22 CPS Owner LLC v Carter
2010 NY Slip Op 31508(U)
June 14, 2010
Supreme Court, New York County
Docket Number: 109748/09
Judge: Carol R. Edmead
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SCANNED ON 6/17/2010

[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 31

Justice

Index Number : 109748/2009

22 CPS OWNERS LLC

VS.

CARTER, JASON D. F/K/A

SEQUENCE NUMBER : 003

PARTIAL SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 5.17.10

MOTION SEQ. NO. 003

MOTION CAL. NO.

on this motion to/for

PAPERS NUMBERED

Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The instant motion (sequence 003) and cross motion are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the part of plaintiff 22 CPS Owner LLC's motion, pursuant to CPLR 3212, for partial summary judgment in its favor on its second and third causes of action is granted; and it is further

ORDERED and **DECLARED** that the penthouse apartment in the subject building located at 22 Central Park West, New York, New York is exempt from rent stabilization coverage, is granted, and the second and third causes of action are hereby severed and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the part of plaintiff's motion, pursuant to CPLR 3212, for partial summary judgment on its sixth cause of action for use and occupancy as against defendant Julia Carter is also granted, and a hearing is to be held regarding the amount to be paid by Julia to plaintiff for use and occupancy, and the motion is otherwise denied; and it is further

ORDERED that upon all the papers and proceedings heretofore had, the court refers the issue of use and occupancy to a Special to hear and determine (CPLR 4317 [b]) (*see Keeney v Keeney*, 297 AD2d 606 [1st Dept 2002]); and it is further

Dated: J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place the issue of use and occupancy on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that defendant Carter Management Corporation's cross motion, pursuant to CPLR 2005 and 3212 (d), for an order vacating its default in answering the amended summons and complaint, and permitting it to answer and appear in this action, as well as for an order, pursuant to CPLR 3211 (a) (7), dismissing plaintiff's fifth cause of action sounding in breach of the implied covenant of good faith and fair dealing as against it is granted, and this cause of action is severed and dismissed as against this defendant, and the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel; and it is further

ORDERED that the action shall continue.

UNFILED JUDGMENT
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room

Dated 6.14.10 ENTER: CAROL EDMEAD J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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22 CPS OWNER LLC,

Index No.: 109748/09

Plaintiff,

-against-

JASON D. CARTER f/k/a J. DOUGLAS COHEN, JULIA CARTER, 22 HOUSE, LLC, 22 CPS, LLC, CARTER MANAGEMENT CORP. and ANDREWS BUILDING CORP.,

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B)

Defendants.

Edmead, J.:

Plaintiff 22 CPS Owner LLC moves, pursuant to CPLR 3212, for partial summary judgment in its favor on its first, second and third causes of action seeking, inter alia, a declaration that the penthouse apartment (the penthouse) in the subject building located at 22 Central Park West, New York, New York (the building) is exempt from rent stabilization coverage. Plaintiff also moves, pursuant to CPLR 3212, for summary judgment on its sixth cause of action for use and occupancy as against defendant Julia Carter (Julia), and, pursuant to CPLR 3215, for the entry of a default judgment on its fourth cause of action for recovery of chattel as against defendant Carter Management Corporation (Carter).

Defendant Carter cross-moves, pursuant to CPLR 2005 and 3212 (d), for an order vacating its default in answering the amended summons and complaint, and permitting Carter to answer and appear in this action. In addition, Carter cross-moves, pursuant to CPLR 3211 (a) (7), for an order dismissing plaintiff's fifth cause of action sounding in breach of the implied covenant of good faith and fair dealing as against it, on the ground that plaintiff failed to state a cause of action upon which relief may be granted.

BACKGROUND

Defendant Julia is the rent-stabilized tenant of the penthouse in the subject seven-story high mixed-use building, which is located immediately adjacent to The Plaza Hotel. In or around 1979-1980, the building underwent a conversion from a primarily commercial use building to a primarily residential use building. The conversion was undertaken pursuant to a net lease agreement, dated December 30, 1977, along with multiple lease amendments (the Master lease), between the building's former owner, net lessor, Western Hotels Company (Western), and defendant J. Douglas Cohen, now known as Jason D. Carter (Jason). Jason became the net lessee of the building for a term of 30 years.

Pursuant to the Master lease, Jason was required to convert the building's units on the second through seventh floors from commercial to residential use, as well as obtain a new certificate of occupancy. Upon completion of these conversions, Jason was responsible for leasing the converted residential units to *bona fide* tenants. Under the terms of the Master lease, Jason was also responsible for maintaining the building's books and records.

In or about 1979, in connection with said conversions, Jason applied for and was granted certain tax benefits pursuant to Administrative Code of the City of New York (Administrative Code) § 11-243, also known as the J-51 program. Upon completion of the conversions, the new residential units in the building became subject to rent regulation. After all of the conversion work was completed, the building was issued a new certificate of occupancy, dated October 17, 1979.

Jason and Julia were married to each other on August 26, 1978. Subsequently, Jason and Julia became tenants of the building's penthouse. At this time, the penthouse was a duplex

consisting of one of the three apartment units on the seventh floor and a new eighth floor (the penthouse floor) that was built at the time of the conversions. On September 1, 1987, Jason and Julia entered into a rent-stabilized lease with the building's then owner, 22 CPS Management Company (22 CPS Management) (the original lease). Both Jason and Julia were listed as tenants on the original lease. Unlike Jason, Julia did not have any interest in 22 CPS Management.

In 1985, Jason obtained permission from Western for the creation of a new residential unit. Thereafter, in 1987, Jason combined and reconfigured all three units from the building's seventh floor and added a mezzanine level above the eighth floor level to create the present penthouse unit. Accordingly, a new certificate of occupancy, dated August 4, 1989, which reflected these alterations, was issued for the subject building.

The building continued to receive J-51 tax benefits until 1992, when the exemption expired and the abatement was exhausted. By An Assignment of Ground Lease, dated September 19, 1996, Jason assigned the Master lease to an entity known as 22 House LLC (22 House) (the first assignment).[1] Jason executed the first assignment in his individual capacity as assignor and in his capacity as manager of 22 House.

By assignment, dated March 4, 2004, 22 House assigned the Master lease to 22 CPS LLC (22 CPS) (the second assignment). The second assignment was executed by Carter 2003 Irrovocable Trust (the Carter trust). The Carter trust is the sole member of 22 CPS. Jason and Julia's children are the sole beneficiaries of the Carter trust, of which Barry Mandel, Esq. is the trustee.

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[1]A company known as Washington Square Management Associates managed the building from 1998 until 2002. Thereafter, the building was managed by Andrews Building Corporation.

On October 14, 2004, by bargain and sale deed, plaintiff's predecessor, CPS 1 Realty LP (CPS 1) became the owner of the building and lessor under the Master lease. On April 7, 2006, by bargain and sale deed, CPS 1 transferred all rights, title and interest in the building to plaintiff, whereby plaintiff became the owner of the building and net lessor under the Master lease.

The original lease was renewed in 2002, 2004 and 2006, between 22 House and Jason and Julia, and in 2007, between 22 CPS and Jason and Julia. In March of 2006, Jason vacated the premises. Thereafter, in September of 2006, Jason and Julia were divorced. Notwithstanding his vacatur of the penthouse in March of 2006, in or about October 1, 2007, Jason issued a purported rent-stabilized renewal lease to himself and Julia, as co-tenants. On April 3, 2008, the Master lease expired by its own terms.

To date, Julia is still in possession of the penthouse. Due to the instant dispute, plaintiff maintains that it has not accepted Julia's payment of rent and/or use and occupancy since April of 2008. A review of Julia's Income Certification Form, submitted to the New York State Division of Housing and Community Renewal for the 2008 filing period, reveals that her total income for each of the two proceeding calendar years is in excess of $175,000.00. Julia is also purported to be the current owner of several somewhat expensive properties throughout the state of New York.

DISCUSSION

WHETHER PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON ITS SECOND CAUSE OF ACTION FOR A JUDGMENT DECLARING THAT, AS THE PENTHOUSE WAS AN "OWNER OCCUPIED UNIT," IT WAS EXEMPT FROM RENT STABILIZATION COVERAGE

The Purpose and Statutory Framework of the J-51 Program

In the year 1955, the New York State Legislature enacted Real Property Tax Law (RPTL) § 489. This law authorized cities to promulgate local laws which would provide tax incentives to multiple dwelling owners for rehabilitating their properties or converting them from commercial to residential use (*Roberts v Tishman Speyer Properties, LP*, 62 AD3d 71, 75 [1st Dept]; *affd* 13 NY3d 270 [2009]). Thereafter, the City of New York (the City) adopted Administrative Code § J51-2.5, now Administrative Code § 11-243, which offers real property tax exemptions and abatement benefits as incentive for various rehabilitation and conversion projects (*id.*). In furtherance of its purpose to encourage the creation of affordable and safe housing, Administrative Code § 11-243 (i) (1) provides that the benefits of the J-51 program are limited to the owners of buildings that are subject to rent stabilization, rent control or the Private Housing Finance Law. Specifically, Administrative Code § 11-243 (i) (1) states, in pertinent part:

> i. The benefits of this section shall not apply:
>
> (1) ... to any existing dwelling which is not subject to the provisions of the emergency housing rent control law or to the city rent and rehabilitation law or to the city rent stabilization law or to the private housing finance law or to any federal law providing for supervision or regulation by the United States department of housing and urban development.

The J-51 program mandates that buildings receiving tax benefits are subject to rent stabilization during the benefit period. However, the application of said rent regulation is

limited. To that effect, Administrative Code § 11-244 provides that "owner occupied units" are not subject to rent stabilization. Specifically, Administrative Code § 11-244 (d) (ii) states, in pertinent part:

> d. During the period of tax exemption or abatement pursuant to this section, each of the following shall be a condition precedent to the continuation of the exemption and/or abatement:
>
> * * *
>
> (ii) all dwelling units, except owner occupied units, shall be subject to the emergency housing rent control law or the local housing rent control act or the tenant protection act.

Here, the parties do not dispute that Jason served as the net lessee of the building. As such, pursuant to Rent Stabilization Code (RSC) § 2520.6 (i), Jason was an "owner" of the building. RSC § 2520.6 (i) defines an owner as "[a] fee owner, lessor, sublessor, assignee, net lessee, or a proprietary lessee of a housing accommodation in a structure or premises owned by a cooperative corporation or association ... or any other person or entity receiving or entitled to receive rent for the use or occupation of any housing accommodation, or an agent of any of the foregoing."

As a result, pursuant to Administrative Code § 11-244, which exempts from rent stabilization owner-occupied units, the penthouse was exempt from rent stabilization during the J-51 benefits period. In addition, pursuant to Administrative Code § 11-243 and § 26-505, as the building was subject to rent stabilization solely by virtue of receiving tax benefits under the J-51 program, the building ceased to be subject to rent stabilization when the J-51 tax benefits expired in the year 1992.

Thus, plaintiff is entitled to partial summary judgment declaring that the penthouse was owner-occupied. Accordingly, the penthouse was exempt from rent stabilization during the J-51

benefits period pursuant to Administrative Code § 11-244, which exempts from rent stabilization owner-occupied units.

It should be noted that defendant Julia argues that, as she was a named tenant on the original lease and the lease renewals in her own right, and as she was never an owner, she obtained rent stabilization rights independently of Jason.

Plaintiff argues that as Julia is Jason's wife, and thus, she is a member of Jason's "immediate family," pursuant to RSC § 2520.6 (n), she is not entitled to rent stabilization rights independent of Jason. However, the relationship of Julia to Jason is not relevant to the discussion of whether the penthouse unit is subject to rent stabilization. To this effect, as Administrative Code § 11-244 provides that "owner" occupied units do not become subject to rent stabilization during the period of tax exemption, the statute regulates the rent stabilization status of the unit itself and not of the individuals who reside therein. Accordingly, as the penthouse was occupied by Jason, as the net lessee, and thus, the owner of the building, for the entire tax exemption period, the unit was exempt from rent stabilization under the express terms of said statute.

Julia also argues that the penthouse never became deregulated upon the expiration of the J-51 benefits, because the penthouse lease did not contain requisite notice to the effect that it would become deregulated when the J-51 benefit period ended. Administrative Code § 26-504 (c) provides that units in buildings receiving the tax benefits under Administrative Code § 11-243 or § 11-244 remain subject to rent stabilization until the first vacancy following the expiration of tax benefits, unless the lease and each renewal lease thereof provides the requisite notice that the apartment will become deregulated when the J-51 benefit period expires (*Roberts*

v Tishman Speyer Properties, LP, 62 AD3d at 71). The policy behind Administrative Code § 26-504 (c) is to protect *bona fide* tenants from being evicted without notice from buildings receiving J-51 benefits.

However, although the purported penthouse lease in this case did not possess the requisite deregulation notice, as required by Administrative Code § 26-504 (c), Jason, as an owner who clearly had knowledge of the facts, and Julia, as his wife, were not the type of *bona fide* tenants this law was intended to protect. In any event, the penthouse was not subject to rent stabilization in the first place because it was owner-occupied during the J-51 period.

Moreover, as coverage under a rent regulatory scheme is a matter of statutory right and cannot be conferred or created by waiver or estoppel, rent stabilization rights to the penthouse could not be conferred simply because the penthouse lease lacked a deregulation notice (*Wilson v One Ten Duane Street Realty Company*, 123 AD2d 198, 200 [1st Dept 1987]; *see also 546 West 156th Street HDFC v Smalls*, 43 AD3d 7, 12 [1st Dept 2007]). "Equitable estoppel does not operate to create rights otherwise nonexistent; it operates merely to preclude the denial of a right claimed otherwise to have arisen [internal quotation mark and citation omitted]" (*id.*).

Julia also argues that, upon the expiration of the J-51 benefits in 1992, the penthouse continued to be subject to rent stabilization, because it was a newly created residential unit in a building that was already subject to the rent stabilization law (*see Roberts v Tishman Speyer Properties, LP*, 62 AD3d at 77). To this effect, Julia asserts that the penthouse was created in approximately 1986-1987, when the penthouse was reconfigured with the plaintiff's predecessor's consent.

However, while "[t]he RSL expressly acknowledges that a building may be subject to its

provisions for more than one reason and states that when both J-51 and another basis concurrently require rent stabilization, the expiration of the J-51 benefits has no effect on the other" (*Id.*), here, the building and all of its units therein were subject to rent stabilization solely by virtue of the building's receipt of J-51 benefits. As such, the penthouse's rent-stabilized status ceased to continue after the expiration of the J-51 benefits.

WHETHER PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON ITS THIRD CAUSE OF ACTION, BECAUSE, PURSUANT TO RSC § 2520.11 (i) (2), THE PENTHOUSE CEASED BEING SUBJECT TO RENT STABILIZATION UPON JASON AND JULIA'S OCCUPANCY OF THE PENTHOUSE

Plaintiff also argues that when Jason and Julia took possession of the penthouse, the penthouse ceased to be subject to rent stabilization under the owner occupancy exemption provisions of the Rent Stabilization Code (RSC). RSC § 2520.11 (i) (2) governs the effect of owner occupancy on premises subject to rent stabilization. This section provides that a housing accommodation is exempt from rent stabilization coverage when "the remaining portion of such dwelling is occupied by the owner or his or her immediate family." Here, as discussed previously, pursuant to RSC § 2520.6 (i), Jason, as net lessee, is considered an owner. In addition, pursuant to RSC § 2520.6 (n), a wife is considered to be "immediate family." Accordingly, the penthouse became exempt from rent regulation coverage when Jason, as owner, and Julia, as his immediate family, occupied the penthouse.

Although Julia asserts that she had rent stabilization rights independent of Jason, as discussed previously, because the penthouse was owner-occupied, it was exempt from the RSC. Thus, pursuant to RSC § 2520.11 (i) (2), plaintiff is entitled to summary judgment on its third cause of action seeking a judgment declaring that when Jason and Julia took possession of the

penthouse, it was no longer subject to rent regulation.

WHETHER PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON ITS FIRST CAUSE OF ACTION AS THE DOCTRINE OF MERGER OF ESTATES RENDERS THE PURPORTED PENTHOUSE LEASE A NULLITY AS A MATTER OF LAW

"The general rule at law with respect to merger of estates, that when a greater estate and lesser estate meet in the same person, *without the existence of an intermediate estate*, the lesser is merged or drowned in the greater [one]" (*Krasner v Transcontinental Equities, Inc.*, 70 AD2d 312, 319 [1st Dept 1979]). "There must always be two parties to a contract and a promise to pay or a guaranty of a payment ceases to be a contract when the promisor becomes the owner of his own promise" (*Persky v Bank of America National Association*, 261 NY 212, 219 [1933] [Court held that the lease which petitioner executed himself was unenforceable]; *Canandaigua National Bank & Trust Co. v Commercial Credit Corporation*, 285 App Div 7, 10 [4th Dept 1954]).

In the event that the merger of estates doctrine were to apply to the instant case, once Jason leased the penthouse to himself, the purported penthouse lease merged into the Master lease. Thereafter, when the Master lease expired in April of 2008, Jason's lesser interest under the purported penthouse lease, which merged into his greater interest under the Master lease, also expired in April of 2008.

However, as set forth by Julia, a review of the September 1, 1987 lease (the 1987 lease) between 22 CPS Management and she and Jason reveals that the 1987 lease addressed the issue of merger. The 1987 lease stated, in pertinent part:

> It is the intention of the parties hereto that the estate and tenancy created by this lease shall be, and shall at all times remain, separate and distinct from all other estates or tenancies held by the tenant herein and shall not be merged therein

(Plaintiff's Affirmation in Opposition, Exhibit F, September 1, 1987 lease, at 19).

Thus, plaintiff is not entitled to summary judgment on its first cause of action seeking a declaration that the doctrine of merger of estates renders the purported penthouse lease a nullity as a matter of law. In any event, as the penthouse was not subject to rent stabilization on the ground that the unit was owner-occupied, as discussed previously, it is not necessary to determine whether or not Jason's purported interest in the penthouse lease merged with his interest in the penthouse under the Master lease, as this issue is now moot. Thus, plaintiff is not entitled to summary judgment on its first cause of action seeking a declaration that the doctrine of merger renders the purported penthouse lease a nullity as a matter of law.

WHETHER THE COURT SHOULD GRANT PLAINTIFF SUMMARY JUDGMENT AGAINST JULIA ON THE SIXTH CAUSE OF ACTION FOR USE AND OCCUPANCY

Initially, it should be noted that, due to the instant dispute regarding the amount of rent to be paid, plaintiff has not accepted Julia's payments of rent since April of 2008. "[A]n occupant's duty to pay the landlord for its use and occupancy of the premises is predicated upon the theory of quantum meruit" (*Eighteen Associates, LLC v Nanjim Leasing Corporation*, 257 AD2d 559, 560 [2d Dept 1999]). "The award of use and occupancy during the pendency of an action or proceeding 'accommodates the competing interests of the parties in affording necessary and fair protection to both,' and preserves the status quo until a final judgment is rendered'" (*MMB Associates v Dayan*, 169 AD2d 422, 422 [1st Dept 1991], quoting *Eli Haddad Corporation v Redmond Studio*, 102 AD2d 730, 731 [1st Dept 1984]).

Julia maintains that plaintiff is barred from collecting use and occupancy for the subject premises, because the building is being used in violation of the building's certificate of occupancy. To that effect, Julia asserts that plaintiff has used 19 of the building's 21 residential

units for commercial purposes since 2006. As such, she asserts that her use and enjoyment of the subject premises has been substantially affected by this allegedly illegal use. In addition, Julia alleges various other hazardous rent-impairing conditions, which allegedly affect her use and occupancy of the penthouse. As such, Julia requests that, in the event that the court grants plaintiff's motion for summary judgment on its use and occupancy claim, the amount of such use and occupancy be set at the rent under the last lease between the parties, and not at the value of the apartment on the free market. In addition, Julia requests that the payment should be conditioned upon plaintiff curing the various alleged hazardous conditions.

In order to maintain the *status quo* until a final judgment is rendered, plaintiff is entitled to summary judgment in plaintiff's favor on its sixth cause of action as against Julia for rent or use and occupancy from April 2008 to date. Since the penthouse is exempt from rent regulation, after a proper hearing, the amount of the money judgment for plaintiff shall be calculated according to the current market rate for the penthouse. However, a hearing is ordered to determine whether or not any rent-impairing violations do, in fact, exist, so that the amount of the money judgment due from Julia to plaintiff can be properly calculated.

WHETHER PLAINTIFF'S FIFTH CAUSE OF ACTION AS AGAINST DEFENDANT CARTER FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

Pursuant to CPLR 3211 (e), a motion to dismiss, based upon CPLR 3211 (a) (7), for failure to state a cause of action upon which relief may be granted, may be made at any time subsequent to joinder of issue. In determining a CPLR 3211 (a) (7) motion, the test is whether the challenged cause of action has been sufficiently stated within the four corners of the challenged pleading (*Frank v Daimler Chrysler Corporation*, 292 AD2d 118, 120-121 [1st Dept

2002]). The court's role is to "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Here, plaintiff has failed to state a cause of action sounding in breach of the implied covenant of good faith and fair dealing as against defendant Carter. Under New York law, within every contract is an implied covenant of good faith and fair dealing (*see 511 West 232nd Owners Corporation v Jennifer Realty Company*, 98 NY2d 144, 153 [2002]). This covenant is breached when a party acts in a manner that deprives another party to the contract of a right "to receive the fruits of the contract" (*id.*). A claim for breach of the implied covenant is thus a claim for breach of contract (*Boscorale Operating, LLC v Nautica Apparel, Inc.*, 298 AD2d 330, 331 [1st Dept 2002]). An essential element of any breach of contract claim is privity under the contract between the plaintiff and the defendant (*Seaver v Ransom*, 224 NY 233, 237 [1918]).

Initially, it should be noted that plaintiff asserts that the complaint does not assert a cause of action for breach of the implied covenant as against defendant Carter in the first place. Carter argues that, as the complaint asserts a claim for breach of the implied covenant as against "defendants," in general, it is unclear as to whether said claim was, in fact, also asserted against it.

In any event, as put forth by Carter, the contract that was allegedly breached is identified in the complaint as the Master lease, which was originally entered into by Jason and Western. The only defendants that plaintiff alleges were parties to the Master lease were Jason, 22 House, LLC and 22 CPS LLC. As a result, plaintiff has not alleged the essential privity element of its breach of the implied covenant of good faith and fair dealing as against Carter. Thus, Carter is

entitled to summary judgment in its favor on that part of its cross claim which seeks to dismiss plaintiff's fifth cause of action for breach of the implied covenant of good faith and fair dealing as against it.

WHETHER PLAINTIFF IS ENTITLED TO AN ENTRY OF DEFAULT AS AGAINST DEFENDANT CARTER ON ITS FOURTH CAUSE OF ACTION FOR RECOVERY OF CHATTEL

Plaintiff maintains that, since the Master Lease expired on April 3, 2008, Jason, his agents and successors and Carter have failed to turn over to plaintiff certain books and records relating to the operation of the building during the term of the Master lease. Plaintiff seeks an entry of a default judgment against defendant Carter, declaring that plaintiff is the rightful owner of said books and records and directing Carter to turn over the same.

CPLR 3215 (a) provides, in pertinent part:

> When a defendant has failed to appear, plead or proceed to trial in an action reached and called for trial, ... the plaintiff may seek a default judgment against him ... Where the case is not one in which the clerk can enter judgment, the plaintiff shall apply to the court for judgment.

Defendant Carter cross moves, pursuant to CPLR 2005 and 3212 (d), for an order vacating its inadvertent default in answering the amended summons and complaint in this action, and permitting Carter to answer and appear in this action.

CPLR 2005 states in pertinent part:

> Upon an application satisfying the requirements of subdivision (d) of section 3012 or subdivision (a) of rule 5015, the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure.

CPLR 3012 (d) states in pertinent part:

> Upon application of a party, the court may extend the time to appear or plead, or

> compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.

The burden is on the party seeking relief from default to provide a reasonable excuse and to demonstrate merit to its claims and/or defenses (*Navarro v A. Trenkman Estate, Inc.*, 279 AD2d 257, 257 [1st Dept 2001]; *Mediavilla v Gurman*, 272 AD2d 146, 148 [1st Dept 2000]). It is within the court's discretion to determine whether the proffered excuse and statement of merit are sufficient (*id.*).

Here, defendant Carter has not appeared in this action and over 30 days have elapsed since the service of the amended complaint, as required under CPLR 3012 (c), nor has it made a motion with respect to the complaint within the 30-day time limit. Carter blames inadvertent and unintentional oversight as the reason for its failure to answer the complaint in a timely manner. To this effect, Carter claims that it had assumed that 22 CPS, LLC's attorneys were also representing Carter, and that, only upon further discussions with these attorneys, was their representation of Carter clarified. Those attorneys maintain that, if they had been aware of this oversight, they would have simply added Carter to the same answer that they submitted on behalf of Jason and 22 House, LLC, as the answer and defenses for Carter would have been identical to those of these defendants.

Although plaintiff asserts that Carter's excuse for its default was insufficient, as Carter's claim of law office failure was not supported by a "detailed and credible" explanation (*see Campbell-Jarvis v Alves*, 68 AD3d 701, 701 [2d Dept 2009]; *Brown v Baghdady*, 226 AD2d 1137, 1137 [4th Dept 1996] [Court noted that "[a] vague and unsubstantiated claim of law office failure" will not suffice]), Carter's cross-moving papers sufficiently set forth adequate detail as to

the reason for the default.

Plaintiff also asserts that Carter has not demonstrated a meritorious defense. However, as discussed previously, and as argued by Carter, plaintiff has not established the essential privity element of its breach of the implied covenant of good faith and fair dealing claim as against Carter. In addition, it has not been sufficiently established that Carter was ever involved with the management of the building, or that it ever had access to or possession of the books and records at issue in this case. It should also be noted that plaintiff cannot make any claim of prejudice resulting from Carter's default. In any event, as Carter asserts, plaintiff cannot claim any prejudice resulting from Carter's default, as this action is still at a very early pleading stage, no discovery has been exchanged and Carter's defenses are similar to those of Jason and 22 House, LLC. In addition, plaintiff was immediately given notice of Carter's inadvertent failure to answer.

Thus, plaintiff is not entitled to an entry of a default judgment as against defendant Carter on its fourth cause of action for recovery of chattel. In addition, this court grants Carter permission to answer and appear in this action.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of plaintiff 22 CPS Owner LLC's motion, pursuant to CPLR 3212, for partial summary judgment in its favor on its second and third causes of action is granted; and it is further

ORDERED and **DECLARED** that the penthouse apartment in the subject building located at 22 Central Park West, New York, New York is exempt from rent stabilization

coverage, is granted, and the second and third causes of action are hereby severed and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the part of plaintiff's motion, pursuant to CPLR 3212, for partial summary judgment on its sixth cause of action for use and occupancy as against defendant Julia Carter is also granted, and a hearing is to be held regarding the amount to be paid by Julia to plaintiff for use and occupancy, and the motion is otherwise denied; and it is further

ORDERED that upon all the papers and proceedings heretofore had, the court refers the issue of use and occupancy to a Special to hear and determine (CPLR 4317 [b]) (*see Keeney v Keeney*, 297 AD2d 606 [1st Dept 2002]); and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[2] upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place the issue of use and occupancy on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that defendant Carter Management Corporation's cross motion, pursuant to CPLR 2005 and 3212 (d), for an order vacating its default in answering the amended summons and complaint, and permitting it to answer and appear in this action, as well as for an order, pursuant to CPLR 3211 (a) (7), dismissing plaintiff's fifth cause of action sounding in breach of the implied covenant of good faith and fair dealing as against it is granted, and this cause of action is severed and dismissed as against this defendant, and the Clerk of the Court shall enter judgment accordingly; and it is further

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[2]Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel; and it is further

ORDERED that the action shall continue.

DATED: June 14, 2010

ENTER:

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).