

First Department Affirms BFA's Summary Judgment Win for Children's Magical Garden

BFA has achieved another important win for pro bono client Children's Magical Garden, Inc. Children's Magical Garden is a beloved and historic community garden across the street from P.S. 20 Elementary School in the Lower East Side of Manhattan.

In 2019, the Garden filed a lawsuit against real estate developer David Marom and his company, the Horizon Group, who have sought to seize a piece of the Garden and bulldoze it. The Garden alleges that as part of his campaign to bully and harass the Garden volunteers, Marom unlawfully built encroachments on two of the Garden's lots; launched raids onto the Garden property to destroy plants and Garden supplies; and unloaded dozens of containers filled with rotting garbage onto their beloved community garden, forcing the Garden to cancel events and programming.

As previously covered, on December 27, 2021, Justice Andrea Masley of the Commercial Division of New York Supreme Court, New York County, granted the Garden's motion for summary judgment on its trespass claim. (See [BFA Wins Summary Judgment for Children's Magical Garden](#).) Marom appealed that decision on the sole issue of whether the Garden lacked standing to sue for trespass because it is a "mere licensee" and the lots at issue are owned by the New York City Parks Department.

On December 15, 2022, the Appellate Division, First Department unanimously affirmed the Supreme Court's decision granting the Garden summary judgment on its trespass claim. The First Department held that the Garden can recover for trespass because it had shown that "the City had transferred exclusive possession and use of the property to [the Garden], and that defendants intruded on the property without [the Garden]'s permission," while Defendants failed to "justify their encroachment on lots."

The First Department's decision affirmed the significant result achieved by BFA in the Supreme Court, with the Supreme Court holding that a community garden without ownership or a lease can still protect itself from trespassers: "We reject defendant's argument that because plaintiff was a licensee and not a lessee, it did not have standing to maintain a trespass action."

This decision follows the Supreme Court's October 5, 2022 ruling that granted BFA's motion to sanction David Marom for having "willfully destroyed" evidence about his

involvement in an April 2019 attack against the Garden where workers cut down trees, destroyed plants, smashed Garden supplies, and dumped at least fifty large traffic barriers filled with rotting garbage, construction debris, and broken glass onto the property. (See [BFA Proves NYC Developer “Willfully Destroyed” Evidence And Wins Spoliation Sanctions.](#))

Children’s Magical Garden, Inc. is represented by Joseph A. Fonti and Benjamin F. Burry, along with their co-counsel at Sidley Austin LLP. Benjamin F. Burry has represented Children’s Magical Garden since 2014 in a series of lawsuits against real estate developers who have sought to interfere with and seize pieces of the historic community garden.