

**Matter of 435 E. 85th St. Tenants Corp. v
Commissioner of the Dept. of Bldgs. of the City of
N.Y.**

2011 NY Slip Op 34287(U)

July 14, 2011

Supreme Court, New York County

Docket Number: 104543/2011

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

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In the Matter of the Application of
435 EAST 85TH STREET TENANTS CORP.,

DECISION AND ORDER

Petitioner,

For a Judgment Pursuant to Article 78,

-against-

Index No. 104543/2011
Submitted: 5/25/11

COMMISSIONER OF THE DEPARTMENT OF
BUILDINGS OF THE CITY OF NEW YORK, THE
DEPARTMENT OF BUILDINGS OF THE CITY OF
NEW YORK, ENVIRONMENTAL CONTROL BOARD,
and 444 EAST 86TH OWNERS CORP.,

Respondents.

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New York, NY 10022

For Respondent 444 East 86th Owners Corp.:
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For Respondents Commissioner of the Department of Buildings of the City of New York, The
Department of Buildings of the City of New York, Environmental Control Board:
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Papers considered in review of this motion for a temporary restraining order or preliminary injunction:

- Notice of Motion 1
- Notice of Cross Motion 2
- Aff in Opp 3
- Reply 4

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HON. SALIANN SCARPULLA, J.:

In this Article 78 proceeding, petitioner 435 East 85th Street Tenants Corp. ("85th St. Tenants") moves, pursuant to CPLR 6301, for a temporary restraining order ("TRO")

or preliminary injunction prohibiting respondents Commissioner of the Department of Buildings of the City of New York, the Department of Buildings of the City of New York ("DOB"), and the Environmental Control Board ("ECB") (collectively, "the City") from holding an ECB administrative hearing to adjudicate a violation issued against 85th St. Tenants, until a prior pending litigation is resolved. 85th St. Tenants also seeks an order pursuant to CPLR 7803(2) dismissing the violation and the February 28, 2011 notice of violation and hearing in their entireties. The City cross-moves for an order, pursuant to CPLR 7804(f) and 3211(a) (7), dismissing this proceeding for failure to state a cause of action, or, in the alternative, if dismissal is denied, granting leave to answer the petition.

On January 3, 2011, the City issued a violation to 85th St. Tenants for "failure to maintain," and violations of the Administrative Code of the City of New York §§ 28-201.1, 28-203.1, and 28-301.1. The violation included the following description: "(i)nspection by FEU (Forensic Engineering Unit) revealed improper drainage on top of concrete slab of garage's roof. The improper drainage and use of planters as rear yard causing severe damage to concrete slab of garage and foundation piers." The violation also specifies the following remedies: "Per Commissioner order(,) provide following() (1) remove all fixtures on top of concrete roof of garage(;) (2) provide complete engineering report with permanent repair plans (by professional engineer) for proper drainage to FEU before 1/21/11."

On February 28, 2011, the City issued to 85th St. Tenants a notice of violation and hearing before the ECB. The notice advised that the statute violated was Administrative Code § 28-301.1. On the notice, the violating conditions observed were described as: "(f)ailure to maintain building in a (Building) Code compliant manner. Defects noted at time of inspection(:) there is inadequate drainage at rear yards (*sic*) of 435 East 85 Street causing damage to the garage's concrete roof and main piers at 444 East 86th Street." The notice also advised 85th St. Tenants that it must cure the condition by repair and/or replacement by April 11, 2011, or a mandatory hearing on the violation will be held before the ECB on April 14, 2011.¹

85th St. Tenants chose not to cure the violation, and requested an adjournment of the ECB hearing. The ECB agreed to adjourn the hearing to June 30, 2011.

On April 14, 2011, 85th St. Tenants commenced this special proceeding for a TRO and a preliminary injunction prohibiting the City from proceeding with administrative hearings on the violation, and for dismissal of the violation. 85th St. Tenants contends that the City is improperly seeking to hold it liable for alleged damage to the garage roof and piers owned by 86th Owners.

¹ The condition of the garage roof is an issue also raised in a pending action commenced in 2009 by respondent 444 East 86th Owners Corp. ("86th Owners") against 85th St. Tenants. *See 444 E. 86th Owners Corp. v 435 E. 85th St. Tenants Corp.*, Sup. Ct., NY County, Index no. 106047/2009 ("the prior action"). In the prior action complaint, 86th Owners alleges that its building was constructed around a pre-existing building owned by 85th St. Tenants, and that its premises includes a garage that sits below ground, partly under its building and partly under a courtyard located between its building and the building owned by 85th St. Tenants. 86th Owners alleges that 85th St. Tenants owns the air rights from the surface of the courtyard to nine feet above that surface, and holds a license to enter onto, and use, the courtyard surface.

In opposition to the petition and in support of the cross motion to dismiss, the City contends that 85th St. Tenants seeks to prohibit the ECB from acts that are clearly within its legal authority and jurisdiction, that 85th St. Tenants has failed to exhaust its administrative remedies, and that, therefore, the petition is premature.

In opposition, 86th Owners opposes the petition on many of the same grounds as does the City, and on the additional ground that an Article 78 proceeding is not appropriate between two private parties.

Discussion

To demonstrate entitlement to a preliminary injunction directing a party to perform a particular act or requiring a party to refrain from certain behavior, the plaintiff must demonstrate that it is likely to succeed on the merits of the claim, that absent an injunction, it will suffer irreparable injury that cannot be compensated by money damages, and that the equities weigh decidedly in favor of the plaintiff. *See* CPLR 6301; *Amarant v. D'Antonio*, 197 A.D.2d 432, 434-435 (1st Dept. 1993).

Here, 85th St. Tenants seeks to prohibit the City respondents from performing some of their regulatory functions. The court has the discretion to issue a writ of prohibition "only where there is a clear legal right and only when the body or officer 'acts or threatens to act without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction'." *Matter of Dondi v. Jones*, 40 N.Y.2d 8, 13 (1976) quoting *Matter of State of New York v.*

King, 36 N.Y.2d 59, 62 (1975). Prohibition "is resorted to not to correct errors, but in aid of substantial justice and to forbid exercise of unauthorized powers. It is only justified when there is no redress by ordinary proceedings at law or equity." *Ronan v. Brown*, 35 A.D.2d 959, 959 (2nd Dept. 1970).

Here, a writ of prohibition against the City respondents is not appropriate. The DOB has the jurisdiction enforce the provisions of Title 28 of the Administrative Code ("the Building Code"), *see* Charter of the City of NY ("Charter") §643, and may issue violations of the Building Code and notices of hearings on such violations. The ECB has the jurisdiction to adjudicate violations of certain provisions of the Charter and the Building Code, including the violations with which 85th St. Tenants is charged by the DOB. During the hearing, 85th St. Tenants will have the opportunity to present all of the issues and arguments that it has raised here, including whether it is the property owner, as that term is defined by Administrative Code §§ 202 and 28-301.1, whether it created the conditions cited, and whether it is responsible for curing the violations asserted by the DOB.

Should 85th St. Tenants disagree with the ECB's final determination, including the assessment of monetary fines, it may seek judicial review. A writ of prohibition is not appropriate where, as here, the petitioner has access to an adequate legal remedy other than a writ of prohibition, such as an Article 78 proceeding after a final determination has been rendered by the governmental agency or officer that the petitioner seeks to prohibit

from acting. See *Matter of Town of Huntington v. New York State Div. of Human Rights*, 82 N.Y.2d 783 (1993).

In addition, 85th St. Tenants fails to demonstrate that it will suffer irreparable harm by proceeding with the ECB hearing, and by the possible necessity of challenging the ECB's final decision. Monetary fines are not considered irreparable harm, inasmuch as such fines are pecuniary in nature, and the individual or business entity fined may be adequately compensated by the imposition of money damages. *New York City Off-Track Betting Corp. v. New York Racing Assn., Inc.*, 250 A.D.2d 437, 442 (1st Dept 1998).

Further, 85th St. Tenants has failed to demonstrate that the City respondents, in issuing the violation and notice of violation and hearing, are acting without jurisdiction, or in excess of their jurisdiction.

Finally, 85th St. Tenants' failure to exhaust the available administrative remedies, such as proceeding with the ECB hearing, or appealing the January 3, 2011 violation to the Board of Standards and Appeals ("BSA"), see Charter § 666; Administrative Code § 28-103.4, warrants the denial of the petition and dismissal of the proceeding. "It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law." *Watergate II Apts. v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978); see also *Koultukis v. Phillips*, 285 A.D.2d 433 (1st Dept 2001). Judicial intervention prior to exhaustion of the administrative remedies "usurps the agency's function when it sets aside the

administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Compensation Commn. of Territory of Alaska v. Aragan*, 329 U.S. 143, 155 (1946); *Young Men's Christian Assn. v. Rochester Pure Waters Dist.*, 37 N.Y.2d 371, 375 (1975).

The petition is also denied as against 86th Owners. "A party whose interest may be inequitably or adversely affected by a potential judgment must be made a party in a CPLR article 78 proceeding." *Matter of Spence v. Cahill*, 300 A.D.2d 992, 993 (4th Dept 2002), *lv denied* 1 N.Y.3d 508 (2004)(internal citation and quotation marks omitted); *see* CPLR 7802(c). However, where, as here, the petition has been dismissed against the administrative agency, the proceeding may not be maintained against the private party.

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed as against all respondents; and it is further

ORDERED that the cross motion to dismiss is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Dated: New York, New York
July 14, 2011

ENTER:

FILED

JUL 21 2011

COUNTY CLERK'S OFFICE
NEW YORK

Saliann Scarpulla
SALIANN SCARPULLA
J.S.C.

[Signature]