

**West 60th St. Realty Partners v Attorney Gen. of
the State of N. Y.**

2008 NY Slip Op 31193(U)

April 21, 2008

Supreme Court, New York County

Docket Number: 0103666/2007

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 103666/2007
WEST 60TH ST. REALTY PARTNERS
vs
ATTORNEY GENERAL
Sequence Number : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

_____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*Petterson and
Cross motion decided per order*

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, a copy of a certified true and correct copy must appear in person at the Judgment Clerk's Desk (Room 1412).

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

Dated: 4/24/08

[Signature]

EMILY JANE GOODMAN J.S.C.

[Signature]

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 : I.A.S. PART 17

-----X
WEST 60TH STREET REALTY PARTNERS LLC,

Petitioner,

Index No. 103666/07

-against-

THE ATTORNEY GENERAL OF THE STATE OF
NEW YORK, INVESTMENT PROTECTION BUREAU,

Respondent.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and a copy cannot be served based hereon. To appear in person at the Judgment Clerk's Desk (Room 1412A)

-----X
EMILY JANE GOODMAN, J.S.C.:

Petitioner West 60th Street Realty Partners LLC seeks a judgment, pursuant to CPLR Article 78, vacating and modifying the decision entered on December 13, 2006 by respondent Attorney General of the State of New York, Investment Protection Bureau, or alternatively, modifying the decision so as to allow petitioner to retain purchaser's down payment. Respondent cross-moves, pursuant to CPLR 3211 (a) (10), 1001 and 217 (1), for an order dismissing the petition based on non-joinder of a necessary party and the expiration of the applicable statute of limitations, or alternatively, if that relief is denied, time to submit an answer to the petition.

On December 13, 2006, respondent issued a decision on an application entitled "In the Matter of S&R Realty Associates Unit PH-2A, The Hudson Condominium." The decision determined the disposition of a down payment made pursuant to a contract of sale

for apartment Unit PH-2A in a condominium known as the Hudson Condominium, located at 225-227 West 60th Street, New York, New York 10023. The purchase agreement was between petitioner, who is the sponsor of the Hudson Condominium, and S&R Realty Associates (S&R), as the purchaser of the apartment unit.

The purchase agreement contained a purchase price for the unit of \$2,861,500, towards which S&R made a down payment of \$295,000. After the contract was signed, S&R objected to closing on the purchase due to the presence of a vertical structural column between the floor and ceiling in the unit's kitchen area. In November 2006, S&R commenced an action against petitioner to recover the \$295,000 down payment. S&R Realty Associates v West 60th Street Realty Partners, LLC, Index No. 604051/06 (Sup Ct, NY County) (the S&R Action).

On November 21, 2006, petitioner filed an application with respondent for a determination of the disposition of the down payment. Respondent found in favor of S&R. In the conclusion section of its December 13, 2006 determination, respondent stated that “[s]ince the existence of the column is a material part of this offering, and since it was not disclosed in key portions of the documents given to the Purchaser, the Purchaser was justified in rescinding the contract and refusing to close.” Respondent directed the escrow agent to release the down payment, plus interest, to S&R within 30 days. Petitioner thereafter commenced the instant proceeding, arguing that respondent's decision was arbitrary and capricious. Prior to commencing this proceeding, Petitioner, S&R and the law firm escrow

agent entered into a stipulation in the S&R action (the Stipulation), which discontinued the action against the agent on the condition that the down payment remain in escrow pending the outcome of “a final non-appealable determination by the Court concerning distribution of the escrow funds or a stipulation executed by the parties providing for the release of the funds.” The escrow agent also consented and represented funds would “not be released absent Court direction or issuance of a final non-appealable order pertaining to the funds or a stipulation executed by the parties providing for the release of the funds.”

In the cross motion, respondent argues that this proceeding should be dismissed for failure to join S&R, as a necessary party. Respondent asserts that such joinder is no longer possible due to the expiration of the four-month statute of limitations applicable to Article 78 proceedings. Respondent argues that the four-month statute of limitations for the proceeding challenging the December 13, 2006 determination expired on April 13, 2007. The instant petition was served on respondent on March 27, 2007. Petitioner did not name S&R as a respondent in the present proceeding, nor did it attempt to serve S&R with the petition. Respondent states that, in S&R’s absence, there is no equitable way of preventing prejudice to S&R, of assuring an effective judgment, or of avoiding the risk of additional litigation between petitioner and S&R relating to the down payment. Respondent points out that, as the administrative agency that made the determination, it does not have a financial stake in the outcome of the instant proceeding, whereas S&R does have such a stake.¹

¹Respondent also contends that the record presented by petitioner is not complete as S&R’s submissions to respondent were not included by petitioner as exhibits to the

Petitioner argues that the cross motion should be denied because S&R is not a necessary party because it waived its participation in the Article 78 proceeding, and even if S&R were a necessary party, petitioner maintains that the Court should determine the petition in S&R's absence, pursuant to CPLR 1001 (b). Petitioner cites to the Stipulation, maintaining that it provides that S&R would be bound by the determination in this proceeding, and asserts that it was entered into because the Article 78 would be decided more quickly than the S&R action and because attorney's fees would be saved. Petitioner also cites to a letter written by S&R attorney Schiro, to petitioner's attorney Zinner, dated February 13, 2007, stating, in relevant part,

As of the date of this letter I have not yet received your Article 78 proceeding regarding the order from the Attorney General dated on or about December 13, 2006. I believe any resolution of the Attorney General's ruling is necessary before the lawsuit seeking return of the down payment can be adjudicated.

Obviously, if your Article 78 proceeding is denied it would be res judicata and collateral estoppel regarding the issues involved in our action seeking return of the down payment monies.

Therefore, I would suggest that we adjourn without date your request to take the deposition of the Plaintiff pending your serving and filing your Article 78 proceeding and/or obtaining disposition of said proceeding.

Petitioner cites to Zinner's response in a February 20, 2007 letter stating that "[t]his will serve to confirm receipt of your letter dated February 13, 2007 suggesting that the depositions of the parties be held in abeyance pending the outcome of the Article 78

instant petition.

proceeding. I agree with your suggestion and as a consequence hereby adjourn sine die the deposition of your client.” Zinner also affirms that after this proceeding was commenced, S&R requested a copy of the petition, which he provided, and that he called S&R to ask whether it intended to intervene in this proceeding or provide him with an affidavit supportive of petitioner’s interpretation. S&R did not return petitioner’s telephone calls.

Discussion

Pursuant to CPLR 1001 (a), “[p]ersons who . . . might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants.” Petitioner’s sole argument that S&R is not a necessary party is based on S&R’s purported waiver its participation in this proceeding. However, nothing in the Stipulation or the letters unambiguously evidences that S&R knowingly and intentionally relinquished its right to participate in this Article 78. The Stipulation and Zinner’s letter does not address the issue either way. Schiro’s letter is ambiguous. Further, Zinner’s affidavit in opposition to the motion only states that pursuant to the Stipulation, S&R agreed to be bound by this proceeding. Notably, he does not state that S&R agreed to waive participation in the proceeding in which it agreed to be bound. Accordingly, because petitioner has failed to prove that S&R relinquished its right to participate in this proceeding, S&R should have been joined as a necessary party.

The Court declines to allow the proceeding to proceed in S&R’s absence, pursuant to CPLR 1001 (b). CPLR 1001 (b) states that “[w]hen a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the

court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party.” The parties do not dispute that, because the statute of limitations expired on April 13, 2007, S&R is not subject to the jurisdiction of the court, and thus cannot be summoned by the court.

Generally, when a necessary party to an Article 78 proceeding has not been timely served, the proceeding should be dismissed, even if the administrative agency that made the underlying determination was timely served. Matter of Ferrando v New York City Board of Standards and Appeals, 12 AD3d 287 (1st Dept 2004); see also Matter of Best Payphones, Inc. v Public Serv. Commn., 34 AD3d 1068 (3d Dept 2006); Karmel v White Plains Council, 284 AD2d 464 (2d Dept 2001). There are limited exceptions. Where the statute of limitations has expired, a court can examine the five statutory factors set forth in CPLR 1001 (b) in order to determine whether it is one of the “rare cases” which should go forward in the absence of the necessary party. Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals, 5 NY3d 452, 460 (2005).

Pursuant to CPLR 1001 (b), in determining whether to allow the action to proceed, a court considers:

1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;

3. whether and by whom prejudice might have been avoided or may in the future be avoided;
4. the feasibility of a protective provision by order of the court or in the judgment; and
5. whether an effective judgment may be rendered in the absence of the person who is not joined.

While it is true that petitioner has no other remedy and although, contrary to respondent's position, the Court finds that no prejudice would accrue if a decision is made in the absence of S&R's participation,² the fact that the attorney could have joined S&R, but made a deliberate strategic decision not to do so, requires a determination that this is not one of the "rare cases" under CPLR 1001 (b). Solid Waste Services, Inc. v NYCDEP, 814 NYS2d 151 (1st Dept 2006) ("[w]hile petitioner has no further remedy, and DEP does not claim prejudice, CDRB is still an indispensable party. . . the failure to join CDRB within the statutory period resulted solely from attorney error, which is not one of the "rare case" factors enumerated in §1001 (b); Matter of Ferrando, 12 AD3d at 288 ("petitioner's nonjoinder of the premises owner was deliberate and not attributable to an "excusable mistake").

Accordingly, it is

ORDERED that the cross motion to dismiss is granted; and it is further

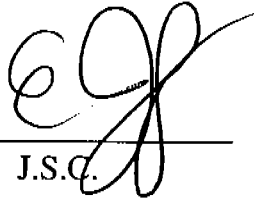
²Respondent's claim of prejudice is unfounded. As judicial review in an Article 78 proceeding is limited to the record below, S&R's presence is not needed in order to provide evidence or testimony. Moreover, although respondent does not have a financial stake in the decision, the Court is confident that the Attorney General of the State of New York is capable of making effective arguments to support any decision it has made.

ADJUDGED that the Petition is denied as moot and the proceeding is dismissed.

This constitutes the Decision, Order and Judgment of the Court.

Dated: April 21, 2008

ENTER:



J.S.C.

EMILY JANE GOODMAN

UNFILED JUDGMENT
 This judgment has not been entered by the County Clerk
 and notice of entry cannot be served based hereon. To
 obtain entry of a judgment or a certified judgment, the
 person in person at the Judgment Clerk's Desk (Room
 100)