City of New York v Pavlenok
2019 NY Slip Op 31938(U)
July 3, 2019
Supreme Court, New York County
Docket Number: 451832/2018
Judge: James E. d'Auguste

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

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The City of New York,

Plaintiff,

-against-

Index No. 451832/2018

Alexandra Pavlenok, *et al.*,

Decision and Order
Mot. Seq. No. 001 & 002

Defendants.

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Hon. James E. d'Auguste, J.S.C.

In this action to abate a public nuisance, plaintiff The City of New York (the "City") seeks, *inter alia*, to enjoin defendants Alexandra Pavlenok, Ekaterina Plotnikova, and Stepan Solovyev (collectively, the "moving defendants") from renting the Subject Buildings,[1] or any apartment therein, to tourists or other transient tenants in violation of several New York Administrative Code, Building Code, Fire Code, and Multiple Dwelling Law provisions.

In Motion Sequence No. 001, the City moves, by order to show cause, pursuant to New York State Multiple Dwelling Law ("MDL") Section 306, New York Civil Practice Law and Rules ("CPLR") 6301 and 6311, and Sections 2-703(d), 27-2122, 28-205.1 of the Administrative Code of the City of New York ("Administrative Code" or "Admin. Code") for a preliminary injunction enjoining defendants, their agents, employees, representatives, and all persons acting individually or in concert with them, during the pendency of this action, from (a) using or occupying, or permitting the use or occupancy of, any of the dwelling units in the Subject Buildings or in any other Class "A" dwelling unit in any other building in the City of New York, for less than thirty (30) consecutive days; (b) booking, offering, or advertising any dwelling units in the Subject

[1] The seven Subject Buildings are located at 12 John Street (Manhattan), 40 Water Street (Manhattan), 151 Stanton Street (Manhattan), 153 Stanton Street (Manhattan), 159 Bleecker Street (Manhattan), 238 Gates Avenue (Brooklyn), and 17-12 Menahan Street (Queens).

Buildings or in any other buildings in the City of New York for occupancy of less than thirty (30) consecutive days; and (c) disposing of, modifying, or in any other manner interfering with the digital or paper documents, photographs, and records maintained in connection with the management, operation, use, and/or occupancy of the Subject Buildings.[2] Also contained within Motion Sequence No. 001, the moving defendants cross-move, pursuant to CPLR 3211(a)(7), to dismiss the complaint as against them for failure to state a cause of action.

In Motion Sequence No. 002, the City moves, by notice of motion, to dismiss defendants' third and fourth affirmative defenses together with defendants' first counterclaim.

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[2] Motion Sequence No. 001 also seeks a temporary restraining order ("TRO"), pursuant to MDL Section 306, CPLR 6313, and Administrative Code Sections 20-703(d), 27-2122, and 28-205.1 enjoining defendants from (a) interfering with the City's right to have immediate and unhindered access for its Fire Department of New York ("FDNY") Fire Protection Inspectors and New York City Department of Buildings ("DOB") Inspectors, including, but not limited to, those personnel assigned to the Mayor's Office of Special Enforcement ("OSE"), to lawfully enter the Subject Buildings or in any other Class "A" dwelling unit in all other buildings in the City of New York where defendants may have advertised, offered, maintained, or operated an occupancy for less than thirty (30) consecutive days, in their normal course of duty, for the purpose of inspecting the buildings and any parts thereof, and any signs or service equipment contained therein or attached thereto, at all reasonable times, pursuant to relevant applicable regulations and unobstructed by defendants, to determine the Subject Buildings' compliance with the provisions of the New York City Building Code ("Building Code"), the New York City Fire Code ("Fire Code"), as well as all other relevant provisions of the Administrative Code, the MDL, any currently applicable administrative orders, and other applicable laws and rules; (b) using or occupying, or permitting the use or occupancy of any residential unit in the Subject Buildings for transient use and/or as illegal short-term rentals, except those units currently so occupied, which must be vacated within twenty-four (24) hours of issuance of this Court's order, unless otherwise directed by any subsequently issued DOB order to vacate sooner, and from further permitting the use or occupancy of such currently occupied units for transient use and/or as illegal short-term rentals immediately after the current occupants leave; (c) permitting the use or occupancy of any additional residential unit at the Subject Buildings or in any other Class "A" dwelling unit in all other buildings in the City of New York for transient use and/or as illegal short-term rentals; (d) registering any new persons at the Subject Buildings for transient short-term occupancy of less than a thirty (30) day stay; (e) booking or advertising any units at the Subject Buildings or in any other Class "A" dwelling units in all other buildings in the City of New York for short-term transient use, either on their own internet sites or on other travel-related internet sites not directly operated by defendants; and (f) disposing of, modifying, or in any other manner interfering with the digital or paper documents, photographs, and records maintained in connection with the management, operation, use, and occupancy of the Subject Buildings. The TRO was granted on September 13, 2018 when the order to show cause seeking the same relief was signed. NYSCEF Doc. No. 99.

The verified complaint sets forth four causes of action: (1) deceptive trade practices in violation of the New York City Consumer Protection Law ("CPL") (located at Administrative Code Sections 20-700, *et seq.*); (2) illegal occupancy and advertising of illegal occupancies in multiple dwellings in violation of the MDL (MDL Sections 4.8(a), 121, and 306); (3) permanent injunction enjoining defendants and all agents from continuing to advertise, offer, and maintain the use or occupancy of dwelling units in Class "A" multiple dwellings for other than permanent residence purposes (*i.e.*, short-term rental for less than thirty (30) days) (New York General City Law Section 20(22)); and (4) abatement of common law public nuisances premised upon violations of various New York City codes by permitting illegal short-term transient rentals in the Subject Buildings.

The City asserts that the use of a Class "A" apartment for transient stays of less than thirty (30) days is prohibited by the MDL and by the Administrative Code as an illegal occupancy and an unsafe condition due to increased fire safety risks and other public health issues. These risks arise because, *inter alia*, transient occupants of Class "A" apartments are not provided with sufficient fire safety protections—including fire suppression devices, alarms, and emergency lighting—which would be required in transient dwellings (*e.g.*, hotels). According to the City, the lack of adequate fire safety, combined with the transient tenants' unfamiliarity with the Subject Buildings, significantly increases the risk of injury to individuals in the event of a fire.

The verified complaint also alleges that apartments in the Subject Buildings are regularly and deceptively advertised on the following websites for short term stays in violation of the MDL and the CPL: www.Airbnb.com ("Airbnb"), www.TripAdvisor.com ("Trip Advisor"), and www.FlipKey.com. NYSCEF Doc. No. 2, ¶ 4. The City alleges that the defendants use at least fourteen (14) separate host accounts controlling at least twenty (20) different listings that

generated approximately $1 million dollars in revenue, with at least 679 reviews so far. *Id.* The City asserts that this suggests over 1,350 short-term rental transactions occurred in the Subject Buildings. *Id.*

Background

The moving defendants have allegedly been operating a multimillion-dollar illegal transient hotel operation by improperly converting permanent residential housing located in Class "A" residential buildings in Manhattan, Queens, and Brooklyn to, effectively, a commercial property. *Id.*, ¶ 4. As articulated in its verified complaint, and unrefuted by the moving defendants, the City commenced this nuisance abatement and consumer protection action to address these alleged illegal short-term rentals in seven of these Class "A" multiple dwelling buildings. NYSCEF Doc. No. 2, ¶¶ 1, 4-8.

Beginning in October 2014, the City asserts that it began to receive multiple public originating complaints about transient use in the Subject Buildings. In response to these complaints, the Office of Special Enforcement ("OSE"), an investigation unit that observes, *inter alia*, health, safety, and fire code compliance in buildings throughout New York City, inspected the Subject Buildings on thirteen (13) separate occasions between 2015 and 2018. The OSE investigations determined that multiple units in the Subject Buildings were repeatedly occupied by transient tenants and that the Subject Buildings did not contain sufficient fire safety protection for such use.[3] Specifically, the City issued, as of the filing of the verified complaint, at least eighty (80) transient use related DOB violations (*i.e.*, the illegal renting of units on a daily or short-term

[3] Requirements imposed on transient residential occupancies beyond those applicable to non-transient occupancies include, *inter alia*, portable fire extinguishers, automatic sprinkler systems, photoluminescent exit path markings, a detailed fire safety and evacuation plan, escape diagrams in each unit, a fire command center and a certified Fire Safety Director on the premises. *See, e.g.*, NYSCEF Doc. No. 84, ¶¶ 11-12; 90, ¶¶ 4-6.

basis of less than thirty (30) consecutive days), nine (9) FDNY violation orders, five (5) FDNY summonses, one (1) FDNY criminal summons, and one (1) DOB vacate order over the span of 2015 through 2018 for the Subject Buildings. *Id.*, ¶ 3.

One example of a violation found by DOB inspectors is that the Certificate of Occupancy was exceeded for the 12 John Street building in Manhattan. The verified complaint asserts that the Certificate of Occupancy for 12 John Street restricts the usage of the building to fifteen (15) Class "A" permanent residential apartments. *Id.*, ¶ 45. Yet, on January 10, 2015, an inspection found that five (5) transient guests had rented the apartment via Airbnb from defendant Pavlenok. *Id.*, ¶¶ 46-47. Based upon observations during the inspection, four (4) DOB violations were issued relating to illegal short-term occupancy, as well as other fire code violations, and additional violations based upon subsequent inspections. *Id.*, ¶¶ 48-66.

On October 31, 2017, an OSE inspection took place at 40 Water Street in Manhattan. *Id.*, ¶ 68. The verified complaint alleges that the Certificate of Occupancy states that "the only lawful use and occupancy of the five-story, mixed-use building is as a library and office on the first floor, offices on the 2nd through 4th floors and one Class 'A' dwelling unit on the 5th floor." *Id.*, ¶ 67. The inspection found four (4) transient guests staying in the fifth floor apartment and seven (7) transient guests staying at the third floor apartment who rented the apartment via Airbnb from defendant Pavlenok. *Id.*, ¶ 69. Based upon observations during the inspection, DOB inspectors issued certain violations related to illegal transient occupancy of that building. *Id.*, ¶¶ 70-73.

On March 26, 2018, an OSE inspection took place at 151 Stanton Street in Manhattan. *Id.*, ¶ 75. The verified complaint alleges that the Certificate of Occupancy states that the four-story building is a Class "A" multiple dwelling building that is restricted to four (4) Class "A" permanent residential dwelling units. *Id.*, ¶ 74. The inspection found four (4) short-term guests who allegedly

booked their stays via Airbnb as advertised by the moving defendants. *Id.*, ¶ 76. Based upon observations during the inspection, four (4) DOB violations were issued relating to illegal short-term occupancy at the building. *Id.*, ¶ 77.

On June 2, 2017, an OSE inspection took place at 153 Stanton Street in Manhattan. *Id.*, ¶ 79. The verified complaint alleges that the Certificate of Occupancy restricts the usage of the building to four (4) Class "A" permanent residential dwelling units. *Id.*, ¶ 78. The inspection found five (5) short-term guests who booked their stay via Airbnb in unit 153A. *Id.*, ¶¶ 78, 80. Based upon observations during the inspection, four (4) DOB violations were issued relating to illegal short-term occupancy and were adjudicated, resulting in fines. *Id.*, ¶¶ 81-82. Additional violations were later issued based upon additional inspections. *Id.*, ¶¶ 83-93.

On August 14, 2017, an OSE inspection took place at 159 Bleecker Street in Manhattan. *Id.*, ¶ 95. According to the verified complaint, the Certificate of Occupancy restricts the usage of the building to eighteen (18) apartments that are Class "A" dwelling units. *Id.*, ¶ 94.[4] The inspection found four (4) guests in Apartment 3C, who booked their stay online. *Id.*, ¶¶ 95-96. One of the guests called the host, identified as defendant Pavlenok, who told the guests not to speak to the inspectors via speakerphone. *Id.*, ¶ 96. A second inspection revealed six (6) guests who were allegedly unlawfully staying in Apartment 3D and their stay was booked via Airbnb. *Id.*, ¶ 100. An additional four (4) transient guests were staying in Apartment 3C. *Id.* Five (5) transient guests who also booked their stay via Airbnb were found staying in Penthouse A. *Id.* As a result, five (5) DOB violations were issued for the building and additional FDNY violations were also issued relating to illegal transient occupancy. *Id.*, ¶¶ 97-103.

[4] A second Certificate of Occupancy states that the building has twenty (20) apartments, all of which are Class "A" dwelling units. *Id.*

On November 18, 2017, an OSE inspection took place at 238 Gates Avenue in Brooklyn. *Id.*, ¶¶ 104-105. According to the verified complaint, the inspection determined that there were nineteen (19) transient guests staying at 238 Gates Avenue in Brooklyn in violation of its Certificate of Occupancy, which restricts the usage of the building to five (5) Class "A" permanent residential apartments. *Id.*, ¶¶ 104-106. The transient guests included nine (9) guests in a room located in the basement, six (6) guests in a room located on the second floor, and four (4) guests in a room located on the third floor. *Id.*, ¶ 106. Based upon observations during that inspection, four (4) DOB violations were issued relating to illegal short-term occupancy at the building. *Id.*, ¶ 107. Additional advertisements for illegal transient occupancy at this building were found on Airbnb. *Id.*, ¶ 108.

On October 19, 2017, an OSE inspection took place at 17-12 Menahan Street in Queens. *Id.*, ¶ 110. According to the verified complaint, the Certificate of Occupancy restricts the usage of the building as a Class "A" multiple dwelling with five (5) apartments and a store at the street level with a cellar. *Id.*, ¶ 109. The inspection found five (5) short-term guests staying in unit 2F who booked their stays via Airbnb as advertised by the moving defendants. *Id.*, ¶ 111. Based upon observations during the inspection, four (4) DOB violations were issued relating to transient use in the building. *Id.*, ¶ 112. Those violations were adjudicated and fines were imposed. *Id.*, ¶ 113. Further investigation resulted in additional DOB and FDNY violations. *Id.*, ¶¶ 114-19. "Due to the 'imminent danger to life or public safety' observed during the April 27, 2018 inspection, the DOB commissioner issued Peremptory Partial Vacate Order," which "required that the cellar level be immediately vacated and remain vacant and unoccupied until such time as the conditions giving rise to this vacate order had been corrected and the vacate order rescinded." *Id.*, ¶ 118. The OSE inspection also discovered defendants' advertisement of illegal transient occupancy at the building

on Airbnb, "offering illegal short-term for up to seven guests at the Menahan Building for the nightly rate of $150 plus various fees." *Id.*, ¶ 120.

Following the multitude of inspections resulting in violations and fines relating to illegal transient occupancy of units in the Subject Buildings, the City initiated the instant nuisance abatement proceeding seeking, *inter alia*, a preliminary injunction against the defendants.

Discussion

I. The City's Motion for a Preliminary Injunction

The City has demonstrated an entitlement to a injunctive relief. The City essentially requests two preliminary injunctions: (1) to enjoin defendants from the illegal use or occupancy of the Subject Buildings and (2) to enjoin defendants from advertising what would be an illegal use or occupancy of the Subject Buildings. Typically, "[a] party seeking a preliminary injunction must demonstrate, by clear and convincing evidence (1) a likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction and (3) a balancing of the equities in the movant's favor." *Gilliland v. Acquafredda Enters., LLC*, 92 A.D.3d 19, 24 (1st Dep't 2011). However, recognizing the public's compelling interest in ensuring that building and fire safety codes are followed, where a municipality seeks injunctive relief in nuisance abatement proceedings, such as in this action, "[t]he three-pronged test for injunctive relief does not apply; no special damage or injury to the public need be alleged; and commission of the prohibited act is sufficient to sustain the injunction." *City of New York v. Bilynn Realty Corp.*, 118 A.D.2d 511, 512 (1st Dep't 1986). Here, under either the three-prong test discussed in *Acquafredda Enterprises, LLC* (92 A.D.3d at 24), or the single prong test set forth in *Bilynn Realty Corp.* (118 A.D.2d at 512), the City has met its prima facie entitlement to a preliminary injunction.

Pursuant to MDL Section 4.8(a), the units within the Subject Buildings, which are Class "A" multiple dwellings, "shall only be used for permanent residence purposes," which is defined as "occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more." Pursuant to MDL Section 306, the City may seek to enjoin any violation of the MDL, including the improper use of a Class "A" multiple dwelling. Further, MDL Section 304 establishes that both the violator and "every person who shall . . . assist in the violation of any provision of [the MDL]" are punishable under the statute.

MDL Section 4.8(a) is incorporated into both the Administrative Code and the Building Code.[5] Pursuant to Administrative Code Section 7-703(d), which contains the "Nuisance Abatement Law," buildings such as the Subject Buildings shall constitute a public nuisance if they is in violation of, *inter alia*, Administrative Code Sections 28-118.3.1, 28-118.3.2, and 28-105.1. Administrative Code Section 28-118.3.1 governs illegal conversion of buildings from residential use to transient use, such as the Subject Buildings. It sets forth the following:

> No building, open lot or portion thereof hereafter altered so as to change from one occupancy group to another, or from one zoning use group to another, either in whole or in part, shall be occupied or used unless and until the commissioner has issued a certificate of occupancy certifying that the alteration work for which the permit was issued has been completed substantially in accordance with the approved construction documents and the provisions of this code and other applicable laws and rules for the new occupancy or use.

Admin. Code § 28-118.3.1. Administrative Code Section 28-118.3.2 provides that "[n]o change shall be made to a building . . . inconsistent with the last issued certificate of occupancy." Administrative Code Section 28-105.1 provides that "[i]t shall be unlawful to . . . change the use

[5] Administrative Code Section 27-265 references and incorporates New York Housing Maintenance Code ("HMC") Section 27-2004(8)(a), which is identical to MDL Section 4.8(a). Similarly, Building Code Section 310.1.2 also references and incorporates HMC Section 27-2004(8)(a) and MDL Section 4.8(a). Each provision governs "buildings with three or more dwelling units that are occupied for permanent residence purposes," like the Subject Buildings at issue herein.

or occupancy of any building . . . unless and until a written permit therefore shall have been issued by the commissioner in accordance with the requirements of this code." Pursuant to Administrative Code Section 7-704, the City may seek an injunction enjoining acts, including the foregoing acts, that constitute a public nuisance.

The allegations asserted in the verified complaint are supported in the motion for a preliminary injunction by affidavits and other proofs. The affirmation in support of the instant motion details twenty listings on Airbnb advertising illegal short-term rentals of units in the Subject Buildings that correspond with the moving defendants' illegal short-term rentals discovered by the City's investigations. NYSCEF Doc. No. 5, ¶ 12. In partial compliance with a subpoena *duces tecum* issued by the City, Airbnb produced documentary evidence containing information regarding listings, users, reservations, and payments. *Id.*, ¶ 13; NYSCEF Doc. No. 10. Some of the user information and listing information regarding illegal short-term rentals in the Subject Buildings corresponds with the alleged illegal short-term rentals contained in the verified complaint sufficient to show that the moving defendants received payments totaling approximately $1,000,000 for 500 reservations made via Airbnb. NYSCEF Doc. No. 5, ¶¶ 14-16; *see also* NYSCEF Doc. No. 10. Additionally, reservation information and reservation confirmations produced by Airbnb contain the moving defendants' names and phone numbers. *See, e.g.*, NYSCEF Doc. Nos. 14, ¶¶ 69-70; 23; 45; 50; 65; 68 (photographs of guest reservation receipts for short term stays).

Further, the City has provided ample evidence that multiple units within the Subject Buildings have been used for transient occupancy in violation of MDL Section 4.8 and various sections of the Administrative Code that prohibit illegal short-term rentals of Class "A" units for a period of less than thirty (30) consecutive days. The City has shown that the moving defendants

have, on a continuing and regular basis, rented Class "A" units in the Subject Buildings, or permitted the same to be rented, to individuals for stays of less than thirty (30) days dating back to 2015 up until the time the instant motion was filed. *See* NYSCEF Doc. Nos. 10, 29, 33, 41, 53, 55, 66, 70, 71, 77, 78 (Airbnb and online advertisements); 22, 24, 27, 28, 32, 34, 37, 39, 43, 44, 46, 48, 51, 53, 54, 57-59, 62, 67, 69, 72, 75 (Notices of Violations and New York City Department of Buildings ("DOB") Complaints referencing the illegal occupancy of the Subject Buildings); 25, 30, 35, 40, 47, 52, 60, 63, 73, (City of New York Environmental Control Board Decisions finding transient occupancy in the Subject Buildings and issuing fines); 76 (DOB Peremptory Partial Vacate Order).

The City has also made a proper evidentiary showing that the Subject Buildings were not maintained in a safe or code-compliant manner in violation of the Administrative Code. *See generally* NYSCEF Doc. Nos. 84-91 (affidavits of FDNY Fire Protection Inspectors and the annexed fire safety violations related to the improper use of the Subject Buildings); 14, 79, 81, 82, 83 (affidavits of DOB Inspectors who found transient rentals at the Subject Buildings). In doing so, the City has sufficiently proven that the moving defendants are operating, or permitting the operation of, the Subject Buildings for a purpose other than permanent residency in violation of MDL Section 4.8(a); Administrative Code Sections 28-118.3.1, 28-118.3.2, and 28-105.1; New York City Building Code Sections 310.1.1 and 310.1.2; as well as various sections of the New York City Fire Code. The commission of these violations, in and of themselves, is sufficient to sustain the City's request for a preliminary injunction. *Bilynn Realty Corp.*, 118 A.D.2d at 512.

The result is no different under the traditional three-prong test. The wealth of evidence provided by the City—and not refuted by the moving defendants—meets the clear and convincing standard of proof to demonstrate the City's likelihood of success in establishing that the moving

defendants have violated the above-mentioned statutes by operating, or allowing the Subject Buildings to be operated, for transient use, thereby committing a public nuisance. As to irreparable injury, where a municipality seeks to enjoin a public nuisance, "irreparable injury is presumed from the continuing existence of an unremedied public nuisance." *City of New York v. 330 Cont. LLC*, 60 A.D.3d 226, 230 (1st Dep't 2009). Here, as discussed above, the City has established the existence of a public nuisance, and therefore has sufficiently established irreparable injury.[6] *See Incorporated Vill. of Plandome Manor v. Ioannou*, 54 A.D.3d 364, 364-65 (2d Dep't 2008) (holding that a municipality "need not demonstrate irreparable harm" when seeking injunctive relief to enforce ordinances). Finally, the equities—enforcing regulations and ordinances designed to protect the health, safety, and welfare of the public versus allowing the continued flaunting of said regulations—unquestionably lie in favor of the City. *See, e.g.*, *Fischer v. Deitsch*, 168 A.D.2d 599, 601 (2d Dep't 1990) (holding that the equities will lie in favor of the movant where the harm to it is greater than harm to the opponent).

The City also argues that the moving defendants should be enjoined from advertising the Subject Buildings for transient use. Pursuant to MDL Section 121 and Administrative Code Section 27-287.1, advertising short-term transient rentals in a Class "A" multiple dwelling, such as the Subject Buildings, is prohibited. These statutes, which are largely identical, make it "unlawful to advertise occupancy or use of dwelling units in a class A multiple dwelling for occupancy that would violate [MDL Section 4.8]." In addition, the New York City Consumer Protection Law ("CPL") prohibits deceptive trade practices, defined as "false . . . or misleading . . . representation[s] of any kind made in connection with the sale, lease, rental or loan or in

[6] Although the City has annexed multiple certifications of corrections of violations spanning 2015 through 2018, these alleged corrections have not prevented the illegal short-term tenancies from occurring and have not stopped the moving defendants from illegally renting units in the Subject Buildings for transient use.

connection with the offering for sale, lease, rental, or loan of consumer goods or services." Admin. Code § 20-701. The rental of an apartment is considered a consumer good or service. *23 Realty Assoc. v. Tiegman*, 213 A.D.2d 306, 308 (1st Dep't 1995) (stating that a residential lease is "a purchase of services from the landlord (and, by extension, his agent)" and "[a]n apartment dweller is today viewed, functionally, as a consumer of housing services").

The City has submitted evidence that the moving defendants have been repeatedly advertising short term rentals via Airbnb, using at least fourteen different "host" accounts, in violation of MDL Section 121 and Administrative Code Section 27-287.1. Such conduct constitutes deceptive trade practices under the CPL. The moving defendants commission of these advertising violations, in and of themselves, are enough to sustain the City's request for a preliminary injunction in this regard. *Bilynn Realty Corp.*, 118 A.D.2d at 512.

The Court has reviewed the moving defendants' arguments in opposition to the instant motion and find them to be without merit. Further, the moving defendants have failed to submit any additional facts or evidence to persuade this Court that the preliminary injunction should not be issued. Accordingly, the City's motion for a preliminary injunction enjoining the moving defendants' use of the Subject Buildings for any purpose other than permanent residency, as defined in the MDL and the Administrative Code, and enjoining the moving defendants from offering or advertising the use or occupancy of the Subject Buildings for any purpose other than permanent residency is granted.

II. Defendants' Motion to Dismiss

Defendants have not demonstrated an entitlement to dismissal of the verified complaint. As an initial matter, the moving defendants do not address any of the causes of action directly. Instead, their motion to dismiss primarily reiterates the arguments made in their opposition to the

City's motion for a preliminary injunction. Specifically, the moving defendants argue that the factual allegations contained in the verified complaint and the exhibits annexed thereto do not constitute sufficient admissible proof to sustain the grant of a preliminary injunction. The moving defendants' arguments are unavailing as the verified complaint more than sufficiently alleges facts supporting the existence of multiple MDL and Administrative Code violations in the Subject Buildings by the moving defendants.

First, the City has adequately set forth the basis for the moving defendants' potential liability under the nuisance abatement and consumer protection laws. The City asserts that the moving defendants have been running an illegal transient rental operation in at least several buildings throughout New York City. Moreover, the City has asserted that the moving defendants' actions have resulted in the illegal conversion of multiple permanent apartment units into short-term rentals. The illegally converted units are allegedly advertised in many instances on internet rental platforms, such as Airbnb and Trip Advisor—a fact that is *not* contested in the moving defendants' cross motion (*see* NYSCEF Doc. No. 132, ¶ 5). The City asserts that, as supported by subpoenaed records and repeated inspections that have shown rampant illegal short-term rentals, it has undertaken multiple enforcement actions over several years prior to commencing the instant litigation without obtaining a cessation of the illegal activity.

Second, defendants' assertion that the verified complaint should be dismissed because the City failed to submit adequate proof supporting its application for a preliminary injunction is without merit. This argument is an impermissible conflation of two separate legal propositions: (1) that a motion for a preliminary injunction opens the record for a court to pass upon the sufficiency of an underlying pleading and (2) when evidentiary material is considered by the Court when deciding a motion to dismiss then the standard is not whether the pleading states a causes of

action, but whether the plaintiff has a cause of action. This attempt to conflate the above standards as a basis for dismissing a case was expressly rejected as improper in *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 272 (1977). In *Guggenheimer*, the Court of Appeals rejected the argument advanced by the moving defendants and determined that dismissal of a complaint in the context of the preliminary injunction motion based upon the content of affidavits was improper as "the affidavits were received for a limited purpose only, a purpose unconnected with summary judgment" and, as such, "the proper focus is on whether the complaint states a cause of action."

In the limited instances where a court has dismissed a complaint, pursuant to CPLR 3211(a)(7) based upon evidentiary proof, it is because the evidence unequivocally demonstrated that the plaintiff lacked a cause of action. Thus, "unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless is can be said that no significant dispute exists regarding it, dismissal should not eventuate." *Wells Fargo Bank, N.A. v. E&G Dev. Corp.*, 138 A.D.3d 986, 987 (2d Dep't 2016) (citing *Guggenheimer*, 43 N.Y.2d at 275). In this instance, the verified complaint adequately asserts a factual basis for recovery. As such, there is no basis for dismissing the verified complaint. Accordingly, defendants' cross-motion to dismiss the verified complaint is denied.

III. The City's Motion to Dismiss

The City has demonstrated an entitlement to dismissal of defendants third affirmative defense (laches), fourth affirmative defense (lack of personal jurisdiction), and first counterclaim (abuse of process). The City has not only demonstrated that the third and fourth affirmative defenses lack merit, but defendants failed to advance any arguments in opposition to their dismissal.

As for the first counter claim, defendants failed to articulate facts supporting a claim against the City and the claim also suffers from procedural infirmities. Indeed, defendants' lone contention advanced in opposition - that the City relied upon a purportedly inadmissible hearsay and unauthenticated documents to obtain a TRO - is without merit. Accordingly, the motion to dismiss filed by the City is granted.

Conclusion

The motion (Mot. Seq. No. 001) by plaintiff The City of New York seeking a preliminary injunction is granted.

The cross-motion (Mot. Seq. 001) by moving defendants Alexandra Pavlenok, Ekaterina Plotnikova, and Stepan Solovyev seeking dismissal of the complaint is denied.

The motion (Mot. Seq. No. 002) by plaintiff The City of New York seeking dismissal of defendants' third and fourth affirmative defenses and first counterclaim is granted.

Settle order on notice.

Dated: July 3, 2019

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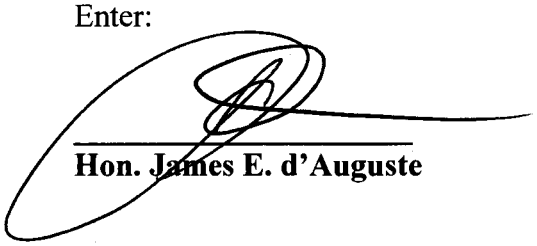

Hon. James E. d'Auguste