

Little Cherry, LLC v Cherry St. Owner LLC
2018 NY Slip Op 32488(U)
October 1, 2018
Supreme Court, New York County
Docket Number: 654136/2016
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

-----X
LITTLE CHERRY, LLC,

Plaintiff,

Index No. 654136/2016
Mot. Seq. Nos. 002 & 003

-against-

CHERRY STREET OWNER LLC and
JDS DEVELOPMENT LLC,

Defendants.
-----X

Masley, J.:

In motion sequence number 002, defendants Cherry Street Owner LLC and JDS Development LLC (collectively, the Developers) move to dismiss the amended complaint under CPLR 3211 (a) (1) and (a) (7). In motion sequence number 003, proposed plaintiff-intervenor New York Community Bank (the Bank) moves, pursuant to CPLR 1012 (a) and 1013, to intervene in this action and serve its proposed complaint in intervention.

Background

The following allegations are taken from the amended complaint, except as otherwise noted.

The Parties

Plaintiff Little Cherry, LLC (Little Cherry) is the tenant of a commercial real estate property located at 235-247 Cherry Street, New York, Block 248, Lot 76 (the Premises). The Premises is owned by nonparty Two Bridgeset Housing Development Fund Company, Inc. (HDFC)¹ (amended complaint ¶¶ 1; 13; 27-29). Defendant JDS Development LLC (JDS) is a commercial developer who contracted with HDFC to the

¹ HDFC is a joint venture between nonparties Settlement Housing Fund, Inc. and Two Bridges Neighborhood Council, Inc., non-profit organizations involved in creating affordable housing on Manhattan's Lower East Side.

purchase the Premises and its development rights. Defendant Cherry Street Owner LLC (CSO) is a single purpose entity created by JDS solely for the purpose of the sales transaction with the HDFC (complaint ¶¶79).² The Bank is the holder of a leasehold mortgage encumbering the lease described below, with Little Cherry as borrower and mortgagor.

The Lease

On October 30, 1995, former owner of the Premises and nonparty Two Bridgeset Associates, L.P. (Two Bridgeset Associates), as landlord, and nonparty Sherilu Construction, Inc. (Sherilu), as tenant, executed a lease with an October 2044 expiration date (amended complaint ¶¶33) (Lease). At the Lease's inception, there was no structure on the Premises; it was vacant land.

Prior to executing the Lease, Two Bridgeset had been designated by the City of New York (the City) as the Sponsor to develop a portion of the "Two Bridges Urban Renewal Area", designated as "the Site" in the Lease (Lease, ¶ A). Two Bridgeset contracted with Sherilu to begin its development plans (Lease, ¶ C). As part of Two Bridgeset's proposal to the City, the "Site" would comprise of "approximately 200 apartment units and related improvements (the 'Residential Building'), including certain commercial improvements to be erected on the site, including retail store space of approximately 11,700 square feet to be erected in a separate building (the 'Store Building') on that portion of the Site delineated on [] Exhibit A [to Lease] as the Store Site (the 'Store Site')" (*id.*, paragraph B). The Lease states that the Store Site and the Store Building will collectively be referred to as the "Leased Space" (*id.*).

² On March 31, 2017, the parties stipulated to remove defendant Michael Stern from the action (NYSCEF Doc. No. 56).

Pursuant to Paragraph 1 of the Lease, Two Bridgeset leased Sherilu the "Store Site." Pursuant to Paragraph 3 of the Lease, "[Sherilu] agree[d] to use the Store Site to construct a Store Building as provided in Article 8 hereof, and thereafter to sublease portions of the Store Building" in accordance with the "Subleasing Protocol" attached as Exhibit B to the Lease.

On April 1, 1996, Sherilu assigned the Lease to Rosefein Associates LLC, which, in turn, assigned the Lease to Little Cherry on June 29, 2006 (amended complaint ¶ 33).³

2008 Merger of Lots 76 and 15

On December 12, 2008, Two Bridgeset, donated the Premises to HDFC pursuant to a Contribution Agreement and HDFC became successor-in-interest to Two Bridgeset as landlord under the Lease. HDFC also became the record owner of the easement and excess development rights appurtenant to the real property adjoining the Premises, located at 82 Rutgers Slip, New York, New York (Block 248, Lot 15) (Adjoining Premises) (amended complaint ¶46).

On that same day, Two Bridgeset and HDFC merged the Premises and the Adjoining Premises, Lot 76 and Lot 15, respectively, into a single "zoning lot," as defined by Section 12-10 of the New York Zoning Resolution (Zoning Resolution), by executing a Declaration of Zoning Lot Restrictions (Declaration) and a Zoning Lot and Development Agreement (amended complaint, exhibit D). Little Cherry alleges that the purpose of this merger was "to add available space in contemplation of potential development by Little Cherry, as the ground-lessee, and later, as contract vendee for

³ The Lease was recorded against the Premises on October 17, 1996 in the Office of the City Register at Reel 3282, pg. 1352.

the acquisition of the Premises" (amended complaint ¶ 49).

As part of the process for the zoning lot merger, First American Title Insurance Company of New York, through Metropolitan Abstract Corporation (Title Company), identified, and recorded, the parties-in-interest, as defined by the Zoning Resolution, for the Premises and Adjoining Premises through a "Certification" (amended complaint ¶ 54). The Certification identifies the parties-in-interest as (1) Two Bridgeset, as the fee owner; (2) HDFC, as the proposed purchaser; (3) mortgagees granted by the fee owner; (4) the Bank, as mortgagee of Little Cherry's leasehold estate; and (5) Little Cherry, as "Leasehold Estate Owner, Lot 76" (amended complaint ¶ 55).

To effectuate the merger, Little Cherry gave its written consent, executing and recording a "Waiver of Declaration of Zoning Lot Restrictions" (amended complaint ¶ 56). Little Cherry alleges that it "did not consent, in advance, to any further enlargement of the zoning lot, including any transfer of development rights to or from another tax lot" (amended complaint ¶ 58).

Little Cherry Tries to Purchase the Premises

On June 1, 2012, Little Cherry and HDFC entered into a contract, whereby Little Cherry agreed to purchase the Premises for \$4,000,000 (Sales Contract). Little Cherry allegedly intended to construct a building on the Premises comprised of residential units and "retail and commercial space, either above the existing building that was then-subleased to Pathmark or, depending on certain events, directly on the Premises after the demolition of the existing building, using the available zoning obtained via the Zoning Lot and Development Agreement" (amended complaint ¶ 64). The Sales Contract contained certain requirements, including obtaining consents "from all

necessary property owners within the existing 'Two Bridges Large Scale Development Plan'; and obtaining certain approval from [the New York City Department of Planning]" (amended complaint ¶ 65). Little Cherry alleges that the Lease would have terminated upon title of the Premises passing to it (amended complaint ¶ 66).

In early 2014, the defendant Developers intervened in the sale to Little Cherry and offered HDFC a purchase price higher than agreed to by Little Cherry (amended complaint ¶ 69). Little Cherry alleges that, initially, the Developers only sought to acquire the Premises and the associated development rights, including those from the Adjoining Premises; however, "[the Developers] recognized that they would need to, in [their] own words, 'buy out the leases'" to develop the Premises as (amended complaint ¶ 71).

On December 2, 2014, HDFC notified Little Cherry that it was terminating the Sales Contract, claiming that Little Cherry had failed to obtain the required approvals by the contractual deadline (amended complaint ¶ 74). On December 12, 2014, Little Cherry simultaneously filed a notice of pendency and complaint against HDFC for terminating the Sales Contract in bad faith (amended complaint ¶ 75; *see also Little Cherry, LLC v Two Bridgeset Housing*, Index No. 653817/2014). On March 17, 2016, Justice Oing granted HDFC's motion for summary judgment to the extent that he dismissed the first, second, fourth and sixth causes of action. Justice Oing held that the claims for a declaratory judgment (first and second causes of action) were duplicative of the breach of contract claim, that the claim for an injunction and specific performance of the Sales Contract could not be sustained as there were conditions precedent to the closing that had to be met (fourth cause of action), and the claim for tortious

interference could not be sustained because Little Cherry plead that HDFC is an alter ego of Settlement Housing Fund and Two Bridges Neighborhood Council and an alter ego of party cannot tortuously interfere with that party (sixth cause of action) (see *id.*, mot. seq. no. 003). This decision was appealed, and on January 31, 2017, the Appellate Division, First Department, dismissed the complaint in its entirety and canceled the notice of pendency (*Little Cherry, LLC v Two Bridgeset Hous. Dev. Fund Co.*, 146 AD3d 714 [1st Dept 2017]; see also amended complaint ¶ 77). The First Department found that Sales Contract clearly provided that the Contract would terminate if Little Cherry failed to obtain approval from the New York City Department of City Planning within a specified time and that this requirement was not met (*id.*).

The Development Plan

On January 27, 2016, HDFC and the Developers entered into a sales agreement for purchase and development of the Premises (Developers Sale Contract) (amended complaint ¶ 79). The Developers sought to acquire the Premises to develop a multi-story building on the adjoining lot, Lot 70⁴. As part of the Developers Sale Contract, HDFC agreed to transfer their excess development rights from the Premises, i.e., the air rights to develop above the one-story building on the Premises, to Lot 70. On March 9, 2016, HDFC and the Developers submitted a Pre-Application Statement, "a precursor to the filing of an application for a discretionary action that is required for development", to New York City's Department of Planning (amended complaint ¶ 81).

The Pre-Application Statement confirmed the Developers' plan to develop "a structure cantilevering directly over – i.e., sitting right on top of the roof of – Little

⁴ Lot 70 is owned by nonparty Two Bridge Senior Apartments, L.P., an affiliate of HDFC.

Cherry's present building on the Premises" (amended complaint ¶ 17). To accomplish their proposed plan, the Developers need to expand the existing zoning, which consists of the merged Lot 76 and Lot 15, to include the adjacent Lot 70 (amended complaint ¶ 18). Little Cherry alleges that the Developers' proposed plan encompasses three tax lots: Lot 76, the Premises; Lot 15, the Adjoining Premises; and Lot 70, a third parcel not included in the 2008 zoning lot merger (amended complaint ¶ 82). Thus, Lot 70 must be combined with the previously-created zoning lot (Lots 76 and 15), which requires consent from all parties-in-interest. (amended complaint ¶ 18). Little Cherry alleges that the Developers misled the Department of Planning in the Pre-Application Statement about possessing "authority to utilize the excess development rights attendant to the Premises and to enlarge the zoning lot to include Lot 70," without referencing or acknowledging Little Cherry's status as a party-in-interest (amended complaint ¶ 85). Little Cherry further alleges that the Lease and the Zoning Lot and Development Agreement confirm Little Cherry's status as holders of the development rights associated with the Premises.

On August 5, 2016, Little Cherry filed this action against the Developers. On March 17, 2017, Little Cherry filed its amended complaint seeking (1) a declaration that the Developers cannot proceed with the development without Little Cherry's consent as a party-in-interest in its capacity as ground lessee under the Lease; and (2) injunctive relief enjoining the Developers from: (i) pursuing their development without Little Cherry's consent; (ii) proceeding with construction in any manner without Little Cherry's consent; (iii) impairing Little Cherry's right to use and occupy the Premises; and (iv)

impairing Little Cherry's entitlement to quiet enjoyment of the Premises. The Developers now move to dismiss the amended complaint its entirety.

Discussion

Developers' Motion to Dismiss

Declaratory Judgment Claim

"Declaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy. The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations" (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 [1st Dept 2009] [internal quotation marks and citations omitted].) "Professor Siegel has remarked that the declaratory judgment action has been employed as a way to resolve a relatively unique dispute where the plaintiff is unable to find among the traditional kinds of action one that will enable her to bring it to court" (*id.* at 100 [internal quotation marks and citation omitted]).

On a motion to dismiss a declaratory judgment claim for failure to state a cause of action, "the only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to him" (*Fillman v Axel*, 63 AD2d 876, 876 [1st Dept 1978] [internal quotation marks and citation omitted]). The Appellate Division, First Department, looks to whether "the declaration will have the immediate and practical effect of influencing [defendants'] conduct" (*M&A Oasis, Inc. v MTM Assocs., L.P.*, 307 AD2d 872, 872 [1st Dept 2003] [internal quotation marks and citation omitted]).

Little Cherry seeks a judgment establishing that it is a party-in-interest in its capacity as ground lessee under the Lease, and that as a party-in-interest, the Developers must obtain Little Cherry's consent in order to proceed with the planned development. This declaration, if awarded, would certainly have an immediate and practical effect of influencing the Developers' actions in planning and executing its development plans. This case also presents a unique dispute that does not fit the mold for a traditional kind of action and a declaratory judgment is an appropriate way to resolve the dispute amongst the parties. Although these reasons alone warrant a denial of the Developers' motion to dismiss, the Developers argue that this claim fails as a matter of law and there are no issues of fact.

"A court may reach the merits of a properly pleaded cause of action for a declaratory judgment upon a motion to dismiss for failure to state a cause of action where no questions of fact are presented [by the controversy]." Under such circumstances, the motion to dismiss the cause of action for failure to state a cause of action should be taken as a motion for a declaration in the defendant's favor and treated accordingly" (*Minovici v Belkin BV*, 109 AD3d 520, 524 [2d Dept 2013] [internal quotation marks and citations omitted]). However, this is not the case here.

Little Cherry argues that, as a party-in-interest, its consent must be obtained before HDFC transfers the Premises' air and development rights in the Sale to the Developers. Little Cherry insists that it is a party-in-interest because it possesses a ground lease and it was certified as a party-in-interest by the Title Company for the 2008 Zoning Lot Merger. The Developers contend that the absence of such an explicit

declaration in the Lease confirms that the Lease, which provides for, in their words, a

"lease of space," cannot be a lease of land. They argue that Little Cherry cannot rely on the Zoning Resolution to block their development plans because Little Cherry possesses no veto rights under the Lease, and in any event, Little Cherry waived its consent rights pursuant to the 2008 Zoning Lot Waiver.

HDFC plans to transfer its alleged development rights from Lot 76 to Lot 70 in connection with the sale to the Developers. Section 12-10 of the Zoning Resolution governs the transfer of development rights.

"New York City Zoning Resolution Section 12-10 restricts the buildable floor space of a structure and expresses this limitation in floor area ratios. Through a zoning lot merger and a transfer of airspace from one zoning lot to another, the floor area ratios of multiple zoning lots may be combined to overcome this restriction. Zoning Resolution provides three basic mechanisms for the transfer of development rights in New York City: by zoning lot merger, by certification or special permit, or through the Inclusionary Housing Program. A 'zoning lot merger' is created when two or more existing zoning lots are joined together. Once the lots are merged, the development rights from all merging lots are combined, and may be used anywhere within the zoning lot, subject to 'split-lot' provisions where the merged lot is comprised of lots located within different zoning districts"

*(BACM 2006-4 Office 41-60, LLC v Flushing Landmark Realty L.L.C., 2014 NY Slip Op 32184 [U], *10-11 [Sup Ct, Queens County 2014] [internal citation omitted]).* Section 12-10 (d) of the Zoning Resolution defines "zoning lot" as "a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of ten linear feet, located within a single block, which at the time of filing for a building permit (or if no building permit is required, at the time of filing for a certificate of occupancy) is declared to be a tract of land to be treated as one zoning lot for the purpose of this Resolution."

Section 12-10 (d) further states that,

"such declaration shall be made in one written Declaration of Restrictions

covering all of such tract of land or in separate written Declarations of Restrictions covering parts of such tract of land and which in the aggregate cover the entire tract of land comprising the zoning lot" and that "each Declaration shall be executed by each party in interest (as defined herein) in the portion of such tract of land covered by such Declaration (excepting any such party as shall have waived its right to execute such Declaration in a written instrument executed by such party in recordable form and recorded at or prior to the recording of the Declaration)"

Thus, to accomplish a zoning lot merger, the Zoning Resolution requires the written consent of all "parties-in-interest" (*Macmillan, Inc. v. CF Lex Associates*, 56 NY2d 386, 390 [1982]).

Section 12-10 (f) (4) of the Zoning Resolution defines a party-in-interest as a party possessing an interest

"in the portion of the tract of land covered by a Declaration ... [which] include[s] only: (W) the fee owner or owners thereof; (X) the holder of any enforceable recorded interest in all or part thereof which would be superior to the Declaration and which could result in such holder obtaining possession of any portion of such tract of land; (Y) the holder of any enforceable recorded interest in all or part thereof which would be adversely affected by the Declaration; and (Z) the holder of any unrecorded interest in all or part thereof which would be superior to and adversely affected by the Declaration and which would be disclosed by a physical inspection of the portion of the tract of land covered by the Declaration"

(*id.* at 391 [internal citations omitted]).

As the Court of Appeals held in *Macmillan*, "tract of land" for the purposes of the Zoning Resolution, refers "only to the underlying surface land and does not embrace buildings on that land" (*id.*). As "tract of land" is not defined in the Zoning Resolution, the Court of Appeals based their conclusion on three considerations. The first is Webster Dictionary's definition of "tract", which is "a region or stretch (as of land) that is usu. indefinitely described or without precise boundaries", or "a precisely defined or definable area of land" and "land", which is "the solid part of the surface of the earth in contrast to the water of oceans and seas" (*id.* at 391-392). The second is that the

Zoning Resolution's drafters chose not to use "land and improvements", and finally, "[t]he words 'tract' and 'lot' are used to refer to equivalent concepts and it would be a strained interpretation to include buildings and structures" (*id.* at 392). The Court further stated that air rights "have historically been conceived as one of the bundle of rights associated with ownership of the land rather than ownership of the structures erected on the land" (*id.* at 392). Thus, the *MacMillan* court rejected the assertion that a "party-in-interest" can be predicated on a party's interest in solely the buildings or improvements (*id.*).

Here, the Lease explicitly states that Two Bridgeset leases Sherilu the "Store Site" and that "[Sherilu] agrees to use the Store Site to construct a Store Building as provided in Article 8 hereof, and thereafter to sublease portions of the Store Building" (Lease ¶¶ 1 and 3). The Lease further refers to the Store Site and the Store Building collectively as the "Leased Space." The question is does the Leased Space include the land.

Little Cherry argues that the Lease defines the Store Site as a specific area of land where the Store Building was to be erected as identified on Exhibit A to the Lease. Thus, Little Cherry argues that Lease Space not only includes the Store Building, but also, the portion of the land where the Store Building was eventually developed. It also argues that ground leases, like the one at issue, are drafted in contemplation of "a long-term, investment and/or development interest in the land akin to outright ownership" (Complaint ¶91). In their view, consent rights comfort commercial tenants that their long-term investments will not be affected by the changing landscape surrounding their development. This court agrees.

"In the most generic terms, a 'ground lease' is any lease made for the rental of unimproved land" (7 Warren's Weed New York Real Property § 84.12). Specifically, it is defined as "[a] long-term (usu. 99-year) lease of land only. Such a lease typically involves commercial property, and any improvements built by the lessee usu. revert to the lessor" (Black's Law Dictionary [10th ed 2014]). Here, the Lease clearly provides that the rental was for unimproved land. The 49-year Lease explicitly states that the tenant leases the Store Site, which, at the time of the execution of the Lease, was a significant portion of vacant land on the Premises (see Lease, exhibit A). Under the Lease, the tenant not only leases the Store Building, the structure eventually built on the Store Site, but also, the Store Site, the underlying surface land. The Lease does not just afford the tenant with the mere right of occupancy of a structure on the land; it affords the right to lease and develop on the designated portion of land known as the Store Site. Thus, the Lease grants Little Cherry an interest in the land.

As a ground lease, this matter falls outside the parameters of *Macmillan*, which held that a tenant of a space lease, i.e., a lease of only building space, was not a party-in-interest under the Zoning Resolution (*Macmillan, Inc.*, 56 NY2d at 392). In *Macmillan*, it was undisputed that the tenant leased only the second to thirty-first floors of the building itself. While the *Macmillan* Court did not specifically hold that a ground lease lessee is a party-in-interest, such can be reasoned based on the Court's detailed explanation of its holding. Specifically, the *Macmillan* Court, in support of its holding, acknowledged that "[t]o require the consent of every space tenant with a recorded interest in the building, and thus to bestow on each such tenant a power of veto, would be so to encumber the procedure for zoning lot merger as to make it of questionable

practical utility" (*id.*). This is not the case when there is a tenant with a lease on unimproved land, where the tenant's obligations and rights are more akin to those of the fee owner. Therefore, under the *Macmillan* Court's reasoning, the development and air rights that are associated with ownership of the land, should extend to a ground lease tenant as the lessee of the land should have a veto power on zoning matters effecting its obligations and rights as ground lease tenant.

The court also notes that the Certification filed in connection with the 2008 Zoning Lot Merger identifies Little Cherry as a party-in-interest. This designation was never objected to.

The Developers also argue that Little Cherry cannot satisfy the second prong of the party-in-interest analysis because Little Cherry's leasehold interest will not be adversely affected by HDFC's transfer of its development rights in the Premises to Lot 70. The Developers assert that Little Cherry will have the same exact property rights as before the transfer and the transfer will have no effect on Little Cherry's right to occupy and utilize the building under the Lease. The court disagrees. The merger *per se* does affect Little Cherry's rights under the Lease, as its rights extend beyond the structure on the land. As stated above, as a ground lease tenant, Little Cherry has property rights in the land akin to the fee owner and any merger would impact with those rights. Any infringement on those rights can be considered adverse.

The Developers further assert that Little Cherry's 2008 written Waiver of Declaration of Zoning Lot Restrictions waived any objection to future zoning lot mergers and expansions. In the 2008 Waiver, Little Cherry acknowledged that Lots 15 and 76 are declared as one zoning lot for the purposes of the Declaration and "waived its rights

to execute a Declaration of Zoning Lot Restrictions with respect to said Combined Zoning Lot", which Combined Zoning is defined as "the Lot 76 Property and the penises known as Tax Lot 15 in Block 248 on the Tax Map of the City of New York, County of New York have been merged into a single zoning lot." Thus, it is clear that the Waiver applies to the 2008 merger of Lots 15 and 76. However, what is not clear, at this stage, is whether the Waiver, which acknowledges the Zoning Lot and Development Agreement, waived any objections to future mergers or expansions of Lot 76.

The Developers motion to dismiss Little Cherry's claim for a declaratory judgment is denied.

Injunction

In its second cause of action, Little Cherry seeks to enjoin the Developers from: (i) pursuing their development without Little Cherry's consent; (ii) proceeding with construction in any manner without Little Cherry's consent; (iii) impairing Little Cherry's right to use and occupy the Premises; and (iv) impairing Little Cherry's entitlement to quiet enjoyment of the Premises.

The Developers contend that Little Cherry's claim should be dismissed because the Developers are not Little Cherry's landlord, and thus, are not in privity with Little Cherry. Essentially, the Developers argue that Little Cherry's claim is premature as the Developers have not closed on their purchase of the Premises to establish privity between the parties. In opposition, Little Cherry states that its second cause of action "is a corollary claim requesting injunctive relief to curb Defendants' conduct in direct disregard of Plaintiffs rights as a party-in-interest in its capacity as ground lessee. Given

Defendants' continuing efforts in disregard of Plaintiffs rights, this request for additional protection is warranted" (pl. opp. br. at 10).

This claim is dismissed to the extent that it seeks to enjoin the Developers from impairing Little Cherry's entitlement to quiet enjoyment of the Premises. Little Cherry presents no legal basis as to why the Developers owe Little Cherry a duty of quiet enjoyment.

Bank's Motion to Intervene

The Bank's motion to intervene is granted.

CPLR 1012 (a) states, in relevant part,

"(a) Intervention as of right. Upon timely motion, any person shall be permitted to intervene in any action:

2. when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment; or

3. when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment"

"In examining the timeliness of the motion, courts do not engage in mere mechanical measurements of time, but consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party" (*Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010] [citation omitted]). Although the Developers argue that the Bank waited over a year, the Bank's intervention would cause no delay in the resolution of this action as the Developers have yet to answer due to this pending motion and discovery is far from complete. Further, the court sees no prejudice to the Developers if the Bank is permitted to intervene. Finally, the Bank, as the holder of a leasehold mortgage encumbering the Lease, may be affected adversely if this court ultimately determines that Little Cherry

waived its right to object to future zoning lot mergers and its consent is not required for the Developers to proceed with their development plans.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted only to the extent that plaintiff's claim to enjoin defendants from impairing plaintiff's entitlement to quiet enjoyment of the Premises is dismissed; and it is further

ORDERED that New York Community Bank's motion to intervene is granted, and New York Community Bank is permitted to intervene in the above-entitled action as a plaintiff-intervenor; and it is further

ORDERED that the Bank's complaint in the proposed form annexed to the Bank's moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendants are directed to serve an answer to the complaint and complaint in intervention within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the attorney for the intervenor shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and upon the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein; and it is further

NYSCEF DOC. NO. 123

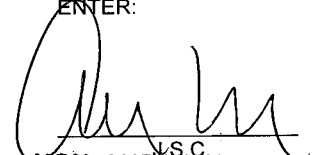
RECEIVED NYSCEF: 10/02/2018
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ORDERED that counsel are directed to appear for a preliminary conference in
Room 242, 60 Centre Street, on October 17, 2018 at 11:30 AM.

Dated: 10/1/18

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ENTER:



L.S.C.
HON. ANDREA MASLEY