

Marchant v NYC Dept. of Hous. Preserv. & Dev.

2015 NY Slip Op 31502(U)

August 6, 2015

Supreme Court, Queens County

Docket Number: 18175/14

Judge: Carmen R. Velasquez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

-----x
GARTH MARCHANT, DIANE HODGES, JANE
DOE and JOHN DOE,

Plaintiffs

against-

NYC DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT,

Defendant.

Index No: 18175/14

Motion Date:
February 26, 2015

Hearing Held:
March 26-27, 2015
and
May 13, 2015

-----x
The following papers numbered 1 - 10 read on this Order to Show Cause by petitioners for an order enjoining the "Vacate Order" of the respondent New York City Department of Housing Preservation and Development.

	<u>PAPERS</u> <u>NUMBERED</u>
Order to Show Cause - Petition - Exhibits ..	1 - 5
Verified Answer - Exhibits	6 - 8
Supplemental papers by Petitioner.....	9 - 10
Respondent's Memorandum of Law	

Upon the foregoing papers and following a hearing held in this Part on March 26-27, 2015 and May 13, 2015, it is ordered that this application is decided as follows:

Petitioner Garth Marchant has occupied the subject premises located at 119-55 Farmers Boulevard, Saint Albans, N.Y. 11412 since 2009. Other persons, including petitioner Diane Hodges, are residing in the premises as well. Apparently, petitioner Marchant collects rent pursuant to the Human Resources Administration Living in Communities Rental Assistance Program. The records of the New York City Department of Buildings indicate that Sonia Pitter, Marchant's niece, was a prior owner of the premises. However, following a foreclosure action in this court, the premises was transferred to Deutsche Bank National Trust Company ("Deutsche Bank") pursuant to a Referee's deed dated October 21, 2014 and recorded in the Office of the City Register of the City of New York on December 23, 2014. Deutsche Bank

maintains that it has no lease with the petitioners, and they are merely foreclosure holdover tenants or squatters.

The court initially notes that any landlord-tenant issues between petitioners and Deutsche Bank are not before the court and, thus, the court will not make any rulings on those issues.

Pro se petitioners bring the instant application to enjoin the respondent New York City Department of Housing Preservation and Development ("HPD") from enforcing a Vacate Order served upon petitioners on December 9, 2014, which alleged that there were various unsafe conditions at the premises.

In the petition, the petitioners allege that the conditions in the premises are not unsafe and that the original HPD inspection report was false. Petitioners also state that the violations listed in the report are Class B and Class C violations, which are correctable by repairs. Respondent, in opposition to the petition, states that inspections of the premises by HPD on November 24, 2015, November 25, 2015, January 9, 2015 and February 15, 2015 still revealed the existence of unsafe conditions. In an affidavit, HPD Inspector Frederick Thomasel avers that at his inspection on January 9, 2015, the premises had electricity and running water but no gas. He noted that the occupants were cooking on a single burner alcohol stove. Additionally, Mr. Thomasel avers in his affidavit that there were signs of a major water leak in the ceilings and walls on the second story of the premises. Mr. Thomasel further found that in the cellar, two electric panels were uncovered, which presented an electrocution hazard. He also found that extension cords and surge protectors were running throughout the cellar which were connected to individual heaters, which presented a fire hazard. Mr. Thomasel also noted that there was no sheetrock to prevent the spread of fire to the upper stories of the premises, in the event of a fire in the cellar. Mr. Thomasel concluded that the vacate order should be enforced.

On December 19, 2014, the petitioners brought an Order to Show Cause seeking to enjoin the vacate order. On December 19, 2014, the Honorable Leslie J. Purificacion, as Emergency Justice, signed the petitioners' Order to Show Cause with a Temporary Restraining Order, which enjoined the vacate order. Thereafter, the Temporary Restraining Order was continued by the assigned Justice, the Honorable Thomas D. Raffaele, on January 7, 2015. The case was reassigned to this Part on January 15, 2015 pursuant to an order of the Honorable Jeremy S. Weinstein, Administrative Judge, Queens County, after Justice Raffaele recused himself from the matter. On January 16, 2015, this court adjourned the matter

until February 26, 2015, continued the Temporary Restraining Order and directed the petitioners to file a formal petition and respondents to file a formal Answer.

On February 26, 2015, the matter was marked fully submitted in this Part, and the court continued the Temporary Restraining Order pending the determination of the underlying application. Thereafter, by short form order dated March 9, 2015, this court set the matter down for a hearing in view of the conflicting averments set forth in the moving and opposing papers.

The hearing commenced in this Part on March 26, 2015, at which time, Neville Nicholas, a contractor, and petitioner Diane Hodges testified. HPD Inspector Frederick Thomasel also began testifying, and his testimony continued on March 27, 2015. In an interim order dated March 30, 2015, this court ordered that Deutsche Bank enter the premises and make all necessary repairs no later than April 1, 2015. The court further stated that respondent HPD may enter the premises and make the repairs in the event that Deutsche Bank fails to do so. The hearing resumed on May 13, 2015, and the parties advised the court that the repairs to the premises were not performed. An attorney representing Deutsche Bank was present and asserted that it has no legal access to the premises and cannot make the repairs until the premises are vacant. After Inspector Thomasel completed testifying, the parties gave their summations. The court reserved decision and continued the Temporary Restraining Order.

The papers submitted in support of, and in opposition to, the application, as well as the testimony adduced at the hearing, set forth the history of this matter. On November 24, 2014, an Inspector from the respondent HPD visited the premises and found it to be unfit for human habitation. He recommended that it be vacated and specifically noted the following unsafe conditions: (1) a defective roof which was open to the elements; (2) a collapsing ceiling on the second story; (3) no gas or hot water; (4) a defective boiler; and (5) the existence of a fire hazard in the cellar due to an accumulation of garbage and other household items. On November 25, 2014, an Associate Inspector and Borough Chief Inspector concurred with the recommendation that the premises be vacated.

On December 9, 2014, HPD issued a full vacate order with respect to premises. The vacate order stated that the premises is "dangerous to life and detrimental to the health and safety of the occupants and others and is unfit for human habitation because of the following conditions:

"(1) Bldg in total disrepair : Ceiling collapsing at 2 sty Apt.
(2) Bldg in total disrepair : Defective Roof Open To Elements
(3) No Gas Service : No Supply : Entire Bldg
(4) No Heat : Boiler Defective : Defective Boiler at Cellar
(5) No Hot water : No Fuel : No Gas to Fire System
(6) Other: Fire Hazard at Cellar due to Accumulation of Garbage and Other Household Items
(7) Illegal Apartment Created at Cellar : Other : Accumulation of garbage throughout illegal cellar apartment."

The Order directed that the above conditions be corrected by December 10, 2014 or all persons must vacate the premises by December 10, 2014. On December 16, 2014, a Vacate Enforcement Order was issued, which directed the petitioners to vacate the subject property by December 22, 2014 at 9:00 A.M. Petitioners then brought the Order to Show Cause to enjoin the enforcement of the vacate order as set forth above.

The court first finds that the vacate order dated December 9, 2014 is defective. There is no evidence that the vacate order was ever served upon Sonia Pitter, who was still listed as the registered owner of the premises at the time the vacate order was served. An HPD employee avers in an affidavit that she mailed a copy of the vacate order to Sonia Pitter at the address of the subject premises. However, the evidence presented at the hearing establishes that at the time of the vacate order, Ms. Pitter was residing in the state of Georgia. HPD knew or should have known that Ms. Pitter was an absentee owner of the subject property when it assumed control of the gas account. Indeed, in the foreclosure action, Ms. Pitter was served at her address in Georgia. In addition, after the Referee's deed was filed and Deutsche Bank became the registered owner of the premises, HPD could have served Deutsche Bank with the vacate order.

With respect to the merits of the application to enjoin the vacate order, the court notes that petitioners' application is really one for a permanent injunction enjoining the enforcement of the vacate order. In order to obtain a permanent injunction, the moving party must establish that there was a "violation of a right presently occurring, or threatened and imminent," that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor. (*Caruso v Bumgarner*, 120 AD3d 1174, 1175 [2d Dept 2014]; *Elow v Svenningsen*, 58 AD3d 674, 675 [2d Dept 2009].)

The court finds that the petitioners have satisfied the

requirements for a permanent injunction herein.

The Housing Maintenance Code (Administrative Code of the City of New York, Title 27, Ch. 2) grants HPD the authority to order a dwelling vacated where it is "unfit for human habitation." (New York City Administrative Code § 27-2139[b].) The Code defines "unfit for human habitation" as conditions constituting "a danger to the life, health or safety of its occupants." (New York City Administrative Code § 27-2139[a].)

Based upon the testimony adduced at the hearing, the court finds that the conditions existing at the premises do not render the premises "a danger to the life, health or safety of its occupants." The vacate order stated that there was a defective roof in the premises, which was open to the elements. However, at the hearing, no one ever testified that they saw any type of hole in the roof. Indeed, Mr. Thomasel testified that he only saw a hole in the roof in a photograph. When Mr. Thomasel visited the premises in January 2015, the roof was covered by snow. Thus, no sufficient evidence was presented to this court of a defective roof. Therefore, item 2 of the vacate order is non-existent.

The vacate order further listed a collapsing ceiling in the second story apartment of the premises. Respondent HPD, however, conceded that there have been repairs made to the ceiling. Moreover, Inspector Thomasel testified that he did not see any leaks from the ceiling on the second floor, in contradiction to his averments in his prior affidavit. Thus, a defective ceiling is no longer a basis to enforce the vacate order, and item 1 of the vacate order is also non-existent.

Items 3, 4 and 5 of the vacate order refer to a lack of gas, heat and hot water at the premises. The evidence establishes that the gas was turned off after an employee of National Grid, the gas company, broke a gas line and caused a gas leak during an attempt to turn on the gas service. However, HPD would not permit the gas to be turned back on. Indeed, the evidence establishes that HPD had assumed control over the gas account. Thus, it could have turned on the gas or attempted to correct the problem. However, HPD never sent any repair person to the premises to attempt to fix the gas problem or to learn the extent of the damage of the gas leak. Thus, the record reflects that the lack of gas, heat and hot water was the result of respondent

HPD's own actions. In such circumstances, the lack of gas, heat and hot water cannot be a basis for the vacate order, and items 3, 4 and 5 of the vacate order are not valid violations.

While the testimony presented at the hearing demonstrated that there was an accumulation of garbage in the cellar of the premises, the court finds that those conditions, as testified to, do not constitute conditions that are "unfit for human habitation." Indeed, Mr. Thomasel's opinion regarding the property in the cellar is subjective. What Mr. Thomasel considers to be garbage, may be valuable and significant household items to others.

Respondent HPD argues that if the vacate order is enforced, it may be able to help locate alternative housing for the petitioners. (see 18 RCNY 18-01.) Thus, according to respondent, petitioners will not suffer any irreparable harm as a result of the vacate order. The court disagrees and finds this remedy to be insufficient. It is unclear what specific alternative housing arrangements are available, and the options that were previously presented in court do not appear to be feasible or satisfactory.

In reaching this decision, the court is of the opinion that respondent HPD has, in effect, unintentionally become an agent of Deutsche Bank through its attempts to enforce the vacate order. Such conduct is improper inasmuch as HPD is not an arm of Deutsche Bank. It is also important to note that Deutsche Bank, as the plaintiff in the foreclosure action and as the owner of a foreclosed property, has a duty to maintain the foreclosed property. (see RPAPL § 1307[1]; *New York City Dept. of Hous. Preserv. & Dev. v Deutsche Bank Natl. Trust Co.*, NYLJ, Oct. 9, 2013, [Civ Ct, Richmond County 2013].) Indeed, where, as here, the bank is the purchaser of a foreclosed property, it cannot evade its responsibilities to maintain the property by failing to promptly register the property with the appropriate clerk's offices.

Accordingly, the Order to Show Cause by petitioners is granted, and it is

ORDERED, that the vacate order dated December 9, 2014 is hereby permanently vacated, and it is further

ORDERED, that Deutsche Bank National Trust Company shall, no

later than August 28, 2015, enter the subject premises located at 119-55 Farmers Blvd., Saint Albans, New York, 11412, for the purpose of making all necessary repairs to the premises. The repairs shall include all conditions listed in the vacate order issued by the respondent on December 9, 2014, which have not yet been corrected, and it is further

ORDERED, that such repairs shall take place on weekdays between the hours of 8:00 A.M. and 6:00 P.M. Petitioners and all other occupants of the premises must provide access to premises to Deutsche Bank National Trust Company and, if necessary, respondent for the purpose of permitting the repairs, and it is further

ORDERED, that Respondent HPD shall, no later than September 4, 2015, inspect the premises to ensure that the repairs have been completed. In the event Deutsche Bank has not completed the repairs, respondent HPD shall enter the premises to make the repairs, and shall have a lien for all costs of repairs done. (New York City Administrative Code §§ 27-2127[b], 27-2128.)

Deutsche Bank is reminded that this is the second order issued by this court directing it to make all the necessary repairs to the subject premises.

A copy of this order is being faxed on this date to counsel for respondent and to counsel for Deutsche Bank National Trust Company and is being mailed to the pro se petitioners.

The parties may pick up their exhibits that were admitted into evidence in courtroom 140. The parties shall contact the Part Clerk at (718) 298-1617 prior to coming to retrieve the exhibits.

Date: August 6, 2015

CARMEN R. VELASQUEZ, J.S.C.