

Mason v Department of Bldgs. of City of N.Y.

2001 NY Slip Op 30086(U)

March 12, 2001

Supreme Court, New York County

Docket Number: 105743/00

Judge: Diane A. Lebedeff

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. DIANE A. LEBEDEFF PART 8
Justice

Mason,

The Dept. of Buildings
of the City of New York,

INDEX NO. 105743/06
MOTION DATE 11/20/00
MOTION SEQ. NO. 002
MOTION CAL. NO. 9

The following papers, numbered 1 to _____ were read on this motion to/for strike

Petition
Notice of ~~Motion~~ / Order to Show Cause — Affidavits — Exhibits ...
X-motion
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE

J.S.C.

DATED:

Dated: _____

MAR 12 2001

DR

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8
-----X

ROBERT MASON and RPM ELECTRONIC SOUND
STUDIOS, INC.,

Petitioners,

For a judgment pursuant to Article 78 of the CPLR,

-against-

Index No. 105743/00
Mot. Seq. Nos. 002
and 003

THE DEPARTMENT OF BUILDINGS OF THE CITY
OF NEW YORK, ENVIRONMENTAL CONTROL
OF THE CITY OF NEW YORK and 12/12 REALTY
ASSOCIATES,

Respondents.

-----X

DIANE A. LEBEDEFF, J.:

Motion sequence numbers 002 and 003 are consolidated herein for disposition.

Petitioners Robert Mason and RPM Electronic Sound Studio, Inc. ("RPM"), bring an Article 78 proceeding seeking a judgment vacating the determination of respondent Environmental Control Board of the City of New York ("ECB") which found petitioners' use of the subject premises was not a valid "home occupation" allowed by the Certificate of Occupancy ("C of O").

Respondent 12/12 Realty Associates ("Landlord") and co-respondents ECB and the Department of Buildings for the City of New York ("DOB"; where applicable ECB and DOB shall hereinafter collectively be referred to as "City respondents"), instead of answering the petition, have moved and cross moved for an order striking certain allegations of the petition and directing petitioners to serve an amended petition providing a more definite statement.

Additionally, the Landlord seeks transfer of this proceeding to the Appellate Division on

substantial evidence grounds.

Petitioners, in opposition to Landlord's motion and City respondents' cross-motion, cross move for an order consolidating this Article 78 proceeding with a pending declaratory judgment action entitled *Robert Mason and RPM Electronic Sound Studios, Inc., v. 12/12 Realty Associates*, Index No. 123702/99.

The respondent Landlord is the owner of the 11th floor condominium unit ("loft"), at a building known as 10-14 East 12th Street. The petitioner Mason is the residential tenant of the subject loft where he also operates a sound studio through his wholly owned business entity RPM. Mason has lived in the loft for approximately 24 years and has operated his recording studio as a "home occupation" pursuant to Zoning Resolution §§12-10 and 15-13.

This Article 78 proceeding arises out of a complaint by Landlord resulting in an inspection of the subject loft by an inspector with the DOB. A notice of violation ("NOV") was issued on the ground that the commercial portion of the joint living and working space exceeded the floor area limitation imposed by the Zoning Resolution on such home occupation use. A hearing was held before an ECBA Administrative Law Judge ("ALJ"). The landlord was permitted to intervene. During the hearing, the DOB withdrew that portion of the allegation relating to floor space and proceeded with its case based upon impermissible home use. At the hearing, which proceeded over three hearing days, testimony was given and evidence was taken. The ALJ found the petitioners' use of the subject premises, in operating a sound recording studio for rent to outside musicians, to be contrary to the provisions of the Zoning Resolution regarding home occupations and thus contrary to the use permitted by the C of O. The ALJ's recommended decision and order was affirmed by the ECB's Board.

The petition raises various grounds for vacatur of the ECB's determination, including, *inter alia*, that it was predicated upon an incorrect factual determination that the petitioners had stipulated they "rented out" the premises to other musicians who did not reside there, that the *ad hoc* amendment to the NOV violated due process by denying petitioner fair notice, and that the ALJ violated due process by permitting the submission of documents and the presentation of witnesses that were not previously disclosed.

With respect to the City respondents' and Landlord's motions for an order striking certain allegations of the petition and directing petitioners to serve an amended petition providing a more definite statement, the petition is 39 pages consisting of 141 separately numbered paragraphs. The petition goes well beyond the proceeding and record before the ECB and includes the approximate 20 year history between petitioners and their Landlord.

The Landlord also seeks transfer of the Article 78 proceeding to the Appellate Division maintaining that a substantial evidence issue is involved and while the City respondents do not take a position as to transfer, they agree that this Article 78 involves a substantial evidence question.

Petitioners, to the contrary, argue that although the ECB's determination was after a "quasi-judicial" hearing, the only issues raised in their petition concern claims that the ECB acted in an arbitrary and capricious manner. Petitioners maintain that the ALJ's sole basis for the decision was an incorrect finding that petitioners had stipulated to the effect that they were "renting out" the sound studio and, therefore, the only issue is whether ECB's construction of the stipulation was arbitrary and capricious.

The determination of the ECB affirming the decision and order of the ALJ, however, indicates that it was based upon the voluminous record before it and that it was not persuaded by

petitioners' claim "that he works with musicians who record music at the premises, providing them with technical expertise as well as a technically proficient sound recording studio." Clearly, the ECB's determination was based, in part, upon substantial evidence and not solely upon its interpretation of a stipulation. Since the petition does raise a substantial evidence question, although the remainder of the petition raises other issues, such issues would not result in termination of the proceeding, therefore, pursuant to CPLR §7804(g), this matter must be transferred to the Appellate Division (*Matter of McKinnon [Bd. of Education North Bellmore Union Free School District]*, 273 A.D.2d 240 [2d Dept. 2000]).

While portions of the petition could be stricken to the extent that it is outside the bounds of the administrative record, respondents' motion and cross-motion, are, nevertheless, denied in the interest of judicial economy. In the event that the Appellate Division retains jurisdiction, the granting of the above relief could result in an incomplete record requiring remittal.

Petitioners' cross-motion to consolidate this Article 78 proceeding with the pending declaratory judgment action is denied based upon the order of transfer. It is noted that even if Article 78 proceeding were not transferred, the motion for consolidation should be denied as there are no common issues of law or fact and consolidation would result in prejudice to the City respondents.

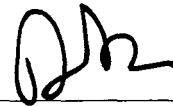
IT IS ORDERED that the application by petitioners seeking to vacate and annual a determination by the ECB is respectfully transferred to the Appellate Division, First Department, for disposition, pursuant to CPLR §7804(g). This proceeding involves an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction of law, is, on the entire record, supported by substantial evidence (CPLR §7803[4]).

The City respondents shall serve and file their answer along with the administrative record with the Clerk of the Court, within 20 days from service of a copy of this order with notice of entry thereon. The Landlord shall serve and file its answer within 10 days after the filing of the administrative record. The petitioners shall have 10 days, thereafter, in which to serve and file a reply.

The Clerk of the Court is directed to transfer the file to the Appellate Division, First Department, upon service of a copy of this order with notice of entry along with notification by attorney's affirmation that the answers, administrative record and reply have been served and filed.

This decision constitutes the order of the court.

Dated: March 12, 2001



J.S.C.