

**Schumacher v Douglas-Worghs Realty Corp.**

2022 NY Slip Op 31318(U)

April 19, 2022

Supreme Court, New York County

Docket Number: Index No. 160811/2021

Judge: Leslie Stroth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LESLIE STROTH PART 52**

*Justice*

-----X

EDWARD SCHUMACHER, MARIBEL SCHUMACHER,  
CARLO-EDOARDO CARLON

Plaintiff,

INDEX NO. 160811/2021

MOTION DATE 02/09/2022

MOTION SEQ. NO. 001

- v -

DOUGLAS-WORGHS REALTY CORP., THE CITY OF NEW  
YORK,

Defendant.

**DECISION + ORDER ON  
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 45, 46

were read on this motion to/for

INJUNCTIVE RELIEF

Upon the foregoing documents, it is ordered that plaintiffs' order to show cause seeking injunctive relief is denied, and defendants' cross-motion to dismiss the complaint is granted. Plaintiffs are the property owners of the buildings abutting 66 and 68 West 119<sup>th</sup> Street, New York, New York (the subject premises). The subject premises shares a party wall with the plaintiffs' respective properties. Defendants are Douglas-Worghs Realty Corp. (Douglas-Worghs), the owner of the subject premises, and the City of New York (the City).

Plaintiffs allege in their underlying complaint that defendants have failed to maintain the subject premises in contravention of Administrative Code of the City of NY § 28.301.1,<sup>1</sup> which

<sup>1</sup> Administrative Code § 28.301.1 provides that:

*All buildings and all parts thereof and all other structures shall be maintained in a safe condition. All service equipment, means of egress, materials, devices, and safeguards that are required in a building by the provisions of this code, the 1968 building code or other applicable laws or rules, or that were required by law when the building was erected, altered, or repaired, shall be maintained in good working condition. Whenever persons engaged in building operations have reason to believe in the course of such operations that any building or other structure is dangerous or unsafe, such person shall forthwith report such belief in writing to the department. The owner shall be responsible at all times to maintain the building and its facilities and all other structures regulated by this code in a safe and code-compliant*

has resulted in damage to plaintiffs' properties. Specifically, plaintiffs claim that water that has pooled in the subject premises has been seeping into the plaintiffs' basements causing water and ancillary damage. In response to the claimed conditions, plaintiffs hired consulting engineers to provide a structural assessment of the subject premises. Plaintiff commenced the instant action based on the report and recommendations of the consulting engineers. (See Plaintiffs' Exhibit E, Structural Assessment Report).

The complaint seeks various declaratory judgments compelling the defendants to perform repairs at the subject premises, as well as monetary damages for alleged damage to the subject properties. Plaintiffs assert in their complaint that the alleged damage resulted from Douglas-Worghs' failure to maintain the Subject Premises in a safe manner and the City's failure to inspect and repair the subject premises.

Plaintiffs bring the instant order to show cause seeking essentially the same relief as the complaint, but request immediate injunctive relief given the alleged emergency resulting from ongoing water damage created by the disrepair of defendants' building and the failure of the Department of Buildings (DOB) to issue violations and/or take other action. Douglas-Worghs and the City oppose and cross-move to dismiss the complaint for failure to state a cause of action.

### **I. Vacate Order**

After two adjournments on consent of the parties, the parties appeared for oral argument on March 9, 2022. At oral argument, plaintiffs' attorney emphasized that subject premises is in a dangerous state of deterioration and requested that the Court issue an order for repairs to be done. Plaintiffs' counsel also noted, however, that on February 10, 2022, during the pendency of the order to show cause, the DOB issued a full vacate order for the subject premises and ordered a full

---

*manner* and shall comply with the inspection and maintenance requirements of this chapter. (Emphasis added).

engineer's report to be submitted to DOB. (*See* DOB Complaints and Violations dated February 9, 2022 and February 10, 2022, Exhibits B-E to Affirmation in Opposition). The DOB violations note the missing and/or compromised roof and windows, the crumbling façade, interior instability, and water damage at the subject premises. (*Id.*). The violations are assigned to DOB's Emergency Response Team. (*See* DOB Complaint and Violation dated February 9, 2022, Exhibits B and D to Affirmation in Opposition).

Both of defendants' attorneys represented that their clients are aware of conditions that resulted in the vacate order and defendant Douglas-Worghs is in the process of attempting to resolve the violations. Both attorneys also stressed that as the DOB is now handling the issues raised by the defendants, it is premature for this Court to intervene and order injunctive relief, as administrative remedies must be exhausted prior to resorting to court intervention. Specifically with regard to any imminent risks, the City's attorney noted that the violations here are not "Class 1" immediately hazardous violations that would require urgent corrections.

## II. Order to Show Cause for Preliminary Injunction

A party seeking a preliminary injunction bears the heavy burden of proving each of the following: (1) the likelihood of its ultimate success on the merits of the underlying petition; (2) that it will suffer irreparable injury if the relief is not granted; and (3) that, on balance, the equities favor granting the preliminary injunctive relief. *State of N.Y. v Fine*, 72 NY2d 967, 968-69 (1988); *W.T. Grant Company v Srogi*, 52 NY2d 496, 517 (1981). As further discussed below, plaintiffs fail to prove the likelihood of ultimate success on the merits, as no private right of action exists under Administrative Code § 28.301.1, nor do plaintiffs demonstrate a right to compel a writ of mandamus. Additionally, plaintiffs do not show they will suffer irreparable harm, as the violations

will be adjudicated through the DOB's normal administrative course, and the DOB has not found any potential urgent harm. Therefore, plaintiff's order to show cause is denied.

### III. Cross-Motions to Dismiss the Complaint

The defendants cross-move to dismiss the complaint on the ground that there is no private right of action under Administrative Code of the City of NY § 28.301.1, which requires owners of city buildings to maintain their property in a safe condition. Plaintiffs' complaint alleges five causes of action, all of which rely on or explicitly reference Administrative Code § 28.301.1, and a sixth cause of action for attorneys' fees.

CPLR 3211 (a) (7) provides for dismissal by motion on the ground that the pleading fails to state a cause of action. On such a motion, the complaint is to be afforded a liberal construction, and the court must accept the facts as alleged as true and provide plaintiff with every favorable inference. *See Leon v Martinez*, 84 NY2d 83, 87 (1994). "However, 'factual allegations ... that consist of bare legal conclusions, or that are inherently incredible...are not entitled to such consideration.'" *Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 (1st Dept 2016), citing *Leder v Spiegel*, 31 AD3d 266, 267 (1st Dept 2006).

Administrative Code § 28.301.1 does not explicitly provide for a private right of action. Moreover, the statute itself provides for the DOB to govern its enforcement. Plaintiffs cite to no statute, case law, or legislative history that would fairly imply an intent to create a private right of action through Administrative Code of the City of NY § 28.301.1. *See Kamins v United Healthcare Ins. Co. of New York, Inc.*, 171 AD3d 715, 716 (2d Dept 2019), citing *Sheehy v Big Flats Community Day*, 73 NY2d 629, 633 (1989).

Additionally, to the extent that the complaint is an improperly asserted plenary action seeking a writ of mandamus, plaintiffs have failed to demonstrate their entitlement to such relief.

The remedy of mandamus is only available to compel an act that is ministerial and non-discretionary, premised upon specific statutory authority mandating performance in a specified manner. *See Grisi v Shainswit*, 119 AD2d 418 (1st Dept 1986); *Peirez v Caso*, 72 AD2d 797 (2d Dept 1979); *Posner v Levitt*, 37 AD2d 331 (3d Dept 1971). Here, the City’s authority to perform emergency repairs and issue violations involves the exercise of discretion. Plaintiffs fail to cite to any law providing that the City is under an obligation to repair the subject premises or to controvert the fact that the actions plaintiffs seek to compel are discretionary in nature.

As plaintiffs have failed to plead a cognizable cause of action under Administrative Code § 28.301.1 or for a writ of mandamus pursuant to Article 78, the complaint must be dismissed. *See* CPLR 3211 (a) (7).


Accordingly, it is

ORDERED that plaintiffs’ order to show cause is denied, and it is further

ORDERED that defendants’ motions to dismiss are granted, and the complaint is dismissed.

This constitutes the Decision and Order of the Court.

4/19/2022  
DATE

  
LESLIE STROTH, J.S.C.

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