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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 2
NASSAU COUNTY

CONVIRO ASSOCIATES INC., BETTER STANDARDS, INC., ANTONIO CERVASIO, SHIRLEY JACKSON, ODESSA BURTON and LISA HAYES,

Plaintiff(s),

-against-

CITY OF GLEN COVE,

Defendant(s).

ORIGINAL RETURN DATE: 11/22/10
SUBMISSION DATE: 03/11/11
INDEX No.: 009242/08

MOTION SEQUENCE #1, 2

The following papers read on this motion:

Amended Notice of Motion.....	1
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Plaintiffs' Memorandum of Law.....	5
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Defendant's motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted to the extent indicated below. Plaintiffs' cross-motion for summary judgment on their complaint is denied.

Plaintiffs, Conviro Associates, Inc., Better Standards, Inc. and Antonio Cervasio (collectively "plaintiffs"), own certain rental properties in the City of Glen Cove which they do not occupy, while plaintiffs, Shirley Jackson, Odessa Burton and Lisa Hayes, are currently month-to-month tenants residing in those rental properties (Cmplt.,¶¶ 2-5; BOP, ¶¶ 5-6; Cmplt.).

Pursuant to Article IX of the Glen Cove City Code, non owner-occupied, one and two unit residential rental properties are subject to certain biannual registration filing and reporting requirements which must be satisfied before the property can be legally offered for rental within the City (*see,* Glen Cove Municipal Code, Article, IX, "Landlord Registry" §§ 168-65-168-72 [the "ordinance"]).

In sum, the so-called Landlord Registry ordinance, whose principal objective is to minimize fire code and other housing violations (Code §§ 168-64 and 168-69(A)), requires owners who do not occupy their qualifying, one and two-unit rental properties to *inter alia*: (1) timely file with the City building department registration forms containing certain requested information; and (2) thereafter permit City officials to conduct a biannual administrative inspection of the property before any registry approval can be issued (*see,* Code § 168-67(A), (B), (D); 168-69(A)).

According to the City, prior to the adoption of the ordinance, a disproportionate percentage of City Housing Court violations were attributable to non-owner occupied dwellings, which overburdened municipal services and contributed to the deterioration of City housing stocks (Suozzi Aff., ¶¶ 5-6; Code § 168-64). The legislative findings which preface the substantive provisions of the ordinance reflect this concern by declaring in relevant part that: (1) "[a]bsentee landlords are less able to maintain daily oversight of their properties to ensure compliance with city laws;" and (2) that "[t]he registering of all non-owner-occupied one-and two-family rental units will better ensure the enforcement of the law and yield greater compliance with housing standards and municipal regulations" (Code § 168-64).

The ordinance provides in substance that an owner will be subject to criminal penalties if he or she rents the property without first obtaining a registry approval, which in turn can be secured, insofar as relevant, only if the City is permitted, or is otherwise able, to conduct the required, biannual inspection (Code §§ 168-65(A); 168-69(A)). The criminal penalties include imprisonment of up to 15 days and fines ranging between $500.00 and $3,000.00 which may be imposed where an owner "fails to comply with any of the requirements" of the Code (Code §§ 168-66(1)(A); 168-72(A)-(C)).

Significantly, where an owner or occupant fails or refuses to authorize the biannual inspection, the ordinance permits building department personnel to request that the City Attorney apply for a search warrant, provided that there is "reasonable cause to believe that a violation of this article or a violation of the New York Uniform Fire Prevention and Building Code, or the Nassau County Fire Prevention Ordinance or this City Code has occurred" (Code § 168-70).

More particularly, the Code states in this respect that "[t]he BDA may seek a search warrant whenever the owner or occupant fails to allow inspection of any rental dwelling unit where there is reasonable cause to believe that a violation of this article or a violation of the New York Uniform Fire Prevention and Building Code, or the Nassau County Fire Prevention Ordinance or this City Code has occurred" and further that any "application for a search warrant shall in all respects comply with applicable laws of the State of New York" (Code § 168-70).

According to one of City's Code Enforcement Officers, Joseph Scarfo, if an owner fails to return the biannual registration form or refuses to authorize a biannual inspection, a Code violation can be issued and a criminal prosecution may thereafter be commenced, although the City contends that its objective is not to prohibit rentals but primarily to protect the public safety and avoid criminal proceedings by fostering cooperation, unless the violations are blatant, serious and

material (Scarfo Dep., pp. 22-23, 28-29, 41; *see also,* Summa Aff., ¶¶ 4-7, 9-11).

It is undisputed that plaintiffs have to date failed to register the subject properties and are in technical violation of the Code's registry requirements, although there is no allegation in the complaint itself asserting that the City has commenced criminal proceedings based upon plaintiffs' current noncompliance with the ordinance or its administrative inspection requirement (Summa Aff., ¶ 5).

By summons and complaint dated May 15, 2008, plaintiffs commenced the within action for, *inter alia*, injunctive and declaratory relief "rescinding and annulling" the ordinance as unconstitutional and void as violative of their due process, Fourth Amendment and equal protection rights under the State and Federal Constitutions (Taranto Aff., Ex., A; Cmplt., ¶¶ 14-25) (*e.g.*, Cmplt., ¶¶ 16-25).

Notably, the complaint itself does not incorporate fact-specific averments describing the occurrences and events which transpired with respect to the subject properties or the City's efforts, if any, to enforce the inspection provisions against plaintiffs in this particular matter. Rather, the allegations and substantive theories of recovery are generically framed and appear to rely on the contention that the ordinance, as adopted, is facially unconstitutional and thus unenforceable as a matter of law (*e.g.*, Cmplt., ¶¶ 14, 16, 18, 23).

The City has since answered, denied the material allegations of the complaint and interposed several affirmative defenses, including the assertion that the challenged ordinance constitutes a properly-tailored exercise of its police power authority which permissibly furthers the "general health, safety and welfare of its citizens" (Ans., 3rd Aff. Def., ¶ 5).

Discovery has been conducted, and the City and plaintiffs now move and cross move, respectively, for summary judgment. Among other things, the City contends that both as enacted and administered, the ordinance is in all respects constitutional, while plaintiffs argue that the ordinance as written, or as administered by the City, is unduly intrusive and violates, *inter alia*, their due process and Fourth Amendment rights to be free of unreasonable searches (Cmplt., ¶¶ 16-17) (*see generally*, *Pashcow v. Town of Babylon*, 53 NY2d 687, 688-689 [1981]; *Sokolov v. Village of Freeport,* 52 NY2d 341, 346-347 [1981]; *see also*, *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 527-529 [1967]).

It is settled that a party contesting the constitutionality of a statute must overcome an "exceedingly strong presumption of constitutionality" which "applies not only to enactments of the Legislature but to ordinances of municipalities as well" (*New York Charter Schools Ass'n, Inc. v. DiNapoli*, 13 NY3d 120, 130 [2009]; *Lighthouse Shores v Town of Islip*, 41 NY2d 7, 11 [1976]; *Bobka v. Town of Huntington*, 143 AD2d 381, 383; *see also*, *Dalton v. Pataki,* 5 NY3d 243, 255 [2005]).

"While this presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt and only as a last resort should courts strike down legislation on the ground of

unconstitutionality" (*Lighthouse Shores, Inc. v. Town of Islip,* 41 NY2d at 11; *see, Town of North Hempstead v. Exxon Corp.*, 53 NY2d 747, 749 [1981]; *Arrowsmith v. City of Rochester*, 309 AD2d 1201, 1202; *Stender v. City of Albany*, 188 AD2d 986, 987).

Nevertheless, the Fourth Amendment prohibits warrantless, administrative inspections of private commercial premises (*Sokolov v. Freeport,* 52 NY2d at 346-347; *Stender v. City of Albany*, 188 AD2d at 987; *see, Pashcow v. Town of Babylon,* 53 NY2d at 688-689; *Town of Brookhaven v. Ronkoma Realty Corp.*, 154 AD2d 665, 666 *cf.*, *Camara v. Municipal Court of City and County of San Francisco*, *supra*).

Municipal registry ordinances which authorize administrative inspections must still comport with governing, constitutional requirements, even though they otherwise legitimately further a constitutionally permissible purpose (*see, Camara v. Municipal Court of City and County of San Francisco, supra*; *McLean v. City of Kingston*, 57 AD3d at 1271-1272; *Stender v. City of Albany*, *supra; Town of Brookhaven v. Ronkoma Realty Corp.,* 154 AD2d at 666).

Accordingly, where "a challenged ordinance directly or in practical effect authorizes or requires a warrantless inspection, it will not pass constitutional muster" (*Stender v. City of Albany*, *supra,* 188 AD2d at 987 *accord, Sokolov v. Freeport,* 52 NY2d at 346-347; *Stender v. City of Albany*, 188 AD2d at 987; *Brookhaven v. Ronkoma Realty Corp., supra; see also, Pashcow v. Town of Babylon,* 53 NY2d at 688-689).

With these principles in mind, the Court agrees that plaintiffs have not sustained their exceedingly heavy burden of demonstrating that the ordinance is facially violative of their due process and Fourth Amendment protections. Courts have rejected equal protection claims arising out of registry ordinances (*Spilka v. Town of Inlet,* 8 AD3d at 813) and consistently recognized that registration ordinances bear "a reasonable relationship to * * * legitimate goals of promoting public health and safety and maintaining property values" (*e.g., Arrowsmith v. City of Rochester,* 309 AD2d 1201; *see*, *Brockport Sweden Property Owners Ass'n v. Village of Brockport*, 81 AD3d 1416, 1418; *Spilka v. Town of Inlet*, *supra*; *Stender v. City of Albany*, 188 AD2d at 987; *see also*, *Camara v. Municipal Court of City and County of San Francisco, supra cf.*, *Anthony v. Town of North Hempstead*, 2 AD3d 378, 379; *Marcin v Incorporated Vil. of Hempstead*, 238 AD2d 389).

Here, the legislative objectives of protecting the public safety, welfare and promoting "greater compliance with housing standards and municipal regulations" represent legitimate constitutional purposes, which have been permissibly achieved through the rational exercise of the City's police power and authority (*Spilka v. Town of Inlet*, *supra; Arrowsmith v City of Rochester*, 309 AD2d 1201; *Stender v. City of Albany*, 188 AD2d at 987; *see*, *Pashcow v. Town of Babylon,* 53 NY2d at 688-689). Contrary to plaintiffs' contentions, the ordinance is "sufficiently precise to satisfy the requirements of due process" (*Arrowsmith v City of Rochester,* 309 AD2d at 1202) and is not unduly invasive in terms of the informational data sought from owners in the registry applications (*cf., Anthony v. Town of North Hempstead*, 2 AD3d at 379; *Marcin v. Incorporated Village of Hempstead,* 238 AD2d 389) (Cmplt.,¶¶ 10, 17-18; Code § 167-67[A]).

Further, a review of the governing Code provisions, as enacted, confirms that an owner's ability to rent his premises is "not conditioned upon his [or her] consent to a warrantless inspection" (*Pashcow v. Town of Babylon,* 53 NY2d at 688; *see, Brockport Sweden Property Owners Ass'n v. Village of Brockport,* 81 AD3d at 1418; *Sokolov v. Freeport, supra*; *McLean v City of Kingston,* 57 AD3d at 1271; *Arrowsmith v. City of Rochester*, 309 AD2d at 1202; *Stender v. City of Albany*, *supra*).

Rather, the relevant provisions, as written, provide that a warrant application can be made when an "owner or occupant fails to allow inspection of any rental dwelling unit *where there is reasonable cause* to believe that a violation of this article or a violation of the New York Uniform Fire Prevention and Building Code, or the Nassau County Fire Prevention Ordinance or this City Code has occurred * * *" (Code § 168-70) (emphasis added). It is settled that "[i]nclusion of the warrant requirement insures protection of the owner's constitutional rights and renders the ordinance sufficient to withstand a facial challenge to its constitutionality" (*Stender v. City of Albany*, 188 AD2d at 987; *see*, *Pashcow v. Town of Babylon*, *supra*; *McLean v. City of Kingston*, 57 AD3d at 1271-1272).

Nevertheless, Courts have warned that despite the presence of search warrant provisions, even otherwise facially valid ordinances "cannot be applied in such a manner as to render the owner's ability to collect rents conditional upon consent to a warrantless entry" (*see, McLean v. City of Kingston*, 57 AD3d at 1271-1272; *Stender v. City of Albany*, *supra; see also, Pashcow v. Town of Babylon*, *supra cf.*, *Sokolov v. Village of Freeport, supra*).

In *McLean v. City of Kingston,* 57 AD3d 1269, relied on by plaintiffs, a very similar ordinance was adopted by the City of Kingston, one which also included a provision authorizing City officials to apply for search warrants upon reasonable cause where an owner declined to authorize an administrative inspection (*see also*, *Stender v. City of Albany*, *supra*). The facial validity of the Kingston ordinance was ultimately upheld (*McLean v. City of Kingston*, 57 AD3d at 1270) but only after the Court was satisfied that "an owner's refusal to consent to an inspection *is [not] considered a violation of the ordinance*" and further that the City did not impose "*criminal sanctions on the basis of an owner's refusal to consent to an inspection* * * *" (*McLean v. City of Kingston,* 57 AD3d at 1271-1272) (emphases added) *citing to*, *Pashcow v. Town of Babylon*, *supra*; *Sokolov v. Village of Freeport*, 52 NY2d at 346 *accord, Stender v. City of Albany*, *supra*).

Upon carefully reviewing the evidence submitted in connection with the City's administration of the ordinance, the Court agrees that plaintiffs have raised a triable issue of fact with respect to precisely how the Code has been administered by the City. At bar, the testimony of the City Code enforcement officer, Joseph Scarfo ("Scarfo"), tends to support plaintiffs' assertion that, as enforced by the City, an owner's refusal to consent to an inspection may be considered "a violation of the ordinance" and that the City's policy may be considered the imposition of "criminal sanctions on the basis of an owner's refusal to consent to an inspection" (*McLean v. City of Kingston,* 57 AD3d at 1271-1272).

Specifically, Scarfo testified that, pursuant to the City's Code enforcement policy as he understood it, owners who withheld their consent to inspection requests would be: (1) sent notices of violation; (2) effectively precluded from renting their properties absent code compliance; and (3) thereafter potentially subject to criminal prosecution if they did not cooperate with the City or conform to the inspection requirements set forth in the ordinance (Scarfo Dep., pp. 21, 23; 29-30) (*see, McLean v City of Kingston,* 57 AD3d at 1271; *see also, Pashcow v. Town of Babylon, supra*; *Sokolov v. Village of Freeport*, 52 NY2d at 346; *Stender v. City of Albany, supra*).

Contrary to the City's contention, the affirmation of Enforcement Director Richard M. Summa, which was prepared after Scarfo's deposition was competed, reads as largely consistent with the key portions of Scarfo's testimony; namely, Scarfo's testimony with respect to when, and for what reasons, violations may be issued and when prosecutions would be commenced under the Code as actually administered by the City (Summa Aff., ¶¶ 9-11).

While Summa's affidavit contains a series of factual assertions and contentions relating to the Code enforcement procedures implemented by the City, his statements indicate that owners who decline inspection requests would be issued Code violation notices and that they could then be subjected to criminal prosecution if they later refused to cooperate with the City by agreeing to the inspection (Summa Aff., ¶¶ 10-11).

More particularly, Summa has generally described the procedures utilized by recounting, *inter alia*, that a registration form is initially sent to an owner by the City. The form "requests [that] the landlord . . . provide a completed form to the City," after which "an inspection of the building will be scheduled" (Summa Aff., ¶ 10). However, Summa notes that at this juncture, "[i]f the landlord does not comply, a notice of violation is forwarded to . . . [him or her]" (Summa Aff., ¶ 10). The immediately following sentence of Summa's affidavit then advises, albeit in obliquely framed prose, that "it is the hope of the City that . . . [he or she] will cooperate with the City . . . [and] . . . comply with the Ordinance and City Code rather than proceed with the machination of the prosecution, which is what the ordinance aims to prevent" (Summa Aff., ¶ 10). These comments, if anything, appear to reaffirm the substance of Scarfo's deposition testimony; namely, that: (1) violations may be issued upon an owner's refusal to consent to the inspection; and (2) that if the owner ultimately declines to cooperate and consent to the inspection, the City could then "proceed with the machination of the prosecution," although it is not entirely clear what meaning the latter phrase is intended to convey.

Significantly, the Court of Appeals has warned "that an owner's ability to rent his premises may not be conditioned upon his consent to a warrantless inspection" (*Pashcow v. Town of Babylon*, 53 NY2d at 688; *McLean v City of Kingston,* 57 AD3d at 1271; *Stender v. City of Albany, supra*). Nor is the objectionable nature of an impermissible penalty dispelled merely because it may be indirectly imposed, since in such a case "the property owner is [still] being penalized for his failure to consent to a warrantless search" (*Sokolov v. Village of Freeport,* 52 NY2d at 346). The Court notes that the City's reply submissions do not meaningfully address the relevant portions of the *McClean* and *Stender* holdings relied upon by plaintiffs.

Lastly, to the extent that the complaint does not expressly identify the City's manner of implementing the ordinance as a theory supporting the constitutional claims advanced, it is settled that a plaintiff may "successfully oppose a motion for summary judgment by relying on an unpleaded cause of action which is supported by plaintiff's submissions" (*Lombardo v. Mastec North America, Inc.*, 68 AD3d 935, 936-937 *cf., Alvord and Swift v. Stewart M. Muller Const. Co., Inc.*, 46 NY2d 276, 281 [1978]).

Summary judgment is a drastic remedy which may be granted only where there is no clear triable issue of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Mosheyev v. Pilevsky*, 283 AD2d 469). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (*In re Cuttitto Family Trust*, 10 AD3d 656; *Rudnitsky v. Robbins*, 191 AD2d 488, 489).

The Court has considered the parties' remaining contentions and concludes that they do not support an award of relief in excess of that granted above.

This decision constitutes the order of the court.

Dated: 5-24-11

HON THOMAS P. PHELAN

J.S.C.

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