Matter of Community Counseling & Mediation Services v New York City Dept. of Health & Mental Hygiene
2006 NY Slip Op 30425(U)
August 21, 2006
Supreme Court, New York County
Docket Number: 103076/06
Judge: Nicholas Figueroa
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[* 1]
SCANNED ON 8/29/2006

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

PRESENT: HON. NICHOLAS FIGUEROA

PART 46

Index Number : 103076/2006

COMMUNITY COUNSELING

vs

HEALTH & MENTAL HYGIENE

Sequence Number : 001

ARTICLE 78

INDEX NO. 103076/06

MOTION DATE 5/12/06

MOTION SEQ. NO. 001

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this 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 See accompanying decision and judgment

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: August 21, 2006

[signature]
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: PART 46

In the matter of
COMMUNITY COUNSELING & MEDIATION
SERVICES and CCM PROPERTY, INC.,

Petitioners,

Index No. 103076/06

For a Judgment Pursuant to C.P.L.R. Article 78

DECISION
AND JUDGMENT

- against -

NEW YORK CITY DEPARTMENT OF HEALTH AND
MENTAL HYGIENE and THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER,

Respondents.

Nicholas Figueroa, J.:

Petitioner seeks a judgment, pursuant to CPLR Article 78, reversing and annulling respondents' decision to charge petitioner $27,671.88 for the cost of cleaning petitioner's property at 1416 Bedford Avenue, Brooklyn, New York. Although respondents' bill for the services was sent to petitioner in October, 2003, and the New York City Department of Finance sent a bill in February, 2004, petitioner alleges, in its attorney's reply affirmation, that this action, commenced on March 6, 2006, is timely because it was commenced within four months of a letter from respondent Comptroller dated November 7, 2005. Petitioner claims the letter constituted respondents' final determination.

Petitioner argues that the charge imposed is "unreasonable and exhibits an agency's abuse of discretion." Petitioner denies that respondent's ten person crew was necessary for the cleaning work over a fifteen day period. Instead, its attorney contends upon information and belief that

"the DOH [respondent's] clean-up work took 4-5 days and involved 4 or 5 workers." Petitioner, in addition to vacatur of respondents' determination, seeks to compel DOH to recalculate its charges.

According to petitioner's attorney, petitioner disputed the bill in a July 13, 2004 letter from its President Emory Brooks to respondent Comptroller with a copy to respondent Department of Health. The letter stated that petitioner received a June 9, 2003 letter advising it that the clean-up costs could be $1000 a day. Petitioner stated that on receiving the letter, it "mobilized local residents to clean the site in an attempt to address DOH's concerns".

Continuing, the Brooks's letter stated that "Despite [petitioner's] efforts, it has come to our attention that we were billed $24,000 for services by DOH in connection with cutting overgrown weeds and removing debris. While we greatly appreciate the efforts of DOH to keep our neighborhood clean, we are troubled by what appears to be a very large charge for the clean-up of a 90 by 100 sq. ft. lot". According to Brooks, persons living near petitioner's land "observed 4-5 people working for 5-6 days." Brooks's letter did not attach affidavits from the observers.

Petitioner submits a March 15, 2005 letter from the Comptroller to Brooks. Apparently, the letter believed petitioner was making a claim. It informed petitioner that an action could be commenced within thirty days from the filing of the claim and within one year and ninety days from the occurrence. The letter informed Brooks that he could receive additional information about a court action from the Civil Court, Kings County.

Petitioner submits a November 7, 2005 letter to Russell A. Kivler, an attorney with Hirwchen & Singer LLP. Petitioner, in its reply papers, describes the firm as its former counsel.

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The letter to Kivler informs him that DOH inspected the property on March 26, 2003 and found overgrown vegetation, discarded tires, cans, bottles, wrapping, metal scraps, broken rocks, cement blocks, and flattened cardboard boxes. The letter informed the attorney that on April 24, 2003 DOH's Commissioner issued an order to petitioner directing it to clean the property or face cleaning and removal charges of up to $1000 a day. The letter also informed the petitioner that on May 2, 2003 DOH mailed another order to it.

Continuing, the letter informed Kivler that DOH conducted a compliance inspection on May 19, 2003 that revealed "overgrown weeds, dense vegetation, rubbish and debris..." A third order was sent to petitioner on June 9, 2003 and another compliance inspection was conducted on July 17, 2003.

The letter concluded by informing Kivler that because the property continued to be in violation of the Health Code, "A final 'order of the Commissioner' was mailed to the property owner on September 4, 2003. A Bureau of Pest Control clean-up crew worked on the property for 15 days from September 19, 2003 through October 10, 2003 or a total of 60 man-hours."

In its answer to the petition, respondents assert that the conditions on petitioner's property were a nuisance under Administrative Code §17-142 and that under the Administrative Code §17-147 if the owner fails to remedy the nuisance within five days of the order to abate the nuisance, the owner can be charged with the costs of abating the nuisance.

Respondents allege that an order declaring property a nuisance may be served by substituted service, posting, or publication (Administrative Code §17-148).

Respondents allege that under Administrative Code §17-151, the cost of curing the nuisance becomes a lien on the property. The lien is presumed lawful under Administrative

Code §17-152. Under that provision, neither the lien's validity nor the lawfulness of the work done and the propriety and accuracy of the expenses incurred are subject to challenge. Further, DOH's records of the expenses are presumptive evidence of the acts in them.

Respondents allege that DOH mailed its orders to the address petitioner listed with the Department of Finance: 185 Montague Street, Brooklyn, New York 11201. Respondents note that none of the orders sent to petitioner at its listed address were returned by the Postal Service. Respondents list the orders sent to petitioner and state that the orders directed petitioner to clean the property or become subject to clean-up costs.

Respondents submit records showing the work that was required, including extermination services because of rat burrows, and the date the work was done and the hours the work was performed.

Respondents allege that pursuant to Administrative Code §17-151, DOH filed the expenses it incurred with the Department of Finance on October 29, 2003. Respondents argue that the October 29, 2003 date is the day petitioner became aggrieved and is the date the four month statute of limitations begins to run. Respondents argue that even if the October 29th date were not the final determination date, petitioner's attorney acknowledged the receipt of a February 27, 2004 delinquency notice in the notice of claim it filed with the Comptroller in July, 2004. Respondents argue that at the latest, the statute of limitations began to run from the February 27, 2004 delinquency notice and that this action was commenced well after four months from that date.

Next, respondents allege that filing a notice of claim was not the proper method of challenging the bill and that in any event, the notice of claim is not a legal challenge; rather, it is

merely a request for a reconsideration. Such a request, respondents argue, does not toll or renew the statute of limitations. Rather, the notice of claim merely gives the Comptroller the opportunity to investigate a claim. The Comptroller does not make a determination about a claim's propriety. The Department of Health is the agency whose final determination is subject to Article 78 review. Therefore, the notice of claim did not toll the statute of limitations and the date of the Department of Health's determination, not the Comptroller's decision, is the date the statute of limitations begins to run.

Respondents deny that the determination was arbitrary and capricious, arguing that petitioner was duly notified that the clean-up costs would approximate $1000 a day. Further, the Department mailed orders to petitioner in April, May, June, and September, 2003. The Department did not perform the work until September, 2003, and so petitioner had ample time to complete the work itself, thereby avoiding the assessed clean-up costs.

Respondents next argues that petitioner failed to submit proof that only four or five workers performed the work over a four to five day period. Respondents assert that its records show the number of hours worked. Petitioner has the burden of overcoming the presumption that the records are inaccurate and that the work was unnecessary.

In reply, petitioner's president, Emory Brooks alleges that when petitioner received "a citation for sanitation violations...[it] mobilized the local community to clean up the property and address the violation.". He alleges that when petitioner received another "citation" in June, 2003, local residents again removed debris from the property.

Brooks denied receiving a bill in October, 2003; rather, it received the bill in February, 2004. According to Brooks, he filed the notice of claim with the Comptroller because "I have

known that the Comptroller was an agency that can review another agency's determination." He "expected the Comptroller to decide the appeal within a reasonable time" and "did not initiate any other appeal process because we were relying on the Comptroller's determination. In addition [petitioner] did not want to undercut or preempt the Comptroller from making the decision."

Brooks further argues that petitioner did not hear from the Comptroller until February, 2006, when the Department of Health informed him about the November 7, 2005 "denial letter". Brooks alleges that petitioner did not directly hear from the Comptroller, because it sent the letter to petitioner's attorney and the attorney moved to a new address. However, Brooks alleges that this proceeding was brought within four months of the November 7, 2005 denial.

The petition must be dismissed both because it is time barred and because petitioner fails to demonstrate that the decision to impose the clean-up charge was arbitrary, capricious, and contrary to law.

Even if petitioner did not receive the Department of Health Bill in October, 2003, petitioner acknowledged receiving it in February, 2004, when it annexed the delinquency notice to the notice of claim it filed with the Comptroller. This acknowledgment of the bill starts the limitations period (see *Matter of M&D Contractors v. New York City Department of Health*, 233 AD2d 230, 231). Therefore, the claim was time-barred by June 2, 2004 before petitioner commenced this proceeding.

Filing the notice of claim did not toll the statute of limitations. A notice of claim is a condition precedent to filing a plenary action against a municipality (General Municipal Law §50-e). It is not a condition precedent to an Article 78 proceeding. Moreover, the notice only

gives the Comptroller an opportunity to investigate and possibly settle an action prior to litigation. However, it is not the litigation itself and only the commencement of litigation ends the statute's running.

Further, the notice of claim "was at best a plea for reconsideration which neither tolled the Statute of Limitations nor began anew the time in which [Article 78] review could be sought" (*Matter Johnson v. Board of Trustees of the Middle Island Public Library*, 97 AD2d 413).

Petitioner's argument that it believed the notice of claim would protect its rights is meritless. Petitioner's belief does not create a legal right where none existed.

Even if this proceeding were not time-barred, petitioner would not be entitled to relief. A court reviewing an administrative determination must decide whether the determination was arbitrary and capricious; the court must determine whether the determination was rational (see *Matter of Heinz v. Brown*, 80 NY2d 998, 1000, citing *Matter of Pell v. Board of Education,* 34 NY2d 222, 230-231). As the court's scope is limited to determining whether the administrative decision was rational, it may not review the facts *de novo* and arrive at an independent determination (*Matter of Pell v. Board of Education*, *id.*, see also *Matter of Marsh v. Hanley*, 50 AD3d 687).

Moreover, under Administrative Code §17-152 the validity of the Department of Health's lien is not "...subject to challenge based on:

(1) The lawfulness of the work done; or
(2) The propriety and accuracy of the items of expenses for which a lien is claimed..."

Even if the lien were subject to a challenge based o n the extent of the work performed, petitioner submits only the hearsay allegation that unidentified persons witnessed only five hours

of work performed by four or five workers. This allegation does not approach meeting petitioner's burden of showing that the Department of Health exaggerated the work it performed.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding dismissed.

This constitutes the decision and judgment of the court.

Dated: August 21, 2006

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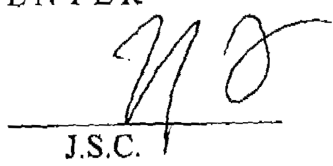

J.S.C.

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