

**Matter of King v Thompson**

2007 NY Slip Op 31849(U)

June 25, 2007

Supreme Court, New York County

Docket Number: 0118048/2006

Judge: Carol R. Edmead

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

PRESENT: EDMEND  
Justice

PART 35

WILLIAM NG KING

- v -

OFFICE OF COMPTROLLER  
OF CITY OF NY

INDEX NO. 118048/06

MOTION DATE 5/31/07

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

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 \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

The within Article 78 matter is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of Petitioner William Ng King, Attorney for Kenny Zhao Hui Mei for an order, pursuant to CPLR 7803(1) and (3), annulling the determination of respondents William C. Thompson, Jr., Comptroller and the Office of the Comptroller of the City of New York is denied. It is further

ORDERED that the cross motion of respondents for an order dismissing the Petition pursuant to CPLR 7804(f) and 3211(a)(5) on the ground that this proceeding is barred by the statute of limitations is granted and the instant Petition is dismissed. It is further

ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for Petitioner.

Dated: 6/25/07



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):

PAPERS NUMBERED  
**FILED**  
JUN 27 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

\_\_\_\_\_  
In the Matter of the Petition  
pursuant to Article 78 of the  
CPLR of WILLIAM NG KING,  
Attorney for KENNY ZHAO HUI MEI,

Index No. 118048/06

Petitioner,

**DECISION/ORDER**

-against-

WILLIAM C. THOMPSON, JR.,  
Comptroller and OFFICE  
of the COMPTROLLER of the  
CITY OF NEW YORK,

Respondent.

**FILED**  
JUN 27 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

\_\_\_\_\_  
EDMEAD, J.S.C.

**MEMORANDUM DECISION**

Petitioner William Ng King, Attorney for Kenny Zhao Hui Mei ("petitioner") moves for an order, pursuant to CPLR 7803(1) and (3), annulling the determination of respondents William C. Thompson, Jr., Comptroller and the Office of the Comptroller of the City of New York (collectively "respondents") for their failure to perform a duty enjoined upon them by law and otherwise made a determination in violation of lawful procedure, was affected by an error of law and as arbitrary and capricious and an abuse of discretion.

Respondents cross move for an order dismissing the Petition pursuant to CPLR 7804(f) and 3211(a)(5) on the ground that this proceeding is barred by the statute of limitations.

*Background*

Petitioner as the attorney for Kenny Zhao Hui Mei ("Mei") who along with others purchased and became an owner of certain property located at 867 44<sup>th</sup> Street, Brooklyn, New

York, Block 733, Lot 52 (the "subject property"). Transfer of title to Mei and his co-owners took place on September 9, 1999. On or about January 12, 2000, after the transfer of title to the subject property to Mei and others, the New York City Department of Health ("DOH") dispatched a clean-up crew to the subject property to perform pest control. Respondents subsequently billed Mei for the clean-up costs and thereafter placed a lien against the subject property in the amount of \$4,984.91.

Petitioner protested the charges. And, on December 20, 2000, the DOH wrote to petitioner inviting him to file a Notice of Claim, which petitioner did on January 3, 2001. On January 4, 2001, the Office of the Comptroller acknowledged receipt of the Notice of Claim. On December 17, 2001, petitioner inquired as to the status of the Claim. On December 27, 2001, the Comptroller's Office wrote back stating that the claim was still under review. On January 9, 2002, the Comptroller's Office advised petitioner that "We will contact you when a determination is reached." A year passed. On March 20, 2003, petitioner again inquired and also pointed out that late charges continued to accrue. On May 19, 2003, the Comptroller's Office stated: "We will expedite our determination and contact you..." On April 12, 2004, the Comptroller's Office wrote to petitioner requesting additional documentation. On April 27, 2004, the information was provided. On December 13, 2004, petitioner wrote: "I am sorely disappointed that this claim has taken more than four years to resolve...." On January 31, 2005, the Comptroller's Office made a settlement offer which petitioner chose not to accept. The letter did not purport to issue a determination of the claim itself. Petitioner decided to wait for a determination. On October 23, 2006 petitioner again requested a resolution of the claim. And, on November 16, 2006, the Office of the Comptroller advised that:

“This is in response to your correspondence dated October 23, 2006 regarding the above referenced claim. The claim concerned charges imposed by the Department of Health for the inspection and cleanup of the property located at 867 44<sup>th</sup> Street, Brooklyn, New York. The due dates of the charges are December 28, 1999 and April 28, 2000. The claim record indicates that an offer of settlement was made on January 31, 2005. This office received no response to the settlement offer. Unfortunately, the six (6) year statute of limitation to pursue this matter has expired.

In view of the above, we have no alternative but to close our claim file.”

*Petitioner's Contentions*

The letter from the Comptroller's Office dated November 16, 2006 is completely and utterly contrary to law. An offer of settlement is not a determination. At no time did respondents make a determination of petitioner's claim as required by law. Respondents also failed to perform a duty enjoined upon them by law and otherwise made a determination in violation of lawful procedure, acted arbitrarily and capriciously and in an abuse of discretion by “closing the file” as stated in their November 16, 2006 letter. The file in this matter should not have been closed.

Finally, the statement that the six year statute of limitations has expired should also not be countenanced by the Court. The November 16, 2006 letter was the first notice petitioner received that the file was being closed. If anything, the statute of limitations should commence November 16, 2006.

*Respondents' Contentions*

Petitioner herein seeks to have the DOH nuisance abatement charges annulled. Because petitioner seeks to review and reverse the determination of the DOH to perform a lot clean up at the subject premises and bill petitioner for the nuisance abatement, it is the determination of the DOH that is the subject of the instant Article 78 proceeding. That petitioner attempted to seek

reconsideration of the DOH determination with the Comptroller does not cause the Comptroller's decision to deny petitioner's request to be the appropriate subject of the instant Article 78 petition. Thus, the naming of William C. Thompson, as Comptroller of the City of New York as the respondent in this action is improper.

Here, the petitioner uses the Comptroller's decision to deny his claim challenging the DOH assessment of clean up charges as a subterfuge to circumvent the applicable statute of limitations. The proper administrative determination challenged herein is that of DOH and thus the DOH is the proper party. Accordingly, it is the determination of the DOH to perform nuisance abatement services on the subject premises and bill petitioner for those services that is the appropriate subject of this proceeding.

Further, petitioner is now time barred from commencing an Article 78 proceeding against DOH. There is no doubt that the imposition of charges by DOH sent to petitioner as initial bills are final determinations. Petitioner was "negatively impacted" when he received the initial bill for the subject lot clean up on or about April 1, 2000.

The fact that petitioner filed a Notice of Claim with the Comptroller's Office in January, 2001 seeking reconsideration of the assessment of charges by DOH does not serve to extend the four month limitations period.

Further, the filing of the Notice of Claim would still not extend the time to meet the applicable statute of limitations.

*Petitioner's Reply*

The respondents' arguments are contradicted by all of the correspondence between petitioner and the DOH as well as the Comptroller's Office. The DOH advised petitioner that he

may file a Notice of Claim with the Office of the Comptroller. Correspondence from the Comptroller's Office evidenced that its ruling was a final determination.

Analysis

CPLR 217 provides a four month time limit for commencing Article 78 proceedings. It states, in relevant part:

**§217. Proceeding against body or officer; four months**

Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty....

An administrative determination is final and binding so as to commence the running of the Statute of Limitations when the petitioner has received notice of the determination and is aggrieved by it ( *Matter of Biondo v New York State Bd. of Parole*, 60 N.Y.2d 832, 470 N.Y.S.2d 130, 458 N.E.2d 371). Moreover, Department of Health regulations provide no mechanism for administrative review of the assessment and, therefore, there are no further administrative remedies which must be exhausted before judicial review may be sought ( *Watergate II Apts. v Buffalo Sewer Auth.*, 46 N.Y.2d 52, 412 N.Y.S.2d 821, 385 N.E.2d 560).

And, in response to the argument that DOH misled petitioner - an attorney - Absent some clear indication that an agency has misled a petitioner into foregoing the right to commence a timely proceeding ( *Simcuski v Sacli*, 44 N.Y.2d 442, 449, 406 N.Y.S.2d 259, 377 N.E.2d 713; *Rains v Metropolitan Transp. Auth.*, 120 A.D.2d 509, 501 N.Y.S.2d 709), a mere inquiry or even

a request for reconsideration outside the formal administrative review process will not render a prior determination non-final ( *Matter of Johnson v Christian*, 114 A.D.2d 321, 322-323, 494 N.Y.S.2d 314).

Conclusion

This court finds that the four-month statute of limitations for challenging the DOH assessment began to run when the subject property owner received invoices reflecting final administrative determination as to cleanup charges, rather than from the date of petitioner's communication with The Office of the Comptroller. As such, this proceeding is untimely. The DOH administrative determination assessing charges against the subject property owner for abatement of nuisance requiring removal of debris from the property became final when the property owner received invoices from DOH stating that, unless paid within 30 days, interest would accrue from date of entry, where there were no further administrative remedies to be exhausted before judicial review could be sought.

Based on the foregoing, it is hereby

ORDERED that the motion of Petitioner William Ng King, Attorney for Kenny Zhao Hui Mei for an order, pursuant to CPLR 7803(1) and (3), annulling the determination of respondents William C. Thompson, Jr., Comptroller and the Office of the Comptroller of the City of New York is denied. It is further

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Dated: June 25, 2007



Carol Robinson Edmead, J.S.C.

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