

**City of New York v Taylor**

2012 NY Slip Op 32489(U)

September 24, 2012

Supreme Court, New York County

Docket Number: 400100/12

Judge: Joan M. Kenney

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

PRESENT: KENNEY  
Justice

PART 8

THE CITY OF NEW YORK

INDEX NO. 400100/12

MOTION DATE \_\_\_\_\_

- v -  
ROBERT TAYLOR, ET AL.

MOTION SEQ. NO. 02

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 \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

PAPERS NUMBERED  
**FILED**  
SEP 28 2012  
NEW YORK  
COUNTY CLERKS OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION.**

Dated: 9/28/12

Joan M. Kenney  
**JOAN M. KENNEY** S.C.

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 8

-----X  
THE CITY OF NEW YORK,

Plaintiff,

Index # 400100/12

-against-

ROBERT TAYLOR, 561 LENOX AVE. LLC, THE  
LAND AND BUILDING KNOWN AS 100 WEST  
139<sup>TH</sup> STREET, TAX BLOCK 2007, TAX LOT  
36, COUNTY OF NEW YORK, CITY AND STATE  
OF NEW YORK, "JOHN DOE" AND "JANE DOE,"  
fictitiously named parties, true names  
unknown, the intended being the owners,  
lessees, operators or occupants of  
Apartment 28A within the building  
located at 100 West 139<sup>th</sup> Street, New  
York, New York, and any person claiming  
any right, title or interest in the real  
property which is the subject of this  
action,

DECISION & ORDER

**FILED**  
**SEP 28 2012**  
**NEW YORK**  
**COUNTY CLERKS OFFICE**

Defendants.

-----X

**Kenney, J., M., J.**

Counsel for Plaintiff:

Attorney for Defendant:

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561 Lenox Ave. LLC  
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EMTC  
East Elmhurst, New York 11370

Papers considered in review of this motion:

**Papers:**  
Order To Show Cause, Affirmation,  
and Exhibits,  
Affirmation in Opposition, and Exhibits  
*Pro Se* Opposition Papers

**Numbered:**  
1-7  
8-11  
12

In this public nuisance action, 561 Lenox Avenue LLC, the land  
owner of the property (the landlord), located at 100 West 39<sup>th</sup>  
Street, New York, New York, moves to vacate a stipulation, dated

January 17, 2012, which was executed in connection with the settlement of the City of New York's (the City), allegations regarding Apartment 28A, (the apartment) and Robert Taylor (Taylor), the tenant of said apartment.

**FACTUAL BACKGROUND**

On or about January 10, 2012, this action was commenced with the alleged service of an Order To Show Cause (OSC) and the pleadings attendant thereto upon the defendants. The OSC sought, *inter alia*, injunctive relief pursuant to Sections 7-709, 7-710 and 7-11 of the Administrative Code of the City of New York and CPLR 6301. Plaintiff, the City of New York (the City) sought to enjoin and restrain defendants from "us[ing], occup[ying] Apartment 28A (the apartment) within the building located at 100 West 139<sup>th</sup> Street, Tax Block 2007, Tax Lot 36, New York, New York."

The pleadings alleged that as a result of an undercover New York City Police Department (NYPD) investigation, that the apartment was being "used for the purpose of selling and/or possessing illegal drugs." According to the affidavits supporting the OSC, on July 21, 2011 and August 1, 2011, two separate controlled drug purchases were made at the apartment by a confidential informant working with NYPD detectives. Field tests were apparently conducted immediately, and the tests resulted in positive findings for cocaine. On August 11, 2011, the NYPD executed a search warrant in the apartment and recovered, among

other things, drug paraphernalia, with residue, and three marijuana cigarettes. An individual was arrested and charged with violating Penal Law Section 220.03 and 221.05.

On or about January 17, 2012, the landlord and the City executed a stipulation of settlement (the stipulation). The stipulation stated in pertinent part that the City and the landlord acknowledged that when the instant action was commenced, the landlord had legal possession of the apartment. According to the landlord, the tenant, Robert Taylor (Taylor) was evicted, pursuant to a default judgment and warrant of eviction, on or about January 3, 2012. Taylor never appeared in the Housing Court proceeding.

The bases for terminating Taylor's tenancy that resulted in the warrant of eviction, were illegal subletting of the apartment; Taylor's allegedly illegal use of the premises, which also constituted an alleged public nuisance, resulting in alleged material breaches of the terms of the lease between the landlord and Taylor.

On or about March 1, 2012, Taylor, (while incarcerated), brought a post-eviction OSC in the Housing Part. The basis for Taylor's application was that he never received notice of the dispossess proceeding because he had lost his mailbox key therefore he did not receive the pleadings in the eviction case. The landlord's current application before this Court seeks to vacate the stipulation based upon the parties mutual mistake. The legal

rationale for this argument is that in the event Taylor is restored to possession by the Housing Court, the landlord would be subject to the very harsh enforcement penalties recited in the stipulation.

Taylor's response to the instant application is to merely state in an unsworn, *ex parte* letter submitted to the Court<sup>1</sup>, that counsel to the landlord was aware of his incarceration and because of said incarceration he was unaware that he had been evicted, notwithstanding that Taylor stated that he was aware the apartment had been re-let.

The landlord argues it is entitle to have the stipulation vacated based upon a mutual mistake made on the part of both parties, e.g., because neither party anticipated the possibility of Taylor being restored to the premises. The City argues in opposition, that the landlord's application is both premature and moot. The City contends that the application is premature because Taylor has not been restored to the apartment by the Housing Court<sup>2</sup>, and moot because the apartment has been re-let pursuant to a the terms of a written lease that does not expire until April 30, 2013.

Although it is generally better to err on the side of caution, it seems that at this juncture the landlord and the City have

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<sup>1</sup>There is no indication in the "letter" that copies were mailed to the other parties to this lawsuit.

<sup>2</sup>The City does not address the fact that this Court stayed Taylor's application pending a determination of this application.

already produced very persuasive evidence that Taylor allegedly engaged in illegal activity while in legal possession of the apartment, e.g., the property vouchered after execution of the criminal search warrant and the predicate support for the warrant itself (the two controlled drug purchases from the apartment). It has already been determined between parties that the apartment was being used for illegal purposes, and because this Court "so Ordered" the stipulation, the stipulation becomes an order of the Supreme Court.

Res judicata and collateral estoppel generally deal with preclusion after judgment: res judicata precludes a party from asserting a *claim* that was litigated in a prior action (see, *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]) (emphasis added), while collateral estoppel precludes relitigating an *issue* decided in a prior action (see, *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 649 [1993]).

It is highly unlikely that the Housing Court will run afoul of the Court of Appeals when it cautioned that "a court should not ordinarily reconsider, disturb or overrule an order in the same action of another court of co-ordinate [or superior] jurisdiction" (see, *Martin v City of Cohoes*, 37 NY2d, at 165 [1975]).

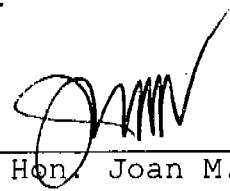
Consequently, the motion is denied without prejudice in the event the Housing Court attempts to restore Taylor to possession of the apartment.

Accordingly, it is

ORDERED that the motion is denied.

Dated: September 24, 2012

E N T E R:



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Hon. Joan M. Kenney

**FILED**  
SEP 28 2012  
NEW YORK  
COUNTY CLERKS OFFICE