At a Term of the Supreme Court of the State of New York held in and for the County of Onondaga at the Onondaga County Courthouse, Syracuse, New York, on the 23rd day of July, 2020.

PRESENT: HON. GERARD J. NERI, J.S.C.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

MATEO THOMAS CRETARO,

Plaintiff,

-against-

SALLY HUNTINGTON and
WILLARD HILTS,

Defendant.

DECISION and ORDER
Index No. 005840/2018

NERI, G.J., J.S.C.

Defendants Sally Huntington and Willard Hilts (collectively the "Defendants") bring a Notice of Motion dated June 30, 2020 seeking summary judgment dismissing Plaintiff's complaint. Plaintiff Mateo Thomas Cretaro filed the instant action on June 15, 2018 seeking return of certain property or alternatively damages he alleges arise from Defendants' conversion of his property which Defendants removed or caused to be removed from Defendants' property at 7755 Myers Road, Kirkville, New York (the "Premises").

By way of background, Plaintiff first bought the Premises circa 1982 (*see* Plaintiff's Transcript, NYSCEF Doc. No. 24, p. 5). Plaintiff defaulted on the mortgage loan and was sued for foreclosure in 2008 (*ibid*). The bank secured a judgment of foreclosure and sale in 2012 (*ibid* at 6). Plaintiff moved out of the Premises circa 2015 (*ibid* at 8). On or about October 9, 2015, the bank bought the Premises at the foreclosure auction (*ibid* at 11). Plaintiff's son and daughter-in-law, Brad and Katrina Cretaro (the "Tenants"), sought Defendants' help in purchasing the Premises

(*see* Hilts Affidavit, NYSCEF Doc. No. 37, paras. 2-4). Katrina Cretaro is the granddaughter of Defendant Hilts (*see* Hilts Affidavit, NYSCEF Doc. No. 37, para. 2). Defendants took a loan out on their residence to purchase the Premises (*see* Huntington Affidavit, NYSCEF Doc. No. 31, para. 2). Defendants were the winning bidder in March 2016 (*see* Huntington Transcript, NYSCEF Doc. No. 47, p. 7). Defendant Hilts states subsequent to taking title to the Premises, he met Plaintiff there and advised him he needed to remove the junk from the property (*see* Hilts Affidavit, NYSCEF Doc. No. 37, para. 4). Plaintiff acknowledges Defendant Hilts asked him to remove his possessions from the Premises "right after Brad [Cretaro] moved in" (*see* Plaintiff's Transcript, NYSCEF Doc. No. 24, p. 16). Pursuant to a certain agreement, Defendants leased to Brad and Katrina Cretaro the Premises (the "Agreement", *see* Agreement, NYSCEF Doc. No. 28). The Agreement anticipated that Katrina Cretaro would receive a Workers' Compensation settlement, allowing Brad and Katrina Cretaro to purchase the Premises, and if the settlement was not received by June 1, 2017, Defendants were free to sell the Premises (*see* Agreement, NYSCEF Doc. No. 28). Defendant further alleges that he told Plaintiff again to remove the junk from the Premises in the fall of 2016 (*see* Hilts Affidavit, NYSCEF Doc. No. 37, para. 6). Defendant Hilts states he had a conversation with Brad Cretaro in which he told Brad to remove the junk from the premises (*see* Hilts Affidavit, NYSCEF Doc. No. 37, para. 7). Katrina Cretaro did not get the settlement amount she hoped for (*see* Huntington Affidavit, NYSCEF Doc. No. 31, para. 4).

The Tenants were not able to purchase the Premises and Defendants were forced to evict them as they would not leave voluntarily (*see* Hilts Affidavit, NYSCEF Doc. No. 37, Para. 8). Defendants and Tenants went before the Manlius Town Court on June 20, 2017 whereat Tenants agreed to vacate by the end of the month (*see* Huntington Affidavit, NYSCEF Doc. No. 31, para. 9). A warrant of eviction was signed by the Manlius Town Court on August 1, 2017 ordering the

Onondaga County Sheriff to remove the Tenants and all other occupants from the Premises (*see* Warrant, NYSCEF Doc. No. 29). The Sheriff enforced the Warrant on August 22, 2017 and removed the Tenants from the Premises (*see* Attorney Affirmation, NYSCEF Doc. No. 21, para. 26). Defendants sent a "Notice of Abandoned Property" dated August 28, 2017 to Plaintiff Tom Cretaro and the Tenants setting a deadline of September 29, 2017 to remove the items from the Premises (*see* Notice of Abandoned Property, NYSCEF Doc. No. 30).

Defendant Hilts states he told Plaintiff he would give Plaintiff access to the six-bay garage once the outside was cleaned up (*see* Hilts Affidavit, NYSCEF Doc. No. 37, para. 9). Despite this, Defendants allege Plaintiff or someone at his direction broke into the structures on the Premises, including the breaking off of a barn door (*see* Huntington Affidavit, NYSCEF Doc. No. 31, para. 16). On one occasion, the Manlius Police were called due to a break-in at the Premises (*see* Huntington Transcript, NYSCEF Doc. No. 47, p. 17). Plaintiff asserts he would spend three to four hours a day working to remove his possessions from the Premises (*see* Plaintiff's Transcript, NYSCEF Doc. No. 24, p. 24). Plaintiff admits that he emptied the contents of one the storage trailers onto the Premises instead of removing them from Premises (*see* Plaintiff's Transcript, NYSCEF Doc. No. 24, pp. 25-26). Defendants disposed of Plaintiff's property by taking some, giving some away, or scrapping it (*see* Plaintiff's Affidavit, NYSCEF Doc. No. 41, paras. 17-19). Defendant Hilts stated in his deposition that much of the property was removed by Val Burton from Mexico, New York who did not charge Defendants for removing the property (*see* Hilts Transcript, NYSCEF Doc. No. 44, pp. 29-30). Defendants retained the John Deere backhoe track machine, a one-ton roller, and the "'47 golf cart" (*see* Hilts Transcript, NYSCEF Doc. No. 44, pp. 31-33).

The Court now considers Defendant's motion. Defendants argue they are they are entitled to summary judgment as they gave the Plaintiff a reasonable amount of time to remove his property and he failed to do so. Defendants assert that the standard for a claim of conversion, in that there must be "interference with another's rights to possession" and the "exercise of dominion over property to the exclusion of and in defiance of the owner's right" (*see* Glass v. Wiener, 104 A.D.2d 967, 968 [Second Dept. 1984]). Defendants argue there was no interference with Plaintiff's rights to possession as Plaintiff had the ability to remove the property not just in the fifteen months Defendants owned the Premises, but also the years before when Plaintiff was on notice of the foreclosure action. Defendants further argues Plaintiff fails the second prong as well. Defendants state that: "the law is clear that a landlord must safeguard a tenant's belongings for a reasonable amount of time which, pursuant to case law, generally is considered to be at minimum a 30 day period" (*see* Khan v Pickens, 62 Misc 3d 1209[A] at 20 [City Ct 2019]). Defendants argue the period to be considered is not merely the thirty-days provided for in the Notice of Abandonment, but also the period of time commencing when Defendants first took title to the property and advised Plaintiff he needed to remove his possessions from the Premises, and even further back to when Plaintiff was first noticed of the previous foreclosure action.

In opposition, Plaintiff argues Defendant has failed to meet their burden. In the context of a landlord tenant proceeding, Plaintiff correctly asserts the warrant of eviction only applies to the real property, not to personal property (Plaintiff's Memorandum of Law, NYSCEF Doc. No. 39, *see* Glass). Plaintiff further argues the conflicting statements between Plaintiff and Defendants concerning whether Plaintiff abandoned his property creates an issue of fact precluding the grant of summary judgment (*see* Medlock Crossing Shopping Ctr. Duluth, GA. LP v. Bath Studio, Inc., 126 A.D.3d 1463 [Fourth Dept. 2015]). Plaintiff further argues Defendants have failed to prove

their defense of abandonment, asserting that, "[t]he abandonment of property is the relinquishing of all title, possession or claim to it or of it – a virtual intentional throwing away of it. It is not presumed. Proof supporting it must be direct or affirmative or reasonably beget the exclusive inference of the throwing away. Abandoned property is owned by him who takes it into his ownership" (Foulke v. New York Consol. R.R. Co., 228 N.Y. 269, 273 [1920]). Importantly, Plaintiff argues he did not abandon his property because he asked for more time to secure it (*see* Memorandum of Law, NYSCEF Doc. No. 39, p. 8). Plaintiff then cites landlord tenant law and the UCC for the proposition that Defendants were under an obligation to store Plaintiff's property. Finally, Plaintiff argues that if the property was abandoned, then Defendants were under an obligation to follow the Abandoned Property Law, specifically §1310.

Defendants submitted a reply, including a reply memorandum of law. Defendants bring attention to a recent decision out of New York County which held that a landlord acted reasonable when, subsequent to tenant's eviction, he waited thirty days before removing tenant's chattel (*see* Dollar Choice Deals, Inc. v. Ross & Ross LLC, 2020 NY Slip Op 31456[U] [Sup. Ct., NY County 2020]). The court in Dollar Choice went on to dismiss a conversion claim noting that in order for there to be a conversion, there has to be a denial of access to the claimant's property (Dollar Choice at 5).

"On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party'" (Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 [2012] *citing* Ortiz v. Varsity Holdings, LLC, 18 N.Y.3d 335, 339 [2011]). "Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which

require a trial of the action'" (Vega at 504 *citing* Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]).

Here, Plaintiff unsuccessfully argues that it was unreasonable for Defendant to grant only thirty days to remove what was accumulated over thirty years. Plaintiff was first noticed of a foreclosure action on the Premises in 2008, had a judgment of foreclosure issued against him in 2012, and the property was sold in 2015. Plaintiff lost all rights in the property and seemingly made no attempt to collect his possessions at that time. When Defendants bought the property through an auction in March 2016, Plaintiff admits he was advised by Defendants that he needed to remove his possessions from the Premises. Instead, Plaintiff, based on an alleged agreement with Brad Cretaro, a tenant of Defendants, continued to keep his possessions on the Premises. In August 2017, Tenants were evicted. It is undisputed that Plaintiff was given a "notice of abandonment" concerning his property still located at the Premises. While Plaintiff alleges he worked to remove the items, he admitted he only worked three to four hours a day, a few days a week. He further emptied the contents of a trailer onto the Premises instead of removing them from the Premises. Defendants ultimately gave him a few additional days yet still saw no substantial effort to remove the items.

The facts in the record contravene Plaintiff's stated desire to retain the property. Using the definition of abandoned property as proffered by Plaintiff via Foulke, the Court finds that Plaintiff forfeited his rights to his property. He had notice he would lose the property to foreclosure as early as 2008. Plaintiff lost his rights to the property, excepting a possible right of redemption, in 2012 with the judgment of foreclosure and sale. Plaintiff lost title in 2015 with the foreclosure sale. He had no right to maintain his property at the Premises. Plaintiff acknowledges that Defendants had demanded he remove his property from the Premises in 2016. When served the

"notice of abandonment", Plaintiff undertook minimal efforts to remove property, and even went so far as to make his situation worse by simply dumping on the Premises some items which were already in a storage container. The Court finds Plaintiff's arguments are without merit.

Because Plaintiff already lost his rights to remove property from the Premises when he lost title to the Premises at the foreclosure sale, Defendant had the clear right to exclude the Plaintiff. "The right to exclude others, as well as their property is one of the most essential sticks in the bundle of rights that are commonly characterized as property" (Novelty Crystal Corp. v. PSA Institutional Partners, L.P., 49 A.D.3d 113, 117 [Second Dept. 2008] *citations omitted*). Plaintiff and Defendants had no privity. Defendants extraordinary tolerance of Plaintiff's continued abuse of the Premises did not create new rights for Plaintiff. Defendants were not unreasonable in their demand to Plaintiff to remove his property and Plaintiff's failure to do so within the time allotted results in his again forfeiting of his rights.

The Court finds that Plaintiff's cases can be distinguished from the instant matter. In 8902 Corp. v. Helmsley-Spear, Inc. the Landlord denied access to the tenant's principal to gain access to the property to regain certain possessions (*see* 8902 Corp. v. Helmsley-Spear, Inc., 23 A.D.3d 316, 316 [First Dept. 2005]). In this instance, Defendants gave Plaintiff in excess of thirty days to remove his property. Similarly in Medlock, the dispossessed tenant claimed he was denied access to retrieve his property. Again, Plaintiff was given in excess of thirty days to remove his property. Even in Cadwell v. 928 Gerard Av. Partners presupposes a landlord/tenant relationship which is not present in the instant matter (*see* Caldwell v 928 Gerard Ave. Partners, 57 Misc. 3d 857 [Bronx County Civil Court, July 12, 2017]). Accordingly, based on all of the above, the Court grants Defendants' motion in its entirety. The above constitutes the Court's decision.

NOW, THEREFORE, based upon a review of all the submissions of papers and documents filed under this Motion Sequence #1, it is hereby

ORDERED, that Defendants' motion for summary judgment is GRANTED and the complaint is dismissed.

ENTER: 7/29/2020

HON. GERARD J. NERI, J.S.C.