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[\*1]

<b>Lozito v Celtic Park Mgt.</b>
2023 NY Slip Op 50391(U) [78 Misc 3d 1230(A)]
Decided on April 25, 2023
Civil Court Of The City Of New York, Queens County
Guthrie, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on April 25, 2023

Civil Court of the City of New York, Queens County

<p><b>Dean Lozito, Petitioner,</b></p> <p><b>against</b></p> <p><b>Celtic Park Management, Miriam Faradey, Respondents,</b> <b>and Department of Housing Preservation and Development,</b> <b>Respondent.</b></p>
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Index No. HP 584/22

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Clinton J. Guthrie, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of [\*2]respondents' order to show cause for a stay of the imposition of civil penalties and to implead the shareholder, *and* petitioner's motion for summary judgment and other relief:

### **Papers Numbered**

Order to Show Cause & Affirmation/Exhibits Annexed 1 (NYSCEF No.4-12)  
Notice of Cross-Motion & Affirmation/Affidavit/Exhibits Annexed 2 (NYSCEF #13-15)  
Reply/Opposition Affirmation & Affidavit Annexed 3 (NYSCEF #16-19)

Upon the foregoing cited papers, the decision and order on respondents' order to show cause and petitioner's cross motion, consolidated for determination herein, is as follows.

### **PROCEDURAL HISTORY**

This HP action seeking an order to correct and a finding of harassment was commenced in September 2022. On the first court date, October 3, 2022, the court issued an order dismissing petitioner's harassment claims pursuant to CPLR § 409(b). Following additional adjournments for inspections and motion practice, the court heard argument on respondents Celtic Park Owners, Inc. and Metro Management Development Inc.'s motion for a stay of the imposition of civil penalties and to implead the shareholder, Enza Lozito, and petitioner's motion for summary judgment and other relief on February 17, 2023. [\[EN1\]](#) The court reserved decision on both motions and determines them herein.

### **RESPONDENTS' ORDER TO SHOW CAUSE**

Respondents seek to implead the shareholder of the subject premises, Enza Lozito, and a stay of the imposition of civil penalties on an interim basis (i.e. until the disposal of this motion). Since the court has effectively granted the interim stay of civil penalties by signing the initial order to show cause and retaining the stay until the determination of the instant motions, the prong of respondents' motion seeking the stay is granted only to the extent of acknowledging that the stay was in effect from January 4, 2023 (the date when the order to show cause was signed) until the issuance of this Decision/Order. Upon the filing of this

Decision/Order on NYSCEF, all stays are vacated.

As for the prong seeking to implead Enza Lozito, respondents assert that only Ms. Lozito, the shareholder, has the obligation, under the terms of her proprietary lease, to repair the conditions listed in the petition that constitute DHPD violations. Specifically, respondents point to relevant language in Paragraph 18 of the proprietary lease: "[t]he lessee shall keep the interior of the apartment (including interior walls, floors and ceilings []) in good repair" and "shall be solely responsible for the maintenance, repair, and replacement of plumbing...as may be necessary in the apartment." Respondents argue that this language covers the conditions alleged in the petition.

Petitioner opposes the motion, arguing that that the conditions in need of repair (and that are subject to DHPD violations) are not his responsibility under the proprietary lease, but instead relate to work that was improperly and/or incompletely done by respondents. Petitioner also disputes that he has impeded access to the apartment for repairs. Annexed to the opposition papers are photographs of holes purportedly cut into the apartment's walls to repair piping in 2018.

In reply, respondents (specifically through an affidavit of Miriam Fardey, the manager for Celtic Park Owners, Inc.), disputes petitioner's assertions and state that petitioner caused the problems at issue by: 1) improperly installing an additional lock in the front door without permission; and 2) impermissibly installing flooring without permission. Ms. Fardey also disputes that the photographs annexed to the opposition papers show the area where the prior piping and plumbing repair work was done.

Under Civil Court Act § 110(d), "on the application of any party the court may join any other person or city department as a party in order to effectuate proper housing maintenance standards and to promote the public interest." Moreover, CPLR § 401, which applies to special proceedings, permits joinder/impleader "by leave of court." *See e.g. 170 W. 85th Street Tenants Assn. v. Cruz*, 173 AD3d 338, 340 [1st Dept 1991]; [Boston Props. v. Taveras](#), 60 Misc 3d 398, 401 [Civ Ct, Bronx County 2018]. Therefore, the court has the power to join/implead a person as a party if it would effectuate proper housing standards. Pursuant to NYC Admin. Code § 27-2004(a)(45), an "owner" is "the owner or owners of the freehold of the premises or lesser estate therein, a mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, agent, or any other person, firm, or corporation, directly or indirectly in control of a dwelling." [See Leung v. Zi Chang Realty Corp.](#), 74 Misc 3d 126[A], 2022 NY Slip Op 50034[U] [App Term, 1st Dept 2021].

In a cooperative, the "cooperative corporation is the sole owner of the land, structures and facilities, while the individual shareholder through the proprietary lease receives the right to occupy the space in the premises to which his or her shares are allocated." *Frisch v. Bellmarc Management, Inc.*, 190 AD2d 383, 387 [1st Dept 1997]. Accordingly, cooperative shareholders may avail themselves of the statutory warranty of habitability. *Id.* at 384-385; [Musey v. 425 E. 86 Apts. Corp., 154 AD3d 401](#), 405 [1st Dept 2017]. Nonetheless, the definition of "owner" in the Housing Maintenance Code is expansive and includes a "lessee directly or indirectly in control of a dwelling" within its ambit. *See e.g. Leung*, 2022 NY Slip Op 50034[U], \*1; *Dept. of Hous. Preserv. & Dev. v. Livingston*, 169 Misc 2d 660, 661 [App Term, 2d Dept, 2d & 11th Jud Dists 1996]. In the instant circumstances, the court finds a sufficient basis for the shareholder and proprietary lessee of the subject premises, Enza Lozito, to be joined pursuant to Civil Court Act § 110(d). The joinder is warranted to "effectuate proper housing standards," particularly in light of the disputed issues of responsibility under the proprietary lease. *See Musey*, 154 AD3d at 405.

Consequently, the court grants the second prong of respondents' order to show cause to the extent of joining Enza Lozito as a third-party respondent. Although respondents' counsel served the order to show cause upon Enza Lozito as required by the court, it shall serve a copy of this Decision/Order and the Verified Third-Party Petition (respondents' Exhibit D) upon Enza Lozito by certified mail, return receipt *and* first-class mail no later than May 3, 2023.

### PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Petitioner, who is Enza Lozito's son, moves for summary judgment and seeks an order requiring respondents to correct the open DHPD violations at respondents' sole expense. Petitioner argues that respondents have failed to raise any triable issue of fact as to the existence of the violations or disputing responsibility for all relevant repairs under the proprietary lease. The motion is supported by an affidavit that raises the same facts as those in opposition to the motion to implead Ms. Lozito, as well as the aforementioned photographs of the cut-out walls. Respondents oppose the motion, primarily with Ms. Fardey's affidavit, which disputes [\*3] respondents' responsibility for the repairs under the proprietary lease and describes impermissible actions undertaken by petitioner to cause the conditions (Page 3 *supra*).

As for the DHPD violations, the court takes judicial notice of those contained on the DHPD website pursuant to Multiple Dwelling Law § 328(3). The open violations constitute

prima facie evidence of the underlying conditions exist and are uncorrected. *See Dept. of Hous. Preserv. & Dev. v. Knoll*, 120 Misc 2d 813, 814 [App Term, 2d Dept 1983]. Therefore, an order to correct would be warranted if respondents failed to raise a viable defense. *See Torres v. Sedgwick Ave. Dignity Devs.*, 2021 NY Slip Op 33000[U] [Civ Ct, Bronx County 2021] [citing CPLR § 409(b)]; [D'Agostino v. Forty-Three E. Equities Corp.](#), 12 Misc 3d 486 [Civ Ct, NY County 2006], *affd on other grounds*, 16 Misc 3d 59 [App Term, 1st Dept 2007]. Here, the court finds that respondents' defense that the shareholder (who is now joined as a party pursuant to this Decision/Order) is ultimately responsible for the repair of the violations under the proprietary lease is sufficiently articulated and supported by evidence to necessitate a trial on disputed issues of fact. *See D'Agostino*, 16 Misc 3d at 62 ["The terms of the lease will govern" [ultimate responsibility for repairs]]; [see also Igbayo v. Kings and Queens Holdings, LLC](#), 74 Misc 3d 136[A]; 2022 NY Slip Op 50295[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2022]. Therefore, petitioner's motion for summary judgment is denied.

## CONCLUSION

For the foregoing reasons, respondents' order to show cause is granted to the extent stated herein. Petitioner's motion for summary judgment is denied. This case will be restored to the Part C calendar for pretrial conference on June 21, 2023 at 9:30 AM. This Decision/Order will be filed to NYSCEF.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: April 25, 2023  
Queens, New York  
HON. CLINTON J. GUTHRIE  
J.H.C.

## Footnotes

**Footnote 1:** The court notes that Celtic Park Owners, Inc. and Metro Management Development Inc. are not specifically named as respondents in the petition. The petition names "Celtic Park Management" and Miriam Faradey" as owner-respondents.

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