CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS HOUSING PART

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622A PRESIDENT STREET OWNERS CORP.,
Petitioner-Landlord,

-against

BRETT WYNKOOP and KATHLEEN KESKE
Respondent-Tenants,

"JOHN DOE" and "JANE DOE"
Respondent(s)-Undertenant(s)

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Index No. LT-081708/2018, LT-081709/2018

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO CROSS MOTION FOR CONSOLIDATION, DEFAULT AND WARRANT OF EVICTION

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS AND OPPOSITION TO CROSS MOTION

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

Eric Richmond ("Affiant","Richmond"), being duly sworn UNDER PENALTY OF PERJURY, deposes and says:

1. Upon information and belief, Affiant is the "John Doe" and "Jane Doe" named in Petition for New York City Civil Court against Jane Doe and John Doe, index numbers LT-081708/2018 and LT-081709/2018 regarding 622A President Street, Apartments 1 and 2, Brooklyn, NY ("PETITIONS").

2. PETITIONS were taped to 622a President Street before 8PM on Friday September 14, 2018.

3. Rejections of PETITIONS were served personally on petitioner counsel the following Monday.

4. The rejections constitute a common law appearance in the action.

5. The verification of the petition by Kyle Taylor does not contain the required words for a verification pursuant to CPLR 3020: "pleading is true to the knowledge of the deponent".

6. As such Kyle Taylor has not risked imprisonment, a risk to Petitioner Affiant did not waive.

7. The verification was notarized by an non-New York notary (a Canadian Attorney) in New York.

8. Upon information and belief, it is illegal for Canadian attorney to notarize in New York State.

9. The Canadian Attorney (Daphne Hooper) then submitted to the court an alleged correction.

10. No such correction has ever been served on Affiant.

11. Counsel for Plaintiff misrepresented to Judge Sikowitz and Judge Harris on October 30, 2018 and Judge Finkelstein on November 13, 2018 that Affiant and other Respondents needed to vacate a default that did not and does not yet exist prior to appearing before the court.

12. Judges Sikowitz and Harris relied on those misrepresentations in denying motion to dismiss.

Dated: Brooklyn, NY - December 10, 2018

STATE OF NEW YORK
COUNTY OF KINGS
Sworn to and subscribed before me this
10th day of December, 2018, by Eric Richmond

JEAN CLAUDE BERNAGENE II
Notary Public, State of New York
No. 01BE6302411
Qualified in Kings County
Commission Expires May 5, 2022

Eric Richmond
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS HOUSING PART

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Index No: LT-081708-2018, LT-108709-2018

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO CROSS MOTIONS TO CONSOLIDATE AND FOR ENTRY OF JUDGMENT OF DEFAULT AND FOR JUDGMENT OF POSSESSION AND OTHER RELIEFS

PRELIMINARY STATEMENT

1. Petitioner, via New York State licensed attorney Kyle Taylor, has been abusing the Housing Court process and misleading the Housing Court with his shady practices as well as shady practices by New York State licensed attorney Daniel Sodroski to do what Kyle Taylor has utterly failed to do in some 6 years of litigation in the Supreme Court of Kings County, remove Wynkoop and Keske and their friends from their Park Slope, Brooklyn, homes via other shady means.

2. The higher court case is quite simple, really. Petitioner did not read, or ignored, the clear language of the proprietary lease that says Wynkoop and Keske get the cellar and the backyard.

3. It was so clear that Petitioner representative, Kyle Taylor, an attorney, neglected to place the page of the proprietary lease (Section 7A) that denotes the cellar and backyard as belonging to Wynkoop and Keske in his original complaint in the higher court, clearly a misrepresentation, by omission.

4. This court is being asked to supersede the higher court by ruling on payment of some form of rent when the payment of any rent is controlled by a higher court ruling that dictates where rent is to be paid, into an account to which Wynkoop is a signatory from which NO disbursement can be made absent agreement by both Taylor/Subramanyam and Wynkoop/Keske. **THERE IS NO SUCH ACCOUNT**.

5. That simple fact should have this court sanction the Petitioner and Petitioner counsel for filing a frivolous action and trying to pull the wool over this court's eyes.

6. Then the court should consider the fact that Petitioner, some 2.5 months after receiving a common law rejection of the Petition, bad verification and an unethical, at best, or illegal, at worst, notarization of the bad verification.

7. Then the court should consider the further gamesmanship of Daniel Sodroski, somehow claiming that personal service, on a Monday, of a rejection, with specificity, of a document taped to a home door of an individual, not an attorney, at work elsewhere the prior Friday was not due diligence because courts have found serving the State of New York at 12:29 PM on a Friday put a 24 hour deadline on a state with dozens of lawyers on staff.

8. Then the court should consider that due to the misrepresentation to three judges of this court that there existed a default that the Sikowitz and Harris decisions premised on such a default be vacated.

STATEMENT OF RELEVANT FACTS

9. Kyle Taylor, purported in the Petition to be an Officer of 622a President Street Owners Corp., LLC, bought a one floor co-op unit and Rajeev Subramanyam bought another one floor unit, making three one floor units and one two floor unit in the building with three of five floors being owned by Wynkoop/Keske.

10. Kyle Taylor, Petitioner representative and Rajeev Subramanyam, he of the as yet unserved affidavit in support, seek, inter alia, a Default Judgment and consolidation of LT-081708/81709-2018.

11. The Petition was taped ('TAPING') to front door of Respondent's building on a Friday.

12. The Petition was reviewed as well as the law around Petitions over the weekend.

13. And, since a verification was attached, the law around verifications was reviewed.

14. On the first business day after the TAPING, separate rejections ('REJECTION'S) of each case by Wynkoop/Keske and Eric Richmond, aka 'John Doe', were served personally on counsel for Petitioner.

15. The next day Daniel Sodroski rejected the REJECTIONS as 'legally insufficient'.

16. It is uncontested that TAPING occurred on a Friday, September 14, 2018.

17. It is uncontested that REJECTIONS were personally served on the following Monday.

18. Prior to October 20, 2018, a Marshal's request for a Judgment of Default was rejected.

19. Despite not having a Judgment of Default in his pocket, Daniel Sodroski represented to Judge Sikowitz on October 30, 2018 and Judge Harris on October 30, 2018 and Judge Finkelstein on November 13, 2018, that no respondent could appear prior to vacating their default.

20. Judges Harris and Sikowitz took the attorney Daniel Sodroski at his word and issued denials of motions to dismiss the complaints absent a vacateur of the defaults despite adamant protestations by both Wynkoop and Richmond that no such Judgements of Default existed.

21. Judge Finkelstein made it clear that counsel for Petitioner, Daniel Sodroski, should seek a Judgment of Default before darkening the doorstep of the court again.

22. The current motion to dismiss is based on the REJECTIONS being valid and timely and the notarization of the verification being illegal.

23. The cross motion to consolidate and for a judgment of default (and other things) ('CROSS') finally, after nearly three months, addresses the issues inthe REJECTION, however badly.

24. The Petitioner tries to imply that due diligence is strictly 24 hours to reject verification.

25. The Petitioner tries to contort all logic by demanding Respondents vacate what is being asked for in CROSS before it can even appear, entry of a Judgment of Default.

26. The Petitioner implies a *nun pro tunc* correction of the illegal notarization of a required verification can magically strip Respondents of the substantial right to notice by way of a legal verification of Petition, by some "skin in the game" by way of possible incarceration for perjury.

27. The Petitioner seeks to have this court impose a substantial bond when there became no case before this court when Petitioner refused to correct the issues in the REJECTIONS. Preposterous.

GHANDI IN THE HOUSE

28. Oft-attributed to Ghandi (but proof is lacking), the following quote tells anyone seeking basic human rights to be in it for the long haul, that there will be opposition of many flavors:

"First they ignore you. Then they laugh at you. Then they attack you. Then you win."

29. First, Daniel Sodroski ignored the REJECTIONS by rejecting them with the unsubstantiated "legally insufficient" argument absent requisite specificity as to why it was "legally insufficient" .

30. Second, Sodroski ridiculed Respondents before three judges by implying that Respondents could be ignored because they had no grasp of the law regarding rejection, default and vacateur.

31. Thirdly, and presently, Daniel Sodroski finally addresses the itemized issues with the rejection. He is now fighting. But the tools he is using to fight are far from on point.

REJECTION IS TIMELY

32. Petitioner does not contest that papers were taped to a door on a Friday and that a response, the REJECTION, was personally served on the first business day thereafter, a Monday.

33. The court should note that if the RESPONDENTS had mailed a rejection by the end of the following day, a Saturday, the rejection would have languished on Sunday, been postmarked on Monday and maybe been delivered on Tuesday or later.

34. Tuesday or later is after the Monday personal service of the rejection.

35. It is also beyond any reason that having had no communication ever with Daniel Sodroski, that he would accept email or fax service of a rejection over a weekend or that it should be expected from a non-attorney who has not had a chance to consult with potential counsel.

36. The first communications between Petitioner and Respondent was a successful attempt at personal service first, which was accomplished on the first business day (Monday) after TAPING (Friday) and weeks before Petitioner bothered to file a facially deficient proof of service.

37. All Petitioner can do is trot out an urban legend-ish 24-hour due diligence maxim that has never been applied by the Court of Appeals, that has no known source save possibly some upstate court rule from decades ago and has been dealt with on a case by case basis, not by strict rule.

FISH IN A BARREL

38. *Aviles v Santana 2017 NY Slip Op 50887(U)2017* is a thorough treatment of verifications:

> First, the court will address the timeliness of Respondent's challenge to the verification. Under *CPLR R 3022*, a party may treat a pleading with a defective verification as a nullity "provided he gives notice with due diligence to the attorney of the adverse party that he elects to do so." Further, under *CPLR R 2101(f)*, "The party on whom a paper is served shall be deemed to have waived objection to any defect in form unless within two days after the receipt thereof, he returns the paper to the party serving it with a statement of particular objections." The short time-frames for rejection of a pleading or paper are tempered by *CPLR § 2004*, which allows the court to "extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown".

The Court of Appeals "has not employed a specific time period to measure due [*2]diligence" under *CPLR R 3022. Miller v Board of Assessors (91 NY2d 82, 86 n 3, 689 NE2d 906, 908 n 3, 666 NYS2d 1012, 1014 n 3 [1997])*. The timeliness of an objection to the propriety of a verification "must turn on the particular circumstances." *Fort Holding Corp v Otero (157 Misc 2d 834, 836, 598 NYS2d 908, 910 [Civ Ct NY Co 1993])*. See, e.g., *Oceana Apartments v Spielman (164 Misc 2d 98, 623 NYS2d 724 [Civ Ct Kings Co 1995])*(motion brought by counsel for previously unrepresented tenant challenging verification of the petition deemed timely, even though case pending for six week). A court's imposition of a 24-hour deadline for challenging a pleading based upon defective verification, as Petitioner's attorney argues is required by the "due diligence" standard, see *Lentlie v Egan (94 AD2d 839, 463 NYS2d 542 [3rd Dep't 1983]); O'Neil v Kasler (53 AD2d 310, 385 NYS2d 683 [4th Dep't 1976]); Westchester Life, Inc v Westchester Magazine Co (85 NYS2d 34, 1948 NY Misc LEXIS 3702 [Sup Ct NY Co 1948])*, " is extraordinarily rare and curiously, not one court that has done so cites to the actual origin of the alleged rule." *Rodriguez v Westchester County Bd of Elections (47 Misc 3d 956, 958, 5 NYS3d 826, 828 [Sup Ct Westch Co 2015])*(rejecting petitioner's claim that by failing to assert lack of verification within 24 hours of being served respondents waived their claim of defective Election Law petition). Factors to consider in determining "due diligence" include the amount of time elapsed between service of the faulty pleading and its rejection; the reasons for, and reasonableness of, time elapsed; whether the party already had counsel or is an attorney; whether the issue was raised at the first opportunity; and the manner in which the issue was raised. Rodriguez (47 Misc 3d at 962, 5 NYS2d at 831). "Ultimately, due diligence requires prompt attention, no undue delays, and no whiff of gamesmanship." Id.

39. Quite simply, RESPONDENTS had, either one day under the unfounded rule used mostly in election cases, at a minimum, or two days, statutorily pursuant to CPLR R 2101(f), to reject, and, since the first day and second day was a Saturday, Sunday or a Holiday, that timeframe must certainly roll over to the first non-Saturday, Sunday or Holiday.

40. How could it be otherwise? Under the standard Petitioner seeks from this court, every Housing Court Petitioner could tape documents on a door on a Friday and the ability to reject would pass even before any Respondent could reasonably contact, meet with and retain an attorney as the ability to hire an attorney on a Saturday or Sunday or Holiday is nearly non-existent.

41. No doubt, this court understands that this is unequal treatment under the law.

42. Yes, that would mean a Respondent who was served (and admittedly received) on a Friday evening must, at a minimum, be allowed to reject the papers thru the following Monday.

43. All the Petitioner has or had to do was get a legitimate verification, from an attorney no less, absent an illegal notarization to move the case forward.

44. What has happened, absent the petitioner having enough brain cells to scrape together to correct insufficient and illegal papers, was Petitioner gaming the court at each and every turn implying and pretending that an ALLEGED STATE of default can be corrected by vacateur of a judgment of default which does not exist as CPLR 5015(a)1 does not deal with a STATE of default.

45. In addition, Petitioner's reliance on the Matter of *K.K. v the State of New York* it distinguishable for a very important reason. In *K.K.*, the Respondent was served at the place of business, the State of New

York at 12:29PM (who has teams of lawyers on staff) on a Friday, not taped to a door that RESPONDENT did not know of until late into the Friday night. To hold RESPONDENTS who were not home, but elsewhere during the day, did not have counsel, were not attorneys with an office to deal with such matters quickly or even attorneys at all, to the same standard of a team of New York State hired attorneys, full time counselors, who were at work, is ridiculous on its face.

TIME TO ANSWER HAS NOT EVEN STARTED

46. The answer clock starts ticking in Housing Court by way of filing of a valid proof of service.

47. No proof of service is valid at all if the Petition is timely rejected and the issues are not corrected.

48. Beyond that, it should go without saying that the proof of service of the Petition cannot misrepresent what was served.

49. The proof of service must fail by way of facially evident misrepresentation by the process server.

50. The proof of service alleges to have served the "attached Notice of Petition and Petition".

51. Oddly, and critically, the proof of service in both cases fails to attach the Petition itself, negating the allegation that process server served any Petition whatsoever.

52. That Daniel Sodroski failed to catch it is another reason to view Petitioner with caution.

AS SUCH PRE_ANSWER MOTION TIMELY

53. Since the time to answer has not yet started, any pre-answer motion is timely.

KATHLEEN KESKE, BRETT WYNKOOP AND JOHN DOE HAVE APPEARED

54. As Petitioner finally acknowledges in the cross motion for a Judgment of Default, rejection papers were served on September 17, 2018, some 79 days (give or take) prior to the cross-motion.

55. Whether timely or not, they constitute a common law appearance, the imposition of anything in the way of a judgement for the Petitioner.

56. Such common law appearances have historically included extensions of time, notice of appearance, rejections, answers or any motion or action that extends the time to answer.

57. As to whether the common law is binding on this court, CPLR 4511 makes it so:

> Rule 4511. Judicial notice of law. (a) When judicial notice shall be taken without request. Every court shall take judicial notice without request of the **common law**, constitutions and public statutes of the United States and of every state, territory and jurisdiction of the United States and of the official compilation of codes, rules and regulations of the state except those that relate solely to the organization or internal management of an agency of the state and of all local laws and county acts. (**emphasis added**)

HAVING APPEARED ALL PAPERS MUST BE SERVED ON RESPONDENTS

58. Even if Petitioner thinks RESPONDENTS have defaulted, by virtue of RESPONDENTS' common law appearance, whether before alleged default or not, as long as before any action seeking a JUDGEMENT of default, mandates service of all papers on RESPONDENTS, forever.

59. Having uncontestedly appeared on September 17, 2018, by way of COMMON LAW REJECTION, it is quite odd, and problematic for jurisdiction, that no RESPONDENT has been served the alleged correction to the fatally flawed Notarization, absent which the power of this court cannot be invoked.

60. No attorney worthy of the title would say that such a correction being attached to a motion some months later is service of the correction at all let alone retroactive prior to service of Petition.

61. It is also quite odd that the communication submitted to the court some 40+ days after common law appearance, stating why they didn't bother to put a required phone number in papers was never served on any RESPONDENT.

62. These are critical and fatal flaws to all things requested in the cross motion.

63. This pattern of *ex parte* communications with the court is troubling, to say the least.

LET'S DO THE TIME WARP AGAIN

64. Having misrepresented to three separate busy justices of this court by subtle wording that there was an actual default to vacate before any pre-answer motion could be addressed, Petitioner now comes before the court again, this time to asked for what he told to three prior judges already existed, a default, which was the basis of the Sikowitz and Harris decisions. Such misrepresentation to the court by an officer of the court (Daniel Sodroski) strips the court of jurisdiction as fraud vitiates all it touches.

65. Petitioner will mutter some "that's not what I said" argument. That would be belied by the transcripts of the Judge Sikowitz and Judge Finkelstein (the Harris recording has disappeared).

66. Quite simply, this type of procedural chicanery should be stopped dead in its tracks.

DECONSTRUCTING THE RAJEEV SUBRAMANYAM AFFIDAVIT

67. The court should note that in pursuit of a Judgment of Default, an affidavit was submitted, one that is not necessary if there is a validly verified complaint.

68. One would expect that the seemingly unnecessary affidavit would be signed by the person who spoke for the corporation in the Petition, Kyle Taylor, would be by Kyle Taylor himself.

69. Rather than the using the rejected verification with the illegal notarization, allegedly corrected on notice or not, in steps Rajeev Subramanyam who makes a similar misdirection as Kyle Taylor.

70. The Rajeev Subramanyam affidavit swears that no respondent has appeared despite acknowledging receipt of the rejection.

71. The affidavit does say that he was advised that the rejection was legally insufficient.

72. Mr. Subramanyam is a big boy playing in the big leagues of Brooklyn real estate and he should be able to say who advised him, Daniel Sodroski, Kyle Taylor, Santa Claus or Babe Ruth.

73. To not say who, specifically, advised him is a fig leaf to protect that person if that person exists and should carry no weight with this court, especially if they are an attorney, as any attorney who has passed the New York State Bar Exam would know, that legally sufficient or not, such a communication is a

common law appearance making Subramanyam's swearing that no Respondent had appeared, at a minimum, incorrect and not sufficient to premise a judgment of Default on, or, at worst, criminal perjury.

DOING THE DEFAULT TANGO

74. Daniel Sodroski has repeatedly said in court and in papers and in casual conversation with Respondents that Respondents needed to vacate some default prior to seeking any relief.

75. RESPONDENTS have repeatedly told the court there is no Judgment of Default to vacate.

76. Two judges bought the Sodroski misdirection hook, line and sinker[1]. The third told Sodroski to go away until he moves for a Judgment of Default, making it clear to all but the thickest attorney, that no Judgment of Default yet existed.

77. Yet, here we are with Daniel Sodroski attempting to have his cake and eat it too[2].

78. In Cross Motion paragraph #3 Daniel Sodroski requests entry of a Judgment of Default:

> "I also submit this affirmation in support of Petitioner's Cross Motion requesting the Court to enter an Order: ... (d) entering a default judgment ..."

79. How can Daniel Sodroski have told the court on three occasions (twice on October 30 and once on November 13) that Respondents have to vacate a Default that, on the clear reading of the Cross Motion and upon a clear review of the docket has never been entered, did not exist on either October 30 or November 13 and does not yet exist?

80. RESPONDENT is not an attorney but logic is not foreign to RESPONDENT and the lack of logic in this situation makes RESPONDENT's head hurt.

81. That Daniel Sodroski is moving this court, on December 11, 2018, for the very thing he said RESPONDENTS had to vacate on October 30, 2018 and November 13, 2018, is shocking to the conscience and puts into question, at a minimum, any decision premised any non-existent Judgments of default.

NUN PRO TUNC'IN

82. Petitioner seeks to have this court allow the correction of an illegal notarization to be corrected on December 11, 2018, *nun pro tunc*, to prior to service of the Petition on September 14, 2018.

83. While that is wildly inappropriate as a notarization impacts a substantial right of RESPONDENTS, that of someone actually putting skin in the game, risk of jail by way of verification, when attempting to evict people, it leads to its own inevitable results.

84. Were the court to do the wildly inappropriate correction of illegal notarization, we would be left with the fact that RESPONDENTS have never been served the correction document, and, as such, no proof of service of the corrected document and no starting of the ten day clock to completion of service.

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[1] used to emphasize that someone has been completely deceived or tricked.

[2] This phrase is easier to understand if it is read as "You can't eat your cake, and have it too". Obviously once you've eaten your cake, you won't have it any more. Used for expressing the impossibility of having something both ways, if those two ways conflict.

JURISDICTION #1: NO DISPUTE BEFORE THE COURT SINCE COMMON LAW REJECTION

85. Upon timely and proper common law and improperly addressed rejection, the petition is a nullity and the power of the court, if it ever was invoked, no longer exists.

86. *Ex Parte McCardle* finds that jurisdiction, once lost, mandates dismissal. Without jurisdiction, the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and, when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.

87. Caselaw is clear that, absent specifics, a rejection has no value.

88. Absent a rejection of the rejection with specifics, there is no dispute before the court.

89. Absent a dispute before the court, the court has no power to declare the law.

90. Absent the power to declare the law, jurisdiction is lost.

91. Absent jurisdiction, all that is left is the ministerial act of dismissing the case.

92. This, as in *Mccardle*, is not less clear upon authority than upon principle.

DA BOND

93. As it is clear that the Petitioner refused to correct the deficient verification, there is no case before this court and a substantial bond is wildly inappropriate.

CONCLUSION

- Absent a valid rejection of the rejections of the Petition, there are no cases before the court.
- Absent a case, there is nothing to consolidate and nothing ripe for a Judgement of Default.
- The proof of service fails to provide any "attached" copy of the Petition as sworn to.
- A facially insufficient proof of service does not start the ten day perfection of service clock.
- It is wildly inappropriate to *nun pro tunc* a notarization of a verification of a Petition.
- Were the court to *nun pro tunc* the notarization correction, it necessarily resets the clock in the case to a time prior to service and therefore prior to completion of service, and, therefore, prior to even the possibility of an allegation of default.
- The asking of the court to enter a judgment of default negates any prior representation that there is any default, clearing the way for this court, by the implicit admission of Daniel Sodroski, to vacate any denial of prior motions to dismiss.

WHEREFORE the court should grant Repondent Wynkoop's motion to dismiss the cases or the Petitioner should be directed to reserve a Petition with a proper verification and the court should deny Petitioner's cross motions for entry of a Judgment of Default, for a bond, for *nun pro tunc* changes to a notarization, for an amendment of the caption, for a final order, for Possession and for a warrant of eviction for any other such relief as the court may find just and proper such as costs.

Dated: Brooklyn, NY December 10, 2018
STATE OF NEW YORK
COUNTY OF KINGS

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