SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAVIOLA SOTO J.S.C. PART 7

Index Number : 114915/2004

PULTZ, DAVID S.

vs

ECONOMAKIS, CATHERINE

Sequence Number : 003

DISMISS ACTION

INDEX NO. _____

MOTION DATE 12/20/05

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

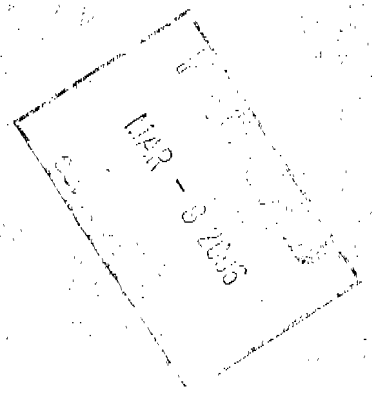
The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Notice of Cross-motion)	2
Replying Affidavits (Answering)	3, 4

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.



Dated: March 6 2006

PAVIOLA SOTO J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

W

Signed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

----------X

DAVID S. PULTZ, MIRIAM GARCIA, LAURA ZAMBRANO, JANET DUNSON and DELORES ALLEN,

Plaintiffs,

Index No.: 114915/04
DECISION & ORDER

-against-

CATHERINE ECONOMAKIS and ALISTAIR ECONOMAKIS,

Defendants.

----------X

HONORABLE FAVIOLA A. SOTO, J.S.C.:

In this action for a declaratory judgment, defendants move for summary judgment to dismiss the complaint, and plaintiffs cross-move for summary judgment on the first and second causes of action in the complaint (motion sequence number 003). For the following reasons, the motion is denied, and the cross- motion is granted to the extent indicated.

BACKGROUND

Defendants Catherine and Alistair Economakis (the landlords) are the owners of a five-story, fifteen-unit, tenement apartment building located at 47 East 3rd Street in the State, City and County of New York (the building). Plaintiffs David S. Pultz, Miriam Garcia, Laura Zambrano, Janet Dunson and Delores Allen are the tenants of apartments 2,4,1,13 and 7 at the building, respectively (the tenants). The building is a rent-stabilized multiple dwelling. The tenants all reside at the building, although the landlords do not.

The landlords seek to terminate all of the tenants' rent-stabilized leases on the grounds that they wish to recover the entire building for their personal use and convert it into a private dwelling. The notices of non-renewal that the landlords have served on each of the tenants

herein state as follows:

> ... Furthermore, the Landlord will not renew your lease based upon the fact that Alistair Economakis seeks possession of [your apartment] for use as Alistair Economakis' primary residence in New York City.
>
> In fact, the Landlord intends, in good faith, to recover possession of all of the apartments located on the First, Second, Third, Fourth and Fifth Floors at 47 East Third Street ...
>
> The facts concerning the Landlord's desire to recover possession of the Subject Premises include, but are not limited to, the following:
>
> Alistair Economakis currently occupies the Top Floor of a brownstone building on 131 Pacific Street in Brooklyn, New York ... with his wife Catherine Economakis. The Pacific Street Space is not a separate apartment with its own entrance door, but access to and from it must be gained through an internal staircase through the occupied Second, Third and Fourth Floors of the building. The Pacific Street Space has one bedroom, a study, two bathrooms, a galley kitchen, a living room and a deck, and is approximately 1000 square feet including the deck. Alistair Economakis and his wife are expecting their first child in December, 2003, and there is insufficient residential living space for he, his wife and their child in the Pacific Street Space. The other floors of the building ... are occupied by relatives of the Landlord, including the parents of Catherine Economakis. There is no room for Alistair Economakis to expand within this building; and Alistair Economakis must obtain his own home which will be suitable to his needs.
>
> The living space that Alistair Economakis intends on creating after recovering possession of the First, Second, Third, Fourth and Fifth Floors at the Subject Building will be better suited to his family's needs than the living space afforded by the Pacific Street Space. Alistair Economakis intends, after recovering the Apartments on the First, Second, Third, Fourth and Fifth Floors at the Subject Building to combine them to create a single living space ... better suited to his family's needs. The living space that Alistair Economakis intends on creating will contain several living spaces that do not exist in the Pacific Street Space ...
>
> On the First Floor, Alistair Economakis intends to create a library, storage room, home study area, bathroom and utility room. On the Second Floor, Alistair Economakis intends to create a guest bedroom, den, gym with adjoining shower, laundry room and bathroom. On the Third Floor, Alistair Economakis intends to create a dining room, living room, kitchen, pantry and bathroom. On the Fourth Floor, Alistair Economakis intends to create a Master Bedroom with a walk-in closet, a Master Bathroom, and a walkway overlooking the living room, which living room will be an open space composed of the Third and Fourth Floors. On the Fifth Floor, Alistair Economakis intends to create two bedrooms, a bathroom, a playroom, and a Nanny's suite containing a bedroom and bathroom. ...

The landlords have already recovered five of the building's 15 apartment units, and they allege that they are now renovating and combining apartments 11 and 14, and will soon be doing the same to apartments 3, 5 and 6. They have submitted an affidavit from their architect, Nikola Martinovic (Martinovic), along with copies of the plans that Martinovic has filed with the New York City Department of Buildings (the DOB).

The tenants commenced this action on October 19, 2004. The complaint sets forth causes of action for: 1) a declaratory judgment that the landlords' plan to convert the entire building into a single family dwelling for their personal use violates the Rent Stabilization Law and Code; 2) a permanent injunction against the landlords' plan based on the foregoing declaration; and 3) attorney's fees.

The tenants moved by order to show cause for a preliminary injunction to stay the landlords from terminating their leases or from pursuing summary holdover proceedings against them in Housing Court (motion sequence number 001). The landlords cross- moved to dismiss this action pursuant to CPLR 3211. By decision and order dated June 20, 2005, the court (Feinman, J.) found[1], in pertinent part, that:

> Based on these principles of statutory construction, a reading of the [Rent Stabilization Code] which allows a landlord to recover all of the rental premises in a tenement building at one time based on plans to turn the entire building into a private home, would appear to be incompatible with the statute's intent to provide New York City residents with the affordable and stable housing. Many, in not all, of the cases relied upon by the defendants refer to smaller brownstone buildings, the restoration of which to an owner-occupied single family home may well be permitted. However, the statute cannot be read as permitting a tenement building to be rid of an entire rent roll of tenants who, given today's rental market, will never be able to find comparable housing in Manhattan, and perhaps not in the

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[1] Judge Feinman's decision is reported at Pultz v Economakis, 8 Misc 3d 1022(A) (Sup Ct NY County 2005).

City. In addition, were the Court to construe the statute in the manner urged by defendants ... there would be no remedy for tenants to punish greedy and unethical landlords. To be clear, the Court is not characterizing these particular landlords as greedy and unethical, but is merely noting that law must be interpreted in a way that prevents potential abuses. "The Legislature does not contemplate the leaving of a party without a remedy," and construing a statute so as to cause that effect is to be avoided (Practice Commentaries, McKinney's Consol. Laws of NY, Book 1, Statutes § 144, p. 293).

Plaintiffs have set forth sufficient arguments to suggest that they will prevail in this forum. Supreme Court is clearly the proper arena for the action, given that it presents a novel issue involving legislative intent, apparent most clearly in a non-Housing Court context ... It affects public policy, statutory intent and regulatory construction. The fact that some landlords have become emboldened to test the parameters of the statutes formerly used conservatively, suggests that the court should address the issues now being raised. ...

Thereafter, the landlords answered on September 28, 2005.

The landlords now move for summary judgment to dismiss the complaint, and the tenants cross- move for summary judgment on their first and second causes of action.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. Zuckerman v City of New York, 49 NY2d 557 (1980); Pemberton v New York City Tr. Auth., 304 AD2d 340 (1st Dept 2003). "'[A]verments merely stating conclusions, of fact or of law, are insufficient' to 'defeat summary judgment.'" Banco Popular North America v Victory Taxi Management, Inc., 1

NY3d 381, 383 (2004). "An attorney's affidavit is of no probative value on a summary judgment motion *unless* accompanied by documentary evidence which constitutes admissible proof ." Adam v Cutner & Rathkopf, 238 AD2d 234, 239 (1st Dept 1997). The court's function, on a motion for summary judgment, is one of issue identification, not issue determination. See e.g. Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 (1957); Grullon v City of New York, 297 AD2d 261 (1st Dept 2002).

Here, as previously mentioned, defendants' motion seeks summary judgment dismissing all three of the causes of action set forth in the complaint, while plaintiffs' cross- motion seeks summary judgment on their first and second causes of action only.

1. Declaratory Judgment

Plaintiffs' first cause of action seeks a declaratory judgment "that the Defendants' Plan [to recover the entire building for their personal use] violates the Rent Stabilization Law and Code." Declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; see e.g. Jenkins v State of New York, Div. of Hous. and Community Renewal, 264 AD2d 681 (1st Dept 1999). The Court of Appeals holds that "[t]he remedy is available in cases 'where ... the legality or meaning of a statute is in question and no question of fact is involved'." Morgenthau v Erlbaum, 59 NY2d 143, 150 (1983), quoting Dun & Bradstreet v City of New York, 276 NY 198, 206 (1937); see also Bankers Trust Corp. v New York City Dept. of Finance, 301 AD2d 321, 328 (1st Dept 2002).

The first issue before this court, therefore, is whether and to what extent the court should grant a declaratory judgment in this action. Here, defendants' first cause of action requests, inter

alia, that the court construe and rule on the application of the Rent Stabilization Law and Code as to defendants' stated intention to recover possession of the entire building. As to this articulated issue, this is an action that may be properly resolved in this declaratory judgment.

With respect to the second (i.e., justiciability) element of their claim, "[a] showing of a justiciable controversy 'requires that the controversy be "definite and concrete", "real and substantial" or admits "of specific relief through a decree of a conclusive character".'" Genesee Hosp. v Allied Office Products, Inc., 193 Misc 2d 225, 228 (Sup Ct Monroe County 2001), quoting Aetna Life Ins. Co. v Haworth, 300 US 227, 240-241 (1937), New York State Assoc. of Insurance Agents, Inc. v Schenck, 44 AD2d 757, 758 (4th Dept 1974).

Here, defendants have already served lease termination notices on all of the plaintiffs, and have begun the physical work necessary to carry out their plans to convert the entire building to their personal use. Accordingly, the court finds that the controversy as articulated by the court is clearly justiciable, and that plaintiffs may therefore properly request declaratory relief.

The first section of the Rent Stabilization Law is entitled "Findings and declaration of emergency," and provides as follows:

> The council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons within the city of New York ...; that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents; that there continues to exist an acute shortage of dwellings which creates a special hardship to persons and families occupying rental housing;... that unless residential rents and evictions continue to be regulated and controlled, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; ...that the transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state and city policy, must be administered with due regard for such emergency; and that the policy herein expressed is now administered locally within the city of New York by an agency of the city itself ...

> The council further finds that, prior to the adoption of local laws sixteen and fifty-one of nineteen hundred sixty-nine, many owners of housing accommodations in multiple dwellings, not subject to the provisions of the city rent and rehabilitation law enacted pursuant to said enabling authority ..., were demanding exorbitant and unconscionable rent increases as a result of the aforesaid emergency...that such increases and demands were causing severe hardship to tenants of such accommodations and were uprooting long-time city residents from their communities; that recent studies establish that the acute housing shortage continues to exist;... that unless such accommodations are subjected to reasonable rent and eviction limitations, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; and that such conditions constitute a grave emergency.

Unconsol. Laws § 26-501.[2]

The Rent Stabilization Law requires the New York State Division of Housing and Community Renewal (the DHCR) to promulgate a Rent Stabilization Code for the New York State legislature to adopt. Unconsol. Laws § 26-511. The portion of the Rent Stabilization Code that is entitled "Construction and implementation" provides that:

> This Code shall be construed so as to carry out the intent of the Rent Stabilization Law to ensure that such statute shall not be subverted or rendered ineffective, directly or indirectly, and to prevent the exaction of unjust, unreasonable and oppressive rents and rental agreements, and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare; and that the policy herein expressed shall be implemented with due regard for the preservation of regulated rental housing.

Unconsol. Laws § 2520.3.

The Rent Stabilization Law sets forth a restriction on any Rent Stabilization Code that the DHCR might promulgate, such that:

> c. A code shall not be adopted hereunder unless it appears to the division of housing and community renewal that such code ...

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[2] The New York State legislature has repeatedly re-enacted the Rent Stabilization Law, most recently through April of 2006. Unconsol. Laws § 26-502.

(9) provides that an owner shall not refuse to renew a lease except: ...

(b) where he or she seeks to recover possession of one or more dwelling units for his or her own personal use and occupancy as his or her primary residence in the city of New York and/or for the use and occupancy of a member of his or her immediate family as his or her primary residence in the city of New York ... The provisions of this subparagraph shall only permit one of the individual owners of any building to recover possession of one or more dwelling units for his or her own personal use and/or for that of his or her immediate family. Any dwelling unit recovered by an owner pursuant to this subparagraph shall not for a period of three years be rented, leased, subleased or assigned to any person other than a person for whose benefit recovery of the dwelling unit is permitted pursuant to this subparagraph or to the tenant in occupancy at the time of recovery under the same terms as the original lease. This subparagraph shall not be deemed to establish or eliminate any claim that the former tenant of the dwelling unit may otherwise have against the owner. Any such rental, lease, sublease or assignment during such period to any other person may be subject to a penalty of a forfeiture of the right to any increases in residential rents in such building for a period of three years; ...

Unconsol. Laws § 26-511 (c) (9) (b).

In deference to this restriction, the Rent Stabilization Code contains a section, entitled "Grounds for refusal to renew lease ... without order of the DHCR," that provides that:

The owner shall not be required to offer a renewal lease to a tenant, ... and may commence an action or proceeding to recover possession in a court of competent jurisdiction, upon the expiration of the existing lease term, if any, after serving the tenant with a notice as required pursuant to section 2524.2 of this Part, only on one or more of the following grounds:

(a) Occupancy by owner or member of owner's immediate family.

(1) An owner who seeks to recover possession of a housing accommodation for such owner's personal use and occupancy as his or her primary residence in the City of New York and/or for the use and occupancy of a member of his or her immediate family as his or her primary residence in the City of New York. ...

(3) The provisions of this subdivision shall only permit one of the individual owners of any building, whether such ownership is by joint tenancy, tenancy in common, or tenancy by the entirety to recover possession of one or more dwelling units for personal use and occupancy.

> (4) No action or proceeding to recover possession pursuant to this subdivision shall be commenced in a court of competent jurisdiction unless the owner shall have served the tenant with a termination notice ...

Unconsol. Laws § 2524.4.

In deference to the statutory policy that favors the preservation of regulated rental housing, however, the next section of the Rent Stabilization Code is entitled "Grounds for refusal to renew lease ... and evict which require approval of the DHCR". It provides that:

> (a) The owner shall not be required to offer a renewal lease to a tenant ..., and shall file on the prescribed form an application with the DHCR for authorization to commence an action or proceeding to recover possession in a court of competent jurisdiction after the expiration of the existing lease term, upon any one of the following grounds:
>
> > (1) Withdrawal from the rental market. The owner has established to the satisfaction of the DHCR after a hearing, that he or she seeks in good faith to withdraw any or all housing accommodations from both the housing and non-housing rental market without any intent to rent or sell all or any part of the land or structure and:
> >
> > > (i) that he or she requires all or part of the housing accommodations or the land for his or her own use in connection with a business which he or she owns and operates; or
> >
> > > (ii) that substantial violations which constitute fire hazards or conditions dangerous or detrimental to the life or health of the tenants have been filed against the structure containing the housing accommodations by governmental agencies having jurisdiction over such matters, and that the cost of removing such violations would substantially equal or exceed the assessed valuation of the structure.
>
> (2) Demolition. (i) The owner seeks to demolish the building. Until the owner has submitted proof of it's financial ability to complete such undertaking to the DHCR, and plans for the undertaking have been approved by the appropriate city agency, an order approving such application shall not be issued...

> (3) Other grounds. The owner will eliminate inadequate, unsafe or unsanitary conditions and demolish or rehabilitate the dwelling unit pursuant to the provisions of article VIII, VIII-A, XIV, XV or XVIII of the PHFL, the Housing New York Program Act or sections 8 and 17 of the U.S. Housing Act of 1937 (National Housing Act)...
>
> (b) Election not to renew. Once an application is filed under this section, with notification to all affected tenants, the owner may refuse to renew all tenants' leases until a determination of the owner's application is made by the DHCR.... If such application is denied, or withdrawn, prospective renewal leases must be offered to all affected tenants within such time and at such guidelines rates as directed in the DHCR order of denial or withdrawal.
>
> (c) Terms and conditions upon which orders authorizing refusal to offer renewal leases may be based. Except as otherwise provided in paragraph (a)(2) of this section, the DHCR shall require an owner to pay all reasonable moving expenses and shall further condition the order upon the payment of a reasonable stipend and/or the relocation of the tenant by the owner to a suitable housing accommodation at the same or lower regulated rent in a closely proximate area. If no such housing accommodation is available at the same or lower regulated rent, the owner may be required to pay the difference in rent between the subject housing accommodation and the new housing accommodation to which the tenant is relocated for such period as the DHCR determines, commencing with the occupancy of the new housing accommodation by the tenant.
>
> (d) Any order granting an application pursuant to this section shall not provide for a stay of eviction which exceeds one year. In addition, where the order if the DHCR is conditioned upon the owner's compliance with specified terms and conditions, if such terms and conditions have not been complied with, the order may be modified or revoked.

Unconsol. Laws § 2524.5.

While not noted by the parties, New York City Administrative Code also provides as follows:

> Withdrawal of occupied housing accommodations from rental market.
>
> (a) A certificate shall be issued where the landlord establishes that he seeks in good faith permanently to withdraw occupied housing accommodations from both

> the housing and nonhousing markets, without any intent to rent or sell all or any part of the land or structure, and:...
>
> > (4) that the continued operation of the housing accommodations would impose other undue hardship upon the landlord.

9 NYCRR § 2204.9.

The court notes that the Rent Stabilization Code applies different regulations to situations in which the owner of a rent stabilized building wishes to recover possession of "one or more dwelling units" therein for his or her personal use and occupancy, and those in which that owner wishes "to withdraw any or all housing accommodations from both the housing and non-housing rental market without any intent to rent or sell." The effect of these regulations is that, in the former situation, the owner need not obtain permission from the DHCR before taking action to recover the rent stabilized apartment units, whereas in the latter situation, the owner must obtain permission from the DHCR before taking such action.

In support of their motion, defendants first argue that the plain language of the Rent Stabilization Law and Code precludes the court from rendering a declaratory judgment in plaintiffs' favor. Defendants specifically base their argument on the language of Unconsol. Law §§ 26-511 (c) (9) (b) and 2524.4. They interpret the portions of the text in those provisions that permits owners of rent stabilized buildings in New York City to recover "one or more dwelling units for personal use and occupancy" as proof that the New York State legislature intended to allow such owners to recover an unlimited number of dwelling units for their personal use, including potentially all of the dwelling units in a given building. Defendants support this interpretation by citing the corresponding text in the Emergency Tenant Protection Regulations

(which set forth the rules that govern rent stabilized housing outside of New York City) that permits owners "to recover possession of not more than two dwelling units for their personal use and occupancy." Unconsol. Law § 2504.4.

Defendants ask the court to conclude that the legislature only intended to restrict the ability of owners of rent stabilized buildings outside of New York City to recover apartment units for their personal use, but did not intend to apply similar restrictions on owners of rent stabilized buildings in New York City.

In their cross- motion, plaintiffs argue that defendants' proposed interpretation of the Rent Stabilization Law and Code is clearly inconsistent with the overall statutory scheme. Plaintiffs specifically argue that defendants' plan to recover the entire building for their personal use will result in the withdrawal of the building from the rental market, and that Unconsol. Law § 2524.5 requires defendants to first obtain permission to do so from the DHCR, as well as imposing other restrictions. Plaintiffs further argue that there is no justification for the inference that defendants wish the court to draw from the different owner-recovery provisions that are set forth in the Rent Stabilization Code and the Emergency Tenant Protection Regulations, because the Rent Stabilization Code contains specific provisions that govern the situation at bar, and it would therefore be irrelevant to consider the provisions of the Emergency Tenant Protection Regulations.

In 390 West End Associates v Harel (298 AD2d 11 [1st Dept 2002]), the Appellate Division, First Department, noted that:

> Our long-established public policy of preserving a moderate-priced housing stock in New York City, based on a legislative finding of an emergency shortage of affordable housing which exists up to the present, has been carefully codified in

rent statutes and regulations ...

(390 West End Associates v Harel, 298 AD2d at 14) and that:

> The original point of rent stabilization was to respond to a critical housing shortage in the aftermath of the Second World War (Rent Stabilization Assn. v Higgins, 83 NY2d 156, 164-165, cert denied 512 US 1213). A policy of addressing the contemporary need to ensure an adequate supply of affordable housing retains a continuing vitality (390 W. End Assoc. v Baron, supra), so as to "ameliorate the dislocations and risk of widespread lack of suitable dwellings" (Manocherian v Lenox Hill Hosp., 84 NY2d 385, 395, cert denied 514 US 1109).

390 West End Associates v Harel, 298 AD2d at 15.

After duly noting these policy considerations, the court finds that Unconsol. Law § 2524.5 governs the subject matter of this action. The building originally contained fifteen rent stabilized apartment units. It presently contains five occupied rent stabilized apartment units. If defendants fully execute their recovery plan, the building will contain no rent stabilized apartment units. The net loss of fifteen rent stabilized apartment units clearly exacerbates the "emergency" described in the Rent Stabilization Law - i.e., an "acute shortage of dwellings which creates a special hardship to persons and families occupying rental housing." That loss also clearly falls afoul of the directive in the Rent Stabilization Code "that the policy herein expressed shall be implemented with due regard for the preservation of regulated rental housing."

The inescapable consequence of defendants recovering possession of the entire building is that all of the building's fifteen rent stabilized apartment units will be forever withdrawn from the rental market. Unconsol. Law § 2524.5 contains the regulations that govern that scenario. Indeed, the very existence of those regulations demonstrates that Unconsol. Law § 2524.4 should not be applied here.

Therefore, the court rejects defendants' statutory construction argument, and finds instead

that defendants have violated Unconsol. Law § 2524.5 by failing to obtain approval from the DHCR before they attempted to regain possession of the entire building. [3]

Defendants also incorrectly argue that the controlling case law precludes the court from rendering a declaratory judgment in favor of plaintiffs; defendants are relying on four appellate decisions[4] utilizing the good faith standard under Unconsol. Law § 2524.4, and the court finds that the facts in this action are governed by Unconsol. Law § 2524.5.

Defendants additionally cite four lower court decisions[5] for the proposition that "there is no limit on how much space a particular owner may regain for personal use" pursuant to Unconsol. Law § 2524.4. Plaintiffs respond that this statement, which first appeared in the decision of the Appellate Term, First Judicial District, in Sobel v Mauri (NYLJ 12/12/84, p. 10, col. 1 [AT 1]), is merely dicta.

The court notes that in this action the June 20, 2005 decision resolved this argument in plaintiffs' favor. The relevant portion of that decision found that:

Although some decisions subsequent to Sobel cite and even quote the observation,

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[3] Contrary to plaintiffs' argument, this court does not read the Rent Stabilization Law or the Rent Stabilization Code as requiring that a per se distinction be made in evaluating personal use recovery scenarios based only on the type of building sought to be recovered. Nor does it appear that any DHCR operational bulletins so require. Accordingly, as it is not the role of this court to usurp the legislative or rulemaking functions that are reserved to the other branches of state government, the court expressly declines to reach this issue in this action.

[4] Defendants cite Rosenbluth v Finkelstein, 300 NY 402 (1950); Nestor v Britt, 213 AD2d 255 (1st Dept 1995); Basic Holding Corp. v Gabel, 21 AD2d 874 (1st Dept 1964); and Salazar v Li, 4 Misc 3d 142(A) (App Term 1st Jud Dist 2004).

[5] Defendants cite Sobel v Mauri, NYLJ 12/12/84, p. 10, col. 1 (AT 1); Croman v Siben, n.o.r., Index No. L&T 50347/03 (NYC Civ Ct); Wong v Repass, NYLJ 12/2/98, p. 29, col. 2 (NYC Civ Ct); Canino v Fogel, NYLJ 9/22/93, p. 23, col. 3 (NYC Civ Ct); and Taiber v Ruscica, NYLJ 10/14/87, p. 14, col. 3 (NYC Civ Ct).

> it is not the holding in Sobel, which is rather that a landlord may occupy the space of her choosing, even when for specialized purposes, as long as there is demonstrated an honest intention.

Pultz v Economakis, 8 Misc 3d 1022(A) at 4, fn 8. This finding should be treated as "the law of the case." See e.g. People v Evans, 94 NY2d 499 (2000). Accordingly, the court finds that the portion of defendants' argument that relies on the Appellate Term's dicta in Sobel v Mauri is misplaced.

In their reply papers, defendants attempt to further buttress their case law argument by claiming that several decisions that were previously rendered in Housing Court have res judicata effect on this court. One of those decisions was issued in a holdover proceeding that defendants had commenced against plaintiff Laura Zambrano, while the other decisions involved tenants who do not appear in this action. In each of the decisions, the Housing Court judge either repeated or paraphrased the Appellate Term's statement from Sobel v Mauri, discussed in the preceding paragraph, that "there is no limit on how much space a particular owner may regain for personal use" pursuant to Unconsol. Law § 2524.4. Id.

Defendants are incorrect. To the extent that any of the Housing Court judges relied on the language in Sobel to find that defendants were entitled to recover possession of rent stabilized apartment units in the building for their personal use pursuant to Unconsol. Law § 2524.4, this court is not constrained thereby and finds that by virtue of defendants' stated plan to withdraw the entire building from the rental market, this action comes within the ambit of Unconsol. Law §2524.5.

Next, defendants argue that the legislative history of the Rent Stabilization Code "shows no limit on the number of units that may be recovered by one owner." Defendants support this

argument by annexing a copy of a 2005 bill that did not pass the state legislature which would have amended Unconsol. Law § 26-511 ©) (9) (b) to require an owner attempting to recover a rent stabilized apartment unit for his or her personal use to demonstrate an "immediate and compelling need" for such unit.

In response, plaintiffs note that previously the New York State legislature amended the foregoing portion of the Rent Stabilization Law to re-enact the language that "only permit[s] one of the individual owners of any building to recover possession of one or more dwelling units for his or her own personal use and/or for that of his or her immediate family." Plaintiffs argue that that action was significant because it revealed the legislature's intent to plug a loophole that could conceivably allow multiple owners to evict multiple tenants and thereby wrongfully decrease the amount of available rent stabilized housing stock in New York City.

These arguments, however, are not applicable to this action. Their arguments bear on the Rent Stabilization Law, an enabling statute, but do not bear on the provision of the Rent Stabilization Code that governs the facts of this action - Unconsol. Law § 2524.5. Further, as previously discussed, that Rent Stabilization Code provision requires a landlord to obtain approval from the DHCR for a plan to permanently withdraw an entire building's worth of rent stabilized apartment units from the rental housing market in New York City. That plain statutory language expresses all of the evidence of the legislatures' intent that is necessary to dispose of this motion. "[T]he starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." Rosner v Metropolitan Property and Liability Ins. Co., 96 NY2d 475, 479 (2001); quoting Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583 (1998).

Finally, defendants argue that the declaratory judgment that plaintiffs' seek would result in a violation of their rights pursuant to both the Fifth Amendment of the U.S. Constitution, and Article I, Section 7 of the New York State Constitution. Defendants cite some language from the United States Supreme Court's decision in Yee v City of Escondido, Cal. (503 US 519 [1992]) to support this proposition. However, a close reading of the decision reveals that defendants' reliance on the selected language is misplaced. The Yee decision actually held that a rent control law that had been passed in a rural California county was not a "taking" as defined by the Fifth Amendment of the U.S. Constitution.

In any event, the courts of this state have already determined that Unconsol. Laws § 26-511 ©) (9) (b) does not violate either the federal or the New York State constitutions. See Kerrigan v Kenny, 121 AD2d 602 (2d Dept 1986). Accordingly, the court rejects defendants' constitutionality argument, and finds that the portion of defendants' motion that seeks summary judgment dismissing plaintiffs' cause of action for declaratory relief should be denied.

Plaintiffs' cross- motion seeks summary judgment on their cause of action for a declaratory judgment that "[d]efendants' Plan violates the Rent Stabilization Law and Code." The court has already determined that this action is governed by Unconsol. Law § § 26-511 ©) (9) (b) and 2524.5, and that defendants have violated both of those statutes by failing to secure permission from the DHCR for their plan to withdraw the buildings from the rental market.

This does not end the inquiry, however. Plaintiffs' requested declaratory relief is in part based on certain assumptions and interpretations of the facts and the statute; those assumptions and interpretations, however, are incorrect, and therefore the court must now fashion the appropriate declaratory relief.

First, the complaint alleges that "[t]he removal of an entire residential building or all of its units from Rent Stabilization requires authorization from the DHCR and compliance with the requirements for demolition or withdrawal from the housing market." While the first portion of this statement is correct, the second portion is not. Plaintiffs argue that defendants fail to satisfy the statutory requirements for withdrawing the building from the rental market because: 1) they have not shown that they "require[] all or part of the housing accommodations ... for [their] own use in connection with a business which [they] own[] and operate[]," pursuant to Unconsol. Laws § 2524.5 (a) (1) (I); and 2) because they have not offered to pay any moving expenses pursuant to Unconsol. Laws § 2524.5 ©).[6]

This argument suggests defendants will never be able to satisfy any of the statutory criteria by which landlords may withdraw buildings from the rental market.

Perhaps because of their position that the facts underlying this action are governed by Unconsol. Laws § 2524.4, however, defendants did not submit an application to the DHCR to withdraw the building from the rental market pursuant to Unconsol. Laws § 2524.5. Should they do so, as the law requires, the application will be considered by the DHCR. How the DHCR will determine that application is not for this court to predict. Nor should the court rule on issues that are not properly before it.

Further, plaintiffs' argument also ignores the portion of 9 NYCRR § 2204.9 (a) (4) that permits owners of rent stabilized buildings to withdraw them from the rental market where "the

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[6] Plaintiffs also argue that defendants fail to satisfy the requirements set forth at Unconsol. Laws § 2524.5 (a) (2) that apply to plans to demolish a building. The court finds that the portion of Unconsol. Laws § 2524.5 that deals with demolitions has no application to this action, however, because the evidence presented to date is that defendants seek to renovate the building, and not to demolish it. Accordingly, plaintiffs' demolition argument is not applicable.

continued operation of the housing accommodations would impose other undue hardship upon the landlord." Although defendants moving papers do not annex any evidence of what financial "hardship"- if any - they would suffer if they continued to operate the building as a residential rental property, defendants' claim that they will suffer undue hardship is left for the DHCR under the appropriate application. See 9 NYCRR § 2204.9 (a) (4). The court will not issue a declaration based on plaintiffs' interpretation of Unconsol. Laws § 2524.5 (and 9 NYCRR § 2204.9 (a) (4)) as set forth in the complaint as to do so would improperly foreclose defendants from presenting any withdrawal applications to the DHCR in the future.

Plaintiffs' second allegation based on their reading of the statute involves the portion of the complaint that alleges that "defendants' plan ... is inconsistent with the statutory scheme for owner-use evictions of rent stabilized tenants" because "the landlord ... must be ready to presently use ... the particular dwelling unit as soon as the tenant vacates."

Unconsol. Laws §§ 26-511 ©) (9) (b) and 2524.4 (a) (5) both provide that a building owner who wishes to recover rent stabilized apartment units therein for his or her personal use may not rent, lease, sublease or assign such units to any other party for a period of three years. Plaintiffs argue that defendants' plan to recover the entire building for personal use requires that a number of the units therein will necessarily remain vacant for several years (i.e., until all of the renovation work is complete), and that this is impermissible pursuant to several lower court decisions that found that it is a statutory violation for an owner to hold such units vacant after recovering them for his or her personal use.[7]

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[7] Plaintiffs cite the Appellate Term decisions in Nestor v Britt (NYLJ 5/18/94 [AT 1]), and Dusza v Rela (NYLJ 8/16/91 [AT 2 & 11]).

Here, however, the facts of this action are governed by Unconsol. Laws § 2524.5, which does not contain the language from which plaintiffs derive their "owner use" argument, and plaintiffs' reading of Unconsol. Laws §§ 26-511 (c) (9) (b) and 2524.4 (a) (5) is not applicable.

In conclusion, the court finds that plaintiffs' cross- motion should be granted solely to the extent of entering a judgment that declares that defendants violated the Rent Stabilization Law and Code by unilaterally attempting to withdraw the entire building from the rental market without first obtaining permission from the DHCR to do so.

Permanent Injunction

Plaintiffs' second cause of action seeks a permanent injunction. Although defendants seek summary judgment dismissing the entire complaint, they fail to submit any additional, specific argument as to why plaintiffs' second cause of action should be dismissed. To the extent that defendants' argument to dismiss the injunctive relief is based upon and intertwined with their argument to dismiss the declaratory relief, it is rejected. That branch of defendants' motion seeking dismissal of plaintiffs' second cause of action is denied.

Plaintiffs' cross- motion seeks summary judgment granting their request for a permanent injunction "tolling the [landlords'] Notices of Non-Renewal and enjoining defendants from instituting holdover proceedings based upon said Notices."

In determining a preliminary injunction motion, a court considers, inter alia, whether movant demonstrates a likelihood of success on the merits. In determining a party's permanent injunction action, a court considers, inter alia, whether and to what extent the party actually succeeded on the merits of the case. Here, plaintiffs were granted a preliminary injunction to restrain defendants "during the pendency of this action, from taking any action to cancel or

terminate any of the plaintiffs' leases..." As the Appellate Division, First Department, has stated, "[a] preliminary injunction is a provisional remedy... [i]ts function is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits." Wall Street Garage Parking Corp. v New York Stock Exchange, Inc., 10 AD3d 223, 226 (1st Dept 2004), quoting Residential Bd. of Managers of the Columbia Condominium v Alden, 178 AD2d 121, 122 (1st Dept 1991); see also Ryan v McLean, 209 AD2d 913, 914 (3d Dept 1994) ("since a permanent injunction is a final judgment, it normally may be granted only after trial").

Up to this point, the preliminary injunction has served the purpose of maintaining the status quo in this action. Now, as the court has found plaintiffs' cause of action for a declaratory judgment to the extent indicated to be meritorious, the court must fashion the appropriate form of the permanent injunction. The injunctive relief to be granted from the court will reflect the court's declaration and therefore differs from the wording of the injunctive relief as originally requested in the complaint and the language of the preliminary injunction.

While the court resolved an issue of law on plaintiffs' declaratory judgment claim, the court also determined that certain factual issues are not properly now before it. The court specifically found that defendants were incorrect to attempt to regain possession of the entire building pursuant to Unconsol. Law § 2524.4, and that they should have proceeded pursuant to Unconsol. Law § 2524.5 instead. The court also specifically declined to usurp the role of the DHCR and now rule on how the DHCR might or should decide, upon submission of a proper application, whether a landlord under the circumstances that may be demonstrated might recover possession of an entire building pursuant to Unconsol. Law § 2524.5 and/or 9 NYCRR § 2204.9

(a) (4).

Were the court to grant plaintiffs their request to now permanently enjoin defendants from commencing holdover proceedings against them in connection with their plan to recover possession of the entire building, defendants' statutory right under certain circumstances to seek such recovery would be effectively negated. The Rent Stabilization Law and Code provides the mechanism for determining whether and under what circumstances a landlord might eventually recover, or be denied, possession of the building, and an injunction herein should not serve to defeat, ignore or undermine the existing statutory scheme. Therefore, the appropriate permanent injunction here differs from the preliminary injunction originally issued.

The court grants a permanent injunction restraining defendants from taking any action to cancel or terminate any of the plaintiffs' leases on the grounds sought herein until defendants proceed through the DHCR. In the event defendants obtain the requisite approval to end one or more of plaintiffs' rent stabilized tenancies and/or to recover possession of the entire building and permanently remove it from the rental market, defendants then may apply to this court to lift this injunction.

Attorney's Fees

Plaintiffs' third cause of action seeks an award of attorney's fees. Again, although defendants seek summary judgment dismissing the entire complaint, they fail to submit any specific argument as to why plaintiffs' third cause of action should be dismissed. Nor have the parties annexed to these papers plaintiffs' respective leases, upon which the claim for attorney's fees stems, or shown which party, if any, is the prevailing party so as to recover the fees. The court also notes that plaintiffs' cross- motion does not seek summary judgment on their claim for

attorney's fees. The court therefore denies that branch of defendants' motion seeking dismissal of plaintiffs' third cause of action.

CONCLUSION

Accordingly, for the foregoing reasons, defendants' motion is denied, plaintiffs' cross-motion is granted to the extent indicated, and the parties are directed to settle this order on notice.

Dated: New York, New York
March 6, 2006

ENTER:

FAVIOLA A. SOTO, J.S.C.

Copies mailed