

**Little Rock Dev. Corp. v New York State Off. of
Mental Health**

2011 NY Slip Op 33473(U)

September 26, 2011

Sup Ct, NY ounty

Docket Number: 113730-07

Judge: Judith J. Gische

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SCANNED ON 12/28/2011
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHKE

PRESENT

PART 10

— Index Number : 113730/2007

LITTLE ROCK DEVELOPMENT

VS.

OFFICE OF MENTAL HEALTH

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

Th

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

DEC 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

MOTION TO DISMISS WITH PREJUDICE TO THE
THE ACCOMPANYING MEMORANDUM DECISION.

MOTION TO DISMISS WITH PREJUDICE TO THE
THE ACCOMPANYING MEMORANDUM DECISION.

SEP 26 2011

Dated: 9/26

HON. JUDITH J. GISCHKE *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
Little Rock Development Corp.,

Plaintiff (s),

-against-

New York State Office of Mental Health and
SUS Mental Health Programs, Inc.,

Defendant (s).
-----X

DECISION/ ORDER

Index No.: 113730-07

Seq. No.: 005

PRESENT:

Hon. Judith J. Gische

J.S.C.

FILED

DEC 19 2011

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

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COUNTY CLERK'S OFFICE

Papers	Numbered
Notice of Motion, SF affirm., NF affd., GA affd., CA affd., exhibits.....	1
Notice of Cross-Motion, RAL affirm., exhibits.....	2
Notice of Cross-Motion.....	3
RAF reply affirm.....	4

Upon the foregoing papers the decision and order of the court is as follows:

Defendant, New York State Office of Mental Health ("OMH") moves for summary judgment: [1] dismissing the complaint, [2] on its counterclaim for mis-appropriated funds and [3] on its separately commenced action for foreclosure. It also seeks attorneys fees. Plaintiff, Little Rock Development Corp. ("LRDC") has cross-moved for summary judgement on all of its causes of action set forth in its complaint. Defendant SUS Mental Health Program, Inc. ("SUS") has also cross-moved for summary judgment dismissing the complaint.

Issue has been joined and the motion was brought within 120 days of the filing of

the note of issue. Although the cross-motions were not brought within the 120 days, they concern the identical causes of action raised by the complaint in chief, and may therefore be considered without a preliminary showing of good cause. Filannino v. TBTA, 34 AD3d 280 (1st dept. 2006). Accordingly, all of the motions are properly before the court for consideration on the merits. CPLR § 3212 [a]; Brill v. City of New York, 2 NY3d 648 (2004); Myung Chun v. North American Mortgage Co., 285 AD2d 42 (1st Dept 2001).

Certain facts are undisputed.

LRDC is a non-profit corporation that was formerly participating as a provider in program known as the "scattered site program," designed to provide housing and other resources to mentally ill persons. In November 2003, it was approved for a substantial state aid grant, in an amount exceeding \$5.5 million dollars, to fund the construction and related costs of a residential facility for mentally ill persons that was to be located at 421 Chester Street in Brooklyn, New York (sometimes "421 Chester" or "premises"). As part of the overall project, LRDC paid a nominal amount (\$6) to become the title owner of 421 Chester Street. It is undisputed that since in or about October 21, 2005, LRDC was and continues to be the deed owner of 421 Chester. LRDC's title, however, is subject to a lien, in the amount of the grant, and in favor of New York State and the requirements of the scattered site housing program.

The project envisioned that 44 single resident occupant apartments would be constructed and that eligible mentally ill persons, meeting OMH criteria and from specific referral sources, would be housed and provided with supportive services at 421 Chester. Rents were to be set according to formulas linked to other governmental

entitlement programs and leasing procedures were to follow the program protocol.

It was further envisioned that LRDC would be certified to own, operate and manage the premises once the construction was completed. LRDC had separately been operating certain scattered site housing for mentally ill persons in Brooklyn according to similar programs, also maintained under the auspices of OMH.

In or about the fall of 2006, OMH began investigating certain complaints against LRDC regarding financial and management improprieties in connection with 421 Chester Street and other housing sites. In October 2006, OMH notified LRDC that its contract to manage scattered site housing would not be renewed, based upon OMH's initial findings of wrongdoing. A financial audit was, thereafter, conducted and a final report was issued on June 22, 2007 after LRDC had a chance, but declined, to comment.

The audit found serious financial misconduct by LRDC, including its use of state grant monies and loans to pay its then executive director's personal expenses, a lack of financial oversight to prevent such abuses, a failure to maintain appropriate financial records, and a failure to fulfill obligations to pay rents on behalf of its client-tenants. The OMH audit found approximately \$220,000 in ineligible expenditures made by LRDC.

Beginning in or about March 2007, OMH was in contact with members of LRDC, and its attorney, about OMH's intention to foreclose its lien against 421 Chester and find another entity to operate the project. The contemplated construction had not yet been completed. In April 16, 2007, OMH was contacted by Mr. Norman Frazier, who represented to OMH that he was the president of LRDC. In communications with Mr,

Frazier, OMH requested that LRDC lease 421 Chester, to SUS, a separate, unrelated, non-profit corporation, with a successful track record of operating residential programs for the mentally ill. In or about July 24, 2007 a written lease, for a one year term beginning July 1, 2007, was signed ("lease"). Under the lease, LRDC leased the property located at 421 Chester to SUS for a monthly rent of \$1. Norman Frazier signed the lease on behalf of LRDC as "Board President." Paragraph 27 of the rider states:

"The effectiveness of this lease is conditioned upon (i) the issuance of the New York City Department of Housing Preservation and Development ("HPD") of its Certificate of Completion pursuant to Section 201B of that certain Land Disposition Agreement dated October 21, 2005, between Landlord and HPD, (ii) the approval of this lease by the New York State office of Mental Health ("OMH"), (iii) the approval of this lease by two-thirds of the entire Board of Directors of Landlord, and (iv) the approval this lease by two-thirds of the entire Board of Directors of Tenant."

The lease is renewable at SUS' option.

SUS took occupancy of 421 Chester. It has completed the construction project and the premises are being operated for its intended purpose, as supportive housing for mentally ill persons.

LRDC commenced the underlying action against OMH and SUS. It alleges that it "never authorized anyone to enter into any agreement, lease or contract to permit defendants SUS, or anyone else, to occupy, work from, squat upon, or otherwise enter upon the subject premises." (Complaint ¶12). It contends that the lease is unenforceable and seeks the following relief: [1] a judgment and order directing SUS, it's agents, employees and assigns to immediately vacate the premises (First cause of

action); [2] a permanent injunction against SUS, its agents, employees and assigns from occupying or entering upon the premises (Second cause of action); [3] permanently enjoining OMH "from engaging in any process or practice, or actions, to place any person, business, corporation, partnership, or entity on the subject premises without an Order of a Court...or except upon OMH properly and legally acquiring right, interest and title to the subject premises" (Third cause of action) and [4] a judgment and order voiding and finding invalid any lease, contract or agreement which SUS may now have concerning the premises (Fourth cause of action).

In its answer, OMH has asserted a counterclaim, based upon its audit, for funds it provided to LRDC to service the mentally ill, which were instead, misappropriated by LRDC. It seeks a return of the money in the sum of \$219,876.

In 2010, OMH commenced a separate action against LRDC in Kings County Supreme Court (Kings County action) seeking: [1] to foreclose its lien against the property and [2] for a constructive trust (Second Cause of Action). The Kings County action has by prior order of this court, been consolidated with this action. By this motion, OMH is only seeking summary judgment on its first cause of action.

Legal Standard Applicable to Summary Judgment

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor, without the need for a trial Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). The party opposing the motion must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her/its failure so to do Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986). Each of the

movants in this case bears the burden on their respective motions.

The counterclaim

The court first considers the motion for summary judgment on the counterclaim. In support of its motion, OMH has provided the affidavit of Glenn Albin, an auditor it employs to review the financial records of contractors OMH retains to operate some of its programs. Mr. Albin states that his job is to "ensure compliance with OMH rule and regulations and other State requirements." (Albin affd. ¶ 1). Mr Albin personally audited the books and records of LRDC. His findings were first set forth in a preliminary report dated March 14, 2007, to which LRDC was given an opportunity to respond.

After receiving no response from LRDC, the findings were incorporated in a final report dated June 22, 2007. Copies of both the preliminary and final reports are provided to the court.

The reports support a conclusion that, for the three year period ending June 30, 2005, OMH had overpaid LRDC in an amount not less than \$211,162. The reports support findings that State funds were improperly used to allow LRDC's then executive director to make a down payment on her personal residence, to pay the executive director's mortgage, and to pay the executive director's and the CEO's personal expenses. Mr. Albin's affidavit and the audit reports satisfy OMH's burden of proving a prima facie case on this counterclaim.

LRDC provides no substantive opposition to this motion. Instead It argues that it has commenced its own action against, Debra Harry and Allen Hand, the individuals it alleges are responsible for the defalcations. It asks the court to wait until the conclusion of its collateral action against Harry and Hand before entering judgment on

this counterclaim.

LRDC has failed to raise any disputed issue of fact in response to OMH's prima facie case. OMH is therefore entitled to a money judgment on its counterclaim against LRDC in the amount of \$ \$211,162.00, with interest from June 30, 2005.

Consideration of OMH's legal arguments, about whether LRDC made judicial admissions of liability in the action against Harry and Hand, are not considered by the court because they are unnecessary for the court to reach its conclusion.

The Kings County action

Since many of the remedies sought by LRDC in its complaint are largely predicated on its status as the deed owner of 421 Chester, the court first considers whether LRDC has the right to continue as the deed owner of the premises.

In support of its motion, OMH has provided proof of the State Aid Grant lien given by LRDC to OMH, placing a lien on LRDC's interest in the premises for a period of twenty (20) years. It acknowledges that, subject to certain adjustments, LRDC is indebted to OMH in a sum equal to the amount of the State Aid Grant actually advanced to LRDC. Under certain circumstances, it provides OMH with the right to either declare the entire indebtedness due or seek possession of 421 Chester. (State Aid Grant Lien ¶¶ IAB, IIC). The right to possession is triggered when there is: [1] an event that poses a substantial threat to the health and safety of the clients of the community residential facility, or [2] the suspension or revocation of the Operating Certificate for the program operating in the premises covered by the lien. In order to recover possession, however, OMH is required to give notice and a reasonable time to cure. (State Aid Grant Lien ¶ IC).

Based upon the lack of appropriate financial management of the grant monies, as found in the June 27, 2007 audit, OMH caused two notice of default to be sent out. On November 29, 2007 HPD sent a notice reporting the default as follows: "[OMH] has reported to HPD that LRDC has been terminated as the Sponsor of the OMH-funded supported housing program for mentally ill homeless adults at 421 Chester Street in Brooklyn, New York, New York...because of LRDC's unsatisfactory record of integrity, failure to maintain appropriate financial, organizational and operational capacity and controls and its unacceptable performance on previous governmental contracts." The notice gave LRDC 30 days to cure the default.

On December 3, 2009 a second notice of default was sent to LRDC outlining the defaults somewhat differently. The default is identified as LRDC's failure to repay the misappropriated funds as found in the June 27, 2007 audit. LRDC was given 30 days to cure that default. The notice stated that if LRDC failed to cure within the time provided, OMH would take action to foreclose the lien.

LRDC has not cured the defaults. The defaults (ie: mismanagement of monies intended for the benefit of the mentally ill) clearly pose a substantial threat to the health and safety of the clients of the community residential facility. In addition, LRDC's right to operate the property was revoked. OMH has, therefore, made out its prima facie case to foreclose the lien and recover possession of the premises.

LRDC has not come forward with any facts in opposition. Nor does it argue that its acts were not defaults, triggering OMH's right to recover the premises. Consequently, OMH is entitled to possession of the property located at 421 Chester Street in Brooklyn, New York. OMH is entitled to a judgment requiring that LRDC immediately convey the

premises located at 421 Chester Street, Brooklyn, New York to OMH and requiring LRDC to execute and deliver a deed for same to OMH.

Under the State Aid Grant lien, because OMH has elected to obtain possession of the premises, it is not entitled to any further relief. In addition, because OMH is entitled to recover the premises, there is no basis for the alternate requested relief¹ of a constructive trust. The second cause of action is, therefore, dismissed in the interest of justice.

LRDC's causes of action

The parties disputes center around a determination of whether the lease is valid and/or enforceable. Although not addressed by the parties, the court believes that the complaint and all of the relief requested is rendered therein has been rendered moot by the fact that OMH is now entitled to ownership and possession of the premises. Consequently, there is no longer any justiciable controversy requiring the court to declare the parties' rights with respect to the lease.

CPLR 3017(b) states:

In an action for a declaratory judgment, the demand for relief in the complaint shall specify the rights and other legal relations on which a declaration is requested and state whether further or consequential relief is or could be claimed and the nature and extent of any such relief which is claimed.

The complaint set forth four causes of action for a declaration of rights with respect to the lease and injunctive relief relative thereto. The prayer for relief is as

¹This relief was requested in the complaint only and is not the basis for summary judgment.

follows:

WHEREFORE, the plaintiff, LITTLE ROCK DEVELOPMENT CORP., respectfully requests that this court issue a Judgment and Order:

a. directing defendant SUS, its agents, employees, and assigns to immediately vacate the subject premises as requested in the First Cause of Action;

b. against defendant SUS, its agents, employees and assigns, enjoining SUS, its from occupying or entering upon the subject premises without the permission of plaintiff as requested in the Second Cause of Action;

c. enjoining OMH from engaging in any process or practice, or actions, to place any person, business, corporation, partnership, or entity on the subject premises without an Order of a Court of competent jurisdiction, or except upon OMH properly and legally acquiring right, interest and title to the subject premises as requested in the Third Cause of Action;

d. voiding, and finding invalid, any lease, contract, or agreement which SUS may now have which purportedly grants SUS the right to occupy, and engage in business from, the subject premises, as requested in the Fourth Cause of Action, and;

e. granting such other and further relief as the court deems to be just and proper including an award of legal fees, costs and disbursements associated with this action.

A fair reading of the complaint and the prayer for relief make it clear that LRDC is primarily seeking injunctive relief as a consequence of its claim that the lease is invalid. With the exception of legal fees, (addressed separately below), no monetary damages are sought.

In order to obtain a declaration of rights from the court, there must be a justiciable controversy. Ford v. Cardiovascular Specialists, P.C., 71 AD3d 1429 (4th

dept. 2010). When subsequent events render a controversy moot, no declaratory judgment may be obtained. Gates v. Hernandez, 26 AD3d 288 (1st dept. 2006).

The injunctive relief that LRDC seeks in the complaint is really an incident of finding that the lease is invalid and unenforceable. The additional predicate for such relief is that LRDC is the deed owner of the premises. By virtue of this decision, however, in connection with the Kings county action, LRDC has no rights of continued future ownership. Thus, the injunctive relief is not available even were this court to declare that the lease is invalid and/or unenforceable.

LRDC has not set forth a specific prayer for monetary damages. The failure of the pleadings to set forth the nature and extent of consequential money damages, precludes recovery of same. CPLR §3017(b); American Hydrocarbon Corp., v. Selby, 47 Misc.2d 777 (Sup Ct. NY Co. 1965). Collaterally, in seeking summary judgment, LRDC does not claim that it suffered any financial damages. ²

Under the circumstances, there is no relief ancillary to the declaration of rights sought by LRDC in this action, warranting its continuation.

LRDC does seek monetary relief in the sense that it seeks to recoup seek the legal fees it expended in this action. In general, however, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 NY2d 1 (1986). Neither circumstance is present here and, thus, there is no legal predicate for an award of legal fees. As a consequence, the request for legal fees does not warrant

²This appears consistent with the intended operation of the premises on a non-profit basis.

a determination on the merits of the declaratory judgment cause of action.

Accordingly, the motion and cross-motions for summary judgment on LRDC's complaint are denied and the action is otherwise dismissed as moot.

OMH's collateral request for legal fees on these motions is also denied, since there is no legal basis for such an award. AG Ship Maintenance Corp. v. Lezak, *supra*.

Conclusion

OMH's motion for summary judgment on its counterclaim in the main action is granted to the extent indicated herein. OMH's motion and SUS' cross-motion for summary judgment dismissing LRDC's complaint is granted because the causes of action for injunctive and declaratory relief are now moot. OMH's motion for summary judgment in the Kings county action is granted.

OMH is directed to settle a judgment on notice to all parties.

FILED

This constitutes the decision and order of the court.

DEC 19 2011

Dated: New York, New York

September 26, 2011

NEW YORK
COUNTY CLERK'S OFFICE

SO ORDERED:


J.G. J.S.C.