

<b>Infinite Green, Inc. v Town of Babylon</b>
2018 NY Slip Op 33096(U)
November 16, 2018
Supreme Court, Suffolk County
Docket Number: 602914-2017
Judge: John H. Rouse
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INDEX NO. 602914-2017

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 12 - SUFFOLK COUNTY

**PRESENT:**

Hon. John H. Rouse  
Acting Supreme Court Justice

MOTION DATE: 06/30/2017  
ADJ. DATE: 07/11/2018  
Mot. Seq. 001-MG

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INFINITE GREEN, INC.,

Plaintiff

-against-

**DECISION & ORDER**

TOWN OF BABYLON, RICHARD SCHAFFER, Supervisor of the Town of  
Babylon, TOWN BOARD OF THE TOWN OF BABYLON,

Defendants

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**TO:**

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Upon the reading and filing of the following papers in this matter:

(1) Notice of Motion by Plaintiff for summary judgment on the first cause of action to its verified complaint dated May 22, 2017, Affirmation of Edward S. Raskin, Esq. for Plaintiff affirmed on May 22, 2017, the Affidavit of Dominick Artale, Secretary of Infinite Green, Inc. sworn on May 16, 2017; **Exhibit 1 Comprised of:** the Verified Complaint; Exhibit A, Town Code; Exhibit B, Accusatory Instrument dated September 26, 2014 against Infinite Green, Inc.; Exhibit C, Superceding Accusatory Instrument dated April 13, 2015 against Infinite Green, Inc.; Exhibit D, Housing Choice Voucher Program Contract and Tenancy Addendum Amendment dated October 1, 2007; Exhibit E, Second Superceding Accusatory Instrument against H.M. dated April 13, 2015; Exhibit F, Letter from Community Development Corporation of Long Island dated August 17, 2015; **Exhibit 2**, Verified Answer; **Exhibit 3**, Order of the Nassau County Supreme Court Justice, Hon. Karen Murphy, J.S.C. entered January 23, 2017, **Exhibit 4**, Certificate of

Incorporation, **Exhibit 5**, Deed, **Exhibit 6**, Certificate of Occupancy, **Exhibit 7**, Decision of the Hon. Justice John J.J. Jones, **Exhibit 8**, Verified Amended Complaint in ATM One, LLC, *et. al.* against Incorporated Village of Hempstead together with Exhibits thereto;

(2) Affirmation in Opposition by Kenneth Seidell, Esq. affirmed on June 15, 2017; and

(3) Reply Affirmation of Edward S. Raskin, Esq., for Plaintiff, affirmed on June 27, 2017 with Exhibit A attached thereto Local Law filing from the New York State Department of State and the Hempstead Rental Registration Law; and

(4) Letter dated May 16, 2018 from Plaintiff's counsel advising the court Plaintiff was discontinuing the second cause of action; it is:

**ORDERED** that the motion (Seq. #001) by Plaintiff for summary judgment on its first cause of action in the complaint is granted; and it is

**ORDERED** that based upon the letter of Plaintiff's counsel dated May 16, 2018 the Second Cause of Action is discontinued; and it is further

**ORDERED** that the Defendants are enjoined from enforcing the requirements of Babylon Town Code Chapter 153, Article I, to the extent it requires: the Plaintiff to submit to an inspection by either the Building Inspector or requires the Plaintiff to produce a certification of compliance after an inspection by a state licensed professional engineer as a condition of issuing a rental permit; and it is further

**ORDERED** that the case is set down for **inquest on Wednesday, Jan. 9, 2019** at 2:00 o'clock in the afternoon in Part 12 of the New York State Supreme Court held in and for the County of Suffolk on the second floor of the Supreme Court Annex at 1 Court Street, Riverhead, New York, whereupon Plaintiff's counsel shall produce such time and billing records and other evidence that may support his claims for attorney's fees, and bring with him a proposed judgment that provides for the relief awarded herein with the amount of attorney's fees left blank, in the alternative if counsel can agree upon the award of legal fees then such stipulation may be filed with the court together with a proposed judgment and any counter judgment in accordance with 22 NYCRR § 202.48 they may do so; and it is further

**ORDERED** that Plaintiff shall serve upon the Defendants a copy of this decision and order together with notice of entry as soon as practicable.

#### **DECISION**

Plaintiff has discontinued so much of its action against the Defendants as asserted a violation of New York State Law under Count Two of its complaint. Under these circumstances, the court is presented with the claim by Plaintiff that the Defendant's rental inspection law is unconstitutional. *Sokolov v. Freeport*, 52 N.Y.2d 341 (1981); *Brookhaven v. Ronkoma Realty*

*Corp.*, 154 AD2d 665 (1989); *ATM One, LLC v Incorporated Vil. of Hempstead*, 91 A.D.3d 585 (2<sup>nd</sup> Dept. 2012); *But See Mamakos v. Town of Huntington*, 2017 U.S. Dist. LEXIS 103706 / 2017 WL 2861719 / 16-CV-5775(SJF)(GRB) (E.D.N.Y. July 5, 2017) affirmed *Mamakos v. Town of Huntington*, 715 Fed. Appx. 77, 2018 U.S. App. LEXIS 6730 (March 19, 2018), petition for writ of certiorari denied October 1, 2018. Plaintiff moves for summary judgment on the First Cause of Action.

#### The Complaint

Defendant in this declaratory judgment action alleges that it contracted with the Community Development Corporation of Long Island (CDCLI) under the Housing Choice Voucher Program. CDCLI administers the Housing Choice Voucher program on behalf of New York State and is the Local Administrator for the New York State Homes & Community Renewal (HCR) Housing Choice Voucher program. CDCLI has been designated as a Public Housing Agency (PHA) by HUD. CDCLI oversees tenant eligibility, lease-up, annual re-certification, as well as Housing Quality Standards inspections of all units. *See 42 U.S.C. § 1437f and 24 CFR § 982.405.* Plaintiff further alleges that when CDCLI learned that Plaintiff did not have a rental permit as required by the Defendants it cancelled the rental assistance it had been paying and Plaintiff alleges it has thereby been deprived of its right to rent the subject premises as a landlord. Plaintiff further alleges that Defendants require Plaintiff to submit to a search of its premises to obtain a rental permit and that this is a violation of the *Fourth Amendment to the United States Constitution and Article 1 § 12 of the New York State Constitution* and seeks redress under *CPLR § 3001; and 42 USC §§ 1983 and 1988.*

This presents two separate questions to the court. The first question is whether the United States Department of Housing and Urban Development can condition rental subsidies paid with tax dollars upon rental inspections of the housing units it elects to subsidize. HUD, HCR, and CDCLI have *not* been joined in this action and this component of the Plaintiff's claim cannot be adequately addressed and must be dismissed for failure to join an indispensable party. *CPLR § 1003.* This leaves the second question that is independent of whether federal rental subsidies may be conditioned upon an inspection.

The second question is whether the rental inspection law violates either the New York State or Federal Constitution such that Defendants should be enjoined from enforcing the local law, *Chapter 153 of the Babylon Town Code*; and whether reasonable attorney's fees should be awarded to the Plaintiff pursuant to *42 USC § 1988* upon this declaratory judgment action.

Chapter 153 of the Babylon Town Code provides in pertinent part:

#### §153-2

A. Occupancy with a rental permit. ***It shall be unlawful for the owner***, owner's agent, real estate agent or any person with apparent authority over any residential building, apartment building, multiple-residence building, senior-citizen multiple-residence building, motels, extended-stay residences, bed-and-breakfasts and any units contained therein ***to allow, permit or suffer the occupancy of any***

**residential building**, apartment building, multiple-residence building, senior-citizen multiple-residence building, motels, extended-stay residences, bed-and-breakfasts and any units contained therein, which is not the actual residence of the owner, ***without having first obtained a rental permit pursuant to this article***. It shall be immaterial whether or not rent or any other consideration is paid to the owner by the occupant of the dwelling unit.

B. Occupancy without a rental permit. It shall be unlawful for a person to occupy any residential building, apartment building, multiple-residence building, senior-citizen multiple-residence building, motels, extended-stay residences, bed-and-breakfasts and any units contained therein until a valid rental permit has been issued for that residential building, apartment building, multiple-residence building, senior-citizen multiple-residence building, motels, extended stay residences, bed-and-breakfasts and any units contained therein, pursuant to this article. It shall be immaterial whether or not rent or any other consideration is paid to the owner by the occupant(s) of the dwelling unit or that the person occupying said residential building, apartment building, multiple-residence building, senior-citizen multiple-residence building, motels, extended-stay residences, bed-and-breakfasts and any units contained therein had knowledge there was not a valid permit.

C. Offeror's responsibility prior to rental/listing: It shall be unlawful and a violation of this article for any person, broker or agent, to list, show or otherwise offer for lease, rent or occupancy any dwelling unit for which a current rental permit has not been issued. It shall be the person, broker or agent's duty to verify the existence of a valid permit before listing, showing or otherwise offering for lease, rent or occupancy any building or dwelling unit in the Town of Babylon.

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A. ***No permit or renewal thereof shall be issued*** under any application ***unless*** the property shall be in compliance with all the provisions of the Code of the Town of Babylon, the New York State Building Code, New York State Property Maintenance Code, the sanitary and housing regulations of the County of Suffolk and the laws of the County of Suffolk and State of New York.

B. ***Prior to the issuance of any such permit or renewal thereof, the property owner shall provide a certification from a licensed professional engineer or a Town building inspector that the property which is the subject of the application is in compliance with all the provisions of the Code of the Town of Babylon, the laws and sanitary and housing regulations of the County of Suffolk and the laws of the State of New York.***

Plaintiff contends that the requirement that an inspection necessary for such certification, either by the Building Inspector or by a licensed professional engineer selected by the Plaintiff is an unconstitutional search under both the *Fourth Amendment to the United States and Article 1 § 12 of the New York State Constitution*. Plaintiff contends this is a Hobson's choice of either accept an unconstitutional search of its residence or be unconstitutionally denied the right to rent it. *Sokolov v. Freeport*, 52 N.Y.2d 341 (1981).

Defendants argue that the rental inspection law is not unconstitutional because the Plaintiff is not required to submit to an inspection by the Building Inspector, but can choose instead to submit to an inspection by Defendants' proxy, a state licensed professional engineer,<sup>1</sup> of the owner's choosing. This very question was presented in *ATM One, LLC v Incorporated Vil. of Hempstead*, 91 A.D.3d 585 (2nd Dept. 2012).

In *ATM One* that court, as here, was presented with a the local law that allowed the property owner to escape an inspection/search of his premises by the building inspector by selecting someone from a class of inspectors, a licensed architect or a licensed professional engineer, to conduct the inspection/search on behalf of the municipality and certify the premises to be in compliance with the law. The court held this statutory scheme was unconstitutional. *ATM One, LLC v Incorporated Vil. of Hempstead*, 91 A.D.3d 585(2nd Dept. 2012).

However, in a decision this year the Second Circuit Court of Appeals appears to reach a different conclusion. *Mamakos v. Town of Huntington*, 715 Fed. Appx. 77, 2018 U.S. App. LEXIS 6730, WL 1377125 (March 19, 2018), petition for writ of certiorari denied October 1, 2018. In *Mamakos* the 2nd Circuit stated that because the property owner could obtain an inspection by a third-party licensed engineer or architect of the owner's choosing then the problem of a mandated and unconstitutional search was obviated by the use of a third-party neutral<sup>2</sup> even though required by the municipal defendant.

This court, however, is bound by the determination of the Appellate Division of the Supreme Court as made in *ATM One, LLC v Incorporated Vil. of Hempstead*, 91 A.D.3d 585, 936 N.Y.S.2d 263 (2nd Dept. 2012). See *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 476 N.Y.S.2d 918 (1984), trial level courts bound by precedent of the Appellate Division of the Supreme Court. Unless and until either the New York Court of Appeals, the Appellate Division of the New York State Supreme Court for the Second Department, or the United States Supreme Court determines otherwise this court cannot choose to follow other conflicting precedent,

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<sup>1</sup>Education Law Article 145 requires that professional engineers be licensed by the state, and they are regulated by the Commissioner of Education, 8 NYCRR Part 68.

<sup>2</sup> The Supreme Court in *Carpenter v. United States*, 138 S. Ct. 2206, 201 L. Ed. 2d 507, 2018 U.S. LEXIS 3844, 86 U.S.L.W. (June 22, 2018) limited the third-party doctrine. This Court finds no precedent other than *Mamakos v. Town of Huntington* for the proposition that the state can mandate a third-party perform a search with neither warrant nor probable cause, conduct the search through such agent, and remain in conformity with the restrictions of the Fourth Amendment to the U.S. Constitution.

federal or state. See *Seltzer v. N.Y. State Democratic Comm.*, 293 A.D.2d 172, 743 N.Y.S.2d 565 (2002).

Accordingly, in conformity with the binding precedent of *ATM One, LLC v Incorporated Vil. of Hempstead*, 91 A.D.3d 585 (2nd Dept. 2012), the Plaintiff's motion for summary judgment on the first cause of action is granted to the extent provided in the orders above. Nothing, however, in this decision prevents a tenant from giving his consent to an inspection of the residence he is occupying, or from enforcing the warranty of habitability as provided by RPAPL § 235-b. Defendants' local law, to the extent it conditions the issuance of a required rental permit upon a search of the residence without a warrant and without probable cause, that is unconstitutional. *ATM One, LLC v Incorporated Vil. of Hempstead*, 91 A.D.3d 585 (2nd Dept. 2012).

It is notable that the local law at issue also makes it illegal for tenants to continue to occupy their residences unless the premises are subject to a government mandated search every two years. *Babylon Town Code 153-2 (B)*. However, where homes are concerned individuals enjoy Fourth Amendment protection without fee simple title. Tenants and resident family members—though they have no legal title—have standing to complain about searches of the homes in which they live. See *Carpenter v. United States*, 138 S. Ct. 2206 at 2270, 201 L. Ed. 2d 507 (2018) Justice Gorsuch dissenting, citing *Chapman v. United States*, 365 U. S. 610, 616-617, 81 S. Ct. 776, 5 L. Ed. 2d 828 (1961), *Bumper v. North Carolina*, 391 U. S. 543, 548, n. 11, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968). There is no authority to treat tenants as citizens with lesser Fourth Amendment rights than homeowners. This action has not been brought by a tenant asserting the tenant's Fourth Amendment rights and these considerations do not form the basis of this court's decision, as such these passing remarks are judicial lagniappe for separate consideration by the parties as they see fit.

Plaintiff as a prevailing party on a 42 USC §1983 claim is entitled to an award of attorney's fees under 42 USC §1988. *Lefemine v. Wideman*, 568 U.S. 1 (2012). The Defendants do not contend that any special circumstances exist that render such an award unjust. Accordingly, the court will conduct an inquest on the issue of attorney's fees unless the parties can stipulate to the fair value of the services provided by Plaintiff's counsel on so much of the case as pertains to Plaintiff's constitutional claim. See *Perdue v. Kenny A.*, 559 U.S. 542 (2010) *identifying those facts and circumstances to be considered by the court in determining the proper award of attorney's fees.*

The foregoing shall constitute the decision and order of the court.

Dated: November 16, 2018

  
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JOHN H. ROUSE, Acting J.S.C.

NON-FINAL DISPOSITION