

**City of New York v Crotona VII Hous. Dev. Fund Corp.**

2012 NY Slip Op 33885(U)

March 23, 2012

Supreme Court, Bronx County

Docket Number: 250105/12

Judge: Kibbie F. Payne

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
OF THE BRONX COUNTY: PART 1**

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THE CITY OF NEW YORK,  
Plaintiff,

-against-

**Decision/Order**  
Index No. 250105/12

CROTONA VII HOUSING DEVELOPMENT FUND CORP.,  
THE LAND AND BUILDING KNOWN AS 1728 CROTONA  
PARK EAST, TAX BLOCK 2940, TAX LOT 29,  
COUNTY OF BRONX, CITY and STATE OF NEW YORK;  
"JOHN DOE and "JANE DOE". Fictitiously  
named parties; True name unknown, the  
intended being the owners, lessees,  
operators or occupants of apartment #3B  
within the building located at 1728 CROTONA  
PARK EAST, Bronx, New York; property which is  
the subject of this action,

Defendants.

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KIBBIE F. PAYNE, J.:

Counsel for Raymond Sowell moves by order to show cause for  
an order denying a preliminary injunction, or in the alternative,  
if a default was issued and ordered vacating the default judgment  
granting a preliminary injunction and vacating the temporary  
preliminary injunction, temporary restraining order and temporary  
closing order.

Plaintiff, City of New York (City), commenced this action on  
February 1, 2012 with an ex parte temporary closing order and  
temporary closing order, pursuant to the Nuisance Abatement Law  
and Article 63 of the CPLR. Pursuant to the execution of a  
search warrant, a search of Apartment #3B, at 1728 Crotona Park  
East, Bronx, New York, was conducted and inside that apartment

the police seized 39 zip lock bags of crack cocaine, 36 zip lock bags of marijuana, seven glassine envelopes of heroin and one scale with drug residue. The February 1, 2012 order to show cause contained a preliminary injunction with a closing order of the apartment, the prohibition of removal of fixtures and furniture used in conducting the nuisance, the prohibition of operating or permitting the apartment's use for the criminal sale or possession of controlled substances, and the prohibiting of allowing the sale or possession of control substances pursuant to Sections 7-709, 7-710 and 7-711 of the New York City Administrative Code.

On the return date February 3, 2012, plaintiff's counsel appeared before the court and the City's request for a preliminary injunction was granted upon default. However, between the hours of 11:30A.M. and 12:00P.M., Raymond Sowell and his sister Lisa Sowell arrived in the courtroom. Counsel for the plaintiff then returned to the courtroom. Mr. Sowell identified himself as the tenant of apartment 3B, and claimed he was late because he did not know where the courthouse was located. In order to permit Mr. Sowell to retain an attorney, this court adjourned the case to February 9, 2012. The preliminary injunction, however, was continued. On February 27, 2012, a decision was rendered, upon default of the "tenant-defendant" ordering the temporary restraining order of February 1, 2012 to

remain in effect during the pendency of this matter. However, on February 29, another justice of this court signed an order to show cause reopening the matter and restoring Raymond Sowell and Lisa Sowell to possession of the subject apartment. That order to show cause was returnable before the undersigned on March 12, 2012. The landlord and owner, defendant Crotona VIII Housing Development Fund Corp. (Crotona VIII) filed opposing papers to the February 29, 2012 order and counsel for plaintiff, who did not submit any papers, orally joined in Crotona VIII' opposition to the application of Mr. Sowell.

Mr. Sowell and his sister by affidavit claim that the apartment has never been used to sell drugs, and that on February 9, 2012 they requested additional time in order to retain an attorney. Mr. Sowell advised the court that he was interviewed by The Bronx Defenders and he hoped to have them represent him in this action. A review of the court records indicates that the case was adjourned to February 23, 2012. The Sowells, without an attorney, returned to court on February 24, 2012. They now claim they were shocked that the case was on the February 23, 2012 court calendar because it was their understanding that they were scheduled to return to court on February 24, 2012. In support of the application, both Mr. Sowell and his sister claim their brother, Andrew Sowell had a key to the subject apartment and used the third bedroom when he came to visit. Mr. Sowell asserts

that Andrew Sowell pleaded guilty to the criminal charges stemming from the search of the apartment on August 1, 2011.

On February 28, 2012, The Bronx Defenders filed a notice of appearance that this law firm had been retained as attorneys for Mr. Sowell. Counsel for Mr. Sowell argues that Mr. Sowell has demonstrated excusable default pursuant to CPLR 5015 and that Mr. Sowell's February 23, 2012 default should be vacated.

Pursuant to New York City Administrative Code §7-701 a civil action may be maintained to abate a public nuisance occurring on premises, and the City may bring an action to permanently enjoin a public nuisance and "the person or persons conducting, maintaining or permitting the public nuisance from further conducting, maintaining or permitting the public nuisance (New York City Administrative Code § 7-706). A permanent injunction embodied in a final judgment is only available after a trial (see *Moore v Ruback's Campers Assn.*, 85 AD3d 1220, 1221; *Ryan v McLean*, 209 AD2d 913, 914). CPLR 5015 permits a party to open a default judgment, based upon excusable default and a meritorious defense. Generally a party moving to vacate his default must establish a reasonable excuse for the delay or default and must further establish that his claim has merit (see *Assignment v Medasorb Technologies, LLC*, 50 AD3d 342).

The February 9, 2012 court calendar in IA Part 27 indicates that the plaintiff, landlord and tenants were present and the

case was adjourned to February 23, 2012. A review of the record reveals there was no valid excuse for the default. I am unpersuaded that the movant has satisfied the prerequisite requirement to obtain relief from his default. Prior to February 23, 2012, Mr. Sowell was granted two adjournments in this matter. The court does not accept Mr. Sowell's self serving affidavit of a different adjourn date.

In order to obtain a preliminary injunction the plaintiff must establish a likelihood of success on the merits, irreparable harm in the absence of an injunction and a balancing of the equities (see CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840; *Sync Realty Group, Inc. v Rotterdam Ventures, Inc.* 63 AD3d 1429, 1430). In this case the plaintiff has met its burden of proof by clear and convincing evidence. On August 1, 2011, an occupant of the subject premises possessed controlled substances to wit 39 zip lock bags of crack cocaine, 36 zip lock bags of marijuana and seven glassine envelopes of heroin. The fact that Mr. Sowell's defense is predicated upon his assertion that he had no knowledge of the illegality is irrelevant. "The court's jurisdiction on the application for preliminary injunctive relief is invoked by the existence of the nuisance at the premises. Thus the jurisdiction is in rem." (*The City of New York v Partner 91 L.P.*, 277 AD2d 164). The tenant's assertion that the brother may have pleaded guilty to the

criminal charges relating to the contraband of the controlled substances is insufficient to warrant the denial of the preliminary injunction. It is undisputed that the contraband was recovered at the premises inside the apartment.

Accordingly pending this action, the City's application for a preliminary injunction is granted and it is

ORDERED that the defendants, including Raymond Sowell and Lisa Sowell, are enjoined from the use and/or occupancy of apartment #3B within the building located at 1728 Crotona Park East, Tax Block 2940, Tax Lot 29, Bronx, New York for any purpose whatsoever and that said premises shall be closed and that the New York City Police Department shall take all steps necessary to effectuate this closing order; and

ORDERED defendants are enjoined from removing or in any other manner interfering with the furniture, fixtures and movable property used in conducting, maintaining or permitting the nuisance complained of herein; and

ORDERED that the defendants are enjoined conducting, maintaining, operating or permitting the subject premise to be used or occupied for the criminal sale or possession of a controlled substance, or for any other activity in violation of Articles 220 and/or 221 of the New York Penal Law; and

ORDERED that the defendants are enjoined from conducting or maintaining a criminal nuisance with the subject premises by

allowing the sale or possession of a controlled substance; the sale or possession of drug paraphernalia; and the criminal possession of marijuana, all of which creates nuisance pursuant to Section 240.45(2) of the New York Penal Law.

Dated: March 23, 2012  
Bronx County



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KIBBIE F. PAYNE  
J.S.C.