

**Concerned Cooper Gramercy Tenants' Association v  
New York City Educational Construction Fund**

2003 NY Slip Op 30103(U)

June 16, 2003

Supreme Court, New York County

Docket Number:

Judge: Barbara Kapnick

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

PRESENT: B. Kapnick  
*Justice*

PART 12

Concerned Cooper Gramercy  
Tenants Assoc.

INDEX NO. 1041076-01

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 001

NYC Educational Construction  
Fund

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

**SCANNED**  
JUN 20 2003

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE

Dated: 6/13/03

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

BARBARA R KAPNICK

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 12

-----X

CONCERNED COOPER GRAMERCY TENANTS'  
ASSOCIATION by Daniel Petrucelli,  
President; DANIEL PETRUCELLI, WENDY  
TINKLER and NEIL RYDER HOOS,

Plaintiffs,

-against-

**DECISION/ORDER**  
Index No. 104076/01  
Motion Seq. No. 001

NEW YORK CITY EDUCATIONAL CONSTRUCTION  
FUND and NUMBER 401 SECOND AVENUE, INC.,

Defendants.

-----X

**BARBARA R. KAPNICK, J.:**

This action involves the Cooper Gramercy Apartments ("Cooper Gramercy"), a 168 unit residential development located at Second Avenue and 23rd Street, a/k/a 401 Second Avenue, New York, New York.

The land at said location was transferred by the City of New York to defendant New York City Educational Construction Fund ("ECF") in 1972 for the sum of \$1.00, pursuant to a resolution of the Board of Estimate ("BOE Resolution 65A") which approved the conveyance of the real property "for the construction of an addition to and modernization of a public school building known as Junior High School 47, Manhattan, and construction of a housing

facility to contain approximately 168 units of publicly assisted housing".

The City and ECF signed a Disposition Agreement on November 10, 1972 pursuant to that resolution in which they indicated that they "contemplate[d] the erection of a combined-occupancy structure within the meaning of Article 10 of the Education Law" consisting of the public school and "a residential structure containing approximately 168 units."

BOE Resolution 65A was referenced and annexed to the Deed dated June 30, 1973 which transferred title of the land to ECF.

ECF thereafter caused the construction of a structure containing a public school and the planned residential apartments. The residential portion of the building was leased in 1973 to defendant Number 401 Second Avenue, Inc. ("Number 401"), a limited profit housing corporation organized pursuant to Article II of the Private Housing Finance Law, commonly known as the "Mitchell-Lama" law, for a seventy-five year term ("1973 Ground Lease").

Section 102 of the 1973 Ground Lease provides as follows:

The Demised Premises shall be used for residential purposes for persons and families of low or moderate income only. The rental specified in Article II hereof is predicated upon such use.

Defendant Number 401 has operated Cooper Gramercy as Mitchell-Lama housing since approximately 1976, but notified the Cooper Gramercy tenants in 1998 that it intended to withdraw from the Mitchell-Lama program.

By letter dated September 21, 1999, ECF advised Number 401 that its withdrawal from the Mitchell-Lama program would be a breach of the 1973 Ground Lease. However, after negotiations (which did not include the Cooper Gramercy tenants), ECF and Number 401 entered into a "Third Amendment of Lease" dated August 4, 2000, which provides in relevant part as follows:

1. The first sentence of Section 102 is hereby deleted and replaced by the following:

"The Demised Premises shall be used for residential purposes for persons and families of low or moderate income only, except that withdrawal of the Demised Premises from the jurisdiction of the Mitchell-Lama Program shall not be deemed a violation of the conditional usage restriction."

Plaintiffs Concerned Cooper Gramercy Tenants' Association by Daniel Petrucelli, President; Daniel Petrucelli, Wendy Tinkler and Neil Ryder Hoos, as tenants in Cooper Gramercy, then commenced a proceeding pursuant to Article 78 of the CPLR against Number 401 and ECF (IndexNo. 124239/00) seeking to annul the Third Amendment to the 1973 Ground Lease on the ground that it violates section 460(2) of the Education Law.<sup>1</sup>

By Decision/Judgment dated May 10, 2001, the Hon. William J. Davis granted motions by Number 401 and ECF to dismiss the petition finding that the petitioners (plaintiffsherein) lacked standing to bring the proceeding. Justice Davis noted that

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<sup>1</sup> Pursuant to Education Law § 460(2)(a), "[a]ny lease, sublease or other agreement entered into between the [New York City Educational Construction Fund ("the fund")] and the owner or developer of a proposed combined occupancy structure shall provide for payment to the fund of the fair market value of such easements, space rights, air rights or other fee or leasehold interests as are to be held or retained by such owner or developer or his successor in interest under the terms of such agreement; provided that where subsidized housing, as hereinafter defined, is intended to be built in or on said easements, space rights, air rights or other fee or leasehold interests, the appropriate document may provide, in the discretion of the fund, for payment to the fund of less than the fair market value of such easements, space rights, air rights, or other fee or leasehold interests. As used in this paragraph, subsidized housing shall mean dwelling units aided by one or more federal, state or municipal programs designed to provide low or moderate income housing."

[i]t is clear that petitioners' ultimate goal is to prevent Cooper Gramercy from withdrawing from the Mitchell-Lama program. Their remedy, however, is to directly challenge any such withdrawal when and if it occurs. As to this proceeding, petitioners, as strangers to the lease between 401 and ECF, have no legally cognizable claim with respect to it and are not in a position to suffer any legally cognizable injury from the alleged violations of the Education Law.

By decision dated April 15, 2003, the Appellate Division affirmed the dismissal of that proceeding, finding that

[t]he IAS court properly dismissed the proceeding for lack of standing. Petitioners are not party to the ground lease or its challenged amendment, and are not harmed by the alleged violation of a statute that does not mandate subsidized housing and does not immediately affect the rents they can be charged. As the IAS court concluded, any failure by the Fund to collect the full rent to which it is entitled can result in injury only to the public at large (*see Matter of Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 N.Y.2d 428, 433, 559 N.Y.S.2d 947, 559 N.E.2d 641).

Concerned Cooper Gramercy Tenants' Ass'n v. New York City Educational Const. Fund, \_\_ A.D.2d \_\_, 758 N.Y.S.2d 47 (1st Dep't 2003).

While the Article 78 proceeding was still pending, plaintiffs commenced the instant action seeking a judgment enjoining defendant

Number 401 "from withdrawing from the Mitchell-Lama program and/or terminating subsidized housing at Cooper Gramercy and enjoining defendant ECF from permitting the premises to be used for other than subsidized housing for low and middle income families..."

Number 401 now moves for an order dismissing this action in its entirety based upon documentary evidence and for failure to state a cause of action.

Pursuant to Private Housing Finance Law § 35(2),

[a] company aided by a loan made after May first, nineteen hundred fifty-nine, may voluntarily be dissolved, without the consent of the commissioner or of the supervising agency, as the case may be, not less than twenty years after the occupancy date upon the payment in full of the remaining balance of principal and interest due and unpaid upon the mortgage or mortgages and of any and all expenses incurred in effecting such voluntary dissolution [emphasis supplied].

The Court of Appeals has held that "*[a]bsent some specific restrictive covenant*, a limited-profit housing company, aided by a loan made after May 1, 1959, may 'voluntarily dissolve', i.e., become deregulated [emphasis supplied]" at the conclusion **of** the mandatory twenty year period. Columbus Park Corp. v. Department of

Housing Preservation and Development, 80 N.Y.2d 19, 23 (1992),  
rearg. denied, 80 N.Y.2d 925 (1992).<sup>2</sup>

Defendant Number 401 argues that in the instant case there is no specific restrictive covenant obligating Cooper Gramercy to remain in the Mitchell-Lama program beyond the twenty year period.

Plaintiffs oppose the motion on the grounds that the Third Amendment to Lease violates Section 102 of the 1973 Ground Lease requiring that the premises be used "for residential purposes for persons and families of low and moderate income only".

Specifically, plaintiffs argue that Cooper Gramercy tenants would not be protected by the Rent Stabilization Law or any other law from increases to market rents in the event that defendant Number 401 is able to withdraw from the Mitchell-Lama program and/or to discontinue subsidized housing, since the subject

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<sup>2</sup> The Court noted that "[u]nder Private Housing Finance Law § 35(2), the only conditions imposed on a housing company for dissolution without the consent of the supervising agency, are that it pay the remaining mortgage loan and all expenses incurred in the dissolution and that at least 20 years have elapsed since the occupancy date." Id. at 23-24.

building was not completed until after the effective date of the Emergency Tenant Protection Act of 1974.

However, Justice Davis and the Appellate Division, First Department have already held that plaintiffs, who are not parties to either the 1973 Ground Lease or to the Third Amendment of that Lease, lack standing to challenge the legality of that amendment. Concerned Cooper Gramercy Tenants' Ass'n v. New York City Educational Const. Fund, *supra*.

Plaintiffs further argue that the proposed withdrawal from the Mitchell-Lama program would violate the terms of BOE Resolution 65A which specified that the land was to be used for the "construction of a housing facility to contain approximately 168 units of publicly assisted housing<sup>N</sup>, and contend that there is at least an issue of fact as to whether or not the defendants intended to be bound by a restrictive covenant to provide subsidized housing for more than the minimum of 20 years (i.e., for the entire 75 years of the lease). See, Dyas v. Yorkville Towers Housing Co., Inc., Index No. 121496/98 (Gammerman, J; September 13, 1999), an action involving the planned withdrawal of other housing developments from the Mitchell-Lama program, in which the court held that

[p]laintiffs should have an opportunity to conduct discovery with respect to the meaning and scope of the covenants contained in the [land development agreements] and to examine the supporting documentation thereon as well as the urban development plan and its definition of the project.

Dvas v. Yorkville Towers Housing Co., Inc., supra at 6.

However, the court in Dyas specifically noted that the land development agreements contained "covenants that run with the land for 40 years," including the explicit covenant that the land be devoted "to the uses specified in the Urban Renewal Plan,..." Id. at 5.

Here, neither BOE Resolution 65A nor the Disposition Agreement contains any provision mandating participation in the Mitchell-Lama program for a period of time greater than twenty years.

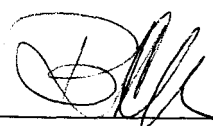
Moreover, plaintiffs have failed to point to any specific restrictive covenant in the subject deed requiring the subject residential building to remain in the Mitchell-Lama program beyond the statutory twenty-year period. See, Columbus Park Corp. v. Department of Housing Preservation and Development, supra at 23.

Accordingly, based on the papers submitted and the oral argument held on the record on November 7, 2001, this motion by defendant Number 401 for an order dismissing this action must be granted.

The Clerk may enter judgment dismissing plaintiffs' complaint with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Date: June 16, 2003

  
\_\_\_\_\_  
Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**