rec'd 12/24/07

CITY COURT OF THE CITY OF NEW YORK
COUNTY OF WESTCHESTER
- -X
JOHN MCFADDEN

Index #SP1502/07

Petition,

NOTICE OF CROSS-APPEAL

-against-

ELENA SASSOWER

Respondent.
- -X

PLEASE TAKE NOTICE that Petitioner John McFadden hereby appeals to the Appellate Term of the Supreme Court, Second Judicial Department, 141 Livingston Street, Brooklyn, New York 11201, from the Decision and Order of White Plains City Court, Judge Brian Hansbury presiding, dated and entered October 11, 2007 insofar as it denied his motion for judgment dismissing respondent's various "affirmative defenses" and counterclaims.

Dated: New York, New York
December 14, 2007

Yours, etc.

Leonard A. Sclafani, Esq.
LEONARD A. SCLAFANI, P.C.
18 East 41st Street - Suite 1500
New York, New York 10017
212-696-9880

Elena Sassower
16 Lake Street-Apartment 2C
White Plains, New York 10603

Present: HON. BRIAN HANSBURY
CITY COURT JUDGE

----------x

JOHN MCFADDEN,

Petitioner (Overtenant),

-against-

ELENA SASSOWER,

Respondent (Subtenant),

----------x

DECISION ON MOTION

TO COMMENCE THE STATUTORY TIME PERIOD FOR APPEALS AS OF RIGHT (CPLR 5513[a]) YOU ARE ADVISED TO SERVE A COPY OF THIS ORDER, WITH NOTICE OF ENTRY, UPON ALL PARTIES.

INDEX NO.: SP 1502/07
MOTION DATE: 8/27/07

The following papers numbered 1 to 11 read on this motion by petitioner/cross-motion by respondent.

Notice of Motion	1
Affirmation of Leonard A. Sclafani	2
Exhibits A thru E	3
Notice of Cross-Motion	4
Affidavit of Elena Ruth Sassower	5
Exhibits H thru AA	6
Reply Affirmation of Leonard A. Sclafani	7
Affidavit of John McFadden	8
Exhibits A thru E	9
Reply Affidavit of Elena Ruth Sassower	10
Exhibits BB thru FF	11

Upon the foregoing papers, the Court finds and decides as follows:

That branch of petitioner's motion for a default judgment based upon respondent's alleged failure to serve and file an answer in a timely fashion is denied. While it may be true that the respondent's answer was served and filed beyond the time set by the Court, it is nonetheless apparent that the delay was minimal and petitioner has failed to establish any prejudice as a result thereof. Further, in accord with this State's strong public policy of disposition on the merits, a default is not warranted on the facts presented (*see generally Classie v. Stratton Oakmont, Inc.*, 236 AD2d 505). Next, the Court is without authority to enter a default judgment based upon respondent's alleged nonpayment of use and occupancy (*see generally Stepping Stones Associates v. Seymour*, 184 Misc.2d 990).

The balance of petitioner's motion is denied in its entirety. Where, as here, a motion to dismiss is supported by the affirmation of an attorney with no personal knowledge of the facts, the Appellate Division has held that denial of the application is proper (*see e.g. Nahrebeski v. Molnar*, 286 AD2d 891; *Arriaga v. Laub Co.*, 233 AD2d 244; *Subgar Realty Corp. v. Gothic Lumber & Millwork, Inc.*, 80 AD2d 774).

That branch of respondent's motion for an order referring this matter to the Department of Housing and Community Renewal is denied. Having reviewed the papers, the Court finds that it has subject matter jurisdiction over this proceeding. More specifically, whether or not the petitioner's cooperative apartment is subject to the ETPA involves interpretation of statute/regulation and resolution of this issue is not within the particular expertise of the DHCR (*see e.g. Davis v. Waterside Housing Co., Inc.*, 182 Misc.2d 851).

That branch of respondent's motion pursuant to CPLR §§ 3211 (a) (1); (2); (4); (5); (10) and 3211 (c) is denied. The moving papers and documentary exhibits annexed thereto fail to conclusively establish entitlement to the requested relief. Rather, a comprehensive review of the motion papers and exhibits discloses triable issues of fact with respect to the nature and terms of respondent's tenancy. Further, in view of the issues of fact presented, the Court declines to treat respondent's motion to dismiss as an application for summary judgment (*see generally Bowes v. Healy*, 40 AD3d 566; CPLR § 3211 [c]).

That branch of respondent's motion which seeks the imposition of sanctions and a referral to the Disciplinary Committee is denied.

Last, the Court has reviewed "Decision on Motion" dated December 19, 1991 under Index No. 651/89 and notes the following: The Hon. James B. Reap is retired. Since the Order "reserved decision" it does not fall within the ambit of CPLR 9002. Additionally, to the extent a prior action remains pending, the Court is not required to enter an order of dismissal under CPLR 3211 (a) (4). Rather, the Court will consolidate any prior pending action with the instant proceeding to avoid duplicative trials and promote judicial economy (*see Toulouse v. Chandler*, 5 Misc.3d 1005 [A], FN. 9).

THIS DECISION CONSTITUTES THE ORDER OF THE COURT

Dated: White Plains, New York
October 11, 2007

HON. BRIAN HANSBURY
CITY COURT JUDGE

TO: Leonard A. Sclafani, P.C.
Attorneys for Petitioner
By: Leonard A. Sclafani, Esq.
18 East 41st Street, 15th Floor
New York, New York 10017

Elena Sassower
Respondent Pro Se
16 Lake Street, Apartment 2C
White Plains, New York 10603

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CITY COURT OF THE CITY OF WHITE PLAINS
COUNTY OF WESTCHESTER

JOHN MCFADDEN,

Petitioner

-against-

ELENA SASSOWER

Respondent

NOTICE OF CROSS-APPEAL

LEONARD A. SCLAFANI, P.C.

Attorneys for PETITIONER

Office and Post Office Address, Telephone

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New York, N.Y. 10017
(212) 696-9880

Pursuant to 22NYCRR 1301.1a the undersigned, an attorney admitted to practice in the courts of New York State, certifies that upon information and belief, and after reasonable inquiry, the contentions contained in the annexed documents(s) are not frivolous:

Leonard A. Sclafani

Service of a copy of the within
is hereby admitted.

Dated,

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Attorney(s) for