

Cvek v Pavicic

2011 NY Slip Op 30462(U)

February 28, 2011

Supreme Court, New York County

Docket Number: 102069/09

Judge: Eileen A. Rakower

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

HON. EILEEN A. RAKOWER

PART 15

Index Number : 102069/2009

CVEK, JOSEPH

vs
PAVICIC, IVAN

Sequence Number : 006

DISCHARGE CONSERVATOR/COMM.

INDEX NO. 102069/09

MOTION DATE

MOTION SEQ. NO. 006

MOTION CAL. NO.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

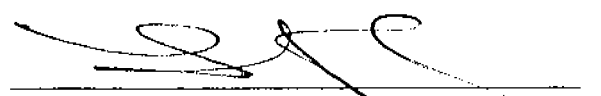
2

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 2/28/11



HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 15

-----X
JOSEPH CVEK,

Plaintiff,

I n d e x
No.102069/09

- against -

Mot. Seq.:006

**DECISION/
ORDER**

IVAN PAVICIC, R. KILCH WINDOW AND DOOR SYSTEM,
MANUFACTURERS AND TRADERS TRUST COMPANY,
BOARD OF MANAGERS OF THREE WEST THIRTEEN
CONDOMINIUM,

“JOHN DOE,” RICHARD ROE,” JANE DOE,” “CORA
COE,” “DICK MOE,” and “RUBY POE,” the six defendants
last named in quotation marks being intended to designate
tenants or occupants in possession of the herein described
premises or portions thereof, if any there be, said names being
fictitious, their true names being unknown to Plaintiff,

Defendants.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

Alfred F. Sica was appointed receiver in this foreclosure action by Order of this Court, dated April 20, 2009. Mr. Sica was unable to act as receiver so by Order dated August 12, 2009, a successor receiver, Lawrence Edward Koester, was appointed. Plaintiff now moves for an order discharging the successor receiver and his surety, pursuant to CPLR §6405, directing Mr. Koester to prepare an accounting of all rents collected and expenses paid, permitting plaintiff to collect rents due on the premises, and directing defendant Ivan Pavicic to turn over any and all security deposits he is currently holding regarding the premises, pursuant to RPAPL §1325. Plaintiff seeks

to have Mr. Koester discharged based on a deed in lieu of foreclosure agreement which was executed by plaintiff and Pavicic on October 15, 2010, transferring title of the premises to plaintiff.

Pavicic opposes the motion to the extent plaintiff seeks the turning over of all security deposits. Pavicic asserts that, prior to the appointment of the receiver, the only two tenants located at the premises defaulted on their rents, requiring Pavicic to apply the security deposits towards the tenants' rent. Pavicic asserts that such application is authorized by the respective leases of the tenants, which Pavicic annexes to his opposition papers. Plaintiff does not submit papers in reply.

CPLR §6405 states:

Upon motion of any party or upon its own initiative, the court which appointed a receiver may remove him at any time.

Pursuant to §1325(2-a):

Where a receiver has been appointed, the order of appointment shall direct the owner or lessee of the mortgaged premises to turn over to the receiver all security deposits received by such owner or lessee and shall further direct the receiver to hold the security subject to such disposition thereof as shall be provided in a further order of this court to be made and entered in the foreclosure action, in accordance with the provisions of section 7-105 of the general obligations law.

General Obligations Law §7-105 states, in relevant part:

Any person, firm or corporation . . . whether the owner or lessee of the property leased, who or which has or hereafter shall have received from a tenant or licensee a sum of money . . . as a deposit or advance of rental as security . . . shall, upon conveying such property . . . or upon the judicial appointment and qualifying of a receiver in an action to foreclose a mortgage . . . at the time of the delivery of the deed or instrument or assignment or within five days thereafter, or within five days after the receiver shall have qualified, deal with the security deposit as follows:

Turn over to his or its grantee, assignee, or to the receiver in the foreclosure action, or to the purchaser at the foreclosure sale if a receiver shall not have been appointed and qualified the sum so deposited, and notify the tenant or licensee by registered or certified mail of such turning over and the name and address of such grantee, assignee, purchaser or receiver . . .

2. . . . [t]he provisions of this section shall not apply if the agreement between the landlord and tenant or licensee is inconsistent herewith.

3. Any failure to comply with this section is a misdemeanor.

Although violation of GML §7-105 permits enforcement by the Attorney General, it also creates a private right of action. (see *Gerel Corp. v. Prime Eastside Holdings, LLC*, 12 AD3d 86[1st Dept. 2004]). In order to establish a prima facie case under GML §7-105, plaintiff must show that “the defendant, in his capacity as landlord, collected security deposits from the tenants; that a receiver was judicially appointed; and that the receiver *made a demand for the security deposits that was not complied with by the landlord* . . . the defendant may nonetheless raise as a defense that he “no longer possessed the funds at the time the demand was made and that the funds were used in a manner provided for in the lease, albeit inconsistent with the statute.”(*People v. Elliott*, 65 NY2d 446[1st Dept. 1985])(emphasis added).

It is undisputed that Pavicic collected security deposits from his tenants, and that a receiver was judicially appointed. However, plaintiff is silent as to whether or not a demand for the security deposits was ever made by the receiver, who does not appear here. Thus, plaintiff has not established a prima facie case under GML §7-105, for return of the deposits. Even if it were shown that a demand was made, and Pavicic had refused such demand, the lease agreements submitted here raise issues of fact regarding whether “the funds were used in a manner provided for in the lease.” Thus, the portion of plaintiff’s motion seeking to have Pavicic turn over security deposits is denied. The remainder of the motion is granted and plaintiff is directed to settle order, in accordance with this decision.

Wherefore it is hereby

ORDERED that the portion of the motion seeking to have Ivan Pavicic turn over any and all security deposits in his possession, is denied; and it is further

ORDERED that the remainder of relief requested is granted, and plaintiff shall settle order, in accordance with this decision, on notice to all parties.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: FEBRUARY 28, 2011



EILEEN A. RAKOWER, J.S.C.