

State of New York v Seaport Manor A.C.F.

2003 NY Slip Op 30211(U)

June 11, 2003

Supreme Court, Kings County

Docket Number: 52275/02

Judge: Ira B. Harkavy

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, CIVIL - PART 42

STATE OF NEW YORK and ANTONIA NOVELLO,
as Commissioner of Health, by ATTORNEY GENERAL
ELIOT SPITZER,

X

Petitioners,

Index No.: 52275/02

-against-

SEAPORT MANOR A.C.F a/k/a SEAPORT MANOR
ADULT CARE FACILITY, SEAPORT MANOR H.F.A.
a/k/a SEAPORT MANOR HOME FOR ADULTS,
CANARSIE HOTEL COMPANY, SEAPORT MANOR LTD.
SEAPORT MANOR CORP., CANARSIE HOTEL CORP.,
CORPORATION "Y", MARTIN ROSENBERG, BARUCH
MAPPA, EMIL KLEIN a/k/a EMIL PAUL KLEIN,
ELIZABETH ROSENBERG a/k/a ESTHER ROSENBERG,
ESTHER BLISKO, and ELIZABETH BLISKO, and SETH FREID,

DECISION OPINION
and ORDER

Respondents.

X

PRESENT: IRAB. HARKAVY
Justice of the Supreme Court

Seaport Manor Home for Adults was an adult home facility, licensed by the State of New York to provide housing and other related services to adult residents.

Seaport Manor, like all adult homes, was regulated by the Department of Health. By law, the Department is required to conduct inspections each year, (N.Y. Soc. Serv. Law § 461-a(2)(a)(2)) and it may conduct any number of different types of inspection.

Over the period of time from May 1998 to September 2001, the Department of Health, as required by law, conducted at least 7 inspections of the facility. Inspection reports were prepared for each inspection. Unfortunately, the facility was plagued with a series of widespread operating failures and deficiencies that threatened the health, safety, and welfare of the residents.

In March 2001, the Department of Health settled a proposed enforcement proceeding to recover civil penalties against Seaport Manor for alleged violations of regulations. This proceeding

was settled by a Stipulation signed by several of the within Respondents on February 22, 2001, and by the Commissioner of Health on March 2, 2001. There was a limited admission by Seaport Manor that there was “substantial evidence” to have supported the citing of the violations, in exchange for a dismissal of the proceeding with prejudice, and limitation on future use of the admissions. Pursuant to the Stipulation, the operators remained at Seaport Manor, a fine was paid, Esther Rosenberg resigned as Administrator, and Seth Fried was approved as the new administrator.

In October 2001, the Department of Health commenced another enforcement proceeding to revoke the operating certificate and to impose civil penalties on Seaport Manor. As a result, the individual owners of Seaport Manor entered into a Stipulation and Order with the Department of Health, on March 7, 2002, which provided for, among other things, the closure of the facility. Pursuant to the Stipulation, an assessment and discharge of all of the residents was to occur by July 1, 2002, and optimally, the facility was to close as of that date. However, the Stipulation also provided that the facility was to remain open beyond July 1, 2002, until all residents had been relocated.

On May 22, 2002, MFY Legal Services commenced a lawsuit on behalf of numerous residents of Seaport Manor, against the operators of Seaport Manor and the Department of Health. By Order to Show Cause, the residents sought an Order requiring that the Department of Health to move to appoint a Receiver; challenged the stipulation between the Department of Health and the operators closing the facility; and sought other relief, including damages against the operators. The Department of Health moved to dismiss the case against the State, and cross-moved for the appointment of a Receiver. The Seaport defendants filed papers in opposition to plaintiffs motion and the appointment of a Receiver.

Additionally, notwithstanding the Stipulation between Seaport and the Department of Health and the Court Order, MFY and the Department of Health entered into their own side agreement regarding the transfer of residents from Seaport to other facilities.

On June 10, 2002, the Court granted the State's cross-motion to appoint a Receiver, and issued an Order appointing a Receiver, Medysis Health Network, Inc., to operate the facility.

Pursuant to the Order appointing the receiver, all of the Respondents had been out of Seaport Manor for six months prior to the commencement of this special proceeding.

All of the residents were ultimately transferred to other facilities and on February 27, 2003, Seaport Manor officially closed.

INSTANT PROCEEDING

Petitioners now move for an order and judgment pursuant to Executive Law § 63(12); General Business Law §§ 349, 350, Social Services Law §§ 131-0, 460-d; declaring that

1a. The respondents have engaged in repeated and persistent illegality, fraud, and deception in the carrying on, conducting, and transaction of business, in violation of Executive Law § 63 (12) and/or General Business Law § 349; and

1b. Respondents have repeatedly and persistently violated Social Services Law Article 7, Social Services Law § 460, 461-c (2-a) (a), 131-o and/or implementing regulations in the operation of Seaport Manor and in the administration of personal needs allowances of Seaport Manor residents;

2. Permanently enjoining each of the respondents from engaging in the illegal, fraudulent, and deceptive practices alleged herein;

3. Permanently enjoining respondents from owning, controlling, operating, or administering, by any means, an adult care facility which requires an operating license from the

Health Department, or a halfway house, hostel or other residential facility or a program or facility licensed or operated by a health, mental hygiene, social services or education agency or department or a program serving persons with mental disabilities;

4. Directing each respondent to pay restitution and damages to be distributed through a fund to each Seaport Manor resident, past and present, who was aggrieved by respondents illegal, fraudulent and/or deceptive conduct as alleged in this Petition, including those residents not known at the time of the order or their estates, plus interest;

5. Directing respondents to provide petitioners a full accounting of all residents at Seaport Manor Home for Adults at least from December, **1998** to the present of all sums of money received from or on behalf of said residents for room, board, and care including but not limited to residents for whom any respondent is a representative payee, and an accounting of all payments of such monies to those residents or for their benefit, by month, including all retroactive payments and payments upon their discharge from Seaport Manor, at least for the period December **1998** through the present;

6. Directing respondents to provide to petitioners a full accounting of all sums of money received from any source for residents personal needs allowances accounts pursuant to an Admission Agreement or otherwise and all amounts paid out since November 1, **1996**;

7. Directing each respondent to pay restitution and damages, including punitive damages, to the Commissioner for distribution pursuant to Social Services Law § 131-o, through a fund to each Seaport Manor resident past and present whose personal needs allowance was misappropriated, improperly withheld, or not applied to their intended use at any time since November **1,1996** by any respondent or their agent or employee as alleged in this Petition, including those residents not known at the time of the order or their estates, plus interest;

8. Directing respondent former operators to pay to the Health Department civil penalties in the amount of \$ 30,000.00, with interest;

9. Directing each respondent to pay a civil penalty in the amount of \$500.00 to the State of New York pursuant to General Business Law § 350-d for each instance of a deceptive or unlawful act or practice;

10. Directing each respondent to pay an additional civil penalty, not to exceed ten thousand dollars (\$ 10,000.00) pursuant to General Business Law § 349-c for conduct which occurred on or after November 1, 1996 and was directed to one or more elderly persons or in willful disregard of the rights of an elderly person;

11. Awarding petitioners additional statutory costs against each respondent in the amount of \$2,000.00 pursuant to New York Civil Practice Law and Rules § 8303 (a) (6);

12. Directing each respondent to notify petitioners of any change of respondents' address within five days of such change; and

13. Granting petitioners such other and further relief as this Court deems just and proper. Respondents Martin Rosenberg, Esther Rosenberg, Seth Fried and Seaport Manor Ltd., move for an order :

1. Dismissing the Petition in its entirety;

2. Or, in the alternative, converting any remaining causes of action to a plenary action pursuant to CPLR § 103(c) with full rights to discovery and trial;

3. Directing discovery, and a trial of evidentiary hearing with respect to any causes of action that may remain to be determined in this special proceeding; and

4. Granting Respondents such other and further relief as this Court deems just and proper.

Respondents Baruch Mappa, Seaport Manor A.C.F., Seaport Manor H.F.A., Canarsie Hotel Company and, Canarsie Hotel Corp., move for an order:

1. Dismissing the Petition as barred by the doctrine of res judicata pursuant to O'Brien v. City of Syracuse, 54 N.Y.2d 353; Smith v. Russell Sage College, 54 N.Y.2d 185; Inc. Village of Laurel Hollow v. Nichols, 260 A.D.2d 439;

2. Dismissing the Petition pursuant to Executive Law § 63 (12) or, in the alternative, converting the form of proceeding to a plenary action pursuant to CPLR § 103(c);

3. Directing discovery, and a trial or evidentiary hearing pursuant to CPLR § 410; In the Matter of Mintz, 113 A.D.2d 803; State v. Wolowitz, 96 A.D.2d 47;

4. Dismissing Count One for lack of standing pursuant to Social Services Law § 461-c(2-a)(b);

5. Dismissing Counts Three and Four for failure to allege a prima facie case pursuant to General Business Law § 349 and Executive Law § 63(12), respectively;

6. Denying Petitioners the relief sought;

7. Dismissing the Petition as to the Canarsie Hotel Co., and Canarsie Hotel Corp. for failure to state a claim; and

8. Granting Respondents such other and further relief as this Court deems just and proper.

Respondent Emil Klein moves for an order:

(1) Pursuant to CPLR 404(a), 411, and 3211(a) (1) (3) (5) and (7), dismissing the Petition on the grounds that: Respondent has a defense based upon documentary evidence;

Petitioner's claims are barred by res judicata and collateral estoppel; Petitioner lacks standing to maintain this action; the Petition fails to plead a prima facie case; Petitioner is not entitled to fines, restitution or other damages; the Petition fails to state a claim against Respondent Emil Klein;

(2) Dismissing the Petition pursuant to Executive Law § 63 (12), or, in the alternative, converting the form of proceeding to a plenary action pursuant to CPLR § 103 (c);

(3) Directing discovery, and a trial or evidentiary hearing pursuant to CPLR § 410; and

(4) Granting Respondent Klein such other and further relief as the Court deems just and proper, including an award of costs and reasonable attorneys' fees pursuant to 22 NYCRR § 130-1.1.

RES JUDICATA

The instant Petition is the third litigation initiated by Petitioners against Respondents in connection with the same alleged deficiencies in the operation of Seaport Manor. It alleges the same statutory and regulatory violations at the same property for the same time period as the previous proceedings. The Petition refers repeatedly to the two stipulations entered into between the parties by which the prior proceedings were settled and discontinued with prejudice.

The first litigation was settled and discontinued with prejudice by a Stipulation and Order dated March 2, 2001 ("Stipulation One").

Stipulation One provided in relevant part that:

"This matter is settled and discontinued with prejudice. The Department shall not pursue additional monetary penalties, except as set forth herein, against the Respondents pursuant to Article 7 of the Social Services Law and 18 NYCRR in connection with the Department's findings based upon the Reports of Inspection dated December 4, 1998, July 19, 1999, January 10, 2000 and December 8, 2000."

The second litigation was settled and discontinued with prejudice by a Stipulation and Order dated March 7, 2002, (“Stipulation Two”, and together with Stipulation One, the “Stipulations”).

Stipulation Two provided in relevant part that:

“The matters commenced by Notice of Hearing and Statement of Charges dated October 5, 2001, are settled and discontinued with prejudice upon the terms and conditions set forth in this Stipulation and Order.”

The very same violations are re-alleged to support the instant Petition which relies upon the Stipulations, the inspection reports, and charges, that formed the basis of the prior proceedings.

The two prior Stipulations sought full relief on behalf of the Department of Health for all the violations it cited in the inspection reports that are the basis for the instant proceeding. Each of these Stipulations, provided that the enforcement proceedings was dismissed with prejudice.

New York has adopted the transactional analysis test for applying the doctrine of *resjudicata*. O’Brien v. Syracuse, 54 N.Y.2d 353,357. Under this approach, *resjudicata* operates as a bar to litigation of a cause of action arising out of the same transaction or series of transactions as a claim raised in a prior proceeding between the same parties. *Id.*; Winkler v. Weiss, 294 A.D.2d 428,429. It is a “pragmatic test, which sees a claim or cause of action as coterminous with the transaction regardless of the number of theories or variant forms of relief available to the plaintiff.” Smith v. Russell Sage College, 54 N.Y.2d 185, 192. The transactional analysis test required that Court to ask whether a claim could and should have been raised in the prior proceeding. Incomorated Village of Laurel Hollow v. Nichols, 260 A.D.2d 439,440. *Resjudicata* applies even if new claims “depend on different shadings of the facts,” or “would emphasize different elements of the facts,” so long as the latter proceeding is grounded on the same gravamen or wrong as the former proceeding.

Smith, 54 N.Y.2d at 192; see Nichols, 260 A.D. at 440. Once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. O'Brien, 54 N.Y.2d at 357. The doctrine of *resjudicata* is based on sound public policy consideration that recognize the fairness of putting an end to a matter once and for all in the interests of both the parties who have endured the costs of litigation and the Courts. Reilly v. Reid, 45 N.Y.2d 24.

The instant case is the third proceeding brought by Petitioners against the Respondents. The two prior proceedings were concluded by Stipulations dismissing the proceedings with prejudice. It is well-settled law that, under the doctrine of *resjudicata*, a Stipulation of Discontinuance with prejudice bars any claim arising out of the same transactions as a prior proceeding between the parties. React Serv. V. Rindos, 243 A.D.2d 550. Here, each cause of action raised by the Petitioners in their Petition is based on the same transactions that were the subject of two prior proceedings.

Accordingly, the Petition is barred by the doctrine of *resjudicata*, with the exception of the fifth cause of action which seeks recovery of unpaid penalties imposed under Stipulation Two, by the respondents who signed the Stipulation.

Paragraph 10 of the Stipulation reads as follows:

Any civil penalty not paid in accordance with this Stipulation and Order shall be subject to all provisions of law relating to debt collection by the State of New York. This includes but is not limited to the imposition of interest, late payment charges and collections fees; referral to the New York State Department of Taxation and Finance for collection and non-renewal of permits or licenses. [Tax Law § 171 (27); State Finance Law § 18; CPLR § 5001; Executive Law § 32].

EXECUTIVE LAW § 63 (12)

Executive Law § 63(12) grants the Attorney General the authority to bring an expedited and summary proceeding to put a halt to on-going fraud or illegality to prevent further harm to consumers.

It provides in pertinent part:

Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the State of New York, to the Supreme Court of the State of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in the appropriate case, cancelling any certificate filed under and by virtue of the provisions of section four hundred forty of the former penal law [now G.B.L §130] or section one hundred thirty of the general business law, and the Court may award the relief applied for so much thereof as it may deem proper.

The objective of this statute is “to prevent the perpetration of continuing frauds by a person or firm carrying on present business as the owner thereof.” 21 N.Y. Jur.2d, Consumer and Borrower Protection § 17. It is not intended as a means to circumvent the rights a litigant ordinarily would enjoy in a plenary action, but rather as “an expeditious means for the Attorney General to prevent further injury and seek relief for the victims of business fraud.” People v. Apple Health and Sports Clubs, Ltd., 206 A.D.2d 266,258. Absent such exigency, there is no basis for maintaining a petition for a special proceeding instead of a complaint for a plenary action.

The Court is of the opinion that there is no exigency here to justify an expedited and summary proceeding. By the June 10, 2002 Order of this Court and the express terms of Stipulation Two, the subject matter of the Petition, alleged deficiencies in Respondents’ operation of Seaport Manor no longer exist. Seaport Manor **had been in receivership and actually closed on February 27, 2003**. Respondents ceased to have a role in its operation on June 12, 2002. Respondents surrendered

their license as operators of Seaport Manor, with such surrender having the same effect as a revocation and non-renewal with prejudice. Respondents cannot operate a similar facility in the future without the express permission of Petitioners. There are currently no allegations of ongoing illegalities, and no **risk** of future harm to Seaport Manor residents, since they no longer exist.

In order to defeat a petition to bring a special proceeding for expedited and summary relief pursuant to Executive Law § 63(12), a respondent must show genuine issues of material fact exist, which issues can be determined only at hearing or plenary trial. State v. Wolowitz, 96 A.D.2d 47,68; People by Jacco v. World Interactive Game Corp., 185 Misc. 2d 852; see also CPLR §410. The Second Department has held that if issues raised in a special proceeding are sufficiently complex, an evidentiary hearing is required after the parties have been given an opportunity for discovery and full development of the facts. In The Matter of Mintz, 113 A.D.2d 803, 809.

Numerous and complex issues of material fact are present in this case.

Special Proceeding/Plenary Action

The Court finds that the issues raised in the Petition are res judicata, except as otherwise set forth herein. Based upon that finding, the Petition is dismissed in its entirety except as otherwise set forth herein. The Court, however, is also of the opinion that if the doctrine of res judicata was not applicable, this special proceeding still should not go forward.

The statutes that Petitioners rely upon for relief requested, require that claims under those statutes be brought in the form of an action.

The first cause of action in the Petition alleges a violation of Social Services Law section 461-c(2-a)(a), which establishes an implied warranty of habitability in each written admission agreement for adult home residents. Subdivision (b) of that same statute, however, states that “[a]n

action for breach of the warranty of habitability ... may be maintained ... by the resident or representative of the resident”. The statute authorizes an action, not a special proceeding. It further authorizes that it be brought by the resident or the representative of the resident.

The second cause of action is for violations of residents’ personal needs allowances pursuant to Social Services Law section § 131-o. Section 131-o states that “[a]ny individual who has not received or been able to control personal allowance funds ...may maintain *an action* in his own behalf for recovery of any such funds ...”. The section further allows the Department to “maintain *an action* on behalf of any individual to recover any funds so misappropriated”. A claim under section 131-o of the Social Services Law should be brought in the form of an action, not a special proceeding.

The third cause of action is for violation of the General Business Law § 349. Pursuant to § 349(d), the Attorney General is authorized to “bring *an action* in the name and on behalf of the People of the State of New York to enjoin such unlawful acts or practices, and to obtain restitution” the statute authorizes an action, not a special proceeding.

The fourth cause of action is brought solely pursuant to Executive Law Section 63(12). That is the primary issue before the Court. Whether this proceeding may be brought under section 63(12). The section states, that in appropriate cases, the Attorney General may apply “for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts.” The statute further allows for the Attorney General to seek restitution and damages, but that is in conjunction with the granting of a injunction against continuance of the fraudulent or illegal acts. This statute does not authorize a lawsuit solely for money damages as a special proceeding, bypassing and superseding the specific statutory requirements in the underlying statutes, all of which require that the litigation be brought in the form of an action.

The fifth cause of action is for the recovery of penalties pursuant to Social Services Law §460-d(7)(c). As that statute states, and as the Petition acknowledges this section authorizes the Attorney General, on the request of the Department, to “commence *an action* ... for the recovery of any penalty assessed by the Department ...”. This cause of action shall be converted to a plenary action. The Attorney General may proceed with this cause of action in a plenary action against the respondents who signed the March 7, 2002 Stipulation.

Each of the statutes relied upon by Petitioners to support their claims of illegality and the right to damages all require that the relief under those statutes be brought in the form of an action.

CPLR section 103(b) provides that “[a]ll civil proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized.” The Petitioners have brought this proceeding pursuant to Executive Law section 63(12), General Business Law sections 349 and 350, and Social Services Law sections 460-d and 131-o. There is no basis for these claims to be brought in the form of a special proceeding. There are numerous and complex issues of fact before this Court which should be brought in a plenary action subject to full discovery. CPLR section 103(c) provides:

If a Court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution.

The instant matter is a “civil judicial proceeding”, defined by CPLR section 104(d) as “a prosecution, other than a criminal action, of an independent application to a Court for relief.” As noted in Mandis v. Gorski, 24 A.D.2d 181, 184, CPLR section 103(c):

was designed to prevent dismissal for errors in form alone and to allow a Court which has proper jurisdiction of the parties to permit the continuation of litigation without regard for technical defects. Among the errors to which it was intended to apply were those

regarding the choice between an action and a special proceeding as the appropriate device for securing judicial relief.

This special proceeding denies the respondents an opportunity to conduct discovery which would be available to them in a plenary action. Accordingly, were the Court not inclined to dismiss the Petition on the grounds of res judicata, with the exception of the fifth cause of action, the Court would order that the proceedings herein be converted to a plenary action.

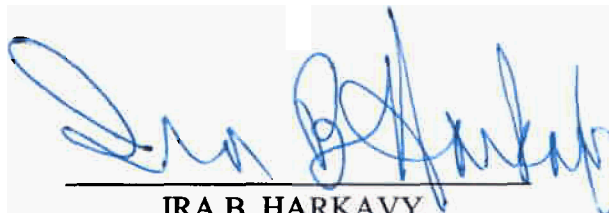
The Petition, as brought against the Canarsie respondents, specifically, Canarsie Hotel Company and Canarsie Hotel is dismissed for failure to state a claim. The Petition charges fraud and illegalities in the operation of Seaport Manor. The Canarsie respondents were the owners of the subject premises. They were not involved in the day-to-day operation of the facility.

Similarly, the Petition, as brought against respondent, Emil Klein, must be dismissed. As evidenced through documents and by affirmations, it is clear to this Court that in September 1997, Mr. Klein withdrew from the Seaport partnership. Mr. Klein has neither had any involvement with Seaport, nor any role in the operation or management of Seaport Manor since that time.

Based upon the foregoing, the Petition is dismissed. The fifth cause of action for the recovery of penalties from those respondents who signed the March 7, 2001 Stipulation is converted to a plenary action.

This constitutes the Decision, Opinion and Order of the Court.

Dated June 11, 2003



IRA B. HARKAVY
J.S.C.