

Motichka v MP 1291 Trust

2024 NY Slip Op 32056(U)

June 17, 2024

Supreme Court, New York County

Docket Number: Index No. 160158/2013

Judge: James E. d'Auguste

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X		PART 55
JOANNE MOTICHKA,		INDEX NO. <u>160158/2013</u>
	Plaintiff,	
		MOTION DATE <u>12/11/2020, 11/12/2021</u>
	- v -	
MP 1291 TRUST, ELI'S BREAD (ELI ZABAR), INC. D/B/A EAT, ELI'S ESSENTIALS,		MOTION SEQ. NO. <u>006 008</u>
	Defendants.	

**DECISION + ORDER ON
MOTION**

-----X

Hon. James E. d'Auguste:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 268, 269, 270, 271, 272, 273, 274, 275, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353

were read on this motion to/for EVICTION/WRIT OF ASSISTANCE

The following e-filed documents, listed by NYSCEF document number (Motion 008) 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400

were read on this motion to/for ENFORCE/EXEC JUDGMENT OR ORDER

Plaintiff Joanne Motichka (tenant) resides in a rent stabilized apartment (the Apartment) located at 150 East 87th Street, New York, New York (the Building). Tenant commenced the underlying action against defendant MP 1291 Trust, as her landlord (landlord), and defendant Eat Lexington 87, LLC d/b/a Eli's Essentials (Eli's), the commercial tenant of stores Nos. 4 and 5, and a portion of the cellar thereunder (the Commercial Premises). The Commercial Premises are located directly under the Apartment. The complaint, as amended, seeks injunctive relief and monetary damages arising from what tenant alleges is the improper use of the Commercial Premises by Eli's in violation of a 1999 stipulation of settlement between tenant and landlord (the

Stipulation) in a prior litigation, as well as certain violations by landlord, which, tenant alleges, make her apartment uninhabitable.

Motion Sequence Nos. 006 and 008 (“MS006 and MS008”) are consolidated for disposition. In MS006, landlord seeks a money judgment and a judgment of possession against tenant, and an order entitling it to evict tenant from the Apartment, based upon tenant’s refusal to comply with this Court’s May 15, 2020, order, which required tenant to tender use and occupancy payments to landlord with respect to the Apartment.

Tenant cross-moves, pursuant to CPLR 2221(e), for leave to renew, as well as for an order: (1) consolidating the case *Joanne Motichka v MP Trust/1291*, Civil Court of the City of New York, City of New York, Index L&T 6249/2018 (the HP Action), pursuant to CPLR 602, with this matter; (2) upon consolidation, granting her pendent lite relief and compelling landlord to commence payment of relocation expenses in the amount of \$6,000 per month (the Relocation Allowance), pursuant to the so-ordered HP Case Stipulation entered into by the parties on January 24, 2019, up until the time that landlord removes violation 11125167; (3) upon consolidation, granting tenant pendent lite relief, compelling landlord to pay her the amount of \$60,000 for past due and owing Relocation Expenses for the months of April 2020 to January 2021, or, in the alternative; (4) upon consolidation, granting tenant judgment against landlord in the amount of \$60,000 plus past interest, for past due and unpaid relocation expenses; and (5) suspending the requirement that tenant pay “use and occupancy” as ordered in the May 15, 2020 Order until defendant removes violation 11125167; or in the alternative, that said monies be paid into an Attorney IOLA Account, or the Court.

In MS008, tenant moves for an order preliminarily enjoining Eli’s from preparing and cooking eggs, sausages, egg breakfast sandwiches, and rotisserie chicken; and directing Eli’s to

preserve and disclose to her all video surveillance footage, indoors and outdoors of the store from 8:00 am to 11:00 am on Monday October 11, 2021 and through November 10, 2021. Tenant also moves for a preliminary injunction directing landlord to continue paying the \$6,000 Relocation Allowance per month; as well as, and in the alternative, ordering that her use and occupancy be abated to \$0 per month while landlord continues to permit Eli's to violate its lease by performing prohibited activities in the Commercial Premises.

FACTS

Familiarity with the underlying facts of this case is presumed. The following is a brief recitation of facts relevant to the motions at issue here.

The Prior Order

In MS004, landlord previously sought an order compelling tenant to pay use and occupancy with respect to the Apartment at the rent in effect during the last rental period, i.e., \$929.80 per month, as well as arrears in the aggregate amount of \$16,346.26. By decision and order dated May 15, 2020 (the Order [NYSCEF Doc No. 247]), after taking into account all of tenant's claims concerning the alleged unacceptable condition of the Apartment, this Court directed tenant to make payments of use and occupancy at the monthly rate of \$852.27. In making this determination, this Court found that:

"Tenant alleges that landlord has left tenant's apartment in disrepair, which has been the subject of numerous complaints to the HPD. In particular, the tenant alleges, inter alia, that the floors are insufficiently insulated, that there is substantial mold throughout the apartment, and that the general poor condition of the apartment, compounded by the presence of Eli's Bread below, has attracted mice, rendered her ill and left her apartment uninhabitable. Tenant claims that as a result of these conditions, she has not paid any rent since 2017, and acknowledges that she paid rent only sporadically between 2013 and 2017. Landlord seeks an order for tenant to pay landlord for use and occupancy, as well as the outstanding rental arrears"

(Order, at 2).

This Court further found that:

“As the Appellate Division, First Department made clear in *Levinson v 390 West End Assoc., LLC*, 22 AD3d 397, 403 [1st Dept 2005], “[c]onsistent with Real Property Law section 220, it has long been held that a dispute concerning the amount of rent owed is no reason to allow a tenant to occupy the landlord’s real property gratis”

(*id.*, also citing *Oxford Towers Co., LLC v Wagner*, 58 AD3d 422, 423 [1st Dept 2009]; *Wasserman v Gordon*, 24 AD3d 201, 202 [1st Dept 2005]).

This Court concluded that:

“While the issues raised by the tenant might ultimately permit certain mitigation, tenant is not entitled to live rent free. Accordingly, under the circumstances it is appropriate to order the tenant to pay, prospectively, monthly use and occupancy, commencing on the date as directed below in this order, in the amount of \$852.27 per month. The issue of whether tenant owes the greater rent (\$929.80), as landlord reports has now been registered with DCHR retroactively, can be addressed at trial”

(*id.* at 3).

Pursuant to the Order, tenant’s use and occupancy payments were to begin in June of 2020, the month after notice of entry of the Order was served (*see* Order, at 8). However, as set forth in the affidavit of Ann Gregory (NYSCEF Doc No. 273), the rental agent for the Building, no use and occupancy payments have been made by tenant with respect to the Apartment pursuant to the Order (Gregory aff, ¶ 3; *see also* rent ledger for the Building (NYSCEF Doc No. 274).

The HP Action

The HP Action was commenced by tenant in Housing Court against landlord and the Department of Housing Preservation and Development (HPD) in December 2018 (*see* HP Action pleadings [NYSCEF Doc No. 311]) to address conditions in the Apartment that tenant alleged made it uninhabitable. In its answer, landlord alleged that tenant routinely failed to grant appropriate access to her Apartment for repairs to be performed by landlord, and that tenant’s own

conduct and behavior greatly contributed towards the conditions which existed in the Apartment, which resulted in the issuance of violations by HPD.

By stipulation dated January 24, 2019 (the HP Stipulation [NYSCEF Doc No. 312]), tenant and landlord settled the HP Action. The HP Stipulation provided, among other things, that repairs would be performed by landlord in the Apartment, that landlord would allow tenant to have a say in what kind of fixtures would be used in the repair of the bathroom, and that if the violations relating to the Apartment were not removed by a date certain, a monthly stipend would be paid to tenant by landlord to assist her in living elsewhere during the ongoing repair work in the Apartment (*see id.*). This stipend is in the amount of \$6,000 per month (*see id.*).

The HP Stipulation also provided that tenant would resolve violation number 5159177 issued by HPD regarding her removal of a wall in the Apartment which illegally created one room out of two (the Wall Violation). Under the terms of the HP Stipulation, tenant was obligated to file plans and take such steps as would be necessary to either legalize the condition in the Apartment without the wall, or to install a new wall in the Apartment in order to restore the Apartment to its condition before the illegal renovation took place. Tenant was obligated to perform this work within three months of the completion of landlord's repair work or, if she chose not to, to notify landlord of her choice so that landlord could perform the curative work to remove the Wall Violation. Landlord asserts that it has never received a notice from tenant regarding her choice in connection with the Wall Violation (2/1/21 aff of Muffy Flouret, landlord's trustee [NYSCEF Doc No. 310], ¶ 5).

According to Ms. Flouret, landlord's repair work promptly ensued after the HP Stipulation was signed, and by May of 2019, the Apartment repair work had been completed (*id.*, ¶ 6). Ms. Flouret further alleges that, by May of 2019 the Apartment was fully ready to be occupied by

tenant, and that all of the violations relating to the habitable living space in the Apartment have been removed as of record by HPD, as reflected in a current HPD violation report for the Building (*id.*, ¶ 7; *see* HPD violation report [NYSCEF Doc No. 313]). Ms. Flouret asserts that tenant's counsel was notified several times between July 2019 and September 2019 that the Apartment was ready for her return, and that all repairs required in the Apartment were made (*id.*; *see* correspondence to tenant's counsel [NYSCEF Doc No. 316]). According to Ms. Flouret, the only violations which have not been removed as of record concern an air shaft running from the Building's roof through the common area of the Building, as reflected in a survey of the Building (*id.*; *see* Building survey [NYSCEF Doc No. 318]). The shaft is not part of any apartment in the Building, but runs adjacent to apartments in the Building, including the Apartment (*id.*). Tenant's deposition testimony in this case makes it clear that her issue with the air shaft, which is located adjacent to an area in her Apartment, concerns noise and vibrations allegedly generated through it by Eli's business operations. (*id.*, ¶ 9).

Landlord continued to pay tenant her Relocation Allowance under the HP Stipulation for many months after the Apartment had been fully repaired by May of 2019 (*id.*, ¶ 11). Landlord paid the Relocation Allowance through March 2020, but stopped thereafter, alleging that, even though the Apartment was fully habitable, "it became clear to Defendant that Plaintiff was using the excuse of relocating from the Apartment during Defendant's repair work in the winter and Spring of 2019 to continue traveling domestically and internationally on Defendant's nickel, so to speak" (*id.*, ¶ 12).

Tenant's Allegations

Tenant admits that she has not paid any of the use and occupancy payments as required by the Order (affidavit of Joanne Motichka [NYSCEF Doc No. 280], ¶ 5), but alleges that "I have

placed the money demanded by the landlord in my attorney escrow account ... to show good faith” (*id.*, ¶ 7). Tenant alleges that “I agree that if I am living in my apartment I should be paying the court ordered use and occupancy- that is just and reasonable” (*id.*, ¶ 13). Tenant further alleges that landlord owes her \$60,000 in past due Relocation Allowance, which continues to accrue at the rate of \$6,000 per month (*id.*, ¶ 7), and that, at this point, landlord owes her more money than she owes it (*id.*, ¶ 14).

According to tenant, pursuant to the HP Order, she “temporarily” left her home on February 11, 2019 so that landlord could remediate and cure the violations related to her apartment, but that, as of December 2020, she still had not been able to move back into the Apartment because landlord refused to cure the remaining substantial violations (*id.*, ¶¶ 9, 15-16). These alleged violations include mice turd; black grease/tar substance on largest room’s floor which is above Eli’s “grill/steam table”; bubbling paint on a kitchen wall, indicating an ongoing issue with moisture and mold; crumbling brick mortar in bathroom; and the chimney stack violation (*id.*, ¶ 54).

However, by letter dated April 20, 2021 to this Court (NYSCEF Doc No. 362), Peter Sverd, Esq, tenant’s attorney, stated that “Joanne will be ending her temporary relocation and resuming occupancy of her apartment starting May 1, 2021.” Although Mr. Sverd also stated that “Joanne will make her Court Ordered ... rent payments in the sum of \$852.27 per month commencing May 2021,” it does not appear that any payments pursuant to the Order have actually been paid by tenant. Indeed, by letter dated March 15, 2024 (NYSCEF Doc No. 418), Mr. Sverd informed this Court that “We have money in escrow for the rent allegedly owed,” which makes it appear that tenant has not made any of the required use and occupancy payments.

DISCUSSION

Motion Sequence No. 006

1. Landlord's Motion and Tenant's Cross-Motion for Leave to Renew

Landlord seeks a money judgment and a judgment of possession against tenant, and an order entitling it to evict tenant from the Apartment, based upon tenant's refusal to comply with the Order. In opposition, tenant seeks to renew the Order, and asserts that, upon renewal, her obligation to pay use and occupancy should be rescinded, or amended, because new facts have occurred, which would change the Order. Specifically, tenant alleges that landlord's continued failure to complete its obligations under the Stipulation renders the apartment uninhabitable, and thus, use and occupancy should not be awarded to landlord.

A motion for leave to renew is intended to bring to the Court's attention new or additional facts which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore, not brought to the Court's attention (*Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 376 [1st Dept 2001]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]; *Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]). Thus, a motion for leave to renew a prior motion must be based upon "new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR § 2221[e]; see *Vasquez v Manhattan Coll.*, 223 AD3d 601, 601 [1st Dept 2024]; *Nassau County v Metropolitan Transp. Auth.*, 99 AD3d 617, 618–619 [1st Dept 2012]).

Judged by these standards, it is clear that tenant fails to meet her burden of proof in demonstrating new or additional facts warranting renewal. First, tenant fails to offer new facts that would have changed the prior determination (see *Fifth Partners LLC v Foley*, ___ AD3d ___, 2024 NY Slip Op 02776, * 1 [1st Dept 2024]; *Romero v Valdez*, 217 AD3d 485, 485 [1st Dept

2023])). Rather, tenant merely restates the same arguments that the Court already rejected in the prior Order.

In support of her motion for reargument, tenant's defense with respect to landlord's motion is premised on her belief that she should not be obligated to pay use and occupancy with respect to the Apartment because of what she believes are less than appropriate living conditions in her Apartment. However, tenant made the very same claims in opposing landlord's prior motion seeking a use and occupancy order, complaining about the same conditions that she now sets forth in her cross-moving affidavit. In the Order, this Court expressly took note of tenant's claims in this regard, and specifically awarded to landlord only prospective use and occupancy at a monthly rate lower than that requested by landlord. In doing so, this Court made it clear that any issues concerning the value of the use and occupancy to be paid by tenant would be addressed at trial, when the alleged issues raised by tenant regarding her Apartment would be adjudicated. Thus, tenant merely repeats and rehashes the same arguments that were originally presented and rejected on the prior motion, without offering any new facts, which is insufficient to grant a motion for renewal (*see Perez v New York City Health & Hosps. Corp.*, 226 AD3d 602, 603-604 [1st Dept 2024]; *Matter of Duval v Centerlight Health Sys., Inc.*, 216 AD3d 529, 530 [1st Dept 2023]; *Singh v QLR Five LLC*, 171 AD3d 614, 614 [1st Dept 2019]).

Accordingly,] the motion for leave to renew is denied.

With respect to landlord's motion, New York courts uniformly recognize the importance of a tenant's payment of rent and/or use and occupancy (*Levinson*, 22 AD3d at 403 ["Consistent with Real Property Law § 220, it has long been held that a dispute concerning the amount of rent owed is no reason to allow a tenant to occupy the landlord's real property gratis"]; *Albright v Shapiro*, 92 AD2d 452, 453-454 [1st Dept 1983] ["Plaintiffs should not be entitled to continue

occupancy of the premises without paying for its use. Balancing the equities, defendants are entitled to the monthly payments for rents or use and occupancy, if only to maintain the status quo until rendition of a final judgment”).

Accordingly, it is well established that where a tenant violates a court order directing payment of use and occupancy, the landlord is entitled to entry of a money judgment in the amount of unpaid use and occupancy, and/or the issuance of a final judgment of possession (*Rose Assoc. v Johnson*, 247 AD2d 222, 223 [1st Dept 1998] [“The tenant’s failure to pay the interim use and occupancy was a violation of a condition to her right to remain in the apartment, ‘permitting defendant (landlord) to apply for appropriate relief, e.g., a money judgment, or eviction, or both’”] [citation omitted]; *Calvert v Le Tam Realty Corp.*, 118 AD2d 426, 426 [1st Dept 1986] [court order to pay use and occupancy constitutes a money judgment]; see e.g. *Port Morris Distillery, Inc. v Global Estate LLC*, 223 AD3d 483, 484 [1st Dept 2024] [“Upon plaintiff’s failure to pay the amounts stated in the January 2023 order, landlord was entitled to a money judgment”]; *Park Terrace Gardens, Inc. v Penkovsky*, 100 AD3d 577, 577 [1st Dept 2012] [ejectment proper upon tenant’s repeated failure to pay court-ordered use and occupancy]).

Here, tenant admits that she has failed to pay any use and occupancy payments to landlord, and asserts that she has placed the unpaid amount into her attorney’s escrow account. As such, landlord is clearly entitled to a money judgment for unpaid use and occupancy since May 2020, and all unpaid use and occupancy shall be paid, without exception, within 20 days of service of this order with notice of entry.

However, although landlord also seeks a judgment of eviction, this Court finds that it would not be appropriate to order eviction, especially given the fact that tenant asserts that she will release the funds placed in escrow to landlord, if directed to do so by the Court. Tenant is cautioned that

continued occupancy of the Apartment is conditioned upon timely, and ongoing, compliance with the Court-directed payment of use and occupancy, such that her failure to comply will result in ejectment from the Apartment, and an award of judgment of possession to landlord (*see Marbru Assoc. v White*, 206 AD3d 562, 564 [1st Dept 2022]; *Park Terrace Gardens, Inc. v Penkovsky*, 100 AD3d 577, 577 [1st Dept 2012]; *East Drive Hous. Dev. Corp v Lawrence*, 2024 NY Slip Op 30470[U], ** 3 [Sup Ct, NY County 2024]). This is because “[a] party claiming a security interest in a lease must, as a condition for asserting its rights in the litigation, comply with the Court’s directions to maintain the status quo or lose its interest in the property” (*61 West 62nd Owners Corp. v Harkness Apt. Owners Corp.*, 202 AD2d 345, 346 [1st Dept 1994]).

2. Tenant’s Cross-Motion for Consolidation

Tenant cross-moves to consolidate this action with the HP action, arguing that the violations complained of in the HP Action are the same violations that give rise to the current action before this Court, and concern the same facts and legal issues. Tenant also moves, upon consolidation, and pursuant to the Stipulation, for preliminary injunctive relief compelling landlord to pay her the amount of \$78,000 in accrued and outstanding relocation expenses, as well as the amount of the \$6,000 Relocation Allowance for each and every successive month, up until such time landlord causes the HPD Violation Number 11125167 against the Apartment to be cured.

CPLR 602 provides that “[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay” (CPLR 602 [a]). Further, the Supreme Court may, on motion, remove to itself an action pending in another court for joint trial or consolidation with the action pending in Supreme Court (CPLR 602 [b]). Consolidation is

generally favored in the interest of judicial economy and ease of decision-making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right (*Amcan Holdings, Inc. v Torys LLP*, 32 AD3d 337, 339 [1st Dept 2006]).

However, parties often refer to the term “consolidation” when, in reality, they intend to refer to a “joint trial” (*Padilla v Greyhound Lines, Inc.*, 29 AD2d 495, 499 [1st Dept 1968]; *Vidal v Sheffield Farms Co.*, 208 Misc 438, 440-441 [Sup Ct, Bronx County 1955]; *see e.g. Rogin v Rogin*, 90 AD3d 507, 508 [1st Dept 2011] [granting “plaintiff’s motion for removal and a joint trial”]). The distinction is important because in a true “consolidation,” both actions fuse into one action, the captions of both actions merge into one action, and all of the parties in both actions become the parties to newly created single action (*Stracham v Bresnick*, 11 Misc 3d 1085[A], 2006 NY Slip Op 50714[U], * 3 [Sup Ct, Kings County 2006]). In a “joint trial,” the actions maintain their separate identities and their separate captions, they exist side by side before the same court, and the Court renders a decision in each case (*see id.*)

In opposition to the motion, landlord agrees that “both cases involve, to some degree, Plaintiff’s allegations concerning alleged conditions in her Apartment upon which she claims (i) an inability to reside therein, and (ii) an entitlement to money damages resulting from Defendant’s alleged failure to take action required of it to cure such alleged conditions” (landlord’s opposition memorandum [NYSCEF Doc No. 324], at 4-5). As such, landlord asserts that it “does not oppose the motion to the extent that this Court orders the removal of the HP Action from the Housing Court for a *joint trial* of the HP Action with this action,” rather than a full consolidation (*id.* at 5 [emphasis in original]).

While courts have discretion to determine which of the two methods of joining the two actions makes sense when they share common issues of law or fact, courts have found that a joint trial is preferred where, as here, the action being removed to the Supreme Court is a Housing Court matter (*see Rendon v Chino*, 2020 NY Slip Op 320237[U], ** 6 [Sup Ct, Kings County 2020] “[in the exercise of sound discretion, with the existence of common questions of fact in these cases, it is proper, pursuant to CPLR § 602, to order a joint trial of the instant Supreme Court action with the Housing Court holdover actions. Joint trial, as opposed to consolidation, is the best way to proceed with these related matters. Joint trial offers the same advantages as consolidation, but with less confusion for a jury and also without any need to amend captions”]; *Stracham*, 11 Misc 3d 1085[A], 2006 NY Slip Op 50714[U] at * 3 [“Thus, in my exercise of sound discretion, with the existence of common questions of fact in these cases, it is proper, pursuant to CPLR § 602, to order a joint trial of the instant Supreme Court action with the Housing Part holdover action. This Court will remove the Housing Part action to Supreme Court for joint trial with the instant action”]’ *see also Goodstein v 695 9th Ave. Hous. Dev. Fund Corp.*, 60 Misc 3d 1227[A], 2018 NY Slip Op 51248[U], * 5 [Sup Ct, NY County 2018] [“Accordingly, in the exercise of its discretion, the court grants plaintiffs’ first motion to that extent of ordering that the Housing Court proceeding be removed to this court and consolidated for trial with the instant action”]).

Likewise, this Court finds that it is appropriate to grant tenant’s motion to the extent of removing the HP Action to this Court for a joint trial with this action.

3. Tenant’s Cross-Motion for a Preliminary Injunction

Tenant also moves for preliminary injunctive relief compelling landlord to make the allegedly past-due payments for her relocation expenses, arising out of the HP Stipulation, as well as a judgment against landlord for those back payments. However, as the HP Action is not yet

before this Court, tenant's request for any relief from this Court in connection with the HP Stipulation is premature.

In any event, tenant cannot demonstrate her entitlement to a preliminary injunction. "In order to prevail on a motion for a preliminary injunction, the movant must establish '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'" (*Atlantic Specialty Ins. Co. v Landmark Unlimited, Inc.*, 214 AD3d 472, 472 [1st Dept 2023], quoting *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). Where, as here, the damage allegedly sustained by the party moving for preliminary injunctive relief can be compensated with money, such damages are deemed not irreparable as a matter of law, and, therefore, such party would not be entitled to a preliminary injunction (*see Musey v 425 E. 86 Apts. Corp.*, 154 AD3d 401, 404 [1st Dept 2017] ["injunctive relief is not available, because money damages are readily ascertainable"]; *Dupree v Scottsdale Insurance Company*, 100 AD3d 467, 468 [1st Dept 2012] ["The additional defense costs that plaintiffs seek to recover constitute monetary harm which can be compensated by damages and does not constitute irreparable injury for which injunctive relief will be granted"]; *Mini Mint Inc. v Citigroup, Inc.*, 83 AD3d 596, 597 [1st Dept 2011] ["We agree with the motion court that plaintiff failed to establish a prima facie case for a permanent injunction requiring defendant to fully repair the premises' employee bathroom and restore it to its original condition. In particular, plaintiff failed to establish that it does not have an adequate remedy at law, namely monetary damages"]).

Tenant does not allege irreparable harm and, in fact, expressly seeks an order compelling the payment of monies by landlord to tenant. As such, this branch of tenant's cross-motion is denied.

Motion Sequence No. 008

In MS008, tenant seeks relief from both landlord and Eli's. First, tenant moves for an order preliminarily enjoining Eli's from preparing and cooking, eggs, sausages, egg breakfast sandwiches, and rotisserie chicken; and directing Eli's to preserve and disclose to her all video surveillance footage, indoors and outdoors of the store from 8:00 am to 11:00 am on Monday October 11, 2021 through November 10, 2021. Tenant also moves for a preliminary injunction directing landlord to continue paying \$6,000 in relocation expenses per month; as well as, and in the alternative, ordering that her use and occupancy be abated to \$0 per month while landlord continues to permit Eli's to violate its lease by performing prohibited activities in the Commercial Premises.

1. Preliminary Injunction Against Eli's

In the mid-1990s, tenant commenced litigation against landlord and others in which she alleged that a coffee shop then operating in the commercial space below her apartment was subjecting her to noxious odors, fumes, smoke and excessive noise. The case was ultimately settled, and the settlement terms were memorialized in a Stipulation of Settlement (NYSCEF Doc No. 367) (*see* amended complaint, ¶ 38). The Stipulation of Settlement states in relevant part:

“The Landlord shall not hereafter rent this subject commercial premises to a coffee shop or food establishment that does cooking (such as broiling, frying, baking) or steaming in the commercial premises, as long as the Tenant is the Tenant of the Apartment”

(Stipulation of Settlement, at 2).

In the instant action, tenant contends that landlord has violated the Stipulation of Settlement by permitting Eli's to operate in the Commercial Premises. She alleges that she has been forced to endure noise and food odors emanating from Eli's, in particular, the cooking and preparation of eggs and sausages, which are interfering with her use and enjoyment of the Apartment. However, tenant admits that she “has moved twice before for injunctive relief seeking to stop Eli's from

cooking food in the commercial premises in violation of its lease” (affidavit of Peter Sverd, Esq. [NYSCEF Doc No. 371], ¶ 9).

First, by order to show cause dated October 19, 2013 (NYSCEF Doc No. 50), tenant sought temporary restraints and a preliminary injunction to enjoin Eli’s from “operating a coffee shop or food establishment that does cooking (such as broiling, frying, baking) or steaming in the commercial premises.” On January 14, 2014, Justice Manuel J. Mendez denied the application for temporary restraints, held a preliminary injunction hearing, and denied the application for a preliminary injunction (NYSCEF Doc No. 71). The Court held:

“This Court finds the plaintiff relies on speculation. She has provided no expert documentation to refute the defendants’ experts and has not established undisputable facts of in the likelihood of her success on the merits, irreparable injury, or that the balancing of the equities lie in her favor for purposes of obtaining an injunction. Plaintiff has not established irreparable injury and that there is no other remedy under the law, she is seeking monetary damages in this action. The burden plaintiff claims she will sustain without the injunction has not been shown to be greater than the harm to the defendants, specifically Eli’s Essentials in being prevented from continuing to operate and maintain its business and the possible loss of employment for its employees”

(*id.* at 3).

Tenant appealed, and the Appellate Division, First Department affirmed the denial of the preliminary injunction, holding that:

“The motion court providently exercised its discretion in denying the motion ... where the evidence raises ‘sharp’ issues of fact regarding plaintiff’s noise and odor complaints, and the intent of the parties that drafted a 1999 stipulation.... Plaintiff has not made the required showing for a preliminary injunction”

(*Motichka v MP 1291 Trust*, 136 AD3d 445, 445 [1st Dept 2016] [citations omitted]).

Again in 2019, tenant made the same motion for an injunction, complaining about odors emanating from Eli’s cooking and reheating food (*see* 3/21/19 *Motichka aff* [NYSCEF Doc No.

176], ¶¶ 138-142; *see also id.* ¶ 254 [“ELI’s must be stop (sic) steaming and cooking and re-heating, and heating food”]). In the Order, this Court held that:

“Tenant previously requested injunctive relief against Eli Bread, which the Court declined to grant.... The Appellate Division affirmed that decision.... Despite certain differences in wording between the two applications, the injunction that tenant previously sought, like the one she seeks now, would, in effect, likely require Eli’s Bread to shut down its business”

(Order, at 3). The Court then denied the motion, pursuant to the doctrine of the law of case, and concluded that:

“Even if the decision on the prior motion was not the law of the case because of some difference between the previous motion for injunctive relief and the current application, the Court would still deny the injunctive relief sought as tenant has failed to show her entitlement for such relief. Additionally, plaintiff’s counsel has acknowledged that the tenant would not likely be able to post a bond in an amount that would reasonably compensate Eli’s Bread for the negative impact on its business should she be granted the injunction preliminarily, but then ultimately lose on the issue at trial”

(*id.* at 3-4).

Tenant’s third application for a preliminary injunction is again precluded by the doctrine of the law of the case. The law of the case doctrine “is a rule of practice premised upon a sound policy that once an issue is judicially determined, further litigation of that issue should be precluded in a particular case” (*Matter of Part 60 RMBS Put-Back Litig.*, 195 AD3d 40, 47 [1st Dept 2021]; *accord Teshabaeva v Family Home Care Servs. of Brooklyn & Queens, Inc.*, ___ AD3d ___, 2024 WL 2061464, * 1st Dept 2024]). “It applies to prevent ‘the parties or those in privity’ from relitigating ‘an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue’” (*Aspen Specialty Ins. Co. v RLI Ins. Co., Inc.*, 194 AD3d 206, 212 [1st Dept 2021] [citation omitted]). Moreover, “[a]n appellate court’s resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court and operates to foreclose re-examination of the question absent a showing

of subsequent evidence or change of law” (*Carmona v Mathisson*, 92 AD3d 492, 492–493 [1st Dept 2012] [citation, internal quotation marks, ellipsis and brackets omitted]).

Given the two prior orders in this Court which denied tenant’s motion for an almost identical preliminary injunction, as well as the Appellate Division, First Department’s affirmance of Justice Mendez’s order, tenant’s third bite at the apple is precluded (*see Mezinev v Tashybekova*, 226 AD3d 570, 571 [1st Dept 2024]).

Moreover, although tenant contends that her most recent application “is based on ‘subsequent evidence and facts’” (affirmation of Peter Sverd, Esq. [NYSCEF Doc No. 371], ¶¶ 12)), in reality, it seeks the same relief as her prior applications – to prevent Eli’s from selling certain reheated food items that she deems offensive. As such, tenant has not demonstrated that subsequent evidence warrants a different result (*see NAMA Holdings, LLC v Greenberg Traurig LLP*, 92 AD3d 614, 614 [1st Dept 2012]).

More specifically, tenant alleges that, “on September 28, 2021, I experienced a new noxious cooking odor coming into my apartment which differed from the previous obnoxious odors that filter into my apartment from Eli’s Essentials,” (11/4/21 Motichka aff [NYSCEF Doc No. 366], ¶ 17), and that “I learned in October 2021, that Eli’s changed its menu and they are now cooking – made to order, eggs, omelettes, bacon, ham in the first floor of their premises” (*id.*, ¶ 19). She further alleges that “Eli’s is cooking eggs, bacon, sausage, ham, and cheese, at all hours of its operation; and every day of the week that it is open for business” (*id.*, ¶ 20).

Despite tenant’s allegations, the evidence submitted by Eli’s makes clear that the way that Eli’s serves its ready-made food has not changed since her prior applications – no food is prepared on-site at Eli’s, and, instead, the food items offered at Eli’s are prepared at Zabar’s other sites, including its commissary location a few blocks away, delivered to the store each morning and sold

on a “grab-and-go” basis (*see* aff of Francis Tejada [NYSCEF Doc No. 62], ¶¶ 5-10; *see also* exh A [describing and attaching video shot on a typical weekday at Eli’s during five different periods: preparing to open for the day, breakfast rush, lunch rush, dinner rush and closing]). Certain foods, such as soups, sausages, and egg sandwiches, are reheated or warmed at Eli’s Essentials, commensurate with customer orders (*see id.*). Moreover, as the deposition testimony of Robert Berger, an employee of Eli’s, makes clear, in 2018, Eli’s was selling and reheating egg sandwiches and sausage, exactly what tenant complains of today (*see* Berger dep [NYSCEF Doc No. 394], at 15-17, 52, 65-65). Thus, there are no new facts that warrant re-examining the issue of an injunction, and no new behavior that this Court could enjoin without analyzing the same issues that were present during the resolution of tenant’s two prior applications for relief.

2. Plaintiff’s Motion Seeking Relocation Expenses

Tenant also seeks a preliminary injunction directing landlord to continue paying \$6,000 in relocation expenses per month; as well as, and in the alternative, ordering that her use and occupancy be abated to \$0 per month. However, tenant sought the identical relief in MS006, which this Court has denied. Hence, this branch of the motion is also denied.

Accordingly, it is

ORDERED that the motion of defendant MP 1291 Trust (MS006) is granted to the limited extent that it is awarded a money judgment in the total unpaid amount of use and occupancy accruing from June 1, 2020, and defendant MP 1291 is directed to submit an affidavit with the total amount sought, and proof of such amount, and plaintiff Joanne Motichka is directed to continue paying use and occupancy to defendant MP 1291 Trust, calculated at the rate of \$852.27 monthly, beginning with the first of the month immediately subsequent to defendant MP 1291 Trust’s service upon plaintiff of a copy of this order with notice of entry; and it is further

ORDERED that the remainder of defendant MP 1291 Trust's motion (MS006) which seeks a judgment of possession against plaintiff Joanne Motichka is denied, without prejudice; and it is further

ORDERED that the branch of plaintiff Joanne Motichka's cross-motion (MS006) that seeks consolidation of the-above captioned action with the holdover proceeding entitled *Joanne Motichka v MP Trust/1291*, Civil Court of the City of New York, City of New York, Index L&T 6249/2018, is granted to the limited extent that both actions will be consolidated for trial only, and the holdover proceeding is removed forthwith to Supreme Court, New York County, Part 55 to be tried jointly with the above-captioned action; and it is further

ORDERED that the branch of plaintiff Joanne Motichka's cross-motion (MS006) that seeks leave to renew is denied; and it is further

ORDERED that the branch of plaintiff Joanne Motichka's cross-motion (MS006) that seeks a preliminary injunction against defendant MP 1291 Trust is denied; and it is further

ORDERED that the branch of plaintiff Joanne Motichka's motion (MS008) that seeks a preliminary injunction against defendant Eat Lexington 87, LLC d/b/a Eli's Essentials is denied; and it is further

ORDERED that the branch of plaintiff Joanne Motichka's motion (MS008) that seeks a preliminary injunction against defendant MP 1291 Trust is denied.

This constitutes the decision and order of the Court.

<u>6/17/2024</u>		<u>James d'Auguste, J.S.C.</u>	
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
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