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

PRESENT: _____ PART _____

Justice

Index Number : 107273/2005

AYMES, CLIFFORD

VS

NYC DEPT OF HOUSING

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED

OCT 21 2005

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/11/05

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

----------X

CLIFFORD AYMES,

Plaintiff,

-against-

NEW YORK CITY DEPARTMENT OF HOUSING, PRESERVATION & DEVELOPMENT, NEW YORK CITY DEPARTMENT OF FINANCE, and THE CITY OF NEW YORK

Defendants.

----------X

Index no.: 107273/2005
Motion seq.: 001
Motion date: August 3, 2005

DECISION AND ORDER

PRESENT: KAREN S. SMITH, J.S.C.:

Plaintiff Clifford Aymes's motion, pursuant to CPLR 3212 and 3211(b), for an order granting summary judgment on his complaint and dismissing the affirmative defense is denied. Defendants New York City Department of Housing, Preservation and Development's ("HPD"), New York City Department of Finance's ("DOF"), and the City of New York's ("NYC") cross motion, pursuant to CPLR 3212, for an order dismissing the complaint is granted.

In this action, plaintiff, proceeding *pro se*, seeks to compel HPD, DOF and all other NYC agencies to discharge all demolition and repair liens recorded for property located at 334-36 St. Nicholas Avenue, New York, New York ("Property"), and to remove records of the charges from their websites, on the grounds that the demolitions were performed and costs were billed without the requisite judicial proceeding. Plaintiff also seeks a declaration of his "right to enforce the contracts against [Gateway Demolition Inc. ("Gateway")], and [NBI Equipment Corporation ("NBI")] and pursue damages, as a party to the contract either by assignment or agency." Plaintiff now moves for summary judgment on the grounds that no issue of fact exists. Defendants cross-move for summary judgment on the grounds that the action is in the improper form, that plaintiff failed to exhaust his administrative remedies, and that plaintiff's claims are time barred.

The relevant facts are contained in the moving papers and are not in dispute unless otherwise

noted. Plaintiff is the current owner of the property, having purchased the property from its previous owner, 334-36 St. Nicholas LLC ("334"), in August of 2003. On July 3, 1998, the Department of Buildings ("DOB") declared that an imminent emergency condition existed on the property. On that date, the property had a vacant, four-story structure on it. The DOB declaration recommended that the structure be demolished immediately. HPD hired Gateway to conduct the demolition, and on July 4, 1998, Gateway completed a partial demolition of the structure, leaving the building's foundation and debris from the demolition. The total charge for those demolitions, not including sales tax and an administrative fee, was $49,789.37 (divided into two separate charges for $47,299.90 and $2,489.47). On November 20, 2002, DOF sent 334 bills for the cost of the demolition and recorded two separate liens in the amount $51,277.14 and $2,769.85, covering the demolition costs plus sales tax and administrative fees. On April 9, 2001, DOB again declared that an imminent emergency condition existed on the property and called for the removal of the foundation and the demolition debris, and the erection of a solid fence surrounding the property. HPD hired NBI to handle the work, which was completed on April 19, 2001. The total charges for the work were $37,000.00, not including tax and an administrative fee. On November 21, 2001, DOF sent 334 a bill for the erection of the fence and removal of the foundation and debris and recorded a lien in the amount of $40,127.50, covering the costs of the work performed plus sales tax and administrative fees. DOF and HPD have posted these charges on their websites. Interest has accrued since the dates the bills were originally mailed.

As noted above, plaintiff purchased the property from 334 in August of 2003. On August 5, 2003, plaintiff purchased a title insurance policy from First American Title Insurance company for the property. Schedule B of the title insurance policy notes the three liens listed above and exempts them from coverage. Plaintiff recorded his title and deed on September 6, 2003.

On April 11, 2005, plaintiff sent Martha Stark, Commissioner of DOF a letter. In the letter, he requested copies of all documents in the possession of DOF concerning court orders and proceedings relating to the demolition work conducted on the property. Plaintiff demanded that, if

the Supreme Court had not approved the demolition work and the costs, the liens be removed and the debts discharged. If DOF elected not to remove the liens, plaintiff requested a hearing on the issue. Plaintiff also indicated in his letter that he felt Gateway and NBI overcharged for their services. Plaintiff received no response to his letter and, on May 23, 2005, commenced this action.

Plaintiff now moves for summary judgment on the grounds that defendants failed to comply with New York City Administrative Code ("NYCAC") §§ 26-236, 26-239, 26-241, and 26-242. Specifically, plaintiff contends that DOB failed to notice the previous owner of the unsafe condition or obtain a precept from the Supreme Court before the building was demolished, that HPD failed to obtain the approval a Supreme Court Justice before paying the demolition expenses, and that, consequently, DOF improperly billed 334 and filed liens for those expenses on the property. Accordingly, plaintiff contends that he is entitled to a judgment ordering defendants to remove the liens.

Defendants cross move for summary judgment dismissing the complaint. Defendants assert three separate grounds for dismissal. First, they contend that plaintiff cannot obtain the relief he seeks through a plenary action and that he must bring an Article 78 proceeding. Second, they contend that the issue is not ripe for judicial determination, as plaintiff has failed to exhaust his administrative remedies. Finally, they contend that the time has expired for plaintiff to obtain the relief he seeks.

Since defendants' motion is premised on procedural grounds and would foreclose consideration of the substantive merits of the action, the court will consider the cross motion first.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact (*Guiffrida v. Citibank* 100 NY2d 72, 81 [2003]). Once the movant has made such a showing the burden shifts to the party opposing the motion to produce evidence in an admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action (*Id*).

NYCAC § 26-235 requires that any structure or part of a structure that is unsafe shall be removed or repaired, so that it no longer poses a threat. NYCAC § 26-236 provides that, upon receipt of a report that a structure is unsafe, the superintendent of DOB shall enter the report on a docket of unsafe structures and serve notice on the owner of the property on which the structure is located. The notice must contain a description of the property and an order directing that the structure be made safe or removed, and must give the owner the option to accept or reject the order. If the owner does not accept the order, the notice shall inform the owner that a survey of the premises will be conducted and the matter will be set down for a trial before the supreme court. NYCAC § 26-239 provides that a trial will be conducted on the issue of whether the structure is safe and, if the trial justice determines that the structure is unsafe, the justice will issue a precept stating as much and directing the superintendent to repair or remove the structure. NYCAC § 26-241 provides that, upon approval from the justice who issued the precept, the superintendent may requisition from the comptroller for the expenses associated with the repair or demolition of the structure. NYCAC § 26-242 provides that the judge who issued the precept shall issue a judgment in the amount of the expenses of the demolition, including appropriate taxes, and an order of sale of the real property on which the premises was located. A *lis pendens* shall be filed with the clerk of the county in which the property is located.

Where an agency acts without a hearing, the proper means to obtain judicial review of its actions is by an Article 78 proceeding in the nature of mandamus to review, which is embodied in CPLR § 7803 (3) *(Hudson River Fisherman's Association v. Williams*, 139 AD2d 234, 238 [1st Dept 1988]). CPLR § 7803 (3) allows that, under an Article 78 proceeding, a petitioner may seek review of a determination made by a body or an officer on the grounds that it was made in violation of a lawful procedure. While the "wherefore clause" of his complaint seeks to compel defendants to act, plaintiff has brought this action to obtain judicial review of the propriety of the defendants actions in fixing the demolition costs, billing 334 for those costs, and placing liens on the property. As grounds for review, plaintiff alleges (but has not established) that HPD and DOF acted in violation

of NYCAC §§ 26-236, 26-239, 26-241, and 26-242. This action fits squarely within CPLR § 7803 (3), as it challenges the determinations of administrative agencies, HPD and DOF, on the grounds that they acted in contravention to a legally required procedure. Accordingly, plaintiff should have commenced an Article 78 proceeding rather than a plenary action. Plaintiff's contention that no formal administrative determination was made that could be challenged is incorrect. The action's in question - fixing the demolition costs, billing 334 and recording liens on the property - are subject to review under Article78. That they were not made by a formal tribunal pursuant to a quasi-judicial hearing simply means that they are subject to review under § 7803 (3) rather than § 7803 (4). Accordingly, plaintiff should have commenced an Article 78 proceeding instead of this plenary action.

While plaintiff's failure to bring the instant action as an Article 78 proceeding does not prevent such relief from being afforded were he to prove his claim, Article 78 proceedings are governed by a very short statute of limitations. CPLR § 217 (a) provides that a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or after the respondent's refusal, upon the demand of the petitioner to perform its duty. Where a determination is clear and certain as to its effect, the time in which an aggrieved party must bring a proceeding is judged from the date that party receives notice of the determination (*In the Matter of Allied Sanitation v. Aponte*, 142 AD2d 511, 512 [1st Dept 1988]). All subsequent purchasers are deemed to have notice of an encumbrance on the title of real property when that encumbrance has been recorded (*Doyle v. Lazaro, et. al.*, 33 AD2d 142, 143 [3rd Dept 1970], *aff'd* 33 NY2d 981 [1974]). Where an Article 78 proceeding is the correct means for the relief sought, the four-month statute of limitations provided in CPLR § 217 (a) applies, even where relief is not sought an Article 78 proceeding (*Leon v. New York City Employee's Retirement System*, 240 AD2d 186 [1st Dept 1997]).

Here, plaintiff challenges the HPD's determination of the expenses and DOF's billing the costs to 334 and filing the liens. These actions were final on the dates DOF sent out bills. Plaintiff

received constructive notice of these actions on the dates DOF recorded the liens on the property, namely November 21, 2001, and November 20, 2002. Therefore, the four month period in which plaintiff could challenge these actions began on those dates. Plaintiff did not commence this action until May 24, 2005, approximately two and one half years after the last lien was recorded. As such, his claim is time barred. That plaintiff brought a plenary action instead of an Article 78 proceeding does not extend plaintiff's time to seek the relief he wants. Plaintiff's remaining arguments on this point are without merit.

Since defendants have made a *prima facie* showing that plaintiff's action is time barred, and plaintiff has not raised a material question of fact on that issue, defendants' motion for summary judgment is granted. Plaintiff's motion for summary judgment on its claims against HPD, DOF, and the City are denied as moot. Plaintiff's request for an order declaring that he has "the right to enforce contracts against Gateway and NBI and pursue damages, as a party to the contract, either by assignment or agency" is denied without prejudice, as those entities are not parties to this action.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied as moot, and it is further

ORDERED that defendants' cross motion for summary judgment dismissing the complaint is granted, and the clerk shall dismiss the instant complaint.

This constitutes the decision and order of the court.

The Clerk is directed to enter judgment accordingly.

Dated: October 11, 2005
New York, New York

ENTER:

KAREN S. SMITH, J.S.C.