

Galuten v City of New York

2014 NY Slip Op 3131 J(U)

April 24, 2014

Supreme Court, Bronx County

Docket Number: 303360/2013

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

SANDRA GALUTEN and SANCO GENERAL
DELAWARE CORP.,

INDEX NUMBER: 303360/2013

Plaintiffs,

-against-

Present:
HON. ALISON Y. TUITT
Justice

THE CITY OF NEW YORK,

Defendant.

The following papers numbered 1 to 4,

Read on this Plaintiffs' Order to Show Cause to Remove Tax Lien and Defendant's Motion to Dismiss the Complaint

On Calendar of 1/13/13

Order to Show Cause-Exhibits, Affidavit and Affirmation 1

Notice of Motion - Affirmation and Exhibits 2

Reply Affirmations 3, 4

Upon the foregoing papers, plaintiffs' Order to Show Cause to remove a tax lien and rescinding any sale which may have taken place and defendant's motion to dismiss the complaint are consolidated for purposes of this decision. For the reasons set forth herein, plaintiffs' Order to Show Cause is denied and defendant's motion to dismiss the Complaint is granted.

Plaintiffs commenced this action seeking to enjoin or rescind a tax lien sale that occurred on May 17, 2013. Plaintiff Sanco General Delaware Corp. was the triple net lessee of the property known as 360 West 253rd Street (Block 5837, Lot 3710) in Bronx County under a 99 year lease agreement in effect from April 15, 1986 through May 9, 2012 when the sole shareholder, plaintiff Sandra Galuten (hereinafter "Galuten") assigned the lease to herself. The owner of the property is Villanova Heights, Inc. Plaintiffs allege that the Court should

reverse the City of New York's (hereinafter "City") tax lien sale on the property because Galuten is eligible to receive a Senior Citizen Homeowner's Exemption (hereinafter "SCHE") and that the Court should order an accounting of the amount of tax arrears because the assessed taxes for the property has contained errors for years. Pursuant to the New York City Administrative Code §11-319, a tax lien was sold on the subject property on May 17, 2013, in the amount of \$1,883,764.44, representing tax arrears for the years 1995 through 2013.

Plaintiffs state that the premises was abandoned property located on land owned by Manhattan College. Plaintiff Galuten states that pursuant to a lease dated April 1, 1986, she and her husband executed a triple net lease intending to give themselves all benefits of ownership. Plaintiff concedes that they were responsible for all taxes, without exception. Plaintiff contends that there have been issues related to the taxation of the property and believes that there are outstanding issues with respect to the proper amount of taxes due. Plaintiff alleges that when they first entered into the lease, they leased a portion of Block 5837, Lot 3701 and a smaller portion of Block 5839, Lot 4018. However, argues plaintiff, while they did not lease the entirety of the former block, they were taxed on it from the outset of their lease in 1987. Plaintiff also alleges that there was confusion regarding taxation of the smaller lot. Plaintiff states that the 19% daily compounding of interest is based on erroneous sums. Plaintiff argues that pursuant to the lease, they were to be granted title to the property in 1997 but title was not delivered to them.

Plaintiff states that she and her husband fell behind on their taxes when her husband got sick in the late 1990's, and her husband passed away in 2007. Since that time, plaintiff has been trying to sell the house but has encountered difficulty from the current owner Villanova Heights, Inc. Plaintiff argues that because she was never granted title to the property, she has been unable to obtain financing to pay the back taxes and sell the property. Plaintiff is currently in litigation with Villanova Heights, Inc. and in her Answer to that lawsuit has alleged counterclaims for delivery of title. Plaintiff states that the original corporation owner, SGD Corp., has been dissolved by proclamation (In 2008, the name of the corporation was changed to Sanco General Delaware Corporation. Plaintiff further states that as the sole shareholder of the former SGD Corp, in winding up the affairs of the corporation, she transferred the lease to her name. Plaintiff alleges that a tax lien sale could impose serious hardship on her as she is 74 years old and her sole source of income is from Social Security, from which she receives \$27,150.00 annually. She states that she is entitled to a senior citizen exemption from a tax sale because her annual income falls below a certain amount.

Section §11-319(a) of the Administrative Code only excludes liens from sale if the real property “is receiving an SCHE exemption pursuant to section 11-245.3.” Defendant City argues that Galuten was not receiving a SCHE at the time of the lien sale, and that she never received or was entitled to receive a SCHE exemption. City requests that the Court take judicial notice of the Complaint filed in Villanova Heights, Inc., f/k/a Chapel Farm Estates, Inc. v. SGD Corporation, Keith Galuten and Sandra Galuten, Index No. 305469/2010, pending in Supreme Court, Bronx County. City argues that Villanova Heights, Inc. is suing plaintiff because they have failed to keep current and pay the real property taxes due and owing on the property. As a result, Villanova Heights, Inc. seeks to terminate the lease agreement and obtain possession of the property because it is the fee owner of the property.

Real Property Tax Law §467 provides that “[r]eal property owned by one or more persons, each of whom is sixty-five years of age or over... shall be exempt from taxes on real estate to the extent of fifty per centum of the assessed valuation thereof.” This fifty per centum partial exemption, known as the Senior Citizens Homeowner’s Exemption, cannot be granted to any aged applicant whose income for the year preceding the application exceeds \$29,000.00, though lesser exemptions are available for applicants whose income is as high as \$37,400.00, pursuant to Administrative Code §11-245(3)(b). Moreover, the aged applicant must have title to the property in his or her own name.

Plaintiff first applied for a SCHE on August 2, 2011, which was denied by New York State Department of Taxation and Finance (hereinafter “DOF”) on or about August 16, 2012, on the grounds that she failed to submit any documentation regarding her identity, age or income. The DOF letter advised plaintiff of her right to appeal the decision of the New York City Tax Commission (hereinafter “Tax Commission”) within 20 days from the date of the letter of denial. Plaintiff again applied for a SCHE on February 19, 2013, and by letter dated March 28, 2013, DOF requested proof of ownership of the property. Having not received sufficient proof, by letter dated May 23, 2013, DOF denied plaintiff’s application because she was not the owner of the property. DOF advised in its letter of plaintiff’s right to appeal the decision within 20 days of the date of the letter. Plaintiff did not appeal.

Defendant City argues that plaintiff Galuten cannot now maintain in the instant action that she qualified for a SCHE exemption as she failed to exhaust her administrative remedies by appealing the DOF determinations. City further argues that because SCHE is a partial exemption, even if plaintiff had appealed to

the Tax Commission and was unsuccessful, her only judicial recourse would be to commence an Article 7 special proceeding pursuant to the Real Property Tax Law, not a plenary action as she has brought here. Additionally, City argues that plaintiff's claims of significant irregularities in the amount of taxes due is without merit. The claim spans the years 1995 through 2013, and yearly real property tax assessments are subject to both administrative and, subsequently, judicial review. However, plaintiff never sought the aforementioned relief.

City contends that this action is improper to challenge the unpaid real property tax assessments. Real Property Tax Law §700(1) provides that "[a] proceeding to review an assessment of real property shall be brought as provided in this article unless otherwise provided by law." The exclusive remedy for judicial review of the amount of an assessment is a tax certiorari proceeding under Article 7 of the Real Property Tax Law. Niagara Mohawk Power Corp. v. City School District of City of Troy, 59 N.Y.2d 262, 268 (1983). A condition precedent to commencing an Article 7 proceeding is that a party claiming to be aggrieved by a real property tax assessment must first seek redress before the Tax Commission. Pursuant to the New York City Charter §163(f) and Rules of the City of New York §37-01, as a condition precedent for the Tax Commission to review a DOF final determination, a taxpayer on a class of property like the subject property would have to first file an application for correction of an assessment with the Tax Commission by March 15th of the tax year to be reviewed. In the instant action, plaintiffs never filed the application for each tax years between 1995 and 2013. Pursuant to the New York City Charter §166, to commence a judicial proceeding to review a DOF determination, a taxpayer must commence an Article 7 proceeding before October 25 of the year after the determination by the Tax Commission was made. Plaintiffs never did. Under the Real Property Tax Law §702(3), the failure to properly commence a proceeding within the required time period "shall constitute a complete defense to the petitioner and the petition will be dismissed. City argues that any Article 7 proceedings are now time barred.

With respect to plaintiff's claim that she should have been granted title to the property in 1997, there is litigation regarding that issue in the Villanova Heights, Inc. action against plaintiffs herein. City argues that had plaintiffs truly been concerned that their lack of title prevented them from obtaining financing to pay the back taxes during the ensuing 14 years, they would have sought resolution of that issue. Resolution is now sought but not by plaintiffs but by Villanova Heights, Inc. Plaintiffs did not raise the issue until Villanova

Heights, Inc. sought possession of the property in 2010 because plaintiffs had failed to keep current with the real property taxes.

When a party moves to dismiss based on legal insufficiency, there is no obligation to show evidentiary facts to support the allegations of the complaint. Generally, on a motion to dismiss made pursuant to C.P.L.R. §3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory". Leon v. Martinez, 84 N.Y.2d 83 (1994). Defendant City has moved pre-Answer, to dismiss plaintiffs' complaint. On a motion to dismiss pursuant to C.P.L.R. §3211(a)(7), the Complaint survives when it gives notice of what is intended to be proved and the material elements of each cause of action. Rovello v. Orofino Realty Co., Inc. 40 N.Y.2d 633 (1976); Underpinning & Foundation Construction v. Chase Manhattan Bank, 46 N.Y.2d 459 (1979). Furthermore, on a motion to dismiss for legal insufficiency, it is proper to consider the facts in an opposing party's affidavit for the limited purpose of sustaining the pleading. Ackerman v. Ackerman, 462 N.Y.S.2d 657 (1st Dept.1983). In reviewing plaintiffs' Complaint, this Court accepts the facts as alleged as true and accords plaintiff the benefit of every possible favorable inference. In determining whether the facts as stated by plaintiffs fit into the cognizable legal theories alleged, this Court finds that it does not.

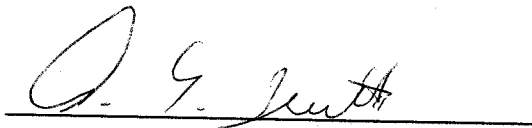
This Court lacks subject matter jurisdiction over plaintiffs' claim that she is entitled to a SCHE for the property. Plaintiff Galuten asserts that she is pursuing an administrative challenge to DOF's denial of her most recent application to the Tax Commission. Plaintiffs' counsel states that her appeal was timely filed on June 12, 2013 and, pursuant to his conversation with the Tax Commission by telephone, he was advised that the appeal is still pending. Since the Tax Commission has not yet ruled on plaintiffs' appeal on the issue of whether she is entitled to a SCHE, this action is improper as plaintiff has not exhausted her administrative remedies regarding the property's 2012/2014 real property tax assessment. It would be premature for this Court to rule on whether the property qualified for a SCHE at the time of the lien sale while Galuten's appeal to the Tax Commission is still pending. See, Watergate II Apartments v. Buffalo Sewer Authority, 46 N.Y.S.2d 52, 57 (1978)(One who objects to the act of an administrative agency must exhaust available remedies before being permitted to litigate in a Court of law). Moreover, should plaintiff exhaust her administrative remedies and the Tax Commission denies her appeal, her recourse would be to commence an Article 7 proceeding pursuant to the

Real Property Tax Law.

Accordingly, plaintiffs' Order to Show Cause to remove the tax lien for the subject property and to rescind the sale of the tax lien is denied and defendant's motion to dismiss the Complaint is granted.

This constitutes the decision and order of this Court

Dated: 4/24/14

A handwritten signature in cursive script, appearing to read "A. Y. Tuitt", is written over a horizontal line.

Hon. Alison Y. Tuitt