Park West Village Tenants Association v PWV Acquisition LLC
2006 NY Slip Op 30020(U)
December 6, 2006
Supreme Court, New York County
Docket Number: 0603756/2006
Judge: Bernard J. Fried

[* 1]

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

PRESENT: BERNARD J. FRIED, *Justice* PART 60

PARK WEST VILLAGE TENANTS ASSOCIATION, LOIS HOFFMAN, RUTH BURLEY AND DEAN HEITNER,

Plaintiff(s),

- v -

PWV ACQUISITION LLC & CPW TOWERS LLC,

Defendant(s).

INDEX NO. 603756/2006

MOTION DATE ______

MOTION SEQ. NO. 1

MOTION CAL. NO. ______

The following papers, numbered 1 to ____ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that

FILED
DEC 08 2006
NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Plaintiffs' motion for a preliminary injunction is decided in accordance with the accompanying memorandum opinion. Defendants' cross-motion to dismiss has not yet been decided and should be marked as open.

Dated: 12/6/06

J.S.C. BERNARD J. FRIED
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 60

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PARK WEST VILLAGE TENANTS ASSOCIATION,
LOIS HOFFMAN, RUTH BURLEY AND DEAN HEITNER,

Plaintiff(s),

Index No.:
603756-2006

-against-

PWV ACQUISITION LLC & CPW TOWERS LLC,

Defendant(s).

APPEARANCES

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FRIED, J.:

Plaintiffs, tenants of a planned housing development on the Upper West Side, filed this complaint on October 27, 2006, alleging that the owner of the development has illegally begun new construction prior to the expiration of a 40-year covenant barring changes to the development without the consent of the City of New York (the "City").

On the same day, Plaintiffs brought this motion by an Order to Show Cause seeking a temporary restraining order ("TRO") and a preliminary injunction prohibiting Defendants from changing the development, including by constructing a 30-story residential tower and retail stores, and enjoining Defendants to reopen and restore the driveway and landscaped

area connecting the interior of the project area with Columbus Avenue.[1] On October 30, 3006, I denied Plaintiffs' motion for a TRO. The parties submitted further evidence, and on November 13, 2006, oral argument was held on Plaintiff's motion for a preliminary injunction. For the reasons that follow, Plaintiffs' motion is denied.

Plaintiffs are Park West Village Tenants' Association and three of its members: Lois Hoffman, Ruth Burley, and Dean Heitner. Park West Village is a planned housing development (the "development") of several 16-story residential buildings, commercial space, and open space. It lies between Central Park West and Amsterdam Avenue and stretches from 97th to 100th Street. It was constructed under the Federal Urban Renewal Act in the late 1950s and early 1960s. Defendants PWV Acquisition LLC and CPW Towers LLC own the development.

On May 22, 1952, the City entered into an agreement (the "agreement") with a developer, pursuant to which the City acquired the land and conveyed it to the developer, which constructed the planned housing development in accordance with a redevelopment plan for the area. The redevelopment plan was attached as an exhibit to the agreement. Its most recent revision was adopted by the Board of Estimate in 1964.

The agreement provided that the deed by which the City would convey the land to the developer would contain certain restrictive covenants, including "[a] covenant that for [40] years from the completion of the project no change shall be made in the project" as set forth

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On November 6, 2006, Defendants cross-moved to dismiss the complaint pursuant to CPLR §§ 3211(a)(1), (7), and (10) based on documentary evidence, failure to state a cause of action, and the absence of a necessary party, but this motion has not yet been argued and is not being decided in this memorandum.

in the redevelopment plan. (Agt. § 509(b).) Under section 304 of the agreement, "construction shall be deemed completed" when the Department of Housing and Buildings has issued "certificates of occupancy for residential purposes for all the residential buildings provided for in the plan of the project." (Agt. § 304.) Section 510 of the agreement also provides that it shall not "be construed to give any person, firm or corporation, other than the parties hereto and the [mortgage holders], any legal or equitable right, remedy, or claim under this Agreement." (Agt. ¶ 510.)

The project area was conveyed by a deed dated August 29, 1952. The deed does indeed contain restrictive covenants. One of them provides that for 40 years after "the completion of the project, as said completion is defined in [§] 304 of the agreement..., no change shall be made in the project, as set forth in the redevelopment plan of the area," without the consent of the City Planning Commission and the Board of Estimate. (Deed ¶ (5)(c).)

As of July 22, 1966, temporary certificates of occupancy had been issued for all the buildings in the development. The final, permanent certificates of occupancy were not issued for all of the buildings until March 30, 1967.

Defendants intend to construct a 30-story residential building, which would include over 350 new apartments, on the site of the (recently demolished) commercial buildings and open area along Columbus Avenue. According to Plaintiffs, the proposed construction would violate portions of the redevelopment plan, by: (a) exceeding the percentage of land (19%) in the complex that is covered by residential buildings, (b) transforming certain residential space into commercial space, (c) exceeding the height restriction for residential

buildings by ten stories, (d) expanding the roadway from Columbus Avenue into a larger thoroughfare at the expense of open space, parking space, and access to Columbus Avenue, (e) increasing the population density, and (f) blocking views, light and air. Defendants do not appear to dispute this description of the changes that will result from the construction.

In a letter dated July 11, 2006, Plaintiffs asked the Department of Buildings to deny Defendants a construction permit, arguing that Defendants' proposed construction violated the agreement. Plaintiffs attached portions of the agreement, including sections 304 and 509, to the letter. Defendants responded in a seven-page letter-brief plus exhibits, and Plaintiffs replied in a ten-page letter-brief plus exhibits dated August 1, 2006. The Department of Buildings referred the matter to the Department of Housing Preservation and Development ("HPD").

In a letter dated August 7, 2006, the HPD, in consultation with the City's Law Department, determined that the issuance of the temporary certificates of occupancy satisfied the agreement's requirement of "certificates of occupancy," so that the 40-year covenant expired on July 22, 2006. The HPD reasoned: "The land disposition agreement defines 'completion' as 'the first date on which there shall have been issued ... certificates of occupancy for all residential buildings." It continued: "Since the land disposition agreement did not specify a permanent certificate of occupancy, we cannot read such a limitation into the provision after the fact." Plaintiffs did not challenge this determination in an Article 78 proceeding.

Beginning on October 10, 2006, Defendants constructed a temporary roadway coming in from 100th Street. Defendants have already demolished the commercial buildings.

On October 13, 2006, the Department of Buildings issued permits for excavation and foundation work. This work began during the week of October 30.

The parties have agreed that the determinative question in this motion is whether the covenant already expired or will expire in March 2007. To answer this question, I must determine whether § 304's requirement of a "certificate of occupancy" can be satisfied by a temporary certificate.

Likelihood of Success on the Merits

To be entitled to a preliminary injunction, Plaintiff must show a probability of success, a danger of irreparable injury, and a balance of the equities in its favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990). Plaintiff bears the burden of proof.

Plaintiffs contend that they are likely to succeed on the merits because the restrictive covenants in the deed bar the proposed construction and are enforceable by Plaintiffs as third-party beneficiaries.

1. Whether Restrictive Covenants in the Deed Bar Construction

Plaintiffs argue that the 40-year period of the covenant did not begin until March 3, 1967, the date the final permanent certificates of occupancy were issued. Defendants contend that the 40-year period began when the temporary certificates of occupancy were issued in July 22, 1966. Defendants also contend that Plaintiffs' action is in the wrong forum: they claim that HPD has jurisdiction (though they do not say it is exclusive) to enforce the agreement and the deed, and its decision, in its August 7, 2006 letter, can be challenged only by naming HPD as a defendant in this action or by bringing an Article 78 proceeding.

Plaintiffs maintain that their interpretation of § 304 is more consistent with general usage; by the plain meaning of the term, Plaintiffs argue, a "temporary certificate of occupancy" certifies that the structure is not yet fully complete. Plaintiffs also maintain that their interpretation of § 304 is more consistent with the language of other city laws, which discuss temporary certificates of occupancy under the broader subject heading of "certificates of occupancy," and do not use the term "permanent certificate of occupancy."

I am not persuaded by Plaintiffs' plain meaning argument. Furthermore, I have read the provisions cited by Plaintiffs' counsel and am not satisfied that Plaintiffs have shown that "certificates of occupancy" more likely than not excludes temporary certificates of occupancy. By July 22, 1966, temporary certificates of occupancy had been issued for all the buildings. Plaintiffs' counsel conceded at oral argument that a temporary certificate of occupancy is virtually the same document as a normal certificate of occupancy, except that it has a (renewable) expiration date. While § 304 is ambiguous as to whether "certificates of occupancy" includes temporary certificates of occupancy, Plaintiffs have not persuaded me that their interpretation of § 304 is more likely than not correct.

2. Plaintiffs' Standing Argument

Furthermore, even if Plaintiffs had shown a likelihood of prevailing on their interpretation of § 304, they have not shown a likelihood that they have standing to enforce the covenant as third-party beneficiaries.

In *Mendel v. Henry Phipps Plaza West, Inc.*, 6 N.Y.3d 783 (2006), the Court of Appeals held that tenants lacked standing to sue for enforcement of a land disposition agreement as third party beneficiaries, where the agreement contained a clause explicitly

negating any intent to permit its enforcement by such third parties – similar to ¶ 510 of the agreement in this case.

Plaintiffs distinguish *Mendel*, however, because there the plaintiffs sued for enforcement of the land disposition agreement, rather than of the deed. On the contrary, Plaintiffs claim that here they are suing to enforce the deed. Plaintiffs have not convinced me that this fine distinction blunts the force of *Mendel*'s holding. In their letters to the Department of Buildings last July and August, Plaintiffs made the same kinds of arguments under the covenant in the agreement. Now Plaintiffs evidently are suing as third party beneficiaries of the deed, and not of the land disposition agreement, in order to try to avoid *Mendel*'s holding. The covenant in the deed mirrors the language of § 509 of the agreement and refers back to the definition of "completion" in § 304 of the agreement. The deed covenant cannot be interpreted apart from the agreement. Therefore, Plaintiffs have not met their burden of showing that *Mendel* does not control this case.

The decisions Plaintiffs cite to the contrary appear to be distinguishable from or overruled to the extent that they are inconsistent with *Mendel*. Plaintiffs cite, for example, *Massagli v. Bastys*, 141 Misc.2d 357 (Sup. Ct. Westchester Cty. 1988), in which the court held that tenants were entitled as third party beneficiaries to enforce a contract into which the town had entered with the property's owner with the intention of benefitting its citizens who were tenants. *Id.* at 363-64. In *Massagli*, however, the contract did not provide that it could not be enforced by third parties, and *Massagli* was decided by a trial court 18 years before *Mendel*.

I conclude that Plaintiffs have not shown a likelihood of success on the merits of their

position that they have standing. Because I have concluded that Plaintiffs have not borne their burden of demonstrating standing as third-party beneficiaries, I do not need to reach Defendants' other arguments in opposition to Plaintiffs' motion.

In light of my conclusion that Plaintiffs have not shown a likelihood of success on the merits of their claim, I do not need to reach the remaining issues of irreparable harm and balance of equities.

Accordingly, it is:

ORDERED that Plaintiffs' motion for a preliminary injunction (Mot. Seq. No. 001) is DENIED; and it is further

ORDERED that a preliminary conference to schedule discovery shall take place on Wednesday, January 3, 2007 at 10:00 a.m.

Dated: 12/6/06

J.S.C.

BERNARD J. FRIED
J.S.C.