

**676 Grand St., LLC v New York City Dept. of  
Hous., Preserv. & Dev.**

2020 NY Slip Op 33350(U)

September 4, 2020

Supreme Court, Kings County

Docket Number: 502609/18

Judge: Katherine A. Levine

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 20 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4<sup>th</sup> day of September, 2020.

PRESENT:

HON. KATHERINE LEVINE,

Justice.

-----X  
676 GRAND STREET, LLC,

Plaintiff,

- against -

THE NEW YORK CITY DEPARTMENT OF HOUSING,  
PRESERVATION AND DEVELOPMENT, DARIUS MAGHEN,  
ABC CORP.,

Defendants.  
-----X

DECISION AND ORDER

Index No. 502609/18 ✓

Mot. Seq. Nos. 2-3

The following e-filed papers read herein:  
Notice of Motion/Order to Show Cause/Petition/  
Cross Motion and Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

<u>NYSCEF Doc. Nos.</u>	
25-26, 30,	45-47
46-47,	50
50,	

Upon the foregoing papers, defendant The New York City Department of Housing, Preservation and Development (HPD), moves in motion (mot.) sequence (seq.) two for an order: (1) dismissing this action in its entirety, pursuant to CPLR 3211 (a) (2) and 3211 (a) (7) on the grounds that (a) the request for injunctive relief in the first cause of action against HPD has been rendered moot; (b) the instant action against HPD should have been brought as an Article 78 proceeding; (c) that plaintiff failed to pursue and exhaust all administrative remedies; and (d) plaintiff failed to state a cause of action against HPD.

Plaintiff, 676 Grand Street, LLC (Grand Street) cross moves, mot. seq. three, pursuant to CPLR 1003 and 3025 (b) seeking to amend its complaint, along with “such other, further and equitable different relief” as this court deems just and proper. Each party has opposed the other’s motion with combined affidavits and affirmations.<sup>1</sup>

### Background

#### (1)

On November 22, 2017, in response to a tenant complaint made by defendant Darius Maghen (Darius), defendant HPD sent an inspector to the premises located at 676 Grand Street, Brooklyn, New York, owned by plaintiff Grand Street. Based upon the conditions observed by the HPD inspector, a Notice of Violation (Nov ID 5925700) was issued, which contained six Class C violations. Class C violations, as defined under the New York City Administrative Code § 27-2005, are conditions that are considered immediately hazardous. Two of these violations concerned apartment 4R occupied by Darius. Specifically, violation numbers 12095629 and 12095668 directed Grand Street, as owner of the property, to repair the broken and defective plastered surfaces and paint the ceiling in a uniform color. The remaining four violations<sup>2</sup> directed Grand Street to make immediate roof repairs so that it would no longer leak. According to the violation, these immediately hazardous conditions were to be remedied by December 5, 2017.

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<sup>1</sup> Counsel is reminded that combined opposition/support/reply papers is improper under the CPLR (see CPLR 2214 [b]). Separate designated papers are required.

<sup>2</sup> 12095682, 12095687, 12095691, and 12095694.

HPD, through its mail vendor FEDCAP, mailed Notice of Violation (NOV) ID 5925700 via certified mail return receipt requested to the agent of record for Grand Street, Angela Jones at 31 Bushwick Avenue, Brooklyn, New York 11210, on November 27, 2017. Grand Street denies having received this NOV, however, it does not deny that Angela Jones was the registered agent for Grand Street with HPD on that date. In fact, Grand Street is completely silent as to Angela Jones' relationship with Grand Street (i.e. member, partner, agent, no relationship, etc.).

On December 15, 2017, HPD sent an inspector to the premises to determine if the repairs were performed since Grand Street did not certify the repairs were completed by the December 5, 2017 deadline. The inspector reported that the repairs had not been performed. Thereafter, HPD, pursuant to its powers under the New York City Administrative Code, selected RLB General Construction Corp (RLB) to perform the repair work.

On January 15, 2018, RLB appeared at the building and performed the repair work in Darius' apartment and on the roof, for which HPD received an invoice from RLB on January 22, 2018 in the amount of \$1,480.00. On February 1, 2018, Kerry Danenberg (Kerry), a member of Grand Street, learned that work had been performed at the premises. Upon inspection, Kerry believed the work performed was shoddy, haphazard and improperly

performed. Kerry claims Darius advised him of HPD performing the work using the services of an outside contractor, "Mo,"<sup>3</sup> who Darius claimed came to the premises.

(2)

Kerry telephoned HPD and confirmed that HPD retained a contractor to perform the work and that said work was completed on January 15, 2018. The next day, February 2, 2018, Kerry appeared at the premises with his own contractor to perform repairs to Darius' unit (Apt 4R). Darius allegedly denied access to Kerry claiming that HPD had already performed the work and that the HPD inspector told him that the owner was "no longer allowed to make any repairs" (NYSCEF Doc. No. 47, Kerry Affidavit at 2, ¶ 12).

Kerry requested to review the documents received by Darius from HPD, however, Darius refused causing Kerry to take a trip to the Housing Court of the City of New York, Kings County, for the purposes of obtaining additional information and, if necessary, to file an order to show cause to prevent HPD from performing further work at the premises.

At the courthouse, Kerry met an attorney from HPD who assisted him, and confirmed that work had been performed, and that no further work was scheduled. The only remaining matter was HPD's reinspection of the roof work previously performed. Kerry thereafter returned to his office and drafted notices, placed strategically throughout the building, advising any contractor they were without authority to perform any work absent Grand Street's permission. He then contacted Darius and scheduled a new repair appointment with Darius for February 5, 2018 to complete any necessary repairs in unit 4R.

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<sup>3</sup> Mo is apparently Mohammad Hossain, the principal of RLB.

(3)

On February 5, 2018, an inspection of unit 4R determined that work had been performed "without notice [to] and approval" by Grand Street (NYSCEF Doc. No. 47, Kerry Affidavit at 4 ¶ 33). The next day, Kerry met with three separate and independent roofing contractors to inspect the work previously performed by HPD's agent, RLB. All three roofing repair contractors, according to Kerry, claimed that the work performed was shoddy and needed to be corrected. The costs for such repairs ranged between \$4,250 to \$6,396.41.

(4)

On February 8, 2018, Kerry caused the instant action to be commenced by filing of an emergency order to show cause (OSC), along with a summons and verified complaint, seeking 1) an order enjoining HPD from performing any further work on the premises (first cause of action); voiding and cancelling the proposed invoice by HPD, in the tentative amount of \$2,351.35 for the work performed by RLB, plus administrative expenses, and enjoining HPD from taking any action to collect this money (second cause of action); and lastly, a money judgment for damages suffered to the premises as a result of the work performed by RLB at HPD's request (third cause of action).

The OSC was immediately sent to Part 81 of this court, where Grand Street and HPD entered into a so ordered stipulation adjourning the OSC to February 23, 2018, permitting HPD to inspect the roof work to be performed by Grand Street, prior to the adjourn date, and that Grand Street would undertake its best efforts to complete the roof repairs by February 22, 2018. The matter was thereafter administratively assigned to Part 20. On February 23, 2018, HPD and Grand Street agreed to a further adjournment to March 9, 2018 as the work

was not yet completed. On March 9, 2018, the motion was marked decided by short form order.<sup>4</sup>

### Discussion

#### **Defendant HPD's Motion to Dismiss**

##### **(1)**

Defendant HPD seeks to dismiss this action in its entirety, pursuant to CPLR 3211 (a) (2), and (a) (7), claiming that the first cause of action has been mooted by the aforementioned stipulation; that the second cause of action, seeking to overturn an administrative order, must be brought by a CPLR Article 78 proceeding, that Grand Street has not exhausted all administrative remedies before commencing this proceeding, and that the third cause of action, for monetary damages, requires a Notice of Claim to be filed as a condition precedent to filing suit, which Grand Street failed to do.

##### **(2)**

CPLR 3211 (a) states that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 2. the court has not jurisdiction of the subject matter of the cause of action.” Simply stated, for a court to obtain subject matter jurisdiction, a plaintiff must bring a justiciable controversy between adverse parties (*see Nasa Auto Supplies, Inc v 319 Main Street Corp*, 133 AD2d 265 [2<sup>nd</sup> Dept 1987]).

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<sup>4</sup> A review of the County Clerk's e-file records does not disclose a short form order in this matter for March 9, 2018, and a search of Case Management indicates that this matter was marked disposed at the March 9, 2018 calendar call.

“On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Rabos v R&R Bagels & Bakery, Inc.*, 100 AD3d 849, 851 [2d Dept 2012, as amended 2013] [internal quotation marks and citations omitted]). “Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary judgment,<sup>5</sup> the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate” (*Atalaya Asset Income Fund II, LP v HVS Tappan Beach, Inc.*, 175 AD3d 1370, 1371 [2d Dept 2019] [internal quotation marks and citations omitted]).

(3)

Turning to Grand Street’s first cause of action, which seeks an injunction barring defendants “from performing any further work at the premises” (NYSCEF Doc. No. 1, Verified Complaint at 8 ¶ 44), HPD claims that the relief sought is now moot as there is no longer a justiciable controversy. Specifically, all the work required to be performed,

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<sup>5</sup> Here, this motion is not being treated as one for summary judgment.

pursuant to Nov ID 5925700, has been completed and certified by HPD. Further, that if Grand Street is seeking to bar HPD from any future inspections and notices of violation, such relief would, in effect, eviscerate HPD's statutory authority and duties under The New York City Housing Maintenance Code (HMC), found in chapter 2, Title 27 of the New York City Administrative Code.

Grand Street, in opposition, does not appear to dispute the fact the work required by Nov ID 5925700 has heretofore been accomplished pursuant to the stipulation on their order to show cause. Since the court is without power to bar HPD from performing its statutory duties in the future, or bar them from issuing any further notices of violations, as such an exercise of judicial power would create an exemption from the statutory scheme solely for the benefit of Grand Street, as opposed to all other building owners, this cause of action must be dismissed.

(4)

Grand Street's second cause of action seeks to bar HPD from collecting the \$2,352.35 for the work performed pursuant to Nov ID 5925700. HPD claims that Grand Street's claim is premature since, at the time this action was commenced, Grand Street had not received an invoice for the HPD work from the New York City Department of Finance (DOF) as part and parcel of its real property statement. Further, that Grand Street has not availed itself of the administrative remedies, set forth in HMC § 27-2129 and § 27-2146, and therefore, this claim is not ripe for review.

Since Grand Street has not opposed this portion of HPD's motion, and according to HPD, the Department of Finance (DOF) invoiced Grand Street \$762.60, which has not been administratively contested,<sup>6</sup> this cause of action is also dismissed as moot.

(5)

Grand Street's third and final cause of action seeks unspecified monetary damages for the "substandard, shoddy and deficient [sic] and damaged the roofing systems of the Premises [sic]" (NYSCEF Doc. No. 1, Verified Complaint at 8 ¶ 49). Further, that defendants conduct was "intentional, willful, reckless, *negligent* [emphasis added] and unlawful" (NYSCEF Doc. No. 1, Verified Complaint at 8 ¶ 50). HPD submits that this claim should be dismissed as Grand Street never filed the requisite Notice of Claim pursuant to Article 4 of the New York State General Municipal Law (GML), specifically GML § 50-e, which is a condition precedent to lawsuits for tort actions (*see Fotopoulos v Board of Fire Commissioners*, 161 AD3d 733 [2<sup>nd</sup> Dept 2018]).

In opposition, Grand Street acknowledges that it did not file the requisite notice of claim for this cause of action, claiming, incredibly, that a notice of claim is not required. Alternatively, that if a notice of claim is required, this court should treat the verified complaint as the GML § 50-e notice of claim since it was filed within 90 days of the underlying events, and contains all the required information GML § 50-e (2).

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<sup>6</sup> Counsel for HPD in fact believes that this sum was paid in full while this motion was pending (NYSCEF Doc. No. 50, Parodi Affirmation at 3 ¶ 11).

GML § 50-I (1) states that

“[n]o action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury, wrongful death or damage to real or personal property alleged to have been *sustained by reason of the negligence or wrongful act of such city, county, town, village, fire district or school district or of any officer, agent [emphasis added] or employee thereof, including volunteer firefighters of any such city, county, town, village, fire district or school district or any volunteer firefighter whose services have been accepted pursuant to the provisions of section two hundred nine-I of this chapter, unless, (a) a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with section fifty-e of this article, (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice, or if service of the notice of claim is made by service upon the secretary of state pursuant to section fifty-three of this article, that at least forty days have elapsed since the service of such notice, and that adjustment or payment thereof has been neglected or refused, and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based; except that wrongful death actions shall be commenced within two years after the happening of the death.*”

Clearly a notice of claim was required to be filed before this action was commenced.

Further, the court declines plaintiff's counsel's invitation to treat the complaint as the notice of claim, as in doing so, would totally upend the statutory scheme of GML Article 4, particularly GML 50-I (1) (b), and its legislative intent to resolve meritorious claims against a municipality, under a limited waiver of immunity, pre-suit. Consequently, this cause of action is also dismissed.

Since none of the causes of action are directed to Darius, and defendant ABC Corp. was at all times acting as the agent for HPD, the complaint is dismissed in its entirety against all defendants named herein.

(6)

#### **Plaintiff's Cross Motion To Amend its complaint**

Plaintiff seeks to amend their verified complaint pursuant to CPLR 3025 (b). A party, pursuant to CPLR 3025 (b), "may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation." Leave to amend shall be freely granted on such terms and conditions that are just, provided there is no surprise or prejudice to the other parties (*see Goldberg v Linden Towers Coop. No. 5*, 147 AD2d 672 [1989]; *Fischer v Carter Indus.*, 127 AD2d 817 [1987]). Granting the motion amending or supplementing the pleading will result unless such an amendment is "clearly and patently insufficient on its face" (*De Forte v Allstate Ins. Co.*, 66 AD2d 1028, 1028 [1978]).

In order to determine if the amendments are not patently insufficient on its face, a copy of the proposed amended pleading is to be attached to the moving papers as an exhibit. Indeed, CPLR 3025 (b) as amended, effective January 1, 2012, provides that "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

“[the] new provision does not prescribe exactly how the changes are to be shown, but any document marked with ‘track changes,’ or some similar program, will likely suffice. Clarity should be the touchstone for any disputes on this front, and there are many ways in which the movant can achieve this legislative goal. [I]t ... appears that ... CPLR 3025 (b) requires a party moving to amend or supplement to include the entire proposed amended or supplemental pleading, and not simply those portions that are amended or supplemented” (see Professor Patrick M. Connors, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3025:9A).

Here plaintiff failed to annex the proposed pleadings, however, the affirmation and affidavit in support indicate that the sole purpose of the amendment is to substitute RLB for ABC Corp., as the proper named defendant. Since RLB performed the work pursuant to “Open Market Order” (OMO) EI08366, they performed the work as an agent of HPD. As HPD has statutory authority to perform the work, and qualified governmental immunity to do so, same extends to RLB. Indeed, this rule,

“[first] announced in 1883 in *Urquhart v. City of Ogdensburg*, 91 N.Y. 67, has been uniformly followed since that time. In the *Urquhart* case, the court denied liability for injuries arising out of a ‘radical defect’ in the plan of a sidewalk built by the municipality, and in the course of its opinion wrote (at page 71):

“The rule is well settled that where power is conferred on public officers or a municipal corporation to make improvements, such as streets, sewers, etc., and keep them in repair, the duty to make them is quasi judicial or discretionary, involving a determination as to their necessity, requisite capacity, location, etc., and for a failure to exercise this power or an erroneous estimate of the public needs, no civil action can be maintained.”

(*Weiss v Fote*, 7 NY2d 63, 579, 584 (1960), quoting *Urquhart v City of Ogdensburg*, 91 NY 67, 71 [1883]). Therefore, the amendment would be clearly and palpably improper.

Accordingly, it is


**ORDERED** that defendant New York City Department of Housing, Preservation and Development's motion, mot. seq. two, to dismiss plaintiff 676 Grand Street, LLC's complaint, is granted in its entirety, and the complaint is hereby accordingly dismissed as against all defendants, and it is further

**ORDERED** that 676 Grand Street, LLC's motion, mot. seq. three, to amend its complaint, pursuant to CPLR 3025 (b), is denied in its entirety.

The court has considered any remaining contentions and finds same unavailing. All relief not expressly granted herein is denied.

This constitutes the decision, order and judgment of the court.

E N T E R,

  
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J. S. C.

HON. KATHERINE A. LEVINE  
JUSTICE SUPREME COURT

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KINGS COUNTY CLERK  
FILED