

COURTESY COPY

FILE

CIVIL COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52/58

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2837 FREDERICK DOUGLAS ASSOC.

Petitioner,

L & T Index No. 108066/03

-against-

DECISION AND ORDER

RODERICK KENDLY C/O WE'VE GOT
YOUR SIZE THE BANDIT BOUTIQUE
STORE #5 D/B/A STUDIO 52 BARBER SHOP

Respondents.
-----x

HON. MATTHEW F. COOPER, J.C.C.

This is a commercial holdover proceeding that was tried before me on February 24, 2004. Petitioner seeks to evict Respondent-tenant, Roderick Kendly, on the grounds that he has permitted the premises to be used for an illegal trade or business, in this case possession and sale of heroin and marijuana, in violation of Real Property Actions and Proceedings Law (R.P.A.P.L.) sections 711(5) and 715.

There is no dispute that the appropriate notices were duly served. The trial was solely on the merits of the allegations. After due deliberation and consideration of the credible evidence adduced at trial, I make the following findings of fact and conclusions of law.

The premises are a ground-floor storefront occupied by a barbershop known as "Studio 52." Respondent is the leaseholder of the premises and the owner of the barbershop.

Petitioner commenced this action after having been instructed by the New York County District Attorney to "diligently prosecute" a summary proceeding against the respondent.

R.P.A.P.L. §715(1). The notice from the District Attorney followed the execution of a search warrant at the premises and the recovery of drugs on August 27, 2003.

Detective David Salvador testified that he was with the police team that executed the search warrant. He had applied for the warrant after a series of controlled buys of narcotics were made at the premises by confidential informants in June, July and August of 2003. Upon execution of the search warrant on August 27, Detective Salvador recovered a quantity of heroin and marijuana from the storage room at the back of the shop. The storage room is a small space that is visible from all parts of the barbershop and is used to store cleaning supplies. The police arrested one Maurice Willis, who was the only person present at the premises at the time of the raid.

Detective Salvador also testified that there was a subsequent controlled buy of drugs made on September 11, 2003. The detective did not have any paperwork, including the laboratory analysis, in connection with that date. Without the lab, any testimony as to the recovery of drugs is hearsay. I find detective Salvador to be a credible witness, but because of the hearsay I am unable to consider his testimony as to the alleged buy on September 11.

Even without considering what is alleged to have occurred on September 11, 2003, the court must conclude on the basis of the competent and admissible evidence that the premises were used for drug purposes. The application for the search warrant followed a series of purchases by confidential informants working with Detective Salvador's unit. The execution of the warrant resulted in the recovery of heroin and marijuana from the barber shop's storage room, and the arrest of Mr. Willis, a barber who was working at the shop.

There is no evidence to suggest that Respondent was a participant in the drug activity at the premises. He was not charged with any crime. He was not present at the premises when the warrant was executed. Detective Salvador had no information indicating that Respondent was

there when the controlled buys were made. The issue, then, is whether Petitioner has sustained its burden of demonstrating that Respondent knew or had reason to know of the illegal activity. Such a showing must be made in order for Respondent to be evicted under the "established" New York standard of "knowledge and acquiescence." See *88-09 Realty v. Hill*, 305 AD2d 409 (2nd Dept 2003); *220 W. 42 Associates v. Cohen*, 60 Misc 2d 983 (App Term, 1st Dept 1969).

It is Respondent's position that he had no knowledge of drug activity in the barbershop. He testified that he did not employ people in his barbershop, but instead "sublet" chairs to the barbers who worked there. He charged approximately \$150 a week for each chair and only came by the shop on certain evenings to collect the fees. Once he found out that Mr. Willis had been arrested, he "terminated him."

The fact that Respondent considered the barbers at "Studio 52 Barber Shop" to be subtenants, as opposed to employees, is not determinative. The barbers – whether subtenants, independent contractors or employees – worked in a shop that was owned and operated by Respondent. Despite Respondent's attempts to show that his involvement was minimal, he admitted he managed the shop, had it cleaned, paid the utilities, determined who worked there and had access to the premises, and dealt with the police concerning issues of people congregating on the sidewalk in front of the shop. In short, Respondent had the responsibilities that come with running a small business. Such responsibility extends to insuring that the business is not used for illegal purposes.

Even assuming for arguments sake that barbers such as Maurice Willis occupied their chairs as "subtenants," the barber chairs were not in a separately demised space hidden or otherwise removed from plain view. See *210 W. 29th Street Corp. v. Scenic Office Parks, Inc.*,

NYLJ, 5/22/00, p 24, col 6 (Civ Ct, NY County). Moreover, the drugs were not recovered from a barber's chair or from a barber's person. They were found in the shop's store room.

Respondent's testimony established that he, not the barbers, had control over the room and that it was used for storing garbage bags and cleaning materials. As respondent admitted that he was responsible for cleaning the shop, there was no reason to have permitted access by others to the space.

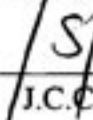
Respondent may have taken a "hands-off" attitude when it came to how his barbers conducted their affairs in his barbershop. But adopting such a position does not immunize Respondent from responsibility for their actions. In a shop as small as his, Respondent had both the duty and the ability to oversee what transpired therein. As the Appellate Term has stated: "There comes a time when one must look, and when he looks, he must see. Convenient indifference should not be confused with pardonable ignorance." *Farhadian v. Diaz*, NYLJ, 2/26/90, p 23, col 4 (App Term, 1st Dept).

The weight of the evidence supports the conclusion that Respondent had reason to know of the drug activity but chose to disregard it. As a result, the cause of action for illegal activity under R.P.A.P.L. section 715 must be granted. A final judgment of possession is issued in favor of Petitioner. Issuance of the warrant is forthwith and execution is stayed through and including March 19, 2004.

This constitutes the decision and order of the court.

Dated: March 9, 2004

Enter:


J.C.C.

HON. MATTHEW F. COOPER

Attorneys

Sperber Denenberg & Kahan
48 W. 37th Street, 16th floor
New York, NY 10018

William Alford, Esq.
325 Broadway, Suite 506
New York, NY 10007

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

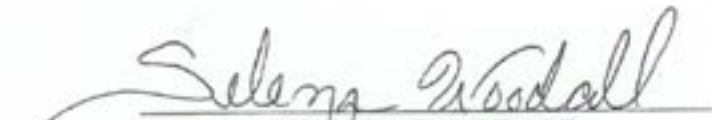
SELENA WOODALL, being duly sworn, deposes and says:

1. Deponent is not a party to the action, is over 18 years of age and is employed by *Sperber Denenberg & Kahan, P.C., 48 West 37th Street, 16th Floor, New York, New York 10018.*

2. On *March 11, 2004*, deponent served a true copy of the *Notice of Entry with Decision and Order* upon the party(ies) whose name(s) and address(es) is(are) listed below as follows:

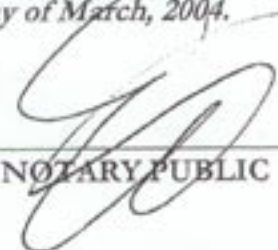
*WILLIAM ALFORD, ESQ.
Attorney for Respondents
325 Broadway, Suite 506
New York, New York 10007*

via Regular First Class Mail by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within New York State.




SELENA WOODALL

*Sworn to before me this
11th day of March, 2004.*



NOTARY PUBLIC

ERIC HOWARD KAHAN
Notary Public, State of New York
No. 02KA5077217
Qualified in Westchester County
Commission Expires May 5, 2007 

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Respondents.

DECISION AND ORDER
with NOTICE OF ENTRY

SPERBER DENENBERG & KAHAN, P.C.

Attorneys for

Petitioner

48 West 37th Street
16th Floor
New York, New York 10018
(917) 351-1335

To:

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated:

.....
Attorney(s) for

PLEASE TAKE NOTICE

that the within is a (certified) true copy of a Decision/Order of the Hon. Matthew F. Cooper, J.C.C.
NOTICE OF ENTRY entered in the office of the clerk of the within named Court on March 9, 20 04

that an Order of which the within is a true copy will be presented for settlement to the Hon.
NOTICE OF SETTLEMENT one of the judges of the within named Court.

at
Dated: on New York, New York
March 11, 2004

, at M.

SPERBER DENENBERG & KAHAN, P.C.

Attorneys for

Petitioner

48 West 37th Street
16th Floor

Direct Application Box