

Plon Realty Corp. v City of New York

2008 NY Slip Op 32158(U)

July 30, 2008

Supreme Court, New York County

Docket Number: 0101728/2008

Judge: Karen Smith

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - I.A.S. PART 62

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PLON REALTY CORP.

Plaintiff

Index No. 101728/2008

-against-

CITY OF NEW YORK

HON. KAREN S. SMITH

FILED
AUG 04 2008
COUNTY CLERK'S OFFICE
NEW YORK

SEQ # 00A
Decision and Order

Plaintiff Plon Realty Corp's ("Plon") order to show cause ("OSC") seeking to (1) stay the enforcement of and, (2) vacate a money judgment for eight years of violations found by the New York City Environmental Control Board ("ECB"), is granted, in part, as more fully discussed below. Defendant City of New York's ("City") cross-motion to dismiss, pursuant to CPLR § 3211(7), is denied, for the reasons stated below, with the exception that the Court converts the instant action to an Article 78 proceeding.

In this OSC, plaintiff seeks (1) to stay ECB from enforcing judgments for ECB violations incurred, for the most part, in 2000, in the amount of \$196,642, by levying upon plaintiff's assets, (2) an order vacating said judgments, and (3) to commence an action to determine the correct amount of monies due.¹ While Pablo Llorente, plaintiff's president, admits that plaintiff owes defendant money for some of the violations, and that he personally received notices of the ECB violations, he claims that he never received the ECB orders or the notices of default in contravention of ECB's rules and regulations.

Defendant cross-moves for dismissal of the petition on the grounds that plaintiff's complaint should have been brought as an Article 78 proceeding, not as a plenary action, and that

¹ In plaintiff's reply papers, plaintiff "cross moves" for an order striking defendant's motion to dismiss for failure to comply with the time frames within which plaintiff was given to oppose defendant's motion. At oral argument, plaintiff withdrew that application.

the controversy is not ripe for judicial review as plaintiff has failed to exhaust his administrative remedies. The Court, *sua sponte*, converts the instant action to an Article 78, pursuant to CPLR § 103©. Clearly, plaintiff's complaint falls within CPLR § 7803(3) as it raises the question as to whether a determination was made in violation of a lawful procedure. As the motion to dismiss can be converted to "an objection in point of law" which may be interposed prior to an answer in an Article 78 proceeding, there is clearly no prejudice to defendant in converting the action to an Article 78, particularly as the OSC was brought within four months of the January 24, 2008 notice to plaintiff of the planned adverse action (the levying of assets to enforce the judgments.) In addition, plaintiff is not precluded from raising the statute of limitations as a defense to the Article 78 proceeding in its answer. As the action has been converted to an Article 78 petition, the portion of plaintiff's action seeking a recalculation of the monies owed to defendant is denied.

In support of its cross-motion to dismiss, the defendant submits the affidavit of an employee of the Department of Finance ("DOF"), who bases her statements on conversations she has had with other DOF employees - which clearly constitute hearsay. While the vast majority of her affidavit refers to the procedures generally followed by DOF in enforcing ECB's judgments and ECB's procedures in obtaining judgments, she never explicitly states that her knowledge is based on custom and practice in these agencies, nor that she was personally a witness to these practices and procedures at the time these judgments were obtained. Nor is it clear, as an employee of DOF, that she is the proper party to discuss the policy and procedures of ECB. To the extent that her statements are taken directly from ECB's rules and regulations, the Court has taken judicial notice of those rules and regulations, referred to below. However, compliance with those rules and regulations, particularly as regards service of notices of hearings, notices of defaults, and copies of the ECB's determinations and orders cannot be assumed absent a copy of the notices with affidavits of service or an affidavit from persons with personal knowledge to state what the ECB's customs and practices were when these judgments were obtained. More importantly, the defendant never denies that plaintiff is entitled to such notices. It is thus clear, at this stage in the proceeding, plaintiff has clearly stated a cognizable claim that defendant's determinations are invalid for failing to follow its own rules and regulations.

Defendant also argues that the petition should be dismissed because the claims are not ripe as plaintiff has failed to exhaust his administrative remedies as provided by 15 RCNY §§ 71, 82, & 83. However, 15 RCNY §31-71(a) provides, in pertinent part : “any party aggrieved by the hearing officer's recommended decision and order may, within 30 days of mailing of the same, file written exceptions with the tribunal.” 15 RCNY §31-82 provides, in pertinent part “a request by respondent for a stay of a default order and a hearing must be made by application to the executive director within 30 days of mailing of the default order.” 15 RCNY § 31-83 provides in pertinent part “(a) A request by a respondent for stay of default and a new hearing made more than 30 days after service of the default order shall be granted where, within 90 days from mailing of the default order, respondent alleges a credible explanation and excuse for the default together with an allegation of a meritorious defense to the violation charged.” All of these provisions, however, presuppose that the respondent was served with the notices and orders in question. Absent receipt of these decisions and orders, plaintiff was unable to pursue these remedies. As defendant has failed to submit any evidence to show that plaintiff was served with these documents, the claim that plaintiff has failed to exhaust his administrative remedies fails.

As plaintiff has stated a cognizable claim and as defendant has thus far failed to demonstrate that plaintiff was able to, and thus failed to exhaust the administrative remedies, defendant's motion to dismiss is denied.

Plaintiff's application for a stay of enforcement of the judgments is also denied with the caveat that the parties shall be required to present evidence at a hearing before the Court as to whether or not the plaintiff corporation was served with all notices of violations, hearings, defaults and determinations and orders as required by the ECB rules and regulations and the City Charter, as provided below.²

Plaintiff is correct when he states that ECB's procedures require that he be provided with the notice of the ECB hearing where the violation was found, notice of the decision and order, and notice of default. 15 RCNY §§ 31-51(b) & © provides:

² Since, plaintiff does not dispute receipt of the notices of ECB violations, the Court has not included those provisions.

(b) Notice of Hearing. The notice of violation shall set the hearing date and place or, if none, the executive director shall set such time and place. In no event shall such hearing date be set for more than 60 days after the filing of the notice of violation at the tribunal. **At least 10 days notice of such hearing date and location shall be sent to all parties.** Where respondent waives the 10 day notice and requests an expedited hearing, the executive director may assign the case for immediate hearing, upon appropriate notice to petitioner and opportunity for petitioner to appear. (Emphasis added.)

(c) Rights of Parties. Every party, except intervenors under § 31-35(b), **shall have the right of due notice**, cross examination, presentation of evidence, objection, motion, argument and all other rights essential to a fair hearing.(Emphasis added.)

15 RCNY §31-57 provides:

(a) Hearing Officer's Recommended Decision and Order. As soon as possible after conclusion of the hearing, the hearing officer shall prepare a recommended decision and order. The hearing officer's decision shall set forth findings of fact and conclusions of law, and it shall set forth the hearing officer's reasons for findings on all material issues. If the charges contained in the notice of violation are upheld, the hearing officer shall prepare an order setting forth the penalty, and if the board is authorized by law to impose remedial relief or other sanction, the relief or sanctions recommended. **The recommended decision and order shall be filed with the executive director and served on all parties.**(Emphasis added.)

15 RCNY § 31-81 provides:

(a) Failure of a respondent to make a timely response, or appear or proceed as required by the tribunal or hearing officer or these rules shall constitute a default. Upon default, the hearing officer or board shall thereupon render such decision and order in accordance with § 1404d.(1)(d) of the Charter. Orders rendered in consequence of a default shall take effect immediately. **Notice of such order shall be sent to respondent.**(Emphasis added.)

Defendant opposes plaintiff's application for a stay of defendant's enforcement of the ECB judgments on the basis that plaintiff cannot meet the three requirements to obtain injunctive relief: that plaintiff is unable to show (1) the likelihood that plaintiff will succeed on the merits of its claim, (2) plaintiff will suffer irreparable injury if the relief is not granted, and (3) in balancing the equities, the balance tips in plaintiff's favor. At this stage in the proceedings, defendant is

correct when it states that plaintiff cannot prove the likelihood that he will succeed on the merits of his claim. While plaintiff's president states, in his affidavit in support of his OSC, he did not personally receive notices of hearings on the violations, notices of default for his non-appearance at the hearings, or copies of the determinations and orders of the ECB, plaintiff leaves open the possibility that the plaintiff corporation did receive such notices. In paragraph 4 of Llorente's affidavit submitted in support of the OSC., Mr. Llorente equivocates by stating that the plaintiff corporation "may have been served other than by personal delivery on the Corporation" with the documents. Mr. Llorente fails to affirmatively state either that "the Corporation was not served" or that "to his best knowledge the corporation was not served." Absent such a statement, plaintiff has not met the burden of showing the likelihood that plaintiff will succeed on the merits of plaintiff's claim, even though defendant does not offer any evidence to dispute the claim that plaintiff was not served with the necessary documents.

As for irreparable injury, defendants argue that there are five categories of judgments, of which only two, "Docketed, Disposition: In Violation" and "Docketed, Disposition : Default," are currently enforceable as only those two categories of judgments have been entered as judgments in Civil Court. The other three categories of judgments- "Hearing Complete, Disposition: In Violation"; "Stay Denied, Disposition: Default"; and "Default, Disposition: Default", have not yet been reduced to a judgment in Civil Court and, according to defendant, are not yet enforceable. While defendant is not seeking at this time to attach assets to enforce the judgments not yet entered in Civil Court, defendant states that they are examining the records of the Civil Court to see when these additional judgements are entered and will then seek to enforce them. To the extent that plaintiff's only assets are the buildings on which the violations were placed, plaintiff would irreparably be injured were defendant to attach plaintiff's assets to enforce those judgments which have been entered in Civil Court. Nor does the Court see a distinction between the effects of enforcement on those judgments reduced to a Civil Court judgment and those waiting for entry of judgment in the Civil Court. However, as plaintiff is unable, at this stage, to sustain his burden of showing the likelihood of succeeding on the merits of his claim the Court must deny the request for injunctive relief and thus does not address the third prong required to obtain injunctive relief - the balancing of the equities.

As the only remaining issue in this proceeding is whether plaintiff corporation was properly served with all of the notices and documents required to support the judgments defendant seeks to enforce, in the interest of both justice and judicial economy, the parties are ordered to appear for a hearing on August 21, 2008 at 3:00 p.m. to present evidence on service of said notices and documents. Accordingly,

(1) It is ordered that the instant action is converted to an Article 78 petition;

(2) Plaintiff's application for a stay of enforcement of ECB's judgment is denied with leave to re-apply for said relief at the hearing set forth herein;

(3) The portion of plaintiff's petition seeking vacature of those judgments as preliminary relief is denied with leave to re-apply for said relief at the hearing set forth herein ;

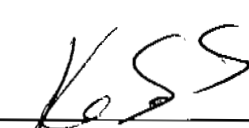
(4) Defendant's motion to dismiss is denied and defendant is ordered to file and serve its answer in this Article 78 petition within 30 days of receipt of this decision and order with notice of entry; and

{5} The parties are Ordered to appear for a hearing on August 21, 2008 at 3:00 p.m. as provided above.

This constitutes the decision and order of the court.

Dated: July 30, 2008

New York, New York



KAREN S. SMITH, J.C.C.

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