

Jacob Cram Co-op., Inc. v Ziolkowski

2022 NY Slip Op 30596(U)

February 24, 2022

Supreme Court, New York County

Docket Number: Index No. 156980/2017

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA JAMES

PART 59

Justice

-----X

JACOB CRAM COOPERATIVE, INC.

INDEX NO. 156980/2017

Plaintiff,

MOTION DATE 02/10/2021

- v -

MOTION SEQ. NO. 017

THOMAS JOHN ZIOLKOWSKI,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 017) 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352

were read on this motion to/for

VACATE - JUDGMENTORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendant (1) to stay the execution of the warrant issued pursuant to the judgment of possession of the cooperative apartment, located at 307 West Broadway, Sixth Floor Unit, New York, New York 10013 (the premises), granted in favor of plaintiff and against the defendant, on October 8, 2020 or (2) to vacate such judgment of dismissal of counterclaims and of possession is DENIED; and it is further

ORDERED that the temporary restraining order staying all proceedings or any acts or other steps to remove defendant from possession of the premises issued on February 1, 2022, is vacated, lifted and dissolved; and it is further

ORDERED, that the execution of the warrant by the Sheriff of New York County (Joseph Fuscito) shall be stayed for fourteen (14) days from service by posting on NYSCEF and by overnight courier upon defendant, addressed to such defendant at 307 West Broadway, Sixth Floor Unit, New York, New York 10013, of a copy of this Order with Notice of Entry.

DECISION

This court agrees with plaintiff that the stay of further proceedings set forth in the Order dated and entered on March 16, 2020 (NYSCEF Document No. 237) was a discretionary, not an automatic, stay under CPLR 321(c), captioned "death, removal or disability of attorney". Such subsection, by its terms, applies to an attorney who "dies, becomes physically or mentally incapacitated, or is removed, suspended or otherwise becomes disabled". See Wells Fargo Bank, NA v Kurian, 197 AD3d 173, 175 (2d Dept 2021) ("the defendant's attorney was suspended from the practice of law"); Matter of Cassini, 182 AD3d 13, 46 ("CPLR 321(c) applies to circumstances in which an event occurs which is personal to the attorney of record which involuntarily prevents the attorney of record from continuing to represent the party, notwithstanding the attorney's willingness to do so"); and Wiley v Musabyemariya, 118 AD3d 898, 899-900 (2d Dept 2014). Thus, the CPLR 321(c) automatic stay did not pertain to the motion to withdraw or to be changed made by Davidoff Hutcher &

Citron, counsel of record representing defendant, pursuant to CPLR 321(b), in the action at bar. Accordingly, the CPLR 321(c) requirement that that action be stayed, by operation of law, for "thirty days after a notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs" is inapplicable to the March 16, 2020 Order.

In any event, this court finds that defendant received adequate notice of the March 16, 2020 Order, when, by regular first-class mail, plaintiff's attorney served such Order with Notice of Entry upon defendant, at his last known address, on May 6, 2020. The court notes that, even applying CPLR 321(c) to this case, such subsection does not specify by whom such notice to appoint another attorney must be served. As plaintiff points out, defendant has not set forth how he has been prejudiced by the fact that, contrary to the March 16, 2020 Order, plaintiff's attorney, and not his former counsel, served such notice upon him. Finally, even assuming arguendo, that that outgoing counsel was required to follow the directive that such counsel serve the notice to appoint upon their former client, defendant by retaining new counsel on July 28, 2020, waived such service. See Wells Fargo Bank, N.A. v Kurian, 197 AD3d 173, 178-179 (2d Dept 2021).

In conclusion, defendant has stated no grounds for the vacatur of any orders subsequent to the March 16, 2020 Order,

including the judgment of possession granted on default dated October 8, 2020 (NYSCEF Document Number 283) ¹. Therefore, this court must deny his motion.

Debra A. James

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<u>2/24/2022</u>				<u>DEBRA JAMES, J.S.C.</u>	
	DATE				
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE

¹ The fifth decretal paragraph of the Order and Judgment of Possession dated October 8, 2020, signed by this court, contains obvious and apparent scrivener's errors as to the disposition of the proceeds of the sale of the shares attributable to defendant's premises, as set forth with respect to any surplus in Article III, THIRD and FOURTH of the Proprietary Lease (NYSCEF Document Number 108), to wit: "paid by Ziolkowski" should state "paid to Ziolkowski"; "giving credit for prior use and occupancy paid by him" should state "debiting outstanding use and occupancy owed by Ziolkowski"; and "the amount of reasonable attorneys' fees and expenses incurred by Jacob Cram Cooperative, Inc." should state "assessing a debit for the amount of reasonable attorneys' fees and expenses incurred by Jacob Cram Cooperative, Inc."