

Matter of Antunes v Division of Hous. & Community Renewal of State of N.Y.
2011 NY Slip Op 33074(U)
November 21, 2011
Supreme Court, New York County
Docket Number: 0107877/11
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

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

PART 5

Paulo Antunes

INDEX NO. 107877/11

MOTION DATE 8/16/11

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

Division of Housing & Community Renewal OF THE STATE OF NY ET AL.

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

Answering Affidavits — Exhibits _____

2, 3, 5

Replying Affidavits _____

4, 6

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

NOV 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/21/11

NOV 21 2011

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
 In the Matter of the Application of:
 PAULO ANTUNES,

Petitioner,

Index No. 10787711

Argued: 8/16/11
 Motion Seq. No.: 001

DECISION & JUDGMENT

For a Judgment pursuant to Article 78 of the Civil
 Practice Law and Rules in the Nature of Mandamus,

-against-

DIVISION OF HOUSING AND COMMUNITY
 RENEWAL OF THE STATE OF NEW YORK,

Respondent,

-and-

104-106 SULLIVAN STREET, LLC,

Intervenor.

-----X
 BARBARA JAFFE, JSC:

For petitioner:

Mayne Miller, Esq.
 P.O. Box 8050, G.P.O.
 New York, NY 10116
 347-599-1920

For respondent:

Kathleen Lamar, Esq.
 Gary R. Connor, Esq.
 NYS Div. of Hous. & Comm. Renewal
 25 Beaver Street, 7th Floor
 New York, NY 10014
 212-480-7137

For intervenor:

Jamie L. Lee, Esq.
 Borah, Goldstein, et al
 377 Broadway
 New York, NY 10013
 212-431-1300

FILED

NOV 28 2011

NEW YORK
 COUNTY CLERK'S OFFICE

By verified petition dated July 7, 2011, petitioner brings this Article 78 proceeding seeking a judgment of mandamus requiring respondent to “respond fully, accurately, and completely to” a judicial subpoena *duces tecum* dated May 6, 2011.

By order to show cause dated July 15, 2011, petitioner moves pursuant to CPLR 2201 and 602 for an order staying the summary proceeding in the Housing Part of the Civil Court, *104-106 Sullivan St., LLC v Antunes*, Index Number L&T 52676/11, pending determination of the petition or until the summary proceeding is consolidated with the instant proceeding.

Respondent opposes the petition, and by notice of cross-motion dated August 3, 2011, moves pursuant to CPLR 404(a), 3211(a)(5) and (7), and 7801(2) for an order dismissing the petition. By affirmation dated August 3, 2011, intervenor opposes the petition and joins in respondent's cross-motion. Petitioner opposes.

I. BACKGROUND

Respondent is the owner and landlord of 104 Sullivan Street. (Pet.). Since 1985, a member of petitioner's immediate family, most recently his mother, has occupied apartment 16 therein. (*Id.*). In 2005, petitioner's mother died; petitioner currently resides in the apartment. (*Id.*).

On or about January 19, 2011, respondent commenced a summary proceeding in the Housing Part of the Civil Court, Index Number L&T 52676/11, alleging that the apartment is subject to rent stabilization based on a lease signed by petitioner's mother, and seeking from petitioner \$9,690.50 in rent arrears. (*Id.*, Exh. B). On or about February 16, 2011, petitioner joined issue with service of his answer, asserting, *inter alia*, that the apartment is subject to rent control, not rent stabilization, and that the rent arrears sought thus exceed the maximum collectible rent. (*Id.*, Exh. C).

On February 24, 2011, the summary proceeding appeared on the Housing Part calendar and was subsequently adjourned several times. (Affirmation of Jamie L. Lee, Esq., in Opposition

and in Support of Cross-Motion, dated Aug. 3, 2011 [Lee Opp. Aff.]).

On March 15, 2011, petitioner served respondent with a judicial subpoena *duces tecum* compelling it to file with the Housing Part on or before March 24, 2011 the following information:

history of rents, services, and adjustments pursuant to the city rent law and the history of the Maximum base Rents and Maximum Collectible Rents, including any Orders for Maximum Base Rent Eligibility, for apartment no. 16 at 104 Sullivan Street, District of Lower Manhattan, New York, New York.

now in your custody or control all other deeds, documents, evidence, and other writings which you have in your custody or control relating to the merits of the said proceeding and the issues to be decided therein.

(*Id.*, Exh. D).

Sometime thereafter, respondent filed with the Housing Part the apartment's rental history from 1984 to the present under rent stabilization. (Pet.).

On or about May 6, 2011, petitioner served respondent with a second judicial subpoena *duces tecum* compelling it to file with the Housing Part on or before June 6, 2011 the following information:

history of rents, services, and adjustments pursuant to the city rent law (RENT CONTROL) and the history of the Maximum Base Rents and Maximum Collectible Rents, including all Orders for Maximum Base Rent Eligibility, for apartment no. 16 at 104 Sullivan Street, District of Lower Manhattan, New York, New York, and all Orders for Maximum Gross Building Rent for the premises 104-106 Sullivan Street, Lower Manhattan, from 1967 to present

now in your custody or control, and all other deeds, documents, evidence, and other writings which you have in your custody or control relating to the merits of the said proceeding and the issues to be decided therein.

(*Id.*, Exh. E).

On July 15, 2011, I signed petitioner's order to show cause, ordering that the summary

proceeding be stayed and that:

service of a copy of this Order, together with a copy of the papers on which it is based upon the New York State Division of Housing and Community Renewal, Office of Legal Affairs, attorneys for the [r]espondent herein, and Borah, Goldstein, Altschuler, Nahins, and Goidel, attorneys for [] [i]ntervenor [], by personal service . . . on or before the 22nd day of July, 2011, be deemed good and sufficient service thereof.

(Order to Show Cause with Stay).

On July 26, 2011, in response to the May 6 subpoena, respondent filed with the Housing Part the following documents: an order of maximum base rent for 104-106 Sullivan Street, dated May 25, 1972, a “Maximum Base Rent Building Profile and Owner’s Order” for the building dated March 27, 1973, a notice of maximum rent for the building dated January 6, 1948, logs reflecting changes in maximum rent from 1959 to 1969, an “MCI Rent Increase Grant” dated July 25, 1991, an order and opinion rejecting a petition for administrative review of the increase dated November 22, 1991, apartment registration records for apartment 16 from December 31, 1985 to December 31, 2007, and a “Landlord’s Report, Certification and Notice of Fuel Cost Adjustment Eligibility” form for the building dated July 10, 1980. (Affidavit of Kathleen Lamar, Esq., dated Aug. 3, 2011 [Lamar Affid.], Exh. A).

On July 8, 2011, petitioner’s counsel informed intervenor’s counsel that he planned to file a motion in the Supreme Court but indicated neither its nature nor its return date. (Lee Opp. Aff.). By order to show cause dated July 27, 2011, petitioner moved in the Housing Part pursuant to Judiciary Law § 756 for an order holding respondent in contempt for failing to respond properly to the subpoenas. (*Id.*, Exh. F). On July 28, 2011, the motion was denied on the grounds that respondent responded to the subpoena and that therefore there was no contempt. (*Id.*).

On August 16, 2011, oral argument was held on the instant petition, during which respondent agreed to search its records and submit the results of the search to me. By letter dated August 18, 2011, respondent submitted the results of the search, along with the affidavit dated August 16, 2011, of its Director of the Records Information Service Unit, Ashu Vyas, who states that his work responsibilities include record searches, that he “conducted a diligent search of all cabinets, storage, and staff areas associated with the processing and storage of the documents sought by [p]etitioner,” and that the attached documents, which include rent cards for apartments 16 and 19 at 104 Sullivan Street, maximum base rent orders, and fuel orders for the building from 1980 to the present, are “all the rent control documents that can be found for [] apartment 16” and “do not include all other possible individual apartment records or orders that pertain to other apartments in the building.”

II. CONTENTIONS

Petitioner asserts that he needs the information demanded in the May 6 subpoena in order to defend himself in the summary proceeding, that he has no adequate remedy at law by which to obtain it, and that respondent is violating a ministerial duty imposed by law in refusing to provide it to him. (Pet.).

In opposition and in support of its cross-motion to dismiss, respondent claims that petitioner is seeking to compel compliance with the subpoena, that such relief may not be obtained through an Article 78 proceeding, and that in any event, this proceeding constitutes an impermissible “collateral attack” on the Housing Part’s denial of petitioner’s July 27, 2011 order to show cause. (Lamar Affid.).

In opposition to the petition, and in support of the cross-motion, intervenor denies having

been personally served with a signed order to show cause, and thus, that the instant action should be dismissed for lack of personal jurisdiction. (Lee Opp. Aff.). It also denies having received notice of the return date of the order to show cause in violation of 22 NYCRR 202.7(f), and claims that, in any event, the instant proceeding is improper, as petitioner should have instead appealed the Housing Part's denial of his order to show cause or made a Freedom of Information Law request to respondent. (*Id.*).

In reply, and in opposition to the cross-motion, petitioner denies that he seeks to compel compliance with the subpoenas but rather seeks production of "raw information" contained in respondent's records and a declaration that respondent is legally obligated to provide him with same. (Affirmation of Mayne Miller, Esq., in Opposition and in Reply, dated Aug. 15, 2011). Moreover, he argues, he has stated a cause of action for mandamus, as he has a legal right to the information by virtue of being a tenant, and respondent has a ministerial duty to provide him with it given that judicial subpoenas have been issued and that it need not exercise any discretion in doing so. (*Id.*). He also denies that he is collaterally attacking the Housing Part's determination, as he does not seek a contempt order, and maintains that he was unable to notify intervenor of the return date of the order to show cause when he contacted its counsel on July 8, 2011, as it had yet to be assigned to a justice, and that he was not required to serve intervenor personally, as it is not a necessary party to the proceeding. (*Id.*).

In response to respondent's August 18 letter and in supplemental opposition to its cross-motion to dismiss, petitioner claims that respondent has failed to provide all of the information he seeks, namely all of the maximum gross building rent calculations for the entire building from 1972 to the present, that the records provided reflect that other records exist, and that the records are disorganized, thereby indicating that respondent's records are "chaotic and incomplete."

(Supplemental Affirmation of Mayne Miller, Esq., in Opposition, dated Aug. 29, 2011).

III. ANALYSIS

A. Standards for mandamus

Mandamus, an extraordinary remedy, lies to compel a ministerial act where the petitioner has a clear legal right to the relief he seeks. (*Harper v Angiolillo*, 89 NY2d 761, 765 [1997]; *Matter of CRP Sanitation, Inc. v Solid Waste Commn. of County of Westchester*, 86 AD3d 608, 611 [2d Dept 2011]; *Matter of Guzman v 188-190 HDFC*, 37 AD3d 295, 296 [1st Dept 2007]). “The ministerial act must be . . . ‘premiered upon specific statutory authority mandating performance in a specific manner[,] and] . . . [t]he right to performance must be so clear as to not admit of reasonable doubt or controversy.” (*Matter of Grisi v Shainswit*, 119 AD2d 418, 420 [1st Dept 1986]).

New York City Administrative Code §§ 26-401 to 26-415 (Rent Control Law) contains no provision providing that tenants of apartments that are subject to, or used to be subject to, rent control are entitled to disclosure by respondent of rent control records. Absent any authority for petitioner’s assertion that he has a clear legal right to the production of the documents he seeks, apart from his status as a tenant of an apartment previously subject to rent control, he has failed to demonstrate same.

B. Availability of mandamus to compel compliance with a subpoena

Mandamus is not available to compel compliance with a judicial subpoena, as the proper procedure for doing so is an application pursuant to CPLR 2308(a), which provides that “[f]ailure to comply with a subpoena issued by a judge, clerk, or officer of the court shall be punishable as a contempt of court.” (*Matter of Brown v Eimicke*, 144 AD2d 460 [2d Dept 1988]).

Here, although petitioner denies that he seeks to enforce the May 6 judicial subpoena, as

he does not seek to compel respondent to file its records with the Housing Part, he admits seeking an order requiring the production of the documents demanded in the subpoena. As the basis for his document request in the instant proceeding (his need to use the documents in the summary proceeding), is identical to the reason for the subpoena, he is actually seeking to compel compliance with the subpoena regardless of the manner of production requested. (*See id.* [where petitioner landlord commenced Civil Court proceeding for possession of apartment and respondent failed to provide rent control records in compliance with judicial subpoena signed by Civil Court judge, Article 78 proceeding for mandamus requiring compliance with subpoena dismissed]).

C. Collateral attack

“A collateral attack upon a prior judgment is an attempt to avoid, defeat, or evade a judicial decree, or deny its force or effect If the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack on the judgment is collateral.” (73 NY Jur Judgments § 280).

Here, regardless of whether petitioner seeks to compel compliance with the subpoena, he seeks the same documents demanded therein. As the Housing Part denied his order to show cause seeking to hold respondent in contempt for failing to comply with the two subpoenas, finding that respondent had already provided petitioner with documents demanded therein, to compel respondent to do so again would remove from that decision its force and effect, and this court does not sit as an appellate court. Therefore, the instant application constitutes an inappropriate collateral attack on the Housing Part’s decision.

In light of this determination, the parties’ contentions as to personal jurisdiction and

notice need not be considered.


IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the proceeding is denied in its entirety and the petition is dismissed; and
it is further

ORDERED, that the stay of the summary proceeding in the Housing Part of the Civil
Court, *104-106 Sullivan St., LLC v Antunes*, Index Number L&T 52676/11, is vacated.

ENTER:



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

DATED: November 21, 2011
New York, New York

NOV 21 2011

FILED

NOV 28 2011

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