

Matter of CRP/Extell Parcel, L.L.P. v Cuomo
2011 NY Slip Op 30151(U)
January 19, 2011
Sup Ct, New York County
Docket Number: 113914/10
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ANIL C. SINGH
Justice

PART 14

CRP/EXTELL PARCEL, LLP,

INDEX NO.

113914/2010

- v -

ANDREW M. CUOMO, et al.

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that ~~this motion~~

the cross-motion is decided in accordance with the annexed decision and order.

FILED

JAN 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 19, 2011

ACS

HON. ANIL C. SINGH J.S.C.
SUPREME COURT JUSTICE

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

NON-FINAL DISPOSITION

REFERENCE

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 14

-----X
In the Matter of the Application of
CRP/EXTELL PARCEL, L.L.P.

DECISION AND
ORDER

Petitioner,

-against-

Index No. 113914/10

ANDREW CUOMO, in his capacity as
THE ATTORNEY GENERAL OF THE
STATE OF NEW YORK, et. al.

FILED

JAN 24 2011

Respondents.

NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. ANIL C. SINGH, J.:

In this Article 78 proceeding petitioner CRP/Extell Parcel, L.L.P.
("CRP/Extell") challenges a determination by the Office of the State Attorney
General ("the Attorney General") issued on April 9, 2010, ordering the return of
sixteen million dollars in downpayments on forty condominium units in a new
construction on the West Side of Manhattan.

Instead of bringing an immediate Article 78 proceeding in state court,
petitioner filed an action in the United States District Court for the Southern
District of New York on May 10, 2010, challenging the Attorney General's
determination on federal and state constitutional grounds. Petitioner also raised a
claim under Article 78 in its federal lawsuit.

By order dated October 12, 2010, the District Court granted the Attorney
General's motion to dismiss the action. The Court dismissed CPR/Extell's

Fourteenth Amendment due process claim, holding that “[u]nder Article 78, CRP/Extell has the right to have a state court determine that the NYAG’s determination ‘was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious.’” (slip op. at p. 2-3) (Daniels, J.). The District Court declined to exercise supplemental jurisdiction over CRP/Extell’s state claims and dismissed all state claims without prejudice.

On October 22, 2010, CRP/Extell commenced this Article 78 proceeding. It moved by order to show cause for a stay of enforcement of the Attorney General’s April 9, 2010 determination ordering release of the security deposits. This court – over opposition of the Attorney General and respondent purchasers – granted a discretionary stay upon the posting of an undertaking.

The Attorney General cross-moves to dismiss the petition on the ground that the proceeding was commenced many months beyond the four-month statute of limitations. CRP/Extell opposes the cross-motion.

It is noteworthy here that the district court could have dismissed the state claim on the ground that an Article 78 proceeding may not be commenced in federal court and that the court lacked subject matter jurisdiction. Instead, the court declined to exercise supplemental jurisdiction over petitioner’s state claim based on Article 78 of the CPLR. Therefore, the statute of limitations was tolled

pursuant to 28 U.S.C. Section 1367(d) with respect to any state claims over which the district court declined to exercise supplemental jurisdiction.

Even assuming for the sake of argument that the district court lacked subject matter jurisdiction to entertain the Article 78 claim, petitioner may invoke CPLR 205[a], which allows a party six months to bring a new action provided that the “action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits”

Citing Asim Drugs, Inc. v. Perales, 183 A.D.2d 893 (2nd Dept. 1992), the Attorney General maintains that CRP/Extell’s federal action does not toll the statute of limitations. It argues that although petitioner raised a claim under Article 78 in its federal lawsuit, an Article 78 proceeding may not be commenced in federal court. Therefore, petitioner’s Article 78 challenge was first commenced on October 22, 2010, and was not “timely commenced” as contemplated by Section 205.

This court disagrees. The Attorney General’s reliance on Asim Drugs, Inc. v. Perales is misplaced. In that case, petitioner initially commenced an action in federal court raising constitutional claims. Significantly, unlike CRP/Extell,

petitioner in Asim Drugs did not raise in the federal suit an Article 78 claim based on supplemental jurisdiction.

Here, the Article 78 challenge to the Attorney General's April 9, 2010 determination was timely commenced in the federal action. The Attorney General argues that the commencement was a legal nullity because an Article 78 proceeding cannot be commenced in federal court. In other words, the federal court does not have the power to adjudicate an Article 78 proceeding and lacks subject matter jurisdiction. It is well settled that a dismissal on subject matter jurisdiction grounds triggers the application of Section 205[a] (see Diffley v. Allied-Signal, Inc., 921 F.2d 421, 424 (2nd Cir. 1990); see also Siegel, New York Practice Section 52 (4th ed. 2010)).

The Appellate Division's ruling in Dyer v. Cahan, 150 AD2d 172 (1st Dept. 1989), is instructive. The district court dismissed a wrongful death action without prejudice for lack of subject matter jurisdiction as there was not diversity. In reversing the state court's dismissal of the subsequently commenced state court action, the First Department gave plaintiff the benefit of Section 205(a). It reasoned that "where the court does not have subject matter jurisdiction, it should refrain from any further exercise of power.... Since Judge Briant's dismissal was 'without prejudice,' it is apparent that he did not intend to preclude plaintiff from

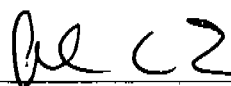
the benefit of CPLR 205(a) and, in light of the broad and liberal purpose for which CPLR 205(a) was intended, defendants' cross motions should be denied" (at p. 173, other citation and internal quotations omitted).

Similarly here, Judge Daniels recognized that petitioner could obtain relief in state court by an Article 78 challenge and dismissed the federal due process claim. He declined to exercise supplemental jurisdiction over the state claims and dismissed those claims without prejudice. Clearly, Judge Daniels intended for petitioner to pursue its Article 78 claim in state court. If the Attorney General's argument is to be accepted, petitioner will not get a determination on the merits. Such a result runs counter to CPLR 205(a).

For these reasons, the cross-motion is denied. Respondents shall file an answer to the petition within twenty days of today.

The foregoing constitutes the decision and order and judgment of the court.

Date: January 19, 2011
New York, New York



Anil C. Singh
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

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