LLHC Realty LLC v Wyoming County Bd. of Health
2014 NY Slip Op 32291(U)
August 28, 2014
Supreme Court, Wyoming County
Docket Number: 46092
Judge: Michael F. Griffith
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT COUNTY OF WYOMING

LLHC REALTY LLC,

Petitioner

vs

ORDER
Index No. 46092

WYOMING COUNTY BOARD OF HEALTH STEPHEN D. PERKINS, in his Official Capacity as Director of Environmental Health for the Wyoming County Department of health, and VILLAGE OF SILVER SPRINGS, NEW YORK,

Respondents

The above named petitioner, having moved this Court pursuant to an Order to Show Cause supported by the affidavit of Jeffrey F. Luellen, and accompanying exhibits, sworn to on October 3, 2013, seeks to annul the respondent Board of Health's revocation of petitioner's mobile home operating permit; vacating the per day fine imposted by the County respondents; and restraining the County respondents from suspending or revoking petitioner's mobile home operating permit; and said motions having duly come on to be heard.

NOW, on reading the pleadings herein, and on reading and filing the Order to Show Cause of the plaintiff, LLHC Realty LLC, dated October 3, 2013 and filed October 4, 2013, supported by the Affidavit of Jeffrey F. Luellen, together with attached exhibits, the Summons, Verified Petition/Complaint, and attached exhibits, the supporting Affirmation of Gregory J. McDonald, Esq., and accompanying Memorandum of Law dated October 3, 2013; the Notice of Motion for Leave to Intervene of New York Municipal Power Agency, filed November 8, 2013, supported by the Affirmation of Konstantin Podolny, Esq., the Verified Answer of the proposed

intervenor, the Affidavit of Frank Radigan, and accompanying Memorandum of Law; the Affirmation in Response in Opposition to the New York Municipal Power Agency's motion to intervene of Gregory J. McDonald, Esq., together with LLHC Realty's Memorandum of Law in Opposition to the Proposed Intervenor's Motion to Intervene dated November 18, 2013; the Verified Answer of the County of Wyoming, dated November 7, 2013, together with the Affidavit of James W. Wujcik, Esq., the Verified Answer of the Village of Silver Springs, filed November 21, 2013, together with the Attorney Affirmation of David M. DiMatteo, Esq., filed the same date; the Answering Affidavit of Stephen D. Perkins, and the Memorandum of Law in Opposition to Petitioner's Order to Show Cause; the Memorandum of Law in Reply to Petitioner's Opposition to the Motion to Intervene, supported by the Affirmation of Konstantin Podolny; and the Reply Affidavit of Jeffrey Luellen, together with attached exhibits sworn to on November 25, 2013, and the Reply Affirmation of Gregory J. McDonald, Esq., dated November 25, 2013; and after hearing counsel for the plaintiff, Gregory J. McDonald, Esq., in support of the Order to Show Cause filed by the petitioner, and Konstantin Podolny, Esq., James M. Wujcik, Esq., and David M. Dimatteo, Esq., on behalf of the respondents, and due deliberation having been had, the following decision is rendered.

The petitioner owns and operates a mobile home park located at Warsaw Boulevard, Silver Springs, New York, which is known as Hillside Terrace Manufactured Housing Community, (hereinafter "Hillside"). The petitioner has owned and operated Hillside since 2007. There are 36 occupied mobile homes at Hillside.

Under New York law, the owner of a mobile home park must apply for an annual permit to operate a mobile home park. Upon receipt of the renewal application on February 26, 2013,

the Wyoming County Health Department conducted a review of the application. Upon receipt of the renewal application, the Respondent was notified by the Village of Silver Springs of alleged violations at Hillside. Hillside was issued an Operational Permit with conditions, with notification that the petitioner was to correct all noted violations by an electrical inspector by May 24, 2013. The petitioner responded that any alleged potential public health hazards were the responsibility of the Village of Silver Springs. The Health Department responded by letter stating that regardless of the Petitioner's position, the violations were to be corrected by May 24, 2013. The Health Department undertook a mobile home park inspection on June 12, 2013 which is alleged to reveal multiple public health hazard violations.

The Department then issued a Complaint/Notice of Hearing detailing the alleged violations on June 25, 2013. The petitioner elected to proceed to a hearing, and an Enforcement Hearing was commenced on July 19, 2013. A determination was made by the Hearing Officer on July 24, 2013 finding that the petitioner was in violation of New York Sanitary Code, Part 17, Section 17.6[c] and recommended that Hillside be operated under a Conditional Permit until the alleged violations were cured by inspection. At a Special Meeting of the Board of Health on August 7, 2013, the Board determined that based upon the Hearing, the petitioner would be fined $1,000.00 per day for each and every day that Hillside remained out of compliance. At the next regularly scheduled Board meeting on September 19, 2013, the Board determine that the petitioner remained out of compliance, and if no action was taken, the petitioner's temporary permit would be revoked. On October 9, 2013, a special meeting of the Board of Health was held in which the operational permit was permanently revoked, and the petitioner was assessed a $1,000.00 per day fine for each day Hillside remained out of compliance. The petitioner then

commenced the within Order to Show Cause with Temporary Restraining Order.

The petitioner contends that the Village is responsible by operation of law to maintain the electric distribution facilities at Hillside. The Village owns and operates a municipal electric system that distributes electricity to customers within the Village including the residents of Hillside. The Village is a member of the New York Municipal Power Agency. Pursuant to a Concurrence Tariff dated October 1, 2001, the Village concurred in and agreed to abide by the rules and regulations as set forth in the generic tariff filed by the New York Municipal Power Agency with the New York Public Service Commission.

Electric distribution service to Hillside is provided by facilities owned and operated by the Village. Provisions for electric service pre-dated petitioner's ownership of Hillside. The Village has five pole mount distribution transformers located within the boundaries of petitioner's property that provide power to the mobile homes. From the transformers, overhead triplex distribution wire goes to each of the utility poles in the park and then runs down the utility poles to the electric meter locations for each of the homes.

Each pole hosts at least two electric meters. From the customer side of the electric meters, underground wires connect the outside electric meter to the inside circuit breaker panel within each of the mobile homes. Electrical consumption is billed by the Village directly to the tenants residing in the mobile homes. The meters are read by representatives of the Village.

Initially, the Petitioner opposes NYMPA's motion for leave to intervene. This Court finds that NYMPA's intervention is warranted under CPLR §§ 7802 and 1013. The Courts have broader or more permissive standards to allow for intervention in Article 78 proceedings than compared to CPLR § 1013. CPLR § 7802(d) requires only a showing that the intervenor is an

interested person. However, to be an "interested" party, one must have a legally cognizable claim to intervene pursuant to CPLR 7802(d), rather than just a general interest in the result of the article 78. This action was commenced under Article 78, and CPLR section 7802(d) shall be applied to NYMPA's motion to intervene. NYMPA is an interested party as they have a legally cognizable claim to intervene, as this action requires the interpretation of the NYMPA tariff. The members of NYMPA have a direct interest in the outcome of the proceedings, not a mere interest in the result of the Article 78 proceeding (Kruger v. Bloomberg, 1 Misc3d 192). Further, there is no prejudice to any parties if NYMPA were allowed to intervene.

Additionally, NYMPA may be allowed to intervene under CPLR § 1013. Under CPLR 1013, the Court, in its discretion, may permit any party to intervene in case where the person's claim or defense and the main action have a common question of law or fact (see, Bernstein v. Feiner, 43 AD3d 1161). There is a common question of fact in that, three of the thirty six members of NYMPA are situate in Wyoming County. It is reasonable to believe that these entities have properties within their municipalities with similar, if not exact, electric service as the one at issue in this case.

Similarly, a common question of law exists with respect to all of NYMPA's members because the tariff provisions in question effects all of those municipalities through their concurrence tariffs, especially those situate in Wyoming County. The petitioner has asked this Court to interpret a provision in the tariff common to all NYMPA members which creates a common question of law to each of those members in New York State. NYMPA's intervention would not cause any undue hardship or prejudice to the petitioners.

The plaintiff seeks a determination that Silver Springs is responsible for maintaining the

electrical distribution facilities up to and including the meters within the mobile home park. The applicable state law concerning the maintenance of the electrical distribution system is the Tariff and related regulations. The Tariff was approved by and filed with the Public Service Commission, giving it the force and effect of law and governs the Village's rates and practices. The Tariff provides guidance to the issues concerning the maintenance of Distribution and Service lines. The facilities inside the trailer park consist of both Service lines and Distribution lines.

Service lines are defined as an electrical line used to connect a distribution line to an individual customer's meter or point of attachment; a service line, at the utility's discretion, may be connected to two or more meters at a single premises (16 NYCRR 98.1[c]). The Tariff states that Service lines must be maintained by the Utility if the Utility both installed the service lines and was responsible for the cost of their installation. It appears from the documents submitted, that Silver Springs did not install the lines in question, nor did Silver Springs build the facilities (Aff. of Allen J. Putney, Village of Silver Springs Record, Ex. 41; Tariff at V.B.2). Accordingly, the Village of Silver Springs has no obligation to maintain the Service lines.

Regarding the maintenance of the Distribution lines, the Utility must maintain distribution facilities if the Utility installed them, or if the applicant installed them pursuant to the Tariff (Tariff at V.B.1). Here, Silver Springs did not install the facilities inside the trailer park, except for its service connection located at the edge of the right of way that includes the Village's transformers and individual customer meters. Additionally, the owner (Hillside) could not have installed the lines pursuant to the Tariff because their installation predates the Tariff, which went into effect in 1998 (Aff. of Allen J. Putney, Village of Silver Springs Record, Ex.

41). Further, Silver Springs was never granted any easements for the maintenance of the lines that were installed by the applicant in the past, which is required under the Tariff (Tariff § V(B)(1) at Leaf 30). Finally, there is nothing in the record indicating that the electrical facilities within the mobile home park were transferred to Silver Springs. If the electrical facilities were turned over to the utility, it would be placed on their inventory of assets. As the Public Service Commission sets the utility's rates for the cost of providing service, the utility is responsible for the expenses including the maintenance of the assets (Affidavit of Frank Radigan, Par. 19). The lines at the mobile home park were never transferred to the Village, and the utility would not receive a rate allowance for their operation and maintenance (Id.). If maintenance is required, and there is not a proper transfer of ownership with easements for the required maintenance, said repairs would be at the expense of the other ratepayers, and for the benefit of the privately owned facility. For these reasons, the Village of Silver Springs is not responsible by operation of law to maintain the electrical distribution facilities up to and including the meters within the mobile home park.

At the hearing before Hearing Officer Farberman, the petitioner testified regarding the alleged violations, together with his claims that the Village of Silver Springs is responsible for the maintenance of the lines pursuant to the Tariff. The Hearing Officer Heard testimony from the respondent Perkins, together with photos and inspection reports. The Hearing Officer was entitled to make credibility determinations in favor of the parties that testified. Thus substantial evidence supports the violation of New York State Code, Part 17, Section 17.6[c], including, in particular, the testimony of the Petitioner and the Director of Environmental Health (see, Matter of Berenhaus v. Ward, 70 NY2d 436, 443-444; Matter of Grimaldi v. Gough, 114 AD3d 679).

The penalty imposed by the Hearing Officer was for the mobile home park to be operated under a conditional permit with a fine of $50.00 per day until the work is completed. The Board of Health, thereafter, permanently revoked the operational permit and levied a $1,000.00 per day fine. The Wyoming County Board of Health has the powers conferred upon it under Public Health Law § 309, including the right to impose civil penalties. A review of the Wyoming County Sanitary Code § 5(b)(vi) as applied to Public Health Law § 309, provides no statutory authorization for a local board of health to impose a $1,000.00 a day fine for a violation of the Sanitary Code. Therefore, the penalty imposed is disproportionate as to offend one's sense of fairness. The fines fell outside the permitted range for the offense, including whether it was a first or repeat offense (see, Wyoming County Sanitary Code § 5(b)(vi); Pub. Health Law § 309; Ancis v. Lomenzo, 31 AD2d 615; Palmer v. Rhea, 78 AD3d 526).

While petitioner's conduct certainly should not be condoned, there are no facts in the record establishing that the alleged violations are such that a revocation of the Petitioner's permit is a warranted sanction. The Hearing Officer heard the testimony, reviewed the evidence and made her recommendations. The mobile home park has been operating for many years with the same electrical distribution system. Permits were also renewed as to the distribution system. While aspects of the system were found to be out of compliance in the latest review, the evidence before the Hearing Officer did not show that these unsafe conditions had been in existence for an extended period of time, or that the petitioner failed to correct repeated violations. The Hearing Officer was in the best position to hear the evidence and recommended a conditional permit and a $50 per day fine. The Board of Health enhanced the fine and penalty without additional evidence, and in excess of any allowable range for the offense. Accordingly, the sanctions

imposed by the Board of Health is an abuse of discretion under CPLR § 7803(3).

NOW, THEREFORE, it is hereby

ORDERED, the Petitioner's action for declaratory judgment pursuant to Article 30 of the CPLR seeking to declare that Silver Springs is responsible for maintaining the electrical distribution facilities up to and including the meters within the mobile home park is denied; and it is further

ORDERED, the Petitioner's request to annul Wyoming County Board of Health's revocation of the mobile home operating permit and vacating the $1,000.00 per day fine imposed by the Wyoming County Board of Health is granted to the extent that the original sanctions imposed by Hearing Officer Farberman are reinstated. Based upon this Court's denial of the petitioner's action for declaratory judgment, the Petitioner has 90 days to remedy the deficiencies with the electrical system as outlined in the violations submitted by Director Perkins. Failure to remedy the deficiencies will result in this Court accepting an application by the defendants for an order of closure of the mobile home park.

Dated: Warsaw, New York
Aug. 28, 2014

ENTER

GRANTED
AUG 28 2014
CHIEF CLERK
WYOMING COUNTY SUPREME COURT

Hon. Michael F. Griffith
Acting Supreme Court Justice