

Briarwood Manor Prop. LLC v County of Niagara

2014 NY Slip Op 33874(U)

May 19, 2014

Supreme Court, Niagara County

Docket Number: 152044

Judge: Ralph A. Boniello III

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

BRIARWOOD MANOR PROPERTY LLC

Plaintiff,

vs.

Index No: 152044

COUNTY OF NIAGARA

and

MOUNT VIEW PROPERTIES OF LOCKPORT LLC

Defendants.

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AMENDED DECISION AND ORDER - VARIOUS SEE IMAGE/B/



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Wayne F. Jagow, Niagara County Clerk

Clerk: DC

AMENDED
DECISION & ORDER

Boniello, III., J.

By Notice of Motion, Defendants County of Niagara (hereinafter, "County") and Mount View Properties of Lockport LLC (hereinafter, "Mount View") seek an Order, pursuant to CPLR § 3012 (d), extending the time for them to file a pleading, compelling the Plaintiff Briarwood Manor Property, LLC (hereinafter, "Briarwood Manor") to accept such pleading and also their responsive motions to dismiss the Plaintiff's Complaint. In addition, both Defendants have requested permission to allow argument of their respective motions to dismiss prior to the submission of a late pleading. Plaintiff Briarwood Manor has cross-moved for an order granting a default judgment against both Defendants pursuant to CPLR § 3215 (f).

Initially, the Court notes that the allegations set forth in the Plaintiff's Complaint seek to challenge a municipal determination to sell property located at 1001 Lincoln Avenue in the Town of Lockport to Mount View. Significantly, the sale was adopted by resolution of the Niagara County Legislature on July 11, 2012. Clearly, an Article 78 proceeding is the proper vehicle to challenge such action rather than a declaratory judgment action (*see, McComb v Greenville*, 163 AD2d 369 [2nd Dept 1990]). The Court hereby converts this action to an Article 78 proceeding pursuant to CPLR § 103 (c). Such ruling eliminates any issue of "default" by the County and Mount View. Further, the papers submitted in support of and in opposition to the motion indicate that the parties are "deliberately charting a summary judgment course" concerning the timeliness of this action. As a result, the parties respective motions shall be deemed as Motions for Summary Judgment pursuant to CPLR 3212 and the response as opposition therein (*see, Nowacki v Becker*, 71 AD3d 1496 [4th Dept 2010]).

Summary Judgment is a drastic remedy which should not be granted if there is a possible relevant factual issue (Siegel, NY Prac § 278, at 459-460 [4th ed]). On a motion for summary judgment, the proponent of the motion must set forth evidentiary proof, in admissible form, eliminating any material issue of fact from the suit (*Dix v Pines Hotel, Inc.*, 188 AD2d 1007 [4th Dept 1992]). Once the moving party makes this prima facie showing, the burden shifts to the opposing party to produce admissible evidence, sufficient to create material issues of fact requiring a trial (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The law is clear that the existence of a bona fide issue must be raised by evidentiary facts and not be based upon conclusory allegations or unsubstantiated assertions in order to defeat a motion for summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Rachlin v Volvo Car Corp.*, 289 AD2d 981 [4th Dept 2001]; *Loomis v Sun Oil Co.*, 79 AD2d 889 [4th Dept 1980]). However, a court must view the evidence in the light most favorable to the party opposing the motion (*Damerou v Johnson*, 265 AD2d 927 [4th Dept 1999]).

Here, the commencement of a declaratory judgment action by Briarwood Manor shall not preclude application of the four-month Statute of Limitations (*see*, CPLR § 217 [1]; *McComb v Greenville, supra*). The law is clear that “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” (CPLR § 217 [1]). An administrative determination is considered final and binding when a petitioner knew or should have known that he/she was aggrieved thereby (*Matter of Arnold v Erie County Med. Ctr. Corp.*, 59 AD3d 1074 [4th Dept 2009]; *Cabrini Medical Center v Axelrod*, 107 AD2d 965 [3rd Dept 1985]).

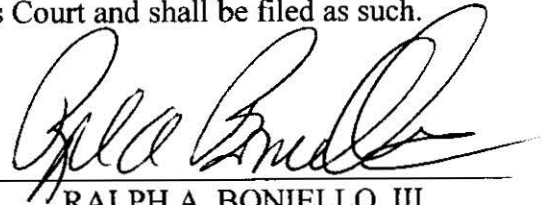
It is undisputed that the Niagara County Legislature's decision making process to enter into a contract to sell the subject property was complete by resolution adopted on July 11, 2012. Notwithstanding, Briarwood Manor asserts that the instant matter is timely based on the fact that the action was commenced on January 17, 2014, within four-months from the time the property was officially conveyed on September 18, 2013. Specifically, Briarwood Manor claims that the actual conveyance of the property on September 18, 2013 was the "final act" that triggered the running of the statute of limitations period. In support of such position, it points to various changes that were made to the contract after the authorization of the Legislature that took place prior to the actual conveyance of the property. The Court finds such claims to be without merit (*see, Matter of Long Is. Pine Barrens Soc'y v County of Suffolk*, 55 AD3d 610 [2nd Dept 2008]; *Broderick v Castro*, 284 AD2d 909 [4th Dept 2001]; *Price v County of Westchester*, 225 AD2d 217 [3rd Dept 1996]; *Sierra Club v Power Auth.*, 203 AD2d 15 [1st Dept 1994]). Significantly, when the Niagara County Legislature approved the sale of the subject property for \$550,000.00 they also provided that the prospective buyer may further negotiate with the County concerning the terms of the contract after conducting an inspection of the premises. The resolution also expressly stated that it would be necessary to abate the asbestos at the property.

For the reasons set forth herein, the instant proceeding must be dismissed as time-barred pursuant to CPLR § 217 (1). All other allegations asserted by Briarwood Manor not specifically addressed herein have been considered by the Court and are found to be without merit.

Accordingly, the Court grants the County and Mount View's request to dismiss the Complaint/Petition in its entirety.

The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

This Decision shall constitute the Order of this Court and shall be filed as such.



RALPH A. BONIELLO, III.
Supreme Court Justice

Dated: May 19, 2014
Niagara Falls, New York

GRANTED

MAY 19 2014

BY Cynthia A. Wam

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