

**Namdar v Court Plaza, Inc.**

2009 NY Slip Op 32989(U)

December 17, 2009

Supreme Court, New York County

Docket Number: 110158/08

Judge: Marilyn Shafer

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# MARILYN SHAFER

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

PRESENT: SHAFER  
Justice

PART 8

NANDAR, MANOUCHER,  
ETAL.

INDEX NO. 110158/08

MOTION DATE \_\_\_\_\_

- v -

COURT PAPER, INC., ETAL.

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *and cross-motion* are decided in accord with the annexed memorandum.

**FILED**

DEC 22 2009

NEW YORK  
COUNTY CLERK'S OFFICE

**MARILYN SHAFER**

Dated: 12/17/09

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 — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER  
Justice

PART 8

MANOUCHER NAMDAR, ALMA BELGRAVE, NAOMI  
NAFFEES, IMRAN CHAUDHARY, JAFFA HAIMOFF,  
SARA KURAYEVE, ILYEAVE MOSHE, INESA  
DZIVINSKY, TERESA PAWLOWSKA, TATANA  
PLASTUNENKO, MATT ENAYATIAN, JACHUELINE  
HINCAPIE (CAMACHO), LINDA SANTIAGO, GJENC  
HYSENBEGASI/VAHIDE HYSENBEGASI,

INDEX NO. 110158/08

Plaintiffs,

-against-

COURT PLAZA, INC., COURT PLAZA TENANTS  
ASSOCIATION, HIMMELSTEIN, McCONNELL,  
GRIBBEN, DONOGHUE & JOSEPH, ESQS.,

Defendants.

The following papers, numbered 1 to 6, were read in Motion 1:

- Order to Show Cause, Affirmation – Exhibits
- Affidavit In Support
- Affirmation In Support
- Affirmation In Opposition
- Affirmation In Reply

PAPERS NUMBERED	
	1, 2
	3
	4
	5
	6

FILED

DEC 22 2009

The following papers, numbered 1 to 3, were read in Motion 2:

- Affirmation in support of Cross-Motion, – Exhibits
- Affirmation In Opposition – Exhibits
- Affirmation in Reply

PAPERS NUMBERED	
	1
	2
	3

Cross-Motion: Yes  No

Upon the foregoing papers, it is ordered that the motion and cross motion are decided as follows:

Introduction

The plaintiffs in these motions are low to moderate income tenants of a building which withdrew from the Mitchell-Lama Program. They have been excluded from receiving any benefit of the settlement agreement reached in a prior lawsuit and face eviction.

### Background

The following facts are undisputed.

The 249 unit apartment house in which plaintiff-tenants live was constructed in 1974 to provide publicly assisted housing to low and middle income individuals and families under Article II of the Private Housing Finance Law, popularly known as the "Mitchell-Lama Law." The Mitchell-Lama Law was designed to encourage private development of affordable housing and offered developers economic benefits, including low interest financing and tax abatements, in exchange for limitations on profits and management control. The law provided that a company could repay its loans and withdraw from the program after 20 years, at which time it would lose its tax abatements and be free from all rent restrictions.

Defendant Court Plaza, Inc., the developer and manager of the building in which the plaintiffs are tenants, leases the land on which the building was constructed pursuant to a ground lease with the New York City Educational Construction Fund. The ground lease runs for 75 years, commencing in 1972, and provides, in relevant part:

The Demised Premises shall be used for residential purposes for persons and families of low or moderate income only. (Section 102)

In 2006, Court Plaza announced its intent to withdraw from the Mitchell-Lama Program, a tenants' association was formed, defendant Court Plaza Tenants (sic) Association, which raised money to retain counsel, defendant law firm Himmelstein, McConnell, Gribben, Donoghue & Joseph, Esqs., to oppose withdrawal. The Tenants' Association was an unincorporated, volunteer, not-for-profit group with no paid members. An action was initiated in which 104 tenants were named as plaintiffs. That action was resolved by a Settlement Agreement, dated May 24, 2007, in which the parties agreed that Court Plaza would withdraw from the Mitchell-Lama Program and rent increases for current tenants would be capped at between 7% and 8% for nine years.

The Agreement imposed three conditions for eligibility for the increase cap: (1) being a tenant as of May 24, 2007; (2) being a member of the Tenants' Association; and (3) executing the Agreement. The Agreement, signed by 164 tenants, was filed in Court on or about June 2, 2007 and "So Ordered" by this Court on June 21, 2007. Court Plaza withdrew from the Mitchell-Lama Program on August 16, 2007.

In April 2008, it came to the law firm's attention that 30 of the plaintiffs of the prior litigation had not signed the Agreement. The law firm withdrew and, represented by other counsel, two separate actions were commenced by tenants who failed to meet one or more of the Agreement conditions and were offered renewal leases with increases of 40% or more.

This Court found that every incumbent tenant in good standing on May 24, 2007 was entitled to participate in the benefits of the Agreement. While the plaintiff-tenants in the prior actions failed, for whatever reasons, to sign the Agreement within the set time

period, their entitlement to do so was undisputed. The Court deemed Court Plaza's refusal to acknowledge the entitlement of qualified tenants based upon a ministerial omission is an unwarranted exaltation of form over substance. Therefor this Court held that its

order dated June 21, 2007, omitting the signatures of certain qualified tenants, contained a mistake and, in the interest of justice, that mistake should be corrected. [pursuant to CPLR § 2001] Those plaintiffs who were tenants on May 24, 2007 and eligible to sign the Agreement should be given the opportunity to sign it. Court Plaza will suffer no prejudice from this correction, since it had notice of these tenants at the time the Agreement was entered. On the contrary, the omission of these otherwise qualified tenants created an unexpected windfall for Court Plaza.

In the two instant motions, three more apparently incumbent tenants in good standing at the time that the Agreement was signed, who did not sign the Agreement, come forward seeking to intervene in this action since no order has as yet been settled.

The doctrine of law of the case is part of a larger family of kindred concepts, which includes *res judicata* (claim preclusion) and *collateral estoppel* (issue preclusion). these doctrines, broadly speaking, are designed to limit relitigation of issues. (*People v Evans*, 94 NY2d 499 [2000]) Like claim preclusion and issue preclusion, preclusion under law of the case contemplates that the parties had a full and fair opportunity to litigate the initial determination. (*Arizona v California*, 460 US 605 [1983]) As distinguished from issue preclusion and claim preclusion, law of the case addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation before judgement. (*Matter of McGrath v Gold*, 36 NY2d 406 [1975]) It has

therefore been characterized as a kind of intra-action res judicata. (Siegel, *New York Practice* § 448, at 723[4th ed]) Law of the case is a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided. (*Arizona v California, supra*)

To the extent, therefore, that the instant motions raise issues which were fully and fairly litigated below, this Court will not reopen its previous decision. This Court found that every incumbent tenant in good standing on May 24, 2007 was entitled to participate in the benefits of the Agreement, even if that tenant had not been included in this Court's order of June 21, 2007. Plaintiff Carlyle Thompson submits an affidavit in motion 1 stating he was a tenant in good standing on May 24, 2007. Based upon this Court's prior holding, Thompson is entitled to to intervene in this action to seek benefits under the Agreement, notwithstanding that he misstates the basis of his entitlement.<sup>1</sup> To the extent that Court Plaza raises the specific defenses of laches and ratification against Thompson, these issues were not been previously litigated and may be asserted in the instant action after intervention.

Tenants Naim Rasulzud and Larisa Avizoa seek intervention through a cross-motion on their behalf brought by the Court Plaza Tenants' Association. Pursuant to CPLR 1014, a motion to intervene shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought. Failure to annex a proposed pleading mandates denial of the motion. (*Fanfan v Rivera*, 33 AD3d 755 [2d Dept 2006]) Motion 2 fails to annex a proposed pleading. Moreover, the motion contains no affidavit

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<sup>1</sup> Thompson claims third-party beneficiary rights under Court Plaza's ground lease, an argument which this Court specifically rejected in the prior decision. Court Plaza properly terms the rejection of any third-party beneficiary rights under the ground lease the law of the case.

from any person with knowledge to substantiate their status as tenants in good standing on May 24, 2007.

We have considered the other arguments raised by the parties and find them to be without merit.

Accordingly, it is

ORDERED, that the motion for injunctive relief in motion 1, on behalf of Carlyle Thompson, is granted; and it is further

ORDERED, that the motion to intervene by plaintiff Carlyle Thompson is granted; and it is further

ORDERED, that Court Plaza Tenant's Association's cross-motion to intervene, on behalf of tenants Naim Rasulzud and Larisa Avizoa is denied without prejudice to renewal upon the papers providing evidence of tenants' standing and proposed pleadings.

Settle Order.

This reflects the decision and order of this Court.

Dated: 12/17/09

FILED MARILYN SHAFER J.S.C. DEC 22 2009 NEW YORK COUNTY CLERK'S OFFICE

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION Over