Block 3066, Inc. v City of New York
2011 NY Slip Op 30190(U)
January 21, 2011
Sup Ct, Richmond County
Docket Number: 101153/10
Judge: Joseph J. Maltese
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND
DCM PART 3

BLOCK 3066, INC.,

Plaintiff,

-against-

THE CITY OF NEW YORK and THE CITY OF NEW YORK DEPARTMENT OF PARKS AND RECREATION,

Defendants.
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Index No: 101153/10
Calendar No: 2514-001

DECISION & ORDER
HON. JOSEPH J. MALTESE

The following papers numbered 1 to 3 were marked fully submitted on the 10th day of September, 2010:

	Pages Numbered
Notice of Motion to Dismiss by Defendants, with Supporting Papers (dated July 20, 2010)..	1
Affirmation in Opposition by Plaintiff (dated July 27, 2010)..	2
Reply Affirmation (dated September 30, 2010)..	3

Upon the foregoing papers, defendants' motion to dismiss the complaint is granted in accordance with the following.

Plaintiff Block 3066, Inc. is the owner of certain premises known as 35, 43, 49, 55 and 61 Shore Acres Road, Staten Island, New York. According to the complaint, in or about and prior to 2008, plaintiff removed certain trees from these premises that were either "dead" and "dangerous," or had fallen during severe storms. The plaintiff was notified by the Director of Landscape Management for the City of New York Department of Parks and Recreation (hereinafter the "City"), in a letter dated September 2, 2008, responding to a request for approval of a "Builder's Pavement Plan," that due to "unaccounted tree removals, missing and dead trees," the agency's approval would not be issued until restitution requirements were met. As specified therein, these included

the remittance of compensatory payment to the City in the amount of $135,037.79. Plaintiff maintains that it is in the process of constructing housing units on the subject properties and is precluded from receiving certificates of occupancy as a result of defendants' allegedly improper allegations and demands. In this declaratory judgment action, plaintiff challenges its liability for the alleged improper removal of trees, which it maintains that (1) were felled by severe storms, (2) were removed because they were "dead" and "dangerous," or (3) never existed. In the alternative, plaintiff seeks a judgment declaring that the fine imposed by the City is excessive.

In moving to dismiss the complaint (*see* CPLR §7804[c]), defendants maintain that plaintiff improperly commenced these proceedings as a declaratory judgment action rather than an Article 78 proceeding. The City also seeks dismissal on the ground that the four-month Statute of Limitations set forth in CPLR §217, which governs this case, has long expired. More particularly, defendants claim that the challenged determination became "final and binding" in September 2008, when plaintiff was notified of the charges imposed for the illegal removal of trees from the subject properties. Therefore, it is argued that this action, which commenced on May 25, 2010, is time-barred.

In opposition to the motion, plaintiff maintains that a final administrative determination by the City was never rendered. In this regard, plaintiff points to the City's failure to produce photocopies of the purported fine or any other documents evidencing the issuance and service upon plaintiff of a final determination by the Commissioner of the Department Parks and Recreation. Plaintiff further argues that in the absence of any administrative proceedings wherein plaintiff had an opportunity to contest the agency's imposition of the purported "compensatory payment," the four-month limitations period never commenced. Consequently, the plaintiff contends that this declaratory judgment action is proper and, in any event, CPLR §103 is to be liberally construed, to permit the Court to convert this action into an Article 78 proceeding.

"The CPLR does not prescribe a specific limitations periods for declaratory judgment actions. Rather, the applicable Statute of Limitations for such an action depends on the underlying claim and the 'nature of the relief' sought" (Stein v

Garfield Regency Condominium, 65 AD3d 1126, 1126-1127, quoting Solnick v Whalen, 49 NY2d 224, 229; *see* Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex., 87 NY2d 36, 40-41). Thus, in determining the Statute of Limitations applicable to a particular declaratory judgment action, the Court is required to look to "the substance of that action to identify the relationship out of which the claim arises and the relief sought" (Solnick v Whalen, 49 NY2d at 229; *see* Matter of Save the Pine Bush v City of Albany, 70 NY2d 193, 202; Atkins v Town of Rotterdam, 266 AD2d 631, 632). "If the court determines that the underlying dispute can or could have been resolved through a form of action or proceeding for which a specific limitation period is statutorily provided, that limitation period governs the declaratory judgment action" (Save the Pine Bush v City of Albany, 70 NY2d at 202; *see* P & N Tiffany Prop., Inc. v Village of Tuckahoe, 33 AD3d 61, 63; Matter of Llana v Town of Pittstown, 234 AD2d 881, 882-883, *lv denied* 91 NY2d 812).

Here, plaintiff's position is that the "compensatory payment" imposed by the City "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion as to the measure or mode of penalty or discipline imposed" (CPLR §7803[3]). Accordingly, although the complaint is fashioned as a declaratory judgment action, it is, clearly, a direct challenge to a determination of an administrative agency, i.e., the New York City Department of Parks and Recreation, and is governed by a four-month Statute of Limitations (*see* CPLR 217[1]; Cloverleaf Realty of N.Y., Inc. v Town of Wawayanda, 43 AD3d 419, 420-421, *lv denied* 9 NY3d 814).

With this established, it is pertinent to note that the above four-month period commences for purposes of CPLR §217 when "the [administrative] determination to be reviewed becomes final and binding" (CPLR 217[1]), i.e., when the party affected receives notice of and is aggrieved by the decision (*see* Matter of Biondo v New York State Bd. of Parole, 60 NY2d 832, 834; Matter of Cauldwest Realty Corp. v City of New York, 160 AD2d 489, 490). If the administrative decision is not final, it is not subject to judicial review in a CPLR Article 78 proceeding. Stated otherwise, a petitioner must exhaust all of his or her administrative remedies before seeking judicial relief (*see* CPLR 7801[1]).

In the matter at bar, the City maintains that since “internal procedures for appealing the [disputed] charges” do not exist, the September 2008 notification to plaintiff constituted a final determination. On the other hand, it is plaintiff’s position that a final ruling or determination has not been rendered since administrative proceedings were never held where it could have contested its liability for the removed trees and/or the purportedly excessive fine. However, CPLR §7803(3) is specifically targeted to those administrative determinations as to which no hearing is required by law (*see* Alexander, McKinneys Cons. Laws of N.Y., CPLR 7801:3, p 36, CPLR 7803:2, p 15; *cf*. CPLR 7803[4]). Moreover, plaintiff does not maintain that the City’s action was ultra vires, or that the exhaustion of administrative remedies would have been futile or the cause of irreparable harm (*see* Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d 52,57). In fact, there is no evidence that reconsideration of the City’s determination was even requested.

Here, it is the opinion of this Court that it is not necessary to reach the question of the finality of the September 2008 notification by the City in order to conclude that plaintiff’s declaratory judgment should be dismissed rather than converted to an article 78 proceeding pursuant to CPLR §103(c) (*see* Matter of Syracuse Brigadiers v Racing and Wagering Board of State of N.Y., 275 AD2d 918, 919; *cf*. Walsh v New York State Thruway Auth., 24 AD3d 755, 756). More specifically, if the City is correct, the absence of any avenue of administrative relief renders the September 2, 2008 letter a final determination as to which the four-month Statute of Limitations has long expired. Alternatively, if plaintiff is correct, its failure to exhaust its administrative remedies, under the facts of this case is a bar to judicial review (*see* CPLR 7801[1]; Matter of Martin v Ambach, 85 AD2d 869, 870, *affd* 57 NY2d 1001; Matter of Syracuse Brigadiers, Inc. v Racing and Wagering Board of State of New York, 275 AD2d at 919; *cf*. Walsh v New York State Thruway Auth., 24 AD3d at 757).

Accordingly, it is hereby:

ORDERED, that defendants’ motion to dismiss the complaint is granted, and the action is hereby dismissed; and it is

ORDERED, that the Clerk enter judgment accordingly.

ENTER,

Dated: January 21, 2011

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Joseph J. Maltese
Justice of the Supreme Court