

West One Twelve Holding Co. Inc. v City of New York

2009 NY Slip Op 32688(U)

November 12, 2009

Supreme Court, New York County

Docket Number: 103154/09

Judge: Saliann Scarpulla

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

PART 52

SALIANN SCARPULLA
Justice

Index Number : 103154/2009
WEST ONE TWELVE HOLDING CO. INC.,
vs.
THE CITY OF NEW YORK
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

INDEX NO. 103154-09
MOTION DATE 9/16/09
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

were read on this motion to/for PLR 3211(a)(5)

PAPERS NUMBERED
<u>1</u>
<u>2</u>
<u>3.4</u>

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes

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 1215).

Upon the foregoing papers, It is ordered that this

motion and cross-motion are decided in accordance with accompanying memorandum decision.

This Constitutes Decision, Order and Judgment of the Court.

Dated: 11/12/09.

Saliann Scarpulla
SALIANN SCARPULLA 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: CIVIL TERM: PART 52

----- X
WEST ONE TWELVE HOLDING CO. INC.,

Plaintiff,

-against-

Index Number 103154/09

Submission Date 9/16/09

Mot. Seq. No. 001

**DECISION, ORDER
& JUDGMENT**

THE CITY OF NEW YORK,

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). X

Appearances: For Plaintiff:
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For Defendant:
New York City Corporation Counsel
By Elizabeth A. Flesher, Esq.
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Papers considered in review of this motion for summary judgment:

Papers	Numbered
Notice of Motion and Affidavit Att.....	1
Affidavit in Opposition with Att	2
Reply Affidavit.....	3

HON. SALIANN SCARPULLA, J.:

On March 6, 2009, plaintiff filed a plenary action against the City of New York (“the City”) seeking an injunction and a declaratory judgment that the invoices issued by the City of New Department of Health and Mental Hygiene (“the Department of Health”), dated June 12 and July 3, 1999, in the amounts of \$5,196.00 and \$10,435.30 respectively, for the clean up work done at the plaintiff’s premises were issued in violation of due process. Defendant the City of New York moves for dismissal of plaintiff’s complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations

applicable to public bodies under CPLR 217 or, in the alternative, on the basis that the present action was improperly commenced as a plenary suit, instead of a special proceeding under CPLR 7804. Plaintiff argues in opposition that there is no statute of limitations on its claim for declaratory judgment, because plaintiff brings a constitutional claim against the City for its failure to serve plaintiff with a five-day notice of violation and an order to remove a health code violation from its property before going ahead with the clean up work.

The facts in this case are mostly undisputed. After receiving the June 12, 1999 and July 3, 1999 invoices, plaintiff protested the charges by letter to the Department of Health. The Department of Health replied by letter, dated July 7, 1999, affirming the lawfulness of the invoices and advising plaintiff that it may file a notice of claim with the City's Comptroller. On October 7, 1999, plaintiff filed a notice of claim with the Office of the Comptroller, requesting that the invoices be retracted, mainly because plaintiff had never been given an opportunity to remedy the health code violation on its own. In its supporting affidavit, plaintiff also stated that the Department of Health did the clean up work not in plaintiff's small backyard, but on an adjacent open vacant lot owned by the City.

In the following several years, a series of letters and telephone conversations ensued between plaintiff and the Comptroller's Office, without any progress. By letter

dated January 10, 2008, the Comptroller denied plaintiff's claim, explaining that the six-year statute of limitations had already expired.

Discussion

The Article 78 proceeding replaces the common law writs of mandamus, prohibition, and certiorari to review, providing in their stead a uniform device for challenging in court the actions and determinations of an administrative agency. Siegel, *New York Practice*, § 557 (4th ed 2005). The scope of the Article 78 application encompasses review of “abuse of discretion as to the measure or mode of penalty or discipline” imposed by administrative agencies of the local and state governments. CPLR 7803(3).

Judicial review of administrative decisions concerning liens must be commenced by an Article 78 proceeding. *See e.g., Atkinson v City of New York*, 96 N.Y.2d 809 (2001) (worker's compensation lien); *Matter of Art-Tex Petroleum v New York State Dept. of Audit and Control*, 93 N.Y.2d 830 (1999) (environmental lien); *Kahal Bnei Emunim and Talmud Torah Bnei Simon Israel v Town of Fallsburg*, 78 NY2d 194, 201 (1991) (tax lien); *O'Neil v City of New York*, 2005 N.Y. Slip. 25443, *2 (App Term, 2nd Dep't 2005) (sanitation clean up lien).

Here, plaintiff argues that because the Department of Health issued the initial Order of Violation Removal in the name of the previous owner of the subject property, the City acted outside of its jurisdiction with respect to the imposition of a lien on

plaintiff's property for nonpayment. According to plaintiff, such a lien may be collaterally attacked in a declaratory judgment action.

Challenges to the Department of Health's fines and liens grounded in the argument of improper service of the initial notice of a health code violation should be reviewed judicially in an Article 78 petition. *See Community Counseling & Mediation Services v New York City Dept. of Health and Mental Hygiene*, 45 A.D.3d 315 (1st Dep't 2007); *see also 72A Realty Assoc. v New York City Env'tl Control Bd.*, 275 A.D.2d 284, 276 (1st Dep't 2000). Accordingly, the present plenary declaratory judgment suit was not properly brought before the Court and ought to be dismissed.

Even if the Court, in the interests of justice, converted the present plenary action into an Article 78 proceeding, the proceeding would be barred by the applicable statute of limitations. CPLR 217(1) provides that an Article 78 proceeding must be commenced within four months of the date of the final determination.¹ CPLR 7801(1); *Carter v State of New York*, 95 N.Y.2d 267, 270 (2000). An agency determination is deemed final "when the petitioner is aggrieved by the determination." *Biondo v New York State Bd. of Parole*, 60 N.Y.2d 832, 834 (1983).]

¹The four-month statute of limitations under CPLR 217(1) would still be applicable to plaintiff's constitutional claims even if the present plenary suit for declaratory judgment and injunctive relief were a proper procedural mechanism. A party may not assert constitutional claims in an attempt to subvert the statute of limitations provided by CPLR 217 when the essence of the party's challenge is to the specific actions of an administrative agency. *See Kahal Bnei Emunim and Talmud Torah Bnei Simon Israel v Town of Fallsburg*, 78 NY2d 194, 201 (1991); *see also Matter of Roebing Liquors, Inc. v Michael Urbach, as Commissioner of the New York State Department of Taxation and Finance*, 245 A.D.2d 829, 830 (3rd Dep't 1997).

In the context of charges for the Department of Health's clean up and restoration remedial actions, the statute of limitations accrues, at the latest, when the property owner acknowledges receipt of the Department of Health invoice and delinquency notice. *Community Counseling & Mediation Services*, 45 A.D.3d at 315. Here, plaintiff received two invoices and a letter from the Department of Health affirming the accuracy of the invoices by July 7, 1999, on which date the four-month statute of limitations started running, lapsing as of November 6, 1999.

Plaintiff argues that for many years, plaintiff engaged in negotiations with the Comptroller's Office regarding the invoices and should not be now punished for attempting to amicably resolve the dispute. Plaintiff's argument is unavailing. Correspondence and a request for reconsideration following a final determination of an agency does not, in and of itself, extend the four-month statutory period in which review of the final determination must be sought. *See De Milion v Borghard*, 55 N.Y.2d 216, 222 (1982); *see also Raykowski v New York City Dept. Of Transp.*, 259 A.D.2d 367 (1st Dep't 1999); *Matter of Fiore v Board of Educ. Retirement System*, 48 A.D.2d 850 (2nd Dept 1975), *aff'd* 39 NY2d 1016 (1976). Plaintiff's filing a notice of claim also did not toll the four-month statute of limitations period. *Community Counseling & Mediation Services*, 45 A.D.3d at 315.

Even if the statute of limitations were tolled until January 10, 2008, on which day the Comptroller's Office denied plaintiff's claim, the current action would still be

untimely. Plaintiff commenced this action on March 6, 2009, almost sixteen months from the Comptroller's January 10 letter and about ten years from the original receipt of the subject invoices. Plaintiff has not shown any legally cognizable excuse for the ten-year delay in challenging the invoices. Therefore, the City's motion must be granted, and the action is dismissed as untimely.

In accordance with the foregoing, it is

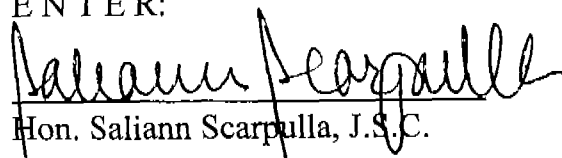
ORDERED, ADJUDGED, and DECREED that the motion by the City of New York pursuant to CPLR 3211(a)(5) dismissing with prejudice plaintiff's complaint in its entirety is granted; and it is further

ORDERED, ADJUDGED AND DECREED that the Clerk of the Court enter judgment accordingly.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York
November 12, 2009

ENTER:


Hon. Saliann Scarpulla, J.S.C.

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