Matter of Hamil Stratten Props., LLC v New York State Dept. of Envtl. Conservation
2009 NY Slip Op 30351(U)
January 28, 2009
Supreme Court, Queens County
Docket Number: 7007/2008
Judge: Orin R. Kitzes

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

In Matter of the Application of HAMIL STRATTEN PROPERTIES, LLC, CORASTOR HOLDING COMPANY, INC., Petitioners, - against - NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, Respondent.	Index Number 7007 2008 Motion Date October 22, 2008 Motion Cal. Numbers 31 & 32 Motion Seq. Nos. 1 & 2

The following papers numbered 1 to 20 read on these separate motions in this hybrid Article 78/declaratory judgment proceeding by petitioners Hamil Stratten Properties, LLC and Corastor Holding Company, Inc. (petitioner), inter alia, to annul the determination of respondent New York State Department of Environmental Conservation (DEC) to terminate Brownfield Cleanup Agreement #W2-0999-04-05 (Agreement), for declaratory judgment stating that Environmental Conservation Law § 27-1409(5) and (12) are unconstitutional, and for damages for breach of contract; and by respondent DEC to dismiss the amended verified petition and complaint as barred by the statute of limitations, lack of subject matter jurisdiction, and for failure to state a cause of action.

	Papers Numbered
Notices of Petition/Motion - Petition Exhibits	1-17
Answering Affidavits - Exhibits	18-20

Upon the foregoing papers it is ordered that the application and motion are consolidated and determined as follows:

Under ECL § 27-1407, to participate in the Brownfield Cleanup Program (BCP), an applicant must apply to the DEC, which determines

whether the site and proposed remediation qualifies under the standards for participation set forth in the aforementioned ECL section. The owner of a qualified site must thereafter enter into a Brownfield Site Cleanup Agreement and become subject to DEC oversight to assure compliance. The benefits for successful participants include limitations on certain future environmental liabilities and tax credits for certain remediation and development costs.

The petitioner and respondent entered into the Agreement dated October 14, 2004 pursuant to which petitioners were obligated to remediate contamination at the National Rubber Adhesives Site, 38-31 9th Street, Long Island City, New York (Site) which is owned by petitioner.

The Agreement entered into between petitioner (also referred to as Volunteer) and respondent in October 2004, with respect to the Site, provides, in relevant part, as follows:

> "If the Department disapproves a submittal ... it shall specify the reasons for its disapproval and may request Volunteer to modify or expand the submittal. Within twenty (20) Days after receiving written notice that Volunteer's submittal has been disapproved, Volunteer shall elect in writing to either (i) modify or expand it within thirty (30) Days of receipt of the written notice of disapproval; (ii) complete any other Department-approved Work Plan(s); (iii) invoke dispute resolution pursuant to Paragraph XIV; or (iv) terminate this Agreement pursuant to Paragraph XIII."

Herein, on July 5, 2007 petitioner submitted a revised report to respondent. By letter dated July 26, 2007, respondent disapproved the revised report and specified the reasons for its disapproval, advising petitioner, in relevant part, as follows:

> "Subparagraph II.E.2 of the ... Brownfield Cleanup Agreement relative to the Site ... reads in part that '... If Volunteer submits a revised submittal and it is disapproved, the Department and Volunteer may pursue whatever remedies may be available under this Agreement or under the law.'"
>
> "By copy of this letter, the Department's case attorney has been placed on notice regarding

> the disapproval of the Revised Report and the Department reserves all rights regarding this matter, including the termination of the Brownfield Cleanup Agreement for the Site ..."

Petitioner did not seek to modify the July revised report or pursue any of the remedies available pursuant to the Agreement with respect to the respondent's disapproval of said report.

Thereafter, by letter dated August 30, 2007, respondent notified petitioner, in relevant part, as follows:

> "This letter serves to formally inform the Volunteer that (i) the Department considers that the Volunteer has failed to substantially comply with the Agreement's terms and conditions and (ii) pursuant to Subparagraph XIII of the Agreement, the Department has elected to terminate the Agreement as a consequence of the Volunteer's failure to submit a revised report that addressed the Department's stated reasons for disapproving the initial submittal."

Petitioner requested "re-instatement and the opportunity to submit a further revised report" in its letter dated September 19, 2007. In a November 19, 2007 letter to petitioner, the respondent "concluded that its August 2007 termination determination should not be altered." By letter dated December 14, 2007, petitioner asserted that it "hereby elect[s] to invoke dispute resolution" with respect to respondent's determination. In the letter dated January 7, 2007(sic) to petitioner's attorney, respondent states, in pertinent part, as follows:

> "... your client's request to invoke formal 'Dispute Resolution' pursuant to the above referenced Agreement is null and void as it stands in direct contradiction of the plain terms of the Agreement. Your client's request for formal Dispute Resolution is therefore beyond the contractual terms of the Agreement and is therefore not binding on the Department's staff ..."
>
> "As such, the conditions for the invocation of dispute resolution pursuant to the Agreement have not been met and no such procedure has

> been commenced. The Department therefore does not recognize the validity of your request and will not participate in any unauthorized and falsely commenced proceedings before the Department's Office of Hearings and Mediation Services..."

Petitioner asserts in its amended petition and complaint, in relevant part, as follows:

> "[Petitioner] and [its] representatives met with [respondent] on October 12, 2007 ... The meeting was attended by representatives of [respondent], the New York State Department of Health (NYSDOH), [respondent's] enforcement attorney, [petitioner's] legal counsel and [petitioner's] new environmental consultant ... [Respondent's] representatives inquired into the second environmental consultant's qualifications and experience and its plans for compliance with the [Agreement] and future remediation of the [Site] ... [Petitioner's] new environmental consultant participated in a follow-up telephone conference with [respondent's] project manager to discuss compliance with [respondent's] concerns, any deficiencies in the remediation to date and plans for future remediation ..."

Pursuant to CPLR 217(1), "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." The question of when the four months begins to run is answered by identifying the administrative action or determination to be reviewed and deciding when it became final and binding (see CPLR 217[1]). It is well settled that an administrative action becomes final and binding when it has an impact upon a party and the party is clearly aggrieved by it (see Matter of Yarbough v Franco, 95 NY2d 342 [2000]; Matter of Edmead v McGuire, 67 NY2d 714 [1986]; Matter of Hunt Bros. Contrs. v Glennon, 214 AD2d 817 [1995]; New York City Off Track Betting Corp. v State of N.Y. Racing & Wagering Bd., 196 AD2d 15 [1994], lv denied 84 NY2d 804 [1994]). The Court of Appeals has articulated a two-part test for identifying when an administrative action is final and binding upon a petitioner. "First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated either by further

administrative action or by steps available to the complaining party" (Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y., 5 NY3d 30, 34 [2005]; see Matter of City of New York [Grand Lafayette Props. LLC], 6 NY3d 540 [2006]; Matter of Properties of N. Y., Inc. v Planning Bd. of Town of Stuyvesant, 35 AD3d 941 [2006]).

A request for reconsideration of an administrative determination will not extend the four-month limitations period (Matter of De Milio v Borghard, 55 NY2d 216 [1982]; Matter of Hunt Bros. Contrs. v Glennon, 214 AD2d 817 [1995]; see Matter of Harford Taxpayers for Honest Govt. v Town Bd., 252 AD2d 784 [1998]; Matter of Stephens v Strack, 249 AD2d 637 [1998]). Where, however, an agency holds a new hearing at which new testimony is taken, new evidence is proffered and new matters are considered, or reconsideration of the matter appears to be on a fresh look at the merits, the statutory period within which to commence a review proceeding is renewed (Quantum Health Resources v De Buono, 273 AD2d 730 [2000]; Chase v Board of Educ. of Roxbury Cent. School Dist., 188 AD2d 192 [1993]; Matter of Rapuzzi v City of New York, Civ. Serv. Commn., 161 AD2d 715 [1990], lv denied 76 NY2d 707 [1990]).

Herein, respondent asserts that its August 30, 2007 letter, which notified petitioner that respondent had elected to terminate the Agreement because petitioner had not submitted a revised report in substantial compliance with the Agreement, was the final administrative determination from which the four month statute of limitations ran, therefore barring the Article 78 proceeding. However, respondent does not address in its initial papers, nor deny in its reply, the significance of the subsequent October 12, 2007 meeting in which, inter alia, petitioner's new environmental consultant met with respondent's representatives, was questioned concerning its qualifications, experience and plans for compliance with the Agreement and future remediation of the Site, and participated in a follow-up telephone conference with respondent's project manager to discuss compliance with respondent's concerns, any deficiencies in the remediation to date and plans for future remediation. In light of the foregoing, the court determines that the October 12, 2007 meeting at which new evidence was proferred and new matters considered constituted a fresh and complete examination into the petitioner's remediation of the Site and, therefore, the statutory period within which petitioner could challenge any declaration resulting therefrom was renewed (see Chase v Board of Educ. of Roxbury Cent. School Dist., supra; Matter of Rapuzzi v City of New York, Civ. Serv. Commn., supra; Matter of Delbello v New York City Tr. Auth., 151 AD2d 479 [1989]; Matter of Corbisiero v New York State Tax

Commn., 82 AD2d 990 [1981], affd 56 NY2d 680 [1982]; Matter of Camperlengo v State Liq. Auth., 16 AD2d 342 [1962]).

Thus, respondent's November 19, 2007 letter concluding that the "August 2007 termination determination should not be altered" is the final and binding determination from which the statute of limitations runs, thereby making the Article 78 commenced on March 19, 2008 timely.

Although petitioners included claims of constitutional vagueness as well as due process arguments in their petition/complaint, the parties framed the constitutional arguments in their oppositions and replies in terms of equal protection and due process, therefore the court will address only these constitutional arguments.

Petitioner asserts that it was deprived of procedural due process by respondent's refusal to conduct a hearing regarding its determination to terminate the Agreement. The basic requirements for procedural due process are notice and the opportunity to be heard (CIBC Mellon Trust Co. v Mora Hotel Corp., 296 AD2d 81, 91 [2002], affd 100 NY2d 215 [2003], cert denied 540 US 948 [2003]). There is no constitutional guarantee of any particular form of procedure (see Kuriansky v Bed-Stuy Health Care Corp., 135 AD2d 160 [1988], affd 73 NY2d 875 [1988]). CPLR article 78, which allows for judicial review and correction of the actions of respondent, provides whatever process the petitioner is due as a matter of Federal law (see Noroian v City of Port Jervis, 16 AD3d 392 [2005]; Velella v N.Y. City Local Conditional Release Comm'n, 13 AD3d 201, 202 [2004]; Matter of C/S Window Installers v New York City Dept. of Design & Constr., 304 AD2d 380 [2003]; Estate of Kadin v Bennett, 163 AD2d 310 [1990]). Therefore, petitioner's due process challenge is without merit.

A violation of equal protection arises where "first, a person (compared with others similarly situated) is selectively treated and second, such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person" (Bower Assoc. v Town of Pleasant Val., 2 NY3d 617, 631 [2004]). Petitioner does not allege selective treatment based on race, religion, or punishment for the exercise of constitutional rights, and fails to allege that respondent singled it out "with malevolent intent" (Bower Assoc. v Town of Pleasant Valley, supra at 631; see Darby Group Cos., Inc., Distribs. v Rockville Ctr., N.Y., 43 AD3d 979 [2007]). Therefore, petitioner's equal protection claim is unmeritorious.

With respect to petitioner's breach of contract claim, since the Supreme Court lacks subject matter jurisdiction over breach of contract causes of action asserted against the State of New York, this cause of action must be dismissed (see Arker Cos. v New York State Urban Dev. Corp., 47 AD3d 739 [2008]; Sims v State, 30 AD3d 949 [2006]; Matter of Barrier Motor Fuels, Inc. v Boardman, 256 AD2d 405 [1998]).

Accordingly, that branch of respondent's motion seeking to dismiss the petition/complaint as untimely is denied and respondent is granted 30 days from the date of the notice of entry to serve its answer. Those branches of respondent's motion seeking to dismiss the declaratory judgment causes of action which sound in constitutional law for failure to state a cause of action and the breach of contract cause of action for lack of subject matter jurisdiction are granted. Petitioner's application is denied as premature.

Dated: January 28, 2009

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J.S.C.