

Island Realty Holdings, LLC v 995 Manor Rd. LLC
2008 NY Slip Op 31236(U)
April 21, 2008
Supreme Court, Richmond County
Docket Number: 0102033/2007
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.: 102033/2007
Motion No.:001, 002 and 003**

ISLAND REALTY HOLDINGS, LLC

Petitioner

against

**995 MANOR ROAD LLC,
NEW YORK CITY DEPARTMENT OF BUILDINGS,
and
JAMES MOLINARO, Borough President**

DECISION & ORDER

HON. JOSEPH J. MALTESE

Respondents

The following items were considered in the review of these motions: for a “Yellowstone” injunction, to dismiss and for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	4,7
Order to Show Cause	1
Answering Affidavits	2,5,8
Replying Affidavits	3,6,9
Exhibits	Attached to Papers

Petitioner’s motion for a *Yellowstone* injunction is dismissed as a subsequent decision of the Civil Court issued November 1, 2007 while this motion was *sub judice* renders the request for this relief moot. A decision in petitioner’s motion to compel the Department of Buildings and Borough President James Molinaro to issue a Certificate of Occupancy is reserved pending an additional hearing. A decision regarding respondents Department of Buildings and Borough President James Molinaro’s motion to dismiss petitioner’s motion is reserved pending an additional hearing. Respondent, 995 Manor Road LLC’s motion to dismiss and seeking reasonable attorneys fees is dismissed in its entirety.

Facts

This action concerns a fifteen year lease executed between petitioner, Island Realty Holdings, LLC (“Island”) and respondent, 995 Manor Road LLC (“Manor Road”). On May 16, 2007 Island presented an Order to Show Cause with a Temporary Restraining Order that, *inter alia*, prevented the running and expiration of the Thirty Day Notice to Terminate issued by respondent Manor Road. In that same Order to Show Cause Island sought to compel the New York City Department of Buildings (“DOB”) and Borough President, James Molinaro, (“Molinaro”) to issue a certificate of occupancy pursuant to a decision of the DOB Borough Commissioner approved.

According to the parties to this action the following time line can be constructed. Beginning on April 21, 2005 petitioner received the written approval of then DOB Borough Commissioner Defoe to expand a gas service station located at 995 Manor Road, Staten Island, New York to add a Dunkin’ Donuts retail store. Based on said written approval Island and Manor Road entered into a fifteen year lease agreement on May 26, 2006. According to the terms of the lease the effective date would be July 15, 2006. The terms of the lease stated in paragraph forty-one of the rider that “[t]he obligation to pay rent hereunder shall commence on the forty fifth day (45th) day following the date that permits for the Tenant’s Work is issued by the New York City Department of Buildings . . .” Pursuant to these terms island procured permits from the DOB on July 26, 2006. Two days after the DOB issued permits to Island it conducted an audit on July 28, 2006. On August 10, 2006, Ira Gluckman the DOB Deputy Borough Commissioner for Staten Island informed Island that the DOB “. . . intends to revoke the approval(s) and permit(s) issued for work at the premises in connection with the application(s) referenced above, pursuant to Section 27-197 of the Administrative Code of the City of New York . . .” The cited section of New York City’s Administrative Code states in pertinent part that:

[t]he commissioner may, on notice to the applicant, revoke any permit for failure to comply with the provisions of this code or other applicable laws and regulations; or whenever there has been

any false statement or any misrepresentation as to a material fact in the application or accompanying plans and papers upon the basis of which the permit was issued . . .¹

The DOB conducted additional audits on August 17, 2006 and August 24, 2006 and eventually issued a stop work order to Island on August 29, 2006.

In addition to these motions before this court, Island and Manor Road engaged in litigation before the Richmond County Civil Court over an issue involving the payment of rent. On April 18, 2007 counsel for Manor Road withdrew its petition that was pending in the Civil Court. However, Judge Philip S. Straniere issued a Decision and Order dated April 20, 2007 that erroneously declared that the lease agreement between Island and Manor Road was unenforceable “. . . since the occupancy is illegal.” In reliance on this erroneous decision Manor Road served Island with a Thirty Day Notice to Terminate. Subsequently, Island moved the Civil Court to declare its Decision and Order dated April 20, 2007 null and void. On November 1, 2007 Judge Straniere granted Island’s motion stating “[t]he prior order of the court dated April 20, 2007 is withdrawn as null and void because the petition and third party petition had been withdrawn by the parties prior to submission to the court.”

Discussion

“Yellowstone” Injunction

In *First National Stores, Inc. v. Yellowstone Shopping Center* the Court of Appeals recognized that a tenant in a commercial lease has a right to move for a temporary restraining order prior to the termination of the default period to prevent eviction while the terms of the lease are reviewed by a court². However, said temporary restraining order must be served prior to the

¹ *NYC Code* § 27-197

² *First National Stores, Inc. v. Yellowstone Shopping Center*, 21 NY2d 630 [1968].

expiration of the default period.³ The Court further clarified this holding in *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates*. In that decision the Court of Appeals stated:

A *Yellowstone* injunction maintains the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture. The party requesting *Yellowstone* injunction must demonstrate that: '(1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises.'⁴

Petitioner sought to utilize a *Yellowstone* injunction to prevent its eviction based on a Thirty Day Notice served on it by Manor Road. In taking this action, Manor Road utilized the April 20, 2007 Decision and Order from Richmond County Civil Court that found a lease did not exist between the parties. Manor Road contended that the notice of termination was statutorily prescribed.⁵ However, that Decision and Order was vacated by the Civil Court on November 1, 2007. As such the original notice of termination served by Manor Road on Island is defective in light of the fact that Island occupies the premises pursuant to a lease agreement.

At all times pertinent in the current litigation before this court and in the prior matter before the Civil Court, petitioner maintained that a valid commercial lease exists between the parties, Island and Manor Road. In fact, in its supporting papers for its motion for summary judgment respondent, Manor Road, seeks to enforce certain provisions of the May 26, 2006 lease

³ *Id.*

⁴ *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates*, 93 NY2d 508 [1999].

⁵ *Real Property Law* § 228.

agreement entitled “Fees and Expenses.” It is the determination of this court that based on the documentary evidence and arguments of counsel a valid commercial lease existed between the parties.

Subsequent to the November 1, 2007 Decision and Order of the Civil Court, respondent took no steps to declare the current lease invalid or otherwise not in effect. As there is apparently no challenge to the validity of the lease between Island and Manor Road, this court finds that the Decision and Order of the Civil Court dated November 1, 2007 rendered petitioner’s application for a *Yellowstone* injunction moot. Additionally, the first and second causes of action raised in petitioner’s verified complaint are struck as the November 1, 2007 Decision and Order of the Civil Court rendered them moot as well.

Action to Compel the Issuance of a Certificate of Occupancy

In addition to the *Yellowstone* injunction petitioner by the same Order to Show Cause sought to compel the Department of Buildings and the Borough President of Staten Island, James Molinaro, to issue a Certificate of Occupancy. It is clear that in such an instance, an Article 78 proceeding is the appropriate remedy to seek judicial review.

For such a matter to be considered the moving party must comply with the procedure prescribed by *CPLR* § 7804. The court does not find any procedural defects with petitioner’s application, nor do the respondents DOB or Molinaro raise such an argument. While the petitioner failed to designate this special proceeding as an Article 78 proceeding, this court will consider it as if it had the proper caption.

Instead of challenging procedural defects, respondents DOB and Molinaro move to dismiss petitioner’s application arguing that petitioner failed to exhaust all administrative remedies before seeking court intervention. Specifically respondents DOB and Molinaro assert that Section 666 of the New York City Charter requires any finding of the DOB to first be appealed to the Board of Standards and Appeals (“BSA”) before an Article 78 proceeding can be

brought. In Article 78 proceedings this standard is known as the *exhaustion rule*. This rule operates to prevent the premature consideration of matters in the judicial context when administrative remedies exist.⁶

However, the *exhaustion rule* is not absolute. The Court of Appeals ruled in *Watergate II Apartments v. Buffalo Sewer Authority* that the exhaustion rule is not inflexible.⁷ Specifically the Court of Appeals held:

The exhaustion rule, however, is not an inflexible one. It is subject to important qualifications. It need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or when resort to an administrative agency would be futile, or when its pursuit would cause irreparable injury. (citations omitted)⁸

In its petition, Island challenged the DOB and Molinaro on three recognized qualifications. First, Island asserts that DOB and Molinaro exceeded their constitutional authority in revoking the initial April 21, 2005 DOB approval. In his affidavit in support of Island's order to show cause Anton Nader, a managing member of Island, averred that "[p]resumably, the only reason the Department of Buildings revoked its own permits and refused to issue a Certificate of Occupancy was because the Borough President decided to self-legislate his own prohibition against the establishment of fast food stores along heavily traveled intersections in Staten Island."⁹ Petitioner's counsel echoes this sentiment in his own affirmation in support of Island's Order to Show Cause. In that document, petitioner's counsel avers that:

⁶ *Watergate II Apartments v. Buffalo Sewer Authority*, 46 NY2d 52 [1978].

⁷ *Id.*

⁸ *Id.*

⁹ Nader, Affidavit in Support of Order to Show Cause, page 6.

n]evertheless because the Borough President seeks to reduce traffic along heavily traveled intersections, and has attempted to create legislation where none now exists, the defendant, Department of Buildings, has refused to issue a Certificate of Occupancy for the Tenant's Dunkin Donuts store.¹⁰

On or about July 19, 1960 the premises in question obtained a certificate of occupancy to conduct business as a gasoline service station. As such, petitioner's counsel directs the court's attention to Technical Policy and Procedure Notice #10/99 ("TPPN #10/99") that states in pertinent part:

Applications to establish a new retail convenience store which is accessory to an existing automotive service station that was established under a BSA resolution on or after December 15, 1961 should be referred to the BSA.¹¹

Pursuant to the directive laid out in TPPN #10/99, Island contacted the DOB Borough Commissioner in April 2005. Then Borough Commissioner Defoe directed Island that an application to the BSA would not be necessary to establish a convenience store.

In essence, respondents DOB and Molinaro contend that the revocation of the building permits issued by the DOB pursuant to the April 21, 2005 approval by then Borough Commissioner Defoe is based on audits conducted by the DOB. On July 28, 2006 DOB examiner Abayomi Akinsola ("Akinsola") noted the following objections: "1) Provide an upgraded survey map of the location (no section code noted); 2) Provide the site plan of the location, Section Code BC 27-157(a)." On August 17, 2006 DOB examiner Akinsola returned to the site and noted the following objections: "1) Provide an upgraded survey map of the location; 2) Provide the site plan of the location, Section Code BC 27-157(a); 3) The scope of work for both interior and external renovations is more than 30% of the building value and so BPP

¹⁰ File, Affirmation in Support of Order to Show Cause, page 10.

¹¹ NYC Department of Buildings, Technical Policy and Procedure Notice #10/99 [April 16, 1999].

[Builders Payment Plan] application filing is required, Dir. #9 1972.” Finally, on August 24, 2006 DOB examiner Neil G. Adler noted the following pertinent objection:

Plans are not of incidental alteration but removal of existing automotive service station. Zoning lots subject to prior BSA resolution. If the automotive service station was established under a prior BSA resolution, the application shall be reviewed to determine if the plans comply with the ZR § 12-10 definition of incidental alterations. If it is determined that the plans do not constitute an incidental alteration application should be referred to BSA.

Island argues further that the alterations to the subject premises were “incidental” as defined by New York Zoning Resolution Section 12-10. As a result, petitioner asserts that it was exempt from BSA review or approval under Zoning Resolution 8/99 and TPPN #10/99. Island further contends that it fully complied with the relevant Technical Policy and Procedure Notice when it contacted and received approval from the Borough Commissioner Defoe.

The aforementioned actions on the part of the DOB demonstrate a string of costly inconsistencies. At the very least it appears that a local entrepreneur that proceeded with good faith and due diligence fell victim to an administrative inconsistency. At the very least these facts indicate a breakdown in communication in the DOB’s Staten Island office; while at most a citizen’s due process rights were violated by an administrative agency. A citizen that is subject to the control of an administrative agency must be assured of consistency in the application of its regulations. Individuals coming before administrative agency must be guaranteed that there is no room for the capricious whim of administrators in the application of a regulatory framework.

The court now turns its attention to petitioner’s additional arguments that seek to circumvent the exhaustion of administrative remedies requirement. First, petitioner argues that the administrative remedy would provide less than adequate relief. Next, Island contends that the matter before the court invokes the emergency situation exception to the *exhaustion rule*. This court does not find either of these arguments persuasive.

The petitioner merely makes a bald accusation that the administrative remedies would be insufficient without elaboration. Secondly, upon the November 1, 2007 Decision and Order of the Civil Court rendered petitioner's reliance on the emergency situation exception to the *exhaustion rule* moot.

Respondent 995 Manor Road's Motion for Summary Judgment

Manor Road seeks to have petitioner's motion dismissed pursuant to *CPLR* § 3212 prior to a decision being reached by this court in the prior *Yellowstone* motion. In addition, it also seeks the payment of counsel fees pursuant to the lease between the Island and Manor Road, as well as under 22 *NYCRR* § 130-1.1. Manor Road's application to dismiss petitioner's complaint and payment of attorney's fees is denied in its entirety.

Respondent, Manor Road, contends that the first and second causes of action in petitioner's verified complaint should be dismissed. In support of this argument Manor Road asserts that it sent the Notice of Termination that triggered this round of litigation in reliance on the Decision and Order of the Civil Court that declared the lease between the parties to be unenforceable. Subsequent to the filing of this Order to Show Cause with the complaint attached, the Civil Court vacated its previous Decision and Order. As such, there exists no challenge to the validity of the lease between Island and Manor Road.

In accordance with this court's decision concerning petitioner's *Yellowstone* injunction, the Civil Court's Decision and Order dated November 1, 2007; and that both Island and Manor Road accept the validity of the lease executed on May 26, 2006; the first and second causes of action of petitioner's complaint should be struck..

The court now turns its attention to petitioner, Manor Road's arguments concerning the third cause of action brought against the DOB and Boro President Molinaro. Manor Road argues that paragraphs 40, 48 and 60 of the Rider to the Lease grants it standing to argue that the third cause of action be dismissed. This court finds this argument unpersuasive. Manor Road lacks

standing with respect to the issue of whether an Article 78 proceeding was correctly executed by the petitioner.

In addition to its position that it is entitled to have petitioner's complaint dismissed, Manor Road asserts that it is entitled to the payment of legal fees. Specifically, Manor Road cites paragraph 19 of the lease agreement as granting this right. Paragraph 19 states:

If Tenant shall default in the observance or performance of any term or covenant on Tenant's part to be observed or performed under or by virtue of any of the terms or provisions in any article of this lease, after notice if required and upon expiration of any applicable grace period if any, (except in an emergency), then, unless otherwise provided elsewhere in this lease, Owner may immediately or at any time thereafter and without notice perform the obligation of Tenant thereunder, and if Owner, in connection therewith or in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorney's fees, in instituting, prosecuting or defending any actions or proceedings and prevails in any such action or proceeding, such sums so paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner within ten (10) days of rendition of any bill or statement to Tenant therefor, and if Tenant's lease term shall have expired at the time of making such expenditures or incurring of such obligations, such sums shall be recoverable by Owner as damages.

Based on the aforementioned express language of the lease agreement between the Island and Manor Road, this court finds that Manor Road is not entitled to attorneys fees in the action before this court. This court finds in the first instance, that Manor Road is not subject to any action brought by a third party as a result of any action taken by Island. As such it is not defending or prosecuting an action brought on by any violation of the lease. Secondly, respondent Manor Road has not alleged any violation of the lease by Island, nor has Manor Road been declared to have "prevailed" in any action brought in connection with the lease.

In connection with deciding the motions before it, this court examined the earlier decisions of the Civil Court in connection with the payment action brought in that court. This court concedes that Island's *Yellowstone* injunction was premature, as it was clear that the Civil Court misapprehended the facts before it when it issued the April 20, 2007 Decision and Order. However, the paragraph cited by Manor Road contains no specific provision for said actions brought by tenants against landlords. To hold otherwise would create a precedent preventing tenants from instituting actions against landlords. Such a holding would chill enforcement actions brought by tenants fearing a negative result would subject them to pay not only for its legal challenge, but the defense by its landlord.

In the matter before this court the parties clearly anticipated that legal actions may arise as a result of the contract between the two entities. Both parties to this lease agreement created provisions to deal with costs associated with legal actions when they entered the agreement. This court will not infer terms in an agreement where none exist.

This court must now turn to Manor Road's assertion that it is entitled to compensation under 22 *NYCRR* § 130-1.1(c) due to perceived frivolous conduct on the part of petitioner. This statute states in pertinent part that:

. . . conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.¹²

This court does not view the actions taken by petitioner's attorney as approaching the level of conduct calling for sanctions to be imposed. In the case cited by Manor Road, *Minister, Elders, and Deacons of the Reformed Protestant Dutch Church of the City of New York v. 198 Broadway, Inc.*,¹³ the sanctioned movant engaged in years of frivolous conduct without any basis in law. This court finds the facts surrounding petitioner's actions inapposite to those found in *Minister*. In *Minister*, the Court of Appeals specifically found that the sanctioned movant engaged in multiple motions lacking merit.

While petitioner's application for a *Yellowstone* injunction was procedurally defective it is the opinion of this court that it does not raise itself to the level of a sanctionable offense. Manor Road's application for fees pursuant to 22 *NYCRR* § 130-1.1 (c) is hereby denied.

Conclusion

It is the finding of this court that petitioner's application for a *Yellowstone* injunction is dismissed as moot. A decision regarding respondents, DOB and Molinaro's motion to dismiss petitioner's cause of action seeking to compel the DOB and Molinaro to issue a Certificate of Occupancy arguing that petitioner failed to exhaust all administrative remedies before seeking court intervention is reserved pending a hearing in which DOB Deputy Borough Commissioner Ira Gluckman shall present evidence to this court concerning his decision to change the prior

¹² 22 *NYCRR* § 130-1.1(c).

¹³ *Manor Road, Minister, Elders, and Deacons of the Reformed Protestant Dutch Church of the City of New York v. 198 Broadway, Inc.*, 76 NY2d 411 [1990].

determination of DOB Commissioner Defoe. Respondent, Manor Road's motion for summary judgment is denied in its entirety.

Accordingly, it is hereby:

ORDERED, that petitioner's application for a *Yellowstone* injunction is rendered moot by the November 1, 2007 Decision and Order of the Civil Court; it is further

ORDERED, that it is the finding of this Court that a valid lease exists between Island and Manor Road; it is further

ORDERED, that this Court shall reserve decision in respondents, DOB and Molinaro's motion to dismiss pending a hearing concerning the reasoning employed by the DOB in overruling Commissioner Defoe's April 21, 2005 approval of petitioner's application; it is further

ORDERED, that The Department of Buildings Deputy Borough Commissioner, Ira Gluckman, appear with counsel before this court on **May 23, 2008 at 2:00 P.M.** for a hearing concerning his reversal of the decision of Commissioner Defoe which had approved petitioner's application; it is further

ORDERED, that the motion of respondent, 995 Manor Road LLC, for summary judgment seeking dismissal of petitioner's complaint along with the payment of reasonable attorneys fees is denied in its entirety; and it is further

ORDERED, that all parties return to DCM 3 at 9:30 A.M. on May 14, 2008 for a status conference.

ENTER,

DATED: April 21, 2008

Joseph J. Maltese
Justice of the Supreme Court