

Gubelmann v New York City Loft Bd.

2020 NY Slip Op 34024(U)

December 7, 2020

Supreme Court, New York County

Docket Number: 151974/2019

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

JAMES GUBELMANN,

Petitioner,

For a Judgment under Article 78 of the Civil Practice
Law and Rules,

INDEX NO. 151974/2019

MOTION DATE 12/06/2019

MOTION SEQ. NO. 001 002

- v -

THE NEW YORK CITY LOFT BOARD, CYNTHIA LAM, and
FRANK LAM,

Respondents.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13, 14, 15, 16, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 72, 73, 74, 75, 76, 77, 78, 79, 88, 89, 90, 91, 95

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

The following e-filed documents, listed by NYSCEF document number (Motion 002) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 80, 83, 84, 85, 86, 87, 92, 94

were read on this motion to/for DISCONTINUE

ORDER

Upon the foregoing documents, it is

ADJUDGED that the motion of petitioner James Gubelmann to
discontinue this proceeding, without prejudice, pursuant to
3217(b), (Motion Sequence No. 002), is granted, and it is further

ORDERED that the cross motion of respondents Cynthia and Frank
Lams to dismiss the petition on its merits (Motion Sequence No.
001) is denied as moot.

DECISION

Petitioner James Gubelmann commenced this Article 78 special proceeding pursuant to CPLR 7803(3) and (4), challenging the determination made by respondent, New York City Loft Board (Loft Board). Such determination denied his application, as well as his request for reconsideration, for coverage and protected occupant status pursuant to Article 7-C of the Multiple Dwelling Law, §§ 280, et seq. (the Loft Law) and regulations.

In Motion Sequence Number 001, respondents Cynthia and Frank Lam (the Lams) cross-move for an order dismissing the petition, pursuant to CPLR 3211 (a) (2) (5) and (8), 7804 (f), and 217, on the grounds that (1) the court lacks subject matter and/or personal jurisdiction, (2) petitioner failed to exhaust his administrative remedies, and (3) the petition is time barred.

In Motion Sequence Number 002, petitioner moves for an order, pursuant to 3217 (b), seeking leave to voluntarily discontinue this proceeding without prejudice. The Loft Board does not oppose the motion (NYSCEF Doc. No. 81). However, the Lams argue, among other things, that given their pending cross motion for dismissal

for lack of jurisdiction and expiration of the statute of limitations, they are entitled to dismissal on the merits of petitioner's claim.

I. Background Facts

442 Broadway, New York, New York, the third-floor unit (the Unit) in the building owned by respondents, the Lams, is the subject of this proceeding.

Petitioner, the tenant and occupant of the Unit applied to the Loft Board for coverage for the unit and protected status for himself, as tenant, under the Loft Law (NYSCEF Doc. No. 1, Petition).

The New York City Office of Administration Trial and Hearings issued its By Report and Recommendation dated April 19, 2016 that denied petitioner's application on the grounds that because Unit 4B of the property failed to satisfy the physical criteria for coverage, there were only two rather than the requisite three qualifying units. Specifically, Unit 4B did not have a window opening onto a street or lawful yard or court (NYSCEF Doc. No. 5, Loft Board Report and Recommendation). Petitioner argues that the

Loft Board erred in denying his application, among other reasons, as it founded its determination on the lack of a window facing a street, lawful yard, or court in one of the three residential units, when the issue of a lack of a window facing a street, lawful yard or court of any of the Units had never been raised or any evidence elicited thereof.

On May 18, 2017, the Loft Board issued a determination denying petitioner's application. On June 23, 2017, petitioner filed an application for reconsideration. On November 15, 2018, the Loft Board issued an order denying petitioner's request for reconsideration. (NYSCEF Doc. No. 5, Loft Board Order No. 4819.)

Petitioner further alleges that as of June 25, 2019, the New York State Legislature amended the Loft Law, in particular, repealing, as prerequisite for coverage under Art. 7-C of the Multiple Dwelling Law, that each of three residential units have a window onto a street, lawful yard or court (NYSCEF Doc. No. 10 and 70, Bill Jacket Chapter 147 and Amended MDL 281, et seq.). Petitioner further argues that the amendments included a provision for retroactive applications of the amendments to pending

applications and provided, further, that no prior denial of a coverage application would be a basis for denial of a new application. By way of the determination of his reconsideration application, petitioner asserts that he has exhausted his administrative remedies and commenced this special proceeding by filing the instant petition on February 22, 2019.

II. Legal Analysis

Petitioner moves for an order, pursuant to CPLR 3217 (b), permitting him to withdraw his petition without prejudice.

CPLR 3217 (b) authorizes a court to grant a motion for voluntary discontinuance, upon terms and conditions as the court deems proper, where such is made more than 20 days after responsive pleadings are due. "While a determination upon such an application is generally within the sound discretion of the court, a party ordinarily cannot be compelled to litigate and, absent special circumstances, such as prejudice to adverse parties, a discontinuance should be granted." (Bank of Am., N.A. v Douglas, 110 AD3d 452 [1st Dept 2013]).

Here, the Lams have not established prejudice and no special circumstances have been shown to warrant denial of petitioner's motion. Nor is there any showing that petitioner sought the discontinuance only to avoid an adverse determination in this proceeding (Gonzalez v Kaye, 58 AD3d 578 [1st Dept 2009]).

The court disagrees with the Lams that this court has no discretion to dismiss this proceeding, where the issue of personal jurisdiction over the Lams is unresolved, as the petitioner's motion to discontinue constitutes a concession that this court lacks personal jurisdiction over the Lams (see Headley v Noto, 45 Misc2d 284 [Supt Ct, Kings Co 1965], affd, 24 AD2d 493 [notice of discontinuance filed in face of a motion to dismiss for lack of personal jurisdiction constitutes a concession that the court lacked such jurisdiction]).

Petitioner argues that the recent amendment to the Loft Law and his filing of two new coverage applications under such Loft Law amendment have rendered this proceeding moot. Unavailing is the Lams contention that the petitioner's refusal to consent to

a decision on the merits of their cross motion to dismiss is prejudicial, given petitioner's concession, with his motion to discontinue, that this court lacks jurisdiction over their persons.

12/7/2020
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input checked="" type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	