

Solomon Burke Corp. v New York City Hous. Auth.

2010 NY Slip Op 33366(U)

December 3, 2010

Supreme Court, New York County

Docket Number: 105999/10

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE J.S.C. Justice

PART 5

Index Number : 105999/2010
SOLOMON BURKE CORP.
vs.
NEW YORK CITY HOUSING AUTHORITY
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM
cal # 108

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for dismiss

PAPERS NUMBERED

1, 2
3
4

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

FILED
DEC 08 2010
COUNTY CLERK'S OFFICE
NEW YORK

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION ORDER**

Dated: 12/3/10
DEC 03 2010

[Signature]
BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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 5

-----X

SOLOMON BURKE CORP.,

Index No. 105999/10

Plaintiff,

Motion Date: 10/5/10

-against-

Motion Seq. No.: 001

Calendar No.: 108

DECISION AND ORDER

FILED
DEC 08 2010
COUNTY CLERK'S OFFICE
NEW YORK

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

-----X

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By notice of motion dated June 18, 2010, defendant moves pursuant to CPLR 3211(a)(1), (5), and (7) for an order dismissing the complaint. Plaintiff opposes the motion.

I. BACKGROUND

Plaintiff is a landlord participating in the federal section 8 program. (Affirmation of Edmund S. Aronowitz, dated June 18, 2010 [Aronowitz Aff.]). As required by federal law, plaintiff entered into a Housing Assistance Payments Contract (HAP contract) with defendant, an administrator of the section 8 program. The HAP contract required defendant to pay monthly housing subsidy payments directly to plaintiff, with the amount of the payments equaling the difference between the apartment's monthly rent, as set by plaintiff, and the amount to be paid by the tenant receiving section 8 benefits, as determined by defendant. (*Id.*, Exh. 2).

According to federal regulations, defendant must re-examine annually each section 8

tenant's subsidy amount and adjust it in accordance with any changes in the tenant's finances.

(*Id.*) After each annual review, defendant sends to the landlord and the tenant a Voucher Payment Change Notification (VPCN), which indicates any adjustments to the subsidy amount to be paid by defendant and the corresponding adjustments to the amount to be paid by the tenant to the landlord.

Defendant retains Interview Records for all section 8 tenants, which it assembles following each annual review. They include the monthly rent owed by the tenant to the landlord and the monthly section 8 subsidy, which equals the total monthly rent, e.g. the contract rent. (*Id.*).

One of plaintiff's section 8 tenants is Ivelina Martinez, who has received section 8 benefits since 1994, and has been plaintiff's tenant since 1997. Martinez's benefits have been reviewed annually since 1995, and following each review, Martinez and plaintiff received a VPCN for the upcoming year. (*Id.*, Exh. 6). Between July 2001 and July 2006, defendant's billing and interview records reflect that Martinez's contract rent was \$591.79, which corresponds with the VPCN's for those years. (*Id.*, Exhs. 4, 6, 7).

In June 2006, plaintiff received from defendant a VPCN, dated May 31, 2006, reflecting that Martinez's portion of the monthly rent would be \$84 and the subsidy amount would be \$814.08, with the rates effective as of July 1, 2006. (*Id.*, Exh. 1). Thus, the total contract rent for Martinez would presumably be \$898.08. However, defendant's interview records dated June 1, 2006 reflect that effective July 1, 2006, the contract rent was \$591.79, with defendant's \$468.79 subsidy and Martinez's \$123 monthly rent. (*Id.*, Exh. 4).

Thus, beginning on July 1, 2006, plaintiff received \$468.79 monthly from defendant, with

Martinez responsible for \$123 monthly, for a total monthly contract rent of \$591.79. (*Id.*, Exh. 7). Between July 2007 and July 2009, defendant's interview and billing records reflect Martinez's contract rent as \$591.79, again corresponding with the VPCN's for those years. (*Id.*, Exhs. 4, 6, 7).

By letter dated January 5, 2006 and addressed to defendant, plaintiff's president advanced his concerns about defendant's payments for three unnamed tenants. (*Id.*, Exh. 1).

On or about April 19, 2010, plaintiff served a summons and complaint on defendant, alleging that defendant had breached its contract and was unjustly enriched by failing to pay the correct subsidy to plaintiff on Martinez's behalf, that defendant negligently failed to pay the proper amount thereby forcing it to commence non-payment proceedings against Martinez and incurring attorneys fees and costs, and that defendant's retention of funds it should have paid plaintiff constitutes fraud and misrepresentation. (*Id.*, Exh. 1). Plaintiff thus seeks the difference between the subsidy amount reflected on the May 2006 VPCN and the amount actually paid by defendant.

II. CONTENTIONS

Defendant argues that plaintiff failed to file a notice of claim before suing defendant, failed to plead in his complaint certain required language, and failed to challenge defendant's determination in an Article 78 proceeding within the applicable statute of limitations. It also asserts that and as the documentary evidence reflects that the subsidy amount listed on the May 2006 VPCN resulted from a clerical error and that it may not be estopped from correcting its error. It also maintains that as a landlord may not commence a nonpayment proceeding against a section 8 tenant based on defendant's failure to pay its share of the tenant's rent, defendant's

alleged failure to pay the correct amount could not and should not have caused plaintiff to commence nonpayment proceedings against Martinez. Defendant also contends that plaintiff's claim of fraud must be dismissed as it was not made with sufficient particularity. (Aronowitz Aff.).

In opposition, plaintiff maintains that there is no evidence that the information contained in the May 2006 VPCN is the result of a clerical error, that it sent numerous notices to defendant about Martinez's rent, and that as its claims address defendant's failure to comply with its own determination, not the nature of the determination itself, the action need not be brought as an Article 78 proceeding. (Affirmation of Edward R. Hall, Esq., dated Sept. 1, 2010).

III. ANALYSIS

Pursuant to New York Public Housing Law (PHL) § 157(2), a notice of claim pertaining to any action against a public housing authority must be served on defendant in compliance with General Municipal Law 50-e, which requires that a notice of claim set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained. The notice of claim must be served personally or by registered or certified mail to defendant or to an attorney regularly representing defendant. (GML 50-e[3]). Moreover, it must be alleged in the complaint or moving papers that "at least thirty days have elapsed since the demand, claim or claims upon which such action or special proceeding is founded were presented to the authority for adjustment and that it has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment." (PHL 157[1]). The failure to serve defendant with a proper notice of claim and/or

to plead compliance with PHL 157 in a complaint requires dismissal of the complaint.

(*Kovachevich v New York City Hous. Auth.*, 295 AD2d 255 [1st Dept 2002]).

Here, plaintiff's 2006 letter does not set forth all of the requisite information. There is no mention of the nature of its claim against defendant, the time, place and manner in which the claim arose, and the items of damages sustained; it does not even mention Martinez by name, and there is no proof that the letter was properly served on defendant. Plaintiff also failed to plead compliance with PHL 157. (See *Kovachevich*, 295 AD2d at 255 [action against defendant for wrongful failure to award contracts to plaintiff dismissed as plaintiff failed to comply with notice and pleading requirements in PHL 157]).

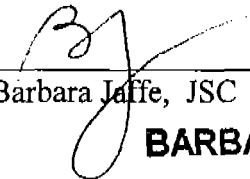
Even if plaintiff had complied with the statute's notice of claim and pleading requirements, defendant's records reflect that between 2002 and 2009, the contract rent for the apartment was \$591.79, which is the amount it paid to plaintiff, and plaintiff does not dispute that Martinez's actual contract rent was \$591.79 in 2006-2007. Thus, defendant has established that its calculation of the contract rent on the May 2006 VPCN was a clerical or administrative error. As an agency's administrative error does not estop the agency from correcting it (*Parkview Assocs. v City of New York*, 71 NY2d 274 [1988]), nor create a right where none exists (*Grishman v City of New York*, 183 AD2d 464 [1st Dept 1992], *lv denied* 80 NY2d 760), defendant's erroneous May 2006 VPCN does not entitle plaintiff to higher subsidy payments or prevent plaintiff from rectifying its error by paying the correct amounts (See *Nelson v Roberts*, 304 AD2d 20 [1st Dept 2003] [even if there had been miscalculation in determining tenant's section 8 rent share, agency did not act unreasonably in correcting mistake as estoppel may not prevent agency from correcting error]; *333 E. 89 Realty LLC v New York City Water Bd.*, 272

AD2d 549 [2d Dept 2000], *lv denied* 95 NY2d 762 [petitioner not entitled to credit that respondent had erroneously given and then revoked]). In light of this result, I need not consider defendant's other arguments.

IV. CONCLUSION

Accordingly, defendant's motion to dismiss the complaint in its entirety is granted.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: December 3, 2010
New York, New York

DEC 03 2010

FILED
DEC 08 2010
COUNTY CLERK'S OFFICE
NEW YORK