

Berger v Prospect Park Residence LLC

2015 NY Slip Op 32889(U)

April 10, 2015

Supreme Court, Kings County

Docket Number: 6639/2014

Judge: Wayne P. Saitta

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Court of the state of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10th day of April, 2015.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

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EMILY BERGER, as Temporary Administrator of the Estate of MARY BERGER, CANDACE BLANDFORD, LILLIAN GUIDE, BELLA HORNAUNG, GEORGE MELAMED, ANNE MARIE MOGIL, ALICE SINGER, JENNIFER STOCK, as Temporary Administrator of JACK STOCK, ROSALIND BLANK, HANNA ESKIN, JONATHAN MARKS, as Temporary Administrator of the Estate of LILLIAN S. MARKS, PAULA ATLAS, RUTH GURTON, HENRIETTA HALLENBORG, TRINA KRUGER and JOACHIM SCHROBSDORFF,

Index No.
6639/2014

DECISION and ORDER

Plaintiffs,

-against-

PROSPECT PARK RESIDENCE LLC, 1 PROSPECT PARK RESIDENCE, LLC, 1 PROSPECT PARK ALF, LLC, PROSPECT PARK RESIDENT HOME HEALTH CARE, INC., HAYSHA DEITSCH, as Owner, Prospect Park Residence for Adults, DAVID POMERANTZ, as Administrator and/or Executive Director, Prospect Park Residence for Adults, SAM ZALMANOV, as Member, 1 Prospect Park Residence, LLC, NEW YORK STATE DEPARTMENT OF HEALTH, NIRAV R. SHAH MD, MPH, as Commissioner of the New York State Department of Health, and HOWARD ZUCKER, MD, as Commissioner of the New York State Department of Health,

Defendants.

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Defendants, NEW YORK STATE DEPARTMENT OF HEALTH, NIRAV R. SHAH MD, MPH, and HOWARD ZUCKER, MD, (the NYSDOH Defendants), have

moved by Order to Show Cause, for an order appointing a temporary receiver to operate the Prospect Park Residence, (the "Residence").

The Order to Show Cause having come before the Court on January 30, 2014, and upon the reading of the Order to Show Cause dated December 15 2014, the Memorandum of Law dated December 12, 2014, the Affidavit of Valerie Deetz, sworn to December 10, 2014, and the exhibits annexed thereto; the Plaintiffs' Memorandum of Law, dated January 9, 2015, and the exhibits annexed thereto; the Affirmation in Opposition of Joel Drucker Esq., dated January 9, 2015, the Affidavit in Opposition of Haysha Deitsch sworn to January 9, 2015, and the exhibits annexed thereto; NYSDOH Defendants' Reply Memorandum of Law dated January 23, 2015; NYSDOH Defendants' Supplemental Memorandum of Law dated March 17, 2015; Plaintiffs' Memorandum of Law in Response, dated March 24, 2015, and the Affidavit of Frederick C. Millett Esq., dated March 24, 2015, and the exhibits annexed thereto; and after hearing argument of counsel on February 4, 2015, and due deliberation thereon, the NYSDOH Defendants' motion is granted to the extent set forth below.

PROSPECT PARK RESIDENCE, LLC, 1 PROSPECT PARK ALF, LLC, HAYSHA DEITSCH, DAVID POMERANTZ, and SAM ZALMANOV, (the "PROSPECT DEFEDANTS"), are alleged by Plaintiffs to own or manage the Residence. The PROSEPECT DEFENDANTS contend that only, 1 PROSPECT PARK RESIDENCE, LLC, operates the Residence and that 1 PROSPECT PARK ALF, LLC, is the owner of the property on which the Residence is located. HAYSHA DEITSCH and SAM ZALMANOV are members of 1 PROSPECT PARK RESIDENCE, LLC. DAVID POMERANTZ was the Executive Director of the Residence and an employee of 1 PROSPECT PARK RESIDENCE, LLC.

Defendant New York STATE DEPARTMENT OF HEALTH (“NYSDOH”), is the State agency that licenses and approves closure plans for adult care facilities, assisted livings facilities, and enhanced assisted living residences in New York. NIRAV R. SHAH MD, MPH, is former Commissioner of the New York State Department of Health, and HOWARD ZUCKER, MD, is the current Commissioner of the New York State Department of Health.

The Residence is an adult care facility located at 1 Prospect Park West in Park Slope, Brooklyn. The Residence has additional certifications as an assisted living facility and an enhanced assisted living residence. The Plaintiffs who still reside at the Residence range in age from 88 years to 99 years old and suffer from various disabilities.

1 PROSPECT PARK RESIDENCE, LLC (“the Operator”) first sought a certificate to operate the Residence as a licensed facility in 2012, after being cited by NYSDOH for operating the facility without a license. On November 30, 2012, NYSDOH conditionally approved the Operator’s request for a license to operate a 139 bed adult home and assisted living residence. The approval was conditioned on the Operator addressing, among other conditions, the lack of smoke stop partitions in the public halls and the lack of sprinklers in the closets of the residents’ apartments.

On March 25, 2013, NYSDOH denied the Operator’s waiver request to install smoke detectors in closets in lieu of sprinklers and to not install smoke barriers in the hallways.

On June 1, 2013, NYSDOH extended the conditional license until November 30, 2013.

On September 27, 2013, the Operator submitted a closure plan to NYSDOH for approval.

On December 19, 2013 NYSDOH extended the conditional approval of the license until March 31, 2014.

On February 24, 2014, NYSDOH sent the Operator notice that it approved implementation of its plan to surrender its operating certificate, and close the Residence. The plan initially set April 30, 2014 as the target closure date for the Residence. At the time the closure plan was approved there were 130 residents in the facility. Presently eight residents still reside at the facility.

The Residence did not close on the target date of April 30th, as state regulations prohibit closure until all residents have transferred to other facilities. 18 NYCRR §485.5(j)(5).

On March 28, 2014, NYSDOH again extended the conditional approval of the license until May 31, 2014.

Two groups of residents filed suits in response to the closure plan, in May and June of 2014, and the actions were later consolidated into this index number.

On May 22, 2014 the parties entered into a stipulation which provided in part that the Operator would postpone the closure date until June 13, 2014, and continue to provide required services to the Plaintiffs. The stipulation further provided that the Operator would not involuntarily transfer residents and would ensure that any transfer is to a setting that is adequate, appropriate, and the most integrated setting appropriate to the Plaintiffs' needs.

On May 29, 2014, NYSDOH extended their conditional approval for the Operator to continue operating the residence until September 1, 2014.

On September 11, 2014, NYSDOH approved the Operator's application to decertify 124 of the beds at the Residence.

In November of 2014, NYSDOH found numerous regulatory violations at the Residence relating to water temperatures, food service sanitation, unauthorized use of space at the facility, and case management. In addition NYSDOH cited the continued lack of smoke barriers and sprinklers in closets. NYSDOH issued Statements of Deficiency to the Operator on November 13, November 14, and November 24, 2014, regarding those violations.

The Operator did not submit a plan of correction for the violations cited in the November 14th and 24th Statements of Deficiency relating to, food service, sanitation, unauthorized use of space at the facility and case management. The Operator has installed neither smoke barriers in the hallways nor sprinklers in the residents' closets, and NYSDOH has not granted a waiver of those requirements.

The last conditional approval by NYSDOH permitting the Operator to continue to operate the Residence expired on December 10, 2014.

The Operator never applied for a further extension of its conditional license after it expired on December 10, 2014, and has been operating the Residence pursuant to the so ordered stipulation in this action since December 10, 2014.

Citing the outstanding violations and the failure of the Operator to renew its certificate, NYSDOH moved by Order to Show Cause, dated December 15, 2014, for the appointment of a temporary receiver to operate the facility.

NYSDOH argues that a receiver should be appointed pursuant to Social Service Law §460-d (5), and CPLR 6401, because the Operator has not addressed violations found by the Department, and because the Operator no longer has a license to operate

the facility. NYSDOH states that the Operators' failure to provide smoke barriers and sprinklers for over two years evidences an inability to operate the facility in compliance with department regulations, which is a condition for renewal of the license pursuant to 18 NYCRR §485.7(b).

The PROSPECT DEFENDANTS oppose the appointment of a receiver, arguing first, that NYSDOH cannot seek a receiver pursuant to CPLR 6401 because it does not have an interest in the property. The PROSPECT DEFENDANTS argue that the appointment of a receiver is not warranted pursuant to Social Services §461-f because NYSDOH did not revoke or suspend the Operator's license.

The PROSPECT DEFENDANTS also argue that there is no basis to authorize a receiver to install smoke barriers or sprinklers, because Social Service Law §461-f(4)(c) grants a receiver the powers and duties of receiver appointed in a foreclosure action and RPAPL 1325 does not authorize a receiver in a foreclosure action to make such repairs.

Plaintiffs do not oppose the appointment of a receiver but ask for input as to who is appointed as receiver, and that the receiver be appointed to manage the facility for the duration of this action. Plaintiffs also seek to require the receiver to provide the level of care required by the stipulations previously entered into in this case.

NYSDOH has demonstrated a sufficient basis for the appointment of a temporary receiver pursuant to Social Services Law §460-d (5). This section grants NYSDOH the authority to seek equitable relief against violations or threatened violations of the department regulations. Such equitable relief includes the appointment of a temporary or permanent receiver for the protection of the health, safety and welfare of any individual in such facility. *Id.* The authority under section 460-d (5) is "[i]n addition to or as an alternative to any power which the department may exercise under this article

[Article 7].” *Id.* Thus, the authority of NYSDOH to seek a receiver is not limited to situations where it has revoked or suspended an operator’s license.

In addition to the fact that the operator did not apply for renewal of its conditional license, NYSDOH has demonstrated that the Operator has failed to operate the facility in compliance with the applicable laws and regulations. The PROSPECT DEFENDANTS in their opposition papers do not contest the existence of the violations, except as to hot water. Instead, they argue that the conditions cited by NYSDOH existed at the time NYSDOH extended the Operator’s license multiple times.

The fact that NYSDOH has extended the Operator’s license for over two years, notwithstanding the lack of sprinklers in the closet and smoke barriers in the hallways, does not relieve the Operators of the obligation to comply with those regulatory requirements.

Aside from the many violations relating to food service, sanitation, unauthorized use of space at the facility and case management, the Operator has had over two years to provide the required sprinklers and smoke barriers, but has failed to do so.

By reason of the foregoing, the appointment of a receiver is justified to ensure that the outstanding violations are remedied, and to protect the health, safety and welfare of the remaining residents.

Among the conditions the receiver must address is the lack of smoke barriers and sprinklers in closets. The PROSPECT DEFENDANTS’ argument that there is no basis to authorize a receiver to make structural alterations or capital improvements to a building is without merit.

While Social Services Law §461-f (4)(c) grants a receiver all the powers of a receiver in a foreclosure action it does not limit a receiver to those powers. This section

specifically grants a receiver authority to operate the facility in compliance with the applicable law and regulations of the department and to incur expenses as may be necessary to so operate the facility. *Id.*

The fact that a correction of a violation may involve structural work or could be characterized as a capital improvement under the tax code does not deprive a receiver appointed to operate an assisted living facility of the authority to correct such violations, particularly where they relate to fire safety of elderly and disabled residents.

During the period a receiver is operating the facility, the Operator is liable for the operating and maintenance expenses incurred by the receiver. Social Services Law §461-f (4)(h)(i) and (ii); 18 NYCRR 485.9 (a)(9)(i)and (ii).

The Commissioner of NYSDOH is authorized to make funds available to a receiver to pay for the operation and maintenance expenses of the facility where the facility's funds are insufficient. Social Services Law §461-f (5)(a); 18 NYCRR 485.9 (a)(12)(i). An operator is liable for any monies made available to a receiver by the Commissioner. Social Services Law §461-f (5)(b); 18 NYCRR 485.9 (a)(12)(ii).

Additionally, the receiver in this case should submit for approval to NYSDOH a new closure plan that details the actions that will be taken to assess the needs and preferences of the of the remaining residents, and that details the actions that will be taken to ensure that residents are given assistance in locating facilities that are appropriate to their needs and preferences, and are the most integrated settings given their needs.

WHEREFORE, NYSDOH's motion to appoint a receiver is granted to the following extent and it is hereby,

ORDERED, that Brian Rosenman is appointed Temporary Receiver to take charge of Prospect Park Residence, effective upon his filing with the Court a statement accepting the appointment; it is further

ORDERED, that the receivership shall be in effect for six months from acceptance of the appointment by the Temporary Receiver, unless extended by order of this Court upon good cause shown; and it is further

ORDERED, that pursuant to 18 NYCRR 485.9(a)(4)(iv), the Temporary Receiver, shall not be required to file a bond; and it is further

ORDERED, that the Temporary Receiver shall have all the powers and duties of a temporary receiver appointed under Sections 460-d(5) and 461-f(4) of the Social Services Law and 18 NYCRR 485.9 (a); and it is further

ORDERED, that the Temporary Receiver shall have sole authority to collect incoming payments currently due or become due the facility, from all sources, and apply them to the costs incurred in performing his functions as Temporary Receiver; and it is further

ORDERED, that the Residents remaining in the facility shall attorn to the Temporary Receiver; and it is further

ORDERED, that the Temporary Receiver is authorized to incur expenses to manage and operate the facility in accordance with the applicable laws and regulations; and it is further

ORDERED, that the Temporary Receiver is not responsible for any obligations incurred by the Operator of the facility or of the owner, or lessor, of the building in which the facility is located, except that the Temporary Receiver shall honor all existing residency agreements; and it is further

ORDERED, that in the event that the funds collected by the Temporary Receiver are insufficient to enable the Temporary Receiver to manage and operate the facility in accordance with the applicable laws and regulations, the Temporary Receiver is authorized to apply to the Commissioner of the New York State Department of Health for funds to operate the facility; and it is further

ORDERED, that in the event that the funds collected by the Temporary Receiver are insufficient to enable the Temporary Receiver to remedy the lack of smoke barriers in the public hallways and sprinklers in residents' closets, the Temporary Receiver is authorized to apply to the Commissioner of the New York State Department of Health for funds to correct those conditions; and it is further

ORDERED, that the Temporary Receiver, shall be entitled to a fee as determined by the Commissioner of the New York State Department of Health, and in the event that the funds collected by the Temporary Receiver are insufficient to pay the Temporary Receiver's fee, the Temporary Receiver is authorized to apply to the Commissioner of the New York State Department of Health for funds to pay his fee; and it is further

ORDERED, that 1 Prospect Park Residence, LLC is liable for any funds made available to the Temporary Receiver by the Commissioner of the New York State Department of Health; and it is further

ORDERED, that the Temporary Receiver shall submit for approval by the New York State Department of Health a new closure plan that sets forth a new closing date, and that details the actions that will be taken to assess the needs and preferences of the of the remaining residents, and that details the actions that will be taken to ensure that residents are given assistance in locating facilities that are appropriate to their needs and preferences, and are the most integrated settings given their needs; and it is further

ORDERED, that the Temporary Receiver shall be liable solely in his official capacity and shall not have any liability in his personal capacity, and it is further

ORDERED, that the Temporary Receiver may not be sued without prior approval of this Court, and it is further

ORDERED, that at the end of the receivership the Temporary Receiver shall render a full and complete accounting to the Court.

This constitutes the decision and order of this Court.

ENTER



J.S.C.
HON. WAYNE P. SAITTA
 J.S.C.



FILED
 CLERK
 J.S. COUNTY
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