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

PRESENT: HON. ELLEN M. COIN PART 63

WSV GREEN NEIGHBORS, INC. (a New York State not-for-profit corporation), et al.,

Plaintiffs,

-against-

New York University (a New York State not-for-profit corporation),

Defendant.

INDEX NO. 155507/2012
MOTION DATE Oct. 24,2012
MOTION SEQ. NO. 1
E-FILED

The following papers, numbered 1 to ___, were read on this motion to dismiss

Papers	Papers Numbered
Notice of Motion/Order to Show Cause-Affidavits-Exhibits	1
Answering Affidavits-Exhibits	2
Reply Affidavits	3

Cross-Motion X Yes

Plaintiffs WSV Green Neighbors, Inc. ("WSV") and rent-stabilized tenants Bertha Chase, Judy Kelly Magida, Timothy F. Healy and Anna M. Lervold move by Order to Show Cause for a preliminary injunction (1)enjoining defendant from reducing or eliminating the interior park at Washington Square Village, including an underground garage, (2)enjoining defendant from taking any action to destroy (a)the building on the commercial strip of LaGuardia Place[1] and (b)Adrienne's Garden, and (3)enjoining defendant from building a construction staging area within the Washington Square Village complex or in any contiguous area. Defendant New York University ("NYU") opposes the motion and cross-moves pursuant to CPLR §3211(a)(1), (2) and (3) for dismissal of the complaint.

The individual plaintiffs are rent-stabilized tenants of Washington Square Village ("WSV"), a residential complex owned by defendant NYU. Plaintiff WSV Green Neighbors, Inc. is a not-for-

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[1]At oral argument plaintiffs' counsel withdrew so much of their motion as sought an injunction with respect to the destruction of the building on the commercial strip of LaGuardia Place. Plaintiffs do not allege that the commercial building is a required service.

profit corporation, "virtually all" of whose members are alleged to be rent-stabilized tenants at WSV (Complaint, para. 3). WSV consists of four high-rise apartment building addresses in two high-rise buildings facing one another, one on the south side of West Third Street and the other on the north side of Bleecker Street. Between the two buildings is an area of nearly two acres (referred to by plaintiffs as a "park-like area" and by NYU as a "courtyard"), located over an underground garage, which includes a locked children's playground on the east side (the "Key Playground") and the Sasaki Garden in the west side area.

This action arises out of NYU's development plan to add two academic buildings to the park-like or courtyard area between the two high-rise buildings. The LaGuardia Building is to be constructed in the vicinity of the area where the LaGuardia Retail Building now stands (Exhs. A, B to the Affidavit of Alison L. Leary, sworn to September 13, 2012) and the Mercer Building is to be constructed in the vicinity of the area where the Key Playground is currently located (Exhs. A, B to Leary Aff.). NYU concedes that its project will cause a net increase in the building footprint in the park-like area or courtyard, but alleges that as part of the project it will remove certain driveways and vehicle circulation areas, which will lead to a net increase of more than 10,000 square feet of playgrounds, walkways, lawns and gardens (Affidavit of John Neill, sworn to September 13, 2012, para.4).

The complaint alleges two causes of action. The first is for a permanent injunction for the same relief sought on this motion. The second is for a declaratory judgment that plaintiffs are entitled to continuation of the Washington Square Village Park as a required service under the Rent Stabilization Law and the precedential decisions of the Conciliation and Appeals Board ("CAB") and the Department of Housing and Community Renewal ("DHCR"). Both causes of action hinge on plaintiffs' contention that the disputed area in its current configuration is a required service under the Rent Stabilization Law.

Moving to dismiss the complaint, NYU alleges that the court lacks subject matter jurisdiction in that plaintiffs' claim is not ripe. Although NYU has obtained approval of its project from the City Planning Commission and the New York City Council under the City's Uniform Land Use Review Procedure ("ULURP"), it argues that the injury plaintiffs seek to prevent--deprivation of a required service--may never come to pass. Thus, it alleges that before construction can begin, NYU must prepare architectural plans, obtain approval of them from the City, obtain all of the financing required, and first complete construction (as part of

the same development plan) on the superblock it owns to the south of WSV.

Plaintiffs contend that their claim is ripe, because NYU announced its intention to post signs to increase public awareness of the existence of the Sasaki Garden and to post signage allowing the public to enjoy the Garden during day-time hours. Plaintiffs contend that the WSV park "is a recreational service space exclusively for their use" (Compl., para. 9). Thus, they allege that upon posting such signs, NYU will destroy the "private" nature of the WSV park as a required service.

NYU, which was not the original owner of WSV, alleges that although the park-like area or courtyard is private property, it has always been open to the public. It alleges that the public has always been physically able to enter the area through the WSV driveways. Further, it alleges that the gates of the Sasaki Garden are unlocked and that NYU does not eject non-WSV tenants from it. It notes that non-party Washington Square Village Tenants' Association has conceded that the Garden is for residents of WSV "and the community" to enjoy (Exh. Q to the Leary Aff.), and that plaintiff Magida herself has testified to the City Council that the Garden was a friend to yoga practitioners, tourists, students, thinkers, and readers (Leary Aff.; Exh. M at 476). Although the Key Playground is gated and locked, community members with children of a certain age who are not tenants of WSV can apply for a key. Thus, NYU alleges, 581 of the 1,097 keys in circulation are held by community members who are not tenants of WSV, and none are held by any of the individual plaintiffs. Further, NYU claims that it has never had a practice of excluding non-WSV tenants from the disputed area.

Moreover, NYU alleges that preservation of the park-like area in its current condition is not required because there have been many changes to it over the years. Thus, it alleges that the retail building on LaGuardia Place was originally two buildings that were joined, eliminating a walkway. Lighting and plantings have been changed, driveways repaved, fencing and gates added and the Key Playground renovated and modified. According to NYU, plaintiffs failed to complain as to any of these changes.

NYU also relies upon the Rules and Regulations attached to the lease of each individual plaintiff, which specifically reserve to the landlord the right to decide how the tenant may use the grounds outside of the leased premises.

Plaintiffs dispute NYU's contentions that the park-like area has always been open to the public. They point to the WSV "Rules

and Regulations" codifying the private use of Sasaki Garden for WSV residents; NYU's elimination in recent years of signs indicating that WSV was private for WSV residents; and an affidavit of a non-tenant who alleges that in 2010 she was asked to leave the Garden by a maintenance employee, who threatened to call a security guard.

Even in the absence of architectural plans, a visual review of the existing layout (Pre-ULURP Project) and projected layout (Post-ULURP Project)(respectively, Exhibits A and B to Leary Aff.) reveals that NYU's project will have a major impact on the disputed area. The presence of two new buildings and attendant daily movements of students, teaching and maintenance staff will unquestionably impact the atmosphere of the park-like or courtyard area and increase foot and vehicular traffic.

Notwithstanding this observation, the court is persuaded that the complaint should be dismissed in its entirety, without prejudice, on the ground that plaintiffs' claim should first be raised for determination before DHCR. Although this court has concurrent jurisdiction over the issues raised herein (*see Matter of Ruskin v Miller*, 172 AD2d 164 [1st Dept 1991]; *Wolf v 72 Eastview Assocs., LLC*, 2008 WL 6892540 [Sup Ct, New York County 2008]), "[t]he question of what constitutes a required service [i]s a factual issue to be determined by DHCR" (*Classic Realty LLC v Div. of Hous. & Community Renewal*, 209 AD2d 201, 202 [1st Dept 2002][citing *Matter of Missionary Sisters of Sacred Heart v Div. of Hous. & Community Renewal*, 288 AD2d 16, 17 [1st Dept 2001]; *Matter of 140 West 57th Street Corp. v Div. of Hous. & Community Renewal*, 260 AD2d 316, 317 [1st Dept 1999]; *see also Matter of Car Barn Flats Residents' Assn. v Div. of Hous. & Community Renewal*, 184 Misc2d 826, 832 [Sup Ct, New York County 2000][DHCR is empowered to determine what constitutes required services]; *cf. Dugan v London Terrace Gardens, L.P.*, 101 AD3d 648 [1st Dept 2012]).

Considering that NYU's construction project is currently in its infancy, with architectural and engineering plans not even drafted, much less finalized, this legal controversy has not fully matured and is subject to long-term gestational development and a long array of changes that may be made to the underlying plans. This court will be called upon to constantly review and evaluate drawings and hold hearings on any proposals for changes to determine adherence to provisions of the Rent Stabilization Law. Such oversight is more akin to an administrative function, rather than determination of a justiciable controversy.

"The doctrine of justiciability is an 'untidy' concept that

'embraces the constitutional doctrine of separation of powers and refers, in the broad sense, to matters resolvable by the judicial branch of government as opposed to the executive or legislative branches or their extensions.'" (*Roberts v Health & Hosps. Corp.*, 87 AD3d 311, 322 [1st Dept 2011][citing *Jiggetts v Grinker*, 75 NY2d 411, 415 [1990]). "While the doctrine of justiciability has evolved with the passage of time, '[t]here is one recurrent theme: the court as a policy matter, even apart from principles of subject matter jurisdiction, will abstain from venturing into areas if it is ill-equipped to undertake the responsibility and other branches of government are far more suited to the task.'" (*Roberts*, citing *Jones v Beame*, 45 NY2d 402, 408-409 [1978]). Thus, "'the tools with which a court can work, the data which it can fairly appraise, [and] the conclusions which it can reach as a basis for entering judgments, have limits.'" (*Jones v Beame*, 45 NY2d at 409).

Because DHCR has concurrent jurisdiction over the subject issues, plaintiffs' objections to NYU's project as eliminating a required ancillary service are better addressed to that administrative agency. (*See, e.g., Wolf v 72 Eastview Assocs., LLC*, 2008 WL 6892540). In the event that plaintiffs prevail before that agency, they will be entitled to seek permanent injunctive relief from this court; if they do not so prevail, they have the right to seek review of DHCR'S determinations by means of an Article 78 proceeding.

In light of the foregoing, plaintiffs' motion for a preliminary injunction must be denied as moot.

It is therefore

ORDERED that plaintiffs' motion for a preliminary injunction is denied; and it is further

ORDERED that defendants' cross-motion to dismiss is granted and the complaint is hereby dismissed without prejudice, and the Clerk of Court shall enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: March 14, 2013

Ellen M. Coin, A.J.S.C.

CASE DISPOSED