

**Malden v R.P.S. Props., LLC**

2017 NY Slip Op 32518(U)

November 1, 2017

Supreme Court, Kings County

Docket Number: 510054/17

Judge: Karen B. Rothenberg

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1<sup>st</sup> day of November, 2017.

P R E S E N T:

HON. KAREN B. ROTHENBERG,  
Justice.

-----X  
KRISTINE MALDEN, MYLES BENNETT, ZACH WEINGART, MATTHEW CHAVES, MARGO LAFONTAINE and MAX LEMBERGER,

Plaintiffs,

- against -

Index No. 510054/17

R.P.S. PROPERTIES, LLC,

Defendant.

-----X

The following papers numbered 1 to 9 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_

1-6

Opposing Affidavits (Affirmations) \_\_\_\_\_

7-9

Upon the foregoing papers in this landlord/tenant dispute, plaintiffs, Kristine Malden (Malden), Myles Bennett (Bennett), Zach Weingart (Weingart), Matthew Chaves (Chaves), Margo LaFontaine (LaFontaine) and Max Lemberger (Lemberger), move, by order to show cause, for an order: (1) granting them a preliminary injunction, pursuant to CPLR 6301 and 6313 (a), enjoining defendant, R.P.S. Properties, LLC (RPS), from commencing summary holdover eviction proceedings against them in the New York City Housing Court (Housing Court) during the pendency of this action, and (2) granting plaintiffs partial summary judgment, pursuant to CPLR 3212, on their fourth cause of action in the complaint.

RPS is the fee owner of a loft building at 49 Wyckoff Avenue in Brooklyn (Building), which allegedly contains 15 residential units. Plaintiffs have been residential tenants of units 3A, 3B and 3C in the Building since July 2010, pursuant to commercial loft leases with RPS. Plaintiffs Bennett, Weingart and Chaves reside in unit 3A. Plaintiffs LaFontaine and Lemberger reside in unit 3B. Plaintiff Malden resides in unit 3C.

The Building, which is located in Manufacturing Zoning District M1-1, does not have a certificate of occupancy for residential use, and has never been registered as “residential” with the New York State Division of Housing and Community Renewal (DHCR).

The Building was erected before January 1, 1974. Before plaintiffs’ tenancies, the Building was a raw, former manufacturing space that had not been developed for residential use. Plaintiffs allegedly converted the third floor of the Building into residential housing accommodations, with RPS’s knowledge, consent and acquiescence. The renovation work on the third floor, which was allegedly performed at plaintiffs’ expense, was completed in December, 2010. Before the third floor of the Building was subdivided into three residential units it was open space of approximately 10,000 square feet. According to plaintiffs, the second and fourth floors of the Building have similarly been converted to residential units and are occupied by residential tenants.

Plaintiffs commenced this action against RPS on May 19, 2017, by filing a summons and a complaint asserting six causes of action for: (1) a declaration that the Building is subject to the Rent Stabilization Law of 1969 (RSL) by virtue of the Emergency Tenant Protection Act of 1974 (ETPA); (2) a mandatory injunction requiring RPS to register the Building with the DHCR as subject to the RSL, listing the proper legal regulated rent and naming plaintiffs as rent-stabilized tenants; (3) a mandatory injunction requiring RPS to issue rent-stabilized renewal leases to plaintiffs, pursuant to the RSL; (4) a declaration that RPS

is prohibited from collecting rent from plaintiffs, pursuant to Multiple Dwelling Law (MDL) § 302 (1), because the Building does not have a certificate of occupancy for residential use, pursuant to MDL § 301; (5) a permanent injunction enjoining RPS from terminating plaintiffs' tenancies and from commencing holdover eviction proceedings against them; and (6) an award of attorneys' fees, pursuant to plaintiffs' leases and RPL § 234.

On June 29, 2017, by serving each of the plaintiffs with a "Thirty (30) Day Notice Of Termination" RPS elected to terminate their tenancies at the Building and demanded that they vacate the Building on or before July 31, 2017, or they would be subject to summary eviction proceedings in Housing Court.

RPS subsequently answered the complaint on or about July 13, 2017, denied the allegations therein and asserted five affirmative defenses, including that the Building is not capable of being legalized for residential use because it is located in an M1-1 Zoning District. RPS also asserted a counterclaim seeking an award of attorneys' fees, pursuant to the terms of plaintiffs' leases.

Plaintiffs move, by order to show cause, for an order: (1) granting them a preliminary injunction enjoining RPS from commencing summary holdover eviction proceedings against them in Housing Court during the pendency of this action, and (2) partial summary judgment on their fourth cause of action in the complaint, which seeks a declaration that RPS is prohibited from collecting rent from plaintiffs, pursuant to MDL § 302 (1).

A temporary restraining order (TRO) was issued, prohibiting RPS from commencing summary holdover eviction proceedings against plaintiffs pending the hearing of the motion.

Plaintiffs contend that they have been covered under the RSL by virtue of the ETPA since they converted the third floor of the Building to residential units in 2010, but RPS has failed to: (1) issue plaintiffs rent-stabilized leases, and (2) register plaintiffs with the DHCR.

According to plaintiffs, RPS “not only knew about the residential use and conversion in the Building, but encouraged and participated in the conversion” of the entire third floor. Although the Building is located in an M1-1 Zoning District, plaintiffs produced records from the Department of Buildings (DOB) reflecting that RPS submitted a 2006 application to convert the fourth floor of the Building into residences, which was approved in September 2006, thus indicating that “the Building is capable of being legalized for residential use.”

Plaintiffs assert that they would suffer irreparable harm without an injunction enjoining RPS from commencing summary holdover eviction proceedings against them in Housing Court during the pendency of this action. Plaintiffs fear that they would be reported to Tenant Screening Bureaus (TSB), which circulate tenant warning reports to prospective landlords and building owners, making it difficult for them to find another place to live. They cite New York cases in which courts have granted injunctive relief restraining eviction proceedings based on the possibility that tenants would be included on TSB blacklists.

Plaintiffs argue that the equities lie in their favor because they “risk losing their home[s] of seven years and being blacklisted, making it nearly impossible for them to find another rental apartment in this city,” while “granting a preliminary injunction would simply maintain the status quo during the pendency of this action.” They also contend that RPS has unclean hands because it served them with termination notices after plaintiffs commenced this action as “a retaliatory measure undertaken only because Plaintiffs chose to finally pursue their rights under rent stabilization.”

Plaintiffs also move for partial summary judgment on their fourth cause of action, seeking a declaration that RPS is prohibited from collecting rent from them, pursuant to MDL § 302 (1). Plaintiffs rely on *Chazon v Maugenest*, (19 NY3d 410 [2012]), in which the Court of Appeals held that in the absence of a certificate of occupancy for an illegal multiple

dwelling, or compliance with the Loft Law's legalization requirements, rent cannot be collected from residential tenants.

RPS, in opposition, contends that plaintiffs' injunction motion should be denied because "the building cannot be subject to the ETPA since it is located in a M1-1 Manufacturing District which prohibits its conversion to residential use." RPS further argues that plaintiffs' summary judgment motion should be denied "because the building is not a multiple dwelling, but rather a commercial factory and, as a result, is not subject to [MDL] § 302."

RPS denies that it previously sought to convert the Building to residential use in 2006. RPS explains that the reference to a "residential" conversion in its 2006 application submitted to the DOB is a "typo" and "apparently a mistake made by the new architect that prepared the [application]." In any event, RPS contends that its DOB applications "were abandoned" because the DOB permit issued on September 18, 2006 "was allowed to expire and . . . was never renewed."

In addition, RPS asserts that it "did not consent [to] Plaintiffs' conversion of the units to residential use" and that "[t]he leases specifically provide that [they] are commercial." Article 2 of plaintiffs' leases (all of which are identical) provide that tenants "shall use and occupy the demised premises [as a] STUDIO." Paragraph 1 of the lease riders provide that "Tenant understands that this is a Commercial Lease and an Open Space." Article 15 of the leases provide, in relevant part, that "Tenant will not at any time use or occupy the demised premises in violation of the certificate[ ] of occupancy issued for the building of which the demised premises are a part . . ." RPS contends that "this routine landlord tenant dispute should be resolved in Housing Court which regularly determines who is and who is not rent regulated." RPS also argues that plaintiffs have failed to establish that they would be

irreparably harmed without an injunction because “Plaintiffs’ fear of being blacklisted and making them unable to find another apartment is a ‘concern’ of some future event which by its very nature [is] speculative.”

RPS opposes plaintiffs’ partial summary judgment motion on the ground that MDL § 302 is inapplicable as the Building is a factory and not a multiple dwelling. RPS relies on case law holding that tenants cannot unilaterally confer residential status upon themselves by illegally converting their units. RPS also argues that “[t]he fact that Plaintiffs, on their own initiative, and in violation of law and their commercial leases[,] converted their commercial units to residential use does not convert the building into a multiple dwelling and require a residential certificate of occupancy.”

#### ***Plaintiffs’ Motion For A Preliminary Injunction***

In order to prevail on a motion for a preliminary injunction, pursuant to CPLR 6301, “the movant has the burden of demonstrating: (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant’s position” (*Walter Karl, Inc. v Wood*, 137 AD2d 22, 26 [1988]; *see also Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]; *W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]; *Butt v Malik*, 106 AD3d 849, 850 [2013]; *Gluck v Hoary*, 55 AD3d 668, 668 [2008]). “As to the likelihood of success on the merits, a prima facie showing of a right to relief is sufficient” (*McLaughlin, Piven, Vogel v Nolan & Co.*, 114 AD2d 165, 172-173 [1986], *appeal denied* 67 NY2d 606 [1986]).

Plaintiffs commenced this action seeking a declaration that their tenancies are subject to the RSL by virtue of the ETPA and, consequently, RPS is required to provide them with

residential renewal leases and to register the rent-stabilized Building with the DHCR.

The Appellate Division, Second Department has repeatedly held that:

“[i]n order to obtain the protection offered by the Rent Stabilization Law for illegally converted commercial premises, a tenant must demonstrate that the owner acquiesced in the unlawful conversion undertaken at the expense of the occupants, *the premises were eligible for residential use by reason of the applicable zoning*, and the owner, during the pendency of the proceeding in which the tenants sought Rent Stabilization Law protection, actually sought to legalize the residential use” (*Sheila Properties, Inc. v A Real Good Plumber, Inc.*, 59 AD3d 424, 426 [2009] [emphasis added]; *see also Bennett v Hawthorne Vill., LLC*, 56 AD3d 706, 709-710 [2008]; *315 Berry St. Corp. v Hanson Fine Arts*, 39 AD3d 656, 657 [2007]).

Here, plaintiffs have not and cannot demonstrate a likelihood of success on the merits because the Building is located in a M1-1 Manufacturing Zoning District and is, therefore, not eligible for residential use by reason of the applicable zoning. Consequently, plaintiffs cannot obtain the protection offered by the RSL for the Building, as a matter of law. Accordingly, plaintiffs’ motion for a preliminary injunction enjoining RPS from commencing summary holdover eviction proceedings against them in Housing Court is denied.

#### ***Plaintiffs’ Motion For Partial Summary Judgment***

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to

establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

“The proponent of a motion for summary judgment 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” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez*, 68 NY2d at 324; see also *Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

The court must evaluate whether the issues of fact alleged by the opposing party are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat a motion for summary judgment (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Spodek v Park Prop. Dev. Assoc.*, 263 AD2d 478 [1999]). “[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment” (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Lastly, if there is no genuine issue of fact, the case should be summarily determined (*Andre*, 35 NY2d at 364).

Plaintiffs move for partial summary judgment on their fourth cause of action, seeking a declaration that RPS is precluded from collecting rent from them absent a

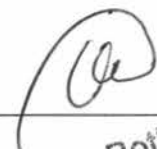
residential certificate of occupancy, pursuant to MDL § 302 (1). However MDL § 280 et seq., also known as the Loft Law, only applies to loft units occupied for residential purposes as of April 1, 1980 (*Caldwell*, 57 AD3d at 21 [holding that “[t]he Loft Law . . . only applies to units that were occupied for residential purposes on April 1, 1980”]). Because there is no dispute that plaintiffs’ loft units were not occupied and converted into residential units until sometime in 2010, MDL § 302 (1) is inapplicable. For this reason, plaintiffs’ are not entitled to partial summary judgment on their fourth cause of action in the complaint. Accordingly, it is

**ORDERED** that plaintiffs’ motion for a preliminary injunction enjoining defendant from commencing summary holdover eviction proceedings against them in Housing Court during the pendency of this action is denied; and it is further

**ORDERED** that plaintiffs’ motion for partial summary judgment on their fourth cause of action in the complaint seeking a declaratory judgment that defendant is prohibited from collecting rent from them, pursuant to Multiple Dwelling Law § 302 (1), is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C   
 Karen B. Rothenberg  
 Justice, Supreme Court

  
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 COUNTY CLERK  
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