

APPELLATE TERM OF THE SUPREME COURT
OF THE STATE OF NEW YORK FOR THE 9TH & 10TH JUDICIAL DISTRICTS

Argued - October 15, 2020 Term

JERRY GARGUILO, J.P.
TERRY JANE RUDERMAN
ELIZABETH H. EMERSON, JJ.

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DECISION & ORDER

Lakeland West Capital XI, LLC, -Petitioner-
Respondent, v Joseph Uvino and Wendy Uvino,
Tenants-Respondents, and Robert Shepherd and Karen
Shepherd, Appellants.

Appellate Term Docket No.
2019-982 S C

Lower Court # 17090159
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Esseks, Hefter, Angel, Di Talia & Pasca, LLP (Amanda Star Frazer and Anthony C. Pasca
of counsel), for appellants.

Kathryn M. Dalli of counsel, for petitioner-respondent.

Twomey, Latham, Shea, Kelley, Dubin & Quartararo, LLP (Kathryn M. Dalli of counsel),
for tenants-respondents.

Appeal from an order of the Justice Court of the Town of East Hampton, Suffolk County
(Steven Tekulsky, J.), entered January 2, 2019, and from a judgment of that court entered February
4, 2019. The order, in a summary proceeding commenced pursuant to RPAPL 713 (5), denied
occupants' motion to vacate a final judgment awarding petitioner possession and the principal sum
of \$121,572, entered September 20, 2017 and, in effect, amended September 27, 2017 upon
occupants' failure to appear or answer the petition, and, upon such vacatur, to dismiss so much of
the petition as was asserted against them and for restitution, and granted petitioner's cross motion
for additional use and occupancy. The judgment, entered pursuant to so much of the January 2, 2019
order as granted petitioner's cross motion for additional use and occupancy, awarded petitioner the
principal sum of \$52,470.32.

ORDERED that so much of the appeal as is from so much of the January 2, 2019 order as
granted petitioner's cross motion for additional use and occupancy is dismissed as the right of direct
appeal therefrom terminated with the entry of the February 4, 2019 judgment (*see Matter of Aho*, 39
NY2d 241, 248 [1976]); and it is further,

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ORDERED that so much of the January 2, 2019 order as denied occupants' motion to vacate the final judgment entered against them on September 20, 2017 and, in effect, amended September 27, 2017 and, upon such vacatur, to dismiss the petition and for restitution is reversed, without costs, and occupants' motion is granted and petitioner is directed to pay occupants restitution in the sum of \$126,278.92 within 30 days of the date of the date of this decision and order; and it is further,

ORDERED that the judgment entered February 4, 2019 is reversed, without costs, so much of the January 2, 2019 order as granted petitioner's cross motion for additional use and occupancy is vacated, and petitioner's cross motion is denied.

Petitioner commenced this summary proceeding in August 2017 against the former owners of the subject property, as well as the former owners' tenants (occupants) for the 2017 summer season, based upon a referee's deed obtained by petitioner after a foreclosure sale (*see* RPAPL 713 [5]). Occupants paid the rent for the entire summer season to the former owners prior to the commencement of the lease, and never made any payments to petitioner.

Insofar as is relevant to this appeal, a final judgment awarding petitioner possession and the sum of \$121,572, representing use and occupancy, was entered on September 20, 2017 and, in effect, amended September 27, 2017 upon occupants' failure to appear or answer the petition, and occupants paid the sum of \$126,278.92 in full satisfaction of the judgment. Occupants moved to vacate the default final judgment (*see* CPLR 5015 [a]) and, upon such vacatur, to dismiss so much of the petition as was asserted against them (*see* CPLR 3211 [a] [7]) and for restitution (*see* CPLR 5015 [d]), and petitioner cross-moved to recover additional use and occupancy from occupants. The Justice Court denied occupants' motion, stating that occupants had failed to demonstrate a meritorious defense to the proceeding, and granted petitioner's cross motion. A second judgment, awarding petitioner the principal sum of \$52,470.32, was entered on February 4, 2019.

The lease with the former owners, upon which occupants' defense to this proceeding is based, was signed many years after a notice of pendency was filed in connection with the foreclosure action (*see* CPLR 6501). Consequently, occupants were bound by the judgment of foreclosure, thereby rendering their lease for the 2017 summer season voidable at the option of petitioner, the new owner (*see West 56th & 57th St. Corp. v Pearl*, 242 AD2d 508 [1997]; *BH 2628, LLC v Zully's Bubbles Laundromat, Inc.*, 57 Misc 3d 63 [App Term, 2d Dept, 2d, 11th, & 13th Jud Dists 2017]). A voidable lease becomes void once the option of voiding it is exercised (*see Matter of Fresh Meadows Jewish Ctr. [Gordon]*, 75 AD2d 814 [1980]). In order to properly maintain a RPAPL 713 (5) proceeding against occupants under these circumstances, petitioner needed to void the lease (*see BH 2628, LLC*, 57 Misc 3d 63). Petitioner has not argued or alleged that it voided the lease, and the record demonstrates that it did not prior to the commencement of this proceeding.

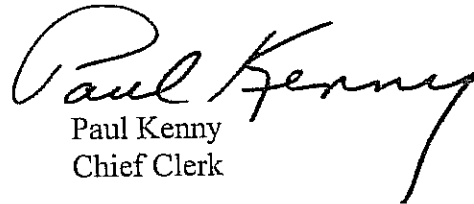
Occupants have demonstrated that they had a reasonable excuse for their default in appearing or answering the petition, and petitioner's failure to void the lease prior to the commencement of this proceeding is both a meritorious defense to the proceeding, requiring the vacatur of the default final judgment (*see* CPLR 5015 [a] [1]), and a basis for the dismissal of the petition (*see* CPLR 3211 [a] [7]). Since petitioner cannot recover possession from occupants in this proceeding, it is also not entitled to recover use and occupancy (*see Esposito v Larig*, 52 Misc 3d 67 [App Term, 2d Dept, 2d,

11th & 13th Jud Dists 2016]). Thus, the branch of occupants' motion seeking restitution should have been granted (*see* CPLR 5015 [d]) and landlord's cross motion for additional use and occupancy should have been denied.

Accordingly, so much of the January 2, 2019 order as denied occupants' motion to vacate the default final judgment entered against them, as in effect, amended and, upon such vacatur, to dismiss the petition and for restitution is reversed, occupants' motion is granted, the petition is dismissed, petitioner is directed to pay occupants restitution in the sum of \$126,278.92 within 30 days of the date of the date of this decision and order, the judgment entered February 4, 2019 is reversed, so much of the January 2, 2019 order as granted petitioner's cross motion for additional use and occupancy is vacated, and petitioner's cross motion is denied.

GARGUILO, J.P., RUDERMAN and EMERSON, JJ., concur.

ENTER:


Paul Kenny
Chief Clerk