

Ariza, LLC v City of New York

2009 NY Slip Op 32112(U)

September 15, 2009

Supreme Court, New York County

Docket Number: 105548/09

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER

PART _____

Justice

*Ariza d/b/a Early Days Childcare
and N+J Assoc.
City of N.Y. A/B/H Dept. of
Buildings & Cos. of Mps of 105 W. 72*

INDEX NO.

105548/09

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2

Answering Affidavits — Exhibits _____

3, 4, 5, 6, 7

Replying Affidavits _____

8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

~~FROM EILEEN A. RAKOWER~~
FILED
SEP 16 2009
COUNTY CLERK'S OFFICE
NEW YORK
**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: _____

9/15/09

HON. EILEEN A. RAKOWER
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK; PART 5

ARIZA, LLC d/b/a EARLY DAYS CHILDCARE
CENTER, and N&J ASSOCIATES, LLC,

Index No.
105548/09

Plaintiffs,

-against-

DECISION
and ORDER

THE CITY OF NEW YORK, acting by and through its
DEPARTMENT OF BUILDINGS, and THE BOARD
OF MANAGERS OF THE 105 W. 72ND
CONDOMINIUM,

Mot. Seq. 001

Defendants.

FILED
SEP 16 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. EILEEN A. RAKOWER:

Plaintiffs bring this action seeking (1) a declaratory judgment against Defendants City of New York ("City") and the Board of Managers of the 105 W. 72nd Condominium ("Board"); (2) damages for alleged breach of contract by the Board; (3) damages for alleged tortious interference with prospective economic relations by the Board; and (4) a permanent injunction against the Board. Presently before the court is a motion by the City to dismiss the first and only cause of action as against the City pursuant to CPLR §3211(a)(5) & (a)(7).

Plaintiff N&J Associates, LLC ("N&J") is the owner of a commercial unit in the 105 W. 72nd Street Condominium ("the Unit"). On or about July 1, 2008, N&J and Plaintiff Ariza, LLC ("Ariza") executed a lease agreement whereby Ariza would lease the Unit from N&J. Plaintiffs contend that it was the understanding of N&J and Ariza that Ariza would use the Unit as a childcare facility. After executing the lease, Ariza began performing minor cosmetic renovations in the Unit. However, it subsequently became apparent to Ariza that major renovations would be necessary in order to ensure that the Unit would be safe and otherwise amenable to the functions of a childcare facility.

Plaintiffs state that Ariza, through its architect and its expediter, worked in tandem with the City Department of Buildings (“DOB”) from about July through November of 2008. On or around November 21, 2008, Ariza received its change of use permit and its construction permit (“the permits”). Plaintiffs claim that the renovations were proceeding without incident from November 24, 2008 until around December 18, 2008, when Ariza was advised by letters from DOB (“the 12/18/08 letters”) that DOB was issuing a Stop Work Order (“SWO”) at the Unit based upon an alleged violation of §27-140 of the City Building Code (“Building Code”) - the alleged violation being Ariza’s failure to obtain the authorization of “the Owner” prior to commencing the work. The letters further advised that the permits would be revoked within fifteen days of the posting of the letters “unless sufficient information is presented to [DOB] to demonstrate that the permit[s] should not be revoked.”

Ariza did not respond to the 12/18/08 letters. By letters dated March 14, 2009, DOB advised Plaintiffs that the permits were revoked, since DOB did not receive any response to the 12/18/08 letters.

Plaintiffs challenged DOB’s revocation of the permits and issuance of a SWO in an Article 78 proceeding brought by order to show cause on April 21, 2009¹. By order of the Hon. Marcy S. Friedman dated May 21, 2009, the Supreme Court, New York County dismissed the Article 78 petition on the grounds that Plaintiffs (the petitioners therein) failed to exhaust available administrative remedies by “fail[ing] to appeal the revocation of the DOB permit to the Board of Standards and Appeals.”

Plaintiffs commenced the instant action on or around April 20, 2009. Relevant to the instant motion, Plaintiffs seek a judgment pursuant to CPLR §3001 declaring that:

- a. N&J is the only lawful owner of the Unit;
- b. Ariza is a lawful lessee of the Unit;
- c. Ariza intends to make lawful use of the Unit;
- d. the Board has no ownership interest in the Unit;
- e. the Board’s consent to renovations is unnecessary;

¹The Article 78 proceeding was titled, “*Ariza, LLC, d/b/a Early Days Childcare Center and N&J Associates, LLC v. The City of New York, acting by and through its Department of Buildings, and The Board of Managers of the 105 W. 72nd Condominium*”, Index No. 105546/09.

- f. the Board's interference with N&J's ownership is unlawful;
- g. the Board's interference with Ariza's tenancy is unlawful;
- h. DOB must lift the SWO forthwith;
- i. DOB must reinstate the permits forthwith; and
- j. Plaintiffs are entitled to the damages they have incurred as a result of the actions of both DOB and the Board.

The City moves to dismiss on the grounds that the nature of the relief sought by Plaintiffs is not properly the subject of a declaratory judgment action, and that the instant action as against the City is precluded by the doctrines of *res judicata* and collateral estoppel. The City submits an affirmation in support of its motion to dismiss. Annexed to the affirmation as exhibits are the 12/18/08 letters; computer printouts for Plaintiffs' permit applications; DOB's 12/22/08 Audit Objections; DOB's 3/24/09 revocation letters; Plaintiffs' Article 78 petition; and Justice Friedman's 5/21/09 decision dismissing the petition.

The Board submits an affirmation in support of the City's motion.

Plaintiffs submit an affirmation and a memorandum of law in opposition to the City's motion. Annexed to Plaintiffs' affirmation as exhibits are Plaintiffs' first amended complaint and the exhibits annexed thereto; the Board's verified answer; Plaintiff's reply to counterclaim; and Justice Friedman's 5/21/09 decision.

The City has submitted a reply affirmation in response to Plaintiffs' opposition, with a copy of Plaintiffs' opposition to the City's cross-motion to dismiss in the Article 78 proceeding annexed as an exhibit.

CPLR §3211 provides, in pertinent part

- (a) Motion to dismiss a cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - 5. the cause of action may not be maintained because of... *res judicata*.
 - 7. the pleading fails to state a cause of action....

Under the doctrine of *res judicata*,

a valid final judgment bars future actions between the same parties on the same cause of action. As a general rule, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343,347 [1999]).

Plaintiffs purport to bring the instant action (as against the City) in the form of a declaratory judgment action. However, the First Department has observed that the proper vehicle for challenging the propriety of administration actions taken pursuant to the exercise of statutory authority, and not to the authorizing statute itself, is an Article 78 proceeding (*see Rosenthal v. City of New York*, 283 A.D.2d 156, 158 [1st Dept. 2001]). While denominated a declaratory judgment action by Plaintiffs, Plaintiffs' cause of action as against the City essentially challenges DOB's decision to impose a SWO and revoke Plaintiffs' permits as violative of lawful procedure, a claim properly brought under CPLR §7803(3) (*see ABC Radio Network v. State Dep't of Taxation and Fin.*, 294 A.D.2d 213, 214 [1st Dept. 2002]) ("[T]he essential nature of a proceeding may not be changed... merely by denominating it as something other than what is actually is.... Although the instant action was denominated as one for a declaratory judgment, it was, in fact, an action cognizable under CPLR 7803(3)").

Accordingly, the court treats Plaintiffs' first and only cause of action as against the City as a proceeding brought pursuant to CPLR Article 78 (*see* CPLR §103(c)). Such a proceeding is clearly precluded by principles of *res judicata*, as Plaintiffs have previously brought an Article 78 proceeding challenging the DOB actions complained of herein and had that action dismissed by Justice Friedman based upon their failure to exhaust their administrative remedies.

Wherefore, it is hereby

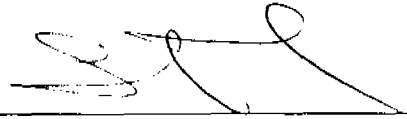
ORDERED that the City's motion to dismiss is granted and the first cause of action of the complaint as against the City is severed and dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled.

DATED: September 15, 2009



EILEEN A. RAKOWER, J.S.C

FILED
SEP 16 2009
COUNTY CLERK'S OFFICE
NEW YORK