

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK : HOUSING PART C  
-----X  
10<sup>th</sup> STREET WEST VILLAGE, LLC,

Petitioner,

Index No. L&T 51549/08

-against-

**DECISION/ORDER**

ROBERT MILLER, *et al.*,

Respondents.  
-----X

**HON. MARCIA J. SIKOWITZ, J.H.C.:**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion to:  
reargue and renew.

<b>Papers</b>	<b>Numbered</b>
Order to Show Cause and Affidavits Annexed .....	<u>1, 2</u>
Answering Affidavits .....	<u>14, 15</u>
Replying Affidavits .....	<u>20</u>
Exhibits .....	<u>3-13; 16-19; 21, 22</u>

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Petitioner commenced the within holdover proceeding to recover possession of the basement space located at 130 West 10<sup>th</sup> Street, New York, NY (the premises). Petitioner alleges, in the first instance, that the term of respondents' month-to-month tenancy expired after the service of a thirty-day notice to quit. In addition, petitioner alleges respondents' residential and commercial use of the premises is illegal per se because the certificate of occupancy (c/o) permits commercial use only, not commercial and residential. Respondents served and filed a written answer to the petition and then an amended answer. Respondents interposed a number of affirmative defenses and counterclaims, including the claim of a five-year lease between the parties which precluded termination of the tenancy by the service of a thirty-day notice.

Respondents then moved for summary judgment dismissing the proceeding and an order directing the correction of certain violations placed by the New York City Department of Housing Preservation and Development. Petitioner cross-moved for summary judgment in its favor. By decision/order dated March 13, 2008, this court denied both motions. The branch of respondents' motion which demanded dismissal of the proceeding was withdrawn prior to submission. Petitioner now moves to reargue and renew its cross-motion and respondents oppose the motion.

Petitioner argues the court misunderstood the law governing this case because none of the authorities cited by the decision involved a residential lease for commercial space. According to petitioner, the residential nature of respondents' lease and their residential use of the subject premises are distinguishing characteristics because the tenants' residential occupancy here violates statutes such as the Multiple Dwelling Law which are intended to promote the public safety.

Any lease, commercial or residential, is not void for illegality simply because the use does not conform to the c/o (*Kosher Konvenience, Inc. v Ferguson Realty Corp.*, 171 AD2d 650 [2<sup>nd</sup> Dept 1991]; *Del Vecchio v Bay Shore Chrysler Plymouth, Inc.*, 53 AD2d 657 [2<sup>nd</sup> Dept 1976], *app den* 40 NY2d 805 [1976]; *56-70 58<sup>th</sup> Street Holding Corp. v Fedders-Quinn Corp.*, 5 NY2d 557 [1959], 7 NY2d 752 [1959]). The critical factor in determining whether the illegal use renders the lease void is what the parties contemplated regarding the illegal use at the time the lease was executed (*Elk Realty v Yardney Electric Corp.*, 153 NYS2d 730, 731 [App Term, 1<sup>st</sup> Dept 1956], n.o.r.). Here, the lease makes no provision whatsoever for the fact the residential use of the premises violates the c/o; further, there is no provision for legitimizing the proposed residential use (petitioner's exhibit G p. 27). The lease provides simply:

It is also agreed that in consideration of the monthly payment of

\$1800.00, Anna Murray will allow Robert Miller and Pamela Alvarez to reside in the basement apartment at 130 West 10<sup>th</sup> Street, New York, New York for five years at the initial rate of \$1800.00 per month with an increase of \$50.00 per year” (Id. ¶ 4).

Where no provision is made to correct an illegal use, there is a failure of consideration and the lease is void (*Verschell v Pike*, 85 AD2d 690 [2d Dept 1981]). This renders respondents’ defense that petitioner is precluded from terminating the tenancy by service of a thirty-day notice invalid.

Accordingly, petitioner’s motion to reargue is granted and this court’s decision of March 13, 2008 is recalled. Petitioner is awarded a final judgment of possession, the warrant shall issue forthwith, and execution is stayed thirty days.

Respondents’ counterclaims are hereby dismissed without prejudice to a plenary action.

Petitioner is directed to serve a copy of this decision/order on respondents within five days after entry.

Petitioner’s additional demand for renewal is not reached by this decision.

The foregoing constitutes the decision and order of the court.

Dated: New York, New York  
August 26, 2008

MARCIA J. SIKOWITZ  
JUDGE, HOUSING COURT  
Marcia J. Sikowitz, J. H. C.

AUG 26 2008