

<b>Mushlam, Inc. v Nazor</b>
2008 NY Slip Op 33623(U)
May 29, 2008
Supreme Court, New York County
Docket Number: 100207/08
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK**  
*Justice*

PART 12

*Mushlem, Inc*

INDEX NO. 100207/08

- v -

MOTION DATE \_\_\_\_\_

*Marc Nazer, also*

MOTION SEQ. NO. 03

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

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

**FILED**

JUN 03 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 5/29/08

*[Signature]*  
**BARBARA R. KAPNICK**  
*JSC*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 12

-----X  
MUSHLAM, INC.,

Plaintiff,

- against -

MARIE NAZOR and PETER MICKLE,

Defendants.

-----X  
BARBARA R. KAPNICK, J.:

DECISION/ORDER  
Index No. 100207/08  
Motion No. 003

**FILED**  
JUN 03 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

In this action, plaintiff-landlord Mushlam, Inc. seeks a judgment against the defendants Marie Nazor and Peter Mickle: (i) restoring plaintiff to possession of the subject premises, 544 West 27th Street, 4th floor (first cause of action); (ii) awarding plaintiff damages on the ground that defendants have wrongfully deprived plaintiff of possession and use of the premises and have failed to pay rent and/or use and occupancy for the period of December 2006 to date (second cause of action); (iii) awarding plaintiff use and occupancy pursuant to Real Property Law § 220 in the amount of \$15,000.00 per month (third cause of action); and (iv) awarding plaintiff damages against the defendants for unjust enrichment (fourth cause of action).

Defendants previously moved, under motion sequence number 002, for an order pursuant to CPLR § 3211 dismissing the Complaint upon

the grounds that the Court does not have personal jurisdiction over the defendants because service of process was insufficient.<sup>1</sup>

Plaintiff opposed the motion and cross-moved for an order awarding plaintiff a money judgment in the amount of \$ 240,000.00 for all past due use and occupancy, and awarding plaintiff all future use and occupancy at a rate of \$15,000.00 per month *pendente lite* during the pendency of this action.

Defendants failed to submit any papers in opposition to the cross-motion.

Thus, by Decision/Order dated April 3, 2008, this Court (i) referred the issue of whether or not defendants were properly served with the Summons and Complaint in this action to a Special Referee to hear and report with recommendations; (ii) held defendants' motion to dismiss the Complaint against them for lack of jurisdiction and that portion of the cross-motion seeking an award for past use and occupancy in abeyance pending the report of the Special Referee and a motion pursuant to CPLR § 4403; and (iii) granted the cross-motion to the extent of directing defendants to

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<sup>1</sup> Specifically, defendants argued that plaintiff's process server failed to make three attempts at personal service, including at least one attempt on a weekend, before resorting to "nail and mail" service.

forward payment of use and occupancy to plaintiff in the amount of \$15,000.00 per month, beginning on May 1, 2008 and continuing every month thereafter during the pendency of this action, without prejudice to the rights of either party.

Defendants now move by Order to Show Cause for an order vacating this Court's April 3, 2008 Decision/Order on the grounds that defendants have both an excusable default and a meritorious defense.

Defendants' Order to Show Cause also sought leave to oppose plaintiff's prior cross-motion for use and occupancy on the grounds that defendants did not receive notice of such motion in advance of its submission and therefore had no opportunity to submit opposition. That branch of the Order to Show Cause was granted on the record on April 23, 2008, when the parties appeared for oral argument on the TRO.

In addition, this Court directed that (i) "pending the hearing of this motion, the payment of use and occupancy in the amount of \$15,000.00 due on May 1, 2008 pursuant to the Decision/Order of this Court dated April 3, 2008 shall be placed in an escrow account

held by defendant's counsel",<sup>2</sup> and (ii) the traverse hearing scheduled pursuant to this Court's prior Decision/Order "shall proceed as scheduled."<sup>3</sup>

Defendants argue that plaintiff is barred under MDL § 302 from recovering rent/use and occupancy for the subject premises because the building is a multiple dwelling and lacks a residential certificate of occupancy.

Plaintiff, on the other hand, contends that but for the single unit occupied by defendants for both commercial and residential purposes, the entire building is occupied solely by commercial tenants.

Defendants further contend that plaintiff has failed to meet its burden pursuant to RPAPL § 749(3) of establishing that \$15,000.00 constitutes the reasonable value of the use and occupation. (The last rent paid on the premises by defendants was allegedly \$3,600.00).

Plaintiff, on the other hand, contends that the fair market value for the subject premises is no less than \$15,000.00 per month, based upon 'comparable rentals in the area' and based upon

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<sup>2</sup> By letter dated May 15, 2008, defendants provided proof that \$15,000.00 was deposited into escrow.

<sup>3</sup> The parties are scheduled to appear in Part 50 on June 5, 2008 for reference to a Special Referee.

a lease that was recently signed for the 6<sup>th</sup> floor space in the same building.

Finally, defendants contend that their payment obligations should be suspended because plaintiff has caused a constructive eviction by deliberately eliminating freight elevator service and thus curtailing defendants' access to the premises.

Plaintiff, however, denies that defendants have been prevented from accessing their space and/or that defendants abandoned the premises. Moreover, plaintiff agreed on the record on May 14, 2008 to provide defendants with an additional set of keys and to ensure that defendants had full use of the freight elevator.<sup>4</sup>

Therefore, based on the papers submitted and the oral argument held on the record on May 14 and 21, 2008, the instant motion to vacate this Court's April 3, 2008 Decision/Order is denied, and the temporary order contained in the Order to Show Cause permitting defendants to deposit use and occupancy into escrow is vacated.

Accordingly, defendants shall forward payment of use and occupancy to plaintiff in the amount of \$15,000.00 per month, beginning on June 1, 2008 and continuing every month thereafter


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<sup>4</sup> Further, on May 21, 2008, plaintiff agreed to provide defendant Mickle with his own set of keys, at his expense.

during the pendency of this action, without prejudice to the rights of either party.

This constitutes the decision and order of this Court.

Dated: May 29, 2008

  
\_\_\_\_\_  
BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK  
J.S.C.**

**FILED**  
JUN 03 2008  
COUNTY CLERK'S OFFICE  
NEW YORK