

**Moskowitz v Hickey**

2018 NY Slip Op 30873(U)

May 9, 2018

Supreme Court, New York County

Docket Number: 155593/2014

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

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ROBERT MOSKOWITZ, as Trustee of the  
MOSKOWITZ CHILDREN IRREVOCABLE TRUST,

Plaintiff,

Index No.155593/2014

v

EILEEN HICKEY, JANE DOE, and JOHN  
DOE (Fictitious Names for Individuals who  
may be in possession of the fourth floor  
of 460 Greenwich Street, New York, New  
York 10013).

DECISION, JUDGMENT,  
and ORDER

MOT SEQ. 013

Defendant.

-----X

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action, inter alia, for ejectment, the plaintiff,  
Robert Moskowitz, as Trustee of the Moskowitz Children  
Irrevocable Trust (the Trust), moves for leave to enter a  
judgment of ejectment upon the striking of the answer of the  
defendant Eileen Hickey. The motion is granted

II. BACKGROUND

The plaintiff owns a residential apartment building at 460  
Greenwich Street in Manhattan. Hickey is a tenant occupying an  
apartment consisting of the entire fourth floor of the building  
(the apartment). On June 9, 2014, Moskowitz, as trustee of the  
Trust, commenced this action against Hickey, and sought to eject

her from the apartment (first cause of action), alleging that she violated several provisions of the Rent Stabilization Code, including 9 NYCRR 2525.6(b), 2525.6(f), 2525.7(a), and 2525.7(b), Real Property Law §§ 226(b) and 235-f, and Administrative Code of City of N.Y. §§ 2004(a)(8)(a) and 28-118.3.2 by subletting the apartment for periods of time shorter than 30 days to Air Bed & Breakfast (Air BnB) customers, and charging the sublessees more than was allowed by law. Moskowitz further sought a judgment declaring that the apartment is no longer subject to the protections of the Rent Stabilization Code (second cause of action), to recover attorneys' fees (third cause of action), to recover for unjust enrichment (fourth cause of action), and for an accounting (fifth cause of action).

By order dated August 22, 2016, this court struck Hickey's answer for her repeated failures to comply with discovery requests and orders. Hickey appealed that order to the Appellate Division, First Department. On October 26, 2016, a Justice of that Court temporarily stayed all proceedings in this action pending hearing of Hickey's motion for such a stay pending appeal. By order dated November 29, 2016, the Appellate Division vacated the temporary stay, and denied Hickey's motion for a stay pending appeal. See Moskowitz v Hickey, \_\_\_ AD3d \_\_\_, 2016 NY Slip Op 92720(U) (1<sup>st</sup> Dept., Nov. 29, 2016). This court conducted an inquest on the issue of damages on May 3, 2017. The

Appellate Division thereafter denied Hickey's motion for a stay, pending appeal, of this court's assessment and award of any damages that might be made in accordance the court's findings after the inquest. See Moskowitz v Hickey, \_\_\_ AD3d \_\_\_, 2017 NY Slip Op 76317(U) (1<sup>st</sup> Dept., Jun. 8, 2017). On October 24, 2017, the Appellate Division affirmed the order striking Hickey's answer. See Moskowitz v Hickey, 154 AD3d 585 (1<sup>st</sup> Dept. 2017), lv denied, \_\_\_ AD3d \_\_\_, 2018 NY Slip Op 61528(U) (1<sup>st</sup> Dept., Jan. 18, 2018). After the inquest, the court, by decision and order dated January 29, 2018, awarded the plaintiff a money judgment against Hickey in the sum of \$35,130.96 on the first cause of action, plus interest thereon at the statutory rate of nine per cent per annum from June 1, 2014, and an award of attorneys' fees on the third cause of action in the sum of \$137,416.40. The money judgment in those amounts was entered on April 20, 2018. The plaintiff now moves for judgment on the first cause of action, which is for ejectment.

### III. DISCUSSION

#### A. FIRST CAUSE OF ACTION—EJECTMENT

A defaulting defendant, including one whose answer has been stricken, admits all traversable allegations in the complaint, including the basic issue of liability. See Amusement Bus. Underwriters v American Intl. Group, 66 NY2d 878 (1985);

Cole-Hatchard v Eggers, 132 AD3d 718 (2<sup>nd</sup> Dept. 2015); Gonzalez v Wu, 131 AD3d 1205 (2<sup>nd</sup> Dept. 2015); G.M. Data Corp. v Potato Farms, LLC, 95 AD3d 592 (1<sup>st</sup> Dept. 2012).

"The law is clear that a rent-stabilized tenant who sublets her apartment at market rates to realize substantial profits not lawfully available to the landlord, and does so systematically, for a substantial length of time, places herself in jeopardy of having her lease terminated on that ground, with no right to cure."

Goldstein v Lipetz, 150 AD3d 562, 563 (1<sup>st</sup> Dept. 2017). In this ejectment action, the plaintiff both alleged and established that the Trust was formerly in possession of the apartment, that it was ousted or deprived of possession, and that it has a right to re-enter and take possession due to Hickey's violation of the terms of the lease and statutory law prohibiting short-term sublets. See Goldstein v Lipetz, *supra*; see generally GMMM Westover, LLC v New York State Elec. & Gas Corp., 155 AD3d 1176 (3<sup>rd</sup> Dept. 2017); RPAI Pelham Manor, LLC v Two Twenty Four Enters., LLC, 144 AD3d 1125 (2<sup>nd</sup> Dept. 2016); Merkos L'Inyonei Chinuch, Inc. v Sharf, 59 AD3d 408 (2<sup>nd</sup> Dept. 2009). Hickey is deemed to have admitted the allegations, and the Trust is thus entitled to possession of the apartment. See Goldstein v Lipetz, *supra*; see also Gordon v 476 Broadway Realty Corp., 129 AD3d 547 (1<sup>st</sup> Dept. 2015).

B. REMAINING CAUSES OF ACTION AGAINST HICKEY

The plaintiff has not submitted proof supporting the second cause of action, which seeks a judgment declaring that the apartment is no longer rent stabilized, the fourth cause of action, which seeks to recover for unjust enrichment, or the fifth cause of action, which is for an accounting. A default judgment in a declaratory judgment action will not be granted on the default and pleadings alone since it is necessary that the plaintiff establish a right to a declaration. See McFadden v Schneiderman, 137 AD3d 1618 (4<sup>th</sup> Dept. 2016); Dole Food Co., Inc. v Lincoln Gen. Ins. Co., 66 AD3d 1493 (4<sup>th</sup> Dept. 2009).

Here, the plaintiff did not establish his entitlement to the declaration sought since he did not present any evidence that, when Hickey ultimately vacates the apartment, the legal regulated rent, plus any vacancy and other statutory increases to which the Trust may be entitled, will be greater than \$2,500.00. See Altman v 285 W. Fourth, LLC, \_\_\_NY3d\_\_\_, 2018 NY Slip Op 02829 (Apr. 26, 2018).

To establish unjust enrichment, "the plaintiff must show that the defendant was enriched, at the plaintiff's expense, and that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." Castelotti v Free, 138 AD3d 198, 207 (1<sup>st</sup> Dept. 2016); see Georgia Malone & Co., Inc. v Rieder, 19 NY3d 511 (2012); Mandarin Trading Ltd. v

Wildenstein, 16 NY3d 173 (2011). Crucially, a plaintiff cannot succeed on an unjust enrichment claim unless he or she has a "sufficiently close relationship" with the defendant. Georgia Malone & Co., Inc. v Rieder, supra, at 516; see Sperry v Crompton Corp., 8 NY3d 204 (2007). The plaintiff adduces no evidence in connection with that claim.

"The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest," (Palazzo v Palazzo, 121 AD2d 261, 264 [1<sup>st</sup> Dept. 1986]), or upon an analogous relationship such as a quasi trust. See Minion v Warner. 238 NY 413 (1924). The plaintiff has developed no evidence tending to establish such a relationship.

By failing to move in connection with these causes of action upon Hickey's default, and essentially disclaiming reliance on them at the inquest, the plaintiff has abandoned them, and they are dismissed. See Rivera v Anilesh, 32 AD3d 202 (1<sup>st</sup> Dept. 2006); Blumberg v Patchogue-Medford Union Free School Dist., 18 AD3d 486 (2<sup>nd</sup> Dept. 2009).

### C. FICTITIOUS DEFENDANTS

There is no showing of any efforts by the plaintiff to identify the fictitious defendants. Since they were never

identified, the plaintiff is precluded from relying on CPLR 1024 to maintain this action against those parties (see generally Fountain v Ocean View II Assocs., L.P., 266 AD2d 339 [2<sup>nd</sup> Dept. 1999]), and the complaint must be dismissed against them.

#### IV. CONCLUSION

ORDERED and ADJUDGED that, upon the striking of the answer of the defendant Eileen Hickey, Eileen Hickey be, and hereby is, ejected from 460 Greenwich Street, 4th Floor, New York, New York 10013; and it is further,

ORDERED, ADJUDGED, and DECLARED that the plaintiff, Robert Moskowitz, as the Trustee of the Moskowitz Children Irrevocable Trust, is entitled to possession of 460 Greenwich Street, 4th Floor, New York, New York 10013, as against Eileen Hickey, and the Sheriff of the City of New York, County of New York, or any duly appointed City Marshal, is directed to place the plaintiff in possession and eject, as necessary, Eileen Hickey and all other persons from 460 Greenwich Street, 4th Floor, New York, New York 10013; and it is further,

ORDERED and ADJUDGED that, immediately upon the entry of this Decision, Order, and Judgment, the plaintiff may exercise all acts of ownership and possession of 460 Greenwich Street, 4th Floor, New York, New York 10013 as against Eileen Hickey and all other persons, except that the right to re-entry shall be stayed

for a period of 30 days after the service of a copy of this Decision, Order, and Judgment with notice of entry by overnight delivery upon Eileen Hickey and her attorneys; and it is further,

ORDERED and ADJUDGED that the Sheriff of the City of New York, County of New York, or any duly appointed City Marshal, is hereby directed and authorized, upon receipt of a certified copy of this Decision, Order, and Judgment, to take all necessary steps, including but not limited to the entry into the premises at 460 Greenwich Street, 4th Floor, New York, New York 10013, to effect the removal and ejection of Eileen Hickey and every person holding possession or the same or any part thereof under Eileen Hickey and adversely to the plaintiff, as the current owner of the premises, and the plaintiff shall be let into possession of said premises at 460 Greenwich Street, 4th Floor, New York, New York 10013, and this Decision, Order, and Judgment be executed by the Sheriff of the City of New York, County of New York, or any duly appointed City Marshal, as though it were an execution for the delivery of possession of said premises, with the eviction and delivery of possession of the premises to be stayed for a period of 30 days after service upon Eileen Hickey and her attorneys, by overnight delivery, of a copy of this Decision, Order, and Judgment with notice of entry; and it is further,

ADJUDGED that the complaint is dismissed as against the fictitious defendants John Doe and Jane Doe; and it is further,

ADJUDGED that the second cause of action, which is for a judgment declaring that the subject apartment is no longer subject to rent stabilization, the fourth cause of action, which seeks to recover for unjust enrichment, and the fifth cause of action, which seeks an accounting, are dismissed as against Eileen Hickey; and it is further,

ORDERED that the plaintiff shall serve a copy of this Decision, Order, and Judgment with notice of entry upon Eileen Hickey and her attorneys, by overnight delivery, within 20 days of its entry.

This constitutes the Decision, Order, and Judgment of the court.

Dated: May 9, 2018

ENTER: \_\_\_\_\_



J.S.C.

**HON. NANCY M. BANNON**