WMC Realty Corp. v City of Yonkers
2018 NY Slip Op 33994(U)
December 13, 2018
Supreme Court, Westchester County
Docket Number: 65933/2017
Judge: Helen M. Blackwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
--x
WMC REALTY CORP. and T.A.C. REALTY CORP.,
on their own behalf and on behalf of those similarly situated,

Plaintiffs,

-against-

CITY OF YONKERS, YONKERS CITY COUNCIL,
and MIKE SPANO,

Defendants.
--x

DECISION and ORDER

INDEX NO.: 65933/2017

BLACKWOOD, A.J.S.C.

The following papers (e-filed documents 3-9, 12-17, 20-26, 28-30) were read on the E-filed motion by defendants CITY OF YONKERS, YONKERS CITY COUNCIL, and MIKE SPANO, for an order dismissing the action against them (motion sequence 1) and on the motion by plaintiffs WMC REALTY CORP. and T.A.C. REALTY CORP., on their own behalf and on behalf of those similarly situated, seeking an extension of time to file its Motion to Certify (motion sequence 2):

Papers

Notice of Motion, Affirmation in Support/Memorandum of Law (Exhibits A-D) (motion sequence 1)

Notice of Motion, Memorandum of Law (Exhibits A, B, & B) (motion sequence 2)

Memorandum of Law in Opposition (motion sequence 1)

Affirmation in Opposition, Memorandum of Law (Exhibits A-F) (motion sequence 2)

Stipulation (motion sequences 1 & 2)

Reply Memorandum of Law (motion sequence 1)

Upon reading the foregoing papers it is

ORDERED that the branch of the motion which seeks dismissal of all causes of action against defendants CITY OF YONKERS, YONKERS CITY COUNCIL, and MIKE SPANO is granted in its entirety; and it is further

ORDERED that the summons and class action complaint and demand for declaratory judgment are dismissed in their entirety; and it is further

ORDERED that the branch of the motion which seeks an extension of time for plaintiffs WMC REALTY CORP. and T.A.C. REALTY CORP., on their own behalf and on behalf of those similarly situated, to file its Motion to Certify is denied as being moot.

On or about October 3, 2017, WMC REALTY CORP. and T.A.C. REALTY CORP., on their own behalf and on behalf of those similarly situated ("plaintiffs"), filed a summons and class action complaint and demand for declaratory judgment against CITY OF YONKERS, YONKERS CITY COUNCIL, and MIKE SPANO ("defendants"), alleging, *inter alia*, that the defendants have been wrongfully charging the plaintiffs, and other Yonkers residents under the Fire and Building Safety Inspection Program and have been failing to perform the legally required inspections for which they have charged the plaintiffs.

WMC REALTY CORP. ("WMC") is a business located at 806 McLean Avenue in the City of Yonkers, New York. TAC REALTY CORP. ("TAC") is also a business located on McLean Avenue in Yonkers and both, in addition to many other businesses in Yonkers, are subject to a Safety Inspection Fee imposed by the City of Yonkers ("the City") as a part of the

City's Fire and Building Safety Inspection Program. This Inspection Program was created pursuant to Article 18 of the Executive Law ("NY Exec"), entitled the New York State Uniform Fire Prevention and Building Code Act ("NYS Code"). According to Yonkers City Code, the purpose of the program is to "inspect residential and business and commercial properties to ensure compliance with applicable codes" (Complaint, ¶12). As such, the Yonkers City Code requires property owners to pay a fee, largely dependent upon the size of its property, ranging anywhere between $250.00 up to $1,250.00. These fees are included in the property owner's tax bill and failure to pay the fee can result in a lien on the property. Both TAC and WMC have been paying these safety inspection fees every year since 1994 and 1995, respectively. Prior to 2014, both businesses paid an annual safety inspection fee of $375. In 2015, the fee rose to $750 annually. Both businesses allege that their properties have never been inspected pursuant to the payment these fees. They seek to pursue this lawsuit with a class to include all property owners within the City that have paid inspection fees but have not received a fire inspection.

In lieu of filing an answer to the lawsuit, the defendants have filed a motion to dismiss the complaint. First, the defendants argue that the action must be dismissed since the plaintiffs did not timely serve a notice of claim pursuant to sections 50-e of the General Municipal Law ("GML"), a condition precedent to filing a claim against a municipality. Moreover, they argue, the plaintiffs have failed to timely file the action in the first place, since GML §50-i requires that a tort claim against a municipality be commenced within one year and 90 days of the event that gave rise to the claim. The statute of limitations bars all of the remaining claims, including the claims for breach of contract and fiduciary duty, and the constitutional claim, as well, according to the defendants.

The plaintiffs answer by pointing out that they complied with the notice of claim requirement and that all of their claims are timely, given the fact that they are alleging a "continuing wrong" on the part of the defendants, with the latest accrual date occurring on April 1, 2017. They argue that April 1, 2017, is the date that the claim accrued since their last payment to the City for the inspection fee was made in March of 2014 and the City had 36 months in which to perform the fire inspection and never did. The continuing wrong, they contend, is the City's continuing requirement that the business owners pay the inspection fee but fail to inspect the premises. Therefore, plaintiffs argue, none of their claims are barred by the statute of limitations.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v. Martinez, 84 N.Y.2d 83, 87 [1994]; citations omitted). Specifically, as the motion to dismiss relates to the timeliness of the notice of claim and the action itself, a party moving to dismiss an action on timeliness grounds "bears the initial burden of demonstrating, prima facie, that the time within which to commence the cause of action has expired" (Collins Bros. Moving Corp. v. Pieroleoni, 155 A.D.3d 601, 603 [2d Dept. 2017]). While the defendants have done so in the case at bar, in opposition, the plaintiffs have "raised a question of fact as to whether the continuing wrong doctrine rendered a portion of the subject cause of action timely" (Garron v. Bristol House, Inc., 162 A.D.3d 857, 828 [2d Dept. 2018]). Therefore, the motion to dismiss based upon timeliness issues is without merit.

Next, the defendants attempt to defeat the action by arguing that there is no private right of action to enforce the NYS Code or the Yonkers City Code since the Secretary of State

has been expressly authorized to enforce the NYS Code. Nor is there any implied right of action under either Code, they argue. Therefore, the action must be dismissed.

The plaintiffs respond by claiming that they are not seeking to enforce either Code, but rather, to be reimbursed for the fees they contend were unlawfully collected by the defendants. They point out that there is no claim in the lawsuit that seeks to compel the City to comply with the Codes, and as such, their claims are not predicated upon a private right of action. Additionally, they argue, even if there court finds their claims to be based upon a private right of action, the lack of a comprehensive scheme for enforcement in the NYS Code, allows for this private right of action. The plaintiffs attempt to distinguish the current case from Sheehy v. Big Flats Community Day, Inc., 73 N.Y.2d 629 (1989), a case on which the defendants heavily rely. In Sheehy, the plaintiff filed an action against the defendant, alleging that it violated section 260.20(4) of the Penal Law ("PL"), a statute that criminalized the sale of alcoholic beverages to a child less than nineteen years old. The 17 year-old plaintiff was struck by a vehicle and injured after having been served beverages at an event sponsored by Big Flats Community Day, Inc. In that case, the court granted a motion to dismiss the action and that determination was upheld by the Court of Appeals. In its decision, the Court of Appeals found that the fact that the legislature had "deliberately adopted a scheme for affording civil damages to those injured by the negligent or unlawful dispensation of alcohol" to minors under a statute separate from the statute which established "criminal penalties for the provision of alcoholic beverages to individuals under the legal purchase age," precluded the plaintiff's private right of action under PL §260.20(4). Plaintiffs argue that the extensive legislative scheme outlined in Sheehy illustrates the significant lack of any such remedies under the NYS Code, thereby inherently creating a private right of action in order to enforce the NYS Code.

Preliminarily, the court is unpersuaded that the plaintiffs' action does not seek enforcement of the NYS Code or the Yonkers City Code. The plaintiffs seek a declaration as to "[w]hether the City is legally required to perform the inspections for which it charges on all paying property" and "[w]hether the City has performed the required inspections or should be required to do so" (Complaint, ¶¶41 & 42). Additionally, the plaintiffs' negligence cause of action alleges that the defendants "breached the duty of reasonable care by . . . failing to ensure that the Fire and Building Safety Inspection Program was properly administered or enforced" (id at ¶58). At the very heart of this litigation is the enforcement of the Fire and Building Safety Inspection Program, promulgated as a result of the NYS Code. Any argument by the plaintiffs otherwise is disingenuous and an attempt to avoid the obvious pitfall of whether a private cause of action is appropriate under these circumstances. Therefore, the court must determine whether or not the NYS Code allows for a private right of action.

In making such a determination, the court turns to the language of the Court of Appeals in Sheehy v. Big Flats Community Day, Inc., 73 N.Y.2d 629 (1989), which outlines the three factors to be considered when determining whether a private right of action may be exercised in a situation such as this. Those factors are: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme" (Sheehy, 73 N.Y.2d at 633). The court turns first to the last factor, which it deems to be determinative in the case at bar.

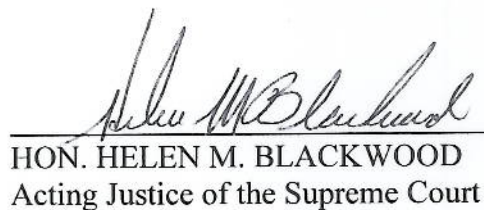
The enforcement portion of the legislative scheme behind the NYS Code is included in Executive Law §381, which authorizes the secretary of state to "promulgate rules and regulations prescribing minimum standards for administration and enforcement of the uniform

fire prevention and building code" (NY Exec §381[1]). In terms of the enforcement of the Code, subsection (4) lists the many actions that the secretary "*shall*" take if it determined "that a local government has failed to administer and enforce" the code (NY Exec §381[4] (emphasis added)). The list includes actions such as issuing an order to compel compliance, asking the attorney general to seek appropriate legal relief, and designating "the county in which the local government is located to administer and enforce the uniform code in such local government" (NY Exec §381[4][a][b][c]). It is important to emphasize that the statute mandates one of the aforementioned actions be taken, which is clear from its use of the word "shall", as opposed to "may" in light of the plaintiffs' argument that the enforcement scheme is not sufficient to preclude a private right of action since it is permissive, and not mandatory. Plaintiffs' conclusion is erroneous. Therefore, after a full review of the legislative scheme, including its enforcement mechanism, the court finds that the creation of a private right of action would be inconsistent with the legislative scheme of the NYS and Yonkers City Code and the motion to dismiss must be granted in its entirety.

In light of the foregoing conclusion, the court need not reach the merits of the defendants' remaining arguments in their motion to dismiss.

This constitutes the decision, and order of this Court.

Dated: White Plains, New York
December 13, 2018



HON. HELEN M. BLACKWOOD
Acting Justice of the Supreme Court

Via E-filing to the attorneys of record