

**Tarar v Island House Tenants Corp.**

2019 NY Slip Op 30776(U)

March 25, 2019

Supreme Court, New York County

Docket Number: 153965/2017

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, IAS PART 29

-----X  
RAMONA TARAR and NADEEM MAKEN  
Individually and on behalf of ISLAND HOUSE TENANTS  
CORP.,

Index No. 153965/2017

Plaintiffs,

-against-

ISLAND HOUSE TENANTS CORP., GRAHAM CANON,  
AMRAH CORDOSO and JOHN DOE and JANE DOE,

Defendants.

-----X  
**Robert D. Kalish, J.S.C.:**

In this action seeking damages for, among other things, an illegal eviction from a cooperative apartment, defendants move for summary judgment dismissing the complaint, and plaintiffs cross move for summary judgment on their third, fourth, and fifth causes of action. As is fully discussed herein, defendants' motion is granted, plaintiffs' motion is denied, and the complaint is dismissed.

**Factual and Procedural Background**

Plaintiffs commenced this action on April 28, 2017, asserting six causes of action: (1) nuisance; (2) housing discrimination; (3) illegal eviction; (4) a judgment declaring what constitutes primary residence; (5) a judgment declaring what constitutes a sub-tenant; and (6) breach of fiduciary duty.<sup>1</sup> As is relevant here, as to the third cause of action, the complaint alleges that defendants rendered plaintiffs' building key fobs inoperable and plugged the keyhole of their

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<sup>1</sup> Plaintiffs have withdrawn their first, second, and sixth causes of action for nuisance, housing discrimination, and breach of fiduciary duty, respectively. (Tr at 4-5.)

apartment door.

Plaintiffs Ramona Tarar (Tarar) and Nadeem Maken (Maken), a married couple, have lived at 575 Main Street, Apt. 507, New York, New York 10044 since 2007. The subject property is a housing complex commonly known as Island House<sup>2</sup>, which was part of a former Mitchell-Lama rental property. In 2012, the Division of Housing and Community Renewal (DHCR) authorized Island House to withdraw from the Mitchell-Lama program and convert the residential apartments to a cooperative corporation, defendant Island House Tenants Corp. (the Co-op). Under this arrangement, plaintiffs were able to purchase their apartment at prices below market.

When plaintiffs sought to purchase their unit, the sponsors, HP Preservation Partners, LLC, did not believe that Tarar qualified as a Mitchell-Lama tenant because she did not reside at the premises as her primary residence, and, therefore, did not have the right to purchase the apartment. Acting on this belief, HP Preservation, LLC petitioned the DHCR for a determination that the subject unit was not Tarar's primary residence. On May 2, 2016, after a hearing, the DHCR issued a finding that Tarar was entitled to purchase the unit despite the fact that she had temporarily moved to Plattsburgh, New York (see Ehrlich affirmation, exhibit M).

Plaintiffs purchased their apartment on August 24, 2016. At the time of purchase or soon thereafter, plaintiffs were issued two key fobs which allowed them to enter their building, 575 Main Street, from both an unattended entrance and the main entrance to the Co-op complex, located at 555 Main Street, which is attended by a 24-hour doorman. The key fobs also granted plaintiffs access to the laundry facility. At that time, plaintiffs signed an Island House Key Fob

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<sup>2</sup> Island House is comprised of three connected buildings located on Roosevelt Island at 551-555-557 Main Street, New York, New York. The main entrance of Island House is 555 Main Street.

Application (key fob agreement) in which they agreed that the key fobs would not be shared or loaned to any other person and that doing so could result in the deactivation of the key fob.

According to the Co-op, between August and October 2016, the Co-op received multiple complaints regarding plaintiffs' use of their unit. Specifically, it is alleged that, while they were not home, plaintiffs regularly had non-registered guests residing in their apartment to whom they had given their key fobs (see Ehrlich affirmation, exhibit N). The Co-op and its general counsel sent plaintiffs correspondence on October 21, 2016, November 18, 2016, and March 3, 2017, putting them on notice that these actions were a violation of the Co-op rules and that their key fobs would be deactivated. Plaintiffs were also informed that their improper guests caused substantial amounts of smoke to emanate from their apartment by, among other things, opening the door to the apartment while smoking in the apartment, causing smoke to enter the common hallways (*id.*).

According to the Co-op, in April 2017, plaintiffs' key fobs were deactivated. Although plaintiffs were no longer able to gain entry through the unattended entrance at 575 Main Street, they were able to access their apartment from the main entrance to the Co-op at 555 Main Street with a 24-hour doorman.

On July 18, 2017, plaintiffs moved by order to show cause for an order directing defendants to re-activate the key fobs. On July 20, 2017, after oral argument, the court ordered that defendants re-activate the key fob for the main entrance. The court also ordered that plaintiffs were not to permit any unauthorized people to use their key fobs.

On February 2, 2018, Tarar testified at an EBT that, in 2016 and 2017, her children went to elementary school in Plattsburgh, New York, but she did not recall where they went to school before then (Ehrlich affirmation, exhibit C, at 38). When questioned, Tarar did not recall that her

2013 and 2016 tax returns indicated that her county of residence was Clinton County, New York (*id.* at 58). Tarar did recall that her husband owned and operated a motel in Plattsburgh and that in 2014 she owned and operated a taxi business in Clinton County (*id.* at 83, 89, 93). Tarar could not recall who has run the taxi company since 2014. Tarar also testified that, as to her allegation that defendants plugged the lock of her apartment door with glue, she did not know exactly who did it and had no proof it happened (*id.* at 126–128). Tarar testified that she did not recall if her Uncle Rakish Malik ever lived in the subject apartment in 2014, 2015, 2016, or 2017 (*id.* at 96-97).

Tarar stated that, from some period shortly after purchasing the property and for some months thereafter, she was not able to use her key fob to gain entry to the building or the laundry room. Tarar further stated that she could enter the building through the main entrance where the doorman would buzz her in (*id.* at 131-17). She testified that, at times, she had to wait 10–15 minutes for the doorman to buzz her in, but she did not recall any specific date this happened (*id.*). With respect to the individually named defendant board members Canon and Cordoso, Tarar was not aware of any specific actions taken by them other than that they were on the Co-op board (*id.* at 142, 144). Tarar testified that the laundry room access was restored after some months, but could not recall exact dates.

On February 15, 2018, Maken testified at an EBT that he visited Plattsburgh a couple of times but never stayed there long and that he only went there to visit his children (see Ehrlich affirmation, exhibit D at 19-20). Maken did not recall how long his children had been living in Plattsburgh or whether the children lived there from 2011-2017 (*id.* at 25-27). Maken testified that he was not familiar with the Plattsburgh address, which is listed as his home on his children's school records and as his property based upon public records (*id.* at 42). Maken also testified that

the lock on the door to his apartment at the Co-op had been glued, but he did not know who did it, and did not have proof (*id.* at 144-146). As to the time after his key fob was deactivated, Maken testified that he entered the building through the doorman entrance but sometimes had to wait for the doorman to buzz him in (*id.* at 153-156). Maken further testified that the laundry door, bike room, and storage room access had been restricted for some period of time but did not remember the exact dates. As to his claims against the individually named defendants, Maken testified that he did not know why they were named but that maybe his wife knew (*id.* at 169).

At his deposition, board member James Starace testified that he had to call the Co-op's public safety office regarding a strange man entering and exiting plaintiffs' apartment (see Ehrlich affirmation, exhibit G at 30-32). When he questioned this man, the man told him that he lived in plaintiffs' apartment (*id.*).

Plaintiffs' lease states, in § 4.6, "Use of Storage Areas," that "[i]f the [Co-op] shall furnish to the Tenant-Shareholder any storage area, service, or facility, the use of the laundry, or any facility outside the Apartment . . . , the same shall be furnished by the [Co-op] under a revocable license."

Defendants now move for summary judgment dismissing the complaint. Defendants argue that plaintiffs have made no allegations with respect to the individually named defendants, and therefore, any claims asserted against them must be dismissed. Further, defendants argue that, with respect to plaintiffs' third cause of action, their illegal eviction claim, plaintiffs were never evicted because they always had access to the building and their apartment through the doorman entrance. Therefore, this claim must be dismissed. Further, any claim regarding glue in the apartment door's lock must be dismissed since plaintiffs admit they do not know who did it.

With respect to plaintiffs' fourth cause of action seeking a declaration that the apartment is plaintiffs' primary residence, defendants argue that there is no justiciable controversy. Defendants argue that, pursuant to the proprietary lease, there is no requirement that the apartment be plaintiffs' primary residence. Further, while primary residence was relevant when plaintiffs purchased their apartment from the sponsor under the Co-op conversion plan, it is not important to the use of either the apartment or the key fobs.

As to plaintiffs' fifth cause of action seeking a declaration regarding what constitutes a sub-tenant, defendants argue there is no justiciable issue since the proprietary lease states that shareholders cannot sublease their apartments without the consent of the Co-op. Moreover, there is no allegation in the complaint that defendants are accusing plaintiffs of subletting the apartment. Rather, defendants are claiming that plaintiffs improperly allowed others to occupy the apartment in their absence. Defendants note that, pursuant to § 5.1.1 of the proprietary lease, "[n]o guests, domestic employees, or family members . . . may occupy the Apartment unless the Tenant-Shareholder is concurrently residing in the Apartment, or unless consented to in writing . . ." (see Ehrlich affirmation, exhibit J).

Plaintiffs cross move for summary judgment on their complaint. In support of their cross motion, plaintiffs argue that, prior to purchasing their apartment, defendants took every step possible to deny them the right to purchase the apartment. Even after the DHCR action, plaintiffs claim that defendants tried to buy them out. Plaintiffs claim that defendants then deactivated their key fobs and glued the lock to their apartment. After their key fobs were deactivated, plaintiffs argue that they were precluded from accessing their home and could only gain entry with police assistance, or through the mercy of the defendants. Plaintiffs argue that they did not rent or sublet

their apartment. Plaintiffs state that, aside from family members and relatives, they rarely had guests in the apartment because defendants would always harass their guests. Plaintiffs argue that the subject apartment is their primary residence.

As to their illegal eviction claim, plaintiffs argue that the deactivation of their key fobs essentially illegally evicted them from their home and that this was improper without a court order. Plaintiffs further argue that they resided in their apartment at all times when they had visitors or guests and therefore did not violate the proprietary lease.

As to their primary residence claim, plaintiffs note that defendants do not dispute that the apartment is their primary residence; therefore, the court should issue a finding that the apartment is their primary residence.

As to their sublease claim, plaintiffs argue that defendants have not presented evidence to establish that they subleased their apartment or that the apartment was unlawfully occupied. Therefore, the court should issue a finding that mere guests and visitors to plaintiffs' primary residence do not meet the requirements to be classified as a subtenant.

Plaintiffs also argue that defendants' motion is not supported by an affidavit of a person with personal knowledge of the facts and circumstances because defendants submitted their attorney's affirmation, and, therefore, the motion should be dismissed.

In opposition to plaintiffs' cross motion, defendants argue that plaintiffs have not opposed the dismissal of the claims against the individually named defendants, and therefore those claims must be dismissed. Defendants also argue that defendant Island House Tenants Corp. was not the Co-op sponsor, so any statements or claims plaintiffs make about the litigation prior to their purchasing their apartment from the sponsor do not apply to Island House Tenants Corp.

Defendants further argue as to the illegal eviction claim that plaintiffs do not dispute that they had access to the Co-op through the main entrance. Therefore, according to defendants, plaintiffs never lost access to their apartment. Defendants note that, in her affidavit submitted in support of the cross motion, Tarar states that she had continuously occupied or resided at the apartment. However, that is contrary to her deposition testimony in which she acknowledged that she spends the week in Plattsburgh when her children are in school (see Ehrlich affirmation, exhibit C at 23). Further, in their memorandum of law submitted in support of their cross motion, plaintiffs state that they have had family members and friends visit them and stay for days and/or weeks (see memo of law at paragraph 66). Finally, defendants argue that plaintiffs have acknowledged that there is no dispute or justiciable issue regarding plaintiffs' primary residence or the subletting of the apartment, therefore those claims must be dismissed.

As to plaintiffs' argument that defendants' motion was not properly supported by an affirmation of a person with personal knowledge, defendants argue that their attorney's affirmation made reference to, and was supported by, the pleadings and the sworn deposition testimony of both plaintiffs, two of their relatives, and several board members.

### **Discussion**

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks omitted]), quoting *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068

[1979]). If the movant fails to establish entitlement to summary judgment as a matter of law, summary judgment must be denied, regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

At the outset, the court notes that plaintiffs do not oppose the dismissal of the claims asserted against the individually named defendants, Graham Canon and Amrah Cordoso. Accordingly, summary judgment dismissing the claims against Graham Canon and Amrah Cordoso is granted.<sup>3</sup>

### **Third Cause of Action—Illegal Eviction**

Administrative Code of the City of NY § 26–521 (a) provides that it “shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer . . .” by the use of force or by a threat to use force or by engaging or threatening to engage in conduct that would interfere with the occupant's peaceful enjoyment of the premises. Here, defendants have demonstrated that plaintiffs were neither evicted from their home nor was there an attempt to evict them by using force, threat of force, or threatening conduct. Rather, in accordance with the key fob agreement, and after plaintiffs had received several notices regarding improper use of their key fobs, the Co-op deactivated their key fobs. The deactivation of the key fobs did not prevent plaintiffs from entering the apartment. Rather, it prevented them from using the unmanned entrance to their building. Plaintiffs admit that they were able to enter the building through the main doorman entrance. Moreover, according to

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<sup>3</sup> Plaintiffs' argument that defendants' motion is not properly supported by a person with personal knowledge of the facts of the case is without merit (*see Cruz v City of New York*, 39 AD3d 398 [1<sup>st</sup> Dept [2007] [the affirmation of defendant's attorney and the arguments made therein are supported by pertinent references to the pleadings, the parties' deposition testimony and establish defendant's prima facie entitlement to summary judgment]).

plaintiffs' deposition testimony, they were always given access to the building from the main entrance but for a few occasions when they state they had to wait for the doorman to buzz them in.

Further, defendants have established that there is no evidence that the Co-op attempted to interfere with plaintiffs' access to their apartment by gluing the lock to the apartment door. Notably, according to plaintiffs' own testimony, there was a single incident in which their lock appeared to have been glued, but they did not know who did it, nor did they have any proof of who did it. Such mere speculation will not serve to sustain an illegal eviction cause of action.

As to the laundry room and, as testified to at Maken's EBT, the bike room and storage area, it is undisputed that the lease provides that plaintiffs' use of such spaces is subject to a revocable license, which is revocable at will. (*See Prospect Owners Corp. v Sandmeyer*, 62 AD3d 601, 602 [1st Dept 2009].)

Based on the foregoing, defendants have established prima facie entitlement to summary judgment dismissing the third cause of action.

In opposition, plaintiffs argue that by deactivating the key fobs defendants were intentionally denying them free access to their apartment, and therefore, plaintiffs were illegally evicted. The Court finds that the cases relied upon by plaintiffs, *Mitchell v City of New York* (154 Misc 2d 222 [Civ Ct, NY County 1992]), *Fischel v Baronelli, Ltd.*, (119 Misc 2d 625 [Civ Ct, NY County 1983]), *Precision Dynamics Corp. v Retailers Representative, Inc.*, (120 Misc 2d 180 [Civ Ct, NY County 1983]), *South Ferry Bldg. Co. v Wall St. Fund.*, (142 Misc 2d 54 [Civ Ct, NY County 1988]), do not support this argument. Rather, the *Fischel*, *Precision Dynamics*, and *South Ferry Bldg.* cases do not even involve an illegal eviction, and plaintiffs do not explain how they are relevant to the facts of this case. Moreover, while *Mitchell* is an illegal eviction case, it involves

a tenant who was illegally locked out of her apartment after the defendant forced entry into her apartment, changed the locks, and prevented her from entering her apartment thereafter (*Mitchell*, 154 Misc 2d at 222-223). Here, while plaintiffs' key fobs were purportedly deactivated due to alleged violations of the proprietary lease and the key fob agreement, plaintiffs still had reasonable access to the building under the circumstances through the main entrance and always had unimpeded access to enter their apartment once inside the building.

Plaintiffs further argue that, even if they had violated the propriety lease or the key fob agreement, defendants' only remedy was to seek judicial intervention prior to deactivating the key fobs. Pursuant to the key fob agreement, which was signed by plaintiffs, the Co-op is authorized to deactivate any key fob without a court order.

The very concept of cooperative living entails a voluntary, shared control over rules, maintenance, and the composition of the community. A shareholder-tenant voluntarily agrees to submit to the authority of a cooperative board, and, consequently, the board "may significantly restrict the bundle of rights a property owner normally enjoys" (*see 40 West 67th Street Corp. v Pullman*, 100 NY2d 147, 158 [2003], quoting *Matter of Levandusky v One Fifth Ave., Apt. Corp.*, 75 NY2d 530, 536 [1990]). The Court finds that access to a second, extra, unmanned building entrance falls squarely within that bundle of "rights" subject to restriction.

The Court finds further that, contrary to plaintiffs' contentions, deactivating the key fob did not evict plaintiffs from their apartment. Rather, the deactivation required plaintiffs to enter the building through the main entrance, where a doorman would perform the function previously covered by the key fob: determining whether the individual at the door is authorized to enter the building. Plaintiffs agreed to this possibility when signing the key fob agreement, which provided

that the privilege of key fob access to the main entrance and to a second, extra, unmanned entrance to the building was revocable.

The possession of a key fob is a privilege afforded by the Co-op. The key fob acts as a proxy for authorization to enter the building under the presumption that the holder of the key fob is such a duly authorized person. Pursuant to the key fob agreement, when that presumption has been overcome by evidence that unauthorized persons have been using the key fob, the key fob no longer serves as a valid proxy for such authorization, and it is rightfully deactivated so that the board may control access to the building for the sake of the community by means of a doorman.

It is undisputed that the main entrance was covered by a doorman 24 hours a day, seven days a week. While plaintiffs allege that they had to wait for the doorman to buzz them in at certain times because, among other things, the doorman would be busy with another activity, such as handling packages, the Court finds that the delays to plaintiffs are a necessary consequence of a controlled building access policy. The Co-op has an interest in ensuring that only authorized persons enter the building. Where the privilege of a key fob has been revoked due to the board's belief that tenant-shareholders have impermissibly given the key fob to an unauthorized person, the duty of determining who is authorized to enter the building and who is not falls to the doorman.

Necessarily, the doorman's duties are various and will take time, but any transient delay to tenant-shareholders in entering the building must be weighed against the community's interest in controlling access to the building. Here, the Court finds that a controlled building access policy that requires a doorman to "buzz in" persons authorized to enter the building is a reasonable act of a cooperative board and does not rise to the level of an illegal eviction. Authorization by proxy to enter the building with the signifier of that authorization—the key fob—was, at most, an extra

privilege afforded plaintiffs pursuant a clear, unambiguous agreement—the key fob agreement. Whether the board properly revoked this privilege pursuant to the agreement is not before the court. If plaintiffs disagreed with the way the Co-op enforced the key fob agreement as against them, their remedy, if any, under the facts of this case, was not an illegal eviction action.

Accordingly, defendants have demonstrated prima facie entitlement to summary judgment dismissing the third cause of action, and plaintiffs have failed to raise an issue of fact precluding summary judgment in defendants' favor.

**Fourth Cause of Action—Declaration that the Apartment is Plaintiffs' Primary Residence; and Fifth Cause of Action—Declaration of What Constitutes a Sub-Tenant**

A cause of action for declaratory relief accrues when there is a bona fide, justiciable controversy between the parties (see CPLR 3001; *Waterways Dev. Corp. v Lavelle*, 28 AD3d 539 [2<sup>nd</sup> Dept 2006]). “A justiciable controversy must involve a present, rather than hypothetical, contingent or remote, prejudice to the plaintiff. The dispute must be real, definite, substantial, and sufficiently matured so as to be ripe for judicial determination” (*Waterways Dev. Corp.*, 28 AD3d at 540 [citation omitted]; see *Park Ave. Clinical Hosp. v Kramer*, 26 AD2d 613, 614 [4<sup>th</sup> Dept 1966] affd 19 NY2d 958 [1967]). A dispute matures into a justiciable controversy when a plaintiff receives direct, definitive notice that the defendant is repudiating his or her rights (see *Stein v Garfield Regency Condominium*, 65 AD3d 1126 [2d Dept 2009]). Pursuant to CPLR 3001, “[S]upreme [C]ourt may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” The plaintiff’s “allegations must demonstrate the existence of a bona fide justiciable controversy, defined as ‘a real dispute between adverse parties, involving

substantial legal interests for which a declaration of rights will have some practical effect” (*Palm v Tuckahoe Union Free School Dist.*, 95 AD3d 1087, 1089 [2d Dept 2012] [internal citations omitted], quoting *Chanos v MADAC, LLC*, 74 AD3d 1007, 1008 [2d Dept 2010]).

Defendants have demonstrated prima facie entitlement to summary judgment dismissing plaintiffs’ fourth cause of action on the ground that plaintiffs’ primary residence is not an issue in this dispute. Rather, the dispute is that plaintiffs are improperly permitting guests to reside in their apartment when they are not present and allowing those guests to use their key fobs, resulting in the deactivation of their key fobs. Plaintiffs argue that since defendants are not challenging their assertion that the apartment is their primary residence, the court should issue such a declaration.

Likewise, defendants have demonstrated prima facie entitlement to summary judgment dismissing plaintiffs’ fifth cause of action on the ground that there is no assertion that defendants’ claim that plaintiffs are illegally subletting their apartment. Plaintiffs argue, somewhat incomprehensibly, that there is no proof that they are subletting the apartment or that it was unlawfully occupied from August 24, 2016, to present, and therefore, they are entitled to a declaration of what constitutes a subtenant under the proprietary lease. Plaintiffs seek a declaration that their visitors and guests are not subtenants.

The court notes that the issue presented by plaintiffs in their complaint is whether plaintiffs have been illegally evicted from their apartment by the deactivation of their key fobs. There is no dispute before the court regarding whether the apartment is plaintiffs’ primary residence, or whether the plaintiffs are illegally subletting their apartment. Thus, these are not justiciable controversies before this court. Accordingly, plaintiffs’ fourth and fifth causes of actions must be dismissed.

**Conclusion**

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted, and the complaint is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further


ORDERED that plaintiffs' cross motion for summary judgment on their complaint is denied; and it further

ORDERED that defendants shall, within 10 days of the date of the decision and order on this motion, serve a copy of this order with notice of entry on plaintiffs and on the Clerk, who is directed to enter judgment accordingly.

DATED:

*March 25, 2019*

ENTER:

  
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HON. ROBERT D. KALISH  
J.S.C.  
J.S.C.