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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 114288/2008
JO-FRA PROPERTIES, INC.
VS.
BOBBE, LELAND
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 4/6/09
MOTION SEQ. NO.
MOTION CAL. NO.

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of plaintiff's motion for summary judgment on its first, second and third causes of action, and for an order directing defendants pay plaintiff rent or use and occupancy arrears from October 1, 2007 to date until plaintiff obtains a residential certificate of occupancy and legal rents are set for the subject units, is denied; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment on its fourth through tenth causes of action and (a) declaring that defendants do not have a right to use the buildings' public areas, to keep and store personal property; (b) permanently enjoining defendants from using the buildings' public areas, including hallways, entryways, stairways, and balconies, to keep and/or store personal property, to construct and maintain walls and other enclosures, to hang items, to keep and use barbeques, and/or for any other personal use; (c) directing all defendants to immediately remove all their personal property and take down, any walls, other enclosures, hanging items and barbeques from the buildings' public areas; and (d) enjoining defendants from future such uses of the public areas, is granted; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment on plaintiff's eleventh cause of action for attorneys' fees, costs and disbursements is granted, and the

Dated: J.S.C.

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

eleventh cause of action is severed; and it is further

ORDERED that the branch of plaintiff's motion pursuant to CPLR 3211 to dismiss defendants' first affirmative defense is denied; and it is further

ORDERED that the branch of plaintiff's motion pursuant to CPLR 3211 to dismiss defendants' second, third, fourth and fifth affirmative defenses, is granted, and such affirmative defenses are dismissed; and it is further

ORDERED that the branch of plaintiff's motion pursuant to CPLR 3211 to dismiss defendants' first counterclaim is denied; and it is further

ORDERED that the branch of plaintiff's motion pursuant to CPLR 3211 to dismiss defendants' second counterclaim for attorneys' fees is granted; and it is further

ORDERED that defendants' cross-motion to dismiss plaintiff's first, second and third causes of action regarding rent/use and occupancy based on the first affirmative defense is granted; and it is further

ORDERED that an assessment of attorneys' fees related to plaintiff's fourth through tenth causes of action shall be held on September 28, 2009, at 10:30 a.m., in Part 40, located at 60 Centre Street, New York, New York, Room 242, before J.H.O Ira Gammerman, and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158), file of a note of issue and a statement of readiness and pay the proper fees, if any, for the assessment hereinabove directed; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon defendants within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated 8/4/09 ENTER: _____, J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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JO-FRA PROPERTIES, INC., Index No. 114288-2008

Plaintiff,

-against-

LELAND BOBBE, ROBIN BOBBE, JERRY MORIARTY, GLEN HANSON, SHAUNA HANSEN, MICHAEL COMBS, NANCY HAGIN, COLIN BROWN, CARA NEGRYCZ, SOPHOCLES STAVRI, and JANINE STAVRI,

Defendants.

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HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff Jo-Fra Properties, Inc. ("plaintiff") owns three buildings in Manhattan, hereinafter referred to as "Building 51," "Building 53," and "Building 55" (collectively, the "buildings") and defendants Leland Bobbe, Robin Bobbe, Jerry Moriarty, Glen Hanson, Shauna Hansen, Michael Combs, Nancy Hagin, Colin Brown, Cara Negrycz, Sophocles Stavri, and Janine Stavri are (collectively, "defendants") are the tenants of their respective units in these buildings. The buildings are Interim Multiple Dwelling ("IMD"), subject to Article 7-C of the Multiple Dwelling Law (the "Loft Law").

Plaintiff now moves (1) for summary judgment on its (a) first, second and third causes of action, and for an order directing that defendants pay plaintiff rent or use and occupancy arrears from October 1, 2007 to date until plaintiff obtains a residential certificate of occupancy and legal rents are set for the subject units; and (b) fourth through tenth causes of action and (i) declaring that defendants do not have a right to use the buildings' public areas to store personal property, (ii) permanently enjoining defendants from using the buildings' public areas to, *inter*

alia, store personal property, and construct walls and other enclosures to hang items, (iii) directing defendants to remove all personal property and take down walls, enclosures, hanging items and barbeques from the public areas, and (iv) enjoining defendants from future such uses of the public areas; (3) pursuant to CPLR 3211 to dismiss defendants' affirmative defenses and counterclaims; and (4) for summary judgment on plaintiff's eleventh cause of action for attorneys' fees, costs and disbursements.

Factual Background[1]

According to plaintiff, more than 10-20 years ago, defendants took occupancy of their respective units under commercial leases, and resided in their units since the inception of their tenancies.

On August 27, 2004, defendants filed a Coverage Application (which was twice amended) (the "Application") under Article 7-C of the Loft Law seeking Loft Law coverage for their respective units and a finding that each unit is an IMD unit. Plaintiff opposed the Application, and asserted various equitable affirmative defenses. The Loft Board referred the case to the Office of Administrative Trials and Hearings ("OATH"), and dismissed the equitable defenses for lack of jurisdiction. The parties litigated and appealed the matter for the next three years.

On August 28, 2007, the parties entered into a Stipulation, on the record before the OATH Administrative Judge, wherein the defendants withdrew their applications without prejudice and plaintiff agreed to register the buildings with the Loft Board by September 30, 2007 (a Sunday). Plaintiff filed the Registration Applications on October 1, 2007, registering the

[1] The Factual Background is taken in large part from plaintiff's motion papers.

buildings as IMDs (see Schlesinger, J. Transcript, p. 5, lines 19-21). Plaintiff contends that defendants then agreed (on or about December 30, 2007) to "pay the base-date rent until the owner's registration applications are accepted by the Loft Board" and "the maximum legal rents thereafter."[2]

By letter dated October 9, 2007, the Administrative Judge referred the matter back to the Loft Board, advising it of the defendants' withdrawal of their Application.

By Final Order dated February 21, 2008 (4 months later), the Loft Board rejected the Administrative Judge's letter, and granted the defendants' Coverage Application. The Loft Board acknowledged that it may "accept a settlement conferring IMD status on a building only where there is an adequate basis for concluding that the building has met the definition of an IMD set forth in MDL 281" and then concluded that the record "contained sufficient facts to establish that the buildings are IMDs as defined by MDL 281."

Plaintiff filed an Article 78 petition, which was granted by the Court (Schlesinger, J.). Judge Schlesinger found that the Loft Board's decision was not based on the withdrawn applications, and the Loft Board was "obligated to accept the registration based on that application." J. Schlesinger directed the Loft Board to strike from its order the language, "Accordingly, the tenant's Article 7-C coverage application is granted." No appeal has been taken from this order.

On February 12, 2009, plaintiff received an Amended Proposed Order to be presented to the Loft Board and discussed on February 19, 2009. The Amended Proposed Order proposes to

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[2] Notwithstanding defendants' agreement, defendants did not pay base rent and maximum legal rent/use and occupancy, even though they are still in occupancy.

accept the parties' settlement from August 2007, rescind the portion of the Final Order granting the Coverage Application, and "accept[] the building registration submitted by the Owner [plaintiff] on October 1, 2007."

On February 27, 2009, the Loft Board issued an order, consistent with J. Schlesinger's decision, and accepted the building registration submitted by plaintiff. Thus, the buildings are registered as IMDs, subject to Loft Law coverage (plaintiff's cross-motion, exh. A; motion, p. 9).

Plaintiff hired an architect, had the residential and commercial units in each building inspected, prepared plans to reflect the work needed to legalize each building under the MDL, Housing Maintenance Code, and Building Code, and filed plans and alteration applications for each building in August 2008 with the Department of Building ("DOB"). Plaintiff also filed or is in the process of filing narrative statements with the Loft Board, and must await certification from the Loft Board that the narrative process is complete before it can obtain the building permit from the Department of Buildings. Plaintiff estimates that it will cost more than $500,000 to legalize the buildings.

Plaintiff's Motion

Plaintiff contends that MDL 285 permits an IMD owner to recover rent from residential occupants if it is in compliance, and section 284 provides a timetable for achieving legalization and obtaining a certificate of occupancy. Under the current statute, the time for complying with safety and fire standards was extended to the later of May 2010, or within 12 months from obtaining an approved alteration permit. However, the deadlines for filing an alteration application, September 1, 1999, and for taking all reasonable action to obtain an approved alteration permit, March 1, 2000, were not extended. It is impossible for plaintiff to achieve

Article 7-B compliance and obtain a certificate of occupancy by the deadlines. And, plaintiff was barred from applying to the Loft Board for an extension of time under MDL 284(vi) to file an alteration application or obtain a permit, because the Loft Board stated that it will not accept such applications.

The MDL (sections 284, 285 and 286) was designed to protect the public health, safety and general welfare, and as a remedial statute, must receive equitable construction so as to permit plaintiff to collect rent/use and occupancy. A literal construction should be avoided under the circumstances, since it resulted in objectionable consequences, hardship and injustice to the owner who will incur substantial renovation costs while tenants are unjustly living rent-free.

The Loft Law encourages the legalization of commercial loft buildings converted to residential use, and section 280 indicates that it was meant to establish a system whereby residential rentals can be adjusted so that tenant can assist in paying the cost of such legalization. The Loft Law recognizes the owner's right to collect rent from tenants while going through the compliance process. Moreover, if the MDL applied to deny any owner who registered its buildings as IMD after September 1999 the right to collect rent, there would be no incentive for any owner to register its buildings as such, thereby undermining the purpose of the law.

Further, argues plaintiff, any interpretation that denies plaintiff a right to collect rents is an unconstitutional regulatory taking of property right without compensation, in violation of the Fifth Amendment. No public interest is served by allowing tenants to live rent-free while the owner is attempting to bring the building into compliance. Moreover, allowing tenants to live rent-free denies an owner the economic viable use of its private property.

Additionally, the legislation, as amended, arbitrarily denies rent to an owner like plaintiff,

who filed a registration after September 1, 1999, and is moving expeditiously toward legalizing the buildings and obtaining residential certificates of occupancy.

Plaintiff also argues that the Court can invoke its equitable powers to direct use and occupancy payments pending legalization of the buildings. First Department caselaw recognizes the landlord's obligation to provide services, and the tenant's reciprocal, interdependent obligation to pay rent. Use and occupancy has been directed even where the landlord has made no effort to comply with the unexpired Multiple Dwelling Law 284 compliance deadlines. The First Department has also concluded that tenants, like defendants herein, who enter into possession aware that their occupancy is illegal, should not reap the benefits of occupancy, while living rent-free.

Furthermore, directing use and occupancy is consistent with Real Property Law 220, which provides that a landlord can recover same, and is based on the theory of *quantum meruit.*

Plaintiff sets forth the amounts it alleges are due and owing from each of the defendants.

As to plaintiff's fourth through tenth causes of action, plaintiff served defendants with a 10-day notice terminating any licenses to use the buildings' public areas. Defendants were previously served two notices to remove their personal property from the common areas, on the ground that their use of same violated NYC Fire Department codes, in further violation of their leases. Defendants' leases, which have expired, did not grant them exclusive use of the public areas for personal belongings, and indeed leases of the Hansens, Combs, Hagin, Brown and Negrycz, and Stavris prohibit the obstruction of the "halls, stairway or entrances to the building." Absent an exclusive possessory right granted in their leases, defendants' use of the buildings' public spaces is a trespass, or at best a license, which is cancelable at will and without cause. The

plaintiff's alleged failure to object to defendants' use of the public areas is consistent with the grant of license. The Notice to Terminate was issued in September 2008, and the continued use of the public areas by defendants constitutes a trespass. Thus, an injunction is warranted, not only to prevent the continued trespass, but also, to remedy the safety and fire hazards created by defendants' use of the public areas.

Further, argues plaintiff, dismissal of the second affirmative defense that defendants' use of the public areas is included in their leases, and the third affirmative defense, alleging that their use of th public areas is a required service under 29-RCNY-2-04(c), is warranted. Defendants' leases did not grant them use of such public areas, as required under 29-RCNY-2-04(c).

Defendants' fourth affirmative defense alleging waiver and estoppel lacks merit. The leases did not grant defendants possessory rights in the public areas, and plaintiff's knowledge of defendants' use did not evolve by wavier or estoppel into a permanent interest, but constituted a license, at best.

Plaintiff also argues that the fifth affirmative defense alleging statute of limitations lacks merit, as defendants' trespass is continuing. Further, a trespass accrued when defendants continued using the public areas after plaintiff terminated their licenses in 2008, and the six-year statute of limitations for injunctive and declaratory relief has not expired.

Further, defendants' first counterclaim alleging that they are entitled to a judgment against plaintiff for the amount of overcharges as determined by the Board, is barred by the statute of limitations. NYC Rules Title 29, section 1-06.1 bars an overcharge award for the period prior to the date of filing of a Registration Application. Defendants' overcharge application alleges an overcharge period of 2004 through September 30, 2007, a period predating

plaintiff's filing of the registration documents on October 1, 2007. Also, the second counterclaim for attorneys' fees must be dismissed, and plaintiff's eleventh cause of action for attorneys' fees granted in accordance with the terms of defendants' leases.

Defendants' Cross-Motion

Plaintiff's failure to comply with the Loft Law precludes the recovery of rent. MDL 302(1) provides that no rent shall be recovered by the owner for any period for which there is no certificate of occupancy. The statutory bar also applies to use and occupancy. The only exception is where an owner of an IMD is in full compliance with the Loft Law, and compliance must be both plead and established before it can collect rent (MDL 285(1)); registration is not enough. Further, future compliance does not cure past non-compliance, and rent which is accrued during the period of non-compliance is not recoverable. Plaintiff concedes that it did not file alteration applications for the buildings until August 2008; it filed and served a narrative statement for Building 55 on September 29, 2008 (15 days late), a narrative statement for Building 53 in January 2009 (five months late), and it has yet to file a narrative statement for Building 51. Plaintiff also acknowledges that it has not obtained an alteration permit for any of the buildings.

Nor is there any basis for the equitable relief plaintiff seeks. The Legislature already made an equitable calculation when it adopted the Loft Law and allowed IMDs, such as plaintiff, to collect rent even though they had rented out their buildings for residential use without first obtaining a certificate of occupancy that permitted such use. The only thing the Legislature asked is that such owners take reasonable, timely steps to bring their buildings up to code. Yet, plaintiff never registered the buildings as IMDs and never took any steps to legalize them until

October 2007, twenty years after the statutory deadline. In the meantime, plaintiff collected some $250,000 more in inflated rents from the defendants than it would have had the buildings been registered, at a time when, by law, it was not entitled to collect any rent.

A building becomes an IMD the moment it satisfies the statutory definition, whether in 1982 when the Loft Law was enacted, or thereafter. Thus, a determination of coverage does not confer status in the first instance; it only confirms what the Loft Law already established. Further, None of plaintiff's excuses have merit. Although defendants waited ten to twenty years to assert Loft Law coverage, plaintiff had an affirmative duty to register the buildings with the Loft Board on or before September 25, 1987, pursuant to MDL 284(2), 29 RCNY 2-05(e)(1)(I). Plaintiff owned the buildings since 1977, and is no stranger to the Loft Law, since it filed an unsuccessful application in 1984 to contest coverage on another building located on West 28th Street. Plaintiff registered this other building, and has received violations from the DOB for illegal residential use in this other building, as well as for the buildings herein, and received three violations for the other building and Buildings 53 and 55 for failing to register such buildings with the Loft Board. Plaintiff even sent letters in 1980 to the then tenants indicating that plaintiff was informed by the DOB that some tenants were using their premises for living quarters.

Further, the constitutionality of the Loft Law has been upheld, and plaintiff has been given due process. In any case, argues defendants, plaintiff's constitutional challenge is defective for failure to notify the Attorney General of its challenge, pursuant to CPLR 1012(b)(3). And, the Legislature is justified in not extending the deadline for filing an alteration application and obtaining a permit. When the Loft Law was enacted in 1982, owners had nine months to file an alteration application and three months afterwards to obtain a permit (MDL 294(1)(I)). These

deadlines were extended. The purpose of the Loft Law is to legalize *de facto* multiple dwellings, and extending the deadlines further defeats the purpose of the Loft Law. And, the Loft Board's rules properly do not permit extending the deadline as they are bound by the Legislature's choice. Since the buildings are indeed covered by the Loft Law, the caselaw permitting use and occupancy for buildings not yet determined to be covered under the Loft Law, are inapplicable.

Further, whether the use of the public areas is included in defendants' leaseholds and whether this use is a required use under the Loft Board rules is a fact-laden issue, not ripe for summary judgment. The leases at issue differ in their description of what is being leased, and none of the leases state whether the landing is included or excluded from the leasehold. Since the landings are adjacent to the units, it cannot be said that the landings are not part of the leaseholds. The defendants have used their landings as extensions of their homes since the inception of their leases, and during renewals of their leases, without objection, and have maintained their respective landings, by replacing light bulbs, keeping them clean, and decorating their walls.

Thus, defendants cross move to dismiss plaintiff's first, second and third causes of action regarding rent/use and occupancy based on the first affirmative defense, alleging noncompliance with the Loft Law.[3]

Plaintiff's Opposition to Cross-Motion and Reply

On February 19, 2009, the Loft Board accepted its Amended Proposed Order in

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[3] In their first affirmative defense, defendants allege, *inter alia*, (1) plaintiff did not file an alteration application for Building 51 until August 1, 2008; (2) plaintiff did not file an alteration application for Buildings 53 and 55 until August 1, 2008; and (3) plaintiff has not obtained alteration permits for the Buildings, and thus, such noncompliance precludes plaintiff's recovery of rent or use and occupancy.

accordance with Judge Schlesinger's decision, and issued a final order. This order accepted the 2007 Stipulation in which defendants' withdrew their coverage application, rescinded the Loft Board's grant of the defendants' coverage application, and accepted the buildings' registrations filed on October 1, 2007. The Loft Board's Executive Director expressed appreciation for plaintiff's "continued cooperation . . . in the expeditious legalization of the buildings."

Where, as here, Loft Law coverage did not vest until after the alteration application and work permit deadlines expired, and the Loft Board enacted an invalid rule barring an owner from applying to extend theses deadlines, the legislative intent is best served by permitting an owner, like plaintiff, who the Loft Board acknowledged acted expeditiously, to collect rent or use and occupancy. Otherwise, similar owners will be discouraged from legalizing their buildings.

Further, prior to entering the Stipulation, plaintiff had no obligation to register the buildings as IMDs. To fall under the Loft Law, it must be established that a building or portion thereof meets the statutory definition by showing the requisite residential occupancy and the physical conversion of the premises to residential use. The defendants possessed knowledge of these facts and yet never asserted a right to Loft Law coverage until August 2004, which plaintiff contested.

Additionally, the Attorney General is not a necessary party to this action because plaintiff does not seek a declaration invalidating the Loft Law as unconstitutional, but asserts an "as applied" challenge.

Plaintiff argues that defendants show no state interest in failing to extend an owner's time to file an alteration application and obtain a work permit under MDL 284. The law's policy cannot be advanced by penalizing any owner who after September 1, 1999, voluntarily

undertakes to legalize its buildings by filing an IMD registration application.

Further, none of defendants' leases grant them exclusive possession of the buildings' public hallways. With the exception of Bobbe, none of the defendants submitted an affidavit attesting to his/her use of the subject spaces, and none have described the public hallways, stairways or entryways as part of his or her leased space. Each lease provides that the landlord makes no representations regarding the demised premises or the building, that "no rights, easements or licenses are acquired by tenant by implication or otherwise," expressly forbids all defendants (except Bobbe) from obstructing halls, stairways, or entrances to the building, and Bobbe's lease gives plaintiff the right to change the arrangement and location of public parts of the building. And, none of the defendants can claim exclusive use of the public spaces which are used by all tenants, and the general public.

Plaintiff also contends that defendants' overcharge counterclaim is barred by 29 RCNY 1-06.1(c), which bars an overcharge award for the period prior to the filing of a coverage application or a registration application. Defendants filed their overcharge application in July 2008, after the coverage application had been withdrawn and the building registrations had been filed with and accepted by the Loft Board. Thus, defendants cannot assert rent overcharges prior to the October 1, 2007 registration date. While defendants could have filed their overcharge claim before withdrawing their application, they elected not to file to preserve their claim.

Furthermore, defendants cite no authorities in opposition to plaintiff's application to dismiss the fourth and fifth affirmative defenses for waiver and estoppel.

Defendants' Reply in Support of Cross-Motion

Defendants argue that plaintiff's claim that the buildings were covered by the Loft Law

until it registered them with the Loft Board lacks merit; otherwise, if it never registered the buildings, they would never be subject to the Loft Law. The buildings became subject to the Loft Law when the Legislature expanded the definition of interim multiple dwellings in July 1987. The buildings have been residentially occupied since the 1960's, before plaintiff purchased them. Violations for illegal residential use were issued before and after 1980. Since the Loft Law was amended in 1987, plaintiff had more than 20 years to investigate the buildings' potential coverage. Plaintiff had a duty to investigate once the law passed, and if it were unsure, plaintiff could have registered and then protest coverage, which is what it did with the 28th Street building. The Loft Board determined that the 28th Street building was covered, and since such building is identical to the buildings in every significant way, and also had tenants on each of the upper floors, plaintiff had to have at least suspected that the buildings were covered also.

Further, the penalty of no rent collection for failure to be in compliance is consistent with the statutory scheme. There is no better way to encourage legalization than to deny an owner rent until it complies.

Additionally, the Attorney General must be notified whenever the constitutionality of the statute "is involved." CLR 1012(b)(2) makes no distinction between "facial" and "as applied" challenges. And, the case cited by plaintiff is distinguishable because it concerned the constitutionality of a local zoning ordinance, not a state law. In any event, plaintiff's claim that the Loft Law is unconstitutional to the extent it denies rent or use and occupancy to an owner who registers and IMD after September 1999 is not an "as applied" challenge, since it would be the same for any owner, not just plaintiff. And, no taking has occurred under the circumstances; plaintiff continues to collect rents from the commercial tenants, which are three-fifths of the a

parcel plaintiff has offered for sale for $44 million. Plaintiff offered no factual detail that the buildings are not economically viable without defendants' rents.

Analysis

"It is well settled that 'the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Johnson v CAC Bus. Ventures, Inc.*, 52 AD3d 327, 328 [1st Dept 2008], *quoting Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A failure to meet this burden requires that the motion be denied, regardless of the sufficiency of the opposing papers (*id.*). If the proponent makes a *prima facie* showing, the burden shifts to the opposing party to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court must view the evidence in the light most favorable to the party opposing the motion, giving it the benefit of every reasonable inference (*Ashland Mgt. Inc. v Altair Invs. NA, LLC*, 59 AD3d 97, 869 NYS2d 465, 467 [1st Dept 2008]).

First, Second and Third Causes of Action for Rent/Use and Occupancy

Article 7-C of the MDL, the Loft Law, is remedial in nature, and is to be "liberally construed" to spread its beneficial effects as widely as possible (*Association of Commercial Property Owners v New York City Loft Board*, 118 AD2d 312 [1st Dept 1986]; *Lesser v Park 65 Realty Owners v New York City Loft Board*, 140 AD2d 169 [1st Dept 1988] ["Remedial statutes should be liberally construed to carry out the reform intended and spread its beneficial effects as widely as possible . . . ."]; *B.S.L. One Owners Corp. v Rubenstein*, 159 Misc 2d 903, 606 NYS2d

979 [Civ Ct New York City 1994] [statutes designed to benefit the public, such as the MDL, will receive equitable construction in order not to defeat a general, as well as specific purpose]). The purpose of the Loft Law, as stated in the "Memorandum of Legislative Representative of the City of New York" in support of the Loft Law (McKinney's 1982 Session Laws of New York, Page 2484) is to "bring order to a chaotic and legally vague process of conversion of loft space formerly used for manufacturing, warehousing and commercial purposes, to residential use in a manner which insures compliance with the Multiple Dwelling Law and various other building codes" (*Ancona v Metcalf*, 120 Misc 2d 51, 465 NYS2d 661 [N.Y. City Civ. Ct.1983]). In balancing the need for the safety and health protections contained in the MDL against the difficulty of accomplishing immediate compliance, the Legislature set forth a scheme for "incremental compliance" in section 284(1) of Article 7-C (*id*). The Loft Law was enacted in 1982 with a built-in expiration date, which has been periodically amended and extended, until May 31, 2010.

MDL § 284 requires "the owner of a interim multiple dwelling to, *inter alia*, file an alteration application; take all action reasonable and necessary to obtain an approved alteration permit; comply with residential fire and safety codes and "take all reasonable and necessary action" to obtain an appropriate certificate of occupancy" (*37 West Realty Co. v Horacio F. Salinas Photography Co., supra*). MDL § 285(1) permits an IMD owner who has not obtained a certificate of occupancy pursuant to MDL §302 (and has not registered pursuant to MDL 325) to collect rent from IMD tenants *provided that the owner is in compliance with the Loft Law*; however, the owner must both plead and prove full compliance with article 7-C before it can collect rent (*37 West Realty Co. v Horacio F. Salinas Photography Co.*, 16 Misc 3d 1122, 847

NYS2d 905 [Sup Ct New York County 2007] *citing County Dollar Corp. v Douglas*, 161 AD2d 370, 371 [1st Dept 1990]; *Lower Manhattan Loft Tenants v N.Y.C. Loft Board*, NYLJ, Aug. 15, 1984, at 11, col 1 [Sup Ct New York County]). Future compliance does not cure past non-compliance and the landlord may not recover rent that accrued during the period of non-compliance (*id*).

Here, it is uncontested that plaintiff, an IMD owner, has not obtained a certificate of occupancy pursuant to MDL §302. Therefore, plaintiff cannot collect rent or use and occupancy at this juncture.

By arguing that by the time defendants sought coverage in 2004, the MDL §284 deadlines for filing an alteration application and obtaining a work permit had already expired, and thus, plaintiff may collect rent even though it is not in compliance, plaintiff misperceives the goal underlying the statutory scheme (*902 Assocs., Ltd. v Total Picture Creative Servs, Inc.*, 144 Misc 2d 316, 547 NYS2d 978 [Sup Ct New York County 1989]). As stated in *902 Assocs., Ltd. v Total Picture Creative Services, Inc.*, 144 Misc 2d 316, 547 NYS2d 978 [1st Dept 1989]), the Loft Law

> does not contemplate a situation where owners will be permitted to collect rent while the building languishes indefinitely as an "interim" multiple dwelling. At some point-and the statute expressly defines the time period-an "interim" multiple dwelling must be upgraded to a class A multiple dwelling. To the extent an owner requires extensions of the time to comply, or to the extent the cost of compliance renders legal residential conversion infeasible, an owner is authorized to apply to the Loft Board for relief (MDL § 284, subd. 1[i]; § 285, subd. 2).

Thus, while the owner of an IMD may recover rent from residential loft occupants notwithstanding the rent-forfeiture provisions of the MDL applicable to owners of dwellings occupied without a certificate of occupancy, this right is contingent upon the loft building

owner's "compliance" with Multiple Dwelling Law section 284 (see MDL §285 (1)).

Thus, the First Department has held that an owner of an IMD is not entitled to collect rent in the absence of compliance by the owner with the Loft Law (*Grossman v MKF Realty Corp.*, 155 Misc 2d 841, 590 NYS2d 1011 [Sup Ct New York County 1992] *citing County Dollar Corp. v Douglas*, 160 AD2d 537, 161 AD2d 370 [1st Dept 1990]). If the landlord has failed to comply with the first requirement in the amended statute that it file an alteration application by October 1, 1992, then it is not "deemed in compliance" and the tenant is not required to pay rent hereafter (*Grossman, supra*).

It has been held that a tenant who asserts an MDL 302 defense to a nonpayment proceeding but whose actions prevent a landlord from correcting a dangerous condition is barred from raising such a defense (*B.S.L. One Owners Corp., supra*]). However here, there is no showing that defendants did anything to prevent the plaintiff from complying with Loft Law (*cf. B.S.L. One Owners Corp. supra* [respondent's motion to dismiss the petition seeking maintenance (rent) arrears on the ground that the landlord, pursuant to MDL 302, is barred from recovering rent withheld, is denied to the extent that petitioner's claim that respondent failed to give access to the apartment to petitioner for purposes of rectifying the dangerous condition that precluded issuance of a certificate of occupancy raises an issue of fact]).

The Legislature further decided to cast upon the owner the obligation to ensure compliance by expressly depriving the owner of any entitlement to rent or other remuneration in the absence of a certificate of occupancy (*Caldwell v American Package Co., Inc.*, 57 AD3d 15, 866 NYS2d 275 [2d Dept 2008]). Unless a tenant actually interfered with an owner's attempt to legalize the premises, "it would be inconsistent with the Legislature's command to shift this

burden by estopping the tenant from relying on the statute as a defense" (*id.*) Further, while it may appear unfair for the plaintiff, as owner to, to provide required services while it obtains its certificate of occupancy, but not collect use and occupancy from its tenants, [a]ny claimed inequities should be addressed to the Legislature" (*see 902 Associates, Ltd. v Total Picture Creative Services, Inc., supra*).

And, with respect to plaintiff's appeal for this Court to apply its equity power and require the payment of use and occupancy, this "Court is charged with enforcing the statute as written. The language of the statute setting forth a timetable is clear and unequivocal and not subject to judicial interpretation" (*902 Associates, Ltd. v Total Picture Creative Services, Inc., supra*).

Although, as plaintiff points out, administrative agency rules or regulations that conflict with the provisions of the statute or are inconsistent with its design and purpose, are to be held invalid (*see Connolly v O'Malley,* 17 AD2d 411, 234 NYS2d 889 [1st Dept 1962]), it cannot be said that the rule prohibiting the extension of time to obtain permit applications do not conflict with purpose of Article 7-C; the purpose is to facilitate the legalization of commercial and manufacturing loft buildings and interim multiple dwellings, and bring them into compliance within a time certain *(Association of Commercial Property Owners, Inc. v New York City Loft Bd.*, 118 AD2d 312, 505 N.Y.S.2d 110 [1st Dept 1986]). It is not the intended purpose of the statute to permit buildings occupied by residential tenants to be so occupied without a certificate of occupancy, indefinitely. "The law provides that a building owner, whose building *appears* from the face of the Loft Conversion Law to be an IMD, *must register* the building with the Loft Board and obtain a registration number (*Vlachos v New York City Loft Bd.*, 118 AD2d 378, 504 NYS2d 649 [1st Dept 1986]). The Loft Board has no "duty to ensure that petitioners had read the

law" concerning deadlines (*see e.g, Vlachos, supra* [rejecting owners' claim that they failed to file a timely hardship application because the Planning Commission did not permit them access to their tenants' grandfathering applications until after the June 30, 1983 deadline for filing hardship applications had passed]).

Further, plaintiff's assertion that the denial of plaintiff's ability to collect rent constitutes an unconstitutional denial of plaintiff's property rights is also unavailing. First, there is no showing by plaintiff that Article 7-C, as applied to plaintiff's buildings, constitutes a taking in violation of the Federal Constitution (*Spring Realty Co. v New York City Loft Bd.*, 69 NY2d 657, 511 NYS2d 830 [1986] ["nor is there any showing that the statute, as applied to the particular properties of plaintiff, contravenes the State or Federal Constitutions as a taking without just compensation"]). Moreover, *Seawall Associates v City of New York* (74 N.Y.2d 92, 544 N.Y.S.2d 542 [1989]), cited by plaintiff for the proposition that the Loft Law's preclusion of plaintiff's recovery of rent under the circumstances, is misplaced. *Seawall* involved a regulation which compelled "owners to be residential landlords; it requires owners to rehabilitate and offer their properties for rent, as SRO units, to persons with whom they have no existing landlord-tenant relationship," a distinction the Court made with other regulations upheld by the Supreme Court. Second, as pointed out by *Seawall*, "[t]he rent-control and other landlord-tenant regulations that have been upheld by the Supreme Court and this court merely involved restrictions imposed on existing tenancies where the landlords had voluntarily put their properties to use for residential housing." Likewise, the regulations at issue do not compel the plaintiff to offer tenancies to people, but instead, imposes restrictions upon the collection of rent.

As to plaintiff's constitutional challenge to the Loft Law and the Loft Board's regulation,

CPLR 1012(b) provides:

> 1. When the constitutionality of a *statute of the state, or a rule and regulation adopted pursuant thereto* is involved in an action to which the state is not a party, the attorney-general, shall be notified and permitted to intervene in support of its constitutionality.

Plaintiff's failure to notify the Attorney General of its constitutional challenge to the Loft Law and Loft Board's regulation precludes this Court from considering the plaintiff's arguments on this issue (*see Jefferds v Ellis*, 122 AD2d 595, 505 NYS2d 15 [4th Dept 1986] ["Special Term erred in determining *sua sponte* the constitutionality of Sections 9-503 and 9-504 of the Uniform Commercial Code without complying with the mandates of CPLR 1012(b)"). In any event, that the Legislature's failure to extend an owner's time to file an alteration application and work permit under MDL 284 is not an "arbitrary" violation of due process or equal protection rights (*Spring Realty Co. v New York City Loft Bd.*, 69 NY2d 657 [1986] [Article 7-C of the MDL "is not in conflict with the due process clauses of the Fourteenth Amendment of the United States Constitution and article I, § 6 of the New York State Constitution"]). Notably, the record indicates that plaintiff still "operate[s] the buildings, pass[es] along the costs and receive[s] an economic return" (*see Enki Properties, N.V. v Loft Bd. of City of New York*, 128 Misc 2d 485, 490, 489 NYS2d 841 [Supreme Court New York County 1985] [a statute is "is only constitutionally infirm when it leaves the property with no 'reasonable income productive or other private use for which it is adapted' leaving it with'"but a bare residue of its value'"]).

This is not an instance where the buildings at issue had not been determined to be covered by the Loft Law. Further, there is no question that plaintiff is not in compliance with such law. Therefore, plaintiff's motion for summary judgment granting its first, second and third causes of

action, and directing defendants to pay plaintiff rent or use and occupancy arrears from October 1, 2007 to date until plaintiff obtains a residential certificate of occupancy and legal rents are set for the subject units, is denied.

Fourth through Tenth Causes of Action

Plaintiff's request for summary judgment declaring that defendants have no right to use the buildings' public areas is granted. Based on the record, it appears that the public area at issue consists of the stairwells, landings thereat, and the foyer of the building. A lease, like any other contract, must be read as a whole to determine the parties' purpose and intent, giving a practical interpretation of the language employed so that the parties' reasonable expectations are realized (*Partnership 92 West, L.P. v N.E.W.S. Realty Corp.*, 2001 WL 168261 [1st Dept, App Term 2002], *citing Sunrise Mall Assocs. v Import Alley*, 211 AD2d 711 [2d Dept 1995] and *Farrell Lines v City of New York*, 30 NY2d 76, 82-83 [1972]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*see e.g. R/S Assoc. v New York Job Dev Auth.*, 98 NY2d 29, 32, 744 NYS2d 358, *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990])

The Leases contain descriptions of the demised premises as follows: the Hansens' Lease is for the "third floor loft"; Combs's Lease is for the "second floor loft"; Hagin's Lease is for "the entire second floor"; Brown and Negrycz's Lease is for the "Third Floor Loft";[4] Stavri's Lease is for the "Fourth Floor"; and the Bobbes's Lease is for the "entire third floor front." The Leases also are for commercial use only, and for the purposes of use as "a Commercial Artist,"

[4] There is no lease for Moriarty.

"Woodcarver and Decoy Maker," "a Commercial Establishment," "Commercial Art," "textile work" and a "Photo Studio." That the Leases do not expressly exclude the stairwell, landings and common areas on each floor, and whether defendants' use constitutes a Fire Department violation, are not dispositive (*see e.g., Wilfred Laboratories, Inc. v Fifty-Second Street,* 133 AD2d 320, 519 NYS2d 220 [1st Dept 1987] *citing* 1 Friedman on Leases, § 3.1 at 24 [2nd ed., 1983][stating that a "lease of an entire floor in a multi-tenant building is not intended to include stairs, corridors, landings and other common areas"]). All of the Leases, except for the Bobbes', *expressly prohibit* the obstruction of the "halls," "stairway" and "entrances" to the building; the Bobbes' Lease expressly reserves the plaintiff's right to change the arrangement and location of passageways, corridors, stairs or other public parts of the building (*see e.g., Wilfred Laboratories, Inc. v Fifty-Second Street*, 133 AD2d 320, 519 NYS2d 220 [1st Dept 1987] rejecting claim that the fourth floor stairwell landing area is part of the demised premises as contrary to the lease, which permits the landlord to change the arrangement and/or location of stairs and other public parts of the building]). Therefore, the argument that the Leases include the public spaces at issue is unsupported by the Leases. Further, the caselaw cited by defendants for the proposition that the public spaces adjacent to their units may be part of their leaseholds, is unpersuasive.

In *Greenblatt v Zimmerman* (132 AD 283 [1st Dept 1909]) cited by defendants, the Court stated that the "term 'appurtenances' in a lease includes everything 'which is necessary and essential to the beneficial use and enjoyment of the thing leased or granted.'" Thus, where the lessee operated the premises for use as restaurant continued to use part of the cellar for the same purpose for which it had been used by the lessor, the right to occupy the cellar to the extent

necessary to store coal to be used in conducting the restaurant business was appurtenant to the lease of the store. The Court found that it was essential to the enjoyment of the lease that the tenant should have a suitable and convenient place for storing coal, and that it "would be absolutely unreasonable to expect the tenant to store the coal in the restaurant or in the yard or to buy it daily by the sack at a much higher rate than by the ton. Here, defendants failed to raise any issue of fact that the use of the landings for storage of personal items, and of stairwells to hang personal belongings, are not "necessary and essential to the beneficial use and enjoyment" of the lofts demised to the defendants. Such uses by defendants are a matter of convenience.

Nor can it be said that the stairwells and landings constitute a single, physically integrated unit, utilized solely by the adjacent unit owners; the stairwells and landings are both used by the public and defendants, and there is no indication in the Leases or in the record that such areas are used by defendants *to the exclusion of others* (*cf. Broadway-Spring St. Corp. v. Jack Berens Export Corp.*,12 Misc 2d 460, 171 N.Y.S.2d 342 [Sup. Ct. New York County 1958] [although mezzanine was not specifically mentioned in the lease of a "store," the "store" consisted of the lower portion of the demised premises and the mezzanine, which both had a common ceiling, and both areas "constituted a single physically integrated unit"; there was a stairway that led *from the lower store to the mezzanine level"* and both areas were used by tenant to conduct its business"]; *Washburn v 166 East 96th Street Owners Corp.*, 166 AD2d 272, 564 NYS2d 115 [1st Dept 1990] [where 302 of the 1,225 shares pertinent to Apt. 16-D purchased by plaintiff represented the entire roof terrace area, all other one-bedroom "D"-line apartments were allocated an average of only 600 shares in the prospectus, and conduct of both plaintiff and defendant's predecessor clearly indicated that the original leasehold included the exclusive use of

the roof terrace area, roof terrace area was appurtenant to plaintiff's apartment within the meaning of the proprietary lease]). And, as defendants admit, the cases decided by the Loft Board involved the use of a roof, which is a space different from the stairwells and landings adjacent thereto.

Since there is no support in the record for the conclusion that the landings and stairwells are included in the defendants' Leases, defendants' use of the subject public areas, with plaintiff's knowledge, constitutes a license, cancelable at will and without cause. "If an owner allows a tenant to use a portion of the owner's property that is not part of the demised premises, such use is recognized as a license which is cancelable at will and without cause" (*Garza v 508 West 112th Street, Inc.*, 22 Misc 3d 920, 869 NYS2d 756 [Sup Ct New York County 2008] *citing Kohman v Rochambeau Realty and Dev. Corp.*, 17 AD3d 151, 792 NYS2d 458 [1st Dept 2005]).

"A license, within the context of real property law, grants the licensee a revocable non-assignable privilege to do one or more acts upon the land of the licensor, without granting possession of any interest therein" (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 730 NYS2d 48 [1st Dept 2001] *citing Greenwood Lake & Port Jervis R. R. Co. v New York & Greenwood Lake R. R. Co.*, 134 NY 435, 440). "[A] license is the 'authority to do a particular act or series of acts upon another's land, which would amount to a trespass without such permission'" (*Ark Bryant Park Corp., supra*; 1 Dolan, Rasch's Landlord and Tenant--Summary Proceedings § 4:11, at 182 [4th ed.]). It is uncontested that plaintiff served a ten-day notice to terminate defendants' licenses to use the buildings' hallways, stairways and other public areas of the building, and defendants have not indicated that they have discontinued

the use of such areas.

Therefore, plaintiff's claim that defendants' use of the public spaces, *i.e.*, the landings, are a licenses revokable at will and defendants' continued use of such space constitutes a trespass is warranted. Accordingly, plaintiff's application for summary judgment on its fourth through tenth causes of action against the defendants concerning their use of the subject areas for storage of personal items, and (a) declaring that defendants do not have a right to use the buildings' public areas to store personal property, (b) permanently enjoining defendants from using the buildings' public areas to, *inter alia*, store personal property, and construct walls and other enclosures to hang items, (c) directing defendants to remove all personal property and take down walls, enclosures, hanging items and barbeques from the public areas, and (d) enjoining defendants from future such uses of the public areas, such request is granted.

Eleventh Cause of Action for Attorneys' Fees

Plaintiff's eleventh cause of action for attorneys' fees is granted in accordance with the terms of defendants' leases, to the extent that plaintiff prevailed on its fourth through tenth causes of action concerning defendants' trespass. Therefore, a hearing shall be scheduled for attorneys' fees due and owing, and costs and disbursements, arising out of defendants' fourth through eleventh causes of action.

Dismissal of Affirmative Defenses and Counterclaims Pursuant to CPLR 3211

Affirmative Defenses

The standard of review on a motion to dismiss an affirmative defense is whether there is any legal or factual basis for the assertion of the defense (*Matter of Ideal Mut. Ins. Co.*, 140

AD2d 62, 532 NYS2d 371 [1st Dept 1988] *citing Winter v Leigh-Mannell*, 51 AD2d 1012, 381 NYS2d 112 [2d Dept 1996]). The truth of the allegations must be assumed, and if under any view of the facts a defense is stated, the motion must be denied (*Matter of Ideal Mutual Ins. Co. v Becker, supra*). "If there is any doubt to the availability of a defense, it should not be dismissed" (*see Nahrebeski v Molnar*, 286 AD2d 891, 730 NYS2d 646 [4th Dept 2001]).

For the reasons noted above, plaintiff's motion to dismiss the first affirmative defense alleging noncompliance with the Loft Board is denied.

For the reasons noted above, plaintiff's request for dismissal of defendants' second affirmative defense alleging that the public space at issue is part of their Leases is granted.

As to the branch of plaintiff's motion to dismiss the defendants' third affirmative defense premised on 29-RCNY 2-04(c), such defenses is dismissed. 29 RCNY 2-04(c), entitled "Additional lease agreement services" provides, in relevant part, that owners:

> shall maintain and shall continue to provide to residential occupants services specified in their lease or rental agreement. In the absence of a lease or rental agreement, owners . . . shall provide those services to residential occupants which were specified in the lease or rental agreement most recently in effect . . . .

Since the stairwells and adjacent landings are not "specified" in defendants' Leases, it cannot be said that such areas are "required services." The Court notes that defendants cite Loft Board Orders for the proposition that 29 RCNY 2-04(c) requires owners to provide IMD tenants with the greater of those services provided to tenants pursuant to their most-recent leases or those services actually provided on the effective date of the Loft Law. However, defendants do not submit these Loft Board Orders for the Court's review, and defendants fail to mention whether

such cases involve the use of public areas such as stairwells and landings. Therefore, the third affirmative defense is dismissed.

As to defendants' fourth affirmative defense alleging waiver and estoppel, plaintiff's application is premised upon the notion that defendants' leases did not grant them a possessory interest in the buildings and thus, defendants' use of the public spaces constitutes a license (Plaintiff's Memo of Law p. 16). As discussed above, the defendants' use of the subject areas constitute licenses. And, their Leases did not grant defendants a possessory interest in the landings or stairwells on their respective floors. "Acquiescence in use does not create a right, since the law does not penalize good nature, nor does indifference ripen into a right" (*Garza v 508 West 112th Street, Inc.*, 22 Misc 3d 920, *supra, citing Kohman v Rochambeau Realty and Dev. Corp.*, 17 AD3d 151, 792 NYS2d 458 [1st Dept 2005]). Therefore, dismissal of the fourth affirmative defense pursuant to CPLR 3211 is granted.

Likewise, dismissal of the fifth affirmative defenses alleging statute of limitations, is warranted. Trespasses of a continuing character may be considered a continuing trespass which would give rise to successive causes of action each time there is an interference with a person's property so that relief would not be barred by the Statute of Limitations for interferences occurring within three years of the commencement of the action (*Sporn v MCA Records, Inc.* 58 NY2d 482 [1983] *citing 509 Sixth Ave. Corp. v New York City Tr. Auth.*, 15 NY2d 48, 255 NYS2d 89 and *Galway v Metropolitan El. Ry. Co.*, 128 NY 132). Defendants' use of the public spaces, *i.e.*, the landings and stairwells, constitute a continuing trespass giving rise to successive causes of action. Therefore, dismissal of the fifth affirmative defense alleging statute of

limitations is warranted.

Counterclaims

Defendants' first counterclaim for judgment against plaintiff for the period of September 1, 2004 through September 30, 2007, in the amount of any overcharges the Loft Board awards defendants is not barred by 29 RCNY 1-06.1, based on plaintiff's filing of the registration on October 1, 2007. 29 RCNY § 1.06.1(c) provides:

> An application for rent overcharges shall be filed within four years of such overcharge. Overcharges shall not be awarded for the period prior to the date of filing of a coverage or registration application, nor for more than four years before the date on which the application for overcharge was filed.
>
> (*Nur Ashki Jerrahi Community v New York City Loft Bd.*, 22 Misc 3d 555, 868 NYS2d 494 [Sup Ct New York County 2008]).

29 RCNY 1-06.1 limits a claim of overcharge to the period subsequent to the filing of a coverage *or* registration application. Although defendants filed their coverage application in August 2004, plaintiff filed its registration application in October 2007. Even though defendants withdrew their coverage application, their withdrawal was *without prejudice*. Further, defendants' counterclaim simply seeks an award based on any award issued by the Loft Board. Therefore, dismissal of defendants' first counterclaim is denied.[5]

As to defendants' second counterclaim for attorneys' fees, defendants failed to set forth any basis for its counterclaim for attorneys' fees. Therefore, plaintiff motion to dismiss the

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[5] Defendants submitted a recent decision by Administrative Law Judge ("ALJ") Allessandra Zorgniotti of the OATH, dated June 22, 2009, wherein the ALJ denied plaintiff's motion to dismiss the overcharge application, and concluded that the filing of defendants' coverage applications, and not the filing of plaintiff's registration application, should be used to commence the four-year time limit for defendants' overcharge award. Such decision had no bearing on this Court determination.

second counterclaim for attorneys' fees on the ground that plaintiff is the prevailing party, is granted, and such counterclaim is dismissed.

Plaintiff's Cross-Motion

Based on the above conclusion that plaintiff's failure to plead and prove its compliance with Loft Law precludes its ability to recover rent and use and occupancy, defendants' cross-motion for dismissal of plaintiff's first, second, and third causes of action for rent or use and occupancy is granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of plaintiff's motion for summary judgment on its first, second and third causes of action, and for an order directing that defendants pay plaintiff rent or use and occupancy arrears from October 1, 2007 to date until plaintiff obtains a residential certificate of occupancy and legal rents are set for the subject units, is denied; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment on its fourth through tenth causes of action and (a) declaring that defendants do not have a right to use the buildings' public areas, to keep and store personal property; (b) permanently enjoining defendants from using the buildings' public areas, including hallways, entryways, stairways, and balconies, to keep and/or store personal property, to construct and maintain walls and other enclosures, to hang items, to keep and use barbeques, and/or for any other personal use; (c) directing all defendants to immediately remove all their personal property and take down any walls, other enclosures, hanging items and barbeques from the buildings' public areas; and (d)

enjoining defendants from future such uses of the public areas, is granted; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment on plaintiff's eleventh cause of action for attorneys' fees, costs and disbursements is granted, and the eleventh cause of action is severed; and it is further

ORDERED that the branch of plaintiff's motion pursuant to CPLR 3211 to dismiss defendants' first affirmative defense is denied; and it is further

ORDERED that the branch of plaintiff's motion pursuant to CPLR 3211 to dismiss defendants' second, third, fourth and fifth affirmative defenses, is granted, and such affirmative defenses are dismissed; and it is further

ORDERED that the branch of plaintiff's motion pursuant to CPLR 3211 to dismiss defendants' first counterclaim is denied; and it is further

ORDERED that the branch of plaintiff's motion pursuant to CPLR 3211 to dismiss defendants' second counterclaim for attorneys' fees is granted; and it is further

ORDERED that defendants' cross-motion to dismiss plaintiff's first, second and third causes of action regarding rent/use and occupancy based on the first affirmative defense is granted; and it is further

ORDERED that an assessment of attorneys' fees related to plaintiff's fourth through tenth causes of action shall be held on September 28, 2009, at 10:30 a.m., in Part 40, located at 60 Centre Street, New York, New York, Room 242, before J.H.O Ira Gammerman, and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158), file of a note of issue and a statement of readiness and pay

the proper fees, if any, for the assessment hereinabove directed; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon defendants within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: August 4, 2009

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD