FOR PUBLICATION

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

IMANTS E. KLINGSBERG dba E & M ASSOCIATES, **Plaintiff,** **v.** **MARY ANGELA WHEAT,** **Defendant.**	**CIVIL ACTION NO. 06-0082** **ORDER GRANTING MOTION TO SET ASIDE PLAINTIFF'S FILINGS OF DEFAULT DOCUMENTS AND PARTIALLY GRANTING MOTION TO STRIKE PLAINTIFF'S ALLEGATIONS UNDER THE HOLDOVER TENANCY ACT**

This matter was last before the Court May 16, 2006, on Defendant's motions to strike or set aside Plaintiff's motion for entry of default and Plaintiff's motion for a judgment of default. Defendant also moved to strike Plaintiff's allegations under the Holdover Tenancy Act. Appearing at oral arguments and/or on the briefs were Stephen Woodruff for Plaintiff Imants E. Klingsberg d.b.a. E&M Associates; and Mark Williams and Eric Smith for Defendant Mary Angela Wheat.

I. BACKGROUND

Defendant was a tenant in an apartment unit owned by Plaintiff. From November 2005 to February 2006, Defendant did not pay rent. Defendant demanded that Plaintiff vacate her apartment. Smith & Williams (SW), counsel for Defendant, wrote to a letter to Plaintiff demanding that he refrain from evicting Defendant. SW asserted that Plaintiff's inability to pay rent was a

result of her fall on Defendant's property, which allegedly prevented her from working.

In December 2005, Eric Smith of SW told Stephen Woodruff, counsel for Plaintiff, that Defendant intended to file counterclaims against Plaintiff if Plaintiff filed a lawsuit against Defendant.

On January 31, 2006, Plaintiff served Defendant with a notice under the Holdover Tenancy Act. The notice stated that Plaintiff would rescind the lease on February 10, 2006 unless Defendant paid the rent in arrearage.

Defendant moved out of the apartment February 14, 2006. In her April 21, 2006 affidavit, Defendant states that she surrendered the key by leaving it in a bag on the doorknob. Plaintiff disputes this claim. He asserts that Defendant left possessions behind, and that he has not been able to reenter the apartment for fear of incurring liability to Plaintiff.

Defendant disagrees with Plaintiff's assertion, and claims that Plaintiff advertised the apartment as being for rent in the local newspaper on February 28, 2006. Plaintiff counters that he did not place the ad cited by Defendant.

On March 9, 2006, Plaintiff initiated a lawsuit against Defendant under the Holdover Tenancy Act. On March 13, 2006, Plaintiff served a copy of the summons and complaint on Defendant. Defendant sought advice from SW on March 14, 2006.

In her April 4, 2006 affidavit, Maria Boongaling, a SW employee, states that she calendared the summons and complaint on March 14, 2006. She claims that she did not realize that it was a Holdover Tenancy Act case requiring an answer within five days. *See* 2 CMC § 40206(a). She calendared the answer due date as April 3, 2006, twenty days after the date of receipt of the summons and complaint.

On March 27, 2006, SW wrote to Plaintiff's counsel on the matter. The letter threatened a lawsuit by Defendant against Plaintiff on a separate matter, but agreed to forego the lawsuit in return for Plaintiff's agreement to forego his claim in the instant case. The letter asked Plaintiff to stay the proceeding "until he considers his best options." The letter states that, "If we do not hear from you or your client on or before March 30, 2006, we will assume that you have agreed to stay the above proceeding and that no request for default shall be entered against Ms. Wheat."

On March 29, 2006, Plaintiff filed a request for an entry of default. To date, the Court has not made this entry. On March 31, 2006, Plaintiff moved the Court for a judgment of default. Counsel for Plaintiff did not notify SW prior to filing these motions.

On April 3, 2006, SW attempted to contact Plaintiff's counsel three times to confirm that the case would be stayed. That afternoon, SW received a letter from Plaintiff's counsel, rejecting the offer made in SW's letter and offering an alternative settlement in the instant case.

On April 4, 2006, Defendant filed a motion to strike or set aside the filing of default documents and to strike Plaintiff's allegations under the Holdover Tenancy Act. Defendant claims that the complaint was not properly brought under the Holdover Tenancy Act, such that the filing of default documents prior to April 3, 2006 was improper.

On April 25, 2006, before this matter could be resolved, counsel for Plaintiff filed a motion to strike Defendant's answer for untimeliness, and to dismiss Defendant's counterclaim. There has not yet been a hearing on this matter.

II. STANDARD FOR ENTRY OF DEFAULT

The Court's basis for deciding the instant case differs slightly from the standards for vacating default judgment cited by counsel, as there has not even been an entry of default, much less judgment of default. Counsel may have been overzealous in filing additional motions that are

likely to be mooted by the resolution of the instant motion. The Court believes that it is a disservice to clients to file such premature motions.

Strong policies favoring the resolution of disputes on their merits limit a court's discretion to enter a default judgment or to deny a motion to set one aside. *See In re Martin-Trigona*, 763 F.2d 503 (2d Cir.1985). A court considers whether: (1) the default was willful; (2) a set-aside would prejudice plaintiff; and (3) the alleged defense was meritorious. *U.S. v. $23,000 in U.S. Currency*, 356 F.3d 157, 164 (1st Cir. 2004); *Roberto v. De Leon Guerrero*, 4.N.M.I. 295, 297 (1995).

III. ANALYSIS

A. Defendant's failure to adhere to the summary proceedings requirements of the Holdover Tenancy Act are not grounds for an entry of default in this case.

The Holdover Tenancy Act, 2 CMC § 40204, provides that a tenant "may be removed from the premises" when the tenant continues in the possession of the premises, without the permission of the landlord, after one of the following:

(a) the expiration of the lease;

(b) any default in the payment of rent pursuant to the lease, where the landlord has served three days' notice in writing on the tenant;

(c) failure to cure a material breach of the lease, other than nonpayment of rent, where the landlord has served 15 days' written notice on the tenant.

Defendant has stated in her affidavit that she vacated the premises. Based on this declaration, it is clear that an eviction action is not needed.

Plaintiff argues that the presence of Defendant's personal possessions in the unit constituted possession at the time he filed suit. *See* Plaintiff's Opposition Memorandum at 11.The Court disagrees. Black's Law Dictionary (8th ed. 2004) defines possession as "the exercise of dominion over property" or "the continuing exercise of a claim to the exclusive use of a material object." *See*

also 13 A.L.R.5th 169, "What constitutes tenant's holding over of leased premises," at §10(b). Defendant had abandoned her key, whether or not Plaintiff received this copy of the key. Plaintiff, with his own key, was able to enter the apartment and determine that Defendant was gone. If Plaintiff was still uncertain as to whether Defendant had actually vacated in accordance with his notice, it would have been fairly easy for him to contact Defendant's lawyer and find out.

The Holdover Tenant Act may still apply, however, with respect to damages. Section 40205 provides that the landlord may recover "double the amount of rent due on the premises, or any part thereof, for the period during which the tenant refuses to surrender possession." Defendant stayed on the property until February 14, 2006, four days after Plaintiff had terminated the lease.

Although damages may be governed by Section 40205, the Court is not convinced that this action warrants a summary proceeding. Section 40206, entitled Summary Possession Proceedings, states that, "The landlord or his attorney ***applying for the removal of any tenant*** shall file a complaint ***stating the facts which authorize the removal of the tenant***." (emphasis added). In such a case, "tenant's answer . . . shall be filed within five days after service of process." *Id.*

In the instant case, there was no need to remove the tenant in a prompt manner. Plaintiff had terminated the lease. Defendant had vacated. Plaintiff was entitled to re-lease the property, and to pursue money damages to compensate his loss. *Cf. Impastato v. Bruno*, 503 So.2d 189 (La. App. 4 Cir. 1987) (summary proceedings should not be the vehicle to recover monetary damages). Under these circumstances, Defendant's counsel could have reasonably believed that Defendant was not subject to the Holdover Tenant Act. *See J.M. Beals Enterprises, Inc. v. Industrial Hard Chrome, Ltd.*, 648 N.E.2d 249 (Ill. App. 1 Dist.1995) (to be charged under the holdover statute, tenant must know that he is wrongfully retaining possession of property).

B. Even if the complaint had been properly filed under the Holdover Tenancy Act, Defendant's counsel was entitled to be contacted before Plaintiff's counsel files default documents.

The actions of Plaintiff's counsel do not advance the purposes of his client (or the Holdover Tenancy Act). The purpose of the Holdover Tenancy Act, 2 CMC § 40201, *et seq*., is to "provide for a prompt and fair summary procedure for the eviction of a holdover tenant from the leased premises." P.L. 10-67 at §2. Prior to P.L. 10-67, such actions could only be filed as breach of contract complaints. *Id.* The Legislature found that, "These prolonged proceedings are an unfair denial of the landlords [sic] right to possession and result in considerable court costs and legal fees which are borne by the landlord." *Id.*

Plaintiff is correct in asserting that Plaintiff's counsel never agreed to stay the proceedings pending settlement negotiations. Nor did he agree to refrain from moving for default. *See* Plaintiff's Opposition Memorandum at 3. The Court also agrees with Plaintiff's argument that Defendant's assumption that the case would be stayed did not constitute misrepresentation by Plaintiff's counsel. *See id.* However, Plaintiff's counsel need not have acted fraudulently for the Court to find that default is unwarranted. Even though Defendant's counsel were erroneous in their assumption that the case would be stayed, it would have been fairly simple for Plaintiff's counsel to provide notice that he would move for an entry of default.

Courts have held that where a defendant's counsel has made an appearance, plaintiff's counsel must give notice to defendant's counsel before filing default documents. The term "appearance" has been loosely construed to include situations where plaintiff's counsel is aware of defendant's counsel's involvement in the case.

In *Sun Bank of Ocala v. Pelican Homestead and Sav. Ass'n*, 874 F.2d 274, 276 (5th Cir. 1989), the court held that a letter from a defendant's counsel to plaintiff's counsel and a telephone conversation between them, in both of which the defendant's lawyer indicated an intention to defend

the suit, sufficed as an appearance under Federal Rule of Civil Procedure 55(b)(2).

In *Key Bank of Maine v. Tablecloth Textile Co. Corp*., 74 F.3d 349 (1st Cir.1996), a letter from defendants' counsel to plaintiff's counsel, in which the former explained defendants' lack of funds and desire to pursue settlement negotiations in preference to judicial remedy if plaintiff would forebear from filing default motion, was considered an appearance.

In *Lutomski v. Panther Valley Coin Exchange,* 653 F.2d 270 (6th Cir.1981), defendants were entitled to notice upon proof that they had contacted plaintiffs and asked for an extension of time to answer.

Plaintiff suggests that the above cases are inapplicable, since, "an appearance, without any further attempt to defend on the merits, will not keep a party from being held in default for failure to plead or otherwise defend, it merely activates the special notice and juridical review protections provided in the rule." Plaintiff's Opposition Memorandum at 7, quoting WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D, Sec. 2686.

The Court agrees that an appearance in the form of a sole phone call or letter will not keep a party from being held in default. However, the Court is guided by the common sense approach suggested in the above cases. When a plaintiff's counsel is aware of the involvement of defendant's counsel in a case, the former should communicate with the latter before moving for the entry of default. This is particularly so in the instant case, when the involvement of Defendant's counsel in the disputes between Plaintiff and Defendant has been much more than a single phone call or letter.

C. Defendant has standing to bring a motion to strike.

Plaintiff asserts that once the default is established, defendant has no further standing to contest the factual allegations of plaintiff's claim for relief. *See* Memorandum at 10, citing *Nishimatsu Const. Co., Ltd. v. Houston Nat. Bank*, 515 F.2d 1200 (5th Cir. 1975). However, the

court in that case noted that the defendant's default does not in itself warrant the entry of default judgment, since there must be a sufficient basis in pleadings for judgment entered. *Id.* at 1206. A default judgment may be lawfully entered only according to what is proper on the basis of the claim (assumed to be true) and not according to prayer of the complaint. *Id.*

Here, even if summary proceedings under the Holdover Tenancy Act were proper, Plaintiff's counsel's failure to communicate with Defendant's counsel was improper. Defendant's defense on these grounds has nothing to do with the merits of the case, and Defendant has not lost "standing" to assert it.

IV. CONCLUSION

The criteria for granting a default judgment have not been met. First, the Court does not believe that Defendant's failure to file an answer within five days was willful. Second, because Defendant has already vacated the premises, the only available relief to plaintiff is monetary damages. Setting aside the default documents does not alter the available relief. While Plaintiff may argue that it slows down his relief, the Court notes that the merits would have been reached much more quickly had Plaintiff's counsel notified Defendant's counsel prior to the filing of the documents. Further, the cases Plaintiff cites in his Opposition Memorandum at 13 regarding prejudice are inapplicable, as they involve opening a default judgment. Here, there is no such judgment. Finally, Defendant has a defense on the merits. Considering these factors, a default judgment is not warranted.

Defendant's motion to strike Plaintiff's filing of Default Documents is GRANTED. Defendant's Motion to strike Plaintiff's allegations under the Holdover Tenancy Act is GRANTED IN PART. The Court will not strike allegations regarding liability for damages under Holdover Tenant Act (Section 40205).

SO ORDERED this 25th day of May 2006.

/s/_____
Juan T. Lizama
Associate Judge, Superior Court