

**1690 President St., LLC v New York City
Comptroller**

2007 NY Slip Op 30745(U)

April 12, 2007

Supreme Court, New York County

Docket Number: 0118786/2006

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

1690 President Street
LLC

INDEX NO. 118786/06

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

- v -

NYC Comptroller,
ET AL.

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

FILED

APR 17 2007

COUNTY CLERK'S OFFICE
NEW YORK

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

APR 18 2007

Dated: _____

HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

1690 President Street, LLC,

Petitioner

DECISION/ORDER

Index No.: 118786/06

Seq No.: 001

*For a Judgment under and pursuant to
Article 78 of the Civil Procedure Law and Rules*

Present:
Hon. Judith J. Gische

J.S.C.

FILED

New York City Comptroller and
The City of New York,

Respondents.

APR 17 2007

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COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of NEW YORK
this/these motion(s):

Papers	Numbered
OSC w/Petition (Art 78), w/ML affid, GTC affirm, exhs	1
X-motion (§3211), AOA affirm, exhs	2
Pet's opp w/GC affirm	3

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

Before the court is an article 78 petition presented by order to show cause to the court. CPLR 403 (d). Petitioner 1690 President Street, LLC ("President") seeks an order from this court declaring that the determination by respondents New York City Comptroller and The City of New York (hereinafter "the City" or "respondents") dated August 21, 2006 which denied petitioner's claim, is void as arbitrary and capricious, and

remanding petitioner's claim for a new hearing. The City has cross moved for an order dismissing the petition on the grounds that the proceeding is time barred [CPLR § 3211 (a) (5)] and that the petition fails to set forth a cause of action [CPLR § 3211 (a) (7)].

Since there is a pre-answer motion to dismiss for failure to state a cause of action, the court accepts all of the allegations of the petition as true and affords the petitioner all favorable inferences to be drawn from them (EBCI, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; Campaign for Fiscal Equity Inc. v. State, 86 NY2d 307 (1995); P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1st Dept 2003]); unless clearly contradicted by documentary evidence submitted by the moving party (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]).

The court must also, and will first consider, whether this proceeding is time barred, as respondents claim. CPLR §§ 217 (1).

Background

Petitioner, the owner of the building located at 1690 President Street in Kings County ("building") contends that it made numerous attempts to correct the ten (10) lead paint violations reported by the Department of Housing Preservation and Development - Division of Code Enforcement ("HPD") on March 3, 2005. The violations, all class "C," were within apartment 4G at the building (NOV# 5385980 through 5385989) and had to be corrected by April 2, 2005. Petitioner sought an extension of time to correct all the violations on April 5, 2005. The request was denied by HPD as untimely, and HPD notified the petitioner of the denial in writing.

Thereafter, HPD did all the repairs to apartment 4G and on July 29, 2005, it notified petitioner that the cost for the repairs was \$14,493.45. Petitioner requested the back up documents for the repairs. HPD complied with that request on August 5, 2005 and also notified petitioner that he had 30 days in which to challenge the charges. Petitioner admits that he failed to meet that 30-day deadline. NY Admin Code § 27-2129 ("statement of account").

Since then, HPD has issued new lead paint violations, all in apartment 4G. According to petitioner many of them are similar is not identical to the violations that were allegedly corrected in July 2005. Thus, for example there were four new lead paint violations reported on October 31, 2005 in apartment 4G (NOV# 5809457, 5809459, 5809460 and 5810542) and petitioner contends that NOV# 580459 is identical to NOV# 5385985 issued on March 3, 2005. Other violations were reported in apartment 4G on October 31, 2005, again all lead paint class "C" violations.

These subsequent violations have been corrected by petitioner; one was downgraded by HPD.

Petitioner filed a Notice of Claim (Claim Number 2006LW005572 with the Office of the Comptroller of the City of New York on February 7, 2006 challenging the \$14,493.45 he was charged for emergency repairs and asking that they be dismissed in their entirety. The Comptroller denied the claim on August 21, 2006. It stated that it had examined the documents that petitioner had submitted and found that the charges were supportable because: 1) he had not timely applied for a postponement of the date set for correction of the violations; 2) the charges appeared commensurate with the

extensive remediation work needed in the apartment; and 3) the time to challenge the charges through HPD had expired.

The City contends that this petition is time barred because the charges related to correcting the lead paint hazards were recorded with the Department of Finance as a lien on July 20, 2005 and although petitioner asked for the "back up" to the fees imposed, he admittedly did not meet the 30 day deadline to challenge them. NY Admin Code § 27-2129. Thus, while the City acknowledges that the petition would be timely using the August 21, 2006 as the point of reference, it claims that the filing of the Notice of Claim was not the right way to challenge the imposing of emergency charges under the lead paint remediation program.

Alternatively, the City argues that the Notice of Claim was not a final determination, or an appeal, but simply a request for a reconsideration of a final determination that it denied which would not renew the statute of limitations on the imposition of the lien in July 2005.

The City argues that the filing of a Notice of Claim is a precondition to commencement of a plenary action against the City so it can evaluate the claim and possibly settle it.

The City claims that it was neither arbitrary or capricious for it to refuse to settle the claim, and it properly exercised its discretion to deny the claim and enforce the lien filed under the remediation program.

Discussion

The standard for evaluating the respondents' determination is whether it was

made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious. CPLR § 7803[3]. In order for the court to find that an agency determination is arbitrary and capricious, it would have to find that the action taken was without sound basis in reason and taken without regard to the facts. The question for the court is generally whether the agency determination has a rational basis. Pell v. Board of Education of Union Free School District No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222 (1974). While pure issues of law should be determined by the court, issues concerning the interpretation of a statute or regulation by the agency responsible for its administration should be upheld, if they are not irrational or unreasonable. Madison-Oneide Board of Compaartive Educational Servicesv. Mills, 4 NY3d 51 (2004); Allstate Ins. Co. v. Libow, 106 AD2d 110 (2nd dept. 1984) affd. 65 NY2d 807 (1985).

As a purely technical matter, this petition is timely because petitioner is challenging the Comptroller's denial of his notice of claim. This petition was brought within 4 months of that determination. However, examining the relief that petitioner was seeking when it filed its notice of claim, clearly it wanted a second opportunity to contest the charges that were reduced to a lien in July 2005. The gravamen of petitioner's argument is that it ought to be able to challenge the July 2005 lien on the grounds that the work ABAX, Inc. charged the City for -- which charges were passed on to the petitioner-- were not, in fact, done at all, or at the very least, were done improperly because class "C" violations continued to be reported against apartment 4G.

In denying the petitioner's claim to reverse the charges the Comptroller

examined petitioner's claims and his documentation. The denial sets forth several reasons for the denial, all of which are reasonable. The work was necessitated because the lead paint violations are hazardous; petitioner could have corrected the conditions itself, but failed to do so; it did not timely seek an extension of time to make the changes; and ultimately, once petitioner did ask for the "back up" for the charges, it did not follow through with challenging them.

Although petitioner places great weight on the fact that ABX, Inc. may have committed a fraud against the City, and that the City, by refusing to settle the emergency charges against him, appears to be condoning such actions, this argument is misleading. The emergency charges were incurred by HPD because petitioner did not voluntarily correct the serious violations that existed at the building. They are, for that reason alone, enforceable charges. The separate issue of whether petitioner can challenge the charges by ABAX, Inc. is not the subject of this Article 78 claim, which is challenging the City's determination, not to settle petitioner's claim that he has been (indirectly) wrongfully charged by the lead paint contractor HPD hired. In re Abramowitz v. Guido, 61 AD2d 1045 (2nd Dept 1978). The Notice of Claim simply notifies the City of a proposed plaintiff's intention to commence a plenary action.

For these reasons, the motion by the respondents to dismiss this Article 78 proceeding is granted in all respects. The Clerk shall enter judgment in favor of The New York City Comptroller and the City of New York against petitioner 1690 President Street, LLC.

Conclusion


Respondents' motion is granted, the petition is dismissed. The Clerk shall enter judgment in favor of respondents The New York City Comptroller and the City of New York against petitioner 1690 President Street, LLC.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
April 12 2007

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED

APR 17 2007

COUNTY CLERK'S OFFICE
NEW YORK