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

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JEANNE DAVIDSON,

Plaintiff,

- against -

506 EAST 88TH STREET LLC, CARLTON MANAGEMENT CORP. a/k/a CARLTON MANAGEMENT,

Defendants.

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DECISION/ORDER
Index No. 116419/07
Motion Seq. No. 001

BARBARA R. KAPNICK, J.:

In this action, plaintiff Jeanne Davidson seeks to recover damages against defendants 506 East 88th Street LLC and Carlton Management Corp. a/k/a Carlton Management for trespass onto areas exclusively within her leasehold (first cause of action), wrongful and/or unlawful partial constructive and/or partial actual eviction (second cause of action) and breach of the covenant of quiet use and enjoyment (third cause of action). Plaintiff also seeks injunctive relief (fourth cause of action) and to recover attorneys' fees (fifth cause of action).

Plaintiff now moves by Order to Show Cause for an order:

(1) enjoining and restraining defendants from continuing demolition and/or construction work in the rear garden of the property at 506 East 88th Street, New York, New York;

(2) enjoining and restraining defendants from interfering with plaintiff's tenancy by entering, taking, removing, blocking or interfering with any part of the garden appurtenant to plaintiff's rent stabilized apartment and tenancy at Apartment #1A of the building; and

(3) enjoining and compelling defendants to remove any and all equipment, building supplies, installations, workers and/or structures from the rear garden of the property and to restore said premises to its condition as of December 9, 2007.[1]

Defendants oppose the motion and cross-move for an order:

(1) dismissing the action pursuant to CPLR § 3211(a)(1) and (7); and

(2) vacating and/or modifying the temporary restraining order.

Plaintiff contends that there is no question that her tenancy has included, from its inception in 1974, her exclusive use of the entire garden appurtenant to the subject premises.

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[1] After hearing oral argument on the record on December 12, 2007, this Court granted a temporary restraining order pending the hearing of this Order to Show Cause enjoining and restraining defendants, their attorneys, contractors, management and/or agents "from continuing demolition and construction work at 506 East 88th Street, New York, New York", and compelling them "to secure the stairwell with railings and snow fence immediately".

By Order and Determination dated October 29, 1985, the DHCR determined that the registration for the apartment should be amended to reflect "that the owner is providing A/C unit for apartment 1A and a garden area in the rear of the building."

By Order and Opinion Remanding Petition for Administrative Review dated March 2, 2001, the Deputy Commissioner of the DHCR found that "[t]he garden at issue was part of the tenant's garden apartment and was not accessed by any other unit in the building" and thus that the plaintiff's complaint could not be processed as a building-wide complaint.

Finally, by Order Pursuant to Remand dated July 27, 2001, the DHCR determined that plaintiff was entitled to a reduction in rent because "tree limbs have fallen into the garden area and present a safety problem, thereby, affecting the tenant's enjoyment of the subject premises."

Plaintiff contends that the owner's plans to construct a bridgeway/deck from Apartment 1B to the fire escape walkway in the garden, and the work the owner has undertaken in connection with those plans, violate her rent stabilized tenancy.

Defendants, however, contend that the construction does not involve or contemplate the taking away of plaintiff's 'use' of the garden. They argue that plaintiff's claim of 'exclusive use' of the entire rear garden of the building is not supported by the written lease agreement. See, Hazlett v. Rahbar, 27 A.D.3d 384 (1st Dep't 2006).

Defendants further argue that any discussion in the DHCR Orders, including the observation in the March 2, 2001 Order that the garden was not, at the time, accessed by any other unit in the building, does not constitute a determination by the DHCR that plaintiff is entitled to 'exclusive use' of the entire garden.

Finally, defendants argue that injunctive relief is not appropriate where, as here, plaintiff has an adequate remedy at law; i.e., plaintiff seeks money damages in the instant action and also has the right to petition the DHCR for a reduction of rent based on the claimed interference with the garden area.

Plaintiff argues in reply that the issue of her exclusive use of the garden is not an open issue because it has, in fact, been determined by the DHCR.

Plaintiff further contends that the owner is illegally attempting to oust her from 40% of that garden, and that it is only appropriate for this Court to grant injunctive relief to protect her tenancy.

Defendants have submitted photographs of the garden which purportedly show a fence which separates the area behind Apartment 1A from the area behind Apartment 1B which defendants contend has never been accessible to plaintiff. However, plaintiff's counsel represented on the record at the oral argument held on January 16, 2008 that the fence in question was erected only one day before the pictures submitted by defendants were taken. Notably, the fence does not appear to be present in earlier photographs of the garden which were submitted by plaintiff.

Moreover, although defendants are correct that the DHCR did not formally rule that plaintiff is entitled to 'exclusive use' of the 'entire garden', that assumption appears to be implicit in the DHCR's prior rulings.

To the extent that the parties seek a clarification of those Orders and a formal ruling on the issue, they should file an appropriate application with the DHCR, the administrative agency which has the necessary expertise and primary jurisdiction to

dispose of this issue. See, 150 Greenway Terrace, LLC v. Gole, 37 A.D.3d 792 (2nd Dep't 2007); Wong v. Gouverneur Gardens Housing Corp., 308 A.D. 301 (1st Dep't 2003).

Since it appears that the proposed work will significantly diminish plaintiff's claimed leasehold interest in the garden, this Court finds that plaintiff is entitled to preliminary injunctive relief pending the DHCR's determination. See, generally, Camatron Sewing Machine, Inc. v. F.M. Ring Associates, Inc., 179 A.D.2d 165 (1st Dep't 1992).

Accordingly, plaintiff's motion is granted to the extent of enjoining and restraining defendants, their contractors, management and/or agents, pending the determination of the DHCR, from conducting any demolition and/or construction work on the first floor of the building located at 506 East 88th Street, New York, New York, unless otherwise authorized pursuant to Stipulation of the parties or further order of this Court.

That portion of the cross-motion seeking to vacate and/or modify the temporary restraining order on the ground that it is overbroad is granted to the extent of permitting construction work to proceed above the first floor of the building.

That portion of the cross-motion seeking to dismiss this action is denied. This action is, however, stayed pending the DHCR's determination.

This constitutes the decision and order of this Court.

Date: January 28, 2008

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED
JAN 29 2008
COUNTY CLERK'S OFFICE
NEW YORK