

Cannon Point North, Inc. v City of N.Y.

2008 NY Slip Op 31646(U)

June 12, 2008

Supreme Court, New York County

Docket Number: 0101157/2004

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART _____

Index Number : 101157/2004
CANNON POINT NORTH
 VS.
CITY OF NY
 SEQUENCE NUMBER : 005
 CONSOLIDATION/JOINT TRIAL

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

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

*Motion decided in accordance
with annexed decision*

FILED

JUN 17 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 12, 2008

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

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

Cannon Point North, Inc.,

Plaintiff,

Decision/Order

-against-

Index No.: 101157/04

Seq. No.: 005

The City of New York et al.,

Defendants.

Present:

Hon. Judith J. Gische, JSC

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this (these) motion(s):

| PAPERS | NUMBERED |
|--|----------|
| Motion Seq. 002 [Art. 78] | |
| Notice of Motion, AR affirm., exhibits..... | 1 |
| DSC affirm., exhibits..... | 2 |
| AR affirm. in reply..... | 3 |
| Motion Seq. 003 [Art. 78] | |
| Notice of Motion to Consolidate, DSC affirm..... | 1 |
| DSC affirm. in reply..... | 2 |
| Motion Seq. 005 [index # 101157/2004] | |
| Notice of Motion, DSC affirm., exhibits..... | 1 |
| BB affirm in Opp., exhibits..... | 2 |
| AR affirm..... | 3 |
| DSC affirm. in reply..... | 4 |

FILED
JUN 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

Hon. Gische, J.:

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

Petitioner, Cannon Point North, Inc. ("CPN") has brought an Article 78 petition challenging two sets of actions by the City of New York Department of Finance ("City"). The City has separately moved to dismiss the proceeding on the ground that it has been abandoned. CPN has also separately moved to consolidate this proceeding with a pending plenary action and for a joint trial. It similarly moved in the plenary action for

an order of consolidation and joint trial. The three motions are considered together in this single decision and order.

The relevant procedural history of the parties' litigations is not disputed. The Article 78 proceeding was commenced by the filing and service of a Notice of Petition and Petition on or about August 16, 2005. CPN is a cooperative corporation owning a multi family residential building located at 25 Sutton Place South in the County, City and State of New York. The building is constructed so that it cantilevers the FDR Drive. A platform which forms a roof over the FDR is also the under support for the building. In the Article 78 CPN is contesting the validity of two actions taken by the City, to wit: [1] applying a regular real estate tax payment made by CPN to a lien the City imposed for repairs it made to the FDR roof structure supporting the building and [2] losing a tax payment made by CPN, resulting in interest charges.

The original return date of the petition was September 22, 2005. The City requested and was given a consent adjournment by CPN to October 24, 2005. When the City went to file the stipulation with the Court, however, it discovered that no RJI had been filed by petitioner. Consequently the City could not file the stipulation with the court and the matter was never actually calendared. Nor was any answer ever interposed by the City and no further action was taken by CPN until recently. An RJI was filed with an Amended Notice of Petition on or about November 7, 2008.

While the Article 78 proceeding lay dormant, however, another previously commenced plenary action (index # 101157/04) between the same parties was moving forward ("plenary action"). The plenary action alleged that the City's actions related to the repair and maintenance of the FDR roof structure violated CPN's rights under the

Federal and New York State Constitutions and that the City is responsible to repair and pay for the repair of the FDR roof structure. The City interposed an answer with counterclaims in that plenary action, including a counterclaim for reimbursement related to repairs it had already made to the FDR roof structure.

Each of the parties moved and cross-moved for summary judgment in the plenary action on the issue about which of them was responsible for the repair and maintenance of the FDR roof structure. By decision and order dated March 11, 2005 The Hon. Saralee Evans granted the City's motion for partial summary judgment declaring that CPN is the owner of the FDR roof structure and responsible for its care an maintenance. Other issues, including damages on the counterclaim, were reserved for trial.

After Justice Evans' decision, the City unilaterally applied a substantial portion of CPN's quarterly real estate taxes to pay monies the City had already expended to repair the FDR roof. The City claims to have taken this action in satisfaction of a lien it had pursuant to 22 NYCRR §27-2144(b) for emergency repairs. This allocation of the funds to the claimed lien is one of the actions challenged by CPN in the Article 78 proceeding.

CPN also filed an appeal of Justice Evans' decision. The underlying plenary action was proceeding on the remaining claims. The parties engaged in substantial settlement discussions and discovery was conducted on the issues left open for trial under Justice Evans' decision. The appeal was perfected, argued and on October 9, 2007 the Appellate Division issued a decision. It affirmed that part of Justice Evan's decision holding that CPN is the owner of the FDR roof structure but reversed that part

of the decision holding that, as a matter of law, CPN was responsible for the maintenance and repair of the FDR roof structure. It reinstated the complaint, leaving for trial the issue of which party was responsible to pay for the FDR roof repairs.

Shortly after the Appellate Division decision, in November 2007, CPN filed an Amended Notice of Petition and obtained an RJI in the Article 78 proceeding. CPN's actions triggered the City's instant motion to dismiss based on CPN's neglect to prosecute. CPN also served an amended complaint dated November 15, 2007 which now includes causes of action based upon the City's application of the regular tax payment to past expenses incurred by it to repair the FDR roof. CPN has moved to consolidate the Article 78 proceeding with the plenary action, claiming there are common questions of law and fact.

Motion to Dismiss

The heart of the City's argument for dismissal is that the matter has been abandoned based upon CPN's neglect to prosecute. Although acknowledging that the statute is not expressly applicable to this case, the City relies on CPLR 3404 to support its argument, arguing that it applies by analogy.

CPLR 3404 provides in pertinent part:

A case in the supreme courtor county court marked "off" or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute.

CPLR applies to cases where the Note of Issue, declaring a case ready for trial, has already been filed. Auerbach v. Kaufman, 173 AD2d 229 (1st dept. 1991). It does

not apply to pre-note of issue cases. Galati v. C. Raimondo & Sons, 35 AD3d 805 (2nd dept. 2006). The City argues, however, that because a Note of Issue is not typically required in an Article 78 proceeding, the court should treat the filing of an RJI as the procedural equivalent for CPLR 3404 purposes. It further argues that although CPN never filed the RJI, it should have under 22 NYCRR 202.6. Thus, the City argues that the court should consider this case as if the RJI had been filed when the Notice of Petition and Petition were first filed with the court, deem the RJI a Note of Issue and dismiss this case because over a year has passed since the RJI should have been but was not filed and CPN has not moved to restore this matter to the calendar.

The City's argument is rejected. The CPLR has an entire article devoted to the procedures that are strictly applicable to Article 78 proceedings. See: CPLR Article 78 generally. Not one of those provisions (or indeed any other provision in the CPLR) provides that in an Article 78 proceeding the RJI is the procedural equivalent of a Note of Issue. CPLR 3404 does not expressly apply. It is limited in its application to cases in which a Note of Issue has already been filed. Moreover the instant article 78 was never marked off calendar, nor struck from the calendar, nor unanswered on a clerk's calendar call. Due to a clerical error the matter was never calendered in the first instance by the court. Thus even if the court were to deem the RJI an Note of issue and further find that the failure to timely obtain an RJI should be treated as though it had been filed timely in this context, the City still cannot satisfy the statutory requirement that it applies only where an action has been marked off, or stricken from the calendar or unanswered on a clerk's calendar call.

This City raises the important issues about Article 78 proceedings being

summary proceedings that should be expedited. It argues that CPN should not have let this case languish. The CPLR, however, does not leave a respondent without a remedy against a recalcitrant petitioner. The City could have utilized CPLR 3126 to ask for a dismissal where a party unreasonably neglects to proceed generally in any action. Of course that would have required that the City file an answer and serve a demand to resume prosecution, neither of which has been done in this case. Galati v. C. Raimondo & Sons, supra.

This case is also unique because the issues in the plenary action and the article 78 are closely aligned. The plenary action was actively being pursued by CPN, demonstrating that CPN never had any intention of abandoning the claims it was making in the related Article 78 proceeding.

Motion to Consolidate

CPLR 602 (a) permits the court to consolidate and/or order a joint trial of pending matters which involve common questions of law and fact. The underlying consideration is whether there are common question of law or fact, such that the proof in each action would overlap one another. JM Mechanical Corp. v. Washington Federal Savings and Loan Assn., 80 AD2d 884 (2nd dept. 1981); Maigur v. Saratopian, Inc., 47 AD2d 982 (3rd dept. 1975). The commonality must relate to substantial issues in both cases. Gibbons v. Groat, 22 AD2d 996 (3rd dept. 1964). Joint proceedings are intended to further the goals of efficiency and economy for both the court and the litigants. It avoids duplication and possibly inconsistent determinations and is a favored policy. New York Annual Conference of Methodist Church v. Nam Un Cho, 156 AD2d 511 (2nd dept. 1989); see also: Stanley v. Callanan Industries, Inc., 54 NY2d 52 (1981). If the criteria

warranting consolidation are met, it may be ordered even where, as here, one of the proceedings is a special proceeding and the other is a plenary action. Elias v. Artistic Paper Box Co., 29 AD2d 118 (2nd dept. 1967).

The decision to consolidate proceedings, however still rests within the discretion of the court. Even where there are common issues of law and fact, a motion pursuant to CPLR § 602 may be denied where it causes prejudice to a substantial right of the non-moving party. Bender v. Underwood, 93 AD2d 747 (1st dept. 1983). Prejudice may include such things as jury confusion, undue delay or bolstering. *See generally: Alexander, McKinney's Practice Commentary*, C602:1, p. 315.

The Article 78 and the plenary action (even as originally conceived before amendment of the complaint) both concern the condition of the FDR roof and who is responsible for payment for the repairs. The counterclaim in the plenary action is for the identical repairs that underlie the claimed lien. The issue of responsibility for repairs that underlies the plenary action in chief is the same issue underlying the counterclaim and the Article 78 proceeding. If CPN prevails on its claim in the plenary action that City has/had the obligation to pay for repairs, it directly affects whether the lien asserted by the City was valid in the first instance. The Amended Complaint presents even more common issues, since CPN has now included direct challenges to the City's actions in using their regularly made tax payment to the lien for the City's repair costs. Indeed the commonality is illustrated by the City's position at oral argument that decisions made by the Court in the Article 78 proceeding will have *res judicata* effect on the plenary action.

Certainly there is not a perfect commonality of issues. The City correctly points out that CPN's claim of a lost payment is wholly independent of the FDR roof repair

issues. There is enough commonality, however, to warrant the consolidation at this time.

The City also argues that if the Article 78 survives its motion to dismiss, it intends to make a motion for summary judgment based upon the statute of limitations. It argues that this is a further basis to deny consolidation at this time. When the motion for summary judgment is made, however, the court can still parse out and address the narrow statute of limitations issues as to some of the claims in the context of the overall consolidated action.

The court therefore orders the matters to be consolidated.

Conclusion

In accordance herewith it is hereby:

ORDERED that respondents motion to dismiss the Article 78 proceeding (index # 111437/2005) is denied in its entirety, and it is further

ORDERED that respondents are given 10 days from the date of this decision to interpose an answer, and it is further

ORDERED that Cannon Point North, Inc.'s motions to consolidate the Article 78 proceeding (index # 111437/2005) with the plenary action (index # 101157/2004) are granted, and it is further

ORDERED that the clerk of the court is directed to consolidate these matters under index # 101157/2004 and it is further

ORDERED that Cannon Point North, Inc. is directed to serve a copy of this decision and order upon the clerk of the court at 60 Centre Street so that the matters may be consolidated in accordance with this court's decision and order, and it is further

ORDERED that any requested relief not expressly granted herein is denied and that this shall constitute the decision and order of the court.

Dated: New York, New York
June 12, 2008

SO ORDERED:



J.G. J.S.C.

FILED
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