

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS V. POLIZZI IA Part 14  
Justice

<hr/> RAY KAISER and KICKI WEHLOU, M.D. as owners of real property located in that parcel of land known as Forest Hills Gardens, Forest Hills, NY, and as members of the Forest Hills Gardens Corporation,	x	Index Number <u>7126</u> 2004  Motion Date <u>June 1,</u> 2004  Motion Cal. Number <u>11</u>
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Plaintiffs,

-against-

FOREST HILLS GARDENS CORPORATION,

Defendant.

x

The following papers numbered 1 to 23 read on this motion by plaintiffs to preliminarily enjoin defendant, pending determination of this action, from enforcing the restrictions and acts of physical exclusion threatened to be imposed in defendant's notice dated March 15, 2004; and this cross motion by defendant for summary judgment dismissing the complaint and for an award of costs and disbursements in the amount of \$3,000.00 and directing the clerk to tax and enter judgment against plaintiffs upon defendant's submission of a bill of costs, and for an award of costs, fees and disbursements associated with defending this action and motions.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits .....	1-9
Notice of Cross Motion - Affidavits - Exhibits ...	10-14
Answering Affidavits - Exhibits .....	15-18
Reply Affidavits .....	19-21
Other .....	22-23

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Defendant Forest Hills Gardens Corporation (FHGC) is a not-for-profit corporation which owns and maintains the streets of the area known as Forest Hill Gardens (the Gardens), located in Queens County, which encompasses approximately 900 homes, and some commercial businesses, particularly in the area of the Gardens known as "Station Square." Plaintiffs allege that for a period of approximately 43 years, the businesses, professionals and residents of the Gardens have been able to have an unlimited number of customers, clients, patients and guests park their automobiles in the Gardens, and have printed informal parking slips for customers, clients, patients and guests, who in turn, placed the parking slips on the dashboard of their automobiles.

Plaintiffs further allege that defendant FHGC issued a notice, dated March 15, 2004, to each owner and lessee of commercial property within the Gardens, stating that the board of directors of FHGC had revised the parking regulations of the community with respect to commercial and professional business visitors to take effect on March 29, 2004. The notice stated that the adoption of the revised parking regulations was the result of the consideration of many factors, including "wear and tear on our private streets, least amount of inconvenience for residents and visitors, maintaining adequate parking for property owners, [and] higher maintenance costs to keep [the] streets in good repair." The notice indicated that under the new parking regulations each business in the Gardens would have the right to purchase up to five visitor passes at a cost of \$250.00 (plus tax) and the responsibility to copy and complete each parking pass, and maintain a record log relative to the issuance of the passes to customers or patients. The notice also indicated that under the new regulations, whenever more than five customers are visiting a business at one time, those additional customers are to park outside the Gardens, and are prohibited from double parking or relying upon "visiting notes." In addition, the notice stated the new regulations would provide for the "booting" (the application of a device to the wheel to immobilize the vehicle) of customer's vehicles in the event time periods for the issued passes for the individual businesses are found to overlap.

Plaintiff Ray Kaiser is a partner in a partnership called Reiner & Kaiser Associates, which leases properties in the Garden, including one at 9 Station Square, which is leased to John Christie Coiffures, Ltd., a commercial tenant, operating a hair salon there. Plaintiff Kicki Wehlou, M.D., is a pediatrician who owns property in the Gardens, at 149 Slocum Crescent, where she maintains her residence and medical practice. They allege the implementation of the revised parking regulations will destroy the business of the hair salon, plaintiff Wehlou's medical practice, and those other commercial establishments and professional practices located within the Gardens, particularly in Station Square. They allege that the

distribution of a maximum of five parking passes per business or professional practice is wholly inadequate, inasmuch as the businesses and professional practices in the Gardens frequently have more than five visitors patronizing such businesses and practices at the same time. Plaintiffs further allege that the nearest public parking is located at a significant distance from the hair salon of John Christie Coiffures, Ltd. and medical office of plaintiff Wehlou, and the additional customers and patients will be greatly inconvenienced by having to walk from their automobiles parked in the public parking area to the hair salon and medical office. Plaintiffs also allege that such inconvenient parking situation for additional customers, clients and patients also will be faced by others who maintain commercial establishments and practices, in the Garden. According to plaintiffs, the severe limitation on the number of parking passes to be distributed, when combined with the increased walking distance to public parking places, will cause customers, clients and patients to quit frequenting the businesses and professional offices located in the Garden, thereby driving the businesses and practices out of business. Plaintiffs Kaiser and Wehlou allegedly have complained to defendant FHGC about the revised parking regulations, without satisfaction.

Plaintiffs Kaiser and Wehlou allege that defendant FHGC's adoption of the revised parking regulations was done in bad faith, and motivated by an intent to eliminate all commercial and professional business in the Gardens. Plaintiffs Kaiser and Wehlou further allege that the revised parking regulations will be arbitrarily implemented since defendant FHGC has admitted its intention to allow at least one professional office to purchase a total of 10 parking passes. They also allege that the implementation of the revised parking regulations will constitute a partial actual eviction, and trespass upon the easements, of the businesses and professional offices in the Gardens.

Plaintiffs commenced this action seeking a judgment declaring that defendant FHGC is not entitled to enforce the restrictions and physical acts of exclusion set forth in the March 15, 2004 notice, and enjoining defendant FHGC from enforcing the restrictions and physical acts of exclusion set forth in such notice.

Defendant FHGC served an answer denying the material allegations of the complaint, and asserting an affirmative defense based upon failure to state a cause of action.

Plaintiffs move, by order to show cause dated March 26, 2004, for a preliminary injunction enjoining defendant FHGC from enforcing the restrictions and acts of physical exclusion set forth in the March 14, 2004 notice. Defendant FHGC cross-moves for

summary judgment dismissing the complaint and to be awarded a discretionary allowance of additional costs to be taxed by the Clerk in the amount of \$3,000.00. The order to show cause contains a temporary restraining order, which has been continued pending the determination of this motion and cross motion.

Defendant FHGC asserts that the complaint fails to state a cause of action. It contends that it has the authority to regulate the streets and sidewalks within the Gardens, pursuant to restrictive declaration, imposing covenants and restrictions running with the land on all properties in the Gardens. Defendant FHGC also contends that such restrictive declaration is enforceable, and the adoption of the revised parking regulations are a legal exercise of the restrictions created by the restrictive declaration. In addition, defendant FHGC contends that the adoption of the revised parking regulations was not motivated by an intent by the board of directors to eliminate commercial business and professional practices from the Gardens. Defendant FHGC argues that plaintiffs have failed to state a claim for partial actual, or constructive, eviction, because no landlord-tenant relationship exists between it and either plaintiff. It also argues that plaintiffs have failed to state any cause of action for interference with any appurtenance or easement because plaintiffs do not possess an easement by grant, or prescription, in the streets.

Plaintiff FHGC's predecessor, the Sage Foundation Homes Company, imposed restrictions and covenants on all properties within the Gardens, pursuant to Declaration No. 3, a recorded restrictive declaration dated April 18, 1913. Paragraph "Twelfth" of Declaration No. 3 provides, in pertinent part, that "All of the land show on said map ... except streets ... now or hereafter opened, laid out or established ... shall be subject to an annual charge or assessment ... to be paid by the owners of property subject thereto .... Said charge or assessment shall be applied toward the payment of the cost of the following ... : Lighting, maintaining and improving streets ... for the general use of the owners of property shown on said map ...." It is undisputed that the restrictions and covenants are still in effect today and appear in the chain of title of all owners of real property in the Garden and burden such properties (see Forest Hills Gardens Corp. v Evan, Supreme Court, Queens County, Index No. 28560/2000, memorandum decision dated January 13, 2003). It is also undisputed that the Sage Foundation Homes Company assigned its rights and powers under Declaration No. 3 to Gardens Corporation, and that Gardens Corporation, thereafter, changed its name to Forest Hills Gardens Corporation (see Forest Hills Gardens Corp. v Evan, Supreme Court, Queens County, Index No. 28560/2000, memorandum decision dated January 13, 2003).

Under the certificate of incorporation, dated December 7, 1922, pursuant to which the Gardens Corporation was founded, the corporation was formed to "promote and sustain in Forest Hills Gardens and vicinity in all suitable ways the living and aesthetic conditions for which the Gardens was founded, and to act as the common agency for the people of the place towards attaining these ends." The certificate of incorporation provides that "Without in any particular limiting or restricting the objects or powers of the corporation it is expressly and specifically declared and provided that the corporation shall have power and that it shall be among its objects: ... (c) [t]o do all things deemed by the corporation advisable for promoting and maintaining any restrictions in Forest Hills Gardens and vicinity..." and "to have, possess, and exercise such other powers as shall be incident to the carrying out of any of the objects for which the corporation is formed or convenient to their exercise."

The business judgment rule applies to the challenged action of rule-making taken by the board of directors of a not-for-profit corporation (see Matter of Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530 [1990]; Martino v Board of Managers of Heron Pointe on the Beach Condominium, 6 AD3d 505 [2004]; Forest Hills Gardens Corp. v Baroth, 147 Misc 2d 404 [1990]; see also Schoninger v Yardarm Beach Homeowners' Assn., 134 AD2d 1, 10 [1987]; Caruso v Board of Managers of Murray Hill Terrace Condominium, 146 Misc 2d 405 [1990]). Under this rule, absent claims of fraud, self-dealing, unconscionability, or other misconduct, judicial inquiry as to the reasonableness of the decisions of the board of directors is limited to (1) whether the action by the board of directors was authorized, and (2) whether the action was taken in good faith and in furtherance of the not-for-profit corporation's interests and purposes (see Gillman v. Pebble Cove Homeowners Assn., 154 AD2d 508 [1989]). The limited judicial review afforded by the rule protects the not-for-profit corporation's decisions against "undue court involvement and judicial second-guessing" (Matter of Levandusky v One Fifth Ave. Apt. Corp., supra at 540).

It is settled that defendant FHGC has broad authority, pursuant to such certificate of incorporation and Declaration No. 3, to regulate the use of the streets in the Gardens, including the authority to adopt and enforce regulations for the parking of vehicles on the streets (see Forest Hills Gardens Corp. v Kowler, 80 AD2d 630 [1981], affd 55 NY2d 768 [1981]; Forest Hills Gardens Corp. v Baroth, supra; Engel v Forest Hills Gardens Corp., (Sup Ct, Queens County, orders dated May 6, 2004 and accompanying memorandum decision, Weiss, J., index No. 19868/1999). In fact, plaintiffs do not contest that the board of directors of defendant FHGC acted within the scope of its authority to promulgate revised parking regulations for the streets in the Gardens. Rather, plaintiffs challenge the nature of the revised parking regulations

based upon their claim that the regulations will have a significant adverse impact on their respective businesses.

Here, defendants FHGC has offered the affidavits of Elizabeth G. Murphy, the president of defendant FHGC, to show that the board of directors acted in good faith, and in the interests of the Gardens as a whole, when adopting the revised parking regulations. According to Ms. Murphy, the revised regulations governing commercial parking were the result of much deliberation, beginning in November 2003, and a legitimate concern for the competing interests of the property owners in the Garden concerning the availability of parking, the degree of noncompliance with the prior parking rules and the financial burden of maintaining the streets.

In addition, Ms. Murphy states that the board of directors entertained comments about the revised parking regulations for commercial parking by owners and lessees of commercial property, was not motivated by any intent to eliminate the commercial businesses and professional practices in the Gardens and, instead, acknowledges the benefit of their existence to the property owners there. She further states, that the board of directors, in any event, would be barred from implementing any strategy to do so, because Declaration No. 3 recognizes the continued non-residential use of certain properties in the Garden, including the property leased by defendant Kaiser's partnership. Ms. Murphy also states that to the extent plaintiffs are concerned that any particular office will be permitted by defendant FHGC to purchase more than five commercial visitor parking passes, such permission will be granted based upon consideration of the number of leased businesses at the location. Ms. Murphy additionally states that defendant FHGC has never granted an easement to any person with respect to the streets located within the Gardens, and that all repairs and maintenance of the streets within the Gardens have always been performed only by defendant FHGC. Such affidavits establish defendant FHGC's entitlement to summary judgment dismissing the complaint.

The burden shifts to plaintiffs to establish, by evidentiary proof in admissible form, a triable issue of fact showing that defendant FHGC, in its adoption of the revised parking regulations, acted in bad faith or in a discriminatory manner towards them, plaintiffs have a landlord-tenant relationship with defendant FHGC, or plaintiffs possess an easement with respect to any portion of the streets within the Garden (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Plaintiffs have failed to make any showing that raises an issue of fact as to any of these subjects (see Jones v Surrey Co-op. Apartments, Inc., 263 AD2d 33 [1999]; Cooper v 6 West 20th Street Tenants Corp., 258 AD2d 362 [1999]). Under such circumstances, the motion by plaintiffs for a preliminary injunction is denied, and that branch of the cross

motion by defendant FHGC for summary judgment dismissing the complaint is granted to the extent of dismissing the claim for injunctive relief, and with respect to the claim for declaratory relief, granting summary judgment declaring that defendant FHGC is entitled to enforce the restrictions and physical acts of exclusion set forth in the March 15, 2004 notice (CPLR 3212[b]).

That branch of the cross motion by defendant FHGC seeking to include a discretionary allowance of additional costs to be taxed by the Clerk in the amount of \$3,000.00 is denied. Although a party may be awarded discretionary costs in an appropriate case (CPLR 8303[a][2]), the court finds the instant case was not so complicated or novel as to justify a conclusion that it was a difficult or extraordinary case (see, F & D Realty Co. v Noto, 127 AD2d 765 [1987]; Delisio v Clyde Milling Corp., 24 AD2d 823 [1965]; Schwartz v Bartle, 51 Misc 2d 215 [1966]).

Dated: July 13, 2004

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J.S.C.