

**Village Realty Holdings, Inc. v 135 W. 13, LLC**

2014 NY Slip Op 30713(U)

March 18, 2014

Supreme Court, New York County

Docket Number: 810207/2011

Judge: Carol R. Edmead

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
VILLAGE REALTY HOLDINGS, INC.,

Index No. 810207/2011

Plaintiff,

Sequence #008

-against-

135 WEST 13, LLC, DAREN HERZBERG, CITY OF  
NEW YORK ENVIRONMENTAL CONTROL BOARD,  
CITY OF NEW YORK DEPARTMENT OF FINANCE,  
JOHN DOE No.1 through JOHN DOE NO. 10, the last  
ten names being fictitious and unknown to the plaintiff,  
the persons and parties intended being the tenants,  
occupants, persons or parties, if any, having or claiming  
an interest in or lien upon the premises described herein,

Defendants.

-----X  
HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this foreclosure action, the Temporary Court Appointed Receiver, Roberta Ashkin (the "Receiver") moves for declaratory relief and an order, *inter alia*, removing Kossoff & Unger ("Kossoff") from representing her in an underlying landlord-tenant action.

Defendants 135 West 13, LLC (the "Owner") and Daren Herzberg ("Herzberg") ("defendants") cross move for an order removing the Receiver from this action, to nullify certain actions the Receiver performed, and for a hearing to determine sanctions against the Receiver for actions she undertook.

*Factual Background*<sup>1</sup>

Plaintiff, Village Realty Holdings, Inc. ("plaintiff") commenced this action against defendants to foreclose on a mortgage concerning the Owner's premises located at 135 West 13th

---

<sup>1</sup> The factual background is taken from the parties' moving papers.

Street, New York, New York (the “Premises”).

By way of background, in 2009 the Owner filed an application before the Division of Housing and Community Renewal Office of Rent Administration (“DHCR”) for “Approval to Refuse Renewal of Lease” of tenants Judith Stollerman and Danielle Sandow (the “tenants”) concerning their apartments (#3 and #4) (the “non-renewal proceeding”), which the tenants opposed. Thereafter, in 2010, the Owner filed two holdover proceedings against the tenants alleging that they did not primarily reside in apartment #4 (the “holdover action”). While the holdover action was pending, the tenants appealed previous determinations by the DHCR made in 2007, which held that their apartments would not “revert” from rent stabilization to rent control (the “reversion proceeding”).<sup>2</sup> Kossoff represented the Owner in the non-renewal proceeding, holdover action, and reversion proceeding (See Kossoff’s Aff. In Opp., ¶1).

This mortgage foreclosure action was then commenced, during which the Court appointed the Receiver to collect all rents and institute and prosecute suits to both protect the Premises or collect the rents (see Order of Appointment dated September 28, 2011). The Court later ordered the plaintiff and the Owner to provide the Receiver with information necessary to carry out her duties (see order dated November 15, 2011). Further, defendants’ counsel (Kossoff) was directed to “provide information with respect to the existing landlord-tenant action” by November 17, 2011.

As relevant herein, the Court subsequently ordered, on January 23, 2012, that no “addition of the Receiver as a party to the [holdover] Action is warranted,” and that:

“with respect to the continued prosecution of the Landlord and Tenant eviction [holdover]

---

<sup>2</sup> The Appellate Division, in 2010, held that the apartments do not “revert” to rent control.

proceedings . . . , Receiver shall rely upon the legal representation and advice of Kossoff & Unger . . . currently engaged as counsel by, and/or behalf of Petitioner 135 West 13<sup>th</sup> Street LLC in the [holdover action] . . . [and] that *the Receiver shall remain involved in all aspects of the continued prosecution and trial of the [holdover action], . . . shall be kept apprised timely of all developments and proceedings as same arise, and shall be included and entitled to participate in all aspects to ensure that the Receiver's interests are protected . . . .*" (Emphasis added).

In March 2012, the Owner withdrew the non-renewal proceeding, resulting in an order by the DHCR permitting the tenants to "file a lease violation complaint if the owner fails to issue a new lease." On May 24, 2012, the tenants filed a lease violation complaint alleging that the Owner refused to issue a renewal lease.

Thereafter, a trial in the holdover action was held by Judge Sheldon Halprin on December 10, 2012, and at its conclusion, Judge Halprin dismissed the action (the "holdover dismissal order"), and Kossoff filed a Notice of Appeal dated December 20, 2012.

Consequently, two days later, on December 22, 2012, the Receiver offered a renewal lease to the tenants for two years at \$606.65 per month (which the tenants signed on January 15, 2013 and the Receiver countersigned on January 29, 2013).

On January 11, 2013, Kossoff filed a motion in Civil Court for a stay pending the appeal.

On March 27, 2013 the Rent Administrator of the DHCR issued an "order granting application" and "terminated" the tenants' lease violation proceeding. The Administrator found that the "matter has been resolved" based on the renewal lease issued. In response, on May 1, 2013, Kossoff filed a Petition for Administrative Review ("PAR"), appealing the Rent Administrator's decision, arguing *inter alia*, that there was a pending "non-primary residence" holdover action (previously filed in 2010) against the tenants at the time the lease violation complaint was filed, and that it was improper for the tenants to file the complaint and for the

complaint to be processed in light of the holdover action. Kossoff asserted that the Receiver's issuance of the renewal lease prejudiced the owner's right of redemption, that the issue of whether the tenant was entitled to a rent stabilized lease was pending in the Appellate Term, and that the owner never had notice of the lease violation complaint or proceeding.

Now, in support of her order to show cause, the Receiver contends that under the January 23, 2012 order, Kossoff became her attorney with respect to the holdover action, and was to protect her interests. The Court allowed Kossoff to continue the prosecution of the holdover action on behalf of the Receiver on the condition that Kossoff take direction only from the Receiver, and not the owner, Kossoff keep her apprised of all the events in the holdover action and not act without her authority, and Kossoff protect the Receiver's interests regarding the Premises.

The Receiver asserts that she did not receive a copy of the holdover dismissal order from "her" attorneys, Kossoff (but instead, received it from a third party with a demand for a rent stabilized renewal lease in accordance with the holdover dismissal order, to which the Receiver complied). The Notice of Appeal of the holdover action, motion for a stay pending appeal, and PAR were filed by Kossoff without her advanced knowledge or permission, in violation of the attorney/client relationship and in violation of the January 23, 2013 order. The Receiver did not receive a copy of the motion for a stay. Kossoff identified the Receiver in the PAR filing as "an affected party" and disparaged and criticized the Receiver of her "blatant interference" with the civil litigation, which "prejudice[d] the current owner and severely disable[d]." Kossoff's statements violated this Court's January 20, 2013 order and the attorney/client relationship.

The Receiver argues that Kossoff cannot represent her and the Owner simultaneously,

and take a position that is inconsistent with the actions of the Receiver. Kossoff misunderstands that the Receiver is its client, and not the owner, and thus owes the Receiver its allegiance. The Receiver's role to protect the property and preserve the property until this action is resolved is in direct conflict with the Owner in regards to the legal advice which Kossoff would provide the Receiver.

Kossoff refuses to withdraw as counsel from the holdover action and the PAR, despite the requests by Receiver's counsel, Kucker & Bruh, LLP ("Kucker & Bruh"), and takes the position that it does not represent the Receiver. The representation of the Owner in the PAR is adverse to the Receiver, Kossoff's client, and violates rule 1.7 of the Professional Conduct Rules, which prohibits a lawyer from concurrently representing clients who are adverse to one another.

Consequently, the Receiver seeks a declaration that (1) the Court's January 23, 2012 order directed the Receiver to rely upon the legal representation and advice of Kossoff, and thereafter, Kossoff became the Receiver's attorney with respect to the holdover action; (2) that Kossoff violated the January 23, 2012 order by (a) filing the Notice to Appeal the holdover action, (b) filing the motion to stay pending the appeal of the holdover action, and (c) filing the PAR on behalf of the Owner, each without the Receiver's advice, consent and knowledge; (3) Kossoff is removed from representing the Receiver in the holdover action; (4) Kossoff is required to immediately withdraw the PAR; (5) Kossoff is stayed and enjoined from performing any further legal work with respect to the Premises, and (6) the Receiver's counsel, Kucker & Bruh, shall be awarded attorneys' fees incurred in connection with the instant order to show cause.

In opposition, Kossoff argues that it never represented the Receiver. The January 23,

2012 Order holds that defendant should continue to prosecute the holdover action, and specifically directs the Receiver, who is an attorney, to protect her own interests by accessing Kossoff's files and presenting to Kossoff questions and concerns regarding the holdover actions at no additional charge to the Receiver. The Receiver was provided complete access to Kossoff's files.

Further, the Court's January 23, 2012 order does not resemble an Order of Appointment of counsel pursuant to 22 NYCRR 36. The Court's January 23, 2012 order did not make reference to 22 NYCRR 36 or direct Kossoff to file any documents (with the fiduciary clerk) required of an Article 36 appointee. And, Kossoff filed no such documents.

Kossoff argues that it was retained by the Owner, and Kossoff's representation of the Owner precedes the Receiver's involvement in this action. The Receiver did not enter into any retainer with Kossoff or enter into any attorney-client relationship with Kossoff. And, the Receiver acknowledges that Kossoff cannot ethically represent both the Owner and the Receiver due to their conflicting interests. Indeed, the Receiver engaged Kucker & Bruh to represent her after she and Kossoff previously agreed that Kossoff's representation of her would present a conflict. The Receiver's unilateral assertion that Kossoff is her counsel is insufficient.

Kossoff never consented to be counsel for the Receiver, and never acted as her counsel. Even assuming the Court ordered Kossoff to represent the Receiver, such order does not, of itself, constitute representation. Kossoff remains counsel for the Owner.

Kossoff contends that the Receiver violated the Court's order by directly interfering with the prosecution of the appeal of the holdover action by issuing the unprofitable renewal leases to the tenants while the holdover action against such tenants was pending and being appealed, and

squandering the Owner's investments in recovering apartment #4. Nor does the Receiver have any bond or liability insurance for the period in question.

In support of their cross-motion, defendants (*via* separate counsel Rex Whitehorn) points out that on April 19, 2012, the Receiver served a letter seeking to address the issuance of new leases to the various existing tenants of the Premises. After the Court directed the parties to submit formal responses to the Receiver's April 19, 2012 letter and effectively converted said April 19, 2012 letter into a motion, and after full submission of all argument regarding the April 19, 2012 letter/motion, the Court directed the Receiver to seek such relief by Order to Show Cause. Since April 19, 2012 to present, despite the Court's order, the Receiver never sought formal approval by the Court for the relief demanded in her letter/motion of April 19, 2012.

Defendants argue that contrary to the refusal of the Court to specifically enable the Receiver to issue new leases, subsequent to April 19, 2012, without any notice, motion, request or other communication to the parties and this Court, the Receiver formally negotiated, executed and issued the renewal leases to the various tenants in the Premises.

The January 23, 2012 order did not place conditions on Kossoff in its continued handling of the holdover action; rather the Court placed the burden on Kossoff to handle the holdover claims and if the Receiver wanted information and/or access to the file, all she had to do was ask. No such requests were ever made by the Receiver for such access.

The Receiver was notified on October 11, 2012 and again on December 11, 2012 about certain motions in the holdover action. The Receiver received further notice of Kossoff's involvement when on November 26, 2012, the respondent in the holdover action filed a motion seeking to recover legal fees.

No express permission or authority was required to file any Notice of Appeal, in the holdover action. The Court's January 2012 order expressly acknowledges that Kossoff was "engaged as counsel by and/or on behalf of Petitioner 135 West 13<sup>th</sup> Street LLC in the [holdover] Action"; the Receiver is not a named party in that action.

The Receiver's issuance of the renewal leases materially negatively affect the value of the subject Premises and eliminate the ability of the Owner to continue its appeal of the holdover action altogether.

The Receiver knew or should have known (either through her own experience as a Receiver or based upon advice from her counsel) that any issuance of a renewal lease would render the Appeal moot, and that specific counsel was appointed to handle all matters affecting that proceeding. At no time was the Owner or Kossoff notified of the issuance of renewal leases for these tenants. Thus, the Court is requested to nullify the issuance of renewal leases for the Premises and further direct and/or assist the Owner in the withdrawal of the renewal leases in both the current DHCR proceeding and the holdover action.

A temporary receiver may exercise only such powers as are granted pursuant to CPLR 6401[b]. The Receiver substantially diminished the Owner's ability to redeem the subject mortgage since the ability to sell the Premises has been substantially reduced by the imposition of rent stabilized tenants in said Premises. The interruption of the Owner's right of redemption, based on the two year renewal leases should be considered oppressive and unconscionable conduct on the Court's behalf, as the Receiver is an Officer of the Court and acts solely by and through the authority of the Court.

The Receiver's acts result in an estoppel and may also relieve the Owner of the terms of

the subject mortgage and notes. The renewal leases impede the Owners's right and effort to sell the property to enable the payoff of the underlying mortgage which is the subject of this foreclosure proceeding. The actions of the Receiver in this regard cannot be overlooked and the Receiver should be removed forthwith pursuant to CPLR 6405. The Owner requests a hearing and ability to amend its Answer to argue and prove its damages.

In opposition, the Receiver argues that Kossoff failed to keep her timely advised of developments in the holdover action and failed to provide her with legal advice as to the status of the proceeding. Despite the Court's order, Kossoff continued to represent only the interests of the Owner to the detriment of the Receiver, acting only in what it perceived to be in the best interests of the Owner, not the Receiver and the Premises. And, the Court gave the Receiver express authority to issue the renewal lease in the Order of Appointment, and neither Mr. Whitehorn nor Kossoff advised the Receiver not to issue a renewal lease. The issuance of the renewal lease did not change the regulatory status of the apartment. Kossoff had no authority to file the PAR on the Owner's behalf or represent the Owner in the DHCR proceeding, as the Court's January Order did not mention any DHCR proceeding. After the Receiver was appointed, she became the sole person with the power to manage and act on behalf the Premises and Kossoff failed to obtain her permission to file the PAR. The Receiver requests that if Kossoff is discharged, the Receiver should be permitted to substitute Kucker & Bruh to represent her in the holdover action.

Further, the request to remove Ms. Ashkin as Receiver should be denied, since her issuance of the renewal lease was with the full authority of the Order of Appointment. The Receiver issued the renewal lease after the holdover action was dismissed and acted consistent

with her fiduciary responsibilities as Receiver. And, the Owner is not estopped from contending that the subject apartment is not subject to rent stabilization. Further, defendants failed to meet the high standard of removal of the Receiver.

The Receiver also contends that because defendants refused to withdraw their cross-motion, sanctions should be imposed against defendants. Thus, the Receiver requests attorneys' fees to recover the costs of defending the cross-motion.

In reply, defendants point out that the Receiver previously sought permission to address the issuance of leases back in April 2012 and knew she was unable to do so unless expressly permitted to do so. And, the Receiver's request for legal fees is itself frivolous. Instead, legal fees and costs should be imposed upon the Receiver and her counsel for her unreasonable motion.

#### *Discussion*

As to the Receiver's motion to remove Kossoff, under the January 23, 2012 order, the Court allowed Kossoff to continue the prosecution of the holdover action as counsel for "135 West 13<sup>th</sup> Street LLC," the Owner, under the express premise that the Receiver was to be "*kept apprised timely of all developments and proceedings as same arise.*" In a proceeding to disqualify opposing counsel, in this instance, Kossoff, the burden is upon the one seeking disqualification "because of the strong public policy to allow persons to retain counsel of their choice and because in many cases, as here, disqualification of counsel would cause severe prejudice to the client, who would have to secure new counsel to deal with somewhat complex litigation with the accompanying increased expense and loss of time" (*Macro Cash and Carry Corp. v Berkman*, 81 AD2d 783, 439 NYS2d 22 [1st Dept 1991]).

The Court notes that the Receiver was *not* made a party to the holdover action. Thus, Kossoff did not become her attorney with respect to the holdover action, and was not charged to protect the Receiver's interests. Nor was there any express requirement in the Court's order that Kossoff take direction only from the Receiver. However, because the Receiver "is an officer of the court and not an agent of the mortgagee or the owner," (*Jacynicz v 73 Seaman Associates*, 270 AD2d 83, 704 NYS2d 68 [1<sup>st</sup> Dept 2000]) in light of the Receiver's court-appointed, fiduciary role to protect the Premises, the Receiver was to be notified "timely" of all the events as they arose. And, since the Court allowed Kossoff to continue the prosecution of the holdover action, integral to the Court's order was the notion that the Receiver was to be kept apprised *by Kossoff*, of all the events in the holdover action and that Kossoff was to confer with and advise the Receiver of all events, as she, and not the Owner, was granted the responsibility to protect the Premises. Indeed, Kossoff, as opposed to the Receiver, occupied the front position in regard to all procedural and substantive aspects of the holdover proceeding. Defendants' attempt to shift the burden to the Receiver to keep apprised of the events in the holdover proceeding is disingenuous.

The record indicates that the Receiver was not timely apprised of the events in the holdover action. The Receiver demonstrated that she did not receive a copy of the holdover dismissal order from Kossoff (but received it from a third party with a demand for a rent stabilized renewal lease). Kossoff filed the Notice of Appeal of the holdover action, motion for a stay pending appeal, and PAR (notwithstanding Kossoff's reference to the Receiver in the PAR as "an affected party"), all without consulting with or advising the Receiver, in violation of the January 23, 2013 order. While the Court's January 20, 2012 order did not create an attorney-

client relationship between the Receiver and Kossoff, the record indicates that Kossoff's actions clearly violated this Court's January 20, 2013 order and that Kossoff, as counsel for the Owner, and takes a position inconsistent with the actions of the Receiver. As such, Kucker & Bruh shall be permitted to represent the interests of the Receiver in any holdover action. Despite the plethora of failures by Kossoff to cooperate and consult with the Receiver, removal of Kossoff as counsel for the Owner is too onerous a penalty and unwarranted. Likewise, the request that Kossoff immediately withdraw the PAR and to stay and enjoin Kossoff from performing any further legal work with respect to the Premises is unwarranted. However, sanctions as a result of Kossoff's noncompliance and pursuit of its meritless cross-motion (*see infra*) are warranted.

As to defendants' cross-motion to remove Ms. Ashkin as Receiver, CPLR 6405 provides: "Upon motion of any party or upon its own initiative, the court which appointed a receiver may remove him at any time."

The Receiver's "duty is to preserve and operate the property, within the confines of the order of appointment and any subsequent authorization granted to him by the court" (*Jacynicz v 73 Seaman Associates*, 270 AD2d 83, 704 NYS2d 68 [1<sup>st</sup> Dept 2000]). Here, the removal of the Receiver from this action is unwarranted, as the record demonstrates that she has acted in good faith for the duration of her receivership and in accordance with the Order of Appointment.

Contrary to the contention that Unger notified the Receiver of Judge Halprin's October 11, 2012 decision (on the record) in the holdover action, the email exchange upon which Unger relies as proof of such notification *does not* mention that the holdover action was dismissed. Instead, Unger's email refers to the "Respondents' Motion for Fees," that the "judge only gave a ruling from the bench" and there "is no appealable or otherwise enforceable paper at this

junction.” Further, Kossoff’s subsequent Notice of Appeal dated December 20, 2012 of the holdover dismissal order was *not* addressed to the Receiver (or Kucker & Bruh). Therefore, the Receiver’s issuance of the renewal lease was without any notice from defendants of their intent to appeal the holdover dismissal rulings by Judge Halprin. The Receiver, upon receipt of a copy of the dismissal ruling from the tenants, which demanded a renewal lease pursuant to Judge Halprin’s ruling, issued the renewal lease accordingly.

The Court notes that the Order of Appointment specifically authorized the Receiver to “rent or lease all of any part of the Mortgaged Premises for terms not exceeding two (2) years pursuant to applicable rent rules . . .” and the renewal lease was so duly issued. Moreover, the Order of Appointment expressly permitted the Receiver to “institute and carry on all legal proceedings” for the collection of rent and “summary proceedings for the removal of any tenants.” Contrary to defendants’ contention, item 2 of the Receiver’s April 19, 2012 letter to the Court did not seek to address the issue of leases, but sought to recover security deposits previously paid to Herzberg. And, that the Receiver requested (in such letter) that the Court address, at a then upcoming conference, “whether or not to enter into written leases with the tenants” in no way diminished the Receiver’s initial authority, under the Order of Appointment, to issue a renewal lease without additional Court intervention. Indeed, the Receiver’s request was due, in part, to the Receiver’s need for “historical information” based on the parties’ “Failure to turn over documents.” (Receiver’s April 19, 2012 letter, Page 4). If anything, the letter indicated the “Receiver’s” inability “to address tenant inquiries regarding lease terms and claims . . . of overcharges,” and was not an application to the Court for express permission to issue leases. Thus, defendants’ claim that the Court refused to “enable the Receiver to issue[] new

leases” by requiring the Receiver to reduce her letter request to a motion (Affirmation in Support of Cross-Motion, ¶13) is unfounded.

Even at the time when the Receiver later countersigned the renewal lease on January 29, 2013, notice of neither Kossoff’s intent to appeal, nor Kossoff’s motion (on January 11, 2013) to stay the holdover dismissal order had been given to the Receiver.<sup>3</sup> Therefore, it cannot be said that the Receiver acted outside the scope of her authority or outside the permissible scope of this Court’s orders in issuing the renewal leases. Thus, based on the above, the requests to remove Ms. Ashkin as Receiver, to nullify her actions, and a set a hearing for sanctions against the Receiver, are unwarranted.

The Court’s January 23, 2012 order acknowledged Kossoff’s continued representation of the Owner in the holdover action, and declined to allow the Receiver to be named as a party in that proceeding. Given its obligation to timely notify the Receiver of events in the Holdover action, Kossoff cannot complain of the Receiver’s issuance of the renewal lease when it failed to notify of the Receiver of its intent to challenge the dismissal of its holdover action.

Finally, the Receiver’s issuance of the renewal lease does not estop the Owner from challenging the regulatory status of the Premises, and the alleged prejudice to the Owner in its ability to redeem the Premises, due to the alleged reduction in value of the Premises is speculative and unsupported by evidence.

Therefore, defendants’ requests that the Court impose legal fees and costs upon the Receiver, and that the Court nullify the issuance of renewal leases for the Premises and assist the Owner in the withdrawal of the renewal leases in both the current DHCR proceeding and the

---

<sup>3</sup> There is no indication that Kossoff’s motion for a stay was granted at that time.

holdover action, are denied.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that the Receiver's order to show cause is granted solely to the extent that (1) it is declared that the Court's January 23, 2012 order directed the Receiver to rely upon the legal representation and advice of Kossoff, (2) it is declared that Kossoff violated the January 23, 2012 order by (a) filing the Notice to Appeal the holdover action, (b) filing the motion to stay pending the appeal of the holdover action, and (c) filing the PAR on behalf of the Owner, each without consulting with and advising the Receiver prior thereto; (3) Kucker & Bruh shall be permitted to represent interests of the Receiver in the holdover action; and (4) a hearing shall be held to determine the amount of legal fees the Receiver's counsel, Kucker & Bruh, incurred in connection with the Receiver's defense of the cross-motion by defendants; and it is further

ORDERED that defendants' cross-motion for an order removing the Receiver from this action, to nullify certain actions the Receiver performed, and for a hearing to determine sanctions against the Receiver for actions she undertook, is denied; and it is further

ORDERED that the issue of the amount of legal fees the Receiver's counsel, Kucker & Bruh, incurred in connection with the Receiver's defense of the cross-motion by defendant is hereby referred to Hon. Ira Gammerman to hear and determine; and it is further

ORDERED that counsel for the Receiver shall serve a copy of this order with notice of

entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Special Referee.

This constitutes the decision and order of the Court.

Dated: March 18, 2014



---

Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**