Armstrong Realty, Inc. v Roche
2021 NY Slip Op 30640(U)
March 3, 2021
Supreme Court, Kings County
Docket Number: 505211/18
Judge: Karen B. Rothenberg

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 360 Adams Street, Brooklyn, New York, on the 3rd day of March, 2021.

PRESENT:

HON. KAREN B. ROTHENBERG,
Justice.

- X

ARMSTRONG REALTY, INC.,

Plaintiff,

Index No. 505211/18

-against-

JOHN EDWARD ROCHE,

Defendant.

- X

The following e-filed papers read herein:	NYSCEF #:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	76-77, 86-91, 117, 121-123, 132-134 132-134, 144, 171-173, 190, 191-194 145-148, 161-163
Answer/Opposing Affidavits (Affirmations)	209-210, 224, 227-230, 238, 253
Reply Affidavits (Affirmations)	235, 250, 252
Sur-Reply Affidavits (Affirmations)	251

Upon the foregoing papers, defendant John Edward Roche, (Roche), moves for an order, pursuant to CPLR 3025 granting him leave to amend his answer (motion sequence number 4). Plaintiff Armstrong Realty, Inc., (Armstrong), by way of an order to show cause, moves for an order: (1) pursuant to CPLR 6601, 6311 and 6313, granting plaintiff a

preliminary injunction enjoining defendant from: (a) performing any renovations and/or construction work in the third floor unit (Unit) located at 120 Waterbury Street, Brooklyn, New York, (the Building) or alternatively, stopping such work until Roche has obtained the required insurance and all of the required permits, (b) any further sublet of the Unit as single room occupancies (SROs) and/or in violation of Real Property Law §§ 226-b and 235 (f), (c) further sublet of any portion of the Unit without prior written consent from plaintiff and subject to applicable occupancy limitations, (d) accessing the roof of the Building or allowing others to access the roof of the building without prior written consent of plaintiff; (2) pursuant to CPLR 3025 (b), granting plaintiff leave to amend the complaint as stated in the proposed amended complaint appended to the motion papers; (3) directing payment of use and occupancy starting August 1, 2020 and continuing thereafter on a monthly basis in the amount of $3,475.00 (motion sequence number 5).

By way of separate orders to show cause, plaintiff moves for an order: (1) pursuant to CPLR 5104 and Judiciary Law §§ 753, 756, and 770, holding defendant in contempt for his willful violation of the temporary restraining order (TRO); and (2) pursuant to Judiciary Law § 773, directing defendant to comply with the TRO; and directing defendant to pay plaintiff's attorney's fees in connection with this motion (motion sequence numbers 6 and 8). Defendant cross-moves for an order, pursuant to CPLR 2201,[1] staying the action

[1] Although defendant refers to CPLR 2101 in his notice of motion, the supporting affirmation of defendant's attorney make clear that defendant intended to reference CPLR 2201.

pending a determination of his Loft Law coverage application that is currently pending before the New York City Loft Board (motion sequence number 7).

Finally, defendant cross-moves for an order: (1) directing plaintiff to remove a security camera placed outside of defendant's bedroom window, and (2) modifying the temporary restraining order to permit up to 10 people to occupy the third floor, with no more than four people in each unit (motion sequence number 9).

It is **ORDERED** that:

(1) (A) Roche's motion for leave to amend the answer (motion sequence number 4) is granted to the extent that defendant may assert the defenses based on the Loft Law in an answer to plaintiff's amended complaint, that as noted below, will be deemed served as of the service of this order upon defendant with notice of entry; (B) Defendant's cross motion for a stay (motion sequence number 7) is granted to the extent that the ejectment and damages causes of action are stayed with respect to defendant's rights relating to Unit 3A of the third floor arising out of the Loft Law that is subject to the administrative proceeding before the Loft Board and is otherwise denied. Plaintiff may proceed with causes of action for possession of Units 3B and 3C and the third floor, and with the ejectment and damages causes of action to the extent that they are not barred by the Loft Law; (C) Defendant's cross motion for an order directing plaintiff remove a security camera and modifying the temporary restraining order (motion sequence number 9) is denied.

(2) Plaintiff's motion for a preliminary injunction and for leave to amend the complaint (motion sequence number 5) is granted to the extent that: (A) defendant is enjoined from performing any alteration work covered by paragraph 8 of the Lease Rider without prior written consent from plaintiff; (B) defendant is enjoined from accessing the roof and enjoined from allowing others to access the roof from his unit without prior written consent; (C) except as allowed by Real Property Law §235-f(3), defendant is enjoined from adding new "roommates" or entering into new sublet agreements with any persons who were not occupants of the third floor space at issue prior to July 10, 2020 without prior written permission; (D) plaintiff must give an undertaking in the amount of $5,000 within 15 days of service of this order; and (E) plaintiff is granted leave to amend the complaint and the proposed amended complaint (NYSCEF document number 94) is deemed served on defendant as of the date this order is served with notice of entry.

(3) Plaintiff's motions to hold defendant in contempt (motion sequence numbers 6 and 8) are granted to the extent that: (A) defendant is in contempt for failing to comply with the provisions of the July 9, 2020 order requiring defendant to obtain insurance as required by the party's expired Lease and Lease Rider and a hearing to determine the appropriate punishment for this contempt will be held on April 8, 2921, at 11:00 a.m. via Microsoft Teams. Defendant may purge this contempt by obtaining insurance complying with the requirements of the Lease

and Lease Rider on or before the hearing date; (B) a hearing will also be held on April 8, 2021, at 11:00 a.m. via Microsoft Teams to determine if defendant may be held in contempt for accessing the roof or allowing others to access the roof in violation of the bar on roof access contained in the July 9, 2020 order; (C) within 20 days of service of this order with notice of entry, defendant is directed to provide plaintiff with the names of the current occupants of the third floor - including those who have been living elsewhere during the Covid-19 pandemic, but who defendant reasonably expects (or expected) to return to the third floor. Plaintiff's motions are otherwise denied.

(4) As this action is nearly 3 years old, as the stay is limited, and as little or no discovery appears to have taken place, plaintiff is directed to submit a request for a preliminary conference within 20 days of service of this order with notice of entry (Uniform Rules for Trial Courts [22 NYCRR] § 202.12).

Background

In this action, plaintiff has pleaded causes of action for property damage, breach of contract, trespass and nuisance and seeks monetary damages based on such causes of action premised on assertions that defendant made residential use of the premises and performed alterations and renovations without the knowledge of plaintiff and in violation of the terms of the August 2009 lease (Lease) entered into between plaintiff and defendant. The Lease was for the third-floor space of a former warehouse and had a five-year term that ended on July 30, 2014. This Lease provided that defendant "shall use and occupy the demised

premises for an Art Studio only. No Live in. Provided such use in accordance with the certificate of occupancy for the building, if any, and for no other purpose" (Lease ¶ 2). The Lease required defendant to maintain general liability insurance with limits of not less than $2,000,000 and $1,000,000 for property damage and with plate glass coverage (Lease Rider ¶ 2), provided that defendant could not "suffer or permit the demised premises or any part thereof to be used by others" (Lease ¶ 11), barred defendant assigning the lease and from subletting any portion of the demised premises without prior written consent (Lease Rider ¶ 16), and barred defendant from making changes to the leased space without prior written consent from plaintiff (Lease ¶ 3 and Lease Rider ¶ 8).

After issue was joined, plaintiff moved for summary judgment based on an affidavit from Jacinto Chua, plaintiff's owner and agent, who asserted that he discovered in early 2018 that defendant had converted the space into single room occupancy units, had replaced the building's gable roof with skylights, and performed such work without his knowledge or permission. In opposition, defendant alleged that he performed the renovations between 2009 to 2012, that he has been living in the space since 2009 with up to seven roommates, and that Chua visited the space on multiple occasions over the years and was aware of and acquiesced to the alterations and residential use. In its April 16, 2019 order this Court found that plaintiff had made a prima facie showing that the changes were made without permission, however, the court also found that Roche's affidavit presented factual issues relating to whether plaintiff waived or was estopped from objecting to the alterations and residential use. In addition, the court noted that, although defendant had

failed to properly exercise his option to renew the Lease in July 2014, the lease covenants remained in effect as part of a month-to-month tenancy under Real Property Law § 232-c.[2]

Relevant to determination of several of the motions that are currently before the court are the June 2019 amendments to the Loft Law (*see* Multiple Dwelling Law § 281 as amended by L 2019, ch 41, §§ 1, 2) which extended Loft Law protections for interim multiple dwellings to include, as is relevant here:

> "buildings, structures or portions thereof that are located in a city of more than one million persons which were occupied for residential purposes as the residence or home of any three or more families living independently from one another for a period of twelve consecutive months during the period commencing January first, two thousand fifteen, and ending December thirty-first, two thousand sixteen, provided that the unit seeking coverage: is not located in a cellar and has at least one entrance that does not require passage through another residential unit to obtain access to the unit, and is at least four hundred square feet in area" (Multiple Dwelling Law § 281 [6] [a]).

Shortly after the June 25, 2019 effective date of the amendments (L 2019, ch 41, § 11), defendant submitted a Loft Board coverage application and protected occupancy status application to the Loft Board in which he sought coverage for three units on the third floor of Armstrong's building, and asserted that each unit exceeded 400 square feet, had a private entrance and all three units were occupied by residential tenants throughout 2015 and 2016.

[2] The court notes that the issues related to the lease renewal option were more fully addressed by this court's April 16, 2019 order in a related action commenced by defendant here (*Roche v Armstrong Realty, Inc.*, index no. 508618/18) in which he sought a Yellowstone injunction. In deciding that defendant here had failed to demonstrate entitlement to a Yellowstone injunction, the court found that he had failed to properly exercise his option to renew the Lease for an additional five year term.

In an amended loft board coverage application, dated January 27, 2020, defendant stated that he resided in Unit 3A, that Laurel Rogers resided in Unit 3B, and that they sought coverage. By way of an October 6, 2020, email, however, Laurel Rogers' counsel informed the Loft Board that Rogers was withdrawing her claims for Loft Law coverage and protected occupant status with respect to Unit 3B.

Discussion

Plaintiff's Proposed Amended Complaint

Armstrong seeks to amend the complaint to add, inter alia: (1) an ejectment cause of action; (2) a cause of action for rent arrears and for use and occupancy, additional factual details in support of the claims for damages based on plaintiff's alterations of the premises; (3) a request for a permanent injunction barring [i] additional alterations, [ii] barring defendant from leasing single room occupancies (SROs), [iii] barring subletting without written consent, [iv] barring roof access, [v] allowing plaintiff access to the third floor, and (4) a request for attorney's fees. Contrary to defendant's assertions, amendments to a complaint are not limited to assertions that merely amplify the original complaint, but rather, are to be "freely given" and only denied where the proposed amendments are "palpably insufficient," where the proposed amendments are "patently devoid of merit," or where the "delay in seeking the amendment would cause prejudice or surprise" (*Lucido v Mancuso*, 49 AD3d 220, 226-227, 229 [2d Dept 2008]; *see Catnap, LLC v Cammeby's Mgt. Co., LLC*, 170 AD3d 1103, 1105 [2d Dept 2019]; CPLR 3025 [b]).

One objection to the amendments is based on the assertion that plaintiff's notice of termination is defective because it only provided defendant with 30 days-notice and, pursuant to Real Property Law §§ 226-c, 232-a and 232-c, defendant was entitled to 90 days-notice. The time requirements of sections 226-c, 232-a and 232-c, however, do not apply here because plaintiff, in its proposed pleading, has pleaded a common-law ejectment cause of action that is not subject to those time requirements (*see Alleyne v Townsley*, 110 AD2d 674, 675 [2d Dept 1986]; *O'Connor v Gallier*, 7 Misc 3d 1016 [A], 2005 NY Slip Op 50632, *1-2 [U] [Sup Ct, Kings County 2005]). Additionally, these statutory notice requirements apply to proceedings based on a tenant's holding over, and plaintiff here is not seeking to eject defendant because he is holding over (*see Charlebois v Carisbrook Indus., Inc.*, 23 AD3d 821, 823 [3d Dept 2005]), but rather, because Roche violated the terms of the expired lease that continues to govern defendant's current month-to-month holdover tenancy (*see Aurora Assoc., LLC v Hennen*, 157 AD3d 608, 608-609 [1st Dept 2018]; *Malach v Chalian*, 64 Misc 3d 804, 812 [Civ Ct, Kings County 2019]). Given that plaintiff served a notice to cure and a notice of termination that more than satisfied the notice requirements contained in the lease (*see Aurora Assoc., LLC*, 157 AD3d at 608-609; *Malach*, 64 Misc 3d at 812), any issue of termination notice is, in and of itself, insufficient to show that the proposed amendments are palpably insufficient or patently devoid of merit (*see JPMorgan Chase Bank, N.A. v Campbell*, 189 AD3d 1014, 1015 [2d Dept 2020]; *see also East 82 v O'Gormley*, 295 AD2d 173, 174 [1st Dept 2002] [found that dismissal for lack of notice would have been an absurd result under circumstances of the case]).

Roche's papers also fail to show that the motion to amend should be denied on statute of limitations grounds. Notably, the statute of limitations cannot be a defense to defendant's ejectment based on his residential use of the premises in violation of the terms of the lease, the certificate of occupancy, and local zoning laws, as such a claim constitutes a continuing wrong if such use cannot be legalized.[3] As pleaded, the claims relating to the subletting and renting illegal SRO rooms are not untimely, and, while defendant disputes those claims, he does not suggest that they are untimely. Although defendant contends that the alteration work that constitutes one of Armstrong's grounds for the breach of lease claim was performed more than six-years ago, since that work was at issue in plaintiff's original complaint, the current claims would be deemed to relate back to the time of that original pleading (*see Catnap, LLC*, 170 AD3d at 1105-1106) and defendant has failed to provide proof that such claims were untimely as of the commencement of this action. Moreover, defendant's alterations could be considered a continuing violation of the lease, trespass or nuisance, giving rise to successive causes of action (*see Bloomingdales, Inc. v New York City Tr. Auth.*, 13 NY3d 61, 65-66 [2009]; *Great Jones Studios Inc. v Wells*, 190 AD3d 587 [1st Dept 2021]; *Garron v Bristol House, Inc.*, 162 AD3d 857, 859 [2d Dept 2018]).

Defendant further contends that the cause of action for use and occupancy is barred because there is no residential certificate of occupancy. The bar on claims for rent and

[3] As discussed below, plaintiff's entitlement to ejectment on this ground turns on whether the defendant is entitled to the protections of the Loft Law.

use and occupancy where there is no residential certificate of occupancy arise from the requirements of Multiple Dwelling Law §§ 301 and 302 (*see Chazon, LLC v Maugenest*, 19 NY3d 410, 414-415 [2012]; *Barrett Japaning, Inc. v Bialobroda*, 190 AD3d 544 [1st Dept 2021]; *Caldwell v American Package Co., Inc.*, 57 AD3d 15, 25-26 [2d Dept 2008]). These sections, and indeed, the Multiple Dwelling Law itself, however, only apply to multiple dwellings (*see* Multiple Dwelling Law §§ 8 and 301 [1]). If plaintiff can demonstrate that its building is not a multiple dwelling for purposes of the multiple dwelling law,[4] section 302 will not bar a claim for rent and use and occupancy and plaintiff may be entitled to obtain the same from defendant (*see 200-218 Soundview Realty Corp. v Sherlock*, 170 Misc 3d 308, 311-312 [Sup Ct, Bronx County 1996]; *see also Netral v Lippold*, 304 AD2d 491, 492 [1st Dept 2003]).

Finally, defendant's conclusory assertions that he has been prejudiced by the amendments are insufficient to require denial of this portion of the motion (*see Lanpont v Savvas Cab Corp.*, 244 AD2d 208, 210-211 [1st Dept 1997]). Indeed, Roche undoubtedly has had notice of many of the claims alleged in the proposed amended complaint based on

[4] Pursuant to Multiple Dwelling Law § 4 (7), "A 'multiple dwelling' is a dwelling which is either rented, leased, let or hired out, to be occupied, or is occupied as the residence or home of three or more families living independently of each other." Multiple Dwelling Law § 4 (5), states that, "A 'family' is either a person occupying a dwelling and maintaining a household, with not more than four boarders, roomers or lodgers, or two or more persons occupying a dwelling, living together and maintaining a common household, with not more than four boarders, roomers or lodgers. A 'boarder,' 'roomer' or 'lodger' residing with a family shall mean a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein."

the issues before the court in Armstrong's summary judgment motion, the related holdover proceeding in Civil Court that has since been discontinued, and based on defendant's own action for a Yellowstone injunction. Further, although the motion to amend was made more than two years after the action was commenced, it is hard to see how the amendments will affect the defense of the action given that no note of issue has been filed and little discovery has taken place (*see Garafola v Wing Inc.*, 139 AD3d 793, 794 [2d Dept 2016]; *see also Catnap, LLC*, 170 AD3d at 1105-1106).[5]

The court will thus grant the portion of Armstrong's motion seeking leave to amend the complaint as stated in the proposed amended complaint.

Plaintiff's Request for a Preliminary Injunction

Armstrong also moves for a preliminary injunction. "The decision to grant a preliminary injunction is a matter ordinarily committed to the sound discretion of the court hearing the motion" (*Nelson, L.P. v Jannace*, 248 AD2d 448, 448–449 [2d Dept 1998]; *see Doe v. Axelrod*, 73 NY2d 748, 750 [1988]; *see 159 Smith, LLC v Boreum Hill Prop. Holdings, LLC*, ___ AD3d ___, 2021 NY Slip Op 00823, *1 [2d Dept 2021]). "The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *see* CPLR 6301). "The purpose of a preliminary injunction is to preserve the status quo until a decision

[5] Indeed, upon reviewing the court's computer calendar system and upon reviewing the documents filed on NYSCEF, it does not even appear that the parties have had a preliminary discovery conference (Uniform Rules for Trial Courts [22 NYCRR] § 202.12).

is reached on the merits" (*Icy Splash Food & Beverage, Inc. v Henckel*, 14 AD3d 595, 596 [2d Dept 2005]; *see 159 Smith, LLC*, 2021 NY Slip Op 00823, *1).

The portion of the motion requesting a preliminary injunction barring renovation/construction work without prior written consent is granted to the extent that defendant is enjoined from performing any alteration work covered by paragraph 8 of the Lease Rider without obtaining prior written consent from plaintiff (*see 542 Holding Corp. v Prince Fashions, Inc.*, 57 AD3d 414, 415 [1st Dept 2008]). As noted above, given that the provisions of the expired lease still govern Roche's month-to-month hold-over tenancy (*see City of New York v Pennsylvania R.R. Co.*, 37 NY2d 298, 300-301 [1975]; *Logan v Johnson*, 34 AD3d 758, 759 [2d Dept 2006]; *O'Donnell v A.R. Fuels, Inc.*, 46 Misc 3d 1208 [A], 2014 NY Slip Op 51906, *8 [Sup Ct, Kings County 2014], *modified on other grounds* 155 AD3d 644 [2d Dept 2017]; Real Property Law § 232-c), defendant remains bound by paragraph 9 of the Lease Rider, which unequivocally requires Roche to obtain prior written consent from Armstrong. While defendant disputes plaintiff's factual assertion that he has performed any such work recently, such a factual issue does not preclude the grant of a preliminary injunction (*see Ruiz v Meloney*, 26 AD3d 485, 486-487 [2d Dept 2006]).

In view of paragraph 29 of the Lease Rider that bars defendant from accessing parts of the building other than the demised third-floor premises, the portion of the motion for a preliminary injunction regarding roof access is granted to the extent that defendant is enjoined from accessing the roof and enjoined from allowing others to access the roof from

his Unit without prior written permission from plaintiff (*see Fairmont Tenants Corp. v Braff*, 162 AD3d 442, 443 [1st Dept 2018]).

Plaintiff requests a preliminary injunction barring defendant from further subletting any portion of the Unit as an SRO and enjoining defendant from further subletting unit without prior written consent from plaintiff. The portion of the request relating to SROs is denied because plaintiff's supporting proof fails to sufficiently demonstrate that the alterations to the unit have turned it into an SRO (*see* NY City Housing Maintenance Code [Administrative Code of City of NY] §§ 27-2004 [a] [17], 27-2004 [a] [15], and 27-2077).[6] Paragraph 11 of Lease, however, bars use of the demised premises by others without prior written consent by plaintiff and paragraph 16 of the Lease Rider bars subletting of all or any portion of the demised without prior written consent of plaintiff. While the lease provisions must be read in conjunction with Real Property Law §235-f (3), which allows occupancy by the tenant, immediate family of the tenant, and one additional occupant and that occupant's dependent children, plaintiff is otherwise entitled to enforce the Lease's restrictions on subletting or occupancy (*see Barrett Japaning, Inc. v Bialobroda*, 68 AD3d 474, 475 [1st Dept 2009]; *1890 Adam Clayton Powell LLC v Penant*, 52 Misc 3d 76, 77-78 [App Term, 1st Dept 2016]). The fact that plaintiff may have failed to enforce the subletting provision in the past does not bar enforcement of the provision with respect to

[6] In any event, even if defendant is deemed to have created SROs, the court finds that the bar on further subletting without prior written approval will sufficiently maintain the status quo pending final determination such that a separate bar on subletting for the purposes of SROs in not necessary.

new occupants in view of the Lease and Lease rider's "no waiver" provisions (*see 1890 Adam Clayton Powell LLC*, 52 Misc3d at 77-78). Contrary to defendant's contention, the language of New York City Loft Board Regulations (29 RCNY) § 2-08, which adopts the definition of a family contained in Multiple Dwelling Law § 4 (5)[7] for the purposes of identifying what constitutes "living independently" during the window period under Multiple Dwelling Law § 281, in no way suggests that that definition overrides the restriction on subletting contained in Armstrong's Lease and Lease Rider (*see Matter of Korn v Batista*, 131 Misc 2d 196, 201 [Sup Ct, NY County 1986], *affd* 123 AD2d 526 [1st Dept 1986], *lv denied* 69 NY2d 602 [1986]; *see also Barrett Japaning, Inc.*, 68 AD3d at 475). Accordingly, plaintiff is entitled to an order enjoining defendant from entering into new sublets without prior written permission from plaintiff.

As an undertaking is required upon the granting of a preliminary injunction (*see Chao-Yu Huang v Harry An-Ling Shih*, 164 AD3d 1298, 1298 [2d Dept 2018]; CPLR 6312 [b]), plaintiff is directed to post an undertaking in the amount of $5,000 within 15 days of service of this order with notice of entry (*see National Church of God of Brooklyn, Inc. v Carrington*, 56 Misc 3d 1215 [A], 2017 NY Slip Op 51007, *13-14 [U] [Sup Ct, Kings County 2017]).[8]

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[8] The court notes that neither party has addressed the appropriate amount of the undertaking in their motion papers and further notes that either party may move to modify the amount of the undertaking to the extent that the amount set is not rationally related to the amount of potential damages defendant might suffer if it is found that the injunction was unwarranted (*see Hofstra Univ. v Nassau County, N.Y.*, 166 AD3d 863, 865-866 [2d Dept 2018]).

Finally, plaintiff's request that defendant be directed to pay use and occupancy starting August 1, 2020 and continuing each month pendente lite is denied. While this court has found that plaintiff may amend the complaint to add a claim for past rent and use and occupancy since plaintiff may be able to show that the building was not subject to Multiple Dwelling Law § 302, the court finds that plaintiff has failed to present evidentiary proof of such for purposes of obtaining use an occupancy during the pendency of this action (*see Caldwell*, 57 AD3d at 25-26; *see also Chazon, LLC*, 19 NY3d at 414-415; *Barrett Japaning, Inc.*, 190 AD3d 544; *cf.* Multiple Dwelling Law § 285 [1] [an owner may recover rent an use and occupancy if it is in compliance with Multiple Dwelling Law art 7C]).

Defendant's Motion for Leave to Amend the Answer and for a Stay

Leave to Amend

Defendant moves for leave to amend the answer to add defenses based on statutory tenancy rights arising out of the protections for interim multiple dwellings under the 2019 amendments to the Loft Law, and separately moves for a stay pending a determination of his application to the Loft Board for coverage under the Loft Law. Defendant's allegations in his proposed amended answer and his Loft Board applications[9] satisfy, at least facially, the requirements for interim multiple dwelling coverage under Multiple Dwelling Law § 281 (6) (a). Plaintiff's opposition to defendant's motion to amend is limited to asserting that any issue relating to amending the answer is moot because plaintiff is entitled to the

[9] The Loft Board application and amended application are submitted in support of plaintiff's cross motion for a stay of this proceedings (NYSCEF document numbers 126 and 127).

requested amendment of the complaint. Given that the court is granting plaintiff's motion to amend the complaint, defendant's motion to amend the answer is granted to the extent that defendant may assert the additional defenses based on the Loft Law in answering the amended complaint.

Cross Motion for a Stay

Defendant's cross-motion for a stay turns on the application of the primary jurisdiction doctrine. Under this doctrine, where a court and an administrative agency have concurrent jurisdiction over a dispute involving issues beyond the conventional experience of judges, the court will stay its hand until the agency has applied its special expertise (*see Matter of Neumann v Wyandanch Union Free School Dist.*, 84 AD3d 816, 818 [2d Dept 2011]).

A Loft Board coverage determination under the Loft Law is generally an issue that falls within the special competence of the Loft Board, and the primary jurisdiction doctrine generally mandates that the court proceedings be stayed to pending a Loft Board's coverage determination (*Eli Haddad Corp. v Redmond Studio*, 102 AD2d 730, 730-731 [1st Dept 1984]; *see also Matter of Jo-Fra Props., Inc.*, 27 AD3d 298, 299 [1st Dept 2006], *lv denied* 8 NY3d 801 [2007]; *EPDI Assoc. v Conley*, 7 AD3d 755, 756-757 [2d Dept 2004]). The coverage determination is relevant to this action because a finding that the protections of the Loft Law are applicable will limit plaintiff's causes of action (*see* Multiple Dwelling Law § 286; *Robinson v 47 Thames Realty, LLC*, 158 AD3d 781, 782-783 [2d Dept 2018]). While plaintiff contends the fact that the Building's location (in an

M1-2 manufacturing zoning district within the North Brooklyn Industrial Business Zone [IBZ]) would preclude a finding that the building is an interim multiple dwelling for purposes of the Multiple Dwelling Law § 281(6). Contrary to Armstrong's contention, interim multiple dwelling status for buildings located within the North Brooklyn IBZ applies unless the building is an M3 zoning area (Multiple Dwelling Law § 281 [6] [b]).[10] Although plaintiff further contends that defendant cannot show that three qualifying units were continuously occupied during the window period under Multiple Dwelling Law § 281 (6) (a), it has failed to provide evidentiary proof of such. Absent an obvious facial defect in defendant's coverage application, the court finds that plaintiff has failed to demonstrate grounds warranting denying the stay relevant to coverage issues. Additionally, while plaintiff argues that proceedings before the Loft Board have a history of moving slowly, this court finds that the potential for delay is, in and of itself, not grounds for denying a stay (*see Missry v Ehlich*, 1 Misc 3d 723, 732-733 [Civ Ct, New York County 2003]). The court, however, will consider a motion to lift the stay in the event that the proceedings before the Loft Board are unduly delayed or once they are terminated (*id.*).

A court has the discretionary authority to limit the stay of the judicial proceedings to the issues or claims that are inextricably interwoven with those that are subject to the administrative proceeding and sever and continue those that are unrelated (*see Weiss v Nath*, 97 AD3d 661, 664 [2d Dept 2012]; *Galanos v Galanos*, 39 AD3d 702, 703 [2d Dept

[10] Indeed, this is how the Loft Board's own regulations read the right to coverage under the similar language contained in Multiple Dwelling Law § 281 (5) (*see* New York City Loft Board Regulations [29 RCNY] § 2-08 [a] [4] [iii]).

2007]). As limited by his amended application, Roche's Loft Board coverage application only involves his rights relating to Unit 3A of the third floor. While the Loft Board will necessarily make a finding regarding whether the three units on the third floor - taken together - constitute an interim multiple dwelling, such a finding would in no way give defendant any right to occupy or make use of Units 3B and 3C (*see Korn*, 131 Misc 2d at 201; *see also Baer v Gotham Craftsman Ltd.*, 154 Misc 2d 490, 492 [App Term, 1st Dept 1992]). Accordingly, any rights defendant may have with respect to parts of the third floor other than Unit 3A arise from rights he may have as a month-to-month tenant under the expired lease and the action may proceed regarding those issues.

Plaintiff also asserts that it is entitled to continue the action with respect to possession of the entire third floor as well as its claims for ejectment and damages (relating to rent gouging and profiteering based on illegal subletting and based on the illegal alterations that have caused damage to the premises) because those claims will not be precluded even if the premises is covered by the Loft Law. In this regard, plaintiff points to a Loft Board regulation providing that an occupant of an interim multiple dwelling may be evicted on the ground "that the residential occupant is committing or permitting a nuisance in such unit; or is maliciously or by reason of gross negligence substantially damaging the building; or his or her conduct is such as to interfere substantially with the comfort and safety of the landlord or of the other occupants . . . " (New York City Loft Board Regulations [29 RCNY] § 2-08.1 [a] [2]).

With respect to plaintiff's alteration claim, this court finds that such a claim may proceed against defendant to the extent that defendant's alterations to the premises extend into areas of the premises not specifically demised to him, create fire or other safety risks, or constitute substantial alterations in violation of the no alteration clause of the lease (*Sam & Joseph Sasson LLC v Guy*, 62 Misc 3d 1215 [A], 2019 NY Slip Op 50141, *1 [U] [Civ Ct, New York County 2019]; *Sam & Joseph Sasson LLC v Guy*, 2018 NY Slip Op 33231, *13-14 [Civ Ct, New York County 2018]; *see also Matter of Pels v New York City Envtl. Control Bd.*, 139 AD3d 414, 415 [1st Dept 2016] [addressing fire code violation against tenant]; *259 West 12th LLC v Grossberg*, 89 AD3d 585, 586 [1st Dept 2011]; *People v Ricchio*, 135 Misc 2d 108, 110-11 [Crim Ct, New York County 1987]; *cf. Rumiche Corp. v Eisenreich*, 40 NY2d 174, 180 [1976]; *West 115 11-13 Assoc. LLC v Pierre*, 63 Misc 3d 158 [A], 2019 NY Slip Op 50854, *1 [U] [App Term, 1st Dept 2019]). This alteration claim, however, is subject to the waiver/forfeiture defenses that this court found sufficient to warrant denial of plaintiff's summary judgment motion, and may only lead to ejectment if the "alterations caused lasting or permanent injury to the premises that was incapable of meaningful cure" (*West 115 11-13 Assoc. LLC*, 2019 NY Slip Op 50854, *1; *Sam & Joseph Sasson LLC*, 2019 NY Slip Op 50141,*3-4; *cf. 259 West 12th LLC*, 89 AD3d at 586; RPAPL 753 [4]). In the absence of a finding of waiver or consent by plaintiff, it will be defendant who bears responsibility for any cure relating for the alterations at issue (*see Sam & Joseph*

Sasson LLC, 2019 NY Slip Op 50141,*3).[11] To the extent that that no cure can be performed or to the extent that the cure is performed by plaintiff, the damages cause of action based on the alterations may also proceed.

This court also agrees that ejectment/eviction may also be obtained based on the rent gouging/profiteering claim, as courts have held that such a claim may provide grounds for eviction even in an interim multiple dwelling unit (*see Matter of 151-155 Atl. Ave., Inc. v Pendry*, 308 AD2d 543, 543 [2d Dept 2003]; *BLF Realty Holding Corp. v Kasher*, 299 AD2d 87, 92-94 [1st Dept 2002]; *see also Board of Mgrs. of the S. Star v Grishanova*, 117 AD3d 442, 442-443 [1st Dept 2014]).[12] Plaintiff, however, has not requested money damages with respect to the rent gouging claim, and, even if it had, a claim for money damages would be stayed in any event, as such a claim turns on the multiple dwelling status of the unit, which is the subject of the Loft Board proceeding (*see Barrett Japaning, Inc.*, 190 AD3d at 544).

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[11] While defendant may be correct that the Loft Law imposes obligations on the landlord/owner to take the steps to render the units found to be interim multiple dwellings usable for residential use and does not impose obligations on tenants to perform the work or require the tenant to pay for the work other than through rent adjustments, nothing in the language of the Loft Law sections relied upon by plaintiff suggests that they wholly override the obligations relating to alterations contained in a lease between the owner and tenant (*see* Multiple Dwelling Law §§ 283, 284, 285, 286).

[12] The court makes no decision at this time as to whether defendant can be deemed to have profiteered where the subletting occurs before the building is found to be an interim multiple dwelling, no legal rent has been established and the building is not otherwise rent controlled or rent stabilized (*cf. BLF Realty Holding Corp.*, 299 AD2d at 92). The court, however, notes that subletting/profiteering was found to support a judgment of possession in *Matter of Freeman St. Props., LLC v Thelian* (34 AD3d 475, 476-477 [2d Dept 2006]) even though the premises there does not appear to have been an interim multiple dwelling or covered by rent control or rent stabilization statutes.

Plaintiff's Motions for Contempt and TRO Compliance/Attorney's Fees

Plaintiff moves to hold defendant in contempt for violation of the temporary restraining order (TRO) signed on July 9, 2020 based on defendant's failure to provide a list of all current occupants of the unit on or before July 10, 2020 and based on his failure to maintain the general liability and property damage insurance required by the lease on or before July 10, 2020 (motion sequence number 6). Plaintiff also moves to hold defendant in contempt in violation of the TRO signed on July 9, 2020 based on defendant's operating illegal SROs, based on defendant's subletting the unit without prior written consent and based on defendant's accessing the roof of the building or allowing others to do so without prior written consent of plaintiff (motion sequence number 8).

"To prevail on a motion to punish for civil contempt, the movant must establish, by clear and convincing evidence (1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the order was disobeyed and the party disobeying the order had knowledge of its terms, and (3) that the movant was prejudiced by the offending conduct" (*see Rose v Levine*, 84 AD3d 1206, 1207 [2d Dept 2011]). As long as the order had not been vacated or modified, neither the propriety of the order nor the fact that the directive is contained in a TRO excuse the failure to obey the order (*see Geller v Flamount Realty Corp.*, 260 NY 346, 351 [1932]; *Busters Cleaning Corp. v Frati*, 203 AD2d 409, 409 [2d Dept 1994]; *Coronet Capital Co. v Spodek*, 202 AD2d 20, 29 [2d Dept 1994]; *Burchill v Cimenti*, 38 AD2d 897, 897 [2d Dept 1972]; *see also Board of Mgrs.*

of the S. Star, 117 AD3d at 442-443; *Incorporated Village of Plandome Manor v Ioannou*, 54 AD3d 365, 366 [2d Dept 2008]).

Given this case law, as well as defendant's failure to move to vacate the TRO (CPLR 5701 [a] [2] [i], 6314), Roche's attack on the propriety of the TRO provides no excuse for his failure to comply with its terms.

With respect to the TRO's bar on defendant accessing the roof or allowing others to do so, Chua's statement in his affidavit, that the roof can only be accessed through defendant's unit, coupled with the date stamped photographs Chua obtained from a neighboring building's security camara showing persons on the roof, are sufficient to demonstrate a possible violation of the TRO. In view of Roche's denial of awareness that anyone accessed the roof from his unit, a hearing is required to determine whether he violated the order and should be held in contempt on that issue.

Regarding the insurance provision, defendant's primary contentions relate to the propriety of the TRO, which, as noted above, are not a ground for opposing the contempt. In any event, contrary to Roche's assertions, the insurance issue is pleaded in the amended complaint, which specifically incorporates the appended notice of cure and termination notices that raise the insurance issue as grounds for termination, and, in each cause of action, repeats and realleges all of the previous allegations, which include the allegations regarding insurance (CPLR 3014, 6013; *see 805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 [1983]). The Lease and Lease Rider unequivocally require defendant to obtain and maintain specified insurance and the failure to obtain insurance as required by

lease provision is generally considered a material breach of a lease (*see 455 Dumont Assoc., LLC v Rule Realty Corp.*, 180 AD3d 735, 736-737 [2d Dept 2020]; *see also Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902-903 [1987]). While requiring a tenant to comply with an insurance provision in a TRO might be unusual, under these circumstances, the provision requiring compliance with the insurance provision is certainly consistent with maintaining the status quo, at least while defendant remains in possession of the entire third floor as a month-to-month tenant under the expired lease (*see Caton v Grand Mach. Exch. Inc.*, 26 Misc 3d 1225 [A], 2010 NY Slip Op 50250, *3 [U] [Sup Ct, New York County 2010] [granting pendente lite order compelling tenant to obtain insurance as required by expired lease and stipulation]).

Roche also asserts that he may not be held in contempt for failing to obtain the requisite insurance because the residential occupancy of the unit renders it impossible to obtain a commercial policy. The TRO and the lease, however, require that defendant obtain a policy with certain coverages and policy limits, and no way require that the policy be identified as a "commercial policy." Roche's counsel provides no evidentiary proof supporting her contention that defendant's residential use of the unit would preclude him from obtaining a policy complying with the requirements of the TRO. As such, defendant has failed to demonstrate that he may not be held in contempt for failing to obtain insurance. The court finds that this conduct was "calculated to, or actually did defeat, impair, impede, or prejudice the [plaintiff's] rights or remedies" (Judiciary Law § 770; *El-Dehdan v El-Dehdan*, 114 AD3d 4, 18-19 [2d Dept 2013] [no hearing required where

elements of civil contempt are established and the opponent has failed to demonstrate a factual issue thereto]), and the court directs that hearing be held to determine the proper sanction. As a hearing is directed with respect to the proper sanction and with respect to the roof access issue, however, the court will grant defendant an opportunity to purge his contempt relating to the failure to obtain insurance by obtaining a policy with the coverage required by the TRO on or before the hearing date (*see Midlarsky v D'Urso*, 133 AD2d 616, 617 [2d Dept 1987]). If defendant is unable to comply with the insurance requirements of the TRO by that date, he must be prepared to present evidentiary proof on the issue.

The motions for contempt, however, must be denied with respect to the assertions that defendant violated the portions of the TRO relating to subletting or operating an SRO and the provision of a list of occupants of the unit. In this regard, the photographs showing a few persons carrying bags or backpacks up the stairs to defendant's unit on different days and the conclusory assertions of Armstrong's principal, Jacinto Chua, as contained in his affidavit are insufficient to demonstrate that defendant operated an SRO or engaged in additional sublets in violation of the TRO (*see 128 Second Realty LLC v Dobrowolski*, 51 Misc 3d 147 [A], 2016 NY Slip Op 50772, *1 [App Term, 1st Dept 2016]; *see also 76 West 86th St. Corp. v Junas*, 55 Misc 3d 596, 599-600 [Civ Ct, New York County 2017]; *cf. 42nd & 10th Assoc., LLC v Ikezi*, 50 Misc 3d 150 [A], 2015 NY Slip Op 51915 [U] [App Term,

1st Dept 2015]).[13] The requirement that defendant identify the occupants of the unit is somewhat ambiguous, and, absent a definition of "occupant" for purposes of the TRO, Roche's identification of himself and Luis Ruelas as the occupants, with the expectation that another unnamed occupant might return did not violate the TRO. Nevertheless, this court has found that defendant has no basis to further sublet the unit without prior written consent, and that in furtherance of this bar, it is appropriate to require defendant to identify, by name, (1) all persons who were physically occupying the unit as of July 9, 2020; (2) any persons who had previously occupied the unit; and (3) those who, while not physically occupying the unit as of July 9, 2020, Roche reasonably expects (or expected) to return to occupy the unit.

Defendant's Motion for an Injunction and to Modify the TRO

Roche's motion for an injunction regarding defendant's placement of security cameras and to modify the TRO to allow up to 10 people to occupy the third floor, with no more than four persons in each unit is denied. The request for an injunction relating to the cameras is denied because defendant has not interposed a counterclaim that would provide the jurisdictional prerequisite for injunctive relief as against Armstrong (*see Davis v Influx Capital Group, LLC*, 183 AD3d 538, 538 [1st Dept 2020]; *Wells Fargo Bank N.A. v Area*

[13] The court notes that defendant has identified the persons in the photographs as himself, two friends who live elsewhere but occasionally stop by to take advantage of the washer dryer in the unit, and Dominique Angloro. Angloro provides her own affidavit stating that she had been an occupant of one of the units on the third floor in June 2019, that she is identified as one of the occupants of the unit in the amended coverage application, and that, although she left the unit for a time during the pandemic, she has since returned.

Plumbing Supply, Inc., 150 AD3d 932, 935 [2d Dept 2017]; CPLR 6001, 6301). Defendant's request that the TRO be modified to allow up to allow 10 people to occupy the third floor is denied for the reasons stated above with respect to the grant of the preliminary injunction barring additional sublets without prior written approval. Moreover, the portion of the motion relating to the TRO became academic upon the grant of the preliminary injunction (*see Crescentini v Slate Hill Biomass Energy, LLC*, 113 AD3d 806, 808 [2d Dept 2014]; *State of New York v Barone*, 141 AD2d 629, 630 [2d Dept 1988]).

The parties' remaining contentions have been found unavailing. All relief not expressly granted herein is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C