Coventry Homeowners Assn., Inc. v Commr. of Dept. of Health of Suffolk County, N.Y.

2009 NY Slip Op 30153(U)

January 2, 2009

Supreme Court, Suffolk County

Docket Number: 30963-2008

Judge: Melvyn Tanenbaum

SHORT FORM ORDER

INDEX No. 30963-2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY

PRESENT:
Hon. MELVYN TANENBAUM
Justice

MOTION #001, 002-CASE DISP
R/D: 092408
S/D 101408

COVENTRY HOMEOWNERS ASSOCIATION, INC.,

PLTF'S/PET'S ATTY:
THEODORE S. STEINGUT, ESQ.
ONE WHITEHALL STREET
NEW YORK, NY 10004

Plaintiff,

- against -

COMMISSIONER OF THE DEPARTMENT OF HEALTH OR SUFFOLK COUNTY, NEW YORK,

DEFT'S/RESP'S ATTY:
CHRISTINE MALAFI, ESQ.
100 VETERANS MEM HWY, POB 6100
HAUPPAUGE, NY 11788

Defendants.

Upon the following papers numbered 1 to 10 read on this motion for an order pursuant to _____ Notice of Motion/Order to Show Cause and supporting papers 1-5; Notice of Cross Motion and supporting papers _____ Answering Affidavits and supporting papers 6-10 Replying Affidavits and supporting papers _____ Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by respondent COMMISSIONER OF THE DEPARTMENT OF HEALTH OF SUFFOLK COUNTY, NEW YORK ("COMMISSIONER") for an order pursuant to CPLR Section 7804(f) dismissing this petition on the basis that no justiciable controversy exists is granted.

On January 25, 2008 and February 1, 2008 inspectors employed by the Suffolk County Department of Health determined that water service to a townhouse unit located in the COVENTRY HOMEOWNERS ASSOCIATION ("CHA") complex had been disconnected. On February 20, 2008 notices of violation of the Suffolk County Sanitary Code were issued to the unit owner and the petitioner homeowners association "CHA". Prior to commencing the scheduled administrative hearing on March 19, 2008 the unit owner stipulated to make payments for her past due common charges and "CHA" agreed to restore water service to the unit. The Department of Health representative thereafter withdrew both violations on the record before the hearing officer.

At the request of the parties the hearing officer permitted additional statements on the record concerning the issues of whether the Suffolk County Code Section 506.2 is applicable to the homeowners

association and whether "CHA" is responsible for making payment to the Suffolk County Water Authority on behalf of the unit owners who have not paid their common charges. The hearing officer agreed to research the questions presented and to provide an answer endorsed by the Commissioner.

On August 20, 2008 the hearing officer provided a three page written document entitled "Finding of Fact Conclusion Recommendation Decision". The document signed by the hearing officer provides:

FINDINGS OF FACT

On the 19th day of March, 2008 at 11:30 a.m., a Hearing pursuant to the Notice of Formal Hearing, dated February 25, 2008, was cancelled due to an agreement between the Respondent and tenant reached before the actual hearing. However, due to the complicated nature of enforcing the statute, testimony was collected and a formal request was made by the Respondent for a clear interpretation of the statute regarding alleged violation of the Suffolk County Sanitary Code, to wit:

SECTION NUMBER

Article V Section 506-2.

1. Mr. Barry Manson, Esq., appeared as the respondent and requested an opinion as to whether it was legal for the complex to run off water to a on-paying member of the complex.

2. The Hearing officer said that due to the ramifications of the interpretation, he would request the Suffolk County Attorney to review the statute to see if it was correctly enforced.

3. The County attorney reviewed the statutes and all the information provided by the respondent and agreed that the complex did not have the right to shut the water off to a non-paying association member even though the charges of the association included the water supply charges that it paid for the whole complex.

4. Based upon the testimony and evidence presented at this informational hearing, it is found by this Hearing Officer that Respondent violated the Suffolk County Law by cutting the water supply, however, since the matter was settled with the tenant prior to the hearing, the charges would be dropped.

CONCLUSION

The complex had no right to sever the water supply to the member of the Association for failure to pay common charges.

RECOMMENDATION

It is the recommendation of this Hearing Officer that no civil penalty be assessed against the Respondent for violations of the Suffolk County Sanitary

Code at this time since an agreement was reached with the resident prior to the start of this hearing.

The code does not permit the shutting off of the water supply to any unit even though common charges may be in arrears. This opinion was reviewed and supported by the County Attorney.

On August 21, 2008 the Assistant Commissioner of Health Services signed a document entitled "Commissioner's Decision and Order" which provides:

COMMISSIONER'S DECISION AND ORDER

Upon review of the record and the Finding of Fact, Conclusion and Recommendation by the Hearing Officer in this matter, I hereby adopt the Findings, Conclusions and Recommendations as my own.

NOW THEREFORE, having considered this matter, it is ORDERED that:

PURSUANT to Article 2, Section 218 (2) of the Suffolk County Sanitary Code, I hereby ORDER and DIRECT that not civil penalty be assessed against the Respondent, Barry Manson, Coventry Manor Townhouses HOA Inc., c/o ABM Management Corp., 310 Northern Blvd., Suite G, Great Neck, NY 11021, for violations found to have existed on 1/25/08 and 2/1/08 at the Respondent's complex at 125 Fieldstone Ct., Middle Island, NY.

FURTHERMORE, I ORDER and DIRECT that the Respondent immediately restore water to the tenants in residence or vacate the tenants from the premises. The Respondent must not shut the supply of drinking water to any unit in the complex for failure to pay common charges.

Petitioner "CHA" commenced this CPLR Article 78 proceeding seeking a judgment annulling the respondent's determination which declared that "CHA" could not terminate water service to any condominium unit owner who failed to pay common charges to the homeowners association and directed that water service be restored to all unit owners. Respondent's motion seeks an order dismissing the petition claiming that petitioner seeks an advisory opinion since the Commissioner's and the hearing officer's August 20 & 21, 2008 decisions were non-binding pronouncements which did not concern an actual pending controversy between the homeowners association and any unit owner.

The issue before the Court on a motion to dismiss for failure to state a cause of action is not whether the cause of action can be proved but whether one has been stated (STAKALS v. STATE, 42 NY2d 272, 397 NYS2d 740 (1977)). On a motion to dismiss a petition pursuant to subdivision (f) of CPLR §7804, only

the petition is to be considered and all allegations are deemed to be true (DEPAOLI v. BOARD OF EDUCATION, 92 AD2d 894, 459 NYS2d 883 (2nd Dept., 1983)).

Although petitioner's application has been submitted in the form of a CPLR Article 78 petition, in essence petitioner is seeking a declaratory judgment to determine whether in the event that another condominium unit owner fails to pay common charges the homeowners association will be justified in terminating water service and not be subject to penalties under Suffolk County Code Section 506-2.

CPLR Section 3001 provides:

> "The Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds."

An action is justiciable when the controversy presented touches the legal relations of the parties having adverse interest from which harm is presently flowing or could flow in the future in the absence of a court determination of the parties' rights. The controversy must be capable of disposition and be presented in an adversarial context with a set of concrete facts (GOODWILL ADVERTISING v. STATE LIQUOR AUTHORITY, 14AD2d 658, 218 NYS2d 759 (3rd Dept., 1961)).

Courts will not entertain a declaratory judgment action when any decree that the court might issue will become effective only upon the occurrence of a future event which may or may not occur (NEW YORK PUBLIC INT. RES. GROUP v. CAREY, 42 NY2d 527, 531 (1978) quoting 3 Weinstein-Korn-Miller, NY Civ. Prac. §3001.096; see EMPLOYERS FIRE INS. v. KLEMONS, 229 AD2d 513, 645 NYS2d 849 (2d Dept., 1996)). If a decision rendered by the Court might ultimately prove to have no effect on the substantial rights of either party, the complaint should be dismissed (EMPLOYERS FIRE INS. v. KLEMONS, supra citing B'NAI JACOB v. PARK SLOPE, 199 AD2d 296, 297).

The Court of Appeals in PUBLIC INTEREST RESEARCH GROUP v. CAREY, supra, held:

> "The fact that the court may be required to determine the rights of the parties upon the happening of a future event does not mean that the declaratory judgment will be merely advisory. In the typical case where the future event is an act contemplated by one of the parties, it is assumed that the parties will act in accordance with the law and thus the court's determination will have the immediate and practical effect of influencing their conduct ***.
>
> "But a request for a declaratory judgment is premature if the future event is beyond the control of the parties and may never occur ***. Then any determination of the court may make would be merely advisory since it can have no immediate effect and may never resolve anything" (id., pp530-531 [emphasis supplied] [citations omitted].""

The notices of violation issued by respondent were withdrawn during the March 19, 2008 hearing as a result of a stipulation agreed upon by the unit owner and the homeowners association representative. Once the respondent's representative made formal application and withdrew the charges against the parties no further action by the hearing officer or the Commissioner was necessary or proper. The written decisions issued on August 20 and 21, 2008 as a result of petitioner's request for a "clear interpretation of the statute" were not binding nor authorized since no actual controversy existed requiring a determination by the Commissioner. No legal basis exists therefore for this Court to entertain this proceeding since it is not and never has been the function of the Supreme Court or any court or administrative tribunal to adjudicate issues which do not exist. Respondent's motion for an order pursuant to CPLR Section 7804(f) must therefore be granted, and it is further

ORDERED that the petition is hereby dismissed.

Dated: January 2, 2009

J.S.C.

MELVYN TANENBAUM