Bowery 8385 LLC v 83-85 Bowery Tenants' Assn.
2017 NY Slip Op 30977(U)
May 8, 2017
Supreme Court, New York County
Docket Number: 152054/16
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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BOWERY 8385 LLC,

Plaintiff,

-against-

83-85 BOWERY TENANTS' ASSOCIATION, YAN LING LIANG, SHU QING WANG, WENXUN SHI, SHANG WU CHEN, BI SHENG ZHENG, SHIXIANG LIN, LAI YU SZE, MEI FANG WANG, AL HUI ZHANG, AI HUI GUO OR, XIU QIN GUO, MEI HUI ZHANG, ALICE RUOYING CHAN, DONG YI CHEN, RONG LIN, LAN YING CHEN, ENIYA CHEN, DE AI CHEN, HANG WANG, XIAOLI WANG, MEE TON CHENG, YING HONG, XING MING WANG, AN JING JIN, MEE CHUAN CHENG, YAN LEE HEE, QIU RONG WANG, LIN HAV, BING REN XUE, CAI JIN LIN, ZHEN LIN, YU ZHU YANG, MING SAI ZHANG, CHUNG FAI CHAN, TING HONG YANG, YIM LING CHAN, FENG PING DONG, CAI DIAN CHEN, PEN MING CHEN, ZI QIANG CHEN, JIN HUA HUANG, XIAN FENG HUANG, JI DUAN CHEN, DE YANG, YAQIN LI, QILAO CHEN and HAO LIN,

Defendants
(Tenants-Occupants),

and

JOHN DOE* and JANE DOE*,

Defendants
(Undertenants).

*First and/or last name(s) of Undertenants is/are fictitious and unknown to Plaintiff. The person intended is whosoever has possessory right to, or actually is in possession of, the premises herein described.

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DECISION AND ORDER
Index No. 152054/16
Mot. Seq. Nos. 002 and 003

KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
MOT. SEQ. 002 - PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT	
PLTF.'S ORDER TO SHOW CAUSE AND BETESH AFF. IN SUPP.	91, 93-118,125-126
KADIN AFF. IN SUPP.	92, 119-120
PLAINTIFF'S MEMO. OF LAW IN SUPPORT	121
ADDENDUM	122
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ANSWER	124
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REPLY MEMO. OF LAW	196-197

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action seeking, inter alia, a declaration that certain premises are not rent stabilized, plaintiff Bowery 8385 LLC, the owner of buildings located at 83 and 85 Bowery, New York, New York (collectively "the buildings"), moves (motion sequence 002): 1) pursuant to CPLR 3212, for summary judgment granting it a writ of ejectment against defendants on the second, third and sixth causes of action of its complaint or, in the alternative; 2) pursuant to CPLR 6301, 6311, and 6313, granting it a preliminary injunction enjoining defendant 83-85 Bowery Tenants' Association and the named defendants/tenants, their agents, or employees from, inter alia, making any further illegal alterations to the buildings; and 3) for such other and further relief as this Court deems just and

proper. Defendants move (motion sequence 003), by order to show cause pursuant to CPLR 3212, for 1) summary judgment declaring that the buildings are rent stabilized and were rent stabilized from the time they were built; 2) dismissing the remainder of the complaint pursuant to CPLR 3211 and 3212; and 3) pursuant to CPLR 603, severing any issues relating to overcrowding, allegedly unlawful alterations and alleged unlawful advertising for sublets to be tried in Civil Court; and 4) for such other and further relief as this Court deems just and proper. After oral argument, and upon a review of the motion papers and the relevant case law and statutes, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff Bowery 8385 LLC commenced this action by filing a summons and verified complaint against the defendants named in the caption on March 10, 2016. Docs. 1, 2.[1] In the complaint, plaintiff alleged, inter alia, that it owned the buildings located at 83 and 85 Bowery, New York, New York pursuant to a deed dated June 3, 2013. Doc. 2, at par. 77. Defendant 83-85 Bowery Tenants' Association was an unincorporated association and the other defendants were tenants or undertenants at 83 or 85 Bowery in New York, New York. Doc. 2, at pars. 2-75.

In the complaint, plaintiff sought removal of the tenants of the apartments at 83 and 85 Bowery due to the fact that the buildings had dangerous structural deficiencies including "broken or defective sloping wood floors; sagging sloping stairs and floors; broken or defective floor joists; and/or broken or defective treads and risers." Id., at pars. 78-81. Plaintiff maintained that the

[1]Unless otherwise noted, all references are to the document numbers of the papers filed with NYSCEF. The papers considered which were specifically submitted in connection with motion sequences 002 and 003 are listed above.

Department of Buildings ("DOB") and the Department of Housing Preservation and Development ("HPD") issued violations against the buildings and that, if such violations were not remedied, the buildings could collapse. Id., at par. 82. In order to restore structural stability to the buildings, plaintiff alleged that it was necessary to install new structural framing, a process which would require the current month-to- month tenants or other occupants to vacate the premises. Id., at pars. 85-86. On or about January 22, 2016, Thirty (30) Day Notices of Termination were served on defendants terminating their tenancies as of February 29, 2016. Id., at par. 89. Since that time, plaintiff has not accepted any rent from defendants, who remain in possession of the apartments in the buildings. Id., at pars. 93, 95.

Plaintiff further maintained that the buildings were not subject to the New York City Rent Stabilization Law ("RSL"), the Rehabilitation Law ("Rent Control"), or the Emergency Tenant Protection Act ("ETPA"). Id., at par. 96.

As a first cause of action, plaintiff sought a permanent injunction enjoining defendants from using and occupying the buildings due to their dangerous condition. Id., at pars. 99-107.

As a second cause of action, plaintiff sought a judgment declaring that 83 Bowery was not subject to the RSL, Rent Control or the ETPA. Id., at pars. 108-122. Plaintiff alleged that 83 Bowery was completed on September 7, 1949 as a Class "B" lodging house and that, as of January 1, 1974, it contained 166 cubicles and was used transiently and for commercial purposes.

As a third cause of action, plaintiff sought a judgment declaring that 85 Bowery was not subject to the RSL, Rent Control or the ETPA. Id., at pars. 123-137. Plaintiff alleged that 85 Bowery was completed on September 7, 1949 as a Class "B" lodging house and that, as of January 1, 1974, it contained 129 cubicles and was used transiently and for commercial purposes.

As a fourth cause of action, plaintiff alleged that, even if 83 Bowery were subject to rent stabilization on January 1, 1974, the building was not subject to the RSL, Rent Control or the ETPA because it was substantially rehabilitated as family units after that date. Id., at pars. 139-146. Specifically, alleged plaintiff, 83 Bowery was converted from a Class "B" lodging house containing 166 cubicles to 12 Class "A" apartments. The renovation was completed on June 24, 1981, when the building was issued Certificate of Occupancy ("COO") number 81467.[2]

As a fifth cause of action, plaintiff alleged that, even if 85 Bowery were subject to rent stabilization on January 1, 1974, the building was not subject to the RSL, Rent Control or the ETPA because it was substantially rehabilitated as family units after that date. Id., at pars. 147-154. Specifically, alleged plaintiff, 85 Bowery was converted from a Class "B" lodging house containing 129 cubicles to 16 Class "A" apartments. The renovation was completed in November, 1980, when the building was issued COO number 80890.[3]

As its sixth cause of action, plaintiff alleged that it was entitled to an order of ejectment against defendants pursuant to Real Property Law § 232-a, Article 6 of the Real Property Actions and Proceedings Law ("RPAPL"), and RPAPL § 735 since the latter failed to vacate the premises by February 29, 2016, the day their rights to occupy the premises expired. Id., at pars. 155-161. Plaintiff also demanded that it be granted possession of the premises and damages. Id., at par. 161.

As its seventh cause of action, plaintiff alleged that defendants were obligated to pay it the fair market value for the use of the premises from March 1, 2016 until the present. Id., at pars. 162-

[2]The final COO for 83 Bowery was issued after an inspection on May 29, 1981. Doc. 108.

[3]The final COO for 85 Bowery was issued after an inspection on November 21, 1980. Doc. 110.

165.

On or about March 15, 2016, plaintiff moved, by order to show cause (mot. seq. 001), seeking to consolidate the Civil Court proceeding entitled *Bowery 8385 LLC v Shu Qing Wang, et al.*, L & T Ind. No. 60243/15[4] with the captioned action; to stay the Civil Court proceedings relating to violations at the premises entitled *83-85 Bowery Tenants' Association v Bowery 8385, LLC, et al.*, HP Ind. No. 1803/15 and *83-85 Bowery Tenants' Association v Bowery 8385, LLC, et al.*, HP Ind. No. 1804/15 ("the HP proceedings") pending a final determination of the captioned action; granting plaintiff a preliminary injunction enjoining defendants from using the building until the final determination of the captioned action; and for an immediate hearing for a declaration that the buildings were not subject to the RSL, Rent Control, or the ETPA. Docs. 6-36.

Defendants joined issue by service of their answer on April 19, 2016. Doc. 49.[5] In their answer, defendants alleged as a counterclaim, inter alia, that the were entitled to a declaration that the buildings were rent stabilized because they "were built before 1974 and each contain[ed] more than 6 units." Id., at pars. 73-75.

By so-ordered stipulation dated September 6, 2016, the parties resolved motion sequence 001 by agreeing to stay the HP actions and the dates for the correction of violations pending the hearing of the parties' imminent motions for summary judgment on the rent stabilization issue. Doc. No. 88.

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[4]This proceeding was discontinued by so-ordered stipulation dated March 15, 2016. Doc. 70.

[5]The answer was verified by defendants Shu Qing Wang and Yaqin Li, identified in the answer as tenant representatives. Doc. 49, at par. 2. The verifications are devoid of any indication that Wang and/or Li verified the answer on behalf of any of the other defendants. Doc. 49. In an affidavit of translation, Wendy Leung stated that she translated the answer for Wang and Li. Id.

The stipulation further provided that the defendants were permitted to "use or occupy their individual units until the issue of their rent regulatory status [was] determined in this action by way of the parties' motions for summary judgment" and that "[d]efendants shall use and occupy the units in accordance with all laws and expired leases." Id. That branch of plaintiff's motion seeking a preliminary injunction was withdrawn without prejudice. Id.

On or about September 29, 2016, plaintiff moved (mot. seq. 002), pursuant to CPLR 3212, for summary judgment granting a writ of ejectment on its second, third, and sixth causes of action based on the fact that the buildings were not rent stabilized or, in the alternative, pursuant to CPLR 6301, 6311, and 6313, granting it a preliminary injunction, pending the final determination of this action, enjoining defendants, their agents, or employees from, inter alia, making any further illegal alterations to the buildings. Doc. 126. Plaintiff also sought to stay and toll all violations issued to it relating to the buildings by the DOB, the Environmental Control Board ("ECB"), and the New York City Fire Department ("FDNY"). Id.

In support of the motion, plaintiff submits, inter alia, the affidavit of Joseph Betesh, managing member of plaintiff (Doc. 91); the affidavit of Cary Kadin, a principal of TenanTracers, an investigation company (Doc. 92); the deed to the premises (Doc. 94); leases for units at 83 Bowery (Doc. 96); leases for units at 85 Bowery (Doc. 97); rent rolls for 83 and 85 Bowery (Doc. 98); the affidavit of Anthony Somefun, a professional engineer (Doc. 99); the affidavit of Michael Cetera, a registered architect (Doc. 100); notices of termination with affidavits of service thereof (Doc. 101); the summons and verified complaint (Doc. 102); prior court orders, including the stipulation resolving motion sequence 001 (Docs. 104-106); COOs for the buildings (Docs. 107-110); photographs (Doc. 113); TenanTracers reports for the buildings (Docs. 114-115); floor plans

(Doc. 116); defendants' answer (Doc. 124); and plaintiff's memorandum of law (Doc. 121).

On or about November 7, 2016, defendants moved (mot. seq. 003), by order to show cause, for summary judgment pursuant to CPLR 3212 declaring that the buildings are rent stabilized and were rent stabilized from the time they were built; dismissing the remainder of the complaint pursuant to CPLR 3211 and 3212; and, pursuant to CPLR 603, severing any issues relating to overcrowding in, and allegedly unlawful alterations to, the buildings, as well as any issues relating to allegedly unlawful advertising for sublets therein, to be tried in Civil Court. Doc. 168.

In support of their motion, defendants submit, inter alia, the affidavit of defendant Shu Qing Wang (Doc. 133); the affidavit of architect John Monroe (Doc. 134); a memorandum of law in support of defendants' motion and in opposition to plaintiff's motion (Doc. 135); leases (Doc. 136); the complaint (Doc. 139); the answer (Doc. 142); the affidavit of engineer Christine Hobson (Doc. 143); the affidavit of accredited lead paint inspector Edward Olmstead (Doc. 144); documents relating to construction performed at 83 Bowery, including permits, applications to perform work, COOs, and owner's cost affidavit (Docs. 148-149); drawings filed with the DOB 10/23/79 (Doc. 150); drawings approved by the DOB on 4/9/81 (Doc. 151); documents relating to construction performed at 85 Bowery, including permits, applications to perform work, COOs, and owner's cost affidavit (Doc. 152); COOs for 83 Bowery (Doc. 153); COOs for 85 Bowery (Doc. 154); and HPD "I-Cards" for the buildings (Doc. 158).

In an affirmation dated November 3, 2016, counsel for nonparty the City of New York ("the City") opposed only that branch of plaintiff's motion seeking a preliminary injunction staying and tolling all violations against plaintiff. Docs. 164-166. The City also submitted a memorandum of law in opposition plaintiff's application for a preliminary injunction. Doc. 167.

In opposition to defendants' motion, plaintiff submits, inter alia, the affidavit of architect Michael Cetera, dated November 21, 2016. Cetera avers that the buildings underwent a substantial rehabilitation resulting in new COOs being issued to 83 Bowery and 85 Bowery in 1981 and 1980, respectively (Docs. 169-171). Plaintiff also submits the affidavit of Cary Kadin of TenanTracers dated November 21, 2016 (Docs. 172-173) and a memorandum of law (Doc. 174).

In reply, defendants submit the affidavit of architect John Monroe dated December 1, 2016 (Doc. 177); a report dated December 1, 2016 by lead paint risk assessor Edward Olmstead (Doc. 178); affidavits of tenants denying overcrowding in their apartments (Docs. 177-195); and a memorandum of law (Doc. 196).

POSITIONS OF THE PARTIES:

In a memorandum of law in support of its motion filed September 27, 2016, plaintiff argues that it is entitled to summary judgment because the buildings are not rent stabilized. Specifically, plaintiff maintains that the buildings were Class B lodging houses used transiently prior to January 1, 1974, the date of the enactment of the ETPA (Chapter 576, Laws of 1974) and that, after that date, the buildings were converted to Class A apartments. Doc. 121. Plaintiff asserts that, although rent stabilization protection was not given to Class B multiple dwellings prior to 1981 (see former New York City Code sec. YY51-3.0), a 1981 amendment to the RSL extended that protection as of June 4, 1981. Ch. 675 of the Law of 1981, amending subd. (b) of NYC Code section YY51-3.0. However, by May 29, 1981 and November 21, 1980, 83 and 85 Bowery, respectively, had already been converted to Class "A" dwellings. Plaintiff maintains that, since the buildings were no longer Class "B" lodging houses as of the date of the enactment of the amendment, the change in the law

did not subject the buildings to the RSL.

Plaintiff further asserts that the Class "B" cubicles in the buildings did not qualify as housing accommodations because, as of 1969, when the RSL was enacted, and on January 1, 1974, when the ETPA became effective, they were used on a transient basis and thus the space could not be characterized as a home, residence or dwelling unit.

Plaintiff maintains that, if it is granted summary judgment on its second and third causes of action, then its sixth cause of action for a writ of ejectment must be granted pursuant to RPL 232-a, RPAPL Article 6, and RPAPL 735 since defendants' month-to-month tenancies were properly terminated.

Alternatively, plaintiff argues that it is entitled to a preliminary injunction preventing the current tenants and occupants at the premises from living in overcrowded conditions which pose an imminent threat to the structural integrity of the building. It asserts that the joists of the sole common stairway in each building are in disrepair and that surveillance footage establishes that there are too many occupants in the buildings and their weight cannot be supported by the floors which are in place. Surveillance footage of what plaintiff claims is an excessive number of people occupying the building was introduced through the affidavit of Cary Kadin of TenanTracers. According to the affidavit of licensed engineer Anthony Somefun, P.E., annexed to plaintiff's motion, the violations issued to the building cannot be remedied while the premises are occupied. Doc. 99, at par. 12.

In a memorandum of law filed November 2, 2016 in opposition to plaintiff's motion and in support of defendants' motion (Doc. 135), defendants assert that the buildings are rent stabilized since they were built prior to January 1, 1974 and contain at least 6 dwelling units. Defendants

assert that the status of the buildings as of 1974 is irrelevant since they were converted to have more than 6 dwelling units when they were converted to Class A dwellings in 1980 and 1981.

Relying on *Gracecor Realty Co. v Hargrove*, 90 NY2d 350 (1997), defendants argue that cubicles in a lodging house are subject to rent stabilization protection. They further assert that the case of *Tegreh Realty Corp. v Joyce*, 88 AD2d 820 (1st Dept 1982) held that the June, 1981 amendment of RSL § 26-504(b), which extended rent stabilization coverage to Class B multiple dwellings, held that the statute was retroactive to January 1, 1974, the date on which the ETPA became effective.

Defendants, relying on *Hickey v Bomark Fabrics*, 120 Misc2d 597 (App Term 1st Dept 1983), also assert that the alleged substantial rehabilitation of the buildings in 1980 and 1981 did not remove them from the protection of the RSL.

Further, defendants, relying on *Woodcrest Mgmt. Corp. v DHCR*, 2 AD3d 172 (1st Dept 2003), maintain that RSL § 2520.11(e) and New York State Division of Housing and Community Renewal ("DHCR") Operational Bulletin 95-2 ("OB 95-2") retroactively apply to the alleged substantial rehabilitation of the premises and that plaintiff failed to establish that such a rehabilitation was undertaken. Specifically, defendants maintain that the RSL and OB 95-2 require that 75% of the building's systems be replaced, including plumbing; heating; gas supply; electrical wiring; intercoms; windows; roof; elevators; incinerators or waste compactors; fire escapes; interior stairways; kitchens; bathrooms; floors; ceilings and wall surfaces; pointing or exterior surface repair as needed; and all doors and frames and that plaintiff failed to make this showing. In support of this position, defendants rely on the affirmation of their architect John Monroe. Doc. 134.

Defendants also argue that plaintiff is not entitled to a preliminary injunction since it did not

allege illegal activity by defendants in its complaint. They further assert that, to the extent any overcrowding exists, it is limited to three violations involving only four of the 27 units in the buildings.[6] Christine Hobson, a licensed professional engineer, submits an affidavit opposing plaintiff's request for a preliminary injunction, stating that "[w]hile it is true that wood beams and joists along the staircases of both buildings have deterioration due to water infiltration and age related fatigue and that there are other conditions at the buildings which must be addressed, necessary repairs can be made with the tenants in place." Doc. 143, at par. 11.

In an affidavit in opposition to plaintiff's motion filed November 3, 2016 (Doc. 164), the City argues that plaintiff is not entitled to a preliminary injunction since the penalties it faces as a result of the violations issued to the buildings are solely financial in nature and thus plaintiff would not suffer irreparable harm if the injunction were not granted. The City further asserts that, since it, and not plaintiff, is likely to prevail on the merits, plaintiff is not entitled to a preliminary injunction.

In an affidavit filed November 21, 2016 in further support of plaintiff's motion and in opposition to defendants' motion (Doc. 169), Cetera avers that the buildings underwent a substantial rehabilitation after 1974. In reaching this conclusion, he reviewed numerous documents relating to 83 Bowery (Doc. 170), including: a 1949 COO reflecting that the building was a Class B lodging house containing 166 cubicles; a current COO reflecting that the building was converted to a Class A multiple dwelling containing 12 apartments on June 24, 1981; a 1978 altered building application proposing to convert the Class B lodging house into Class A apartments; floor plans showing the removal of the 166 cubicles to form the 12 new apartments; 1978 plumbing specifications reflecting

[6]Although the COOs reflect that the buildings contained a total of 28 Class A units after work was completed on them in 1980 and 1981, defendants' attorney states that there are now 27 and gives no explanation for this discrepancy.

work performed on the plumbing and mechanical systems in the building including, but not limited to, the installation of 4 new water closets, 4 new water basins, 4 new bathtubs, and 4 new sinks on each of the 2nd, 3rd, 4th, and 5th floors; DOB permits to perform work at the premises; an owner's cost affidavit, dated May 6, 1981, reflecting that at least $240,000 was spent on renovating the premises; an HPD/DOB inspection report reflecting that the renovation work was not commenced until March 29, 1981 and that it complied with all applicable codes and requirements; drawings of the plans for both buildings, filed with the DOB in October of 1979; and a drawing of 83 Bowery approved by the DOB on April 9, 1981.

Cetera also reviewed several documents relating to 85 Bowery (Doc. 171), including a 1949 COO reflecting that the building was a Class B Lodging House containing 129 cubicles; a current COO dated November 23, 1980 reflecting that the building was converted to a Class A multiple dwelling containing 16 Class A apartments; a 1978 altered building application which proposed to convert the Class B Lodging House into a Class A multiple dwelling; plans for the building; 1978 plumbing specifications detailing the work performed on the plumbing and mechanical systems of the building including, but not limited to, the installation of 5 new water closets, 5 new water basins, 5 new bathtubs, and 5 new sinks on each of the 2nd, 3rd, 4th, and 5th floors; an owner's cost affidavit reflecting that at least $240,000 was spent to renovate the building; and a DOB permit.

In a memorandum of law in further support of plaintiff's motion and in opposition to defendants' motion (Doc. 174), plaintiff argues, inter alia, that it is entitled to a preliminary injunction because the use of the building by an excessive amount of people poses a danger to the occupants of the building, the general public, and first responders.

Plaintiff further argues that the buildings are not rent stabilized and that it is undisputed that

the buildings are not subject to rent control. Specifically, plaintiff argues that, since the buildings did not contain housing accommodations as of January 1, 1974 and were converted to housing accommodations after 1974 but prior to the enactment of Ch. 675 of the Laws of 1981, they were not subject to the RSL in the first instance and did not become subject to the RSL simply because they were converted to Class A multiple dwellings in November, 1980 and June, 1981.

In addition, plaintiff asserts that Shu Qing Wang, who submitted an affidavit in support of defendants' motion, did not establish that any permanent residents lived in the building prior to 1974. Indeed, asserts plaintiff, Wang's affidavit reflects that no tenant living in the buildings resided there prior to 1991 (Doc. 133, at par. 12), 17 years after the enactment of the ETPA.

Next, plaintiff asserts that, although the case of *Tegreh Realty Corp. v Joyce*, 88 AD2d 820 (1st Dept 1982) retroactively applied the 1981 amendment to the ETPA, thereby extending rent stabilized protection to Class B units, it did so only as to those tenants still in possession at the time of the amendment. Thus, maintains plaintiff, since no tenant was in possession in 1974 or 1981, the ETPA cannot be applied retroactively under the circumstances of this case.

In a reply affidavit dated December 5, 2016, Monroe avers that an asbestos and lead testing report made by Edward Olmstead after inspecting the premises on November 30, 2016 reflects that there is lead paint in the common hallway near the stairs and on the stairs and railings at both buildings, as well as asbestos floor tiles in the common hallways in the buildings. Doc. 177. Monroe further asserts that the buildings were not used for commercial purposes when they were Class B multiple dwellings. Additionally, Monroe maintains that Cetera's affidavit fails to establish that the buildings underwent a substantial rehabilitation removing them from protection by the RSL since he merely stated that the bathroom kitchens and fixtures were replaced and did not establish

that 75% of the buildings' systems were replaced as required by DHCR OB 95-2. Id.

In support of defendants' motion, they submit affidavits of 17 tenants representing that the premises are not overcrowded. Docs. 179-195. The tenants who executed the affidavits represented that they moved into their respective apartments between 1979 and 2012. Id.[7]

In a memorandum of law in further support of defendants' motion, filed December 5, 2016, defendants argue, inter alia, that, because the buildings each had six or more residential units and were built prior to 1974, they were rent stabilized pursuant to RSL § 26-504. Defendants urge that it is irrelevant whether the buildings were used transiently or permanently prior to 1974 since the cubicles rendered the premises rent stabilized regardless of whether they were used on a permanent basis. Further, argue defendants, once the buildings became converted to apartment buildings containing 6 or more units, they became rent stabilized. They further assert that, even if the buildings had been rent stabilized, they were not substantially rehabilitated after 1974 within the meaning of ETPA § 5(a)(5). Defendants maintain that, in order to establish such a substantial rehabilitation, plaintiff must prove compliance with OB 95-2, which is retroactive, and that plaintiff failed to do so.

LEGAL CONCLUSIONS:

The Parties' Motions For Summary Judgment

"The proponent of a summary judgment motion must demonstrate that there are no material issues

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[7]Although the affidavit of Shu Qing Wang submitted in support of the motion represents that no current tenant lived in the buildings prior to 1991, some tenants state in their affidavits in support of defendants' motion that they moved into the buildings prior to that year. Docs. 179 (1989); Doc. 187 (1979); and Doc. 190 (1984). However, those tenants do not represent that they have lived in their apartments continuously since that time.

of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). If the movant fails to make this showing, the motion must be denied regardless of the sufficiency of the opposing papers. *Id.* Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact. *See Zuckerman v City of New York*, 49 NY3d 557 (1989); *People ex rel Spitzer v Grasso*, 50 AD3d 535 (1st Dept 2008). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation." *Morgan v New York Telephone*, 220 AD2d 728 (2d Dept 1985).

Here, neither party has established, as a matter of law, that the buildings were or were not rent stabilized before they underwent what plaintiff alleges was a substantial rehabilitation which led to the issuance of updated COOs in 1980 and 1981.

Assuming that the buildings were rent stabilized prior to 1980 and 1981, [RSC] 2520(e), as supplemented by OB 95-2, exempts from rent stabilization "housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after January 1, 1974." Warren A. Estis and Jeffrey Turkel, *Substantial Rehabilitation of Buildings as Family Units*, NYLJ, July 2, 2014 at 5, col 2. "To briefly summarize OB 95-2, DHCR will find that a substantial rehabilitation has taken place where 75 percent of 17 enumerated building-wide apartment systems (such as plumbing, heating, and gas supply) 'have been completely replaced with new systems.' OB 95-2 additionally provides that the rehabilitation had to have been commenced in a building 'that was in a substandard or seriously deteriorated condition,' further stating that '[w]here the rehabilitation was commenced in a building that was at least 80% vacant of residential tenants, there

shall be a presumption that the building was substandard or seriously deteriorated at that time.'" Id.

If the buildings were rent stabilized prior to the alleged substantial rehabilitation, an issue of fact would exist regarding whether the said rehabilitation removed the buildings from the protection of the RSL. Although the DHCR has the discretion to apply the criteria for substantial rehabilitation set forth in OB 95-2 (*see Cassorla v Foster*, 2 Misc 3d 65 [App Term 1st Dept 2004]), and the Appellate Division has held that the DHCR did not abuse its discretion where it applied the criteria set forth in OB 95-2 to a rehabilitation performed prior to the enactment of that operational bulletin (*see Woodcrest Mgmt. Corp. v Div. of Hous. & Cmty. Renewal*, 2 AD3d 172 [1st Dept 2003]), OB 95-2 does not itself provide that it governs improvements made prior to its effective date of December 15, 1995. It is thus unclear whether OB 95-2 must be applied to the work performed by the owner of the buildings between 1978 and 1981.

The ETPA provides, at section 8632 (a)(7) of the Unconsolidated Laws, that

> In any action or proceeding before a court wherein a party relies for a ground of relief or defense or raises issue or brings into question the construction or validity of this act or any regulation, order or requirement hereunder, the court having jurisdiction of such action or proceeding may at any stage certify such fact to the [DHCR]. The [DHCR] may intervene in any such action or proceeding.

McKinney's Unconsol. Laws 8632(a)(7).

Since it is unsettled whether OB 95-2 must be applied to improvements made before its effective date, and since the determination of the rent stabilization status of the buildings in this matter hinges on matters which are within the specific expertise of DHCR, this Court, in its discretion, certifies this matter to DHCR for determination of the rent regulatory status of the buildings. *See Draper v Georgia Props.*, 230 AD3d 455, 464 (1st Dept 1997, Andrias J., dissenting).

Defendants have failed to establish their entitlement to the remainder of the relief they requested. They have not established their entitlement to the dismissal of plaintiff's remaining claims pursuant to CPLR 3211 or 3212. Nor does this Court find that defendants are entitled, at this time, to severance of any issues pertaining to illegal alterations and advertising, as well as overcrowding, which they assert should be determined by the Civil Court, since there is currently in place a stipulation requiring defendants to occupy the premises in a legal manner pending the determination of the parties' motions for summary judgment.

Plaintiff's Motion for a Preliminary Injunction

As noted above, plaintiff argues that, if it is not granted summary judgment declaring that the buildings are not rent stabilized, then it is entitled to a preliminary injunction enjoining defendant 83-85 Bowery Tenants' Association and the named defendants/tenants, their agents, or employees from, inter alia, making any further illegal alterations to the buildings. It also seeks a stay of the HP proceedings pending a final determination of the captioned action.

"A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing. Accordingly, a preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party." *1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18, 23 (1st Dept 2011). Whether to grant a preliminary injunction is a matter to be determined in the discretion of the court. *See Cityfront Hotel Assoc. Ltd. Partnership v Starwood Hotels & Resorts Worldwide, Inc.*, 142 AD3d 873 (1st Dept 2016).

Initially, the branch of plaintiff's motion seeking a preliminary injunction is denied because it is not necessary to grant such relief. As noted previously, by so-ordered stipulation dated September 6, 2016, the parties resolved motion sequence 001 by agreeing to stay the HP actions and the dates for the correction of violations pending the hearing of the parties' imminent motions for summary judgment. Doc. No. 88. The stipulation further provided that the defendants were permitted to "use or occupy their individual units until the issue of their rent regulatory status [was] determined in this action by way of the parties' motions for summary judgment" and that "[d]efendants shall use and occupy the units in accordance with all laws and expired leases." Id. Thus, the parties have already stipulated that the HP proceedings would be stayed pending a final determination of the captioned action and that no illegal alterations could be made to the buildings.

Even if the parties had not stipulated to the terms above, that branch of plaintiff's motion seeking a preliminary injunction would nevertheless be denied since there is a sharp factual dispute preventing the granting of such relief. Specifically, licensed engineer Anthony Somefun opines in support of plaintiff's motion that the violations which need to be cured cannot be remedied with the defendants/tenants residing at the premises. Doc. 99, par. 12. In opposition, defendants' licensed professional engineer Christine Hobson states that the repairs to the buildings can be made with the defendants/tenants in place. Doc. 143, par. 11. Where, as here, the facts are in such sharp dispute, this Court cannot conclude that plaintiff established its right to injunctive relief. *See Omakaze Sushi Rest. v Ngan Kam Lee*, 57 AD3d 497 (2d Dept 2008).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of plaintiff's motion (mot. seq. 002) seeking summary judgment, as well as defendants' motion for summary judgment (mot. seq. 003), are referred to the New York State Division of Housing and Community Renewal solely for a determination regarding whether 83 Bowery and 85 Bowery, New York, New York, are subject to the Rent Stabilization Law; and it is further,

ORDERED that the branch of plaintiff's motion (mot. seq. 002) seeking a preliminary injunction is denied; and it is further,

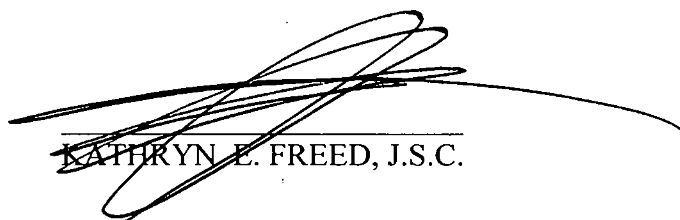
ORDERED that defendants' motion is otherwise denied; and it is further,

ORDERED that counsel for plaintiff is to serve a copy of this order with notice of entry upon all parties, the New York State Division of Housing and Community Renewal, the County Clerk's Office (Room 141B), and the Clerk of the Trial Support Office (Room 158) within 30 days of the date hereof; and it is further,

ORDERED that a status conference shall be conducted with this Court by telephone on November 30, 2017 at 3:00 p.m., and that the parties are directed to contact the Clerk of Part 2 at (646) 386-3852 at that time; and it is further,

ORDERED that this constitutes the decision and order of this Court.

Dated: May 8, 2017 ENTER:



KATHRYN E. FREED, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT