SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

To be argued by:
Briscoe R. Smith

BARKLEE REALTY COMPANY LLC
and BARKLEE 94 LLC,

Plaintiffs-Respondents,

New York County
Index No. 120546/99

- against -

GEORGE E. PATAKI as Governor of the
State of New York,

Defendant-Appellant.

Brief of *Amici Curiae*
Community Housing Improvement Program, Inc.,
Maurice Mann d/b/a Mann Realty Associates,
The Rent Stabilization Association of N.Y.C., Inc.
and Small Property Owners of New York, Inc.

Atlantic Legal Foundation
150 East 42nd Street, 2nd Floor
New York, NY 10017
(212) 573-1960

Attorneys for *Amici Curiae*
Community Housing Improvement Program, Inc., Maurice Mann d/b/a Mann Realty Associates, The Rent Stabilization Association of N.Y.C., Inc. and Small Property Owners of New York, Inc.

Briscoe R. Smith
Martin S. Kaufman
of Counsel

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Interest of *Amici*

Community Housing Improvement Program, Inc. ("CHIP"), established in 1966, is a trade association representing approximately 2,500 owners of apartment buildings in New York City. CHIP lobbies on housing related legislation in New York City, New York State, and Washington, D.C. CHIP provides its members with information on compliance with local, state and federal laws, provides a forum for discussion of building management issues, and has often initiated litigation on behalf of the real estate industry. Hundreds of CHIP members have converted their building ownership from partnerships to limited liability companies in the past decade.

Maurice Mann, d/b/a Mann Realty Associates, owns and manages real estate properties in New York City. All of the buildings managed by Mann Realty are residential rental properties in Manhattan. Mann Realty regularly buys and sells residential properties in the names of LLC's. Currently, Mann Realty owns and operates five LLCs each of which owns and operates a single residential property. In 2002, Mann Realty formed five new LLC's for the purpose of acquiring and managing additional properties. Thus Mann is directly affected by section 206 of the Limited Liability Company Law.

The Rent Stabilization Association of N.Y.C., Inc. ("RSA") is the largest real estate industry trade association in New York, representing 25,000 property owners and managing agents responsible for approximately 1,000,000 units of housing. RSA's members range from owners of one small building to owners of large multi-family rental complexes, cooperatives and condominiums. RSA lobbies for the real estate industry and provides a wide variety of educational programs and services to its members. RSA's goal is to revive free

enterprise in New York City's housing market and to maintain its economic viability. Many of RSA's members have adopted the LLC form for their real estate ownership and management operations and are directly affected by the publication requirement of Section 206 of the Limited Liability Company Law.

Small Property Owners of New York, Inc.("SPONY") is a non-profit membership organization comprised of people who own and operate the affordable private-sector housing in New York. It is a volunteer organization, dedicated to the goal of returning rationality and fairness to the relationship between owners and tenants in New York. SPONY represents the interests of approximately 22,000 small owners most of whom own fewer than 20 units. Its members are generally residents of the communities in which they own their buildings, and are often owner occupants. SPONY believes government must embrace policies which will result in small and medium sized property owners being able to maintain their buildings, and to remain in New York. Many of SPONY's members, and many more small property owners in New York, own, manage and operate their residential properties as Limited Liability Companies, and are directly affected by the publication requirement of Section 206 of the Limited Liability Company Law.

Questions Presented

1. Does Section 206 of the New York Limited Liability Company Law deprive plaintiffs-respondents and others similarly situated of due process of law? The court below responded in the affirmative.

2. Does Section 206 of the New York Limited Liability Company Law deprive plaintiffs-respondents and others similarly situated of equal protection of the law? The court below responded in the affirmative.

Statement of the Case

Following the lead of several other states, in 1994 the New York Legislature enacted a limited liability company law (herein "LLC Law"), designed to combine the corporate limitations on liability with the flexibility of operations of a New York partnership. Section 202 of the LLC Law, enumerating the powers conferred on all LLCs, included the right to sue and access to New York Courts. LLC Law § 202 (a).

Section 206 of the LLC Law requires each LLC to publish within 120 days its articles of organization or comparable information (i) weekly for (ii) six successive weeks (iii) in two local newspapers selected by the county clerk where the LLC has its principal office (iv) followed by the filing of an affidavit with the Department of State attesting that the publication has been made.

If the publication requirement of Section 206 is not completed within 120 days of the LLC's formation, the LLC will be precluded from "maintaining any action or special proceeding" in any New York court "unless and until" it complies with the publication requirement. However, the failure of an LLC to fulfill the publication requirements will not impair any of its contracts or acts or the right of any other party to maintain an action or special proceeding or prevent the LLC from defending any such action or proceeding.[1]

Prior to the enactment of the LLC Law, the New York State Attorney General recorded his "strong" opposition to the publication requirements. In his memorandum for the Governor, the Attorney General emphasized that the publication requirements was "costly and unnecessary" and that the information to be contained in the publication is "readily

[1]The statute is silent as to whether a non-publishing LLC could counterclaim; presumably a third party claim would be subject to a motion to dismiss.

available" in the Secretary of States' office. He added: "Requiring an LLC to publish its Articles of Organization will only increase the cost of forming an LLC with no corresponding benefit to the public." (Supplemental Record on Appeal, 9).

In July, 2001, in response to an inquiry from the Court below, the now former Attorney General stated:

> As you might expect, there was strong lobbying in favor of the publication requirement from a number of representatives of New York media. While those who supported publication did so on the alleged argument that it would increase public knowledge, it was my belief at the time that the publication requirement was solely an attempt to preserve a benefit for certain publications that derived considerable income from the publication of partnership notices. However, it was also my view at the time that it would be difficult if not impossible for the bill to pass without a publication requirement because of the support that media interests generated among legislators.

(*Id*. at 7).

The Attorney General was not alone in registering opposition to the publication requirement. The Association of the Bar of the City of New York noted its objection and argued that "there is no information in the notice that is not already available form the articles on file with the Secretary of State" (*Id*. at 11). As the Court below found, there is no comparable publication requirement in the Uniform Limited Liability Company approved by the National Conference of Commissioners on Uniform State Laws or in the American Bar Association's Prototype Limited Liability Act (Decision & Order, 11/16/2001, at 2).

Plaintiffs-Respondents are LLCs engaged in the real estate business. Their organizer, Barbara Kraebel, filed articles of organizations with the Secretary of State in May and June, 1999. However, she, chose not to comply with the publication requirement. Earlier, she had complied with Section 206 for another LLC and had been required to the $1,645, cost of

publication in addition to the Secretary of State's $200 filing fee. (*Id*. at 2-3). Ms. Kraebel was advised that publication with respect to Barklee 994 LLC would cost $1,328, not including the cost of filing the affidavits. (Brief of Plaintiffs-Respondents at 5).

Plaintiffs-Respondents brought this action pursuant to state and federal law, challenging Section 206 under the New York and United States Constitutions, asserting that the statute deprives plaintiffs of due process, equal protection and (by amending the complaint) their right to unencumbered access to the New York Courts. In addition to declaratory relief, plaintiffs requested an injunction barring enforcement of Section 206 (Decision & Order, 11/16/01 at 3-4).

Both sides moved for summary judgement. The competing legal contentions were summarized by the court below:

> 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 that it is unlikely that an actual litigant would have ever see 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.

(*Id*. at 5-6)

Citing *Boddie v. State of Connecticut*, 401 U.S. 371 (1971), Justice Schlesinger concluded with respect to the due process argument that the publication requirement does not represent a "countervailing state interest." (Decision & Order, 11/16/01, at 7). She found that LLC's right to sue, similar to a corporation's right to sue, protected by Article 10, Section 4 of the New York Constitution, "has been compromised by the publication requirement which makes no sense and is arbitrary." (*Id*. at 8). Finally, applying *Heller v. Doe*, 509 U.S. 312 (1993), Justice Schlesinger held that the publication requirement failed the rational basis review test because the six successive weeks of publication of the LLC's particulars "does not in any way enhance the adjudication of justice." (*Id*. at 10).

The court granted plaintiffs' motion for summary judgment and denied defendant's cross motion. Defendant and the State were enjoined from enforcing Section 206. This appeal followed.

Argument

I.

THE DECISION AND ORDER SHOULD BE AFFIRMED

The decision of Justice Schlesinger is in all respects sound on the facts, about which there is no dispute, and on the law and this Court should affirm.

Section 206 of the LLC Law imposes a burdensome, time consuming, wasteful and expensive requirement on LLCs and serves absolutely no state interest or public purpose. All agree that the information required to be published already is readily and inexpensively available to any individual choosing to deal with an LLC by means of a simple inquiry of the office of the Secretary of State.

It is telling that eight years after the enactment of Section 206, the defendant is incapable of identifying any public purposes or state interest it serves. The best defendant can do is to claim that Section 206 provides the members of the public with "specific, important information about the newly organized LLC," (Brief for Defendant-Appellant at 21) - - all of which is readily available from the Secretary of State -- "to permit them to act upon that information, if and when appropriate." (*Id*. at 22).[2] Of course, it makes no sense to suggest that members of the public would search the newspaper classifieds to discern the organizational details of newly formed LLCs on the remote chance that they might become involved with the LLC and that a dispute with that LLC might develop. It is equally nonsensical to believe that a member of the public would go to the trouble of searching the

[2] Defendant does not attempt to explain why the publication requirement has a public purpose for LLCs but not to most other limited liability business entities, which are not similarly bound by a publication requirement.

newspapers to get information about an LLC after a dispute has erupted, possibly years or decades after the LLC was formed and the notice published. As a practical matter, the designation "LLC" adequately puts the public on notice that members of the company are not personally liable for the company's transactions.

The onerous and expensive publication requirement on its face is bad enough. However, failure to comply with it is coupled with the denial of a fundamental right: equal access to the administration of justice and the of property and other rights that access to courts ensures.

Defendant, with all respect, seems to confuse court filing fees and similar requirements imposed on all litigants with the denial of a fundamental right to court access – as a penalty for failure to comply with an unrelated and, here, meaningless mandate.

A. New York Due Process

In New York, limited liability entities enjoy a fundamental right to court access as a matter of Constitutional and statutory law. N.Y. Constitution, Art. 10 § 4; LLC Law § 202 (a). *See* Brief of Plaintiffs-Appellants at 28-29. Indeed, defendant comes close to conceding this fundamental point in drawing a distinction between "bringing" an action, as to which there is no prohibition, and "maintaining" one for which he asserts there is only a "conditional bar." (Brief of Defendant-Appellant at 27).

Once the right to sue is granted, the Court of Appeals has made it clear that "the Legislature may not alter or restrict this property right [access to the courts] arbitrarily" *Colton v. Riccobono*, 67 N.Y. 2d 571, 576 (1986). In *Colton*, petitioner challenged Judiciary

Law § 148-a, which establishes a pre-trial mediation mechanism for medical malpractice litigation. The Court noted:

> It [Judiciary Law § 148-a] was seen as a means of better equipping litigants to mediate a settlement, if warranted, or to prepare and narrow the issues for trial, if trial was required, thereby reducing the cost of litigation and helping preserve quality health care in this State. Since the legislation bears a rational relationship to that need, it does not violate substantive due process concerns.

Following the Court of Appeal's directive in *Colton*, Justice Schlesinger examined the relationship between the publication requirement and access to the courts, correctly finding that LLC's access to the administration of justice "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." (Decision & Order at 8)

B. Federal Due Process

Justice Schlesinger reached the same result using a federal constitutional analysis, relying on *Boddie v. Connecticut*, 401 U.S. 371, (1971), which looked to whether there was a "countervailing state interest of overriding significance" where there is a denial of a "meaningful opportunity to be heard." Justice Schlesinger found the publication requirement lacked any countervailing state interest and had "nothing to do with any aspect of a court proceeding." (Decision & Order at 7).

C. Equal Protection

Moving to the equal protection issue, Justice Schlesinger cited *Heller v. Doe*, 509 U.S. 312 (1993), adopting its "rational basis" test. She again found no connection between

court access and the publication requirement. Indeed, complying with the publication requirement would prevent court access where a short statute of limitation is involved.

Defendant argues that because a non-publishing LLC is barred only from maintaining an action - - but not from bringing one - - that its constitutionally is preserved. That follows, it is said, because a court is authorized to stay an action to permit a non-publishing LLC to comply. (Brief for Defendant-Appellant at 33-34). While such a stay (if the LLC thought to seek one and if the court in its discretion granted one) might toll a statute of limitations, full access to the judicial system is still barred as no affirmative relief could be awarded to an LLC unless and until the publication requirement is satisfied.

Defendant also contends that there is a rational basis or legitimate purpose for the publication requirement because "the statute's conditional bar against maintaining legal proceedings ensures that the required publication will be made." (Brief of Defendant-Appellant at 27; see also *Id*. at 23). This "carrot-and-stick" argument does not bear scrutiny. In the first place, as a practical matter the "public notice" rationale is satisfied when the LLC files in the first instance with the Secretary of State. As Justice Schlesinger found, "this information is readily available to any and all people who want or need this information" from the Department of State itself. (Decision & Order at 9). Second, an LLC could well decide to ignore the additional newspaper publication either because of the substantial expense or because the business purpose of the LLC seemed to make it unlikely to lead to the need for judicial intervention. For example, an LLC's business might be limited to holding property to be owner-occupied, occupied by a family member or someone else with whom the

likelihood of litigation was remote. Third, the structure of Section 206 does nothing to ensure that newspaper publication is made during the initial 120 day period since a default can be cured if and when the LLC must resort to litgation.

Defendant correctly notes that Justice Schlesinger's analysis does not distinguish between bringing an action and maintaining one (Brief for Defendant-Appellant at 9) and her decision and order pointed out that adjudication of justice would not be enhanced where "a short statute of limitations had expired." (*Id*. at 11). This additional reason is not essential to her holding; moreover, statutes of limitation indeed would run if counsel for a non-publishing LLC failed to appreciate the subtle distinction between "bringing" and "maintaining" an action before the publication had been accomplished.

Finally, Justice Schlesinger reflected on the Legislature's overall purpose in permitting limited liability companies:

> The purpose of the 1994 LLC law was to encourage business and commence [sic] 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.

(Decision & Order at 11)

It would be difficult to contend that the expense of the publication requirement encourages business and commerce in New York, particularly when many LLCs are characterized as small and vulnerable (Brief of Plaintiffs-Respondents at 23-24).

CONCLUSION

Section 206 of the LLC Law deprives plaintiffs, *amici cuiae* and other LLCs of due process of law as well as equal protection of the laws. The decision and order of Justice Schlesinger should be affirmed.

Respectfully submitted,

Atlantic Legal Foundation

By_____
150 East 42nd Street, 2nd Floor
New York, NY 10017
Attorney for *Amici Curiae*
Community Housing Improvement Program Inc., Maurice Mann d/b/a Mann Realty Associates, Rent Stabilization Association of N.Y.C., Inc. and Small Property Owners of New York, Inc.

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Briscoe R. Smith
Martin S. Kaufman
of Counsel