Matter of American Chophouse Enter., LLC v Town of Huntington

2009 NY Slip Op 33206(U)

December 29, 2009

Supreme Court, Suffolk County

Docket Number: 18049/2007

Judge: Joseph Farneti

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[* 1]

SHORT FORM ORDER

INDEX NO. 18049/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

In the Matter of the Application of

AMERICAN CHOPHOUSE ENTERPRISES, LLC, and PORT DOCK AND STONE CORP.,

Petitioners,

-against-

for a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and other relief against

THE TOWN OF HUNTINGTON, PLANNING BOARD OF THE TOWN OF HUNTINGTON, PAUL MANDELIK, JANE DEVINE, MITCHELL SOMMER, AVRUM ROSEN, LORRAINE SANTOIANNI, STEVEN SCHNITTMAN and LYNN HEALY each as Members of the PLANNING BOARD OF THE TOWN OF HUNTINGTON,

Respondents.

ORIG. RETURN DATE: JANUARY 15, 2009
FINAL SUBMISSION DATE: MARCH 12, 2009
MTN. SEQ. #: 008
MOTION: MD

PETITIONERS' ATTORNEYS:
GREENBERG TRAURIG, LLP
BY: JAMES W. PERKINS, ESQ.
METLIFE BUILDING
200 PARK AVENUE
NEW YORK, NEW YORK 10166
212-801-9200

RESPONDENTS' ATTORNEYS:
JOHN J. LEO, ESQ.
HUNTINGTON TOWN ATTORNEY
BY: ELLEN SCHAFFER, ESQ.
ASSISTANT TOWN ATTORNEY
100 MAIN STREET
HUNTINGTON, NEW YORK 11743
631-351-3042

Upon the following papers numbered 1 to 10 read in this motion FOR AN AWARD OF FEES AND EXPENSES. Notice of Motion and supporting papers 1-3; Supplemental Affirmation and supporting papers 4, 5; Memorandum of Law 6; Affirmation in Opposition and supporting papers 7, 8; Replying Affidavit and supporting papers 9; Reply Memorandum of Law 10; it is,

ORDERED that this motion by petitioners AMERICAN CHOPHOUSE ENTERPRISES, LLC ("American") and PORT DOCK AND STONE CORP. ("PDSC") (collectively "petitioners") for an Order, pursuant to CPLR 8601, for a money judgment in favor of petitioners and against respondents THE TOWN OF

HUNTINGTON, PLANNING BOARD OF THE TOWN OF HUNTINGTON, PAUL MANDELIK, JANE DEVINE, MITCHELL SOMMER, AVRUM ROSEN, LORRAINE SANTOIANNI, STEVEN SCHNITTMAN and LYNN HEALY, each as Members of the PLANNING BOARD OF THE TOWN OF HUNTINGTON ("Town" or "respondents") for counsel and expert fees and expenses incurred by petitioners herein in the amounts set forth in petitioners' application, is hereby **DENIED** for the reasons set forth hereinafter. The Court has received an affirmation in opposition to the instant application from respondents, and a reply affidavit in response thereto. Respondents have also filed a sur-reply affirmation that has not been considered by the Court.

The factual and procedural history of this Article 78 proceeding was recited in detail in this Court's Order dated April 14, 2008, as well as in the Order of even date issued by this Court in a related action entitled, *Town of Huntington and Huntington Sewer District v. Port Dock and Stone Corp., and American Chophouse Enterprises, LLC a/k/a Prime Restaurant*, under index number 26493/2007. The gravamen of petitioners' argument was that the Town was unreasonably refusing to issue a building permit and certificate of occupancy for American's outdoor porch/deck/patio, and was refusing to process two other building permit applications of American's in connection with American's cabana and walk-in freezer, as a result of American's refusal to accede to the Town's request with respect to two easements sought by the Town, to wit: a north-south easement approximately eight (8) feet wide along the entire waterfront westerly side of the property, as well as an easement eight (8) feet wide from New York Avenue across petitioners' property to the water for public ingress and egress.

By Order dated April 14, 2008, this Court directed that American re-notice its petition, pursuant to CPLR 7804 (f), naming PDSC as an additional petitioner. By Order of even date in a related action entitled *Town of Huntington and Huntington Sewer District v. Port Dock and Stone Corp., and American Chophouse Enterprises, LLC a/k/a Prime Restaurant*, under index number 26493/2007, this Court denied both a motion by the Town for a preliminary injunction and a cross-motion by defendant American to dismiss the complaint.

Thereafter, by Order dated September 30, 2008 in the instant proceeding, this Court granted petitioners the relief demanded in their amended petition, to wit: an Order vacating "Condition 5" of a May 9, 2007 Resolution, which concerned the two easements, and remanding the matter to the Planning Board for the filing of a resolution without Condition 5. In addition, the Court

directed respondents to issue a building permit upon American's building permit application, bearing identification number 04-10-07-19, relative to American's cabana, schedule an inspection, and issue a certificate of occupancy within sixty (60) days of the date of that Order with notice of entry. The Court found that the attempt by the Town to exact two easements from the property as a condition of approval of American's site plan for an unrelated porch/deck/patio area and cabana, was arbitrary, capricious, without a rational basis in fact and law, and violated Town Law and controlling case law, in that a planning board may not condition site plan approval on land donation for public recreational purposes, and any conditions imposed must be "reasonable" and "directly related to and incidental to a proposed site plan." Petitioners inform the Court that respondents have not appealed from the Order of September 30, 2008, and therefore the Order has become final for purposes of an application under Article 86 of the CPLR.

Based upon the foregoing, petitioners have now filed the instant motion for an Order, pursuant to CPLR 8601 (b), granting petitioners a money judgment to recover the fees and costs incurred in the instant proceeding. Petitioners claim that they have incurred legal fees and expenses in the amount of $382,819.28 with respect to services rendered by the firm of Greenberg Traurig, LLP, not including the fees and costs of the instant application, which petitioners estimate to be at least $25,000.00. Petitioners allege that at the time of the filing of the within petition, American had approximately eighty-four (84) employees and PDSC had none, thereby satisfying the statutory maximum for the recovery of counsel fees and expenses pursuant to CPLR 8602 (d).

In addition, petitioners have submitted an affirmation of Michael L. McCarthy, Esq., the principal member of Michael L. McCarthy, PC, attorneys and local zoning counsel for American. Mr. McCarthy alleges that since his firm was retained in October of 2005, it has rendered approximately 250 hours of legal services to American, at a rate of $350.00 per hour for a total of $87,500.00, which American has paid in full. Further, petitioners have submitted invoices of Pryor & Mandelup, L.L.P. for services rendered on behalf of American, which total $4,106.50. As such, petitioners request that the Court consider these two amounts in addition to the amounts incurred relative to legal services rendered by Greenberg Traurig.

Petitioners argue that each petitioner, as a "prevailing party," is eligible to receive an award of counsel fees and expenses against the Town of

Huntington, as a subdivision of the State of New York, under Article 86 of the CPLR. Moreover, petitioners allege that the position of the Town was not "substantially justified," and there do not exist special circumstances that would make an award unjust.

In opposition, respondents argue that the instant application is untimely, as it was not filed with the Court within thirty (30) days of a final judgment pursuant to CPLR 8601 (b). Respondents allege that the Order of September 30, 2008 was entered with the Clerk of Suffolk County on October 14, 2008, and was received by respondents with notice of entry on October 20, 2008. As such, respondents argue that petitioners were required to file the instant application no later than thirty (30) days after October 20, 2008, or by November 19, 2008. The Court notes that according to the affidavit of service, the Order with notice of entry was served upon respondents on October 17, 2008. However, petitioners served this application on respondents on December 22, 2008. Thus, respondents seek a denial of the motion as time-barred.

In addition, respondents argue that American is one of four corporate entities with the same owners and managing partners, and is thus an "interlocking business" ineligible for relief under CPLR 8602 (d) (ii). Respondents allege that four restaurants owned by the Bohlsen family, to wit: Beach Tree Café, Teller's Chophouse, H2O, and Prime, are all organized through a corporate holding known as "Restaurant Management, Inc." located at 166 West Main Street, Islip, New York, the same name and address appearing on the Greenberg Traurig invoices. Respondents inform the Court that the address on file with the Secretary of State for American is also 166 West Main Street, Islip, New York. Thus, respondents contend that American is not an independently owned company to be an "eligible" party under CPLR 8602 (d) (ii). Further, respondents allege that American is not an "economically disadvantaged litigant" who may not have "the resources to sustain a long legal battle against an agency" (*see New York State Clinical Lab. Ass'n v Kaladjian*, 85 NY2d 346 [1995]). Respondents also allege that the Town was "substantially justified" in its actions herein (*see* CPLR 8601 [a]), as petitioners admittedly built a smaller 484 sq. ft. cabana without the required building permits or certificate of occupancy, and agreed to pay a civil fine in the amount of $10,000 to the Town as a result thereof.

In reply, petitioners claim that American is not one of several "interlocking businesses," but rather American is owned by Michael Bohlsen and his father John Bohlsen, and that other family members own the other

companies. Petitioners also indicate that Restaurant Management, Inc. does not hold an ownership interest in any other company, but rather it is a special purpose C-corporation that performs bill paying and payroll services for the various restaurant entities that are owned by Bohlsen family members, i.e., paying the legal bills incurred by American. Moreover, petitioners argue that their application is timely, as it was served upon respondents on December 22, 2008, within thirty (30) days of November 21, 2008, the date that the Order of September 30, 2008 became final and not appealable.

Article 86 of the CPLR is entitled "Counsel Fees and Expenses in Certain Actions Against the State," and is commonly known as the "New York State Equal Access to Justice Act" (*see* CPLR 8600 *et seq.*). The legislature enacted the Equal Access to Justice Act to help litigants secure legal assistance to contest wrongful actions of the state (*see e.g. Scott v Coleman*, 20 AD3d 631 [2005]). "By allowing victorious plaintiffs to gain attorney's fees, the statute seeks to help those whose rights have been violated but whose potential damage awards may not have been enough to induce lawyers to fight city hall. The legislature, however, did not intend to provide every plaintiff -- or even every 'prevailing' plaintiff -- with attorney's fees. Instead, fees 'may' be awarded only where the plaintiff 'prevails' and where the agency's position was not 'substantially justified' and no special circumstances make an award unjust" (*Wittlinger v Wing*, 99 NY2d 425 [2003]; *see* CPLR 8601 [a]). The term "substantially justified" has been interpreted as meaning "justified to a degree that could satisfy a reasonable person," or having a "reasonable basis both in law and fact" (*New York State Clinical Lab. Ass'n v Kaladjian*, 85 NY2d 346, 356 [1995], quoting *Pierce v Underwood*, 487 US 552 [1988]). The failure to establish any one of the required elements precludes the award of counsel fees (*id.* at 351-352).

Furthermore, the Equal Access to Justice Act provides that a party seeking a fee award shall submit to the Court an application within thirty (30) days of "final judgment" in the action (CPLR 8601 [b]). By definition, "final judgment" means a judgment that is final and not appealable (CPLR 8602 [c]; *NANCO Envtl. Servs. v New York State Dep't of Envtl. Conservation*, 149 Misc 2d 991 [Sup Ct, Albany County 1991]). Thus, interlocutory orders are excluded. Article 86 is in derogation of the common law and should therefore be strictly construed (*see Lee v Higgins*, 213 AD2d 553 [1995]; *Matter of Peck v New York State Div. of Hous. & Community Renewal*, 188 AD2d 327 [1992]).

Here, both parties acknowledge that the Order of September 30, 2008 finally resolved this proceeding. No judgment was entered upon the Order of September 30, 2008. As such, the parties have analyzed the time restrictions of Article 86 relative to that final Order. As discussed, the Order of September 30, 2008 was served upon respondents with notice of entry on October 17, 2008. If an order is the final paper, computation of the time to appeal or move for leave to appeal commences upon service of the Order with written notice of its entry (*see Whitfield v City of New York*, 90 NY2d 777 [1997]). Since an aggrieved party has thirty (30) days from service of a copy of the Order together with notice of entry to serve a notice of appeal or move for permission to appeal (CPLR 5513, 5514), the thirty (30) days allowed by CPLR 8601 (b) runs from the end of that period (*see* 2-33 Weinstein, Korn & Miller CPLR Manual § 33.19). Here, the thirty (30) day period of CPLR 8601 (b) began to run from the time respondents' right to appeal the Order had terminated on November 21, 2008.[1] Thus, thirty days hence from November 21, 2008 was December 21, 2008, which would have been the deadline for an application herein under Article 86. However, as December 21, 2008 was a Sunday, the time period was extended to the following day (*see* General Construction Law § 25-a), December 22, 2008, the date of service of the instant application upon respondents.

Notwithstanding the foregoing, while a motion is made for timeliness purposes when a notice of motion is served (*see* CPLR 2211; *Cruz v New York City Housing Authority*, 62 AD3d 643 [2009]), CPLR 8601 (b) expressly states that "[a] party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, *submit to the court* an application which sets forth (1) the facts supporting the claim that the party is a prevailing party and is eligible to receive an award under this section, (2) the amount sought, and (3) an itemized statement from every attorney or expert witness for whom fees or expenses are sought stating the actual time expended and the rate at which such fees and other expenses are claimed" (CPLR 8601 [b] [emphasis supplied]). The Court notes that the legislature did not use the phrase "*serve* an application" or "*move* for an order," but rather chose to utilize the phrase "submit to the court" (*cf.*

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[1] Petitioners served the Order with notice of entry upon respondents by first class mail on October 17, 2008, and therefore respondents' right to appeal terminated thirty-five (35) days later on November 21, 2008. Where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period (*see* CPLR 2103 [b] [2]).

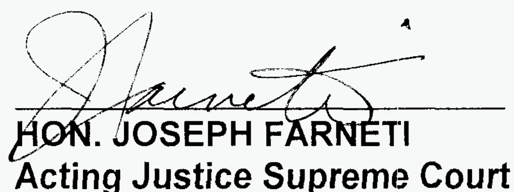
CPLR 3212 ["*move* for summary judgment"]; CPLR 6211 [b] [*move* . . . for an order confirming the order of attachment]). Statutes Law § 240 provides that where a law expressly describes a particular act, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded (Statutes Law § 240; *see e.g. Schultz Mgmt. v Bd. of Stds. & Appeals*, 103 AD2d 687 [1984])

Article 86 does not define the phrase "submit to the court," and this Court is unaware of any case law defining or interpreting the phrase in this context. However, as discussed, Article 86 is in derogation of the common law and must therefore be strictly construed (*see Lee v Higgins*, 213 AD2d 553, *supra*; *Matter of Peck v New York State Div. of Hous. & Community Renewal*, 188 AD2d 327, *supra*). Based upon the foregoing, the Court finds that the legislature intended that the application be *submitted* for the consideration of the Court within thirty (30) days of a final judgment or Order. This situation is analogous to the situation where an Order that directs "submit judgment" within a certain time period; such judgment must actually be submitted to the Court, not merely served, within that time period or risk being denied by the Court (*see* 22 NYCRR § 202.48; *Citibank, N.A. v Velazquez*, 284 AD2d 364 [2001]; *Zaman v Shukla*, 248 AD2d 379 [1998]). Therefore, petitioners were required to serve and submit the application to the Court no later than December 22, 2008. Although petitioners served the instant application on December 22, 2008, petitioners filed the application with the Court on January 5, 2009, well beyond the thirty-day (30) period provided by CPLR 8601 (b). As such, the Court finds this application to be untimely.

Accordingly, this motion by petitioners for a money judgment in favor of petitioners and against respondents for counsel and expert fees and expenses incurred by petitioners herein is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: December 29, 2009



HON. JOSEPH FARNETI
Acting Justice Supreme Court