SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA ANNE CRANE** **PART** **IAS MOTION 15EFM**

Justice

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INDEX NO. 100207/2008

MUSHLAM, INC.

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 024

- v -

NAZOR, MARIE

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 024) 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 400, 401, 402, 408, 409, 411, 412, 413, 414, 415, 416

were read on this motion to/for RENEWAL.

Upon the foregoing documents, it is

In this protracted landlord/tenant dispute, defendants Maria Nazor (Nazor) and Peter Mickle (Mickle) (together, defendants) move by order to show for an order, pursuant to CPLR 2211 (e), granting them leave to renew a supplemental decision and order of the court (Jaffe, J.) entered October 18, 2018 granting plaintiff Mushlam, Inc. summary judgment on the first cause of action for ejectment based on a change in law. Upon granting renewal, defendants seek vacatur of the judgment of ejectment. Defendants also move, pursuant to CPLR 6301 and 6313, for a preliminary injunction and temporary restraining order enjoining plaintiff from spoliating any possible evidence that may be used to establish defendants' residential occupancy.

BACKGROUND

The court presumes familiarity with the history of this action as set forth in previous decisions in this action. Briefly, plaintiff is the owner of a six-story building located at 544 West 27th Street, New York, New York (the Building) (NY St Cts Elec Filing [NYSCEF] Doc No. 3,

complaint, ¶ 2). In May 1983, Nazor, nonparty Nicholas Barth (Barth) and the Building's prior owner entered into a lease for the fourth floor (*id.*, ¶¶ 3-4), whereupon Nazor and Barth subdivided the fourth floor into two live/work loft units and other work spaces. In 1993, the prior owner executed a lease modification and extension with defendants, which extended the lease term to May 31, 2003 (*id.*, ¶ 5). Plaintiff, who acquired the Building in 1995, did not renew defendants' lease upon its expiration in 2003, and, in 2007, it commenced this action for common-law ejectment and to recover unpaid use and occupancy. In a decision and order dated December 31, 2009, the court (Feinman, J.) granted plaintiff summary judgment on the ejectment claim (NYSCEF Doc No. 62). Following an amendment to Article 7-C of the Multiple Dwelling Law (the Loft Law),[1] the court (Feinman, J.), in a decision and order dated December 13, 2010, granted defendants' motion to amend its answer to assert a tenth affirmative defense for Loft Law coverage and vacated its prior order granting plaintiff summary judgment on the ejectment claim (NYSCEF Doc No. 161 at 24-25).

Despite obtaining leave to amend their answer to assert Loft Law coverage as an affirmative defense, defendants waited until March 2014 to file a coverage application with the New York City Loft Board (the Loft Board). The Loft Board denied the coverage application in April 2017. Plaintiff then moved to renew its earlier motion for summary judgment on its cause of action for ejectment (NYSCEF Doc No. 334). The court (Jaffe, J.) denied the motion without prejudice since defendants had filed an application for reconsideration with the Loft Board, and directed the parties to keep the court apprised of the Loft Board's determination (NYSCEF Doc

[1] Multiple Dwelling Law § 281 (5), added by L 2010, ch 135 § 1 and amended L 2010, ch 147 § 1, expanded the definition of what qualifies as an "interim multiple dwelling" to include buildings located north of West 24th Street, south of West 27th Street, west of Tenth Avenue and east of Eleventh Avenue that were used for residential purposes where three or more families lived independently from each other for 12 consecutive months between January 1, 2008 and December 31, 2009.

No. 359 [the February 2018 Order] at 3). After the Loft Board denied the reconsideration application in 2018, the court (Jaffe, J.), in a supplemental decision and order dated October 15, 2018 and entered October 18, 2018 (the October 2018 Order), granted judgment to plaintiff on the ejectment claim and directed it to submit a proposed order and judgment (NYSCEF Doc No. 377 at 1).

At the same time, defendants' Article 78 proceeding challenging the Loft Board's determinations on the coverage and reconsideration applications were transferred to the Appellate Division, First Department (NYSCEF Doc No. 185, May 6, 2019 decision and order, in *Matter of Nazor v New York City Loft Bd.*, Sup Ct, NY County, index No. 159870/2018 [*Nazor I*]). The Court consolidated the resolution of the substantial evidence issue raised in *Nazor I* with defendants' appeal of the February 2018 Order and the October 2018 Order and granted a stay of the ejectment proceedings (*see Mushlam, Inc. v Nazor*, 2019 NY Slip Op 65589[U] [1st Dept 2019]). The Court subsequently concluded that the Loft Board's determination on the coverage application was supported by substantial evidence and that the Loft Board had properly exercised its discretion in denying the reconsideration application (*see Matter of Nazor v New York City Loft Bd.*, 179 AD3d 609, 609-610 [1st Dept 2020], *rearg denied, lv denied* 2020 NY Slip Op 65795[U] [1st Dept 2020], *lv dismissed, lv denied* 35 NY3d 1053 [2020]). The Court also found that the October 2018 Order granting plaintiff summary judgment on its ejectment claim was not premature (*id.* at 610-611).

While *Nazor I* and the appeal in this action were pending, the Loft Law was amended once again. Multiple Dwelling Law § 281 (6) (a), as added by L 2019, ch 41 § 2, expanded the definition of an "interim multiple dwelling" to include buildings used for residential purposes where three or more families lived independently from each other for 12 consecutive months between January 1,

2015 and December 31, 2016 (the 2015-2016 Window). Defendants now move, pursuant to CPLR 2221 (e) (2), for leave to renew the October 2018 Order based on a change in law, and for a preliminary injunction enjoining plaintiff from spoliating evidence related to defendants' residential occupancy at the Building.

DISCUSSION

A. Leave to Renew

CPLR 2221 (e) (2) provides, in relevant part, that a motion to renew "shall demonstrate that there has been a change in law that would change the prior determination."

Here, defendants have demonstrated that a change in law requires vacatur of the order granting plaintiff summary judgment on the ejectment claim. As stated above, the 2019 change to the Loft Law created a new 2015-2016 Window during which a building may be recognized for coverage. Contrary to plaintiff's assertion that the Loft Law may not be applied retroactively, "Article 7-C, being remedial legislation, should be liberally construed to spread its beneficial effects as widely as possible" (*Matter of Association of Commercial Prop. Owners v New York City Loft Bd.*, 118 AD2d 312, 318 [1st Dept 1986], *affd* 71 NY2d 915 [1988]; *Ardrey v 12 W. 27th St. Assoc.*, 117 AD2d 538, 541 [1st Dept 1986] [agreeing that Loft Law should be given retroactive effect]; *465 Greenwich St. Assoc. v Schmidt*, 116 Misc 2d 62, 63-64 [Sup Ct, NY County 1982]). Additionally, Laws of 2019, chapter 41, § 10, states:

> "No provision of this act or article 7-C of the multiple dwelling law, as amended by this act, or any other law or prior judgment, shall be construed to prevent an application from being filed with the loft board and considered by such board, or a claim in a court of competent jurisdiction, for coverage or for registration as an interim multiple dwelling or units within a building, including those previously determined not to be covered, where the basis for such application or claim is that such building or units are subject to such article as a result of the amendments made by this act."

Importantly, the Court noted on the recent appeal in this action that "the instant determination of tenants' rights under the 2010 Loft Law is independent from their application for coverage under the 2019 Loft Law" (*Matter of Nazor*, 179 AD3d at 610). Thus, defendants are not precluded from asserting a Loft Law coverage defense even though the Loft Board has denied a prior application for coverage under a different statutory window.

Additionally, counter to plaintiff's position, the instant motion is timely and is not procedurally improper. While CPLR 2221 (e) does not impose a specific time limit within which a motion to renew must be made, "[a]bsent circumstances set forth in CPLR 5015 …, a motion for leave to renew based upon a change in the law must be made prior to the entry of a final judgment or before the time to appeal has expired" (*Dinallo v DAL Elec.*, 60 AD3d 620, 621 [2d Dept 2009]; *accord Matter of Eagle Ins. Co. v Persaud*, 1 AD3d 356, 357 [2d Dept 2003]). Importantly, renewal based on a change in law is not proper where there has been a final judgment (*see Glicksman v Board of Educ./Central School Bd. of Comsewogue Union Free School Dist.*, 278 AD2d 364, 366 [2d Dept 2000]). In this instance, a final judgment has not yet been entered. The October 2018 Order directed plaintiff to submit a proposed order and judgment of ejectment. "When a decision ends with the directive to 'submit order,' the court is generally directing the prevailing party to 'draw[ ] the order and present[ ] it to the judge … who looks it over to make sure it reflects the decision properly, and then signs or initials it'" (*Funk v Barry*, 89 NY2d 364, 367 [1996] [internal citation omitted]). Thus, "further drafting and judicial approval of the judgment or order is contemplated" (*id.*). Plaintiff has submitted a proposed order and judgment of ejectment along with a proposed writ and order of assistance (NYSCEF Doc Nos. 379-380), but neither has been signed.

Lastly, plaintiff argues that it will suffer prejudice if the ejectment order is vacated because plaintiff, as the prevailing party, cannot recover the $450,000 in legal fees it has expended in this action and in the other actions or proceedings brought by defendants. However, no determination has been made as of yet on whether the Building qualifies as an interim multiple dwelling, despite defendants' contention that plaintiff and its principal have already conceded this point. Accordingly, that branch of the motion seeking renewal is granted, and upon granting renewal, the October 2018 Order is hereby vacated.

B. Injunctive Relief

Defendants also move for a preliminary injunction enjoining plaintiff and its agents from spoliating any possible evidence of residential occupancy at the [B]uilding during the 2015-2016 Window, more specifically video surveillance footage. In response, plaintiff denies ever spoliating evidence, and "agrees not to spoliate any evidence for the period of 2015-2016" (NYSCEF Doc No. 396, Philip L. Billet affirmation, ¶ 86; NYSCEF Doc No. 397, Shimon Milul aff, ¶ 65).

CPLR 6301 states, in part:

> "A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff."

To obtain a preliminary injunction, the moving party "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981] [same]). The moving must prove each element

with clear and convincing evidence (*see Gilliland v Acquafredda Enters., LLC*, 92 AD3d 19, 24 [1st Dept 2011]). The "[p]roof establishing these elements must be by affidavit and other competent proof, with evidentiary detail" (*Faberge Intl. v Di Pino*, 109 AD2d 235, 240 [1st Dept 1985]).

Here, defendants have not demonstrated that plaintiff "threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of" their rights. Defendants contend that plaintiff may spoliate evidence of their residential occupancy because plaintiff's principal removed "luxury fixtures the day before a court-ordered inspection" of his unit and that plaintiff destroyed surveillance video defendants believe would have proven their residency during an earlier statutory window period under the Loft Law (NYSCEF Doc No. 385, Bruce H. Weiner affirmation, ¶ 16). At oral argument on this motion, plaintiff maintained that surveillance video footage from the 2015-2016 Window no longer exists because the footage is "taped over every 30 days" (NYSCEF Doc No. 409, oral argument 1/6/2020 tr at 20). Defendants, in response, speculated that a hard drive storing the video surveillance footage may be maintained on a server hosted by a third-party (*id.* at 20-23). However, "speculation is not a basis for the imposition of a preliminary injunction" (*U.S. RE Cos., Inc. v Scheerer*, 41 AD3d 152, 155 [1st Dept 2007]), and defendants have not offered any evidence other than conjecture to support this contention. Thus, the branch of the motion for a preliminary injunction enjoining plaintiff from spoliating video surveillance footage from the 2015-2016 Window is denied. As a result, the court need not address the other elements necessary to prevail on a motion for a preliminary injunction.

That said, defendants are not without entirely recourse if it is later discovered that video surveillance footage for the 2015-2016 Window is maintained on a third-party server. Defendants acknowledged that they had served a pending discovery request to requisition the hard drive

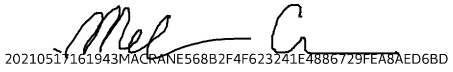
(NYSCEF Doc No. 409 at 20). As such, they are not precluded from pursuing the relief available to them under Article 31 of the CPLR if plaintiff fails to respond to that request.

Accordingly, it is

ORDERED that the part of the motion brought by defendants Maria Nazor and Peter Mickle for leave to renew the court order dated October 15, 2018 and entered October 18, 2018 granting plaintiff Mushlam, Inc. judgment on the ejectment claim (motion sequence no. 24) is granted, and upon granting renewal, the court order dated October 15, 2018 and entered October 18, 2018 is hereby vacated, and judgment for plaintiff Mushlam, Inc. on the ejectment claim is denied; and it is further

ORDERED that the part of the motion brought by defendants Maria Nazor and Peter Mickle for a preliminary order enjoining plaintiff Mushlam, Inc. from spoliating evidence related to their tenancy from January 1, 2018 to December 31, 2019 is denied; and it is further

ORDERED that the temporary restraining order enjoining plaintiff Mushlam, Inc. and its agents from spoliating video surveillance footage at the subject Building immediately prior to, during, or after the January 1, 2015 to December 31, 2016 window period, as directed in the order to show cause signed July 16, 2019, is hereby vacated.



5/17/2021
DATE

MELISSA ANNE CRANE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE