

Tax Equity Now NY LLC v City of New York
2018 NY Slip Op 33049(U)
November 30, 2018
Supreme Court, New York County
Docket Number: 153759/2017
Judge: Gerald Lebovits
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. GERALD LEBOVITS

PART

IAS MOTION 7EFM

Justice

-----X

INDEX NO. 153759/2017

TAX EQUITY NOW NY LLC,

MOTION SEQ. NO. 008 009

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF
FINANCE, STATE OF NEW YORK, NEW YORK OFFICE OF
REAL PROPERTY TAX SERVICES,**DECISION AND ORDER**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 008) 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 170, 176, 182, 183, 184, 185, 186, 187 were read on this motion to/for STAY.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 161, 162, 163, 164, 165, 166, 167, 168, 169, 171, 177, 178, 179, 180, 181 were read on this motion to/for STAY.

I. Background

On April 25, 2017, plaintiff, Tax Equity Now NY LLC (TENNY), filed this action seeking injunctive and declaratory relief to remedy alleged inequities in New York City's property-tax system. TENNY brought four causes of action against City of New York and the New York City Department of Finance (collectively, City Defendants). TENNY brought 12 additional causes of action against the State of New York and the New York Office of Real Property Tax Service (collectively, State Defendants) and the City Defendants.

On July 7, 2017, the City Defendants moved to dismiss all 16 causes of action against them. On the same day, the State Defendants moved to dismiss all 12 causes of action against them. On September 24, 2018, this court denied the City Defendants' motion to dismiss and granted in part and denied in part the State Defendants' motion to dismiss. The City Defendants and the State Defendants appealed this court's September 2018 order to the Supreme Court, Appellate Division, First Department. Plaintiff filed a cross-appeal against the State Defendants to reinstate the 10 causes of action this court dismissed.

The City Defendants now move for an automatic stay of the proceedings in this action under CPLR 5519 (a) (1) or, in the alternative, for a discretionary stay under CPLR 5519 (c) or CPLR 2201. The State Defendants now move only for a discretionary stay under CPLR 5519 (c) or CPLR 2201. These two motions, Motion Seq. 008 and 009, are consolidated for resolution.

II. City Defendants' Motion for an Automatic Stay under CPLR 5519 (a) (1)

The City Defendants are entitled to an automatic stay under CPLR 5519 (a) (1). Under CPLR 5519 (a) (1), "[s]ervice upon the adverse party of a notice of appeal [by the state or its subdivision] stays all proceedings to enforce the judgment or order appealed from pending the appeal." According to the First Department, a notice of appeal stays an order denying the state's or its subdivisions' motion to dismiss. (*See E. Paralyzed Veterans Assn., Inc. v Metropolitan Transp. Auth.*, 79 AD2d 516, 516 [1st Dept 1980] [holding that after the Metropolitan Transportation Authority and its board members appeal the trial court's order denying their motion to dismiss, "the notice of appeal effectively stay[s] the order"].) The City Defendants filed their notice of appeal of this court's September 2018 order, which denied the City Defendants' motion to dismiss. (City Defendants' Affirmation in Support of Motion, Exhibit H.) Thus, the City Defendants are entitled to an automatic stay.

Citing decisions from the Appellate Division's Second, Third, and Fourth Departments, plaintiff argues that a CPLR 5519 (a) (1) automatic stay should apply only to an order or decision that is executory in nature, not to an order denying the state's or its subdivision's motion to dismiss. (*See e.g. Pokoik v Dept of Health Serv.*, 220 AD2d 13, 15 [2d Dept 1996] ["[T]he scope of the automatic stay of CPLR 5519 (a) is restricted to the executory directions of the judgment or order appealed from which command a person to do an act, and that the stay does not extend to matters which are not commanded but which are the sequelae of granting or denying relief."]; *Walker v Delaware & Hudson R.R. Co.*, 120 AD2d 919, 919 [3d Dept 1986] ["Appellant has taken an appeal to this court from an order partially denying its motion for summary judgment. Since the trial in this matter is not a proceeding to enforce the order appealed from, we are of the opinion that the statutory stay provision of CPLR 5519 (a) (1) does not prevent the trial herein."]; *Baker v Bd. of Educ. of W. Irondequoit Sch. Dist.*, 152 AD2d 1014, 1014 [4th Dept 1989] ["Neither a discretionary stay nor an automatic stay under CPLR 5519 stays all proceedings in the action; it stays only proceedings to enforce the order or judgment appealed from."].) Perhaps the decisions of the other judicial departments on this issue represent a preferable interpretation of CPLR 5519 (a) (1). But this court is constrained by the First Department's decision in *Eastern Paralyzed Veterans* (79 AD2d at 516), in which the First Department, alone among the departments, holds that a notice of appeal stays an order denying the state's or its subdivisions' motion to dismiss.

Plaintiff argues that the law of automatic stays under CPLR 5519 (a) (1) has changed in the First Department since *Eastern Paralyzed Veterans* and that an automatic stay no longer applies to a trial court order denying the state's or its subdivisions' motion to dismiss. Plaintiff argues that *Raes Pharmacy, Inc. v Perales* (181 AD2d 58 [1st Dept 1992]) and *All American Crane Service, Inc. v Omran* (2008 NY App Div LEXIS 10416, *1 [1st Dept 2008]) have superseded *Eastern Paralyzed Veterans*. This court disagrees.

Raes Pharmacy has not superseded *Eastern Paralyzed Veterans*. The *Raes Pharmacy* Court found that "[t]he automatic stay provided to state agencies by CPLR 5519 (a) merely stays all proceedings to enforce the judgment or order appealed from pending appeal." (181 AD2d at 64.) The issue in *Raes Pharmacy* is whether publishing a court order in the New York Law

Journal provides sufficient notice to make the order enforceable. The scope of an automatic stay was not at issue in *Raes Pharmacy*, and the case did not involve an appeal of an order denying a motion to dismiss.

Nor has *All American Crane Service* superseded *Eastern Paralyzed Veterans*. The *All American Crane Service* Court found an automatic stay under CPLR 5519 (a) (1) inapplicable to a challenged injunction that is prohibitory in nature. (See 2008 NY App Div LEXIS 10416, at*1.) In *All American Crane Service*, the defendant appealed an injunction order that prohibited him from enforcing a law limiting plaintiff's crane service. (*Id.*; see generally *All American Crane Serv. Inc. v Omran*, 58 AD3d 467, 467 [1st Dept 2009].) *All American Crane Service* did not involve an appeal of an order denying a motion to dismiss. The *All American Crane Service* Court did not find an automatic stay under CPLR 5519 (a) (1) inapplicable to an order denying the state's or its subdivisions' motion to dismiss.

Furthermore, *All American Crane Service* is inapposite to this case. Unlike the order in *All American Crane Service* (see 2008 NY App Div LEXIS 10416, *1), this court's September 2018 order is not prohibitory in nature.

Even if this court were to agree with plaintiff that a CPLR 5519 (a) (1) automatic stay should apply only to an order or decision that is executory in nature, the City Defendants are still entitled to an automatic stay. This court's September 2018 order directs "the parties [to] appear for a preliminary conference" to address discovery issues. (City Defendants' Affirmation in Support of Motion, Exhibit F.) That aspect of this court's order is executory in nature and thus subject to an automatic stay.

III. City Defendants' Motion for a Discretionary Stay under CPLR 5519 (c) or CPLR 2201

As discussed in Part II above (City Defendants' Motion for an Automatic Stay under CPLR 5519 [a] [1]), the City Defendants' motion for an automatic stay under CPLR 5519 (a) (1) is granted. No need exists to address the City Defendants' motion for a discretionary stay under CPLR 5519 (c) or CPLR 2201.

But even if this court — or the Appellate Division, First Department — were to find that the City Defendants are not entitled to an automatic stay under CPLR 5519 (a) (1), this court would find that they are entitled to a discretionary stay under CPLR 5519 (c). First, the City Defendants' appeal raises a threshold issue of jurisdiction. Second, without a stay, the City Defendants will spend substantial time and money engaging in discovery. Third, plaintiff will not suffer material delay from the stay. The appeal will be heard expeditiously. Under the First Department's rules, the City Defendants' appeal must be perfected by April 2019.

IV. State Defendants' Motion for a Discretionary Stay under CPLR 5519 (c)

The State Defendants' motion for a discretionary stay under CPLR 5519 (c) is granted.

This court disagrees with plaintiff that the scope of a CPLR 5519 (c) discretionary stay is coextensive with a CPLR 5519 (a) (1) automatic stay. CPLR 5519 (c) provides that “[t]he court from or to which an appeal is taken ... may stay all proceedings to enforce the judgment or order appealed from pending an appeal ... in a case not provided for in subdivision (a).”

A court may grant a stay in its discretion if an automatic stay under CPLR 5519 (a) (1) is unavailable. (*See* CPLR 5519 [c].) For a discretionary stay, a court may consider “any relevant factor, including the presumptive merits of the appeal and any exigency or hardship confronting any party.” (Richard C. Reilly, *Practice Commentaries*, McKinney’s Cons. Laws of NY, CPLR C5519:4, Court Ordered Stay.)

The facts of this case support a discretionary stay for the State Defendants. First, the State Defendants’ appeal has raised issues of subject-matter jurisdiction for certain federal claims and of associational standing. (*See* State Defendants’ Affirmation in Support of Motion, Exhibit C.) They are threshold issues in this action.

Second, the State Defendants will suffer hardship if this court does not grant a stay. Plaintiff filed this action seeking injunctive and declaratory relief to remedy alleged inequities in New York City’s property-tax system. Plaintiff’s discovery request involves materials from various state departments and senior administrative officials. (*See* State Defendants’ Reply Affirmation in Support of Motion, Exhibit B.) With threshold issues about subject-matter jurisdiction and associational standing pending on appeal, the State Defendants, without a stay, will spend substantial time and money engaging in discovery. Plaintiff cross-appealed this court’s September 2018 order, which dismissed 10 of plaintiff’s 12 claims against the State Defendants, seeking to reinstate the 10 dismissed claims. Without a stay, discovery ensues. To the extent that any dismissed claim is reinstated against the State Defendants based on plaintiff’s cross-appeal, the State Defendants will need to redo their answer and part of discovery, such as depositions.

Third, plaintiff will not suffer undue prejudice from this stay. Plaintiff argues that with a stay, some members of the public will suffer from New York City’s allegedly unequal property-tax system by paying excessive and illegal property taxes. But neither this court nor a higher court has issued a final decision finding the alleged inequities in the New York City property-tax system. Furthermore, the alleged delay from this stay will not be excessive, the State Defendants’ appeal and plaintiff’s cross-appeal will be perfected by April 2019.

Fourth, plaintiff might benefit from a stay, too. If the First Department reverses or modifies this court’s September 2018 order and reinstates any dismissed claim against the State Defendants, plaintiff will need to redo part of its discovery.

V. State Defendants’ Motion for a Discretionary Stay under CPLR 2201

As discussed in Part IV above (State Defendants’ Motion for a Discretionary Stay under CPLR 5519 [c]), the State Defendants’ motion for a discretionary stay under CPLR 5519 (c) is granted. This court need not address the State Defendants’ motion for a discretionary stay under CPLR 2201.


NYSCEF DOC. NO. 189

RECEIVED NYSCEF: 12/04/2018

Accordingly, it is hereby

ORDERED that City of New York and the New York City Department of Finance's motion to stay the proceedings in this action is granted pending appeal; and it is further

ORDERED that State of New York and the New York Office of Real Property Tax Service's motion to stay the proceedings in this action is granted pending appeal.

<u>11/30/2018</u>			
DATE		GERALD LEBOVITS, J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED <input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED <input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> OTHER <input type="checkbox"/> REFERENCE