

Matter of Amy's Take Away, Inc. v City of New York

2007 NY Slip Op 31705(U)

June 14, 2007

Supreme Court, Greene County

Docket Number: 0020061/4831

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

In the Matter of the Application of,

AMY'S TAKE AWAY, INC.

Petitioner,

DECISION and ORDER
INDEX NO. 06-1483
RJI NO. 19-06-2742

For a Judgment Pursuant to Section 1105
of the Public Health Law,

-against-

CITY OF NEW YORK and NEW YORK CITY
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

Supreme Court Albany County All Purpose Term, April 5, 2007
Reassigned to Justice Joseph C. Teresi

APPEARANCES:

Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC
Attorneys for Petitioner
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Corporation Counsel of the City of New York
(Linda A. Geary, Esq. Assistant Corporation Counsel)
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TERESI, J.:

Petitioner seeks a judgment pursuant to Article 11 of the Pubic Health Law, Article 6 of

the Eminent Domain Procedure Law and Article 4 of the CPLR awarding her 50% of the costs incurred to have her private property comply with the City of New York's stormwater controls that are required pursuant to the City of New York's Watershed Regulations. The respondents move to dismiss the petition pursuant to CPLR 3211(a)(5) alleging the claim is untimely as the statute of limitations has expired.

Petitioner resides and operates a business at New York State Route 214, Lanesville in the Town of Hunter, Greene County, New York. The real property is located near the City of New York Watershed that provides drinking water to the City of New York. The petitioner sought to operate a small take-out food business from her home and sought to add a 20 x 21 foot addition to her home to facilitate the new business. Petitioner's property lies within 100 feet of a water course that is a portion of New York City's Watershed. The construction of the addition was generally prohibited by the Watershed Regulations. On February 6, 2003 the petitioner submitted an application for a variance with the NYC Department of Environmental Protection (NYCDEP). Pursuant to the Watershed Regulations § 18-399(b) stormwater pollution prevention plans (SPPP's) were required for new construction. The petitioner was required to implement stormwater abatement measures as a condition to the addition to her home. On October 8, 2003, the respondents issued a variance for the construction of the addition.

The New York City Watershed Memorandum of Agreement (MOA) provides in paragraph 145(a)(ii) that:

The City will pay 50% of the incremental costs of designing and implementing stormwater pollution prevention plans required by Section 18-39(b) of the Watershed Regulations [10 NYCRR § 128-3.9(b)] and not otherwise required by state or federal law, for all small businesses.

The MOA further provided that the remainder of the incremental costs, the other 50%, be paid for by the Catskill Watershed Corporation from the Future Stormwater Funds established by the MOA and funded by the City of New York.

After complying with the DEC requirements, the addition was completed. On October 28, 2004, the petitioner submitted an application seeking reimbursement for the costs of stormwater controls she installed pursuant to the NYC Watershed Regulations. Petitioner's costs amounted to \$18,461.05. Petitioner sought reimbursement from the respondents and the Catskill Watershed Corporation for 50% each of her costs. On February 1, 2005, after ninety days had passed, petitioner's counsel wrote to the respondents requesting payment. In a letter dated March 28, 2005, the respondents acknowledged receipt of petitioner's application for reimbursement. The respondents offered to reimburse the petitioner the sum of \$2,438.00 claiming the measures required by the variance went beyond the costs of a normal SPPP. On July 21, 2005 the respondents attempted to resolve the matter and presented the petitioner with an Agreement whereby the petitioner would receive \$2,437.17 from the respondents if she would execute a general release. Petitioner rejected the Agreement. The Catskill Watershed reimbursed the petitioner 50% of the costs incurred for the stormwater project in the amount of \$9,230.53. On March 25, 2005, the petitioner served a verified Notice of Claim upon the respondents pursuant to GML § 50-e. Petitioner alleges she sustained property damage resulting from the enforcement of the Watershed Regulations.

Respondents move to dismiss the petition alleging it is untimely. Respondents allege the Notice of Claim was filed on March 25, 2005 pursuant to GML § 50-e. Respondents contend the petitioner did not commence this action until December 7, 2006. Respondents alleges GML §

50(1)(c) requires the commencement of an action or special proceeding against a municipality within one year and ninety days of the event upon which the claim is based. In addition, the respondents allege since the petitioner objected to the variance in her February 1, 2005 letter, she should have commenced an CPLR Article 78 proceeding challenging the October 8, 2003 variance determination of the respondents. The respondents allege Article 78 proceedings have a four month statute of limitations and in this case would have expired on February 8, 2003.

The petitioner alleges she does not challenge the City's right to act pursuant to the Watershed Regulations. The petitioner asserts one claim pursuant to Public Health Law (PHL) § 1105 for a statutory cause of action for compensation for injury to her property by the enforcement of the Watershed Regulations. The petitioner alleges the cause of action is timely. Petitioner alleges a three year statute of limitation governs this proceeding for actions to recover damages for "an injury to property" pursuant to CPLR § 214(4). In addition, petitioner claims CPLR § 213(1) is also applicable with a six year statute of limitations for proceedings without express limitation periods.

Petitioner alleges PHL § 1104(3) and § 1005(1) create a statutory claim for compensation to persons whose property rights have been affected by the enforcement of the Watershed Regulations. PHL § 1105(2)(a) provides that any action for damages against the municipality shall be brought pursuant to the provisions of the Eminent Domain Procedure Law (EDPL). Petitioner alleges Article 6 of the EDPL provides an inexpensive procedure for the processing of small claims of less than \$25,000.00. Eminent domain statutes seek primarily to protect the interest of property owners and to ensure that their property is taken only in accord with proper procedure and for just compensation. See, East Thirteenth Street Community Ass'n v. New York

State Urban Development Corp., 84 NY2d 287 (1994); Fifth Ave. Coach Lines v. City of New York, 11 NY2d 342 (1962). Claims for damages for takings by the State of New York provide for a three year period to file a claim. See, EDPL § 601 and EDPL § 503(A). However, a claim for damages due to a municipal taking must be brought “within the time specified by the court.” See, EDPL § 503(B). The Court of Appeals addressed EDPL § 508(B) in Grandinetti v. Metropolitan Transportation Authority, 74 NY2d 785 (1989) and held,

Under EDPL 503(B), a claim required to be made in the Supreme Court (see, EDPL 501(B)) for damages arising out of the condemnation of real property must be interposed by filing a written claim, demand or notice of appearances “within the time specified by the court.” Contrary to the conclusion of the Appellate Division **the time specified by the court pursuant to this provision is not a Statute of Limitations.** Nor is it a condition precedent compliance with which is ordinarily deemed a necessary element of the claim. **Statutes of Limitations and conditions precedent are, in most instances, specific legislatively prescribed restrictions on a party’s ability to recover on a claim. A time period that is variable and involves a discretionary judicial weighing of a number of pertinent factors on a case-by-case basis does not fall within this category.** Instead, the filing deadline contemplated by EDPL is merely a procedural direction to be issued by the court in the exercise of its broad discretion to administer the litigation in an orderly and expeditious manner. As such, the court may extend the time fixed by its own prior order “upon such terms as may be just and upon good cause shown.” (CPLR 2004) (citations omitted) (emphasis added).

The Court concludes that Articles 5 and 6 of the EDPL does not specify the applicable statute of limitations when the taking is by a municipality.

The respondents allege the petition must be dismissed as untimely pursuant to GML 50-i(1). GML 50-i(1) details the procedure one must follow in commencing a tort action against a municipality. This statute authorizes a proceeding where there is damage to real property by

reason of the negligence or wrongful act of the municipality or its agents. An action is considered timely under GML § 50-i(1) “when it is commenced within one year and ninety days after the happening of the event upon which the claim is based.” The respondents contend they notified the petitioner by letter on March 28, 2005 of its refusal to reimburse petitioner for the SPPP costs. The respondents claim the petitioner never commenced this action until December 7, 2006 which is beyond the statutory requirement of one year and ninety days. The respondents claim the underlying claim sounds in tort for a wrongful action when the City failed to fulfill its obligations pursuant to the Watershed Regulations and the MOA causing damage to the petitioner. In addition, the respondents allege the petitioner has failed to demonstrate any *de facto* taking of her property.

The petition seeks monetary damages pursuant to PHL § 1105 and the EDPL for injuries the petitioner sustained resulting from the respondents enforcement of the Watershed Regulations. The petitioner alleges she is not seeking damages in tort resulting from the negligence or wrongful acts by the respondents. PHL § 1105 clearly gives an individual a cause of action for damages to their property by a municipality. The legislature designated that any actions arising out of this provision be commenced in accordance with the provisions of the eminent domain procedure law. The legislature specifically designated the EDPL as the governing statute for commencing PHL § 1105 actions. GML 50-i(1) is not applicable to this cause of action. The petitioner seeks money damages from the respondents for their refusal to reimburse her for the SPPP improvements. This cause of action does not lie in tort as the petitioner does not allege any negligence or wrongful acts by the respondents or their agents. In addition, respondents’ claim that petitioner’s alleged challenge to the variance requirement is

subject to a four month statute of limitations is without merit as the petitioner never challenged the determination of the respondents requiring a variance. Respondents' motion to dismiss the petition as untimely pursuant to CPLR 3211(a)(5) is denied.

The remaining question before the court is what statute of limitations applies to PHL § 1105 claims pursuant to the EDPL? EDPL § 703 provides "the civil practice law and rules shall apply to practice and procedure in proceedings under this law except where other procedure is specifically provided by this law or rules governing or adopted by the appropriate court." Therefore, the Court may look to the CPLR to ascertain the appropriate statute of limitations for a taking by a municipality pursuant to PHL § 1105. CPLR § 214(4) requires a three year statute of limitations to commence an action to recover for damages for injury to property. EDPL § 601(A) designates EDPL §503 as the appropriate limitations statute. EDPL § 503(B) does not allocate a specific statute of limitations for a taking by a municipality. However, EDPL § 503(A) designates a three year statute of limitations for a taking of real property by the State of New York. See, EDPL § 501. The Court determines that the appropriate statute of limitations for damages to real property pursuant to PHL § 1105 is three years.

The respondents notified the petitioner that her reimbursement application was denied on March 28, 2005. The petitioner timely commenced this action with the filing of a Petition and Notice of Petition on December 1, 2006. Petitioner's request for attorney fees is denied.


Accordingly, the motion to dismiss the petition is denied. The respondents are directed to hereby answer the petition within twenty days from the entry of this Decision and Order.

All papers, including this Decision and Order are being returned to the attorneys for the petitioner. The signing of this Decision and Order shall not constitute entry or filing under CPLR

2220. Counsel are not relieved from the applicable provision of that section respecting to filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
June 14, 2007



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition dated December 1, 2006;
2. Verified Petition dated November 30, 2006 with attached exhibits A-G;
3. Petitioner's Memorandum of Law dated November 30, 2006 with attached exhibits A-J;
4. Notice of Motion dated March 26, 2007;
5. Affirmation of Linda A. Geary, Esq. dated March 26, 2006 with attached exhibits A-H;
6. Respondents' Memorandum of Law dated March 26, 2006;
7. Petitioner's Memorandum of Law dated April 2, 2007;
8. Respondents' Memorandum of Law dated April 4, 2007.