

**Department of Hous. Preserv. & Dev. of the City of  
N.Y. v Feldman**

2021 NY Slip Op 32404(U)

November 19, 2021

Civil Court of the City of New York, New York County

Docket Number: L&T 303185/2021

Judge: Frances A. Ortiz

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This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK, HOUSING PART B

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DEPARTMENT OF HOUSING PRESERVATION  
AND DEVELOPMENT OF THE CITY OF NEW  
YORK

Petitioners,

**Index No. L&T  
303185/2021**

**-against-**

**DECISION AND ORDER**

MICHAEL FELDMAN  
DAN SHALOM  
HIGHPOINT ASSOCIATES XII, LLC

Respondents,

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**FRANCES A. ORTIZ, JUDGE**

Recitation as required by CPLR 2219(a), of the papers considered in the review of the respondent, Dan Shalom and Highpoint Associates XII, LLC's, -motion to dismiss.

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<b>Papers</b>	<b>Numbered</b>
Respondent Dan Shalom/Highpoint Associates' Notice of Motion & Affirmation.....	1/NYSCEF 10- 20
Affirmation in Opposition to Dan Shalom's Motion.....	2/NYSCEF 27 - 33
Reply Affirmation.....	3/NYSCEF 34 & 35

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Upon the foregoing cited papers, the Decision/Order of this Court on respondents' motions to dismiss.

This is an HP Action brought by Department of Housing Preservation and Development ("HPD") against respondents, Michael Feldman, Dan Shalom and Highpoint Associates XII, LLC who are the owners of the subject building, 410 West 46 Street, New York, NY 10036. The petition seeks an order to correct approximately 68 open HPD violations at the subject premises.

### Facts

Respondents, Dan Shalom/Highpoint Associates XII, LLC, indicate that the City of New York commenced a Supreme Court action by Summons and Complaint dated August 13, 2019 against many defendants including them - Daniel Shalom and Highpoint Associates XII, LLC. The title of the action is *The City of New York v Keystone Management Inc. et. al.*, New York County, Supreme Court, Index No. 451285/2019, the "Supreme Court action." (NYSCEF 14). According to the complaint, the City of New York brought the action for shut down of illegal transient (less than 30-day) rentals, to hold the defendants responsible for years of neglect by failing to keep their buildings located at 410 West 46<sup>th</sup> Street, NY, NY, 412 West 46<sup>th</sup> Street, NY, NY, and 452 West 36<sup>th</sup> Street, NY, NY in a safe and code complaint manner and for persistent participation and acquiescence to harassment conduct against permanent residents. The Complaint claims that defendants have created and/or permitted public nuisances in the form of illegal transient rentals and that the action is mainly brought pursuant to the common law of public nuisance. According to paragraph 23 of the Complaint, it seeks preliminary and permanent injunctive relief, imposition of civil statutory penalties, compensatory, punitive damages against the owners, managers, lessees, licensees, operators and agents of the subject buildings for violations under the Multiple Dwelling Law ("MDL"), the New York City Building Code ("the Building Code"), and the New York City Housing Maintenance Code ("Housing Maintenance Code") for creating nuisances as defined in Section 7-701 et seq., of the Administrative Code (the "Nuisance Law") (NYSCEF 14).

Further, the complaint mentions numerous inspections performed by Department of Buildings (DOB) Inspector's and FDNY Fire Protection Inspectors from the Mayor's Office of Special Enforcement ("OSE") at the subject building where multiple violations were issued by

DOB. These violations indicate that at least five (5) of the fifteen (15) class “A” units in the building had been rented and occupied on a transient basis for less than 30-day stays, in violation of the buildings Certificate of Occupancy (“C of O”), the MDL, the Building Code, and the Fire Code. The OSE Teams issued about 12 Environmental Control Board (“ECB”) Summons to respondent/owners herein and \$82, 175 in penalties. (*NYSCEF 16, Complaint ¶ 58*).

In sum, the Complaint in the Supreme Court action, contains nine causes of actions relating to statutory public nuisances for transient residential occupancy, illegal occupancy, criminal nuisance, violation of the MDL on transient occupancy, harassment and common law nuisance.

**Dan Shalom/Highpoint Associates - Motion to Dismiss**

Respondents/Dan Shalom/Highpoint Associates XII, LLC move to dismiss the petition pursuant to *CPLR § 3211 (a) (4)* and/or *CPLR § 3212*. Alternatively, pursuant to *CPLR § 3211 (a) (4)* seek a stay of this proceeding pending the Supreme Court action.

Under *CPLR § 3211 (a) (4)*, a party may move to dismiss a cause of action if there is another action pending between the same parties for the same cause of action in a court of any state or the United States and the court need not dismiss upon this ground but may make such order as justice requires. Moreover, *CPLR § 3211 (a) (4)* vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action. *Whitney v. Whitney, 57 N.Y.2d 731, 732 (1982)*.

Here, two (2) out of the three (3) respondent/owners are named defendants with other defendants in the Supreme Court action. Specifically, respondents, Dan Shalom and Highpoint Associates XII, LLC are named defendants in the Supreme Court action. Nevertheless,



respondent Michael Feldman is not a named defendant in the Supreme Court action. The petitioner in this action is HPD, a City of New York agency, and the plaintiff in the Supreme Court action is the City of New York.

However, in terms of the cause of action, this is an HP Action involving one subject building located at 410 West 46 Street, New York, NY 10036 while the Supreme Court action involves a total of three buildings. These buildings are located at 410 West 46<sup>th</sup> Street, NY, NY, 412 West 46<sup>th</sup> Street, NY, NY, and 452 West 36<sup>th</sup> Street, NY, NY. This HP Action was commenced in the Housing Part of the New York Civil Court pursuant to *N.Y. City Civ. Ct. Act § 110 (a) (9)*,<sup>1</sup> seeking an Order to Correct, civil penalties for failure to correct sixty-eight (68) HPD violations at the subject building. The Complaint in the Supreme Court action names nine causes of action involving statutory public nuisances for transient residential occupancy, illegal occupancy, criminal nuisance, violation of the MDL on transient occupancy, harassment and common law nuisance. None of these nine causes of action involve an order to correct the open sixty- eight (68) HPD violations at the subject premises. While it is true that the Complaint in the Supreme Court action mentions HPD violations for the subject building, the relief sought in the Supreme Court action involves declaratory relief, injunctive relief, civil penalties, as it relates to public nuisance of illegal transient use and occupancy and harassment. As such, respondents/Dan Shalom/Highpoint Associates XII, LLC motion to dismiss the petition pursuant to *CPLR § 3211 (a) (4)* and/or *CPLR § 3212* is denied. *Sprecher v. Thibodeau*, 148 A.D.3d 654,

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<sup>1</sup> The city department charged with enforcing the multiple dwelling law, housing maintenance code, and other state and local laws applicable to the enforcement of proper housing standards **may commence any action** or proceeding described in paragraphs one, two, three, four, six and seven of this subdivision by an order to show cause, returnable within five days, or within any other time period in the discretion of the court. Upon the signing of such order, the clerk of the housing part shall issue an index number.

656 (1<sup>st</sup> Dep't 2017). Likewise, any relief sought to stay this HP Action pending the Supreme Court action based on the same argument is also denied for the reasons already discussed above, since they are both unrelated.

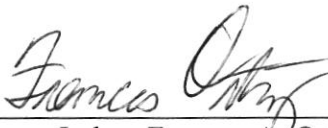
The matter is restored to the calendar to January 11, 2022 at 3:30 p.m. to 4:30 p.m. with the companion case Index No. 303173/2021, DHPD v Michael Feldman et. al. for all purposes. To join the conference by phone call, please call (833) 262 – 7886, conference ID 466 235 385#. To provide an email address to receive an invitation to appear via Microsoft Teams, please call Part B clerk at (646) 386 – 5529.

ORDERED: Respondent, Dan Shalom/Highpoint Associates XII, LLC's, motion to dismiss or for a stay of the proceeding is denied.

ORDERED: The matter is restored to the calendar.

This is the decision and order of the Court, copies of which are being uploaded to NYSCEF.

Date: November 19, 2021

  
Hon. Frances Ortiz  
Judge, Frances A. Ortiz

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