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

PRESENT: EMILY JANE GOODMAN Justice PART 17

Mary Carol Newmann, Ph.D.

- v -

Mapama Corp.

INDEX NO. 109421/07

MOTION DATE

MOTION SEQ. NO. 001

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided per attached

FILED
APR 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/8/08

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 17

----------X

MARY ANN NEWMANN, Ph.D,

Plaintiff,

--against- Index No.: 109421/07

THE MAPAMA CORPORATION,

Defendant.

----------X

EMILY JANE GOODMAN, J.S.C.:

In this dispute over a loft resident's entitlement to use a freight elevator at a building located in lower Manhattan, plaintiff, a resident of the rear unit on the sixth floor of the building, moves for a preliminary injunction requiring defendant, her landlord, to provide access to the elevator in question 24 hours a day, seven days a week, in order to accommodate her alleged physical disability. Defendant moves to dismiss the complaint.

More specifically, in motion sequence no. 001, plaintiff seeks a preliminary injunction requiring that: (a) the rear freight elevator in the building which opens into her loft unit be maintained in good repair and working order; (b) plaintiff and her husband be designated as operators of the elevator; and (c) defendant allow plaintiff, her husband and emergency personnel to use the elevator 24 hours, seven days a week, irrespective of whether they are transporting freight. Plaintiff asks for these rights, contending they are required to accommodate an alleged disability pursuant to sections 8-102(18) and 8-107(15)(a) of the Administrative Code of the City of New York.

In motion sequence no. 002, defendant, The Mapama Corporation, moves to dismiss the complaint with prejudice pursuant to CPLR 3211(a)(2), (5) and (7), and for an award of

attorneys' fees, costs and expenses. Defendant argues that the complaint fails for lack of subject matter jurisdiction because the claims are barred by New York City Administrative Code § 8-502(b). Alternatively, defendant maintains that plaintiff's claims are barred under the doctrine of collateral estoppel, arguing that the same claims were rejected by the New York City Human Rights Commission (HRC). Finally, plaintiff allegedly fails to state a cause of action for housing discrimination under the New York City Human Rights Law based on a disability.

For the reasons stated herein, both motions are denied.

FACTUAL ALLEGATIONS

The complaint alleges that plaintiff, a 63-year old woman, and her husband, Robert Newmann, are protected occupants under the Loft Law, Article 7-C of the Multiple Dwelling Law (MDL), of the sixth floor rear loft at 545 Broadway, New York, New York (the building). Defendant is the owner of the building. In 1999, plaintiff suffered a stroke, resulting in a central motor neuropathy which is commonly called "foot drop." Plaintiff alleges that this is a permanent disability, that it causes her to limp, makes her susceptible of falling, and that it is difficult for her to climb stairs without falling. She also claims to be suffering from arthritis in both knees, which has been exacerbated by the falls she has taken.

There are two elevators in the building. A freight elevator in the rear or Mercer Street side of the building opens directly into the plaintiff's unit. A passenger elevator on the Broadway side of the building opens into the residential units on the front, or Broadway side of the building. Plaintiff alleges that the passenger elevator is only accessible to her if she leaves her own unit, goes through a corridor, enters the unit of a neighbor with their permission, and walks through the length of the neighbor's unit to the passenger elevator. Plaintiff contends that while her

neighbor occasionally allows plaintiff access to use the passenger elevator, her neighbor could withdraw this privilege at any time. Plaintiff further contends that unless an elevator is used, the only means of access to her unit is by means of a long staircase on the Mercer Street side of the building, which contains 128 steps or the equivalent of nine flights.

Pursuant to a June 1988 ruling of the Loft Board, the Newmanns are entitled to use the freight elevator from 8 A.M. to 5 P.M., Monday to Friday. However, plaintiff claims that, for about 15 years prior to February 2005, defendant made the freight elevator available to plaintiff and her husband 24 hours, seven days a week (hereinafter "24-7 access"), and they operated the elevator themselves.

Beginning in February 2005, the freight elevator was out of service for eleven months. When it was eventually restored to working order, plaintiff alleges that she and her husband were given 24-7 access. The freight elevator broke down a second time in December 2006, and did not become operational until May 2007.[1] At that time, plaintiff was informed in writing by defendant's attorney that the freight elevator would only be made available to her from 8 A.M. to 5 P.M. on business days, and defendant then commenced to employ an elevator operator to run the freight elevator. The freight elevator is allegedly locked in the basement the rest of the time. Plaintiff's written request for 24-7 access for her and her husband due to her disability was denied.

Plaintiff commenced this lawsuit on July 10, 2007. Her complaint asserts four causes of action for injunctive relief, damages and attorneys' fees based on the defendant's purported

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[1]The complaint also alleges that the delay in restoration of service of the freight elevator was unreasonable and that defendant did not make all reasonable and necessary efforts to restore service expeditiously.

failure to provide reasonable accommodation of a disability pursuant to New York City Administrative Code § 8-107(5). All four causes of action are thus tied to the single issue of disability discrimination within a housing context, that is, whether defendant has refused to make reasonable accommodation to afford plaintiff equal opportunity to use and enjoy her dwelling in light of her disability. United Veterans Mut. Hous. No. 2 Corp. v New York City Commn. on Human Rights, 207 AD2d 551, 552 (2d Dept 1994); see also Executive Law § 296(18)(2).

In support of her motion for preliminary injunctive relief, plaintiff argues that she may suffer irreparable harm if she is not granted 24-7 access to the freight elevator. She submits an affidavit from her physician, Mark E. Horowitz, M.D., in which he avers that plaintiff is not

> capable of the repeated effort of walking up and down six long flights of stairs during the pendency of this action. Stairs are particularly difficult for her to negotiate, in light of her medical conditions. Lifting up her foot is the very issue of her gait disturbance; it significantly limits her ability to ascend stairs. Her pace is glacial and the effort is extremely uncomfortable for her. Further, her balance is poor, and she is likely to fall when both ascending and descending the stairs.

Horowitz Aff., ¶ 6. Dr. Horowitz further avers that in the event plaintiff should have another stroke, the lack of availability of the freight elevator at night and on weekends would make it difficult for Mr. Newmann to take plaintiff out of the building to the hospital and would also delay the arrival of emergency services to her unit. Id., ¶ 7. Finally, Dr. Horowitz contends that, despite her disability, plaintiff as well as her husband, are fully capable of operating the freight elevator.

In plaintiff's view, the equities favor the granting of a preliminary injunction because the elevator is already in the building, is presently operational, and its continued operation is a required service that defendant must maintain under the Loft Law. Since plaintiff and her

husband can operate the elevator, as they allegedly did for many years until May 2007, extension of hours of the recently-arrived elevator operator is not necessary to the granting of the relief sought.

Defendant opposes plaintiff's motion for a preliminary injunction, claiming that her alleged life-threatening disability is greatly exaggerated, and that the building security cameras have captured acts of physical mobility and dexterity by plaintiff wholly inconsistent with the degree of disability she claims. Defendant further alleges plaintiff and her husband have tried to cover the lenses of the building security cameras in an attempt to conceal the true nature of plaintiff's physical abilities, and that covering these lenses also show them to be reckless, irresponsible and a danger to those who occupy the building.

Defendant's principal, Angela Parisi, disputes that the Newmanns ever had permission to use the freight elevator 24 hours, seven days a week, and claims that plaintiff and her husband have completely disregarded the Loft Board's order and have, without authority, utilized the freight elevator for personal use outside the permitted weekday 8 A.M. to 5 P.M. restriction, despite demands from defendant to cease and desist. She offers a letter dated December 20, 2004 from defendant's attorneys to the Newmanns objecting to their evening and weekend use of the freight elevator. Ms. Parisi further claims that the Newmanns have tampered with the freight elevator by cutting wires and applying makeshift ropes to assist with elevator operation, causing serious safety issues and interruption in service. Plaintiff's claim that she has operated the freight elevator "safely for 30 years" is also disputed. Ms. Parisi claims that plaintiff, on one occasion, left the door to the freight elevator open, exposing the 25-foot drop in the elevator shaft.

Defendant claims that the injunctive relief plaintiff requests has already been afforded to her by the HRC or by the Loft Board. With respect to that part of plaintiff's application that the freight elevator be maintained in good working order and that plaintiff and Mr. Newmann be designated as operators, defendant argues that it is already under obligation to permit use of the freight elevator pursuant to Loft Board Order 769. As to the remaining issue of 24-7 access to the freight elevator, defendant contends that the issue was before HRC based on a complaint plaintiff filed in May 2005, and that HRC, after a full and fair investigation, determined that plaintiff had been afforded a reasonable accommodation and that further relief was not required by law.

On or about May 13, 2005, plaintiff filed a complaint with HRC claiming that she had been discriminated against on the basis of disability under Admin. Code § 8-107(5)(a) due to defendant's failure to repair the freight elevator and provide elevator service despite being on notice of her disability. Defendant filed an answer to the complaint, plaintiff filed a rebuttal, and conciliation was attempted, but without success. In a "Closing Memo" penned by HRC Investigator Rudolph Pyatt dated January 16, 2007, he concluded, in pertinent part, as follows:

> After investigation, evidence does not tend to support wilful, deliberate refusal to accommodate. Moreover, it is not in the public interest to proceed further.
>
> The elevator in question has been taken out of service by the company servicing it [Otis] because of the danger in continuing to operate it. Simply repairing it will be prohibitively expensive, and unreasonably so given that the Complainant pays no rent. Settlement efforts have failed because the parties are more concerned with the impact of [this] case on decades-long Loft Board proceedings than anything else. Each is seeking the result here that they have not yet achieved before the Loft Board.
>
> Considering all these factors, upon consultation with and direction from Deputy Commissioner Mehlman, this case is being closed for administrative convenience

per 8-113(a)(5), Not In the Public Interest.

Watanable Aff. Exh. H thereto. A "Notice of Administrative Closure" was issued by Deputy Commissioner Avery S. Mehlman on January 17, 2007, in which the parties were advised only that the case was being "administratively closed" pursuant to Admin. Code § 8-113(a)(5) on the ground that "[p]rosecution of the complaint will not serve the public interest." Id., Exh. I thereto.

By letter dated January 30, 2007, plaintiff's counsel, Margaret Goldfarb, Esq., wrote to the Commissioner of HRC requesting a meeting to discuss re-opening the case. In the letter, Ms. Goldfarb took issue with HRC's consideration of the fact that plaintiff and her husband do not pay rent, contending that, under the Loft Law, they are absolutely legally within their rights not to pay rent due to defendant's repeated failure to obtain a residential certificate of occupancy for the building. Second, Ms. Goldbfarb contended that the cost of repairing the freight elevator is much less than defendant contends, that plaintiff was not seeking to upgrade the existing freight elevator to a passenger car, which defendant had claimed would cost in excess of $100,000.

In the meantime, HRC learned from plaintiff that Loft Board inspectors had issued two violations at the building and that a hearing had been scheduled before the Loft Board on February 23, 2007. In discussing the matter with plaintiff, HRC investigator Pyatt observed that the matter was now before the Loft Board who would resolve the dispute. Watanable Aff., Exh. K thereto at p. 2. Plaintiff objected, arguing that she needed HRC to rule that she is entitled to 24-7 access, because the Loft Board bases the right to service on the last lease in effect for the unit, and that the lease in question only stipulated that the freight elevator would be available for tenant use between 8 A.M. to 5 P.M. Id., at pp. 2-3. Investigator Pyatt concluded that plaintiff was asking HRC:

> to provide what the Loft Board hasn't, a ruling that she is entitled to 24hr service. But [HRC] cannot provide this ruling in the absence of a functioning elevator. That is, as long as the elevator is working and can be made to do so through regular (not extraordinary) maintenance, we could hold that [defendant] cannot remove or withhold the accommodation.

Id., at p. 3. Investigator Pyatt concluded:

> The problem with [plaintiff's] approach in bringing an action here is that the Commission cannot simply render an unlawful act (passenger use of freight elevator) lawful by fiat. Even though such usage would accommodate her disability, this would remain a usage outside that permitted under the Building Code.

Id., at p. 5.

However, the next day, February 22, 2007, Investigator Pyatt called the Department of Buildings (DOB) and was told by Chief Inspector Doug Smith of the Elevator Division that, given the route plaintiff would have to take to get to the passenger elevator, DOB would not prohibit plaintiff from using the freight elevator on a 24-hour basis, would order restoration of service and would be sending someone out to inspect and issue a restore service order. Watanabe Affirm., Exh. K at p. 5. Investigator Pyatt concluded that the case would therefore be resolved at the February 23rd Loft Board hearing or by the DOB's issuance of a restore service order, and that HRC "is out of the case." Id. Later that day, Investigator Pyatt spoke to Steven Neal, the Director of Enforcement at the Loft Board, who said that the issue of 24-7 access was a "moot" issue because the freight elevator was not running and there was no service at any time. Id., at p. 6.

At the February 23rd Loft Board hearing, defendant's counsel indicated that it would take approximately six to nine weeks to repair the freight elevator. The parties stipulated that defendant would pay a $250 fine to the Loft Board for the out-of-service violation, and defendant

agreed to make the necessary repairs by May 16, 2007. Citing Loft Board Order 769, defendant's counsel stated that plaintiff was only entitled to access from 8 A.M. to 5 P.M., and that plaintiff was not entitled to 24-7 access. Id., at p.6. Neither party submits any evidence as to whether the issue of 24-7 access was discussed further at this Loft Board hearing.

As a result of the Loft Board hearing and the stipulation agreed to at that time, Investigator Pyatt concluded that the only issue left for HRC was the "lawful extent of C's access beyond the 8am x 5 pm granted under the mid-1990s [sic] Loft Board ruling." Watanabe Affirm., Exh. K thereto at p. 7. At a March 7, 2007 meeting with HRC staff and counsel for the parties, counsel for defendant represented "that there is no way to prevent Complainant from using the elevator as and when she needs without turning it off, and represented that service would not be arbitrarily disrupted." Id., at p. 8. Even though plaintiff insisted that she needed, and was entitled to, an order from HRC requiring 24-7 access, HRC took the position that:

> the only issue within its purview is access or the denial thereof. A Loft Board order is now in place that will insure the elevator is properly repaired and may be operated safely. Moreover, Respondents are aware that Complainant is free to bring a claim for denial of access should service be disrupted in the future.

Id., at p. 8.

That day, Investigator Pyatt confirmed HRC's position in a letter to both sides, in which he stated:

> Although Respondent's counsel indicated that she did not want her clients to sign a formal agreement guaranteeing 24-hour elevator access, citing concerns over potential liability in the event of accident, injury or death, counsel also acknowledged that her clients could not and would not prevent Complainant from using the elevator whenever she wished.
>
> Under these circumstances, should elevator access be shut off in the future, the Complainant will still have the right to file a denial of access claim.

Id., Exh. L thereto at p. 2.

Ms. Sandercock, by letter dated March 20, 2007, appealed the closure of the proceeding, arguing that HRC did not conduct a full investigation of plaintiff's complaint, and that the Loft Board cannot order extended hours based on a residential occupant's disability, because that is the bailiwick of HRC. At the very least, Ms. Sandercock asked to keep the proceeding open until the repairs have been performed "and the landlord's oral representation that it will leave the elevator on 24/7 thereafter, can be verified." Watanabe Affirm., Exh. M thereto at p. 2. By letter dated April 12, 2007, HRC's Law Enforcement Bureau reiterated that because the respondents represented "that they will permit Complainant to use it once it is in operation[,]" [s]hould they deny her access to the elevator at a future time, she may contact the Commission, whereupon the Bureau will determine the appropriateness of filing a new complaint regarding such denial of access." Id., Exh. N thereto at p. 1. A formal "Determination and Order After Review" was issued by HRC Commissioner Patricia Gatling on May 1, 2007 in which she affirmed the administrative closure dismissing the complaint. Id., Exh. O thereto.

DISCUSSION

Lack of Subject Matter Jurisdiction -- Election of Remedies

Defendant argues that the court lacks subject matter jurisdiction over plaintiff's housing disability discrimination claim, because the issue of her 24-7hour access to the freight elevator was litigated before the HRC and plaintiff lost and failed to take an appeal pursuant to CPLR Article 78. Specifically, defendant relies on Administrative Code § 8-502(b), arguing that there has been an election of remedies on her discrimination claim, and that plaintiff is not permitted to utilize the resources of the HRC and then seek to have the claims heard a second time because of

an adverse determination by that agency.

Section 8-502 of the New York City Administrative Code provides, in pertinent part:

> a. Except as otherwise provided by law, any person claiming to be aggrieved by an unlawful discriminatory practice as defined in chapter one of this title or by an act of discriminatory harassment or violence as set forth in chapter six of this title shall have a cause of action in any court of competent jurisdiction for damages, including punitive damages, and for injunctive relief and such other remedies as may be appropriate, unless such person has filed a complaint with the city commission on human rights or with the state division of human rights with respect to such alleged unlawful discriminatory practice or act of discriminatory harassment or violence. * * *
> b. Notwithstanding any inconsistent provision of subdivision a of this section, where a complaint filed with the city commission on human rights . . . is dismissed by the city commission on human rights pursuant to subdivisions a, b or c of section 8-113 of chapter one of this title, . . ., an aggrieved person shall maintain all rights to commence a civil action pursuant to this chapter as if no such complaint had been filed (emphasis added).

In the instant case, plaintiff's complaint was administratively closed pursuant to Admin. Code § 8-113(a)(5) on the ground that prosecution will not serve the public interest. Thus, the plain language of the statute supports plaintiff's right to sue in this court.

In addition to the fact that the matter before HRC was closed for administrative convenience pursuant to Admin. Code § 8-113(a)(5), this occurred over plaintiff's strenuous objection, and there is no evidence that the closure was "due to a change of litigation strategy by the complainant.'" Kordich v Povill, 244 AD2d 112 (3d Dept 1998) (citation omitted). Thus, the case law that defendant relies on is clearly distinguishable. In National Broadcasting Co., Inc. v State Div. of Human Rights (1988 WL 241124 [Sup Ct, NY County], affd without opinion, National Broadcasting Co., Inc. v Tong, 144 AD2d 1046 [1st Dept 1988]), after the complainant asked to withdraw her discrimination complaint against her former employer (NBC), the State Division of Human Rights issued a "Determination After Investigation" which

stated that the complaint "is ordered dismissed on the grounds of administrative convenience." NBC objected to this categorization of the dismissal, as it allowed the complainant to begin anew in court, and brought an Article 78 proceeding to force the agency to continue processing the complainant's complaint administratively. The Supreme Court granted the petition, finding that the complainant had requested the withdrawal only because her counsel was frustrated in seeking to obtain a settlement with NBC. The court reasoned that:

> to permit a complainant to withdraw just so she can begin anew in court, after she has made her election of remedies the action challenged represents a colossal waste of agency time and effort; that it flys in the face of the bar against permitting judicial action after an administrative remedy has been elected; it imposes upon an accused the burdens of wasted time and expense and, strategically, allows Ms. Tong to have a free discovery of NBC's defense and materials that might not be permissible in litigation; that judicial action imposes upon NBC a different statutory period within which a claim must be pressed.

1988 WL 241124 at *2. Here, plaintiff preferred that her case remain before HRC, and fought the closure "tooth and nail," while defendant did not oppose the administrative closure.

Kordich v Povill (244 AD2d 112, supra), cited by defendant, is inapposite. There, an administrative convenience dismissal was found to bar a subsequent state court action on the ground that the dismissal had been intended by the State Division of Human Rights only to allow the plaintiff to pursue litigation in federal court.

Thus, the court finds no basis to dismiss this action for lack of subject matter jurisdiction.

Collateral Estoppel

Defendant maintains that plaintiff's housing discrimination claim is barred by the doctrine of collateral estoppel as a result of the HRC proceeding.

Collateral estoppel applies to bar the re-litigation of a claim when: "(1) the issues in both

proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits." Alamo v McDaniel, 44 AD3d 149, 153 (1st Dept 2007), citing Ryan v New York Tel. Co., 62 NY2d 494 (1984); and Gramatan Home Invs. Corp. v Lopez, 46 NY2d 481 (1979). Collateral estoppel is equally applicable to confer conclusive effect to the quasi-judicial determination of an administrative agency. Alamo v McDaniel, 44 AD3d at 153-54; Ryan v New York Tel. Co., 62 NY2d at 499.

Defendant does not meet its burden of demonstrating that the issue of whether 24-7 access to the now working freight elevator in the building is required as a reasonable accommodation was actually litigated and decided by HRC. First, while defendant contends that there was a "full investigation" by HRC, as set forth in Ms. Sandercock's March 20, 2007 letter to HRC, plaintiff was not given an opportunity to contest and offer evidence regarding defendant's claims of financial hardship to repair the elevator, nor was their any investigation of the need or cost of a full-time operator, or of the extent and seriousness of plaintiff's disability. Second, HRC held no hearing on plaintiff's discrimination claim, rather the matter was deemed administratively closed. The cases cited by defense counsel in asserting that the "findings" of HRC in dismissing the plaintiff's administrative complaint against defendant are entitled to deference are inapposite since no hearing was held in this case. Both Burlington Indus. v New York City Human Rights Commission (82 AD2d 415 [2d Dept 1981], affd 58 NY2d 983 [1983]), and 300 Gramatan Ave. Assocs. v State Div. of Human Rights (45 NY2d 176 (1978]), concern cases in which factual hearings were held by the respective agencies.

Third and most importantly, defendant contends that "the Commission determined," "after a full investigation and appeal process, that the "evidence does not tend to support a willful, deliberate refusal to accommodate (emphasis added)." Defs. Mem. of Law In Support, at p. 12. However, this quote is not from any official determination by HRC, but from the "Closing Memo" of Investigator Pyatt dated January 16, 2007, issued at a time when the freight elevator was not working at all and before the appeal requested by plaintiff's counsel. Indeed, it is clear from this document that HRC was under the impression that "the freight elevator could only be made operable through major repairs," "that is was unsafe to use, and too expensive to repair, for [defendant] to provide service." Id., at p. 4. However, in response to action by the Loft Board and DOB, the freight elevator was, in fact, repaired by defendant by May 2007. At this point in time, however, HRC declined to make any ruling on plaintiff's request for 24-7 access based on the representation by defendant's counsel, Laura A. Watanabe, Esq., that 24-7 access could not be prevented without turning the elevator off and that service would not be "arbitrarily disrupted." Watanabe Aff., Exh. K thereto at p. 8. HRC's Law Enforcement Bureau specifically noted in their April 12th letter that plaintiff "may" file a new complaint with HRC should defendant deny her access to the elevator at a future time. When the representation to provide continuous service was not kept at the time the freight elevator was repaired and returned to service in May 2007, this action ensued.

The doctrine of collateral estoppel is not applicable to this action, and defendant's motion to dismiss pursuant to CPLR 3211(a)(5) is, therefore, denied.

Failure to State a Claim for Relief

Defendant seeks dismissal of the complaint pursuant to CPLR 3211(a)(7) on three

grounds.

First, defendant contends that plaintiff fails to state a cause of action under the New York City Human Rights Law because defendant is not an "owner, lessor, lessee, sublessee, assignee, or managing agent of, or other having the right to sell, rent or lease . . .[the] housing accommodation [at issue]," citing Admin. Code § 8-107(5). Rather, defendant argues that the accommodation at issue is an "Interim Multiple Dwelling" subject to the MDL which, by virtue of its "interim" status, legally prevents defendant from renting or leasing the premises to plaintiff, citing MDL §§ 284, 325(2).

Neither of the MDL sections cited compel such a reading of the Administrative Code. Under the MDL, a building subject to the Loft Law is, in fact, a "housing accommodation," because residential occupancy is specifically permitted by MDL § 283. The Loft Law specifically recognizes that residential occupants qualified for protection shall be afforded the protections available to residential tenants under the Real Property Law and the RPAPL (MDL § 286[11]), and case law refers to protected occupants such as the plaintiff as "tenants." See, e.g., County Dollar v Douglas, 161 AD2d 370 (1st Dept 1990). Defendant also unpersuasively maintains that because it is not entitled to collect rent from the plaintiff until it complies with its obligations under the Loft Law (Mapama Corp. v Nadelson, 155 AD2d 233 [1st Dept 1989]; MDL § 285[1]), it is not covered by Admin. Code § 8-107(5). The fact that defendant has chosen not to exercise its right to collect rent, by legalizing the apartment, does not mean that defendant does not have the right to rent the apartment. Further, to hold that the owner of interim multiple dwelling may engage in housing discrimination because the owner is in default of its obligation to obtain a certificate of occupancy for residential use would be a nonsensical holding.

Defendant's second ground for dismissal pursuant to CPLR 3211(a)7) is that full-time freight elevator use by the plaintiff and her husband is barred by 22 NYCRR §§ 8-1.8 and 8-2-1. Section 8-2.1(f) provides that hand-powered freight elevators are permitted only to carry "the operator and employees necessary for loading and unloading . . ."[2] Section 8-1.8(b) merely provides that freight elevators display a sign saying "Passengers Not Permitted."

Plaintiff contends that both she and her husband qualify for designation as elevator operators under New York City law. Specifically, she relies on Admin. Code § 27-1005 which provides that "elevator operators shall be at least eighteen years of age, free from serious physical or mental defects and shall be selected with consideration of their ability to perform their duties in a careful and competent manner." She further relies on Section 207.4 of the AMSE elevator standards, which provides that a court may order the use of a freight elevator to provide passenger service based on facts such as these, for example, to accommodate a physical disability. In addition, the record reflects that HRC Investigator Pyatt was informed by the DOB's Elevator Division that, given the route plaintiff would have to take to get to the passenger elevator, DOB would not prohibit plaintiff from using the freight elevator on a full-time basis and Investigator Pyatt concluded that based on this information, plaintiff "can and should be designated an 'operator' for purposes of the Building Code (27-1005)." Watanabe Affirm., Exh. K thereto at p. 5.

Defendant fails to establish that ordering full-time freight elevator use by the plaintiff and

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[2]In addition, 22 NYCRR § 8-2.1, by its terms, only applies to hand-powered elevators, and plaintiff's counsel, Margaret B. Sandercock, avers that "the elevator is question is not a hand powered elevator, but a cable operated elevator, and therefore this provision does not apply." Sandercock Reply Affirm., ¶ 14, n.1. Neither side offers a description of how the freight elevator actually functions.

her husband is barred by the New York City Administrative Code, and whether plaintiff and her husband qualify to be designated as "operators" is a question of fact that cannot be resolved on these papers.

Defendant's third and final argument is that plaintiff fails to plead the necessary element of disability discrimination, because she admits she has continued enjoyment of housing in the building through other available means of ingress and egress, specifically the passenger elevator, and the law only requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain the same housing that other tenants without disabilities enjoy. However, this argument ignores the fact that plaintiff's access to the passenger elevator is limited because it is completely enclosed in the neighboring residential unit and because its use is subject to the neighbor's consent.

Preliminary Injunctive Relief

Plaintiff's motion for preliminary injunctive relief is denied.

First, the purpose of a preliminary injunction is to maintain the status quo pending a full hearing on the merits, rather than to determine the parties' ultimate rights and mandate corrective action. Morris v Port Auth. of New York & New Jersey, 290 AD2d 22, 26 (1st Dept 2002); Jamie B. v Hernandez, 274 AD2d 335, 336 (1st Dept 2000).

Second, plaintiff has failed to demonstrate a likelihood of success on her claim that defendant has refused to make reasonable accommodation of a covered disability. The extent and seriousness of plaintiff's alleged disability is sharply disputed by the parties.[3] Further,

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[3]The court has not considered the building security camera tapes which have been belatedly offered by defendant to show that plaintiff is not disabled.

plaintiff has not demonstrated that the accommodation is reasonable. However, the court will order expedited discovery in this action so that a quick resolution can be reached and the parties will be notified of a conference date.[4]

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for preliminary injunction (seq. no. 001) is denied; and it is further

ORDERED that defendant's motion to dismiss the complaint (seq. no. 002) is denied in its entirety; and it is further

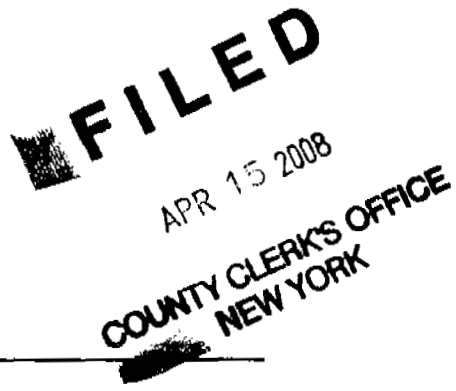
ORDERED that defendant shall serve and file an answer to the complaint within twenty (20) days of service of a copy of this order with notice of entry

This constitutes the Decision and Order of the Court.

Dated: April 8, 2008

ENTER:

J.S.C.
EMILY JANE GOODMAN



[4]While plaintiff's treating physician opines that there is a risk of delayed medical treatment "in the event" of another stroke, he does not claim that plaintiff is at risk of having another stroke. Further, any risk of delayed treatment would be the same risk faced by any person living in a walk up building.