

<b>Fellner v 40 E. 88 Owners, Inc.</b>
2020 NY Slip Op 33666(U)
November 4, 2020
Supreme Court, New York County
Docket Number: 158234/2018
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14**

*Justice*

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**INDEX NO. 158234/2018**

DONALD FELLNER,

**MOTION DATE N/A**

Plaintiff,

**MOTION SEQ. NO. 004**

- v -

40 EAST 88 OWNERS, INC., ORSID REALTY CORP.

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115

were read on this motion to/for DISMISSAL.

The motion by defendants to dismiss plaintiff’s first cause of action in the amended complaint is denied.

**Background**

Defendants are the owner and managing agent of a coop building and plaintiff owns shares and is the proprietary leasee of apartment 12C. This dispute arises out of a small area, totaling approximately nine square feet, located between a door in plaintiff’s kitchen and the main 12<sup>th</sup> floor corridor. Plaintiff, and other “C” line apartments, have two doors leading out of their apartment: the front door, which goes directly to the main corridor and the kitchen door, which has this small area between the kitchen door and the door to the main corridor.

This case arose because defendants decided to upgrade the electrical service in the building and use these adjacent spaces (which defendants identify as water closets) in all C-line apartments, including plaintiff’s unit. Plaintiff asserts that he never received any notice of the

construction and that the conduits that were installed block access to his water closet. He maintains that the water closet served as another access point for his apartment.

In a previous motion, the Court dismissed plaintiff's first, second, fifth and ninth causes of action (NYSCEF Doc. No. 63). Plaintiff then filed an amended complaint.

Defendants now move to dismiss the first cause of action in the amended complaint. In this claim, plaintiff seeks a declaration that the water closet is part of his apartment, or in the alternative, that plaintiff has the right to use and pass through this space and that the co-op is permanently enjoined from taking any action that would interfere with plaintiff's rights with respect to this area.

Defendants emphasize that the offering plan does not mention these tiny rooms (with respect to the "C-Line" apartments) and, therefore, defendants claim that plaintiff does not have any exclusive rights with respect to the water closet. They argue that plaintiff has now contradicted his prior claims; they point out that previously plaintiff asserted that he lost the use of a secondary service door but now claims he lost a "vestibule." Defendants argue that however plaintiff characterizes this room, he cannot avoid prior court rulings by now calling it a vestibule that is part of the apartment. They note that shareholders with these tiny rooms have received notices over the years that the co-op owns these spaces and they are not for the shareholders' exclusive use.

Defendants also argue that the co-op's governing documents establish that plaintiff has no right to a vestibule or water closet. They point to the definition of the apartment pursuant to the offering plan, which purportedly makes clear that the apartment has four rooms, two baths and a dining alcove but does not mention the water closet. Defendants contend that there is no

basis to find that this space is an appurtenance because it is not essential; it is merely another means of access to the apartment.

In opposition, plaintiff emphasizes that he found out that defendants made electrical upgrades in the water closet after returning from vacation. He argues that a prior ruling by Justice Kahn rejected defendants' contention that the offering plan did not establish a defense as a matter of law. Plaintiff claims defendants have provided no further evidence about this issue that could alter the previous conclusion. He claims that he fixed the problems identified by Justice Kahn by filing the subject amended pleading. Plaintiff contends that this motion violates the single-motion rule and defendants are merely recycling old arguments that were previously rejected.

In reply, defendants assert that the single motion rule does not prevent a motion to dismiss a new cause of action in an amended pleading. They stress that the law of the case doctrine does not apply because the previous ruling by Justice Kahn did not resolve any issues on the merits.

### **Discussion**

As an initial matter, the Court finds that the law of the case doctrine does not apply here. “[L]aw of the case is a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power. As such, law of the case is necessarily ‘amorphous’ in that it ‘directs a court's discretion,’ but does not restrict its authority” (*People v Evans*, 94 NY2d 499, 503, 706 NYS2d 678 [2000] [internal quotations and citations omitted]). “[P]reclusion under the law of the case contemplates that the parties had a “full and fair” opportunity to litigate the initial determination” (*id.* at 502).

Here, plaintiff relies on a previous decision where Justice Kahn stated that “At best herein, Plaintiff can claim the water closet is part of his co-operative apartment which makes it part of his leasehold appurtenant to his shares in the co-operative corporation which is personalty, not realty” (NYSCEF Doc. No. 63 at 3). However, that statement was made in connection with dismissing plaintiff’s cause of action for a declaration for an easement. The Court finds that this statement was not a finding on the merits that plaintiff has a cognizable cause of action for declaratory relief here. Rather, the sentence was dicta, to point out how silly is was to claim an easement when a proprietary leasee owns no real property. The fact is that the precise issue now before this Court was not before Justice Kahn. Plaintiff filed an amended complaint with a new declaratory relief claim and defendants did not have an opportunity to litigate the potential dismissal of that claim.

Turning to the merits, the Court denies the motion. There is simply no evidence submitted by defendants that demonstrates that the water closet/vestibule was indisputably considered a common element owned by the co-op. At the pleadings stage, the Court can only consider whether plaintiff has stated a cognizable cause of action and it finds that he has. Defendants are correct that the offering plan does not mention the water closet as part of the apartment. But there is no definition provided that mentions the water closet. The Court cannot simply assume that it’s a common element because it was not included in the offering plan. The omission of the water closet from the offering plan might provide the basis for a persuasive argument before a fact finder, or even perhaps on summary judgment, but it is not a basis to grant a motion to dismiss. Discovery is clearly necessary to explore, for example, how these tiny spaces were treated over the years.

Similarly, the documents concerning the notices sent to shareholders about the electrical work (NYSCEF Doc. No. 97) does not compel the Court to dismiss the first cause of action. While the co-op asserts in these documents that these spaces are owned by the co-op, they also direct shareholders to clear out any personal property that is stored there. This generates more questions about how these spaces were treated over the years. It may be that all unit owners had complete control over these water closets or, possibly, the co-op could have cleaned these spaces or used them for their own storage. How the vestibules were used is critical because, as stated above, there is no clear definition provided for these spaces in the documents submitted by defendants on this motion.

Accordingly, it is hereby

ORDERED that the motion to dismiss the first cause of action in the first amended complaint is denied.

Remote Conference: November 5, 2020 at 3 p.m.

11/4/2020  
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE