

105 Street Associates v City of New York

2006 NY Slip Op 30028(U)

October 10, 2006

Supreme Court, New York County

Docket Number: 8_30060/2539

Judge: Paul G. Feinman

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: PAUL G. FEINMAN

PART 52

Index Number : 602539/2003

105 STREET ASSOCIATES, LLC

vs

CITY OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. 602539/2003
MOTION DATE 6/14/04
MOTION SEQ. NO. 002
MOTION CAL. NO. 11

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 2 (Cross Motion)

Replying Affidavits Confidential material on deletion

Cross-Motion: Yes No

PAPERS NUMBERED

1, 2

3, 4, 5

6-10

11

Upon the foregoing papers, it is ordered that this motion cross motion was
decided in accordance with the annexed
memorandum decision & order wherein
the Court has granted partial summary judgment
to defendants, the 1st, 2nd, 3rd, 4th & 7th c/a are
dismissed. See order annexed hereto.

cc 10/15/06 2 am
PD Carter, Rm 102

FILED

OCT 16 2006

NEW YORK COUNTY CLERK'S OFFICE

Dated: 10/10/06

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM: PART 52

----- X
105 STREET ASSOCIATES, LLC,

Plaintiff,
-against-

Index No. 602539/2003
Mot. Seq. No. 002
Mot. Sub. Date 6/14/04
Motion Cal. No. 11

THE CITY OF NEW YORK, JERILYN PERINE, in her
official capacity as Commissioner of the City of New York
Department of Housing Preservation and Development,
and MARTHA E. STARK, in her official capacity as
Commissioner of the City of New York Department of
Finance,

Defendants.
----- X

APPEARANCES:

For the Plaintiff:
Farrell Fritz, P.C.
By: Peter A. Mahler, Esq.
600 Third Avenue, 18th Fl.
New York NY 10016
(212) 687-1230

For the Defendants:
Michael A. Cardozo, Esq.
By: Mark W. Muschenheim, Esq.
100 Church Street
New York NY 10007
(212) 422-0573

Papers considered in review of this motion and cross-motion for summary judgment:

| Papers | Numbered |
|--|-----------------|
| Notice of Motion, Affidavits Annexed, and Memo of Law..... | <u>1, 2</u> |
| Affidavits in Opp of Motion and in support of Cross-Motion..... | <u>3, 4</u> |
| Notice of Cross-Motion, Affidavit and Memo of Law in Opp..... | <u>5, 6, 7</u> |
| Reply Affidavits and Affirmations & Memo of Law in Further Support..... | <u>8, 9</u> |
| Reply Memo of Law in Opposition..... | <u>10</u> |
| Confidential materials submitted per stipulation for in camera review..... | <u>11</u> |

PAUL GEORGE FEINMAN, J.:

Defendants move pursuant to CPLR 3212 for an order granting summary judgment and dismissal of the complaint. Plaintiff cross-moves pursuant to CPLR 3212 for an order granting partial summary judgment invalidating the subject demolition charges and liens and directing the City of New York to discharge said liens. For the reasons set forth below, the motion is granted in part and the cross-motion is denied.

Factual and Procedural Background

Plaintiff is a limited liability company owned by the principals of a development

company called BFC Partners (BFC) which has been involved in approximately sixty real estate development projects in New York City over the last twenty years (Not. of Cross-Mot. Ex. A, Complaint [hereinafter Complaint] ¶ 1; Capoccia Aff. in Opp. ¶¶ 2-3, 34-35). Defendants are the municipal government of the City of New York and two commissioners of agencies charged with the placement and discharge of liens on real property located within the City of New York (Complaint ¶ 3).

The property at issue was originally comprised of three contiguous buildings located at 235, 239, and 243 East 105th Street (Lots 15, 16 and 18), in New York County (Complaint ¶ 2). According to defendants, on December 15, 1997, the City's Department of Buildings (DOB) determined that the buildings were in imminent danger of collapse due to extensive fire damage (Not. of Mot. Ex. A [DOB Emer. Decl. Form, pertaining to "243-247 East 105th St."]). The DOB wrote to the property's then owner Karel Simek on December 15, 1997, misspelling his name as "Karen," instructing him to correct the condition at "243-247 East 105th Street" immediately and informing him that if he did not, "the city will perform the necessary work and seek to recover its expenses from you." (Not. of Mot. Ex. B). Two days later, the New York City Department of Housing Preservation and Development (HPD) notified Simek and his wife, by return receipt signed on December 18, 1997, that it had received an "Immediate Emergency Declaration" from the DOB requesting demolition of 243 East 105th Street and was in the process of processing a contract to demolish the "building(s)" and would seek reimbursement (Not. of Mot. Ex. B). Simek apparently failed to respond; the City began demolition on December 24, 1997 and completed the job on January 26, 1998 (Not. of Mot. Ex. C) [HPD Final Demol. Rep.]).

In about September 1998, Donald Capoccia, a partner of BFC Partners, first saw the now

vacant lots on East 105th Street (Capoccia Aff. in Opp. ¶¶ 5, 7, 27). In October 1998, through plaintiff's predecessor in interest, BFC entered into arm's-length negotiations with Simek to purchase the property (Capoccia Aff. in Opp. ¶¶ 9-10).¹ The intent was to construct middle-income rental apartments (Capoccia Aff. in Opp. ¶¶ 11-12, Ex. 1). According to plaintiff, the financing arrangements ultimately consumed nearly three years largely because Simek had not paid real estate taxes liens filed by the New York City Department of Health for unpaid pest control charges for the years 1990-1996, and plaintiff's representatives attempted to negotiate with the Mayor's Office and HPD in an effort to resolve the tax and liens (Capoccia Aff. in Opp. ¶¶ 13, 40-43).² These issues, "among others," caused plaintiff to seek a reduction in the purchase price of the property. The contract with Simek was amended, and the Closing Statement was ultimately signed by plaintiff and Simek on June 28, 2001 (see Capoccia Aff. in Opp. Ex. 3).³

Plaintiff argues that it had no knowledge of the HPD demolition charges on or before June 28, 2001. During plaintiff's discussions and negotiations with the City and HPD, plaintiff's Capoccia avers that HPD never advised "that it had undisclosed demolitions charges over

¹Plaintiff's predecessor in interest was 105th Street Development Corp. (Capoccia Aff. in Opp. ¶ 10). Capoccia is a member of plaintiff.

²In January 2001, plaintiff's predecessor in interest commenced an Article 78 proceeding to discharge the lien, which ultimately resulted in a settlement in January 2002 that waived payment of interest and penalties (Capoccia Aff. in Opp. ¶ 15; Ex. 2 [Stip. of Settl.]).

³On June 20, 2001, eight days before the closing, Simek wrote to HPD contesting the initial emergency charges pertaining to Lots 15 and 18 (235 and 243 East 105th) on the grounds that he had not received notice of repairs and that the charges did not pertain to the buildings (Not. of Mot. Ex. L [Simek Letter, June 20, 2001]). HPD responded more than 11 months later, on May 22, 2002, providing documents and advising him that if he wished to protest the charges, he should do so within 30 days (Not. of Mot. Ex. L [HPD Letter, May 22, 2002]).

\$400,000, much less that it intended to file liens against the Properties long after 105 acquired title and secured HDC financing.” (Capoccia Aff. in Opp. ¶ 44). According to plaintiff, its real estate counsel engaged a qualified title agent, Royal Abstract of New York, LLC, to perform “multiple searches” of various municipal agencies and pertinent public records to ascertain whether there were unpaid charges, liens, or charges for works in progress concerning the properties in question (Capoccia Aff. in Opp. ¶¶ 19-20). Royal’s updated report, issued “prior to” the June 28, 2001 closing, did not indicate any HPD demolition charges (Capoccia Aff. in Opp. ¶¶ 21-22).

Plaintiff alleges that it only became aware of the HPD charges for the demolition of the three buildings in March 2002 when Royal’s search disclosed “emergency repairs in progress” for demolition work “at each site for a total of \$450,000” (Capoccia Aff. in Opp. ¶ 26, Ex. 4). Plaintiff concluded that as the property had been vacant since at least late 1998, the reports citing work in progress “obviously were incorrect.” (Capoccia Aff. in Opp. ¶¶ 27, 28). On November 13, 2002, after the liens were filed, a representative from S.J. Carroll Jr., Inc., a company hired by plaintiff’s title insurer, commenced a short series of letters with HPD seeking cancellation of the liens (see Affidavit of Carmine Coppola of Feb. 15, 2005 [hereinafter Coppola Aff.], Exs. 2-5 [Letters of Nov. 13, Dec. 5, Dec. 13, 2002]). S.J. Carroll, Inc., which specializes in researching municipal records, argued to HPD that 105 Street Associates should be considered an “innocent purchaser” as the search undertaken by the title company prior to the closing did not reveal any record of pending charges, and it was not billed “until July 2002,” with the liens only filed thereafter. HPD Associate Commissioner Vito Mustaciuolo denied “bona fide purchaser” status. He stated that the HPD Demolition reports existed as hardcopy in the HPD offices at 100 Gold

Street and should have been checked by the title company, and that the demolition information was also on HPD computers at the time of the purchase and was also provided to the Land Title Association in an electronic file format for distribution to its members.

According to HPD, the standard work order completed by HPD is called an Open Market Order and includes various details pertaining to emergency repairs undertaken by the City (Not. of Mot., Peskin Aff. ¶ 4). Open Market Orders are recorded on HDP Info, a publicly available computer database maintained by HPD that allows members of the public to have the Orders available to them within 24 hours after their entry (Not. of Mot., Peskin Aff. ¶¶ 2-4). According to defendants, HPD entered the data concerning the work performed at issue into the department records on February 8, 2001 for Lot 16, March 21, 2001 for Lot 18, and March 28, 2001 for Lot 15 (Cross-Mot. Ex. C [Def. Sec. Amended Resp. & Obj., Ans. to 4[d]]).⁴ In addition, HPD Associate Commissioner Mustaciuolo, avers that since at least February 2001, the charges relating to the demolition of the three buildings existed on a hard copy list which was, and is, kept available in the HPD office “immediately adjacent to” the computers at which the public can access HPD Info (Not. of Mot. Mustaciouso Aff. ¶¶ 1-3; and Ex. I [Demol. Hardcopy Rep.]). Defendants thus argue that when plaintiff ordered a Continuation Title Search in June 2001, it could have ordered a more comprehensive search at a slightly higher cost, which would have revealed the existence of the Open Market Orders in the HPD file (see, e.g., Not. of Mot. Ex. F [EBT testimony of Martin Kravet, president of Royal Abstract Company, a title insurance agent, esp. p. 24]; Ex. H [EBT testimony of David Carroll, of S.J. Carroll, Inc., municipal records

⁴It is not entirely clear whether this statement refers to the Open Market Order recorded in HDP Info.

research company, esp. pp. 11,15, 20-21] [concerning expanded searches]; see also, Ex. K [Pl. Letter with Continuation Title Search]).

Defendants state that bills and demands for payment in the amount of \$366.80 were issued for each Lot on May 31, 2001. The bills concerning Lots 15 and 18 were mailed to Simek, while for Lot 16, they were mailed to the property location as there was no other address listed with the Department of Finance. Subsequently, bills and demands for payment in the amount of \$141,817.24 were issued as to Lot 16 on June 26, 2002 and as to Lots 15 and 18 on July 26, 2006 (Not. of Cross-Mot. Ex. C [Def. Second Amend. Resp. at 3, Ans. to No. 2]).⁵ The charges were all entered into the Department of Finance records about 30 days after their respective billing dates (Not. of Cross-Mot. Ex. C [Def. Second Amend. Resp. at 6, Ans. to No. 7]). A second round of billing occurred on July 31, 2002 (as to Lot 16) and August 27, 2002 (as to Lots 15 and 18) (Not. of Cross-Mot. Ex. C [Def. Second Amend. Resp. at 7, Ans. to No. 10]). Liens against Lots 15 and 18 were filed on August 26, 2002, and against Lot 16 on September 29, 2002 (Complaint ¶¶ 8, 9).

This action to discharge the liens and for other related relief was commenced on August 12, 2003 by the filing of the summons and complaint. The complaint is based on plaintiff's contentions that the demolition liens at issue are invalid because defendants failed to comply with statutory requirements concerning recording and notice as to the demolition charges and because they were filed more than a year after plaintiff acquired the property. Plaintiff also contends that it had no opportunity to be heard on the proceedings or the reasonableness of the charges and that the previous owner had no notice of the costs of the demolition.

⁵The demolition liens total \$425,451.69 [Pl. Memo of Law in Opp. p. 7]).

The complaint asserts seven causes of action/prayers for relief: (1) a declaratory judgment that the liens are invalid and must be canceled and removed because defendants failed to comply with section 27-2144 of the Administrative Code of the City of New York (the "Code"); (2) a mandatory injunction directing defendants to cancel the liens; (3) damages based on defendants' alleged slander of title; (4) damages based on defendants' alleged disparagement of title; (5) discharge of the liens and damages based on defendants' alleged failure to give plaintiff a hearing in violation of plaintiff's due process rights guaranteed by the State and Federal Constitutions as well as violation of 42 USC §1983; (6) discharge of the liens and damages based on defendants' alleged failure to give plaintiff reasonable notice in violation of plaintiff's due process rights and violation of 42 USC § 1983; and, (7) an alternative declaration that section 27-2144(b) of the Code is void for vagueness under the due process guarantees of the State and Federal Constitutions and in violation of 42 USC §1983, plus damages (Complaint pp.5-8).⁶

Parties' Contentions

In support of their motion for summary judgment, defendants argue that plaintiff's first two causes of action are barred by the four-month statute of limitations set forth in CPLR 217(1) because the placing of a lien on real property by HPD is an administrative act governed by Article 78 of the CPLR. Defendants further contend that had plaintiff performed a proper search of HPD's records, it would have learned prior to its closing of the existence of the demolition work orders entered into the HPD system. As to the plaintiff's causes of action for slander and disparagement of title, defendants argue that they cannot be sustained because plaintiff failed to file a timely notice of claim and failed to establish the elements required to maintain such claims.

⁶Issue was joined on September 23, 2003.

Defendants argue that plaintiff's two due process claims fail because the prior owner of the properties was given notice of the emergency conditions and an opportunity to contest the demolition charges, and plaintiff was given the opportunity to establish that it did not have notice of the liens after it purchased the properties. Finally, defendants argue that the claim based on unconstitutional vagueness must fail because the statute in question, Administrative Code § 27-2144(b), does not regulate future conduct and is sufficiently definite as to the conduct required.

In opposition and in support of its cross-motion, plaintiff contends that it is entitled to summary judgment discharging the liens because defendants do not dispute that they failed to record the demolition work orders within 30 days after issuance as mandated by section 27-2144(a) of the Code. According to plaintiff, the printouts purporting to show that defendants complied with the statute by entering work orders on the HPD Info computer database in February and March 2001 are not admissible evidence because defendants have not established a proper foundation for their admission. Plaintiff also claims that title reports did not disclose the existence of the work orders and that an emergency repair search conducted at HPD's office prior to 2001 did not disclose the existence of the work orders in HPD's computer, lien book, or Demolition List. Plaintiff further contends that its action is not barred by the four-month statute of limitations as it was not constrained to bring the action as an Article 78 proceeding and was not required to serve a notice of claim when seeking equitable relief for slander of title. It also argues that its due process claims raise triable issues.

Legal Analysis

Summary judgment is proper when there are no issues of triable fact (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). It is a drastic measure and to be used sparingly (*Wanger v*

Zeh, 45 Misc 2d 93 [Sup. Ct., Albany County], *aff'd* 26 AD2d 729 [3rd Dept 1965]). Issue finding rather than issue determination is its function (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Weiss v Garfield*, 21 AD2d 156 [3rd Dept 1964]). “Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied.” (*Daliendo v Johnson*, 147 AD2d 312 [2d Dept 1989]).

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]).

At issue here is section 27-2144 of the New York City Administrative Code. Section 27-2144 addresses the procedure by which HPD can enforce a lien against the property where an owner refuses to pay for the cost of work undertaken to correct dangerous conditions.⁷ Subsection (b) states that all expenses incurred by the City agency for the repair or the elimination of the dangerous or unlawful conditions shall constitute a lien upon the premises which will be filed in the office of the Department of Finance. In order to enforce the lien against a subsequent good faith purchaser, however, subsection (a) requires that there

shall be filed in the office of the department [HPD] *a record of all work* caused to be performed by or on behalf of the department. Such records shall be kept on a building-by-building basis and *shall be accessible to the public* during business hours. *Within thirty days after the issuance of a purchase or work order to cause*

⁷Section 27-2125 of the Administrative Code allows authorizes City agencies to correct a dangerous condition on a property where an owner will not, and then charge the owner for the costs.

a repair to be made by or on behalf of the department, entry of such order shall be made on the records of the department. Such entry shall constitute notice to all parties.

(NYC Admin. Code §27-2144[a] emphasis added). According to the statute, if the issuance of a purchase or work order was not entered into the departmental records within thirty days, the lien may not be enforced against a subsequent purchaser in good faith, however

this limitation shall only apply to transactions occurring after the date such record should have been entered pursuant to subdivision a and the date such entry was made.

(NYC Admin. Code §27-2144[b]).

1. Statute of Limitations

a. First and Second Causes of Action (Discharge of Liens)

Defendants seek summary judgment and dismissal of the first two causes of action based on the running of the four-month statute of limitations pursuant to CPLR Article 78. Defendants argue that the four-month statute of limitations is proper pursuant to *SJL Realty Corp. v City of Poughkeepsie*, 133 AD2d 682, 682 (2nd Dept. 1987), which held that the imposition of a lien and levy by an administrative body is “rather essentially administrative . . . If the performance of such duties is to be judicially reviewed, a proceeding pursuant to CPLR 78 is the appropriate vehicle for doing so.”

Plaintiff argues in opposition that the court is bound by *Rosenbaum v City of New York*, 272 AD2d 91 (1st Dept. 2000), *rev'd on other grounds* 96 NY2d 468 (2001), which also concerned a plaintiff who sought to discharge a lien filed on a property subsequent to the plaintiff's purchase. In *Rosenbaum*, where the City argued that the matter was subject to the four-month CPLR Article 78 statute of limitations, the First Department ruled that the owner

“was not constrained to bring th[] matter in the nature of an article 78 proceeding.” (272 AD2d at 95). In the next sentence, the Court stated, “[t]he applicable time limitation for a slander of title action is one year.”⁸ Thus, argues plaintiff, as in *Rosenbaum*, the statute of limitations in the present action is one year.

Plaintiff’s contention that *Rosenbaum* is controlling here is unpersuasive as it takes certain sentences from the Appellate Division decision out of context. In the verified complaint in *Rosenbaum*, the first cause of action seeking discharge of the liens stated in part: “[t]he placing of liens on the premises was illegal, in violation of the Administrative Code . . . and is a slander of plaintiff’s title *** and must be discharged of record.” (Not. of Cross. Mot. Ex. Z [Ver. Complaint, *Harold Rosenbaum v City of New York, et al.*, ¶¶ 17-18, Sup. Ct., Bronx County 1994]).⁹ Thus, although plaintiff argues otherwise (see Pl. Reply Memo pp. 3-4), a fair reading of the First Department’s decision suggests that its holding spoke specifically to the drafting of the pleadings and the arguments in the papers.

Rosenbaum sought in its one cause of action (entitled “Discharge of Liens”) both to discharge the liens *and* monetary damages for slander of title. Here, the complaint’s first and second causes of action seek solely the equitable relief of discharge of the liens, while the third and fourth causes of action claim slander and disparagement of title. Therefore, the court must, in deciding the motion for summary judgment and dismissal of the complaint, analyze each cause of action separately.

The first and second causes of action seeking to discharge the liens are in essence a

⁸This matter was not readdressed by the Court of Appeals.

⁹The only other cause of action in the verified complaint was for damages and costs.

challenge to the HPD's determination to file the liens. An administrative determination becomes final and binding, and the applicable statute of limitations begins to run, when the administrative action has its impact upon a party and the party is aggrieved thereby (*Matter of Edmead v McGuire*, 67 NY2d 714, 716 [1986]; *Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]). The statute of limitations will not commence to run until the aggrieved party is notified of an administrative determination that is unambiguous and certain in its effect (*Matter of Edmead v McGuire* at 716).

The courts routinely hold that review of administrative decisions concerning various types of liens should be commenced by an Article 78 proceeding (*see, e.g., Atkinson v City of New York*, 96 NY2d 809 [2001] [article 78 proceeding to prohibit City from enforcing workers' compensation lien]; *Matter of Art-Tex Petroleum v New York State Dept. of Audit and Control*, 93 NY2d 830 [1999] [article 78 proceeding to annul and vacate an environmental lien on petitioner's land filed following a petroleum discharge]; *Matter of Bethelite Commun. Church v Department of Envir. Protec. of City of New York*, 27 AD3d 256 [1st Dept. 2006] [article 78 petition brought to compel exemption from certain municipal charges and to abate tax liens arising from those charges]; *see also, SJL Realty Corp. v City of Poughkeepsie*, 133 AD2d 682; *Triway Realty Corp. v City of New York*, 218 AD2d 592, 594 [1st Dept. 1995] [proper method to challenge lien was by Article 78 proceeding not by declaratory action]). Article 78 procedures are governed by CPLR 217(1) which provides that these proceedings must be commenced within four months of the date of the final determination (*Carter v State of New York*, 95 NY2d 267, 270 [2000]). Although plaintiff notes the factual and procedural distinctions amongst *SLJ Realty*, *Triway Realty* and the present action (Pl. Reply Memo p. 6), the law is nonetheless clear that a party seeking to challenge the imposition of a lien must bring an Article 78 proceeding and

is bound by that proceeding's statute of limitations.

Accordingly, because plaintiff did not commence its action within four months of when the liens were placed on August 26, 2002 and September 29, 2002, defendants' motion for summary judgment and dismissal of the first two causes of action is granted; plaintiff's cross-motion for summary judgment as to the first two causes of action is denied as academic.

b. Third and Fourth Causes of Action (Slander/Disparagement of Title)

Defendants' motion for summary judgment and dismissal of the third and fourth causes of action on the ground that they were untimely commenced, is denied. A cause of action for slander of title begins to accrue on the date that the lien is recorded (*Rosenbaum v City of New York*, 24 AD3d 349, 355 [1st Dept. 2005]; *lv to appeal granted* 2006 NY App. Div. LEXIS 4428 [1st Dept. 2006]). Here, where the liens were recorded on August 26, 2002, and September 29, 2002, and the action was commenced on August 12, 2003, the claims are timely.

2. Third and Fourth Causes of Action (Slander/Disparagement of Title)

Defendant seeks summary judgment and dismissal of the third and fourth causes of action, based on slander of title, for failure to file a notice of claim, and failure to establish the elements of the claim. The failure to file a notice of claim here is not, however, fatal because "[no] notice of claim is required in an action against a municipality where money damages are demanded incidental to the equitable relief sought [citations omitted]." (*Greaney v Springer*, 266 AD2d 707, 708 [3d Dept 1999]; *American Pen Corp. v City of New York*, 266 AD2d 87, 88 [1st Dept 1999]).

"The elements of a cause of action for slander of title are: a communication (1) falsely casting doubt on the validity of complainant's title; (2) reasonably calculated to cause harm; and

(3) resulting in special damages [citation omitted]" (*Rosenbaum v City of New York*, 24 AD3d at 355). In a claim for slander of title, the element of special damages "must be pleaded and later proved" (*Carnival Co. v Metro-Goldwyn-Mayer, Inc.*, 23 AD2d 75, 77 [1st Dept. 1965]).

Plaintiff urges the court to rely on *Rosenbaum*, 24 AD3d 349, which denied summary judgment and upheld the claim of slander of title for trial. In that case, the Court held that the elements of slander of title had been made out. The false communication was the liens which had been found invalid. The element of intent to cause harm was sufficiently called into question by the fact that the City had commenced a separate action, later withdrawn, to foreclose on the liens (24 AD3d at 351). As for the element of special damages, plaintiff argues that *Rosenbaum* stands for the proposition that a claim for slander of title accrues upon the filing of the improper liens, "without more. In other words, a plaintiff need not suffer or allege further, special damages such as subsequent lost sale." (Pl. Reply Memo p. 9). This argument however fails to take into account that according to the First Department in *Rosenbaum*, "the complaint did not adequately plead special damages" but the trial court had allowed it to be amended (5 AD3d at 154), and the plaintiff had also offered evidence of a lost sale (*Id.*).

Reading the affidavits herein broadly, it could be found for purposes of the motion, that plaintiff establishes an intent by defendants to cause harm by HPD's failure to inform plaintiff during the years of negotiations over the other liens and outstanding taxes, that there were \$450,000 in work orders that it intended to file as liens. However, the court is unable to determine without resort to rank speculation what special damages plaintiff has accrued, and plaintiff has not pled that element. Therefore, as plaintiff does not set forth a prima facie case of slander of title or disparagement of title, the motion for summary judgment is granted and the third and fourth causes of action are dismissed.

3. Fifth and Sixth Causes of Action (Due Process and 42 USC § 1983)

Defendant seeks summary judgment and dismissal of the fifth and sixth claims pertaining to notice and reasonable opportunity to be heard. Plaintiff's fifth claim is that it was not afforded an opportunity to be heard as to the reasonableness of the proceedings or the charges (Complaint ¶¶ 45-46). Its sixth claim is that HPD's system of recording emergency demolition charges is inconsistent, inadequate, haphazard, unreliable, nonuniform, and outdated, and does not provide reasonable constructive notice of such charges against real property (Complaint ¶¶ 48-52). For both, plaintiff alleges that defendants are liable under the Federal Civil Rights Act, section 1983 of Title 42 of United States Code (Complaint ¶¶ 47, 53).

Due process is "a flexible concept which tailors procedural protections to particular facts." (*Curiale v Ardra Ins. Co.*, 88 NY2d 268, 274 [1996]). It requires a balancing of the State's interests and administrative burdens against the need to safeguard the individual's interest by requiring actual notice of specific government actions (*Gardens Homes Woodlands Co. v Town of Dover*, 95 NY2d 516, 519 [2000], citing *Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 314 [1950]). In examining a claim of violation of due process rights, the court must examine "three distinct factors": the private interest that is affected by the official action; the risk of erroneous deprivation of the interest through the procedures used, the government's interest, including the function involved, and the fiscal and administrative burdens that additional or substitute procedural requirement would entail (*Curiale*, quoting *Mathews v Eldridge*, 424 US 319, 335 [1976]).

In a section 1983 action, the initial inquiry focuses on the presence of two essential elements: (1) conduct committed by a person acting under color of state law, (2) which deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United

States (*Hughes Vil. Rest. Inc. v Village of Castleton-on-Hudson*, 11 Misc.3d 1060A, 2006 NY Slip Op. 50319U [Sup. Ct. Renssalaer County 2006] [citing *Parratt v Taylor*, 451 U.S. 527, 535, [1981], *overruled on other grounds*, *Daniels v Williams*, 474 U.S. 327 [1986]). In a procedural due process claim, what is unconstitutional is not in itself the deprivation by state action of a constitutionally protected interest in life, liberty, or property but the deprivation of such an interest without due process of law (*Id.*, citing *Zinerman v Burch*, 494 U.S. 113, 125, [1990]).

Here, there is no question that the actions taken by defendants were taken under color of State law. Nor, contrary to defendants' argument otherwise, is there any real issue that a lien is an impairment of a property right (see *Rosenbaum v City of New York*, 272 AD2d at 98 [Rubin dissent]). Although defendants argue that it complied with the spirit if not the letter of the statute, plaintiff raises a question of fact as concerns the sufficiency of the notice sent to Simek and the ability of either Simek or plaintiff to challenge it pursuant to sections 27-2146(b) and 27-2129 of the Code (Pl. Memo of Law in Opp. pp. 37-38). Indeed, the initial notice stating the need for emergency repairs did not mention 235 East 105th Street. The December 17, 1997 notice concerning the immediate emergency declaration, mailed return receipt requested, referred only to 243 East 105th Street. Thus, it is not clear that Simek was given sufficient notice that all three of the buildings were in imminent peril.

Moreover, although Simek only protested a partial lack of notification in June 2001, the City's desultory response made 11 months later, informing him that he had 30 days to set forth in writing any objections to any of the charges, places plaintiff in an unconscionable position. Plaintiff is apparently bound by whatever Simek did or, more likely, did not do. The first demands for payment were properly sent to Simek, who was owner at the time the demolition work was performed (see NYC Admin. Code § 27-2129; see also *Department of Hous. Pres. and*

Devel. of the City of N.Y. v 849 St. Nicholas Equities, 141 Misc.2d 258, 270 [Civ. Ct., New York County 1988]). There is no evidence that the demands were contested by him, and accordingly, by statute the amounts may not be challenged (NYC Admin. Code § 27-2129) (“If the owner does not within thirty days of service of such statement, notify the department in writing of his or her objection to the statement of expenses or any individual item therein, such owner may not in any subsequent judicial or administrative proceeding contest any item contained in such statement.”). Thus, even though the bills were only issued *after* the property was sold, plaintiff appears to have no recourse to contest the validity of the charges.

Plaintiff also raises questions concerning the length of time the entire process took and whether due process rights were violated on that ground.. Leaving aside the issue of when the work orders were “published,” there is no dispute that the demands and bills were issued years after the buildings were demolished. In *849 St. Nicholas Equities*, the Civil Court of the City of New York held that although there was no “mechanical rule” to be discerned from section 27-2144 of the Code, it would “refuse to give conclusive effect to a ‘statement of expenses’ which is served more than six months after DHPD incurs ERP expenses.” In that case, where the statements covered periods in excess of three years, the court held “*they are all stale.*” (141 Misc. at 270, emphasis added). Defendants offer no justification for the manner in which this process is conducted.

Additionally, the very fact that the parties offer conflicting evidence concerning whether HPD documents were accessible and when, whether screen printouts are viable or not, whether hardcopy reports existed at any particular time in an age of computerization, and what complexity of title search is adequate to turn up outstanding work orders, are all sufficient to raise issues of fact.

Accordingly, defendants' motion for summary judgment and dismissal of the sixth cause of action is denied.

4. Seventh Cause of Action (Void for Vagueness and 42 USC § 1983)

Defendant seeks summary judgment and dismissal of the seventh cause of action which seeks in the alternative a finding that if plaintiff is found to be a subsequent purchaser under the law, then section 27-2144(b) of the Code is void for vagueness.

A statute is presumed valid, and therefore a party seeking to invalidate it must show beyond a reasonable doubt that it is unconstitutional (*Matter of Travis*, 96 NY2d 818, 820 [2001], citing *People v Foley*, 94 NY2d 668, 677, cert. denied 531 US 875 [2000]; *People v Bright*, 71 NY2d 376, 382 [1988]; *People v Tichenor*, 89 NY2d 769, 773, cert. denied 522 US 918 [1997]). "A statute is 'unconstitutionally vague if it fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and it is written in a manner that permits or encourages arbitrary or discriminatory enforcement'" (*Matter of Travis*, at 820, quoting *People v Foley*, 94 NY2d at 681).

Plaintiff contends that in particular, part of subsection (b) of section 27-2144 of the Code is unconstitutionally void. The pertinent part reads:

no lien created pursuant to this chapter shall be enforced against a subsequent purchaser in good faith. . . unless the requirements of subdivision a of this section are satisfied; this limitation shall only apply to transactions occurring after the date such record should have been entered pursuant to subdivision a and the date such entry was made.

(NYC Admin. Code §27-2144[b]). Plaintiff points in support of its argument to the Court of Appeals's dictum in *Rosenbaum*, that "the statutory scheme, to put it mildly, 'is not a model of clarity'" and its suggestion that "the appropriate legislative bodies revisit this statutory scheme to clarify its purpose and design" (96 NY2d at 474).

Plaintiff argues that the statute as a whole requires HPD to computerize or otherwise make available the work records to the public within 30 days of issuance of a work order, or forfeit enforcement of the lien against any subsequent purchasers in good faith (Pl. Memo of Law p. 10). It cites the Court of Appeals' holding in *Rosenbaum* that “[t]o take priority over liens and encumbrances arising after the issuance of purchase or work orders, HPD must file those purchase and work orders in its own building-by-building index in accordance with section 27-2144(a).” (96 NY2d at 473). Section 27-2144(a), of course, states that HPD is to record orders into its system within 30 days of the work orders. Plaintiff thus argues that, following *Rosenbaum*, because HPD admittedly did not enter the work orders into the system within 30 days, the liens are not enforceable.

This argument ignores the presence of the second part of section 27-2144(b). *Rosenbaum* did not address itself to any analysis of the second part of subsection (b). In that case, it was conceded that the City did not file any purchase or work orders prior to the plaintiff's buying the property; the issue was whether plaintiff had actual notice, and the City was unable to establish a triable issue of fact as to that issue (96 NY2d at 474). Here, it is disputed when the work orders existed in a form accessible to plaintiff, and thus, the “limitation” section of the statute becomes relevant.

Plaintiff poses several questions concerning definitions and interpretations of various terms used in subsection (b), in an attempt to establish that it fails to pass constitutional muster (Pl. Memo of Law in Opp. p. 16-19). However, defendants' contention that the “limitation” phrase is a “savings clause” which provides that a work order filed after the 30-day rule can still result in a valid and enforceable lien as long as the order was entered prior to the purchase of the property, can withstand scrutiny on constitutional grounds. “A statute . . . is to be construed as a

whole, and all parts of an act are to be read and construed together to determine the legislative intent.” (McKinney’s Statutes § 97). The language of the “savings clause” as already noted by other courts, is poorly crafted, but it is not so rife with ambiguity that the statute is unconstitutionally vague beyond a reasonable doubt. Therefore, defendants’ motion for summary judgment and dismissal of the seventh cause of action is granted.

Plaintiff’s cross-motion for summary judgment invalidating the liens and for an order to discharge the liens is denied, for the reasons stated above. It is

ORDERED that defendants’ motion for summary judgment is granted to the extent that the First, Second, Third, Fourth, and Seventh causes of action are dismissed and otherwise denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment dismissing the First, Second, Third, Fourth and Seventh causes of action and shall sever the remaining causes of action, which shall continue under this index number; and it is further

ORDERED that plaintiff’s cross-motion is denied in its entirety; and it is further

ORDERED that defendants’ counsel shall within 10 days of entry of this Order retrieve from the Clerk of Part 52 all confidential material previously submitted to the Court for *camera* review pursuant to the parties’ stipulation; and it is further

ORDERED that the parties shall appear for a compliance conference regarding any outstanding discovery issues in Supreme Court, 80 Centre Street, room 103, at 2:00 p.m. on November 15, 2006. This conference shall not be adjourned without court approval.

This constitutes the decision and order of the court.

DATED: October 10, 2006
New York, New York


J.S.C.
HON. PAUL G. FEINMAN

FILED

OCT 16 2006

NEW YORK
COUNTY CLERK'S OFFICE