

Little Rock Dev. Corp. v New York State Off. of Mental Health
2007 NY Slip Op 34486(U)
December 19, 2007
Sup Ct, New York County
Docket Number: 113730/07
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GISCHE
Justice

PART 10

LITTLE ROCK DEVELOPMENT CORP.

INDEX NO. 113730/07

MOTION DATE _____

- v -
N.Y.S. OFFICE OF MENTAL HEALTH,
ET AL,

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED
JAN 07 2008
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/19/07

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: ☐ FINAL DISPOSITION

☒ NON-FINAL DISPOSITION

Check if appropriate: ☒ DO NOT POST

☐ REFERENCE

Supreme Court of the State of New York
County of New York: IAS 10

-----X
Little Rock Development Corp.

Plaintiff,

-against-

New York State Office of Mental Health, and
SUS Mental health Programs, Inc.,
Defendants.

Decision/Order
Index # 113730/07
Mot. Seq. # 001

-----X
Hon. Judith J. Gische:

Pursuant to CPLR §2219(A) the following papers were considered in connection with the underlying motion:

PAPERS	NUMBERED
OSC, AF affd., KDS affirm., exhibits.....	1
CM affd., exhibits.....	2
YA affd.,.....	3
EK affd. in reply , KDS affirm. in reply, exhibits.....	4
PTO affirm., exhibit.....	5

FILED
JAN 07 2008
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff, Little Rock Development Corp. ("LRDC") is seeking a preliminary injunction against the New York State Office of Mental Health ("OMH") and SUS Mental Health Programs ("SUS") (collectively "defendants"). LRDC seeks an order pending determination of this action: [1] prohibiting defendants from occupying or conducting business from the premises located at 421 Chester Street in Brooklyn, New York ("421 Chester Street"); [2] directing defendants to remove themselves from 421 Chester Street and [3] enjoining defendants from going onto, occupying or conducting business from 421 Chester Street without appropriate legal authority. Simultaneously with seeking a preliminary injunction, LRDC has commenced an action for declaratory relief,

permanent injunctive relief and a judgment voiding a certain lease which purports to give SUS to right to occupy and engage in business from 421 Chester Street.

Defendants oppose the requested preliminary relief in its entirety.

LRDC is a non-profit corporation. In November 2003 it was approved for a substantial state aid grant, in an amount exceeding \$5.5 million dollars, to pay for the construction and related costs of a residential facility at 421 Chester Street that was intended to house mentally ill persons. As part of the overall project LRDC paid a nominal amount (\$6) to become the title owner of 421 Chester Street. Title is subject to a lien in the amount of the grant and in favor of New York State and the requirements of the housing program.

The project envisions that 44 single resident occupant apartments would be constructed and that eligible mentally ill persons, meeting OMH criteria and from specific referral sources, would be housed and provided with supportive services at 421 Chester. Rents were to be set according to formulas linked to other governmental entitlement programs and leasing procedures were to follow the program protocol.

It was further envisioned that LRDC would be certified to own, operate and manage the premises once the construction was completed. LRDC had separately been operating certain scattered site housing for mentally ill persons in Brooklyn according to similar programs also maintained under the auspices of OMH.

In or about the fall of 2006, OMH began investigating certain complaints against LRDC regarding financial and management improprieties in connection with 421 Chester Street and other housing sites. In October 2006 OMH notified LRDC that its contract to manage scattered site housing would not be renewed based upon OMH's

initial findings of wrongdoing. A financial audit was thereafter conducted and a final report was issued on June 4, 2007; but only after LRDC had a chance, but declined, to comment.

The audit found serious financial misconduct by LRDC, including its use of state grant monies and loans to pay its executive director's personal expenses, lack of financial oversight to prevent such abuses, failure to maintain appropriate financial records, and failure to fulfill obligations to pay rents on behalf of its client- tenants. The OMH audit found approximately \$220,000 in ineligible expenses made by LRDC.

OMH claims that at least beginning in January 2007 it was in discussions with LRDC's then CEO, Elizabeth King, LRDC's attorney, Kofi Scott, Esq. and others about LRDC voluntarily relinquishing the deed for 421 Chester Street. Although there are factual disputes about what may or may not have been said during those communications, a barrage of e-mails and letters and acknowledged meetings confirm that there was substantial communication between OMH and LRDC during the relevant period of time.

OMH claims that on March 15, 2007 it sent a letter to LRDC and its attorney confirming that OMH intended to transfer the deed for 421 Chester Street to SUS, another service provider, with a track record of success in these type of housing projects. Notwithstanding LRDC's present denial of having received this letter, there is later e-mail communication with LRDC's attorney discussing the very same issues raised in that correspondence.

On April 16, 2007 Norman Frazier contacted OMH stating that he was the president of LRDC. Subsequent communication by Mr. Frazier identified himself as the

only one able to authorize issuance of LRDC checks. He also represented to OMH that the LRDC Board had voted to transition 421 Chester Street over to the receiving organization designated by OMH.

In May 2007 there was a series of e-mails between OMH and Elizabeth King regarding LRDC payments in connection with the construction and Mr. Frazier's authority to act on behalf of LRDC. OMH plainly stated its intention to deal with Mr. Frazier as their primary LRDC contact. No specific repudiation of Mr. Frazier's authority to act was made at that time. Mrs. King only indicated that in so doing OMH should not initiate any actions to supercede or override LRDC's established protocol. There was no articulation in any written communication of what that protocol was.

In order to permit the housing program to go forward pending legal action by OMH to enforce the state's lien and other rights with respect to 421 Chester Street, OMH asked LRDC to enter into a lease with SUS. On or about July 27, 2007 Norman Frazier, as president of LRDC, signed a lease for 421 Chester Street in favor of SUS. The lease provides for an annual rent of \$1.00. Since that time SUS has supervised the completion of the construction phase of the project and organized the property to begin leasing it to the intended population of authorized residents.

The relief sought by LRDC at this time is to prevent SUS from acting in accordance with the terms of the lease. LRDC claims that the lease is invalid because, although Norman Frazier was LRDC's president at the time of its making, he had no authority to enter into a lease. Plaintiff further claims that defendants colluded with Mr. Frazier to set him up as a "straw man" to enter into a bogus lease and obtain rights to 421 Chester Street back from LRDC without going through proper procedures to regain

title. OMH claims that the lease is valid as far as they know and that when they entered into it, they had every reason to believe that it was valid and that Mr. Frazier could sign it on LRDC's behalf. In any event, they claim that LRDC has no right to operate the premises which should now be used for their intended purpose and to serve the intended community.

DISCUSSION

In order to obtain a preliminary injunction the moving party must show: [1] a likelihood of success on the merits; [2] irreparable injury and [3] a balancing of equities in his/her favor. W.T. Grant Co. v. Srogi, 52 NY2d 496 (1981); Coinmach Corp. V. Alley Pond Owners Corp., 25 AD3d 642 (2nd dept. 2006). LRDC has not met this heavy burden and is not entitled to such relief.

Plaintiff has not shown that it will succeed on its action to set aside the lease. While conclusive proof is not required, the showing requires proof that it is more likely than not that movant will prevail in the underlying action. County of Westchester v. United Water New Rochelle, 32 AD3d 979 (2nd dept. 2006). Ruiz v. Meloney, 26 AD3d 485 (2nd dept. 2006). The disputed lease in this case appears valid on its face and was signed by someone maintaining a position of responsibility within LRDC. Although movant acknowledges Mr. Frazier had certain authority, it claims that such authority did not extend to signing the lease in question. They have not produced any LRDC records or documents in support of their position. They have not even shown that Anthony Flemming, the primary affiant was duly elected as CEO by LRDC.

Even if plaintiff's could prove that Mr. Frazier exceeded his authority, the record of evidence on this motion that OMH knew of Mr. Frazier's limited authority, much less

set him up as a "straw man" is virtually non-existent on this motion. Indeed, there are serious issues regarding whether defendants had a right to rely on Mr. Fraziers' apparent authority in making the lease. McGuire v. Parties, Picnics & Promotions, __ AD3d __ (4th dept 2007); 845 NYS2d 629.

Plaintiff has not shown irreparable harm. Although it is acknowledged that plaintiff still holds title to 421 Chester Street, it is not a conventional title holder with unfettered rights. The deed is conditioned upon OMH approval of plaintiff's operation of 421 Chester Street. OMH has unequivocally indicated that it will not give such approval based upon its findings, after audit, of LRDC's malfeasance and financial irresponsibility. Even if plaintiff is successful in invalidating the lease, it still does not have any authority at this time to operate and manage the property. Even if plaintiff is successful in resisting the transfer of the deed, an issue not directly addressable in the action, it has not shown that money damages are inadequate or that it cannot be restored to its interest in the property. Sterling Fifth Associates v. Carpententille Corp., Inc. 5 AD3d 328 (1st dept. 2004).

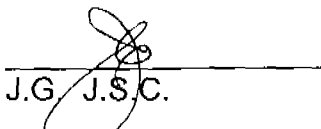
Finally, a balancing of the equities requires that no injunction be granted. Allowing SUS to operate 421 Chester Street pursuant to the lease permits OMH to make sure that the property is being used for its intended purpose, ie: to provide housing and supportive services to mentally ill persons in danger of becoming or who actually are homeless. Since the construction phase has been completed with public monies and 421 Chester Street is now ready to be rented, the equities weigh in favor of permitting tenants to move in and the property being in full operation. Granting plaintiff the injunction it seeks would result in the property remaining vacant until after the

resolution of the parties' disputes because plaintiff is not presently authorized to operate or manage 421 Chester Street. In the event plaintiff succeeds in this action and in challenging any decision by OMH that denied it the right to operate the property, it would still be required to tenant 421 Chester Street with the same population that SUS is undertaking to populate the property with at this time. No valid interest is served by issuing an injunction that prevents 421 Chester Street from being used for its intended purpose and denying housing and services to this at risk population.

Accordingly the motion for a preliminary injunction is denied in all respects. The court sets **January 31, 2008 at 9:30am** in part 10 room 122 as and for a preliminary conference. This constitutes the decision and order fo the court.

Dated: New York, NY
December 19, 2007

SO ORDERED:


J.G. J.S.C.

FILED
JAN 07 2008
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COUNTY CLERK'S OFFICE