At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13th day of December, 2018.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

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KRISTINE MALDEN, MYLES BENNETT, ZACH WEINGART, MATTHEW CHAVES, MARGO LAFONTAINE and MAX LEMBERGER,

Plaintiffs,

- against -

Index No. 510054/17

WYKOFF S.P., LLC,[1]

Defendant.

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The following papers numbered 1 to 7 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3-6
Reply Affidavits (Affirmations)	7

Upon the foregoing papers in this landlord/tenant dispute, defendant Wykoff S.P., LLC (Wykoff) moves for an order: (1) awarding it summary judgment on plaintiffs' first and fourth causes of action for declaratory relief, pursuant to CPLR 3001 and 3212, by: (i) "[d]ismissing Plaintiffs' First Cause of Action and declaring that the building and premises are **not** subject to and covered under the Rent Stabilization Law by virtue of the Emergency Tenant Protection Act"; and (ii) "dismissing Plaintiffs' Fourth Cause of Action without an affirmative declaration on the merits because it is not a genuine, ripe and otherwise justiciable controversy"; or, alternatively (iii) "dismissing Plaintiffs' Fourth Cause of Action

[1] By a July 19, 2018 order, Wykoff was substituted in as defendant in place of R.P.S. Properties, LLC (RPS) and the caption was amended to reflect the substitution.

and affirmatively declaring that Defendant is **not** prohibited from collecting rent from Plaintiffs or from maintaining an action or proceeding for non-payment of rent against Plaintiffs while the Building lacks a certificate of occupancy pursuant to MDL §§ 301 (1) and 302"; (2) granting it summary judgment dismissing the second, third, fifth and sixth causes of action for injunctive and monetary relief, pursuant to CPLR 3212; and (3) granting it summary judgment on its counterclaim for an award of reasonable attorneys' fees, costs and disbursements against plaintiffs Kristine Malden (Malden), Myles Bennett (Bennett), Zach Weingart (Weingart) and Matthew Chaves (Chaves),[2] and referring the issue to a special referee.

Wyckoff is the current fee owner of a loft building at 49 Wyckoff Avenue in Brooklyn (Building). Plaintiffs have been residential tenants of units 3A and 3C in the Building since July 2010, pursuant to identical commercial loft leases. Plaintiffs Bennett, Weingart and Chaves reside in unit 3A and Malden resides in unit 3C.

The Building, which is located in Manufacturing Zoning District M1-1, does not have a certificate of occupancy for residential use, and has never been registered as "residential" with the New York State Division of Housing and Community Renewal (DHCR). There is no dispute that no one has ever applied for or obtained a zoning variance for the Building.

The Building was erected before January 1, 1974. Before plaintiffs' tenancies, the Building was a raw, former manufacturing space that had not been developed for residential use. Plaintiffs allegedly converted the third floor of the Building into residential housing accommodations, with the former owner's knowledge and consent. The renovation work on the third floor, which was allegedly performed at plaintiffs' expense, was completed in

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[2] Plaintiffs Margo Lafontaine and Max Lemberger have vacated unit 3B and surrendered possession to Wyckoff.

December 2010. Before the third floor of the Building was subdivided into three residential units, it was a raw, open space of approximately 10,000 square feet.

The Instant Action

Plaintiffs commenced this action asserting six causes of action for: (1) a declaration that the Building is subject to the Rent Stabilization Law of 1969 (RSL) by virtue of the Emergency Tenant Protection Act of 1974 (ETPA); (2) a mandatory injunction requiring the owner to register the Building with the DHCR as subject to the RSL, listing the proper legal regulated rent and naming plaintiffs as rent-stabilized tenants; (3) a mandatory injunction requiring the owner to issue rent-stabilized renewal leases, pursuant to the RSL; (4) a declaration that the owner is prohibited from collecting rent, pursuant to Multiple Dwelling Law (MDL) § 302 (1), because the Building does not have a certificate of occupancy for residential use, pursuant to MDL § 301; (5) a permanent injunction enjoining the owner from terminating plaintiffs' tenancies and from commencing holdover eviction proceedings against them; and (6) an award of attorneys' fees, pursuant to plaintiffs' leases.

RPS, Wyckoff's predecessor, answered the complaint, denied the allegations therein and asserted affirmative defenses, including that the Building is not capable of being legalized for residential use because it is located in an M1-1 Zoning District. RPS asserted a counterclaim seeking an award of attorneys' fees, costs and disbursements, pursuant to Article 19 of plaintiffs' leases.[3]

Plaintiffs previously moved for: (1) a preliminary injunction enjoining the owner from commencing summary holdover eviction proceedings against them, and (2) summary

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[3] Article 19 of the leases provides, in part, that:

"[i]f Owner . . . in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorneys' fees, in instituting, prosecuting or defending any action or proceeding, and prevails in any such action or proceeding, then Tenant will reimburse Owner for such sums so paid or obligations incurred with interest and costs."

judgment on their fourth cause of action, which seeks a declaration that the owner is prohibited from collecting rent from plaintiffs, pursuant to MDL § 302 (1).

By a November 1, 2017 order (2017 Order), the court denied plaintiffs' motion for injunctive relief, and held that:

> "plaintiffs have not and cannot demonstrate a likelihood of success on the merits because the Building is located in a M1-1 Manufacturing Zoning District and is, therefore, not eligible for residential use by reason of the applicable zoning. Consequently, plaintiffs cannot obtain the protection offered by the RSL for the Building, as a matter of law."[4]

In the 2017 Order, the court also denied plaintiffs' motion for summary judgment on their fourth cause of action on the ground that:

> "MDL § 280 et seq., also known as the Loft Law, only applies to loft units that were occupied for residential purposes as of April 1, 1980 (*Caldwell*, 57 AD3d at 21 [holding that "(t)he Loft Law . . . only applies to units that were occupied for residential purposes on April 1, 1980"]). Because there is no dispute that plaintiffs' loft units were not occupied and converted into residential units until sometime in 2010, MDL § 302 (1) is inapplicable."

The 2018 Order

On April 13, 2018, RPS made a motion for an order substituting Wyckoff, the current owner of the Building, as defendant and directing plaintiffs to pay use and occupancy pendente lite. By a July 19, 2018 order (2018 Order), the court substituted Wyckoff as defendant and ordered plaintiffs to "pay $3,500 use and occupancy pendente lite to substituting defendant Wyckoff . . . each month beginning on August 1, 2018 . . ."

Wyckoff's Instant Summary Judgment Motion

Wyckoff now seeks summary judgment dismissing plaintiffs' first cause of action for a declaration that the Building is subject to the RSL based on this court's 2017 Order. Wyckoff relies on the court's determination that "plaintiffs have not and cannot demonstrate a likelihood of success on the merits because the Building is located in a M1-1

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[4] Subsequently, Wyckoff commenced summary holdover eviction proceedings against plaintiffs in Housing Court.

Manufacturing Zoning District and is, therefore, not eligible for residential use by reason of the applicable zoning." Wyckoff asserts that it "is entitled to an affirmative declaration as a matter of law that the building and subject premises are **not** subject to rent stabilization."

Wyckoff further contends that the second cause of action for an injunction requiring it to register the Building with the DHCR as subject to the RSL and the third causes of action for an injunction requiring it to issue rent-stabilized renewal leases are also subject to dismissal because both causes of action are "dependent and premised upon the success of" plaintiffs' first cause of action.

Wyckoff seeks dismissal of the fourth cause of action, which seeks a declaration that it is prohibited from collecting rent from plaintiffs, on the ground that "there is no genuine, ripe and justiciable controversy between the parties." Wyckoff asserts that the fifth cause of action for an injunction enjoining it from terminating plaintiffs' tenancies and from commencing holdover eviction proceedings against them in Housing Court must be dismissed as moot, since such relief was denied in the 2017 Order.

Wyckoff argues that dismissal of the sixth cause of action, by which plaintiffs seek an award of attorneys' fees, is warranted because plaintiffs are not the prevailing parties. Wyckoff, on the other hand, contends that its counterclaim for "reasonable attorneys' fees, costs, disbursements and interest incurred in successfully defending this action . . ." should be granted against plaintiffs Malden, Bennett, Weingart and Chaves, jointly and severally, pursuant to Article 19 of plaintiffs' leases.

Plaintiffs, in opposition, argue that Wyckoff's summary judgment motion should be denied because they "can establish that the subject lofts *are capable of being legalized* for residential usage through a variance or pursuant to Article 7-B of the [MDL]" (emphasis added). Plaintiffs submit an expert affidavit from Arthur Atlas, an architect, who attests that

although "the building is located within an M1-1 Zoning District" "the building may be legalized for residential usage with a Zoning Variance upon application to the Board of Standards and Appeals." In addition, plaintiffs argue that "many, if not most, buildings in the immediate neighborhood of the [B]uilding set within this zoning district, are residential."

Plaintiffs also argue that Wyckoff's summary judgment motion should be denied as premature, pursuant to CPLR 3212 (f), because they have not deposed the owner's former architect, Henry Radusky, regarding whether or not Wyckoff's predecessor directed him to seek a residential variance. Plaintiffs also seek to depose Wyckoff regarding its "intention to file for a zoning variance . . . and that its intended use for the building is as a factory."

Wyckoff, in reply, argues that the Building cannot qualify for rent stabilization, as a matter of law, because "[t]here is no dispute that the Building is in an M1-1 zoning district . . . has a manufacturing Certificate of Occupancy and no one has ever applied for or obtained a zoning variance for the Building." Wyckoff notes that plaintiffs' expert, Arthur Atlas, "actually reinforces the undisputed facts . . ." and "admits that the Building is located in a M1-1 zoning district, which does not permit residential use as-of-right, and states that there would need to be (but there has never been) a zoning variance . . ." While plaintiffs contend that Wyckoff "could" obtain a variance, Wyckoff argues that "[p]laintiffs provide no basis for compelling a building owner to seek a variance . . ."

Wyckoff contends that "[p]laintiffs raise numerous baseless arguments in their opposition papers in an attempt to feign material issues of fact[,]" including "the lawful residential use of certain buildings across the street which were built as residences in 1905 . . ." Wyckoff asserts that the residential nature of those buildings are irrelevant because they "were legally constructed well before the original 1916 New York Zoning Resolution, which first established the 'business' use district . . ." and, therefore, were grandfathered in.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

"The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez*, 68 NY2d at 324; *see also Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

The court must evaluate whether the issues of fact alleged by the opposing party are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [1987]; *Columbus Trust Co. v Campolo*, 110

AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat a motion for summary judgment (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Spodek v Park Prop. Dev. Assoc.*, 263 AD2d 478 [1999]). "[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment" (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Lastly, if there is no genuine issue of fact, the case should be summarily determined (*Andre*, 35 NY2d at 364).

As this court held in the 2017 Order, the Second Department has repeatedly held that:

> "[i]n order to obtain the protection offered by the Rent Stabilization Law for illegally converted commercial premises, a tenant must demonstrate that the owner acquiesced in the unlawful conversion undertaken at the expense of the occupants, *the premises were eligible for residential use by reason of the applicable zoning*, and the owner, during the pendency of the proceeding in which the tenants sought Rent Stabilization Law protection, actually sought to legalize the residential use" (*Sheila Properties, Inc. v A Real Good Plumber, Inc.*, 59 AD3d 424, 426 [2009] [emphasis added]; *see also Bennett v Hawthorne Vill., LLC*, 56 AD3d 706, 709-710 [2008]; *315 Berry St. Corp. v Hanson Fine Arts*, 39 AD3d 656, 657 [2007]).

Here, there is no dispute that the Building is located in a M1-1 Manufacturing Zoning District and is, therefore, not eligible for residential use by reason of the applicable zoning. Furthermore, as plaintiffs' concede, the owner *never obtained* a zoning variance permitting residential use of the Building. For this reason, plaintiffs cannot obtain the protection offered by the RSL for the Building, as a matter of law. Plaintiffs, in opposition, failed to raise any triable issue of fact to preclude summary judgment. The mere fact that Wyckoff has the *ability* to seek a variance is irrelevant because no variance was obtained. In addition, the residential nature of the buildings in the neighborhood is entirely irrelevant. Consequently, dismissal of plaintiffs' first cause of action for a declaration that the Building is subject to

the RSL, is warranted, and Wyckoff is entitled to a declaration that the Building is not subject to the RSL.

Plaintiffs' second cause of action for an injunction requiring Wyckoff to register the Building with the DHCR as subject to the RSL and the third causes of action for an injunction requiring Wyckoff to issue rent-stabilized renewal leases are also subject to dismissal because the Building is not subject to the RSL.

Plaintiffs' fourth cause of action, which seeks a declaration that Wyckoff is prohibited from collecting rent from plaintiffs, is dismissed. The 2018 Order required plaintiffs' to pay $3,500 use and occupancy *pendente lite*, however, there is no genuine justiciable controversy regarding plaintiffs' obligation to make *future* rental payments. There is no dispute that plaintiffs' month-to-month tenancies were terminated and Wyckoff is presently seeking to evict plaintiffs from the Building in the pending Housing Court holdover proceeding. Similarly, plaintiffs' fifth cause of action for an injunction enjoining Wyckoff from terminating their tenancies and from commencing holdover eviction proceedings against them in Housing Court is dismissed as moot, since this court previously denied plaintiffs such relief in the 2017 Order.

Plaintiffs' sixth cause of action for an award of reasonable attorneys' fees, pursuant to the terms of plaintiffs' leases, is also dismissed. Article 19 of plaintiffs' leases provides that "Owner" is entitled to reasonable attorneys' fees and costs if it prevails in any action or proceeding regarding tenants' default in the payment of rent. There is no provision in the leases that entitles plaintiffs to an award of attorneys' fees. In addition, under the plain terms of the leases, Wyckoff is not entitled to summary judgment on its counterclaim for an award of reasonable attorneys' fees and costs because this action did not involve plaintiffs' default in the payment of rent. Accordingly, it is

ORDERED that the branches of Wyckoff's summary judgment motion seeking to dismiss the first, second, third, fourth and sixth causes of action are granted; and it is further

ORDERED that the branch of Wyckoff's summary judgment motion seeking to dismiss the fifth cause of action as moot is granted; and it is further

ORDERED, ADJUDGED AND DECLARED that the Building is not subject to and covered under the RSL by virtue of the ETPA; and it is further

ORDERED that the branch of Wyckoff's motion seeking summary judgment on its counterclaim for an award of reasonable attorneys' fees, costs and disbursements is denied.

This constitutes the decision, order and judgment of the court.

ENTER,

J. S. C

Karen B. Rothenberg
Justice, Supreme Court

FILED
KINGS COUNTY CLERK
2018 DEC 24 AM 8:10