

**Kosciuszko Plaza LLC v New York City Dept. of  
Hous. Preserv. & Dev.**

2016 NY Slip Op 30764(U)

April 26, 2016

Supreme Court, New York County

Docket Number: 161835/2015

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
KOSCIUSZKO PLAZA LLC, as successor to NEW  
KOSCIUSKO LLC and KOSCIUSKO REHAB LLC,

Index No. 161835/2015

Petitioner,

**DECISION/ORDER**

-against-

NEW YORK CITY DEPARTMENT OF HOUSING  
PRESERVATION AND DEVELOPMENT,

Respondent.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	3
Answering Affidavits to Cross-Motion.....	4
Replying Affidavits.....	5
Exhibits.....	6

Petitioner commenced the instant proceeding pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to challenge respondent's decision denying petitioner's application for J-51 tax benefits. Respondent moves for an Order dismissing the petition on the grounds that it is time-barred and that petitioner did not properly serve respondent with process. Petitioner cross-moves for an Order pursuant to CPLR § 306-b extending petitioner's time for service of the Notice of Petition and Petition on the Corporation Counsel of the City of New York. For the reasons set forth below, respondent's motion to dismiss the petition is granted, petitioner's cross-motion to extend its time for service is denied and the petition is dismissed in its entirety.

The petition alleges as follows. Petitioner is the owner of the building located at 41

Kosciuszko Street, Brooklyn, New York (the "building"). In or around September 2009, petitioner began converting the building from a non-residential building to a multiple dwelling residential building. At the time petitioner began this conversion, the J-51 "program," established pursuant to Real Property Tax Law § 489 and § 11-243 of the Administrative Code of the City of New York and administered by respondent, awarded tax benefits when non-residential buildings were converted to multiple dwelling residential buildings. On or about January 30, 2013, Real Property Tax Law § 489 was amended to provide that tax benefits would only be awarded for projects carried out with the substantial assistance of a grant, loan or subsidy from a federal, state or local government agency when the conversion was completed on or after December 31, 2011. Generally, a project is deemed completed upon the earlier of (1) the date of the issuance or reissuance of a permanent Certificate of Occupancy by the Department of Buildings, (2) the date of the issuance of a temporary Certificate of Occupancy for all of the dwelling units or (3) the date of the issuance of a sign-off by the Department of Buildings in connection with the conversion. Rules of City of NY [28 RCNY] § 5-02.

Petitioner did not receive assistance from any government agency for the conversion, construction for which was finished on December 29, 2011. However, the final Certificate of Occupancy for the building was not issued until March 12, 2012 because the electrical inspector for the New York City Department of Buildings who was scheduled to conduct a final inspection on December 29, 2011 did not show up that day. Thereafter, petitioner applied for J-51 tax benefits. On or about January 13, 2015, respondent sent a letter to petitioner stating that petitioner was ineligible to receive J-51 tax benefits because its conversion had been completed after December 31, 2011 without assistance from a government agency. The letter stated that respondent "determined, based upon the information [petitioner] provided, that the Project is

ineligible for the requested tax benefits...Since failure to meet the eligible Project criteria conclusively precludes the granting of any benefits under the J-51 Program, we have not analyzed the Project further.” Petitioner acknowledges that there is no formal appeal or review process for J-51 tax benefit determinations. However, petitioner requested a meeting with respondent’s Commissioner Vicki Been (“Commissioner Been”) and other high-ranking officials. At the meeting held on April 22, 2015, petitioner explained that it had completed its conversion of the building on December 29, 2011 and would have received the Certificate of Occupancy but for the fact that the electrical inspector did not show up on time. Commissioner Been asked petitioner for proof that construction was completed on December 29, 2011. On or about May 8, 2015, petitioner’s attorney sent Commissioner Been a letter explaining petitioner’s position and attached a letter from Ira M. Gluckman, Brooklyn Borough Commissioner of the Department of Buildings, stating that construction was completed on December 29, 2011 and that the failure of the electrical inspector to show up to the scheduled inspection caused the delay in the issuance of the Certificate of Occupancy. Although petitioner’s attorney sent multiple emails to Commissioner Been, petitioner did not receive a response to this letter until July 21, 2015, when Commissioner Been called petitioner’s attorney and told him that petitioner’s “appeal from the HPD Decision had been denied.” On November 17, 2015, petitioner commenced the instant action by filing the Notice of Petition and Petition.

The petition must be dismissed on the ground that it is time-barred. Pursuant to CPLR § 217, there is a four-month statute of limitations to bring an Article 78 proceeding to challenge an administrative determination, measured from the date the determination becomes final and binding upon the petitioner. Agency action is “final and binding upon a petitioner” when the agency has reached a definitive position on the issue that inflicts actual, concrete injury and

when the injury inflicted may not be prevented or significantly ameliorated by further administrative action or steps available to the complaining party. *Best Payphones, Inc. v. Department of Information, Technology and Communications of City of New York*, 5 N.Y.3d 30 (2005).

In the present case, the petition is time-barred as respondent made a final, binding determination denying petitioner's application for J-51 tax benefits on January 13, 2015, more than four months before petitioner commenced the instant action on November 17, 2015. Respondent reached a definitive position on petitioner's application for J-51 tax benefits that inflicted injury on January 13, 2015 through its letter clearly denying petitioner's application and stating that petitioner was ineligible for J-51 tax benefits. Further, no additional administrative action or steps were available to ameliorate this injury as there was no prescribed appeal or review process. Thus, the statute of limitations accrued on January 13, 2015. As petitioner failed to commence this action by May 13, 2015, the petition must be dismissed as time-barred.

Petitioner's argument that the July 21, 2015 phone call from Commissioner Been, rather than the January 13, 2015 decision, was the actual final determination, and therefore that its action was timely commenced, is without merit. A request for reconsideration in the absence of a statutory right to further proceedings "does not toll the four-month statute of limitations, even when an agency takes it under review or negotiates with a petitioner over modification of the administrative determination." *Goonewardena v. Hunter Coll.*, 40 A.D.3d 443, 444 (1<sup>st</sup> Dept 2007) (internal citations omitted) (holding that respondents' actions subsequent to its original determination, including requesting information from petitioner's psychiatrist, did not toll the statute of limitations). *See also Seidner v. Town of Colonie*, 79 A.D.2d 751, 752 (1<sup>st</sup> Dept 1980) (holding that the original determination was final where negotiations to reconsider the

