

City of New York v Corn Exchange, LLC

2009 NY Slip Op 30240(U)

January 29, 2009

Supreme Court, New York County

Docket Number: 401846/08

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE
Justice

PART 10

City of New York

INDEX NO. 401846/08

- v -

MOTION DATE _____

Corn Exchange

MOTION SEQ. NO. 001

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 this motion

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED
FEB 05 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/29/09

JUDITH J. GISCHE, J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
THE CITY OF NEW YORK and NEW YORK CITY
LANDMARKS PRESERVATION COMMISSION,

Plaintiffs,

-against-

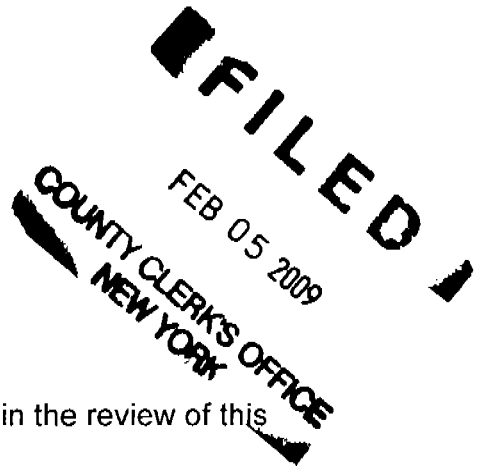
CORN EXCHANGE, LLC, ETHEL BATES, THE
LAND and BUILDING THEREON KNOWN AS
81-85 EAST 125TH STREET, A.K.A. 1820 PARK
AVENUE, Block 1750, Lot 34, In The County of
New York, City and State of New York, and "JOHN
DOE" and "JANE DOE," fictitious names, true names
unknown, the parties intended Being owners,
operators, lessees, employees, agents and all Other
persons and entities claiming any right, title or Interest
in the premises which is the subject of this action,

Defendants
-----X

Decision/Order

Index No.: 401846/08
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.



Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
Ptiff's OSC [PI] SK emergency affirm, , SK affirm, JW, affirm, JG affid, exhs	1
EB affid, exhs	2
SK reply affirm	3
DW affirm, exhs	4
DW supp affirm	5
Transcript 10/23/08	6

Upon the foregoing papers, the decision and order of the court is as follows:

This case involves the landmark Mount Morris Bank Building a/k/a the Corn
Exchange Bank Building, a Queen Anne/Romanesque style bank building built in 1883-84
and located at 81-85 East 125th Street (the "premises"). The premises were designated an
Individual Landmark on January 5, 1993.

Plaintiffs are the City of New York (the "City") and The Landmarks Preservation Commission (the "Commission"). The Commission is an agency of the City and is empowered to identify, preserve and protect the City's historical, architectural, cultural and social history. Defendant Corn Exchange, LLC (the "Corn Exchange") is the title owner of the premises, and defendant Ethel Bates ("Ms. Bates") is the President of the Corn Exchange.

In this action, plaintiffs seek civil penalties and to enjoin defendants from allowing the premises to continue to deteriorate and to require defendants to repair, restore and maintain the premises in a condition of good repair as required under the New York City Administrative Code § 25-301 *et seq* (the "landmarks law"). Plaintiffs now move for preliminary injunctive relief compelling the defendants to repair and restore the premises and maintain it in good repair during the pendency of this action.¹ Plaintiffs maintain that if the court does not grant them the relief sought herein, the building is in danger of further and irreparable deterioration.

Plaintiffs allege that defendants have failed to maintain the premises as required by New York City Administrative Code § 25-301 *et seq*. (collectively herein referred to as the "landmarks law"). Plaintiffs state that currently, "character-defining, significant architectural features of the [premises], as well as structural elements, are in a state of significant deterioration and extreme disrepair." Plaintiffs specifically claim that "the roof is missing, some floors are structurally unsound or have collapsed, portions of the exterior

¹ In their Order to Show Cause, plaintiffs also sought an order directing the defendants to provide immediate access to the premises so that plaintiffs may inspect and further assess the existing exterior and interior conditions of the premises. Plaintiffs have withdrawn this request for relief since such access has since been provided to plaintiffs.

walls are missing, windows are missing or damaged, the exterior walls need re-pointing and there is extensive water damage." Plaintiffs have provided several photographs of the premises which evidence the aforementioned deterioration.

The Corn Exchange acquired title to the premises by deed dated February 5, 2003 (the "Deed"). At that time, the premises was already in a state of decay; the premises had been vacant since the late 1970s and had suffered from several fires and other acts of vandalism. After a fire in 1997, the roof and upper floors of the premises were removed to address safety concerns.

Plaintiffs have provided the affirmation of John Weiss, Deputy Counsel for the Commission, wherein he describes many efforts made by plaintiffs to bring defendants within compliance of the landmarks law. Plaintiffs admit that some progress has been made by the defendants to rehabilitate the premises such as obtaining permits and erecting scaffolding, but claim that the premises remains unsound and severely deteriorate.

On June 26, 2006, Justice John E. H. Stackhouse held an Unsafe Building Hearing in an action entitled In re City of New York v. The Unsafe Building and Structure Located at 81 East 125th Street, New York, New York (Landmark), bearing index number 402009/06. As a result of that hearing, on June 26, 2006, Justice Stackhouse issued a precept authorizing the City to stabilize the premises and, if necessary, demolish the building. Plaintiffs thereon detail the back-and-forth communications between their representatives and representatives of defendant Corn Exchange regarding the stabilization work at the premises. Plaintiffs have provided copies of these communications.

On or about May 15, 2007, defendant Corn Exchange sent plaintiffs an initial work schedule for the rehabilitation of the premises. The schedule called for the completion of the work by mid-April 2008. Mr. Weiss claims that based upon his periodic visits to the premises made beginning in October 2007 through July 2008, only some interior debris was being removed from the premises and that no other construction work was taking place. Plaintiffs also provide a copy of a Field Report prepared by John Graham, the Commission's Special Projects Director, on October 29, 2007 (the "Field Report"). The Field Report provides in pertinent part:

A comparison of 2002 photographs and photos taken during the October 29, 2007 site inspection show that no significant construction work at the exterior of the building has taken place since that time, and that some masonry has been removed.

...

The condition of all of the facades is physically unsound and unsafe. The demolition of the upper floors of the building appears to have led to accelerated deterioration due to water infiltration, constituting a generally hazardous state in need of immediate action to prevent the destruction of the building. ... Action must be taken immediately to correct hazardous conditions and to seal the building to stop water infiltration into the building envelope.

Immediate Work Required:

1. Install bracing to stabilize the walls of the upper floors, where floor and ceiling joists have been removed;
2. Providing temporary roofing;
3. Close all window and door openings
4. Prepare a schedule for the approved work under the cited permit.

Work Necessary to Return the Building to a Condition of Good Repair:

1. Reconstruct the facade walls, and re-point existing masonry facades as necessary;
2. Install structural members;
3. Install the new roof, recreating the historic dormers and sheet metal cornice;

4. Install new windows and doors.

On November 29, 2007, Landmarks Chair Robert B. Tierney issued an Order pursuant to Landmarks Law § 25-317.1 ("Commission's Order") that found that the premises was in serious disrepair. The Commission's Order mandated that the defendant Corn Exchange bring the premises to a condition of good repair and notified defendants that failure to comply with the Commission's Order would make them subject to legal action, daily fines of \$5,000 and other substantial penalties.

Defendants have submitted the affidavit of Ethel Bates and several affirmations by David Wechsler. Ms. Bates describes her history in connection with obtaining the premises, and her efforts to complete the rehabilitation thereof. Ms. Bates claims that "[i]f the Court grants Landmarks and the City a preliminary injunction, the Corn Exchange will suffer a serious financial prejudice. It would likely dry up the financing, which is almost in place, resulting in even more costs and delays..." In his affirmations, Mr. Wechsler details the most recent actions taken by the defendants to rehabilitate the premises.

Arguments of the Parties

Defendants argue that plaintiffs are not entitled to preliminary injunctive relief prior to resolving the action entitled New York City Economic Development Corporation v. Corn Exchange, LLC, bearing index number 405031/07 ("NYCED v. Corn Exchange"). Specifically, defendants claim that because the New York City Economic Development Corporation ("NYCED"), an agency of the City, seeks title to the premises in NYCED v. Corn Exchange, granting plaintiffs' the relief sought herein would be grossly unfair to defendants.

Plaintiffs argue that a municipality seeking injunctive relief is entitled to such relief

upon a *prima facie* showing that its laws are being violated, rather than satisfying the traditional three prong test, to wit: irreparable injury, a likelihood of success on the merits and a balancing of the equities in the movants' favor. Defendants reject this argument. Plaintiffs further contend that assuming they must satisfy the aforementioned three-prong test, they have met this burden, as well.

Discussion

At the outset, the court's decision in NYCED v. Corn Exchange does certainly impact this motion. By decision and order of even date, the court has resolved the substantive issues raised in NYCED v. Corn Exchange, to wit, the court has granted NYCED summary judgment and held that NYCED is vested with title to the premises. Although there is no dispute that the premises is a landmark building entitled to the protections afforded under the landmarks law, defendants cannot be compelled to rehabilitate the premises to which they no longer hold title. Therefore, plaintiffs are not entitled to a preliminary injunction.

In fact, plaintiffs' attorney, Ms. Kurland, conceded this point at oral argument on the instant motion held before the court on October 23, 2008:

Ms. Kurland: As long as [defendants] have title to the building, it's their obligation [to rehabilitate the premises]. In the event that title reverts to the city –

The Court: Right.

Ms. Kurland: – the city, it's my understanding, the city will seek to issue a RFP and hopefully there would be a new owner who would hopefully quickly repair the building. But at this point it's defendants' choice. They are seeking to hold on to this building and, you know, unless there is a court decision to – for title to revert or unless the defendants make some other choice with respect to the building, it's their obligation...

* 8]
For the foregoing reasons, plaintiffs' motion for a preliminary injunction must be denied, and the court does not reach plaintiffs' remaining arguments.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for a preliminary injunction is denied in its entirety; and it is further


ORDERED that a status conference be held on February 26, 2009 at 9:30 a.m. at Part 10 at 80 Centre Street, Room 122.

Any requested relief not expressly addressed herein has nonetheless considered by the court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
January 29, 2009

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
FEB 05 2009
COUNTY CLERK'S OFFICE
NEW YORK