

Baer v 400 S. 2nd St. Realities, L.P.
2021 NY Slip Op 31661(U)
April 9, 2021
Supreme Court, Kings County
Docket Number: Index No. 507689/15
Judge: Lawrence S. Knipel
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At an IAS Term, Part NJTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of April, 2021

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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ADAM BAER, MICHAEL SMART, ELIZABETH BALDWIN, KIRSTEN RUSSELL, CHUCK THOMAS, JUSTIN BLEJER, CAROLINA PINHEIRO, JEREMIAH MANDEL, SYVAN YEHEZKEL and ALI MATLOCK,

Plaintiffs.

- against -

Index No. 507689/15

400 SOUTH 2ND STREET REALTIES, L.P.,

Defendant.

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The following efiled papers read herein:

		<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits	(Affirmations)	Annexed
		<u>193-196, 206-207</u>
Opposing Affidavits (Affirmations)_____		<u>207</u>
Reply Affidavits (Affirmations)_____		_____
<u>211, 214</u>		

Upon the foregoing papers, plaintiffs Michael Smart, Elizabeth Baldwin, Chuck Thomas, Justin Blejer and Carolina Pinheiro move, by order to show cause, for an order: (a) vacating the stay of the instant action for the sole purpose of hearing plaintiffs' motion to renew; (b) pursuant to CPLR 2221 (c), granting plaintiffs leave to renew their

opposition to the prior order to show cause of defendant 400 South 2nd Street Realities, L.P., decided by order dated November 18, 2020; and (c) restoring the stay of this action pending the outcome of the Loft Law coverage proceeding pending at the Office of Administrative Trials and Hearings (OATH). Defendant cross-moves for an order (a) compelling plaintiffs to pay use and occupancy in accordance with the November 18, 2020 order, and (b) pursuant to CPLR 2221 (d), granting defendant leave to reargue the November 18, 2020 order to the extent of modifying the order to state that defendant be allowed to accept use and occupancy without prejudice to amounts that accrued prior to December 2020 and without prejudice to defendant seeking the difference between such payments and any higher amounts of rent or use and occupancy permitted by law after final determination of plaintiffs' Loft Law application.

Plaintiffs commenced this action seeking, among other relief, a judgment declaring that their respective residential units in the subject building at 394-400 South 2nd Street in Brooklyn are protected by the Rent Stabilization Law. The subject building lacks a residential certificate of occupancy. In January 2020, defendant registered plaintiffs' units as interim multiple dwellings with the Loft Board. Defendant previously moved, by order to show cause, for an order amending the caption to reflect defendant as the new owner of the building, staying this action until a final determination of plaintiffs' Loft Law application currently pending at OATH and directing plaintiffs to pay rent and/or use and occupancy arrears from February 1, 2020 as well as prospective use and occupancy. By order dated November 18, 2020, this court granted defendant's motion

to the extent of amending the caption, staying this action and directing plaintiffs to pay prospective use and occupancy, with 50% awarded to defendant and 50% to be placed into escrow.¹ The court denied that part of defendant's motion for retrospective use and occupancy.

There is no dispute that at the time the November 18, 2020 order was issued, defendant was in compliance with the timetables set forth in the relevant portion of Multiple Dwelling Law [MDL] § 284, made effective on June 25, 2019, which required the owner of an interim multiple dwelling to: (a) "file an alteration application within nine months from the effective date of the chapter of the laws of two thousand nineteen that amended this paragraph;" (b) take all reasonable and necessary action to obtain an approved alteration permit within twelve months from such effective date;" (c) "*achieve compliance with the standards of safety and fire protection set forth in article seven-B of this chapter for the residential portions of the building within eighteen months from obtaining such alteration permit or eighteen months from such effective date, whichever is later;*" and (d) "take all reasonable and necessary action to obtain a certificate of occupancy as a class A multiple dwelling for the residential portions of the building or structure within thirty-six months from such effective date" (MDL 284 [1] [vii] [emphasis added]).

Under the aforesaid statute, defendant had until December 25, 2020 to achieve Article 7-B compliance and obtain a temporary certificate of occupancy. On December

¹The portions of the order amending the caption and staying the action were on consent of

21. 2020, defendant filed an application with the Loft Board for an extension of the deadline for Article 7-B compliance, which is pending. In their motion to renew, plaintiffs argue that since defendant is no longer in compliance with MDL 284 as of December 26, 2020, it is prohibited by MDL 302 from collecting rent or use and occupancy due to the building's lack of a residential certificate of occupancy. Plaintiffs thus seek to modify that part of the November 18, 2020 order directing further payment of use and occupancy so long as defendant remains in noncompliance with MDL 284.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [c] [2]) and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [c] [3]). "The requirement that a motion for renewal be based on new facts is a flexible one" (*Gonzalez v Vigo Constr. Corp.*, 69 AD3d 565, 566 [2d Dept 2010]; see *Matter of Serviss v Incorporated Vil. of Floral Park*, 164 AD3d 512 [2d Dept 2018]). "The new or additional facts presented "either must have not been known to the party seeking renewal or may, in the Supreme Court's discretion, be based on facts known to the party seeking renewal at the time of the original motion"" (*Matter of Serviss*, 164 AD3d at 513, quoting *Deutsche Bank Trust Co. v Ghaness*, 100 AD3d 585, 586 [2d Dept 2012]; see *Cioffi v S.M. Foods, Inc.*, 142 AD3d 526, 529 [2d Dept 2016]).

Plaintiffs' motion to renew is properly based on the new fact that defendant is no longer in compliance with the MDL 284 timetables, which could not have been presented

plaintiffs.

on the prior motion insofar as defendant was technically in compliance when the prior motion was decided. MDL 302 (1) (b) provides that where a dwelling is occupied residentially without a conforming certificate of occupancy, “[n]o rent shall be recovered by the owner of such premises for said period, and no action or special proceeding shall be maintained therefor, or for possession of said premises for nonpayment of such rent.” The Loft Law establishes a series of deadlines by which the owners of interim multiple dwellings are required to alter them to conform to safety and fire protection standards, ultimately doing everything necessary to obtain a residential certificate of occupancy (*see* MDL 284 [1]). An owner unable to meet the deadlines is entitled to an extension of time if that owner demonstrates to the Loft Board that it has made good faith efforts to comply (*see* MDL 284 [1] [vii]). Until the certificate of occupancy is obtained, the rents in interim multiple dwellings are regulated, and the tenants are protected against eviction for nonpayment (*see* MDL 286), while the owners, as long as they are in compliance with the Loft Law, are relieved from MDL 302’s prohibition against collecting rent or seeking eviction for nonpayment (MDL 285 [1]). In *Chazon, LLC v Maugenest* (19 NY3d 410 [2012]), the Court of Appeals stated that in the absence of compliance with the timetables set forth by Multiple Dwelling Law § 284 or the granting of an extension of the relevant deadlines, “the law’s command is quite clear: ‘No rent shall be recovered by the owner of such premises . . . and no action or special proceeding shall be maintained therefor, or for possession of said premises for nonpayment of such rent.’ Those are the words of Multiple Dwelling Law § 302 (1) (b), and Multiple Dwelling Law § 285 (1) makes an

exception only for a landlord who is “in compliance with” the Loft Law” (*Chazon, LLC*, 19 NY3d at 415). MDL 302’s prohibition against collection of rent in the absence of a conforming certificate of occupancy includes awards for “use and occupancy” (see *Malden v Wykoff S.P., LLC*. — AD3d — , 2021 NY Slip Op 01761 [2d Dept 2021]; *Caldwell v American Package Co., Inc.*, 57 AD3d 15 [2d Dept 2008]). Now that defendant can no longer be deemed in compliance with the MDL 284 timetables, the court finds that defendant is barred by the strict mandate of MDL 302 from collecting use and occupancy unless and until it is granted an extension by the Loft Board and is placed back into compliance.

Defendant’s reliance on a Civil Court order (which is not binding on this court) involving an occupant of the subject building whereby the Civil Court stated defendant was entitled to use and occupancy, is misplaced. The Civil Court treated that proceeding as a purely commercial holdover proceeding against a commercial tenant. Likewise unpersuasive is defendant’s submission of a stipulation in a separate Civil Court proceeding against an occupant of the subject building whereby plaintiffs’ counsel agreed to pay use and occupancy. Under the stipulation, the payment of use and occupancy was merely consideration for defendant’s agreement to stay the proceeding; there was otherwise no acknowledgment by plaintiffs’ counsel that defendant is entitled to use and occupancy where defendant is not in compliance with MDL 284 timetables.

As a result, plaintiff’s motion for renewal is granted, and upon renewal, the November 18, 2020 order is hereby modified to direct payment of use and occupancy

until December 25, 2020 (to the extent same has not been remitted) and to further allow defendant to resume collection of use and occupancy provided that the Loft Board grants defendants' extension application. The stay of this action shall continue pending OATH's resolution of plaintiffs' Loft Law application.

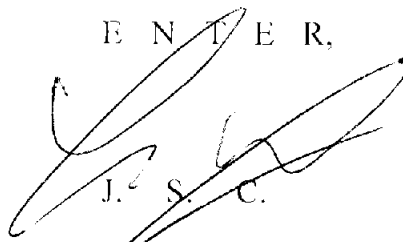
That part of defendant's cross motion to compel payment of use and occupancy is granted to the extent that plaintiffs shall pay prospective use and occupancy pursuant to the November 18, 2020 order until December 25, 2020 (if not yet done) and shall pay prospective use and occupancy (50% to defendant, 50% into escrow) in the event defendant's extension application is granted.

In its cross motion for reargument, defendant contends that the court did not address in the November 18, 2020 order certain specific relief sought in defendant's previous motion regarding defendant's potential entitlement to higher rental amounts upon issuance of a final Loft Board order and/or rents accruing prior to December 2020. "A motion for leave to . . . reargue is addressed to the sound discretion of the Supreme Court" (*Central Mtge. Co. v McClelland*, 119 AD3d 885, 886 [2d Dept 2014]). "A motion for leave to reargue must be 'based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion'" (*id.* at 886, quoting CPLR 2221 [d] [2]; see *Maurisaca v Bowery at Spring Partners, L.P.*, 168 AD3d 711, 712 [2d Dept 2019]). While it is unclear what facts or law were necessarily overlooked or misapprehended by the court in its November 18, 2020 order, the court, in its discretion,

hereby modifies the November 18, 2020 order to clarify that it is without prejudice to defendant seeking any rent, use and occupancy or other sums which it may become entitled to under law.

The foregoing constitutes the decision and order of the court.

E N T E R,

A handwritten signature in black ink, appearing to read 'L. Knipel', is written over the text 'J. S. C.'.

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE