

<b>Momart Discount Store Ltd. v Rossi</b>
2016 NY Slip Op 32165(U)
July 18, 2016
Civil Court of the City of New York, New York County
Docket Number: 86283/2015
Judge: Jack Stoller
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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: HOUSING PART C

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MOMART DISCOUNT STORE LTD.,

Petitioner,

Index No. 86283/2015

- against -

**DECISION/ORDER**

ROBERT ROSSI,

Respondent/Tenant.

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Present:

Hon. Jack Stoller  
Judge, Housing Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of these motions.

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Papers	Numbered
Notice of Motion and Supplemental Affidavit and Affirmation Annexed.....	1, 2, 3
Notice of Motion To Dismiss and Supplemental Affirmation and Affidavit Annexed	4, 5, 6
Affidavit and Affirmation In Opposition to Motion for Discovery	7, 8
Affirmation and Affidavit In Opposition To Motion To Dismiss	9, 10
Reply Affirmation In Support of Motion Seq #1	11

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

Momart Discount Store Ltd., the petitioner in this proceeding (“Petitioner”), commenced this holdover proceeding against Robert Rossi, the respondent in this proceeding (“Respondent”), seeking possession of 870 Broadway a/k/a/ 230 East 18<sup>th</sup> Street, #3 on the ground that Respondent is not maintaining the subject premises as his primary residence. Petitioner now moves for leave to obtain discovery. Respondent cross-moves to dismiss and for a stay. The Court consolidates both motions for resolution herein.

As Respondent's cross-motion raises threshold issues, the Court first considers Respondent's cross-motion. There appears to be a protracted dispute between the parties before the Loft Board regarding the subject premises. The petition pleads that there is a pending challenge before the Loft Board concerning Respondent's status. Respondent moves to dismiss on the ground that a failure of a tenant covered by the Loft Law<sup>1</sup> to maintain a demised premises as a primary residence is not a ground upon which to evict such a tenant.

Respondent relies upon authority standing for the proposition that residential occupancy of a premises during a statutory window period need not be a matter of primary residence in order for a premises to be covered by the Loft Law. Kaufman v. American Electrofax Corp., 102 A.D.2d 140, 143 (1<sup>st</sup> Dept. 1984), S. Axelrod Co. v. Mel Dixon Studio, Inc., 122 Misc.2d 770, 783 (Civ. Ct. N.Y. Co. 1983). However, this proposition is limited to "Loft Law *coverage*" (emphasis added). Vlachos v. New York City Loft Bd., 70 N.Y.2d 769, 770 (1987). The effect of nonprimary residence on Loft Law coverage differs from the question of whether a Loft Law landlord has a cause of action sounding in nonprimary residence. BOR Realty Corp. v. New York City Loft Bd., 129 A.D.2d 496, 498 (1<sup>st</sup> Dept. 1987). The Court of Appeals upheld a regulation promulgated by the Loft Board conferring upon Loft Law landlords such a cause of action, Lower Manhattan Loft Tenants v. New York City Loft Bd., 66 N.Y.2d 298, 301 (1985), and so landlords may pursue such causes of action. See, e.g., Katz v. Gelman, 177 Misc. 2d 83, 84 (App. Term 1<sup>st</sup> Dept. 1998), Eichenbaum v. Mulberry, 1994 N.Y. Misc. LEXIS 725 (App. Term 1<sup>st</sup> Dept. 1994).

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<sup>1</sup> Codified at Article 7-C of the Multiple Dwelling Law.

Respondent also moves to dismiss this proceeding on the undisputed ground that Petitioner did not serve a predicate notice upon Respondent. Part of the rationale for imposing a primary residence requirement upon Loft Law tenants was a construction of the Loft Law *in pari materia* with the Rent Stabilization Law. D&R Realty Corp. v. Blakely, 9 Misc.3d 203, 205-206 (Civ. Ct. N.Y. Co. 2005), *citing* Lower Manhattan Loft Tenants, *supra*, 66 N.Y.2d. at 304 (“[t]he Loft Law was created to protect covered tenants and to provide regulation of [Loft Law] units in much the same manner as the Rent Stabilization Law and Code.”). The Rent Stabilization Code requires service of a predicate notice prior to commencement of a nonprimary residence holdover proceeding. 9 N.Y.C.R.R. §§2524.2(c)(2), 2524.4(c).

Live by the *in pari materia* construction, die by the *in pari materia* construction. A nonprimary residence holdover proceeding, while permitted against a Loft Law tenant, requires service of a predicate notice on such a Loft Law tenant. Kiamie-Princess Marion Realty Corp. v. Lipton, 20 Misc.3d 423, 424 (Civ. Ct. N.Y. Co. 2008), *citing* Rose v. Genesis Real Estate, Inc., 101 A.D.2d 427, 431 (1<sup>st</sup> Dept.), *appeal dismissed*, 63 N.Y.2d 676 (1984), Mazda Realty Assocs., L.L.P. v. Green, 187 Misc. 2d 419, 420 (App. Term 1<sup>st</sup> Dept. 2000). Accordingly, the Court dismisses so much of the petition as seeks a judgment against Respondent on a theory of nonprimary residence and denies Petitioner’s motion for leave to obtain discovery.

The petition pleads an alternate ground for relief, that Respondent’s lease expired and that no regulation requires it to renew Respondent’s lease. Respondent moves to dismiss the entirety of the proceeding on the ground that the petition is fatally defective, as it pleads two inconsistent causes of action as such. However, a litigant may plead causes of action alternatively or

hypothetically, CPLR §3014, including inconsistent causes of action. Kerzhner v. G4S Govt. Solutions, Inc., 138 A.D.3d 564, 565 (1<sup>st</sup> Dept. 2016), Corsello v Verizon N.Y., Inc., 77 A.D.3d 344, 360 (2<sup>nd</sup> Dept. 2010). In a summary proceeding, alternative pleading is permitted so long as it is made with specificity. Turin Hous. Dev. Fund Co. v. Maor, 1 Misc.3d 907(A) (Civ. Ct. N.Y. Co. 2003), *citing* 349 E. 49<sup>th</sup> St. Equities v. Vought, N.Y.L.J., May 27, 1982 at 5:4 (App. Term 1<sup>st</sup> Dept.). See 3657 Realty Co. LLC v. Jones, 52 A.D.3d 272 (1<sup>st</sup> Dept.), *appeal dismissed*, 11 N.Y.3d 829 (2008)(a notice to cure and a notice of termination, which plead alternative grounds for eviction, were not jurisdictionally defective, even though the notice to cure was based on an illegal sublet and the notice of termination identified an additional ground of non-primary residence, when they sufficiently apprised the respondent of the grounds on which she would have to defend the proceeding). The petition in this matter is clear and detailed as to the dispute between the parties as to the rent regulatory status of the subject premises, Petitioner's position in that dispute, and the alternative grounds for relief. Accordingly, the Court denies Respondent's motion to dismiss so much of the petition as seeks a judgment based upon the expiration of Respondent's lease.

Respondent moves for a stay as alternative relief. As Petitioner has no cause of action to evict Respondent upon expiration of his lease if Respondent is a protected tenant under the Loft Law, the outcome of Petitioner's cause of action sounding in expiration of Respondent's lease wholly turns on the outcome of proceedings before the Loft Board. Where the decision in one proceeding will determine all the questions in another proceeding and the judgment on one trial will dispose of the controversy in both, a stay is appropriate, SSA Holdings LLC v. Kaplan, 120

A.D.3d 1111, 1111-1112 (1<sup>st</sup> Dept. 2014), Uptown Healthcare Mgt., Inc. v. Rivkin Radler LLP, 116 A.D.3d 631 (1<sup>st</sup> Dept. 2014), Oxbow Calcining USA Inc. v. American Indus. Partners, 96 A.D.3d 646 (1<sup>st</sup> Dept. 2012), 952 Assoc., LLC v. Palmer, 52 A.D.3d 236, 236-37 (1<sup>st</sup> Dept. 2008), Belopolsky v. Renew Data Corp., 41 A.D.3d 322, 322-323 (1<sup>st</sup> Dept. 2007), even for summary proceedings. Maguire v. Ardea Realty Corp., 279 A.D. 904 (1<sup>st</sup> Dept. 1952), Boca Broadway Realty Co. v. Naim, N.Y.L.J. June 8, 1995 at 31:5 (App. Term 1<sup>st</sup> Dept.), *leave to appeal denied*, 1996 N.Y. App. Div. LEXIS 8474 (1<sup>st</sup> Dept. 1996), Ennismore Apartments v. Gottlieb, NYLJ, Sept. 24, 1992, at 24:5 (App. Term 1<sup>st</sup> Dept.), 5201 Snyder Ave. Assoc. LP v. Clarke, 32 Misc.3d 1203(A) (Civ. Ct. N.Y. Co. 2011), Mozaffari v. Schatz, 12 Misc.3d 1162(A) (Civ. Ct. N.Y. Co. 2006), Twenty Seven Naught One Assoc. v. Tirado, 1995 N.Y. Misc. LEXIS 728 (Civ. Ct. N.Y. Co. 1995), *citing* Mora v. DiBartolo, N.Y.L.J. Feb. 8, 1995 at 27:2 (Civ. Ct. N.Y. Co.). Even if the Court has concurrent jurisdiction with the Loft Board, the pendency of the Loft Board proceedings militate in favor of a stay due to the risk of inconsistent determinations between the Court and the administrative agency. Compare 310 West End Ave. Owners Corp. v. Rosenberg, N.Y.L.J. August 28, 1991 at 21:4 (App. Term 1<sup>st</sup> Dept.), Ft. Greene Assets Inc. v. Delaine, N.Y.L.J. March 27, 1995 at 30:3 (App. Term 2<sup>nd</sup> & 11<sup>th</sup> Depts.) (while the Housing Court has jurisdiction to entertain a rent overcharge claim, the Housing Court will not do so if there is a pending overcharge complaint at the New York State Division of Housing and Community Renewal.

CPLR §2201 permits a stay upon such terms as may be just. Intuitively, such terms of a stay of this proceeding would require payment of use and occupancy. Respondent argues that

Petitioner is not in compliance with legalization schedules of the Loft Law, thus relieving Respondent of the obligation to pay rent or use and occupancy. Petitioner argues that Respondent has prevented it from legalizing the subject premises by denying access to the subject premises.

Petitioner's argument amounts to an admission that Petitioner is not in compliance with the legalization schedules of the Loft Law, which, in and of itself, would preclude Petitioner from collecting rent or use and occupancy. MDL §302. Petitioner argues that Respondent's conduct preventing the legalization of the subject premises precludes the application of MDL §302, an argument that has support in appellate authority. Chatsworth 72<sup>nd</sup> Street Corp. v. Rigai, 71 Misc.2d 647, 651, (Civ. Ct. N.Y. Co. 1972), *aff'd*, 74 Misc.2d 298, 345 N.Y.S.2d 355 (App. Term 1<sup>st</sup> Dept.), *aff'd*, 43 A.D.2d 685, 351 N.Y.S.2d 636 (1<sup>st</sup> Dept. 1973), *aff'd on the opinion of the Civil Court of the City of New York*, 35 N.Y.2d 984, 985 (1975), First Edition Composite, Inc. v. Wilkson, 177 A.D.2d 297, 299 (1<sup>st</sup> Dept. 1991), Hornfeld v. Gaare, 130 A.D.2d 398, 400 (1<sup>st</sup> Dept. 1987), Amdar v. Armenti, N.Y.L.J., June 23, 1994 at 28:4 (App. Term 1<sup>st</sup> Dept.).

This authority relies upon an “abandon[ment of] a literal application of MDL §302 in favor of allowing equity to control in order to avoid a tenant's unjust enrichment,” as one Court put it. B.S.L. One Owners Corp. v. Rubenstein, 159 Misc.2d 903, 908 (Civ. Ct. Richmond Co. 1994). However, a recent Court of Appeals case rejects the abandonment of a literal application of MDL §302. Chazon, LLC v. Maugenest, 19 N.Y.3d 410, 415-16 (2012)(“[i]n the absence of compliance, the law's command is quite clear ... [judicially-carved-out exceptions to MDL §302] may make sense from a practical point of view. But we find nothing ... to explain how they can

be reconciled with the text of the statute. They simply cannot. ...If that is an undesirable result, the problem is one to be addressed by the Legislature”). The Court's strict application of MDL §302 appears to render the rest of the authority standing for a different result without effect. Accord, 742 Realty LLC v. Zimmer, 46 Misc.3d 1204(a)(Civ. Ct. N.Y. Co. 2014), *citing* Caldwell v. American Package Company, Inc., 57 A.D.3d 15, 26 (2<sup>nd</sup> Dept. 2008).

Petitioner argues that Chazon, LLC, *supra*, is distinguishable from this matter because Chazon, LLC, *supra*, applied MDL §302 to an action seeking a judgment sounding in nonpayment of rent, while Petitioner herein seeks use and occupancy. However, MDL §302 applies to use and occupancy as well as rent. Jo-Fra Props., Inc. v. Bobbe, 81 A.D.3d 29, 34 (1<sup>st</sup> Dept. 2010), Sheila Props., Inc. v. A Real Good Plumber, Inc., 59 A.D.3d 424, 425 (2<sup>nd</sup> Dept. 2009), Caldwell, *supra*, 57 A.D.3d at 24, Jalinos v. Ramkalup, 255 A.D.2d 293, 294 (2<sup>nd</sup> Dept. 1998), 99 Commercial Street v. Llewellyn, 240 A.D.2d 481, 482-483 (2<sup>nd</sup> Dept. 1997),<sup>2</sup> Fields v. Rohinsky, 39 Misc.3d 142(A) (App. Term 2<sup>nd</sup> Dept. 2013).

Even if a Loft Law unit does not yet have a residential certificate of occupancy, a Loft Law landlord may still collect rent if it is in compliance with the law. MDL §285(1). The Loft Board is empowered to make a determination as to whether a Loft Law landlord is in compliance with the law. See, e.g., 29 R.C.N.Y. §2-01.1(b)(2). Indeed, it is the extant Loft Board litigation involving the parties herein that is to determine the only claim left in this proceeding, i.e., whether the subject premises is subject to any regulation and therefore whether Petitioner states a

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<sup>2</sup> To the extent that this case permitted a Loft Law landlord other relief, the Court of Appeals abrogated this decision. Chazon, LLC, *supra*, 19 N.Y.3d at 416.

cause of action sounding in expiration of Respondent's last lease. The tail of a use and occupancy application should not wag the dog of an ultimate determination of the merits of this dispute between the parties. Petitioner has its remedies before the extant Loft Board litigation, and the Court therefore does not condition a stay pursuant to CPLR §2201 on payment of use and occupancy. However, as the Court defers to the expertise of the Loft Board on this issue, this ruling is without prejudice to a contrary ruling in the future depending on additional findings of the Loft Board, and the Court holds in abeyance so much of Respondent's summary judgment motion pursuant to MDL §302 pending the outcome of Loft Board proceedings.

Accordingly, this proceeding is stayed pending the outcome of Loft Board proceedings. Either party may move to vacate the stay. Both parties may stipulate to restore the matter to the Court's calendar for any purpose.

This constitutes the decision and order of this Court.

Dated: New York, New York  
July 18, 2016



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HON. JACK STOLLER  
J.H.C.