Matter of Ridge Mgt. Corp. v Town of Brookhaven
2013 NY Slip Op 32975(U)
July 2, 2013
Sup Ct, Suffolk County
Docket Number: 13-14133
Judge: Daniel Martin

[* 1]

SHORT FORM ORDER

INDEX No. 13-14133

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 6-12-13 (#001)
MOTION DATE 7-2-13 (#002)
ADJ. Date 7-2-13
Mot. Seq. # 001 - MG
002 - MD

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In the Matter of the Application of

RIDGE MANAGEMENT CORP.,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

- against -

TOWN OF BROOKHAVEN, DIANA WEIR, Individually and in her capacity as Commissioner of the Department of Housing & Human Services of the Town of Brookhaven, ROSEANN D. GALLAGHER, Individually and in her capacity as Rental Program Coordinator of the Department of Housing & Human Services of the Town of Brookhaven, ARTHUR GERHAUSER, Individually and in his capacity as Chief Building Inspector for the Town of Brookhaven, WALTER E. DUNN III, Individually and in his capacity as Senior Fire Marshal for the Town of Brookhaven, and STRATHMORE RIDGE HOMEOWNER'S ASSOCIATION,

Respondents.

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Upon the following papers numbered 1 to 27 read on these motions for a preliminary injunction and to dismiss; Notice of Motion/ Order to Show Cause (001) and supporting papers 1 - 21 ; Notice of Motion/ Order to Show Cause (002) and supporting papers 22 - 25 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 26 - 27 ; Replying Affidavits and supporting papers ___; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (001) by petitioner for an order restraining and enjoining respondents from certain actions and the motion (002) by the named respondents (except respondent Strathmore Ridge Homeowner's Association) for an order dismissing the petition are consolidated for the purposes of this determination; and, it is further

ORDERED that the motion (001) by petitioner for an order pursuant to CPLR 6301 restraining and enjoining respondents from abating rent and terminating the HUD Section 8 contract and lease at 8B Ticonderoga Court and 7B Saratoga Court, Ridge New York and from withholding the rental permit at 2D Independence Court, Ridge, New York; and, preliminarily enjoining respondents from taking any action to revoke, cancel, void, or otherwise terminate, fail to renew, or approve any HUD Section 8 contracts and leases or any rental permits associated with premises owned by petitioner at Strathmore Ridge based solely upon the alleged failure to maintain and inspect the fire alarm system at the premises, pending the determination of the petitioner's Article 78 proceeding is granted; and, it is further

ORDERED that the motion (002) by respondent for an order dismissing the petition pursuant to CPLR 3211 (a) (2) and (7) is denied with leave to answer the verified petition and submit a return within twenty (20) days after receipt of service of a copy of this order with notice of entry.

The petitioner maintains that it is the owner of twelve properties located within Strathmore Ridge, a residential community consisting of 236 single-family attached homes and common facilities, in which each property (or single-family home) assumes the obligation of membership in Strathmore Ridge's homeowners association. The petitioner rents each of its properties to non-parties, some of which are rented pursuant to federal Housing and Urban Development ("HUD") Housing Assistance Program ("HAP") or "Section 8" contracts. Two of its properties, 7B Saratoga Court ("7B") and 8B Ticonderoga Court ("8B") were rented pursuant to Section 8 contracts administered by respondents[1], 7B since May 1, 2008 and 8B since September 1, 2008. Petitioner claims that another property 2D Independence Court ("2D") would have been rented pursuant to a Section 8 contract, but for respondents' failure to release a rental permit associated therewith.

By way of a letter dated July 10, 2012 and signed by respondent Roseann D. Gallagher, respondent Town of Brookhaven notified petitioner that its 8B property failed the Annual Housing Quality Standards inspection stating that "[t]he fire alarm system must be inspected and certified by a fire alarm installation and service company stating the system is operational and monitored. ... Please be advised that in accordance with federal law, you have thirty (30) days from the date of this inspection, to

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[1]"Respondents" signifying the following named respondents: Town of Brookhaven, Diana Weir, individually and in her capacity as Commissioner of the Department of Housing & Human Services of the Town of Brookhaven, Roseann D. Gallagher, individually and in her capacity as Rental Program Coordinator of the Department of Housing & Human Services of the Town of Brookhaven, Arthur Gerhauser, individually and in his capacity as Chief Building Inspector for the Town of Brookhaven, and Walter E. Dunn III, individually and in his capacity as Senior Fire Marshal for the Town of Brookhaven. Respondent, Strathmore Ridge Homeowner's Association, will be referred to herein as "the homeowners association".

correct these violations. ... [after a reinspection is performed, if] you have failed to correct the [housing quality standards] violations ... identified as your responsibility, the Housing Assistance Payment (HAP) will be abated in accordance with federal law, effective August 31, 2012." Petitioner, through its attorneys, responded via letters dated July 16 and August 7, 2012 that it had "requested a copy of said certificate from the Homeowner's Association ... [a]s the fire alarm system is maintained by the Homeowner's Association and [unit 8B] is connected to an 8-unit system, the owner is unable to independently obtain such a Certificate."

With regard to petitioner's 2D property, respondent Town of Brookhaven issued a notice before summons to petitioner indicating that it "shall **IMMEDIATELY** have [its] fire alarm system tested and inspected by a New York State licensed fire alarm technician. ... [and that] [f]ailure to inspect and test the fire alarm system is in violation of the Local Law of the Town of Brookhaven, Chapter 30 Fire Prevention, Article XXVII Fire Protection Systems, Section 30-159 Installation and maintenance." Petitioner replied through its attorneys that it was its position "that the individual unit owner [was] not responsible under the Town Code or under the formative documents in relation to Strathmore Ridge to test or inspect the fire alarm system that serves its premises, in part, because each unit owner can not necessarily access the control panel that serves its particular unit."

In a letter dated April 4, 2013 respondent Roseann D. Gallagher as rental subsidy program coordinator for respondent Town of Brookhaven indicated that it had conducted a housing quality standards inspection ("HQS") with regard to petitioner's 7B property and that HQS deficiencies were revealed. "The most serious deficiency [was] the failing fire alarm system which is in violation of the Town of Brookhaven Code, Chapter 30. ... Unless this fire alarm panel is certified as an operational system with your unit and all the other units in the building interconnected to the working panel by April 19, 2013, this office will move to terminate this Housing Assistance Payments (HAP) Contract effective June 30, 2013, for your failure to comply with the Housing Quality Standards." In response thereto, petitioner, through its attorneys, indicated once again that

> "[t]he fire alarm system is owned and maintained by the Homeowner's Association and the unit at issue is connected to an 8-unit system. As such, the owner of the unit is neither able nor required to independently obtain such a Certificate for his own unit. Additionally, [it] should not be responsible to show proof that all the other interconnected units to which [it] has no access or interest are also fully operational. Further, as the building does not exceed 12,000 square feet in gross area, it is not subject to the any [*sic*] fire equipment standard [*sic*] other than the installation of smoke detectors. ... [HQS] do not require a fire alarm system or certification thereof. Rather, HQS requires at least one battery-operated smoke detector on each level of the unit. See 24 CFR Section 982.401 (n) (1). Smoke-detectors have always been installed and operational in [petitioner's] units. As such, the Town is abusing its power as administrator of the HUD Section 8 program by denying Section 8 rent in relation to this unit and improperly using the Town Code requirement of a fire alarm system certification as support thereof under the guise of Federal Housing Quality Standards."

Additionally, petitioner requested that respondent Town hold any action it intended to take in abeyance pending a court determination as to the respondent Homeowner Association's liability for the alleged code violations.

In a decision after trial regarding Town of Brookhaven v Strathmore Ridge, Docket # BRTO 2187-12, held on April 11, 2013 in the 6th District Court for the County of Suffolk, the Hon. Janine Barbera-Dalli, J.D.C., found that respondent the homeowners association "was and is, *inter alia*, responsible for the fire alarm systems located at the 38 multi dwelling units contained within the complex overseen by the defendant HOA ... [that] the fire alarm system was initially installed by the developer and selling agent ... in 1973, but was altered and replaced in 2005. ... that the permit for the Fire Alarm Installation which was applied for by Diamond Security Inc. on May 23, 2005, was applied for on behalf of the [respondent] Strathmore Ridge HOA. [that the] actual permit for the Fire Alarm Installation which was issued by the [respondent] Town of Brookhaven was also issued to [respondent] Strathmore Ridge HOA ... [and] that the [respondent] HOA was and is exclusively responsible for the inspection, testing and maintenance of the fire alarm systems for the complex." The court found respondent homeowners association guilty of the misdemeanor charge of failing to maintain the fire alarm system in accordance with § 30-159 (A) of the Code of the Town of Brookhaven.

Thereafter, petitioner commenced this article 78 petition alleging that respondents failed to perform a duty enjoined upon them, made a determination in violation of lawful procedure, and are proceeding in excess of jurisdiction. Petitioner claims, *inter alia*, that respondents acted in excess of their jurisdiction in administering the Section 8 program by supplanting the Town Code for the Federal Housing Quality Standards; that the certificates of occupancy predate the town fire code and the New York State Fire Code does not require a fire alarm system in a building such as the one at issue so that the rental permit should not be subject to the town's fire code's requirement of a fire alarm system; and, that even if the alarm system is required, petitioner is being deprived of its protected property rights without due process in that it was not offered an opportunity to be heard or to confront witnesses in relation to the respondents' action against issuing a rental permit. Petitioner urges the Court to balance the equities, arguing that the conditions have existed since at least 2004, that respondents have inspected and granted certificates of compliance on all twelve (12) of petitioner's units and issued rental permits on all but one (2D Independence Court–for which respondent issued a rental permit since 2004) since at least 2008, and that the fire alarm concern was not raised until 2012.

Petitioner now moves for an order pursuant to CPLR 6301 restraining and enjoining respondents from abating rent and terminating the HUD Section 8 contracts and leases for the 8B and 7B properties and withholding the rental permit at the 2D property based solely upon an alleged fire code violation pending a determination of the article 78 petition. "A party seeking the drastic remedy of a preliminary injunction has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balancing of the equities in the movant's favor" (***Berkoski v Board of Trustees of Inc. Vil. of Southampton***, 67 AD3d 840, 844, 889 NYS2d 623 [2d Dept 2009]; *see* ***Shasho v Pruco Life Ins. Co. of N.J.***, 67 AD3d 663, 665, 888 NYS2d 557 [2d Dept 2009]; ***Ying Fung Moy v Hohi Umeki***, 10 AD3d 604, 781 NYS2d 684 [2d Dept 2004]). "The purpose of a preliminary injunction is to maintain the

status quo and prevent the dissipation of property that could render a judgment ineffectual" (***Ruiz v Meloney***, 26 AD3d 485, 486, 810 NYS2d 216 [2d Dept 2006]). "The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court" ***(Arcamone–Makinano v Britton Prop., Inc.***, 83 AD3d 623, 625, 920 NYS2d 362 [2d Dept 2011]). Respondents' papers do not address the petitioner's request for a restraining order, thus it is unopposed. Petitioner has shown in its moving papers that there is a likelihood of success on the merits (since there has been a judicial finding that respondent homeowner's association is responsible for maintaining the fire alarm system it is unclear how respondents have the authority to terminate a contract for petitioner's failure to maintain that same system) and that petitioner may suffer irreparable injury absent temporary relief (the loss of the tenants and rental income). Thus, when considering those factors and when balancing the equities in petitioner's favor, a preliminary restraining order pursuant to CPLR 6301 is warranted and the motion for same is granted.

Respondent moves to dismiss the petition alleging that it fails to state a cause of action and that the court does not have subject matter jurisdiction. In determining whether to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must assume to be true the facts plead, give every favorable inference to the allegations, and determine only whether the alleged facts fit any cognizable legal theory (***Dickinson v Igoni***, 76 AD3d 943, 908 NYS2d 85 [2d Dept 2010]; ***Tsutsui v Barasch***, 67 AD3d 896, 892 NYS2d 400 [2d Dept 2009]). The test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (***Sokol v Leader***, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). In determining if a pleading states a cause of action, "the sole criterion" for the Courts is whether "from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (***Guggenheimer v Ginzburg***, 43 NY2d 268, 275, 401 NYS2d 182 [1977]). Within the four corners of the petition, there are allegations which are sufficient to make out a claim pursuant to CPLR 7803 (1), (2), and (3). Thus, the motion of the moving respondents to dismiss the petition on the grounds that it fails to state a cause of action is denied. Similarly, as the petition seeks relief in the nature of mandamus and prohibition under the auspices of CPLR article 78, the Court has subject matter jurisdiction and the motion to dismiss the petition pursuant to CPLR 3211 (a) (2) is denied.

Dated:_____

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J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**