured the defaults listed in the April 4, 2003 notice of default, (4) the tenant had defaulted under the lease by failing to cure violations existing in and around the Furniture World and Jimmy Jazz stores located in the buildings, and (5) the tenant had failed to deposit a sum equal to twice the annual rent as a down payment for the purchase of the premises.

On or about February 4, 2007, Kaygreen commenced Action No. 1 for a judgment (1) declaring, inter alia, that it had properly exercised its option to purchase the premises and that the defendant landlords had wrongfully rejected it and (2) directing specific performance of those sections of the lease concerning the option to purchase.

On or about February 15, 2008, the defendant landlords sent the plaintiff tenant a twenty-one page notice of default making no less than 177 charges of default including, but not limited to, (1) use of the roof of the building for parking, (2) failure to pay rent and additional rent, (3) failure to maintain insurance, (4) failure to defend the landlords against claims of third parties, (5) failure to maintain the premises in good condition, and (6) failure to obtain the landlords' approval before making alterations to the building.

On or about April 22, 2008, Kaygreen began Action No. 2 for a judgment declaring that it was not in default under the terms of the lease as asserted in the Notice of Default dated February 15, 2008. The defendant landlords counterclaimed for a judgment declaring that Kaygreen had voided the purchase option contained in the lease and on April 15, 2009 they submitted a motion for summary judgment on their counterclaim. Pursuant to a decision and order dated April 17, 2009 (one paper) this court denied the motion. In the course of its memorandum, this court noted: "After a long and contentious trial [in the 2003 action], it was determined that any and all violations that existed were

corrected at the time of trial and tenant was not in default. Any and all violations or defaults that were pleaded by defendants were considered at the trial. Violations that existed at the time of trial should have been raised by a new notice of default, amending the pleadings prior to trial to prevent surprise and an opportunity to cure. If defaults or violations existed and were not properly before the Court, defendants would be precluded from seeking to raise such issues after the trial. If new violations or defaults were created after the trial and not existing at the time of trial, a new proceeding with the required notices of default could have been commenced."

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ***." (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324.) Kaygreen has carried this burden. Kaygreen has established that the doctrine of res judicata eliminates all factual issues pertaining to the Notice of Rejection served in 2006 and Notice of Default served in 2008 raised in Action No. 1 and Action No. 2 respectively.

This court held in its decision dated April 17, 2009 that the defendant landlords are barred by the principle of res judicata from asserting defaults by Kaygreen as, inter alia, a defense to the tenant's action for specific performance of the option to purchase. This Court's findings about violations and defaults other than those previously adjudicated were essential to the determination of the motion then before the court. (*See*, *Donahue v Nassau County Healthcare Corp.*, *supra*.) "The doctrine of law of the case 'applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision' ***." (*Gay v Farella*, 5 AD3d 540, 541, quoting *Baldasano v Bank of N.Y.*, 199 AD2d 184, 185.) The court understood the issue presented by the defendants' prior motion to be whether the plaintiff had properly followed the option procedure proscribed by the lease: "Now that the lease has expired on December 31, 2008, defendants are contending that plaintiff has defaulted anew in failing to exercise the option." The quoted comments concerning res

judicata, while not found in that section of the court's opinion which begins with the denial of that branch of the defendants' motion which sought summary judgment on their counterclaim, clearly go to the denial of the motion. In the dispositional section, the court held essentially: "Plaintiff was not required to engage in the pre-conditions to exercising the option since it was clear that defendants would not live up to the contract." This Court also found that plaintiff properly tendered defendants the down payment to exercise the option. In effect, this Court held that Kaygreen was entitled to reverse summary judgment on its complaint. (*See*, *Costello v Hapco Realty, Inc.,* 305 AD2d 445.)

The principle of judicial estoppel does not bar Kaygreen from asserting here that the judgment rendered in the 2003 action has a res judicata effect on matters raised in the notices served in 2006 and 2008. The doctrine of judicial estoppel "precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed ***." (*Ford Motor Credit Co. v Colonial Funding Corp*., 215 AD2d 435, 436; *see*, *Tedesco v Tedesco*, 64 AD3d 583; *City of New York v College Point Sports Assn., Inc*., 61 AD3d 33.) Kaygreen successfully moved in the 2003 action to limit the trial to issues raised only by the 2003 notice of default. Moreover, Kaygreen successfully argued the point on appeal. Kaygreen's interests are not contrary to those set forth at the trial, in fact, they are the same in that they seek to limit the defendants ability to bring in alleged maintenance issues and/or violations not specifically set forth on schedule A annexed to the notice of default, that should have been set forth therein. In other words, Kaygreen's interest has been consistent in attempting to keep defendant from allowing irrelevant matters that are outside of the scope of the default notice to be considered in this litigation. Accordingly, they are not judicially estopped from asserting their res judicata claim.

The doctrine of res judicata precludes the defendant landlords from asserting all defaults raised in the notices served in 2006 and 2008 as a defense to Action No. 1 and

Action No. 2. Pursuant to the doctrine of res judicata, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy ***." (*O'Brien v City of Syracuse*, 54 NY2d 353, 357; *Parker v Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343.) "Under the transactional analysis approach to res judicata applied in this State, as a general rule a valid final judgment on a claim or claims precludes future litigation between the same parties of claims arising from the same causes of actions, i.e., the same transactions or series of transactions, even if based upon different theories or if seeking a different remedy ***." (*Schulz v New York State Legislature*, 278 AD2d 710, 712; *Marinelli Associates v Helmsley-Noyes Co., Inc*., 265 AD2d 1.) "[T]he doctrine bars not only claims that were actually litigated but also claims that could have been litigated, if they arose from the same transaction or series of transactions." (*Marinelli Associates v Helmsley-Noyes Co., Inc., supra*, 5.) The determination of what "factual grouping" amounts to a "transaction" or "series of transactions" for res judicata purposes depends on such factors as the relation of the facts in time, space, and origin. (*See*, *Smith v Russell Sage College*, 54 NY2d 185; *Marinelli Associates v Helmsley-Noyes Co.,Inc., supra*.)

The defaults alleged in the 2003 Notice do not differ substantively or temporally from the defaults alleged in the 2006 Notice of Rejection and the 2008 Notice of Default. In fact, at the trial, it was found that all of the defaults alleged in the 2006 and 2008 Notices existed at the time of the service of the 2003 Notice and the defendants failed to include them in the 2003 Notice. These defaults should have been included in the 2003 Notice and defendants failed to do so. Defendants were obligated to raise all available issues in the 2003 Notice or risk those claims being barred at any subsequent proceeding. *See*, Modell and Co., Inc. V Minister, Elders, and Deacons Reformed Protestant Church of the City of New York, 68 NY 2d 456 (1986.) This Court cannot allow defendants the ability to hold in abeyance alleged defaults and use them in a succession of Notices that are designed to infringe upon the rights of plaintiff that this Court found to exist at the 2008 trial. In fact, during the pendency of this

litigation, this Court sanctioned and admonished defendants for frivolous actions that were clearly designed to merely extend this litigation and delay Kaygreen from exercising its option. This litigation has already gone on for an extensive time and there is no need for it to continue. Accordingly, plaintiff Kaygreen's cross motion for summary judgment in Action 1 and 2 is granted.

II. The motion by the petitioner landlords for summary judgment on their petition. The cross motion by Kaygreen for, inter alia, summary judgment dismissing the L&T proceeding brought against it.

In June, 2006, the petitioner landlords cancelled Kaygreen's right to extend the lease, thereby terminating the lease as of December 31, 2008. On December 16, 2006, Kaygreen notified the petitioner landlords of its exercise of the option to purchase and tendered a deposit of $100,000, but the petitioner landlords rejected the exercise of the option. Kaygreen refused to quit the premises on December 31, 2008, and on or about May 1, 2009 the petitioner landlords began a summary holdover proceeding in Queens County Civil Court. The petitioner landlords sought (1) a final judgment of possession with the issuance of a warrant to remove the tenant and its subtenants from the premises and (2) a money judgment for use and occupancy of the premises since the expiration of the lease. Pursuant to a decision and order dated June 17, 2009, this court removed the holdover proceeding to this court and consolidated it with Action No. 1 and Action No. 2.

Generally, a tenant who validly exercises his option to purchase property as provided by a lease becomes a vendee in possession similar to a tenant who executes a contract to purchase the premises. (*See*, *Lelekakis v Kamamis,* 41 AD3d 662; *Fulgenzi v Rink*, 253 AD2d 846; Unique Marble & Granite Org. Corp. v *Hamil Stratten Properties, LLC,* 12 Misc 3d 1162[A] [Table], 2006 WL 1479555 [Text] [n.o.r.], *rearg*, 13 Misc 3d 1239[A] [Table], 2006 WL 3361537 [Text] [n.o.r.].) "When a tenant exercises an option to buy contained in a lease, the option becomes a binding executory contract for the purchase and sale of land ***." (2 Rasch's N.Y. Landlord & Tenant § 20:28 [4th Ed].)

Absent the parties' contrary intent, a purchase contract executed by a landlord and tenant before a lease expires merges the landlord-tenant relationship in that of a vendor-vendee in possession. (*See*, *Wulf v Colf*, 286 AD2d 895; *Barbarita v Shilling,* 111 AD2d 200.) "Although the two relationships are not mutually exclusive, the general rule is that execution of a contract of sale between landlord and tenant serves to merge the landlord-tenant relationship into the vendor-vendee relationship and thus effectively terminates the former, unless the parties clearly intend the contrary result ***." (*Barbarita v Shilling, supra,* 201-202.) "An intention to deviate from the general rule and to avoid a merger may be directly expressed in the agreement or may be inferred from a medley of factors such as the terms of the agreement, the circumstances of its making, and the subsequent behavior of the parties ***." (*Barbarita v Shilling, supra*, 202.)

With an exception provided by RPAPL 713(9) not relevant here, a landlord cannot maintain a summary holdover proceeding against a vendee in possession after the expiration of the lease where there has been a merger. (*See*, *Osborne v Moutafis*, 7 Misc 3d 32 [AT 9th & 10th] ["Absent the parties' contrary intent, the purchase contract, executed before the commercial lease expired, merged the landlord-tenant relationship into that of vendor-vendee in possession *** barring the commencement of a summary proceeding against the vendee, the equitable owner ***"]; *Danyluk v Glashow*, 2 Misc 3d 1005[A] [Table], 2004 WL 556582 [Text] [n..o.r.]; 2 Rasch's N.Y. Landlord & Tenant § 20:28 [4th Ed.].) "After the exercise of the option to buy granted in the lease, the tenant is a purchaser in possession against whom the landlord cannot proceed in summary proceeding as a holdover tenant after the expiration of the lease term." (2 Rasch's N.Y. Landlord & Tenant § 20:28 [4th Ed].)

Regarding the summary judgment motions in the instant holdover proceeding, this Court denies the motion by petitioner IG Second Generation Partners, L.P. and I Bldg. Co., Inc and grants the motion by Respondent-Tenant Kaygreen. Based on the evidence presented in these motions, and the findings of fact made by this Court at the 2008 trial, there

are no issues of fact pertaining to (1) whether Kaygreen did not meet the conditions for the valid exercise of the option to purchase, thereby preventing it from attaining the status of a vendee-in-possession (*see*, *Lelekakis v Kamamis, supra* ["the parties were never in a vendor-vendee relationship, because the option to purchase was never effectively exercised"] and (2) whether under all of the circumstances of this case, the parties did not intend the merger of estates. (*See*, *Barbarita v Shilling*, *supra*.) Kaygreen has established that it met the conditions for the valid exercise of the option to purchase since they timely tendered the appropriate amount of money and there were no existing defaults on the premises when this option was tendered. As such, the Court finds that the circumstances of this case establish that the parties intended a merger of estates which precludes this holdover proceeding.

The parties shall now adhere to the agreed to appraisal process to determine the purchase price, as set forth in their Lease. The parties shall adhere to the previous stipulations and Orders regarding Kaygreen's monthly payments to IG Second Generation Partners, L.P. and I Bldg. Co., Inc. until otherwise appropriate.

Accordingly, the motion is denied and the cross motion is granted.

Short form order signed herewith.

Dated: April 9, 2010

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J.S.C.