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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

RIVERBAY CORPORATION,
d/b/a CO-OP CITY,

Plaintiff,

MEMORANDUM DECISION/ORDER
Index No.: 309465/12

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and CARTER STRICKLAND, AS COMMISSIONER OF NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants.

HON. MARK FRIEDLANDER

Defendants, The City of New York (the "City"), New York City Department of Environmental Protection ("DEP"), and Carter Strickland, as Commissioner of DEP (collectively "defendants"), move for an order, pursuant to CPLR§3211(a)(7), dismissing the complaint for failure to state a cause of action and for failure to exhaust administrative remedies. The motion is decided as hereinafter indicated.

According to plaintiff's complaint, Riverbay is the owner of a cooperative apartment complex in the Bronx, known as Co-op City, built under the Mitchell-Lama program, consisting of 15, 372 residential units with 35 high rise buildings and 7 groups of 236 townhouses, with a residential population of approximately 55,000. On February 2, 2005, a DEP Inspector appeared at a vacant apartment, where wood tiles, which had been installed 38 years earlier, were being replaced. The DEP Inspector noticed mastic glue on the bottom of tiles. DEP issued a violation,

and fined Riverbay $10,000.00 for allegedly not treating renovation of the apartment as an asbestos remediation project.

The aforesaid glue was used to bond tiles to the floor during initial construction of the complex. Laboratory testing of the glue, using extreme conditions involving high temperature burning, disclosed chrysotile, a form of benign asbestos, in the ashes. Riverbay asserts that DEP's position (that this is an asbestos sensitive activity justifying full abatement practices in connection with renovation and repair) is arbitrary. Riverbay further asserts that compliance with DEP's orders, directions and regulations (pertaining to what Riverbay asserts is unnecessary asbestos removal) will cost Riverbay approximately $4 million per year for the project, which is projected to continue.

Riverbay alleges that its experts found: a) no friable asbestos in the floor tiles or mastic glue that binds them to floor; b) material does not become friable at any time during its life on floor, neither when it separates, nor during the floor tile replacement work; c) since no friability, no dangerous asbestos fibers present any risk to the workers or residents of Riverbay; d) more than 65,000 earlier studies complement these facts; e) current tests by experts retained by Riverbay conclude that it is not appropriate to treat routine replacement or repair of floor tiles as asbestos abatement projects.

Riverbay alleges that, on June 13, 2006, it requested relief from New York State Deptment Of Labor ("NYSDOL"), which had jurisdiction relating to Riverbay workers. A variance was issued regarding asbestos remediation, based on the fact that the mastic glue does not represent a health hazard. In 2007, second variance was granted by NYSDOL. However, it determined that Riverbay should be subject to DEP regulations, as the issue may affect tenants.

As a result of the foregoing, Riverbay's complaint seeks: (1) a preliminary and permanent injunction enjoining DEP from issuing violations to Riverbay, or requiring Riverbay to engage in what it asserts are unnecessary and costly asbestos remediation efforts regarding the flooring, tiles and glue in the buildings of Co-op City; (2) a declaratory judgment determining that Riverbay does not have to undergo the aforementioned asbestos remediation; and (3) unspecified monetary damages.

Defendants seek dismissal of plaintiff's complaint on the grounds that: (1) the complaint fails to state a cause of action, as it does not allege that defendants acted in violation of the City Asbestos Control Rules or any other statute or rule; and (2) plaintiff has not exhausted available administrative remedies.

The DEP has broad authority to make rules for the protection of the public and workers relating to the handling of asbestos in the City of New York. *Vision Environmental Services Corp. v. New York City Depart. of Environmental Protection,* 242 A.D.2d 431 (1st Dept. 1997), *lv. to appeal den.,* 91 N.Y.2d 805 (1998). *See also, Consolidated Flooring Corp. v Environmental Control Bd. of city of New York,* 58 A.D.3d 541 (1st Dept. 2009). Riverbay does not dispute DEP's authority, but asserts that DEP misapplied the regulations. However, a plenary lawsuit for a declaratory judgment is not the appropriate method for challenging DEP's findings or any alleged misapplication DEP's rules. The statutory scheme sets forth an administrative procedure for challenging an adjudication. More specifically, any violation issued by DEP may be contested at a hearing before an Administrative Law Judge (hearing officer) of the Environmental Control Board ("ECB"). A person or entity aggrieved by a decision issued by an Administrative Law Judge my seek review by Appeal to the ECB. A final

decision by the ECB is subject to review in an Article 78 proceeding.

There is no averment by Riverbay that it followed the statutory scheme challenging any violation issued by DEP to Riverbay or that it exhausted it administrative remedies. Thus, regardless of the merits of the substantive assertions in the complaint, the Court is compelled to dismiss the instant action for failure to first seek appropriate administrative relief.

Accordingly, defendants' motion is granted and plaintiff's complaint is dismissed in its entirety.

The foregoing constitutes the Decision and Order of the Court.

Dated: 3/9/15

MARK FRIEDLANDER, J.S.C.