

Matter of Small v City of New York

2007 NY Slip Op 31106(U)

April 25, 2007

Supreme Court, New York County

Docket Number: 0112307/2006

Judge: Kibbie F. Payne

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

PRESENT: KIBBIE F. PAYNE
Justice

PART 4

In the Matter of the Application of

ROBERT SMALL,

INDEX NO. 112307/06

Petitioner,

MOTION DATE 3/9/07

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

- against-

MOTION SEQ. NO. 001

CITY OF NEW YORK, DEPARTMENT of SANITATION,
and ENVIRONMENTAL CONTROL BOARD,

MOTION CAL. NO. _____

Respondents.

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

As indicated in the attached memorandum, respondents' cross-motion to dismiss this CPLR article 78 proceeding is denied and respondents are directed to serve an answer within 20 days after service of the order with notice of entry.

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: April 25, 2007


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 : IAS PART 4**

In the Matter of the Application of
ROBERT SMALL,

Petitioner,

Index No. 112307/06
Motion Seq. 001

JUDGMENT

For a Judgment pursuant to Article 78 of
the Civil Practice Law and Rules,

-against-

CITY OF NEW YORK, DEPARTMENT of
SANITATION, and ENVIRONMENTAL
BOARD,

Respondents.

UNFILED JUDGMENT
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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).

KIBBIE F. PAYNE, J.:

Pro se petitioner commenced this CPLR article 78 proceeding
against respondents seeking to annul the determination of
respondent the City of New York Environmental Control Board,
which denied his appeal of the Administrative Law Judge's
decision and order, determining that petitioner violated section
16-118 (2) of the Administrative Code of the City of New York.
Respondents cross-move to dismiss this petition on the ground
that the proceeding is time-barred by the applicable four-month
statute of limitations (see CPLR 3211 [a] [5]; see also CPLR 217
[1]). In the event the court denies the cross-motion,
respondents request permission to serve and file an answer within
30 days after service of the order with notice of entry (see CPLR
7804 [f]).

It is well-settled that a CPLR article 78 proceeding must be commenced within four months after the determination to be reviewed becomes "final and binding upon the petitioner" (see CPLR 217 [1]). "Under the commencement by filing system, a special proceeding is 'commenced by filing a petition'" (Matter of Correnti v Suffolk County Dist. Attorney's Office, 34 AD3d 578, 579 [2006], citing CPLR 304). "Claims asserted in such proceedings are deemed 'interposed' for Statute of Limitations purposes at the time of filing" (Matter of Grant v Senkowski, 95 NY2d 605, 608 [2001], citing CPLR 203 [c]). The term "filing" is statutorily defined as "the delivery of the . . . petition to the clerk of the court in the county in which the . . . special proceeding is brought . . . together with any fee required . . . for filing" (CPLR 304). The fee required at the time of filing is for an index number, which the clerk must assign (see CPLR §§ 304, 306-a [a], 8018 [a] [1]).

CPLR 304 provides that, "[a]t the time of filing, the filed papers shall be date stamped by the clerk of the court who shall file them and maintain a record of the date of the filing and who shall return forthwith a date stamped copy, together with an index number, to the filing party." The purpose of date-stamping the papers is to "pinpoint the moment of commencement, thereby fixing the crucial date for determining whether the Statute of Limitations is satisfied" (Matter of Grant, 95 NY2d at 609

[*4]
[quotations and citations omitted]).

Here, the clerk assigned an index number and date-stamped the petition as filed on September 1, 2006. Thus, this action is timely as the determination being challenged was final and binding on May 4, 2006. Respondents contention that this action was commenced only after petitioner filed his RJI on June 16, 2005 is unavailing. Respondents provide no controlling authority for this proposition. The court has reviewed the parties' remaining contentions and find them without merit.

Accordingly, it is


ORDERED that respondents' cross-motion to dismiss this petition is denied; and it is further

ORDERED that respondents are directed to serve and file an answer to the petition within 20 days after service of the order with notice of entry.

The foregoing constitutes the decision and judgment of the court.

Date: April 25, 2007

Enter:


Kibbie R. Payne, J.S.C.

UNFILED JUDGMENT

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