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5/25/2018 11:48 am

U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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COLLEEN WONG,

Plaintiff,

-against-

THE TOWN OF HEMPSTEAD, NEW YORK, JOHN R. ROTTKAMP, *personally and in his capacity as the Commissioner of the Hempstead Department of Buildings*, RAYMOND SCHWARZ, *personally and in his capacity as Supervisor of the Building Department of the Town of Hempstead*, SAL MASTRACCHIO, *personally and as a Code Enforcement Officer for the Town of Hempstead*, THOMAS HALL,

Defendants.

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THE TOWN OF HEMPSTEAD, NEW YORK, JOHN R. ROTTKAMP, *personally and in his capacity as the Commissioner of the Hempstead Department of Buildings*, RAYMOND SCHWARZ, *personally and in his capacity as Supervisor of the Building Department of the Town of Hempstead*, SAL MASTRACCHIO, *personally and as a Code Enforcement Officer for the Town of Hempstead*,

Third-Party Plaintiffs,

-against-

THOMAS HALL, *as co-administrator of the Estate of Lucille Hall*, JERLINE ROSS, *as co-administrator of the Estate of Lucille Hall*,

Third-Party Defendants.

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MEMORANDUM OF DECISION & ORDER
2:16-cv-00009 (ADS) (ARL)

APPEARANCES:

Nassau/Suffolk Law Services Committee, Inc.
Attorneys for the Plaintiff
One Helen Keller Way
Hempstead, NY 11550
By: Jane C. Reinhardt, Esq.,
Michael Wigutow, Esq., Of Counsel

Berkman, Henoch, Peterson, Peddy & Fenchel, P.C.
Attorneys for the Defendants/Third-Party Plaintiffs The Town Of Hempstead, New York, John R. Rottkamp, Raymond Schwarz, and Sal Mastracchio
100 Garden City Plaza
Garden City, NY 11530
By: Donna A. Napolitano, Esq.,
Daniel James Evers, Esq.,
Kaitlyn Anne Costello, Esq., Of Counsel

NO APPEARANCES:

Thomas Hall
Defendant/Third-Party Defendant

Jerline Ross
Third-Party Defendant

SPATT, District Judge:

The Plaintiff Colleen Wong (the "Plaintiff") brought this action against the Defendants the Town Of Hempstead, New York ("Hempstead" or the "Town"), John R. Rottkamp ("Rottkamp"), Raymond Schwarz ("Schwarz"), Sal Mastracchio ("Mastracchio") (collectively, the "Town Defendants"), and Thomas Hall ("Thomas Hall") alleging that she was deprived of due process when she was evicted from 643 Southern Parkway in Uniondale, New York (the "Property").

Presently before the Court are cross-motions for summary judgment pursuant to Federal Rule of Civil Procedure ("FED. R. CIV. P." or "Rule") 56 by the Plaintiff and the Town Defendants. For the following reasons, the Plaintiff's motion is denied, and the Defendants' motion is granted.

I. BACKGROUND

A. The Relevant Facts

Lucille Hall, and her husband purchased the Property on or about December 12, 1975. The Plaintiff lived at the Property between January 4, 2011, and October 3, 2014.

The Plaintiff was previously married to Thomas Hall, but they divorced in 1996. Thomas Hall is Lucille Hall's son.

On October 15, 2010 Lucille Hall apparently deeded the Property to herself and the Plaintiff (the "Wong Deed").

The Plaintiff testified that she moved into the Property with one of her children and Lucille Hall on January 4, 2011. She further testified that she bought some appliances and carpeting for the Property; paid a contractor to remove broken marble flooring; and paid electricity bills.

On July 6, 2011, Lucille Hall died. The Plaintiff testified that she made mortgage payments after Lucille Hall died. At various times while the Plaintiff resided at the Property, one of her sons, and her boyfriend apparently also lived there.

On August 23, 2011, Lucille Hall's children Thomas Hall and Jerline Ross were issued limited Letters of Limited Administration by the Surrogate's Court of the State of New York, Nassau County.

On April 12, 2012, the Estate of Lucille Hall (the "Estate") commenced an action against the Plaintiff in the Supreme Court of the State of New York, Nassau County, seeking to set aside the Wong Deed as a fraudulent transfer (the "Fraudulent Transfer Action"). On December 3, 2012, the Supreme Court of the State of New York entered a default judgment against the Plaintiff, voided the deed, and set it aside.

As a result, on December 7, 2012, the Estate initiated a Holdover Proceeding in the Nassau County District Court, Landlord-Tenant Part, seeking, *inter alia*, to evict the Plaintiff from the Property (the "Landlord-Tenant Action").

In early 2013, the Plaintiff was unable to pay for electrical services at the Property. At some point, she applied for benefits under the Home Energy Assistance Program ("HEAP"). However, the Nassau County Department of Social Services (the "NCDSS") denied her application due to the dispute over the Property.

On May 8, 2013, the Supreme Court of the State of New York, Nassau County, denied the Plaintiff's motion to vacate the default judgment. The Plaintiff appealed from the May 8, 2013 order and sought a stay of the Landlord-Tenant Action while her appeal was pending.

On July 30, 2014, the Supreme Court of the State of New York, Appellate Division, Second Judicial Department (the "Second Department") affirmed the lower court's orders of December 3, 2012 and May 8, 2013. Notice of entry was filed on August 5, 2014.

On August 12, 2014, the Plaintiff filed a motion for leave to appeal the Second Department's July 30, 2014 decision. The notice of appeal also sought a continuation of the stay.

On September 4, 2014, the NCDSS denied the Plaintiff's request for "emergency assistance funds to prevent utility termination" because she did not "verif[y] that [she] [was] the tenant of record." (Defs.' Ex. M). On September 5, 2014, the NCDSS denied the Plaintiff's request for "emergency assistance funds to restore [National Grid] service" because she had "two active [National Grid] accounts. One in Nassau County[,] and one in Albany County." (*Id.*). The September 5, 2014 notice further stated that the NCDSS could not determine her residency. The Plaintiff testified that she was unable to get any financial assistance because the Wong Deed had been set aside, and she could not prove that she had a right to live at the Property.

On September 5, 2014, PSE&G also sent a notice to the Plaintiff informing her that her application for electrical service at the Property had been denied because there was an outstanding balance of $6,207.11 on the Property's account.

At some point in September of 2014, the Plaintiff purchased a gas-powered electrical generator (the "generator") at Wal-Mart, and the Plaintiff had a Wal-Mart employee install the generator at the Property. The generator powered the refrigerator, and some of the Property's lights. It did not power the oil burner. The Plaintiff purchased the generator because PSE&G had shut off the electricity to the Property.

After PSE&G shut off the electricity to the Property, the Plaintiff went to PSE&G's offices. PSE&G advised her that a cord that ran from a nearby pole to the Property had been cut, and that the cord was her responsibility.

On September 23, 2014, the Town of Hempstead's Building Department (the "Building Department") received a complaint that a very loud generator was being used on the Property, and had been running for three weeks.

The next day, September 24, 2014, Mastracchio, who was a Code Enforcement Officer I with the Town during the relevant period, sent a letter addressed to the owner/occupant of the Property stating that he would be investigating the contents of the above complaint. The letter repeated the allegation contained in the complaint, and said that "if a violation is present, a correction date must be set forth to remove the violation. Failing to remove the violation(s) will result in court action." (Defs.' Ex. R). The Plaintiff testified that upon receiving this letter, she threw out the generator. Apparently, the Plaintiff went without electricity from that point until the Property was boarded up on October 3, 2014.

The Plaintiff seeks to introduce evidence that a certain reverend attempted to negotiate with the Town Defendants on her behalf. However, the sole evidence offered in support of this fact is hearsay—the Plaintiff's testimony concerning what the reverend allegedly said. The Town Defendants object to this evidence on hearsay grounds. The Court finds that there is no exception to overcome the hearsay rule, and does not consider the evidence. Even if it were to be offered as to the state of mind of the Plaintiff, the Court would not be able to consider the evidence for the truth of the matter asserted, and the Plaintiff's state of mind is irrelevant here.

The Plaintiff also seeks to introduce evidence of an alleged conversation with a member of the Town. However, she does not identify the speaker, and it is therefore inadmissible hearsay. Again, to the extent that the Plaintiff seeks to introduce it as to her state of mind, her state of mind is irrelevant.

The Plaintiff testified at her deposition that at some point between September 24, 2014 and September 29, 2014, Mastracchio and Code Enforcement Officer Roy Gunther ("Gunther") called her and asked who owned the Property. She apparently told them that she was the owner. Mastracchio and Gunther both submitted affidavits disputing that this conversation ever took place. In fact, Mastracchio submitted an affidavit in which he stated that before the September 29, 2014 inspection, he did not speak with anyone claiming to be an owner or occupant of the Property.

Mastracchio inspected the Property on September 29, 2014. His notes from the inspection indicate that electrical service was disconnected; and that there was a generator in the backyard which was connected to the house via extension cords running through the windows. The generator was not running at the time, and no one answered the door. Mastracchio posted placards on the doors that read:

72 HOURS TO VACATE
WARNING
STRUCTURE UNFIT FOR HUMAN OCCUPANCY
<u>DO NOT ENTER</u>
THIS STRUCTURE IS UNSAFE AND ITS OCCUPANCY HAS BEEN PROHIBITED BY THE CODE ENFORCEMENT OFFICIAL IN ACCORDANCE WITH § 107.1.3 OF THE NEW YORK STATE PROPERTY MAINTENANCE CODE
OWNER – CONTACT DEPARTMENT OF BUILDINGS <u>IMMEDIATELY</u>
BETWEEN 9 AM 10:30 AM MONDAY THROUGH FRIDAY (516) 538-8500
DATE 9/29/14 BY ORDER OF THE COMMISSIONER OF BUILDINGS

(Defs.' Ex. T). The Plaintiff testified that she became aware of the notice before October 3, 2014. This is confirmed by the fact that on September 30, 2014, one of the Plaintiff's attorneys emailed the NCDSS stating that the Plaintiff was in urgent need of a grant to pay the PSE&G bill because the Plaintiff had received notice that the Property would be boarded up by October 2, 2014 if electricity was not restored.

On September 30, 2014, the Town performed a tax search on the Property. The search revealed that the owners of the Property were Thomas and Lucille Hall. That same day, Schwartz, the Supervisor of Inspection Services for the Town Department of Buildings, ordered a "rush" inter-departmental request for the last known owner of the Property. On October 2, 2014, the Department of Buildings ran a search for owners and liens of the Property. The search showed that Thomas and Lucille Hall held the title to the Property. It further stated that the deed which gave title to the Plaintiff and Lucille Hall was "found to be fraudulent[.] This deed set aside and voided 12-3-12 12892-486." (Defs.' Ex. E at Wong 000025–27).

Mastracchio returned to the Property on October 3, 2014 to perform another inspection. He was accompanied by Code Enforcement Officer Roy Gunther ("Gunther"). Before visiting the Property, Mastracchio spoke with the Plaintiff's boyfriend, who told Mastracchio that someone

would come to remove a dog from the Property. The Plaintiff's son did come to pick up the dog that day. Mastracchio's notes further state that:

> Once the house was open, we confirmed the electrical service was not functioning, and found that the heating system was disable[d] with the fl[ue] pipe disconnected. In addition[,] the hot water heater was improperly installed.
> . . .
> The install of the hot water heater allows for the fl[ue] [g]ases to be trapped in the pipe and the potential for the gases to enter into the house. In addition, there were no function[ing] smoke or [carbon-monoxide] detectors[;] [there were] broken windows[;] and the interior [was] in general disrepair. . . . During the board up, the occupants arrived and we explained that they were not able to live in the house and that we would allow them in to collect their belongings another day.

(Defs.' Ex. Q at Wong 000182).

Further, it appears from his affidavit that he and Gunther gained access to the Property while the Plaintiff and her son were removing their belongings. Gunther submitted an affidavit that corroborated the account in Mastracchio's affidavit.

Mastracchio and Gunter took pictures of the Property and had a Town contractor secure the Property.

The Plaintiff testified that when she arrived at the Property, Gunther did permit her to enter the Property and remove whatever belongings she could. Gunther advised her that she would be able to remove her remaining personal effects at a later date.

The Plaintiff testified that after the Property was boarded up, her personal belongings that were left inside included: beds, dressers, a table, a sofa, kitchenware, electronics, keepsakes, and clothing. The Plaintiff further testified that at certain points, vandals broke in while the Property was boarded up and stole some of her items.

The Plaintiff testified that Gunther allegedly told her that "the owner wanted the house boarded up." (Pl.'s 56.1 ¶ 55). In his affidavit, Gunther stated that he never spoke to Thomas

Hall, and he did not have any knowledge that Thomas Hall had reached out to the Town about the premises.

On October 6, 2014, Mastracchio returned to the Property to perform another inspection. He took photos, and posted placards.

The Plaintiff testified as to how she lived after the Property was boarded up. However, those facts are irrelevant to the issues of liability.

On October 7, 2014, the Town opened a Town of Hempstead Town Code Chapter 90 ("Chapter 90") investigation into the Property. The investigation was assigned to Schwarz.

That same day, October 7, 2014, Thomas Hall, on behalf of the Estate of Lucille Hall, executed a Hold Harmless Agreement with the Town. The agreement stated that the Estate would defend, indemnify, and hold harmless the Town for any claims arising out of the lack of habitability of the Property. Further, the Estate agreed that it would not sleep or reside at the Property until the premises was restored to a state approved by the Town.

On October 9, 2014, one of the Plaintiff's attorneys faxed several documents to Schwarz and Mastracchio: namely, the Wong Deed; the Order setting aside the Wong Deed; the Second Department's order staying the Landlord-Tenant action while the Plaintiff's appeal of the Fraudulent Transfer Action was pending; the Second Department's Order affirming the Supreme Court's decisions; the Plaintiff's motion for leave to appeal the Second Department's decision the New York State Court of Appeals and a request for a stay; and a copy of N.Y. C.P.L.R. § 5519. The fax claimed that § 5519(e) allowed for a continuation of the Second Department's stay of the Landlord-Tenant Action.

Schwarz sent a letter to the Plaintiff and Thomas Hall on October 14, 2014 which stated:

> The above premises has been deemed to be unfit for human occupancy in accordance with §107.1.3 New York State Property Maintenance Code. No person

> shall reside or sleep in said premises until and unless permits are issued to restore the plumbing, heating, and electrical systems.
> Due to the ongoing property dispute, judgment, and appeal; this Department under the advice of the Town Attorney's Office, will not permit access to the dwelling unless a notarized stipulation between the parties or a court order is issued, and received by this office.
> A special assessment will be placed upon the property for all expenditures made at this location, in the manner prescribed by law.

(Defs.' 56.1 ¶ 66 (quoting Defs.' Ex. X)).

On October 23, 2014, the Town received a complaint that a tree had taken down part of the fence at the Property and damaged the house.

On November 3, 2014, the Second Department denied the Plaintiff's motion for leave to appeal its July 30, 2014 decision.

On November 6, 2014, the Plaintiff asked the NCDSS to help her pay the costs of moving her personal belongings out of the Property. That same day, the Plaintiff and the Estate settled the Landlord-Tenant action. The parties agreed that the Plaintiff would vacate the Property and remove her personal belongings on a single day within one week of a grant of access by the Town, and that the Plaintiff would pay for the removal. Further, the Plaintiff would notify Ross as to the date and time when she would be removing her belongings. Once the Plaintiff vacated the Property and removed her belongings, the Estate would discontinue the Landlord-Tenant action.

On November 21, 2014, the Plaintiff and the Estate requested that the Town grant them access to remove their personal belongings, and to permit Hall to make necessary repairs.

On December 19, 2014, the Plaintiff removed more of her personal belongings after coordinating with the Town. Mastracchio allowed extra time for the Plaintiff to collect her items, and then locked the Property.

On January 8, 2015, Thomas Hall asked the Plaintiff to remove her property as soon as possible so that he could restore the Property.

On January 9, 2015, Thomas Hall asked that the water at the Property be turned off. He was told to speak with Mastracchio about winterizing the Property. The Town asked Long Island American Water that day to turn the water off. The Town further informed Long Island American Water that the Property had been determined to be unsafe pursuant to Chapter 90 of the Town Code, and that the Property could be demolished.

On January 9, 2015, a Town attorney asked the Plaintiff to give the Town a firm date for the removal of her personal belongings.

The Plaintiff testified that her ability to remove her personal belongings was limited by her finances.

On February 23, 2015, the Plaintiff told the Town that the locks on the door had been changed. The Town said that it would investigate.

On March 23, 2015, the Plaintiff went to the Town offices with the Wong Deed, and asked to sign a hold harmless agreement. Schwarz "advised [her] that she cannot sign [a Hold Harmless Agreement] nor [could] the [Town] allow access because [it] [did] not have possession of the proper[ty] – [Thomas] Hall is the owner and has already signed [a Hold Harmless Agreement]." (Defs.' Ex. Q at Wong 000185).

On June 10, 2015, Thomas Hall executed a Hold Harmless Agreement with the Town. The Property was returned to him at that time. Any required alterations were to be monitored by the Town.

On August 4, 2015, the Town Board adopted Resolution No. 956-2015 ("Resolution 956") regarding the Property. Resolution 956 noted that the Commissioner of the Department of Buildings had inspected the Property; found that it was open and abandoned; deemed that it was a source of imminent danger to the life and/or safety of the residents in the area; and had boarded up

the Property. Resolution 956 ratified and confirmed the actions taken by the Commissioner of the Department of Buildings against the Property.

On August 18, 2015, the Estate and the Plaintiff entered into a stipulation of settlement regarding the Landlord-Tenant Action in which the judgment of possession and warrant of eviction were issued against the Plaintiff with no stay of the execution of the warrant.

On October 1, 2015, the Town Board adopted Resolution number 1202-2015 ("Resolution 1202"). Resolution 1202 was substantially similar to Resolution 956.

On October 24, 2015, the Plaintiff removed her personal items from the Property with the assistance of NCDSS.

B. The Relevant Procedural History

On January 1, 2016, the Plaintiff filed her initial complaint.

On April 15, 2016, the Town Defendants filed an answer to the initial complaint, and filed their third-party complaint against the Third-Party Defendants Hall and Jerline Ross the next day, April 16, 2016.

On April 28, 2016, the Plaintiff filed an amended complaint as a matter of right. *See* FED. R. CIV. P. 15(a)(1)(B). The amended complaint brings claims pursuant to 42 U.S.C. § 1983 ("Section 1983") against all of the Defendants for allegedly violating the Plaintiff's Fourteenth Amendment right to due process, and for unlawful eviction pursuant to N.Y. REAL PROP. ACTS. § 853.

On July 20, 2016, and August 17, 2016, respectively, the Clerk of the Court noted the default of Ross and Hall. To date, neither the Plaintiff nor the Town Defendants have moved for a default judgment against either Ross or Hall.

On September 19, 2017, the Plaintiff filed her motion for summary judgment. While she classifies it as a motion for partial summary judgment, she seeks judgment as a matter of law on both of her claims, as well as claims that were never brought.

On September 20, 2017, the Town Defendants filed their motion for summary judgment to dismiss the complaint.

II. DISCUSSION

A. The Summary Judgment Standard

Pursuant to Rule 56, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). When deciding a motion for summary judgment, "[t]he Court 'must draw all reasonable inferences and resolve all ambiguities in favor of the non–moving party.'" *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 137 (2d Cir. 1998) (quoting *Garza v. Marine Transp. Lines, Inc.*, 861 F.2d 23, 26 (2d Cir. 1998)).

"[A]t the summary judgment stage the judge's function is not [] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Redd v. N.Y. State Div. of Parole*, 678 F.3d 166, 173–74 (2d Cir. 2012) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986) (internal quotation marks omitted)). In other words, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Barrows v. Seneca Foods Corp.,* 512 F. App'x 115, 117 (2d Cir. 2013) (summary order) (quoting *Redd,* 678 F.3d at 174 (internal quotation marks omitted)). The Court should not attempt to resolve issues of fact, but rather "assess whether there are any factual issues to be tried." *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.,* 677 F.3d 109, 119 (2d Cir. 2012).

The movant has the burden of demonstrating the absence of genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). If a nonmoving party fails to make a sufficient showing on an essential element of their case where they will have the burden of proof, then summary judgment is appropriate. *Id.* at 323. If the nonmoving party submits evidence which is "merely colorable," legally sufficient opposition to the motion for summary judgment is not met. *Liberty Lobby,* 477 U.S. at 249. The mere existence of a scintilla of evidence in support of the nonmoving party's position is insufficient; there must be evidence on which the jury could reasonably find for that party. *See Dawson v. Cty. of Westchester,* 373 F.3d 265, 272 (2d Cir. 2004).

B. As to the Plaintiff's Request for Summary Judgment on Her Unplead Claims

In her memorandum of law in opposition to the Town Defendants' motion for summary judgment, the Plaintiff argues that she is entitled to summary judgment on Section 1983 claims for unlawful search and seizure and for denial of equal protection under the law, which were not included in her amended complaint. Alternatively, the Plaintiff requested leave to amend her complaint to add those claims.

Before granting summary judgment on unplead claims, the Court must first determine whether the Plaintiff may request to amend her pleadings in a memorandum in opposition. In the event that the Court answers that question in the affirmative, the Court must then decide whether there is good cause to grant the Plaintiff's request to amend her pleadings as the deadline to amend has long since passed. *See Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000) ("We now join these courts in holding that despite the lenient standard of Rule 15(a), a district court does not abuse its discretion in denying leave to amend the pleadings after the deadline set in the scheduling order where the moving party has failed to establish good cause. Moreover, we

agree with these courts that a finding of "good cause" depends on the diligence of the moving party."). The Court answers each of the questions in the negative. The Plaintiff may not move to amend her pleadings in a memorandum in opposition to a motion for summary judgment, and she has not shown good cause as to why the motion should be granted. To that end, she has not even met the more lenient standard of Rule 15 because she delayed in making her request, and the delay was seemingly in bad faith.

It is well settled that a party may not amend its pleadings in its briefing papers, including in a memorandum in opposition to summary judgment. *See Avillan v. Donahoe*, 483 F. App'x 637, 639 (2d Cir. 2012) (summary order) ("The district court did not err in disregarding allegations Avillan raised for the first time in response to Potter's summary judgment motion." (internal citation omitted)); *Wright v. Ernst & Young LLP,* 152 F.3d 169, 178 (2d Cir. 1998) (recognizing that a party may not use opposition to a dispositive motion as a means to amend the complaint); *Shah v. Helen Hayes Hosp.*, 252 F. App'x 364, 366 (2d Cir. 2007) (summary order) (holding that "[a] party may not use his or her opposition to a dispositive motion as a means to amend the complaint" (internal citation omitted)); *Mediavilla v. City of New York*, 259 F. Supp. 3d 82, 106 (S.D.N.Y. 2016) ("Because this theory of excessive force is raised for the first time in Plaintiff's opposition to Defendants' motion for summary judgment, I need not consider it here. It is well settled that a litigant may not raise new claims not contained in the complaint in opposition to a motion for summary judgment." (internal citations and footnote omitted)), *reconsideration denied*, No. 14-CV-8624 (VSB), 2017 WL 4155401 (S.D.N.Y. Sept. 18, 2017); *Wright v. Jewish Child Care Ass'n of N.Y.*, 68 F. Supp. 3d 520, 529 (S.D.N.Y. 2014) (holding that even *pro se* plaintiffs are not permitted to assert new claims in opposition to a motion for summary judgment); *Enzo Biochem, Inc. v. Amersham PLC*, 981 F. Supp. 2d 217, 223 (S.D.N.Y. 2013) ("It is well settled

that a party may not amend its pleadings in its briefing papers." (internal citations omitted)); *Bentley v. Providian Fin. Corp.*, No. 02 CIV.5714(WHP)(FM), 2003 WL 22234700, at *3 (S.D.N.Y. Apr. 21, 2003) ("Unfortunately, it is not appropriate to raise new claims for the first time in submissions in opposition to summary judgment." (internal citations and quotation marks omitted)); *Caribbean Wholesales & Serv. Corp. v. U.S. JVC Corp.,* 963 F. Supp. 1342, 1359 (S.D.N.Y. 1997) ("[Plaintiff] in effect is apparently attempting to add a claim never addressed, or even hinted at, in the complaint. Such a step is inappropriate at the summary judgment stage, after the close of discovery, without the Court's leave, and in a brief in opposition to a dispositive motion.").

Therefore, the Plaintiff's request to amend her complaint to add claims for violations of the Equal Protection Clause and the Unreasonable Searches and Seizures Clause, and for summary judgment on those claims, is denied.

Even if the Court were to liberally construe the Plaintiff's memorandum of law in opposition to the Town Defendants' motion for summary judgment as a motion to amend, the motion would be denied as untimely.

A court should deny leave to amend "in instances of futility, undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice to the nonmoving party." *Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 126 (2d Cir. 2008) (per curiam).

The Plaintiff has waited until after the close of discovery; after her motion for summary judgment was filed; after the Town Defendants' motion for summary judgment was filed; and after the case was marked trial ready pending the Court's decision on the competing motions for summary judgment. The Plaintiff does not claim that new information came to light during

discovery. Indeed, the arguments submitted in support of the unplead claims are the same as those put forth in support of her claims included in her amended complaint. In other words, the Plaintiff could have brought these claims when she filed her initial or amended complaints. She does not explain the reason for the delay.

Therefore, not only has the Plaintiff engaged in undue delay, but she has also shown bad faith. Such an amendment would also prejudice the Town Defendants, as discovery has completed and they have already filed their motion for summary judgment. *See Ansam Assoc., Inc. v. Cola Petroleum, Ltd.,* 760 F.2d 442, 446 (2d Cir. 1985) ("[P]ermitting the proposed amendment would have been especially prejudicial given the fact that discovery had already been completed and [defendant] had already filed a motion for summary judgment."); *Gerentine v. United States*, No. 00 Civ. 0813 (JSM), 2001 WL 876831, at *5 (S.D.N.Y. Aug. 2, 2001) ("Plaintiff had knowledge of these alleged facts when she filed her Original Complaint in February 2000, not to mention when she filed her First Amended Complaint in April 2000 and her Second Amended Complaint in March 2001. Thus, this is not a case in which a plaintiff discovered new facts through the discovery process that support her claims. Rather, these new facts were submitted as a last-ditch attempt to preserve Plaintiff's tort claims in light of the overwhelming evidence of preemption and untimeliness put forth by the Individual Defendants in their motion. As such, there is an element of bad faith in Plaintiff's untimely bid to add them now." (internal citations omitted)); *Berman v. Parco*, 986 F. Supp. 195, 217 (S.D.N.Y. 1997) ("Leave to amend a complaint will generally be denied when the motion to amend is filed solely in an attempt to prevent the Court from granting a motion to dismiss or for summary judgment, particularly when the new claim could have been raised earlier."); *CL–Alexanders Laing & Cruickshank v. Goldfeld,* 739 F. Supp. 158, 166–67 (S.D.N.Y. 1990) ("When the motion [to amend] is made after discovery has been completed and

a motion for summary judgment has been filed, leave to amend is particularly disfavored because of the resultant prejudice to defendant."); *Bymoen v. Herzog, Heine, Geduld, Inc.,* No. 88 Civ. 1796 (KMW), 1991 WL 95387 (S.D.N.Y. May 28, 1991) ("[W]here a considerable period of time has passed between the filing of the complaint and the motion to amend, the burden is upon the movant to show some valid reason for the movant's neglect and delay. . . [W]here it appears that a plaintiff's purpose in asserting a new claim is his or her anticipation of an adverse ruling on the original claims, the court will deny leave to amend.").

Finally, as the Court noted above, district courts have the discretion to deny leave to amend pleadings where the plaintiff fails to show good cause as to why the motion should be granted after the deadline for filing amendments has passed. The Plaintiff has not shown good cause as to why she delayed nearly two years in bringing these claims. As stated above, the Plaintiff's arguments in favor of these claims mirror the arguments presented in support of her claims that were included in the amended complaint. The Court fails to see why these claims were not initially plead, or brought before the deadline for amendments.

Therefore, the Plaintiff's request to amend her pleadings is denied, and her motion for summary judgment on those claims is also denied.

C. As to the Plaintiff's Procedural Due Process Claims

To sustain a procedural due process claim under the Fourteenth Amendment, Plaintiff must prove that she "[(1)] possessed a protected liberty or property interest, and [(2)] that [s]he was deprived of that interest without due process." *McMenemy v. City of Rochester*, 241 F.3d 279, 286 (2d Cir. 2001) (internal citation and quotation marks omitted).

1. As to Whether the Plaintiff Had a Protected Property Interest in the Property

The Plaintiff argues that her property interest arose out of the "order of the State Appellate Division staying the Estate's continued prosecution of its Landlord/Tenant action, pending the outcome of her appeal." (Pl.'s Mem. in Opp. to Town Defs.' Mot. for Summ. J., ECF No. 44 ("Pl.'s Opp.") at 9–10. In opposition, the Town Defendants contend that the Plaintiff was a squatter, or at most, a licensee. As such, they argue that she did not have a protected property interest. The Court finds that at the time the Town posted the notice declaring the Property unfit for human habitation, the Plaintiff did not have a protected property interest in the Property.

"Property interests are not created by the Constitution, but instead, are created and defined by existing rules or understandings 'stemming from an independent source,' which source supports a 'legitimate claim of entitlement.'" *Barnes v. Pilgrim Psychiatric Ctr.,* 860 F. Supp. 2d 194, 201 (E.D.N.Y. 2012) (quoting *Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)).

It is well-settled under New York law that while tenants have possessory interests in property, licensees and squatters do not. *See Smith v. Cty. of Nassau*, No. 10-CV-4874 (MKB), 2015 WL 1507767, at *8 (E.D.N.Y. Mar. 31, 2015) ("To the extent that Plaintiff was a squatter, he had no legal right to remain on the Property, and therefore cannot assert a cognizable property interest in the continued occupancy of the Property. . . . [L]icensees, as opposed to tenants, do not have a cognizable property interest in the continued occupancy of a property." (internal citations omitted)), *aff'd*, 643 F. App'x 28 (2d Cir. 2016); *Pelt v. City of New York,* No. 11–CV–5633 (KAM)(CLP), 2013 WL 4647500, at *8–9 (E.D.N.Y. Aug. 28, 2013) ("Under New York law, it is well settled that a licensee acquires no possessory interest in property." (collecting cases)); *Walls v. Giuliani,* 916 F. Supp. 214, 218 (E.D.N.Y. 1996) (noting that New York law "does not confer

any property interest on squatters"); *see also Morrison v. City of Hudson*, No. 1:14-CV-1409 (GTS/DEP), 2017 WL 4357456, at *8 (N.D.N.Y. Sept. 29, 2017) ("Plaintiff, as a licensee, did not have 'a cognizable interest in the continued occupancy of the property.'" (quoting *Smith*, 2015 WL 1507767, at *8) (internal brackets omitted)); *Ostensen v. Suffolk Cty.,* 378 F. Supp. 2d 140, 147–48 (E.D.N.Y. 2005) ("New York law states that a servant or licensee acquires no possessory interest in property . . . ." (internal citations and quotation marks omitted)); *City Enters., Ltd. v. Posemsky,* 184 Misc.2d 287, 708 N.Y.S.2d 230, 231 (N.Y. App. Div. 2000) ("A licensee . . . has no estate in the land.").

Once the Wong Deed was set aside, the Plaintiff became a licensee. *Rosenstiel v. Rosenstiel,* 20 A.D.2d 71, 76, 245 N.Y.S.2d 395 (N.Y. App. Div. 1963) ("[A] licensee is one who enters upon or occupies lands by permission, express or implied, of the owner . . . without possessing any interest in the property, and who becomes a trespasser thereon upon revocation of the permission or privilege."). She did not own the Property, and did not have a lease with the owners of Property. *See Smith*, 2015 WL 1507767, at *10 ("[T]he fact that Terezakis gave Plaintiff permission to stay at the Property did not make Plaintiff a tenant. There is no indication that this permission was formalized as a lease or rental agreement giving Plaintiff exclusive control or possession of the Property, and accordingly, rights as a tenant." (internal citations omitted)). She was permitted, through the Estate's express or implied consent, to stay there, until it took action against her.

The Defendants contend that the Plaintiff was a squatter, but there is no evidence that the Estate expressly revoked her permission to remain on the Property until it initiated the Landlord-Tenant Action. *See* N.Y. REAL PROP. ACTS. LAW § 713 (McKinney) ("To constitute a squatter under RPAPL § 713(3), the person sought to be evicted must have intruded into or squatted upon

the property without the permission of the person entitled to the possession thereof."). In contrast, "[a] licensee is defined as '[a] person who has a privilege to enter upon land arising from the permission or consent, express or implied, of the possessor of land but who goes on the land for his own purpose rather than for any purpose or interest of the possessor.'" *Gladsky v. Sessa,* No. 06–CV–3134 (ETB), 2007 WL 2769494, at *8 (E.D.N.Y. Sept. 21, 2007) (quoting BLACK'S LAW DICTIONARY 921 (6th Ed. 1990)) (noting "[t]his definition is consistent with [the interpretation] employed by New York courts" and collecting cases). On the evidence before the Court, after the Wong Deed was set aside, the Plaintiff was a licensee because the Estate permitted her to remain on the Property until they commenced the Landlord-Tenant Action. As a licensee, she did not have a cognizable property interest in the Property.

In a factually similar situation, the Court in *Ostensen* held that the plaintiff, who had lived with the deceased owner, was a licensee of the owner, and not a tenant. 378 F. Supp. 2d at 147. More importantly, the Court noted that "the Plaintiff's license had expired when the home was transferred to the estate of Mr. Capucci after his death. As such, no landlord-tenant or licensee relationship existed between the Plaintiff and the estate of the decedent," *id.* at 148, and that the plaintiff therefore did not have a possessory interest in the property. Arguably, the Plaintiff's license also expired when Lucille Hall died. However, as stated above, the Court finds that the Plaintiff was implicitly permitted to remain on the Property by the Estate until they commenced the Landlord-Tenant Action, as there is no evidence that they revoked her license before then. Nevertheless, licensees do not have a possessory interest in the property they occupy.

To that end, the Court agrees with the Defendants' contention that the Estate did not have to initiate the Landlord-Tenant Action. *See Visken v. Oriole Realty Corp.,* 305 A.D.2d 493, 494, 759 N.Y.S.2d 523 (N.Y. App. Div. 2003) ("Since the plaintiff was a mere licensee . . . , Oriole, as

owner, had an owner's common-law right to oust [the plaintiff] without legal process."); *Paulino v. Wright*, 210 A.D.2d 171, 172, 620 N.Y.S.2d 363, 364 (N.Y. App. Div. 1994) (holding that the defendants were within their rights to evict plaintiff occupants without instituting an eviction proceeding because the plaintiffs had "no property interest in the premises or in its continued occupancy. . . . While it is true that tenants as defined in RPAPL 711 may be evicted only through lawful procedure, others, such as licensees and squatters, who are covered by RPAPL 713 are not so protected. RPAPL 713 merely permits a special proceeding as an additional means of effectuating the removal of nontenants, but it does not replace an owner's common-law right to oust an interloper without legal process. (internal citations, quotation marks and alterations omitted)).

The Plaintiff maintains that her possession of the Property, and the stay of the Landlord-Tenant Action afforded her a constitutionally protected interest in the Property. The Court disagrees.

A constitutionally protected interest "cannot be created out of 'an abstract need or desire for it,' nor from a 'unilateral expectation of it'; rather, a plaintiff must 'have a legitimate claim of entitlement to it.'" *Safepath Sys. LLC v. New York City Dep't of Educ.*, 563 F. App'x 851, 855 (2d Cir. 2014) (summary order) (quoting *Roth,* 408 U.S. at 577, 92 S. Ct. at 2709). To that end, "[b]are possession is not constitutionally protected." *De Villar v. City of New York*, 628 F. Supp. 80, 83 (S.D.N.Y. 1986) (citing *Rosado v. Dudio*, No. 83 Civ. 2407, 1984 WL 1083, at *2 (S.D.N.Y. Dec. 21, 1984)). Therefore, the mere fact that the Plaintiff possessed the Property does not afford her a constitutionally protected right.

Nor did the purported stay of the Landlord-Tenant Action afford the Plaintiff a constitutionally protected right. Assuming that the Second Department's stay of the Landlord-

Tenant Action continued when the Plaintiff filed her motion for leave to appeal, "procedural safeguards do not, by themselves, create a property interest sufficient to support a due process claim." *Valdez v. Town of Brookhaven*, No. 05-CV-4323JSARL, 2005 WL 3454708, at *11 (E.D.N.Y. Dec. 15, 2005) (internal citations omitted). While it is true that the New York State Supreme Court could not evict the Plaintiff while the motion for leave to appeal was being decided, this does not change the fact that the Plaintiff was a mere licensee. Furthermore, pursuant to the case law cited above, it appears that the Estate still could have exercised its common law right to evict the Plaintiff without legal process. Yet, the Court does not rely on the latter fact in its determination.

As the Plaintiff points out, when a stay is in place while an appeal is pending, a moving party's property interest is preserved until the appeal or motion for leave to appeal is decided. *See generally Da Silva v. Musso*, 76 N.Y.2d 436, 440, 559 N.E.2d 1268, 1269 (N.Y. 1990) ("It is elementary that a final judgment or order represents a valid and conclusive adjudication of the parties' substantive rights, unless and until it is overturned on appeal. Furthermore, while an appeal from a final judgment or order may leave an inchoate shadow on the rights defined therein, those rights are nonetheless fully enforceable in the absence of a judicially issued stay pending disposition of the appeal." (internal citation omitted)). The Plaintiff did not have a property interest before she filed her leave to appeal, or after she filed her leave to appeal. She was in bare possession, a licensee staying at the Property with the implied consent of the Estate. Filing a motion for leave to appeal to the Court of Appeals did not change that status.

Therefore, the Plaintiff, as a licensee of the Estate on the Property, did not have a protected interest in the Property.

While the Plaintiff also contends that she was deprived of her personal belongings when the Property was boarded up, the Court finds that she was not so deprived. She was afforded an opportunity to remove her belongings before the Property was boarded up, and was given endless opportunities to collect her personal property after the Town boarded up the Property. As such, the Town Defendants did not deprive the Plaintiff of her personal property. *See Kostiuk v. Town of Riverhead,* 570 F. Supp. 603, 609 (E.D.N.Y. 1983) ("[W]here as here, the person knows where his or her property is, knows he or she will soon get it back . . . and the property is not expected to be and is not, in fact, permanently damaged, then there is no constitutional deprivation of property."). The Court finally notes that although the Plaintiff testified that vandals took several of her personal items, barring allegations of conspiracy, government actors cannot be held liable for the acts of private individuals. *See, e.g., Morris v. Katz*, No. 11-CV-3556 (JG), 2011 WL 3918965, at *6 (E.D.N.Y. Sept. 4, 2011) ("Private conduct, no matter how discriminatory or wrongful, is generally beyond the reach of § 1983." (citing *Academy v. Tennessee,* 531 U.S. 288, 304–05, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001))).

Therefore, as the Plaintiff had multiple opportunities to remove her belongings, she knew the location of those items, and knew that she would soon have an opportunity to retrieve them, she was not deprived of her personal effects.

In any event, as discussed below, even if the Town Defendants deprived the Plaintiff of her personal belongings, she had an adequate post-deprivation remedy in the form of an Article 78 proceeding.

2. As to Whether the Plaintiff was Deprived of Due Process

Even assuming that the Plaintiff had a protected property interest in the Property or in her personal belongings, the Plaintiff cannot show that she was deprived of due process because there was an adequate post-deprivation procedure.

As to this element, a plaintiff must prove that she was deprived of "an opportunity . . . granted at a meaningful time and in a meaningful manner for [a] hearing appropriate to the nature of the case." *Boddie v. Connecticut,* 401 U.S. 371, 378, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971) (internal citations and quotation marks omitted).

The Supreme Court has distinguished between those claims based on a deprivation that occurred pursuant to established state procedures, and those that were the result of random, unauthorized acts by state employees. *Rivera–Powell v. N.Y.C. Bd. of Elections,* 470 F.3d 458, 465 (2d Cir. 2006) (citing *Hudson v. Palmer,* 468 U.S. 517, 532, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984)); *Parratt v. Taylor,* 451 U.S. 527, 537, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled on other grounds by Daniels v. Williams,* 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)).

Where a plaintiff alleges a deprivation pursuant to an established state procedure, "the state can predict when it will occur and is in the position to provide a predeprivation hearing." *Id.* (citing *Hellenic Am. Neighborhood Action Comm. v. City of New York,* 101 F.3d 877, 880 (2d Cir. 1996)). "Under those circumstances, 'the availability of post-deprivation procedures will not, *ipso facto,* satisfy due process.'" *Id.* (quoting *Hellenic,* 101 F.3d at 880).

On the other hand, where a plaintiff brings a procedural due process claim "[b]ased on random unauthorized acts by state employees," the state satisfies procedural due process requirements so long as it provides a meaningful post-deprivation remedy. *Id.* (citing *Hellenic,* 101 F.3d at 880; *Hudson,* 468 U.S. at 532, 104 S. Ct. 3194). A suitable postdeprivation remedy

requires that the plaintiff be given an opportunity to be heard at a meaningful time and in a meaningful manner, though the timing and the nature of this hearing depends upon the nature of the individual circumstances. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433–34, 102 S. Ct. 1148, 1156–57, 71 L. Ed. 2d 265 (1982).

Included in the latter class are those situations where a state actor responds to a perceived emergency. *Heckman v. Town of Hempstead*, 568 F. App'x 41, 45 (2d Cir. 2014) (summary order) ("In an emergency situation 'a state may satisfy the requirements of procedural due process merely by making available some meaningful means by which to assess the propriety of the State's action at some time after the initial taking.'" (quoting *WWBITV, Inc. v. Vill. of Rouses Point,* 589 F.3d 46, 50 (2d Cir. 2009)); *WWBITV*, 589 F.3d at 50 ("Where there is an emergency requiring quick action and where meaningful pre-deprivation process would be impractical, the government is relieved of its usual obligation to provide a hearing, as long as there is an adequate procedure in place to assess the propriety of the deprivation afterwards."); *Catanzaro v. Weiden*, 188 F.3d 56, 61 (2d Cir. 1999) ("Either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." (internal citation and quotation marks omitted)).

Thus, *Parratt* and its progeny provide an emergency-based exception to the requirement that notice and predeprivation process be provided. *See Catanzaro*, 188 F.3d at 61. In such a circumstance, due process rights are violated "only when an emergency procedure is invoked in an abusive and arbitrary manner." *Id.* at 62.

The inquiry in such a situation is twofold: whether there was an emergency that required immediate action, and whether adequate post-deprivation remedies were available. *Id.* at 61–62. In determining the need for immediate action, the Second Circuit, relying on the Supreme Court's decision in *Hodel,* directs that courts avoid hindsight analysis of whether an emergency actually existed, but rather, afford the decision to invoke the emergency procedures "some deference." *Id.* at 62 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 302–03, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981)). Stated another way, "when there is competent evidence allowing the official to reasonably believe that an emergency does in fact exist . . . the discretionary invocation of an emergency procedure results in a constitutional violation only where such invocation is arbitrary or amounts to an abuse of discretion." *Id.* at 63.

Here, the Court finds that the Town Defendants did not act in an arbitrary manner and did not abuse their discretion.

Before engaging in a discussion as to whether the Town Defendants abused their discretion, the Court first finds that the Town Code afforded the Town Defendants the discretion to deem the Property unsafe and not provide the residents notice or hearing. *See* TOWN OF HEMPSTEAD TOWN CODE ("Town Code") § 90–15 (allowing a building inspector to order the immediate vacation of a building "where it reasonably appears that there is imminent danger to the life or safety of any person"); *Id.* at § 88-3(E) ("Whenever the Manager of the Building Department finds that an emergency exists which requires immediate action to protect the public health, safety and welfare, he may, without notice or hearing, issue an order reciting the existence of such an emergency and requiring that such action be taken as he deems necessary to meet the emergency. Notwithstanding the other provisions of this chapter, such order shall be effective immediately. Any party to whom such order is directed shall comply therewith immediately. If such party is not available or does

not respond with sufficient promptness to meet the emergency, then the Manager of the Building Department shall have the power to correct the emergency, and any expense suffered by this Town of Hempstead shall be borne by the party."); *see also* N.Y. PROP. MAINTENANCE CODE § 107.1 ("When a structure or equipment is found to be unsafe, or when a structure is found unfit for human occupancy, or is found unlawful, such structure shall be condemned pursuant to the provisions of this code."); *id.* at § 107.1.3 ("A structure is unfit for human occupancy whenever such structure is unsafe, unlawful or, because of the degree to which the structure is in disrepair or lacks maintenance, is insanitary, vermin or rat infested, contains filth and contamination, or lacks ventilation, illumination, sanitary or heating facilities or other essential equipment required by this code, or because the location of the structure constitutes a hazard to the occupants of the structure or to the public."); *id.* at § 108.1 ("When there is imminent danger . . . because of explosives, explosive fumes or vapors or the presence of toxic fumes, gases or materials, or operation of defective or dangerous equipment, the occupants shall vacate the premises forthwith."). Therefore, pursuant to the Town Code, the Town Defendants were given the discretion to determine whether a property should be vacated in light of imminent danger to the life or safety of any person.

When Mastracchio visited the Property on September 29, 2014, the Property did not have electricity because the electric service had been disconnected. He observed extension cords running through windows into the backyard. At least one window was open. Included in the definitions of a dangerous building of the Town Code are buildings that are open at a door or window, Town Code § 90(A)(7), and those that pose a "fire hazard or a nuisance to the general public." *Id.* at § 90(A)(6). A nuisance is defined as "whatever is dangerous to human life or detrimental to health, and shall include . . . [a] building . . . which has an existing electrical wiring

system which is defective . . . ." *Id.* at § 90(A). The Town Code further states that "[e]very dwelling unit and all public and common areas shall be supplied with electric service, outlets and fixtures which shall be properly installed, shall be maintained in good and safe working condition and shall be connected to the sources of electric power in a safe manner." *Id.* at § 88-5(D).

In light of the fact that there was a cut power cord; no electricity; and an open window, the Court cannot say that Mastracchio abused his discretion when he determined on September 29, 2014 that the Property was unfit for human occupancy as he could have reasonably determined that such conditions posed a danger or a nuisance pursuant to the Town Code.

When Mastracchio and Gunther were able to enter the Property on October 3, 2014, they observed that the Property did not have a functioning heating system; there was the presence of broken windows; candles were strewn throughout the house; various items were piled up throughout the house; there was an absence of functioning smoke or carbon monoxide detectors; and the hot water heater had been installed in such a way as to create the potential for gases to enter the house. The Property therefore failed to meet other minimum standards set forth in the Town Code, s*ee id.* at § 88-5(E) ("Every dwelling or dwelling unit shall be supplied with heating facilities which are properly installed, are maintained in safe and good working condition and are capable of safely and adequately heating all habitable rooms . . . ."), and also plausibly posed a danger or nuisance to the public.

Mastracchio and Gunther's October 3, 2014 observations bolstered Mastracchio's earlier determination that the Property was unfit for human occupancy, and he did not abuse his discretion or act in an arbitrary manner. *See Capozzi v. City of Olean, N.Y.*, 910 F. Supp. 900, 910 (W.D.N.Y. 1995) ("[I]t is clear from the undisputed facts in this case that the condition of Capozzi's house was very poor, that there was no heat at the time Blakeslee was in the house, that the wood stove

had flammable objects in and around it, that there was water damage to the kitchen ceiling, and that the house was full of debris of all kinds from the floor to the ceiling and from wall to wall. As such, the court finds that it was objectively reasonable for Blakeslee to characterize the house as uninhabitable, and to direct Capozzi that he must vacate the premises." (internal citations to the record and quotation marks omitted)).

The Plaintiff has introduced evidence which purportedly shows that the Town treats violations such as those present here differently depending on whether the home is occupied by an owner or a non-owner. When the Town finds violations where an owner occupies the property, the Town does not direct them to evacuate the premises. Conversely, when the Town finds violations that involve non-owners, they typically file evacuation notices. Schwarz testified in a deposition in another case that the Town makes such distinctions because "upon discussions with the Department of State, our liaison . . . has advised us that in cases of titled owners, due to constitutional issues, we would probably be best off only issuing a ticket and not evacuating people under those circumstances." (Pl.'s Ex. E at 63).

This fact does not affect the Court's determination. First, the evidence shows that the Town treats all non-owners similarly. To that end, the Town cannot be said to act arbitrarily because it treats similarly situated individuals in the same way. *See, e.g., Gallo v. Suffolk Cty. Police Dep't*, 360 F. Supp. 2d 502, 510 (E.D.N.Y. 2005) (stating that a claim for equal protection can be established where a "similarly situated individual was treated differently by a state official who acted in an arbitrary manner and without rational basis"). Furthermore, the Town Code permits the Commissioner of Buildings to post such notices on residences where the safety of the public is at issue, or where the building could create a nuisance. To that end, Schwarz offered a rational basis for the different treatment—that owners and tenants have a constitutionally protected interest

in residences. As shown above, licensees, occupants, and squatters do not. Finally, and most importantly, there is no evidence here that the Town Defendants acted arbitrarily here, or that they abused their discretion. The Court notes that the argument presented here by the Plaintiff may have been better served on a claim for denial of equal protection; however, as stated above, the Plaintiff cannot amend her complaint to bring such a claim.

As to the second step outlined in *Catanzaro*, the Court finds that there was an adequate post-deprivation remedy available to the Plaintiff in the form of an Article 78 proceeding. A claimant may bring an Article 78 proceeding where she claims that "a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed . . . ." N.Y. C.P.L.R. 7803(3). Here, the Plaintiff claims that the Town Defendants violated lawful procedure; and that they acted in an arbitrary and capricious manner because there was no emergency that required the Property to be vacated and boarded up. Therefore, she could have brought an Article 78 proceeding against the Town.

The Second Circuit "has held on numerous occasions that where, as here, a party sues the state and its officials and employees for the arbitrary and random deprivation of a property or liberty interest, an Article 78 proceeding is a perfectly adequate postdeprivation remedy." *Grillo v. N.Y.C. Transit Auth.,* 291 F.3d 231, 234 (2d Cir. 2002) (quoting *Hellenic*, 101 F.3d at 880–81).

The Plaintiff contends that due process was offended here because she was not informed that she could bring an Article 78 proceeding. The Court disagrees. The Town Defendants were not required to inform the Plaintiff of the availability of an Article 78 proceeding—the fact that it was available to the Plaintiff is sufficient process. *Sheffield v. Roslyn Union Free Sch. Dist.*, No. 13-CV-5214 (SJF)(AKT), 2014 WL 4774133, at *4 (E.D.N.Y. Sept. 23, 2014) (finding that it was

of no consequence that the plaintiff did not know that she could bring an Article 78 proceeding, and stating that "[i]t is the *availability* of an adequate post-deprivation remedy that is key, not whether the plaintiff, for whatever reason, chose to avail, or not avail himself of that opportunity" (emphasis in original) (collecting cases)); *S.C. v. Monroe Woodbury Cent. Sch. Dist.*, No. 11-CV-1672 (CS), 2012 WL 2940020, at *10 (S.D.N.Y. July 18, 2012) ("Plaintiffs' contention that procedural due process required Defendants to provide Plaintiffs with notice of their opportunity to appeal is incorrect. . . . The Article 78 proceeding, itself a sufficient post-deprivation remedy, is also adequate process." (internal citations omitted)); *Hennigan v. Driscoll*, No. 5:06-cv-426 (FJS/GJD), 2009 WL 3199220 at *11 (N.D.N.Y. Sept. 30, 2009) (noting that the Syracuse Police Department was not required to notify the plaintiff of his option to pursue an Article 78 proceeding after he was terminated without a hearing); *Walsh v. Suffolk Cty. Police Dep't*, No. 06-CV-2237 (JFB)(ETB), 2008 WL 1991118, at *14 n.3 (E.D.N.Y. May 5, 2008) (concluding that the police department did not have to inform an employee of the availability of an Article 78 proceeding where officer was not offered pre- or post-deprivation procedures to contest the validity of his termination); *Vialez v. New York City Hous. Auth.*, 783 F. Supp. 109, 121 (S.D.N.Y. 1991) (holding that where the plaintiff claimed that she did not know that she had the right to pursue an Article 78 appeal because she did not speak English, "New York does provide an adequate avenue for appeal of a Housing Authority decision [in the form of an Article 78 proceeding], and due process does not require that plaintiff have been sent notice of that opportunity to appeal"); *see also Nenninger v. Vill. of Port Jefferson*, 509 F. App'x 36, 39 (2d Cir. 2013) ("[T]he [procedural due process] claim fails in any event because Nenninger was free to bring an Article 78 [] proceeding in New York State court." (internal citations omitted)); *Campo v. New York City Emp. Ret. Sys.,* 843 F.2d 96, 102 n.6 (2d Cir. 1988) ("[Plaintiff] may be barred by [the statute of] limitations from

presently proceeding pursuant to Article 78. However, the fact that Article 78 may not now be available to [plaintiff] for that reason would not affect the result herein because [plaintiff] had available an Article 78 remedy whether she timely utilized it or not."); *Patterson v. Labella*, No. 6:12-cv-01572 (MAD/TWD), 2014 WL 4892895, at *21 (N.D.N.Y. Sept. 30, 2014) ("Although Plaintiff could have challenged the alleged denials through an Article 78 proceeding, he did not avail himself of that right."), *aff'd*, 641 F. App'x 89 (2d Cir. 2016).

The cases cited by the Plaintiff have no bearing on this matter. Both *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977) and *Kia P. v. McIntyre*, 235 F.3d 749 (2d Cir. 2000) dealt specifically with the removal of children from their families, and parents' retention of their children. While the Court did say that "[t]he burden of initiating judicial review must be shouldered by the government," *Kia P.*, 235 at 760 (quoting *Duchesne*, 566 F.2d at 828), that holding appears to be limited to situations of the removal of children. As the *Duchesne* court said, "[i]n *this situation*, the state cannot constitutionally sit back and wait for the parent to institute judicial proceedings." 566 F.2d at 828 (emphasis added). This is further bolstered by the fact that the Second Circuit limited the holding of *Duchesne* to the facts of that case in *Gottlieb v. Cty. of Orange*, 84 F.3d 511 (2d Cir. 1996). In *Gottlieb*, the Court held that the government did not have to initiate post-deprivation hearings where a child had been removed from a home and the plaintiffs had consulted with an attorney before making their decision.

More importantly, none of those cases dealt with the availability of an Article 78 proceeding. While the Court did address the sufficiency of an Article 78 proceeding in *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002), that case was also limited to the narrow situation of vehicle seizure. The Second Circuit specifically held that "the suggested remedy of an Article 78

proceeding does not provide a prompt and effective means for claimants to challenge the legitimacy of the City's retention of their vehicles *pendente lite*." *Id.* at 60.

In contrast, multiple courts have found, both before and after *Krimstock*, that Article 78 proceedings were proper venues for plaintiffs to challenge evictions and findings of building inspectors. *Ahmed v. Town of Oyster Bay*, 7 F. Supp. 3d 245, 254 (E.D.N.Y. 2014) (Article 78 proceeding was adequate post deprivation remedy for store owners who claimed that building inspectors deemed their store dangerous); *Dellutri v. Vill. of Elmsford*, 895 F. Supp. 2d 555, 574 (S.D.N.Y. 2012) (holding that plaintiff could have brought an Article 78 proceeding against building inspectors who served plaintiff with a notice of building violations); *Xue Ming Zheng v. New York City Hous. Auth. Office of Impartial Hearing*, No. 10 CIV. 509 (DAB), 2010 WL 3910480, at *2 (S.D.N.Y. Sept. 28, 2010) (noting that plaintiff commenced two Article 78 proceedings to appeal the termination of his tenancy and grant a stay on all eviction proceedings); *Weissman v. Fruchtman*, 765 F. Supp. 1185, 1190 (S.D.N.Y. 1991) (stating that property owners can bring Article 78 proceedings where a permit for voluntary demolition is denied); *Vialez*, 783 F. Supp. at 121 (holding that an Article 78 proceeding was a proper venue to contest NYCHA decision terminating her tenancy). As stated above, multiple courts have held that claimants need not be informed of the availability of an Article 78 proceeding.

Therefore, the Plaintiff was not deprived of due process because the Defendants did not act in an arbitrary manner or abuse their discretion when they acted in response to a perceived emergency, and the Plaintiff had an adequate post-deprivation remedy in the form of an Article 78 proceeding. Accordingly, the Town Defendants' motion for summary judgment pursuant to Rule 56 dismissing the Plaintiff's procedural due process claim is granted.

D. As to the Plaintiff's Substantive Due Process Claim

At the outset, the Court finds that despite the Town Defendants' protestations to the contrary, the Plaintiff did include a claim for substantive due process in her amended complaint. While the word "substantive" cannot be found in the complaint, it does allege violations of due process, and those violations can be presumed to include both procedural and substantive elements. Accordingly, the Court proceeds to analyze the claim.

In order to prove that her right to substantive due process was violated the Plaintiff "must show (1) that [she] had a valid property interest . . . and (2) that the Town [Defendants] infringed that interest in an arbitrary or irrational manner." *O'Mara v. Town of Wappinger*, 485 F.3d 693, 700 (2d Cir. 2007) (internal citation omitted); *see also Natale v. Town of Ridgefield*, 170 F.3d 258, 262-63 (2d Cir. 1999); *Soundview Assoc. v. Town of Riverhead*, 893 F. Supp. 2d 416, 430-431 (E.D.N.Y. 2012). A plaintiff must plead "governmental conduct that 'is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" *Velez v. Levy*, 401 F.3d 75, 93 (2d Cir. 2005) (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)); *Rosa R. v. Connelly*, 889 F.2d 435, 439 (2d Cir. 1989) (a plaintiff must establish that the government decision it challenges "was arbitrary or irrational or motivated by bad faith").

The Court has already found that the Plaintiff did not have a valid property interest in the Property. Therefore, the Plaintiff's substantive due process claim fails as a matter of law.

Furthermore, the Court has found that the Town Defendants did not act in an arbitrary manner when they boarded up the Property. To that end, mere arbitrariness would not necessarily establish a due process violation. "[S]ubstantive due process 'does not forbid governmental actions that might fairly be deemed arbitrary or capricious and for that reason correctable in a state

court lawsuit. Its standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority.'" *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 505 (2d Cir. 2001) (quoting *Natale*, 170 F.3d at 263); *see also Cunney v. Bd. of Trustees of the Vill. of Grand View, New York*, 660 F.3d 612, 626 (2d Cir. 2011) ("Substantive due process protects against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against government action that is incorrect or ill advised." (internal citation and quotation marks omitted)).

"In order to shock the conscience and trigger a violation of substantive due process, official conduct must be outrageous and egregious under the circumstances; it must be truly brutal and offensive to human dignity." *Lombardi v. Whitman,* 485 F.3d 73, 81 (2d Cir. 2007) (internal quotation marks and alteration omitted); *Velez*, 401 F.3d at 93–94 (noting that actions which shock the conscience occur "largely in the context of excessive force claims" but also unquestionably include other "malicious and sadistic abuses of power by government officials, intended to oppress or to cause injury and designed for no legitimate government purpose" (internal quotation marks omitted)); *Schultz v. Inc. Vill. of Bellport,* No. 08–CV–0930 (JFB)(ETB), 2010 WL 3924751, at *6 (E.D.N.Y. Sept. 30, 2010) (noting that the shock the conscience standard "is not easily met; the plaintiff must show the government conduct was egregious and outrageous, not merely incorrect or ill-advised." (quoting *Ferran v. Town of Nassau,* 471 F.3d 363, 369–70 (2d Cir. 2006) (internal quotation marks omitted))).

Here, the Town Defendants went to the Property to investigate a complaint of a loud generator. They found an open window, a severed power line, a generator, and no electricity running to the Property. Upon entering the home, they saw that the Property did not have heat; that it was in a state of disrepair; that candles were located throughout the house; that the hot water

heater was improperly installed so as to create the possibility that gases could escape into the house; and that the house had broken windows. As demonstrated above, pursuant to the Town Code, they had the discretion to deem the Property unsafe.

As such, no reasonable trier of fact could find that the Town Defendants acted in such a way as to shock the conscience. *See Harlen*, 273 F.3d at 505 (noting that a substantive due process claim did not lie where the alleged actions "did not transgress the 'outer limit' of legitimate governmental action"); *Catanzaro*, 188 F.3d at 64 (finding that an order to demolish plaintiff's buildings was nothing worse than "incorrect or ill-advised" and did not rise to the level of a substantive due process violation); *Longinott v. Bouffard,* No. 11 CV 4245 (VB), 2012 WL 1392579, at *5 (S.D.N.Y. Apr. 17, 2012) ("[T]he Supreme Court has repeatedly emphasized that only the most egregious official conduct can be said to violate substantive due process." (citing *Lewis,* 523 U.S. at 846, 118 S. Ct. 1708)); *Yu Juan Sheng v. City of New York,* No. 05–CV–1118 (RRM)(VVP), 2009 WL 6871132, at *11 (E.D.N.Y. June 26, 2009) (finding claims associated with the seizure of an automobile not to be arbitrary or conscience-shocking as a matter of law), *report and recommendation adopted*, 2010 WL 3744428 (E.D.N.Y. Sept. 20, 2010); *see also Manza v. Newhard,* 470 F. App'x 6, 8–9 (2d Cir. 2012) (summary order) (finding that the issuance of, and reliance upon, a legal opinion which led to termination of property owner's water service after a sixty-day period to pursue legal remedies could not be said to shock the conscience).

Therefore, the Plaintiff's claim for substantive due process fails as a matter of law. Accordingly, the Town Defendants' motion for summary judgment dismissing that claim is granted.

E. As to the Plaintiff's Remaining State Law Claims

The Plaintiff's sole remaining claim is brought pursuant to N.Y. REAL PROP. ACTS. § 853. "The United States Supreme Court has instructed that courts should ordinarily decline to exercise supplemental jurisdiction in the absence of federal claims." *Butler v. City of Batavia*, 545 F. Supp. 2d 289, 294 (W.D.N.Y. 2008) (citing *Carnegie–Mellon Univ. v. Cohill,* 484 U.S. 343, 350 n.7, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988) (stating that when all federal claims are dismissed before trial, the relevant factors indicating whether the court should exercise supplemental jurisdiction will "point towards declining to exercise jurisdiction over the remaining state-law claims"); *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 726, 86 S. Ct. 1130, 1139, 16 L. Ed. 2d 218 (1966) ("Certainly, if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well.")), *aff'd*, 323 F. App'x 21 (2d Cir. 2009); *see also Castellano v. Bd. of Trustees,* 937 F.2d 752, 758 (2d Cir. 1991) ("[I]f [all] federal claims are dismissed before trial . . . the state claims should be dismissed as well." (quoting *Gibbs,* 383 U.S. at 726, 86 S. Ct. at 1139)).

Therefore, the Court declines to exercise supplemental jurisdiction over the remaining state law claim. The statute of limitations will be tolled as long as the Plaintiff refiles in state court within 30 days from the date of the filing of this decision and order. *See* 28 U.S.C. § 1367(d) ("The period of limitations for any claim asserted under subsection (a) [discussing supplemental jurisdiction], and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.").

Accordingly, the Plaintiff's state law claim is dismissed without prejudice.

III. CONCLUSION

For the reasons stated above, the Plaintiff's motion for summary judgment is denied in its entirety, and the Town Defendants' motion for summary judgment is granted in its entirety. The Clerk of the Court is respectfully directed to terminate the first-party action. The Town Defendants are directed to inform the Court on how they wish to proceed with the third-party action within ten days of entry of this order.

It is **SO ORDERED:**

Dated: Central Islip, New York

May 25, 2018

___*/s/ Arthur D. Spatt*___

ARTHUR D. SPATT

United States District Judge