

Trio Bronx Inc. v Hernandez

2009 NY Slip Op 32506(U)

October 16, 2009

Supreme Court, New York County

Docket Number: 114703/08

Judge: Joan A. Madden

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SCANNED ON 10/28/2009
[* 1]
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. Middlew

PART 11

Index Number : 114703/2008
TRIO BRONX
VS.
HERNANDEZ, TINO
SEQUENCE NUMBER : 001
DISMISS ACTION

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 is decided in accordance with the attached Memorandum Decision + Order

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

FILED
OCT 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: October 16, 2009

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 11

-----X
TRIO BRONX INC.,

Index No. 114703/08

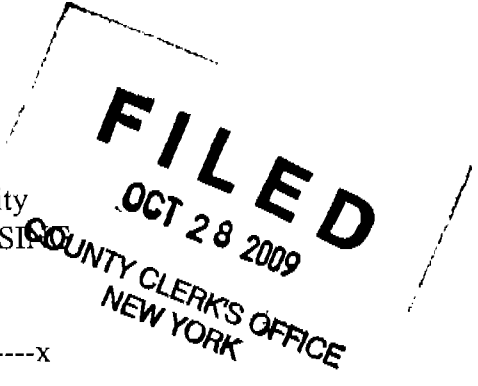
Plaintiff,

- against -

TINO HERNANDEZ, as Chairman of the New York City
Housing Authority, and THE NEW YORK CITY HOUSING
AUTHORITY,

Defendants.

-----X
JOAN A. MADDEN, J.:



Defendants Tino Hernandez as Chairman of the New York City Housing Authority and the New York City Housing Authority ("NYCHA") move to dismiss the complaint on the grounds that: (1) plaintiff failed to properly serve, and plead service of a notice of claim on the NYCHA, (2) the complaint fails to state a cause of action, and (3) this matter is an Article 78 proceeding and is time-barred by the four month statute of limitations governing such proceedings. Plaintiff opposes the motion, which is granted for the reasons below.

Background

The following facts are based on allegations in the complaint and the documentary evidence submitted on the motion.

NYCHA is an agency charged with, inter alia, the administration of tenant-based housing assistance programs authorized by the United States Housing Act of 1937, 42 USC § 1437f ("Section 8"). NYCHA provides rent subsidies ("Section 8 subsidies") to landlords who provide housing for approved low-income tenants based on funding provided by the U.S . government. NYCHA is also charged with ensuring that Section 8 landlords and tenants follow the program's

qualifying guidelines set by the U.S. Department of Housing and Urban Development (HUD). Plaintiff is a domestic corporation and a section 8 landlord.

The complaint alleges that during portions of 2004-2008 NYCHA failed to pay Section 8 subsidies owed to Plaintiff for three (3) apartments, known as the Holley apartment, the Berisha apartment and the Brinkley apartment, in breach of the Housing Assistance Payments (HAP) contracts agreed to by the parties. The complaint also alleges that NYCHA has been unjustly enriched as a result of its failure to pay the Section 8 subsidies.

NYCHA now moves to dismiss the complaint on the grounds that the plaintiff has failed to properly serve, or plead service of a notice of claim on the NYCHA as required by New York Public Housing Law ("PHL") § 157. NYCHA further argues that as this action seeks to review its administrative decision making, relief must be sought via an Article 78 proceeding, and that the four month statute of limitations governing such proceedings has expired.

As to the breach of contract action, NYCHA argues that documentary evidence shows that the complaint fails to state a cause of action since the denial of Section 8 subsidies was warranted based on serious Housing Quality Standards ("HQS") violations in the subject apartments and that, with the exception of the Berisha apartment for the period from September 2004 to March 2005 for which Plaintiff has received retroactive payment, timely repairs were not made. NYCHA further argues that Plaintiff's unjust enrichment claim is without merit as the HAP contract is an express agreement between parties which precludes such a claim.

In support of its motion, NYCHA submits documentary evidence including the HAP contracts for each Section 8 tenant. Additionally, NYCHA provides notices delivered to Plaintiff informing it of violations recorded during NYSHA inspections of the subject apartments.

NYCHA also submits the affidavit of Venice Kendall (“Kendall”), who is the manager of the Inspection 2 Unit of NYCHA’s Leased Housing Apartments Bronx Office. Kendall states that based on her personal knowledge and the books and records of NYCHA that the subsidies at issue were suspended based on plaintiff’s failure to remedy violations of federally mandated HQS standards, and that plaintiff’s received notice of the violations and failed to timely cure them.

Plaintiff opposes the motion, arguing that it provided notice to NYCHA which satisfies the notice of claim requirements of PHL § 157 (1) with respect to the Holley and Brinkley apartments when it instituted summary proceedings and served the tenants and the NYCHA with notices of petition and certificates of eviction. In support of this argument, plaintiff submits two notices of petition in summary proceeding and eviction certificates requesting the tenant’s share of the Section 8 apartments rent.¹ Plaintiff next argues that this action does not seek Article 78 relief but damages for breach of contract and unjust enrichment, and that in any event, the action was timely commenced.

Plaintiff further argues that the complaint states a breach of contract claim, and provides documentary evidence that certain violations in the Berisha and the Brinkley apartments had been cured and that during a subsequent inspection, NYCHA found different defects than those that were the cause for the original subsidy suspension. Plaintiff also asserts that “upon information and belief Plaintiff has in fact [retroactively] received five months of the subsidy for the Berisha apartment.” Plaintiff further contends that inconsistencies in NYCHA’s inspection results are

¹The court notes that NYCHA refused to certify plaintiff’s basis for eviction in both instances.

sufficient to raise issues of fact.

In reply, NYCHA asserts that Plaintiff's claims for subsidy payments for the Berisha apartment for the periods September 2004 to March 2005 and November 2006 to March 2007 and for the Brinkley apartment for April 2008 through January 2009 are now moot since the NYCHA has paid the subsidies for those periods. NYCHA further argues that for the remainder of the Berisha and Brinkley claims and the entirety of the Holley claims, Plaintiff either failed to demonstrate that it promptly repaired the HQS violation or was not paid the subsidy. NYCHA also argues that the notices of petition and certificate of evictions served in the summary proceedings for the Holley and Brinkley apartments do not satisfy the notice of claim requirement.

Discussion

The first issue is whether the Plaintiff has served a notice of claim on the NYCHA. Public Housing Law § 157(1) requires that in every action against a public housing authority the complaint must allege that at least thirty (30) days have elapsed since the plaintiff presented defendant authority with the demand, claim or claims upon which the complaint is based and the authority neglected or refused to make such adjustment or payment in those thirty days. Here, the complaint does not contain allegations regarding service of notice of claim on the NYCHA as required by PHL § 157(1) and there is no evidence that NYCHA was served with notices of claim.

Moreover, contrary to Plaintiff's argument, the two notices relied upon by the Plaintiff do not satisfy the requirements of PHL § 157(1), particularly as Plaintiff did not serve the notices and certificates to a NYCHA department authorized to accept service of a notice of claim.

Accordingly, the complaint should be dismissed for failure to serve a notice of claim on the NYCHA. See *Kovachevich v. New York City Hous. Auth.*, 295 AD2d 255 (1st Dep't 2002).

The complaint must also be dismissed for failure to state a cause of action. On a motion pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. *Guggenheim v. Ginzburg*, 43 NY2d 268 (1977); *Morone v. Morone*, 50 NY2d 481 (1980). At the same time, “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference” *Morgenthau & Latham v. Bank of New York Company, Inc.*, 305 AD2d 74, 78 (1st Dept 2003), quoting, *Biondi v. Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999), *aff'd*, 94 NY2d 659 (2000). In such cases, “the criterion becomes ‘whether the proponent has a cause of action, not whether he has stated one.’” *Id.*, quoting, *Guggenheimer v. Ginzburg*, 43 NY2d at 275.

Here, with the exceptions indicated below, NYCHA’s refusal to pay the subsidies at issue was consistent with the terms of the HAP contracts and federal housing regulations. Specifically the records reveal that NYCHA inspected the subject apartments to ensure federally mandated Housing Quality Standards (HQS) compliance as governed by Part B, section 3(e) of the HAP contracts, and upon discovery that such standards were violated, notified Plaintiff of the defects and provided it with a specific time period to fix the problems in full accordance with Part B, section 3(f) of the HAP contracts. When certain defects were not remedied by the time specified, NYCHA suspended subsidy payments, as required by Part B, section 3(d) and permitted by section 3(c) of the HAP contracts. As for the proof submitted in opposition that Plaintiff made

timely repairs to the Berisha and Brinkley apartments and thus is entitled to subsidies for certain periods, NYCHA has shown in reply that it has paid such subsidies and these claims are moot. Additionally, it appears that the asserted inconsistencies referred to by Plaintiff arose out of NYCHA's reinspection of the Berisha and Brinkley apartments and the NYCHA's determination that since the original violations were repaired, Plaintiff was entitled to subsidies as to those repairs. However, that determination does not raise an issue of fact regarding claims seeking subsidies for violations which were not remedied.

Accordingly, as the NYCHA acted in accordance with the terms of the HAP contracts and consistent with federal law, the breach of contract claim must be dismissed for failure to state a cause of action.

Next, the unjust enrichment claim, which alleges that the NYCHA unjustly benefitted from its withholding of Section 8 subsidy payments, is also insufficient to state a claim. When, as here, an express agreement exists between parties that governs a specific subject matter, recovery on a theory of unjust enrichment regarding the same subject matter is generally precluded. *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 (2009); *see also Cox v. NAP Constr. Co., Inc.*, 10 NY3d 592 (2008). Here, the unjust enrichment claim is based on the NYCHA's withholding of subsidy payments, a matter explicitly governed by the HAP contracts agreed to by each party. Accordingly, Plaintiff's unjust enrichment claim must be dismissed.

Finally, as the complaint fails to state a cause of action, the court need not reach whether this action is in the nature of an Article 78 proceeding and therefore time barred.

Conclusion

In view of the above, it is

ORDERED that the motion to dismiss by the defendants, Tino Hernandez and The New York City Housing Authority, is granted; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint in it's entirety.

Dated: October 16, 2009



J.S.C.

FILED
OCT 28 2009
COUNTY CLERK'S OFFICE
NEW YORK