

**300 CPW Apts. Corp. v Wells**

2013 NY Slip Op 32612(U)

October 17, 2013

Supreme Court, New York County

Docket Number: 154658/2012

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. Justice

PART

Index Number : 154658/2012
300 CPW APARTMENTS CORP.
vs.
WELLS, DIANE
SEQUENCE NUMBER : 009
VACATE STAY/ORDER/JUDGMENT

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):

Dated: 10/17/13

CYNTHIA S. KERN J.S.C.

- 1. CHECK ONE: CASE DISPOSED
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  
300 CPW APARTMENTS CORP.,

Plaintiff,

Index No. 154658/12

-against-

**DECISION/ORDER**

DIANE WELLS, ESTATE OF CONSTANCE JOYCE  
CHENEY, "JOHN DOE" and "JANE DOE",

Defendants.

-----x  
HON. CYNTHIA S. KERN, J.S.C.

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

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmations in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

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Defendant Diane Wells ("Ms. Wells" or "defendant") has brought the present motion to vacate the default judgment entered against her on May 17, 2013, and for an order pursuant to CPLR § 1201, § 1202(a)(2) and § 1203, appointing a guardian ad litem to protect her rights and interests during this litigation. Plaintiff cross-moves for an order requiring Ms. Wells to pay plaintiff the monthly maintenance fees, special assessments, rent, additional rent and all other monthly charges, including the monthly cost for electricity usage, attributable to Apartment 9B, on the first of each month retroactive to August 1, 2012, for use and occupancy of the apartment, until such time as Ms. Wells vacates the Apartment. For the reasons stated below, both defendant's

motion and plaintiff's cross-motion are denied.

The relevant facts and procedural history are as follows. Plaintiff is the owner of the cooperative apartment building located at 300 Central Park West, New York, New York (the "Building"). In or around July of 2009, Joyce Cheney, the then owner of the shares appurtenant to Apartment 9B in the Building, requested that her daughter, defendant Diane Wells, be added to the Proprietary Lease (the "Lease") as co-owner of the apartment. Plaintiff conceded to the request on the condition that Ms. Cheney and Ms. Wells sign an escrow agreement with plaintiff wherein they agreed to deposit a sum no less than 12 months worth of maintenance fees as security for the payment of the maintenance and other charges relating to the apartment. Ms. Cheney has since passed away and her shares in the apartment have passed to her Estate.

By July 1, 2012, Ms. Wells' had failed to pay several monthly maintenance fees, special assessments, rent, additional rent and other charges when they became due and owing to the plaintiff and was indebted to plaintiff in the amount of \$18,629.15. On or about July 2, 2012, plaintiff sent Ms. Wells a notice to cure, which gave her ten days to cure her default and pay the amount due. In the notice to cure, plaintiff instructed Ms. Wells that failure to make payment would result in the amount due being removed from the escrow account, which she would then have to replenish immediately so that the account contained a minimum of \$51,289.80, as required under the escrow agreement. Defendant failed to cure and on July 13, 2012, plaintiff sent defendant a notice terminating her Lease effective July 18, 2012. Ms. Wells neither attempted to cure her default nor vacate the apartment at that time and continues to reside in the apartment to date without paying rent.

On or about July 18, 2012, plaintiff commenced the instant holdover proceeding seeking an

order ejecting Ms. Wells from the Apartment and to recover monetary damages as a result of Ms. Wells' defaults. Ms. Wells failed to timely submit an answer to plaintiff's complaint and on or about October 16, 2012, plaintiff moved for default judgment. Ms. Wells opposed plaintiff's motion and cross-moved to vacate her default, compel plaintiff to accept her late answer and for summary judgment. By Decision and Order dated December 21, 2012, this court denied plaintiff's motion and granted the portion of Ms. Wells' cross-motion seeking to vacate her default and directed plaintiff to accept her untimely answer on the ground that Ms. Wells had provided a reasonable excuse for her default.

Thereafter, this court scheduled several conferences to ascertain the status of the case and to set a discovery schedule. However, Ms. Wells continuously failed to appear at these conferences. Accordingly, by Order dated January 17, 2013, this court granted default judgment against Ms. Wells pursuant to the Uniform Rules for New York State Trial Courts § 202.27(a) on the ground that Ms. Wells failed to appear for two compliance conferences scheduled for July 23, 2013 and July 30, 2013, and directed that an inquest be held on the issue of damages. An inquest was thereafter held on February 14, 2013, before the Honorable Ira Gammerman, J.H.O., which Ms. Wells did not appear at or offer any opposition thereto. On March 1, 2013, plaintiff moved for an order confirming the Report issued by J.H.O Gammerman, which awarded plaintiff damages in the amount of \$229,197.70. Plaintiff's motion was unopposed and by Amended Decision and Order dated May 17, 2013 (the "May Decision"), this court confirmed the Report and directed the Clerk to enter judgment in favor of plaintiff and against defendant in the amount of \$229,197.70, and in favor of plaintiff and against defendant ejecting Ms. Wells from the Apartment.

Ms. Wells now moves for an order vacating the May Decision and appointing her a guardian

ad litem. In the event that this court grants the motion to vacate the default, plaintiff cross-moves for an order granting it use and occupancy from August 12, 2012 up until the date Ms. Wells vacates the apartment.

The court first turns to Ms. Wells' motion to vacate her default. It is well settled that a party seeking to vacate a default judgment under CPLR § 5015(a)(1) must establish a reasonable excuse for the default and a meritorious defense to the underlying action. *Mercado v. Allstate Life Ins. Co.*, 193 A.D.2d 476 (1<sup>st</sup> Dept 1993); *Arred Enterprises Corp. v. Indemnity Ins. Co.*, 108 A.D.2d 624 (1<sup>st</sup> Dept 1985). Here, Ms. Wells' motion to vacate her default is denied as she has failed to establish a meritorious defense to the instant action. The only argument put forth by Ms. Wells to support her claim of a meritorious defense to this action is that a conditional limitation for non-payment of rent in a residential apartment lease, like the one present in this action, is void as against public policy and as such plaintiff's action cannot stand. However, such argument is insufficient as a matter of law as the facts present in this case cannot support such a finding.

No court has ever held that a conditional limitation in a proprietary lease providing for forfeiture of the tenancy upon the nonpayment of rent is void as a matter of law. See *205 West End Avenue Owners Corp. v. Adler*, NYLJ November 2, 1990, pg. 21 col. 4; *61 East 72<sup>nd</sup> Street Corp. v. Zimberg*, 161 A.D.2d 542 (1<sup>st</sup> Dept 1990). To the contrary, the primary case relied upon by defendant, *61 East 72<sup>nd</sup> Street Corp.*, holds that such a provision would be against public policy in instances when it denies the tenant the right to cure. See *61 East 72<sup>nd</sup> Street Corp.*, 161 A.D.2d at 545. Specifically, in that case, simultaneous with the commencement of the holdover proceeding, respondent tenants effected a cure of their non-payment of rent by tendering a cashier's check for all arrears, plus a guarantee of future payment. *Id.* However, notwithstanding the cure, petitioner

landlord proceeded with the action asserting a conditional limitation in the lease, the breach of which was non-curable by the continuous nature of the tenants' default in non-payment of rent. *Id.* In upholding the dismissal of the action, the First Department stated that such a contractual provision would be against public policy because it denies the tenant any right to cure. *Id.* The Second Department, on the other hand, has stated that there is absolutely no authority for the "contention that a conditional limitation in a proprietary lease providing for forfeiture of the tenancy upon the nonpayment of rent is void as against public policy." *Goldcrest Realty Co. v. 61 Bronx Riv. Rd. Owners, Inc.*, 83 A.d.3d 129, 134 (2<sup>nd</sup> Dept 2011).

In the present case, whether applying the First or Second Department case law, it is clear that enforcement of the conditional limitation provision in this instance is not against public policy as Ms. Wells, in stark contrast to the respondents in *61 East 72<sup>nd</sup> Street Corp.*, has been given an unlimited amount of time to cure her default but has failed to do so. Indeed, even on this motion, defendant still fails to give any indication of her intent or ability to cure the default, which was precisely the reason why this court declined to sign the Order to Show Cause brought by plaintiff seeking the same relief sought on this motion. Had Ms. Wells presented such evidence of her intent or ability to cure, the court would have considered such evidence in vacating her default. However, as defendant has failed to do so and there is no bar to a landlord terminating the lease pursuant to a conditional limitation clause when there is a continuous non-payment of rent and no ability to cure, defendant has no meritorious defense to the instant action and her motion to vacate her default and the May Decision must be denied.

As the court has determined that Ms. Wells does not have a meritorious defense to the instant action, the court is not required to make any determination as to whether she has provided a

