[* 1]
SCANNED ON 1/20/2011

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

PRESENT: **PART** 2

Index Number : 115256/2009

BIKMAN, CHARLA

VS

595 BROADWAY ASSOCIATES

Sequence Number : 004

VACATE DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE 11/24/04

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ **were read on this motion to/for** _____

	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

FILED
JAN 20 2011
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 1/14/11

Louis B. York
J.S.C.

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 2

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CHARLA BIKMAN,

Plaintiff,

-against-

Index № 115256/09

595 BROADWAY ASSOCIATES,

Defendant.

----------X

LOUIS YORK, J.:

This is a motion by plaintiff pro se Charla Bikman (C. Bikman) for an order permitting her to renew her motion to vacate this court's May 19, 2010 orders and the resulting judgment entered on June 2, 2010. Plaintiff commenced this action seeking a declaratory judgment declaring an October 31, 2003 money judgment against her to be null and void ab initio. This court granted a dismissal of her complaint as well as other related relief following C. Bikman's failure to appear for oral argument on May 19, 2010.

The underlying dispute involves a loft located in the Soho section of Manhattan. C. Bikman's sister, Minda Bikman (or, decedent), was the sole tenant-of-record of the loft from 1974 until her death on February 19, 1997. At the time of her death, decedent's monthly regulated rent was $646.71, which she paid to defendant 595 Broadway Associates (595 Broadway or Landlord), the owner and landlord of the building. Without disclosing the fact of her sister's death, or the fact that she was now occupying the loft, C. Bikman handled the monthly rent obligations following Minda Bikman's death. These monthly rent checks were drawn on a joint survivorship account which the sisters had opened approximately two months prior to Minda Bikman's death, and evidently, Bikman paid 595 Broadway by "submitting rent

checks bearing her sister's printed name only and what purported to be her deceased sister's signature" (*Matter of Bikman*, 304 AD2d 162, 163 [2003]).

This subterfuge continued until sometime in or about 1999, when the Landlord discovered that its tenant-of-record had died, and it commenced a summary holdover proceeding against Bikman. The proceeding, which was brought in New York City Civil Court's Housing Court (*see* 22 NYCRR § 208.42 [a]; RPAPL §§ 701, 745 [1], 745 [2] and 753 [2]), under index No. L & T 54819/99, sought eviction and possession of the loft, an award of use and occupancy in the amount of $3,500 per month, with interest from January 1, 1999, plus costs and disbursements. As an attorney at law, then-licensed to practice in the State of New York, C. Bikman chose to represent herself in that matter. She opposed the Landlord's petition and served an answer together with the following six affirmative defenses: (1) the housing court lacks subject matter jurisdiction; (2) Landlord fails to state a cause of action; (3) as sister of the tenant of record, Bikman has succession right to the subject premises; (4) Landlord waived its alleged rights; (5) breach of the warranty of habitability; and (6) Landlord has not complied with Article 7-C of the Multiple Dwelling Law in that it has not made the necessary repairs and alterations to obtain a Certificate of Residential Occupancy.

The proceeding was assigned to housing court Judge Howard Malatzky, before whom C. Bikman moved for an order quashing 595 Broadway's subpoenas, and 595 Broadway cross moved for an order striking C. Bikman's affirmative defenses (lack of subject matter jurisdiction, failure to state a cause of action, waiver, succession, breach of warranty of habitability and noncompliance) and/or for summary judgment in its favor. Judge Malatzky issued an order and judgment on May 11, 1999, finding that C. Bikman: (1) failed to establish a right of succession in

that she did not provide any proof that she had resided in the loft with her sister for two years prior to her sister's death; (2) did not provide proof of petitioner's "waiver" in that she was unable to prove that 595 Broadway cashed any rent checks it received in Minda Bikman's name *after* it learned of its tenant-of-record's death; and (3) failed to provide evidence sufficient to either substantiate the balance of her affirmative defenses or to forestall her eviction from the loft and award possession to petitioner. His decretal language provided as follows:

> ORDERED, that the Clerk is to enter a Judgment of Possession in favor of Petitioner [Landlord] and against Respondent [Bikman]. The Judgment of Possession is to provide for the issuance of a warrant of eviction forthwith, the execution of the warrant stayed through May 10, 1999 [*sic*].
> ORDERED, that Respondent's affirmative defenses are dismissed with prejudice; and it is further
> ORDERED, that Petitioner, 595 Broadway Associates . . . is awarded a money judgment and recovery in favor of Petitioner and against Respondent Charla Bikman . . . in the amount of $3,233.55 [representing] . . . all outstanding use and occupancy at the rate of $646.71 per month due from December 1998 through April 30, 1999 and that the clerk is directed to enter a money judgment accordingly.

C. Bikman immediately sought an order staying the enforcement of Judge Malatzky's order/judgment and warrant of eviction pending her appeal to the Appellate Term. By order dated May 20, 1999, the Appellate Term granted the stay on the conditions that C. Bikman serve and file her notice of appeal and then perfect her appeal by the September 1999 term; pay the judgment ($3,233.55) by June 2, 1999, and the May and June use and occupancy ($646.71 per month) to the Landlord, without prejudice; and to continue "to pay for accruing use and occupancy at said rate, without prejudice to petitioner moving in the trial court for an appropriate amount due for use and occupancy."

595 Broadway, thereupon, brought a motion in the trial court for a determination as to use

and occupancy. At a hearing on the issue before Judge Malatzky on June 8, 1999, C. Bikman argued that the court should stay the use and occupancy hearing/determination until after her appeal was decided. The judge denied her request, noting that Appellate Term had sent it back to him to conduct a use and occupancy hearing (Aff. in Opp., Exhibit N, at 19). C. Bikman responded by pointing out that "It [the Appellate Term] just said housing part. It didn't say to you specifically." Judge Malatzky, nevertheless, set the hearing down for June 29, 1999 stating:

> Listen to me. Listen to me. Listen. Listen. I may decide to send it to a trial part. I may. I don't' know. But right now it's before me for the [use and occupancy] hearing. We have some discretion. I mean, some judges send out all of their compliance hearings. I had a whole bunch of them. I was sending them out. The Administrative Judge told me, why don't you keep a few. So I've been keeping a few.
> Whether I keep this one, I don't know. I'm just telling you it is on in this part, 2:15, June 29. I'll see you then" (*id.* at 21).

The use and occupancy hearing was eventually held on July 30, 1999 before another Civil Court/Housing judge, Judge Laurie Lau. The Landlord's evidence consisted of testimony pertaining to current rents for other lofts with similar square footage, footprint, and location, and C. Bikman's evidence consisted of testimony pertaining to the loft's fixtures, leaks and mice infestation(s). At the conclusion of the hearing, Judge Lau determined that: (1) $4,800 represented a fair market, use and occupancy monthly rent for the loft: (2) $4,800 was the proper monthly rent for the period between December 1998 and June 1999; (3) payment of the new use and occupancy rate ($4,800) was prospective, commencing in July 1999; and (4) C. Bikman was under no obligation to pay the difference between the $646.71 and $4,800 for any month prior to July 1999 until such time as the Appellate Term ordered her to do so. Judge Lau issued her order on July 30, 1999.

595 Broadway moved, by notice of motion, dated August 18, 1999, for an order vacating the Appellate Term's stay of enforcement of the order/judgment and execution of the warrant of eviction and for other relief, and C. Bikman cross-moved for an order staying Judge Lau's order of July 30, 1999, and for an order enlarging her time to perfect her appeal. By order, dated September 9, 1999, the Appellate Term resolved the motion and cross motion to the extent of maintaining the stay on the condition that C. Bikman continue to pay use and occupancy in the amount of $646.71 per month, without prejudice, and perfect her appeal by the November 1999 term.

On or about June 23, 2000, the Appellate Term issued its decision, affirming, as modified, Judge Malatzky's May 11, 1999 order and final judgment. The Appellate Term affirmed Judge Malatzky's finding that C. Bikman did not demonstrate entitlement to succeed to her sister's tenancy in the loft, and modified the finding as to use and occupancy rent for December 1998 (it had been paid). C. Bikman's appeal to the Appellate Division, First Department resulted in an order confirming the Appellate Term's June 23, 2000 order, and a determination that her remaining arguments were unavailing (*see 595 Broadway Assoc. v Bikman*, 287AD2d 285 [1st Dept 2001][1]). It is undisputed that C. Bikman vacated the loft in or about 2001.

C. Bikman and 595 Broadway returned to Housing Court's trial part where they, once again, argued about use and occupancy before Judge Lau. In her decision and order, dated January 29, 2002, Judge Lau reaffirmed prior orders setting fair market use and occupancy for

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[1]The First Department recalled and vacated its prior order in this matter, dated June 5, 2001 (284 AD2d 117 [1st Dept 2001]).

the loft at $4,800, and calculated that unpaid use and occupancy through July 2001 totaled $129,393.70 plus statutory interest. The resulting money judgment, dated February 5, 2002, awarded $159,483.90 in favor of 595 Broadway. C. Bikman's motion to resettle, renew and reargue was denied on March 19, 2002.

C. Bikman again appealed Judge Lau's decision, order and judgment to the Appellate Term, arguing, among other things, that the Landlord was, and is, precluded from seeking a use and occupancy at a rate exceeding $646.71, as a result of Judge Malatzky's decision to strike from his May 11, 1999 order, a paragraph containing language ordering a fair market use and occupancy hearing. In an order filed on September 2, 2003, the Appellate Term granted C. Bikman's appeal only to the extent of modifying the period of the use and occupancy award, and remanded the matter for recalculation of the judgment award and prejudgement interest, and affirmed the judgment in all other respects. The Appellate Term reasoned that C. Bikman

> was not entitled to succeed to occupancy of the Article 7-C loft unit upon the death of her sister, the record tenant . . . [and that because she] was not a lawful tenant of a regulated apartment, landlord's recovery for use and occupancy was not limited to the prior regulated amount (see, Weiden v 926 Park Avenue Corp., 154 AD2d 308). Moreover, in light of the Loft Board's finding of abandonment, of which we take judicial notice, the unit was no longer subject to the continued regulation under Article 7-C . . . There is sufficient record evidence . . . to support the hearing court's finding of $4,800 per month as fair rental value . . . [but] [w]e limit the use and occupancy award to the period commencing May 1999, since use and occupancy for December 1998 through April 1999 was previously included in the final judgment entered May 11, 1999 - subsequently affirmed by this court and the Appellate Division - and was not subject to further modification or review.

C. Bikman's motion for leave to appeal the decision and order of the Appellate Term was denied by the First Department, and on or about October 31, 2003, Judge Lau granted and adjudged a money judgment in favor of 595 Broadway and against C. Bikman:

> in the sum of $112,138.83 together with prejudgment interest in the sum interest from the date of the decision to the date of entry of the judgment, in the sum of $5,253.50, and interest from the date that the judgment was entered through September 30, 2003, in the sum of $16,617.85, all for a total judgment of $145,346.88, and that the Petitioner [595 Broadway] have execution therefor.

C. Bikman's motion for a stay of the enforcement of the (October 31, 2003) money judgment pending its appeal was denied by the Appellate Term on November 21, 2003. Her motion for leave to appeal the order of the Appellate Term denying her a stay was denied by the First Department on February 26, 2004.

In the interim, on the recommendation the Departmental Disciplinary Committee for the First Judicial Department, C. Bikman was suspended from the practice of law in the State of New York, for a period of 18 months, effective May 5, 2003. The disciplinary action and suspension stemmed from findings that C. Bikman's conduct, with respect to the loft, was fraudulent and in violation of the Code of Professional Responsibility Disciplinary Rules 1-102 (a) (4) and (7) (*see Matter of Bikman*, 304 AD2d 162, *supra*).[2]

In 2006, C. Bikman, pro se, commenced an action in federal court (United States District Court for the Souther District of New York), naming Judges Fern Fisher, Laurie Lau, Lucindo Suarez, William McCooe and Phyllls Gangel-Jacob as defendants (Judicial Defendants). The premise of her federal action was that the Judicial Defendants infringed upon her constitutional rights in the manner in which they addressed, decided, and/or monitored the civil court litigation involving the loft. The Judicial Defendants moved for a dismissal of the complaint. Oral argument was held on February 2, 2007, after which, by order dated February 15, 2007, the Hon.

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[2]It appears that, as of this motion, C. Bikman is still suspended from the practice of law in the State of New York (Aff. in Opp., Exhibit 3).

Harold Baer, Jr., dismissed the complaint for lack of subject matter jurisdiction. Upon appeal to the US Court of Appeals for the Second Circuit, the judgment of the District Court was affirmed on March 17, 2009 (*Bikman v Fisher*, 316 Fed Appx 13 [2009]).

Also in 2006, C. Bikman, as Administrator of the Estate of Minda Bikman, pro se, commenced an Article 78 proceeding under New York County index No. 113398/06, seeking an order annulling the January 9, 2003 order of the New York City Loft Board (Loft Board), under order No. 2770. By that order, the Loft Board deemed the loft "abandoned," and it denied the decedent's estate's request for compensation for the value of the fixtures and improvements which the decedent had installed and which were left in the loft at the time C. Bikman surrendered the keys in 2001. By order, dated March 28, 2007, the Hon. Emily Jane Goodman granted the petition to the extent of remanding the matter back to the Loft Board for an appraisal of decedent's fixtures and improvements, and "ADJUDGED that pending the sale of the fixtures and improvements, the rent for the [loft] remains regulated pursuant to Article 7-C of the Multiple Dwelling Law." Justice Goodman's judgment was affirmed on appeal (*Matter of Bikman v New York City Loft Bd.*, 57 AD3d 448 [1st Dept 2008], *affd* 14 NY3d 377 [2010]).

C. Bikman then commenced the instant action, pro se, by filing a summons and complaint on or about October 29, 2009, seeking a judicial declaration that the October 31, 2003 money judgment is null and void. Issue was joined by service of 595 Broadway's answer with counterclaims, on or about November 24, 2009. Following service of C. Bikman's answer to the counterclaims, 595 Broadway served a motion, under motion sequence 001, for a summary judgment dismissal of the complaint, and for relief in the form of sanctions and an injunction. C. Bikman opposed the motion, cross-moved for a summary judgment dismissal of the

counterclaims, and served a separate motion, by order to show cause, under motion sequence 002, for an order transferring and reassigning this matter to Justice Goodman, who, as indicated above, presided over her Article 78 proceeding.

The motions were calendared for oral argument on May 19, 2010. As a result of C. Bikman's failure to appear, at 10:15 A.M., this court issued orders with respect to motion sequences 001 and 002. By these orders, this court granted defendant's motion to the extent of dismissing the complaint and "requiring the defendant [*sic*] to seek the approval of this Justice before bringing any further motions in this action," and denied plaintiff's motion to transfer and refer this action to Justice Goodman. The resulting judgment, with costs and disbursements, was filed with the office of the New York County Clerk on June 2, 2010.[3]

By notice of motion dated June 9, 2010, C. Bikman moved for an order vacating the orders and judgment. Due to confusion caused by the inadequacy of the papers submitted by both parties with respect to the motion to vacate, this court denied plaintiff's motion without prejudice to renew her motion "annexing all relevant papers and providing a clear procedural history" (*see* Order, filed August 25, 2010). However, this court denied that portion of C. Bikman's motion that sought to vacate this Court's denial of her motion to refer the matter to Justice Goodman. The court also found that her request for a transfer lacked merit and noted that the Article 78 proceeding, which did not involve identical parties, had been resolved some three-and-a half years ago, and that there is, currently, no related case pending in Justice Goodman's part.

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[3]C. Bikman filed a notice of appeal to the First Department with respect to this court's orders dated May 19, 2010.

With respect to her motion, it is well settled that a party seeking to vacate a default must demonstrate both a reasonable excuse for the default and that there is merit to the action itself (CPLR 5015 [a] [1]; *Gray v B. R. Trucking Co.*, 59 NY2d 649, 650 [1983]).

To this end, C. Bikman explains that the reason that she failed to appear for oral argument is that she did not have actual notice that it had been scheduled, and details the proceedings in Housing Court, the Appellate Term, the First Department and in Federal Court in order to show that Judge Lau had no authority to issue the October 31, 2003 judgment. Based upon her analysis and assessment of these proceedings, C. Bikman concludes, and asks this court to conclude, that the May 11, 1999 judgment of Judge Malatzky is the only valid judgment pertaining to the loft (despite having tried to have it reversed based on, among other things, lack of subject matter jurisdiction) and that the October 31, 2003 judgment of Judge Lau setting fair market use and occupancy in the amount of $4,800 and ordering her to pay use and occupancy in that amount for the period between May 1999 and September 30, 2003, must be rendered null and void ab initio for, among other things, lack of subject matter jurisdiction.

595 Broadway's opposition is based on the fact that C. Bikman is, or was, an attorney with extensive knowledge of how to find out when a motion is scheduled for oral argument, and that all of her arguments have been previously made and rejected by the courts.

Considering C. Bikman's history of litigation with respect to the loft, and the fact that she had submitted written opposition, a cross motion, and a separate motion for a transfer of this action to Justice Goodman's part, plaintiff's default was out of character and unexpected. The fact is, that despite her mischaracterizations of the prior decisions, orders and judgments rendered in this matter, there is no evidence that her default on May 19, 2010 was willful or deliberate (*see*

Cacciatore v City of New York, 49 AD3d 271 [1st Dept], *lv denied* 11 NY3d 705 [2008]).

However, C. Bikman has failed to demonstrate that there is merit to her claim that the October 31, 2003 judgment should be declared null and void ab initio because: (1) the court lacked the authority to award fair market use and occupancy for residential premises which lack a certificate of occupancy; (2) it purports to be a final judgment when it was second in time to the final judgment rendered by Judge Malatzky, and therefore, a nullity; and (3) housing court lacked subject matter jurisdiction to award fair market use and occupancy after she vacated the premises.

With the exception of the Federal Court action, plaintiff has argued lack of subject matter jurisdiction at each procedural juncture and has been unsuccessful each time. Within the City of New York, the Housing part of the Civil Court is granted jurisdiction over summary proceedings to recover possession of residential premises, to remove tenants and to render judgment for any rents due (NY City Civ Ct Act §§110, 204; 22 NYCRR § 208.42 [a]; RPAPL §§ 701, 745 [1], 745 [2] and 753 [2]). As a judge of the Civil Court assigned to the housing part, Judge Malatzky had subject matter jurisdiction to resolve issues pertaining to C. Bikman's eviction from decedent's loft, and subject matter jurisdiction to determine that she owed use and occupancy at the rate of $646.71 per month for the period of December 1998 through April 30, 1999 (modified by the Appellate Term to account for rent received for the month of December 1998). The Appellate Term also directed that a hearing be held in housing court with respect to an appropriate fair market use and occupancy for the loft. That matter was ultimately assigned to Judge Lau and the resulting October 31, 2003 judgment pertained to the court's assessment of an appropriate fair market use and occupancy for the loft and the time period to which the increased

rent applied. Plaintiff's assertions notwithstanding, these judgments are not inconsistent, and they do not represent final judgments as to the same subject matter.

Furthermore, and as indicated above, C. Bikman abandoned her appeal of this order/judgment. As a result, not only did Judge Malatzky's order/judgment of May 11, 1999 become law of the case as to the matters it resolved, but Judge Lau's judgment of October 31, 2003 became law of the case as to the matters it resolved.

Accordingly, plaintiff has not met her burden under CPLR 5015 (a) (1), and her inability to obtain a favorable outcome does not entitle C. Bikman to litigate, once again, the same issues previously decided. It is, therefore, appropriate to enjoin her from bringing any further actions in the New York State Unified Court System against 595 Broadway with respect to these issues and claims without prior approval of the appropriate administrative judge or justice (*see Vogelgesang v Vogelgesang*, 71 AD3d 1132, 1134 [2nd Dept 2010]).

Accordingly, it is

ORDERED that the motion by plaintiff to vacate this court's orders of May 19, 2010 and judgment entered on June 2, 2010, is denied.

Dated: January 14, 2011

ENTER:

J.S.C.

LOUIS B. YORK
J.S.C.