

Coizza v 164-50 Crossbay Realty Corp.

2007 NY Slip Op 34461(U)

October 26, 2007

Supreme Court, Queens County

Docket Number: 26004 2004

Judge: Janice A. Taylor

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IA Part 15
Justice

	x	
EUGENE COIZZA II and ANNE DELLAQUILLA,		Index Number <u>26004</u> 2004
Plaintiffs,		Motion Date <u>June 5,</u> 2007
- against -		Motion Cal. Number <u>9</u>
164-50 CROSSBAY REALTY CORP., VINCENT SODANO and 164 CROSSBAY CORP.,		Motion Seq. Nos. <u>6, 7, 8</u>
Defendants.		
	x	

The following papers numbered 1 to 35 read on this motion by Alex T. Roshuk, Esq. to declare that he is not the attorney of record in this action, or alternatively, to withdraw as attorney of record and, in addition, to stay this action pursuant to CPLR 2201, or to recognize the automatic stay pursuant to CPLR 321(c) as being operable in this action and the action entitled Bombi Piece, Inc. v 164-50 Crossbay Realty Corp. (Supreme Court, Queens County, Index No. 18413/2006) retroactive to February 1, 2007, and to confirm the stay until substitute counsel is obtained; motion by plaintiffs for leave to enter a default judgment against defendants, to direct defendants to convey title to the premises known as 164-50 Cross Bay Boulevard, Howard Beach, New York, to plaintiffs in accordance with the contract of sale dated August 9, 2002 at a date, time and place to be fixed by the court, to direct defendants to do all acts and things necessary to convey insurable and marketable title in accordance with the contract of sale, to direct that the conveyance be without prejudice to a hearing to be held to fix and determine damages, reduction in purchase price and monetary adjustments suffered by plaintiffs by reason of defendants' failure to convey previously title, to enjoin defendants from instituting or prosecuting any proceeding in Civil Court, Queens County, to evict or vacate the tenancy of Maximum Flooring, Inc. at the subject premises, to transfer and consolidate any landlord/tenant proceeding with the instant action, to fix a date for a hearing to punish defendants for contempt of court and/or issue a preliminary injunction; this cross motion by

defendants to vacate any default they committed in answering the amended complaint; and this motion by plaintiffs to consolidate the summary proceeding entitled 164 Crossbay Corp. v Maximum Flooring, Inc. (Civil Court, Queens County, L&T Index No. 061139/2007) with the instant action.

	<u>Papers Numbered</u>
Orders to Show Cause - Affidavits - Exhibits.....	1-15
Notice of Motion - Affidavits - Exhibits.....	17-20
Notice of Cross Motion - Affidavits - Exhibits...	21-23
Answering Affidavits - Exhibits.....	24-26
Reply Affidavits.....	27-35

Upon the foregoing papers it is ordered that the motions and cross motion numbered 6, 7 and 8 on the motion calendar for June 5, 2007 are joined together for consideration herein, and are determined as follows:

On August 9, 2002, plaintiffs contracted to purchase a multi-purpose commercial real property from defendant 164-50 Crossbay Realty Corp., as seller. Defendant Vincent Sodano, as the seller's president, executed the contract on its behalf. The purchase price of \$1,200,000.00 was to be financed by means of a purchase money mortgage, and the closing was set for "on or about" January 15, 2003. The contract provided that the seller was to convey insurable title and that the property was being conveyed subject to applicable zoning laws and regulations "provided that they are not violated by the buildings and improvements erected on the property or their use." The contract required the seller to deliver a "valid and subsisting" certificate of occupancy (or other required certificate of compliance or evidence that none was required), "covering all structures on the subject [p]remises authorizing their current usages as marine supply store, floral shop, retail shop, and upstairs storage space." It further provided that the seller was not required to "bring any action or proceeding to ... make the [p]remises legal for the use represented...."

At the same time that plaintiffs contracted to purchase the property, they also leased a portion of the premises for use as a retail store. Pursuant to that lease, plaintiffs were granted the right to assign the demised premises to plaintiffs' corporation, Maximum Flooring, Inc. The seller agreed not to "extend, modify or alter" the validity of the other leases in place at the premises without the prior written consent of plaintiffs. Under the contract, the seller acknowledged that plaintiffs were to expend

substantial sums in connection with the leasehold in anticipation of the conveyance of the property. Because of such reason, the contract provided that in the event title did not close for any reason other than plaintiffs' willful default, plaintiff would be paid the sum of \$100,000.00 as "liquidated damages." Defendant Sodano personally guaranteed the payment of the liquidated damages on behalf of the seller.

By facsimile transmission dated January 14, 2003, plaintiffs' counsel inquired of counsel for the seller regarding whether a recent survey had been made showing an addition. The seller's counsel responded by letter dated January 15, 2003, that a new survey was required to obtain a certificate of occupancy and it had been ordered three weeks before, but had not yet been received. By letters dated February 5, 2003, March 25, 2003 and June 3, 2003, counsel for plaintiffs made inquiries of the seller's attorney regarding the status of the certificate of occupancy, and in the letter dated October 8, 2003, proposed that the parties negotiate a reduction in the purchase price in the event the seller was unable to obtain the certificate of occupancy. By letter dated October 15, 2003, counsel for the seller informed plaintiffs' counsel that their respective clients were discussing the matter. Plaintiffs' counsel, by letter dated May 25, 2004, informed the seller's counsel that plaintiffs had retained an architect and filed plans, and scheduled a Buildings Department inspection to expedite the issuance of a certificate of occupancy. In addition, plaintiffs' counsel warned that the "current owner" of the "travel center" intended to subdivide the space, in violation of the requirement of the contract of sale that the property be delivered subject to the premises' layout as it had existed at the date of contract.

By letter dated November 1, 2004, counsel for plaintiffs informed the seller's counsel, that the closing would take place at the latter's office on November 29, 2004. The letter also indicated that if the seller found November 29, 2004 to be "severely inconvenient," an alternative date would be possible, so long as the new date was "close" to November 29, 2004. By letter dated November 5, 2004, the seller's counsel informed plaintiffs' attorney that the delay in closing had cost it approximately \$48,000.00, and that as a result, the seller was exercising its right under the contract, "which provide[d] that in the event title did not close for any reason," the seller was to pay the stipulated liquidated damages to plaintiffs.

Plaintiffs thereafter commenced this action for an injunction, reformation of contract, and specific performance, naming 164-50 Crossbay Realty Corp. and Sodano as party defendants. By

order to show cause dated November 14, 2004, plaintiffs moved for a preliminary injunction, pending the outcome of the action, enjoining defendants from altering any portion of the premises without the specific written consent of plaintiffs and leasing the premises without the express consent of plaintiffs, and requiring defendants to restore the condition of the premises to that which existed on the date of the contract. That same date, the court issued a temporary restraining order (TRO) ordering and directing that pending the hearing of the motion, defendants 164-50 Crossbay Realty Corp. and Sodano were to "cease and desist" from "altering or attempting to alter any portion of the subject premises without the specific written consent of the [p]laintiffs," and "renting, leasing, or attempting to lease any portion of the subject premises without the express consent of the [p]laintiffs."

Prior to the adjourned return date of the motion for a preliminary injunction, plaintiffs moved for an order of contempt, claiming that defendants 164-50 Crossbay Realty Corp. and Sodano had violated the TRO.

The seller and defendant Sodano opposed both motions, and thereafter moved to dismiss the complaint pursuant to CPLR 3211(a)(1), (7) and (8). Plaintiffs then served a supplemental summons and amended complaint, naming 164-50 Crossbay Corp. as an additional defendant. Plaintiffs alleged that 164-50 Crossbay Corp. was an alter ego of the seller and Sodano. Defendants 164-50 Crossbay Realty Corp., Sodano and 164-50 Crossbay Corp. moved, among other things, to dismiss the amended complaint pursuant to CPLR 3211(a)(1) and (7), or in the alternative, to extend the time to answer the amended complaint.

By order dated July 18, 2005, the motion to dismiss the original complaint was granted. In three other separate orders, all dated July 18, 2005, the court denied as academic the plaintiffs' motions for a preliminary injunction and an order of contempt, and denied the second motion to dismiss, both as academic, and as "duplicative" of the first one. Plaintiffs appealed all four orders. By decision and order dated February 20, 2007, of the Appellate Division, Second Department, the first, second and third orders dated July 18, 2005 were reversed on the law, that branch of the motion by defendants 164-50 Crossbay Realty Corp. and Sodano to dismiss the original complaint pursuant to CPLR 3211 was denied, and the matter was remitted to this court for consideration and determination of plaintiffs' motions for a preliminary injunction and for an order of contempt in the first instance (Coizza v 164-50 Crossbay Realty Corp., 37 AD3d 640 [2007]). The Appellate Division dismissed the appeal from the fourth order dated July 18, 2005 denying the branch of the motion

to dismiss the amended complaint, on the ground plaintiffs were not aggrieved thereby. The Appellate Division also reinstated the TRO pending the determination of the motion by plaintiffs for a preliminary injunction.

The motion by Alex T. Roshuk, Esq. is withdrawn without prejudice pursuant to a stipulation and consent to change attorney form dated May 22, 2007, which was filed with the County Clerk on June 7, 2007.

Plaintiffs assert that defendants were served with a copy of the order of the Appellate Division with notice of entry by mail on February 27, 2007, but failed to serve an answer to the amended complaint, at any time prior to plaintiffs' making of the motion for leave to enter a default judgment.

CPLR 3211(f) provides that service of a notice of motion under CPLR 3211(a) or (b), before service of a pleading responsive to the cause of action sought to be dismissed, extends the time to serve the pleading until 10 days after service of notice of entry of the order. CPLR 2103(a)(2) provides that where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed time period. Thus, in this case, defendants were obligated to serve an answer to the amended complaint by March 14, 2007. Although defendants moved by notice of motion dated March 28, 2007 for leave to reargue the appeals to the Appellate Division, Second Department or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of the Appellate Division, such motion did not extend their time to answer the amended complaint.¹ Thus, contrary to defendants' argument, they are in default in answering the amended complaint.

To the extent defendants assert a lack of personal jurisdiction, the Appellate Division reached the merits of the question of whether plaintiffs were precluded from seeking specific performance under the contract of sale. (It is unclear from these submissions whether defendants 164-50 Crossbay Realty Corp. and Sodano ever argued the issue of lack of personal jurisdiction to the Appellate Division in their original appeals or in their motion for leave to reargue the appeals.) In addition, defendants 164-50 Crossbay Realty Corp., Sodano and 164-50 Crossbay Corp. did not assert lack of personal jurisdiction due to improper service in

1

Defendants' motion for leave to reargue or leave to appeal was denied by decision and order of the Appellate Division, Second Department dated May 4, 2007.

their motion to dismiss the amended complaint. Furthermore, defendants 164-50 Crossbay Realty Corp., Sodano and 164-50 Crossbay Corp. seek to vacate their default in answering the amended complaint, and leave to file and serve an answer, as proposed, which contains no affirmative defense based upon lack of personal jurisdiction due to improper service.

Under these circumstances, the court deems any objection by defendants based upon lack of personal jurisdiction due to improper service of process, to have been waived. Thus, that branch of the cross motion by defendants to vacate their default in answering based upon lack of personal jurisdiction due to improper service pursuant to CPLR 5015(a)(4) is denied.

A defendant seeking to vacate a default in answering a complaint must demonstrate a justifiable excuse for the default and a meritorious defense to the action (see CPLR 5015[a][1]; White v Daimler Chrysler Corp., 2007 WL 2875201 [2007]; Fekete v Camp Skwere, 16 AD3d 544 [2005]; Caputo v Peton, 13 AD3d 474 [2004]; Glibbery v Cosenza & Assoc., 4 AD3d 393 [2004]). In this instance, defendants' default in answering the amended complaint was neither willful nor intentional. It arose as a result of their confusion relative to when the answer had to be served, and which attorney would serve one on their behalf. Defendants have demonstrated potentially meritorious defenses based upon plaintiffs' failure to tender performance or make time of the essence, and continued insistence, by means of the November 1, 2004 letter, that the seller meet all terms and conditions of the contract of sale (see Coram Professional Bldg. Associates, L.P. v Route 347 Realty Corp., 171 AD2d 722 [1991]; cf. Caira v Bell Bay Properties, Inc., 143 AD2d 870 [1988], appeal denied 74 NY2d 608 [1989]).

Under such circumstances, the motion by plaintiffs for leave to enter a default judgment is denied, and the cross motion by defendants to vacate their default in answering the amended complaint is granted, and the proposed answer is deemed served.

Plaintiffs obtained the order to show cause dated April 24, 2007 seeking to enjoin defendants from instituting or prosecuting any proceeding in Civil Court, Queens County, to evict or vacate the tenancy of Maximum Flooring, Inc. at the subject premises. The court declined to issue a temporary restraining order in connection with it. Prior to the submission of the motion, defendant 164-50 Crossbay Corp. commenced a summary proceeding (Civil Court, Queens County, L&T Index No. 061139/2007) against Maximum Flooring,

Inc.² As a consequence, plaintiffs made the separate motion to consolidate such proceeding with the instant action.³

That branch of the motion by plaintiffs to consolidate the summary proceeding (Civil Court, Queens County, L&T Index No. 061139/2007) with the instant action is denied. "The primary purpose of consolidation 'is to eliminate technicalities, multiplicities of actions and delays and to protect substantial rights,' (Datz v Economy Cotton Goods Stores, 263 NY 252, 254 [1934])" Inspiration Enterprises, Inc. v Inland Credit Corp. Inspiration Enterprises, Inc. v Inland Credit Corp., 54 AD2d 839 [1976]). Although Maximum Flooring, Inc. is not a party herein, it is not necessary, for purposes of consolidation, that all parties or all issues be common to both this action and the summary proceeding (L&T Index No. 061139/2007) (see Fourteen Sharot Place Realty Corp. v Miceli, 125 AD2d 634 [1986]). Nevertheless, the summary proceeding (L&T Index No. 061139/2007) involves the purported nonpayment of rent by Maximum Flooring, Inc., to 164-50 Crossbay Corp., which issue has no bearing upon plaintiff's entitlement to specific performance of the real estate contract (id.) (cf. Notarius v Hess Oil & Chemical Corp., 30 AD2d 663 [1968]).

The contract of sale makes no specific reference to nonpayment of rent as a basis for cancellation or termination of the contract by the seller under the contract of sale. To the extent plaintiffs assert that the seller is obligated under the contract of sale not to "extend, modify or alter or in any way voluntarily affect the validity" of the leases of the tenants in possession at the premises without plaintiffs' prior written consent, such obligation does not preclude the landlord from commencing or prosecuting a summary proceeding to recover possession from Maximum Flooring, Inc. based upon nonpayment of rent.

It is well settled that to be entitled to preliminary injunctive relief, the movant must establish "(1) the likelihood of

2

Two prior summary proceedings brought by defendant 164-50 Crossbay Realty Corp. against Maximum Flooring, Inc. were discontinued pursuant to stipulations of discontinuance.

3

Maximum Flooring, Inc., a nonparty, appears in support of the motion by plaintiffs for consolidation, without having moved for leave to intervene herein. Under such circumstances, its papers have not been considered by this court.

success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor" (Schweizer v Town of Smithtown, 19 AD3d 682, 682 [2005]) (see W.T. Grant Co. v Srogi, 52 NY2d 496, 517 [1981]; Albini v Solork Assoc., 37 AD2d 835 [1971]). Preliminary injunctive relief is a drastic remedy which will not be granted unless a clear right is established by undisputed facts and the burden of showing an undisputed right rests upon the movant (see Miller v Price, 267 AD2d 363, 364 [1999]).

Plaintiffs have failed sufficiently to show a balancing of the equities in their favor to warrant the granting of a preliminary injunction enjoining defendants from instituting or prosecuting any proceeding in Civil Court, Queens County, to evict or vacate the tenancy of Maximum Flooring, Inc. at the subject premises. Defendant 164-50 Crossbay Corp. may assert its rights, if any, under the alleged lease agreement, in the summary nonpayment proceeding pending in the Civil Court. The motion by plaintiffs to enjoin defendants from prosecuting the summary proceeding (Civil Court, Queens County, L&T Index No. 061139/2007) is denied. That branch of the motion by plaintiff to enjoin defendants from instituting or prosecuting any proceeding in Civil Court, Queens County, to evict or vacate the tenancy of Maximum Flooring, Inc. based upon nonpayment of rent is also denied.

With respect to the motion for a preliminary injunction remitted to this court, (see order to show cause dated November 17, 2004), plaintiffs asserted they were aware prior to their entry into negotiations of the contract of sale, that the seller had made substantial structural changes at the premises and that a certificate of occupancy or certificate of completion for the structural changes was necessary to validate the use and occupancy of the premises. Plaintiffs therefore knew it was possible that a certificate of occupancy for the structures, if one existed, would not cover the uses being made of the premises at that time. Plaintiffs consequently conditioned their purchase of the property upon the seller's delivery of a certificate of occupancy (or certificate of completion or evidence no certificate was required) covering the structures on the premises authorizing the structures' then current uses. The contract of sale required both parties to take such action "as may reasonably be requested by the other to carry out the intent and purpose of [the] contract," short of requiring the seller to bring an action or proceeding to render the title marketable or insurable or to make the premises legal for the use represented in the contract. Plaintiffs learned from the title search report, obtained following the execution of the contract, that the certificate of occupancy dated July 18, 1990 for the

property permitted use of the first floor of the building at the property as a motor vehicle repair shop, with accessory parking, and that New York City computer records indicated plans had been filed to construct interior partitions and install plumbing fixtures. The title report indicated that the actual plans had not been found.

Plaintiffs contended that on or about December 10, 2002, defendant Sodano entered into negotiations for tenants to lease the second floor of the premises in violation of the contract of sale, and made structural changes and alterations to the premises. Plaintiffs claimed that any occupancy of the space by new tenants, and the changes and alterations performed at the premises, would jeopardize steps taken towards the issuance of an updated certificate of occupancy, and the seller's ability to deliver insurable title in accordance with the terms of the contract of sale. Plaintiffs offered, by letter dated December 13, 2002, to cooperate with the seller in the seller's leasing of the vacant second floor premises upon condition they were given an opportunity to approve the tenant, the tenant acknowledged the possibility of the nonexistence of a certificate of occupancy for use of such space as office space, and the tenant agreed that the landlord not be held liable in the event the use of the second floor as office space violated the certificate of occupancy. Prior to final submission of the November 17, 2004 order to show cause, plaintiffs moved for an order of contempt claiming that defendants 164-50 Crossbay Realty Corp. and Sodano had violated the TRO.

Defendants 164-50 Crossbay Realty Corp. and Sodano opposed the motions for a preliminary injunction and an order of contempt asserting that plaintiffs had come to court with unclean hands, plaintiffs could not meet the three-prong test for granting a preliminary injunction, and they had not violated the TRO. Defendants 164-50 Crossbay Realty Corp. and Sodano also asserted that the TRO was too vague and non-specific enough to permit a contempt finding for a violation based upon the performance of alterations or attempted alterations.

With respect to the motion for an order of civil contempt remitted to this court, "[a] party seeking to hold another in civil contempt bears the burden of proof (see McCain v Dinkins, 84 NY2d 216, 225-227 [1994]; Rupp-Elmasri v Elmasri, 305 AD2d 394, 395 [2003])" (Riverside Capital Advisors, Inc. v First Secured Capital Corp., 28 AD3d 455, 456 [2006]). In addition, to prevail on a motion to hold another in civil contempt, the movant must demonstrate that the party charged, violated a clear and unequivocal court mandate, and that the offending conduct or failure to act "defeated, impaired, impeded or prejudiced" a right

or remedy of the movant (Judiciary Law § 753[A]; see Riverside Capital Advisors, Inc. v First Secured Capital Corp., 28 AD3d 455, supra). "The party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party" (McCormick v Axelrod, 59 NY2d 574, 583 [1983] [citations omitted]). The contempt must be proven by clear and convincing evidence (see Raphael v Raphael, 20 AD3d 463 [2005]).

Plaintiff Eugene Coizza stated in his affidavit in support of the motion for an order of contempt that on November 19, 2004, he observed construction work being performed at the premises, including the creation of interior partitions and installation of a dropped ceiling, and that Michael Sodano, the son of defendant Sodano, was serving as construction foreman. Plaintiff Eugene Coizza further stated that on December 8, 2004, he observed "sheet rocking of the walls continuing." Plaintiff Euguene Coizza additionally stated that an engineer hired by plaintiffs had advised him that there had been significant alterations at the premises since the plans had been filed and revised by defendants.

Defendants responded that the leasing of the premises to two new tenants had occurred in late October 2004, the tenants had made only "cosmetic" changes and halted making all cosmetic changes upon being informed of the TRO, and the premises were still vacant.

The copy of the lease between defendant 164-50 Crossbay Realty Corp. and Bombi Piece Corp. is dated October 21, 2004, prior to the issuance of the TRO, and plaintiffs have made no allegation or showing that it was backdated. Although plaintiff Eugene Coizza stated that he observed an incoming tenant at the premises on December 8, 2004, plaintiffs presented no evidence that she had become a tenant following the issuance of the TRO. Plaintiffs failed to offer any other proof demonstrating that defendants 164-50 Crossbay Realty Corp. and Sodano rented, leased or attempted to lease any portion of the premises without the express consent of plaintiffs since the issuance of the TRO. Under such circumstances, that branch of the motion for an order for contempt based upon the alleged violation of the TRO due to the renting, leasing or attempted leasing of the premises without plaintiffs' consent is denied.

Notwithstanding the protestations of defendants 164-50 Crossbay Realty Corp. and Sodano, the TRO set forth an "unequivocal mandate" regarding the performance of any alterations or attempts to alter the premises. The TRO was not impermissibly "vague" simply because it did not limit the prohibited alterations to those of a "major" or "structural" type, or because it failed to

make reference to the New York City Building Code. An "alteration" under its common usage and understanding, means a change or modification (see People v Versaggi, 83 NY2d 123 [1994]). With respect to a structure on real property, the common usage and understanding of the word "alteration" is in regards to a substantial, not a trifling modification, of a building, and usually, does not refer to an addition to or removal of the exterior dimensions of a building's structural parts although such addition and removal by their nature constitute alterations (see Black's Law Dictionary [8th ed 2004]).

The three affidavits of Robert Feliciano, a licensed private investigator, when considered together, indicate that Mr. Feliciano served two sets of copies of the November 17, 2004 order to show cause, containing the TRO, and the summons and complaint and notice of pendency upon the seller's counsel by in-hand delivery at 2:25 P.M. on November 19, 2004. Mr. Feliciano's affidavits of service also indicate he attempted personal delivery of another set of the same papers to defendant Sodano on November 19, 2004, twice on November 20, 2004 and again on November 22, 2004. Mr. Feliciano states that on November 22, 2004, the wife of defendant Sodano refused to answer the door, and as a consequence, he affixed the set of papers to the outside door, and on the same date, mailed defendant Sodano a copy of the set of papers to Sodano's residence. Furthermore, plaintiff Eugene Coizza averred that he told Michael Sodano, the son of defendant Sodano, in the afternoon of November 19, 2004, of the existence of the TRO.

Defendant Sodano stated that he first received the TRO when he returned, from out of town, to his residence after Thanksgiving Day (November 25, 2004), and that he "does not see how [my real estate lawyer] could have sent me any of th[e] documents as I was in a remote sportsman's lodge...." It is unclear from these submissions, however, when defendant Sodano first gained knowledge of the TRO and its contents. Thus, a hearing must be held regarding when defendant Sodano first knew of the TRO, when defendants 164-50 Crossbay Realty Corp. and Sodano informed the new tenants regarding the TRO, and whether defendants 164-50 Crossbay Realty Corp. and Sodano are guilty of contempt (see Mulder v Mulder, 191 AD2d 541 [1993]). The hearing shall be held on January 15, 2008, at 2:00 P.M. at the Supreme Court, Queens County, 88-11 Sutphin Boulevard, Jamaica, New York, Part 15, Courtroom 44.

As for the motion for a preliminary injunction (order to show cause dated November 17, 2004) remitted to this court, the purpose of a preliminary injunction is to maintain the status quo pending the litigation (see Coinmach Corp. v Alley Pond Owners Corp., 25 AD3d 642, 643 [2006]). There has been a substantial passage of

time since the initial making of such motion, and therefore, the court directs that it be re-noticed by plaintiffs for a new motion calendar date, and that in connection with the re-noticed motion, the parties provide this court with updated information regarding the premises, including the present number of tenants or occupants in possession at the premises, the physical layout and present use of the premises, including the second floor, and whether an updated certificate of occupancy has been issued.

Dated: October 26, 2007

J.S.C.

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