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[2] 165 William Street, LLC, Plaintiff, -against- Signe Baumane, Wallace Keller, Matthew Leaker, and the New York State Division of Housing and Community Renewal, Defendants.**

Index No.: 116050-07

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2008 N.Y. Misc. LEXIS 10083; 2008 NY Slip Op 32237(U)

August 5, 2008, Decided

August 11, 2008, Filed

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS

SUBSEQUENT HISTORY: Related proceeding at *Matter of Baumane v. New York State Div. of Hous. & Community Renewal*, 2011 N.Y. Misc. LEXIS 699 (N.Y. Sup. Ct., Jan. 4, 2011)

JUDGES: [*1] PRESENT: Hon. Judith J. Gische, J.S.C.

OPINION BY: Judith J. Gische

OPINION

DECISION/ ORDER

Upon the foregoing papers, the decision and order of the court is as follows:

This action is for a declaratory judgment and other relief in connection with the parties' dispute over whether the individually named defendants are entitled to a rent **[**3]** stabilized renewal lease. At bar are motions by plaintiff, the individual defendants and the New York State Division of Housing and Community Renewal ("DHCR"). Plaintiff's motion (sequence number 2) is for

a preliminary injunction against DHCR proceeding with the complaint filed before it by the individual defendants. DHCR opposes that motion. It has also separately cross moved to dismiss plaintiff's 1st and 5th causes of action. *CPLR 3211*. The individual defendants oppose plaintiff's motion. They support DHCR's cross motion and have also separately moved to dismiss the complaint in its entirety.

Plaintiff commenced this action with the filing of the summons and complaint on December 4, 2007. At that time plaintiff brought an order to show cause seeking a temporary restraining order ("TRO"), enjoining DHCR from acting on defendants' complaint and other relief. The court granted **[*2]** the TRO and extended it on the return date of the motion, so that it remains effective pending the court's decision on these motions. Plaintiff has since served an amended complaint as of right. *CPLR 3025*.

In connection with the motions to dismiss, the court will consider whether, accepting all of the plaintiffs' facts, they support the causes of action asserted. *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 634, 357 N.E.2d 970, 389 N.Y.S.2d 314 (1976). However, plaintiff's burden on its motion for a preliminary injunction is different. To satisfy the requirements for the issuance of a preliminary injunction, the plaintiff must show a

likelihood of success on the merits, irreparable harm, and a balancing of the equities in its favor. *CPLR § 6301, Aetna Insurance Co., Inc. v. Capasso*, 75 NY2d 860, 552 N.E.2d 166, 552 N.Y.S.2d 918 [1990]; *W.T. Grant Co. v. Srogi*, 52 NY2d 496, 420 N.E.2d 953, 438 N.Y.S.2d 761 (1981). Although the party seeking a preliminary injunction does not have to provide conclusive proof of its right to such relief, and a preliminary injunction can, in [**4] the court's discretion, even be issued where there are disputed facts (*Terrell v. Terrell*, 279 A.D.2d 301, 719 N.Y.S.2d 41 [1st Dept 2001]), generally a preliminary injunction will be denied unless the relief is necessitated and justified [**3] from the undisputed facts. *O'Hara v. Corporate Audit Co.*, 161 AD2d 309, 555 N.Y.S.2d 82 (1st Dept 1990).

Facts considered and arguments presented to the court

Plaintiff 165 William Street, LLC ("plaintiff" at times "landlord") is the present owner of 165 William Street in New York City ("the building"). Its predecessor in interest is non-party 169 Beekman Associates, L.P. The transfer in ownership occurred in April 2007.

Defendants Signe Baumann, Wallace Keller and Matthew Leaker (collectively "individual defendants") occupy the 2nd floor apartment. Wanda Coffee moved into the apartment in 1978 when it was a loft and lived there with Mel Geary until her death in 1997. Geary continued renting the apartment until he died in July 2007. At the time of his death he had a rent stabilized lease expiring December 2007.

Following Geary's death, plaintiff received two bank checks from the individual tenants for the rent on the 2nd floor apartment. Plaintiff cashed both checks. Thereafter, plaintiff received a letter from the individual defendants dated September 17, 2007 requesting a renewal lease stating as follows:

"we have been living in the apartment for upwards of 11 years, with Mel [Geary] having permanently [**4] vacated the apartment in early 1998. We are concerned that we have not received a lease renewal form and wish to continue our happily uneventful residence within 165 William Street, 2nd floor. We understand that, with the unfortunate death of Mel Geary, and our long established

payment history, we are entitled to assume the existing lease, be afforded a lease renewal in our names . . ."

[**5] Shortly thereafter, on September 26, 2007, the individual defendants filed a complaint with DHCR [VI 410065 RV] ("DHCR complaint) alleging that the plaintiff had refused to give them a renewal lease, although they were entitled to one. The individual tenants' claim before the DHCR (and in this case) is that Geary was an illusory tenant who charged them more than the legal rent for the apartment. They contend Geary permanently out of the 2nd floor apartment in 1998, but sublet the apartment to them for \$ 2,260 per month although the legal rent for the apartment is \$ 1,015 per month. The individual defendants contend that plaintiff and/or plaintiff's predecessor in interest knew that Geary no longer lived at the apartment, but even if they did not know, they are true occupants of the apartment with rights [**5] under the rent regulations.

Plaintiff did not answer the DHCR complaint, but instead commenced the within action on December 4, 2007 for a declaration that there was no illusory tenancy, the individual defendants have no right to a renewal lease in their own names, and therefore the defendants are illegal occupants without the right to continued possession of the apartment (1st cause of action). Plaintiff has asserted other causes of action in its amended complaint. They are as follows: 2nd cause of action - for a preliminary injunction, enjoining the individual defendants from allowing additional occupants to move into and reside in the apartment; 3rd cause of action - fraud; 4th cause of action - unjust enrichment; 5th cause of action - for a permanent injunction against the DHCR from adjudicating the complaint before it; and 6th cause of action - a writ of ejectment.

In support of its motion for a preliminary injunction, and in opposition to the motions to dismiss its 1st cause of action for a declaration and its 5th cause of action for [**6] a permanent injunction against the DHCR, plaintiff argues that the parties' disputes are best addressed and decided in court, rather than before [**6] the DHCR because DHCR cannot adjudicate some of the landlord's claims, or provide complete relief. Thus, plaintiff argues that DHCR has no jurisdiction to decide its fraud claim or issue a writ of ejectment, nor can it award damages on its unjust enrichment claims as this court can. Plaintiff

argues further that the fair market rent for the 2nd floor apartment is in excess of \$ 10,000 per month, and that this court can - and should - order the individual defendants who are illegal occupants to pay that amount. Plaintiff contends that relief is not available through DHCR.

It is unrefuted that the DHCR complaint filed by the individual defendants was first in time. Nonetheless, plaintiff contends that until the Geary renewal lease expired, it could not bring any action to adjudicate the parties' dispute, and therefore the individual defendants had an unfair advantage. In any event, plaintiff argues this is a more preferable forum for it to resolve the disputes between itself and the individual defendants because the court's jurisdictional powers are far broader than DHCR's.

Plaintiff argues that it can obtain discovery here, whereas only limited discovery is available before the DHCR. [*7] Plaintiff warns that were it forced to proceed before the DHCR, it would be relegated to bringing an Article 78 petition to challenge the agency's determination, which would entail an entirely different - and higher - burden of proof, thereby causing it severe prejudice because of the court's limited scope of review ("arbitrary and capricious").

Plaintiff contends that it meets the threshold requirements for a preliminary injunction which are a likelihood of success on the merits, irreparable harm, and that [*7] the equities balance in its favor. Plaintiff argues that it can prove that Geary was not an illusory tenant. It can also prove that the individual defendants tried to conceal their occupancy by sending bank checks after Geary died, without identifying themselves by name. Plaintiff provides sworn affidavits by Jack Berman, the building manager who states that he is "directly responsible for the management of the building." He also states that plaintiff accepted "rent" checks from the occupants, but did so by accident. Berman denies that plaintiff (or its predecessor in interest) knew that Geary had moved out, or that the individual defendants were living there.

In support of the "irreparable [*8] harm" requirement, plaintiff argues that unless the DHCR is enjoined there is the potential that DHCR will make determinations that are inconsistent with this court's decisions. Plaintiff argues further that the equities balance in the landlord's favor because the individual tenants are

not paying rent, or even if they will pay rent, it will be at below market rate. Thus, plaintiff argues the court can, and should, order the individual defendants to pay use and occupancy in excess of \$ 10,000 per month because they are not subject to the protections of rent stabilization. The plaintiff also seeks a preliminary injunction preventing the individual defendants from bringing in any new occupants.

DHCR and the individual tenants oppose plaintiff's motion for a preliminary injunction. The individual tenants and DHCR also seek the dismissal of the 1st and 5th causes of action as well. The arguments by the agency and individuals in connection with these motions are closely related and complementary. Therefore they are presented together and examined holistically.

The defendants argue that the core issues before the DHCR to decide are [*8] indistinguishable from, if not exactly identical to, the [*9] declaration that plaintiff seeks from this court, to wit: was Geary an illusory tenant? did he intentionally overcharge the individual tenants to evade rent regulations? and are the individual defendants entitled to a renewal lease in their own names? ¹ The individual tenants argue they have chosen DHCR as their forum to litigate this dispute and there is no reason to disturb that choice since they brought that complaint first in time, and DHCR has the power to resolve these disputes.

1 The individual defendants have now brought an overcharge claim (February 13, 2008) before the DHCR. They urge that this is yet another reason to leave the disputes before the agency. This argument, however, has not been factored into the court's decision.

DHCR supports those arguments and amplifies them. It argues that it is the state administrative agency charged with administering the regulation of residential rents under the Rent Stabilization Law and that it has primary jurisdiction to decide disputes that may arise under the rent regulation laws. Furthermore, DHCR contends that this court should not wrest this dispute from it, not only because the DHCR complaint was first in time, but also because [*10] it can apply its experience and technical expertise in resolving the controversy.

DHCR argues that there is no legal basis for the plaintiff to seek a judicial declaration when an available, conventional, forum is available for the adjudication of

this controversy. DHCR points out that discovery is available, as are the powers to issue subpoenas under the CPLR, the burdens of proof before the agency and the court are the same (preponderance of the evidence) and that DHCR can and will order a testimonial hearing, if one is necessary.

[**9] The individual defendants argue that there is no basis to grant plaintiff a preliminary injunction against them from allowing anyone else to occupy the apartment (2nd cause of action) with them pending the resolution of their disputes, not only because they have no intention of letting any one else move in, but because their rights under the Rent Stabilization Law cannot be curtailed. Thus, they contend until the issue of their status is adjudicated, any decision about who is allowed to live in the apartment is premature, and therefore should be dismissed. Although this claim is not against the DHCR, it agrees with the individual defendants that the claim [*11] is premature.

All defendants argue that the fraud (3rd cause of action) claim should be dismissed because plaintiff has not pled any facts tending to show that the individual defendants made statements to the landlord, let alone false ones, and therefore the plaintiff has failed to state a prima facie cause of action for fraud.

The defendants collectively argue that even if plaintiff can prove the individual defendants have no rights under the Rent Stabilization Laws, the landlord would have no unjust enrichment claim (4th cause of action) against them because they made payments to Geary in excess of the legal rent for the apartment. Thus, the unjustly enriched party would be Geary, whose legal representative is not a named party to this action, and therefore this cause of action should be dismissed for failure to state a claim.

As for the 6th cause of action, the individual defendants contend that it is without any supporting facts and that until the overarching issue of their legal status is decided, the plaintiff has no right to eject them. DHCR agrees with those arguments and states further that the landlord will not be prejudiced if the dismissal is made without prejudice.

[**10] Discussion

The [*12] discussion of whether plaintiff is entitled to a preliminary injunction against DHCR taking any

action in connection with the individual defendants' complaint necessarily begins with an analysis of the overarching issue of whether the dispute among the individual defendants and the plaintiff should be decided by the court, or by the DHCR. If there is no predicate cause of action in this court, then plaintiff's motion for a preliminary injunction must be denied. *Tribune Printing Co. v. 263 Ninth Avenue Realty, Inc.*, 88 AD2d 877, 879, 452 N.Y.S.2d 590 (1st Dept 1982).

Preliminary Injunction: Motions to Dismiss the 1st and 5th Causes of Action

There is no dispute that this court has general original jurisdiction in law and equity. *NY Const, art VI, § 7*. It is also undisputed that the DHCR is empowered to enforce the Rent Stabilization Law and the code. *RSL § 26-516*. In fact, under the Rent Stabilization Law, the DHCR may issue orders necessary to enforce the Rent Stabilization Law and the code. *RSL § 2526.2*.

By definition, an illusory tenant is a party who, while assuming the guise of a prime tenant, enter into a sublease agreement for profit which allows that person to circumvent the requirements of the [*13] Rent Stabilization Law. *Avon Furniture Leasing, Inc. v. Popolizio*, 116 A.D.2d 280, 500 N.Y.S.2d 1019 (1st Dept 1986). This arrangement can be with or without the knowledge of the landlord. *Primrose Mgt. Co. v. Donahoe*, 253 A.D.2d 404, 676 N.Y.S.2d 585 (1st Dept. 1998). Controversies involving illusory tenancies and primary tenancies are therefore closely interwoven with disputes about whether an individual is an unauthorized occupant of a residential apartment, or a regulated tenant entitled to the full panoply of rights under the Rent Stabilization Law, including the right to a stabilized lease, or [**11] renewal lease in his or her own name. *RSC §§ 2522.5 (b), 2523.5. see Badem Bldgs. v. Abrams*, 70 N.Y.2d 45, 510 N.E.2d 319, 517 N.Y.S.2d 450 (1987). It is beyond cavil that the DHCR is routinely called upon to make (and does make) decisions about illusory tenancies in connection with complaints filed with the agency. *Pechock v. New York State Div. of Housing and Community Renewal*, 253 A.D.2d 655, 677 N.Y.S.2d 554 (1st Dept 1998); *Grimm v. State of New York Div. of Housing and Community Renewal*, 4 A.D.3d 295, 773 N.Y.S.2d 17 (1st Dept 2004).

Although it is also within the jurisdiction of the Supreme Court to decide disputes involving illusory tenancies (*Primrose Mgt. Co. v. Donahoe*, 253 A.D.2d

404, 676 N.Y.S.2d 585 [1st Dept. 1998]; [*14] *Bozzi v. Goldblatt*, 186 AD2d 82, 587 N.Y.S.2d 658 [1st Dept 1992]; *Avon Furniture Leasing Inc. v. Poplizio*, 116 A.D.2d 280, 500 N.Y.S.2d 1019 [1st Dept 1986]), this does not mean the dispute between the individual defendants and the landlord must be judicially determined, or that this court should wrest the dispute from DHCR because the plaintiff believes this is a more appropriate forum.

Here, not only is there a prior complaint pending before the DHCR, but that agency has the necessary expertise to dispose the issues presented. *Davis v. Waterside Housing Co., Inc.*, 274 A.D.2d 318, 711 N.Y.S.2d 4 (1st Dept 2000) *den* 95 N.Y.2d 770, 745 N.E.2d 393, 722 N.Y.S.2d 473 (2000); *see Galin v. Chassin*, 217 A.D.2d 446, 629 N.Y.S.2d 247 (1st Dept 1995). It is, therefore, appropriate that this court defer to that agency's primary administrative review of these disputes. *Davis v. Waterside Housing Co., Inc.*, 274 AD2d at 319 (citing *Capers v. Giuliani*, 253 A.D.2d 630, 677 N.Y.S.2d 353 [1st Dept 1998] *lv den and dism* 93 N.Y.2d 868, 711 N.E.2d 199, 689 N.Y.S.2d 14 [1999]). This doctrine of "primary jurisdiction" coordinates the relationship between courts and administrative agencies so that "the agency's views concerning not only the factual and technical issues involved but also the scope and meaning of the statute administered by the agency" are not [**12] rendered [*15] ineffective. *Davis v. Waterside Housing Co., Inc.*, 274 AD2d at 319 (citing *Capital Tel. Co. v. Pattersonville Tel. Co.*, 56 NY2d 11, 22, 436 N.E.2d 461, 451 N.Y.S.2d 11 [1982]). There is simply no legal basis to interfere with the DHCR's administrative proceedings. *see Galin v. Chassin, supra*.

The court is not persuaded by plaintiff's arguments that it cannot obtain a full and fair determination of the illusory tenancy/primary tenancy/lease renewal dispute before the DHCR. The DHCR can investigate the facts, hold conferences, take evidence, order a hearing, and require any party to appear or produce documents (RSL § 2527.5), thus affording the parties due process. *Mauro v. Division of Housing and Community Renewal*, 250 A.D.2d 392 (1st Dept 1998); *Davis v. Waterside Housing Co., Inc., supra*; *Gattiboni v. Aponte*, 188 A.D.2d 434, 592 N.Y.S.2d 1 (1st Dept 1992). Furthermore, the burden of proof in this court rests on the plaintiff to prove its case by the fair preponderance of the evidence, the same as before the DHCR. RSL § 2525.6; *see Bellstell 140 East 56th Street. L.L.C. v. Layton*, 180 Misc.2d 25, 687

N.Y.S.2d 536 (N.Y. City Civ. Ct. 1999); *see Gattiboni v. Aponte, supra*. Thus, while plaintiff correctly contends that this court's review of any Article 78 [*16] action it brings will be limited (*In re Partnership 92 L.P. v. State Div of Housing and Community Renewal*, 46 AD3d 425, 849 N.Y.S.2d 43 [1st Dept 2007]), this standard of review is only applicable *after* the DHCR renders its decision on a full record that is developed before it. In any event, while deference is accorded to an administrative determination, that is so provided it is not irrational or unsupported by substantial evidence (*In the Matter of Gracecor Realty Co., Inc. v. Hargrove*, 90 NY2d 350, 683 N.E.2d 326, 660 N.Y.S.2d 704 [1997]).

Although plaintiff's preliminary injunction is against the DHCR proceeding in connection with the complaint before it, and DHCR argues this court is without the legal [**13] authority to do so (*see Davis v. Waterside Housing Co., supra*), even if plaintiff had sought such relief against the individually named defendants, the motion would be denied. Plaintiff has not proved the likelihood of ultimate success on the merits, that he will suffer irreparable harm unless the relief is granted, and a balance of the equities in his favor. *Paine v. Chriscott v. Blair House Associates*, 70 AD2d 571, 417 N.Y.S.2d 68 (1st dept. 1979); *Aetna Insur. Co. v. Capasso*, 75 NY2d 860, 552 N.E.2d 166, 552 N.Y.S.2d 918 (1990). Moreover, plaintiff has not proved that a preliminary [*17] injunction is needed to maintain the status quo. *see Moy v. Umeki*, 10 AD3d 604, 781 N.Y.S.2d 684 (2nd dept. 2004).

Having denied plaintiff's motion for a preliminary injunction in its entirety, the court grants each motion by the defendants for an order severing and dismissing the 1st and 5th causes of action. For the reasons stated, the declaration plaintiff seeks is indistinguishable from the issues raised in the DHCR complaint, and the court has decided it will neither stay the DHCR from proceeding with the complaint, nor decide the disputes here. DHCR has raised other arguments in opposition to plaintiff's motion for a stay against it, including whether this court could even stay an administrative agency performing its statutory duties (*see Greystone v. CAB*, 62 NY2d 763, 465 N.E.2d 1251, 477 N.Y.S.2d 315 [1984]). These arguments do not have to be resolved in light of the court's decision to allow the complaint to proceed before the DHCR.

The Remaining Causes of Action

In deciding whether the remaining causes of action

survive the pleading stage motions to dismiss, the court's attention is focused on whether the plaintiff has a cause of action rather than on whether he has properly stated one. *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 634, 357 N.E.2d 970, 389 N.Y.S.2d 314 (1976). [*18] The facts as alleged must be accepted by the court as [**14] true, for purposes of such a motion, and are to be accorded every favorable inference. *Morone v. Morone*, 50 NY2d 481, 413 N.E.2d 1154, 429 N.Y.S.2d 592 (1980); *Beattie v. Brown & Wood*, 243 AD2d 395, 663 N.Y.S.2d 199 (1st dept. 1997).

The individual defendants ask the court to dismiss all the remaining causes of action. DHCR, however, has cross moved for a stay of these claims until the complaint before it is determined. Alternatively, if the claims are not dismissed, but are allowed to proceed, DHCR argues that it is not a necessary or proper party against whom plaintiff asserts any right to relief, and therefore, the agency seeks an outright dismissal of those claims. McKinney's CPLR 1002(b).

2nd and 6th Causes of Action

The 2nd cause of action is for a stay against the individual defendants allowing any additional occupants to move in with them into the subject premises, pending the resolution of the parties' dispute. The 6th cause of action is for a writ of ejectment. RPL § 232-a.

Although the individual defendants deny they intend to let anyone else move into the apartment with them, and argue in the alternative that the landlord does not have the right to restrict who occupies the [*19] apartment with them because of regulations that apply to roommates, occupants, etc., (RPL § 235-f) the court finds that plaintiff has stated a cause of action that withstands dismissal. Likewise, although the ejectment action is premature, it states a cause of action for relief that may be available once DHCR has made its determination. Therefore, the individual defendants' motion to dismiss that claim is also denied.

DHCR's motion for a stay of the 2nd and 6th causes of action pending its decision [**15] on the complaint before it is granted. The pending administrative complaint will likely resolve the claims raised in those causes of action and constitute res judicata.

4th Cause of Action

In connection with its unjust enrichment claim, plaintiff alleges that had it known Geary had moved out of the apartment, it would have taken steps to have it deregulated, or obtain any available vacancy increases in the legal rent. Plaintiff alleges that the individual defendants were benefitted by occupying the apartment although they had no legal right to do so. While this cause of action may not be ultimately successful, plaintiff has stated this cause of action for equitable relief. *see Rosar Realty Corp. v. Leavin*, 7 AD3d 295, 776 N.Y.S.2d 258 (1st Dept 2004). [*20] Therefore, the individual defendants' motion to dismiss the unjust enrichment cause of action is denied. DHCR's motion for an order staying this cause of action is granted.

3rd Cause of Action

The facts that plaintiff relies upon to support its fraud claim are as follows: the individual defendants conspired with Geary to defraud the landlord into believing the apartment was Geary's primary residence when, in fact, he had moved out, the individual defendants were the actual occupants, and they concealed their occupancy from the landlord. By comparison, an illusory tenancy is a residential leasehold created in a person who does not occupy the premises for his or her own residential use. *Primrose Management Co. v. Donahue*, *supra*. The hallmarks of such a tenancy are a prime tenant who enters into a sublease agreement for profit which allows that person to circumvent the requirements of the Rent Stabilization Law, with or without the knowledge of the landlord. *Id.*; *Avon Furniture Leasing Inc. v. Popolizio*, 116 A.D.2d 280, 500 N.Y.S.2d 1019 [**16] (1st Dept 1986).

Plaintiff, however, alleges certain additional facts that are beyond what is before the DHCR to decide. Plaintiff alleges that it inadvertently accepted payments [*21] by the individual defendants for two months following Geary's death. The payments were made by official bank checks and therefore, did not identify who the payor was. Plaintiff contends that these are acts of active concealment by the individual tenants, and further evidence their scheme to defraud the landlord so they could remain in the apartment undetected.

Although the DHCR's decision, once made, may affect this fraud claim [*Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 [1984]; *O'Brien v City of Syracuse*, 54 NY2d 353, 429 N.E.2d 1158, 445 N.Y.S.2d 687 [1981)], the court denies

the individual tenants' motion to dismiss this claim, but will instead stay it pending the DHCR's determination of the complaint before it.

Summary and Conclusion

Plaintiff's motion for a preliminary injunction against the DHCR is hereby denied for the reasons stated and all stays issued by this court are vacated forthwith.

The cross motion by DHCR and the motion by the individual tenants for the dismissal of the complaint are granted as follows:

The 1st (declaratory judgment) and 5th (permanent injunction) causes of action are hereby severed and dismissed as against all defendants.

The individual defendants' motion for an order dismissing the 2nd [*22] (no new occupants), 3rd (fraud), 4th (unjust enrichment), and 6th (ejectment) causes of action is, however, denied. DHCR's motion for

an order staying these causes of action is granted. The stay is pending agency's decision in connection with DHCR complaint VI [**17] 410065 RV.

Either side may move to restore this case by bringing a motion for the appropriate relief.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York

August 5, 2008

So Ordered:

/s/ Judith J. Gische

Hon. Judith J. Gische, J.S.C.