

Nazor v Sydney Sol Group, Ltd.
2021 NY Slip Op 31656(U)
May 17, 2021
Supreme Court, New York County
Docket Number: Index No. 156920/2019
Judge: Melissa A. Crane
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MELISSA ANNE CRANE **PART** **IAS MOTION 15EFM**

Justice

-----X

NAZOR, MARIA

Plaintiff,

- v -

SYDNEY SOL GROUP, LTD.

Defendant.

-----X

INDEX NO. 156920/2019

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 70, 71, 72, 73, 74, 75, 76

were read on this motion to/for JUDGMENT - DEFAULT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

This action is the latest in a years-long dispute between plaintiffs Maria Nazor (Nazor) and Peter Mickle (Mickle) (together, plaintiffs), the tenants in a building located at 544 West 27th Street, New York, New York (the Building) and owned by defendant Sydney Sol, Group, Ltd. f/k/a Mushlam, Inc. (Sydney). Sydney and its principal, defendant Shimon Milul (Milul) (together, defendants), now move to dismiss the first and second causes of action in the complaint.

BACKGROUND

The court assumes familiarity with the facts as discussed in the decisions and orders entered in the other actions regarding plaintiffs' tenancy – *Mushlam, Inc. v Nazor*, Sup Ct, NY County, index No. 100207/2008 (the Ejectment Action); *Matter of Nazor v New York City Loft Bd.*, Sup Ct, NY County, index No. 159870/2018 (*Nazor I*); and, *Matter of Nazor v New York City Loft Bd.*, Sup Ct, NY County, index No. 160900/2018 (*Nazor II*). Briefly, changes to Article 7-C of the

Multiple Dwelling Law (the Loft Law) in 2010 extended coverage to buildings located north of West 24th Street, south of West 27th Street, west of Tenth Avenue and east of Eleventh Avenue in New York County where three or more families lived independently from each other for 12 consecutive months between January 1, 2008 and December 31, 2009 (*see* Loft Law [Multiple Dwelling Law art 7-C] § 281 [5], added by L 2010, ch 135 § 1 and amended by L 2010, ch 147 § 1). Plaintiffs, who allege they have resided continuously in separate units on the fourth floor since 1995 (NY St Cts Elec Filing [NYSCEF] Doc No. 45, Maxwell Breed [Breed] affirmation, exhibit 1, ¶ 21), have been unsuccessful in their pursuit of coverage for the Building as an “interim multiple dwelling,” as that term is defined in the Loft Law¹ (*see Matter of Nazor v New York City Loft Bd.*, 179 AD3d 609, 609 [1st Dept 2020], *rearg denied, lv denied* 2020 NY Slip Op 65795[U] [1st Dept 2020], *lv dismissed, lv denied* 35 NY3d 1053 [2020]). In the Ejectment Action, Sydney has been granted summary judgment on its ejectment claim (*id.* at 610).

In 2019, the Loft Law was amended once more to expand the definition of an “interim multiple dwelling.” Multiple Dwelling Law § 281 (6) (a), added by L 2019, ch 41 § 2, reads, in part, that:

“[an] ‘interim multiple dwelling’ shall include buildings, structures or portions thereof ... 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”

¹ For ease, the court cites to plaintiffs’ exhibits since each bears a separate NYSCEF document number.

Plaintiffs commenced this action by filing a summons with notice on July 15, 2019, three weeks after the effective date of the amendments (*see* L 2019, ch 41 § 11). The complaint pleads twelve causes of action for: (1) a judgment declaring that plaintiffs' units are covered under the Loft Law and that plaintiffs are protected occupants; (2) a judgment declaring that plaintiffs may pursue their Loft Law coverage claim in Supreme Court and that the Loft Board is precluded from determining plaintiffs' coverage claims under the Loft Law; (3) rent overcharge; (4) unjust enrichment; (5) harassment in violation of Real Property Law § 235-d and New York City Loft Board Regulations (29 RCNY) § 2-02; (6) breach of the warranty of habitability; (7) and accounting; (8) breach of lease; (9) retaliatory eviction; (10) constructive eviction; (11) property damage; and (12) recovery of attorneys' fees under Real Property Law § 235-d, New York City Loft Board Regulations (29 RCNY) § 2-02 and Multiple Dwelling Law § 302 (1) (b). After twice rejecting defendants' answer with counterclaims (NYSCEF Doc Nos. 33 and 35), the parties executed a stipulation in which plaintiffs withdrew their notices of rejection (NYSCEF Doc No. 36).

Defendants now invoke the doctrine of primary jurisdiction and move to dismiss the first two causes of action seeking declaratory judgments under the Loft Law.

DISCUSSION

The doctrine of primary jurisdiction “generally enjoins courts having concurrent jurisdiction to refrain from adjudicating disputes within an administrative agency’s authority, particularly where the agency’s specialized experience and technical expertise is involved” (*Sohn v Calderon*, 78 NY2d 755, 768 [1991], citing *Capital Tel. Co. v Pattersonville Tel. Co.*, 56 NY2d 11, 22 [1982]). “[W]hile concurrent jurisdiction does exist, where there is an administrative agency which has the necessary expertise to dispose of an issue, in the exercise of discretion, resort

to a judicial tribunal should be withheld pending resolution of the administrative proceeding” (*Davis v Waterside Hous. Co.*, 274 AD2d 318, 318-319 [1st Dept 2000], *lv denied* 95 NY2d 770 [2000], quoting *Eli Haddad Corp. v Redmond Studio*, 102 AD2d 730, 730 [1st Dept 1984]). It is generally within the court’s discretion whether to grant an application based on primary jurisdiction (*see Davis*, 274 AD2d at 319).

As is relevant here, Multiple Dwelling Law § 282 establishes “a special loft unit referred to herein as the ‘loft board’ ... [that] shall have the following duties: (i) the determination of interim multiple dwelling status and other issues of coverage pursuant to this article ...” As such, the Loft Board has special competence in resolving coverage issues under the Loft Law and has primary jurisdiction over such issues, while the courts have concurrent jurisdiction (*see EPDI Assoc. v Conley*, 7 AD3d 755, 756 [2d Dept 2004]; *Eli Haddad Corp.*, 102 AD2d at 730; *Little W. 12th St. Realty L.P. v Inconiglios*, 19 Misc 3d 508, 518 [Civ Ct, NY County 2008], *affd* 23 Misc 3d 28 [App Term, 1st Dept 2009] [concluding that Housing Court has concurrent jurisdiction with the Loft Board to decide Loft Law coverage issues]). Indeed, “[a]ssuming judicial jurisdiction concurrent with the Loft Board, resort to the courts should be withheld in deference to the Loft Board’s expertise” (*Matter of Jo-Fra Props., Inc.*, 27 AD3d 298, 299 [1st Dept 2006], *lv denied* 8 NY3d 801 [2007]). Applying these precepts, the court agrees that the issues of whether the Building qualifies as an interim multiple dwelling under the 2019 expansion of the Loft Law and whether plaintiffs are protected occupants should be heard by the Loft Board in the first instance.

Plaintiffs oppose, and argue that the motion is both untimely and procedurally defective because defendants have: failed to identify the CPLR section on which relief is sought in the notice of motion; waived the defense under CPLR 3211 (e); failed to tender an affidavit in accordance

with CPLR 3212; and, failed to request a pre-motion conference in accordance with this court's Part Rules. Their arguments are unpersuasive.

CPLR 2214 (a) partially provides that “[a] notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor.” It is within the court’s discretion to deny a motion that fails to comply with the statute (*see Abizadeh v Abizadeh*, 159 AD3d 856, 857 [2d Dept 2018]). Here, the notice of motion specifies the date, time and place where the motion shall be heard and identifies the papers in support. In addition, the notice of motion and the underlying papers plainly specify the relief sought – dismissal of the first two causes of action without prejudice to plaintiffs’ right to file a coverage application with the Loft Board based on the doctrine of primary jurisdiction. The court also notes that neither CPLR 2214 (a) nor Uniform Rules for Trial Courts (22 NYCRR) § 202.7 (b), that sets forth the general form language to include on a notice of motion, require a moving party to identify the specific CPLR section upon which relief may be granted. Thus, the notice of motion comports with CPLR 2214 (a), even though it fails to identify a particular provision of the CPLR (*see Bank of Am., N.A. v Diaz*, 160 AD3d 457, 458 [1st Dept 2018] [reasoning that “[a]lthough defendant did not cite a specific section of the CPLR, it is abundantly clear, from his affirmation in support of his cross motion” that the defendant sought dismissal based on the lack of personal jurisdiction]).

Nor is there merit to the assertion that the motion is time-barred under CPLR 3211 (e). Plaintiffs maintain that by failing to move for pre-answer dismissal, defendants have waived the right to move on grounds other than subject matter jurisdiction, failure to state a cause of action or failure to name a necessary party. The doctrine of primary jurisdiction, though, is not one of the enumerated grounds listed in CPLR 3211 (e) that may be waived. The court also notes that

defendants have not waived the primary jurisdiction defense, because they raised it as a fourth affirmative defense in their answer (NYSCEF Doc No. 46, ¶¶ 56-59).

Likewise, plaintiffs' contention that defendants are actually seeking summary judgment under CPLR 3212 is unconvincing. The motion seeks to defer the Loft Law claims to the Loft Board, the entity with special expertise in the Loft Law. An affidavit from one with personal knowledge is not necessary on this type of motion.

Plaintiffs also urge the court to deny the motion for defendants' failure to request a pre-motion conference in accordance with this Part's Rules. While the failure to comply with a trial court's part rules may warrant denial of a motion in some instances (*see S&Y Grace Corp. v Boston Post Food Corp.*, 189 AD3d 720, 721 [1st Dept 2020]), it is not usually grounds to deny the motion (*see Castor Petroleum, Ltd. v. Petroterminal de Panama, S.A.*, 90 A.D.3d 424 (1st Dep't 2011)

. As defendants noted in reply, the parties attended a court conference during which a briefing schedule was discussed (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.70 [rule 24 (a)] [stating that counsel's failure to furnish the court with advance notice of a motion "may result in the motion being held in abeyance until the court has an opportunity to conference the matter"]).

Plaintiffs also liken themselves to residential tenants who, under the Housing Stability and Tenant Protection Act of 2019 (HSTPA), are entitled to pursue their claims in their choice of forum. The HSTPA provides that "[t]he courts and [DHCR] shall have concurrent jurisdiction, subject to the tenant's choice of forum" (*Collazo v Netherland Prop. Assets, LLC*, 35 NY3d 987, 990 [2020], quoting L 2019, ch 36, Part F, §§ 1, 3). In view of this language, it has been held that a plaintiff's initial forum of choice controls (*id.*). By contrast, the Laws of 2019, chapter 41, § 10, amending the Loft Law in 2019, states:

"No provision of this act or article 7-C of the multiple dwelling law, as amended by this act, or any other law or prior judgment, shall be

construed to prevent an application from being filed with the loft board and considered by such board, or a claim in a court of competent jurisdiction, for coverage or for registration as an interim multiple dwelling or units within a building, including those previously determined not to be covered, where the basis for such application or claim is that such building or units are subject to such article as a result of the amendments made by this act.”

The section clearly contemplates concurrent jurisdiction between the Loft Board and “a court of competent jurisdiction” such as Supreme Court, which is a court of general jurisdiction (*see* NY Const, art VI, § 7). Notably, though, the section omits any language favoring a resident’s choice of forum for adjudicating a coverage claim under the Loft Law. Therefore, defendants are not precluded from moving for dismissal based on primary jurisdiction even though plaintiffs initially brought their claims in Supreme Court.

Plaintiffs also oppose the motion claiming that bias tainted the prior proceedings before the Loft Board. They submit that “[d]efendants have bad-faith ulterior motives for trying to force [p]laintiffs to bring their new claims before the Loft Board” where the Loft Board ignored certain abuses, such as Milul’s allegedly perjurious testimony and an alleged spoliation of surveillance video evidence (NYSCEF Doc No. 44, Breed affirmation, ¶¶ 35-37). Plaintiffs, though, previously raised this allegation of bias on the part of the Loft Board in *Nazor I*. There, the Appellate Division, First Department concluded that plaintiffs’ “argument that either the ALJ or the Loft Board was affected by bias is not supported by the record” (*Matter of Nazor*, 179 AD3d at 610). The Court’s finding in *Nazor I* forecloses a contrary finding here.

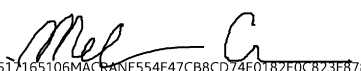
Similarly unconvincing is plaintiffs’ argument that defendants consented to litigate the Loft Law coverage issue in this forum because they have pled a counterclaim for a judgment declaring that the Building is not an interim multiple dwelling and that plaintiffs are not protected occupants under the Loft Law. First, defendants have not waived the defense because, as stated above,

defendants raised it as an affirmative defense. Second, defendants moved promptly for dismissal shortly after serving their answer (*see e.g. Sangare v Edwards*, 91 AD3d 513, 514-515 [1st Dept 2012] [denying a belated motion to refer the issue of whether the plaintiff was the defendants' special employee to the Workers' Compensation Board, which has primary jurisdiction on employment issues, because the defendants waited to seek a determination of the issue on the eve of trial]). The two cases plaintiffs cite in support, *Bell v Little* (250 AD2d 485 [1st Dept 1998]) and *Liebling v Yankwitt* (109 AD2d 780 [2d Dept 1985]), are also inapposite. Both involved a defendant's waiver of a claim of lack of personal jurisdiction. Moreover, while plaintiffs submit that the Loft Board lacks jurisdiction to render a declaratory judgment, the court is merely deferring the coverage determination to the Loft Board because of its competence and expertise.

Lastly, plaintiffs' remaining claims for the overpayment of rents, unjust enrichment, harassment, breach of contract, constructive and retaliatory eviction and property damage are not so intertwined with the Loft Law claims such that all claims should be resolved together.

Accordingly, it is

ORDERED that the court grants the motion brought by defendants Sydney Sol, Group, Ltd. f/k/a Mushlam, Inc. and Shimon Milul to dismiss the first and second causes of action of the complaint without prejudice to plaintiffs seeking a determination from the New York City Loft Board on whether the subject building is an "interim multiple dwelling" and whether plaintiffs Maria Nazor and Peter Mickle are protected occupants under Article 7-C of the Multiple Dwelling Law (motion sequence no. 002), and the first and second causes of action are dismissed without prejudice, in accordance with the above.



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5/17/2021

DATE

MELISSA ANNE CRANE, J.S.C.

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: