Matter of City of New York v (Fifteenth Amended Harlem-E. Harlem Urban Renewal Plan (E. 125th St.), Stage 1
2015 NY Slip Op 31524(U)
August 13, 2015
Supreme Court, New York County
Docket Number: 450370/14
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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In the Matter of the Application of

THE CITY OF NEW YORK,

Petitioner,

To Acquire by Exercise of its Powers of Eminent Domain, Fee Simple in Certain Real Property Known as Tax Block 1790, Lots 1, 5, 44, and 101, located in the Borough of Manhattan, needed for the

FIFTEENTH AMENDED HARLEM-EAST HARLEM URBAN RENEWAL PLAN (EAST 125th STREET), STAGE 1,

Within an area generally bounded by East 126th Street on the north; 2nd Avenue on the east; East 125th Street on the south; and 3rd Avenue on the west, in the Borough of Manhattan, City and State of New York.

Index No.: 450370/14

Motion Sequences: 1, 2 & 3

DECISION/ORDER

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HON. SHLOMO S. HAGLER, J.S.C.:

Motions under sequence numbers 001, 002 and 003 are consolidated herein for disposition and decided as follows:

Petition

Motion sequence number 001 is a Petition by The City of New York (the "City") to acquire title in fee to real property by virtue of the Fifteenth Amended Harlem-East Harlem Urban Renewal Plan (East 125th Street)("Harlem Urban Renewal Plan"). The real property sought to be acquired at this stage are four parcels in New York County: Tax Block 1790, Tax Lots 1, 5, 44, and 101 ("the Properties") as shown on the Acquisition Map annexed as Exhibit "B" to the Petition. (Petition at ¶ 7, 8).

The Petition recites in detail the statutory and administrative authority authorizing the Harlem Urban Renewal Plan and the acquisition of the Properties, including New York City Charter sections

197-c and 197-d, Article 15 of the General Municipal Law, approval by the New York City Planning Commission on August 27, 2008 (Calendar Nos. 15 and 16), the New York City Counsel on October 7, 2008 (Resolution Nos. 1649, 1650, and 1652), by the Office of the Mayor on November 7, 2008 (Cal. No. 14), and the Office of the Deputy Mayor on February 7, 2014. (Petition at ¶ 2, 3).

Pursuant to sections 201 et seq. of the Eminent Domain Procedure Law ("EDPL"), on April 20, 2009, the City conducted a public hearing concerning the acquisition of the Properties. Pursuant to EDPL § 202, the City provided notice of the public hearing by publication in the City Record and the New York Daily News, on April 8 through 12, 2009. A copy of the notice of public hearing, and proof of publication and service are annexed as Exhibit "C" to the Petition. The City made its written Determination and Findings, pursuant to EDPL § 204 , which were also published in the City Record and the New York Daily News, on June 18 and 19, 2009. A copy of the Determination and Findings, with proof of publication and service are annexed as Exhibit "D" to the Petition. (Petition at ¶ 10).

On or about July 17, 2009, a petition[1] was previously brought to annul the Determination and Findings pursuant to EDPL § 207. On October 12, 2010, the Appellate Division denied the petition and confirmed the Determination and Findings. (See, *Matter of Uptown Holdings, LLC, v City of New York* (77 AD3d 434 [1st Dept 2010]). The Appellate Division found, *inter alia*, that the City had complied with all required notices concerning the required hearing, that all due process

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1. A declaratory judgment action and Article 78 proceeding was also filed by many property owners including Uptown Holdings LLC and Heron Real Estate Corp as well as the East Harlem Alliance of Responsible Merchants challenging various aspects of the Harlem Urban Renewal Plan. By decision and order dated January 7, 2010, the Hon. Joan B. Lobis, J.S.C. dismissed both proceedings. (See, *East Harlem Alliance of Responsible Merchants v City of New York*, 2010 Slip Op. 30023[U] [Sup Ct, NY County 2010]).

obligations had been fully observed, that the acquisition was made for the public benefit, and that petitioners had failed to present any valid basis upon which the City's Determination and Findings could be invalidated. (*Id.*) The petitioners therein appealed the adverse Appellate Division decision to the Court of Appeals. On February 17, 2011, the Court of Appeals dismissed the appeal "*sua sponte*, upon the ground that no substantial constitutional question is directly involved." (See, *Matter of Uptown Holdings, LLC, v City of New York,* 16 NY3d 764 [2011]).

Verified Answer

A Verified Answer, dated May 5, 2014, was submitted on behalf of the following respondents-condemnees: City Lights Properties Three LLC ("City Lights"), 2305-07 Third Avenue LLC ("2305"); 207 East 125th Street LLC ("207"); and 205 East 125th Street LLC ("205") seeking dismissal of the Petition on the grounds, *inter alia*, that the project for which the acquisitions are sought will destroy businesses that are 100% black and Hispanic owned, and the accompanying jobs and the livelihoods that they provide to them. Moreover, respondents further allege that the proposed housing for which the acquisitions are sought will promote the gentrification of the neighborhood with no benefit of any kind to the minority population whose livelihoods will be lost and businesses will be displaced. In respondents' own words, the Harlem Urban Renewal Plan "will destroy the heritage and culture of self-determination through small business management . . . seeking to raze the culture of East Harlem to the ground in order to erect nothing in particular . . ." (Verified Answer at ¶ 19, 22). Respondents also assert that there is no articulated public purpose for the petitioned acquisition to constitutionally warrant the exercise of eminent domain without due process of law and in violation of equal protection of the laws under Fourth and Fourteenth Amendments to the Constitution. Finally, respondents allege that the minority condemnees are

victimized by the petitioned acquisitions, and it should be enjoined as a veiled attempt to deprive them of their property on the basis of racial bias in violation of 42 U.S.C. § 1983.

Aside from the general allegations of the Verified Answer stated above, respondents allege two objections in point of law, six affirmative defenses and six counterclaims which will be dealt with below. In the first affirmative defense, respondents allege that this Petition is barred by the three-year statute of limitations pursuant to EDPL Article 4, in that it was brought beyond the applicable statute of limitations, running from October 12, 2010, the date of the decision of the Appellate Division affirming the City's Determination and Findings. The second affirmative defense alleges that City engaged in "schemes and machinations" and is "guilty of unclean hands." (Verified Answer at ¶ 72, 73). The third and fourth affirmative defenses allege lack of either personal or in rem jurisdiction due to improper notice and insufficient proof thereof. The fifth affirmative defense asserts all of the foregoing defenses as a basis for equitable relief. The sixth affirmative defense alleges the City's failure to comply with EDPL § 402.

In the first counterclaim, respondents seek a declaratory judgment that the Harlem Urban Renewal Plan is defunct; the second counterclaim seeks an injunction enjoining the City from depriving respondents of their property without due process under color of State Law pursuant to 42 U.S.C. § 1983; the third counterclaim also seeks an injunction forbidding the City from acquiring their property to construct edifices; the fourth counterclaim seeks an award of attorney's fees as a result of being entitled to an injunction under 42 U.S.C. § 1983; the fifth counterclaim seeks money damages for each of the answering respondents due to alleged "manipulation of the real estate taxes levied" and "the loss of business opportunities;" and the sixth counterclaim seeks reimbursement of

incidental expenses pursuant to EDPL § 702(B). The first and second objections in point of law are essentially the same or similar to the first and second counterclaims and will be decided together.

Statute of Limitations

In the first affirmative defense, respondents allege that this Petition is barred by the statute of limitations set forth in EDPL § 401(A)(3), wherein condemnor must commence acquisition proceedings within three years of the "entry of a final order or judgment on judicial review" pursuant to EDPL § 207. Respondents assert that the accrual date was October 12, 2010, the date of the decision of the Appellate Division. Petitioner, however, argues that the accrual date runs from the Court of Appeals' dismissal of the appeal on February 17, 2011. It is clear that if the accrual date runs for the date of the Appellate Division's decision, this Petition would be time-barred; if it runs from the Court of Appeal's dismissal of the appeal, this Petition was timely commenced.

The issue to be determined herein is whether the accrual date of EDPL § 401(A)(3) runs from the Appellate Division order on October 12, 2010, or was it extended by the Court of Appeals dismissal of the appeal on February 17, 2011. It appears that the First Department has not conclusively decided this legal issue. Notwithstanding respondents' argument to the contrary, in *Matter of New York State Urban Dev. Corp. (TOH Realty Corp.)*, (165 AD2d 733 [1st Dept 1990], *appeal dismissed* 76 NY2d 982 [1990], *lv to appeal denied* 77 NY2d 810 [1991]), the First Department merely reiterated the language of EDPL § 401(A)(3) to the extent that the accrual date in *TOH Realty Corp.* began to run from final judicial scrutiny after a merit determination by the Court of Appeals in *Matter of Jackson v New York State Urban Dev. Corp.*, (67 NY2d 400 [1986]). In *TOH Realty Corp.*, the First Department ruled in a case where the Court of Appeals addressed the merits of the underlying appeal, but it did not hold that its ruling would be different if it had involved

the denial of leave and/or dismissal of an appeal. Simply stated, the First Department has not made any pronouncement that a "merit determination" (as opposed to a dismissal of an appeal) is required for the accrual date to be extended from the date of the Court of Appeals' last determination. While this appears to be true for the First Department, the Fourth Department has clearly decided this precise issue in *Matter of City of Syracuse Indus. Dev. Agency (J.C. Penney Corp.)*, (32 AD3d 1332 [4th Dept 2006], *lv denied* 7 NY3d 714 [2006]).

In *J.C. Penney Corp.*, the petitioner-condemnor commenced an EDPL Article 4 proceeding on December 29, 2005, and respondents-condemnees moved to dismiss the petition as time-barred because the Appellate Division had confirmed the petitioner's determination and findings on November 15, 2002 (*Matter of Kaufmann's Carousel v City of Syracuse Indus. Dev. Agency,* 301 AD2d 292 [4th Dept 2002]; *Matter of J.C. Penney Corp. v City of Syracuse Indus. Dev. Agency*, 301 AD2d 305 [4th Dept 2002]). Petitioner argued that the accrual date began to run on February 25, 2003, the date the Court of Appeals denied respondents leave to appeal and dismissed the appeal (99 NY2d 508 [2003]; 99 NY2d 609 [2003]). The Supreme Court denied the motions to dismiss and granted the petition. Respondents appealed and the Appellate Division affirmed the Supreme Court's order holding as follows:

> Here, the court properly determined that the three-year time period set forth in EDPL 401(A)(3) commenced on February 25, 2003, the date on which the Court of Appeals denied the motion for leave to appeal from our [Appellate Division] orders of November 15, 2002, confirming the 2002 determination and findings of SIDA [petitioner] to acquire certain property interests and dismissed the appeal of respondent J.C. Penney Corporation, Inc.

(32 AD3d at 1333 [citations omitted]).

The dissent in *J.C. Penney Corp.* took a contrary position as follows:

> I conclude that this Court's [Appellate Division's] order with respect to each proceeding, and *not* the orders of the Court of Appeals dismissing one appeal and denying the motion for leave to appeal with respect to the other appeal, constitutes the " 'final order . . . on judicial review pursuant to [EDPL 207]' " (EDPL 401[A][3]). That conclusion is compelled by the plain language of the statute, inasmuch as neither the dismissal of an appeal nor the denial of a motion for leave to appeal constitutes " 'judicial review' " within the meaning of EDPL 401(A)(3).

(32 AD3d at 1335 [emphasis added]).

This Court is bound to follow the Fourth Department's holding in *J.C. Penney Corp.* based on the doctrine of *stare decisis.* In a recent case, the First Department reviewed the long-standing rule that Supreme Court is bound to apply the law promulgated by the Appellate Division within its particular Department and "where the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of *stare decisis* to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals" (citations omitted)." (*D'Alessandro v Carro,* 123 AD3d 1, 4 [1st Dept 2014]). It appears that the movants seem to adopt the same or similar arguments of the dissent in *J.C. Penney Corp.* which was expressly rejected by the majority opinion.

Assuming *arguendo* that this Court need not follow the Fourth Department ruling in *J.C. Penney Corp.*, there is persuasive authority to hold that the accrual date runs from the date the Court of Appeals denies leave and/or dismisses the underlying appeal. There are two well-reasoned decisions which take contrary positions concerning whether an EDPL Article 4 condemnation proceeding must await the Court of Appeals' review of the Appellate Division's order, or does the Appellate Division's order constitute a "final judicial review" to enable the condemnor to commence condemnation proceedings. (*Matter of New York State Urban Dev. Corp. [Atlantic Yards]*, 26 Misc

3d 1228[A] [Sup Ct, Kings County, 2010]; *Matter of New York State Urban Dev. Corp. [42nd Street Development Project- Site 8 South]*, 193 Misc 2d 290 [Sup Ct, New York County, 2002]).

In both of these cases, the condemnees argued that the condemnor's petition was premature because the accrual period runs from "final judicial review" by the Court of Appeals.[2] Both courts reached different conclusions based, *inter alia*, upon varying policy considerations. In *42nd Street Development Project- Site 8 South*, the Supreme Court held that in the "interests of expediency, all condemnation projects should not have to await all possible appeals, given that the Appellate Division or the Court of Appeals could easily and quickly issue a stay in those cases where the particular facts so warrant." (193 Misc 2d at 300). On the other hand, the Supreme Court in *Atlantic Yards* held that the accrual date begins to run from the date of the Court of Appeals' decision in order "to avoid the possibility of the Court of Appeals invalidating a decision to take property in a condemnee's EDPL 207 challenge after title has already vested in a condemnor." (26 Misc 3d 1228[A], 2010 N.Y. Slip Op. 50301 [U], at *12).

As a matter of practicality, the latter approach better safeguards due process rights by permitting the condemnee's challenge to be fully heard prior to commencement of condemnation proceedings; it provides an easier demarcation for the public and litigants to recognize that the accrual date begins when the Court of Appeals' finally rules upon the legal issues; and it promotes judicial economy by requiring finality so that the condemnor will not needlessly commence proceedings, and litigate for months or years, only to have the Court of Appeals reverse the Appellate Division's order permitting the taking of the condemnee's property.

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2. In our case, the condemnees argue that the accrual date runs from the Appellate Division's "final judicial review."

Thus, the instant Petition dated February 12, 2014, was timely commenced within the three year statute of limitations set forth in EDPL § 401(A)(3). Accordingly, the first affirmative defense asserting that the Petition is barred by the statute of limitations, and the first counterclaim[3] for a declaratory judgment that the Harlem-East Harlem Urban Renewal Plan is "defunct" and "abandoned" seemingly due to statute of limitations grounds are stricken and/or dismissed.

Unclean Hands and Other Equitable Defenses

The second affirmative defense is based on the doctrine of "unclean hands," as respondents allege that "schemes and machinations" caused the City to lose "the moral authority to maintain these proceedings." The fifth affirmative defense mimics the second affirmative defense in that both are premised upon the doctrine of unclean hands and other equitable defenses.

It is well-settled law that a vesting petition may not be opposed based on unclean hands or any other equitable remedy (*Matter of New York State Urban Development Corporation [Atlantic Yards]*, 26 Misc 3d 1228[A], 2010 N.Y. Slip Op. 50301(U) at *28-29 [Sup Ct Kings County 2010]; *Matter of Town of Chenango*, 29 Misc 3d 1216(A), 2010 N.Y. Slip Op. 51852(U) at *4 [Sup Ct Broome County 2010]; *see generally, Matter of Parkview Associates v City of New York,* 71 NY2d 274 [1988], *rearg denied* 71 NY2d 995 [1988], *cert denied* 488 US 801 [1988]).

Therefore, the second and fifth affirmative defenses lack merit and are stricken.

Procedural Defenses

The third affirmative defense alleges several defects in obtaining jurisdiction over the respondents. The fourth affirmative defense asserts the insufficiency of the affidavits of service.

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3. Moreover, the first counterclaim is wholly conclusory without any requisite specific allegations.

The sixth affirmative defense asserts the failure of the City to comply with the procedures required under EDPL § 402.

Publication (Third Affirmative Defense)

In paragraphs 81 through 84 of the Verified Answer, respondents allege that the City failed to comply with the publication requirements of EDPL § 402(B)(2)(a). The affidavit of publication of Eli Blachman ("Blachman"), Editor of the City Record, sworn to on March 19, 2014, and annexed to the Petition, demonstrates that the required notice was published in ten consecutive issues of the said City Record commencing on March 5, 2014, and concluding on March 18, 2014. The return date of the Petition was March 25, 2014, and respondents assert that, therefore, the first day of publication would need to be no later than March 3, 2014, because the City Record is published only on five weekdays. Therefore, the last day of publication being March 18, is not "at least ten days" prior to the return date of March 25, 2014. However, the City is only required to *commence* publication at least ten days prior to the return date, not *complete* publication ten days before the return date (*Matter of Uptown Holdings, LLC v City of New York*, 77 AD3d at 434).

Respondents assert that the published notice is further defective in that it does not prove that the required map or diagram was included in the publication. However, although the Blachman affidavit shows only a copy of the text of the published notice, at the very bottom of the text is the legend "SEE MAP ON BACK PAGE." The affidavit of posting, sworn to by Kenneth Cisath ("Cisath") on March 13, 2014, also annexed to the Petition, attaches a copy of the text of the notice, identical to the copy of the text attached to the Blachman affidavit, and a copy of the required map. This may be sufficient to reliably demonstrate that the publication requirement of a copy of the acquisition map was complied with (EDPL 402[B][2][a]). However, since the parties did not

submit admissible evidence showing that a copy of the map did, or did not, in fact appear on the back page of the City Record on each day that the text of the published notice appeared in the body of the said newspaper, a further hearing is necessary as set forth below.

Respondents also allege non-compliance with EDPL § 402[B][2][b], the posting requirement. This objection is unclear, since the aforesaid Cisath affidavit sets forth that posting in three conspicuous places was achieved at or near the property on March 12, 2014. This posting was effectuated more than ten days before the return date of the Petition in accord with the requirement that it be posted for the same period of time as the publication of the notice. The defect claimed by respondents is not apparent.

Respondents further object that the Cisath affidavit does not identify the three conspicuous places at which the posting was made. However, this is neither required by the statute, nor have respondents cited any other authority that would support this claimed defect.

The allegation in paragraph 78 of the Verified Answer that respondents were not properly served under "all relevant requirements of the CPLR and the EDPL" is not supported by any evidentiary submissions in contradiction of the affidavit of service of Paul Farinella, sworn to on February28, 2014, and annexed to the Petition.

Accordingly, the motion to strike respondents' third affirmative defense is granted solely to the extent set forth above.

Sufficiency of the Affidavits of Service (Fourth Affirmative Defense)

The fourth affirmative defense presents conclusory allegations challenging the sufficiency of the affidavits of service. An examination of the affidavits of service annexed to the Petition reveals that they are facially sufficient in the absence of any evidentiary submissions by respondents controverting their sufficiency.

Accordingly, the fourth affirmative defense is stricken.

Compliance with EDPL § 402 (Sixth Affirmative Defense)

The sixth affirmative defense conclusory alleges that the City has failed to comply with all the procedural requirements of EDPL § 402(B)(5). An examination of the Petition and its supporting papers, as set forth above, demonstrates that the Petition adequately complies with the procedural requirements of EDPL § 402(B)(5) in the absence of any evidentiary submissions by respondents controverting its sufficiency.

Accordingly, the sixth affirmative defense is stricken.

Objections in Point of Law/Counterclaims

The objections in point of law and counterclaims will be decided together as they are intertwined.

The respondents' first objection in point of law[4] asserts that this Petition violates their Fifth and Fourteenth Amendment constitutional rights, and their challenge to the public purpose underlying the acquisition. These arguments were previously raised and rejected by the Appellate Division and by the Supreme Court in a related Article 78 proceeding. (*Matter of Uptown Holdings, LLC v City of New York*, 77 AD3d 434 [1st Dept 2010]; *East Harlem Alliance of Responsible Merchants v City of New York*, 2010 Slip Op. 30023[U] [Sup Ct, NY County 2010]).

42 USC § 1983 (Second Objection in Point of Law/2nd-4th Counterclaims)

The second objection in point of law as well as the second, third and fourth counterclaims assert assorted iterations of deprivation of respondents' civil rights under 42 USC § 1983. These

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4. To the extent that the first counterclaim may be also challenging the public purpose and a violation of the procedural due process, the same legal arguments exist to dismiss the first counterclaim.

claims were required to be raised in the proceeding before the Appellate Division under EDPL § 207, and cannot be raised in an EDPL § 402 proceeding (*Matter of City of New Rochelle v O. Mueller, Inc.*, (191 AD2d 435, 436 [2d Dept 1993]) (The Appellate Division "has exclusive original jurisdiction to hear and determine a condemnee's objections. . . . Having failed to comply with the requirements of EDPL 207 by filing a timely petition for review of the condemnor's determination in this Court, the appellants " 'may not circumvent the command of the statute with respect to procedures governing judicial review by raising [their] objection . . . within the context of an . . . article 4 vesting proceeding' "[citations omitted]); (*Matter of Consolidated Edison Co. of N.Y. [Neptune Assoc.]*, 143 AD2d 1012, 1015 [2d Dept 1988]) ("Since . . . [condemnee] could have properly raised the question of whether the proceeding was in conformity with due process requirements of the Federal and State Constitutions (EDPL 207[A], [B], [C][1]) in the prior judicial review proceeding before this court, but failed to do so, it was barred from raising it in the subsequent proceeding pursuant to EDPL article 4").

Accordingly, the respondents' second objection in point of law and the second, third and fourth counterclaims are dismissed.

Damage Claims (Fifth Counterclaim)

The fifth counterclaim seeks damages on behalf of respondents based on lost business opportunities, failure to obtain financing, and resultant higher real estate taxes, all stemming from the what respondents claim is the failed attempt to condemn respondents' property by reason of the City having exceeded the applicable statute of limitations. Inasmuch as this Court has determined that the statute of limitations was not exceeded, the fifth counterclaim is dismissed as moot.

Incidental Expenses (Sixth Counterclaim)

The sixth counterclaim seeks costs, disbursements and expenses, including reasonable attorney's and other professional fees, pursuant to EDPL § 702(B), based upon condemnor's alleged abandonment of the project by reason of failure to comply with the procedural requirements of EDPL§ 402 and statute of limitations grounds. While this Court has rejected respondents' argument that the Petition is time-barred due to statute of limitations grounds, a part of respondents' third affirmative defense remains as set forth above. Therefore, the sixth counterclaim is dismissed except as it relates to respondents' allegation that petitioner failed to comply with the procedural requirements of EDPL§ 402, as specifically alleged in the remaining portion of the third affirmative defense.

Motion Sequence Number 002

In motion sequence number 002, the City moves for dismissal of all affirmative defenses, objections in point of law, and counterclaims in respondents' Verified Answer. Respondents' oppose the motion and cross-move seeking summary judgment in its favor dismissing the Petition.

As specifically set forth above, petitioner's motion is granted to the extent of striking and/or dismissing all of respondents' affirmative defenses, objections in point of law, and counterclaims except for portions of the third affirmative defense and sixth counterclaim. Respondent's cross-motion for summary judgment is denied as there is no basis in law to grant it.

Motion Sequence Number 003

In motion sequence number 003, Heron Real Estate Corporation ("Heron") was permitted to intervene in this proceeding by so-ordered stipulation dated November 18, 2014. Heron moved

for an order dismissing the Petition on the ground that it is untimely, and deeming the condemnation of the above captioned real properties to be consequently abandoned. These grounds are the same or similar to the grounds asserted in respondents' first affirmative defense in their Verified Answer. As such, Heron's motion for dismissal is denied as moot for the same reasons stated above.

Conclusion

Accordingly, it is

ORDERED that petitioner's motion (sequence number 002) to strike and/or dismiss is granted to the extent of striking and/or dismissing all of respondents' affirmative defenses, objections in point of law, and counterclaims except for portions of the third affirmative defense and sixth counterclaim as set forth above; and it is further

ORDERED that respondents' cross-motion (sequence number 002) for summary judgment is denied; and it is further

ORDERED that the motion (sequence number 003) by intervenor Heron Real Estate Corporation to dismiss the Petition is denied as moot; and it is further

ORDERED that the Petition (sequence number 001) is adjourned to September 16, 2015, at 11:00 o'clock A.M. for a further hearing on the remaining portions of respondents' third affirmative defense and sixth counterclaim.

The foregoing constitutes the decision and order of this Court.

ENTER:

Dated: August 13, 2015
New York, New York

Hon. Shlomo S. Hagler, J.S.C.