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### Tzifil Realty Corp. v. Mazrekaj

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[\*1]

<b>Tzifil Realty Corp. v Mazrekaj</b>
2023 NY Slip Op 51271(U) [81 Misc 3d 1205(A)]
Decided on October 11, 2023
Civil Court Of The City Of New York, Kings County
Jimenez, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on October 11, 2023

Civil Court of the City of New York, Kings County

<p><b>Tzifil Realty Corp., Petitioner,</b></p> <p><b>against</b></p> <p><b>Hassan Andy Mazrekaj, Respondent.</b></p>
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Index No. 89035/19

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Sergio Jimenez, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of petitioner's motion seeking use and occupancy (Seq. 11) and petitioner's second motion (Seq. 12) seeking sanctions as against respondent and any other relief as the court may find appropriate:

**Papers Numbered**

Notice of Motion (Seq. 11) with affidavits and exhibits 1 (NYSCEF #256-262)

Affirmation in Opposition and exhibits 2 (NYSCEF #263-273)

Reply in Support of Seq. 11 3 (NYSCEF 274)

Notice of Cross-Motion (Seq. 12) with affidavits and exhibits 4 (NYSCEF #275-276)

Affirmation in Opposition to Seq. 12 5 (NYSCEF #278-287)

Reply in further support and exhibits 6 (NYSCEF #288-299)

This is a holdover proceeding which was commenced in December of 2019. The petitioner sought possession of the premises located at 922 East 15th Street, Apartment 1C, in [\*2]Brooklyn New York 11230. The instant motions seek use and occupancy as well as sanctions as against the respondent. After a full briefing on the issue, the parties appeared on September 27, 2023, the court heard argument and reserved decision.

The history of this proceeding has been recounted any one of the court's various decisions in this proceeding. However, most relevant is the Appellate Term's decision dated February 24, 2023 decision modifying Judge Capell's November 22, 2021 decision and remanding the proceeding to Civil Court for a "new determination of petitioner's motion seeking, among other things, an award of use and occupancy." Of particular note in the Appellate Term decision, the claim for possession was reinstated.

Motion for a Possessory Judgment and Use and Occupancy

The moving party bears the prima facie burden of proof to obtain the relief sought. [\*Matter of Stop & Shop Cos. Inc. v. Assessor of the City of New Rochelle\*, 32 Misc 3d 496](#) (Sup. Ct. Westchester Co, 2011).

Petitioner seeks to put forth the theory of unjust enrichment ("*quantum meruit*") as the reason why respondent should be ordered to pay use and occupancy. This is clearly an equitable claim. This court has the jurisdiction to hear equitable defenses in limited circumstances ([\*Nissequogue Boat Club v. State\*, 14 AD3d 542](#) [2d Dept 2005]; [\*Carr v. Carr\*, 78 Misc 3d 135](#)[A][App Term 2d Dept 2nd ,11th & 13th Jud Dists, 2023]; [\*Hampton v.\*](#)

[Hampton, 66 Misc 3d 1219](#)[A][Civ Ct Queens Co 2019]). However, the court may not exceed its jurisdictional mandate as to a determination of equitable issues unless they are defenses to possessory claims or the maintenance of the housing code are at stake (See [Mendoza v. 74-78 Post Avenue Heights Assoc. LLC, 76 Misc 3d 963](#) [Civ Ct Bronx County 2022]). In remanding this proceeding, the Appellate Term stated that respondent had vacated the premises as a matter of fact. It did not, however, find that petitioner had taken possession. The court notes the distinction between a respondent vacating and the petitioner taking possession of the premises themselves. Here, both have now occurred.

As recently as August 2023 in *Barton v. Bixler* [80 Misc 3d 417, App Term 2d Dept 9th & 10th Jud Dists 2023], the Appellate Term reversed the lower court for awarding use and occupancy where there was no basis in the RPAPL for the result. Here, petitioner is not arguing that the RPAPL supports their position but rather that equitable relief mandates the court order use and occupancy. However, based on petitioner's counsel's [\[FN1\]](#) in-court statements, the court finds that petitioner has taken possession of the premises. Petitioner in their papers agree that respondent has moved out as of September 2021 [\[FN2\]](#) . In fact, petitioner has been renting the unit to a tenant since "a few months" after vacatur of the respondent. This court believes that this is a telling difference between the record in Judge Capell's decision and the one before the court now. Petitioner has undoubtedly accepted possession, which means it is no longer at stake and that no claim of possession is available ([Felsenfeld v. Rogers, 78 Misc 3d 970](#) [Just Ct Westchester County, 2023, Gasbarro]).

However, the court must also analyze whether a money judgment is appropriate where the respondent has vacated, and the petitioner has accepted such a surrender. The court notes this is not a question of whether the surrender occurred prior to the commencement of the proceeding [\[\\*3\]](#) as the appellate courts have been quite clear as to that depriving the court of jurisdiction for the purposes of a summary proceeding ([92 Bergenbrooklyn, LLC v. Cisarano, 50 Misc 3d 21](#) [App Term 2d Dept, 2nd, 11th and 13th Jud Dists 2015]). Here, the proceeding unquestionably started prior to the vacatur. Petitioner then unquestionably accepted the surrender, through their acts, namely renting the premises to another individual. Intentionality may be implied by acts (*Heidi E v. Wanda W*, 210 Ad2d 918 [4th Dept 1994]). The court finds that the affirmative re-renting of the premises constitutes an acceptance of the surrender. This is still not the end of the inquiry.

Post-commencement surrender does not necessarily divest the court of jurisdiction ([Tricarichi v. Moran, 38 Misc 3d 31](#) [App Term 2d Dept 9th and 10th Jud Dists]). As such, jurisdiction is not in question here. What is relevant, however, is whether an award of a

monetary judgment is still available to petitioner. The court must answer in the negative. As stated both in the Appellate Term decision in this proceeding as well as a bevy of caselaw, a monetary judgment, in a summary proceeding, may only be awarded if there is a concomitant award of possession to the petitioner ([\*Tizifil Realty Corp. v. Mazrekaj\*, 78 Misc 3d 128](#)[A][App Term 2d Dept, 2nd, 11th & 13th Jud Dists 2023]; [\*Felsenfeld v. Rogers\*, 77 Misc 3d 128](#)[A][App Term 2d Dept, 9th & 10th Jud Dists]; [\*Javaherforoush v. Sherrard\*, 74 Misc 3d 137](#)[A][App Term 2d Dept, 9th & 10th Jud Dists 2022]; [\*Carney Realty Corp. v. Elite Tent & Party Rental\*, 73 Misc 3d 141](#)[App Term 2d Dept 9th & 10th Jud Dists 2021]; [\*Hillside Place, LLC v. Rahman\*, 79 Misc 3d 1207](#)[A][Civ Ct Queens County 2023]). Here, there is not one available as it is undisputed that petitioner has accepted surrender. The court need not reach the question of whether rejecting a surrender is even possible as it is clear that surrender was accepted here. The Appellate Term allowed the petitioner to make an argument as to what theory they sought to receive use and occupancy and they chose one of unjust enrichment, an equitable remedy not normally available in this court for the reasons set forth above. As such, the motion for use and occupancy is denied as no money judgment may be granted without a possessory judgment being available as is the case here. This is without prejudice to any claims between the parties in courts of competent jurisdiction.

### Motion for Sanctions

Petitioner also seeks sanctions against respondent's counsel. 22 NYCRR 130-1.1 states that sanctions are appropriate relief when one party engages in frivolous conduct. Frivolous conduct may be an argument put forth that is "completely without merit in law" and is not a good faith argument seeking a modification or reversal of existing law or something that is undertaken solely to "delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR 130-1.1). However, the imposition of sanctions is inappropriate in situations where it can have the adverse effect of "inhibiting good-faith arguments to modify existing law" *W.J. Nolan & Company, Inc. v. Daly*, 170 AD2d 320 (1st Dept. 1991). Petitioner here does not argue that the conduct seeks to "delay harass or maliciously injure" the petitioner, but rather that the argument against petitioner's motion is without "merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" (22 NYCRR 130-1.1).

Here, respondent's arguments are not meritless, in fact they were successful on the substantive motion at large. The court notes it may be sanctionable to make a frivolous motion for costs and sanctions (*Patterson v. Balaquiot*, 188 AD2d 275 [1st Dept, 1992];

*Southern Boulevard Sound, Inc. v. Felix Storch, Inc.*, 167 Misc 2d 731 [App. Term, 1st Dept, 1996]). While the court is authorized to consider *sua sponte* sanctions, it declines to do so at this time [\*4](See *Shelley v. Shelley*, 180 Misc 2d 275 [Sup. Ct., Westchester County 1999]). The court has an obligation to not chill arguments, that even if ultimately wrong on the law, could constitute seeking a modification or reversal on the law. 22 NYCRR 130-1.1; Siegel, NY Prac. §414(A) (6th Ed.).

## Conclusion

For the reasons set forth above both Motion Seq. 11 and Motion Seq. 12 are denied in their entirety. The proceeding is dismissed as per CPLR §409(b) where the court no longer has the ability to adjudicate a possessory judgment. As such, respondent is entitled to a judgment of dismissal. This constitutes the Decision and Order of the Court.

Dated: October 11, 2023  
Brooklyn, New York

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Sergio Jimenez, JHC

## Footnotes

**Footnote 1:**Of note, petitioner's counsel states that he is also a member of the petitioner.

**Footnote 2:**See NYSCEF # 288 Paragraph 13.

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