

Abelesz v City of New York
2017 NY Slip Op 32105(U)
September 26, 2017
Supreme Court, Kings County
Docket Number: 504923/2017
Judge: Reginald A. Boddie
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At an I.A.S. Trial Term, Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 26th day September of 2017.

P R E S E N T:

Honorable Reginald A. Boddie
Justice, Supreme Court

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ERNEST ABELESZ, as trustee of A & L FAMILY
TRUST,

Plaintiff,

Index No. 504923/2017
Cal. No. 1

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT, and THE NEW YORK CITY
DEPARTMENT OF BUILDINGS,

DECISION AND ORDER

Defendants.
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Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Df. Notice of Motion & Annexed Affidavits/Affirmation	1-2
Df. Memorandum of Law in Support	3
Pl. Affirmation in Opposition & Memorandum of Law	4-5
Df. Reply	6

Upon the foregoing cited papers, and after oral argument, the decision and order on defendant's motion to dismiss is as follows:

Plaintiff (Trust) is the owner of a three-story building located at 146 Wilson Street, Brooklyn, New York, Block 2182, Lot 16. On December 14, 2015, at 9:00AM, the New York City Fire Department responded to a soil collapse due to a 20-foot wide, 60-foot long, 13-foot deep excavation in plaintiff's yard which trapped three laborers. On December 14, 2015, at 2:40PM, plaintiff was served with a Notice of Violation and Hearing, No. 35155767J (NOV)

with a full stop work order from the New York City Department of Buildings (DOB) for excavation without a permit. Plaintiff alleges it promptly retained Mohammad H. Baalbaki, an engineer, to inspect the property and devise a plan to remedy the violation.

On December 16, 2015, DOB issued an Immediate Emergency Declaration (IED) confirming declaration of the emergency condition and determining the remedy as “backfill and grade the entire illegal excavation” at the premises. By letter dated December 16, the New York City Department of Housing Preservation & Development (HPD) advised plaintiff that DOB issued the December 14 IED and that unless the Trust immediately contacted DOB to obtain its approval to begin work and request DOB place a hold on HPD’s execution of the IED, it would correct the condition at plaintiff’s expense. It further informed the Trust that unless DOB issues a hold on the IED within three business days of the date of the notice, HPD would move forward to execute the IED.

On that same day, HPD commenced backfilling the premises. Mr. Baalbaki submitted his report and recommendations to DOB for approval. The Trust, through its attorney, Mr. Baalbaki, and other representatives exchanged several emails with DOB and HPD in an effort to obtain the hold on HPD’s execution. No hold was placed on HPD and the agency performed the remedial work over two days on December 16 and 17.

On April 4, 2016, the Trust appeared by counsel at a hearing before the Environmental Control Board in regard to the December 14 NOV. The Trust admitted to the charge, waived the right to appeal, and was fined \$1600.

New York City subsequently billed the Trust for the remedial work in the amount of \$338,592.56 and asserted a tax lien. On September 27, 2016, the Trust, by counsel, issued a letter

to HPD protesting the charges and denying liability on the grounds that DOB and HPD failed to follow their own procedures regarding the Trust's time to cure and alleging property damage. HPD responded in writing on October 18, 2016, concluding after a review of the relevant records that the charges were proper.

On March 10, 2017, the Trust commenced this action to recover for property damage against defendants for failing to follow DOB and HPD's procedures, negligence, nuisance, illegal trespass, and tort in the amount of \$750,000 for each cause of action.

Plaintiff's first cause of action in the complaint challenges the City's action in deciding to backfill the excavation with concrete and allegedly depriving plaintiff of the opportunity to cure, contrary to the procedures of DOB and HPD. Plaintiff's second cause of action alleges defendants deprived plaintiff of the opportunity to correct the condition and thereby trespassed. Plaintiff's third cause of action alleges defendants intentionally interfered with plaintiff's property rights. Plaintiff's fourth cause of action alleges defendants trespassed by entering the property and backfilling with concrete. Plaintiff's fifth cause of action alleges defendants' actions constitute prima facie tort.

Defendants move to dismiss the complaint on the ground this action should have been brought as an Article 78 proceeding, the action is barred by the applicable statute of limitations and otherwise fails to state a cause of action.

Contrary to plaintiff's contentions, the allegations in the complaint are not cognizable under theories of negligence in a tort action. The issues presented here are substantially questions regarding the authority of the DOB and HPD to enter the property and backfill the property with concrete in these circumstances. Plaintiff also challenges HPD and DOB's action in allegedly

failing to follow their own procedures.

CPLR Article 78 is specifically designed to address agency determinations made in violation of lawful procedure, affected by an error of law, or done in an arbitrary and capricious manner, or an abuse of discretion (CPLR 7803 [3]). Therefore, the within matter should have been commenced as an Article 78 petition within the four-month statute of limitations period (CPLR 217 [a]). Even assuming the statute of limitations began to run on October 18, 2016, the date HPD determined the charges were proper, the lawsuit was not commenced until March 10, 2017, four months and 20 days later.

Although this Court has the authority to convert the instant action to an Article 78 proceeding, the Court declines to do so because such proceeding would be time-barred by the four-month statute of limitations applicable to Article 78 proceedings (CPLR 103 [c]; *see* CPLR 217; *Allied Chem. v Niagara Mohawk Power Corp.*, 72 NY2d 271, 279 [1988]; *Keles v Hultin*, 144 AD3d 987, 988 [2d Dept 2016]). Accordingly, the defendants' motion is granted to the extent the complaint is dismissed (*Keles*, 144 AD3d at 988 [holding the Supreme Court properly directed dismissal of the complaint since it would have been dismissed as time-barred had it been brought as an Article 78]). The remainder of defendants' motion is deemed moot.

Dated: September 26, 2017

E N T E R:



Hon. Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.