

Lieberman v 244 E. 86th St., LLC

2014 NY Slip Op 32836(U)

October 30, 2014

Supreme Court, New York County

Docket Number: 156370/2013

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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CHAD IAN LIEBERMAN,

Plaintiff,

-against-

244 EAST 86TH STREET, LLC and VENTURA
IN MANHATTAN, INC.,

Defendants.

DECISION AND
ORDER

Index No. 156370/2013

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HON. ANIL C. SINGH, J.:

The limited amount of land on the island of Manhattan results in the development of tall buildings crowded together reducing light and air to residential apartments. In this case, plaintiff Chad Ian Lieberman alleges that a cantilevered structure on an adjoining building constructed in the late-1990s obstructs light and air to three rooms of his eight room, rent-controlled apartment to which he obtained succession rights in 2013. In order to alleviate the problem, he seeks a “mandatory injunction directing [the owner of the neighboring building] to restore sufficient light and air to the apartment so that the apartment contains the six lawful living rooms it contained on September 16, 1957.” In short, Liberman seeks a court order directing the adjoining owner to tear down a 25-story building, containing 246 apartments as well as a 30,000-square-foot supermarket. Such demotion would disrupt the housing of hundreds of residential tenants.

Motion sequence 001 and 002 are consolidated for disposition. In motion sequence 001, defendant Ventura In Manhattan, Inc. (Ventura) moves, pursuant to CPLR 3211(a) (3), (5), and (7), for an order dismissing the second and fourth causes of action asserted in the complaint, and for an order directing plaintiff, or plaintiff’s counsel, to pay Ventura the attorneys’ fees and costs

incurred in this action. In motion sequence 002, defendant 244 East 86th Street, LLC (“Landlord”) moves for an order dismissing the complaint pursuant to CPLR 3211(a)(3) and (5), on the grounds that the complaint is barred by laches, and for an order imposing sanctions upon plaintiff and his attorneys pursuant to 22 NYCRR § 130-1.1 *et seq.*

The complaint alleges that plaintiff is the rent-controlled tenant of apartment 66 in the building located at 244 East 86th Street in Manhattan (“Building”), having succeeded to that tenancy upon the death of his grandfather Eric Oppenheimer (“Oppenheimer”) on January 2, 2013. Landlord is the owner of the Building, and Ventura is the owner of the real property located at 230-240 East 86th Street (“the Adjacent Lot”). The Adjacent Lot abuts the Building on its western side on 86th Street. In 1997, non-party MEPT Realty LLC (“MEPT”) owned both the Building and the Adjoining Lot, and wished to build a new residential building on the latter. At the time Oppenheimer first leased the apartment, which occupies the entire west side of the sixth floor of the Building, the apartment contained eight rooms.

In order to maximize the rentable space in the new building, MEPT planned to cantilever a portion of the new building over the western side of the existing Building, which would cover the air shaft providing light and air to three rooms in the apartment. To accomplish this goal, MEPT entered into an agreement with Oppenheimer (and other tenants in the same line of apartments) on May 6, 1997, (“1997 Agreement”) pursuant to which Oppenheimer would cease to use two of the three affected rooms as living space, MEPT would reconfigure the third room to make it an alcove off the dining room, and Oppenheimer’s rent would be reduced from \$687 to \$100 per month, for such time as he, his wife, and Ruth Winkler, who also lived in the apartment, resided there (*see* Lamb affirmation, exhibit F). Plaintiff alleges that MEPT never reconfigured the room into an alcove pursuant to their agreement.

He then claims that, on June 5, 1998, MEPT sold the Building to Landlord, and that, on June 8, 1998, Landlord entered into a written Easement Agreement (the "Easement Agreement") granting MEPT an easement to cantilever the new building over the air shaft. By deed dated March 2, 2000, MEPT transferred ownership of the Adjacent Lot and the new building to Ventura (see Lamb affirmation, exhibit G). Finally, the complaint alleges that Landlord misrepresented to the New York State Division of Housing and Community Renewal ("DHCR") the number of rooms in the apartment in connection with filings for increases in rent based upon major capital improvements and increases in maximum base rent and maximum collectible rent.

Standing:

Defendants argue that plaintiff lacks standing to bring this action. The Landlord had originally argued that plaintiff is a mere licensee of the apartment. However, while the motion to dismiss was *sub judice*, Landlord conceded in a summary proceeding in the housing part of the Civil Court that plaintiff is, as he alleges, the rent-controlled tenant of the apartment (see Lamb, supplemental affirmation in opposition, exhibit B at 4). Since plaintiff is entitled to succession of a rent-controlled apartment upon the death of the statutory tenant-of-record, he argues that he has standing as the rent-controlled tenant.

Alternatively, defendants contend that irrespective of Lierberman's status as the rent-controlled tenant, he has no standing to assert the claims herein because he is neither a party to the 1997 Agreement or the Easement Agreement. Defendants argue that standing cannot be conferred onto plaintiff by virtue of his designation as a third-party beneficiary or as one suffering direct harm flowing from the contract. Plaintiff counters that although he is not a signatory to either agreement, he is still bound by the terms of the 1997 Agreement and the Easement Agreement since the latter is incorporated into the former. Additionally, plaintiff

argues that he is suffering direct harm as a result of the agreements through loss of use of three rooms in the apartment.

A defendant may raise the affirmative defense of lack of standing in a motion to dismiss pursuant to CPLR 3211(a)(3). “Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, [when challenged], must be considered at the outset of any litigation.” (Dairylea Coop., Inc. v Walkley, 38 NY2d 6, 9 [1975]). If plaintiff lacks standing to sue, his claims must be dismissed (see Sterling v Minskoff, 226 AD2d 125 [1st Dept 1996]).

Plaintiff concedes that he is not a party to either the 1997 Agreement or the 1998 Easement Agreement. However, he asserts standing as a successor to the tenancy, thus stepping into the shoes of the former tenant of record, his grandfather, the original signatory to the 1997 Agreement.

This argument ignores the plain language of the 1997 Agreement which provides, “[s]uch reduced rent is personal to Tenants herein [Oppenheimer and his wife Ruth Winkler, who were in possession of the property at that time and referenced in the previous paragraph] and no person shall be entitled to succeed to the tenant’s rights under this agreement.” (1997 Agreement ¶5).

In support of plaintiff’s position, he cites to Duell v. Condon for the proposition that successive tenant’s rights transfer (84 NY2d 773 [1995]). However, Duvel refers to the rights that are conferred due to the local rent-control laws and that transfer due to those laws (id.). Here, the rights plaintiff seeks to assert are ones derived from a private agreement. Accordingly, plaintiff does not have standing to raise the claims, for the contract gives him no rights.

Plaintiff also contends that he is harmed directly by the 1997 Agreement and the Easement Agreement. “It is well settled that in order to have standing to challenge a contract, a non-party to the contract must either suffer direct harm flowing from the contract or be a third-party beneficiary thereof.” (Decolator, Cohen & DiPrisco, LLP v. Lysaght, Lysaght & Kramer, P.C., 304 AD2d 86, 90 [1st Dept 2003]).

Lieberman argues that he suffered harm because a “substantial portion of the living space has been removed and the statutorily mandated light and air have been cut off.” However, plaintiff fails to point to any statute conferring the right to a set amount of light and air when an adjoining building is cantilevered over his building (see Blair v. 305-313 E. 47th St. Assoc., 123 Misc.2d 612, 612-13 [Sup Ct, NY County, 1983] (“Plaintiffs have no natural or inherent right to light or air and may not complain that either has been cut off by the erection of buildings on adjoining land”). Even assuming the reduction in light and air constituted direct harm, plaintiff was not the tenant-of-record at the time the harm occurred. Rather, Oppenheimer agreed to less light and air in exchange for a benefit in the reduction of his rent. Plaintiff exercised his right to succession with full knowledge that light and air had been decreased almost two decades ago. Lieberman has not suffered any harm from the agreements. Accordingly, he has no standing to challenge the agreements.

Failure to State a Cause of Action & Statute of Limitations

Even assuming plaintiff has standing, the complaint should be dismissed. The complaint seeks: (1) a judgment declaring that (a) as a matter of public policy, the 1997 Agreement and the Easement Agreement are void ab initio, (b) plaintiff’s obligation to pay rent or use and occupancy is completely abated from January 2, 2013, and continuing until such time as adequate light and air are restored to the apartment; (2) an order directing the entry of an order in

the Office of the City Register vacating the easement in its entirety; (3) a mandatory injunction directing Landlord and Ventura to restore sufficient light and air to the apartment so that it will contain the six lawful living rooms that it contained on September 16, 1957, when Oppenheimer first leased it; and (4) attorneys' fees, pursuant to article 17 of the lease and Real Property Law § 234.

The linchpin to Lieberman's claims is his attack of the 1997 Agreement as violating the statutory scheme governing his rent-controlled apartment. He also seeks to void the Easement Agreement that allowed defendant Ventura's predecessor-in-interest to cantilever a portion of its new building over the building in issue.

Plaintiff's complaint states, "[t]he 1997 Agreement waives the statutory protection of DHCR approval for a decrease and/or modification in services and/or living space. The 1997 Agreement is void pursuant to 9 NYCRR § 2200.15. The 1997 Agreement is therefore void *ab initio* as a matter of public policy." (Comp. ¶¶45-48). The Rent Law and regulation that plaintiff alleges defendant violated provides that "[a]n agreement by the tenant to waive the benefit of any provision of the Rent Law or these regulations is void." (9 NYCRR 2200.15). In his opposition papers, plaintiff further states that the Landlord violated the Rent Laws, that "the landlord shall maintain the same dwelling space . . . unless and until he has filed an application to decrease the dwelling space." (9 NYCRR 2202.21).

However, contrary to plaintiff's position, the Rent Law, and regulations have not been violated as plaintiff's grandfather was not subject to a decrease in dwelling *space*. The Easement Agreement provides that "certain rooms in [plaintiff's] apartment[] in the Building . . . are to be non-living quarters." (Easement Agreement ¶8). However, there has been no diminution of

dwelling space, for the apartment still contains the same square footage (see DWELLING-HOUSE, Black's Law Dictionary (9th ed. 2009)) (defining dwelling house as the “house or other structure in which a person lives; a residence or abode”). Pursuant to the 1997 Agreement and the execution of the Easement Agreement, the apartment’s access to light and air altered the use of some rooms in the apartment. Accordingly, the Rent Laws and regulations cited by plaintiff are inapplicable.

Lieberman’s contention that DHCR approval is necessary to decrease services under this circumstance is without merit. The regulation on adjustment of legal regulated rent states that an “owner *may* file an application to decrease required services for a reduction of the legal regulated rent on forms prescribed by the DHCR on the grounds that: (1) the owner and tenant, by mutual voluntary written agreement, consent to a decrease in dwelling space, or a decrease in the services, furniture, furnishings or equipment provided in the housing accommodation.” (9 NYCRR 2522.4) (emphasis added). Here, Oppenheimer and MEPT, defendant Ventura’s predecessor-in-interest, agreed by a mutual voluntary private written agreement to the reduction of light and air, thus making approval from the DHCR optional. Nor for that matter is there any support for Lieberman’s position that New York Rent Stabilization Code §2522.4 regulates a private easement agreement between owners of adjoining property.

The private agreement takes the written agreements out of the ambit of the regulations cited by plaintiff. Since DHCR approval was not mandatory for executing the 1997 Agreement, the Rent Laws and regulations have not been violated. Accordingly, the 1997 Agreement is valid and not void ab initio (see Matinzi v. Joy, 60 NY2d 835, 837 [1983] (holding that a private agreement between a tenant and landlord is valid and enforceable where there is no showing of fraud, collusion, mistake or accident); Merwest Realty Corp. v. Prager, 264 AD2d 313, 314 [1st

Dept 1999] (finding that rent and rehabilitation law was not violated and thus “[i]t is well settled that, unless public policy is affronted, the courts favor and encourage parties to civil disputes to fashion stipulations resolving such disputes, and that they may stipulate away statutory or even constitutional rights”).

It bears emphasizing that Oppenheimer entered the agreement voluntarily with the advice of counsel, consenting to changed use of his apartment in exchange for valuable consideration. In view of the Court’s finding that the 1997 Agreement does not violate public policy and is valid, and not void it follows that the Easement Agreement that incorporates the 1997 Agreement is not void against public policy.

Accordingly, the complaint fails to state a cause of action, and, likewise, plaintiff’s claims are barred by the statute of limitations, which expired in 2004 (see Oxford Towers Co., LLC v. Wagner, 58 AD3d 422, 422 [1st Dept 2009]) (finding agreement was not void ab initio and thus barred by the statute of limitations).

This court finds that this action is not frivolous within the meaning of 22 NYCRR § 130-1.1 *et seq.*, Thus, we decline to impose sanctions and/or attorney fees.

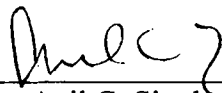
Accordingly, it is hereby

ORDERED that, in motion sequence 001, defendant Ventura in Manhattan, Inc.’s motion to dismiss the complaint is granted; and it is further

ORDERED that, in motion sequence 002, defendant 244 East 86th Street, LLC’s motion to dismiss the complaint is granted; and it further

ORDERED that the Clerk is directed to enter judgment in favor of defendants dismissing the action in its entirety, together with costs and disbursements to defendants, as taxed by the Clerk upon presentation of a bill of costs.

Date: October 30, 2014
New York, New York


Anil C. Singh

**HON. ANIL C. SINGH
SUPREME COURT JUSTICE**