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ANALYSIS

A Tree Grows on the Lower East Side



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Analysis



By Joseph A. Fonti and Benjamin F. Burry | November 01, 2023 at 10:00 AM

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The Children's Magical Garden

The Children's Magical Garden is a beloved community garden at the corner of Norfolk and Stanton in the Lower East Side of Manhattan. More than 40 years ago, the garden was founded by neighborhood residents who were unsettled by piles of garbage, used needles and discarded waste piled up on an abandoned corner lot across from an elementary school.

Together, these residents formed the Children's Magical Garden, cleared the site and transformed the land into a thriving community garden that, since 1982, has provided afterschool and summer programs for thousands of children to safely play and learn about nature. The garden has been recognized by the New York City Council as a "neighborhood treasure" that has played a "vital role in transforming the Lower East Side environment."

Summary of the Dispute

The garden consists of three adjoining lots. In 2013, a real estate developer claimed to own the central lot of the garden and announced plans to bulldoze it to build a seven-story private residence. While fighting the developer's ownership claim on that contested lot, the garden attempted to continue its community garden programming on the two adjoining lots owned by the city and licensed to the garden.

In response, the developer consistently interfered with the garden on the neighboring lots by building and maintaining fencing, dumping construction debris, cutting down tree branches and plants and drilling into the soil around the its old growth trees, vegetables and flower gardens.

At times, the developer's interference was so severe that the garden was forced to shut down operations. Moreover, the encroachments threatened to destroy its prized 40-foot-tall mulberry tree that is at the heart of the garden and central to its ecosystem.

The developer's actions gave rise to sprawling litigation over the past decade that now spans multiple lawsuits. The developer's primary argument in defense of these actions is that the garden lacks standing to complain because it is a mere licensee, and the city, which owns the land, did not bring formal legal action against the developer.

The developer's arguments have been unsuccessful. In February and December 2021, the Commercial Division of New York Supreme Court, New York County, rejected the developer's lack of standing defense. *Children's Magical Garden v. Marom*, 2021 WL 6114009, 2021 N.Y. Slip Op. 32814(U) (N.Y. Sup. Ct. Dec. 27, 2021) & Index No. 654960/2019, at NYSCEF 138 (N.Y. Sup. Ct. May 4, 2021) (transcript of February 2021 ruling), *aff'd* 211 A.D.3d 524 (1st Dep't 2022).

Most recently, on Sept. 30, 2023, the court granted a permanent injunction protecting the city-owned mulberry tree in the garden from the developer's trespass. *Children's Magical Garden v. Marom*, No. 654960/2019, 2023 WL 6388180 (N.Y. Sup. Ct. Sep. 30, 2023).

The decisions are informative because they address how common law doctrines concerning land use, trespass and injunctive relief apply when private actors with competing interests clash over interference and disturbances on city-owned property.

The decisions may also help inform non-profit and community organizations on how to protect critical land and ecosystems against encroachment.

A Licensee Can Hold an Intruder Liable For Unlawfully Encroaching on City Land

In November 2020, the garden moved for summary judgment against the developer on its trespass claim. It primarily argued that it could hold the developer liable as a trespasser because the developer was an unlawful intruder disrupting its peaceful occupancy and could not demonstrate a superior right to the property.

This argument flows from a New York Court of Appeals case from 1912, *Beardslee v. New Berlin Light & Power*, 207 N.Y. 34, 40–41 (1912). The garden argued that the court should follow the common law principles articulated in *Beardslee* and reject the developer's contention that it lacked standing. To rule

otherwise, the garden argued, would mean that intruders could intentionally and illegally seize property from lawful occupants—with no right to do so—and leave the disposed victim with no legal recourse.

In a decision from the bench on Feb. 21, 2021, and written decision on Dec. 27, 2021, the Supreme Court agreed with the garden and granted it summary judgment as to liability on its trespass claim. The court rejected the developer's argument that, as a mere licensee, the garden had no standing to stop the developer from seizing possession. This is because the garden "w[as] physically in possession" of the property and held a license from the city to operate its community garden, which constituted "superior rights" to the developer. *Children's Magical Garden*, Index No. 654960/2019, at NYSCEF 138.

The court also explained that the developer did not even attempt to "justify the encroachment with its own title," as *Beardslee* required, for an intruder to avoid liability for trespass. *Children's Magical Garden*, 2021 WL 6114009, at *4.

The developer appealed and the First Department affirmed, holding that "defendants intruded on the property" and failed to offer any facts to "justify their encroachment." *Children's Magical Garden v. Marom*, 211 A.D.3d 524 (1st Dep't 2022).

These decisions finding that the garden had legal standing to protect its use of the city's land as a licensee set the stage for the important decision issued in September 2023 that permanently enjoined the developer from destroying a beloved mulberry tree on the property.

Threatened Destruction of Garden Ecosystem Constitutes Irreparable Harm For Permanent Injunction

Despite being liable as a trespasser onto city-owned lots, the developer continued its trespass and refused to remove encroachments, threatening the life of the garden's mulberry tree.

Based on the continued trespass and the imminent threat presented to the tree, the garden moved for summary judgment on a permanent injunction to enjoin the developer's encroachments, affirmatively require the developer to remove fencing from the lots, and pay arborist fees to remediate the conditions that threatened the life of the mulberry tree.

On Sept. 30, 2023, the Supreme Court granted the permanent injunction along with other relief sought by the Garden. *Children's Magical Garden v. Marom*, No. 654960/2019, 2023 WL 6388180 (N.Y. Sup. Ct. Sep. 30, 2023). Of note is that the court found that the garden had established the necessary element of a threatened "irreparable harm" in two ways.

First, the developer's obstruction that would ultimately kill the mulberry tree and cause it to come crashing down in a high-traffic pedestrian area, "poses the potential risk of hurting or even killing passerby."

Second, the injunction is necessary to protect the Mulberry Tree because it provides “significant shade and climate control for the garden . . . and forms an integral part of its habitat and ecosystem, which can only be achieved by growing a tree to maturity over the course of many years.”

The trespass and permanent injunction summary judgment rulings offer a cautionary tale for real estate developers disrupting or encroaching on trees or environmental ecosystems, and a potential roadmap for not-profit or community organizations with a vested interest in protecting precious land and ecosystems.

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