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

PRESENT: EILEEN A. RAKOWER J.S.C. Justice PART Part 5

Astor, et al.,

-v-

Carnegie Hall Corporation et al.,

INDEX NO. 110609/07

MOTION DATE

MOTION SEQ. NO.

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 ...	1,2,3
Answering Affidavits — Exhibits	4,5,6,7
Replying Affidavits + amended complaint further replies to cross motion + to original o/s/c + amended complaint	8,9 10,11,12,13,14+15

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

which supercedes the Court's interim order dated August 3, 2007.

FILED
OCT 02 2007
NEW YORK COUNTY CLERK'S OFFICE

Dated: Sept. 26, 2007

EILEEN A. RAKOWER J.S.C.
J.S.C.

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

☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT, STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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JOSEF ASTOR, et al.,

Plaintiffs,

- against -

CARNEGIE HALL CORPORATION and THE CITY OF NEW YORK,

Defendants.

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Index No. 110609/07

Decision and Order

Mot. Seq. 001

HON. EILEEN A. RAKOWER:

The cultural institution Carnegie Hall ("the Hall") opened on May 5, 1891. The North and South Studio Towers ("studio towers") were erected over the concert hall between 1894 and 1896. These individual studios were uniquely designed and built, some offering floor to ceiling windows and skylights intended to catch the northern light. The Hall was sold in 1925 to a real estate developer, who, over the years, made several attempts to sell the property. All of these attempts failed to produce a buyer, and finally, the Hall was slated for demolition on March 31, 1960. Plans were developed to replace the Hall with a skyscraper.

The Citizens Committee for Carnegie Hall ("the committee"), which included many notable figures of the day, petitioned Governor Nelson A. Rockefeller to prevent the Hall's imminent demolition. The New York Legislature responded, and on April 14, 1960, Chapter 524 of the 1960 Session Laws of New York ("524") was passed, forming the Carnegie Hall Corporation ("CHC"). Chapter 524 provided for the City of New York ("City") to purchase the Hall and lease the Hall to the CHC. The intent of 524 was to preserve the Hall for the purposes for which it was built. 524 states, in relevant portion:

> There is hereby established The Carnegie Hall Corporation . . . for the purpose of owning or leasing, and managing and operating Carnegie Hall . . .as an auditorium and facility for musical concerts, symphonies, recitals and instruction, cultural displays, lectures and exhibits, public

> assembly and the educational, recreational and incidental residential purposes and activities for which said hall and properties have heretofore been used, and to encourage by scholarship, grant and other means the development of talent in music, drama and related graphic arts.

Chapter 22 of the Laws of New York of 1962 amended 524 and repealed Section 6 of that Act, which had permitted for the eventual transfer of title to the Hall from City to CHC.

The City leased the space to CHC in 1960, for a period of 99 years. The amended and restated lease, effective December 31, 1987, is the document which currently controls CHC's possession of the premises.

CHC announced plans to drastically renovate the studio towers in order to expand its musical education programs on May 21, 2007. The plans would entail "extensive renovation of the Studio Towers and backstage areas, including the addition of substantial dedicated space to house Carnegie's ever-growing education programs." There were originally 180 units in the studio towers. Seventy seven of the studios were occupied in connection with 51 sub-tenancies (some subleases encompassed more than one studio space) as of May 2007. The subtenants were sent letters on May 21, 2007 which informed them that CHC was planning to take possession of the studios and that leases would not be renewed after June 30, 2007 or that month-to-month tenancies would be terminated as of July 31, 2007.

Plaintiffs here are 33 current subtenants in the studio towers who make up 30 sub-tenancies. The rental status of the plaintiffs are as follows: 18 are unregulated, market rate commercial sub-tenancies; 8 are unregulated, market rate residential sub-tenancies; and 4 are rent controlled sub-tenancies. Proceedings have been commenced in Civil Court, Housing Court and DHCR regarding many of these tenancies. Plaintiffs have filed an action for declaratory judgment seeking to permanently enjoin CHC from evicting the current tenants on the grounds that, among other things, the proposed purpose for the evictions is invalid and the renovation cannot go forward as proposed.

Plaintiffs now urge this court to issue a temporary restraining order and preliminary injunction enjoining CHC from instituting or further prosecuting

landlord/tenant proceedings against them. Plaintiffs argue that all of the claims raised in their complaint cannot be resolved in the different courts and administrative forums; rather, the legitimacy of the proposed purpose for the evictions must be adjudicated in the Supreme Court as a precedent affecting the other proceedings. Plaintiffs ultimately seek the Supreme Court's declaration that "an internal renovation does not constitute a demolition under the applicable law [which] would not only prevent the eviction of the rent controlled tenants, but would require substantial rethinking of the entirety of the proposed plan by CHC." CHC and City cross move to dismiss, urging that each of the actions brought can be adequately adjudicated in the different forums provided.

Initially, plaintiffs present themselves as similarly situated aggrieved parties and argue that a stay is necessary to resolve certain larger issues that cannot be addressed in Civil Court or in administrative proceedings before the DHCR. Plaintiffs claim that CHC's lease with defendant City unequivocally requires the maintaining of a mix of residential and non residential tenants. Plaintiffs refer to Article 10(a) and 10(b) of the Lease Between City and CHC which describes in detail how vacant studios used for artistic, non-artistic, residential and non residential purposes are to be re-let to prospective subtenants. 10(d) states, in relevant part:

> The purpose of subsections b. and c. of this Article 10 is to seek to maintain the overall percentage balance between uses of the Studios for artistic and non-artistic activities and for residential and non-residential purposes . . .

Notwithstanding the above, The Amended and Restated Net Lease effective December 21, 1987 between the City and CHC Article 35, titled No Third Party Beneficiary, states:

> Neither subtenant nor any other person not a party hereto shall be deemed a beneficiary of this Lease, or shall have any authority or rights to enforce or to require the City to enforce against Tenant any or all of the provisions, terms, conditions, covenants and agreements of this Lease.

Thus, plaintiffs are without standing to enforce the lease provisions.

CHC, in its cross motion, argues that plaintiffs' motion/action should be dismissed because the dispute involving the unregulated subtenants is a standard landlord/tenant issue which can be adequately resolved in Civil Court. Further, since four of the plaintiffs' sub-tenancies fall under rent control, those cases must be heard before the New York State Division of Housing and Community Renewal ("DHCR") and can only properly come before the Supreme Court as an Article 78 petition once DHCR makes its determination.

New York City Civ. Crt Act § 204 gives the Civil Court jurisdiction over summary proceedings involving landlord/tenant disputes. Civil Court is the preferred forum for resolution of disputes over the possession of leasehold premises. (*Waterside Plaza, LLC v. Valentina Yasinskaya*, 306 A.D.2d 138[1st Dept. 2003]). Unless it clearly appears that relief sought is unavailable in the summary proceeding, its prosecution should not be stayed. (*Lun Far Company, Inc. v. Aylesbury Associates et al.*, 40 A.D.2d 794 [1st Dept. 1972]). Further, the Supreme Court cannot usurp the jurisdiction over rent controlled residential tenancies from DHCR. "It is clear beyond question that the legislature intended disputes over a landlord's right to demolish a regulated building to be adjudicated by the DHCR." *(Sohn v. Calderon*, 78 NY2d 755 [1991]).

Plaintiffs' tenancies vary greatly. Plaintiffs have failed to demonstrate how a psychotherapist, who occupies his studio as an unregulated commercial tenant pursuant to a now expired lease, is similarly situated to four rent-controlled residential tenants. The rights each of these individuals have to the premises they occupy must be determined based upon the individual circumstances and agreements which pertain to them.

CHC argues that plaintiffs' motion for a preliminary injunction should be denied because they have failed to meet the standards of the three part test required in order to issue a preliminary injunction. Specifically, CHC claims that plaintiffs have not shown: 1) that they will be irreparably harmed absent the preliminary injunction; 2) that a balance of equities is in their favor; and 3) that there is a likelihood plaintiffs will succeed on the merits. (*Doe v. Axelrod,* 73 NY2d 748, 750 [1988]).

Plaintiffs claim that CHC cannot evict rent controlled tenants who are scattered on different floors in both towers. DHCR is clearly the forum to determine

possess premises without a lease or after their unregulated leases expired by their terms. More appropriately, the above may be pleaded as a defense to eviction proceedings by those tenants for whom such a defense has merit.[1]

Plaintiffs' fifth cause of action seeks a declaration from this Court that CHC is so "entwined" with City in the management of the studio towers that CHC should be deemed a state actor and procedural due process concerns should be triggered. *Sharrock v. Dell Buick-Cadilac, Inc.*, (45 N.Y.2d 152 [1978]), lists four factors which must be considered in determining whether the State is significantly involved in statutorily authorized private conduct. "These factors include: the source of authority for the private action; whether the State is so entwined with the regulation of the private conduct as to constitute a State activity; whether there is meaningful State participation in the activity; and whether there has been a delegation of what has traditionally been a State function to a private person. As the test is not simply State involvement, but rather significant State involvement, satisfaction of one of these criteria may not necessarily be determinative to a finding of State action." (*Sharrock v. Dell Buick-Cadilac, Inc., supra,* citations omitted, emphasis added).

Here, CHC does not get its authority to pursue evictions from City, rather its authority arises from the landlord tenant relationship it created with each individual sub-tenancy. CHC, the sub-lessor, seeks to evict its sub-lessees from certain of the studio towers and City has no role in those actions. CHC, like any other private landlord, is governed by the RPAPL. Nor is the role of landlord a traditional State function that has been delegated to CHC. Accordingly, the Court finds that CHC's actions in regard to the tenants of the studio towers do not demonstrate that the relationship between CHC and City is so entwined that CHC should be deemed a State actor.

Plaintiffs sixth cause of action is for attorneys fees. Attorneys fees are recoverable where such is provided by statute or contract between the parties. (*Green v. Potter,* 51 N.Y.2d 627 [1980]). Each tenant's right to attorney's fees in the

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[1]City's reply states that, to the extent any plan was submitted to it by CHC, the plan was insufficient. By letter dated June 8, 2007, Deputy Commissioner Lori Fierstein of the Real Estate Division of the Department of Administrative Services states that "the level of specificity in the plans and specifications submitted . . . is not sufficient to allow for full review by Landlord (City) and accordingly, we are unable to consider your request at this time." City's letter continues by inviting CHC to submit "more fully developed plans and specifications."

underlying actions will be governed by his/her/its individual tenancy and the contract giving rise to that tenancy, the RPAPL sections applicable to each individual tenancy, and each party's success in the underlying actions. Plaintiffs are not beneficiaries of the contract between CHC and City, and no applicable statute implicated in the original complaint provides for attorneys fees in this action.

Plaintiffs have failed to demonstrate that they will be irreparably harmed by their cases proceeding in Civil Court, Housing Court and before DHCR. Plaintiffs have also failed to demonstrate that there is a likelihood they will succeed on the merits. Therefore, the temporary restraining order imposed pending submission of papers is hereby lifted in all respects.[2] The instant application for a temporary and/or preliminary injunction enjoining CHC from instituting or prosecuting landlord and tenant proceedings against the plaintiffs is denied.

The Court is mindful that subsequent to plaintiffs' Order to Show Cause plaintiffs filed an amended complaint which adds the New York City Department of Cultural Affairs, (DCA), as a defendant, plus three additional causes of action which pertain to Uniform Land Use Renovation Procedure (ULURP), the State Environmental Quality Review Act, (SEQRA), and the City Environmental Quality Review Act, (CEQRA).

City's reply states that any ULURP, SEQRA or CEQRA determinations are premature because, at this time, CHC has not proposed any renovation plans that are sufficiently detailed for City to examine or approve. CHC's reply argues that the new causes of action should be dismissed, along with the original six causes of action, as they are irrelevant to holdover proceedings in Civil Court.

No answer or pre-answer motion has been filed regarding the amended pleading and the motion to dismiss made by way of reply is denied without prejudice to a proper motion.

Wherefore it is hereby

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[2] As part of CHC's reply, it includes a September 11, 2007, decision of the Appellate Division, First Department, vacating that portion of this Court's August 3, 2007 stay of the proceedings "in Civil Court affecting the tenancies of all plaintiffs, except any order(s) of eviction, pending hearing and determination of the underlying motion . . .." The Court notes that its decision here is not inconsistent with that of the Appellate Division.

ORDERED that plaintiffs' motion for a preliminary injunction is denied; and it is further

ORDERED that the temporary restraining order issued by this court on August 3, 2007, is hereby lifted in all respects; and it is further

ORDERED that defendants' cross motions to dismiss are granted as to plaintiffs' first, third, and fifth causes of action; and it is further

ORDERED that defendants' cross motions to dismiss are granted as to the second cause of action, and the issue is to remain before DHCR; and it is further

ORDERED that defendants' cross motions to dismiss are granted as to the plaintiffs' fourth cause of action, without prejudice to any individual tenant pleading the same as a defense to eviction proceedings where such a defense is appropriate; and it is further

ORDERED that plaintiff' sixth cause of action as originally pleaded is also dismissed, without prejudice to a claim for attorneys fees incurred in connection with plaintiffs' underlying actions, respectively, and without prejudice to a claim for attorneys fees which may be provided for by statute pursuant to ULURP, SEQUA and CEQUA as pleaded in the amended complaint.

All other relief requested is denied.

This constitutes the decision and order of the Court.

Dated: September 26, 2007

Eileen A. Rakower, J.S.C.