

**Stop the Chop NYNJ, Inc. v Franchise & Concession
Review Comm. of the City of N.Y.**

2018 NY Slip Op 30066(U)

January 11, 2018

Supreme Court, New York County

Docket Number: 159582/2016

Judge: Arlene P. Bluth

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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 32**

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STOP THE CHOP NYNJ, INC.,

Petitioner,

-against-

**FRANCHISE AND CONCESSION REVIEW COMMITTEE
OF THE CITY OF NEW YORK ACTING BY AND
THROUGH THE NEW YORK CITY DEPARTMENT OF
SMALL BUSINESS, THE NEW YORK ECONOMIC
DEVELOPMENT CORPORATION, FIRSTFLIGHT
HELIPORTS, LLC d/b/a SAKER AVIATION SERVICES**

**Index No. 159582/2016
Motion Seq: 001 & 002**

DECISION & ORDER

HON. ARLENE P. BLUTH

Respondents.
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Motion Sequence Numbers 001 and 002 are consolidated for disposition. The motion to dismiss (Mot Seq 001) by respondents Franchise and Concession Review Committee of the City of New York, the City of New York acting by and through the New York City Department of Small Business and the New York City Economic Development Corporation (collectively, the "City") and the motion to dismiss (Mot Seq 002) by respondent FirstFlight Heliports, LLC d/b/a Saker Aviation Services ("FirstFlight") are granted.

Background

This proceeding arises out of petitioner's complaints about noise from tourist helicopter rides in Manhattan. Petitioner claims that it is a non-profit corporation consisting of thousands of New York City residents who live along the flight path of these helicopter rides. On July 13, 2016, respondent Franchise and Concession Review Committee approved a resolution

implementing provisions contained in a February 2016 agreement between respondent FirstFlight and the New York City Department of Small Business Services and the New York City Economic Development Corporation. This 2016 Agreement extended the terms of a previous (2008) contract to April 2021 with two one-year renewal options for the City; the 2016 agreement also included provisions that reduced tourist flight operations, ended Sunday tourist flights and included a cap on Saturday tourist flights.

The City moves to dismiss (Mot Seq 001) on the ground that petitioner lacks standing to bring the instant proceeding. The City argues that petitioner failed to plead any particularized and specific facts to show how one of its members is adversely affected by the tourist helicopter flights. The City further argues that the instant proceeding is time-barred because petitioner failed to file a petition within four months of the July 13, 2016 resolution approving the agreement. The City argues that petitioner filed a summons with notice on November 14, 2016 but did not file a petition until February 2017. The City insists that a special proceeding can only be commenced by filing a petition. The City further argues that petitioner's common law claims are also time barred because they are based upon the 2016 Agreement and petitioner cannot collaterally attack a governmental determination through a plenary action.

FirstFlight makes similar arguments regarding standing and the statute of limitations in support of its motion to dismiss (Mot Seq 002).

In opposition, petitioner characterizes the instant proceeding as a hybrid Article 78 proceeding seeking injunctive and monetary relief against respondents. Petitioner insists that the City violated the State Environmental Quality Review Act ("SERQA") by failing to conduct an environmental review of its decision to execute the 2016 Agreement. Petitioner complains that

although the 2016 Agreement purports to offer improvements (fewer flights), the agreement only reduces flight traffic since 2016 but it still permits more flights than were allowed in 2008 (the date of the initial agreement with FirstFlight). Petitioner emphasizes that the number of tourist helicopter flights has increased every year from 2009 through 2015. Petitioner claims that the instant proceeding was timely filed because a hybrid case can be commenced using any of the procedural mechanisms under the CPLR.

Discussion

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994] [citations omitted]).

CPLR 304(a) provides, in part, that “ An action is commenced by filing a summons and complaint or a summons with notice in accordance with rule twenty-one hundred two of this chapter. A special proceeding is commenced by filing a petition in accordance with rule twenty-one hundred two of this chapter.”

The Article 78 claims

The question for this Court is whether the petition in an Article 78 proceeding must be filed within four months, even if petitioner self-styled the matter as a hybrid proceeding. For the reasons below, the answer to that question is ‘Yes.’ Therefore, based on the statute of limitations, all the claims set forth in the Article 78 portion of the hybrid proceeding are

dismissed as untimely because petitioner did not file a petition within four months of the July 2016 resolution (*see Long Island Citizens Campaign, Inc. v County of Nassau*, 165 AD2d 52, 55-56, 565 NYS2d 852 [2d Dept 1991] [finding that an Article 78 proceeding was untimely where petitioner served respondent with only a notice of petition and that an Article 78 proceeding must be commenced with *both* a notice of petition and a petition]). Although courts have permitted litigants to pursue hybrid proceedings, petitioner failed to demonstrate that it is entitled to choose whichever CPLR commencement procedures are most convenient for it. Here, where the basis for its case is a governmental action— the July 2016 resolution - the commencement procedure for a special proceeding must apply.

In support of its position, petitioner relies on two Supreme Court cases. In *Strishak v Town of North Hempstead* (2010 WL 331975, 2010 NY SlipOp 30129 [Sup Ct, Nassau County 2010]), the plaintiff sought to resolve an open permit, which allowed construction of a fence on residential property formerly owned by plaintiff and her husband. In that case, the Court converted the complaint into an Article 78 mandamus to compel— the Court noted that plaintiff sought a ruling that the defendant failed to perform a duty enjoined upon it by law (*id.*). *The Court also noted that the statute of limitations issue was not raised by the defendant and was waived (id.)*. As respondents here point out, there is no indication that the plaintiff in *Strishak* styled her case as a hybrid Article 78 proceeding. Although the plaintiff in *Strishak* commenced her case by filing a summons with notice, that was before the Court converted the proceeding to a mandamus to compel. This Court is unable to find that *Strishak* stands for the proposition that a hybrid Article 78 proceeding can be commenced by filing a summons with notice.

Petitioner also relies on *Donohue v Zoning Bd. of Appeals of Town of Middlebury* (8

Misc3d 1023(A), 803 NYS2d 18(Table) [Sup Ct, Wyoming County 2005]) where the Supreme Court ruled that plaintiffs were entitled to commence their hybrid action and special proceeding by using any of the provisions under the CPLR, including a summons with notice. However, the Court declines to embrace this holding, which did not cite any relevant case law to support its conclusion that a litigant can choose how to commence a hybrid proceeding. Additionally, as pointed out by respondents, it appears that the complaint in *Donohue* was filed within the four month limitations period and the *Donohue* decision did not explore commencement of a hybrid proceeding in connection with a statute of limitations claim. In other words, the primary issue here, statute of limitations, was not at all an issue in the case relied upon by petitioner.

A summons with notice provides a defendant with only a recitation of the claims pursued against him or her. It does not provide the factual allegations setting forth the basis for an action. Failing to identify the specifics underlying a claim is anathema to the purpose of an Article 78 proceeding, which offers an expedited procedure to challenge a governmental decision. Unlike in a plenary action, the Article 78 process is designed to address a determination quickly (*see e.g.*, CPLR 408 [requiring leave of court to obtain discovery]; CPLR 217[1] [implementing a four-month statute of limitations for Article 78 proceedings]; CPLR 7803 [limiting the issues that can be raised in an Article 78 proceeding]). It makes no sense to allow petitioner, under the circumstances present here, to simply file a summons with notice at the end of the four-month statute of limitations period and then file a complaint three months later, well after the statute of limitations expired. Therefore, the Article 78 claims are time barred.

Common law claims

The Court finds that the common law claims in the instant complaint are also time barred because they all arise out of the City's decision to enter into the 2016 Agreement with FirstFlight. In fact, the four causes of action asserted in petitioner's complaint all reference the 2016 Agreement (*see* NYSCEF Doc. No. 5 at 7-9). Petitioner may not collaterally attack the July 2016 resolution adopting the agreement with FirstFlight through common law causes of action (*see e.g., Fiala v Metro. Life Ins. Co.*, 6 AD3d 320, 321-22, 776 NYS2d 29 [1st Dept 2004] [holding that a breach of contract claim constituted a collateral attack against a determination by the Superintendent of Insurance and should have been brought as an Article 78]).


Because this complaint is all about the 2016 Agreement, petitioner should have filed a petition within four months of the July 13, 2016 resolution adopting the Agreement, this proceeding is time-barred.

Accordingly, it is hereby

ORDERED that the motions (Mot Seq 001 & 002) to dismiss the petition are granted and this proceeding is dismissed.

This is the Decision and Order of the Court.

Dated: January 11, 2018
New York, New York



ARLENE P. BLUTH, JSC