Matter of Carr v de Blasio
2020 NY Slip Op 34251(U)
December 22, 2020
Supreme Court, New York County
Docket Number: 101332/19
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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In the Matter of GWEN CARR, ELLISHA FLAGG GARNER, CONSTANCE MALCOLM, LOYDA COLON, JOO-HYUN KANG, MONIFA BANDELE, KESI FOSTER, and MARK WINSTON GRIFFITH,

INDEX NO. 101332/19

Petitioners,

-against-

BILL DE BLASIO, Mayor of the City of New York, JAMES P. O'NEILL, New York City Police Commissioner, DANIEL A. NIGRO, New York City Fire Commissioner, KEVIN RICHARDSON, New York City Police Department Deputy Commissioner, and THE CITY OF NEW YORK,

Respondents,

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JOAN A. MADDEN, J.:

The issue raised in this motion is whether respondents' filing of a notice of appeal of this Court's decision and order denying in part their motion to dismiss, triggered the automatic stay under CPLR 5519(a)(1). For the reasons given below, the Court finds that the order did not trigger the automatic stay.

In lieu of answering the petition, respondents moved to dismiss. On September 24, 2020, this Court issued a decision and order granting the motion in part, and denying the motion in part. The decretal provisions of the Court's order are as follows (emphasis added):

> ORDERED, that consistent with the decision above, respondents' motion to dismiss the petition is denied to the extent of *ordering a judicial inquiry* into alleged violations and neglect of duties in connection with:
>
> 1) the stop and arrest of Mr. Eric Garner, and the force used by police officers other than Officer Pantaleo;
>
> 2) the filing of official documents concerning Mr. Garner's arrest;

3) the leaking of Mr. Garner's alleged arrest history and medical condition in the autopsy report; and
4) alleged lack of medical care provided to Mr. Garner by police officers; and, it is further

ORDERED that respondents' request to submit an answer is denied; and it is further

ORDERED that respondents' motion is granted to the extent that a summary inquiry is denied in connection with alleged violations and neglect of duties in connection with:

1) present training of NYPD officers concerning appropriate guidelines on the use of force subsequent to Mr. Garner's death; and
2) statements to the media by the City concerning the stop and arrest of Mr. Garner, except to the extent that those statements, where relevant, may be explored as part of the inquiry concerning the stop and arrest of, and use of force against Mr. Garner; and
3) medical care provided to Mr. Garner by members of the EMS and paramedics; and it is further

ORDERED that this matter is placed on the calendar for a conference call with the court on October 6, 2020 at 11:00 a.m. with respect to further proceedings.

On October 2, 2020, respondents served and filed a notice of appeal, indicating that the issue proposed to be raised is "[w]hether the Supreme Court properly granted in part petitioners' application for summary inquiry." In conferences with this Court, a dispute arose as to whether petitioners were entitled to discovery, whether the Court had the authority to order discovery, and whether discovery and other proceedings in this matter were stayed pursuant to the automatic stay imposed by CPLR 5519(a)(1). At the Court's direction, petitioners are now moving by order to show cause for an order "directing that such further proceedings as this Court deems just and proper move forward before the Court while Respondents' appeal is pending." Petitioners acknowledge that at this time they are not making an application for discovery. The Court, therefore, is not being asked to determine whether and to what extent petitioners are entitled to discovery, and the only issue is the scope of the automatic stay under CPLR 5519(a)(1).

In support of the motion, petitioners argue that CPLR 5519(a)(1) does not apply to bar the Court from proceeding with discovery or other matters in connection with the summary inquiry, as the order partially denying respondents' motion to dismiss was "'self-executing,'" and does not contain "'executory directions that command a person to do any act," quoting Pokoik v. Department of Health Services, County of Suffolk, 220 AD2d 13 (2nd Dept 1996). Citing Tax Equity Now NY LLC v. City of New York, 173 AD3d 464 (1st Dept 2019), petitioners assert that when an order merely denies a motion to dismiss or for summary judgment, an appeal from that order does not stay discovery or other proceedings that are a mere consequence or "sequelae" of the order, as such matters are not "proceedings to enforce the judgment or order appeal from" within the meaning of CPLR 5519(a)(1).

In opposition, respondents argue that only the Appellate Division has the authority to determine the scope of the CPLR 5519(a)(1) automatic stay; and this Court's order is subject to the automatic stay since it is "similar to a judgment, in that it grants the Petition and affirmatively directs respondents to submit to a summary inquiry as to four categories of alleged violations of neglect of duty, thereby requiring respondents' participation under threat of civil contempt."[1]

In reply, petitioners argue that respondents cite no case law to support their assertion that this Court lacks the authority to determine the scope of the automatic stay. Petitioners further argue that the "plain text"of the order "never grants" the petition as respondents assert, but rather

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[1]The Court will not address respondents' additional arguments focusing on whether discovery is available in a summary inquiry under New York City Charter §1109. Respondents are not cross-moving for any affirmative relief, and as noted above, petitioners have made clear that the only issue raised in their motion, is whether the automatic stay under CPLR 5519(a)(1) is applicable to the Court's order. The Court likewise will not address the discovery arguments included in petitioners' Reply Memorandum in Law.

the "language in the Order recognizes that a natural consequence of denying the motion to dismiss is that the matter may proceed," which "does not necessarily mean" that the Court ordered the relief sought in petition or directed respondents to submit to a summary inquiry. In the alternative, petitioner argues that even if the order grants the petition, it does not contain any executory directions, but was self-executory and therefore not subject to CPLR 5519(a)(1). Specifically, petitioners assert that the order did not affirmatively direct the summary inquiry to proceed or direct respondents or anyone else to participate on any particular date or in any particular manner, but instead leaves open how the Court will "control" the inquiry, including the extent to which the Court "may require an officer or employee or any other person to attend and be examined in relation to the subject of the inquiry," citing section 1109 of the New York City Charter.

CPLR 5519(a)(1) states in relevant part that "[s]ervice upon the adverse party of a notice of appeal . . . stays all proceedings to enforce the judgment or order appealed from pending the appeal . . . where . . . the appellate . . . is the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state." CPLR 5519(a)(1); see Tax Equity Now NY LLC v. City of New York, supra at 464-465; Pokoik v. Department of Heath Services, County of Suffolk, supra at 14.

In Pokoik, the Appellate Division Second Department provides a detailed analysis of issues related to the scope of the stay afforded by CPLR 5519(a), holding that by its "express terms" CPLR 5519(a) stays only "proceedings to *enforce* the judgment or order appealed from," so a stay obtained under CPLR 5519(a) "has the effect of temporarily depriving the prevailing party of the ability to use the methods specified by law (*see e.g.* CPLR art. 51, entitled

'Enforcement of Judgments and Orders Generally') to enforce the executory provisions of the judgment or order appealed from." Id at 15. "Those provisions of the judgment or order appealed from which are self-executing upon its promulgation and those provisions which have been brought to execution by voluntary or compelled compliance prior to the effective date of the stay are not undone." Id. Thus, the "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 . . . the stay does not extend to matters which are not commanded but which are the sequelae of granting or denying relief." Id; accord Tax Equity Now NY LLC v. City of New York, supra at 465. For example, when an order "merely denies a motion for summary judgment or to strike the case from the calendar, an appeal from that order will not stay a trial which is a consequence of the order but is not directed by it." Pokoik v. Department of Heath Services, County of Suffolk, supra at 15. Recognizing that "[f]uture acts which are not expressly directed by the order or judgment appealed from may nevertheless have the effect of changing the status quo and thereby defeating or impairing the efficacy of the order which will determine the appeal," the Second Department found that even though an automatic stay is not available in such cases, "the aggrieved party may apply to the appellate court to exercise . . . its inherent power to grant a stay of such acts in aid of its appellate jurisdiction." Id at 16.

In Tax Equity Now NY LLC v. City of New York, supra, the Appellate Division First Department determined that the automatic stay did not apply when the City appealed an order denying its motion to dismiss. Citing Pokoik, the First Department held that "[w]hile the automatic stay applies to stay 'proceedings to enforce the judgment or order appealed from pending the appeal,' which include executory directions that command a person to do an act

beyond what is required under the CPLR, the automatic stay does not extend to matters that are the 'sequelae' of granting or denying relief." Tax Equity Now NY LLC v. City of New York, supra at 465 (quoting Pokoik v. Department of Heath Services, County of Suffolk, supra at 15). Based on this rule, the First Department further held that the "inclusion in an order of affirmative directives on matters addressed in the CPLR does not trigger the stay as to the CPLR obligations," and specifically that the automatic stay does not apply to defendants' CPLR obligations to answer and provide discovery pending their appeal of the order denying their motion to dismiss. Id at 465.

Turning to petitioners' motion, on the authority of Tax Equity Now NY LLC v. City of New York and Pokoik v. Department of Heath Services, County of Suffolk, the Court concludes that respondents' filing of a notice of appeal of this Court's order denying in part their motion to dismiss did not trigger the automatic stay pursuant to CPLR 5519(a)(1), as it is clear the order does contain any affirmative directives commanding a person to do an act beyond what is required under the CPLR. See Tax Equity Now NY LLC v. City of New York, supra at 465; Pokoik v. Department of Heath Services, County of Suffolk, supra at 15. The only affirmative directive in the order pertains to a court conference that has already taken place, so it is no longer executory. See Pokoik v. Department of Heath Services, County of Suffolk, supra at 17.

While the order effectively grants the petition to the extent of "ordering a judicial hearing" as to four specified items of inquiry and dismisses the petition as to three other items of inquiry,[2] the Court simply determined that a hearing is warranted, but did not issue any directives

[2]Petitioners' argument that the Court did not grant the petition is not persuasive, as no other meaning can be reasonably derived from the phrase "ordering a judicial inquiry." As

with respect the hearing, such as the date of the hearing or the persons to appear and testify at the hearing. Notably, given petitioners' position as to the need for discovery is, it would have been premature for the Court to issue any such directives. Moreover, while the issue is not before the Court at this time, it appears questionable whether discovery or the judicial hearing itself would be covered by the automatic stay even if those matters were the subject of affirmative directives, given the holdings in Tax Equity and Pokoik, that a notice of appeal from an order denying a motion to dismiss or for summary judgment will neither stay a trial nor the obligations to answer and comply with discovery requests. See Tax Equity Now NY LLC v. City of New York, supra at 464-465; Pokoik v. Department of Heath Services, County of Suffolk, supra at 16.

The Court rejects respondents' argument that the Appellate Division has exclusive authority to determine the scope of the CPLR 5519(a)(1) automatic stay. As petitioners correctly assert, respondents cite no authority directly on point to support their position. To the contrary, case law establishes that both trial and appellate courts have decided issues involving the automatic stay, and even where a trial court has been appealed, the Appellate Division has simply determined the propriety of the decision granting or denying the stay, and has not held that the trial court lacked authority to decide the issue. See e.g. Tax Equity Now NY LLC v. City of New York, 173 AD3d 464 (1st Dept 2019), modifying 2018 WL 6329474 (Sup Ct, NY Co 2018) (holding that the Supreme Court should not have granted the City's motion for a stay under CPLR 5519(a)(1), as the order directing the parties to appear for a preliminary conference to address discovery issues did not trigger the stay as to CPLR obligations).

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stated in respondents' notice of appeal, the issue proposed to be raised is "[w]hether the Supreme Court properly granted in part petitioners' application for summary inquiry."

Finally, the Court notes that even though there is no automatic stay, if respondents believe the order granting the petition in part has the "effect of changing the status quo and thereby defeating or impairing the efficacy of the order which will determine the appeal," they still have the option of applying to the Appellate Division First Department for a stay. Pokoik v. Department of Heath Services, County of Suffolk, supra at 16.

Thus, since respondents' appeal of this Court's order denying in part their motion to dismiss did not trigger the automatic stay under CPLR 5519(a) (1), petitioners' motion is granted and the parties shall move forward with further proceedings in this matter.

Accordingly, it is

ORDERED that since respondents' appeal of this Court's order denying in part their motion to dismiss did not trigger the automatic stay under CPLR 5519(a)(1), petitioners' motion is granted and the parties shall move forward with further proceedings in this matter while the appeal is pending; and it is further

ORDERED that the parties are directed to consult the Court's e-filing website after January 1, 2021 to determine the new judge assigned to this case, and to contact that judge with respect to further proceedings in this matter.

DATED: December 22, 2020

ENTER:

J.S.C.

HON. JUAN A. MADDEN
J.S.C.