

**Collins v Collins**

2010 NY Slip Op 33970(U)

March 10, 2010

Supreme Court, New York County

Docket Number: 108001/2006

Judge: Jane S. Solomon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

3

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 55**

JANA COLLINS,  
Plaintiff,

-against-

725 REALTY CO., LLC, PINNACLE HOLDING  
COMPANY III, LLC, PINNACLE MANAGING  
CO. LLC and WIENER REALTORS LLC,  
Defendants.

INDEX NUMBER 108001/2006  
Motion Sequence 007  
DECISION & ORDER

**FILED**  
MAR 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

**JANE S. SOLOMON, J.:**

Defendants move to dismiss the complaint against them pursuant to CPLR 3211(a)(5) and (7), contending that the Plaintiff's request for permanent injunctive relief has been resolved, in her favor, by a final determination of the New York State Division of Housing and Community Renewal (DHCR) and that the complaint fails to state any valid claim for relief.

Plaintiff Jana Collins (Plaintiff) is a rent-stabilized tenant in an apartment building at 725 Riverside Drive (the building), New York County, owned and managed by defendants<sup>1</sup>, pursuant to a lease dated April 5, 2000, which has been renewed through the inception of the instant action.

On or about September 23, 2005, Plaintiff received a proposed offering plan to convert the building, which contains 76 apartments, into a condominium. The conversion apparently took place on June 12, 2007. On or about October 3, 2005, defendants filed an application with DHCR to install a trash compactor in the building, asserting that the only loss of services to the

---

<sup>1</sup>The instant motion claims that 725 Realty Co., LLC owns the building, Pinnacle Managing Co. LLC manages the building, and Pinnacle Holding Company III, LLC and Wiener Realtors LLC have no connection to the building.

building's occupants would be the elimination of the top pane of one window in Plaintiff's apartment. With their application pending, defendants obtained a work permit from the New York City Department of Buildings (DOB), on or about April 12, 2006, for construction of a trash compactor equipment room and took, what they characterize as, "certain minor preliminary steps" (Affidavit in Support, para. 18) on this project on or about May 2, 2006. Three days later, Plaintiff and other tenants filed a complaint with DOB regarding defendants' unauthorized construction work, which then ceased, and the alleged sealing of a fire emergency door, which resulted in the issuance of a violation by DOB.

The complaint, filed on June 8, 2006, asserts causes of action against defendants for a preliminary and permanent injunction against altering or modifying the area adjacent to Plaintiff's apartment, trespass, breach of duty in maintaining, repairing and renovating the building, fraud, and legal fees and disbursements. On March 12, 2007, the court granted Plaintiff's request for a preliminary injunction until a final determination was made in DHCR's proceeding on defendants' application of October 3, 2005. On January 24, 2007, DHCR denied the application and defendants filed a Petition for Administrative Review (PAR) the next month. DHCR denied defendants' PAR on April 1, 2009. At Plaintiff's request thereafter, the court restored the action to its calendar and held a conference on June 15, 2009, where the parties stipulated to continue the preliminary injunction.

Defendants are not challenging DHCR's final determination, having allowed CPLR § 217(1)'s four-month time limit to bring such an action to lapse. They acknowledge their intent to file another application with DHCR to install a trash compactor (Affidavit in Support, para. 32), but they are moving to dismiss the complaint on the grounds that *res judicata* applies, there is no

cause of action upon which relief may be granted, and there is no entitlement to legal fees and disbursements.

Defendants correctly state that Plaintiff's cause of action for a preliminary injunction was resolved in her favor by the court's order of March 12, 2007, which lapsed on April 1, 2009 by its own terms, and the parties' stipulation of June 15, 2009, which was not so-ordered by the court. Defendants further contend that DHCR's denial of their application and subsequent PAR eliminate the need for a permanent injunction as the issues have been fully and fairly adjudicated. Even though they did not prevail, defendants assert that this administrative determination has preclusive effect as it is "quasi judicial" in character.

While Plaintiff, pro se when the instant motion was fully submitted, agrees that defendants' application has been "denied in totality" by DHCR (Affidavit in Opposition, para. 8), she claims that there has not been a final determination of the application on its merits, because the PAR denial states it is "issued without prejudice to the owner's right to refile an application for modification of services with additional evidence in support of the application" (Notice of Motion, Exhibit G). Additionally, she maintains that a subsequent application would keep the issue alive possibly through a PAR and an Article 78 proceeding. Preserving the instant action, she argues, protects her until a truly final determination emerges.

Much of Plaintiff's opposition is devoted to why there should never be a trash compactor installed in the building, but that is not the issue before the court. She offers no authority for the court to act on her speculations about the possible future conduct of the owner and DHCR, and the judicial review and appellate processes of the New York State courts. Defendants' plans clearly aggravated Plaintiff, but DHCR's determination prevented any of the injuries she

anticipated when she commenced this action. For instance, the cause of action for trespass alleges no conduct that had yet occurred, but, instead, charges an encroachment when the trash compactor is installed. Currently, there is no justiciable dispute between the parties and dismissal of the causes of action for a permanent injunction against altering or modifying the area adjacent to Plaintiff's apartment, trespass, and breach of duty in maintaining, repairing and renovating the building (numbers one through three) is appropriate. *Prashker v United States Guarantee Co.*, 1 NY2d 584, 592 (1956) ("The courts do not make mere hypothetical adjudications, where there is no presently justiciable controversy before the court, and where the existence of a 'controversy' is dependent upon the happening of future events").

The complaint's fourth cause of action alleges fraud by defendants in applying for DOB approval of the trash compactor project. However, fraud requires justifiable reliance by the plaintiff and damages to the plaintiff (*Art Capital Group, LLC v Neuhaus*, 2010 NY Slip Op 1600, 2 [1st Dept Feb. 25, 2010]), not some third party. Plaintiff has failed to state a cause of action for fraud.

The complaint's fifth cause of action requests legal fees and disbursements for bringing the action pursuant to Plaintiff's lease at § 20(B), which provides that "You have the right to collect reasonable legal fees and expenses incurred in a successful defense by You of a lawsuit brought by Owner against You or brought by You against Owner." Lease § 20(B), Exhibit F to Notice of Motion. Plaintiff's lawsuit "against Owner" was an unneeded step in asserting or protecting her rights, because she had, with other tenants, filed a complaint with DHCR five weeks earlier stopping the project. Under these circumstances, an award of legal fees and expenses is unwarranted.

Accordingly, it is

ORDERED, that defendants' motion to dismiss the complaint is granted in its entirety;

and it is further

ORDERED, that the Clerk shall enter judgment accordingly without costs and disbursements to the defendants.

DATED: March 10, 2010

ENTER:



---

J.S.C.

JANE S. SOLOMON

**FILED**  
MAR 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE