Askinazy v Prince 156 Assoc., L.P.

2009 NY Slip Op 32009(U)

September 1, 2009

Supreme Court, New York County

Docket Number: 106719-2009

Judge: Carol R. Edmead

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SCANNED ON 9/2/2009
[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35
Justice

Steve Askinazy

INDEX NO. 106719/09
MOTION DATE 6/23/09
MOTION SEQ. NO. 001
MOTION CAL. NO.

- v -

Prince 156 Associates

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

FILED
SEP - 2 2009
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the order to show cause to enjoin and restrain defendant Prince 156 Associates, L.P., ("defendant") from (1) entering into or changing any portion of the backyard behind his apartment 1A at 156 Prince Street, New York, New York (the "backyard"), (2) disturbing plaintiff's quiet enjoyment of the backyard, and (3) disturbing plaintiff's possession of the backyard (except to permit defendants to perform inspections to comply with the New York City Building Code), is denied; and it is further

ORDERED that defendant's cross-motion pursuant to CPLR 3211(a)(7) to dismiss the Complaint for failure to state a cause of action is granted as to plaintiff's first, second, fourth, and fifth causes of action, and denied as to plaintiff's third cause of action for conversion; and it is further

ORDERED that any stay imposed by the Court is hereby lifted; and it is further

ORDERED that this matter is transferred to the Civil Court, City of New York pursuant to CPLR 325-d in accordance with the attached order; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 9/1/09

J.S.C.
HON. CAROL EDMEAD

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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 35
---X
STEVE ASKINAZY,

Index No. 106719-2009

Plaintiff,

-against-

PRINCE 156 ASSOCIATES, L.P.,

Defendant.
--- X
HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff Steve Askinazy ("plaintiff") moves by order to show cause to enjoin and restrain defendant Prince 156 Associates, L.P., ("defendant") from (1) entering into or changing any portion of the backyard behind his apartment 1A at 156 Prince Street, New York, New York (the "backyard"), (2) disturbing plaintiff's quiet enjoyment of the backyard, and (3) disturbing plaintiff's possession of the backyard (except to permit defendants to perform inspections to comply with the New York City Building Code).

In response, defendant cross moves pursuant to CPLR 3211(a)(7) to dismiss the Complaint for failure to state a cause of action.

Factual Background

It is alleged that plaintiff leased Apartment 1A (or the "Apartment") from defendant's predecessor landlord in 1975, and for the past 34 years, has exerted exclusive control of the backyard from the inception of his tenancy. The backyard has two areas: a patio area approximately 12 feet deep (the "Patio") and a rear yard area (the "Rear Yard") directly beyond the Patio. Plaintiff installed shrubs and planted flowers, installed furniture, and used the space

almost daily during the warmer months. It is alleged that plaintiff was the only tenant with a key to the door leading to the backyard, which went directly from his apartment onto the Patio and from the Patio to the Rear Yard. It is also alleged that no one else used the backyard.

By letter dated April 29, 2009, defendant sent plaintiff a letter advising that it

> will be cleaning up the garden in an effort to make it more inviting for the tenants of the building. This work will not interfere with your small patio area, but we are requesting that you please remove all of your personal items from the rest of the rear yard.

In early May 2009, defendant sent workers into the backyard and destroyed the fence between plaintiff's and the neighbor's yard space. The workers also uprooted plaintiff's shrubs and plants and have begun demolishing the backyard. Plaintiff believes that defendants intend to lay concrete over the backyard, and lease the backyard to the other tenants of the building.

Consequently, plaintiff filed an action for a permanent injunction, damages for conversion and trespass, adverse possession, and a declaration that the entire backyard is part of plaintiff's leased premises as defined by the Rent Stabilization Laws and Code (the "RSC"). Plaintiff alleges that defendant has breached the lease and violated the RSC, which requires that (1) the terms and conditions of the original rental agreement carry forth into all renewal leases (RSC § 2523.5), and (2) the owner maintain ancillary services that it provided when the tenant moved into the premises (RSC § 2520.6r).

Order to Show Cause

Plaintiff maintains that the parties, by their actions over the past 34 years, have established that the backyard is part of the leased premises and both sides have ratified the terms of the lease. Plaintiff argues that recent First Department caselaw found that where a tenant had exclusive access to a backyard from the commencement of the tenancy, such backyard access

could be found to fall within the definition of required ancillary services. The sole door with direct access to the backyard is through plaintiff's apartment, and plaintiff has had exclusive use of the entire backyard for 34 years. Moreover, defendant has not once in 34 years objected to plaintiff's use or improvement of the backyard. Further, the RSC explicitly provides that an area such as a backyard is an ancillary service included in a rent stabilized tenant's leased space.

Therefore, plaintiff is entitled to preliminary injunctive relief. Plaintiff is likely to succeed on the merits of his claim, and irreparable injury caused by defendant's destruction of plaintiff's backyard is compelling, as the backyard plaintiff spent 34 years growing, will be destroyed. Further, the balance of the equities weighs in favor of plaintiff because defendant will not be prejudiced at all and plaintiff's garden will be lost forever.

Cross-Motion

Defendant opposes the relief sought and argues that the Complaint fails to state a cause of action.

Defendant never granted plaintiff any right to use the backyard, which has been treated as a shared amenity for the use of all residents in the building. Plaintiff's access and use of the backyard is subject only to a revokable license, cancelable at defendant's will. The plaintiff's lease makes no reference to any rights to the backyard and patio.

Nor is the backyard an ancillary service to plaintiff's tenancy, within the purview of RSC § 2520.6(r)(3). At best, the use of the backyard is an ancillary service to the building, and plaintiff has not been deprived on his shared use of this building-wide amenity. Defendant does not intend to limit or restrict plaintiff's access or use of the backyard, but instead, insists that plaintiff shares this common area with other tenants in the building. The backyard was never

registered with the DHCR as an apartment service or a building service pursuant to RSC 2528(a)(6), which requires owners to register all services provided for in the lease. Defendant's DHCR registration lists the apartment services as "stove; refrigerator; room air cond[itioner]," and the building services as automatic elevator; intercom, bell & buzzer system; maintenance services; laundry room." Under First Department caselaw, since the lease was silent on plaintiff's use of the backyard and there is no showing that the backyard was a required service under the RSC, plaintiff's use of the backyard created a revocable license. And, the caselaw cited by plaintiff is distinguishable.

Further, as depicted in the floor plans for the building, all residents have access to the backyard and patio. Plaintiff's statement that he was given keys to the door to the backyard is misleading; there is no door to the backyard which requires a key entry; the keys he refers to are those to the backdoor of his apartment, which opens onto the backyard. All residents may access the backyard without a key through a passageway in the basement. Defendant points out that plaintiff's neighbor in 1A also has a back door that enters onto the backyard and patio.

Defendant also argues that plaintiff's conversion, trespass and permanent injunction claims fail, because he does not have an exclusive property or leasehold right to support these causes of action. Further, plaintiff's adverse possession claim fails because he cannot establish that his alleged possession of the backyard was "hostile and under a claim of right"; plaintiff admits that the backyard belongs to the defendant. In any event, any adverse possession arising out a landlord-tenant relationship does not ripen until ten years after the tenancy expires, which has not occurred. Additionally, defendant is aware of plaintiff's use and has not revoked its permission for plaintiff to continue using the backyard.

Plaintiff is not likely to succeed on the merits of his claims and will not suffer irreparable harm. Defendant made efforts to improve the backyard by removing garbage and debris to make it more inviting for the residents, and only removed ivy and weeds that created a breeding ground for rodents.[1] Defendant has no intent to lay concrete over the backyard, but intends to landscape the backyard and patio and install benches and barbeques. Defendant also removed plaintiff's yard-long fence as it was installed without defendant's authorization and obstructed egress from the tenant in Apartment 1B and the ladder descending the rear fire escape. Therefore, such improvements will not cause plaintiff to suffer irreparable harm. Nor does the balance of equities lie in plaintiff's favor; defendant must comply with the Building Code's provisions regarding egress and clear the obstructions that prohibit the tenant in Apartment 1B from exiting through the basements in case of an emergency.

Plaintiff's Reply

Both the defendant and the tenant of Apartment 1B, Susan Kohn ("Ms. Kohn") attest that each yard was a part of their leased premises when they moved in, and that they had exclusive use of their respective backyards for decades. Defendant also admitted same in a 1988 letter to a neighboring landlord for repairs to be made to plaintiff's and Ms. Kohn's "garden" apartment rear yard. Defendant also did not deny that the rear yard was part of Ms. Kohn's premises when she filed a Decrease in Service Complaint in 1996 for a rent reduction based on conditions therein and listed her backyard as a private backyard. Also, at a tenant's association meeting, plaintiff told defendant's agent that the backyard was plaintiff's, and to leave, the agent left,

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[1] Defendant is in contract to sell the building and close later this year and the purchaser intends to advertise the backyard as a shared building amenity.

[* 7]

thereby acknowledging that the backyard was not public space. Further, the other tenants attest that the backyards belong to plaintiff and Ms. Kohn, respectively, and that they never used the backyards except upon invitation. The fence which divided the backyards predated plaintiff's tenancy. And, defendant's architect, Daniel Alter, indicates that there is no Code issue with regard the fence; the fence is less than eight feet in height and is permitted by the Building Code.

The backyard was only accessible to the remaining tenants by use of an emergency basement passageway, which was never used for public use to access the backyards. There was a sign which said that such passageway was for emergency access only. Moreover, this corridor led to a locked emergency door which barred reentry after one exited through the corridor. No tenants had the keys to the emergency exit so they could hardly use the corridor for access to the backyard. An affidavit from a registered architect, Daniel Alter, indicates that the emergency corridor is not a lawful passageway, being too low in height for tenants to walk through in the building. Therefore, there is no means of egress to the plaintiff's backyard.

Ms. Kohn also attests that when she initially leased her apartment in 1990, the landlord's agent specifically referred to her apartment as including the backyard directly behind her apartment. And, when defendant leased the premises to plaintiff, the defendant informed him that the backyard was a private yard that was part of his leasehold.

Caselaw holds that an outdoor space such as a backyard can be a required ancillary service even where it is not included in the lease or on the registration statement, since the backyard was provided by the defendant at the commencement of the tenancy, and since plaintiff was given exclusive use of the backyard for 34 years. Further, there is no requirement that an owner register an ancillary service or that a backyard be registered. DHCR expressly does not

attest to the truthfulness of the statements made by an owner in the registration statement.

In addition to destroying his yard, absent an injunction, the defendant and others could sit on the window ledge adjacent to plaintiff's bedroom and create a safety hazard or disturb his privacy. Defendant has not established any harm. Since the other tenants do not have access to the backyard, the yard is not usable to anyone else but plaintiff. The fire escape has always been unobstructed; there is direct access from the fire escape to the emergency corridor, and no one has ever complained about any potential violations concerning egress.

At best, defendant failed to set forth a basis to dismiss the action, and has raised an issue of fact.

Defendant's Reply

The letters from defendant merely show that defendant has referred to plaintiff's apartment as a "garden apartment" and has addressed some of the complaints of plaintiff's neighbor pertaining to conditions in the backyard. Further, the fact that defendant addressed conditions in the backyard does not constitute an admission that the backyard is included as part of Apartment 1B or that the backyard is an ancillary service to Apartment 1B. The building has 24 units, only 11 of which are currently occupied. The affidavits of the three other tenants in the building merely establish that the two who were invited were misled by plaintiff to believe that they were permitted to freely access the backyard, and that they were simply unaware that the backyard was a building-wide amenity to enjoy whenever they wanted. Further, the affidavits of the tenants are vague and inconsistent, and include statements of facts of which they lack personal knowledge.

As indicated by defendant's registered architect, Pedro Castillo, the backyard is an

integral part of the building's safety plan and necessary for defendant's compliance with the Building Code, and the basement passageway is a means of egress. And, as depicted in the photographs and affidavit by the intended purchaser, any tenant may freely pass through the door from the main basement area to the exit corridor onto the backyard. A tenant cannot privatize areas that are part of a building's required means of egress.

Further, recent First Department caselaw[2] holds that a rent stabilized tenant's use of a roof space adjacent to a portion of the tenant's apartment was pursuant to a revocable license. Since the backyard's use is unambiguously absent from the plaintiff's lease, extrinsic evidence of plaintiff's extended use of the backyard is irrelevant. The cases cited by plaintiff are factually distinguishable.

Analysis

It is undisputed that the "party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Second on Second Café, Inc. v Hing Sing Trading, Inc.*, --- NYS2d ---, 2009 WL 2151134 [1st Dept 2009] *citing Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005], *citing* CPLR 6301).

Breach of Lease

Plaintiff failed to demonstrate a likelihood of success on the merits of his claim that the backyard is part of the leased premises, as opposed to an area subject to a license, as defendant

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[2] In response to defendant's citation to the First Department's order, which affirmed a trial court order initially cited in defendant's cross-motion, plaintiff points out that such case did not address the issue of whether an ancillary space, which by definition is space not included in a lease, can be taken by a landlord; the First Department only addressed whether a tenant had a license or a lease to the outdoor space.

contends.

"Whereas a license connotes use or occupancy of the grantor's premises, a lease grants exclusive possession of designated space to a tenant, subject to rights specifically reserved by the lessor" (*Prospect Owners Corp. v Sandmeyer*, 62 AD3d 601 [1st Dept 2009] *citing American Jewish Theatre v Roundabout Theatre Co.*, 203 AD2d 155 [1st Dept 1994]); *Garza v 508 West 112th Street, Inc.*, 22 Misc 3d 920, 869 NYS2d 756 [Sup Ct New York County].

It is uncontested that the plaintiff's lease is silent as to plaintiff's use of the backyard, and that the demised premises is described as "Apartment 1-A on the first floor." Moreover, there is no ambiguity in plaintiff's lease as to the definition of the demised premises. Therefore, there is nothing in plaintiff's lease that would permit the Court to extend the words "Apartment 1-A on the first floor" to include the backyard space as well.

The First Department recently addressed the issue herein in *Prospect Owners Corp. v Sandmeyer* (62 AD3d 601 [1st Dept 2009]). In *Prospect*, the Court addressed the issue of whether defendants/tenants' use of "the south roof" adjacent to the tenant's apparent rent stabilized unit subject to RSC 2520.6[r][3], was governed by the parties' lease or was subject to a license. The Court first stated that the south roof was *not* governed by the tenants' lease, which did not include the south roof in the demised premises. The Court next explained that the defendants' use was not exclusive to the plaintiff/landlord, who had access to the south roof to perform maintenance and repairs or to the ground floor restaurant whose machinery was stored on the south roof. The Court also rejected the tenants' attempt to introduce parol evidence of the course of conduct, including the tenants' use of the south roof to the exclusion of all other tenants, the landlord's failure to objection to tenants' use of the space, and its "alleged

acknowledgment and implicit approval" of tenants' use to establish the parties' intent to include the south roof at the inception of the lease. The lease was silent to the tenants' right to use that space, and there was no ambiguity as to whether the south roof was included in the leased premises (*see also Hazlett v Rahbar*, 27 AD3d 384 [1st Dept 2006] [denying a tenant's application to enjoin the owner from creating a cellar door to the backyard, stating that "There is nothing in the lease" that mentions use of the backyard, and the lease's reference to terraces and balconies, was "simply a provision in a standard form which discusses the rules and regulations for the use of such a structure if one exists"]).[3]

Likewise here, the lease is silent as to plaintiff's right to use the backyard. As depicted in the floor plans for the building, all residents have access to the backyard and patio, albeit through the basement corridor. Plaintiff's back door is not the sole means by which the other residents may access the backyard without a key. The Court also notes that according to plaintiff's architect, Daniel Alter, for the apartments in the back of the building, "the fire escape provides egress into the rear yard" which provides egress to the front of the building through the basement passageway. The use of the backyard as a means of egress in the case of an emergency for the apartments in the rear of the building is inconsistent with plaintiff's alleged claim to exclusive use of the backyard.

Therefore, the backyard is not governed by the parties' lease, and the parol evidence, such as the conduct of the parties, is irrelevant since there is no ambiguity in the lease herein (*cf.*

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[3] While the First Department's further held that the plaintiff also failed to demonstrate that exclusive use of the backyard/garden/terrace was a required service that must be maintained as part of her rent-stabilized tenancy, the tenant merely argued that defendants were not permitted to discontinue this "required" or "essential service" absent approval from the DHCR.

Conforti v Goradia, 234 AD2d 237 [1st Dept 1996] [finding that defendants' contention that "summary judgment was improper in the absence of any documentary evidence that the terrace is included in the leased space" where "the record contains plaintiff's affidavit, which states that . . . the penthouse apartment . . . consists of a studio apartment with a separate kitchen and a large terrace, all situated on the roof of 49 Park Avenue"]). Here, documentary evidence, *i.e.*, the lease indicates that the demised premises solely includes Apartment 1-A.

Plaintiff's reliance on *Llorente v New York State Div. of Housing and Community Renewal* (16 AD3d 105 [1st Dept 2005]) and *Garza v 508 West 112th Street, Inc.* (22 Misc3d 920 [Sup Ct New York County 2008]) is misplaced.

In *Llorente*, the owner terminated the tenant's access to the backyard on the grounds that the laundry services had been provided by a former superintendent as his own business without owner authorization, and that there was nothing in the tenant's lease authorizing the use of the backyard. The tenant applied for and apparently obtained a rent reduction. On the issue of whether the determination in the tenant's favor by the Division of Housing and Community Renewal ("DHCR") was rationally based, the First Department held that the laundry room facilities and backyard access fell within the definition of required ancillary services. It was undisputed that "the offer of those services induced the tenant to sign her initial lease" and the backyard was continuously provided by landlords or the superintendent and enjoyed by the tenant for the first six years of her occupancy.

Here, defendant does not seek to terminate plaintiff's access to the backyard; instead, defendant seeks to terminate plaintiff's attempt to use the backyard to the exclusivity of the other tenants in the building. Moreover, the issue before the Court was whether DHCR's

determination of the tenant's rent reduction application was rationally based.

In *Garza v 508 West 112th Street, Inc.* (22 Misc3d 920 [Sup Ct New York County 2008]) the issue was whether the lease included plaintiffs' right to use the exterior area ("EA"), and if so, were the terms of the use of the EA a revocable license or an required service under the RSC. The court held that the EA was a "roof terrace," and consequently a terrace, within the meaning of the lease and lease renewals, and that plaintiffs' use of the terrace was intended to be ancillary to the tenancy of the combined apartment and was not a revocable license. The Court's conclusion was based on (1) the 1989 lease read in conjunction with the 1982 lease, (2) representations made to the tenant at the time she signed the 1982 lease, (3) the tenant's and her families' exclusive use of the EA, (4) the configured access to the EA through doorways located in the combined apartment and (5) the fact that the owner knew and condoned plaintiffs' exclusive use of the EA. Notably, the Court's conclusion was *first* based on its consideration of the ambiguous terms of two leases. The Court explained that the 1982 lease expressly referred to a "roof terrace," and provided that its use "was subject to the owner's approval." The 1989 lease, however, did not contain a "parallel reference to a 'roof terrace,'" but referred to the demised premises as including 'a terrace, if any' thereby including the roof terrace that the parties understood to exist at the time. The Court then continued, noting "additional supportive evidence" in form of the parties' conduct, that the parties intended to grant plaintiffs exclusive personal use of the EA in the 1989 lease and renewal leases. The Court explained that the tenants had exclusive access from two doors from within the interior of the combined apartment; the third point of access to the EA was through a common vestibule alarmed door, for which only plaintiffs and the owner had a key. Plaintiffs' use of the EA over the years was open, and to the

exclusion of all the other occupants residing in the building, which was made clear when the owner installed an alarmed door in the common vestibule, effectively prohibiting anyone other than plaintiffs and the owner from having access to the EA. The prior owner clearly knew about plaintiffs' exclusive use of the EA over the years, had conversations about the type of furniture permitted on the roof, and attended parties hosted by one of said tenants on the roof. In rejecting the owner's contention that the EA was a revocable license, the Court noted that the 1982 lease expressly made the use of the roof terrace subject to landlord's approval, and that such language was consistent with the notion of a license. However, the Court noted, "That operative language . . . was completely omitted in 1989" and such omission was "consistent with an interpretation that use of EA as a terrace was part of the lease of the demised premises."

Unlike the leases in *Garza*, there is no ambiguity in plaintiff's lease that would permit the Court to consider factors such as any representations made to plaintiff, plaintiff's exclusive use of the backyard, and the defendant's acquiescence to plaintiff's use of the backyard. There is no reference in the plaintiff's lease to the backyard so as to render it consistent with granting plaintiff's exclusive use thereof. In any event, the other tenants have access to the backyard through the basement corridor, which does not require the use of a key (Affidavit of defendant's principal, Ronald Schaffer, ¶8). Although the basement passageway has a low ceiling which is allegedly inconsistent with the Building Code and Multiple Dwelling Law, according to defendant's architect, Pedro Castillo, this passageway complied with the Building Code and Multiple Dwelling Law *in effect when the Building was constructed.* Further, the record fails to establish that plaintiff's use was to the exclusion of defendant and to the 11 tenants in the building.

The Court is mindful of the apparent conflict created by a 1996 First Department decision, *Meirowitz v New York State Division of Housing and Community Renewal* (28 AD3d 350, 814 NYS2d 56 [1st Dept 2006]) which involved an appeal of a Rent Administrator's determination that a tenant's access to a backyard was not a service landlord was required to maintain for tenant. Petitioner tenant asserted that he was entitled to use the backyard garden because he used it openly and notoriously for an extended period of time without any written prohibition, *i.e.*, a lease. *The relevant inquiry was "whether access to the backyard is a required service"* within the meaning of the law. Petitioner's admission that his only *access to the yard was through a window* belied the inference that such access was a service affirmatively provided by the landlord. The Court found that there was no basis for disturbing the credibility determinations of the Administrative Law Judge who heard the testimony of the owner and the superintendent that *petitioner was repeatedly instructed not to use the backyard.* Further, the Court concluded that petitioner's insistence that the owner should have provided a lease did not warrant a different outcome, and respondent's finding that lack of a lease was irrelevant to the proceeding was rational, inasmuch as its procedures allow for a separate proceeding if a tenant believes he is entitled to a lease. Finally, the Court noted, "More significantly, even if petitioner had a lease for the premises, the analysis would be the same unless the lease *expressly* provided for or excluded use of the yard."

Notably, the lease herein does not expressly provide for or expressly exclude use of the backyard. However, where there is a lease, and the lease is unambiguous and does not expressly grant the tenant use of an alleged ancillary service, such lease does not govern the use of such space so as render it as part of the demised premises and resort to parol evidence to establish

otherwise is prohibited (*see Prospect Owners Corp. v Sandmeyer, supra*).

Further, RSC § 2520.6[r][3], which according to caselaw, appears to serve as a ground for a rent reduction by the DHCR, does not entitle plaintiff to the relief he seeks. "Required services" under RSC § 2520.6[r][3] is "(1) That space and those services which the owner was maintaining or was required to maintain on the applicable base dates set forth below, and any additional space or services provided or required to be provided thereafter by applicable law. "Required services" includes "Ancillary services" which is

> That space and those required services not contained within the individual housing accommodation which the owner was providing on the applicable base dates set forth below, and any additional space and services provided or required to be provided thereafter by applicable law. . . . Such ancillary services are subject to the following provisions:
> (1) No owner shall require a tenant or prospective tenant to lease, rent or pay for an ancillary service, other than security, as a condition of renting a housing accommodation. . . . .

Whether ancillary space to a demised rent stabilized premises is a required service depends "on the facts and circumstances of a particular case" and important considerations include: the point of access; the exclusivity of the use, and the customary use of the space over a long period of time (*Garza v 508 West 112th Street, Inc., supra*). While access from a door within an apartment is consistent with a required service, access through a window is not; exclusive use is consistent with a required service, while an incidental building wide access is not; prolonged customary use is consistent with a required service under a lease. Notwithstanding plaintiff's use of the space over the past 34 years, plaintiff clearly does not have exclusive access to the backyard from his apartment, since access is also provided by the basement corridor, which is accessible to the remaining tenants in the building. Plaintiff's

submissions fail to establish that his use was exclusive to the 11 tenants and defendant. And, it is uncontested that the backyard serves as means of egress from a fire escape for those tenants who apartments are located in the rear of the building.

Therefore, plaintiff's failed to establish a likelihood of success on the merits of his first cause of action for a declaration that the backyard is part of the leased premises and/or an ancillary service as defined by the lease and RSC and that defendant is not permitted to enter the backyard without plaintiff's permission unless in an emergency and shall replace the fence and replant all plants removed from the backyard.

Permanent Injunction

Likewise, plaintiff failed to establish the likelihood of success on the merits of his second claim to permanently enjoin defendant from entering the backyard without plaintiff's permission except in an emergency situation and from disturbing his quiet enjoyment of the backyard.

Conversion

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" *(Vigilant Ins. Co. of America v Housing Authority of City of El Paso*, 87 NY2d 36 [1995]). The complaint sufficiently alleges that plaintiff owned the right to possess the fence,[4] ivy, plants and shrubs in the backyard and that defendant destroyed or removed same to the exclusion of plaintiff's rights. However, as plaintiff only seeks monetary relief in the amount of $10,000.00 in connection with the alleged destruction of his personal property, injunctive relief pertaining the defendant's interference with

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[4] Plaintiff states that the fence was in existence for at least 50 years, long predating his tenancy (Plaintiff's Reply Affirmation, ¶ 15).

the fence, ivy, plants and shrubs is unwarranted (*McCall v State*, 215 AD2d 1 [3d Dept 1995] [as "the only detriment that plaintiffs have actually suffered-can be fully redressed by a monetary award, should their challenge succeed, preliminary injunctive relief is not warranted"]).

Trespass

Trespass involves an interference with a person's right to possession of real property either *by an unlawful act or a lawful act performed in an unlawful manner (Kurzner v Sutton Owners Corp.*, 245 AD2d 101 [1st Dept 1997]). Since the documentary evidence conclusively establishes that the backyard is not part of plaintiff's demised premises to the exclusion of defendant, plaintiff cannot establish the likelihood of success on the merits of his trespass claim.

Adverse Possession

Nor has plaintiff acquired the right to exclusive use of the backyard through adverse possession, since he has had an ongoing landlord-tenant relationship with defendant or its predecessors since 1975 (*see e.g., Prospect Owners Corp. v Sandmeyer, supra, citing* RPAPL 531; CPLR 212[a]). In any event, it cannot be said that plaintiff's possession of the backyard has been exclusive, and the evidence on which plaintiff relies to support his argument that defendant acquiesced in his use and possession of the backyard defeats any claim that their possession was hostile, adverse, or under a claim of right (*Prospect Owners Corp., supra* at 63, *citing Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 159 [1996]; 10 E. 70th St. v Gimbel, 309 AD2d 644, 645, 766 NYS2d 38 [2003]).

Cross-Motion

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action *(Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (see, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

On a motion to dismiss for failure to state a cause of action, where the parties have submitted evidentiary material, including affidavits, or where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence" the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d

802, 653 NYS2d 279 [1996]). While affidavits may be considered, if the motion is not converted to a 3212 motion for summary judgment, they are generally intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims (*Nonnon v City of New York*, 9 NY3d 825 [2007] [emphasis added]). As to affidavits submitted by the defendant, such affidavit "will almost never warrant dismissal under CPLR 3211 unless they "establish conclusively that [petitioner] has no [claim or] cause of action" (*Lawrence v Miller*, 11 NY3d 588, 873 NYS2d 517 [2008] *citing Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

The lease and affidavits submitted by defendants conclusively establish that the backyard is accessible to the remaining tenants in the building through the basement passageway, and that plaintiff's access to the backyard is not to the exclusion of the defendant. Therefore, the first cause of action for a declaration that the backyard is part of the leased premises and/or an ancillary service as defined by the lease and RSC and that defendant is not permitted to enter the backyard without plaintiff's permission unless in an emergency and shall replace the fence and replant all plants removed from the backyard, is dismissed.

The second cause of action for an order permanently enjoining defendant from entering the backyard without plaintiff's permission except in an emergency situation and from disturbing his quiet enjoyment of the backyard is denied, and this cause of action is dismissed.

The third cause of action for conversion survives dismissal. The Complaint sufficiently alleges that plaintiff owned the right to possess the fence, ivy, plants and shrubs in the backyard and that defendant destroyed or removed same to the exclusion of plaintiff's rights. Thus, dismissal of the third cause of action is denied.

The fourth and fifth causes of action for adverse possession and trespass, respectively, are

dismissed, for the reasons noted above.

Therefore, the cross-motion by defendant to dismiss the Complaint is granted, except as to plaintiff's third cause of action for conversion.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the order to show cause to enjoin and restrain defendant Prince 156 Associates, L.P., ("defendant") from (1) entering into or changing any portion of the backyard behind his apartment 1A at 156 Prince Street, New York, New York (the "backyard"), (2) disturbing plaintiff's quiet enjoyment of the backyard, and (3) disturbing plaintiff's possession of the backyard (except to permit defendants to perform inspections to comply with the New York City Building Code), is denied; and it is further

ORDERED that defendant's cross-motion pursuant to CPLR 3211(a)(7) to dismiss the Complaint for failure to state a cause of action is granted as to plaintiff's first, second, fourth, and fifth causes of action, and denied as to plaintiff's third cause of action for conversion; and it is further

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COUNTY CLERK'S OFFICE
NEW YORK

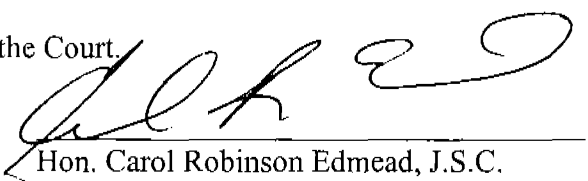
ORDERED that any stay imposed by the Court is hereby lifted; and it is further

ORDERED that this matter is transferred to the Civil Court, City of New York pursuant to CPLR 325-d in accordance with the attached order; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: September 1, 2009



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

At an Individual Assignment Part 35 of the Supreme Court of the State of New York, held in and for the County of New York, at the courthouse thereof in the County of New York, City, and State of New York, on the 1st of September, 20 09

PRESENT:

HON: **HON. CAROL EDMEAD**

JUSTICE.

Steve Askinazy

vs.

Prince 156 Associates, L.P.,

PRE-NOTE OF ISSUE

ORDER OF TRANSFER-325(d)

County Clerk's

Index No. 106719 / 20 09

It appearing that the Civil Court of the City of New York has jurisdiction of the parties to this action and pursuant to Rule 202.13(a) of the Uniform Civil Rules for the Supreme Court and the County Court, it is

ORDERED, that this cause bearing Index Number 106719/09 be, and hereby is, removed from this court and transferred to the Civil Court of the City of New York, County of New York, and it is further

ORDERED, that the clerk of New York County shall transfer to the clerk of the Civil Court of the City of New York, County of New York, all papers in this action now in his possession upon payment of his proper fees, if any, and the clerk of the Civil Court of the City of New York, County of New York, upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the clerk of the County of New York, shall issue to this action a Civil Court Index Number without the payment of any additional fees, and it is further

ORDERED, that the above-entitled cause be, and it is hereby, transferred to said Court, to be heard, tried and determined as if originally brought therein but subject to the provisions of CPLR 325(d).

FILED
SEP - 2 2009
COUNTY CLERK'S OFFICE
NEW YORK

ENTER,

HON. CAROL EDMEAD

J.S.C.