

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

PRESENT: _____

ALICE SCHLESINGER

Justice

PART **IA** Part 16

BARKLEE REALTY Co, LLC

INDEX NO.

120546/99

MOTION DATE

MOTION SEQ. NO.

003

MOTION CAL. NO.

George E. PATAKI

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: _____

NOV 16 2001

Alice Schlesinger

ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

-----X
BARKLEE REALTY COMPANY LLC and
BARKLEE 94 LLC,

Plaintiffs,

-against-

Index No. 120546/99

GEORGE E. PATAKI, AS GOVERNOR OF
THE STATE OF NEW YORK,

Defendant.

-----X
SCHLESINGER, J.:

In 1994, New York State passed a law allowing for the creation of limited liabilities companies. Part of that statute, specifically Limited Liability Law (LLC) Section 202(a), which enumerated the powers that LLC's would have, comparable to ones possessed by corporations under the Business Corporation Law ("BCL"), was the power to sue. However, unlike the BCL or for that matter unlike virtually any other non-limited liability business entity, such as professional service corporations (New York Business Corporation Law), cooperative corporations (New York Cooperative Corporations Law) not-for-profit corporations (New York Not For Profit Law), religious corporations, (New York Religious Corporation Law), joint stock associations (New York General Associations Law), business trusts (New York General Associations Law) or individuals who have filed to conduct business under an assumed name or designation (Article 9B of the New York General Business Law), limited liability companies were required to fulfill a publishing and filing

requirement which requirement was a precondition to their right to sue in the New York Courts.

Specifically, Section 206 of the law, which was included in the statute against the strong opposition of the original sponsor of the bill in the Assembly and later as New York State Attorney General, G. Oliver Koppell, as well as the New York City Association of the Bar (see Legislative History for the State Assembly Standing Committee on Judiciary and Assembly Standing Committee on Corporations, Authorities & Commissions, Public Hearing on Limited Liability Company Legislation held on June 11, 1992) and unlike The Uniform Limited Liability Company Act approved by the National Conference of Commissioners on Uniform State Laws and unlike the American Bar Association Prototype Limited Liability Act, requires each LLC to publish its Articles of Organization or comparable specified information weekly for six successive weeks in two local newspapers selected by the County Clerk of the county where the LLC has its principal office, followed by an affidavit filed with the Department of State stating that this has been done. Section 206 goes on to say that if this requirement has not been met by an LLC within 120 days of its formation, it will be precluded from bringing or maintaining any action or special proceeding in any New York court until it complies.

Plaintiffs are two limited liability companies with principal offices in New York County, formed in 1999. They each consist of one member, the pro se plaintiff Barbara Kraebel, and are in the business of managing real estate in the City of New York. After

submitting the Articles of Organization for both entities in May and June 1999 to the New York Department of State, which were accepted, the plaintiff was advised via the Filing Receipt sent to her of the following:

This filing has an Associated Publication Requirement. The Newspapers In Which This Publication Is To Be Made Are Designated By The County Clerk Of The County in Which The Entity's Office Is Located. Contact The Respective County Clerk For Further Information.

In June 1998, Ms. Kraebel had formed her first limited liability company, Barklee 147 LLC, an owner of real property in New York County and had complied with the publication and filing requirement at a cost to her of \$1645.00. However, believing this served no useful purpose and objecting to the payment of like fees for the two subsequent limited liability companies, Barklee Realty Company LLC and Barklee 94 LLC formed in 1999, Ms. Kraebel refused to similarly publish and file. Instead she brought this action.

The complaint challenges the constitutionally (United States' and New York's) of Section 206 in three ways. First, it is urged the Section violates the plaintiffs' (and others in a similar condition) due process rights under the Fifth and Fourteenth Amendments to United States Constitution and Article 1 Sec. 6 of the New York State Constitution (first cause of action). Next, to the extent that Section 206 denies plaintiffs access to the New York courts unless they comply with the publication requirement, it is urged the Section violates their right to equal protect under the Fourteenth Amendment to the United States

Constitution and Article 1 Section 11 of the New York Constitution (second cause of action). It is also urged that it violates plaintiffs' right to unencumbered access to the New York courts under Article 10 Sec. 4 of the New York State Constitution (third cause of action). Finally, in the fourth cause of action, plaintiffs request this court to permanently enjoin the defendant, the Governor of the State, from enforcing this section.

In an earlier phase of the action, plaintiffs successfully moved to amend the complaint to include the third cause of action and at the same time withstood a motion to dismiss made by the defendant. Subsequent to that, the defendant filed an answer and the parties engaged in limited discovery.

Now in competing motions, both sides have asked this court to grant summary judgment in their favor. In Ms. Kraebel's affidavit accompanying the first of these motions, she points out that Barklee 94 LLC owns a 10-unit rent regulated apartment house in New York City and Barklee Realty Company manages that building as well as another building owned by Ms. Kraebel's earlier LLC, Barklee 147 LLC. She then enumerates various laws and their time constraints which apply to New York City landlords and property owners. The examples she gives are the following: Sec. 702 of the Real Property Law which requires a New York City property owner to bring a legal proceeding challenging a real estate assessment within 30 days after a final assessment, Sec. 217 of the CPLR which requires a New York City property owner challenging an administrative determination in an Article 78 proceeding to bring it within four months of the determination, Sec. 2530.1 of the Rent

Stabilization Code which requires landlords wishing to contest a final determination by DHCR to bring an Article 78 proceeding within 60 days after the determination; Sec. 27-2009.1 of the New York City Administrative Code which requires a City landlord to begin a legal proceeding against a tenant with an unauthorized pet within three months of learning about the pet, and finally case law applied in New York City Housing Courts which often preclude landlords from suing for rent and evicting a tenant via a summary proceeding on the basis of unpaid rent occurring more than three months before the proceeding is commenced.

It is the plaintiffs' contention that there is no adequate justification provided by the State for this costly and unnecessary publication requirement. She points out that the information required to be published at the time of formation is easily obtained from the Secretary of State with minimal cost or for nothing over the internet. She argues it is unlikely that an actual litigant would have ever seen the material published in the Classified section of the newspapers. She urges that without any countervailing meaningful rational purpose, this Section unduly restricts her right to do business in the State and violates her Constitutional rights to due process and equal protection of the law.

The defendant defends the publication provision, § 206 of the LLC law and asks the court to declare it constitutional. Counsel argues that plaintiffs are not members of any suspect class. Nor can they allege a violation of any fundamental right. Therefore they cannot show that the statute is unconstitutional. Further, it is urged Section 206's

publication requirement is reasonably related to the goal of ensuring that members of the public are given notice of the information which the statute requires to be disclosed.

Discussion

Access to courts, except when the subject matter is one of a fundamental nature, is generally a matter of state concern and is not unrestricted. There are numerous cases that uphold filing fees (United States v. Kras, 93 S. Ct 631, 409 U.S. 434 (1973), undertakings (Curiale v. Ardra Ins. Co., Ltd., 88 NY2d 268, 1996) and security bonds for appeal purposes (Lindsey v. Normet, 92 S. Ct. 862, 405 U.S. 56). The sole exception to this tenet was the opinion delivered by the United States Supreme Court in 1971 in Boddie v. State of Connecticut, 91 S. Ct 780, 401 U.S. 371. There the court, on due process grounds, struck down a Connecticut statute which set mandatory court fees and costs incident to a divorce proceeding. However the majority decision was narrowly drawn and relied upon the basic position of the marriage relationship in society and the state monopolization of the means of dissolving that relationship. It also was a class action, brought on behalf of poor women in Connecticut receiving State welfare assistance who were unable to pay these court costs and fees. Justice Harlan, in delivering the opinion of the court, stated "This court has seldom been asked to view access to the courts as an element of due process" (page 785) but also acknowledged that the Fifth and Fourteenth Amendments to the Constitution "recognized the centrality of the concept of due process in the operation of this system" (784) (the system of courts or other quasi-judicial official bodies that regulate the

implementation of dispute settlement). Finally, in the area of due process, the court approvingly did point to earlier decisions "that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard" (pg 785).

Thus the issue here in deciding the due process question and plaintiffs' argument that her two LLC's were denied this by requiring compliance with Sec. 206's publication dictates, is whether the publication mandate represents a countervailing state interest. I do not believe that it does. The publication mandate, required as a precondition to access to the courts, has nothing to do with any aspect of a court proceeding. This coupling, which the State characterizes as an "incentive" and the plaintiffs term a "penalty or punishment" cannot be said to provide financial support to the courts, provide a measure of security to an adversary, or even provide any notice as to a pending lawsuit. The only coffers enriched by the publication requirement is the newspapers. But it is an obvious stretch to assume that any potential defendant to an action commenced by an LLC would be perusing the classifieds on a regular basis so as to note the organizing information provided by a newly formed LLC.

The defendant cites the case of Colton v. Riccobono, 67 NY2d 571 (1986) and quotes the following language from that decision at page 576 for the proposition that access to the courts is not a constitutionally protected right.

Access to the Civil Courts is primarily a matter of State concern and legislatures have been granted broad latitude in establishing the machinery for resolving disputes as long as the challenged provision is adopted in the interest of the community, is reasonable in relation to its subject, and affords litigants the fundamentals to procedural due process (citations omitted). As a general rule, access to the courts in and by itself is not a right protected by the Constitution."

However, the words that follow, omitted by counsel, also bear noting: They are:

Nevertheless a state may create a right of access by its Constitution or statutes, as petitioner claims it has done here and if it does, the legislature may not alter or restrict this property right arbitrarily.

Here the legislature did create a statute which enabled the formation of LLC's in New York State. In delineating the powers and rights for this new business form, right at the top was the right to sue in court, similar to a corporation's pursuant to Article 10, Section 4 of the New York Constitution. I find that the establishment of this right has been compromised by the publication requirement which makes no sense and is thus arbitrary. Clearly, one's right to petition a court regarding one's property is a right subject to due process protection. Thus, I find that this Section does constitute a violation of plaintiff's due process rights.

The plaintiffs also argue that Section 206 denies them equal protection of the law, also constitutionally guaranteed to them. Both parties agree here that these plaintiffs do not fall into a suspect class. Also it is clear that under these circumstances, a statute enjoys a strong presumption of constitutionality which plaintiffs must overcome beyond a reasonable

doubt. Because of that, constitutional assessments on these grounds are subject to the lowest level of judicial review or whether any rational basis supports the challenged legislation. In fact, the rational basis does not have to be apparent or even stated by the legislature (Port Jefferson Health Care Facility, et al. v. Wong, 94 NY2d 284, 704 N.Y.S.2d 897, 1999). The Port Jefferson case concerned a system of taxation vis-a-vis for profit residential health care facilities which exempted from taxation receipts for the care of Medicaid patients but not for the care of private patients. Since it did involve a system of taxation, an even higher standard of review was to be applied as the court stated, relying on the U.S. Supreme Court Case Nordlinger v. Hahn, 112 S. Ct 2326, 505 U.S. 1. "This standard is especially deferential in the context of classifications made by complex tax laws." In the Port Jefferson case, the New York Court of Appeals did find a justification for the difference in tax treatment, namely "to mitigate the disincentive of higher quality of care RHCFs from admitting Medicaid patients and to encourage those nursing homes to share in the burden of caring for the medically needy" (page 903).

Here, as discussed earlier, the rationale proffered by defendant, namely "informing members of the public of specific important information regarding the newly organized company" is not persuasive. (Pg 13 of defendant's February 23, memorandum of law in support of its motion for summary judgment). First, this information is readily available to any and all people who want or need to know this information. Presumably those people would want the information at the time they were threatened with litigation by an LLC.

Also, no other business entity carries such a precondition, an expensive one, for going into court. (The fee for filing an LLC is only \$200.00, money which properly goes to the State for processing the papers.)

In Heller v Doe, 113 S. Ct 2637, 509 U.S. 312 (1993) the Supreme Court stated: "A statutory classification fails rational-basis review only when it rests on grounds wholly irrelevant to the achievement of the State's objective" (at page 2645). The publication requirement as a precondition for access to the courts fails this test. The notice given for six successive weeks after an LLC's formation does not in any way enhance the adjudication of justice. Further, it could have just the opposite effect when an LLC, such as the plaintiffs here, as New York City landlords, fail to publish and wish to commence law suits but are not able to because a short statute of limitation has expired.

In Lindsey v. Normet 92 S. Ct. 862, 405 U.S. 56 (1972), the State of Oregon had passed a Forcible Entry and Wrongful Detainer Statute which applied to landlord tenant matters. Part of that statute mandated that a tenant post a bond in double the amount of an award as a prerequisite to appealing an adverse ruling. The Supreme Court found that this condition violated the petitioner's right to equal protection of the law. Normally, to appeal a civil case in Oregon, a litigant had to file an undertaking covering all damages, costs and disbursements which may be awarded against him on the appeal. However, under the FED statute, a losing defendant had to post twice that. The court stated that this section of the statute "imposes additional requirements that in our judgment bear no reasonable

relationship to any valid state objective and that arbitrarily discriminate against tenants appealing from adverse decisions in FED actions" (pg 876).

The double bond requirement arguably weeded out frivolous appeals, as the State argued. However, it also precluded arguably meritorious appeals by those unable to meet this requirement. No other appellant in any kind of action was subject to the automatic assessment of unproved damages. The court stated, "we discern nothing in the special purposes of the FED Statute or in the special characteristics of the landlord tenant relationship to warrant this discrimination" (pg 877).

The same could be applied to the section at issue, here, § 206, although arguably the tenants in Oregon could not pay the double bond while plaintiffs here choose not to pay. The purpose of the 1994 LLC law was to encourage business and commerce by allowing for the formation of a new, to New York, form of business entity, one that combined a corporation's limitations on personal liability with the operating flexibility of a partnership. The statute was meant to expand business opportunities and to make this state a more amenable place to do business. As referred to earlier, both the City Bar and the then Attorney General of the State opposed the publication requirement as being burdensome without serving a discernible purpose.

I find that there is no rational basis for Section 206's mandates and that the plaintiffs have, in this regard carried their burden in showing an unfair discrimination which violates their equal protection of the laws.

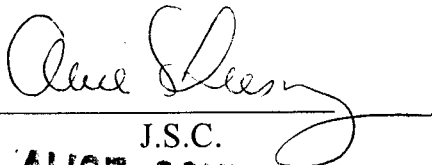
Finally, counsel's argument, made for the first time now, rather than in the earlier dismissal motion, that the Governor is an improper party, is rejected. He, as the elected executive of the State has the power to enforce statutes and explain their rationale. He is also the responsible official to ensure that certain entities are treated fairly and not discriminated against.

The plaintiffs' motion for summary judgment is, in all respects granted and the defendants cross motion for the same relief is denied. For the reasons already discussed, I find that Section 206 violates plaintiffs' right to due process, right to equal protection of the laws, and right to access to New York courts. Therefore, I am enjoining the Defendant and the State from enforcing this section.

This decision constitutes the order of the Court.

Dated: November 16, 2001

NOV 18 2001



J.S.C.
ALICE SCHLESINGER