

Palmer v WSC Riverside Dr., LLC

2008 NY Slip Op 33705(U)

May 20, 2008

Supreme Court, New York County

Docket Number: 117302/06

Judge: Lottie E. Wilkins

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Hon. **Lottie E. Wilkins**
JSC

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

-----X
ROBERT PALMER,

Plaintiff,

- against -

WSC RIVERSIDE DRIVE, LLC and DOMINION
MANAGEMENT COMPANY,

Defendants.

-----X

PART 18

Index No. 117302/06

DECISION and JUDGMENT

Lottie E. Wilkins, J.:

This is an action seeking declaratory judgment with respect to a lease which plaintiff Robert Palmer and defendant WSC Riverside Drive LLC entered into for Apartment PHE at 190 Riverside Drive in Manhattan. Plaintiff alleges that an ambiguity requiring the Court's clarification exists in the lease with respect to the term "apartment." Specifically, plaintiff alleges that, throughout the term of his tenancy, he has always understood the "apartment" described in his lease to include the outdoor roof area adjacent to the apartment. Defendants claim that there is no ambiguity in the lease and the word "apartment" means the indoor areas only, and that the roof area outside plaintiff's apartment is not intended to be used in any way except as an alternate mean of egress during a fire or other emergency. In the event that no ambiguity exists in the lease, plaintiff alternatively argues that his many years of open and notorious use of the roof area as a terrace with the knowledge of various landlords

over the years amounted to a license to use and enjoy the roof area outside of his apartment. The parties agree, however, to the extent this dispute calls for revocation of a license, that is a matter better left to the Housing Court.

A non-jury trial was conducted over the course of two days during which plaintiff Robert Palmer testified. Plaintiff also called Neva Strom, a resident of 190 Riverside Drive, and James Rinzler, a partner of the defendant corporation WSC Riverside Drive, LLC. Defendants called Roman Sherer, another resident of 190 Riverside Drive and one-time owner and landlord of the entire building who, through his company Concord Properties, gave plaintiff his first lease for Apartment PHE in January 1990. Based on the testimony of the parties, the Court makes the following findings of fact.

Findings of Fact

Plaintiff Robert Palmer first moved into Apartment PHE at 190 Riverside Drive, New York, New York in or about 1979. At that time, plaintiff moved in with then-lessee David Timmins. Plaintiff was not a lessee of the apartment during Mr. Timmins' lifetime.

David Timmins died sometime in the Fall of 1988. Plaintiff continued to

reside in Apartment PHE after Mr. Timmins' death.

Sometime during the year 1989, then-owner of Apartment PHE, Concord Properties, Inc., commenced a proceeding in the Housing Part of the Civil Court under Index No. L&T 054185/89 seeking to remove plaintiff from Apartment PHE.

That proceeding was settled pursuant to a stipulation between the parties dated January 31, 1990 which provided that "Petitioner Concord Properties, Inc. ("Landlord") shall give to Respondent Robert B. Palmer ("Tenant") a two-year rent stabilized lease for Penthouse E located at 190 Riverside Drive..."

The same stipulation provided at paragraph 3, entitled "Repairs," and more specifically at subparagraph "(e)" entitled "Steps" that the landlord agreed to "repair steps which connect Apartment to terrace."

Plaintiff and Concord Properties, Inc. entered into a two-year rent stabilized lease for Apartment PHE at 190 Riverside Drive, New York, New York dated January 1, 1990.

The lease does not refer to a terrace or other outdoor space. Although the lease frequently refers to the apartment, it does not define the physical boundaries of the demised premises.

The current owner and lessor of Apartment PHE is defendant WSC Riverside Drive, LLC, a corporation that acquired ownership of the apartment

subsequent to a cooperative conversion. WSC Riverside Drive, LLC has given subsequent lease renewals to the plaintiff in accordance with applicable rent regulations. There was no evidence as to whether WSC Riverside Drive, LLC was the original sponsor of the cooperative or whether it is a subsequent shareholder.

Within Apartment PHE there is a doorway which provides access to the roof area outside. The doorway has a step on either side which requires one to step up in order to reach the doorway and then to step down once through the door.

The outdoor roof area of the penthouse floor (12th floor) runs adjacent to two other apartments on that floor. The two other apartments also have doorways that provide access to the roof. In total, there are four doorways that open onto the roof area from the penthouse floor: one in each of the three penthouse apartments and one near the stairway in the public hall of the 12th floor. The doorway at the top of the public stairway has a "crash bar" which activates an alarm when it is opened.

During his co-habitation with David Timmins, and continuously throughout his own tenancy, plaintiff utilized the outdoor area adjacent to Apartment PHE as a terrace by placing patio furniture and planters on it, and by using the space to have meals and to entertain guests.

In May 2006, scaffolding was placed on the roof area outside Apartment PHE without notice to or consent from the plaintiff. The scaffolds were placed on the

roof by the defendant managing agent, Dominion Management Company in anticipation of work to be performed in the area.

Conclusions of Law

Inasmuch as plaintiff, and lessee David Timmins before him, openly and notoriously used the roof adjacent to Apartment PHE as a terrace, and inasmuch as the plaintiff's 1990 lease with Concord Properties is silent as to what area is described by the term "Apartment PHE" or "apartment," an ambiguity existed in the original lease as to whether it included the adjacent outdoor roof area (see, 1058 Corp. v Ergas, 174 AD2d 415 [1st Dept. 1991]).

Leaving aside the question of whether leasing the outdoor area as a terrace would have been allowed under local rules and ordinances, it is not clear whether the original landlord, Concord Properties, intended to lease the outdoor area when it first rented Apartment PHE to plaintiff in 1990. Thus reference to extrinsic evidence might prove helpful to clarify the understanding between plaintiff and Concord Properties when they entered into their 1990 lease.

Under the present circumstances, however, recourse to extrinsic evidence for the purpose of understanding the parties original intent would not be useful because, whatever the understanding between plaintiff and Concord Properties in 1990,

the current defendant, WSC Riverside Drive, can only lease to plaintiff that part of the premises in which it has a possessory interest by virtue of its status as a shareholder in the cooperative corporation and, more specifically, as the proprietary lessee of Apartment PHE.

Concord Properties, the original 1990 lessor, owned the entire building at 190 Riverside Drive and could presumably lease the outdoor areas (or any other area) to plaintiff as it saw fit, subject only to limitations by applicable laws and regulations. Following a cooperative conversion, however, the owner of Apartment PHE – or more properly the shareholder entitled to the proprietary lease for that apartment – could only lease to plaintiff that area which it was entitled to possess as an individual apartment owner.

Pursuant to the lease currently in effect between plaintiff and defendant WSC Riverside Drive, this Court concludes that plaintiff is entitled to possession of the entirety of Apartment PHE from defendant WSC Riverside Drive. However, plaintiff adduced no evidence whatsoever as to what portion(s) of the building at 190 Riverside Drive defendant WSC Riverside Drive is entitled to possess by virtue of its cooperative ownership of Apartment PHE. Without reliable proof of WSC Riverside Drive's property rights, the rights of the plaintiff cannot be established. Assuming for the sake of argument that WSC Riverside Drive was not originally given the right to occupy and

use the roof area adjacent to Apartment PHE as a private terrace, then a declaration that plaintiff has a right to occupy that area under its lease with WSC Riverside Drive could have the collateral effect of altering ownership rights as between the cooperators in the building. Moreover, if the roof area is not owned by defendant WSC Riverside Drive, a declaration that plaintiff is entitled to occupy that area could very well amount to a taking from the person or entity that owns the roof area and may not even be a party to this action.

In sum, plaintiff has established an entitlement to possession of all of Apartment PHE at 190 Riverside Drive from defendant WSC Riverside Drive under their current lease. However, plaintiff has not established what possessory rights are encompassed in defendant WSC Riverside Drive's ownership of Apartment PHE. Therefore, this Court cannot grant the declaration that plaintiff seeks. To the extent plaintiff argues that license to use the roof exists, that is matter better left to the Housing Court. Accordingly, it is

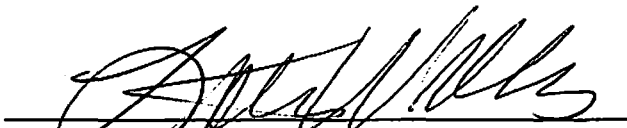
ORDERED that the complaint is dismissed and judgment shall be entered in favor of defendants.

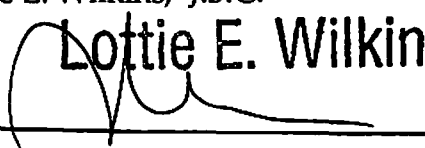
This constitutes the decision and judgment of the Court.

Dated: 5/20/08

MAY 20 2008

FILED
 JUL 30 2008
 NEW YORK
 COUNTY CLERK'S OFFICE


 Lottie E. Wilkins, J.S.C.

Lottie E. Wilkins

 Clerk