

**Cannon Point N., Inc. v City of New York**

2008 NY Slip Op 32323(U)

August 20, 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 \_\_\_\_\_

*Justice*

Index Number : 101157/2004

CANNON POINT NORTH

vs

CITY OF NY

Sequence Number : 006

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

**FILED**

AUG 22 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/20/08

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

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

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Cannon Point North, Inc.,

Plaintiff,

**Decision/Order**

-against-

Index No.: 101157/04

Seq. No.: 006

The City of New York et al.,

Defendants.

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Cannon Point South, Inc.,

Plaintiff,

-against-

Index No.: 120652/03

Seq. No.: 005

The City of New York, et al.

Defendants.

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**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**

Index # 101157/2004

Notice of Motion.....1

DSC Affirmation, exhibit.....2

RBG Sur-reply Affirmation, exhibit.....3

Index # 120653/2003

Notice of Motion.....1

JF Affirmation, exhibits.....2

**FILED**

**NUMBERED**

AUG. 22 2008

**COUNTY CLERK'S OFFICE  
NEW YORK**

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

The State of New York and the New York State Department of Transportation (collectively "State") are named as defendants in each of the two captioned matters. The State moves, pursuant to CPLR § 3211, to dismiss the causes of action asserted against it in each complaint. While the plaintiffs are separate entities and their

proceedings were separately commenced, the claims made by them against the State are substantially the same. The arguments both in favor and against dismissal are, likewise, substantially the same. The motions to dismiss are, therefore, consolidated for consideration and disposition in this single decision.

The State's motion regarding plaintiff, Cannon Point South, Inc. ("CPS") pertains to its Fourth Amended Complaint. The State's motion regarding plaintiff, Cannon Point North, Inc. ("CPN") pertains to its Second Amended Complaint. Since there are many causes of action asserted against multiple defendants in each proceeding, there was initial confusion regarding which of the causes of action were actually being asserted against the State. Thus, the State originally moved to dismiss those causes of action based on substantive due process violations (CPS' tenth cause of action and CPN's sixth cause of action) and a *de facto* taking (CPS' fifth cause of action and CPN's seventh and eighth causes of action). In response, neither CPS nor CPN seeks to sustain a substantive due process cause of action against the State. CPS does not seek to sustain against the State any *de facto* taking claim. CPN does not seek to sustain against the State the *de facto* taking claim contained in its eighth cause of action.

Instead, CPS claims that the first, second, third and sixth causes of action in its Fourth Amended Complaint, which seek various forms of equitable relief, are properly asserted against the State as well as the other defendants. CPN claims that the first, second and seventh causes of action in its Second Amended Complaint, which seek various forms of equitable relief, are properly asserted against the State as well as the other defendants.

The State contends that such “equitable claims” against it fail as a matter of law and seeks their dismissal. CPS and CPN oppose the respective motions.<sup>1</sup>

## **Discussion**

### **A. Standard of Review**

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (see CPLR 3026; Leon v Martinez, 84 NY2d 83, 87 [1994]). The court accepts the facts as alleged by plaintiff as true, affording them the benefit of every possible favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1<sup>st</sup> Dept 2003]), unless clearly contradicted by evidence submitted in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1<sup>st</sup> Dept 2006]).

### **B. Facts Alleged**

The CPS and the CPN complaints each rely upon commonly plead facts which, insofar as relevant to the claims against the State, are briefly summarized as follows: CPS owns a residential co-op building located at 45 Sutton Place South in Manhattan, while CPN owns the directly neighboring residential co-op building located at 25 Sutton Place in Manhattan (collectively “buildings”). In the late 1930s and extending through the 1950s, in accordance with certain agreements and court orders, the City of New

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<sup>1</sup>Because plaintiffs only clarified the causes of action they were asserting against the State in their original opposition to the State’s motions, the reply papers contained new arguments. Rather than requiring that new motions be made by the State, the court afforded each of the plaintiffs the opportunity to address the new arguments on their merits in additional papers that were submitted. Thus, all of the parties were given an opportunity to be heard on the arguments made in favor and against dismissal.

York condemned a portion of property owned by plaintiffs' predecessor in interest, the Henry Phipps Estate ("HPE"), in order to construct the FDR drive ("FDR"). HPE retained the right to build over the FDR in the future and specific rights concerning the times it was permitted to alter FDR traffic in order to construct and maintain any buildings to be built above the FDR.

The buildings were, thereafter, constructed over the FDR so that concrete columns were installed adjacent to the FDR and a concrete roof was installed over the FDR (collectively "concrete structures"). The concrete roof served as a base for the buildings which are cantilevered over the FDR drive.

The concrete structures eventually began to deteriorate. Beginning in 2002 the City issued Notices and Emergency Declarations to plaintiffs. The City ultimately performed remediation work itself. At or about the same time, the City and the State planned to reconstruct and improve portions of the FDR located directly below the buildings, with the intention of making the FDR part of the State Arterial System. Highway Law §349. In furtherance of the improvements, the State constructed a floating detour bridge in the East River that allowed certain lanes of FDR traffic to be taken out of service. Plaintiffs allege that the City wanted to piggy back the concrete structure remediation work with the State's improvement work to keep overall costs down. They also allege that the State's access to the FDR during the improvement work influenced the City to decide to completely demolish and replace the concrete structures, rather than to simply repair the problems at less expense.

Plaintiffs also allege that in order to assure that the concrete remediation was completed at the same time as the FDR improvement work, the City acceded to the

State's demand that the City use the same contractors that were also performing work for the State at the time.

#### C. Causes of Action Asserted

In its first cause of action, CPS seeks reformation of the agreements entered into between the City and HPE to reflect the parties' intention that past, present and future maintenance of the concrete structures was and continues to be the City's responsibility. In its second cause of action, CPS seeks a declaration that is excused from any maintenance obligations related to concrete structures because the City and the State have restricted CPS' ability to perform work on those structures. In the third cause of action, CPS seeks a declaration that it is entitled to access to the FDR to perform repair work during usual business hours, to avoid costly overtime charges. The sixth cause of action seeks a declaration that the concrete structures were included in the original easement taken by the City because the City restricted CPS' access to the concrete structures and exercised dominion and control over them.

In its first cause of action, CPN seeks a declaration that it is not obligated to maintain and repair the concrete structures under the 1941 and 1957 agreements due to impossibility. The second cause of action seeks a declaration of rights concerning maintenance of the concrete structures including CPN's rights of access pursuant to the 1941 and 1957 agreements. CPN's seventh cause of action seeks a declaration that by inverse condemnation the City is the owner of the concrete structures and is responsible for maintenance and repair of same.

#### D. The Court's Analysis

The starting point of the court's analysis is the well accepted proposition that

claims against the State which seek money damages may only be brought in the court of Claims and not in the Supreme Court. Court of Claims Act §9 (4); Schaffer v. Evans, 57 NY2d 992 (1982). Harkening back to the doctrine of Sovereign Immunity, the State argues that because it has not given permission to be sued in equity in the Supreme Court, this court does not have jurisdiction over the instant controversies. Common law, however, has permitted actions to be commenced against the State in the Supreme Court in which a declaration of rights is sought. Johnson v. State Insurance Fund, 50 AD3d 1544 (3<sup>rd</sup> dept. 2008); Cavaioli v. Board of Trustees of SUNY, 116 AD2d 689 (2<sup>nd</sup> dept. 1986) Town of Ohio v. State of New York, 264 AD 220 (3<sup>rd</sup> dept. 1942). Saso v. State of New York, 20 Misc.2d 826 (Sup. Ct. West. Co.). According to the Court in Town of Ohio, *supra*, the fundamental reasoning underlying Sovereign Immunity has no application to cases that do not seek any affirmative relief against the State, but instead seek only to settle and define relationships between government and a citizen. Thus, the court rejects the State's argument that any action for a declaration of rights against the State brought in the Supreme Court is *per se* improper. The court, however, does not reach the issues of whether and what limitations there may be on such a declaratory action brought against the State because, for the reasons that follow, these actions must otherwise be dismissed.

The State alternatively argues that the cases against it should be dismissed because there is no relief that is or can be asserted against it at this time. It does not own or control the FDR and is not a party to any of the agreements that underlie the controversy. Plaintiffs argue that because it is inevitable that the State will become a successor in interest to the City with respect to the FDR, the State is a necessary party

to these actions. The State counters that regardless of whatever its interest may be in the future with respect to the FDR, it does not need be part of these actions because they are not presently part of the controversy. They argue that if and when it becomes a successor to the City with respect to the maintenance of the FDR, its rights and obligations will follow as a matter of law.

CPLR § 3001 permits this court to render a declaratory judgment regarding the rights and legal relations of parties where there is an actual and otherwise justiciable controversy before it. A request for a declaratory judgment is ordinarily premature where a future event affecting the obligations of the contracting parties is contemplated, yet uncertain of occurrence and beyond the parties' control. Such relief is available, however, where the likelihood that a contingent event will occur is great and the declaration will have the immediate and practical effect of influencing the parties' current conduct. Remsen Apartments, Inc. v. Nayman, 89 AD2d 1014 (2<sup>nd</sup> dept 1982) affd. 58 NY2d 1083 (1983); Butler v. Goldberg, 40 AD3d 333 (1<sup>st</sup> dept. 2007); 40-56 Tenth Avenue, LLC v. 450 West 14<sup>th</sup> St. Corp., 22 AD3d 416 (1<sup>st</sup> dept. 2005).

While the declaratory relief is available in these actions against the City, because it will affect the City's conduct, the same cannot be said about the State. The State's only interest in these matters derives from Highway Law § 349. It presently has no control and/or maintenance responsibilities with respect to the FDR. The fact that at some future time it may have maintenance responsibilities with respect to the FDR, does not mean there is a justiciable controversy against it at this time. See: 39th-40th Corp., v. Port of New York Authority, 188 Misc. 657 ( Sup. Ct. NY Co. ).

There are allegations made about the State's conduct, but the facts alleged have

no bearing upon the causes of action asserted against the State. Even accepting as true plaintiffs' allegations that the State is involved in an improvement project on that portion of the FDR under or near the concrete structures and/or that the City wanted to piggy back repairs of the concrete structures to the State improvements and/or that the State insisted on the use of a particular contractor, there is no relief sought that presently affects the State. CPS' first, second and sixth causes of action all seek relief that makes the City responsible for maintenance of the concrete structures. They do not at this time seek any declaration that the State is responsible for such maintenance. CPS' third cause of action seeks a declaration that it is entitled to access to perform any repairs to the concrete structures during certain hours of the day. The access they seek can only be given by the City at this time. All of CPS' claims have as their starting point the agreements and Court orders dating back to the original condemnation, which did not involve the State.

CPN's first and second causes of action seek declarations of rights under agreements made with the City. While its claims of lack of access to do repairs may be factually based in part on alleged actions taken by the State, the causes of action seek no affirmative relief against the State. Similarly its claim of inverse condemnation seeks a declaration that the City is the owner of the concrete structures. It does not seek any declaration against the State.

Plaintiffs expressed their concern that because the State will be assuming the responsibilities of the City with respect to the FDR, they are a necessary party. Plaintiffs want to ensure that if they achieve a favorable outcome against the City in these actions, the State will be bound as well. CPLR 1001(a) provides in pertinent

part: "**Parties who should be joined.** Persons who ought to parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." The purpose fo the compulsory joinder rule is to prevent duplicative litigation and to protect the rights of persons who may be adversely affected by the outcome. Beuchel v. Bain, 275 AD2d 65 (1<sup>st</sup> dept, 2000) affd. 97 NY2d 295 (2001) cert den 122 S. Ct. 2293 (2002).

The State is not a necessary party. The court can grant full relief without them since the relief sought is really against the City. While the State may at some point in the future be a successor in interest to the City's obligations of maintenance of the FDR, it is unclear when or even if that will happen. If it does happen, then the State's obligations would be a matter of law that flows from its obligations under Highway Law § 349. Such a potential claim against the State is not ripe for declaratory adjudication at this time.

The court rejects plaintiff' claim that the State has waived any rights it otherwise had to have these cases dismissed, because of its prior participation in the action. While these actions have proceeded in court for a very long time, the pleadings being challenged by the State were only interposed by each of the plaintiffs in January of this year.

#### Conclusion

In accordance herewith it is hereby

ORDERED that the motion to dismiss made by the State of New York and the State of New York Department of Transportation in the case of Cannon Point South,

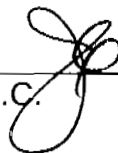
Inc. v. the City of New York and others (index # 120652/03) is hereby granted and the clerk is directed to issue a judgment severing and dismissing them from the case, and it is further

ORDERED that the motion to dismiss made by the State of New York in the case of Cannon Point North, Inc. (Index #101157/04) is hereby granted and the clerk is directed to issue a judgment severing and dismissing it from the case, 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  
August 20, 2008

So Ordered:

J.G.J.S.C. 

**FILED**  
AUG 22 2008  
COUNTY CLERK'S OFFICE  
NEW YORK