MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

X	INDEX NO. 7007/08
MATTER OF THE APPLICATION OF HAMIL STRATTEN PROPERTIES, LLC, et al.	MOTION SEQ. NO. 3
	MOTION DATE: JUNE 10, 2009
- against -	MOTION CAL. NO. 25
	BY: KITZES, J.
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION	DATED: AUGUST 7, 2009
X	

In this Article 78 proceeding, petitioners Hamil Stratten Properties, LLC (Hamil) and Corastor Holding Company, Inc. seek an order pursuant to CPLR 2201 staying the proceedings and determination of the within Article 78 proceeding pending a trial of the factual issues raised herein. Respondent New York State Department of Environmental Conservation (DEC) cross-moves in opposition and seeks an order vacating the note of issue demanding a jury trial.

Petitioners entered into a Brownfield Clean-Up Agreement (BCA) dated October 14, 2004 with the DEC, pursuant to which petitioners were obligated to remediate contamination at the National Rubber Adhesive Site, 38-31 9th Street, Long Island City, New York. Petitioners acquired said real property, but did not cause its contamination. The BCA collectively refers to the petitioners as the "Volunteer" and states in pertinent 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."

In April 2007 petitioners submitted to the DEC a "Soil Vapor Extraction Pilot Study Report" (Report). The DEC in a letter dated May 14, 2007 notified petitioners that it had disapproved the Report and specified the reasons for its disapproval. The petitioners' representative, in a letter dated May 23, 2007, advised the DEC that it would modify the Report and a revised Report was submitted to the DEC on July 5, 2007.

In a letter dated July 26, 2007, the DEC notified petitioners that it had disapproved the revised Report and specified at least three reasons for its disapproval. The DEC advised petitioners that "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," and stated that its case attorney had been placed on notice regarding this disapproval and that it was reserving all rights in this matter, including the termination of the BCA agreement.

Petitioners did not seek to modify the July 5, 2007 revised Report, and did not pursue any remedies available under the BCA with respect to the DEC's July 26, 2007

disapproval of said report. Rather, petitioners' environmental consultant, in a letter dated August 28, 2007, requested a meeting with the DEC to discuss the revised Report.

Respondent DEC, in a letter dated August 30, 2007, notified petitioners that, 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."

Petitioners' counsel, in a letter dated September 19, 2007, stated that they had "encountered difficulty in complying with the Department's requirements due to contractual problems that arose between the Volunteer and its environmental consultant who was responsible for submitting the necessary reports and the remediation activity on the site. The Volunteer has no expertise in this area and relied fully on the consultant. Once the contractual problems arose, the Volunteer was unable to respond satisfactorily to the Department. Therefore, the Volunteer has retained a new consultant .... It has always been the Volunteer's intention to perform under this Agreement and to remediate this site." Petitioners' counsel stated that the new consultant was in the process of reviewing the site history, the remediation work performed, the BCA, and the work plan and would prepare a second revised Report which would address the DEC's concerns. Petitioners in this letter requested that they be re-instated and given the opportunity to submit a further revised report.

On October 12, 2007, an informal meeting was held with the DEC, at which time petitioners' new environmental consultant was present.

The DEC, in a letter dated November 19, 2007, in response to the September 19, 2007 request for reconsideration informed petitioners' counsel that the August 2007 termination was a consequence of the Volunteers':

> "failure to submit a revised report that addressed the Department's stated reasons for disapproving the initial submission. Based upon the Department's review of its records for the Site, the Department has concluded that its August 2007 determination should not be altered.
>
> "This conclusion is based in part on the Volunteer's repeated failure to fulfill its obligations under the Agreement. It has been more than three years since the Volunteer executed the Agreement with the Department, but the remedial investigation at the Site remains uncompleted. The Site is listed in the Registry of Inactive Hazardous Waste Disposal Sites in New York State with a Classification "2" pursuant to ECL 27-1305. A class "2" site is one at which contamination constitutes a significant threat to public health or the environment. The Department does not consider your client's belated decision to retain "a new consultant" persuasive.
>
> "However, in the interests of having the investigation and remediation associated with the Site completed by the Volunteer timely, the Department will offer the Volunteer the opportunity to enter into a Consent Order for the development and implementation of a remedial program for the Site."

The DEC further stated that if the petitioners decided to enter into the Consent Order they were required to do so by December 7, 2007 and that their counsel should so advise the DEC in writing no later than November 26, 2007. The DEC further

stated that if it did not hear from petitioners' counsel by November 26, 2007, it would consider it to be a negative response, and the Department would implement the remaining remedial activities for the site using the Hazardous Waste Remedial Fund, and would refer the matter to the Attorney General for cost recovery.

This letter was also emailed to petitioners' counsel on November 19, 2007. Petitioners' counsel, in an email dated November 20, 2007, expressed his disappointment that the contract was not reinstated, and requested an extension of the deadline dates to November 30, 2007 and December 12, 2007, as his office would be closed over the Thanksgiving holiday. The DEC agreed to these extensions of time; however, petitioners did not enter into a Consent Order.

Petitioners' counsel, in a letter dated December 14, 2007 and addressed to the DEC's Office of Hearings and Mediation Services (OHMS), stated that petitioners "hereby elect to invoke dispute resolution with respect to the NYS DEC Division of Environmental Enforcement dated November 14, 2007 not to reinstate Volunteer into the Brownfield Cleanup Program." Petitioners assert in this letter that following the termination of the BCA on August 30, 2007, the Volunteer requested reinstatement in its letter of September 19, 2007, and that the DEC had "accepted Volunteer's request for reinstatement and informal negotiations were held" on October 12, 2007. Counsel stated that after the Volunteer was accepted into the Brownfield Program in October 2004, it retained an environmental consultant to implement the BCA and to remediate the site, and that it relied

upon its expert consultant to comply with the BCA. Counsel stated that said reliance was misplaced and claimed that "[d]ue to the inability and failure of the consultant to comply with the requirements of the Division of Environmental Enforcement, the Division terminated the Brownfield Site Cleanup Agreement." The letter states that the Volunteer then retained a new environmental consultant, whose representative attended the informal negotiations on October 12, 2007, and that the DEC did not object to the new consultant. Counsel asserted that the Division's "refusal to reinstate the Volunteer, in part because of the 'Volunteer's repeated failures to fulfill its obligations under the Agreement' and for the reason that it did 'not consider [Volunteer's] belated decision to retain a new consultant persuasive' was unreasonable, arbitrary and capricious and an abuse of discretion, and set forth its arguments in this regard. In essence, petitioners asserted that up until the termination of the BCA, each submission it had made that was disapproved by the DEC was later revised and approved, and that it had expended considerable sums on consultants, remediation costs and State costs incurred in relation to the implementation of the BCA.

The DEC, in a letter dated January 7, 2007 responding to the December 14, 2007 letter, explicitly stated that this letter was not a response of the Department's OHMS. The DEC stated that petitioners had not met the conditions set forth in the BCA for invoking formal dispute resolution; that the request for dispute resolution was beyond the contractual terms of the BCA; and that the DEC would not participate in any proceedings commenced before the OHMS. The DEC also reviewed the petitioners' efforts to comply with the BCA

and remediate the site since 2003, and concluded that due to the environmental and public health hazards present at the site, it needed to expedite the remediation of the site.

An Administrative Law Judge (ALJ), in a report dated May 1, 2008, recommended that the Director of the Division of Environmental Remediation dismiss the Volunteer's December 14, 2007 request for formal dispute resolution filed with the OHMS, as the BCA does not provide for dispute resolution with respect to the DEC's determination to terminate the BCA. The Director, in a letter dated May 2, 2008, adopted the ALJ's recommendation dismissing the request for formal dispute resolution.

Petitioners commenced the within hybrid Article 78 and declaratory judgment action on March 19, 2008. Petitioners thereafter moved to annul the DEC's determination to terminate the BCA, for declaratory judgment to the effect that ECL § 27-1409(5) and (12) are unconstitutional, and for damages for breach of contract. The DEC separately moved to dismiss the amended verified petition/complaint on the grounds of statute of limitations, lack of subject matter jurisdiction, and failure to state a cause of action. This court, in its order of January 28, 2009, denied that branch of respondent's motion to dismiss the petition/complaint as untimely and granted it 30 days from the date of entry to serve its answer. Those branches of respondent's motion which sought to dismiss the due process and equal protection claims set forth in the declaratory judgment claim were dismissed on the grounds of failure to state a cause of action and the cause of action for breach of contract was

dismissed on the grounds of lack of subject matter jurisdiction. Petitioners' motion was denied as premature.

On April 13, 2009, the DEC served a verified answer and memorandum of law and filed the administrative record with the court, in compliance with the terms of said order.

Petitioners filed a note of issue and demand for a jury trial on April 27, 2009. In the within order to show cause dated April 28, 2009, petitioners seek a stay of the within proceedings and determination of the within petition, pursuant to CPLR 2201, pending a trial on the issue of whether they were in "substantial compliance" with the BCA agreement. Petitioners assert that they never had an evidentiary hearing on the issue of "substantial compliance" and, thus, seek to contest this determination at trial. Petitioners assert that the BCA agreement by its terms is "enforceable as a contractual agreement under the laws of the State of New York"; that the question of whether it substantially performed under said contract is generally a question of fact; that on this record, whether petitioners failed to "substantially comply" with said agreement cannot be determined as a matter of law; that they never had an evidentiary hearing on this issue; and that the failure to conduct such a hearing constitutes a denial of due process.

Respondent DEC cross-moves in opposition, and seeks to vacate the note of issue and demand for a jury trial, on the grounds that the remaining causes of action of the within hybrid Article 78 proceeding and declaratory judgment action do not raise any triable issues of fact.

CPLR 7804(h) provides that "If a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith." This statutory provision does not address what issues are appropriate for trial before the court in an Article 78 proceeding, nor does it identify the specific circumstances that may render it appropriate for a court to conduct such a trial (*Matter of Pantelidis v New ork City Bd. of Stds. & Appeals*, 43 AD3D 315 [2007]). The existence of a triable issue of fact is not an ordinary occurrence in an Article 78 proceeding. Triable issues of fact are presented in an Article 78 proceeding, particularly in mandamus to review proceedings, where the record is insufficiently developed for the court to evaluate the rationality or legality of the body or officer's determination; the petitioner has presented competent and relevant proof that the material on which the body or officer "based its determination had no basis in fact...."; or on a claim of illegal selective enforcement of valid laws or regulations, the petitioner has presented factual proof in the form of affidavits, documents or other evidence, that he or she is more likely than not to succeed on the claim (14-7804 New York Civil Practice: CPLR P 7804.08 [Note: on-line treatise]).

Respondent has submitted a copy of the administrative record, which is sufficient for the court to determine the issues raised in the petition. The parties agree on the salient facts that led to the DEC's termination of the BCA. Petitioners, however, take issue with the conclusion reached by the DEC, and assert that the DEC acted arbitrarily and capriciously, and abused its discretion when it terminated the contract. The question of whether or not the DEC actions were proper, as well as any remaining constitutional claims,

solely raise legal issues and do not present any triable issues of fact. Upon examination of the administrative record, the court finds that it is sufficiently developed to evaluate the rationality or legality of the DEC's determination.

Petitioners, assert that whether a party has "substantially performed" under a contract usually raises a question of fact, and relies solely upon cases involving claims of breach of contract (*Garofalo Elec. Co. Inc. v New York Univ.*, 300 AD2d 186 [2002]; *Merritt Meridian Constr. Corp. v Old Country Iron Works*, 229 AD2d 661 [1996]; *Anderson Clayton & Co. v Alanthus Corp.*, 91 AD2d 985 [1983]). Petitioners, however, may not pursue a claim for breach of contract in the guise of an Article 78 proceeding. Furthermore, as this court previously stated, this court lacks subject matter jurisdiction over any such claim for breach of contract.

Therefore, petitioners' motion for a stay pending an evidentiary hearing is denied, and respondent's cross motion to vacate the note of issue and jury demand is granted.

Turning now to the Article 78 proceeding, the DEC's determination was not made as a result of a hearing held and evidence taken, pursuant to direction by law. Therefore, the appropriate standard of review is whether the determination has a rational basis in law (CPLR 7803[4]; *see generally Matter of Sullivan County Harness Racing Assn., Inc. v Glasser*, 30 NY2d 269 [1972]; *Matter of Colton v Berman*, 21 NY2d 322 [1967]).

To the extent that petitioners assert that respondent's actions were arbitrary and capricious, "[a]rbitrary action is without sound basis in reason and is generally taken without

regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *see also Matter of Arrocha v Bd. of Educ. of City of New York*, 93 NY2d 361 [1999]; *Matter of Zupa v Bd. of Trustees of Town of Southold*, 54 AD3d 957 [2008]; *Matter of Ball v New York State DEC*, 35 AD3d 732 [2006]).

The first cause of action of the amended petition alleges that the DEC's termination of the BCA was arbitrary and capricious in that petitioners have substantially complied in all material aspects with the terms and conditions of the BCA from its effective date until May 14, 2007; that the dispute that led to the termination involved a technical disagreement or misunderstanding over the scope of the proposed SVE system; that petitioners have been in compliance with the contract for 97% of the time it was in effect; that the ECL and the DEC's regulations do not require 100% compliance with a BCA; that petitioners have incurred over $100,000.00 in investigation and remedial costs, and have agreed to pay or have paid DEC's costs in an amount greater than $54,000.00; and that the parties' dispute should have been resolved through formal dispute resolution as requested by petitioners rather than by termination.

Section XIII of the subject BCA provides that the DEC "may terminate this Agreement at any time ... in the event Volunteer fails to substantially comply with the Agreement's terms and conditions." Section 27-1409(5) of the Environmental Conservation Law similarly provides that the DEC is authorized "to terminate a Brownfield site cleanup

agreement if the applicant implementing such agreement fails to substantially comply with such agreement's terms and conditions." Thus, substantial, rather than strict compliance with the terms of the BCA was required.

It was within the DEC's authority to terminate the subject contract, pursuant to the terms of said agreement. In determining whether petitioners had substantially complied with the BCA, the DEC was entitled to examine petitioners' conduct. Here, the evidence in the record establishes that the DEC terminated the BCA after petitioners failed to follow the procedures set forth in a work plan drafted by their own consultant and approved by the DEC two months prior to the submission of the SEV Report; that petitioners failed in their revised Report to correct the specific objections to the initial Report; and that petitioners failed to invoke the dispute resolution provisions within 30 days of receipt of notice that the revised Report had been rejected and that the contract was subject to termination.

Although petitioners assert that they were in substantial compliance with the BCA 97% of the time, the evidence in the administrative record demonstrates that petitioners' readily admitted that prior to May 2007, they had a history of making submissions to the DEC which had been rejected, revised, and ultimately accepted. Moreover, petitioners conceded that they had a contractual dispute with their environmental consultant, and, thus, were unable to respond in a satisfactory manner to the DEC's rejection of the subject initial and revised Report. The submission of said Report was subject to the

DEC's approval, and pursuant to Subparagraph II.E.I of the BCA, such submissions, if approved, became an enforceable part of the contract. Subparagraph II.E.2 of the contract further provides that if a submission is disapproved, the DEC had a variety of options, including termination of the agreement. Thus, the submission of the Report and its approval, was a condition of the BCA, which petitioners were contractually obligated to fulfill, and not a mere "technical" dispute.

Despite petitioners' claim that their prior environmental consultant was "responsible" for submitting the necessary reports and remediation activity on the site, said environmental consultant was petitioners' agent and not a party to the BCA. Thus, it remained petitioners' responsibility to perform their obligations under the contract. In their dealings with the DEC, petitioners failed to demonstrate that they were able to comply with the requirement that they submit the subject Report, or a Revised Report, in conformity with the approved work plan, and the terms of the BCA.

To the extent that petitioners and respondent have submitted affidavits regarding petitioners' compliance with the BCA prior to the submission of the subject Report and revised Report, these affidavits are outside of the administrative record and shall not be considered here (*see Featherstone v Franco*, 95 NY2d 550 [2000]; *Yarbough v Franco*, 95 NY2d 342 [2000]).

The court, therefore, finds that the DEC's determination that petitioners' failure to submit an initial or revised Report in conformity with the work plan constituted a lack of

substantial compliance with the BCA, is supported by the administrative record and, thus, is neither arbitrary nor capricious, nor an abuse of discretion.

Petitioners' second cause of action, in which they claim to have timely invoked their right to an impartial hearing pursuant to the dispute resolution procedures of paragraph XIV.B of the BCA, is without merit. In order to invoke the formal dispute resolution proceedings set forth in subparagraph XIV.B of the BCA, petitioners were first required to comply with the informal dispute resolution procedures set forth in subparagraph XIV.A of the contract. Subparagraph XIV.A provides that:

> "In the event disputes arise regarding any notice of disapproval of a submittal, proposed Work Plan or Final Report, or during the implementation of any Work Plan, Volunteer may, within thirty (30) Days of receipt of notice, request in writing informal negotiations with the Department in a good faith effort to resolve the dispute. The Department and Volunteer shall consult together in good faith and exercise best efforts to resolve any differences or disputes without resort to the procedures described in Subparagraph XIV.B. The period for informal negotiations shall not exceed thirty (30) Days from Volunteer's request for informal negotiations. If the parties cannot resolve a dispute by informal negotiations during this period, the Department's position shall be considered binding unless Volunteer notifies the Department in writing within thirty (30) Days after the conclusion of the thirty (30) Days period for informal negotiations that it invokes the dispute resolution provisions under Subparagraph XIV.B."

Following receipt of the DEC's letter of July 26, 2007 which rejected the submission of the revised Report, petitioners did not make a written request for informal dispute resolution. Contrary to petitioners' claim, the letter of September 19, 2007 did not

constitute a timely request for informal dispute resolution. Rather, this letter specifically sought reinstatement of the BCA, which had been terminated on August 20, 2007. Petitioners' claims regarding the termination of the BCA and the DEC's refusal to reinstate the BCA, however, were clearly beyond the scope of the agreement's dispute resolution provision. To the extent that the parties met on October 12, 2007 and participated in a conference call on October 30, 2007, these meetings did not constitute informal negotiations under the terms of the BCA, as petitioners never made a timely request for informal dispute resolution.

The court, therefore, finds that the DEC's denial of petitioners' request for dispute resolution pursuant to paragraph XIV.B of the BCA was neither arbitrary and capricious nor contrary to public policy.

Petitioners' third cause of action asserts that the DEC's failure to adopt uniform procedures for terminating a BCA and the DEC's alleged haphazard termination of a BCA constitutes a violation of the due process and equal protection. As previously stated by this court, the basic requirements for procedural due process are notice and an opportunity to be heard (*CIBC Mellon Trust Co. v Mora Hotel Corp.*, 296 AD2d 81, 91 [2002], *affd* 100 NY2d 215 [2003]). Petitioners' allegations, however, are not based upon an alleged lack of notice and opportunity to be heard. Rather, the petition alleges that the DEC has "not issued procedures, guidelines or regulations interpreting or clarifying what constitutes 'comply substantially' with the terms and conditions of the BCA," and has left

such a determination to the "whim" of a DEC staff attorney. Clearly, there is no constitutional right to have the DEC spell out in advance what level of conduct constitutes substantial compliance with the terms of a contract. Petitioners' due process claim, therefore, is rejected.

A violation of equal protection arises "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]). Petitioners do not allege selective treatment on any such impermissible grounds or that the respondent singled it out "with malevolent intent" (*Bower Assoc. v Town of Pleasant Val.*, *supra*; *Darby Group Cos. Inc. Distribs v Rockville Ctr. N.Y.*, 43 AD3d 979[2007]. Therefore, petitioners' equal protection claim is meritless.

Petitioners' fourth cause of action which alleges that the DEC's dismissal of Hamil's request for dispute resolution, constituted a denial of Hamil's right of due process, is without merit. Contrary to petitioners' claim, the DEC's letter of November 19, 2007 did not constitute an end of informal negotiations under the terms of the BCA. Since the parties never entered into informal dispute resolution pursuant Subparagraph XIV.A of the BCA, petitioners were not entitled to seek formal dispute resolution before the OHMS. Moreover, neither the termination of the subject contract nor the refusal to reinstate said contract were

subject to dispute resolution under the terms of the BCA. Following the termination of the BCA, petitioners were entitled to seek Article 78 review in this court, or bring an action in the Court of Claims for breach of contract. Petitioners' December 14, 2007 request for formal dispute resolution under the terms of the BCA was impermissible and, therefore, the OHMS's rejection of said request did not constitute a denial of due process.

Petitioners' claim that the DEC's failure to give notice of its intent to terminate the contract and failure to provide Hamil with an opportunity to cure, pursuant to 6 NYCRR 375-3.5(c)(1)(ii) was arbitrary and capricious and an abuse of discretion, is rejected. Petitioners' reliance on 6 NYCRR 375-3.5 is misplaced. This regulation provides that certain notice provisions for terminating a Brownfield cleanup contract be set forth in such contracts. However, this regulation was adopted on November 29, 2006, more than two years after the subject contract was entered into in 2004. These provisions, therefore, are inapplicable to the subject contract.

Petitioners' sixth cause of action alleges that the DEC's reasons for refusing to reinstate the BCA were pretextual, and, therefore, its actions were arbitrary and capricious and an abuse of discretion. It was within the DEC's discretion to reinstate the contract, and that its refusal to do so is supported by the evidence in the record. Petitioners' claim of "pretext," thus, is without merit.

Petitioners seventh and eight causes of action allege, in essence, that the termination of the contract, the refusal to reinstate the contract and the offer of a

Consent Order, which deprived petitioners of their ability to derive benefits under the BCA is arbitrary and capricious, an abuse of discretion and constitutes a penalty.

The benefits available to the petitioners under the BCA were dependent upon their adherence to the requirements of the cleanup program and the proper performance of said contract. Petitioners' failure to comply with the terms of the contract disqualified them from these benefits, but did not constitute a penalty.

As regards the DEC's offer to enter into a Consent Order, petitioners were under no obligation to enter into said order. The fact that petitioners may be potentially liable for off-site contamination under a separate statutory scheme (ECL § 27-1313) does not constitute a penalty.

In view of the foregoing, petitioners' motion for a stay is denied, and respondent's cross motion to vacate the note of issue and jury demand is granted. Petitioners' request to annul the DEC's termination of the BCA and to reinstate said BCA is denied, and the petition is dismissed.

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J.S.C.