[*1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Samantha Carroll

INDEX NO. 109293/02

MOTION DATE 1/25/05

- v -

MOTION SEQ. NO. 002

Nostra Realty Corp.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for reargue/renew

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED

MAR 22 2005

COUNTY CLERK'S OFFICE NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that defendant's motion to renew and reargue is granted solely to the extent of granting reargument; and it is further

ORDERED that the motion pursuant to CPLR §602(b) to consolidate is granted and the above-captioned action is consolidated in this Court with *Nostra Realty Corporation v Debra Carroll and James Carroll*, Index No. 103564/01 (Civil Court, New York County) for discovery and trial purposes only; and it is further

ORDERED that defendant's motion for use and occupancy, *pendente lite*, is granted, and the tenants shall tender to landlord payment of rent arrears for August and September 2004 at the rate of $2,809.66 per month, and rent arrears for October, November, and December 2004 at the rate of $2,992.29 per month, and $2,992.92 per month for January through March 2005, within 30 days of service of this order with notice of entry; tenants shall also tender $2,992.92 per month for April 2005 and continuing each month thereafter as such payment becomes due pursuant to the lease agreement; such payments shall be made without prejudice; and it is further

ORDERED that the Clerk of Civil Court, New York County, shall transfer the papers on file in *Nostra Realty Corporation v Debra Carroll and James Carroll* under Index No.103564/01 to the Clerk of this Court upon service of a certified copy of this order and payment of the appropriate fee, if any; and it is further

ORDERED that the note of issue shall be filed by April 11, 2005; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: 3/18/05 This constitutes the decision and order of the court.

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF STATE OF NEW YORK
COUNTY OF NEW YORK : PART 35

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SAMANTHA CARROLL, and ZACHARY CARROLL, infants under the age of 14 years, by their mother and natural guardian, DEBRA CARROLL, and DEBRA CARROLL and JAMES CARROLL, individually

Index No. 109293/2002

Plaintiffs,

-against-

DECISION/ORDER

NOSTRA REALTY CORPORATION,

Defendant.

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HON. CAROL R. EDMEAD

MEMORANDUM DECISION

In this personal injury action, defendant, Nostra Realty Corporation ("landlord") moves pursuant to CPLR §2221 for leave to renew and reargue its prior motion to consolidate this action with its summary non-payment proceeding against plaintiffs James Carroll and Debra Carroll ("tenants") in Civil Court, New York County, Index No. 103564/2001 (the "summary proceeding"). In addition, the landlord petitions the Court to order payment of rent arrears and use and occupancy, *pendente lite*, from tenants.[1]

The cases that the landlord seeks to consolidate arise from a dispute with the tenants over the living conditions at the residential premises of 845 West End Avenue, Apartment 5E, New York, New York ("the premises"), which the landlord has leased, and continues to lease, to the tenants. Since 2001, the tenants have tendered only four months rent, allegedly in response to the

[1] The landlord also moved pursuant to CPLR §§3124 and 3126 to compel tenants to submit to depositions. However, on March 1, 2005, counsel for landlord advised the Court that depositions were held, and its request to compel same is moot.

ongoing existence of numerous defects and hazardous conditions in the premises.

In October of 2001, the landlord commenced the summary proceeding against the tenants in the Civil Court of the City of New York. The tenants proffered the affirmative defenses of breach of the warranty of habitability as well as constructive eviction based on, among other things, the presence of mold in the premises. The tenants also alleged three counterclaims seeking: (1) monetary damages based on the landlord's breach of the warranty of habitability, (2) an order requiring the landlord to correct the dangerous conditions pursuant to the Multiple Dwelling Law of the State of New York, the Maintenance Code, Building Code and Health Code of the City of New York, and Real Property Law §235-b, and (3) attorney's fees, costs, and disbursements pursuant to the lease and Real Property Law §234.

Thereafter, in April of 2002, the tenants commenced the instant action against the landlord alleging that they, along with their two children Samantha and Zachary Carroll, sustained severe and permanent mental and physical injury as a result of the landlord's negligence regarding the presence of toxic mold and asbestos in the premises (the "tort action").

In the summary proceeding, tenants' and landlord's applications for various forms of relief resulted in a stipulation, dated December 11, 2002 (the "stipulation"), wherein the landlord agreed to return the premises to a "safe and habitable condition hereof, including without limitation, Paragraph VI(d) of the Scope of Work, so that the Respondents may resume their occupancy thereof and the Petitioner may receive payment of the rent." The parties also agreed that the determinations of mutually selected third party contractors regarding remediation and

repair would be final and binding.[2] The landlord subsequently undertook remediation and reconstruction of the premises, which was completed approximately one-and-a-half years later. During that period of remediation, the tenants resided at a hotel, at the landlord's expense pursuant to the terms of the stipulation.

Subsequently, in the tort action, the landlord moved to consolidate the instant tort action with the summary proceeding. The Court denied the motion based upon case law[3] cited by the tenants which held that landlord-tenant disputes should be removed from Civil Court only when such forum cannot afford the parties complete relief. The instant motion to renew/reargue ensued.

In support of renewal and reargument, the landlord contends that the Court misapprehended the posture of the case, insomuch as it was the landlord, and not the tenants, who moved to consolidate. Also, the landlord, as the movant, was willing to accept the delay in prosecuting the non-payment proceeding. The landlord also contends that the Court failed to consider the landlord's reply papers, which were filed and submitted in a timely fashion, when the underlying motion was transferred to the Court. Therefore, reargument and renewal is warranted.

The landlord further argues that upon renewal and reargument, the Court should grant consolidation in light of parallel factual allegations set forth by the tenants in both the summary proceeding and the tort action pertaining specifically to the existence and remediation of mold

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[2]After re-entering the premises, the tenants paid rent for the month of July 2004, but have not paid additional rent since that date.

[3]*Scheff v 230 East 73rd Owners Corp.*, 203 AD2d 151, 610 NYS2d 252 [1st Dept 1983].

and moisture damage in the premises, and money damages arising therefrom. The landlord further argues that a single trial is necessary because adjudication in either the summary proceeding or the tort action will affect the other action, and alternatively, the issues may be adjudicated inconsistently. The landlord also cites judicial economy as a justification for consolidation, in addition to its contention that consolidation will result in reduced legal costs for all parties.

The landlord further points out, *inter alia*, that according to its reply papers the Civil Court's ability to adjudicate the summary proceeding is of no moment, and is in fact the incorrect standard for determining whether a summary proceeding and a Supreme Court action should be consolidated. As argued in its reply papers, *Amtorg Trading v Broadway and 56th Street* (191 AD2d 212, 594 NYS2d 204 [1st Dept 1993]) stands for the proposition that consolidation of a summary proceeding and a Supreme Court action pursuant to CPLR §602(b) is warranted so long as there is a common question of law or fact between the two causes of action, and there will be no prejudice to the non-movant if the motion is granted. The landlord contends that the tenants have failed to demonstrate that any prejudice would inure to them if the cases were consolidated. Relying on *Moretti v 860 W. Tower, Inc.* (221 AD2d 191, 633 NYS2d 133 [1st Dept 1995]), the landlord argues that the tenants' bare claim of prejudice arising from removal of the summary proceeding from its recognized forum, and the resultant delay thereof, is inadequate. Furthermore, the landlord argues that in contrast to *Scheff v 230 East 73rd Owners Corp.* (*supra*), upon which the Court previously relied, consolidation is warranted because any delay in adjudication of the summary proceeding will inure to the detriment of the *movant*, herein the landlord, which is willing to accept the delay in the interest of avoiding two trials on the same

issues.

The landlord also argues that should the Court grant consolidation, the Court should order the tenants to pay rent arrears and use and occupancy *pendente lite*.[4] The landlord notes that since 2001, the tenants have paid only four months rent, including three months pursuant to an Order of the Civil Court and the aforementioned July 2004 payment after remediation and reconstruction was completed. The landlord contends that despite being furnished with a newly renovated apartment which has been approved by a mutually selected environmental consultant, the tenants will not pay rent absent a Court order.

In opposition to renewal and reargument, the tenants argue primarily that neither *Amtorg* (*supra*) nor *Moretti* (*supra*) warrant consolidation because those cases are distinguishable upon their facts. First, it is argued, *Amtorg* addressed a commercial tenancy, as opposed to a residential tenancy. More importantly, the tenants note, in both *Amtorg* and *Moretti*, the controversy concerned the amount of rent due, and not possession of the premises. The tenants maintain that in the summary proceeding at hand, possession remains an issue. The tenants also argue that unlike the cases relied upon by the landlord in which the cases sought to be consolidated were inextricably intertwined, here, the issues of rent abatements and counterclaims would remain even if the Supreme Court failed to find injury in the tort action. The tenants posit that consolidation is inappropriate because the standard for breach of warranty and constructive eviction is whether the conditions in the premises posed a danger to the health and safety of the

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[4]Landlord seeks rent arrears for August and September 2004 at the rate of $2,809.66 per month, and for October, November, and December 2004 at the rate of $2,992.29 per month, totaling $14,596.19 for the entire period. Landlord also seeks payment for use and occupancy, *pendente lite*, at the rate of $2,992.92 per month.

tenants, not whether the tenants suffered medical harm due to the landlord's negligence.

The tenants also argue that they should not be ordered to pay rent arrears and use and occupancy. Relying upon *Hung-Thanh, Inc. v Doktori* (21 HCR 564A, NYLJ Oct. 28 1993, 27:3 [App Term 1st Dept]) and its progeny, the tenants claim that landlords are not entitled to an award of use and occupancy *pendente lite* absent a showing of delaying tactics undertaken by the tenant.[5] The tenants maintain that the summary proceeding is ready for trial, and should proceed to trial accordingly. As such, the tenants contend that if the landlord is willing to suffer the prejudice and delay of consolidation, it must, consequently, forgo use and occupancy. The tenants further allege that there were numerous defects in the premises upon re-entry, including, but not limited to: the existence of bags of "soft goods" left in the living room, cracked and discolored grout between bathroom tiles, defective doorknobs, a faulty intercom, malfunctioning hot water valve (which had been repaired), an abnormality in the electrical system (which had been repaired), and an improperly finished bedroom floor (which had been repaired).

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[5]These cases rely largely on New York Real Property Actions and Proceedings Law ("RPAPL") §745 (2)(a), which sets specific parameters as to what type of delay will trigger an award of use and occupancy. The law states in pertinent part:

> "In a summary proceeding upon the second of two adjournments at the request of the respondent, or, upon the thirtieth day after the first appearance of the parties in court less any days that the proceeding has been adjourned upon the request of the petitioner, whichever occurs sooner, the court shall direct that the respondent, upon an application by the petitioner, deposit with the court within five days sums of rent or use and occupancy accrued from the date the petition and notice of petition are served upon the respondent, and all sums as they become due for rent and use and occupancy. . . ."

Analysis

Renewal and Reargument

Although the line between renewal and reargument is often blurred, the landlord's motion is more properly characterized as a motion for leave to reargue. In a motion to reargue under CPLR §2221(d) the movant alleges that the court has misapprehended or overlooked facts or the law, while a § 2221(e) motion for leave to renew is premised on new facts or law *not offered on the prior motion* that would change the prior determination. Here, the landlord's reply papers in the underlying motion were not available to and thus overlooked by the Court, through no fault of the landlord.[6] The landlord, as is proper in a motion for leave to reargue, draws the Court's attention to case law contained in its reply papers, and not previously considered (*see Macklowe v Browning School*, 80 AD2d 790, 791, 437 NYS2d 11, 12 [1st Dept 1981]). Therefore, the landlord's motion for leave to reargue is granted, and the Court will reconsider the merits of the underlying motion to consolidate.

Motion to Consolidate

This case presents the Court with an opportunity to synthesize First Department case law that has yet to articulate a singular analysis to be used in determining whether to consolidate a landlord-tenant summary proceeding with an action in Supreme Court.

The threshold question in considering any motion to consolidate is whether there exists "a common question of law or fact" between the causes of action that are to be consolidated (CPLR § 602(a)). "Consolidation is generally favored by the courts in the interest of judicial economy

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[6]Although the order misapprehended the identity of the movant, the status of the movant as the "landlord" had no bearing on the Court's prior determination.

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" (*Amtorg*, 191 AD2d at 213). Hence, the landlord's motion to consolidate is based on the axiom that consolidation of actions sharing a common question of law or fact is desirable in the interests of judicial economy, *unless prejudice may be demonstrated by the non-movant.*

The tenants' argument against consolidation, however, is based upon another recognized principle that summary proceedings brought in Civil Court should generally remain there since that court is explicitly designated to hear landlord-tenant disputes. According to the tenants, and the cases upon which they rely, *unless the movant can establish a necessity for consolidation*, the summary proceeding herein should remain in Civil Court.

These basic principles, each meritorious on their own, come into apparent conflict in the present matter. The Court opines that although the Civil Court may be the preferred forum for expediently resolving landlord-tenant disputes, the preference for maintaining summary proceedings in that forum is not absolute. Rather, this preference may lack justification under the facts of a given case, at which point consolidation is appropriate so long as the legal prerequisites are met. The dispute at bar represents such a case, and the landlord's motion to consolidate is *therefore granted.*

Where the preference for consolidation and judicial economy has intersected with the preference that summary proceedings remain in Civil Court, resolutions have been disparate within the First Department. For example, in *Amtorg*, on which the landlord relies in support of its motion to consolidate, the court granted the tenant's motion to remove and consolidate a summary holdover proceeding with a Supreme Court action for conversion of the proceeds of a

letter of credit used to secure a lease (*Amtorg*, 191 AD2d at 213). The court reasoned that consolidation was appropriate given that (1) there were common questions of law and fact and (2) there was no showing of "prejudice by defendants" since possession of the premises was no longer an issue and the only remaining issues were whether Amtorg became a month-to-month tenant and the amount of rent due (*Id.*).

Similarly, in *Atherton v 21 East 92nd Street Corp.* (149 AD2d 354, 539 NYS2d 933 [1st Dept 1989]), the First Department noted that the Supreme Court improperly characterized the summary proceeding as one for possession, and that as such, the Supreme Court's denial of consolidation on the ground that the Civil Court had power to determine issues in dispute was improper. According to the First Department, the "absence in the complaint of any demand for possession, which is essential to the maintenance of a summary proceeding renders the Civil Court suit merely a plenary action for the recovery of money." Therefore, consolidation of the Civil Court summary proceeding for rent arrears and the Supreme Court action for damages for breach of implied warranty of habitability was warranted since the "suits involve[d] common questions of law or fact."

However, in *44-46 West 65th Apartment Corp. v Stvan* (3 AD3d 440, 772 NYS2d 4 [2004]), on which tenants primarily rely, the Appellate Division, First Department addressed the potential of consolidating a summary holdover proceeding with a breach of contract action in Supreme Court, and noted that neither party alleged that the Civil Court was incapable of resolving the holdover proceeding, and had thus failed to demonstrate the necessity for consolidation (*Id.* at 442). In *44-46*, the tenants moved to stay a holdover proceeding which was commenced by their landlord in Civil Court two years after the landlord had brought a breach of

contract action against the tenants in Supreme Court (*Id.* at 441). In granting the stay, the Supreme Court found a "great deal of coincidence" between the two proceedings. The First Department, however, reversed, "given the distinct nature of the respective causes and the prejudice to plaintiff in depriving it of the appropriate recognized forum for a summary holdover proceeding" (*Id.* at 441-42).

Therefore, contrary to the tenants' contention, it appears that when considering consolidation, the Courts must apply the recognized standard for consolidation, to wit: whether there are common questions of law and fact and an absence of prejudice to the nonmovant, and where such standard has not been satisfied, the court may consider whether the movant has established that consolidation is yet necessary in that the Civil Court does not have power to adjudicate the claims before it. In cases where the Court has considered whether consolidation was necessary, the First Department has found that the necessity to consolidate did not exist.

Common Question of Law or Fact

The tenants' claims in both the summary proceeding and the tort action arise from a common nucleus of facts. The tenants' claim for breach of the implied warranty of habitability as well as their negligence claim turn substantially on the nature of the living conditions at 845 West End Avenue, and the degree to which the landlord attempted to resolve the alleged inadequate conditions.

Contrary to the tenants' contention, that the summary proceeding involves "rent" and the instant tort action involves an "injury" ignores the reality that the defense to the non-payment of rent, i.e., breach of warranty of habitability, and the alleged injuries resulting from landlord's negligence arises out of and are premised upon the same facts: the alleged the presence of toxic

mold and asbestos in the premises. The testimony and documentary evidence, if any, to support the allegations of mold and its effect on the tenants are material and necessary to both tenants' defense to the summary proceeding and to their claims for damages for personal injuries.

Further, tenants' contention regarding the legal distinctions between the various causes of action and defenses at issue, different burdens of proof, uncommon elements, and different forms of relief do not warrant a different result. The language of CPLR §602 permits consolidation where there is a "common question of law *or* fact" (CPLR §602(a)) (emphasis added). This factor is met with ease under the circumstances herein.

Prejudice to the Non-movant

The tenants argue that prejudice will inure to them both in the delay of the summary proceeding inherent in consolidation, as well as the removal of the summary proceeding from its recognized forum, which in this case, is capable of adjudicating the matter.

The Court observes that "[t]he mere fact that a case may be somewhat delayed by such consolidation will not suffice to bar it" (*Amtorg*, 191 AD2d at 213). Indeed, it has been held that the "delay in determination of the nonpayment proceeding will not cause prejudice sufficient to justify denial of the motion [to consolidate where] the parties' real controversy concerns money, not possession of the premises" and interest may be awarded if landlord prevails (*Moretti v 860 West Tower*, 221 AD2d 191, 192 [1st Dept 1995]). The tenants' characterization of the summary proceeding as one primarily about possession as opposed to money is inaccurate. The summary proceeding at issue, a dispute concerning rent arrears, is clearly a controversy about money, not possession (*see Atherton v 21 East 92nd Street Corp.*, 149 AD2d 354 (finding that the "absence in the complaint of any demand for possession, which is essential to the maintenance of a

summary proceeding renders the Civil Court suit merely a plenary action for the recovery of money"]). The tenants' attempts to frame the nature of the summary proceeding as one about possession do not pass muster; although the tenants in *Amtorg* were out of possession whereas the tenants in the case at bar maintain possession, such distinction does not render possession the central controversy of the summary proceeding at bar as the tenants contend. That *Amtorg* involved a commercial tenancy as opposed to a residential tenancy, as pointed out by the tenants, is of no moment.

Indeed, a landlord may suffer monetary prejudice if forced to delay recovery from a tenant in a non-payment proceeding, and, a dispute over possession adds an element of urgency that would militate in favor of maintaining the summary proceeding in Civil Court. However, any delay of the summary proceedings does not operate as a bar to consolidation because the party here, the landlord, prejudiced by the delay in the resolution of its nonpayment proceeding *supports* consolidation and acquiesces to the delay of the monetary relief it seeks to recover. Even though the landlord seeks use and occupancy from the time the tenants re-entered the premises, the landlord has willingly accepted the prejudice of the delay in the determination of its claim in the summary proceeding for *past* rent allegedly due.

Furthermore, there are no facts in the record demonstrating that the delay in resolution of the summary proceeding would inure to the detriment of the tenants in litigating their defense to such proceeding. To accept the tenants' conclusory argument that they will be prejudiced by delay of the summary proceeding, is to adopt the notion that delay is tantamount to prejudice *per se*. The Court rejects this notion. Rather, since the controversy in the summary proceeding is one about payment and not possession, tenants cannot establish that they will suffer prejudice

through delay of its resolution. While the tenants may have a legitimate desire to see the proceedings end as soon as possible, this is not prejudice that could tip the scales against consolidation.

It has been held that "[e]ven where there are common questions of law or fact, consolidation is properly denied if the actions are at markedly different procedural stages and consolidation would result in undue delay in the resolution of either matter" (*Abrams v Port Auth. Trans-Hudson Corp.*, 1 AD3d 118, 766 NYS2d 429 [1st Dept 2003]). In *Abrams,* the First Department affirmed the denial of consolidation of a summary proceeding already on the trial calendar with a Supreme Court case that had barely advanced to discovery, on the ground that consolidation would delay both the resolution of the Civil Court action and the trial of the consolidated action. In the instant case, the summary proceeding which, according to the tenants, "could be restored," is not on the trial calendar. And, the parties are proceeding with discovery in the tort action and have held depositions. Further, this Court could also place the instant tort action, as consolidated, on a "rocket docket" expedited discovery schedule. In any event, given that any prejudice in the delay of the prosecution of the summary proceeding inures to the detriment of the movant for consolidation herein, the holding in *Abrams* is not controlling under the circumstances herein.

Cases also evince a presumption in favor of maintaining a summary proceeding in Civil Court, and the cases that adhere to this presumption take for granted that the non-movant will be prejudiced by the removal of the summary proceeding from Civil Court. Thus, the First Department has held that "depriving [a party] of the appropriate recognized forum for a summary holdover proceeding" may be prejudicial (*44-46*, 3 AD3d at 442). However, transferring the

summary proceeding at issue from a "recognized" forum to the Supreme Court does not amount to prejudice *per se,* especially since, the summary proceeding here is not a holdover proceeding, but one for nonpayment of rent.

Consolidation is further warranted based on the risk of inconsistent judgments as between the tenants' defenses and counterclaims in Civil Court, and their claims in Supreme Court. Given that the outcome of both proceedings hinges upon largely the same set of operative facts, namely, the existence (or non-existence) of unhealthy living conditions and the action (or inaction) of the landlord with regard to these conditions, the risk of inconsistent judgments is acute.[7] The same factual overlap speaks to the desirability of consolidation for the purpose of judicial economy as well (*see, e.g., Cinelli v Gillman*, 68 AD2d 254, 855, 414 NYS2d 556, 557 [1st Dept 1979] [keeping actions separate would result in "substantial duplication of evidence"]). Although the purpose of a summary proceeding is to resolve landlord-tenant disputes in an expeditious fashion, such purpose is undermined in light of the tenants' affirmative defenses and counterclaims, which beg discovery. To force the landlord to proceed in Civil Court and rebut these defenses and counterclaims without the benefit of discovery would amount to prejudice by the movant.

Accordingly, as there is a common question of law or fact, the summary proceeding is essentially one to recover money, and there is no demonstrable prejudice to the tenants upon consolidation, consolidation under CPLR §602(b) is warranted (*see, Moretti v 860 West Tower*,

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[7]By way of example, it would be entirely inconsistent for the landlord to be held responsible for serious illness contracted by its tenants in the negligence action yet at the same time, to find that the implied warranty of habitability was not breached in the summary proceeding.

221 AD2d 191 *supra* [where cases involved common questions of law and fact and plaintiff would be unable to obtain full redress of her negligence and injunctive relief claims in the nonpayment proceeding, delay in determination of nonpayment proceeding will not cause sufficient prejudice and parties' real controversy involves money, not possession, consolidation is warranted]).

Payment of Rent Arrears and Use and Occupancy

The Supreme Court retains broad discretion in deciding whether to compel payment of use and occupancy *pendente lite* (*Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124, 710 NYS2d 890 [1st Dept 2000]). Payment of use and occupancy *pendente lite* "accommodates the competing interests of the parties in affording necessary and fair protection to both and preserves the status quo until a final judgment is rendered" (*MMB Assoc. v Dayan*, 169 AD2d 422, 564 NYS2d 146, 147 [1st Dept 1991]).

According to the December 2002 stipulation, the tenants' resumption of occupancy and payment of rent in correlation therewith was conditioned upon restoration of the premises to a "safe and habitable condition." For the purposes of the instant motion, the tenants' re-entry of the premises and payment of July 2004 rent strongly indicate that the landlord substantially complied with the stipulation and Scope of Work, and that the premises were safe and habitable in July of 2004 and going forward. Thus, having entered into possession, tenants should not now be permitted to reap the benefits of occupancy and, at the same time, avoid the payment of rent (*see Eli Haddad Corp. v Cal Redmond Studio*, 102 AD2d 730, 731, 476 NYS2d 864, 866 [1st

Dept 1984];[8] *see also Abright v Shapiro*, 92 AD2d 452, 458 NYS2d 913 [1st Dept 1983] [where landlord's summary proceedings in Civil Court against certain doctors was consolidated with a Supreme Court action for declaratory that their apartments were rent stabilized, denial of landlord's application for an injunction prohibiting tenants from continued use and occupancy of the premises was conditioned upon payment of current rent as it became due . . .]).

The Court observes that the stipulation states that the parties shall be bound by the remediation and property determinations of the company mutually chosen to facilitate the work done to the premises. As such, the tenants have no grounds to withhold rent based on soft goods left in their living room, or for other defects (improperly-functioning intercom, cracked and discolored bathroom tiles, improperly finished bedroom floor, exposed Sheetrock, etc...) which may or may not have already been cured, but still do not render the premises unsafe and uninhabitable so as to justify rent-free living until final disposition. Additionally, the existence of housing code violations on the premises cannot be said to summarily entitle the tenants to disturb the status quo and withhold rent at this juncture; this is an issue for trial (*see Park West Mgt. Corp. v Mitchell,* 47 NY2d 316, 327, 418 NYS2d 310, 316 [1979] ["[A] simple finding that conditions on the lease premises are in violation of an applicable housing code does not necessarily constitute automatic breach of the warranty. In some instances, it may be that the code violation is *de minimis* or has no impact upon habitability]).

The tenants' reliance on *Hung-Thanh* and its progeny to rebuff the landlord's motion for rent arrears and use and occupancy is misplaced. In *Hung-Thanh*, the tenant had not sought any

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[8]Though the controversy between landlord and tenant in *Eli Haddad* was very different than the present case, the court's declaration encapsulates the untenable nature of the tenants' position.

adjournments (*see* RPAPL §745, subd. 2[a]), moved to stay the proceeding, or otherwise sought the favor of the court; indeed, any delay of the trial in the matter was occasioned by the landlord's own request for disclosure. Therefore, according to the First Department, in such procedural posture, it was improvident for the court to require interim rent payments to the landlord. However, the tenants herein are seeking favorable relief from this court, in the form of its personal injury action, and, the nature of the tenants' defense and counterclaim to nonpayment and affirmative action in Supreme Court necessitates discovery and any concomitant delay associated with such discovery.

Accordingly, the Court hereby orders the tenant to tender payment of rent arrears, directly to the landlord, from August 2004 through December 2004 in the amount of $14,596.19, as well as $2,992.92 per month retroactively from January 2005 going forward until final disposition of the proceedings.[9] This payment preserves the status quo between landlord and tenants until final judgment (*MMB Assoc.*, 169 AD2d at 422). Further, the payment represents no prejudice to the tenants as they may be entitled to an appropriate refund or rent credit should their claims prove meritorious (*East 4th St. Garage, Inc. v Estate of Berkowitz*, 265 AD2d 249, 697 NYS2d 266, 267 [1st Dept 1999]).

As the tenant has failed to justify non-payment of rent pursuant to the parties' lease agreement during the pendency of these proceedings, in this Court's discretion, defendant's application for use and occupancy is granted.

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[9]While the tenants contend that it is inappropriate to award rent arrears and use and occupancy to the landlord, they do not contest the accuracy of the rent amounts sought by the landlord. Furthermore, the tenants request to have the moneys deposited into the Himmelstein McConnell escrow account is denied.

Accordingly, it is hereby

ORDERED that defendant's motion to renew and reargue is granted solely to the extent of granting reargument; and it is further

ORDERED that the motion pursuant to CPLR §602(b) to consolidate is granted and the above-captioned action is consolidated in this Court with *Nostra Realty Corporation v Debra Carroll and James Carroll*, Index No. 103564/01 (Civil Court, New York County) for discovery and trial purposes only; and it is further

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ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

The foregoing shall constitute the decision and order of the court.

Dated: March 18, 2005

Hon. Carol Edmead