

De Lage Landen Fin. Servs., Inc. v Gordon
2012 NY Slip Op 31137(U)
April 25, 2012
Sup Ct, NY County
Docket Number: 100840/12
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

4/27/12

PRESENT: _____
Justice

PART _____

Index Number : 100840/2012
DE LAGE LANDEN FINANCIAL SERVICES
vs.
GORDON, JACQUELINE
SEQUENCE NUMBER : 001
TURNOVER PROCEEDING

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____
Answering Affidavits — Exhibits _____ **No(s).** _____
Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

FILED
APR 26 2012
CLERK OF SUPREME COURT - CIVIL

FILED

APR 27 2012

Dated: 4/25/12

NEW YORK
COUNTY CLERK'S OFFICE CK, J.S.C.

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
DE LAGE LANDEN FINANCIAL SERVICES, INC.,

Petitioner,

Index No. 100840/12

-against-

JACQUELINE GORDON AND NINA IZHAKY,

Respondents.
-----X

FILED

APR 27 2012

HON. CYNTHIA KERN, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Petition and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner De Lage Landen Financial Services, Inc. ("DLL") commenced this special proceeding pursuant to CPLR 5225 and/or 5227 seeking a judgment directing respondent Jacqueline Gordon to remit half of all rents she pays to respondent Nina Izhaky to petitioner instead or, in the alternative, directing respondent Ms. Izhaky to pay to DLL one half of the rent she receives from respondent Gordon, or, failing either of those, to appoint a receiver to collect said rents, to satisfy in part a judgment DLL has against Ms. Izhaky's husband, Daniel Izhaky. Respondents interpose a counterclaim seeking a CPLR 5239 proceeding. For the reasons set forth more fully below, the petition is granted in part and denied in part and respondents' counterclaim is denied.

The relevant facts are as follows. DLL entered a judgment in the amount of \$1,562,928.91 against Daniel Izhaky in a matter entitled *De Lage Landen Financial Services, Inc. v Tribeca Technology Solutions, Inc. and Daniel Izhaky a/k/a Dan Izhaky*, Supreme Court, New York County, Index Number 650532/2010. Judgment debtor Daniel Izhaky ("Dan") and his wife, respondent Nina Izhaky ("Nina") own a condominium known as 101 Warren Street, Apartment 620, New York, New York, (the "Condominium") as tenants by the entirety. Nina and Dan are in the midst of divorce proceedings. Nina and the couple's two minor children occupy Apartment 610 at the same building and partially occupy the Condominium. The other portion of the Condominium has been rented to respondent Gordon.

Respondent Gordon and Dan entered into a lease for the Condominium for a term beginning on August 17, 2010 and ending on July 31, 2011 ("Lease One"). When Lease One expired, Gordon entered into another lease for the same Condominium, but this time with Nina Izhaky, for the period of August 1, 2011 through August 31, 2013 ("Lease Two"). Both leases appear to be for the entirety of the Condominium even though the parties assert that Nina Izhaky and the couple's two children partially occupy the unit.

On or about November 3, 2010, DLL provided the City Marshal of the City of New York with a property execution for service upon the tenant of the Condominium in order to levy upon any and all rents due to respondent Nina Izhaky from respondent Gordon. As a result, respondent Gordon paid one month's rent, consisting of \$6,500.00 to the City Marshall, which DLL received after deducting the marshal's fees. DLL alleges that additional monies were due but does not appear to seek any previously paid rent in this proceeding.

DLL is entitled to an order directing Nina Izhaky to remit half the future rent she receives

from Gordon pursuant to Lease Two to DLL but is not entitled to such an order with regard to Gordon. It is undisputed that Nina and Dan Izhaky own the Condominium as tenants by the entirety. Accordingly, they are each entitled to one-half the rents and profits from the property. *See Brevilus v Brevilus*, 72 A.D.3d 999 (2nd Dept 2010); *Niehaus v Niehaus*, 141 A.D. 251 (1st Dept 1910). Therefore, even though the landlord on Lease 2 is listed as Nina only, Dan is still entitled to half the rent paid pursuant to Lease 2. Because DLL has an unsatisfied judgment against Dan, it is entitled to that half of the rent until the judgment is satisfied. However, this court cannot order respondent Gordon to remit half her rent to DLL directly because “future rents are not leviable or attachable under CPLR 5225 and 5227.” *Oil City Petroleum Co. v Fabac Realty Corp.*, 70 A.D.2d 859 (1st Dept 1979).

Respondents’ argument that petitioner is estopped from receiving half of the rent because it received the full amount of rent for one month when there was a lease between Dan and Gordon is without basis. “The doctrine of... estoppel against inconsistent position precludes a party from taking a position in one legal proceeding which is contrary to that which he or she took in a prior proceeding, simply because his or her interests have changed.” *Festinger v Edrich*, 32 A.D.3d 412, 413 (2nd Dept 2006); *see Environmental Concern v Larchwood Constr. Corp.*, 101 A.D.2d 591, 593 (2nd Dept 1984). In the instant case, the principle of estoppel does not apply as petitioner never asserted a position inconsistent with its present one in a prior proceeding.

Accordingly, the petition is granted to the extent that Nina Izhaky is ordered to remit half of the rent she receives each month pursuant to Lease Two until the judgment against Dan Izhaky is satisfied or the lease is terminated. The counterclaim seeking a determination pursuant to

CPLR 5239 determining the priority of rights to the rental payments is denied as moot as the court has made a determination herein as to who is entitled to the rental payments as between the parties to this proceeding. This constitutes the decision, order and judgment of the court.

Dated: 4/25/12

Enter: cg
J.S.C.

FILED

APR 27 2012

NEW YORK
COUNTY CLERK'S OFFICE