

**Rapps v City of New York**

2012 NY Slip Op 33075(U)

December 7, 2012

Supreme Court, Richmond County

Docket Number: 12951/04

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND                      DCM PART 3**

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**Index No.: 12951/04**

**JACK RAPPS and DOROTHY RAPPS,**

*Plaintiff*

*against*

**THE CITY OF NEW YORK,**

*Defendants*

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**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

After a Jury Trial finding the defendant, City of New York, liable for violating the plaintiffs' civil rights pursuant to 42 USC 1983, but awarding no monetary damages, the plaintiff has moved for an Order:

1. Converting the preliminary injunction already issued by this court, staying the execution of a certain tax lien imposed on the real property commonly known as 2073 Richmond Terrace, Staten Island, New York, for the cost of demolition of the building on that property into a permanent injunction;
2. Awarding the plaintiffs at least nominal damages in this matter;
3. Awarding plaintiffs' counsel fees and costs herein; and
4. Granting such other and further relief as is just and proper.

The defendant, City of New York, has also moved post verdict for an Order:

1. Pursuant to CPLR §4404(a) directing judgment notwithstanding the verdict in favor of the City of New York as a matter of law;
2. Denying plaintiffs' oral motion to set aside the jury's verdict of no damages as inconsistent with the jury's finding of liability; and
3. Granting such other, further and different relief that this court deems just, proper or equitable.

This court has heard the oral arguments from counsel for the parties on their respective motions and has read the following filed documents:

1. Plaintiff's Notice of Motion and Affidavit in Support of Post Verdict Motions;
2. Defendant's Notice of Motion;
3. Defendant's Memorandum of Law in Support of City's Motion and in Opposition to Plaintiffs' Motion to Set Aside the Jury's Damages Award;
4. Defendant's Memorandum of Law in Opposition to Plaintiffs' Post Verdict Motion;
5. Affirmation of Pawan Nelson, Esq. in Support of Defendant's Memorandum of Law;
6. Affirmation of Joseph D. Manno, Esq. in Opposition to Defendant's Motion for Judgment Notwithstanding the Verdict;
7. Reply to Plaintiffs' Opposition to Defendant's Motion

### **Facts**

In the afternoon of Friday, October 27, 2000, while on a routine building field inspection, a firemen employed by the New York City Fire Department, without any notice of any safety or building violations, observed the plaintiffs' multiple dwelling apartment building located at 2073 Richmond Terrace, Staten Island, New York, in Block 1068, Lot 18.

The firemen observed what Fire Battalion Chief John Calderon characterized as a dangerous structural deficiency. Chief Calderon in turn communicated their observation to the New York City Building Department Staten Island Office, which dispatched Building Inspector Ron Silver to the scene. He also called for a "collapse response assignment," which is a specialized unit that is trained and equipped to perform tactical operations such as shoring (TR 195).

Firemen and the building inspector observed an exterior addition that had detached approximately 12 inches to the top from the building and bowed interior hallway floors that were propped up with beams and a jack on the ground floor.

Chief Calderon then, without any prior warning to the 34 residents, ordered that they immediately vacate the premises and were accompanied by firemen out of the building in less than half an hour because the Fire Department was preparing to shore up the building (TR 202).

Building Inspector Ron Silver, who is not an engineer nor architect, with limited formal education but on the job training, advised the Fire Department that it was going to demolish the building, therefore there was no need to shore up the building (TR201).

Vito Mustaciuolo, the Assistant Commissioner for Code Enforcement of the New York City Department of Housing Preservation and Development (HPD) arrived at the scene from his Manhattan office. Mr. Mustaciuolo has a Bachelor of Business Administration and is not an engineer. He testified that when HPD gets an immediate emergency declaration from the Department of Building (DOB), it attempts to contact the owner or managing agent. At the same time it contacted one of its pre-approved contractors to put them on standby in the event action needs to be taken (TR 207). HPD through the Red Cross arranged to relocate the displaced residents.

Jack Rapps, one of the plaintiff owners, was contacted by telephone at his Brooklyn residence to come to the building. When he arrived at approximately 6:30 - 7:30 p.m. he observed workers from a demolition company retained by the City of New York.

Deputy Commissioner Mustaciuolo testified that he was aware of a “verbal” immediate emergency declaration issued by DOB Inspector Ron Silver. Mustaciuolo observed the wooden planks shoring up the floor joists and the bowed floor. The Commissioner testified that when he spoke to Mr. Rapps he advised him that he could hire the demolition company that HPD ordered onto the scene to demolish and remove the building or that HPD would pay for the demolition and removal at a higher amount due to the City’s requirements of extended payments and insurance. He could also hire his own engineers and contractor that evening, but in any event the building was coming down that evening. Mr. Rapps wanted time to remedy his building rather than demolish it

within hours of being advised that the City was taking such a drastic action. Mr. Rapps called his lawyer, who was powerless to stop the immediate demolition. The building was demolished on Friday evening, October 27, 2000. The City placed a fence around the debris and advised Mr. Rapps to clean it up.

### **Discussion**

Inspector Silver ordered the building to be immediately demolished that Friday evening with no reasonable ability for the owner to correct the conditions, for which no violations were pending, nor were any issued that evening. Inspector Silver, who is not an engineer or architect, acknowledged that it was the responsibility of the Department of Buildings Borough Commissioner, who by job description is either a professional engineer or a registered architect. Nevertheless, he ordered the building to be immediately demolished because he was concerned that the residents that were dispossessed would break into the boarded up building and create another hazard. Building Inspector Silver undertook that responsibility without prior approval because he claimed that the Borough Commissioner was not available on a Friday evening to approve his findings.

Under the New York City Department of Buildings Operations Policy and Procedure Notice #16/93 it states in part:

Purpose:

...

When the Department of Buildings declares either an Immediate Emergency or an Emergency on an unsafe building, it is effectively sanctioning the city to demolish, repair, or take whatever action necessary to make the building safe. And either declaration allows the City to use an expedited bid process to retain a contractor to perform the required work.

In effect, there is not procedural difference between an Immediate Emergency and an Emergency declaration, only the speed with which that work is accomplished

...

An Immediate Emergency will be declared on a building with life threatening structural damage and/or in imminent danger of collapse. The expectation is that work on the structure will begin by the day after the declaration. (Emphasis added.)

Unless requested by HPD on a site specific basis, no U.B. notice of violation should be written and no precept will be sought in those instances where the Borough Commissioner determines the condition is so egregious as to declare an Immediate Emergency.

An Emergency will be declared on a building with serious structural damage and/or a deteriorating condition when a collapse or failure is expected in the very near future. The expectation is that work will begin within thirty (30) to sixty (60) days of the declaration. A U.B. violation must be written and forwarded to the Central U.B. Processing Unit.

#### Notice to Owners

For both of these conditions a letter (enclosed) must be sent to the owner listed on the BIS Finance screen, or HPD's Multiple Dwelling Registration File in the case of residential multiple dwellings only.

All paperwork associated with either of these declarations must be forwarded to the Executive Chief Inspector's Office by close of business the day after such emergency is declared.

#### Paperwork Required

Inspector's Report

Original signed Emergency Declaration Form

Copy of letter(s) alerting the owner(s) of the condition

Photos of condition (Immediate Emergency Only)

Once the building was vacated there was no immediate emergency to demolish it that very evening without proper authorization from the Borough Commissioner. This was the essence of the plaintiffs' case, that his property was taken without any notices of violations and reasonable period in which to repair it. The plaintiffs argued that this constituted an unjust taking of his property without due process or compensation for same in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution and 42 USC 1983.

Furthermore, Inspector Silver acted arbitrarily and most capriciously in ordering the building to be immediately demolished. He originally was going to merely have the building shored up and boarded up by the Fire Department and HPD. But he claimed that upon seeing the dispossessed residents standing around the corner, he gave the order to demolish the building because he feared

that the residents would break in and resume residing there, which of course was speculation on his part. No photos were taken of the building to memorialize its condition before it was demolished as is required.

Inspector Silver gave no consideration to the owner to attempt to correct his premises, nor did he give any consideration to the 34 residents who he dispossessed within a half hour with just the clothes on their backs. Little did he care about the fact that all their worldly possessions were in the building which he callously ordered demolished with no opportunity for the residents to retrieve their clothing, furnishings, appliances and other possessions.

It is clear to this court and it was clear to the jury that Inspector Silver, as an employee of the New York City Department of Buildings, exceeded his authority and did not await the approval of the Building Commissioner to take such drastic, hasty measures and thereby violated the civil rights of the plaintiffs' who sued the City of New York and the dispossessed residents who lost all their property who did not sue.

The expert real estate appraiser presented by the plaintiffs testified that, notwithstanding the fact that he did not see the building in question because it was demolished, he did testify that he was thoroughly familiar with the area in that he grew up in that neighborhood and was familiar with that type of building. He utilized comparable market values, an income value approach and a cost approach to value the property. He summarized that the value was \$240,000. On cross examination, the attorney for the defendant pointed out some shortcomings on the comparable sales and methodology he utilized in his printed report.

Notwithstanding the jury's finding that the City is liable for a violation of 42 USC 1983, it did not award monetary damages. While this appears to be an inconsistent finding, the jury may have found that the quantification of damages by the expert witness was discredited by the cross examination of counsel for the City of New York. But it is not the role of the court to second guess the motives of a jury where the evidence may justify their findings. Great deference is accorded to

the fact-finding functions of the jury, and determinations regarding credibility witnesses are for the fact-finders who had the opportunity to see and hear the witnesses.<sup>1</sup> Accordingly, this court finds that a fair and reasonable jury could have come to the same conclusions and consequently, this court will uphold their verdict and award nominal damages in the sum of One Dollar.

### **Lien**

The plaintiffs argue that not only was their building taken and their rent roll lost, the City placed a lien on the remaining land to cover the cost of the demolition and the resultant debris, which totaled over \$204,000 at the time of trial. But the City attorneys refused to allow the enforcement of the lien to be considered by the jury. However, this court must now in equity deal with that matter.

Justice Thomas P. Aliotta, who presides over the City of New York Part of this Court on June 16, 2010 without objection from the City of New York, issued a preliminary injunctive concerning the enforcement of the lien for the costs of demolition of the plaintiffs' building located at 2073 Richmond Terrace, Staten Island, New York. The plaintiffs now seek to either vacate the lien or convert the enforcement of it into a permanent injunction. Since the jury has ruled that the defendant, City of New York, violated the plaintiffs' due process rights pursuant to 42 USC 1983 in their demolition of the plaintiffs' property, it would be totally inequitable for the City of New York to be compensated for that wrongful demolition without proper approval and without following the Building Department's Operations Policy and Procedure Notice in effect on October 27, 2000. Therefore, this court in equity is vacating said lien in its entirety.

### **Attorneys Fees**

Moreover, since the plaintiffs were successful in finding the City of New York liable for the violation of 42 USC 1983, the plaintiffs are entitled to reasonable attorney fees and costs. (See 42 USC §1988(b).)

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<sup>1</sup> *Hedaya Home Fashions, Inc. v. AM Motorists Ins. Co.*, 12 AD3d 639 [2<sup>nd</sup> Dept., 2004].



Joseph Manno, Esq., counsel for the plaintiff, has submitted an Affirmation of Legal Services and Costs for:

Discovery, court conference, review of file, motion practice, Meetings and communications with plaintiffs, legal research and writing, investigation.....	175 hours
Appellate practice including legal research and preparation of Records on Appeal and Legal Brief and oral argument.....	80 hours
Trial and post-trial practice including trial preparation, jury Selection, trial litigation, port-trial motion practice.....	<u>85 hours</u>
Total Hours.....	340 hours

Attorney Joseph Manno's hourly rate is listed at \$350 per hour for a total claim of 340 hours at \$350 per hour or \$119,000.00.

This court finds that his hourly rate of \$350 per hour to be commensurate with attorneys in this county with 31 years of legal practice who have handled numerous litigated matters in various courts and appeals at the Appellate Divisions of the Supreme Court. The hours for the work outlines above appear to be conservative based upon this court's observation of the pleadings, conferences, the successful appeal to the Appellate Division and the trial of this matter.

Therefore, this court finds that attorney Joseph Manno's claim for legal fees in the sum of \$119,000.00 to be fair and reasonable.

In addition, attorney Joseph Manno has itemized his legal expenses for the prosecution of this matter as follows, which this court finds to be fair and reasonable:

Index number.....	\$ 210.00
RJI.....	125.00
Note of Issue.....	75.00
Notice of Appeal.....	65.00
Printing Costs of Appeals.....	1,000.00
Expert Witness Fee.....	750.00
Copying Costs.....	<u>200.00</u>
Total Expenses.....	\$2,425.00

Therefore, this court awards Joseph Manno, Esq. the sum of \$2,425.00 in legal costs of suit.

Accordingly, it is hereby decided and ordered as follows:

ORDERED, that the defendant's motion to set aside the jury verdict as against the weight of the evidence and directing judgment for the City of New York, notwithstanding the verdict is denied; and it is further

ORDERED, that the plaintiffs' motion to convert the preliminary injunction staying the execution of a certain tax lien imposed on the real property commonly known as 2073 Richmond Terrace, Staten Island, New York, located in Block 1068, Lot 18, for the cost of demolition of the building on that property, into a permanent injunction or to vacate the lien is granted to the extent that said lien is vacated; and it is further

ORDERED, that the Richmond County Clerk is hereby ordered to vacate the lien imposed by the City of New York against the plaintiffs located at 2073 Richmond Terrace, Staten Island, New York, under Block 1068, Lot 18 forthwith; and it is further

ORDERED, that in view of the jury verdict in favor of the plaintiffs, the plaintiffs are entitled to nominal damages in the sum of One Dollar (\$1.00); and it is further

ORDERED, that in view of the jury verdict in favor of the plaintiffs, pursuant to a violation of 42 USC 1988, the plaintiffs are entitled to reasonable attorneys fees, and that having reviewed the application submitted by the plaintiffs' attorney, this court awards plaintiffs' counsel, Joseph Manno, Esq., attorneys fees to cover the costs of the suit, his successful appeal to the Appellate Division, Second Department and his verdict in favor of the plaintiffs on the remaining violation of 42 USC 1983 action, a sum of money determined to be \$119,000.00, plus costs of suit in the amount of \$2,425.00.

Settle Judgment on Notice.

ENTER,

DATED: December 7, 2012

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Joseph J. Maltese  
Justice of the Supreme Court